On receiving this explanation, the Judge, on the 18th March 1871, recorded the following remarks :—

The Magistrate has given very good grounds for his proceeding in the explanation herewith; but as the ruling he quotes appears to me to clash with the High Court ruling of 24th August 1868 (1), as well as with that of 10th July 1869 (2), I am of opinion that these remarks must be sent on to the High Court.

(1) *Before Mr. Justice Loch and Mr. Justice Glover.*

The 24th August 1868.

THE QUEEN *v.* BHAGABATI SUTHRAN AND OTHERS.*

JUDGMENT was delivered by

GLOVER, J.—The Deputy Magistrate's order of the 13th of May, dismissing the complaint, under section 259 of the Criminal Procedure Code, is clearly illegal.

The charge made was one of criminal misappropriation, in which the Deputy Magistrate exercised the discretion allowed him by section 248 of the Code, and issued a summons, in the first instance, against the persons complained against, instead of a warrant.

But the mere fact of a summons having been issued did not bring the case within the purview of Chapter XV of the Code, or allow the Deputy Magistrate to dismiss the complaint under section 259, because the complainants do not appear on the day appointed. The case remained subject to the rules laid down in Chapter XIV of the Code, and there is no provision in that chapter for the dismissal of complaints on account of non-attendance of complainants.

The Deputy Magistrate's order is therefore quashed, and the charge will be proceeded with in the usual course.

Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

The 10th July 1869.

THE QUEEN *v.* BIDUR GHOSE.*

THE facts of this case were as follows:—One Dhan Chang, on the 18th March, complained at the Chattak police station, that Bidur Ghose, Sheikh Adil, and others, had wrongfully confined his relative Lochan Chang for the purpose of extorting money. The police entered the case under section 342, and though they reported it true, sent it up in B. form, as they said it was not proved. On April 1st, the Acting Magistrate, Mr. Peterson, ordered the papers to be filed, but on April 2nd, Lochan Chang himself presented a petition, stating that he had been confined in various places to make him pay his rent, and having been released by the police, now brought a charge under sections 342 and 347.

The police reports were examined, and, on April 6th, the deposition on oath of, Lochan was taken, and sum-

* Reference under section 434 of the Code of Criminal Procedure and Circular Order, No. 18, dated the 15th July 1853, by the Sessions Judge of Beerbhoom.

† Reference under section 434 of the Code of Criminal Procedure and Circular Order, No. 18, dated the 15th July 1853 by the Sessions Judge of Sylhet.

1871

TAKI MAHOMED MANDAL v. KRISHNA NATH RAI.

NORMAN, J.—The point referred to the High Court in this case is whether a Deputy Magistrate, in dealing with a charge of wrongful confinement under section 342 of the Indian Penal Code, under Chapter XIV of the Code of Criminal Procedure, has power to discharge the accused if the prosecutor and witnesses are not present on the day fixed for the hearing.

Notwithstanding the case cited—*The Queen* v. *Bhagabati Suthran* (1)—I think that there is no doubt but that, where the

monses on five men, named Bidur, Mathan, Naru. Adil, and Bipari, were issued, and April 16 was fixed for the trial.

On that day all the parties being present, the case was made over to the Deputy Magistrate, who, on the 17th and 19th, took the evidence of the prosecutor and his witnesses; and on the 19th, holding the accused to bail, postponed the case till May 13th for the evidence of two persons whose evidence was considered necessary by the Court.

On May 13th, he dismissed the case, and discharged the accused, because the complainant was not present. On that same day (May 13th), the complainant, Lochan Chang, applied to the Joint Magistrate (who was in charge of the current duties of the Judge's office) stating that he had been present all day in the Deputy Magistrate's office, and that not his name, but that of Dhan Chang (the original informant at the police station) had been called out, and because he had not answered it, the case had been dismissed.

The Sessions Judge of Sylhet, who referred the case, considered there were three illegalites at least in the Deputy Magistrate's proceedings:—

(1) He had no power to dismiss, in default of prosecution, a charge laid under section 347.

(2) Having taken the evidence of a prosecutor, and postponed the case for the evidence of other parties to a future date, he had no power to dismiss any case in default of prosecution, the prosecutor having given his deposition in the presence of the accused; and having produced his witnesses, the case should then have been decided on its merits.

(3) The prosecutor's name entered on the fly leaf of the case was Dhan Chang, the actual prosecutor was Lochan Chang, and Lochan's name ought to have been cried, not Dhan's. In the matter of calling the names, the Judge stated that he fully believed Lochan's story, as it is corroborated by his subsequent behaviour and by the record.

Under these circumstances he referred the case to the High Court under section 434, in order that the Deputy Magistrate's order of dismissal might be quashed.

The irregular proceedings of the Deputy Magistrate, in delaying the examination of the witnesses from April 16th to 19th, were also noticed.

The judgment of the High Court was delivered by

JACKSON, J.—We agree with the Magistrate and the Sessions Judge. We quash the order of the Deputy Magistrate, dismissing the complaint for default, and direct that he proceed therewith according to law.

(1) *Ante*, p. 9.

accused, having been duly summoned or arrested under a warrant, is present to meet any charge, and no evidence is forthcoming against him, if it be not shown to the Magistrate that the case is one in which he ought to adjourn the inquiry under section 224, the Magistrate is not only authorized, but is empowered, and in fact, required, to discharge such accused person.

The case of the accused stands thus:—On the day of trial, not only has no offence been proved, but there is no evidence on which a Magistrate could possibly find that an offence had been proved.

The point however does not arise on the facts of the case before us. On the 28th of December, a complaint appears to have been preferred by the prosecutor to the officer in charge of the police station, which resulted in an inquiry, which must have been by order of the Magistrate, and a report that the charge of wrongful confinement was a false one. Dissatisfied with the result of the police inquiry, on the 16th of January the prosecutor made his complaint, under section 66, before the Joint Magistrate, who examined the prosecutor on the 17th, but his only order on that compliant was "Let this be put with the police papers." There seems to be an order of the Joint Magistrate on the police report on the 16th, that witnesses should be in attendance on the 21st.

On the 21st., the case was adjourned to the 28th. The complainant's witnesses had been summoned, by what authority I know not, and were in fact then in attendance. On the 28th, the case was made over to the Deputy Magistrate, who, in an order stating that he had no time to take up the case on that day, fixed the 1st of February for hearing the complainant's witnesses. On the 1st of February, the complainant and his witnesses not being in attendance, the case was dismissed by the Deputy Magistrate. Down to this time, no summons or warrant had issued against the defendant. The Joint Magistrate did not decide that there was no sufficient ground for proceeding. All that we know on that point is that the Joint Magistrate and the Deputy Magistrate between them have burked the case, and got rid of a troublesome complainant. I think the Joint Magistrate's proceedings were illegal and oppressive.

1871

TAKI MAHOMED MANDAL v. KRISHNA NATH RAI.

The law contemplates no such delays as those which the Joint Magistrate has interposed between the complaint and the adjudication upon such complaint.

"I do not think that section 180 was ever intended to enable the Magistrate in ordering cases to examine witnesses in the absence of the accused. I do not say that a case may not be supposed in which such a course may be necessary.

On the 17th of January with the police report and the examination of the complainant before him, it is very difficult to see why the Joint Magistrate should not have proceeded at once to pass orders under section 67. The reference to the Subordinate Magistrate on the 28th must have been an additional cause of vexation and expense to the unfortunate complainant.

Delay in the adjudication upon complaints in small criminal cases is a great hardship to poor people, who may be debarred from resorting to Courts of Justice by finding that the remedy is an evil more grievous than the wrong.

The complainant had, and has, a right to an adjudication under section 67, upon the point whether, in the judgment of the Magistrate, there is sufficient ground for proceeding. I think it may very well be that the complainant's absence on the day of hearing may have been caused by the utter weariness of hanging about the police station in the first place, and the Court afterwards, with his witnesses, in the hope of getting a proper hearing.

I think the Joint Magistrate should be directed to restore the case to his own file, and to do now what he ought to have done at latest within a few days after the 31st of last December.

AINSLIE, J.—It appears to me that the question referred to this Court does not arise in this case. The Magistrate had not issued, nor had he made any order to issue, any warrant or summons to bring the accused person before the Court.

The matter was in that stage to which the provisions of section 180 of the Criminal Procedure Code apply. By section 246, as amended by Act VIII of 1869, the provisions of section 180 are extended to cases triable by the Magistrate under Chapter XIV of the Code. The Magistrate had before him a report

1871

TAKI MAHOMED MANDAL v. KRISHNA NATH RAI.

by the police, on the charge preferred by the complainant at the police station, to the effect that it was a false charge.

On the 16th of January 1871, he directed that a limited number of witnessess should be sent in for examination. Whether he had before him at this time the complainant's petition which bears date 4th Magh 1277, corresponding to the 16th January 1871, is uncertain; but this is not material. When the complainant had been examined on the 17th, he made an order that his complaint should be put up with the police papers, and as he made no further order on it, I think his order of the 16th must be taken as intended to be a sufficient order in the matter, and as made under section 180.

By the order of the 16th January, the 21st idem was fixed for proceeding with the preliminary inquiry under section 180. Apparently no steps were taken to bring in the witnesses, and on the 21st, the Magistrate made a further order that they should be summoned to attend on the 28th.

On the 28th, certain witnesses attended under the summons; and on that day the Magistrate made over the case to the Deputy Magistrate, with instructions to satisfy himself by examining the witnesses whether there were sufficient grounds for proceeding further, and to go on with the case, or dismiss it summarily accordingly. On the same day, the Deputy Magistrate recorded an order to the effect that he was unable to proceed with the case on that day, and directed that the witnesses should be discharged on recognizances to appear again on the 1st of February. On the 1st of February the case was called on, but neither complainant nor witnesses were in attendance, and it was dismissed on default. Such being the facts, it appears to me that the ruling quoted by the Sessions Judge, *The Queen* v. *Bhagabati Suthran* (1), does not apply; still less does the ruling in *The Queen* v. *Bidur Ghose* (2) do so.

This was a case in which the complaint had not been admitted: the issue of process against the accused was dependent on the Court being satisfied of the propriety of making any order in the matter. If the complainant negligently failed to appear and

(1) *Ante*, p. 9 (2) *Ante*, p. 9.

1871

TAKI MAHOMED MANDAL v. KRISHNA NATH RAI.

satisfy the Court, there was nothing to make it incumbent on the Deputy Magistrate to proceed further with the complaint. But, under the circumstances of this case, I concur in thinking that the non-attendance of the complainant on the 1st February ought not to have been treated as a wilful act of negligence, and that the Deputy Magistrate's order of that date, dismissing the complaint, should be set aside.

[APPELLATE CIVIL.]

Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.

ISHAN CHANDRA AND OTHERS (PLAINTIFFS) *v.* SUJAN BIBI (DEFENDANTS).*

1871
March 29.

Registration—Lease—Mortgage—Act XVI of 1864, *ss.* 13, 14.

B. sued for possession of certain lands, on a contract embodied in a document which purported to grant B. possession of these lands for a period of six years, on payment of Rs. 99. *Held*, that the document in question was not a lease, but an usufructuary mortgage, and that the consideration-money being less than Rs. 100, its registration under Act XVI of 1864 was merely optional (1).

THE plaintiffs in this case sued the defendant for possession of certain lands, which had been assigned to them by a deed dated 19th Sraban 1227 Maghi (August 3rd, 1865).

The defendant denied the genuineness of the deed of 19th Sraban 1227 (August 3rd, 1865), and entirely repudiated the plaintiffs' claim.

There were only two issues fixed by the first Court: one was as to the genuineness of the deed of 19th Sraban 1227 (August 3rd, 1865), and the right of the plaintiffs to recover possession; the other was as to the amount of mesne profits. The Moonsiff found upon the evidence in favor of the plaintiffs on both the

*Special Appeal, No. 2211 of 1870, from a decree of the Additional Judge of Chittagong, dated the 21st July 1870, reversing a decree of the Moonsiff of that district, dated the 9th December 1869.

(1) See Act VIII of 1871, ss. 17 & 18.