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the merits of the case. But as the case was argued upon the merits as well, we think it right to make a few observations upon the merits of the case. It was strongly pressed upon us by the learned vakil for the respondents that the finding of the Court below as to the genuineness of the *arpannama* or deed of dedication, and as to the *debutter* character of the property is wholly unsustainable on the evidence. We have heard the evidence read. Though we must say that the first witness examined by the plaintiff to prove the *arpannama* is in our opinion an unreliable witness, so far as he deposes to the execution of that document, still, having regard to the age of the document, and to the fact of its having been filed in previous suits so far back as the year 1881, and having regard also to the fact that one of the defendant's own witnesses, Bara Lall Lachman Singh Deo, proves that Pancham Kumari had an idol of the name of Kalachand Jeo Thakur, and that she performed the *sheba* of Kalachand with the income of her properties in Nagpur, we are not prepared to dissent from the conclusions arrived at by the Court below.

As the suit fails upon the ground of limitation, it is not necessary to say anything more upon this point, or upon the other points raised in the appeal.

The appeal is accordingly dismissed with costs.

S. C. C. *Appeal dismissed.*

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Pigot, Mr. Justice Macpherson, Mr. Justice Ghose, and Mr. Justice Rampini.

MUKHI HAJI RAHMUTTULLA (PLAINTIFF) *v.* COVERJI BHUJA (DEFENDANT.)*

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Limitation Act (XV of 1877), section 20—Part-payment of principal of debt—"Person making the same"—Mode of creating new period of limitation by part-payment.

In order to create a new period of limitation under the proviso to section 20 of the Limitation Act (XV of 1877), the fact of part-payment of the principal of a debt must appear in the hand-writing of the person making the part-payment, and not in that of any other person, however authorized.

Bhugabuth Thakur v. *Madhub Kristo Sett* (1), overruled.

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REFERENCE to a Full Bench made by the Chief Justice (Sir W. Comer Petheram, Knight), Mr. Justice Pigot and Mr. Justice Macpherson.

This reference arose out of a case stated by E. W. Ormond, Esq., Second Judge of the Court of Small Causes of Calcutta, under section 69 of Act XV of 1882 and section 617 of the Civil Procedure Code, the suit in the Small Cause Court being suit No. 18025 of 1895.

The case was stated for the opinion of the High Court in the following terms:—

"The question referred to the Honorable High Court in this suit is one as to the sufficiency of an entry of payment so as to save limitation under section 20 of the Limitation Act.

"The plaintiff sues for Rs. 1,931-4-9 as the balance of brokerage due to him for passing gunny-bag contracts between 10th September 1891 and 27th February 1892. The suit was instituted on the 26th August 1895. The plaintiff relied on an entry in the cash-book of one Haji Hossein Ismail—which shows a payment of Rs. 175 to the plaintiff on behalf of the defendant on the 10th April 1893—to save his claim from being barred by limitation.

"There is nothing in the entry itself to show that the payment of this Rs. 175 was a part-payment on account of the brokerage; but the oral evidence clearly shows that the plaintiff had a claim against the defendant for brokerage due under several contracts, and that the defendant gave this Rs. 175 to Haji Hossein Ismail to pay it to the plaintiff 'on account of his brokerage' on the 8th April 1893, and the plaintiff received it accordingly.

"Several bills for brokerage were presented by the plaintiff to the defendant during the year 1892, such bills including items of brokerage due under several contracts; but no appropriation of this payment of Rs. 175 was made to any particular bill, or to any particular item of brokerage, either by the defendant or the plaintiff; and there is no doubt that it was paid by the defendant and received by the plaintiff on account of, and as a part-payment towards, the whole of the plaintiff's claim for brokerage. The whole of the plaintiff's claim, therefore, is either barred or saved by the above entry. The entry is written by Haji Hossein Ismail's cashier in his presence and under his instructions, and is a debit entry against plaintiff for Rs. 175, and contains the words 'the money received from Coverji paid to you.'

"Mr. Farr, the defendant's attorney, contended that the entry was not

(1) See *post*, p. 553.

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sufficient to save limitation, because it was written by Haji Hossein Ismail's sircar and not by himself. But section 20 of the Limitation Act contemplates a part-payment either by the debtor himself or by his authorized agent; and the proviso to the section stipulates that the fact of payment must appear in the hand-writing of the person making it, in order to create a new period of limitation. Haji Hossein Ismail was clearly the defendant's duly authorized agent to make this part-payment, and he was the person who made the part-payment. In the case of *Bhugabuth Thakur* v. *Madhub Kristo Sett* (1) (a reference from this Court), the payment was made by one of the debtor's sircars, and the entry of payment made by another sircar, both under the debtor's supervision; and the High Court held that the payment and entry saved limitation.

"I cannot see that the principle in the present case is in any way different. The entry of payment is written, not by the person making it, but by his cashier under his immediate supervision and in his regular cash-book, and for all practical purposes such an entry is the entry of the master.

"Then Mr. Farr relied on a passage in the judgment of the case of *Mackenzie* v. *Tiruvengadathan* (2) at page 273 of the report, stating that the Act requires that the writing should show for what purpose the payment was made, and that such payment was a part-payment.

"The case decided that an endorsement of a cheque is merely an order to pay, and is not a sufficient writing within section 20 of the Limitation Act.

"The above passage is merely an *obiter dictum*; and that this *dictum* was not fully considered, or that the report is inaccurate is shown in the next line, where it is stated that the writing must be signed by the debtor or his agent.

"The case of *Jada Ankamma* v. *Nadimpalle* (3) is a direct authority to show that it need not appear in the writing that the payment was a payment towards principal; and in the case of *Raman* v. *Vairavan* (4), a writing which did not apparently identify or even mention the debt, was held to be a good acknowledgment under section 19.

"I think, therefore, the writing itself need only show that a part-payment has been made, and the oral evidence shows that it was a part-payment towards the plaintiff's brokerage account.

"I therefore hold that the plaintiff's claim is not barred.

"I found that Rs. 1,328-5-3 was due to the plaintiff on the merits, and I have given judgment for that sum with costs.

"My judgment is contingent upon your Lordship's opinion as to whether the above entry of payment is a sufficient writing within the proviso to section 20 of the Limitation Act. This seems to me the only question of law that arises in the suit."

(1) *Post*, p. 553.
(2) I. L. R., 9 Mad., 271.
(3) I. L. R., 6 Mad., 281.
(4) I. L. R., 7 Mad., 392.

The case was heard by PETHERAM, C.J., and PIGOT and MACPHERSON, J.J., on the 2nd January 1896.

Mr. *O'Kinealy* for the defendant.—In the case of *Bhugabuth Thakur* v. *Madhub Kristo Sett* (1) cited by the lower Court, the debtor and the person making the entry were in effect the same person, for the person making the entry was the debtor's agent. But here they are two distinct persons. It cannot be argued that the fact of making the payment must appear in the hand-writing of the person making it or of his agent. There are only two cases contemplated by the section: (1) payment by the debtor and a writing by the debtor; (2) payment by an agent of the debtor and a writing by the agent. But the Courts have gone further and have said that there is a third case, namely, payment by the debtor and an entry, by the debtor's agent, of the debtor's payment. [PIGOT, J.—Suppose the agent cannot write?] Then it would be going far beyond the principles of agency to allow him to authorize some third person to make the entry and bind the debtor. The case of *Mackenzie* v. *Tiruvengadathan* (2) is on all fours with the present case, for here the entry of payment is no more than the endorsement of the cheque; yet the Madras Court held that that was insufficient to take the case out of the Act. In order to do that, it must be shown that the payment was made in respect of some particular debt. *Tippets* v. *Heane* (3), *Waters* v. *Tompkins* (4). The case of *Jada Ankamma* v. *Nadimpalle Rama Sastrula* (5) is distinguishable; for there the payment of the sum of Rs, 10 must have been a part-payment of the principal, because so much interest could not have become due in the interval from the previous payment. The case of *Raman* v. *Vairavan* (6) has no bearing on the present case, for it was decided under section 19 of the Limitation Act, not under section 20.

Mr. *Hill* for the plaintiff.—Section 20 deals with two things, namely, payment and an entry of that payment. The Courts have no doubt enlarged the words of the Act by allowing a person to

(1) *Post* p. 553.
(2) I. L. R., 9 Mad., 271.
(3) 1 Cr. M. and R., 252.
(4) 2 Cr., M. and R., 723.
(5) I. L. R., 6 Mad., 281.
(6) I. L. R., 7 Mad., 392.

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adopt the entry of another person by directing that other person to make it. And if the debtor can adopt the writing of another person, then equally can the person authorized to make the entry of the payment; because the debtor authorizes his agent to make the payment, and therefore authorizes him to do all things necessary for making the payment effective in law for all purposes. In *In re Tahiti Cotton Company* (1), Jessel, M. R., held that the mere fact of handing over blank transfers authorized the person to whom they were delivered to fill up the blanks in any way he thought proper. There is nothing in the Limitation Act to show that not only the fact of the payment but the character of it also must appear in the writing made in evidence of the payment. The payment of the sum of Rs. 175 in the present case fulfils every condition required by Parke, B., in *Waters* v. *Tompkins* (2). The decision in *Mackenzie* v. *Tiruvengadathan* (3) is an *obiter dictum*; for the Court finds that there was no payment.

Mr. *O'Kinealy* in reply.—If any person not authorized by the debtor could make the entry of payment, why should not the creditor make it? But surely that would not be good evidence of the payment. The contention that the authority to make the payment carried with it the authority to empower some other person to make the entry of payment is unreasonable.

Their Lordships, being unable to agree with the decision in the case of *Bhugabuth Thakur* v. *Madhub Kristo Sett* (4) (Small Cause Court Reference, No. 2 of 1885) made the following order of reference to the Full Bench:—

The suit is brought for the amount of a balance due by the defendant to the plaintiff for brokerage due in respect of contracts passed by the plaintiff for the defendant, between September 10th, 1891, and February 27th, 1892. The suit was brought on the 26th August 1895, and the plaintiff's claim is barred, unless it is kept alive by a payment of Rs. 175 which was made to the plaintiff on account of his brokerage on the 10th April 1893, by Haji Hossein Ismail who was the defendant's agent, duly authorized in that behalf.

(1) L. R., 17 Eq., 273.
(2) 2 Cr., M. and R., 723.
(3) I. L. R., 9 Mad., 271.
(4) *Post* p. 553.

At or about the time of payment an entry of the payment was made in the cash-book of Haji Hossein Ismail, showing the payment as made to the plaintiff on behalf of the defendant.

The question is referred to us by the Second Judge of the Small Cause Court in the following terms: Whether the above entry of payment is a sufficient writing within the proviso to section 20 of the Limitation Act.

The question to be determined is the following: Is the entry made in the books of Haji Hossein Ismail by the latter's cashier enough to satisfy the proviso in the section? We think it does sufficiently satisfy the proviso, so far as it makes the fact of the payment appear; for it is not necessary that the fact that the payment is made in respect of the particular debt should be made to appear in the hand-writing which is required by the proviso.

The Judge finds that the entry is written by Haji Hossein Ismail's cashier in his presence and under his instructions.

We have been referred to the cases in Madras on this subject and particularly to those reported in I. L. R., 7 Mad., 55 and I. L. R,. 7 Mad., 76, where it was held that a signature by a marksman to what was, as to the rest, in the hand-writing of another person, was sufficient to satisfy the Act.

It is enough to say that those cases do not apply to the present case. In them the "person making payment" could not write; and, as far as was possible, the fact of the payment appeared in his hand-writing.

We are also referred to an unreported case in this Court, upon a reference from the Small Cause Court (No. 2 of 1885), in which it is said: "That as the entry of the payment was made by the sircar by the order and under the direction of the defendant, the suit is not barred by limitation."

The following is a copy of the judgment in that case:—

"As to the first question referred to us, we think that as the Judge has found that the defendants Nos. 2 and 3 promised to pay their share of the debt separately, the case may proceed against those defendants only.

"As to the second question, we think that as the entry of the payment was made by the sircar by the order and under the direction of the defendants, the suit is not barred by limitation.

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"We annex to this reference a copy of the case then submitted by the Small Cause Court.

"We are unable with great respect to agree with the decision; it appears to us to be contrary to the intention of the proviso which we suppose to be, to exclude, as far as possible, oral evidence, and to substitute for it the real evidence furnished by the hand-writing of the person making the payment. We therefore feel bound to refer the question to a Full Bench, whether the decision in Small Cause Court Reference No. 2 of 1885 is correct."

The reference came on for hearing before the Full Bench on the 26th February 1896.

Mr. *Pugh* for the defendant.—Section 20 of the Limitation Act means that if the principal makes the payment, the entry must be in the hand-writing of the principal; if the agent makes the payment, the entry must be in the hand-writing of the agent. In this case the entry is in the hand-writing of the cashier of the duly authorized agent; but the cashier had no authority from the debtor to do anything.

Mr. *Pugh* was stopped by the Court.

The plaintiff was not represented.

The judgment of the Court was delivered by:—

PIGOT, J.—We think the question referred to the Full Bench in this case must be decided in the negative; that is to say, that the decision of the High Court in the Small Cause Court Reference No. 2 of 1885 is, in our opinion, not correct. It appears to us that the terms of the proviso to section 20 of the Limitation Act are imperative. The new period of limitation is to be computed from the time when the payment was made, provided that, in the case of part-payment of the principal of a debt, the fact of the payment appears in the *hand-writing of the person making the same*. Words more express, we think, could not be used. They appear to us to negative the supposition that the hand-writing of another person, however authorized by him, who makes the payment, could be contemplated by that proviso. As has been said in the order of reference, it appears to us that the intention of the section must be, so far as possible, to

exclude oral evidence and to substitute for it the real evidence furnished by the hand-writing of the person making the payment; and that it is the hand-writing of the person making the payment, which is required as an essential condition to the operation of that part of the section which provides for the exemption from limitation. We therefore hold that in this instance the entry was not a sufficient writing within the proviso to section 20 of the Limitation Act. With reference to the Madras cases we only desire to say that we do not deal with those cases in any way; they are outside the subject of this case.

The costs of this hearing will be part of the costs in the reference made by the Small Cause Court Judge, and will be dealt with by him."

On the 3rd March 1896 the learned Chief Justice (Sir W. Comer Petheram, Knight) and Justices Pigot and Macpherson sat to determine the Small Cause Court Reference in accordance with the foregoing judgment of the Full Bench.

Their Lordships' judgment after stating the facts of the case referred, was as follows:—

The answer, therefore, which we give to the question put to us by the learned Judge of the Small Cause Court is that the entry of payment, as made in the book of Haji Hossein Ismail, is not a sufficient writing within the proviso to section 20 of the Limitation Act, the principle affirmed by the Full Bench being that the hand-writing must be the hand writing of the person making the payment.

BHUGABUTH THAKUR AND OTHERS (PLAINTIFFS) *v.* MADHUB KRISTO SETT AND OTHERS (DEFENDANTS.)*

Dated the 8th April 1885.

Case stated for the opinion of the High Court in its ordinary original civil jurisdiction under section 617 of the Code of Civil Procedure and section 69 of Act XV of 1882, by Mr. Sreenath Roy, Offg. Judge of the Small Cause Court, Calcutta.

"The plaintiffs are flour merchants. They sued the defendants in this case for the recovery of Rs. 114-11-3, being the balance of account for goods supplied. It appears that the defendants, as members of a joint

* S. C. C. Reference No. 2 of 1885.

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A copy of the Full Bench reference and Full Bench judgment will be sent with this answer to the Court of Small Causes which will dispose of the question of costs of this reference, including the costs of the hearing before the Full Bench.

Attorneys for the plaintiff: Messrs. *Sowton & Sen.*

Attorney for the defendant: Mr. *Farr.*

H. W.

Hindu family had had transactions with the plaintiffs from a long time up to 1st of Assin 1288 B. S. The account ran in the name of Madhub Kristo Sett, the senior member of the family and uncle of defendants Kanye Lall and Gopal Lall Sett, who are uterine brothers. Admittedly, the transactions were carried on at a time when the defendants lived in commensality and joint estate. A separation, however, has subsequently taken place. The suit was instituted on the 2nd of July 1884, corresponding with 19th of Assar 1291 B. S. It would thus appear that the dealings between the 19th of Assar and the 1st of Assin 1288 were within the limitation period. The other portion of the claim having reference to the prior transaction is barred by limitation, but the plaintiffs pray for exemption from the operation of the law of limitation on the ground that a part-payment of Rs. 100 *towards the principal* was made on the 13th of Assin 1288, *i.e.*, before the expiration of the prescribed period for payment. On proceeding with the case it transpired on the evidence of Kristo Mohun Ghose, the manager of the plaintiffs, that, after the separation of the defendants Madhub Kristo Sett, the first defendant had paid his share of the balance due at the time to the plaintiffs, who had given him a deed of acquittance, and that the other two defendants had promised to pay the remainder (the amount in claim) as due by them. The plaintiffs thereupon gave up the first defendants and restricted their case solely to the two other defendants. Whereupon the defendants' pleader, Babu Protap Chunder Bose, raised the following objections, and urged that the case should be thrown out, as it cannot be maintained in its present shape.

"The objections are:—

"1. That the plaintiffs have no right to proceed with the case by reason of their having abandoned one of the defendants, the cause of action being collectively and jointly against all.

"2. That the plaintiffs are not entitled to exemption from limitation, inasmuch as the fact of the payment referred to, which is a part-payment of the principal amount due, did not appear in the hand-writing of the person making it.

"Before entering into the determination of these questions, I am to state that evidence has been gone into in the case, and my findings thereon are: That the amount of the claim has been proved to be due; that the defendants Nos. 2 and 3 promised to pay their share of the debt separately; that they are a

moiety shareholder of the estate; that a payment of Rs. 100 was made on the 13th Assin 1288 through the hands of defendants' sircar Jogendra Nath Chuckerbutty, and an entry of the payments was made in the *Khatta* in the hand of Mathur Sircar, another servant, under the direction and order of the defendant, Kanye Lall Sett.

"The questions raised in defence being important questions of law, and it being pressed on both sides that a reference should be made to the High Court for a decisive ruling on the points, I beg to submit them for decision of the Honorable Court.

"The first ground, I am fully of opinion, is wholly groundless. It is not denied that the promise by Madhub Kristo Sett was a promise on behalf of all the defendants, consequently it was a joint promise. Under section 43 of the Contract Act a promise may, in the absence of express agreement to the contrary, compel any one of such joint promisors to perform the whole of the promise. There is no statement or evidence to shew that there existed any agreement as contemplated by the law. It being so, and the law giving the plaintiff power to compel one or more or all the promisors to perform the promise at his option, the case is not defective in law, and as it is the plea falls to the ground. This question apart, there is another very strong ground in favour of the plaintiffs. It has been found in evidence that the defendants had promised to pay the amount separately according to their respective shares, and the defendant No. 1 had actually paid his share. I do not understand how under such circumstances the defendants, now representing the defence, can object to the suit being restricted to them, the amount in claim being proved to be due by them only. It is contended that under section 28 of the Civil Procedure Code the plaintiffs had no option to abandon one of the defendants and proceed against the others. This plea, I think, is not tenable. The object of that section, I think, is not properly appreciated. Be it as it may, that section can be no bar to the operation of the provision of section 43 of the Contract Act alluded to above.

"With reference to the second question I have to state that section 20 of the Limitation Act (Act XV of 1877) runs as follows: 'When interest on a debt or legacy is, before the expiration of the period prescribed, paid as such by the person liable to pay the debt or legacy or by his agent duly authorized on this behalf, or when part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf a new period of limitation * * * * shall be computed from the time when the payment was made, provided that in the case of part-payment of the principal of a debt, the fact of the payment appears in the hand-writing of the person making the same.' In this case the payment and the entry were made under the direct superintendence and order of defendant, Kanye Lall, by persons, who are his servants and have authority to do so. Both these acts were, for practical purposes, the acts of Kanye Lall, and he is, it seems

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to my mind, bound by those acts. In large firms, and I would include that of the defendants as one, there are several departments, some transacting business, others keeping accounts, and so on ; and all such actions are considered to be actions of, or on behalf of, the owner. I should think, therefore, that the payment of the money and the entry in the *khatta* of such payment are both acts of Kanye Lall or his duly authorized agents. The words 'in the hand-writing of the person making it' make no difference in this case. That phrase requires a reasonable construction. It cannot stand to reason for a moment that the Legislature intended that the provision should be inoperative, unless the payment is shewn in the hand-writing of the person making it through whose hands it is made ; there are cases in which the person making the payment may not, from physical disability or ignorance, be able to write. In such a case somebody writing under authority on behalf of the persons liable to pay seems to be quite sufficient to meet the requirements of the law. In this case the payment must be considered to have been made by Kanye Lall, though through the hands of some one else ; and the man who made the entry, though not the person through whose hand the payment was made, must be considered to be the duly authorized agent of Kanye Lall, for he acted under the authority of the latter. There is no necessity of writing in case of payment of interest, possibly because, as the plaintiffs' pleader suggested, there are means of making out the propriety or otherwise of the plea of such payment. It requires writing in the other case, simply because the evidence of payment may be precarious, unless it appears in writing. Supposing the payment is considered to have been made by Jogendra, or he was the 'person making it,' and he could not write, would the writing of any of his agents be sufficient ? I think the Legislature did not mean such a thing. What the Legislature wanted seems to be, that the person liable to pay should himself write down the payment or cause it to be written by an authorized agent of his. The fact of the payment is admitted by the debtor. It is also admitted that the writer of the payment is an agent or servant of the debtor acting under his order. The requirements of the law in my opinion have been fulfilled in this case, and the plaintiffs are entitled to the exemption asked for.

"My queries therefore are :—

"*First*: Whether this case may under the circumstances proceed against the defendants Nos. 2 and 3 ?

"*Second*: Whether the payment alluded to is sufficient to save limitation ?

"In submitting these questions for the determination of the Honorable Court, I reserve judgment pending the decision of the Court."

The judgment of the Court (GARTH, C.J., and CUNNINGHAM, J.) was as follows :—

As to the first question referred to us we think that as the Judge has found

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that the defendants Nos. 2 and 3 promised to pay their share of the debt separately, the case may proceed against those defendants only.

As to the second question, we think that as the entry of the payment was made by the sircar by the order and under the direction of the defendants, the suit is not barred by limitation.

CRIMINAL REVISION.

Before Mr. Justice Ghose and Mr. Justice Rampini.

KALI KISSEN TAGORE (PETITIONER) *v.* ANUND CHUNDER ROY AND OTHERS (OPPOSITE PARTY.) *

1896 *February* 18.

Criminal Procedure Code (Act X of 1882), section 147—Dispute concerning julkur right—Breach of the peace—Imminent danger—Grounds for Magistrate taking proceedings under section 147—Procedure to be adopted by Magistrate, when dispute concerning easements, &c., exists.

The words "right to do anything in or upon tangible immoveable property" in section 147 of the Criminal Procedure Code include *julkur* right. A Magistrate is competent to take action under that section in the case of a dispute concerning the exercise of a *julkur* right.

Dukhi Mullah v. *Halway* (1), followed.

If the materials upon which the proceedings are based do not disclose the fact that there is an imminent danger of a breach of the peace, then the Magistrate has no jurisdiction to take action under section 147 of the Criminal Procedure Code. Any evidence that he may take in the course of the trial cannot give him a jurisdiction which he does not otherwise possess. *Queen-Empress* v. *Gobind Chandra Das* (2).

The proper course to be adopted by the Magistrate, when a dispute concerning easements, &c., arises, is to bind down under section 107 of the Code such of the persons as are likely to disturb the peace.

Bathoo Lal v. *Domi Lal* (3), followed.

ON the 14th of May 1895 Nasaruddi Shikdar, alleging himself to be *ijaradar* of Anund Chunder Roy (first party) presented an application to the Deputy Magistrate of Madaripur praying for an order under section 144 of the Criminal Procedure Code to be issued against the *ijaradars* of Kali Kissen Tagore (petitioner,

* Criminal Revision No. 710 of 1895, against the order passed by F. Karim, Deputy Magistrate of Madaripur, dated the 4th of November 1895.

(1) P. 55 *ante*. (2) I. L. R., 20 Calc., 520.

(3) I. L. R., 21 Calc., 727.