

Below this entry appear the thumb marks of the persons who hired the machine. In one of the documents there is a further statement that the hirers would return the pans hired at their own cost. After hearing the learned counsel on both sides and carefully considering the terms of the documents, we are satisfied that each of these documents is an "instrument" as defined in sub-section (14) of section 2 of Act No. II of 1899, and that the contents of the documents fall within the terms of article 5 of schedule I of the said Act, being memoranda of agreements within the meaning of that article. Under clause (b) of article 5, each of the documents therefore required a stamp of eight annas. This case is similar to the case of *Mulchand Lala v. Kashiballav Biswas* (1). This is our answer to the reference. A copy of this will be sent under seal of the Court and bearing the signature of the Registrar to the Chief Controlling Revenue Authority and another copy to the Judge who made the reference.

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 MUTASADDI
 LAL
 v.
 HAREESH.

MISCELLANEOUS CRIMINAL.

1913

November, 12.

Before Justice Sir George Knox.

EMPEROR v. MANGAL AND OTHERS.*

Criminal Procedure Code, sections 244 and 540—Right of accused to summon witnesses—Second application by accused to magistrate not seized of the case—Procedure—Affidavit.

When an accused person has been called upon to make his defence and has applied for and obtained the summoning of witnesses on his behalf, his only means of procuring the summoning of further witnesses is to ask the Court to take action under section 540 of the Code of Criminal Procedure.

The accused has no right to put in a second application *simpliciter* for the summoning of more witnesses, nor has the Court any power to grant such an application, more particularly when such Court is a magistrate not seized of the case, to whom the application is made in the absence of the trying magistrate.

Observations on the contents, drafting and attestation of affidavits.

THIS was an application for the transfer of a case under Act No. III of 1907 pending against the applicant in the court of a Magistrate of Mirzapur district. The facts upon which the application was based are set forth in detail in the order of the High Court.

* Criminal Miscellaneous No. 223 of 1913.

(1) (1907) I. L. R., 35 Calc., 111.

1913

EMPEROR
v.
MANGAL.

Mr. A. P. Dube and *Satya Chandra Mukerji*, for the applicants.

The Officiating Government Advocate (Mr. *W. Wallach*), for the Crown.

KNOX, J.—This is an application presented on the part of Mangal Prasad and others. The application is supported by an affidavit bearing date the 18th of October, 1913. That affidavit purports to be sworn by one Shambhu, son of Gopi, caste Brahmin, resident of Jangi Ghat, in the City of Mirzapur. The application prays (1) that the order of Mr. L. S. White, dated the 1st of October, 1913, be set aside and the order of Babu Jwala Prasad, summoning the Line Inspector, Mr. Firth, and the City Kotwal be restored; (2) that the District Magistrate of Mirzapur and the Superintendent of Police be ordered to be summoned; (3) that after passing these orders the case be transferred to some other competent Magistrate. After hearing the learned counsel in support of the application I find from the record that this was a case falling under sections 3 and 4 of Act III of 1867. The accused were sent up by the police and placed before Mr. L. S. White for trial on the 2nd of September, 1913. On that date the Magistrate examined all the witnesses for the prosecution and called upon the accused for their defence. After the defence was taken, he adjourned the case to the 4th of October, 1913, and again to the 20th of October, 1913. There is another order of adjournment which need not be noticed. On the 26th of September, 1913, Mr. White was away from Mirzapur, and in his absence an application was put in on behalf of the accused praying that eighteen witnesses might be summoned as witnesses for the defence. This application was placed before Mr. Jwala Prasad. That officer, on what authority I know not and cannot discover, passed an order that these witnesses be summoned. Not being seised of the case himself, he had absolutely no power of any kind to pass an order in the case, especially an order of this description. In this list of witnesses neither the Magistrate of Mirzapur nor the Superintendent of Police are named. The accused had, therefore, exhausted the power of summoning witnesses for the defence. All that he could do was to move the Magistrate to summon any other witnesses whom he might deem necessary under the powers vested in the Magistrate

under section 540 of the Code of Criminal Procedure. That an error was made by Babu Jwala Prasad in passing the order he did will be seen from this fact that Babu Jwala Prasad was never seised of the case and had no power to issue summonses for witnesses. On the record there is no order of transfer giving Mr. Jwala Prasad jurisdiction to pass such an order. It will also be seen that Mr. White was quite within his powers in refusing to summon the District Magistrate and the Superintendent of Police. The orders then complained of are right and proper orders, and there exist no grounds of any kind justifying an order of transfer in this case. This application is, therefore, dismissed. But there remain still more serious acts on the part of Shambhu, whom I have already mentioned above. Shambhu in his affidavit sets out that "this case was originally heard and tried by Babu Jwala Prasad, Magistrate, first class, before whom four prosecution witnesses viz., Mr. Firth, Line Inspector, Police, City Kotwal, Kalka Prasad, one Shahmir, and a man named Kaderi were examined and cursorily cross-examined. I know this from my personal knowledge. That the said Babu Jwala Prasad after the witnesses were so examined called the accused to enter upon their defence, whereupon in view of the cursory cross-examination of the witnesses, the accused put in an application that the witnesses be re-summoned for further cross-examination, which the court in the interest of justice granted." The affidavit concludes:—"I solemnly affirm that this my declaration is true, that it conceals nothing and that no part of it is false." Let an order issue directing the District Magistrate of Mirzapur to serve a summons upon Shambhu, son of Gopi Nath, caste Brahman, resident of Jangi Ghat, City of Mirzapur, to appear in this Court on the 12th of November, 1913, to show cause why he should not be tried for swearing a false affidavit or why some other suitable order should not be passed.

On cause being shown by the accused the Court delivered the following judgement.

Shambhu, son of Gopi Nath, caste Brahman, resident of Jangi Ghat, City of Mirzapur, has appeared in this Court in obedience to the order issued upon him. He says that in instructing the learned counsel who drew up the affidavit he made use of the words "Joint Sahib" and never made use of the words Babu

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Jwala Prasad. For the words which appeared in paragraph 3 of the affidavit he expresses regret and says that he had no intention to mislead the court. The explanation is a very lame one. Not only did he aver that the person who called the accused to enter upon their defence was Babu Jwala Prasad, and that he swore this of his own personal knowledge, but he appended an attestation clause which vouched for the truth of his declaration. To go further, when he came before the Commissioner he solemnly affirmed that this fact was true. It appears from that affidavit that the affidavit was read over and explained to him. It is difficult to understand how, if this procedure was duly carried out and the deponent paid attention to the words read over to him, he failed to notice that he was being made to swear to a fact which did not exist. I am afraid, however, that it may be the case that the care and precision with which affidavits are intended to be verified and sworn to by the persons who make them are not always observed by those who administer affidavits and those who prepare them. The intention of the law is, and it cannot be too often repeated, that an affidavit must contain nothing but bare facts known to the person who makes the affidavit, either personally or upon information from a source which he believes to be a correct source and one on which reliance can be placed. Further, as it is possible for human beings to make a mistake in reciting a fact, the law requires that the contents of affidavits should be carefully read over to the deponents in words understood by them and vouched by them to be correct. In whatever haste Shambhu may have been, it is difficult to conceive that, if he intended to tell the truth, he would not have noticed that the writer of the affidavit had led him, no doubt, unwittingly, into the making of a statement which he, Shambhu, knew to be false. For this reason I accept the apology which is made by him, and I hope after this that those who make affidavits, those who prepare affidavits, and those who are entrusted with the solemn duty of having affidavits sworn before them will take proper care to see that the provisions of the law are duly carried out. Carelessness on the part of any one of these three may place the deponent in a very serious position, and the apology which I accept on the present occasion must not be construed to be a precedent of this Court for

always accepting statements of this nature as sufficient to condone the making of a false statement. I discharge Shambhu with this warning. The contents of this warning will be duly and carefully explained to him.

1913

 EMPEROR
 v.
 MANGAL.

APPELLATE CIVIL

Before Mr. Justice Rynes and Mr. Justice Piggott.

KAPILDEO AND ANOTHER (DEFENDANTS) v. THAKUR PRASAD AND ANOTHER
 (PLAINTIFFS)*

1913
 November, 14.

Hindu law—Joint Hindu family—Antecedent debt—Mortgage executed by father to complete purchase of immovable property at an execution sale, but executed after expiry of time for paying in the balance of the price—Property nevertheless remaining with the purchaser.

An auction purchaser of immovable property paid in the amount required by law as a preliminary deposit, but, being unable to find the remainder of the auction price, borrowed it on the security of a mortgage comprising the property purchased at the auction sale and also some property of the joint family of which the auction purchaser was the head. This mortgage was, however, executed after the expiry of the time fixed by law for payment of the balance of the auction price. The executing court refused to accept payment of the balance, but the property remained with the purchaser, apparently in virtue of some arrangement with the judgement-debtor, by whom ostensibly the decree was satisfied.

Held that in the circumstances above described the mortgagee was entitled to recover on his mortgage, and that the sons of the mortgagor could not be heard to plead that the mortgage money was not borrowed to pay an antecedent debt, within the meaning of the Hindu law.

THIS was a suit for sale on a mortgage executed in circumstances described at length in the judgement of the High Court by the father of the joint Hindu family. The defendants were the sons of the mortgagor and pleaded that for various technical reasons they were not liable in respect of the mortgage debt.

The court of first instance decreed the claim and this decree was confirmed on appeal. The defendants thereupon appealed to the High Court.

Dr. Satish Chandra Banerji, for the appellants.

Munshi Gobind Prasad, for the respondents.

* Second Appeal No. 1522 of 1912 from a decree of F. D. Simpson, District Judge of Gorakhpur, dated the 30th of August, 1912, confirming a decree of Hidayat Ali, officiating Second Additional Subordinate Judge of Gorakhpur, dated the 12th of March, 1912.