upon the record to show that he used any force or violence, or made any attack upon the complainant's party; and as regards Jodha Singh all that the evidence indicates is that he had a *lathi* in his hand, and that he struck Dipa Singh with the *lathi*. But it does not appear that he inflicted the fatal blow. Therefore, so far as the first-mentioned appellant is concerned, we do not see how he could be convicted of any offence in this case; and as to the other appellant, Jodha Singh, if the fact be that the complainant's party were the aggressors, he was entitled in the exercise of his right of private defence of property to use such force or violence as was necessary to prevent the aggression; and it does not appear that he used more violence than was necessary on this occasion.

1897

PACHKAURI v. QUEEN-EMPRESS.

Upon these grounds we think that the conviction and sentence must be set aside.

C. E. G. *Appeal allowed.*

APPELLATE CIVIL.

Before Sir Francis William Maclean, Knight, Chief Justice, and Mr. Justice Banerjee.

BAHABAL SHAH (PLAINTIFF) *v.* TARAK NATH CHOWDHRY (DEFENDANT.)*

1897 March 18

Damages, Suit for—Opium Act (I of 1878), section 9—Act XIII of 1857—Wrongful entrance and illegal search—Code of Criminal Procedure (Act X of 1882), sections 155, 156 and 165—Non-cognizable offence.

An offence under section 9 of the Opium Act (I of 1878), and not coming under section 14 of that Act, is a non-cognizable offence, and is therefore one for which by section 4 of the Criminal Procedure Code a police officer cannot arrest without warrant; and he has therefore under section 155 of the Code no authority to investigate such an offence without the order of a Magistrate; nor under section 165 can he make a search in respect of it.

* Appeal under section 15 of the Letters Patent No. 3 of 1895, against the decree of the Hon'ble Robert Fulton Rampini, one of the Judges of this Court, dated the 7th of December 1894 in appeal from Appellate Decree No. 677 of 1894, against the decree of D. Cameron, Esq., Officiating District Judge of Dinagepore, dated the 19th of March 1894, reversing the decree of Babu Ashini Koomar Gooha, Munsif of that district, dated 30th of December 1893.

1897

BAHABAL SHAH v. TARAK NATH CHOWDHRY.

The power of arrest without warrant referred to in clause (*g*) of section 4 of the Criminal Procedure Code is an unqualified power, and not a conditional power, as in section 24 of Act XIII of 1857, which only gives the right to a police officer to arrest without warrant in case the accused does not furnish the security required by that section.

Where a police officer, therefore, in respect of an offence under section 9 of the Opium Act not coming under section 14 of that Act, made a search in the house of the accused without an order of a Magistrate: *Held*, that his action could not be justified, either under section 24 of Act XIII of 1857, or under the Code of Criminal Procedure, and that he was liable in an action for damages for the illegal search.

THE facts of the case, so far as they are necessary for the purposes of this report, and the arguments, appear sufficiently from the judgments of the High Court.

Babu *Girija Sunker Mozoomdar* for the appellant.

Babu *Srinath Das* and Babu *Mohiny Mohun Chuckerbutty* for the respondent.

The judgments of the High Court (MACLEAN, C.J., and BANERJEE, J.) were as follow:—

MACLEAN, C. J.—In this case the plaintiff sued the defendant, who is a sub-inspector of police, for damages for having, as he alleged, wrongfully and illegally entered and searched his house.

The question which we have to decide is whether the police officer, under the circumstances in this case, had any right to enter the plaintiff's house and to make a search.

The Munsif before whom the suit was originally brought found in favour of the plaintiff, and he gave the plaintiff Rs. 10 for damages; the plaintiff stated that he desired nothing in the nature of large damages, and that the only object of his action was to clear himself against the imputation which lay upon him by reason of the proceedings which were taken by the police officer.

The case then came before the District Judge in appeal. He reversed the decision of the Munsif and dismissed the plaintiff's suit. The District Judge in his judgment has not gone into the question of law which was raised before Mr. Justice Rampini, and which has been discussed before us.

The plaintiff appealed from the decision of the District Judge

1897

BAHADAL SHAH v. TARAK NATH CHOWDHRY.

to this Court, and Mr. Justice Rampini affirmed that decision. Hence the present appeal.

The appellant bases his appeal upon the ground that the sub-inspector had no authority to search the plaintiff's house under the circumstances in the case. I need not go into the facts in detail because the only question which we have to decide and which we can decide now is a question of law. But shortly the facts are these: The police sub-inspector received an information to the effect that the plaintiff was illegally cultivating poppy plants in his field, and in consequence of that information he went to the spot where it was alleged that they had been cultivated. He there found only one poppy plant, but in consequence of some indication which he said he saw there he was led to suspect that there had been other poppy plants growing in the same field, and that they had been previously removed. Drawing an inference from that, that they had been carried to the plaintiff's house, the police officer went to the plaintiff's house and made search for those plants; but in the result he found none. Criminal proceedings were then taken against the plaintiff, which ultimately resulted in his discharge. Hence the present action. These are all the facts that I need advert to for the purpose of the present case. The real question resolves into one of law, namely, whether the police officer had any authority to make the search which he did.

As I said before, the District Judge has not gone into the question of law which was raised before Mr. Justice Rampini, and which has been raised before us. Mr. Justice Rampini considered that under the Opium Act (I of 1878) the police officer had no authority to make the search he did.

That was practically admitted by the learned Vakil who appears for the respondent, though at the conclusion of his argument he made a somewhat faint suggestion that the search was authorized under section 14 of that Act. Looking at the language of that section, I think that this case does not come within that section, and I agree with Mr. Justice Rampini on this point.

Then it is said that, assuming that the search was not authorized by Act I of 1878, the police officer had power to make a

1897

BAHADAL SHAH v. TARAK NATH CHOWDHRY.

search under the provisions of section 165 of the Code of Criminal Procedure. Now to arrive at a conclusion as to whether that argument be sound or not we must look at that section and also at some other sections of the Code. Section 165 says that "whenever an officer in charge of a police station, or a police officer making an investigation, considers that the production of any document or other thing is necessary to the conduct of an investigation into any offence which he is authorized to investigate, he may make a search." I pass over the consideration as to whether or not there was in this case any evidence to show that the police officer had any "reason to believe" as required by the section, and before he can make the search, that the appellant would not have produced the poppy plants if he had been summoned or ordered under section 94 of the Code to do so. In my mind this case hinges upon the question whether this was a case which the police officer was authorized to investigate; for, if he were not, it must be admitted, as indeed it has been admitted by the respondent's Vakil, that section 165 has no application to this case.

To ascertain then the cases which police officers are authorized to investigate, one must look at sections 155 and 156 of the Code of Criminal Procedure. Section 155 says this:

"When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter in a book to be kept as aforesaid the substance of such information and refer the informant to the Magistrate.

"No police officer shall investigate a *non-cognizable* case without the order of a Magistrate of the first or second class having power to try such case or to commit the same for trial or of a Presidency Magistrate."

If this case were a non-cognizable case, it is admitted that there was no order of any Magistrate. Then section 156 provides: "Any officer in charge of a police station may, without the order of a Magistrate, investigate any *cognizable case* which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into and try under the provisions of chapter XV relating to the place of inquiry or trial.

What then we have to ascertain is whether this case was a non-cognizable case within the meaning of section 155 of the Code, or a 'cognizable case' within the meaning of section 156. Cognizable and non-cognizable cases are defined in sub-section (*q*), section 4 of the Code. "'Cognizable offence' means an offence for, and 'cognizable case' means a case in, which a police officer, within or without the Presidency towns, may in accordance with the second schedule or under any law for the time being in force arrest without warrant."

It is, I think, clear that the police officer could not in this case have arrested without warrant in accordance with the second schedule to the Code. Whether he could have done so "under any law for the time being in force," I will deal with in a moment. "'Non-cognizable offence' means an offence for, and 'non-cognizable case' means a case in, which a police officer within or without the Presidency towns may not arrest without warrant."

The contention of the respondents is that this was a cognizable case within the meaning of the definition of such case in the Code of Criminal Procedure, the police officer having power to arrest without warrant by virtue of the provisions of section 24 of Act XIII of 1857; and that, being a cognizable case, the police officer was authorized to investigate the case without the order of a Magistrate according to the provisions of section 156 of the Code.

The question then is now reduced to whether the police officer could lawfully arrest without warrant. It is conceded that the only law in force which could give him the power is section 24 of Act XIII of 1857. That section says: "Whenever a police officer or Abkari daroga or Opium gomastah shall receive intelligence of any land within his jurisdiction to have been illegally cultivated with poppy he shall immediately proceed to the spot; and if the information be correct shall attach the crop so illegally cultivated and report the same without delay to the authority to which he may be subordinate. He shall at the same time take security from the cultivator of the said land for his appearance before the Magistrate; and in the event of such cultivator not giving the required security, he shall send him in custody to the Magistrate." Can this be said to

1897

BAHABAL SHAH v. TARAK NATH CHOWDHRY.

give the police officer a power to arrest without warrant within the meaning of sub-section (*q*) of section 4 of the Code of Criminal Procedure? I think not. It is not an absolute power of arrest; it is conditional only upon the accused not giving the required security. It may be described as a right to take him into custody if he cannot give bail. That is what it amounts to. The police officer is bound to take security for the appearance of the accused before the Magistrate, consequently the police officer has no power to arrest under that section, unless and until the accused person refuses or is unable to furnish the security which is referred to in that section. In my opinion such a qualified power of arrest—a power of arrest not in respect of the offence alleged against him, but only of arrest in default of his giving security for his appearance before a Magistrate—is not such a power to arrest without warrant as is pointed out in the definition of "cognizable offence" in the definition clause of the Code of Criminal Procedure. The power to arrest without warrant in that definition must, I think, be referable to a power of arrest in respect of and on account of the offence alleged. But the power to arrest under section 24 of Act XIII of 1857 is not in respect of the offence alleged, but because the accused cannot or will not give bail. That is quite a different thing. The case then not being a cognizable case within the meaning of the definition in the Code, is a non-cognizable one, and under section 155 the police officer was not authorized to investigate it without an order of the Magistrate.

That being so, and inasmuch as his power to search under section 165 of the Code is incidental to the conduct of the investigation into any offence which he is authorized to investigate, I think that the police officer not having been authorized to investigate into the alleged offence had no right to make the search he made under section 165. I am, therefore, of opinion that the police officer acted illegally in entering and searching the plaintiff's house, and in consequence an action for damages by the plaintiff will lie against him. It was conceded that if the officer had no authority to search the plaintiff's house the action would lie.

At the same time I desire to add, and I think that it is my

duty to add, that I have seen nothing in this case to indicate, as regards the conduct of the police officer, that he acted otherwise than *bonâ fide* and in the belief that he was authorized to make the search, and that he was only doing his duty.

The result, therefore, is that the decrees of the District Judge and Mr. Justice Rampini will be set aside, and that of the Munsif restored. The appellant will get his costs in all the Courts.

BANERJEE, J.—I am of the same opinion. The question is, whether the defendant, who is a sub-inspector of police, has made himself liable in this action for damages for having searched the house of the plaintiff under the circumstances found by the learned District Judge. It has been found that in searching the house of the plaintiff he acted, not maliciously, but in good faith, under an honest belief that he was only doing his duty. That is a finding which this Court is bound to accept, and I may add that I see no reason to dissent from that finding. I think that having regard to the circumstances disclosed in the evidence that is the only finding that a Court of justice should arrive at. But, then, there still remains the question whether that should exempt the defendant from liability to an action like this, if the search of the plaintiff's house made by him was altogether unauthorized by law. To that question the answer must be in the negative. It therefore becomes necessary to consider whether the search made by the defendant of the plaintiff's house was, or was not, authorized by law. It was but faintly urged before us that the search was authorized by section 14 of the Opium Act (I of 1878). I quite agree with Mr. Justice Rampini in thinking that that section does not apply to this case, because there is nothing to show that the police officer had either personal knowledge or information in writing to the effect that the house he searched contained opium or poppy heads, which would come under the definition of opium in the Opium Act. That being so, the question is reduced to this, namely, whether the search he made was authorized by section 165 of the Code of Criminal Procedure as Mr. Justice Rampini has held.

In order that a search may be authorized by that section, it is necessary that the police officer should consider that the produc-

1897

BAHADAL SHAH v. TARAK NATH CHOWDHRY.

tion of some particular thing "is necessary to the conduct of an investigation into any offence which he is authorized to investigate." The offence here was that of illicit cultivation of poppy, which is made punishable by section 9 of the Opium Act,—and the question reduces itself to this, namely, whether that is an offence which a police officer is authorized to investigate without any order of a Magistrate.

Section 155 of the Code of Criminal Procedure enacts that "no police officer shall investigate a non-cognizable case without the order of a Magistrate." If the offence here was a non-cognizable offence, the police officer had no power to investigate it, and the case would not come under section 165 of the Code. Referring to the definition of "non-cognizable case" and "non-cognizable offence" as given in clause (*q*) of section 4 of the Code of Criminal Procedure, I find that a "non-cognizable offence means an offence for, and a non-cognizable case means a case in, which a police officer, within or without the Presidency towns, may not arrest without warrant." Schedule II of the Code of Criminal Procedure under the head of "Offences against other Laws," shows for what offences not coming under the Indian Penal Code a police officer may arrest without a warrant; and they are offences punishable with imprisonment for three years and upwards. The offence in this case is punishable under section 9 of the Opium Act with imprisonment not exceeding one year; so that the case is not one for which a police officer may arrest without warrant under the provisions of the Code of Criminal Procedure.

But then it was contended, and that contention has been accepted by Mr. Justice Rampini, that under section 24 of Act XIII of 1857, the police officer here was authorised to arrest the plaintiff without a warrant. Section 21, however, as has been clearly pointed out in the judgment of the learned Chief Justice, does not authorise a police officer, unconditionally, to arrest a person against whom the information mentioned in that section has been received. It only authorises a police officer to take security from the person informed against, and the power to take such person into custody arises only upon his default in giving the security that may be demanded of him. The liability

1897

BAHABAL SHAH v. TARAK NATH CHOWDHRY.

to arrest is a concomitant, not of the offence of which the person is suspected, but of his inability to give security for the furnishing of which alone he is liable. That being so, the case does not come under the definition of a cognizable case, and the police officer was prohibited by section 165 of the Code to investigate it; and, accordingly, section 165 had no application. The view taken of the case by Mr. Justice Rampini and the learned District Judge must therefore be held to be incorrect, and the judgment and decree of both the learned Judges must be set aside and the decree of the Munsif restored with costs.

S. C. G. *Appeal allowed.*

FULL BENCH.

Before Sir Francis Maclean, Knight, Chief Justice, Mr. Justice O'Kinealy, Mr. Justice Macpherson, Mr. Justice Trevelyan and Mr. Justice Banerjee.

1897
February 3
March 12.

MOTI SINGH AND ANOTHER (DEFENDANTS) *v.* RAMCHARI SINGH AND ANOTHER (PLAINTIFFS).*

Interest—Transfer of Property Act (IV of 1882), section 86—Mortgage by conditional sale—Interest after due date—Interest Act (XXXII of 1839)—Limitation Act (XV of 1877), Schedule II, Articles 116, 132.

Held, by a majority of the Full Bench (MACLEAN, C.J., O'KINEALY, J. and MACPHERSON, J.) that when a mortgage bond contains no stipulation for the payment of interest after the due date, interest is payable by virtue of the Interest Act (XXXII of 1839). Article 116 of schedule II to the Limitation Act prescribes the period of limitation in such a case; and therefore only six years' interest after the due date at 6 per cent. per annum is recoverable. The mortgagor cannot redeem until he has repaid the principal sum with such interest and costs.

Gudri Koer v. *Bhubaneswari Coomar Singh* (1), approved.

Mathura Das v. *Narindar Bahadur Pal* (2), *Cook* v. *Fowler* (3) and *Bikramjit Tewari* v. *Durga Dyal Tewari* (4), referred to.

* Full Bench Reference in Appeal from Appellate Decree No. 534 of 1895 against the decree of G. G. Dey, Esq., District Judge of Shahabad, dated the 15th December 1894, modifying the decree of Babu Kalidhan Mookerjee, Munsif of Arrah, dated the 1st May 1894.

(1) I. L. R., 19 Calc., 19.
(2) I. L. R., 19 All., 39; L. R., 23 I. A., 138.
(3) L. R., 7 H. L., 27. (4) I. L. R., 21 Calc., 274.