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under the first mortgage, and they are persons who are deprived of any claim they might have had against the appellant because the provisions of section 52 of the Transfer of Property Act are against them. We, therefore, consider that the objection which the respondents have made in regard to their payment of Rs.2,151-14-0 on the 29th of July, 1926, cannot be sustained. Therefore we allow the appeal, set aside the order of the lower appellate court, and restore the order of the Munsif, and we dismiss the objection of the respondents with costs throughout.

## REVISIONAL CRIMINAL

*Before Mr. Justice Allsop*

1936
*February*, 20

EMPEROR *v.* KUNJ BEHARI DAS AND OTHERS*

*Criminal Procedure Code, section* 145, *clauses* (4), (9)—*Summoning of witnesses named by a party—Discretion of court—Duty of court to summon witnesses, not imperative in all kinds of cases—Revision—Substantial justice.*

Sub-section (4) of section 145 of the Criminal Procedure Code has to be read with sub-section (9), which leaves it entirely to the discretion of the Magistrate, in a proceeding under that section, whether he will or will not summon any witness or witnesses, on the application of either party.

There is no general duty upon a court in all kinds of proceedings to issue process to compel the attendance of witnesses desired by the parties; special rules are laid down in the Criminal Procedure Code in this respect according to the nature of the inquiry with which the Magistrate is dealing. Having regard, obviously, to the fact that a proceeding under section 145 is a summary proceeding about the possession of parties, sub-section (9) makes it discretionary to summon or not to summon witnesses.

Even if there were any doubt on this question of law, there would be no ground for interference in revision where the order of the court under section 145, which had been passed

*Criminal Revision No. 1043 of 1935, from an order of K. K. K. Nayar, Sessions Judge of Muttra, dated the 13th of November, 1935.

after a personal inspection and local inquiry, was substantially just.

Mr. *M. L. Chaturvedi,* for the applicants.

Mr. *K. N. Agarwala,* for the opposite party.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

ALLSOP, J.:—This application in revision arises out of proceedings under section 145 of the Criminal Procedure Code. The present applicants claim to be the managing committee or trustees of a certain temple. They say that the original mahant died some time at the end of the year 1933 and that they appointed Radha Raman Das as his successor on the 4th of December, 1933. Radha Raman Das continued to be mahant till the 28th of July, 1935, when he executed a document relinquishing that position. On the 29th of July, 1935, Radha Raman Das sent a telegram to the District Magistrate and made a report to the police that he had been forcibly dispossessed. On the 3rd of August, 1935, he made the application under section 145 of the Criminal Procedure Code which has given rise to these proceedings. He said that he had been compelled by force to execute the deed of relinquishment. A police inquiry was then held and a report was made that there was a danger of a breach of the peace. The Magistrate called upon the parties on the 31st of August to put in their written statements. The written statements were filed on the 2nd of September. The present applicants made an application on the 3rd of September asking that the Magistrate should issue process to summon 12 or 13 witnesses. The Magistrate on that date said that he would go and make a local inquiry on the 4th of September. He did this early on the morning of the 4th and he afterwards passed an order holding that Radha Raman Das had been in possession of the property up to the 28th of July, 1935, and that he had been forcibly dispossessed. He directed that Radha

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Raman Das should be placed in possession of the property. The main complaint of the applicants now is that they were not given an opportunity to produce their witnesses. No order was passed on their application of the 3rd of September, directing that the witnesses were to be summoned, and orders were passed without the examination of those witnesses. I have been referred to the case of *Emperor* v. *Chakrapan* (1). A learned Judge of this Court remarked in that case that clause (4) of section 145 of the Criminal Procedure Code threw upon the Magistrate a duty to summon such witnesses as might be mentioned to the court by either party. As this application before me is an application in revision I do not consider that the applicants can require me to adjudicate upon this question of law, but I am prepared to say that I have considerable doubt whether I should be prepared to follow the ruling in *Chakrapan's* case (1). The attention of the learned Judge who decided that case was apparently not drawn to the provisions of sub-section (9) of section 145. This sub-section is in the following terms: "The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing." It seems to me that this sub section leaves it entirely to the discretion of the Magistrate whether he will or will not summon any witness or witnesses. The argument placed before me seems to rest upon the supposition that in every case it is the duty of the court to issue process to summon any witnesses whom either party wishes to summon. I do not think that there is any justification for assuming that any such principle exists. The duty of the court in the matter of summoning witnesses is set forth differently according as the matter before the court is an inquiry into a case triable by a court of session or a summons case or a warrant case, and the duty varies

(1) (1929) I.L.R., 52 All., 91.

as between the prosecution and the accused. Under section 208 of the Criminal Procedure Code, in an inquiry into a case triable by the court of session, if the prosecution apply to the Magistrate to issue process he shall issue such process, unless for reasons to be recorded he deems it unnecessary to do so. When the accused is called upon for his defence he is required to furnish a list of witnesses. The Magistrate may in his discretion summon and examine any witness named in the list in his own court. If the accused is committed to the court of session the Magistrate is bound to summon the witnesses included in the list unless he thinks that they have been so included for the purpose of vexation or delay or for defeating the ends of justice, and he must give the accused person an opportunity of showing that they were not so included. During the trial of summons cases the duty of the Magistrate is much the same as it is in proceedings under section 145 of the Criminal Procedure Code. In section 244(2) it is said that the Magistrate may, if he thinks fit, on the application of the complainant or accused, issue a summons to any witness directing him to attend or to produce any document or other thing. It is obvious to my mind that in such petty cases it is entirely a matter for the discretion of the Magistrate whether he will summon witnesses or not. Then in the course of the trial of warrant cases the Magistrate shall summon such witnesses for the prosecution as he thinks necessary and if the accused applies to the Magistrate to issue any process for compelling the attendance of any witness the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. I think it is obvious that there is no general duty upon a court in any proceeding to issue process to compel the attendance of witnesses. Special rules are laid down according to the nature of the inquiry with which the Magistrate is dealing. In

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these circumstances I cannot see how it can be said in view of the wordings of sub-section (9) of section 145 that the Magistrate is bound to issue process to compel the attendance of witnesses. The real question in this matter before me is whether any serious and substantial injustice has been done to the applicants. There can be no doubt to my mind on the written statement put in by the applicants and a document, which is not in evidence but which has been read to me in the course of arguments and on which the applicants rely, that Radha Raman Das was in possession of the property in dispute up to the 28th of July, 1935. From the written statement it appears that Radha Raman Das's predecessor, the previous mahant, was in possession of the property and that after his death it was managed by a committee of persons interested in the property. Thereafter Radha Raman Das was appointed mahant. It is true that he executed the document to which I have referred above, namely the document which has been read to me and upon which the applicants rely, and that he said in that document that he would manage the property in certain ways, that is, that he would deal with it in accordance with the views of the majority of the committee and that he would appoint a certain person to carry out the actual management under his supervision and that that person should keep accounts which should be produced and so forth. I do not think that this implies that the property still vested in the committee and not in Radha Raman Das. The question after all is not a legal question whether Radha Raman Das is to be considered to have been in possession of the property merely as an agent or in his own right. The question is who was actually in physical possession. There seems to be no real doubt that Radha Raman Das in his capacity as mahant was in possession up to the 28th of July, 1935. Then it is urged that he delivered possession voluntarily when he executed the deed of relinquishment. In view of the fact that he made immediate protests on the very

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next day, the 29th of July, and that since then there has been a dispute as to the right of possession, I think it is extremely improbable that Radha Raman Das could have voluntarily relinquished possession on the 28th of July, 1935. This is after all not a final adjudication of the rights of the parties. An order under section 145 is passed as the result of a summary proceeding about the possession of the parties and the aggrieved party can always have recourse to the civil court to establish his right. The real dispute between the parties in the present case is whether the present applicants in revision are entitled to eject Radha Raman Das from his position as the mahant of the temple. That is a question which can properly be agitated only in a civil court. It seems to me that the order of the Magistrate was substantially just and there is certainly no ground to interfere with it in revision. The application is rejected.

## APPELLATE CIVIL

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Bennet*

1936
*February*, 25

JOHN BROTHERS (OPPOSITE-PARTY) *v.* OFFICIAL LIQUIDATOR, AGRA SPINNING AND WEAVING MILLS CO. (APPLICANT)*

*Companies Act (VII of 1913), section 188—"Purchaser"—"Other person from whom money is due"—Scope of section—Money due from a person upon a contract given by the liquidator to him for working the mills of the company in liquidation—Order for payment of such money to the liquidator or into Bank—Execution of such order—Jurisdiction.*

Where with the approval of the court a contract was given by the official liquidator to a third person for the working of the mills of the company in liquidation, and according to the terms of the contract a certain sum fell due from such person, and upon the application of the official liquidator the com-

*Appeal No. 146 of 1934, under section 10 of the Letters Patent.