

the repayment of a debt carves out in favour of the mortgagee a portion of the borrower's interest in the property and is thus a transfer and a simple mortgage within the meaning of section 58. In this country there can be no transfer of interest in the same way in which in the case of a mortgage in England the property mortgaged is conveyed to the mortgagee. In the present instance the intention, it seems to me, was clear that the person who had lent the money would have a right to realize his money from the property by causing it to be sold. Otherwise the provision in it forbidding a transfer of the property until the debt was repaid would be unmeaning. I hold that the document in this case was intended to be and is a simple mortgage within the meaning of the Transfer of Property Act; and, therefore, it cannot be a charge within the meaning of section 100 of that Act. A charge under that section arises only when the transaction does not amount to a mortgage. In my opinion the view taken by the court below is not correct, and the case ought to be remanded to that court for trial on the merits.

BY THE COURT :—The order of the Court is that the appeal be dismissed with costs.

*Appeal dismissed.*

## REVISIONAL CRIMINAL.

*Before Mr. Justice Ryves and Mr. Justice Piggott.*

JAGARNATH SAHU v. PARMESHWAR NARAIN,

*Criminal Procedure Code, section 133—Jurisdiction—Channel which may be lawfully used by the public—Field over which water from other fields at a higher level flows.*

*Held* that a field, which is on a lower level than the adjoining fields and over which the surplus water of those adjoining fields used to flow into a tank, even if it could be described as a channel, is not such a channel as had been or could lawfully be used by the public, and action cannot be taken under section 133 of the Code of Criminal Procedure, for the removal of any obstruction from it.

*Junnu Singh v. Mata Awar* (1) and *In re Maharana Shri Jaswatsangji Fatesangji*, (2) referred to. *Emperor v. Bharosa Patil* (3) and *Zaffer Nawab v. Emperor* (4) distinguished.

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JAWAHIR  
MAL  
v.  
INDOMATI.

1914  
February, 5.

\* Criminal Revision No. 1083 of 1913 from an order of Suraj Nath Singh, Magistrate, first class, of Deoria, dated the 27th of October, 1913.

(1) Weekly Notes, 1906, p. 190. (3) (1912) I. L. R., 34 All., 845.  
(2) (1897) I. L. R., 22 Bom., 988. (4) (1904) I. L. R., 82 Cal., 930.

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JAGARNATH  
SAHU  
v.  
PARMESEHWAR  
NARAIN.

THE facts of this case were as follows :—

The complainant filed a complaint in the magistrate's court to the effect that the rain water of the village Deokali, in which the complainant lived, used to flow through a field No. 35 to the accused's village Jaraso, and there collect in a ditch No. 40 belonging to the accused; that the accused has deepened the ditch, taking out earth from it and throwing it on to the Deokali side so as to block the passage of rain water, that this obstruction has caused damage to the fields in Deokali, especially the complainant's field No. 53. On these facts he prayed for removal of the obstruction. The accused denied that field No. 35 was ever used as a channel, or that he ever obstructed the water from flowing in its channel. The Magistrate took evidence on both sides and came to the conclusion that the water of Deokali used to pass through the channel marked D in the map as well as through field No. 35, and ordered the alleged obstruction to be removed.

Mr. *D. R. Sawhny*, for the applicant, contended that the Magistrate had no jurisdiction to pass the order that he did, inasmuch as the case was not one of a public nuisance. The matter was really one for the Civil Court to decide, the dispute being a private dispute. The public were not interested in the matter at all. *In re Maharana Shri Jaswatsangji Fatesangji* (1), *Jhunnu Singh v. Mata Avatar* (2). The case of *Emperor v. Bharosa Pathak* (3) was wrongly decided.

Mr. *J. Simeon*, for the opposite party, contended that the obstruction was a cause of damage to the whole village Deokali and thus the obstruction was one in which the public were interested. Section 133 of the Code of Criminal Procedure was, therefore, applicable. He relied on *Emperor v. Bharosa Pathak* (3) and *Zaffer Nawab v. Emperor* (4).

RYVES and PIGGOTT JJ:—This is an application in revision to set aside an order purporting to have been passed under section 137 of the Code of Criminal Procedure. The facts appear to be as follows: The applicant Jagarnath Sahu owns a field No. 35 in the village of Jaraso. This field is on the extreme northern border of that village. It marches with field No. 52 and a portion of field No. 53 of village Deokali. It appears that the level of field

(1) (1897) I. L. R., 22 Bom., 388.

(8) (1912) I. L. R., 34 All., 345.

(2) Weekly Notes, 1906, p. 190.

(4) (1904) I. L. R., 32 Calc., 230.

No. 35 is below that of the surrounding fields, and the result was that the surplus water had flowed in the past over this field into a tank to the south of the field in the village of Jaraso. It is said that Jagarnath Sahu has erected a *band* on the north of this tank and has also raised the level of the field No. 35 to such an extent that the flood-water, instead of flowing into the tank as it used to do, is now held back and thus causes injury to the field No. 53 of Deokali in particular and also to some of the neighbouring fields. An application, purporting to be made under section 133, was filed before the Magistrate by the owner of the field No. 53 in Deokali, whereupon the Magistrate issued notice to the other side. Jagarnath Sahu showed cause against that order, stating that the field was not a channel to which section 133 could possibly apply. The learned Magistrate took evidence in the case on both sides and ultimately passed the order complained of. It has been argued on behalf of the applicant that the learned Magistrate had no jurisdiction, on the facts of the case, to pass this order. Under section 133, he could only take action if he was satisfied that an unlawful obstruction required removal from a channel which is, or may be, lawfully used by the public. It seems to us that even if field No. 35 could be described as a channel, it is not such a channel as had been or could lawfully be used by the public. If injury has been caused by any tortious act done by Jagarnath Sahu, then the persons who have been damaged may have their remedy by civil suits. Reliance has been placed on the case of *Emperor v. Bharosa Pathak* (1) and on *Zaffer Nawab v. Emperor* (2). The former decision must be taken in conjunction with the particular facts of that case. It is not an authority applicable to the present facts. The Calcutta case is clearly distinguishable. There the public had acquired a right to ford a river at a particular place, and obstruction to this public right was obviously within the purview of section 133 of the Code of Criminal Procedure. A case more in point is that of *Jhunnu Singh v. Mata Antar* (3). See also *In re Maharana Shri Jaswatsingji Patesingji* (4). In our opinion the learned Magistrate had no jurisdiction to pass the order. We therefore set it aside.

*Order set aside.*

(1) (1912) I. L. R., 84 All., 345.

(3) Weekly Notes, 1906, p. 190.

(2) (1904) I. L. R., 32 Cal., 930.

(4) (1897) I. L. R., 22 Bom., 938.

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