

arise on the pleadings. Paragraph 10 of the written statement of the defendants 9 and 10 says :

“ The plaintiff has no right to obtain a decree for the *ijara* money, inasmuch as he has failed to make any allegation about the payment of the rent reserved, and to produce any account for the period of *ijara*.”

There is no allegation that the rent was not paid. This question was not put in issue and no evidence was given about it and the point is not open to the respondents.

There must, therefore, be a decree against respondents 9 and 13 to 15 for a sum of Rs. 4,000 with interest at 1 *per cent. per mensem* from the 28th March, 1918, until the date of the decree; the amount of the decree to carry future interest at 6 *per cent. per annum* and to be realizable only from the assets of Birjan Chaudhury, the mortgagor, which have come to the hands of these defendants. To this extent the appeal is decreed with costs against defendant 9 and 13 to 15 and is dismissed against the other defendants, with costs to defendants 1, 2 and 3. The costs will be in proportion to success.

DAS, J.—I agree.

*Appeal decreed in part.*

## REVISIONAL CRIMINAL.

*Before Adami and Bucknill, J.J.*

JAMUNA SINGH

*v.*

KING-EMPEROR.\*

1924.

BENARASI  
PRASHAD  
*v.*  
MOHTUDDIN  
AHMAD.

Ross, J.

1924.

March, 11.

*Code of Criminal Procedure 1898 (Act V of 1898), section 257—Duty of the court to examine all witnesses cited by the accused.*

One of two accused persons who were alleged by the prosecution to be the ringleaders in the offence charged asked

\* Criminal Revision No. 93 of 1924, from a decision of A. N. Mitter, Esq., Officiating Sessions Judge of Saran, dated the 28th January, 1924, affirming a decision of Babu Matukdhari Singh, Deputy Magistrate of Chapra, dated the 17th December, 1923.

1924.

JAMUNA  
SINGH  
v.  
KING-  
EMPEROR.

permission to call a certain person as a defence witness in order to prove an *alibi*. The witness intimated to the court that he could not come owing to ill-health and his statement was supported by a medical certificate. On the very first day when the defence opened their case, the accused put in a petition asking that the witness might be examined on commission on the ground that he was ill. The Magistrate was of the opinion that as the case was important the attendance of the witness in court was absolutely necessary. He therefore, thought there was no other alternative but to reject the petition for the issue of a commission.

*Held*, that the Magistrate took an incorrect view of his powerlessness and the proper course would have been that some effort should have been made to ascertain as to whether it would, within a reasonable time be possible for the witness to come to the place where the case was being tried, and, if this was not possible, then to permit his evidence to be taken on commission.

This was an application in criminal revisional jurisdiction made by ten persons who were originally all convicted on the 17th December, 1923, by a Magistrate of the first class at Chapra, of various offences, and sentenced to various terms of imprisonment in connection with an assault upon a man of the name of Raghunath Singh. This Raghunath Singh was the complainant in the case. From the decision of the Magistrate an appeal was preferred to the Sessions Judge of Saran but was dismissed on the 28th January, 1924.

The position during the trial was that one of the two persons who were stated in the story for the prosecution to be the ringleaders of the affair was the second applicant whose name was Nageswar Prasad. This man, who was said to be a petty landlord of some little importance in his neighbourhood, asked permission to call a certain witness on his behalf in order to show that he (the applicant) was, at the time when the offence was alleged to have been committed, not present thereat, but was actually in Calcutta. This person whose testimony it was thus sought to be

obtained was a Mr. R. H. M. Rustomji of 20, Ballygunje Circular Road, Calcutta, and it was admitted that he was a mercantile gentleman of some position and importance. In the written statement which the applicant filed in the first instance, he did not therein state that he proposed to urge in his defence a plea that he was not present at the assault; but he did mention Mr. Rustomji in his list of witnesses, and it was clear from the explanation which was given by the Deputy Magistrate to the High Court that Mr. Rustomji could not attend the Court. He wrote to the Court stating his inability to attend on account of ill-health and forwarded a medical certificate with his letter. On the 27th November, which was the first day upon which the defence opened its case, the applicant put in a petition asking that Mr. Rustomji might be examined on commission on the ground that he was ill. In his explanation to the High Court the Deputy Magistrate stated :

“ It is true that a petition was filed on the 27th November, 1923, to examine the *alibi* witness, Mr. R.H.M.Rustomji of Calcutta, of one of the accused persons, but as the case was important I thought his attendance in Court was absolutely necessary.”

“ The certificate about his illness did not suggest by which date he could undertake the journey of coming over to Chapra and the accused did not insist for another date to produce him. I had therefore no other alternative but to reject the application for his examination by commission.”

The accused appealed against the order of the Sessions Judge affirming the decision of the Magistrate.

*K. B. Dutt* (with him *B. P. Sinha*), for the appellant.

*H. L. Nandkeolayar*, Assistant Government Advocate, for the Crown.

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

I think that perhaps the Deputy Magistrate took an incorrect view of his powerlessness. The letter which was couched in very courteous language written by Mr. Rustomji to the Deputy Magistrate was of such

1924.

JAMUNA  
SINGH  
v.  
KING-  
EMPEROR.

1924.

JAMUNA  
SINGH  
v.  
KING-  
EMPEROR.

BUCKNILL, J.

a character and was accompanied by a medical certificate of such a character that I should have thought it spoke for itself. It says that he regretted that he was unable owing to ill-health to undertake a railway journey and therefore could not attend the Court and the medical certificate stated that he was suffering from a weak heart and a painful internal malady. Under these circumstances and as the Deputy Magistrate thought that this gentleman was a very important witness, I think that the proper course would have been that some effort should have been made to ascertain (either by telegram or by correspondence and either undertaken on behalf of the Court or undertaken by the applicant himself) as to whether it would, within a reasonable time, be possible for this invalid gentleman to come to Chapra and if not, then, reluctantly, to come to the conclusion that it was necessary that his evidence should be taken on commission owing to his inability to be present at the place where the case was being decided. But all that the Deputy Magistrate did at that time, so far as I can gather, was simply to note in the order-sheet "Rejected. Filed". He gives no reason there for such rejection and he certainly does not indicate that he contemplated either giving the applicant another chance of ascertaining when and if this gentleman could attend or of assisting further through the Court the applicant to ascertain those facts as to the possibility of attendance and as to the necessity of taking the evidence on commission. I am bound to say that as the matter stands I should have felt that the applicant might consider himself somewhat hardly treated. There does occur, however, a circumstance which may be explicable but which does not seem to have been well explained by the learned Counsel who appears for the applicant. It does not seem that any question about this witness was referred to at the trial, because the Deputy Magistrate does not refer to it himself in his decision. That may perhaps be, because, he having rejected the petition, there was nothing more for him to say, but what does seem noticeable and inclines one perhaps to consider

that there may be something in what the learned Assistant Government Advocate suggests, namely, that the evidence of this gentleman would not be of much value, is that in the ground of appeal to the Sessions Judge this point does not seem to have been included and that the Sessions Judge himself does not in his judgment mention it at all. It is, however, put in the fore front of the application in revisional jurisdiction made to this Court. I am bound to say that on general principles I think that this man was entitled, under the circumstances, to have the evidence of this gentleman taken. Whether it would have been of any value to him it is impossible to hazard any confident conjecture, but that he thought it was and that the Deputy Magistrate himself thought that Mr. Rustomji was an important witness appears to be quite clearly the case. The question as to how far the evidence of this Mr. Rustomji might have affected others of the applicants, other than the applicant himself, is one which perhaps needs at a later stage very careful consideration. It is quite obvious that, if the prosecution story which puts as the leader of an affray or of an assault an individual whose presence at the scene of the alleged occurrence is conclusively disproved, it cannot but throw serious grounds of suspicion upon the whole of the prosecution story; and I should not be prepared definitely to say that in the event of this witness being able clearly to show that this Nageswar Prasad, the applicant, was not present at all at the scene of what took place, but was in Calcutta at that time, that such evidence would not militate very seriously against the whole truth of the complainant's story. Under these circumstances I think that the proper course will be to set aside the decision of the Sessions Judge of the 27th January last and to set aside the judgment of the Magistrate of Chapra of the 17th December last and to order, firstly, that the evidence of this Mr. R. H. M. Rustomji shall, if possible, be taken on behalf of the accused Nageswar Prasad Singh. I do not pretend to be able to foresee in what way this evidence can be taken. It may be

1924.

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JAMUNA  
SINGH  
v.  
KING-  
EMPEROR.

BUCKNILL, J.

1924.

JAMUNA  
SINGH

v.

KING-  
EMPEROR.

BUCKNILL, J.

that this gentleman is now in a position in which he can and will come from Calcutta in order to give his testimony; on the other hand he may be still in such a state of health that a commission will have to be issued to take his evidence in the case at his own home. Secondly, that the Magistrate shall, after, if possible, having taken this evidence, re-consider in the light of that evidence (if it throws any light at all upon the matter) the case of all those accused who were before him. If he is unable for any reason to take or obtain the evidence of this Mr. Rustomji I think that it is necessary that his report to that effect and the reason for his failure should be submitted to this Court.

ADAMI, J.—I agree.

*Case remanded.*

## APPELLATE CIVIL.

*Before Adami and Bucknill, J.J.*

MUSSAMMAT BHAGWANTA KUER

v.

DEWAN ZAMIR AHMAD KHAN.\*

1924.

*March, 11.*

*Limitation Act, (Act IX of 1908), Schedule I, Articles 182 and 183—Final decree prepared in pursuance of Order-in-Council—application for execution—Civil Procedure Code of 1908 (Act V of 1908), Order XLV, rule 15 and Order XXI, rule 16, failure to comply with, whether nullifies the execution proceedings—Step-in-aid of execution, application under rule 16, is.*

S. R. and G. decree-holders, applied on 11th March, 1916, for execution of the final decree prepared in pursuance of an Order-in-Council. Subsequently the decree-holders' interest in the decree passed to A, B and C by successive assignments. On the 7th June, 1919, one of the decree-holders and all the assignees applied to the executing court

\* Appeals from Original Orders Nos. 82 and 84 of 1923, from an Order of D. H. Kingsford, Esq., I.C.S., District Judge of Shahabad, dated the 19th February, 1923.