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subsequently withdrew would not help the other plaintiffs so as to enable them to claim now a preferential right based on their near relationship with the vendor. We are, therefore, of opinion that the effect of obtaining the exchange in September, 1928, was to put the defendants on the same footing as the three plaintiffs on that date, and a subsequent withdrawal of Hari Shankar or the passing of the Amending Act would not improve the position of the plaintiffs.

In the result, we allow the appeal and setting aside the decree of the lower appellate court dismiss the plaintiffs' claim for pre-emption. As the exchanges were obtained during the pendency of the suit, we direct that the plaintiffs should have their costs of the first court from the defendants vendees, but that they must pay the costs of the defendants vendees in the other two courts.

REVISIONAL CRIMINAL

Before Mr. Justice Kendall

EMPEROR *v.* KHAIRATI*

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Criminal Procedure Code, section 162—*Statement of abducted girl, who had been taken to another town, recorded by the police of that town—Admissibility of such statement at the trial which was held where the abduction took place—Statement made in the course of an "investigation"—Criminal Procedure Code, sections* 4(*l*), 156 (1) *and* 181—*Jurisdiction.*

A girl was abducted from her husband's house in the Moradabad district, and a report was made at police station Amroha in that district. About four months later she was seen in the company of one of the accused in Delhi, in suspicious circumstances; and a constable took them to a police station in Delhi and the sub-inspector recorded the statement of the girl. At the trial, which took place in the Moradabad district, this statement was adduced in evidence by the prosecution.

*Criminal Revision No. 317 of 1933, from an order of Rup Kishen Agha, Sessions Judge of Moradabad, dated the 11th of April, 1933.

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Held, that the statement was inadmissible in evidence under section 162 of the Criminal Procedure Code. It was a statement made to a police officer in the course of an investigation; for, according to the definition of "investigation" in section 4(*l*) of the Criminal Procedure Code it includes the collecting of evidence by a police officer. It cannot be said that the police officer at Delhi could not have been "investigating" in the present case as he had no jurisdiction to do so; for, he had such jurisdiction under section 156(1) of the Code, inasmuch as by section 181(4) the offence could be inquired into or tried by a court at Delhi where the abducted person had been conveyed or detained.

Mr. *Shambhu Nath Seth*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

KENDALL, J. :—The applicant Khairati has been convicted by the Assistant Sessions Judge of Moradabad of an offence under section 366 of the Indian Penal Code and sentenced to three years' rigorous imprisonment. The conviction and sentence have been upheld by the learned Sessions Judge. The present application is made on the ground that both courts have convicted the present applicant, who was put on his trial with several others, on the strength of a statement made by Mst. Naziran to the sub-inspector of the police station in Delhi, whereas it is argued that the statement was inadmissible under section 162 of the Code of Criminal Procedure. No objection appears to have been taken to the admission of the statement in the trial court. It was proferred in evidence by the prosecution and it was also used on behalf of the defence in order to shake the testimony of the witness by showing that there were discrepancies between her statement made in court and the statement made to the police.

It appears that the case for the prosecution was that the girl was taken away from her husband's place in the Moradabad District and that some four months

later she was seen with Jahana (one of the persons convicted in this case) in Delhi in circumstances that aroused the suspicion of a constable, who took both of them to the thana and made a report. After receiving the report of the constable the sub-inspector recorded the statement of the girl. It was this statement that was afterwards produced in court to corroborate the testimony of the girl.

The question of admissibility of the statement was raised in the lower appellate court, but the learned Judge, after discussing the matter at some length, came to the conclusion that as the statement was made to a police officer at Delhi, who "had no business to investigate an offence, of the commission of which a report had been made long before at Amroha and which was therefore liable to be investigated by the police there", section 162 of the Code of Criminal Procedure would not exclude it from evidence. Section 162 provides: "No statement made by any person to a police officer in the course of an investigation under this chapter shall . . . be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made." An "investigation" has been defined in section 4(*l*) of the Code of Criminal Procedure as including "all proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf." It can hardly be denied that in recording the statement of the girl and the statement of the constable the sub-inspector was proceeding to collect evidence, but the Sessions Judge has remarked that he cannot have been investigating in the present case because he had no jurisdiction to do so. It has been pointed out, however, that under section 156(1) of the Code of Criminal Procedure "an officer in charge of a police station

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may . . . investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of chapter XV relating to the place of inquiry or trial"; and turning to chapter XV we find in clause (4) of section 181: "The offence of kidnapping or abduction may be inquired into or tried by a court within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted or was *conveyed or concealed or detained.*" The court at Delhi could, therefore, have inquired into or tried the case, and the sub-inspector in charge of the police station at Delhi could have investigated the case, and consequently it is not correct to say that he had no jurisdiction to investigate the case or that his proceedings cannot have been an investigation because he had no jurisdiction.

I am therefore decidedly of opinion that this statement was not admissible in evidence. The next argument of Mr. *S. N. Seth* is that the trial court has made it clear that if the statement of the girl in court had not been corroborated by her statement made to the police, the applicant, at any rate, could not have been convicted. The trial court after reviewing the evidence for the prosecution remarked: "This oral evidence would not by itself have sufficed to prove the case for the prosecution, but to my mind a very strong and reliable piece of evidence is the statement of Mst. Nazir Bi herself which she made to the police at New Delhi in October, 1932, when she was arrested." The lower appellate court has remarked: "The trial Judge had therefore no option but to discard almost the whole of the prosecution evidence as affording sufficient foundation for holding any of the accused other than Jahana guilty of the offence"; and it was only because the lower appellate court felt justified in admitting the

statement recorded by the police and in relying on it that it was able to maintain the conviction. 1933 EMPEROR v. KHAIRATI

The result is that the application must be allowed, and I therefore set aside the order of conviction and sentence passed by the Sessions Judge of Moradabad and direct that the applicant be acquitted.

APPELLATE CIVIL

Before Justice Sir Lal Gopal Mukerji and Mr. Justice Bennet

RAM KATORI AND ANOTHER (DECREE-HOLDERS) *v.* SHAFIQ AHMAD AND ANOTHER (JUDGMENT-DEBTORS)* 1933 *July*, 24

Civil Procedure Code, order XLI, rule 6(2)—Appeal from preliminary decree for sale—No appeal filed from final decree—Application for execution of final decree may be stayed pending decision of the appeal from preliminary decree—"Such decree" includes the preliminary decree.

During the pendency of an appeal from a preliminary decree for sale on a mortgage the final decree was passed and the decree-holder applied for execution, praying for sale of the properties. *Held* that the sale could be stayed, under order XLI, rule 6(2) of the Civil Procedure Code, until the disposal of the appeal. Although no appeal was pending from the final decree which was being executed, yet the sub-rule would apply, because if the appeal from the preliminary decree was allowed, not only that decree but also the final decree would be set aside.

A final decree is based on a preliminary decree and contains within itself the adjudication between the parties which has already been made in the preliminary decree, and to that extent an appeal against a preliminary decree is also by implication an appeal against a final decree, although it is not an appeal in express terms against a final decree.

Mr. *Vishwa Mitra*, for the appellants.

Mr. *Panna Lal*, for the respondents.

MUKERJI and BENNET, JJ. :—This is an execution first appeal by the decree-holders against an order of the execution court dismissing the application for

*First Appeal No. 191 of 1932, from a decree of P. N. Agha, Additional Subordinate Judge of Moradabad, dated the 27th of February, 1932.