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the mode of enforcing the liability was a matter of procedure and the Insolvency Court being competent to decide questions of title could enforce it. The other cases cited are on the liability of the family property for family debt. That is not the issue in this case. The issue is whether the properties can be sold in execution of these decrees.

A question was raised before us that the properties claimed by the appellant were not in fact assigned to her separately. This is a question of fact, and the learned Subordinate Judge has not decided it. His judgment proceeds on the assumption that there was a partition and that the properties claimed were so assigned to the appellant. The materials before us are not sufficient to come to any conclusion in this respect.

I would set aside the orders of the learned Subordinate Judge, and remand the cases to him to decide whether in fact the properties claimed by the appellant were really, on a bona fide partition, separately assigned to her before the institution of the suit. Any property which may be found to have been so assigned to her will be released from attachment.

The appeals are, therefore, allowed, and the cases are remanded. In the circumstances of the case, the parties will bear their own costs.

LUBY, J.—I agree.

Appeals allowed.
Cases remanded.

REVISIONAL CRIMINAL.

1934.

August, 9.

Before Courtney Terrell, C. J. and Luby, J.

DAROGA MAHTO

v.

THE KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 195 (*1*) (*b*) *and* 476—*Penal Code*, 1860 (*Act XLV*

* Criminal Revision no. 330 of 1934, from an order of R. B. Beevor, Esq., I.C.S., Sessions Judge of Bhagalpore, dated the 1st May, 1934.

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of 1860), section 211—protest petition by informant after cognizance taken by magistrate on police complaint under section 211—magistrate, jurisdiction of, to proceed with police complaint—rejection of protest petition without enquiry, whether bad—omission to examine informant on oath, whether mere irregularity.

When once the magistrate has taken cognizance of a police complaint under section 211 of the Penal Code, 1860, nothing that subsequently happens, such as the filing of a protest petition by the accused, and nothing in section 195 (1) (*b*) of the Code of Criminal Procedure, 1898, can operate to deprive him of jurisdiction to proceed thereon according to law.

Where, therefore, *after* the magistrate had taken cognizance of the police complaint under section 211 the informant filed a protest petition impugning the police report and asking for an opportunity to prove his case, and the magistrate rejected the petition without enquiry and proceeded with the complaint and eventually committed the accused to the Court of Sessions where he was tried and convicted.

Held, that the procedure adopted by the magistrate was right. *Permanand Brahmachari* v. *King-Emperor*(1) and *Subhag Ahir* v. *The King-Emperor*(2), followed.

Ramdhari v. *The King-Emperor*(3), overruled.

Shaikh Muhammad Yasin v. *King-Emperor*(4), *Daroga Gope* v. *King-Emperor*(5) and *Queen-Empress* v. *Sham Lal*(6), distinguished.

Held, further, that the omission of the magistrate to examine the informant on oath after he had filed the protest petition was, at most, an irregularity.

Bharat Kishore Lal Singh Deo v. *Judhistir Modak*(7), followed.

The facts of the case material to this report are set out in the judgment of Luby, J.

(1) (1927) 10 Pat. L. T. 618.
(2) (1931) I. L. R. 11 Pat. 155.
(3) (1928) 9 Pat. L. T. 236.
(4) (1924) 6 Pat. L. T. 457.
(5) (1925) I. L. R. 5 Pat. 33.
(6) (1887) I. L. R. 14 Cal. 707, F. B.
(7) (1929) I. L. R. 9 Pat. 707, S. B.

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DAROGA MAHTO v. THE KING EMPEROR.

Satyendra Nath Bannarji, for the petitioner.

S. M. Gupta as *amicus curiæ*.

LUBY, J.—Daroga Mahto has been convicted by the Assistant Sessions Judge of Bhagalpur and sentenced to four years' rigorous imprisonment under section 211 of the Indian Penal Code; and his appeal has been dismissed by the Sessions Judge on May, 1934.

The charge against him was that he had laid a false complaint of arson against Tulshi Rai and others at Bihpur police-station on October 27, 1933.

The proceedings against him were instituted in the following manner. The sub-inspector of police after enquiring into the arson case submitted a final report "maliciously false" and prayed for prosecution of the informant under section 211, Indian Penal Code. That was on November 7. A week later the Subdivisional Magistrate took cognizance of the sub-inspector's complaint and issued a summons to Daroga Mahto, fixing November 30 for his trial under section 211. On November 28 Daroga came to Court and filed a protest petition impugning the police report and asking for an opportunity to prove his arson case. The Magistrate rejected his petition without enquiry and proceeded with the trial and eventually committed Daroga to Sessions, where he was tried and convicted and sentenced as mentioned above.

Now the learned advocate for Daroga Mahto asks this Court to set aside the proceedings as void *ab initio*, on the ground that the Magistrate was bound to treat the protest petition as a complaint and to enquire into it before proceeding with the trial under section 211, Indian Penal Code; and was also bound to file a complaint himself against Daroga Mahto under section 476 of the Criminal Procedure Code, if he still wished to have Daroga tried under section 211 after enquiring into his arson case.

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Reliance is placed upon the order passed in *Ramdhari Gope* v. *King Emperor*(1). In that case Jwala Prasad, J. sitting singly based his order upon the decision made by a Division Bench in *Yasin's* case(2). But the circumstances of *Yasin's* case(2) were quite different from those of *Ramdhari's* case(1). Possibly the learned Judge was misled by the head-note to *Yasin's* case(2) which is inaccurately worded. In *Yasin's* case(2) the protest petition was filed in the Magistrate's Court *before* the police had submitted their final report. Their Lordships held that " by making his complaint to the Court the informant has withdrawn the information from the category of mere police proceedings and raised it to the category of a proceeding in Court ". A similar conclusion was reached under similar circumstances by another Division Bench in *Daroga Gope's* case(3). But in *Ramdhari's* case(1) the protest petition was not filed till *after* the Magistrate had summoned Ramdhari on the police complaint under section 211. The Magistrate took no action on the protest petition but continued his enquiry under section 211 and committed Ramdhari to Sessions. The commitment was quashed on the ground that Ramdhari could not be tried under section 211 unless and until the Magistrate himself made a complaint under section 476 of the Criminal Procedure Code.

In the following year Macpherson, J. dealt with the same point differently, in his judgment in *Parmanand Brahmachari* v. *King-Emperor*(4). In that case the protest petition was filed *after* the Magistrate had taken cognizance of the police complaint under section 211. It was held that when once the Magistrate had taken cognizance of the police complaint nothing that could subsequently happen (such as the filing of a protest petition) and nothing in section 195

(1) (1928) 9 Pat. L. T. 236.
(2) (1924) 6 Pat. L. T. 457.
(3) (1925) I. L. R. 5 Pat. 33.
(4) (1927) 10 Pat. L. T. 618.

(*1*) (*b*) of the Code of Criminal Procedure could operate to deprive him of jurisdiction to proceed thereon according to law. The judgment contains an admirable exposition of the points of law involved, and requires no supplement or comment from me. The views therein expressed were quoted and approved by a Division Bench [Macpherson and Scroope, JJ.] in *Subhag Ahir's* case(1) from which I may quote just one sentence which puts the whole matter in a nutshell:

"If cognizance has been taken of the offence under section 211 on the complaint of the police officer before the informant has by an application to the Magistrate traversed the police report, repeated his charge, and asked for a judicial investigation, section 195 (*1*) (*b*) does not become applicable; but where no cognizance has been taken by the Magistrate of the offence under section 211, the application of the informant if within the definition of a complaint does bring section 195 (*1*) (*b*) into operation."

Personally, I was under the impression that the law on this point was regarded as settled by the decisions, in *Parmanand Brahmachari* v. *King-Emperor*(2) and *Subhag Ahir's* case(1). But strangely enough neither of those decisions made any reference to the order passed in *Ramdhari's* case(3). So *Ramdhari's* case(3) is still being quoted as not yet overruled. I think the time has come for a pronouncement that the order passed in *Ramdhari's* case(3) was a mistaken order and should be disregarded in future.

The learned advocate for Daroga Mahto has invited our attention to the Full Bench decision of the Calcutta High Court in the case of *Queen-Empress* v. *Sham Lal*(4). In that case Sham Lal had laid an information before the police, and the police had

(1) (1931) I. L. R. 11 Pat. 155.
(2) (1927) 10 Pat. L. T. 618.
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reported that his information was false; the District Magistrate passed an order for prosecuting Sham Lal under section 211; then Sham Lal appeared before the Magistrate, asking that his case might be investigated and his witnesses summoned. This application was refused and the Magistrate sent the case under section 211 to a Deputy Magistrate for enquiry or trial. On reference to the Full Bench, it was held that the District Magistrate had upon the police report jurisdiction to make his order for prosecuting Sham Lal under section 211; but that in the peculiar circumstances of the case the District Magistrate had not exercised a sound judicial discretion. I do not consider that this decision helps Daroga Mahto in any way. The quality of judicial discretion has to be estimated on a consideration of the circumstances in each case. The decision does, however, show that the District Magistrate had jurisdiction to make his order. It does not help us as regards section 195 and section 476 of the Code of Criminal Procedure, because both those sections have been amended since.

It is argued that the police will have an unfair advantage over members of the public, because the sub-inspector can attach his complaint under section 211 to his final report and get the Magistrate to take cognizance of the complaint under section 211 before the informant can ascertain the result of the police enquiry. This argument will not hold water, because it ignores the Magistrate who plays the chief part in such proceedings. The Magistrates are there to see fair play between the police and the general public; and so far as I am aware, they perform that duty very efficiently. After all, a Magistrate is not bound to issue process at once on any complaint. He can if he thinks fit make a preliminary enquiry under section 202, Criminal Procedure Code, or have it made by some one else. And in dealing with police complaints the Magistrate as local head of the police has

an even freer hand. If he has any doubts about a complaint made under section 211, Indian Penal Code, by a sub-inspector, he can return it to the sub-inspector for reconsideration, or send it to some superior police officer for his opinion. I think that the Magistrates can ordinarily be trusted to use their powers with discretion, and not to start prosecutions under section 211 without good and sufficient cause. If once in a while a Magistrate is too hasty, the person aggrieved can invoke the aid of this Court. But such invocation should be done at once, not after a lapse of several months as has been done in the present case. It is difficult to believe in the genuineness of a grievance which has been kept up the sleeve so long. And how can we hold that the Magistrate has failed to exercise a sound judicial discretion, after the Magistrate's use of his discretion has been fully justified by the result of the Sessions trial?

In the case which is now under our consideration, Daroga Mahto informant did not lodge his protest petition until *after* the Magistrate had taken cognizance of the offence under section 211, Indian Penal Code, on the sub-inspector's complaint. In those circumstances, the Magistrate was not bound to stay his proceedings under section 211, Indian Penal Code; though he could have done so if he had thought fit. And if he did not think fit to stay his proceedings on the sub-inspector's complaint, he was not bound to make a complaint of his own against Daroga under section 476, Criminal Procedure Code. He had jurisdiction to proceed as he did proceed. And I am of opinion that he used a sound judicial discretion in so proceeding. So there is no call for interference in revision.

It is also argued that the Magistrate was bound to examine Daroga Mahto on oath as soon as the protest petition was filed; and that his omission to do this was a serious illegality. About this I would say that the examination of Daroga on oath would be

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a mere formality, if the Magistrate had already made up his mind to proceed with the sub-inspector's complaint first. At most it would be an irregularity, as observed in the case of *Bharat Kishore Lal Singh Deo* v. *Judhistir Modak*(1).

LUBY, J.

Lastly the learned advocate asks us to interfere in the matter of sentence. But four years' rigorous imprisonment cannot be called excessive punishment for bringing a false charge of arson.

I would refuse this application.

We desire to acknowledge the assistance which we received from Mr. S. M. Gupta who at our request appeared as *amicus curiæ*, there being no appearance on behalf of the Crown.

COURTNEY TERRELL, C.J.—I agree.

Rule discharged.

(1) (1929) I. L. R. 9 Pat. 707, S. B.