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provision giving the mortgagee a power of sale is wanting. We think this case is quite distinguishable.

The result, therefore, is that we agree with the lower appellate court in holding that the mortgage in suit is not an anomalous mortgage within the terms of section 98 of the Transfer of Property Act and that the decree for sale passed by it is correct.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL

Before Mr. Justice E. M. Nanavutty

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March 23

SURAJ LAL AND OTHERS (ACCUSED-APPLICANTS) v. SHEO
SHANKAR LAL (COMPLAINANT-OPPOSITE PARTY)*

Criminal Procedure Code (Act V of 1898), sections 195 and 476—Indian Penal Code (Act XLV of 1860), sections 193 and 211—Perjury—Application to Magistrate to file complaint for offences under sections 193 and 211, I. P. C.—Magistrate filing complaint without making inquiry and without passing order under section 476, legality of—Section 476 proceedings, when to be started on private complaints.

It is incumbent upon a Magistrate who receives an application requesting him to file a complaint against certain persons charging them with offences under sections 211 and 193 of the Indian Penal Code to record a finding that it is expedient in the interests of justice that an inquiry should be made into the offences of sections 193 and 211 of the Indian Penal Code said to have been committed by those persons.

Where, therefore, a person files a complaint under section 476 of the Code of Criminal Procedure read with section 195 of the said Code requesting a Magistrate that a complaint be filed by him against certain persons charging them with offences under sections 211 and 193 of the Indian Penal Code and the Magistrate concerned, without making any inquiry under section 476 of the Code of Criminal Procedure and without passing an order under section 476 of the Code of Criminal Procedure, draws up a complaint addressing it to another Magistrate charging those persons with an offence under section 193 of the Indian Penal Code and further charging one of them with an offence

*Criminal Revision No. 35 of 1934, against the order of Pandit Shiam Manohar Nath Shargha, Sessions Judge of Gonda, dated the 2nd of December, 1933.

also under section 211 of the Indian Penal Code, the procedure adopted by the Magistrate is illegal and unjustifiable. *Keramat Ali v. Emperor* (1), *Munuswami Naidu v. Emperor* (2), *Shankar Sahai v. King-Emperor* (3), *Surendra Nath Jana v. Kumeda Charan Misra* (4), *Nabani Nath Mukherjee v. Emperor* (5), *Chothu Ram v. Emperor* (6), and *Rahimatullah Sahib v. Emperor* (7), referred to and discussed.

Proceedings under section 476 of the Code of Criminal Procedure regarding the institution of a complaint ought not to be undertaken on the application of private persons unless the prosecution is clearly in the interest of the State and is reasonably certain to result in a conviction.

Mr. *Ram Prasad Varma*, (R. B.), for the applicant.

Mr. S. N. Roy, for the opposite party.

NANAVUTTY, J.:—This is an application for revision under section 439 of the Code of Criminal Procedure against an order of the learned Sessions Judge of Gonda, refusing to withdraw a complaint filed by a Magistrate of the 1st class of Gonda on the 4th of September, 1933, directing the prosecution of Suraj Lal, Ratti Pal Singh, Suraj Bakhsh Singh, Baleshar Singh, Madho Raj Singh and Bindra for an offence under section 193 of the Indian Penal Code and further directing the prosecution of Suraj Lal under section 211 of the Indian Penal Code.

The facts out of which this application for revision arises are as follows:

A complaint under section 324 of the Indian Penal Code was filed by Suraj Lal Singh against Bhagauti Singh, Somai Singh, Sheo Shankar Lal and Chandra Sekhar. In this complaint Suraj Lal alleged that on the 21st of February, 1933, he heard his brother Suraj Bakhsh Singh shouting that the four accused had come to beat him. He went to see what was happening and thereupon Chandra Sekhar, Sheo Shankar Lal and Somai Singh caught hold of him and Bhagauti Singh pierced a *beru* (a small spear) into his stomach. Ratti

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(1) (1928) I.L.R., 55 Cal., 1312.

(3) (1930) 7 O.W.N., 598.

(5) (1933) A.I.R., Cal., 147.

(2) (1928) A.I.R., Mad., 783.

(4) (1930) A.I.R., Cal., 352.

(6) (1930) A.I.R., Lah., 316.

(7) (1908) I.L.R., 31 Mad., 140.

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Pal Singh (P. W. 2) came to his rescue and thereupon Sheo Shankar Lal also pierced his hand with a *beru* or spear. Suraj Bakhsh Singh, the brother of Suraj Lal, was also beaten by the accused. A hue and cry was raised and then the accused ran away. A report was made at the thana and the injured persons were sent to the dispensary at Colonelganj. Babu Chumni Lal, Medical Officer, incharge of the Colonelganj dispensary, was examined as a witness in the case. He is P. W. 7 and he has deposed that on the 21st of February, 1933, he examined Suraj Lal at the Colonelganj dispensary and found the following injury on his person:—

An incised wound $\frac{1}{2}'' \times 1/10'' \times \frac{1}{4}''$ transversely trailing at both ends on the right side of the abdomen $1\frac{1}{2}''$ above and to the right side of the umbilicus.

The injured man was detained in the hospital for observation as regards any internal injury which he may have received. In the opinion of the medical officer the injury was a simple hurt caused probably by a sharp-pointed and sharp-edged weapon. On the same day Babu Chumni Lal, medical officer of the Colonelganj dispensary, examined Ratti Pal Singh and he found the following injuries on his person:

(1) An incised wound $\frac{3}{4}'' \times \frac{1}{4}''$ communicating with injury No. 2 on the palm of the left hand close to its outer edge.

(2) An incised wound $\frac{1}{2}'' \times \frac{1}{8}''$ communicating with the back aspect of the left hand close to the outer edge. Both injuries constituted simple hurt and were probably caused by the thrust of a pointed weapon like a spear.

Six witnesses were examined on behalf of the prosecution in this case of Suraj Lal, but their evidence was not preferred to the evidence of *alibi* given by Sheo Shankar Lal in his defence and the learned Magistrate Mr. Gundevia by his judgment, dated the 17th of June, 1933, acquitted the accused Bhagauti Singh, Somai Singh, Shiv Shankar Lal and Chandra Sekhar of an

offence under section 324 of the Indian Penal Code and summed up the case at the end of the judgment as follows:

“Thus a careful reading of the evidence leads me to conclude that the case against the accused has not been proved beyond reasonable doubt and I am obliged to acquit all the accused under section 258 of the Criminal Procedure Code.”

Somewhere at the commencement of his judgment the learned Magistrate Mr. Gundevia had held that the evidence of P. W. 7 (B. Chunni Lal) proved beyond all doubt that both persons (Suraj Lal and Ratti Pal Singh) had been injured by a sharp-pointed and sharp-edged weapon somewhat like a spear on or about the 21st of February, 1933. That passage in his judgment runs as follows:

“Medical evidence of P. W. 7, who is a Medical Officer, Colonelganj dispensary, proves beyond doubt that both persons have been injured by a sharp-pointed and sharp-edged weapon somewhat like a spear on or about the 21st of February. Exs. 2 and 3 are his medical reports.”

The Magistrate considered the *alibi* evidence produced by Sheo Shankar Lal in his defence to be true and because he believed this evidence of *alibi*, he naturally doubted the truth of the evidence given by the eye-witnesses of the occurrence. On this point the observations in his judgment are as follows:

“I consider this *alibi* (of Sheo Shankar Lal Patwari) as proved. This naturally affects further the prosecution allegation against the other accused also.”

Throughout his judgment, dated the 17th of June, 1933, the learned Magistrate has said not a word against the testimony of the injured persons Suraj Lal and Ratti Pal Singh, nor has he even hinted that the case against the accused was a false one. All he has done is to give the accused the benefit of the doubts that he had concerning their guilt which constrained him to acquit

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them under section 258 of the Code of Criminal Procedure in respect of the charge under section 334 of the Indian Penal Code.

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Six weeks after the accused had been acquitted, one of them, Sheo Shankar Lal Patwari filed a complaint under section 476 of the Code of Criminal Procedure read with section 195 of the said Code requesting that a complaint be filed by the Magistrate against Suraj Lal, Suraj Bakhsh Singh, Ratti Pal Singh, Madho Raj, Baleshar Singh and Bindra Brahman charging them with offences under sections 211 and 193 of the Indian Penal Code. The Magistrate concerned, without making any enquiry under section 476 of the Code of Criminal Procedure and without passing an order under section 476 of the Code of Criminal Procedure, drew up a complaint on the 4th of September, 1933, addressing it to the Sub-Divisional Magistrate of Tarabganj in the district of Gonda, charging Suraj Lal, Ratti Pal Singh, Suraj Bakhsh Singh, Madho Raj Singh, Baleshar Singh and Bindra with an offence under section 193 of the Indian Penal Code and further charging Suraj Lal with an offence also under section 211 of the Indian Penal Code.

An appeal under section 476B of the Code of Criminal Procedure was filed by these persons Suraj Lal, Ratti Pal Singh, Suraj Bakhsh Singh, Baleshar Singh, Madho Raj Singh and Bindra against the complaint made by Mr. Gundevia, dated the 4th of September, 1933, charging them with offences under sections 193 and 211 of the Indian Penal Code. This miscellaneous criminal appeal was for reasons which I fail to understand treated by the learned Sessions Judge of Gonda as a miscellaneous civil appeal and numbered as No. 28 of 1933. It was dismissed by the learned District Judge on the 22nd of December, 1933 and a decree was prepared by his office and signed by the learned District Judge on the 5th of January, 1934. The case started on the complaint of Mr. Gundevia, Assistant

Magistrate of Gonda, was taken by Saiyid Zahiruddin, and one witness constable Mohammad Hasan was examined by him on behalf of the prosecution. The accused then moved for an adjournment of the case in order to enable them to file a revision against the order of the learned Sessions Judge of Gonda declining to withdraw the complaint filed by the Assistant Magistrate Mr. Gundevia.

The accused filed their application in this Court on the 26th of February, 1934, and the Hon'ble the Chief Judge admitted the application and directed the issue of notice to the opposite-party on the same date, and this is the application which I have now to dispose of.

I have heard the learned Counsel of both parties and have examined the record of the case.

The initial mistake committed by the learned Magistrate was that he did not follow the procedure laid down under section 476 of the Code of Criminal Procedure. That section prescribes the procedure which courts have to follow in respect of the offences mentioned in section 195 of the Code of Criminal Procedure. Section 476, sub-section 1 of the Code of Criminal Procedure runs as follows:

"When any Civil, Revenue or Criminal Court is, whether on application made to it in this behalf or otherwise, of opinion *that it is expedient in the interest of justice* that an enquiry should be made into any offence referred to in section 195, sub-section (1), clause (b) or clause (c), which appears to have been committed in or in relation to a proceeding in that Court, such Court may after such preliminary enquiry, if any, as it thinks necessary, *record a finding* to that effect and make a complaint thereof in writing signed by the presiding officer of the Court, and shall forward the same to a Magistrate of the first class having jurisdiction"

It was, therefore, incumbent upon the Magistrate who received the application, dated the 31st of July,

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1933, of Sheo Shankar Lal Patwari to record a finding that it was expedient in the interest of justice that an enquiry as desired by Sheo Shankar Lal Patwari should be made into the offences of sections 193 and 211 of the Indian Penal Code said to have been committed by Suraj Lal and his witnesses. I find, however, from the record that the learned Magistrate made no preliminary enquiry himself and passed no order of any kind whatsoever on the application made by Sheo Shankar Lal Patwari giving reasons for holding that offences under sections 211 and 193 of the Indian Penal Code had been committed in his Court in the course of the trial of the original case under section 324 of the Indian Penal Code against the Patwari and the other accused in that case. The complaint of the 4th of September, 1933, addressed to the Sub-Divisional Magistrate by Mr. Gundevia constitutes no compliance of the imperative provisions of section 476 of the Code of Criminal Procedure. That complaint is somewhat curiously worded and is also in parts argumentative. It in parts misquotes the evidence of the prosecution witnesses, who were charged with an offence of perjury under section 193 of the Indian Penal Code and this complaint further does not clearly specify what particular statements in the evidence of each witness the learned Magistrate held to be false, and what evidence he had in his possession which would go to prove the charge of perjury under section 193 of the Indian Penal Code against each of the accused persons. All these points would have been fully elucidated, if the learned Magistrate had, as required by section 476 of the Code of Criminal Procedure, held a preliminary enquiry to elicit the points in issue between the parties and to clarify his own thoughts on the subject. Had he given himself time to think, he would have realised that he, at the time when he acquitted Sheo Shankar Lal Patwari and others did not consider the story told by Suraj Lal and Ratti Pal Singh to be false, but that their complaint

was fully corroborated by the medical evidence of P. W. 7 (Babu Chunni Lal) and that there was no doubt that Suraj Lal and Ratti Pal Singh had been injured by a sharp-cutting weapon like a spear on or about the 21st of February, 1933. He would also have realized that he had not stigmatised the complaint of Suraj Lal and Ratti Pal Singh as false but had acquitted the accused rather reluctantly because the case against them had not been proved beyond all reasonable doubt. In this connection I cannot do better than quote once more the last paragraph in the judgment of acquittal passed by the Magistrate on the 17th of June, 1933:

“Thus a careful reading of the evidence leads me to conclude that the case against the accused has not been proved beyond reasonable doubt and I am *obliged* to acquit all the accused under section 258, I. P. C.”
(Cr. P. C.)

This ought to have made him hesitate for a long time before he filed the complaint against the injured persons and thus completely identified himself with the view of the case taken by Sheo Shankar Lal Patwari.

It also did not occur to the learned Magistrate Mr. Gundevia that just as he felt constrained to give the benefit of the doubt to the accused Bhagauti Singh, Sheo Shankar Lal, Somai Singh and Chandra Sekhar, so another Magistrate, who had to decide the complaint launched by Mr. Gundevia himself against the complainant Suraj Lal and his witnesses, might have felt equally well entitled to give the benefit of the doubt to Suraj Lal and his eye-witnesses and to hold that the story of Suraj Lal and the evidence of the eye-witnesses might well be true especially in the light of the medical evidence of Babu Chunni Lal, which went to corroborate the fact that Suraj Lal and Ratti Pal Singh had been actually struck with a sharp-cutting weapon. In this view of the matter there was no possibility of securing a conviction of Suraj Lal and his eye-witnesses for having launched, as alleged, a false case. All these

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considerations ought to have been clearly present in the mind of the Magistrate when he initiated a prosecution against the ill-fated Suraj Lal and his eye-witnesses at the instigation of Sheo Shankar Lal Patwari by filing a complaint addressed to the Sub-Divisional Magistrate of Tarabganj complaining against these persons that they had committed offences under sections 193 and 211 of the Indian Penal Code. The hasty and irregular conduct of the trying Magistrate in launching a prosecution against Suraj Lal and others also misled the learned Sessions Judge in appeal. There was no order of the trial Magistrate under section 476 of the Code of Criminal Procedure and the appeal under section 476B of the Code of Criminal Procedure was made not against any order of the trial Magistrate directing that a complaint should be filed against Suraj Lal and others, but it was an appeal against the complaint, dated the 4th of September, 1933, made by the Magistrate against them. The initial mistake committed by the trial Magistrate was further accentuated by the learned Sessions Judge of Gonda who treated the criminal appeal under section 476B of the Code of Criminal Procedure as a Miscellaneous Civil Appeal No. 28 of 1933 with the result that a decree with a memorandum of costs was prepared in this criminal case.

These serious irregularities led to a complete denial of justice to the applicants who have come up in revision before me. In *Keramat Ali v. Emperor* (1), it was held by two learned Judges of the Calcutta High Court that it was only where a Court was expressly of opinion that "it was expedient in the interests of justice that an enquiry should be made" into the offence of giving false evidence that an order under section 476 of the Code of Criminal Procedure could be made.

In *(Chaduvula) Munuswami Naidu v. Emperor* (2), it was held by a learned Judge of the Madras High Court that before a complaint under section 476 of the

(1) (1928) I.L.R., 55 Cal., 1312.

(2) (1928) A.I. R., Mad., 783.

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Code of Criminal Procedure was launched, it was necessary that a Court which thought that an offence mentioned in section 195, sub-section (1), clause (b) or (c) had been committed, should record a finding to that effect and after recording such finding, file a complaint against the persons who had committed those offences, that the provision to record a finding was not merely directory but it was made mandatory under section 476 of the Code of Criminal Procedure, and that when the section of the Code required a certain thing to be done, it was not open to the Court to say that it was optional for a Court to do it or not, and that, therefore, failure by the Court to record a finding was not merely an irregularity curable by section 537 of the Code of Criminal Procedure. It was further observed in that case that though courts ought to be anxious to put down perjury as much as possible, it was not every case of perjury that should form the subject of an enquiry, and it was only when the interests of justice required that a complaint ought to be made, that a complaint should be made.

In *Babu Shankar Sahai v. King-Emperor* (1), it was held by a single Judge of this Court that proceedings under section 476 of the Code of Criminal Procedure regarding the institution of a complaint ought not to be undertaken on the application of private persons unless the prosecution was clearly in the interest of the State and was reasonably certain to result in a conviction. I am in entire agreement with the principle enunciated in this case.

In *Surendra Nath Jana v. Kumeda Charan Misra* (2), it was held that there must be an express finding by the Court initiating a prosecution that "it was expedient in the interest of justice" that a complaint should be made into the offence of giving false evidence under section 476 of the Code of Criminal Procedure, and that such an express provision for a finding to be

(1) (1930) 7 O.W.N., 638.

(2) (1930) A.I.R., Cal., 352.

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recorded was not satisfied by inferences which might or might not be drawn from other findings of facts arrived at by the Court.

In a still more recent ruling of the Calcutta High Court decided last year reported in *Nabani Nath Mukherjee and another v. Emperor* (1), it was held that in the absence of an express finding that it was expedient in the interests of justice that an enquiry should be made into an offence of perjury or of filing a false complaint, a complaint made under section 476 of the Code of Criminal Procedure was not maintainable.

Apart from the weight of the authorities cited above I am clearly of opinion that the facts and circumstances of this case render it extremely inexpedient, to say the least, to launch any complaint against the injured Suraj Lal and Ratti Pal Singh. The fact that they did receive serious injuries is proved by the medical evidence. No enmity has been alleged by the accused in the original case as to why they should be falsely implicated. The evidence of *alibi* which was believed by the learned trial Magistrate does not necessarily and irresistibly lead to the conclusion that the accused are innocent. The evidence of *alibi* is purely oral and is not supported by any irrefutable documentary evidence of proved and unimpeachable genuineness. Moreover when Suraj Lal and Ratti Pal Singh stand in the position of accused persons it has to be proved affirmatively that the complaint filed by Suraj Lal was false and the evidence given by his witnesses was perjured. There is no such evidence, oral or documentary, to prove the falsehood of the complaint or the untruthfulness of the evidence given by the prosecution witnesses on behalf of Suraj Lal. The medical evidence fully corroborates the truth of the story told by Suraj Lal and Ratti Pal Singh, and the mere inference from the *alibi* evidence proved by Sheo Shankar Lal cannot in my opinion justify the conclu-

(1) (1933) A.I.R., Cal., 117.

sion that the complaint of Suraj Lal was false. It is not alleged that the injuries on the persons of Suraj Lal and Ratti Pal Singh were manufactured or faked, and in this state of the record no prosecution for perjury or for bringing a false case could possibly succeed, and therefore no such prosecution ought to have been launched.

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It has been held in *Chothu Ram v. Emperor* (1), that an order under section 476 of the Code of Criminal Procedure should be made either at the close of the proceedings in the original criminal trial or so shortly thereafter that it might reasonably be said that the order under section 476 of the Code of Criminal Procedure was a part of the proceeding in that criminal trial, and that the power conferred by section 476 could be exercised by the Court only in the course of the judicial proceeding or at its conclusion or so shortly thereafter as to make it really the continuation of the same proceedings in the course of which the offence was committed, and that the delay in starting the proceeding under section 476 of the Code should not receive any encouragement as it was highly unjust and improper. In this case a Full Bench ruling of the Madras High Court reported in *Rahimatullah Sahib v. Emperor* (2), was followed. In the present case I am sure that had any of the accused at the time of his acquittal on the 17th of June, 1933, moved the Magistrate to take proceedings under section 476 of the Code of Criminal Procedure, he would have at once declined to take any such action in view of the reasons given by him in his order of acquittal. Six weeks later on the 31st of July, 1933, Sheo Shankar Lal moved the Magistrate to take proceedings under section 476 of the Code of Criminal Procedure, and the only reason which he gave in that application was that as the Magistrate had believed the evidence of *alibi* furnished by the applicant Sheo Shankar Lal, so it followed necessarily that the

(1) (1930) A.I.R., Lah., 316.

(2) (1908) I.L.R., 31 Mad., 140.

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complaint of Suraj Lal and the evidence of the eye-witnesses examined in support of the complaint were false. This special pleading found favour with the learned trial Magistrate, who without recording any order directing that a complaint be filed as required by section 476 of the Code of Criminal Procedure drew up a complaint against Suraj Lal and his witnesses and addressed that complaint to the Sub-Divisional Magistrate of Tarabganj on the 4th of September, 1933. Not only was the procedure adopted by the learned trial Magistrate illegal and unjustifiable, but on the merits too there was no case made out against Suraj Lal and his witnesses.

For the reason given above I allow this application for revision, set aside the order of the learned Sessions Judge of Gonda refusing to withdraw the complaint filed by Mr. Gundevia against the applicants and direct that that complaint be consigned to the record-room without any further enquiry into the alleged offences mentioned therein.

Application allowed.

APPELLATE CIVIL

Before Mr. Justice Rachhpal Singh and Mr. Justice H. G. Smith

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BAIJ NATH (DEFENDANT-APPELLANT) *v.* PARMESHURI
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Indian Limitation Act (IX of 1908). Articles 111 and 116—Sale of property subject to mortgage—Sale consideration left with vendee to pay off mortgage—Stipulation that balance after payment of mortgage to be returned to vendor—Suit to recover balance, whether governed by Article 111 or Article 116—Commencement of the period of limitation—Articles 111 and 116, Limitation Act, when apply—Transfer of Property Act (IV of 1882), sections 3 and 6(e)—Actionable claim—Right to

*Second Civil Appeal No. 161 of 1932, against the decree of Babu Gopendra Bhushan Chatterji, Subordinate Judge of Rae Bareli, dated the 11th of May, 1932, modifying the decree of Sheikh Ekbal Husain, Munsif. Dalmau, Rae Bareli, dated the 31st of July, 1931.