further supported by the recent case of *Lal Bahadur* v. *Ambika Prasad* (1), decided by their Lordships of the Privy Council. In that case two previous mortgages of 1895 were held to be "antecedent debts" which would justify for their liquidation a sale of family property in favour of purchasers who were, one, some, or all nominees of the mortgagee.

We are accordingly of opinion that the mortgage of 1910 was in lieu of an antecedent debt due from the plaintiffs' fathers and grandfathers and was, therefore, binding on the plaintiffs. The plaintiffs were, therefore, in no way prejudiced by the previous decree. The appeal is accordingly dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Banerji.

EMPEROR *v.* ATMA RAM AND OTHERS.*

1926 *October*, 7.

Act No. XLV of 1860 (*Indian Penal Code*), *section* 323—*Criminal Procedure Code, section* 106—*Security to keep the peace—Summary trial—Notes of evidence not kept.*

Where a magistrate trying a case summarily made some notes of the evidence given but destroyed them: *held* that this was a sufficient cause for setting aside the conviction.

Held also, that a magistrate having convicted an accused person under section 323 of the Indian Penal Code cannot bind him over to keep the peace under section 106 of the Code of Criminal Procedure unless he also finds that the offence was one involving a breach of the peace. *Ainuddi Sheikh* v. *Queen-Empress* (2), *Satish Chandra Mitra* v. *Manmatha Nath Mitra* (3) and *Muhammad Rahim* v. *Emperor* (4), referred to.

* Criminal Reference No. 526 of 1926.

(1) (1925) I.L.R., 47 All., 795.
(2) (1900) I.L.R., 27 Calc., 450.
(3) (1920) I.L.R., 48 Calc., 280.
(4) (1925) 23 A.L.J., 1053.

1926

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This was a reference made by the Sessions Judge of Meerut.

THE facts of the case are fully stated in the Sessions Judge's order which was as follows:—

This is an application for revision of an order of Mr. Piari Lal, first class Special Magistrate of Meerut, convicting the applicants under section 323 of the Indian Penal Code and sentencing them to a fine of Rs. 25 each and also ordering them to execute a bond in Rs. 100 each to keep the peace for one year.

Only two points are urged in revision. The first is that the Magistrate tried the case summarily, but he did not record any notes of evidence or, at any rate, did not preserve any notes of evidence on the record. The second is that the order passed under section 106 of the Code of Criminal Procedure is illegal.

Now, with regard to the first point, the Magistrate himself says that he did make some notes of the evidence of the witnesses for his own information, but he did not preserve these notes and keep them on the record. He says he was not required to do so. Now there can be no doubt that a certain number of witnesses were examined in this case, but it does not appear from the judgement as to who these witnesses were. There is a reference to the evidence of three witnesses only, but the names of two are not disclosed. The name of the only witness which is disclosed in the judgement is Dr. Murari Lal. He must have examined the injuries of one of the complainants. There is, therefore, nothing in the judgement itself which could show what the evidence of these witnesses was and, as admitted by the learned Magistrate, there are no notes of evidence kept on the record. So far it is clear. But it is contended on behalf of the applicants that although the object of a summary procedure is to shorten the course

of a trial it is nevertheless incumbent on the Magistrate to put on record sufficient evidence to justify his order. In support of this contention reliance is placed on *Ainuddi Sheikh* v. *Queen-Empress* (1). It is also contended that if at the commencement of the trial the Magistrate is unable to determine whether the proper sentence to be passed should be an appealable one or not he must make a memorandum of the substance of the evidence of each witness as his examination proceeds. It is further urged that if he actually does so, the notes of the evidence must form part of the record of the case and cannot be destroyed by him. And it is lastly contended that where the Magistrate does record the evidence but subsequently destroys the notes the conviction must be set aside. In support of this contention reliance is placed upon *Satish Chandra Mitra* v. *Manmatha Nath Mitra* (2). In my opinion these rulings should be followed, especially when there is no ruling to the contrary of the High Court of Allahabad. I, therefore, hold that the destruction of the notes of evidence has rendered the conviction improper.

With regard to the second point the case of the applicants is clear. It was a case under section 323 of the Indian Penal Code and it arose simply on account of a sudden altercation over a trivial matter. Now section 323 of the Indian Penal Code is not an offence referred to in section 106 of the Code of Criminal Procedure, but even then an order can be passed after a conviction under this section if it was found by the Magistrate that the offence involved a breach of the peace. But there must be a finding of the Magistrate; otherwise his order is not justified. In *Muhammad Rahim* v. *Emperor* (3) it was laid down that an order under this section can only be passed when in a case of causing simple hurt a breach of the peace is involved.

(1) (1900) I.L.R., 27 Calc., 450. (2) (1920) I.L.R., 48 Calc., 280.
(3) (1925) 23 A.L.J., 1053.

1926

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It was also held that the Magistrate cannot merely on the ground that the parties were on bad terms bind the accused down. Under these circumstances I hold that the order passed under section 106 of the Code of Criminal Procedure is not legal.

I, therefore, submit this case to the Hon'ble High Court with a recommendation that the conviction of the applicants under section 323 of the Indian Penal Code and the order under section 106 of the Code of Criminal Procedure both be set aside and such further orders may be passed by the Hon'ble Court as are deemed fit. The record shall be submitted to the Hon'ble Court after the explanation, if any, of the Magistrate concerned is received.

Babu *Sailanath Mukerji*, for the applicant.

The Assistant Government Advocate (Dr. *M. Wali-ullah*), for the Crown.

BANERJI, J. :—I accept the reference. It is unnecessary to order a re-trial. The fines, if paid, will be refunded.

Reference accepted.

MISCELLANEOUS CIVIL.

Before Mr. Justice Iqbal Ahmad.

1926 *October*, 19.

AHMADI BEGAM (PLAINTIFF) *v.* GIRRAJ KISHORE (DEFENDANT).*

Act No. IX of 1887 (*Provincial Small Cause Courts Act*), *schedule II, article* 8—*Small Cause Court—Jurisdiction* —"*House-rent.*"

Held that the term "house-rent" as used in article 8 of the second schedule to the Provincial Small Cause Courts Act, 1887, is not confined to the rent of a dwelling-house, but

* Miscellaneous Reference No. 571 of 1926, from Harnath Prasad Ashthana, Munsif of Mainpuri, exercising the powers of a Small Cause Court Judge.