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MUHAMMAD YUNIS KHAN v. MUHAMMAD SALEH KHAN.

The learned advocate for the appellant has argued that Haji Yusuf Khan has since died and the option has therefore come to an end. He has alleged that the plaintiff should therefore be given a decree, as the transfer has already become absolute. We cannot accept this contention. On the date when the demands are alleged to have been made the claim was premature and no right of pre-emption had accrued to the plaintiff. If at a subsequent stage a right of pre-emption accrues, there are to be fresh demands and a fresh claim for pre-emption. This follows from the last sentence in the passage quoted from the Hedaya.

In this view of the matter, we consider it unnecessary to go into the evidence regarding the true consideration. Both the appeals are dismissed with costs.

REVISIONAL CRIMINAL.

Before Mr. Justice King.

KALLU v. BASHIR-UDDIN.*

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July, 25.

Criminal Procedure Code, sections 356 and 537—Depositions not recorded in vernacular—Magistrate recording depositions in English—Irregularity not going to the root of the proceeding—Curable if parties not prejudiced thereby.

In certain proceedings under section 145 of the Criminal Procedure Code the evidence of the witnesses was not recorded in the vernacular either by the Magistrate himself or by any other person in his presence as required by section 356 of the Criminal Procedure Code, but the Magistrate recorded in English the evidence at length and in great detail. There was no suggestion that the English record did not contain a full and accurate account of the depositions; nor was any complaint made by the party against whom the Magistrate decided the case that they were prejudiced in any way by the omission to record the depositions in the vernacular. On the question whether the non-observance of the provisions of section 356 vitiated the whole proceedings,—

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Held that a breach of an imperative statutory rule of procedure is not necessarily enough to vitiate the whole proceedings. The court should consider the gravity of the irregularity or omission and whether it might have worked actual injustice to the accused. In the circumstances of the present case the irregularity in question was a mere technical irregularity, which did not go to the root of the trial of the case, and which obviously did not prejudice the parties or occasion a failure of justice. It was, therefore, one curable under section 537 and did not warrant the quashing of the proceedings.

Mr. *Mushtaq Ahmad*, for the applicant.

Mr. *Saila Nath Mukerji*, for the opposite party.

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

KING, J. :—This is a reference by the learned Sessions Judge of Benares recommending that an order passed by a Special Magistrate of the first class under section 145 of the Code of Criminal Procedure be set aside or in the alternative that the order be modified as to costs.

It appears that one Bashir-uddin started proceedings under section 145 of the Code of Criminal Procedure against the opposite party, who are now the applicants before me, alleging that a certain *chabutra* belonged to him and that the accused were interfering with his possession and were likely to commit a breach of the peace. The Magistrate found that the *chabutra* was in Bashir-uddin's possession and passed orders restraining the opposite party from interfering with Bashir-uddin's possession and ordered them severally and jointly to pay to Bashir-uddin a sum of Rs. 428-6-0 as costs under section 148(3). It appears that the Magistrate recorded the evidence of the witnesses in English and that the evidence of the witnesses was not recorded in the vernacular either by the Magistrate himself or by any other person in his presence. This procedure, being in contravention of the provisions of

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section 356 of the Code of Criminal Procedure, constituted an illegality or irregularity, in the opinion of the learned Sessions Judge, such as to vitiate the whole proceedings.

As proceedings under section 145 of the Code are inquiries under chapter XII of the Code it is clear that under section 356(1) the evidence of each witness should have been taken down in writing *in the vernacular* by the Magistrate himself, or in his presence and hearing and under his personal direction and superintendence, and should have been signed by him. This procedure was not followed. The learned Sessions Judge states that the Magistrate kept only an English memorandum of the evidence. I think the Magistrate's record amounts to more than a memorandum. He did in fact record the evidence of the witnesses at length and in great detail and I think his record amounts to more than a memorandum, but it is certainly in English and there is no vernacular record, so it must be conceded that the provisions of section 356 have not been complied with.

The question then arises whether this error or irregularity or illegality is sufficient to vitiate the whole proceedings.

It is argued by the learned advocate for the applicants that the provisions of section 356(1) are imperative and that a breach of these provisions amounts to an illegality and not a mere irregularity such as might be curable under section 537. He has cited certain authorities which more or less support his contention. In the case of *Matai* v. *Anant Ram* (1) a single Judge of this Court set aside an order passed by a Magistrate on account of various irregularities. One of the irregularities specified was that the Magistrate had failed to comply with the provisions of section 356, since he had recorded the evidence of

(1) Weekly Notes' 1890, p. 164.

witnesses in English only and had not kept any vernacular record. It must be noted, however, that this was by no means the only irregularity. It appears to me that the Judge laid great stress upon the non-compliance with the provisions of section 202. He did not hold that the failure to observe the provisions of section 356 was of itself and apart from all other considerations sufficient to vitiate the order. This decision therefore does not clearly support the applicant's contention.

In the case of *Queen Empress* v. *Barmajit* (1) a conviction was set aside on account of several irregularities. Here again one of the irregularities was that the Judge did not make his memorandum of the evidence at the time when the evidence was actually given and this constituted a breach of the provisions of section 356. But some of the other irregularities that occurred in the trial of the case were of a graver nature. The learned Sessions Judge in recording the opinion of the assessors had shown that the assessors found the accused guilty, although it appears, as a matter of fact, that the assessors found the accused not guilty. Hence, although the conviction was set aside and a retrial ordered, it was certainly not merely or even mainly upon the ground that the provisions of section 356 regarding the mode of recording evidence had not been complied with. The case of *Udit Narain* v. *Emperor* (2) does indeed support the applicant's contention. In that case a single Judge of this Court held that as the evidence of witnesses had been recorded in English only and not in the vernacular, this amounted to an irregularity which vitiated the trial. With due respect to the learned Judge, however, I do not think this ruling is very satisfactory. The question whether the irregularity was or was not curable under section 537 was not even discussed.

(1) Weekly Notes, 1891, p. 145. (2) (1919) 17 A.L.J., 1146.

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In the case of *Janki Prasad* v. *Emperor* (1) a single Judge of the Patna High Court held that where in a trial the Magistrate had recorded the evidence in the Urdu character only, which was not the language of the court in that province, he had been guilty of an illegality which vitiated the trial, and further that even if it were held to be only an irregularity then it was not such an irregularity as would be curable under section 537.

Reliance is also placed upon a ruling of a Bench of the Calcutta High Court in the case of *Sadananda Mandal* v. *Krishna Mandal* (2). This was a case under section 145 of the Code of Criminal Procedure and is therefore directly applicable to this case. In that case the Magistrate made a memorandum of the evidence in English but the depositions were not taken down in the vernacular. It was held that the provisions of section 356(1) were imperative and that noncompliance with those provisions cannot be condoned. It is perhaps possible to distinguish that case on the ground that in the case before me the evidence was recorded in full and amounts to more than a mere memorandum of the substance of the evidence, but the reasoning of this case does no doubt support the applicant's contention.

For the opposite party reference is made to a very recent decision of a learned Judge of this Court in the case of *Sankatha Misir* v. *Bishwanath* (3). The facts of that case are almost precisely on all fours with the case before me. In proceedings under section 145 the Magistrate had only recorded the evidence of the witnesses in English and their depositions had not been recorded in the vernacular as required by section 356. The learned Judge distinguished the ruling of the Privy Council in the case of *Subrahmania Ayyar*

(1) (1917) 43 Indian Cases, 827. (2) (1914) I.L.R., 42 Cal., 381.
(3) A.I.R., 1931 All., 2.

v. *King-Emperor* (1) in which their Lordships remarked that they were unable to regard the disobedience of an express provision of law as to the mode of trial as a mere irregularity. I agree that that ruling can be distinguished and it has been distinguished by their Lordships of the Privy Council themselves in a more recent case, *Abdul Rahman* v. *King-Emperor* (2) to which I shall presently refer again. In the case of *Subrahmania Ayyar* a man was tried on charges of extortion in respect of forty one criminal acts extending over a period of two years, in contravention of a provision of the Code providing that a man can only be tried at one trial for three offences which have been committed within a period of twelve months. The procedure adopted in that case was one which the Code positively prohibited and it was possible that it might have worked actual injustice to the accused. There was thus a grave illegality or irregularity in the mode of trial. It was an irregularity which went to the root of the trial. Finding that the case of *Subrahmania Ayyar* was distinguishable the learned Judge relied upon the case of *Emperor* v. *Bechu Chaube* (3), and held that as the applicants in revision had not been in any way prejudiced and as there was no error in procedure which went to the root of the trial, the Magistrate's order should be upheld.

I agree with the learned Judge that the case of *Subrahmania Ayyar* is distinguishable and that a breach of an imperative rule of procedure does not *necessarily* vitiate the whole proceeding.

A similar view was taken by a Bench of this Court in the case of *Emperor* v. *Jhabbar Mal* (4). In that case the trial court had omitted to question the accused generally on the case after the witnesses for the prosecution had been examined. The court did question the accused after the prosecution witnesses

(1) (1901) I.L.R., 25 Mad., 61. (2) (1926) I.L.R., 5 Rang., 53.
(3) (1922) I.L.R., 45 All., 124. (4) (1927) 26 A.L.J., 196.

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had been examined-in-chief, but did not question him again after the witnesses had been cross-examined and re-examined. The learned Judges held that this was a breach of the provisions of section 342(1) of the Code, but nevertheless it was curable under section 537.

I rely strongly upon the decision of their Lordships of the Privy Council in *Abdul Rahman* v. *King-Emperor* (1). In that case it was held by their Lordships that the provisions of section 360, which require that the deposition of each witness is to be read over to him, had not been complied with. They then proceeded to discuss whether non-compliance in this respect should vitiate the trial. They distinguished the case of *Subrahmania Ayyar* and disapproved of two decisions of the Calcutta High Court in which it had been held that non-compliance with the provisions of section 360 vitiated the trial. Their Lordships, at page 69, summed up their views as follows: "To sum up, in the view which their Lordships take of the several sections of the Code of Criminal Procedure, the bare fact of such omission or irregularity as occurred in the case under appeal, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction which, in their Lordships' view, may be supported by the curative provisions of sections 535 and 537."

In the face of this pronouncement it is no longer open to the courts in India to hold that the mere fact that an imperative statutory rule of procedure has been broken is enough to vitiate the trial or proceeding. It is clear that the courts should consider the gravity of the irregularity or omission and whether it might have worked actual injustice to the accused. If non-compliance with an imperative provision in section 360 is curable under section 537, as held by their Lordships, it is clear that it is open to this Court

(1) (1926) I.L.R., 5 Rang., 53.

to consider whether a breach of a statutory provision under section 356 is not similarly curable. In my opinion the irregularity complained of may be considered a mere technical irregularity. The evidence of the witnesses was recorded in full and there is no suggestion that the record does not contain a full and accurate account of the depositions. The fact that the applicants were not prejudiced, and that the irregularity cannot possibly be held to have occasioned a failure of justice is apparent *inter alia* from the fact that when the applicants applied in revision to the Sessions Judge they set forth five grounds, alleging certain illegalities or irregularities, but it never occurred to them to set forth a ground complaining of the irregularity of failing to record the depositions in the vernacular. The point was raised by the learned Sessions Judge himself. He was no doubt perfectly entitled to raise that point although it had not been raised by the applicants themselves, but it is quite obvious that the applicants did not consider themselves in any way prejudiced by the procedure adopted by the trial court and that no failure of justice was occasioned thereby.

I hold, therefore, that I should not be warranted in setting aside the order under section 145 on the ground of non-compliance with the provisions of section 356, as the irregularity did not go to the root of the trial and did not prejudice the applicants or occasion a failure of justice.

Another point remains, namely, the amount of costs which the applicants have been ordered to pay to the successful opposite party. [The amount of costs was then examined and modified.]

I therefore maintain the order passed by the trial court regarding possession, but modify the order regarding costs only to this extent that I substitute the sum of Rs. 220-6-0 instead of Rs. 428-6-0.