1877.

GANGA'DHAR SHIVKARN v. THE COLLECTOR OF AHMEDNAGAR.

We reverse the decrees of the Courts below, and remand this cause to the Subordinate Judge in order that he may refer the plaintiff, pursuant to Section 32 of Act XIV. of 1869, to the District Judge, in whose Court the plaint must be presented. The District Judge should proceed in the cause in the ordinary way as upon the institution of a new suit, and should have regard to this judgment. The costs already incurred in the Subordinate Judge's and District Judge's Courts and in this special appeal must abide the final result of the cause.

Decrees reversed.

[APPELLATE CRIMINAL JURISDICTION.]

Before Mr. Justice Kemball and Mr. Justice Nanábhái Haridás.

March 8.

In re ANNAPURNA'BA'I.*

The Code of Criminal Procedure (Act X. of 1872,) Chapter XXX.—Property alleged to be stolen—Its restoration—Order for its disposal by 2nd Class Magistrate—Reversal of the order by the Magistrate of the District—The effect of reversal.

A was charged before the Police with theft of certain property. The Police considered that no theft had been committed, and reported the matter to a 2nd Class Magistrate, who, agreeing with the Police, ordered the property to be restored to A. On application by the complainant, the District Magistrate found that A had removed, though not dishonestly, the property from B, a deceased person; and ordered the property to be given by the Police to B's heirs. It was so given.

Held that the provisions of Chapter XXX. of the Code of Criminal Procedure do not apply to such a case. Sections 415, 416, and 417 contemplate proceedings preliminary to, and independent of, inquiry. Upon general principles, where there has been an inquiry, or a trial, and the accused person is discharged or acquitted by any Criminal Court, that Court is bound to restore that property into the possession of the person from whom it is taken, unless, as provided for by Section 418, such Court is of opinion that "any offence appears to have been committed" regarding it, then such order as appears right for the disposal of the property may be made.

The High Court cannot direct the restoration of the property already delivered by the Police under the illegal order of the District Magistrate.

THIS was a reference by W. Wedderburn, Session Judge of Thána, under Section 296 of the Code of Criminal Procedure.

The circumstances of the case are as follows:—

* Criminal Reference No. 10 of 1877.

1877.

In re ANNAPURNA'BA'I.

One Annapurnábái and her brother Hari Vithal Patwardhan lived in the same house and carried on business together. On the death of the latter, Annapurnábái—as she herself admitted—took away a number of documents in his name and lived separate from his widow, Rakhmábái. Purshotam, the brother of Rakhmábái, charged Annapurnábái before the chief constable of Kalyán with having committed theft of those documents. The chief constable, after making such inquiries as he deemed necessary, reported, on the 27th of April 1876, to the 2nd Class Magistrate of Kalyán, apparently under Section 127 of the Code of Criminal Procedure, that, in his opinion, no theft had been committed. Pending the orders of the 2nd Class Magistrate, the constable kept the documents in his own possession.

On the 6th of May following, the 2nd Class Magistrate directed the chief constable to examine both Annapurnábái and Rakhmábái. On the 12th and 23rd some further information was sent for and obtained; and on the 19th June 1876 the 2nd Class Magistrate passed the following order:—

"No one states that the documents alleged to have been stolen were stolen by Annapurnábái from the possession of Rakhmábái. When Rakhmábái's husband was alive, the documents were in the possession of Annapurnábái, who had the key of the box. When the Police made inquiry, Annapurnábái produced them, and from the evidence it appears that Annapurnábái and Rakhmábái's husband carried on money dealings together, and that they lived together. This, therefore, appears to be a matter of civil dispute. It is not, therefore, necessary to take further steps. A record may be kept, and the documents returned to the person from whose possession the Police obtained them, and a receipt should be sent."

Dissatisfied with this order, Rakhmábái's brother, Purshotam, petitioned the Magistrate of the district, who, by an order dated the 28th of June 1876, stopped the delivery of the documents to Annapurnábái, and, subsequently by an order, dated the 11th July 1876, addressed to the 2nd Class Magistrate of Kalyán, directed the Police to make the documents over to the heirs of Hari Patwardhan. In this order the District Magistrate says that there is no evidence to show that Annapurnábái stole the documents

1877.

In re ANNAPURNA'BA'I.

from Hari's possession; but that "Annapurnábái in her statement says she took them from the possession of the deceased. The documents are in the name of the deceased, and, therefore, orders should be issued to the Police to make over the documents to his heirs. She alleges that the money mentioned in the documents is hers, and if there be evidence that the documents were executed in the name of Hari, she being a woman, steps may be taken in the Civil Court against the heirs of Hari."

In accordance with these orders the chief constable (on the 26th July) reported that he had handed over the documents to Rakhmábái and taken a receipt.

The Court of Session at Thána, on the application of Annapurnábái, called for the record of the case under Section 295 of Code of Criminal Procedure for the purpose of satisfying itself as to the legality of the order passed by the District Magistrate. At the hearing of the case Annapurnábái's vakil contended that the order of the 2nd Class Magistrate was passed under Section 415, the documents having been seized by the Police on the allegation that they had been stolen; and that there was no appeal against an order so passed. No inquiry having been held by any Magistrate, and no offence having been committed, the District Magistrate had no power to interfere with the order of the 2nd Class Magistrate.

The Session Judge, Mr. Wedderburn, being of opinion that this contention was valid, referred the proceedings, under Section 296 of the Code of Criminal Procedure, for the orders of the High Court.

There was no appearance on behalf of either party.

PER CURIAM:—It appears to the Court that the provisions of Chapter XXX. of the Code of Criminal Procedure do not apply to such a case. Section 415 and the two succeeding sections contemplate proceedings preliminary to and independent of inquiry. Upon general principles where there has been an inquiry or a trial, and the accused person is discharged or acquitted by any Criminal Court, that Court is bound to restore the property, the subject matter of the investigation, into the possession of the person from whom it is taken, unless, as provided for in Section 418, such Court is of opinion that "any offence appears to have been

committed" regarding it, when such order as appears right for the disposal of the property may be made. It is clear that the 2nd Class Magistrate did not consider that any offence had been committed in respect of the property in question: therefore, Section 419 gave the District Magistrate no jurisdiction to interfere. On this ground the Court will cancel his order. Whatever may have been the merits of the case, the Magistrate of the District had no sort of right to assume to himself the functions of a Civil Court.

1877.

In re ANNAPURNA'BA'I.

It is to be regretted that the Court is unable to afford to the applicant any adequate remedy for the wrong done her.

Order cancelled.

[APPELLATE CIVIL JURISDICTION.]

Before Sir M. R. Westropp, Knt., Chief Justice, and Mr. Justice Melvill.

JAMAL WALAD AHMED (PLAINTIFF AND APPELLANT) *v.* JAMAL WALAD JALLA'L AND OTHERS (DEFENDANTS AND RESPONDENTS.)*

April 5.

Muhammadan Law—Appointment of a Kazi—Qualification for that office—Regulation XXVI. of 1827—*Act XI. of* 1864.

The enactment of Bombay Regulation XXVI. of 1827 was adverse to any supposition that the office of Kazi could be hereditary. The repeal of that Regulation by Act XI. of 1864 left the Muhammadan Law as it stood before the passing of that Regulation; and that law sanctioned no grant of such an office to a man and his heirs.

The appointment of Kazi lies exclusively with the sovereign, or other chief executive officer of the State, and ought to be made with the greatest circumspection with regard to the fitness of the individual appointed; and though the sovereign may have full power to make the *vatan* attached to the office of Kazi hereditary, yet he has, under the Muhammadan Law, no power to make the office itself so.

In the absence of an established local custom to that effect, the office of Kazi is not hereditary. *Quære*—Whether such a custom would be valid?

* Special Appeal No. 343 of 1876.