

1881

DEBI CHARAN  
v.  
PIRBHU DIN  
RAM.

refused. In holding this view, we are only following an authority—*Mulug Fageer Buksh v. Lala Manchur Doss* (1)—which we both had occasion to consider in reference to a decision given by us in *Harsukh v. Meghraj* (2). There is also another case—*Thamman Singh v. Ganga Ram* (3)—; and we have heard nothing in argument on this reference to lead us to doubt the accuracy of the judgments therein delivered, with the opinions expressed in which we may say we entirely concur. Under these circumstances our reply to this reference is as already indicated.

## CRIMINAL JURISDICTION.

1881  
January 12.

*Before Mr. Justice Straight.*

IN THE MATTER OF THE PETITION OF SAT NARAIN SINGH AND ANOTHER.

*Warrant case—Refusal of Magistrate to summon witness named by accused—Error or defect in proceedings—Act X of 1872 (Criminal Procedure Code), ss. 283, 362.*

Where the Magistrate trying an offence rejected an application by the accused person that a certain person might be examined on his behalf either in court or by commission, without recording his reasons for refusing to summon such person, as required by s. 362 of the Criminal Procedure Code, *held* that the conviction of the accused person must be set aside, and the case be re-opened by such Magistrate, and the application by the accused for the examination of such person be disposed of according to law.

THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872. The petitioners, Sat Narain Singh and Ram Alam Singh, were convicted on the 9th October, 1880, in a trial before Babu Harnam Chandar Seth, exercising the powers of a Magistrate of the first class in the Mirzapur district, of rioting and causing hurt. They appealed to the Sessions Judge of Mirzapur, Mr. S. Moons, who on the 11th November, 1880, affirmed the convictions. It appeared that the riot had taken place at a village called Dharmurpur in which the petitioners resided. The defence of the petitioners was that they had not taken any part in the riot, not having been in that village on the day on which the riot occurred, but having been on that day at Chunar; and they applied to the Magistrate that a lady

(1) N.-W. P., H. C. Rep., 1870,  
p. 29.

(2) I. L. R., 2 All., 345.

(3) I. L. R., 2 All., 342.

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residing at Chunar called the Rani of Nipal might be summoned in order that she might be examined on their behalf, or that she might be examined on their behalf by commission. The Magistrate refused to summon the Rani, or to have her evidence taken by commission, without recording his reasons for such refusal. The Magistrate made the following observations in his decision regarding the defence set up by the petitioners:—"Sat Narain Singh, Ram Alam Singh, and Amir Singh state that they were not in the village on the date in question and did not join in the riot: the first two say that they were at Chunar, while the third deposes that he was at Benares: three witnesses have been adduced by the former who depose that Sat Narain Singh came to the house of the Rani of Nipal on Friday evening and returned on Saturday evening, but their evidence is hardly reliable, because Sat Narain Singh is not now in the Rani's service, and the occasion on which he is stated to have been called was of such an ordinary nature that there was no special reason for his attendance: the worship which the Rani performed was of no extraordinary nature, but one performed every month almost in every respectable Hindu family: I have no doubt that these persons have come forward merely to help the accused, because it is impossible to believe that the Rani has such interest in the accused (who is not now in her service) as to invite him specially on the occasion of an ordinary religious ceremony: Sheo Gobind, witness, is always prepared to help Sat Narain Singh, and he admits that on a former occasion he also gave evidence in this man's favour: two persons out of the three mentioned in a summary manner that Ram Alam Singh was also at Chunar, but the feelings with which they make this statement are apparent, *i. e.*, merely with a view to assist a fellow-servant."

The ground on which revision was sought was that the Magistrate had refused to summon or to have examined by commission the most important witness for the defence, without recording his reasons for such refusal.

Mr. Dillon, for the petitioners.

STRAIGHT, J.—I cannot say that the grounds upon which this application for revision is based have no force, nor can I, with

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sufficient certainty, make up my mind that the refusal on the part of the Magistrate, who tried the applicants, either to summon the Rani of Nipal or to take the necessary steps to obtain the issue of a commission to examine her, did not prejudice them in their defence. Apart from this, however, the Magistrate has omitted to satisfy the plain directions of the law, by failing "to record his reasons for refusing to summon the witness named," which reasons, had he given them, might have themselves been made the subject of appeal. It appears to me that there is no other alternative open but to set aside the convictions of Sat Narain Singh and Ram Alam Singh, and to order the Magistrate to re-open the case and formally dispose of the application for the examination of the Rani, in accordance with the provisions of the Criminal Procedure Code. If he decides to summon her or to have her evidence taken by commission, he will, after considering her statements, pass such orders on the whole case as may appear to him to be just and right. If he refuses to summon or have her examined by commission, it would probably be as well, before giving final judgment in the matter, to allow the accused to appeal to the Judge against such refusal. This record and order will be conveyed without delay through the Sessions Judge to the Magistrate of Mirzapur, for him to carry out the directions given him.

## APPELLATE CIVIL.

1881  
January 13.

*Before Mr. Justice Pearson and Mr. Justice Straight.*

TAWANGAR ALI (DEFENDANT) *v.* KURA MAL (PLAINTIFF).\*

*Suit to cancel Instrument—Act XV of 1877 (Limitation Act), sch. ii, No. 91.*

*K*, to whom *B* had given a usufructuary mortgage of certain land, promising to put him in possession, sued *B* for the mortgage-money, *B* having failed to put him in possession. This suit was instituted on the 22nd November, 1875. On the 25th of the same month *K*, learning that *B* was about to dispose of his property, caused a notice to issue to him directing him not to transfer any of his property. This notice was served on *B* on the 29th November. On the 1st December, 1875, *B* transferred certain land to *T* by way of sale. *K*'s suit was dismissed by the lower Courts, but the High Court, on the 7th August, 1876, gave him a decree. Certain

\* Second Appeal, No. 367 of 1880, from a decree of H. M. Chase, Esq., Judge of Saharanpur, dated the 13th January, 1880, affirming a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Saharanpur, dated the 14th August, 1879.