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JAIRAJ MAL
v
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KISHAN.

lays down that a person in the position of Jairaj Mal is not debarred from proving that the mortgage set up by the plaintiff was fictitious and without consideration. This being our opinion on the question of law involved, we think that the proper course to be adopted is to send the case back to the first appellate court for disposal of the other pleas in the appeal. We are further of opinion that costs of this reference should be costs in the cause, and that costs should abide the result.

Answer accordingly.

APPELLATE CRIMINAL.

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February, 24.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

EMPEROR v. GULABU.*

Act No. 1 of 1872 (Indian Evidence Act), section 91—Evidence, admissibility of—Confession made to inquiring magistrate, but not recorded by him in writing—Criminal Procedure Code, sections 364 and 533.

Held that a confession of an accused person made to a magistrate holding an inquiry is a matter required by law to be reduced to the form of a document within the meaning of section 91 of the Indian Evidence Act, 1872, and that no evidence can be given of the terms of such a confession except the record, if any, made under section 364 of the Code of Criminal Procedure. Section 533 of the Criminal Procedure Code has no application to a case where no record whatever has been made of such a confession.

THIS was an appeal on behalf of the Local Government against an order of acquittal passed by the Sessions Judge of Saharanpur. The accused in this case made a confession before a Tahsildar who was holding an inquiry as a Magistrate. The Tahsildar did not record the confession in writing. At the trial the Tahsildar offered oral evidence of what the accused had stated to him in the confession. The Sessions Judge held that this evidence was inadmissible, and, there being no other evidence upon which much reliance could be placed, acquitted the accused.

The Government Advocate (Mr. A. E. Ryves), for the Crown, contended that oral evidence of the confession was admissible. A confession made to a private individual might be proved by the oral evidence of that individual, and there was no provision of law which prohibited such a course when the individual to whom the confession was made was a magistrate holding an inquiry.

*Criminal Appeal No. 37 of 1913 by the Local Government, from an order of W. J. D. Burkitt, Sessions Judge of Saharanpur, dated the 13th of September, 1912.

Mr. *Nihal Chand*, for the accused, contended that it would be dangerous to allow such oral evidence to be given. Section 364 of the Criminal Procedure Code was enacted to guard against this danger. That section read with section 91 of the Evidence Act rendered such oral evidence inadmissible.

GRIFFIN and CHAMBER, JJ.:—This is an appeal under section 417 of the Code of Criminal Procedure against an order of the Sessions Judge of Saharanpur acquitting one Gulabu of a charge of having murdered his wife Musammat Khushalia. It appears the Tahsildar of Chakrata, who has the powers of a magistrate of the third class, and who has been invested by the Local Government with power to take cognizance of offences upon complaint or upon police reports, received information in the shape of a complaint that the woman had been murdered by her husband. He sent for a number of persons and had their statements recorded in his presence by a *wasil-baqi nawis*. He also interrogated Gulabu. The case was subsequently taken up by the Cantonment Magistrate and Gulabu was committed for trial. At the trial the Tahsildar was asked by the public prosecutor to repeat a confession said to have been made to him by Gulabu. The Sessions Judge declined to allow this to be done. On behalf of the Crown it is contended that the Sessions Judge ought to have allowed the Tahsildar to repeat the confession. The Tahsildar's evidence shows that he was conducting an inquiry into this affair at the time when the statement was made to him. In the court below it was contended on behalf of the accused that the Tahsildar had the powers of a police officer and was acting as such, but there is nothing to show that he had been invested with the powers of a police officer. The prosecution say, and we think rightly, that he must be deemed to have been conducting an inquiry as a magistrate. Section 364 of the Code of Criminal Procedure provides that whenever an accused person is examined by a magistrate the whole of the examination, including the questions put to him and every answer given by him, shall be recorded in full. But no record whatever was made of Gulabu's statement. Section 533 of the Code provides that if any court before which a confession, recorded or purporting to be recorded under section 364, is tendered, finds that any of the provisions of that section have not been complied with by the

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magistrate recording the confession, it shall take evidence that such person duly made the statement recorded, and, notwithstanding anything contained in the Indian Evidence Act, section 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits. This reference to section 91 of the Evidence Act shows that the Legislature intended that the provisions of that section should apply to the case of a confession made by an accused person to a magistrate holding an inquiry. Reading section 364 of the Code of Criminal Procedure with section 91 of the Evidence Act we must hold that a confession of an accused person made to a magistrate holding an inquiry is a matter required by law to be reduced to the form of a document within the meaning of the latter section, and that no evidence can be given of the terms of such a confession except the record, if any, made under section 364. Section 533 has no application to a case where no record whatever has been made of such a confession. The learned Government Advocate is unable to refer to any case in which oral evidence of the terms of a confession made to a magistrate during the course of an inquiry has been admitted, and we know of no case in which this has been done. Apart from this objection to the reception of oral evidence of the confession, we would point out, as the learned Sessions Judge has done, that the confession was made under peculiar circumstances. It is more than doubtful whether it was made voluntarily. The evidence of the Tahsildar shows that it was made after the Tahsildar had arrested the accused and told him that evidence had been obtained which showed that he had committed murder. The Tahsildar admits that he took no steps to ascertain whether the confession was made voluntarily or under pressure. Lastly, assuming that the confession can be admitted in evidence, we do not think that the case calls for further inquiry. The only evidence in support of the alleged confession is the statement of a man named Jaswant. At the trial this man gave evidence to the effect that the woman had died as the result of a miscarriage. A previous statement made by the witness to the Tahsildar on the 24th of April, 1912, was put to him and he denied that he had made it, but he said that through fear he had told the Tahsildar that Gulabu had brought out the body and that blood was then oozing from the mouth and the nostrils.

The statement made by the witness on the 24th of April, 1912, in the absence of the accused, is not admissible in evidence under section 288 of the Code of Criminal Procedure. The witness was examined again by Cantonment Magistrate on the 4th of June and he then admitted that he had made the statement of the 24th of April and also admitted that it was true. It is possible that the statement of the 24th of April might be treated as having been incorporated in and so forming part of the statement of the 4th of June which was made in the presence of the accused. If so, it might be admitted under section 288 of the Code of Criminal Procedure. But on the 4th of June, while admitting the truth of his previous statement of April 24th, Jaswant made other statements wholly inconsistent with that statement. It is impossible to place much reliance on such a witness. It seems to us that, even if the confession were admitted in evidence, it would be unsafe to rely on it and that the other evidence is wholly insufficient to justify a conviction. We therefore dismiss this appeal and direct that Gulabu be set at liberty.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

JHUNKA PRASAD (PLAINTIFF) v. NATHU (DEFENDANT) *

Hindu law—Adoption—Ahirs—Validity of adoption after marriage of adopted son.

Held that amongst Ahirs the adoption of a son after his marriage has taken place is not permissible. *Pichuwayyan v. Subbayyan* (1) followed.

THE plaintiff in this case sued on the allegation that over six years ago the defendant, who was his paternal uncle, had adopted him with all due ceremony. He claimed a declaration of title and possession of his share of the family property by partition. The defendant admitted the *factum* of the adoption, but pleaded that it was invalid in law for the reason that at the time of the adoption the plaintiff was a married man with a daughter of his own. The parties were *ahirs* by caste. Both the lower courts gave effect to

* Second Appeal No. 435 of 1912 from a decree of W. H. Webb, Additional Judge of Saharanpur, dated the 8th of February, 1912, confirming a decree of Jawwad Husain, Subordinate Judge of Saharanpur, dated the 17th of July, 1911.

(1) (1889) I. L. R., 13 Mad., 128.

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