

1885  
 JOYDEO  
 SINGH  
 v.  
 HARIHAR  
 PERSHAD  
 SINGH.

no special grounds for granting this fresh sanction. Neither does it appear from the record that any explanation was given by the opposite party to this rule as to why proceedings were not commenced at least within six months from the date when the decree of the Munsiff was confirmed in appeal.

Under these circumstances I am of opinion that the Munsiff did not exercise a sound discretion in granting the fresh sanction prayed for. We accordingly set aside the order of the Munsiff of the 13th April 1885.

*Order set aside.*

*Before Mr. Justice Mitter and Mr. Justice Norris.*

QUEEN EMPRESS v. DURGA SONAR (ACCUSED)\*

1885  
 May 26.

*Evidence—Deposition of accused person when admissible in evidence against him in subsequent proceeding—Evidence Act (I of 1872) s. 80.*

A deposition given by a person is not admissible in evidence against him in a subsequent proceeding without its being first proved that he was the person who was examined and gave the deposition.

A pardon was tendered to an accused, and his evidence was recorded by the Magistrate. Subsequently the pardon was revoked, and he was put on his trial before the Sessions Judge along with the other accused. At the trial the deposition given by him before the Magistrate was put in and used in evidence against him without any proof being given that he was the person who was examined as a witness before the Magistrate.

*Held*, that the deposition was inadmissible without proof being given as to the identity of the accused with the person who was examined as a witness before the Magistrate.

IN this case the accused and three others were charged with the murder of one Nemani Sonar.

On February 2nd, the accused Durga made a confession before the Joint Magistrate, who recorded the usual memorandum at the foot of the confession as required by s. 164 of the Criminal Procedure Code. Subsequently a pardon was tendered to Durga, on the 10th February by the Joint Magistrate, who recorded his reasons for so doing as required by s. 337 of the Code, as follows: "I am inclined to believe that he (Durga) was

\* Criminal Reference No. 16 and Appeal No. 322 of 1885, made by J. W. Badcock, Esq., Officiating Sessions Judge of Bhagalpore, on the 4th of May 1885.

“under the impression that he would be pardoned when he made his statement to the police and before me, and that his confession therefore will not be evidence against him or the other accused.”

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Subsequently the pardon was revoked on the ground that he did not make a full disclosure of all the facts, and he was put upon his trial along with the other accused for the murder.

At the trial the Sessions Judge did not admit the confession as he considered he was bound by the statement of the Joint Magistrate as recorded at the time of granting the pardon. The deposition made by Durga before the Joint Magistrate was admitted in evidence against him, in which he stated that he had assisted at the murder.

No evidence was, however, given to prove that he was the person who had given the deposition before the Joint Magistrate.

The Sessions Judge, agreeing with the assessor, acquitted the other accused on the ground that Durga's deposition was no evidence against them, and that the other evidence was untrustworthy and unreliable; but he convicted Durga mainly upon the statement contained in his deposition, coupled with the fact that there was evidence which could be relied on; that a quarrel existed between him and the murdered man; and that they were seen together the evening before the body was found. He accordingly sentenced him to death and referred the case to the High Court for confirmation of the sentence.

Durga also appealed.

No one appeared for either party.

The judgment of the High Court (MITTER and NORRIS, JJ.) was as follows:—

The Sessions Judge has admitted the depositions of the prisoner made before the Joint Magistrate of Monghyr on February 10th, 1885, without any evidence of his identity.

At page 54 of the Sessions Record the Judge says: “The Government Pleader then put in Durga's statement on oath taken on February 10th after the offer of a pardon was made under s. 337 of the Code of Criminal Procedure”—(then follow some words which are quite illegible)—“under s. 339 of the Code of Criminal Procedure.” And we suppose he thought that under

1885 s. 80 of the Evidence Act it was admissible without proof that  
 the Durga Sonar who made the deposition was the same Durga  
 Sonar then being tried.

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This was a gross blunder. Without the deposition there is no sufficient evidence to warrant a conviction of the prisoner, and we accordingly set aside the conviction and direct his discharge.

*Conviction set aside.*

## APPELLATE CIVIL.

*Before Mr. Justice Mitter and Mr. Justice Field.*

1885. PERGASH KOER AND ANOTHER (PLAINTIFFS) v. MAHABIR PERSH.  
 April 20. NARAIN SINGH AND ANOTHER (DEFENDANTS).\*

*Mortgage—Conditional Sale—Foreclosure—Suit for possession on foreclosure—Regulation XVII of 1806, ss. 7, 8—Act IV of 1882 (Transfer of Property Act) ss. 2, clause (c) and 86.*

The procedure laid down in the Transfer of Property Act may be applied to the case of foreclosure of a mortgage executed before the Act came into operation, provided it be so applied as not to affect the rights saved by s. 2, clause (c) of the Act.

Where, therefore, under the provisions of Regulation XVII of 1806 notice of foreclosure had been served on a mortgagor by conditional sale, the mortgage having been executed, and the foreclosure proceedings taken before the Transfer of Property Act came into force, and after the expiry of the year of grace the money not having been paid, the mortgagee instituted a suit for possession on foreclosure, and when such suit was defended by a third party who had purchased the mortgaged property at an execution sale and obtained possession before the commencement of the foreclosure proceedings and the necessary notice had not been served upon him,

*Held*, that it was competent to the Court to apply the procedure prescribed by the Transfer of Property Act and grant the mortgagee a decree in the terms of s. 86, substituting the period of "one year" for the period of "six months" therein mentioned. *Ganga Sahai v. Kishen Sahai* (1) referred to.

In this suit the plaintiffs sought to obtain possession on foreclosure of a two-anna nine-pie share, out of five annas six pie out

\* Appeal from Original Decree No. 277 of 1883, against the decree of Baboo Amrit Lal Pal, Rai Bahadur, Second Subordinate Judge of Sarun, dated the 22nd of September 1883.

(1) I. L. R., 6 All., 262.