1934

EMPEROR v. HAR NARAIN

made voluntarily. He has also to make a memorandum that he believes that the confession was voluntarily made. The Magistrate is, therefore, to exercise his judgment and has to be satisfied that the confession is voluntary.

In these circumstances it is very difficult to hold that a Magistrate recording statements under section 164 is not a court within the meaning of section 195.

It is not necessary to decide in this case whether the proceeding before him is a judicial proceeding, for section 193 applies both to a judicial and to "any other case".

We are, therefore, of opinion that the Special Magistrate who has convicted the accused had no authority to take cognizance of the offence punishable under section 193, when it was alleged to have been committed in the proceeding under section 164 in the court of a Magistrate, without a complaint in writing of such court or some other court to which it was subordinate.

We accordingly set aside his order dated the 22nd of February, 1934.

REVISIONAL CIVIL

Before Mr. Justice Bennet

GANESHI LAL KISHAN LAL (DEFENDANT) *v.* MOOL CHAND NEMI CHAND (PLAINTIFF)*

1934
December, 12

Civil Procedure Code, order XLVII, rules 1 and 8—Review of judgment by trial court after it has been dealt with by higher court—Merger—Revision from small cause court decision dismissed—Subsequent review of judgment by small cause court on the ground of discovery of new evidence—Whether evidence other than the newly discovered evidence can also be allowed—Jurisdiction.

Upon the dismissal of an application in revision against a decree passed by a small cause court, the decree remains the decree of the small cause court and is not merged in the dec-

*Civil Revision No. 301 of 1934.

1934

GANESHI LAL KISHAN LAL v. MOOL CHAND NEMI CHAND

ree of the High Court; therefore, a subsequent application for review of judgment, on the ground of discovery of new and important evidence, can be entertained by the small cause court.

Upon the application for review being granted and an order for re-hearing being passed under order XLVII, rule 8, the court has jurisdiction, unless it has ordered that no evidence other than the newly discovered evidence should be produced, to allow other evidence also to be produced at the re-hearing.

Mr. *Chandra Bhan Agarwala,* for the applicant.

Mr. *R. K. S. Toshniwal,* for the opposite party.

BENNET, J.:—This is an application in a civil revision by a defendant against an order of a small cause court allowing a review of judgment. The facts are that the predecessor of the court below on the 9th July, 1932, dismissed the suit of the plaintiff. Subsequently there was an application by the plaintiff in revision in this Court which was dismissed. Later an application was made for review of judgment after the period of limitation had expired and the plaintiff, the applicant for review, asked for the benefit of section 5 of the Limitation Act. The application was based on the discovery of two post cards stated to have been written by the defendant and to have not been discovered at the time of the suit. Evidence was given that these post cards could not be discovered with due diligence and the lower court has accepted that evidence. The lower court has also allowed the application of section 5 of the Limitation Act on this ground that the matter only came to the knowledge of the plaintiff with the discovery of the letters and that the application was made within the period of limitation allowed from the date of the discovery.

The first ground which is argued in ground No. 1 of revision is that the lower court's judgment having merged in that of the High Court, the lower court was not competent to entertain an application for review. Learned counsel for the applicant refers to various rulings, one of which is *Gauri Shankar Bhargava*

v. *Jagat Narain Shahgal* (1). In that case there was an *ex parte* decree in the small cause court for the plaintiff and the plaintiff applied in revision to this Court asking for future interest and this Court allowed the revision and added future interest to the decree. The decree of the small cause court therefore merged in the decree of this Court and a new decree was framed by this Court. This case, however, is different from the present case where the application in revision was dismissed. In the present case the decree of the small cause court dismissing the suit of the plaintiff granted the defendant costs in the small cause court. The decree in the High Court dismissing the revision application of the plaintiff merely said that the application was dismissed, and granted costs of the High Court to the defendant opposite party. There were thus two decrees in favour of the defendant. It was not a case where there was merger of a decree of the small cause court in that of the High Court. As there were two separate decrees in the present case it is clear that there was no merger. Reference was also made for the applicant to *Sheo Balak Singh* v. *Mahabir Singh* (2). That was a case of this Court in second appeal confirming the decree of the court below and therefore there was a merger. Similarly in *Shivappa* v. *Ramachandra Narasinh* (3) there was a merger in the case of a second appeal to the High Court. No ruling has been produced for the applicant to show that any High Court has held that there is a merger in the case of a High Court dismissing an application in revision. The contrary has been held in *Khuda Bakhsh* v. *Allah Ditta* (4). It was laid down in that ruling that "a decree of a small cause court is final and not appealable, and although in certain circumstances it may be set aside or modified by a High Court in virtue of its revisional powers, it must remain the decree of the court which

(1) (1933) I.L.R., 56 All., 608.
(2) A.I.R., 1931 All., 704.
(3) A.I.R., 1922 Bom., 130.
(4) (1919) I.L.R., 1 Lah., 342.

1934

GANESHI LAL KISHAN LAL v. MOOL CHAND NEMI CHAND

originally passed it when the High Court declines to interfere with it on the revision side and that the lower court accordingly was competent to entertain the application for amendment". I consider that this ruling applies to the facts of this case and that the lower court was competent to entertain the application in review of judgment.

The next ground which was argued was ground No. 7 that the order of the lower court allowing the plaintiffs to produce further evidence besides the two letters could not be justified. Learned counsel for the applicant argued that the court would be limited by the provisions of order XLVII, rule 1 in making directions in regard to evidence. That rule does not purport to deal with this matter. On the contrary, rule 8 is the rule which applies and that rule states as follows: "When an application for review is granted, a note thereof shall be made in the register and the court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit." This rule shows that it was open to the court either to re-hear the case or to make such order in regard to the re-hearing as it thought fit. It would no doubt have been open to the lower court to make an order that no evidence should be produced except in regard to the two letters. It was, however, open to the lower court to make a simple order for re-hearing, as it has done. This matter being within the jurisdiction of the lower court, I do not think that I should interfere with that portion of the order in revision.

[The judgment then proceeded to deal with other points not material for the purpose of this report.]

I consider that no ground for interference in revision has been shown. I, therefore, dismiss this application for revision with costs.