

For these reasons I think that this appeal must fail on both grounds. The result is that the appeal is dismissed with costs to the respondents who have appeared.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

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MAHASA-
RIK
v.
BHAGAN
SAHU.

REVISIONAL CRIMINAL.

Before Mullick and Buckmill, J.J.

ABDUL HAMID

v.

KING-EMPEROR.*

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Code of Criminal Procedure, 1898 (Act V of 1898), section 205—personal attendance of accused, whether may be dispensed with.

Section 205 of the Code of Criminal Procedure, 1898, applies only to cases in which the Magistrate has issued a summons in the first instance and not where the accused has been arrested without or after the issue of a warrant.

Except in a case in which a summons is issued in the first instance a Magistrate has no jurisdiction to try a case in the absence of the accused even though the latter applies to be permitted to appear by his pleader.

The four accused persons were tried by the Subdivisional Magistrate of Araria. Bati Lal appeared on the 8th July, 1921, Abdul Razak and Sultan on the 23rd August, 1921, and Abdul Hamid on the 2nd September, 1921. The next material date was the 17th March, 1922; on that date all the accused, with the exception of Abdul Hamid, were present and the Court recorded the following order :

"Accused Hamid absent. Said to be ill. Applies for appearance by Mukhtar. Permitted. 8 prosecution witnesses examined at length. To-morrow for further hearing."

* Criminal Revision No. 257 of 1923 from a decision of H. R. Meredith, Esq., I.C.S., Sessions Judge of Purnea, dated the 3rd April, 1923, affirming an order of Maulavi A. Majid, Subdivisional Magistrate, Araria, dated the 31st January, 1923.

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It appeared that a *mukhtar*, named Babu Sheo Nandan Lal, was permitted to represent Abdul Hamid and some witnesses for the prosecution were then examined in chief on various dates in his presence between the 17th March and the 19th May when the Court recorded the following order :

Accused Hamid absent. Said to be ill. Permitted to appear through Babu Bajrang, Mukhtar.

The reason for appointing another *mukhtar* to represent Abdul Hamid, was not stated in the order, but a possible reason was suggested by Counsel for the petitioner, and is referred to in the judgment. Between the 19th May and the 27th July more prosecution witnesses were examined in chief. On this last mentioned date Abdul Hamid attended and on the 29th July a charge, under section 420, Penal Code, was framed against him and his three co-accused. On the 15th August Abdul Hamid gave a *vakalatnama* to a pleader named Babu Charu Chandra Majumdar, who appeared for him and the cross-examination of the witnesses for the prosecution began on that date in his presence and the case continued till the 31st January, 1923, when it ended in the conviction of all the accused.

Abdul Hamid moved the High Court.

Muhammad Yunus (with him *Reyasat Hussain*), for the petitioner.

MULLICK, J. (after stating the facts, as set out above, proceeded as follows) :—

The point made before us is that the trial is bad because the Deputy Magistrate had no power to allow Abdul Hamid to be represented by a *mukhtar* and to hear the examination-in-chief of the prosecution witnesses in his absence. I think this contention must prevail. Section 205, Criminal Procedure Code, applies only to cases in which the Magistrate has issued a summons in the first instance. It does not apply to a case such as the present, where the accused has been arrested without or after the issue of a warrant.

It would also appear that Abdul Hamid never asked to be represented by a *mukhtar* or pleader, but I doubt whether the defect in jurisdiction would have been cured even if there had been an express request on his part; for if the Magistrate had no jurisdiction to hear the case in the absence of the accused, jurisdiction could not be conferred by any consent. The Magistrate seems to have been under the erroneous impression that Abdul Hamid had made a petition and the fact seems to be that the accused, Abdul Razak, signed and filed a petition, the body of which purports to be a petition by Abdul Hamid requesting for permission to appear by proxy. It does not appear that Abdul Razak had any authority to make any application on behalf of Abdul Hamid and the petition is unintelligible unless it be taken as a request by Abdul Razak to allow Abdul Hamid to be represented by proxy in order that the case against Abdul Razak might not be further delayed. The order passed upon this by the Magistrate was that Abdul Hamid was to be represented by Mukhtar Babu Sheo Nandan Lal; but this gentleman was not Abdul Hamid's *mukhtar* at all and how he came to be appointed is not known. In Abdul Razak's petition it was prayed that either Moulvi Farid-ud-din or Babu Bajrang Sahay might be appointed to represent Abdul Hamid and it seems that on the 19th May, finding that Babu Sheo Nandan had no authority to appear for Abdul Hamid, the Magistrate recorded an order permitting Bajrang Sahay to represent him. Therefore in this case the Deputy Magistrate's order was bad for two grounds: first, because it was not a case in which a summons had been issued, and, secondly, because the accused had never asked for permission to appear by his pleader or *mukhtar*.

The fact that the accused did not take the objection in the trial Court does not appear to me to be material. If the defect could be cured by section 537, Criminal Procedure Code, his acquiescence would have been an important factor, but as, in my opinion, there was a complete absence of jurisdiction to hold the trial in

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his absence the question of the application of section 537 does not arise.

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The result is that the conviction and sentence passed upon Abdul Hamid will be set aside and the case will be remanded to the Subdivisional Magistrate

MULLICK, J. of Araria for a *de novo* trial.

The petitioner will surrender before the District Magistrate when called upon to do so.

BUCKNILL, J.—I agree.

Case remanded.

APPELLATE CIVIL.

Before Mullick and Bucknill, J.J.

SIA SHACHARI PEARI

v.

RAM KISHORI KUER.*

1923.

June, 8.

Maintenance, decree for—specific properties charged—charged properties exhausted—whether decree executable against other properties—Code of Civil Procedure, 1908 (Act V of 1908), Order XXXIV, rule 6—Transfer of Property Act, 1882 (Act IV of 1882), section 39

Where maintenance is awarded to a Hindu widow by a decree which charges specific property for the payment of it, the decree may be executed as a simple money decree, and when the property so charged is exhausted the decree-holder is entitled to execute the decree against other properties of the judgment-debtor, provided these properties belonged to the widow's husband, without making an application under Order XXXIV, rule 6, Code of Civil Procedure.

Ashutosh Banerjee v. Lukhimoní Debya(1), followed.

Appeal by the judgment-debtor.

These two appeals arose out of the execution of a decree, dated the 8th March, 1911, passed by the

* Appeals from Original Orders Nos. 176 and 185 of 1922, from an order of A. N. Mitter, Esq., Additional District Judge of Darbhanga, dated the 26th May, 1922.

(1) (1892) I. L. R. 19 Cal. 130, F.B.