

judgment in the case. Now if the learned Magistrate will look at section 209 he will find that he is not authorized to write a judgment in a case triable by a Court of Session; all that he is empowered to do is to record reasons for a discharge if he make such an order and to pass the order of discharge. This Court has gone into the matter at considerable length in the case of *Fattu v. Fattu* (1). The learned Magistrate has done exactly what this Court in the case cited above condemned. He has criticized the evidence given with painful minuteness. He has found it entirely unreliable and worthless, and he has written a paragraph saying that he is dealing with the complainant for making a malicious complaint without any foundation to harass the accused. The case has to be thoroughly inquired into. A thorough and complete inquiry has not been made. I set aside the order of discharge and I return the case to the District Magistrate of Etah who will direct Babu Brij Nath Ugra, if he is still there, or some other Magistrate competent to hold inquiry, to take any further evidence that may be offered, to examine the accused, and to commit them to the Court of Session for trial.

Order set aside.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.
LALTA PRASAD CHAUDHRI (PLAINTIFF) v. GOKUL PRASAD
 AND OTHERS (DEPENDANTS). *

Pre-emption—Custom—Wajib-ul-arz—Right of pre-emption acquired by means of imperfect partition of the village.

There being a pre-existing custom of pre-emption in a village, a right of pre-emption may arise in favour of an individual co-sharer just as much by the creation of a new patti by imperfect partition as by purchase by the co-sharer of a share in the patti. *Mahadeo Prashad Sahu v. Jaipal Raut* (2) dissented from.

THE *wajib-ul-arz* of a village, framed in 1860, afforded evidence of a custom of pre-emption existing in the village, the first right being to *hissadar-i-karibi*, or co-sharers in the same sub-division of the village. Some time subsequent to 1860,

* Second Appeal No. 6 of 1917, from a decree of Gopal Das Mukerji, Additional Subordinate Judge of Gorakhpur, dated the 28th of September, 1916, reversing a decree of Girish Prasad, Munsif of Bansi, dated the 29th of January, 1916.

(1) (1904) I. L. R., 26 All., 564. (2) (1910) 8 Indian Cases, 867.

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the village was divided by imperfect partition. A share in one of the new pattis so formed was sold and a suit for pre-emption was brought by a co-sharer in the same patti. The court of first instance gave the plaintiff a decree. The lower appellate court reversed the decision of the first court solely on the ground that the plaintiff's being in the same patti as the vendor was due to imperfect partition. The plaintiff appealed to the High Court.

Mr. J. Simeon, for the appellant.

Munshi Gulzari Lal, for the respondents.

RICHARDS, C.J. and TUDBALL, J. :—This appeal arises out of a suit for pre-emption. The plaintiff is a co-sharer in the same patti with the vendor, but the patti was created by imperfect partition and in more recent years. There seems to be no dispute that a custom of pre-emption prevails in the village. The entry in the *wajib-ul-arz* of 1860 gives the first right to *hissadar karibi* and both courts were of opinion that this meant that the co-sharer in the same sub-division as the vendor would have a preference over a co-sharer in another sub-division. The court of first instance decreed the plaintiff's claim. The lower appellate court reversed the decision of the court of first instance solely on the ground that the plaintiff's being in the same patti as the vendor was due to imperfect partition. It referred to the case of *Mahadeo Prashad Sahu v. Jaipal Raut* (1). We do not agree with the decision in this case. It seems to us that where a custom is proved and the plaintiff can show that he comes within the custom at the time of the sale he is entitled to the benefit of the custom. The mere fact that he was not within the custom prior to partition does not prevent him from subsequently acquiring the right. For example it can hardly be said that if a co-sharer acquired a share in a patti by sale that he would not have the right of a co-sharer in that patti upon a sale subsequently made by one of the co-sharers. The rights which the plaintiff acquired by imperfect partition were just as binding upon the co-sharers as if he had acquired the right by sale. We must allow the appeal, set aside the decree of the lower appellate court, and restore the decree of the court of first instance with costs in all courts.

Appeal allowed.

(1) (1910) 8 Indian Cases, 867.