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suit after it had been heard on the merits. I would reject the application.

BANERJI, J.—I also am of opinion that the application should be rejected, but I would confine myself to this ground in rejecting it that it is not maintainable under section 115 of the Code of Civil Procedure. It cannot be said that the court below exercised a jurisdiction which was not vested in it by law. In the exercise of the jurisdiction which it undoubtedly had it may have committed an error, and apparently it did commit an error in the present case; but that alone would not justify this Court in interfering under section 115 as interpreted by their Lordships of the Privy Council in previous cases, and also in the recent case to which the learned Chief Justice has referred. This being so, the application for revision cannot in my opinion be entertained and must be rejected.

BY THE COURT.—The order of the Court is that the application is rejected with costs.

Application rejected.

REVISIONAL CRIMINAL.

Before Justice Sir George Knox.

HET RAM v. GANGA SAHAI AND OTHERS. *

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May, 7.

Act No. XLV of 1860 (*Indian Penal Code*), *section* 494—*Offence triable by Court of Session—Accused discharged—Order directing complainant to pay compensation—Criminal Procedure Code, section* 250—*Judgment written by magistrate.*

Section 250 of the Code of Criminal Procedure is not applicable where the charge which is being inquired into by a magistrate is one which is exclusively triable by a Court of Session. Neither in such a case is the magistrate empowered to write a judgment; 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, *Fattu* v. *Fattu* (1) referred to.

A MAGISTRATE of the first class was inquiring into a charge against certain persons under section 494 of the Indian Penal Code. There were also subsidiary charges under sections 363 and 420 of the Code. The Magistrate wrote a more or less lengthy judgment, in which he criticized the evidence with great

* Criminal Reference No. 135 of 1918.

(1) (1904) I. L. R., 26 All., 564.

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minuteness, and wound up by discharging the accused. He also passed an order, purporting to be under section 250 of the Code of Criminal Procedure, directing the complainant to pay compensation to the accused. With reference to this latter order the Second Additional Sessions Judge of Aligarh referred the case to the High Court, recommending that the order should be set aside as illegal.

Mr. *C. J. A. Hoskins*, for the applicant.

Mr. *Nihal Chand*, for the opposite parties.

KNOX, J. :—This is a reference made by the Second Additional Sessions Judge of Aligarh. He sends us an order passed by a first class Magistrate of Etah ordering the discharge of several persons accused before him and directing the complainant to pay compensation to the accused persons. The order directing payment of compensation is undoubtedly, to my mind, illegal and must be set aside. The offence with which the accused were charged was really an offence under section 494 of the Indian Penal Code; sections 363 and 420 of the Indian Penal Code, which were added as sections under which the accused were alleged to be guilty, were mere appendages to the original section. The Magistrate had no jurisdiction to try the offence under section 494 of the Indian Penal Code. Sections 250 and 253 of the Code of Criminal Procedure are to be found one in a chapter which deals with the trial of summons cases by a Magistrate, and the other in a chapter dealing with the trial of warrant cases by Magistrates. This was neither a summons nor a warrant case. All that the first class Magistrate had jurisdiction to do in a case of a charge of an offence under section 494 of the Indian Penal Code was to follow the procedure laid down by chapter XVIII of the Code of Criminal Procedure. In that chapter neither section 250 nor section 253 finds any place. The order directing payment of compensation is set aside and the compensation or such part of it as may have been paid will be at once refunded.

In going into the case, however, a more important question arises and that is whether the Magistrate, Babu Brij Nath Ugra, was justified in discharging the accused. I hold that he was not. He has evidently misconceived the purpose and the intention of section 209 of the Code of Criminal Procedure. He has written a

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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 (DEFENDANTS). *

1918
May, 7,

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., 554. (2) (1910) 8 Indian Cases, 867.