1900 DEC. 18. APPELLATE CIVIL. 28 C. 393.

Appellate Court, therefore, that on the plaintiff's own showing his claim comes, not under Article 60, but under Article 64 of the 2nd Schedule of the Limitation Act, cannot in our opinion stand. The view we take is in accordance with that taken by this Court in the case of *Ishur Chunder Bhaduri* v. *Jibun Kumari Bibi* (1). That being so, the decree of the Lower Appellate Court dismissing the plaintiff's claim on the ground of limitation, without going into any of the facts necessary to be found in order to dispose of the question of limitation, must be set aside, and the case must be sent back to that Court, in order that it may deal with the question of limitation and any other question arising in the case, after taking into consideration the evidence in the case.

The costs of this appeal will abide the result.

Appeal allowed, case remanded.

28 C. 397.

[397] CRIMINAL REFERENCE.

Before Mr. Justice Ameer Ali and Mr. Justice Stevens.

QUEEN-EMPRESS *v.* SURENDRA NATH SARKAR (*Accused*).*

[17th, 18th and 22nd January, 1901.]

Accused—Improper discharge of—Commitment—Power of Sessions Judge and District Magistrate to order commitment, instead of directing fresh enquiry—Code of Criminal Procedure (Act V of 1898), ss. 209, 307, 436, 437 and 532.

Under s. 436 of the Code of Criminal Procedure in cases exclusively triable by the Court of Session the Sessions Judge and District Magistrate have co-ordinate powers to order a commitment upon the evidence already taken, instead of directing a fresh enquiry by the inferior Court, which has improperly discharged the accused.

Queen-Empress v. *Krishna Bhat* **(2) referred to.**

AT 2 A.M. on the morning of the 21st April 1900, a chowkidar at Mankar hearing groans issuing from the hut of one Assam Baisthabi, a prostitute, called together a number of the neighbours and proceeded to her hut. On entering the hut they found Assam lying murdered on the *pira* of the hut, and it was alleged that the accused was seen running out of the hut through a door opening to the north. The accused was afterwards arrested and put upon his trial before a Deputy Magistrate, who discharged him under s. 209 of the Code of Criminal Procedure. Subsequently the District Magistrate, upon going through the record and coming to the conclusion that the accused had been improperly discharged, called upon him under the provisions of s. 436 of the Code to show cause, why he should not be committed to the Court of Session and, after hearing his pleader, directed his commitment. The accused was thereupon tried on a charge of murder under s. 302 of the Penal Code by the Sessions Judge of Burdwan and a jury, and was unanimously acquitted by the jury. The Sessions Judge, however, disagreeing with their verdict, referred the case to the High Court under s. 307 of the Code of Criminal Procedure.

[398] The *Deputy Legal Remembrancer* (Mr. *Gordon Leith*) for the Crown.

Mr. *P. L. Roy* (with him Babu *Jadu Nath Kanjilal*) for the accused.

* Criminal Reference No. 44 of 1900 made by Kumar Gopendra Krishna Deb, Sessions Judge of Burdwan, dated the 1st of December 1900.

(1) (1888) I. L. R. 16 Cal. 25. (2) (1885) I. L. R. 10 Bom. 319.

1901 JAN. 17, 18 & 22.

CRIMINAL REFERENCE.

28 C. 397.

1901, JANUARY 17. The judgment of the Court (AMEER ALI and STEVENS, JJ.) was as follows :—

Mr. Roy takes a preliminary objection to the trial in the Sessions Court on the same ground as was put forward in the Court below. It appears that an enquiry was held in this case by a Deputy Magistrate, who discharged the accused under s. 209 of the Code of Criminal Procedure. The District Magistrate, upon going through the record, came to the conclusion that the prisoner had been improperly discharged; he thereupon called upon the accused to show cause, why he should not be committed to the Court of Session; and, after hearing his pleader, directed his commitment.

Mr. Roy's contention is that the commitment is bad and ought to be quashed under s. 532 of the Code of Criminal Procedure, as the District Magistrate had no power himself to commit, he could only direct the officer, who had discharged the accused, to do so. In support of this contention, he refers to the language of ss. 436 and 437 and urges that the words "order him to be committed for trial" in s. 436 mean that the Sessions Judge or the District Magistrate can only order the inferior Court to commit the accused for trial. In our opinion s. 437 deals with a totally different class of subjects. In considering the present objection we have to confine our attention to s. 436 with its provisos. We think that under that section the Sessions Judge and the District Magistrate have co-ordinate powers to order a commitment upon the evidence already taken, instead of directing a fresh enquiry. The first part of the section runs as follows :—"When, on examining the record of any case under s. 435 or otherwise, the District Magistrate, as in this case, considers that such case is triable exclusively by the Court of Session, and that an accused person has been improperly discharged by the inferior Court, the District Magistrate may cause him to be arrested." The second part goes on to say :—"And may [399] thereupon," that is, upon the recorded evidence, "instead of directing a fresh enquiry, order him to be committed for trial upon the matter, of which he has been in the opinion of the District Magistrate improperly discharged." In other words the District Magistrate may either direct a fresh enquiry by the inferior Court, which has improperly discharged the accused, or he may, in his discretion, order the commitment of the accused for trial before the Court of Session. This meaning is made clear by the proviso which follows :—

"Provided that the accused has had an opportunity of showing cause to such Magistrate, why the commitment should not be made;" not to be made by anybody else, but by the Magistrate himself. The second proviso declares :—"If such Judge or Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such Judge or Magistrate may direct the inferior Court to enquire into such offence." Proviso (*a*) taken in connection with proviso (*b*) cannot leave any reasonable doubt that the commitment there intended is a commitment upon the record by the Sessions Judge or the District Magistrate, who, upon a perusal of the evidence, is of opinion that the accused has been improperly discharged. This view is in accord with that expressed in the case of *Queen-Empress* v. *Krishna Bhat* (1) and no authority to the contrary has been laid before us. We, therefore, overrule the objection.

(1) (1885) I. L. R. 10 Bom. 319.