

1881

GOLUCK  
CHUNDER  
MAHINTA  
v.  
SURBO-  
MANGALA  
DABI.

right, title, and interest, seeing that the property had been mortgaged, consisted merely of the equity of redemption. If the purchasers at that sale omitted to make proper inquiries and so ascertain the existence of the mortgage lien, such laches will not alter the effect of the sale. Having then purchased the equity of redemption, the appellants next bought in the mortgage lien; and to our minds the effect of this was, that the appellants became entitled to hold the property discharged from the lien; but they contend that they are entitled to something more. They seek to execute the mortgage-decree against the surplus sale-proceeds, which must be taken to represent the value of the equity of redemption; that is, having purchased and paid for the equity of redemption and the mortgage lien, they now desire not only to have the unincumbered property, but also to get back the whole of the price which they have paid for the equity of redemption.

We think that they cannot be allowed to do this.

Under these circumstances, we think that so much of the order of the Subordinate Judge as directs the surplus sale-proceeds not to be taken out until the further orders of the Court, which is in fact an attachment of these sale-proceeds, until the judgment-debtors have proceeded against the property, must be expunged. In other respects, the order of the Subordinate Judge will be confirmed.

*Lower Courts' order modified.*

## APPELLATE CRIMINAL.

*Before Mr. Justice Cunningham and Mr. Justice Prinsep.*

1881  
Feb. 28.

IN THE MATTER OF THE PETITION OF DEELA MAHTON (PETITIONER) v.  
SHEO DYAL KOERI (OPPOSITE PARTY).\*

*Evidence—Summoning Witnesses—Refusal of a Magistrate to summon Prisoner's Witnesses—Criminal Procedure Code (Act X of 1872), s. 359.*

A Magistrate is not at liberty to refuse to summon a witness tendered by an accused person, except on the grounds specified in s. 359 of the Criminal

\* Criminal Motion, No. 30 of 1881, against the order of E. Stewart, Esq., Deputy Magistrate of Barh, dated the 22nd November 1880.

Procedure Code; and if he does refuse, he is bound to proceed under that section. The fact that the accused declines to examine a witness is no reason for refusing to summon him to meet fresh evidence given subsequent to the defence being closed.

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 IN THE  
 MATTER OF  
 THE  
 PETITION OF  
 DEELA  
 MAHTON.

MR. R. E. Twidale appeared for the petitioner on this motion.

The facts of this case appear sufficiently, for the purposes of this report, from the judgment of the Court (CUNNINGHAM and PRINSEP, JJ.), which was delivered by

CUNNINGHAM, J.—We think that the Magistrate was not at liberty to refuse to summon the witnesses tendered by the accused, except on the grounds specified in s. 359 of the Code of the Criminal Procedure; and that if he did refuse on those grounds, he ought to have proceeded under that section. The fact that the accused stated that they did not wish to examine those witnesses when the case closed, was no reason for refusing to summon them to meet fresh evidence which had been taken by the Magistrate after hearing the arguments on behalf of the defence. We must, accordingly, direct that the proceedings be recommenced from that stage, and that the Magistrate do either take the evidence or record his reasons for not doing so, and proceed as directed by law.

*Case remanded.*

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## APPELLATE CIVIL.

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*Before Mr. Justice Morris and Mr. Justice Tottenham.*

SUNDHYA MALA (ONE OF THE DEFENDANTS) v. DABI CHURN DUTT  
 AND OTHERS (PLAINTIFFS).\*

1881  
 Feb. 16.

*Res judicata—Civil Procedure Code (Act X of 1877), s. 13.*

The plaintiff sued to recover certain lands, claiming them as a portion of A, and alleging that A was portion of a mouza which had been leased to him in patni by the zemindar. The suit was dismissed, on the ground that

\* Appeal from Appellate Decree, No. 890 of 1879, against the decree of Baboo Kally Doss Dutt, Second Subordinate Judge of Tipperah, dated the 23rd January 1879, affirming the decree of Baboo Ram Chunder Dhur, Munsif of Chauki Nasirnugger, dated the 28th February 1878.