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RAM SAKAL
MALLAH
v.
NAGESHAR
MALLAH

Sulaiman,
C. J.

But a franchise of a ferry is not necessarily connected with the proprietorship of the land; but where acquired as an easement it must, of course, be appurtenant to the land. The exclusive right of ferry would ordinarily imply a right to prevent other people from plying boats between certain parts of the banks on both sides of the river even though the lands belong to them. Without proof of a right acquired by grant, it would not be possible for a claimant to prevent others from plying boats between their own lands, even if their lands happen to be quite close to the land over which the right of ferry exists.

By THE COURT:—The appeal stands dismissed with costs.

REVISIONAL CRIMINAL

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and
Mr. Justice Bajpai*

EMPEROR *v.* HAR NARAIN AND OTHERS*

1934
December, 11

Criminal Procedure Code, section 195(1)(b)—“Court”—Magistrate recording a statement or confession under section 164 is a “court”—Complaint by the Magistrate necessary for prosecution for making a false statement under section 164—“Judicial proceeding”.

A Magistrate recording a statement or confession under section 164 of the Criminal Procedure Code is a “court” within the meaning of section 195(1)(b) of the Code, and except on a written complaint of his no court can take cognizance of an offence of perjury in relation to a statement recorded by him under section 164. In this connection it is immaterial whether such recording of statement does or does not amount to a judicial proceeding, for section 195(1)(b) refers to “any proceeding” and is not confined to a judicial proceeding.

The applicants were not represented.

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

*Criminal Reference No. 370 of 1934.

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SULAIMAN, C.J., and BAJPAI, J.:—In this case complaints were filed under section 193 of the Indian Penal Code against the applicants in respect of previous statements made by them under section 164, Criminal Procedure Code, before a Magistrate. The Magistrate had not himself filed any complaint. The accused took objection that the court had no power to take cognizance of the offence without such a complaint, but their objections were rejected summarily on the ground that section 195 of the Criminal Procedure Code had no application. The learned Sessions Judge is of the opinion that the prosecution of the applicants is barred by the provisions of section 195, Criminal Procedure Code. As no direct case on this point was cited before the learned single Judge, the case has been referred to a Division Bench.

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Section 195(1)(b) provides that no court shall take cognizance of any offence punishable under section 193, when such offence is alleged to have been committed in, or in relation to, any proceeding in any court, except on the complaint in writing of such court or of some other court to which such court is subordinate. Then sub-section (2) provides that the term "court" includes a civil, revenue or criminal court, but does not include a Registrar or Sub-Registrar under the Indian Registration Act, 1877.

The main question therefore is whether the recording of the statement under section 164 before the Magistrate was a proceeding in a court within the meaning of the section.

Now the word "court" has not been defined in the Code, nor in the General Clauses Act. There is a definition in section 3 of the Indian Evidence Act where "court" includes all Judges and Magistrates, and all persons, except arbitrators, legally authorised to take evidence. But this definition cannot directly apply to the word "court" used in the Code of Criminal Procedure, though it may be some guide. Section 6 of

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the Code lays down that Magistrates constitute one of the classes of criminal courts. Even a Bench Magistrate, who is invested with first class powers, has the ordinary powers of a Magistrate of the first class as enumerated in schedule III, which include power to record statements under section 164.

It is significant that section 195(1)(b) refers to "any proceeding", and is not confined to a judicial proceeding. It is, therefore, not necessary for its application that the court should be engaged in a judicial proceeding. It is also clear from sub-section (2) that the term "court" in this section is used in a very wide sense. The word "includes" indicates that there may be courts other than civil, revenue or criminal courts. That the use of the word "includes" is deliberate is obvious from the circumstance that the legislature has by amendment substituted this word for the old word "means" which was much narrower in scope. Again, from the fact that it was thought necessary to exclude a Registrar or Sub-Registrar from the scope of the term "court", and a special exception has been made, it follows that the legislature considered that, but for such an exception, a Registrar or Sub-Registrar would be included in the term "court".

In the cases of *Kanhaiya Lal v. Bhagwan Das* (1) and *Bilas Singh v. Emperor* (2) it was held that the term "court" has a wider meaning.

Now a Magistrate acting under section 164 does not act mechanically merely as a ministerial officer. He can record a statement or confession made to him in the course of an investigation as well as before the commencement of an inquiry or trial. The statements are to be recorded in the manner prescribed for recording evidence. The Magistrate has not only to warn the person making a confession, but is prohibited from recording such confession unless, upon questioning the person making it, he has reason to believe that it was

(1) (1925) I.L.R., 48 All., 60 (65). (2) (1925) I.L.R., 47 All., 984.

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.* MOGL
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-