1866. *December* 17. *C. P. No.* 152 *of* 1866.

to direct that further enquiry be made and additional evidence be taken upon the point, whether the information alleged to have been given by the prisoner that he had seen Ayalu Nayakkan at Tuticorin 10 or 12 days prior to the 5th September 1865 was false information.

The Court of Session will certify to this Court the result of such further enquiry and the additional evidence received.

We must also point out that the letter written by the 1st witness upon receiving the information, and which was filed as Exhibit A in Calendar No. 104 of 1865, was not duly put in evidence as it should have been at the present trial.

APPELLATE JURISDICTION (*a*)

Criminal Petition No. 160 *of* 1866.

Ex parte KARAKA NÁCHIÁR *alias* VELLIA NÁCHIÁR.

On an application to the High Court, as a Court of revision, to discharge an order made by a Session Judge, under Sec. 435, Criminal Procedure Code, for the comimttal of certain accused persons for trial on a charge of dacoity.

Held, that as all that was done was done under a claim of right in good faith entertained by the accused, however erroneously, the charge could not be sustained.

The order of the Session Judge annulled.

1866. *December* 17. *C. P. No.* 160 *of* 1866.

THIS was a petition against the order of R. R. Cotton, the Session Judge of Madura, dated the 27th September 1866, in, Case No. 95 of 1866.

The Petitioner was originally charged under Sections 143 and 447 of the Indian Penal Code, it being alleged that pending a dispute between her and one Udayappa Setti, concerning the melwaram of the Village of Padamattur, she caused her servants to remove the produce. The Magistrate considered the proper remedy to be by civil suit, and accordingly dismissed the criminal charge. The Sessions Judge, on a petition, directed the Magistrate to commit the Petitioner to the Sessions Court on the charge of abetting dacoity.

(*a*) Present : Collett and Ellis, J. J.

1866. December 17. C. P. No. 160 of 1866.

Petitioner appealed to the High Court, praying that, under Section 404 of the Code of Civil Procedure, the above order of the Sessions Court might be cancelled.

O'Sullivan and *Srinivasachariyar*, for the Petitioner.

Advocate General, and *Rajagopala Charlu*, on behalf of the prosecution.

The Court made the following

ORDER :—This is an application to discharge an order made by the Session Judge of Madura, under Section 435, Criminal Procedure Code, for the committal of certain accused persons for trial on a charge of dacoity. The matter comes before us as a Court of revision under Section 404, Criminal Procedure Code, and it is for us to say what order, upon a consideration of the points of law arising out of the case, it is right that we should pass in the matter.

As we observed at the final hearing of the arguments urged on behalf of both parties, we desire to base our decision upon a ground that shall go to the whole merits and substance of the case, rather than upon any technical objection to the regularity of the proceeding, below, or any other ground which, though perhaps sound and sufficient, might not in all respects be so satisfactory as the one on which we intend to rely. We think it right, however, to notice, though we shall not decide, the other objections which may be taken to the order of the Session Judge.

In the first place, objection may be taken that the Session Judge acted entirely without jurisdiction in ordering the Magistrate to make an enquiry. When the case first came before the Session Judge, the complainant had charged the accused simply with criminal misappropriation, and the facts stated in his sworn deposition, if taken to be all true, could not constitute either theft or robbery. It would be for consideration, therefore, whether the Session Judge was not bound to look merely to the facts as sworn to by the complainant before the Magistrate, and not to his unsworn and conflicting petition presented to the Court of Session. If so, then, whether within the strict terms

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of Section 435, Criminal Procedure Code, the Session Judge had jurisdiction to order an enquiry, and if not, what would be the effect of such order made without jurisdiction upon the subsequent proceedings.

Another objection deserving of consideration is, whether after the enquiry was made, the Magistrate having, upon evidence upon which it was legally open for him to decide, come to a judicial decision and recorded judgment of acquittal under Section 272, Criminal Procedure Code, it is competent to a Session Judge to receive an appeal from such judgment and by an order under Section 435 to reverse it. If there was before the Magistrate no evidence upon which the Magistrate could legally come to any other conclusion than that a particular offence not within his own cognisance either had or had not been committed by the accused, then, no doubt, a perverse judgment of acquittal under Section 272 would be no bar to the exercise of the Court of Session's jurisdiction under Section 435. But if (as in the present case is abundantly clear) there was evidence before the Magistrate of facts, the legal aspect of which did admit of his coming to a conclusion that an offence within his own cognisance either had or had not been committed by the accused, and he has come to a judgment upon such evidence, then it seems much more difficult to determine whether such judgment could in effect be reversed by an order under Section 435. We desire to be clearly understood as giving no opinion upon this question.

A third question which was a good deal discussed before us was whether the complainant had any possession of the grain removed, or whether it was not in the sole possession of the 11th prisoner. Certainly till the grain was divided, the complainant had neither property nor possession; upon the division he no doubt had property in it, but if, as seems to be the case, the contract of the ryot was to deliver at the landlord's storehouse, it may be questioned whether there was any possession by the landlord until such delivery, any more than where, on a purchase, grain has been separated and appropriated from the bulk and so the property has passed, but the possession remains in the seller who is

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bound to deliver it at a certain place. That the complainant in his own view never had possession seems borne out by the fact that his first charge was of criminal misappropriation, and among the persons so charged was the ryot the 11th prisoner. This objection, if sustained, would of course by fatal to any charge of theft or robbery; and the more so as in theft under the Code regard is had to possession rather than property.

A fourth matter for observation to which the present case seems to be open is whether, assuming all the evidence to be true, it could support a charge of robbery. Force there certainly was none ; the only evidence was to a putting in fear. If the credibility of this evidence was open to our consideration we should have no difficulty in properly characterising it, but assuming it to be all true, it seems to us exceedingly doubtful, to say the least, whether it can in point of law be said to show such threatening or putting in fear as, in common experience, is likely to create an apprehension of danger, and induce a man to part with his property for the safety of his person.

But the ground on which we intend to dispose of the case is, that all that was done was done under a claim of right in good faith entertained by the first accused person. The question of good faith is no doubt a question of fact, but looking at the manner in which, and the length of time for which the 1st accused has been putting forward her claim and the success also which has attended her efforts in the Civil Courts, we think that we are entitled to regard the reality of her claim of right as a fact admitted on all hands. There can be no reasonable doubt of it, and, so far as we can see, its reality has never been questioned. Certainly it has not been in the proceedings of the Court of Session ; all that has been objected to it either by the complainant or by the Court of Session is that it is not a cliam which could be sustained in a Court of law. That may be so, but it is clear that however erroneous the claim of right, if in fact the conduct of the accused was solely induced by such claim, there is an end of any charge of robbery. If a person had violated the orders of a Civil Court, or, acting under an erroneous notion

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of his rights has used force or otherwise committed a breach of the peace, there are sufficient ways in which the authority of the Civil Court may be vindicated, and the breach of the public peace, or the use of force to private persons adequately punished; but to go further than this would be to distort every instance of a trespass or assault in assertion of the rights of property into a case of robbery or dacoity. On this ground, therefore, which we think admits of no question, and which goes to the whole merits of the case, we think that there is nothing, as apparent from the evidence before the Magistrate, which could legally justify a charge of dacoity against these accused persons, and we must therefore set aside the order for their committal made by the Session Judge under Section 435, Criminal Procedure Code.

It is accordingly ordered that the said order of the Session Court be and the same hereby is annulled.

Order annulled.

APPELLATE JURISDICTION (*a*)

Special Appeal No. 415 *of* 1866.

SARASVÁTI and another.....*Special Appellants.*

PACHANNÁ SETTI and another....*Special Respondents.*

Where the Statute of Limitations was pleaded for the first time in a petition for Review of the judgment of the Lower Appellate Court :— *Held* that, the review being part of the proceedings in Regular Appeal, the question was whether the Statute may be pleaded for the first time in Regular Appeal, and that where, upon the admitted facts, it is clear that the statute is a bar, it may be pleaded for the first time in Regular Appeal.

1866. December 19. S. A. No. 415 of 1866.

THIS was a Special Appeal from the decision of M. J. Walhouse, the Civil Judge of Mangalore, in Regular Appeal No. 6 of 1865, reversing the Decree of the Court of the District Munsif of Puttur in Original Suit No. 644 of 1861.

Subbarayulu Chetti for *Parthasarathi Ayyangar*, for the special appellants, the plaintiffs.

Rajagopala Charlu and *Srinivasachariyar*, for the special respondents, the first and seventh defendants.

The Court delivered the following

(*a*) Present : Collett and Ellis, J. J.