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EMPEROR
P.
FATEH SINGH.

It is true that against the other party there is no charge under section 304 of the Indian Penal Code. At the same time these reasons must weigh with a court, and if there is no danger of the applicant Fateh Singh absconding if released on bail, I think that he should be so released. It was necessary for the Sessions Judge to consider all these points under section 498 of the Criminal Procedure Code.

The trying Magistrate is directed to release Fateh Singh on bail if he is satisfied that there is no apprehension of his absconding on proper sureties being ordered and secured. The trying Magistrate will please fix a bond and security accordingly if, in his opinion, such a bond and security will be sufficient to prevent Fateh Singh from absconding.

APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

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January, 23.

ZALIM SINGH AND ANOTHER (DEFENDANTS) *v.* RAGHUNANDAN AND OTHERS (PLAINTIFFS AND DEFENDANTS).*

Act (Local) No. XI of 1922 (Agra Pre-emption Act), sections 3 and 5—Custom of pre-emption recorded in two out of three mahals formed by partition of a village—Presumption.

A village was divided into three mahals; a custom of pre-emption was recorded in two mahals and in the third mahal, in which the vended property was situated, the *wajib-ul-arz* did not record any custom of pre-emption and simply stated that it was owned by a single proprietor. *Held*, in the absence of any *wajib-ul-arz* of the village prior to partition, it could not be presumed that the *wajib-ul-arz* of the parent mahal must have recorded a similar right.

*Second Appeal No. 1784 of 1926, from a decree of Syed Ziaul Hasan, Additional Judge of Cawnpore, dated the 29th of June, 1926, reversing a decree of Sarup Narain, Second Additional Subordinate Judge of Cawnpore, dated the 30th of September, 1925.

Dr. *Kailas Nath Katju* and *Munshi Shambhu Nath Seth*, for the appellants.

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Babu *Piary Lal Banerji* and *Pandit Rama Kant Malaviya*, for the respondents.

SULAIMAN and KENDALL, JJ. :—This is a defendants' appeal arising out of a suit for pre-emption. The first court dismissed the claim, but on appeal the lower appellate court has decreed it, holding that there is no right of pre-emption in the mahal in which the property is situated. There are three mahals in this village. *Wajib-ul-arzes* for all the three mahals have been produced and only two record a right of pre-emption, and the third mahal in which the property sold is situated does not record any right of pre-emption at all. It only states that it is owned by a single proprietor.

It is quite clear that the Act being applicable to the village in question, section 3 allows the right of pre-emption only in accordance with the provisions of this Act. Under section 5 a right of pre-emption is to be deemed to exist only in mahals or villages in respect of which any *wajib-ul-arz* prepared prior to the commencement of the Act records a custom, contract or declaration. No *wajib-ul-arz* prepared of the mahal in question records any such right. Thus there is no record of rights in respect of the area covered by this mahal which contains any such declaration. In our opinion the mere fact that there are *wajib-ul-arzes* for other mahals would not be sufficient to allow of a right of pre-emption in this mahal.

No earlier *wajib-ul-arz* of the village before there was a partition has been produced in this case. The lower appellate court thought that because the *wajib-ul-arzes* of the other two mahals recorded similar customs, the *wajib-ul-arz* of the parent mahal or village must also have recorded a similar right. In our opinion such a presumption is by no means justified inasmuch as it is quite pos-

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sible that the entry of such a right was made for the first time at the time of the partition when the three mahals were formed. In any case it was incumbent on the plaintiff to show that there was a *wajib-ul-arz* prepared prior to the commencement of this Act in respect of this particular mahal or village out of which it was formed which recorded such a custom or right. As the plaintiff failed to show that, the suit ought to have been dismissed.

We accordingly allow the appeal and setting aside the decree of the court below dismiss the plaintiff's suit with costs to the appellants.

Before Mr. Justice Banerji and Mr. Justice King.

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January, 24.

NAUBAT LAL AND OTHERS (DEFENDANTS) v. MAHADEO PRASAD AND OTHERS (PLAINTIFFS).*

Act No. IX of 1908 (Indian Limitation Act), article 61—Auction purchase by mortgagee decree-holder—Sale set aside under order XXI, rule 89 by vendee of part of mortgaged property—Vendee's suit for possession or repayment—Transfer of Property Act (IV of 1882), section 56—Contribution.

On the 11th of September, 1874, defendants' ancestors mortgaged 3 as. 1'33 pies in a village to one G, who on the 25th of June, 1919, purchased the property in execution of his decree. Plaintiffs, who were purchasers under simple money decrees of a 1 a. 7'33 pies share, deposited the decretal amount under order XXI, rule 89 of the Code of Civil Procedure and got the sale of the 25th of June, 1919 set aside. The plaintiffs then sued for possession of the property mortgaged in the deed of 1874 or in the alternative for the amount paid with interest from the date of payment. *Held* that the plaintiffs' suit was not time-barred and that article 61 of the Indian Limitation Act did not apply; and that the property in the hands of the parties must contribute rateably to G's decree.

*First Appeal No. 76 of 1926, from a decree of Madan Mohan Seth, Additional Subordinate Judge of Gorakhpur, dated the 22nd of December, 1925.