

1871
 PRINCE
 GHOLAM
 MAHOMED
 v.
 INDRACHAND
 JAHUR.

to take that objection now. Besides the mode of attachment adopted in this case is the one usually adopted in the Mofussil Courts, and I do not think that the appellant has been in any manner prejudiced by the irregularity he complains of, supposing it to be an irregularity at all.

Appeal dismissed.

[APPELLATE CRIMINAL.]

Before Mr. Justice Bayley and Mr. Justice Paul.

1871
 June, 17. THE QUEEN v. KALI CHANDRA SHAH AND MAHIMA RANJAN ROY CHOWDHRY.*

Criminal Procedure Code (Act XXV of 1861), s. 318—Evidence on Oath—Actual Possession.

In a proceeding under section 318 of the Criminal Procedure Code, to determine the right of actual possession, it is necessary that evidence should be taken upon oath.

THIS case arose out of a dispute for a chur claimed on the one hand by the zemindars of Kakira, and on the other hand by the izardar holding under the zemindar of Purbhobhog of Cooch Behar. The dispute commenced in the cold season of 1869-70, since which time petitions were filed on either side, and the police had been directed to investigate these cases. The police sent in their report in B form as true cases, at the same time giving it as their opinion that the izardar, holding under the zemindar of Purbhobhog, was in possession. Upon this report, on the 6th January 1871, it appears that the Officiating Joint Magistrate recorded a proceeding, giving reasons for apprehending a breach of the peace, and calling on the parties to produce any witnesses or other evidence regarding actual possession. Shortly after this proceeding, on the 10th January, one of the parties in this dispute, named Sheikh Burra

* Reference under section 434 of the Code of Criminal Procedure, by the Officiating Magistrate of Rungpore.

Mahomed, presented a petition, complaining of the probability of a breach of the peace taking place, and setting out the grounds of his apprehension. He was thereupon at once examined on solemn affirmation, and in his evidence he repeated all the main facts stated in his petition.

The proceedings under section 318 of the Criminal Procedure Code were actually taken after this statement had been taken on solemn affirmation.

On the 31st January 1871, the Officiating Joint Magistrate held that the dispute could not be properly decided without a local investigation; and on the 18th February he visited the spot, made a local enquiry, and ordered that the izardar of Purbhobhog be considered to be in possession of the disputed chur until ousted by due course of law. Between the 31st January and 18th February, it appeared that nothing was done, nor does it appear that the Officiating Joint Magistrate, on going to the spot, took the depositions of witnesses on oath. The zemindars of Kakina brought this order to the notice of the Magistrate for the purpose of having the proceedings sent up to the High Court, and the order under section 318, Criminal Procedure Code, set aside.

The Magistrate, considering the order of the Officiating Joint Magistrate to be illegal, sent up the records of the case to the High Court in a long letter of twelve paragraphs, proposing two grounds for the reference:—

I. “Before a case can be brought under section 318, of the Criminal Procedure Code, is it necessary to adjudicate upon legal evidence?”

II. “Having been so brought, are the statements of the parties, and mere local enquiry not on oath, sufficient data on which to decide who is in possession of the disputed land?”

The Magistrate, after reciting the facts of the case, and laying down the points of reference in paragraphs 7 to 9 of his letter, discussed the rulings bearing on the two points of reference, and pointed out certain differences of opinion between the several Divisional Benches, suggesting at the same time a reference to a Full Bench for a clear and authoritative ruling on these points.

1871

THE QUEEN
V.
KALI CHAN-
DRA SHAH
AND
MAHIMA
RANJAN ROY
CHOWDMRY.

1871

THE QUEEN
v.
KALI CHAN-
DRA SHAH
AND
MAHATA
RANJAN ROY
CHOWDHRY.

He referred, upon the first point, to the cases of *Dewan Elahee v. Newoz Khan v. Suburunnissa* (1), *The Queen v. Abbas Ali Chowdhry* (2), and *The Queen v. Ballabh Kant Bhattacharjee* (3),

(1) 5 W. R., Cr., 14,

(2) 6 B. L. R., 74.

(3) *Before Mr. Justice L. S. Jackson and Mr. Justice Markby.*

April 6th 1869.

THE QUEEN v. BALLABH KANT RHUTACHARJEE AND OTHERS.*

Baboo Sreenath Das and Kissen Dayal Roy for the prisoners.

JACKSON, J.—This is an order under section 318 of the Code of Criminal Procedure by the Magistrate of Rurpore, which has been laid before us by the Sessions Judge for revision, and against which we have also heard an argument on the part of one of the zemindars interested, the effect of the Magistrate's order being to keep the opposite party, the zemindar of Nekbukht, in possession of a quantity of chur land, excepting a certain part which the Magistrate described as being unculturable and sandy soil, and therefore not capable of being possessed in the usual way, and which, oddly enough, he goes on to say, must be considered as not forming part of the disputed land, but as being in the undisputed possession of the second party. The question before us, however, does not relate to this small portion of sandy chur, but to the larger area which has been found to be in possession of the opposite party.

The objections urged before us are, first, that the Magistrate's proceedings were not commenced in the way required by section 318, and that, consequently the orders were altogether bad on that account. Now it seems to

me that the Magistrate has recorded an amply sufficient proceeding as to the grounds upon which he was satisfied that such a dispute existed regarding these lands as was likely to occasion a breach of the peace, and therefore demanded his interference. It has been argued before us that, in order to his being satisfied on this subject he ought to have summoned witnesses. This is not prescribed by the Code, nor has it been so held in any case before this Court so far as I know. The Magistrate was satisfied by certain investigations conducted by the district police, and the report made by the police was clearly sufficient ground upon which to proceed.

The next objection is that the Magistrate has decided, not with reference to possession, but with reference to the title of the parties respectively; and also that the Magistrate has come to a decision entirely upon documentary evidence, and has not examined the witnesses whom the parties were ready to produce. Now I think it very clear on the face of these proceedings that the Magistrate has quite misconceived the nature of the jurisdiction which he has to exercise under the 22nd Chapter of the Code of Criminal Procedure. What the Magistrate has to do under that chapter, when he finds that occasion exists, is to make a speedy and summary enquiry into the fact of possession of the disputed land, and to pass with as little delay as possible an order declaring the party whom he finds to be in such possession entitled to retain

* Reference to the High Court, under section 434 of the Code of Criminal Procedure, by the Sessions Judge of Rurpore.