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SURJYA KANTA ACHARJEE *v.* HEM CHUNDER CHOWDHRY.*

[4th, 19th November and 1st December, 1902.]

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Jurisdiction—Criminal Procedure Code (Act V of 1898) ss. 145, 355, 356—Witness, attendance of—Process, refusal to issue—Magistrate, discretion of—High Court, power of interference by—Charter Act (24 and 25 Vict., C. 104), s. 15—Proceedings under Chapter XII of the Criminal Procedure Code.

Where the refusal by a Magistrate to assist one of the parties to a proceeding under Chapter XII of the Criminal Procedure Code, in procuring the attendance of his witnesses, deprived that party of a hearing on the only question for the determination of the Court and so amounted to a denial of justice :—

Held, that the Magistrate in refusing process acted without jurisdiction.

Madhab Chandra Tanti v. *Martin* † referred to.

The High Court in the exercise of general powers of supervision vested under 24 and 25 Vict., C. 104, s. 15, has power to interfere in a case like this, even if it cannot, in strictness, be said that the Magistrate acted without jurisdiction.

A mere refusal, however, to summon or examine a particular witness or witnesses cited by a party, in proceedings under Chapter XII of the Criminal Procedure Code is not necessarily a ground for interference by the High Court.

It cannot be laid down as a rule of law that proceedings under Chapter XII of the Criminal Procedure Code should be regarded, as to procedure, as summons cases.

Hurendro Narain Singh Chowdhry v. *Bhobani Prea Baruani* (1) and *Ram Chandra Das* v. *Monohur Roy* (2) explained.

[**Fol.** 34 Cal. 840 ; 2 C. L. J. 286 N. ; **Ref.** 31 I. C. 685 ; 17 C. P. L. R. 133 ; 30 Cal. 508 Note ; **Ref.** 32 Cal. 1093=2 C. L. J. 280 ; 31 Cal 685.]

[509] RULE granted to the petitioner, Surjya Kanta Acharjee.

This was a Rule calling on the District Magistrate of Mymensingh to show cause why the order under s. 145 of the Criminal Procedure Code, dated the 17th May 1902, passed by the Subdivisional Magistrate of Netrokona, declaring the first party to be in possession, should not be set aside, on the ground that the Magistrate had refused to issue process to compel the attendance of the witnesses of the petitioner who was the second party.

On the 2nd April 1902, the Subdivisional Magistrate of Netrokona, on the basis of a police report, instituted proceedings under s. 145 of the Criminal Procedure Code against the first and second parties, and directed summonses to issue to certain witnesses mentioned in the police report, who, however, were not witnesses named by the parties. The case was fixed for hearing on the 16th April, but it being found on that day that the parties had not filed their written statement, the case was adjourned till the 8th May, on which day the evidence of two witnesses for the first party was taken.

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* Criminal Revision No. 805 of 1902, against the order passed by Nikhil Nath Roy, Subdivisional Officer of Netrokona, dated May 17, 1902.

† MADHAB CHANDRA TANTI *v.* MARTIN. (*a*)

In this case a Rule was obtained by the petitioners, Madhab Chandra Tanti and others, calling upon the District Magistrate of Burdwan to show cause why the order under s. 145 of the Criminal Procedure Code should not be set aside on the ground that the Magistrate should have allowed summons to issue on the witnesses cited by the petitioners on the 7th October, 1901, notwithstanding the reasons given by him for refusing to do so.

(*a*) Criminal Revision No. 1157 of 1901.

(1) (1885) I. L. R. 11 Cal. 762. (2) (1893) I. L. R. 21 Cal. 29.

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On the 28th April, the petitioner put in a list of thirty-one witnesses and applied for process to compel their attendance, but owing to his having paid only Re. 1-8 as process fee, summonses were issued only against five of the witnesses and these were duly served.

[510] On the 8th May none of the petitioner's witnesses attended Court, and he made an application praying that, as their evidence was material, process might be issued for their attendance. The Magistrate then passed the following order:—

"They must bring evidence themselves. These witnesses will be examined as soon as those on behalf of the first party have been."

The examination of the witnesses for the first party was concluded on the 12th May, and the case was adjourned until the following day. On the case being resumed on the 13th May, the petitioner again applied to the Magistrate, stating that his witnesses had not attended, and asked that process might be issued on payment of costs for their attendance. On that application the Magistrate passed the following order:—

"The witnesses for the first party have been examined and their case closed. Applicant should have taken steps earlier to procure the attendance of these witnesses. Applicant must bring his witnesses to-morrow."

On the 14th May the petitioner, finding it impossible to produce his witnesses without process, applied again for process, whereupon the Magistrate passed the following order:—"File with the record;" and after hearing the pleaders for both sides adjourned the case for judgment to the 17th May, on which day the Magistrate having held that there was no evidence from the petitioner's side to rebut the evidence on the record, declared the first party to be in possession.

Babu *Joy Gopal Ghose* for the petitioner. In this case the action of the Magistrate was without jurisdiction, inasmuch as no opportunity was given to the petitioner to adduce evidence. The orders passed on the several applications asking for processes against the witnesses do not show any good reasons for their refusal. It has been repeatedly held that the Magistrate, having once issued processes for the attendance of witnesses, is bound to assist the party in enforcing such attendance. Here the applications were repeated and the petitioner acted with due diligence; it was beyond his power to bring his witnesses without the assistance of the Court, and that assistance was refused. The order passed on the last application was simply "file"; that was not the proper way to deal with the application, as has been frequently pointed out by this Court. Section 145 of the Code is [511] peremptory so far as regards the taking of evidence offered by a party. The words used are "shall take all the evidence." Therefore refusal to take evidence

Mr. *Hill* and Babu *Dasarathi Sanyal* for the petitioners.

Mr. *Jackson* and Babu *Sarat Chunder Roy Chowdhry* for the opposite party. . . .

PRINSEP AND HENDERSON, JJ. The Rule will be made absolute, but only on one point, and that is, that the Magistrate acted without jurisdiction in refusing on the 7th October to issue process for the attendance of the witnesses cited by the petitioners. No doubt the petitioners were somewhat late in applying for process, but still there was ample time to serve these processes, so as to obtain the attendance of the witnesses, and the proper order for the Magistrate to have made was not to refuse process on the ground that there was not sufficient time, but to allow the petitioners' application for the processes on the distinct understanding that unless they were served within sufficient time to enable the witnesses to appear, no further time will be allowed, but the matter would be peremptorily taken up on the 10th October—the date fixed for the final order. The Magistrate must allow process for the attendance for these witnesses and then proceed to deal with the case before him.

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would be acting without jurisdiction, and I submit the refusal by the Court to help a party to obtain his evidence by enforcing the attendance of his witnesses is equally acting without jurisdiction.

Babu *Jogesh Chandra Roy* for the opposite party. The procedure adopted in cases under s. 145 is that prescribed for summons cases, and an absolute discretion is given to the Magistrate by s. 244 of the Code to refuse to issue processes for witnesses: see *Hurendro Narain Singh Chowdhry* v. *Bhobani Prea Baruani* (1) and *Ram Chandra Das* v. *Monohur Roy* (2). There is no question of jurisdiction in the present case, and this Court should not interfere.

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Babu *Joy Gopal Ghosh* in reply. There is nothing in the Code which says that the procedure to be followed in cases under s. 145 is that provided for summons cases. Sections 355 and 356 of the Code show there is a distinction to be drawn between summons cases and cases under s. 145. The High Court has jurisdiction to interfere where the Magistrate has acted arbitrarily, as in this case: see the case of *Madhab Chandra Tanti* v. *Martin* (3), in which the order of the Magistrate was set aside on exactly the same ground.

STEPHEN AND HENDERSON, JJ. In this case a Rule was granted calling upon the Magistrate and the opposite party to show cause why an order under section 145 of the Criminal Procedure Code declaring the first party to be in possession should not be set aside on the ground that the Magistrate had refused to issue process to compel the attendance of the witnesses of the petitioner who was the second party.

The facts are not disputed. On the 2nd April 1902, the Deputy Magistrate, on the basis of a police report, instituted proceedings under section 145 of the Criminal Procedure Code, and directed summons to issue to the witnesses mentioned in the police report, fixing the hearing for the 16th April. The witnesses [512] so mentioned were not, so far as appears, the witnesses put forward by the parties, and it is not shown whether they were served or not. On the 16th April, the parties not having filed their written statements, the case was adjourned, and the Magistrate made an order that the witnesses present, if any, should give recognizances of Rs. 20 each. On the 16th April the case was again postponed until the 8th May, on which day the parties filed their written statements, and the evidence of two witnesses for the first party was recorded. In the meantime the petitioner, on the 28th April, had put in a list of 31 witnesses and applied for process to compel their attendance. The order made upon the application is not quite intelligible. It was as follows: "Issue summons if there is orders." With the application the petitioner deposited Re. 1-8 as costs for all the witnesses. In his explanation the District Magistrate states that as only Re. 1-8 was paid as process fee for all these (31) witnesses, summons only issued against five of these witnesses, and they were duly served. The District Magistrate assumes that, "it is clear from the fact that as only Re. 1-8 was paid, the petitioner wished summons to issue only against the five, and intended to bring the others himself." He admits that on the 8th May none of the petitioner's witnesses attended, and he states that no application for further process was made that day. The latter statement appears to be incorrect, for we find that on the 8th May the petitioner made an application alleging that none of the witnesses cited

(1) (1885) I. L. R. 11 Cal. 762.
(2) (1893) I. L. R. 21 Cal. 29.
(3) See *ante*, p. 508 (note).

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by him had appeared, and praying that as their evidence was material, process might be issued for their attendance. The Deputy Magistrate passed the following order upon the application :—

"They must bring evidence themselves These witnesses will be examined as soon as those on behalf of the first party have been."

The examination of the witnesses for the first party was continued on the 9th, 10th and 12th May, and the case then adjourned until the 13th May. On that day the petitioner again applied that process might be issued on payment of costs for the attendance of his witnesses, of whom he gave a list, and he stated that they had not appeared and that their evidence was very material. On that application the Deputy Magistrate passed the following order :—

"The witnesses for the first party have been examined and their case closed. Applicant should have taken steps earlier to procure the [513] attendance of these witnesses . . . Applicant must bring his witnesses to-morrow." [That is, the 14th May.]

On the 8th May, when the petitioner applied for summons for his witnesses, there was apparently ample time to procure their attendance, but the Magistrate then refused the application, directing that the petitioner should bring his own witnesses. Considering that the petitioner had stated he was unable to bring his witnesses without the assistance of the Court, it was unreasonable to refuse his application. It was not suggested then that the application was too late. As a matter of fact, the petitioner had previously on the 28th April applied for process against 31 witnesses, and we do not think that it was right to assume from the fact that an insufficient sum had been deposited that he only required the attendance of 5 out of the 31 witnesses named. Even the 5 on whom summons was issued and served did not appear.

The affidavit on which the Rule was granted states that on the 14th May it had been found impossible to produce any witness without process. On that day another application was made alleging that the witnesses would not attend without summons and asking for process. Upon this application the Magistrate merely passed the order "File with the record." We may here express our opinion that this was not the proper way to deal with the application. It was the duty of the Magistrate either to grant or refuse the application.

On the 14th May the petitioner was unable to produce any of his witnesses, and after hearing the pleaders on both sides the case was adjourned for judgment to the 17th May, when the Magistrate, holding "that there was no evidence from the other side to rebut the evidence on the record," declared the first party to be entitled to possession until ejected in due course of law.

The only question we have to determine is whether the Magistrate in refusing to issue process to compel the attendance of the witnesses of the petitioner, acted without jusrisdiction, for otherwise we are unable to interfere.

It has been contended that proceedings under Chapter XII of the Criminal Procedure Code are in matters of procedure to be regarded as summons cases. The Code nowhere declares that such [514] proceedings are to be so regarded; and it is remarkable that a distinction is drawn in sections 355 and 356 between summons cases and inquiries under Chapter XII. Section 355 directs that in summons cases the Magistrate shall make a memorandum of the substance of the evidence of each

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witness, whereas section 356 directs that in all inquiries under Chapter XII the evidence of each witness shall be taken down in writing in the language of the Court by the Magistrate, or in his presence or hearing, or under his personal direction and superintendence, and shall be signed by the Magistrate. In the case of *Hurendro Narain Singh Chowdhry* v. *Bhobani Prea Baruani* (1) a Division Bench of this Court stated, it was inclined to think that from their nature, proceedings under Chapter XII should be regarded on all points of procedure as summons cases, and the case was cited with approval in *Ram Chandra Das* v. *Monohur Roy* (2). If such proceedings are to be regarded as summons cases so far as procedure is concerned, the taking of evidence is regulated by section 244. The language of the section is not altogether appropriate to quasi-civil proceedings, such as proceedings under Chapter XII. It directs the Magistrate to take the evidence produced in support of the prosecution and by the *accused in his defence* ; and empowers him, if he thinks fit, on the application of the complainant or accused, to issue process to compel the attendance of any witness, thus apparently leaving it in the discretion of the Magistrate to issue process or not. It has, however, been frequently held that this discretion should not be exercised to the detriment of the applicant in an arbitrary manner. It appears to us that it cannot be laid down as a rule of law that proceedings under Chapter XII of the Criminal Procedure Code should be regarded, as to procedure, as summons cases, and we do not understand that in the cases to which reference has been made the Court intended to do more than lay down a rule of convenience in a case where special provision was not made by the law. Section 145 of the Criminal Procedure Code enjoins the Magistrate " to receive the evidence produced " by the parties and to take such further evidence, if any, as he thinks necessary, but this does not, in our opinion, mean that the parties shall produce their own evidence, or [515] absolve the Magistrate from the duty of assisting the parties in procuring the attendance of material witnesses when it is shown that their attendance cannot be enforced without such assistance.

In the case before us, if the Magistrate had a discretion, we consider that in refusing to issue process he acted arbitrarily and without any good or sufficient reason. The arbitrary exercise of discretion does not necessarily amount to acting without jurisdiction so as to justify this Court in interfering in all cases where discretion has been arbitrarily exercised. Where, however, the refusal of a Magistrate to assist one of the parties to a proceeding under Chapter XII of the Criminal Procedure Code in procuring the attendance of his witnesses deprives that party, as in this case, of a hearing on the only question for the determination of the Court, and so amounts to a denial of justice, we think that the Magistrate, in refusing process, acts without jurisdiction. In the case of *Madhab Chandra Tanti* v. *Martin* (3) it was held by a Division Bench that a Magistrate in proceedings under section 145 of the Criminal Procedure Code acted without jurisdiction in refusing to issue process for the attendance of the witnesses cited by the petitioners in that case. In that case also the petitioners were unable to procure the attendance of any of their witnesses, and their opponents were consequently declared, upon the unrebutted evidence produced by them, to be in possession of the land in dispute. The circumstances of the two cases are practically

(1) (1885) I. L. R. 11 Cal. 762.
(2) (1893) I. L. R. 21 Cal. 29.
(3) See *ante*, p. 508 (note).

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the same. It may be mentioned that a member of this Bench was a party to the decision on the case referred to.

Even if it cannot, in strictness, be said that the Magistrate in the case before us acted without jurisdiction or declined jurisdiction, we consider that, having regard to the view which we entertain as to the effect of his action, the case is one in which we ought to interfere in the exercise of the general powers of superintendence vested in this Court under 24 and 25 Vict., c. 104, section 15.

At the same time, we are not prepared to say that a mere refusal to summon or examine a particular witness or particular [516] witnesses cited by a party in proceedings under Chapter XII of the Criminal Procedure Code is necessarily a ground for interference by this Court. Each case must be determined upon its own circumstances.

For the reasons stated, therefore, we set aside the order complained of.

It must be left to the discretion of the Magistrate to say whether, having regard to the existence or otherwise of circumstances likely to lead to a breach of the peace, the proceedings should be dropped, or taken up again and a reasonable opportunity afforded to the petitioner to produce his witnesses with the assistance of the process of the Court, if necessary.

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30 C. 516.

APPELLATE CIVIL.

PERCIVAL *v.* COLLECTOR OF CHITTAGONG.* [31st July, 1900.]

Court-fee—Decree—Memorandum of appeal, amendment of—Civil Procedure Code (Act XII of 1882) ss. 53, 582—Court-fees Act (VII of 1870.)

In the generality of cases, an appellate Court cannot pass a decree for a larger amount than that claimed in the memorandum of appeal, unless, before the judgment is pronounced, an amendment of the memorandum of appeal is allowed and the additional court-fee paid in.

APPLICATIONS

THESE applications arose out of an appeal from original decree, preferred by the plaintiffs, H. Percival and others.

There were 22 references made to the Civil Court under s. 18 of the Land Acquisition Act by the Collector, and the cases were tried together by the Subordinate Judge of Chittagong. The lands were acquired for the Assam-Bengal Railway. The total [517] amount of the compensation decreed by the Subordinate Judge was Rs. 21,726-4-10. The plaintiffs Nos. 1, 2, and 5 appealed to the High Court, and the appeal being valued at Rs. 13,000 court-fees were paid for that amount.

The appeal was heard by the High Court on the 20th July 1900, and the amount of the compensation was raised to over Rs. 40,000. After the judgment was delivered, the learned Government Pleader for the Collector of Chittagong, who was the defendant-respondent in the appeal, pointed out that the appeal had been valued at Rs. 13.000 only, and that, under the decree passed by the High Court, the appellants would get much more than that amount. This objection was not taken at the hearing; and the learned counsel who appeared for the appellants

* Applications in appeal from Original Decree No. 201 of 1897, against the decree of Jadu Nath Dass, Subordinate Judge of Chittagong, dated Feb. 22, 1897.