

REVISIONAL CRIMINAL.

1909
May 11*Before Mr. Justice Richards and Mr. Justice Alston.*

KING-EMPEROR v. HINGU*.

Criminal Procedure Code (Act No. 7 of 1898), sections 133, 137—Order to show cause—Accused appearing—Starting proceedings.

When a person ordered to show cause under section 133, Criminal Procedure Code, appears and shows cause, the Magistrate is bound to take evidence as in a summons case, *i. e.* the complainant has to start proceedings by adducing evidence and then the party showing cause may produce his own evidence, if so advised. When this has been done, but not before, the Magistrate can make the conditional order absolute if he finds sufficient reason for doing so. *Srinath Roy v. Ainaddi Halder* (1) followed.

THIS was a reference made by the Sessions Judge of Mirzapur under section 438 of the Criminal Procedure Code. The facts of the case appear from the judgment.

RICHARDS and ALSTON, J.J.—This is a reference from the Sessions Judge of Mirzapur suggesting that the order of a Magistrate of the first class, purporting to Act under sections 133, 134 and 137 of the Code of Criminal Procedure, should be set aside. The facts are shortly as follows. The Magistrate having received information, (which we will assume was sufficient within the meaning of section 133) that a certain public way was obstructed by a *chabuttra* constructed by Hingu, made a conditional order requiring Hingu to remove the alleged obstruction or appear and move to have the order set aside or modified. Hingu appeared, and the Magistrate being of opinion that the duty lay upon Hingu to show that the conditional order was not justified, called upon him to produce evidence. Hingu did produce three witnesses. The learned Magistrate considered their evidence of no weight, and at once made his conditional order absolute. Hingu applied to the Sessions Judge in revision, one of the grounds taken being that the learned Magistrate was not justified in making absolute the conditional order without taking evidence in support of the order issued, as provided by section 137 of the Code. It is admitted that the learned Magistrate took no evidence except the evidence offered by Hingu.

* Criminal Reference No. 175 of 1909, made by S. Muhammad Ali, Sessions Judge of Mirzapur, dated the 7th of April 1909.

(1) (1897) I. L. R., 24 Calc., 395.

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The learned Sessions Judge considered that the ground for revision was well founded, and he has accordingly referred the matter to this Court. We think that the view taken by the learned Sessions Judge is correct. Section 137 expressly provides that if a person served with a conditional order under section 133 appears and shows cause, the Magistrate "shall take evidence in the matter as in a summons case." This certainly cannot mean that the person showing cause is to start the proceedings and produce evidence to meet a case which he has never heard. He is not supposed to know the substance of the Police report made to the Magistrate, or "other information" on which the Magistrate acted. He is entitled to hear the evidence, taken as in a summons case, and cross-examine; and then he may produce his own evidence if so advised. When this has been done, but not before, the Magistrate can make the conditional order absolute if he finds sufficient reason for doing so. This view is supported by the ruling in *Srinath Roy v. Ainaddi Halder* (1). We accordingly set aside the order of the Magistrate, dated 4th March 1909, in which he made absolute the conditional order, and we refer the matter back to him to proceed according to law, having regard to what we have said above.

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May 12.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Tudball.

AJUDHLA AND ANOTHER (DEFENDANTS) v. RAM SUMER MISIR (PLAINTIFF,)*
Hindu law—Mitakshara—Daughter's daughter's son—Bhima gotra Sapinda—Bandhu—Alienation by Hindu widow—Legal necessity—Burden of proof.

A daughter's daughter's son is a *bandhu*, and in the absence of any other heir he is entitled to succeed to the estate of the last owner.

A mere recital in a mortgage-deed executed by a Hindu widow with a qualified interest as to the existence of necessities is not enough. It is for the creditor to show either that there was legal necessity or at least that he was led on reasonable grounds to believe that there was necessity for the alienation.

THE facts of this case are as follows :—

One Sheo Narain died leaving him surviving a widow, Sugandha and a daughter Chaura. The plaintiff, Ram Sumer

* Second Appeal No. 581 of 1908 from a decree of Saiyid Muhammad Ali, District Judge of Mirzapur, dated the 9th of March 1908, confirming a decree of Shah Amjad-ul-lah, Subordinate Judge of Mirzapur, dated the 4th of December 1907.