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only passes the right, title, and interest of those who are parties to the suit—*Máruti Nárâyan* v. *Lálchand*(1), and, therefore, although the debt contracted by Abáji and Gopál may have been for a family purpose, the plaintiff's share in the southern half, (the subject of this suit), cannot be affected by the execution proceedings in Krishnáji's suit. We must, therefore, reverse the decree of the Court below, and declare that the sale to the defendant No. 2 is void as against the plaintiff's one-fifth share in the southern half of the house. The plaintiff to pay the defendants four-fifths of their costs throughout.

Decree reversed.

(1) I. L. R., 6 Bom., 564.

FULL BENCH.

CRIMINAL REVISION.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice West, and Mr. Justice Nánábhái Haridás.

1886. *December* 20.

QUEEN-EMPRESS *v.* BHARMA' BIN NINGA'PPA'.*

Criminal Procedure Code (Act X of 1882), *Sec.* 164—*Statement recorded by a Magistrate—Evidence—Judicial proceeding—Giving false evidence—Indian Penal Code (Act XLV of* 1860), *Secs.* 191 *and* 192.

A statement taken by a Third Class Magistrate under section 164 of the Code of Criminal Procedure (Act X of 1882),such Magistrate not having authority to carry on the preliminary inquiry in the case, is not evidence in a stage of a judicial proceeding within the meaning of sections 191 and 193 of the Indian Penal Code, such that, when the statement is contradicted afterwards before the Magistrate having jurisdiction and exercising it in the preliminary inquiry, it will form a sufficient basis for an alternative charge of giving false evidence in a judicial proceeding.

IN the course of a police investigation into the murder of one Bálápá the accused Bharmá made a statement on solemn affirmation, before a Third Class Magistrate, that he had seen one Dhanáppá stab Bálápá.

It was mainly in consequence of this statement that Dhanáppá was prosecuted on a charge of murder. Bharmá was called as a witness for the Crown at the preliminary inquiry before the

* Criminal Revision, No. 259 of 1886.

committing Magistrate. In his examination he stated that he knew nothing of the murder, had given no information to the police, and had made no previous statement before the Third Class Magistrate. Thereupon Bharmá was charged, under section 193 of the Indian Penal Code, with giving false evidence in a stage of a judicial proceeding, in that he had made two contradictory statements—one before the Third Class Magistrate, the other before the committing Magistrate—one of which statements he knew or believed to be false. He was convicted of this offence by the First Class Magistrate of Sholápur, and sentenced to nine months' rigorous imprisonment. In appeal, the Sessions Judge confirmed the conviction and sentence.

The accused applied to the High Court under its revisional jurisdiction.

The Court (West and Birdwood, JJ.,) after examining the record of the case referred the following question to the Full Bench :—

"Whether a statement made before a Magistrate in the course of a police investigation is made in a stage of judicial proceeding so as to suffice as a basis, in part, of an alternative charge of an offence under section 193 of Indian Penal Code."

Mánekshán Jehángirshán for the accused :—The statement before the Third Class Magistrate was not made in a stage of a judicial proceeding. He was not qualified to hold a preliminary inquiry in a case of murder. He was not acting in a judicial capacity under section 164 of the Criminal Procedure Code. Therefore he was not competent to administer an oath to the person making the statement. The Magistrate not exercising the functions of a Court under section 164, the statement taken by him is not evidence.

Ganpat Sadáshiv Ráv :—Section 164 of the Code of Criminal Procedure provides that the Magistrate should record the statement of an informant in the same manner in which evidence is recorded. Chapter XXV of the Code shows how evidence is to be recorded. The evidence of witnesses is given and recorded on oath or solemn affirmation. Section 4 of the Oaths Act

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(X of 1873) empowers a Court to administer an oath. The Magistrate who records a statement under section 164 is a Court. He is, therefore, competent to administer an oath to the person making the statement. If the statement is false, the person is liable to a charge of giving false evidence under section 191 of the Indian Penal Code. He is also liable under section 193 of the Penal Code. The police investigation is but preliminary to the proceedings before the committing Magistrate. The statement is, therefore, made at a stage of a judicial proceeding within the meaning of section 193 of the Penal Code. Refers to *Empress* v. *Malka*(1); *Imperatrix* v. *Irbasápá*(2); *Queen Empress* v. *Parshrám Raysing*(3).

PER CURIAM :—The Court is of opinion that a statement taken by a Third Class Magistrate under section 164 of the Code of Criminal Procedure, such Magistrate not having authority to carry on the preliminary inquiry in the case, is not evidence, in a stage of a judicial proceeding within the meaning of sections 191 and 193 of the Indian Penal Code, such that when the statement is contradicted afterwards before the Magistrate having jurisdiction, and exercising it in the preliminary inquiry into an accusation of murder, it will form a sufficient basis for an alternative charge of giving false evidence in a judicial proceeding.

Conviction and sentence reversed.

(1) I. L. R., 2 Bom., 643. (2) I. L. R., 4 Bom., 479 (3) I. L. R., 8 Bom., 216.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887. *March* 22.

SHANKAR MURLIDHAR, (DEFENDANT No. 2), APPLICANT, *v.* MOHANLA'L JADURA'M, (PLAINTIFF), OPPONENT.*

Contract Act (IX of 1872), Sec. 108, Exception I—Possession with consent of owner—Bailment—Bailee—Sale by bailee of goods bailed—Title of vendee.

The general rule laid down by section 108 of the Contract Act, that no seller can give to a buyer a better title than he has himself, is qualfied by Exception I to that section. But the possession contemplated by that exception does not extend to every case of detention of chattels with the owner's consent. The exception has particular relation to the cases of persons allowed by owners to have

*Application, No. 200 of 1886.