1886
July 20.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

LALLI (DEFENDANT) *v.* RAM PRASAD AND OTHERS (PLAINTIFFS).*

Bond—Interest—"Dharta"—Illiterate agriculturist—Unconscionable bargain.

The High Court as a Court of Equity possesses the power exercised by the Court of Chancery of granting relief in cases of such unconscionable or grossly unequal and oppressive bargains as no man of ordinary prudence would enter into, and which, from their nature and the relative positions of the parties, raise a presumption of fraud or undue influence. The principles upon which such relief is granted apply to contracts in which exceedingly onerous conditions are imposed by money-lenders upon poor and ignorant persons in rural districts. The exercise of such power has not been affected by the repeal of the usury laws. *Chesterfield* v. *Janssen* (1), *O'Rorke* v. *Bolingbroke* (2), *Earl of Aylesford* v. *Morris* (3), *Nevill* v. *Snelling* (4), and *Beynon* v. *Cook* (5), referred to.

An illiterate *Kurmi* in the position of a peasant proprietor executed a mortgage-deed in favour of a professional money lender to whom he owed Rs. 97, by which he agreed to pay interest on that sum at the rate of 24 per cent. per annum at compound interest. He further agreed that "*dharta*," or a yearly fine, at the rate of one anna per rupee, should be allowed to the mortgagee, to be calculated by yearly rests. It was also provided that the interest should be paid from the profits of certain *malikana* land of the mortgagor, and that if the interest were not paid for two years, the mortgagee should be put in possession of this land. As security for the debt, a six pies zamindari share was mortgaged for a term of eleven years. The effect of the stipulation as to "*dharta*" was that one anna per rupee would be added at the end of every year, not only to the principal mortgage-money but also to the interest due, and the total would be again regarded as the principal sum for the ensuing year. Ten years after the date of the mortgage, the mortgagor brought a suit for redemption on payment of only Rs. 97 or such sum as the Court might determine as due to the mortgagee. At that time the accounts made up by the mortgagee showed that the debt of Rs. 97, with compound interest, had swollen to Rs. 873, of which the "*dharta*" alone amounted to Rs. 211.

Held that the stipulation in the deed as to "*dharta*" was not of the kind referred to in s. 74 of the Contract Act (IX of 1872), and that there was no question of penalty, but that, looking to the relative positions of the parties, and the unconscionable and oppressive nature of the stipulation, the benefit thereof should be disallowed to the mortgagee, and the mortgagor permitted to redeem on payment of the mortgage-money and interest, no appeal having been preferred

* Second Appeal No. 1721 of 1885, from a decree of G. E. Ward, Esq., Commissioner of Jhánsi, dated the 17th July, 1885, modifying a decree of W. R. Tucker, Esq., Assistant Commissioner of Orai, dated the 4th February, 1885.

(1) 1 White and Tudor's Leading Cases in Equity, 4th ed., 541; 2 Ves. 155.
(2) L. R., 2 App. Cas. 814.
(3) L. R., 8 Ch App. 484.
(4) L. R., 15 Ch. D. 679.
(5) L. R., 10 Ch. App. 389.

by him from the decree of the first Court making redemption subject to the payment of interest. 1886

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THE facts of this case were as follows :—The plaintiff, Ram Prasad, was an illiterate *Kurmi* in the position of a peasant proprietor of some land in the Jalaun district of the Jhánsi Division. The defendant, Lalli, appeared to be a professional money-lender. On the 9th July, 1875, a sum of Rs. 97 having been found to be due to the defendant by the plaintiff, the latter executed a mortgage-deed, by which he agreed to pay interest on that sum at the rate of 24 per cent. per annum at compound interest. He further agreed that "*dharta*" or a fine, at the rate of one anna per rupee, should be allowed to the mortgagee, to be calculated by yearly rests. There was also a provision that the interest should be paid from the profits of certain *malikana* land of the mortgagor, and that if the interest were not paid for two years, the mortgagee should be put in possession of this land. As security for the debt, the plaintiff mortgaged a six pies zemindari share, the term of the mortgage being eleven years. The effect of the stipulation as to the fine or *dharta* was that one anna per rupee would be added at the end of every year, not only to the principal of the mortgage-money, but also to the interest due, and the total would be again regarded as the principal sum for the ensuing year. The account made up by the mortgagee showed that for a period of ten years and seven weeks (*i.e.*, from the 9th July, 1875, to the 29th August, 1884), the *dharta* alone amounted to a sum of Rs. 211-8-6 on Rs. 97, the principal mortgage-money.

The present suit was instituted by Ram Prasad for redemption of the mortgaged property on payment of only Rs. 97, or such sum as the Court might determine as due to the mortgagee, alleging that, under the terms of the mortgage, the mortgagee was placed in possession of certain plots of land in lieu of interest, and the mortgage was redeemable on payment of only the principal sum of money due on the mortgage, and that the clauses in the mortgage-deed relating to compound interest and *dharta* were inserted dishonestly by the defendant, and without the plaintiff's knowledge. The Court of first instance (Assistant Commissioner of Orai) found that "the evidence shows that Ram Prasad was quite aware of the clauses in the deed relating to interest and penalty;

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and, since the terms of the deed have been acted up to, it may reasonably be presumed that his declaration of ignorance is false." Upon this finding the Court allowed to the defendant not only the full amount of the compound interest, but also the *dharta* and costs, thus making the decree for redemption subject to the payment of Rs. 1,002-1-7. From this decree the plaintiff appealed to the Commissioner of Jhánsi, who modified the first Court's decree. The Commissioner observed that the bond was of the most extortionate character, although the security was good. "The loan was of Rs. 97, and notwithstanding that the appellant has paid Rs. 157-8, the account against him at the end of ten years and a few weeks stands at Rs. 990-12. I do not see how the terms of the bond in respect of the interest can be evaded; but the additional yearly fine called *dharta* is, I think, of a penal nature, and may be set aside." The effect of this was to make the decree for redemption subject to payment of Rs. 456-14-3, instead of Rs. 1,002-1-7, which the first Court had allowed the defendant.

The defendant appealed to the High Court. It was contended on his behalf that the Commissioner was wrong in law in holding that the *dharta* agreed to be paid by the respondent was a penalty, and as such could not be awarded.

Babu *Ratan Chand*, for the appellant.

Mr. *N. L. Palielogus*, for the respondent.

MAHMOOD, J. (after stating the facts of the case and the plea of the appellant as above, continued):—I am of opinion that this contention is only plausible, but has no real force, and cannot prevail under the circumstances of this case. It is perfectly true that there is no real question of penalty, in its strict sense, involved in this case, and the law upon the subject has been consolidated for us in s. 74 of the Contract Act (IX of 1872). I also concede the obvious proposition that ever since the repeal of the usury laws, Courts of Justice will not interfere with private contracts in regard to the rate of interest on pecuniary obligations. But the case presented here does not seem to me to rest upon any such principle, for I hold that the nature of the transaction is such as calls for interference of that equitable jurisdiction which the Courts of Chancery possess in England, and which the Courts of Justice in India

are also entitled to exercise by the nature of their constitution. We in India are no doubt bound by the rules of the statutory law; but to use the language of Mr. Justice Story, "law, as a science, would be unworthy of the name, if it did not to some extent provide the means of preventing the mischiefs of improvidence, rashness, blind confidence, and credulity on one side, and of skill, avarice, cunning, and a gross violation of the principles of morals and conscience, on the other. There are many cases in which Courts of Equity interfere upon mixed grounds of this sort. There is no more intrinsic sanctity in stipulations by contract, than in other solemn acts of parties, which are constantly interfered with by Courts of Equity upon the broad ground of public policy, or the pure principles of natural justice.....The whole system of equity jurisprudence proceeds upon the ground, that a party having a legal right, shall not be permitted to avail himself of it for the purposes of injustice, or fraud, or oppression, or harsh and vindictive injury."—(Story's Equity Jurisprudence, 11th ed., s. 1316.)

These observations, though they were made in connection with penal clauses in contracts, are applicable in principle to cases like the present, which require the exercise of equitable jurisdiction, and I am prepared to adopt them in connection with Indian cases.

Now, the expression "fraud" is one of the most important terms in connection with the exercise of equity jurisdiction, and Lord Hardwicke in a celebrated case—*Chesterfield* v. *Janssen* (1)—after remarking that a Court of Equity has an undoubted jurisdiction to relieve against every species of fraud, proceeded to enumerate its different kinds, and after stating actual fraud (*dolus malus*) went on to enumerate others which have been summarised in Mr. Justice Story's celebrated work (s. 188) in the following terms:—

"Secondly: It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other; which are inequitable and unconscientious bargains, and of such even the common law has taken notice.

(1) 1 White and Tudor's Leading Cases in Equity, 4th ed., 541; 2 Ves. 155.

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"Thirdly: Fraud, which may be presumed from the circumstances and conditions of the parties contracting; and this goes farther than the rule of law, which is, that it must be proved, not presumed. But it is wisely established in the Courts of Chancery, to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience, as to take advantage of his ignorance."

It appears to me that the Court of first instance in this case, in dealing with the allegations of the plaintiff as to the compound interest and "*dharta,*" ignored these two important aspects of *fraud* as understood in equity, for the mere fact of the plaintiff, an illiterate and ignorant *Kurmi* agriculturist, who could not even write his own name, for he made a mark, and another person wrote his name as the bond shows, being aware of the entry of the clause as to "*dharta,*" would not deprive him of the benefit of the principles of equity applicable to such cases. For while Courts bound by the technical rules of common law require specific proof of fraud or undue influence, Courts of Equity act upon inferences derived from the circumstances of the case in "bargains of such an unconscionable nature, and of such gross inequality, as naturally lead to the presumption of fraud, imposition, or undue influence. This is the sort of fraud to which Lord Hardwicke alluded, in the passage already cited, when he said, that they were such bargains that no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept, on the other, being inequitable and unconscientious bargains. Mere inadequacy of price, or any other inequality in the bargain, is not, however, to be understood as constituting, *per se*, a ground to avoid a bargain in equity. For Courts of Equity, as well as Courts of Law, act upon the ground that every person who is not, from his peculiar condition or circumstances under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet, or profitable or unprofitable, or otherwise, are considerations, not for Courts of Justice, but for the party himself to deliberate upon."—(Story's Equity Jurisprudence, 11th ed., s. 244.) "Still, however, there may be such an unconscionableness or inadequacy in a bargain, as to demonstrate some gross imposition or some undue influence;

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and in such cases Courts of Equity ought to interfere, upon the satisfactory ground of fraud. But then such unconscionableness or such inadequacy should be made out as would (to use an expressive phrase) shock the conscience, and amount in itself to conclusive and decisive evidence of fraud. And where there are other ingredients in the case of a suspicious nature, or peculiar relations between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud."—(Story's Equity Jurisprudence, 11th ed., s. 246.)

Now, in this case the circumstances furnish ample reason for the view that the plaintiff, Ram Prasad, could not, by reason of being an ignorant and illiterate agriculturist, understand the exact effect of the stipulation as to *dharta*, coupled with compound interest, which, by a complicated arithmetical calculation, has swollen a debt of Rs. 97 to more than ten times its amount in the course of a little over ten years, as the decree of the first Court shows. A man of ordinary prudence would never enter into such a bargain, for, as the learned Commissioner observes, the loan was not advanced without adequate security, and there was no reason to stipulate such an exorbitant rate of interest. "And here we may apply the remark that the proper jurisdiction of Courts of Equity is to take every one's act according to conscience, and not to suffer undue advantage to be taken of the strict forms of law or of positive rules. Hence it is that even if there be no proof of fraud or imposition, yet if, upon the whole circumstances, the contract appears to be grossly against conscience, or grossly unreasonable and oppressive, Courts of Equity will sometimes interfere and grant relief, although they certainly are very cautious of interfering unless upon very strong circumstances."—(Story's Equity Jurisprudence, 11th ed., s. 331.)

I am of opinion that the "strong circumstances" contemplated in this passage do exist in this case, and require the application of the doctrines of equity, to which reference has already been made at such length. I am aware that "the mere fact that the bargain is a very hard or unreasonable one is not, generally, sufficient, *per se*, to induce the Courts to interfere."

But "one of the most striking cases in which the Courts interfere is in favour of a very gallant, but strangely improvident, class

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of men, who seem to have mixed up in their character qualities of very opposite natures, and who seem from their habits to require guardianship during the whole course of their lives, having at the same time great generosity, credulity, extravagance, heedlessness, and bravery. Of course, it will be at once understood that we here speak of common sailors in the mercantile and naval service. Courts of Equity are always supposed to take an indulgent consideration of their interests, and to treat them in the same light with which young heirs and expectants are regarded. Hence it is that contracts of seamen respecting their wages and prize-money are watched with great jealousy, and are generally relievable whenever any inequality appears in the bargain, or any undue advantage has been taken. It has been remarked by a learned Judge that this title to relief arises from a general head of equity, partly on account of the persons with whom the transaction is had, and partly on account of the value of the thing purchased. And, he added, that he was warranted in saying that they were to be viewed in as favourable a light as young heirs are, by what has been often said in cases of this kind, and what has been done by the Legislature itself, which has considered them as a class of men, loose and unthinking, who will, almost for nothing, part with what they have acquired, perhaps, with their blood."—(Storey's Equity Jurisprudence, 11th ed., s. 332.)

I have quoted the whole of this passage because, in my opinion, it is entirely applicable, *mutatis mutandis*, to the agricultural population of India, and especially to peasant proprietors, such as the plaintiff, Ram Prasad, in this case. The conditions of all parts of India are sufficiently homogenous to make these observations almost universally applicable, and by a curious coincidence the tendency of recent legislation in India, as represented by the Dekkhan Agriculturists' Relief Act (XVII of 1879) and by the Jhánsi Encumbered Estates Act (XVI of 1882), has been in the same direction as that indicated by the passage which I have quoted from Mr. Justice Story's celebrated work. And I may add that I shall always be willing as an Indian Judge to apply to the contracts of the agricultural population of India, where the circumstances of the case justify such a course, the principles enunciated in the passages which I have quoted.

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Applying those principles to the present case, I have no doubt that the learned Commissioner acted rightly in disallowing to the mortgagee in this case the benefit of the unconscionable stipulation as to the "*dharta*" or fine which increased the debt by one anna per rupee, not only upon the principal sum but also upon interest calculated at the compound rate.

I will say nothing as to whether the principle might not have been carried further, because no appeal or objections in the nature of appeal have been preferred to us on behalf of the plaintiff, Ram Prasad, and the other plaintiffs, who, as purchasers of a portion of his rights, have joined in the suit for redemption.

It is enough to say that, upon general principles of equity, the interference of this Court is not called for in a case such as this. But I wish to add that I have considered it my duty to deliver such an elaborate judgment in this case, because I am aware that a general notion prevails in the mufassal that ever since the repeal of the usury laws, the Courts of Justice are bound to enforce contracts as to interest, regardless of the circumstances of the case, the relative conditions of the parties, and irrespective of the unconscionableness of the bargain. Courts of Justice in India exercise the mixed jurisdiction of the Courts of Law and Equity, and in the exercise of that jurisdiction, whilst bound to respect the integrity of private contracts, they must not forget that cases which furnish adequate grounds for equitable interference must be so dealt with, not because such a course involves any the least contravention of the law, but because by reason of undue advantage having been taken of the weak and the ignorant, the contract itself is tainted with *fraud* in the broad sense in which that term is understood in the Courts of Equity in England and in America—a remark which seems to me fully justified by the rule of justice, equity, and good conscience, which we are bound to administer in such cases.

For these reasons I do not think this is a case in which we should interfere. I would dismiss this appeal with costs.

STRAIGHT, Offg. C. J.—I entirely concur in the construction placed by my brother Mahmood upon the terms of the instrument of 9th July, 1875. I agree with him that the condition therein as to payment of *dharta* is not of the kind mentioned in s. 74 of the

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Contract Act, and that the question of penalty does not arise. The contract made between the parties on that date, therefore, comes to this: that for an old debt of Rs. 97, and no present cash payment, Ram Prasad agreed to pay interest at the rate of 24 per cent., compound interest on default of payment of interest and *dharta*, and as security mortgaged a 6 pies zamindari share, with a further provision that if interest were not paid for two years, the mortgagee was to obtain possession of certain *malikana* land of the mortgagor. The term of the mortgage was eleven years. The *dharta* was payable thus—at least, so I understand it: if interest were regularly paid, then at the end of each twelve months one anna in the rupee, calculated on Rs. 97, was to be added to the amount to bear interest thereafter; if interest were not paid, then to be calculated on the Rs. 97 *plus* the interest or compound interest, and then added. The effect of this arrangement has been, that in ten years the debt of Rs. 97, with compound interest, has swollen to Rs. 873, or nine times the original sum, of which the *dharta* supplies Rs. 211-8-6. The practical result is, that for the Rs. 97, Ram Prasad is sought to be made liable to pay interest at the rate of Rs. 77 per annum. I then have to ask myself, is it within reason or conscience that this Court or any other Court of Justice should be made the medium for enforcing such one-sided and unconscionable terms? No doubt I have no right to usurp jurisdiction, that is to say, I must not assume a power not vested in me: but has not this Court, as a Court of Equity, authority to do what the Courts of Equity in England have over and over again done, namely, to relieve the party who has been grievously disadvantaged by another from the strict letter of his contract? I think that it has.

The principle which was enunciated by the Court of Chancery in *Chesterfield* v. *Janssen* (1), as applied in that case, no doubt had reference to "catching bargains with heirs, expectants, and reversioners," but as the passage from Lord Hardwicke's judgment therein, which my brother Mahmood has quoted from Story, shows, there was no declaration that the equity then applied was to be limited to that class of persons only, as the following remarks

(1) 1 White and Tudor's Leading Cases in Equity, 4th ed., 541; 2 Ves. 155.

of Lord Hatherley in *O'Rorke* v. *Bolingbroke* (1) exemplifies :— "It sufficiently appears that the principle on which Equity originally proceeded to set aside such transactions was for the protection of family property; but this principle being once established, the Court extended its aid to all cases in which the parties to a contract have not met upon equal terms. In ordinary cases each party to a bargain must take care of his own interest, and it will not be presumed that undue advantage or contrivance has been resorted to on either side; but in the case of the 'expectant heir,' or of persons under pressure without adequate protection, and in the case of dealings with *uneducated, ignorant persons*, the burthen of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract." So Lord Selborne, in *Earl of Aylesford* v. *Morris* (2), referring to the presumption of fraud, mentioned by Lord Hardwicke in the judgment already adverted to, observes :—"Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *primâ facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it, in point of fact fair, just, and reasonable." These views were given effect to by Denman, J., in *Nevill* v. *Snelling* (3), and the principle enunciated by them was fully recognised by Jessel, M. R., in *Baynon* v. *Cook* (4). I gather therefore, according to the rule of equity laid down by Lord Hardwicke, that equitable relief of the kind described by him may be extended to the cases of "persons under pressure without adequate protection," or to transactions with "uneducated, ignorant persons," and that it lies upon him who seeks to fix them with a liability, which, upon the face of it, appears unconscionable, to establish that the contract out of which it arises was "fair, just, and reasonable." Now, what is the state of things here? The plaintiff, an uneducated, ignorant countryman of one of the most rural districts within our jurisdiction, found himself unable to pay Rs. 97 to his creditor. The creditor, an astute Brahman money-lender, knowing that in their

(1) L. R., 2 App. Cas., 814.
(2) L. R. 8 Ch. App., 484.
(3) L. R., 15 Ch. D., 679.
(4) L. R., 6 Ch. App., 339.

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relative positions, one to the other, he can dictate almost any terms, proceeds to put forward the agreement, the onerous conditions of which I have explained at the outset of my judgment. It is obvious that in reality the debtor had little or no choice but to accept them, and that much in the same way as a young spendthrift will give his promissory note for a large amount, so long as he gets a small sum of present cash, the plaintiff in his case was willing to consent to any proposal to escape from his immediate embarrassment. It is equally clear to my mind that the object the defendant had in view, knowing the plaintiff's pecuniary capabilities, was to put him under such terms that, unless he obtained funds from foreign sources, he would never be able to redeem his share, and it would thus inevitably fall into hands.

It is bargains of this description between the small village proprietors and the money-lenders that are gradually working the extinction of the former class in many of the country districts, and producing results which are not only a serious scandal, but a positive mischief. For it is to be borne in mind that the pecuniary difficulties of the persons I have mentioned are as often as not the result of misfortune rather than improvidence, and that bad seasons have as much to do with causing them as waste or extravagance. Whichever way it be, this is certain that the money-lenders, as anyone who sits in this Court must see, are to an alarming extent absorbing proprietary interests in the village communities, and that the body of ex-proprietors is enormously on the increase. It is, of course, not my business here to discuss the policy that should govern the action of the State in dealing with this state of things, but as a Judge having power to enforce equitable principles, I am resolutely determined, until I am set right by higher authority, to give effect, in cases of this kind, to the principles propounded by the eminent lawyers, to whose utterances I have referred, and to see that justice is done. It may be said that the repeal of the usury laws prohibits me from adopting the course I propose to take. As to this, it is enough to say that Lord Selborne, Lord Hatherley, and Sir George Jessel, in the judgments to which I have adverted, remarked in the clearest and most emphatic language that the repeal of the usury laws in

England had in no way touched or affected the power claimed by the Court of Chancery to grant relief in such matters. I entirely concur in, and approve, the order proposed by my brother Mahmood.

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Appeal dismissed.

REVISIONAL CRIMINAL.

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Before Mr. Justice Brodhurst.

QUEEN-EMPRESS *v.* PURAN AND OTHERS.

Complaint, dismissal of—Revival of proceedings—Criminal Procedure Code, ss. 203, 437.

A complaint was made, before a Magistrate of the first class, of an offence punishable under s. 323 of the Penal Code. The Magistrate recorded a brief statement by the complainant, but did not ask him if he had any witnesses to call. An order was passed directing that "a copy of the petition of complaint should be sent to the police-station, calling for a report on the matter," and on receipt of the report the Magistrate dismissed the complaint under s. 203 of the Criminal Procedure Code. There was nothing in the Magistrate's original order to show that he saw reason to distrust the truth of the complaint, nor did he direct any local investigation to be made by a police officer for the purpose of ascertaining the truth or falsehood of the complaint. Subsequently to the dismissal of the complaint, the same complainant brought a fresh charge upon the same facts against the same persons in the same Court, and upon this charge the accused were tried, convicted, and sentenced.

Held that the Magistrate had not complied with the provisions of s. 202 of the Criminal Procedure Code, and ought not, merely on the report he had received, to have dismissed the first complaint under s. 203.

Held also that the Magistrate in ordering a further inquiry, on receiving the complainant's second petition, did not act contrary to any provision of the law, and that, considering the circumstances under which the first complaint had been dismissed, a further inquiry was necessary.

THIS was a case reported to the High Court for orders by Mr. W. Crooke, Officiating Magistrate of Aligarh. The Magistrate stated as follows in reporting the case :—

"The facts of this case are as follows : —On the 28th May, 1886, the complainant Tika Ram laid a charge, under s. 323, Penal Code, against Kapuriya, Puran, Choteh, Jhanda, Behari, Asa, Ram Ratan, Pema, and Budha. The charge was laid in the Court of Munshi Intizam-ud-din, Deputy Magistrate, who referred the matter to the police for inquiry, and on receipt of the police report, which was to the effect that the evidence against the defendants was