

We allow the appeal, set aside the decree of this Court and also of the lower appellate court, and remand the case to the court of first instance with directions to proceed to hear the evidence for the defence and to decide the case according to law. The Court will be entitled, after hearing the defendant's evidence, if it thinks it necessary so to do, to hear any further evidence which the parties may adduce. Costs here and heretofore, including both hearings in this Court, will be costs in the cause.

Appeal decreed and cause remanded.

REVISIONAL CRIMINAL.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

EMPEROR v. NARAIN.*

Criminal Procedure Code, section 282—Jury—Juror discharged during trial and fresh juror substituted—Trial not recommenced—Invalidity of proceedings.

On a trial by a jury, after two witnesses had been examined, one of the jurors was discovered to be deaf and was discharged and another juror sworn in his place. The trial, however, was not commenced afresh, but the evidence given by the two witnesses was read over to and admitted by them. *Held* that this procedure was inadmissible and the trial so held invalid.

THIS was a reference under section 307, clause (1), of the Code of Criminal Procedure made by the Sessions Judge of Benares, who had disagreed with the finding of a jury in a trial on a charge of theft. It was, however, brought to the notice of the High Court that during the trial, one of the jurors had been discharged on account of his deafness and a new juror substituted, and further that the trial had not, on this, been recommenced, but the evidence of the witnesses already examined had merely been read over to and admitted by them in the presence of the new juror.

The Assistant Government Advocate, (Mr. R. Malcomson), for the Crown.

Munshi Harnandan Prasad, for the opposite party.

MUHAMMAD RAFIQ and PIGGOTT, JJ.—This is a reference by the learned Sessions Judge of Benares under section 307, clause (1), of the Code of Criminal Procedure. It seems that one Narain was tried in the court of the learned Sessions Judge with the help of jury on a charge of theft. The charge was denied by

1914

BABU
v.
SITA RAM

1914
May, 16.

1914

EMPEROR
v.
NARAIN.

Narain. The prosecution examined three witnesses in support of the charge and the accused gave evidence to show that he bore a good character. The jury returned a unanimous verdict of not guilty. The learned Sessions Judge, being of opinion that the verdict of the jury was flagrantly in opposition to the evidence in the case and was perverse, did not accept it and has submitted the case to this Court under section 307, clause (1), of the Code of Criminal Procedure. We find on a perusal of the record that, after the first two witnesses for the prosecution had been examined, it was discovered that one of the jurors was deaf and had not followed the trial at all. He was discharged and another juror was added. The learned Sessions Judge did not commence anew the trial of Narain, but called up the first two witnesses for the prosecution and had their statements read out to them and they admitted that their evidence which they had heard was correct. The trial then proceeded and other witnesses were examined for prosecution and for the defence. Apart from the question whether the verdict of the jury is perverse or not, we find that the trial before the learned Sessions Judge has been defective in view of the provisions of section 282 of the Code of Criminal Procedure. It was not open to the learned Sessions Judge to merely read over the statements of the first two witnesses and obtain their admissions to validate the trial where one of the jurors had been discharged and replaced by a new juror. We therefore direct that Narain be retried before another jury according to law.

Retrial ordered.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Piggott.

MUHAMMAD HUSAIN (DEBTOR-HOLDER) v. INAYAT HUSAIN AND ANOTHER
(JUDGEMENT-DEBTORS).*

Execution of decree—Limitation—Act No. IX of 1908 (Indian Limitation Act), schedule I, article 182—Application in accordance with law—Judgment-debtor missing.

A decree for sale on a mortgage executed by A was passed against A (who was reported to be missing at the time) and against B, C, D and E, who were

*Second Appeal No. 1293 of 1913 from a decree of Rama Das, officiating first Additional Subordinate Judge of Agra, dated the 2nd of July, 1913, confirming a decree of Kaulshwar Nath Rae, Munsif of Bulandshahr, dated the 3rd of April, 1913.

1914
May, 18.