hold that the successor-in-interest of the original mortgagor cannot maintain a suit for redemption of the original mortgage simply because he obtained a declaratory decree that the mortgage was not binding on him and that he could take possession of the property on payment of Rs. 1,200 and failed to avail of the decree. We are definitely of the opinion that it was for the plaintiff to avail of the decree or not to do so, and if he chose not to avail of it, he cannot be deprived of his rights to obtain redemption of the mortgage as an heir of the mortgagor on payment of the mortgage money in terms of the mortgage deed itself. The view taken by the lower appellate Court seems to us to be quite correct and in the result we dismiss the appeal with costs.

MEHAR SINGH, J.—I agree.

R.S.

REVISIONAL CRIMINAL.

Before D. Falshaw and Harbans Singh, JJ.

JODH SINGH AND OTHERS,—*Petitioners.*

versus

MAHANT BHAGAMBAR DASS AND OTHERS,—*Respondents.*

Criminal Revision No. 1873 of 1959

1960

Oct. 11th.

Code of Criminal Procedure (V of 1898)—S. 145(1)(4) and (9)—Procedure prescribed by—Difference in procedure introduced by the Amendment Act (XXVI of 1955) Persons whose affidavit not filed in Court—Whether can be summoned to give evidence—Proceedings under section 145—Nature and object of.

Held, that a comparison of the provisions of sub-section (1) and (4). as they existed prior to the amendment

and as they are now, clearly shows that under the old procedure the parties were required to put in written statements in the first instance and then they were entitled to examine such witnesses as they deemed fit and it was, thereafter, that the Magistrate was to make up his mind as to the party who was in possession, after taking into consideration the written statements originally put in and the evidence produced by the parties. The Magistrate was further given the power to examine such other witnesses as he may think necessary. Under the amended provisions, parties are not only required to put in written statements by the date fixed by the Magistrate but they are also required to put in documents and to adduce evidence of such persons as they rely upon in support of such claim by putting in affidavits. Under sub-section (4) the Magistrate is required to come to the relevant conclusion on the basis of the written statements, the documents and the affidavits out in by the parties. The power of the Magistrate to examine further evidence is confined, by the proviso, to the examination of only such of the persons whose affidavits have been put in. Sub-section (9) also does not give any right to a party to summon or examine any witness orally apart from the right, to adduce evidence as detailed in sub-section (1). The oral examination of a witness must be confined within the limits of the newly added first proviso to sub-section (4).

Held, that the proceedings under section 145, Criminal Procedure Code, are in the nature of a summary inquiry into a dispute which is essentially of a civil nature and the steps are taken by the Magistrate under this section to ensure that the dispute in question may not lead to a breach of peace. The object of the changes made by the amending Act obviously appears to be to shorten the proceedings under section 145 by providing that the evidence to be adduced by the parties may be given by affidavits and that the delay in getting the witnesses summoned and examined orally may be eliminated. For the purposes of elucidation of the facts stated in the affidavits put in, power is reserved to the Court to examine such of the persons orally as he may deem necessary, out of the persons whose affidavits have been put in.

Case referred by Hon'ble Mr. Justice Harbans Singh, on 22nd February, 1960, to a larger Bench for decision of the

important question of law involved in the case. The case was finally decided by a Division Bench consisting of Hon'ble Mr. Justice Harbans Singh and Hon'ble Mr. Justice D. Falshaw, on 11th October, 1960.

Petition under section 439 read with section 435, Criminal Procedure Code, for revision of the order of Shri A. N. Bhanot, Additional Sessions Judge, Ambala Camp, Ludhiana, dated 21st October, 1959, affirming that of Shri Thakar Dass, Magistratt, Ist Class, Ludhiana, dated 7th July, 1959, permitting respondents Nos. 1 to 4 to examine 10 witnesses out of 51 witnesses.

Proceedingsu nder section 145 Criminal Procedure Code. ...

A. S. SARHADI, ADVOCATE, *for the Petitioner.*

K. S. KAWATRA, ASSISTANT ADVOCATE-GENERAL AND Y. P. GANDHI, ADVOCATES, *for the Respondents.*

JUDGMENT

HARBANS SINGH, J.—This revision petition raises a question of the interpretation of sub-sections (4) and (9) of section 145 of the Criminal Procedure Code and in view of the importance of the question the matter was referred to a larger Bench when the petition came up before me sitting in Single Bench. Harbans Singh, J.

The facts giving rise to the dispute may briefly be stated as under: With regard to a *chabutra* in Ludhiana attached to a religious institution there was a dispute between two rival parties and on the report of the police the *chabutra* was attached and notice was issued to both the parties to put in written statements and documents in support of their respective claims to the possession of the same. When the parties, after service, appeared before the Court on 21st August, 1958, the case was adjourned till 12th September, 1958, to enable the

Jodh Singh and others, v. Mahant Bhagambar Dass and others,

Harbans Singh, J.

parties to produce affidavits of such witnesses as they may deem fit. On the latter date, affidavits of seven persons were put in on behalf of the first party and affidavits of twenty-six persons on behalf of the second party petitioners in the present petition). The Court summoned some witnesses for 1st October, 1958. On that date an application was put in on behalf of the first party (the respondents in the present petition) asking for permission to file affidavits of a number of other persons on the plea that they could not file those affidavits earlier because their counsel Mr. B. S. Thapar had gone to Kashmir. Objections having been taken to the entertainment of affidavits at that late stage, the case was adjourned on a number of hearings for arguments when ultimately on 9th December, 1958, the learned trial Magistrate, held that further affidavits could not be allowed at that stage under the provisions of law. He, however, further remarked that the party concerned could apply to the Court to summon any witness under section 145(9), Criminal Procedure Code, at any stage when necessary orders will be passed. Against this order the first party went up in revision to the Sessions Court. The point urged before the learned Additional Sessions Judge, who heard the revision, was that in case affidavits of additional witnesses sought to be put in by them were not allowed to be taken on the record they would not, under the law, be able to examine those persons as their witnesses and in support of this contention they placed reliance *on Kashab Acharya* v. *Somenath Behera* (1). However, the learned Additional Sessions Judge felt that no good reasons had been assigned for the non-production of the affidavits at the proper stage and

(1) A.I.R. 1958 Orissa 79.

Jodh Singh and others, v. Mahant Bhagambar Dass and others,

Harbans Singh, J.

that the trial Court was justified in refusing to receive the same when offered at a late stage and consequently dismissed the revision petition. No further revision was filed against this order in this Court. Later on behalf of the first party, an application was made that 51 witnesses mentioned in the list attached to the application may be summoned as witnesses on their behalf. The learned trial Magistrate on 7th July, 1959, ordered that 10 out of them, mentioned in the order, may be summoned. The present revision has been filed by the second party against the aforesaid order.

The sole point requiring decision is whether in view of the amended provisions of sub-section (4) of setion 145, Criminal Procedure Code, any party to the proceedings has a right to have a witness summoned with a view to examine him even if no affidavit of such a person has been filed? For the proper decision of the point in controversy, it is necessary to refer to the provisions of sub-esctions (1), (4) and (9) of section 145. Out of them sub-section (1), as it originally stood, prior to the amendment incorporated by the amending Act XXVI of 1955, provides that a Magistrate, if satisfied that the dispute was likely to cause a breach of peace, may issue a notice to the parties concerned to attend his Court at a time to be fixed and "to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute." By the amendment, the following words have been added: "and further requiring them to put in such documents or *to adduce by putting in affidavits, the evidence of such persons, as they rely upon in support of such claims.*" Similarly, under sub-section (4) as it stood prior to the amendment the Magistrate was required to "peruse the statements so put in, hear the parties,

Jodh Singh and others, v. Mahant Bhagamber Dass and others, Harbans Singh, J.

receive all such evidence as may be produced by them, respectively,. . . . take such further evidence (if any) as he thinks necessary, and, if possible, decide which party was in possession at the date of the order." Under the sub-section as amended, the Magistrate is required to "peruse the statements, documents, and affidavits, if any, so put in, hear the parties,..... and decide the question whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject." Apart from the other provisos which are not material and which originally existed and have been reproduced in the amended sub-section without any material change, the following further proviso has been added:—

> "Provided that the Magistrate may if he so thinks fit, summon and examine any person whose affidavit has been put in as to the facts contained therein."

Thus a comparison of the provisions of sub-sections (1) and (4), as they existed prior to the amendment and as they are now, clearly shows that under the old procedure the parties were required to put in written statements in the first instance and then they were entitled to examine such witnesses as they deemed fit and it was thereafter that the learned Magistrate was to make up his mind as to the party who was in possession, after taking into consideration the written statements originally put in and the evidence produced by the parties. The learned Magistrate was further given the power to examine such other witnesses as he may think necessary. Under the amended provisions, parties are not only required to put in written statements by the date fixed by the learned Magistrate but they are also required to

put in documents and to adduce evidence of such persons as they rely upon in support of such claim by putting in affidavits. Under sub-section (4), the learned Magistrate is required to come to the relevant conclusion on the basis of the written statements, the documents and the affidavits put in by the parties. The power of the learned Magistrate to examine further evidence is confined, by the proviso, to the examination of only such of the persons whose affidavits have been put in.

The proceedings under section 145, Criminal Procedure Code, are in the nature of a summary inquiry into a dispute which is essentially of a civil nature and the steps are taken by the Magistrate under this section to ensure that the dispute in question may not lead to a breach of peace. The object of the changes made by the amending Act obviously appears to be to shorten the proceedings under section 145 by providing that the evidence to be adduced by the parties may be given by affidavits and that the delay in getting the witnesses summoned and examined orally may be eliminated. For the purposes of elucidation of the facts stated in the affidavits put in, power is reserved to the Court to examine such of the persons orally as he may deem necessary, out of the persons whose affidavits have been put in sub-section (9) which was not touched by the amending Act runs as under:—

> "The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing."

Jodh Singh and others, v. Mahant Bhagambar Dass and others.

Harbans Singh, J.

In the context of the provisions of sub-sections (1) and (4) as they existed prior to the amendment, sub-section (9) provided a procedure by which, at the instance of either of the parties, the Magistrate could issue summons for the attendance of any witness "to attend or to produce any document or thing." In view of the amendments made in sub-sections (1) and (4), however, the question of the examination of witnesses at the instance of the parties, does not arise, because it has been directed that evidence by the parties shall be adduced by means of affidavits. The position taken by the petitioners is that the provisions of sub-section (9), in any case, are merely procedural and do not create any right in the parties to examine a witness; that the substantive right to produce documents and to adduce evidence by affidavits is given only under sub-sections (1) and (4) and that no party has, therefore, a right to make an application for the issue of summons to any witness whatever. It was suggested and not without reason, that though in view of the amendment made, sub-section (9) became redundant, yet the necessity of deleting or modifying the same has been overlooked. In the alternative it was urged that even if it be taken that sub-section (9) gives a right to a party to make an application to the Court (and the plain wording of the sub-section does give such a right) such a right must be taken to be limited in respect of the persons whose affidavits have already been put in. In other words such an application would virtually be a request by a party to the Court to consider the desirability of exercising its powers under the new proviso to sub-section (4) and examining a person orally whose affidavit has already been put in by either party, to elicit clarification of the facts stated in his affidavit.

This matter came up directly for decision in *Bhagwat Singh* v. *State* (1). In that case the learned Magistrate had examined certain witnesses whose affidavits had not been placed on the record It was urged before the High Court that such evidence could not be taken into consideration by the Magistrate in coming to the conclusion as to which party was in actual possession. For the contrary view two arguments seem to have been advanced, first that the words "hear the parties" in sub-section (4) includes the oral examination of the parties and their witnesses and secondly that sub-section (9) confers a right upon a party to examine a person as its witness. Both these arguments were repelled. Before us, it was not urged that the words "hear the parties" includes oral examination of the parties and their witnesses, and consequently it is not necessary to go into that point in detail and it is enough to say that we respectfully agree with the view taken by the learned Judge, in the abovementioned case that "hear the parties" only means hearing the agruments and nothing more. With regard to the second argument M. C. Desai, J., observed as follows:—

> "Sub-section (9) does not confer any right upon a party to examine a person as its witness, it only lays down the procedure to be followed in procuring the attendance of its witnesses. Whether it has a right to examine a witness or not has to be ascertained from other provisions. All that the sub-section means is that if a party has a right to examine a witness orally, it may obtain

(1) A.I.R. 1959 All. 763.

Jodh Singh and others v. Mahant Bhagambar Dass and others.

Harbans Singh, J.

from the Magistrate a summon directing him to attend the court. The first proviso to sub-section (4) is the only provision which confers a right upon a party to examine a witness orally in the court; so sub-section (9) must be read with the first proviso to sub-section (4)."

There is no direct case taking a contrary view. Reliance, however, was placed on behalf of the respondents on *Bahori* v. *Ghure* (1). That was a case where the learned Magistrate examined a Patwari as a Court witness and an objection was taken to this procedure. While delivering the judgment up-holding the action of the learned Magistrate certain observations were made by Sarjoo Prosad, C.J., which give support to the contention that sub-section (9) authorised the learned Magistrate to summon a witness on the application of either party. The head-note is as follows:—

"The proviso to sub-section (4) of section 145 is merely an enabling provision of law which entitles the Magistrate to summon and examine any of the persons whose affidavits have been filed on behalf of the parties, if he so desires in order to decide the question of possession; but the proviso does not preclude the Magistrate from calling as a witness any other person that he thinks proper to examine. Sub-section (9) of section 145 contemplates such a situation. Sub-section (9) says that the Magistrate, if he thinks fit, at any

(1) A.I.R. 1960 Raj. 15.

stage of the proceedings under the section on the application of either party, issue summons to any witness directing him to attend or to produce any document or thing. If on the application of either party to the proceeding the Magistrate can do so, he can do so equally in the ends of justice of his own accord. Indeed section 540 of the Code empowers the Magistrate like any Court to do so."

The decision in the above-mentioned case was really based on the provisions of section 540 which give ample powers to a Court holding an inquiry or trying a case to examine or re-examine any witness if in the view of the Court it is necessary to do so in the interests of justice for arriving at a correct decision. No such question arises in the present case and we are consequently not called upon to express our views on the same. The observations in the above-mentioned case with regard to sub-section (9) were, if we may say so with respect, mere obiter and we find it difficult to agree with the same. If the contention of the learned counsel for the respondents is accepted that under sub-section (9) either party has a right to apply even for the summoning of a witness, whose affidavit has not been filed, with a view to examine him orally, then the very object of sub-sections (1) and (4) as amended would be nullified. The procedure instead of being shortened would become doubly cumbersome, by adding provisions for the production of documents and affidavits and retaining the old procedure of examining witnesses orally.

Though we feel that the continued existence of sub-section (9) in its present form is certainly

Jodh Singh and others, v. Mahant Bhagambar Dass and others, Harbans Singh, J.

not very apt and requires looking into by the Legislature, yet we have no doubt in our mind that it gives no right to a party to summon or examine any witness orally apart from the right given to it to adduce evidence as detailed in sub-section (1) and that oral examination of a witness must be confined within the limits imposed by the newly added proviso, namely, the first proviso to sub-section (4).

In view of the above we feel that the learned Magistrate acted without jurisdiction in summoning witnesses, at the instance of the respondents, whose affidavits had not been placed on the record. This revision is, therefore, accepted and the impugned order, dated 7th July, 1959, is set aside. The case will now go back to the trial Court, for proceeding further in accordance with law and in the light of the observations made above. Parties are directed to appear before the trial Court on 7th November, 1960, and in view of the great delay that has already taken place, we direct that the trial Court may proceed with and conclude the case, as expeditiously as possible.

FALSHAW, J.—I agree.

R.S.

CIVIL MISCELLANEOUS

Before A. N. Grover, J.

BUR SINGH AND OTHERS,—*Petitioners.*

versus

COMMISSIONER OF PATIALA DIVISION AND OTHERS,—*Respondents.*

Civil Writ No. 1013 of 1959

1960

Nov., 10th.

Pepsu Tenancy and Agricultural Lands Act (XIII of 1955) Section 43—Object and scope of—Whether can be applied to trespassers.