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has completed a forcible entry into a house should be deemed, by reason of violence subsequently used, to have used violence while house-breaking. For this reason I hold that the Magistrate was justified in refusing to commit the accused on a charge under section 459.

The Magistrate, then, had jurisdiction to try the case himself, without committing to Sessions. Nor, in my opinion, was it so undesirable for him to do so as to call for interference in revision. I dismiss both these applications and direct that the records be returned and the trial proceed.

Applications dismissed.

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

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April, 19.

HAR LAL SINGH AND ANOTHER (PLAINTIFFS) *v.* RUDRA SINGH AND OTHERS (DEFENDANTS).*

Civil Procedure Code, order XXXII—Guardian ad litem—*Appointment of guardian after expiry of period of limitation—Pre-emption*—Wajib-ul-arz—*Interpretation—Custom or contract.*

Under order XXXII of the Code of Civil Procedure it is the duty of the court, when it is brought to its notice that one of the defendants is a minor, to appoint a guardian, and the mere fact that the guardian may not be appointed until after the expiry of the period of limitation, would not be fatal to the suit. *Rup Chand* v. *Dasodha* (1), followed.

The material portion of a *wajib-ul-arz* dealing with the subject of pre-emption ran as follows:—

"In future, every co-sharer has a right to transfer the whole or a portion of his property. Up till now no pre-emption suit was instituted on behalf of any co-sharer . . . In future if any co-sharer likes to sell his property, he will at first sell it to his co-sharers," etc., etc., *Held*, that there was nothing in the language of the paragraph which militated

* First Appeal No. 138 of 1924, from a decree of Preo Nath Ghosh, Subordinate Judge of Bareilly, dated the 22nd of December, 1923.

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against the existence of a custom and, therefore, plaintiff's suit must succeed.

Digambar Singh v. *Ahmad Sayed Khan* (1) and *Sheobaran Singh* v. *Kulsum-un-nissa* (2), followed.

THIS was an appeal by the plaintiffs arising out of a suit for pre-emption of property sold to three vendees under a sale-deed, dated the 23rd of January, 1922. On the 12th of January, 1923, the present suit for pre-emption was instituted, in which all the three vendees were impleaded. Later on it was discovered that one of the vendees was a minor and on an application made by the plaintiffs a guardian *ad litem* was duly appointed by the court. This appointment, however, was after the expiry of one year from the date of the registration of the document. The plaintiffs relied on the *wajib-ul-arz* of 1870 and alleged that it recorded a custom of pre-emption. They also disputed the genuineness of the amount of consideration mentioned in the sale-deed. The defendants, on the other hand, pleaded that the claim as against one, and, therefore, as against all, was barred by limitation, and also that there was no custom of pre-emption in the village. They further pleaded that the consideration set forth in the sale-deed was true.

The learned Subordinate Judge, in a very short judgement, disposed of only two issues, leaving the others undecided. He held that, inasmuch as the guardian *ad litem* of one of the defendants was appointed after the expiry of the period of limitation, the claim was barred by time as against him. He also held that having regard to the language of the *wajib-ul-arz* no custom was established, and accordingly dismissed the suit. The plaintiffs appealed.

Munshi *Sarkar Bahadur Johari*, for the appellants.

(1) (1914) I.L.R., 37 All., 129. (2) (1927) I.L.R., 49 All., 367.

Munshi *Binod Bihari Lal*, for the respondents.

The judgement of the Court (LINDSAY and SULAIMAN, JJ.), after stating the facts as above, thus continued :—

We are unable to agree with either of the views expressed by the court below. It is difficult to see how the claim can be barred by limitation. The real parties to the suit were the vendees themselves and all of them were impleaded within the time allowed. The mere fact that the guardian of one of the vendees was not appointed by the court till after the expiry of the period would in no case be fatal. Under order XXXII it is the duty of the court, when it is brought to its notice that one of the defendants is a minor, to appoint a guardian, and as has been held in the case of *Rup Chand* v. *Dasodha* (1), the subsequent appointment of a guardian is not fatal as a plea of limitation. As regards the question of custom the only evidence in support of it is the *wajib-ul-arz* of the year 1870. This settlement expired about the year 1900, when the new *wajib-ul-arz*, under the circular of the Board of Revenue, could not contain an entry either way. The heading of paragraph 8 which embodies a right of pre-emption is as follows :—

" Relating to transfer of property by means of mortgage, sale, gift, inheritance and custom of pre-emption."

The opening portion of the paragraph which deals with the question of custom is as follows :—

" That, in future, every co-sharer has a right to transfer the whole or a portion of his property. Up till now no pre-emption suit was instituted on behalf of any co-sharer and decided. In future if any co-sharer likes to sell his property, he will at first sell it to his co-sharers and subsequently to the co-sharers in the village, and if they also refuse to purchase it, he may sell it to any one he likes. If there shall

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be any dispute between the vendor and the vendee regarding the difference in price, the co-sharer shall have to pay the same price which a stranger would be willing to pay."

The rest of the paragraph deals with customs of adoption and inheritance with which we are not directly concerned. The concluding portion of that paragraph indicates that the proprietors of the resumed land, who are Muhammadans, are governed, as regards inheritance, by the Muhammadan law. In our opinion there is nothing in the language of this clause which would rebut the *primâ facie* presumption that it is a record of a custom. The statement that no suit for pre-emption had been instituted so far is a mere statement of fact which is not conclusive either way. Similarly, the use of the words "in future" in no way indicates that it was for the first time that the co-sharers were expressing the desire that a right of pre-emption should exist. This expression found place in the *wajib-ul-arz* before their Lordships of the Privy Council in the case of *Digambar Singh* v. *Ahmad Sayed Khan* (1) and in spite of its occurrence their Lordships were inclined to hold that there was nothing in the clause which militated against the existence of a custom. The opening portion of this clause is similar to the opening portion of the clause in the *wajib-ul-arz* in F. A. F. O. No. 17 of 1925, decided on the 25th of June, 1925, by a Bench of this Court, of which one of us was a member. The Bench was inclined to hold that it was a record of custom. This view is now strengthened by the recent pronouncement of their Lordships of the Privy Council in the case of *Sheobaran Singh* v. *Kulsum-un-nissa* (2). We are, therefore, of opinion that the presumption arising from the entry in the *wajib-ul-arz* has not been rebutted, and there is no reason to suppose that

(1) (1914) I.L.R., 37 All., 129. (2) (1927) I.L.R., 49 All., 367.

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the Settlement Officer in making the entry under the heading, "custom of pre-emption," did not intend to record it as such.

As remarked above, the other issues have been left undisposed of by the Subordinate Judge.

[The judgement then dealt with the evidence and concluded as follows :—]

The result, therefore, is that we allow the plaintiffs' appeal, and setting aside the decree of the court below decree the plaintiffs' claim for pre-emption.

Appeal allowed.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

NIRBAN SINGH (PLAINTIFF) *v.* BARI BITTA AND ANOTHER (DEFENDANTS).*

1927

April, 19.

Act (Local) No. III of 1901 *(United Provinces Land Revenue Act), section 111—Partition—Question of title—Compromise of doubtful rights—Writing—Registration.*

The jurisdiction of the civil court to inquire into a claim of title as regards properties which are the subject-matter of a partition in the revenue court arises only under section 111 of the Land Revenue Act. When no suit has been instituted within the time allowed by that section and in compliance with it, the civil court cannot go on with the inquiry.

Under section 111 of the Land Revenue Act, the partition court has power either to decide the question of title itself or direct any party in the case to institute a suit within three months in the civil court for the determination of the question raised. If the party ordered to file a suit within three months fails to do so, under sub-clause (2) of that section the Collector must decide the question against him, and if the suit is instituted, the partition court acts in accordance with the decision of the civil court.

Under no law is a compromise or a mutual settlement between parties required to be reduced into writing, and when

* First Appeal No. 237 of 1924, from a decree of Gauri Prasad, Subordinate Judge of Pilibhit, dated the 13th of March, 1924.