1887

RAM-CULPO BHATTACHARJI v. RAM CHUNDER SHOME.

and in "security" I include "decree," for the benefit of one individual party, he can waive it, if he thinks fit, and consequently the only question which arises in a case of this kind is the same question as that which arises under Art. 75 of Sch. II of the Limitation Act, namely, whether the decree-holder did, at the time when default was made, waive his right to the whole sum that was decreed to him or whether he did not.

On the findings in this case, and on the facts in this case, we do not think there can be any doubt that he did waive it, because what he says, and what is uncontradicted, is that, although there was a default in the payment of an instalment, the creditor accepted so much of it as was not paid at the time afterwards, and therefore it is obvious that he did waive it, because he did not, as he was not bound to, insist upon putting into force the decree for the whole amount; and inasmuch as this proviso was for his benefit he might or might not take advantage of it as he pleased. Under these circumstances we think that this creditor did waive the right which he had under the decree to enforce it for the whole amount in the event of a default being made in the payment of any instalment, and having waived it, the decree still remained a decree for the recovery of the sum decreed by instalments, and therefore the Statute of Limitations did not run against him.

For these reasons we think that the Judge was wrong in holding that this decree was barred by limitation, and his judgment must be reversed with costs.

T. A. P. *Appeal allowed.*

CRIMINAL REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Norris.

QUEEN-EMPRESS *v.* CHANDU GOWALA AND ANOTHER.*

1887 *March* 21.

Magistrate, Jurisdiction of—Criminal Procedure Code (Act X of 1882), s. 349 — Penal Code, Act XLV of 1860, s. 411—Receiving stolen property.

Under s. 349 of the Criminal Procedure Code a Second Class Magistrate transmitted a case to the District Magistrate, being of opinion that a more

* Criminal Reference No. 51 of 1887, made by T. Smith, Esq., Sessions Judge of Gya, dated the 12th of March, 1887.

1887

QUEEN-EMPRESS v. CHANDU GOWALA.

severe punishment was deserved than he was empowered to inflict. The District Magistrate returned the record to the Second Class Magistrate, directing him to commit the case to the Sessions Court. The committal directed was duly made. The High Court refused to interfere in the matter, holding that the proceedings of the Second Class Magistrate were not illegal, and that there was nothing done which took away the jurisdiction of the Second Class Magistrate to commit.

Two persons were accused before Baboo Chandra Bhusan Chakravarti, a Magistrate of the second class, of dishonestly receiving stolen property, and were found guilty; the Magistrate, there being a previous conviction against one of the accused for a like offence, considering that the case required a higher punishment than he, as Second Class Magistrate, was empowered to give, forwarded the two accused to the District Magistrate to be dealt with in accordance with s. 349 of the Criminal Procedure Code.

The District Magistrate considered that the case was a bad one, and returned the record to the Second Class Magistrate, directing him to commit the case to the Sessions. The accused were, therefore, charged under s. 411 of the Penal Code, and were committed to the Sessions Court for trial.

The Sessions Judge, considering that the order of the District Magistrate and the final order of commitment by the Second Class Magistrate to be illegal on the authority of the case of *Queen-Empress* v. *Havia Tellapa* (1), reported the matter to the High Court, recommending that the order of commitment should be quashed, and that the District Magistrate should be ordered to dispose of the case, committing it to the Sessions himself should he think that the case was one for the Sessions Court, and remarking that the prisoner, against whom the previous conviction had been charged, had since died in jail.

No one appeared for before the High Court, and the Court (PETHERAM, C.J., and NORRIS, J.) passed the following order:—

We do not think that what happened took away the jurisdiction of the Second Class Magistrate to commit the case to the Sessions, and as his proceedings were not illegal we decline to interfere; the Sessions Judge must proceed to try and dispose of the case.

T. A. P. *Order of committal upheld.*

(1) I. L. R., 10 Bom., 196.