

Before Mr. Justice Kemp and Mr. Justice Pontifex.

IN THE MATTER OF THE PETITION OF SHAMASANKAR MAZUMDAR.*

1872

Nov. 19.

Code of Criminal Procedure (Act XXV of 1861), s. 318—Summoning Witnesses.

THE Assistant Magistrate of Goalundo, on perusal of a Police report and the evidence in certain other cases, held that there was a likelihood of a breach of the peace taking place with regard to a piece of land, and issued notices on Baboo Shamasankar Mazumdar and Rani Anandamayi Dasi as parties concerned in the dispute likely to give rise to a breach of the peace, to file written statements of their respective claims to actual possession. Both sides filed written statements. Shamasankar Mazumdar then petitioned the Court to summon witnesses on his behalf, alleging that he was unable by his own efforts to procure the attendance of his witnesses. The Assistant Magistrate merely ordered the petition to be placed on the record (*nathi shamil yesh*) and proceeded to examine witnesses tendered by Rani Anandamayi, and upon their evidence held that she was in possession, and passed an order retaining her in possession. In his judgment, the Assistant Magistrate remarked, with reference to the petition of Shamasankar Mazumdar, praying the Court to procure the attendance of his witnesses, that, in cases coming under Chapter xxii of the Criminal Procedure Code, he had no power to summon any witnesses.

Baboo *Nalitchandra Sen*, on behalf of Shamasankar Mazumdar, moved the High Court (BAYLEY and MITTER, JJ.), under s. 404 of the Code of Criminal Procedure, and obtained an order calling for the proceedings of the Assistant Magistrate of Goalundo, that the order passed by him might be quashed, on, among others, the following grounds, that the initiation of the proceedings was not based upon any legal evidence, and that the Assistant Magistrate ought to have summoned any witnesses required by the parties who were concerned in the dispute.

Baboo *Nalitchandra Sen* and *Girijasankar Mazumdar* for the petitioner.

Baboo *Durgadas Dutt* for Anandamayi Dasi.

Baboo *Nalitchandra Sen* contended that there was no evidence before the Magistrate; that Chapter xxii of the Procedure Code must be read with the other parts of the Code, not inconsistent with any of the special provisions in that Chapter.

* Miscellaneous Criminal Case, No. 194 of 1872, against an order of the Assistant Magistrate of Goalundo, dated the 4th September 1872.

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Baboo *Durgadas Dutt*, who was directed to confine his arguments to the second point, contended that the petitioner was not entitled to complain of the refusal to summon his witnesses, as he did nothing to press his application except filing a petition.

The Judgment of the High Court was delivered by—

KEMP, J.—The first point taken in this case is that the proceeding of the Magistrate under s. 318 of the Criminal Procedure Code is based upon the report of the Police officer alone, and such report not being legal evidence, all the proceedings subsequently taken by the Magistrate are without jurisdiction. On referring to the record, we find that the Magistrate did not proceed upon the report of the Police officer alone, in which case, perhaps, under the rulings of this Court, the objection might avail (1); but we find that the Magistrate refers to evidence taken in other cases, which we must assume he inspected, and he goes on to say that he is satisfied upon that evidence that there was a likelihood of a breach of the peace. This objection is therefore overruled.

The next objection is, that the petitioner has not had a proper hearing inasmuch as the Magistrate held that the law did not confer upon him the power to summon witnesses, in cases of this description, and when the petitioner prayed the Magistrate to summon his witnesses, no order beyond placing his petition on the record was passed. On referring to the judgment of the Magistrate, we find that he states that he can find no provisions in Chapter xxii for the summoning of witnesses. No doubt there is no mention in that Chapter of any particular provisions under which witnesses are to be summoned; but in cases coming under s. 318, oral evidence as to the fact of possession is always adduced; and it is the duty of the Court, if the parties cannot produce their witnesses, to issue summonses for their attendance. Now, in this case, it is clear that the petitioner petitioned the Magistrate, urging his inability to produce his witnesses, and asking for the assistance of the Court to summon these witnesses. It does not appear that any proper order was passed upon this application, and therefore it amounts to this that the petitioner has not had a proper hearing.

We therefore send back the case. The Magistrate will summon the witnesses for the petitioner, and, after hearing and considering their evidence, pass a fresh decision.

(1) See In the matter of the Petition of J. D. Sutherland, ante, p. 229.