

1878
 BONOMALEE
 NAG
 v.
 KOYLASH
 CHUNDER
 DEY.

the point in this Court, I think that I ought to follow it, and not to give effect to any doubts of my own.

I do not think this case distinguishable from that of *Dooma Sahoo v. Joonarain Loll* (1), and, therefore, upon the authority of that decision, and without expressing any opinion of my own, I hold that the decision in the suit brought by Dhonomonee, against the present defendant, is not binding upon the present plaintiff.

The only objection, therefore, taken to the decision of the Court below fails, and this appeal must be dismissed with costs.

PRINSEP, J.—On the authority of the case of *Dooma Sahoo v. Jonarain Loll* (1) I concur in holding that a mortgagee not in possession is not barred by a decision, affirming a right of way in a suit between a third party and the mortgagor, from suing to declare that there is no such right of way, he having no knowledge of that suit, which was, however, decided without any collusion between the parties to it. The point is, I admit, by no means free from doubt, but we cannot, I think, hold, that a mortgagor in possession so far represents the entire estate as to affect the right of a mortgagee.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Morris and Mr. Justice White.

IN RE EMPRESS v. MANNOO TAMOOLEE.*

1879.
 Feb. 19.

Evidence—Admissibility of Secondary Evidence of Confession—Confession not taken in accordance with s. 346 of Criminal Procedure Code (X of 1872).

When the confession of a prisoner under s. 122 of the Criminal Procedure Code was not taken in the manner provided by s. 346, and was, therefore, defective,—*held*, that the evidence of the Recording Officer, that such confession was actually made, was inadmissible to remedy the defect.

Reg. v. Bai Batan (2) followed.

* Criminal Reference, No. 53 of 1879, from an order made by J. F. Browne, Esq., Officiating Sessions Judge of Patna, dated 28th January 1879.

(1) 12 W. R., 362.

(2) 10 Bom. H. C. Rep., 166.

THIS case was submitted to the High Court under the provisions of s. 263 of the Criminal Procedure Code. The prisoner was charged with the murder of a woman named Bojya, and, on being arrested, he made a confession of his guilt before the Deputy Magistrate. On his trial before the Sessions Judge he was found guilty on that confession, and sentenced to death; three of the jury acquitting him, and the other two agreeing in convicting him. At the trial, however, an objection was taken on behalf of the prisoner that there had been irregularities committed in the manner in which the confession had been recorded. It being admitted that the prisoner did not affix his mark thereto; that the confession was not recorded in the vernacular; and that there was no proper certificate attached to it in accordance with s. 346 of the Criminal Procedure Code, the only certificate being one under s. 122, it was, therefore, contended that the confession could not be received in evidence, and that, by a ruling of the Bombay High Court in the case of *Reg. v. Bai Batan* (1), the evidence of the Magistrate as to the confession was not admissible, and, therefore, the prisoner was entitled to an acquittal. This objection was overruled, and the prisoner was convicted and sentenced to death.

On the case coming before the High Court, the *Legal Remembrancer* (Mr. O'Kinealy) appeared for the Crown.

Baboo *Omerendro Nath Chatterjee* for the prisoner.

The following judgments were delivered:—

MORRIS, J.—The confession made by the prisoner on the 17th November 1878, must, I think, be treated as a confession recorded under the provisions of s. 122 of the Criminal Procedure Code. The prisoner was arrested by the Police on the afternoon of the 16th, and carried early the next morning before the Deputy Magistrate, Mr. White, who was then at a place (Bankipore) outside the limits of the division of which he had charge. Mr. White recorded the prisoner's confession, and attached to it the certificate required by s. 122. It is clear from

(1) 10 Bom. H. C. Rep., 166.

1879
 EMPRESS
 v.
 MANNOD
 TAMOOLKE.

this that Mr. White considered himself to be acting under the terms of that section. Subsequently, Mr. White returned to Barh within the limits of his own division, and, having power to do so, took up the case against the prisoner, conducted the preliminary enquiry, examined the prisoner as prescribed by s. 346, and finally, on the same date, the 20th November, committed him for trial before the Court of Session.

The confession of the 17th November is, undoubtedly, defective, inasmuch as it does not bear the proper certificate, and it is not signed or attested by the mark of the prisoner. In these respects, the confession was not taken in the manner provided in s. 346 as prescribed by s. 122. The question, therefore, arises, whether these omissions can be rectified under the authority contained in the last clause of s. 346, by taking the evidence of the Recording Officer that the prisoner duly made the statement recorded. As at present advised, I think I ought to follow the ruling of the Full Bench of the Bombay High Court, on this point as given in the case of *Reg. v. Bai Batan* (1), and hold that the imperfect record of the confession, taken under the terms of s. 122, cannot be repaired by secondary evidence. The special and express provision made to meet the case of an imperfect record of examination of a prisoner, in the course of a preliminary enquiry, cannot, in my opinion, be made applicable to the case of an imperfect record of a confession made before any Magistrate whilst the prisoner is still in the hands of the Police, simply because such confession has to be taken "in the manner" provided in s. 346. In this view, therefore, the confession of the 17th November is not admissible in evidence, and must be excluded from consideration altogether.

It remains to consider whether, setting this confession aside, there is sufficient evidence on the record to convict the prisoner. (The learned Judge then went into the rest of the evidence, and held it sufficient to convict the prisoner.)

WHITE, J.—I am of the same opinion. I agree that the statement made by the prisoner on the 17th November, and which is alleged to amount to a confession, is inadmissible in

• (1) 10 Bom. H. C. Rep., 166.

evidence. It was clearly taken under s. 122 of the Criminal Procedure Code. The prisoner was brought before Mr. White simply for the purpose of having his alleged confession recorded, and there are no grounds for saying that, when Mr. White took down the prisoner's statement, he was examining the prisoner in the course of a preliminary enquiry, or that he intended to do so. The circumstance that Mr. White was also the committing Magistrate, furnishes no reason, in my opinion, why, upon Mr. White's proceedings on the 17th of November, a construction should be put which is contradicted by the facts. The alleged confession of the 17th November is defective for the reasons stated by my brother, Mr. Justice Morris, and upon the authority of the case in *Reg. v. Bai Batan* (1), the defects cannot be remedied by examining Mr. White.

We are not at liberty, therefore, to look at the alleged confession of the 17th November. It appears to me, however, that independently and irrespective of it, there is no reasonable doubt upon the evidence that the prisoner is guilty of the offence with which he is charged. (The learned Judge then went through the rest of the evidence, and agreed in convicting the prisoner.)

Conviction affirmed.

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

GOLUCK CHUNDER MASANTA AND OTHERS (DEFENDANTS) v. NUNDO
COOMAR ROY (PLAINTIFF).*

1878
Dec. 2.

Suit for Possession—Specific Title—Adverse Possession.

Where a person claims possession of property under a specific title, coupled with an allegation that he has been in possession of that property for more than twelve years under that title, he is entitled to a decree on the strength of his twelve years' possession, even though he fail to make out his specific title.

(1) 10 Bom. H. C. Rep., 166.

* Appeal, under s. 15 of the Letters Patent, against the decree of Mr. Justice Tottenham, dated 9th July 1878, in appeal from Appellate Decree, No. 91 of 1878.