1876

QUEEN v. GOBIN TEWARI.

provision in the law for rehearing an appeal. Under s. 297, when the Court ordered that an accused person who had been improperly discharged be tried, it was not disputed that the Court could order the re-arrest of the accused person though there was no express provision on the point in the section: and in the same way he submitted that the Court had equal authority to direct the re-arrest of the accused on the admission of an appeal under s. 272.

MACPHERSON, J.—Let the Magistrate be directed to re-arrest Gobin Tewari and Jodoo Lall, and keep them in custody till the hearing of the appeal.

Application granted.

Before Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Morris.

1876
March 28.

IN THE MATTER OF THE PETITION OF MOHESH MISTREE AND ANOTHER.*

Criminal Procedure Code (Act X of 1872*), ss.* 294, 295, 296, *and* 297*—Order of Discharge under s.* 215*—Revival of Proceedings.*

An order of a District Magistrate, directing the revival of certain criminal proceedings against the petitioners who had been discharged under s. 215 of the Criminal Procedure Code by a Subordinate Magistrate after evidence had been gone into, quashed as illegal and *ultra vires*.

As the case was one of improper discharge and came before the Magistrate under s. 295 of the Criminal Procedure Code, the proper and only course for him was to report it for orders to the High Court, which, if of opinion that that the accused were improperly discharged, might, under s. 297, have directed a retrial.

The case of *Sidya bin Satya* differed from.

APPLICATION to set aside an order of the Magistrate of Alipore for the revival of certain criminal proceedings against the petitioners, discharged by the Cantonment Magistrate of Barrackpore under s. 215 of the Code of Criminal Procedure.

The facts of the case material to this report are as follow:—In July 1875, one Gopal Malla charged the petitioners with

* Criminal Motion, No. 53 of 1876, against the order of the District Magistrate of the 24-Pergunnas, dated the 10th February 1876.

causing hurt to him, in the Court of the Cantonment Magistrate of Barrackpore, then presided over by Colonel Elderton, who heard the evidence for the prosecution and called upon the petitioners for their defence. Before the disposal of the case, however, he was relieved in his office by Captain Hopkinson, who refused to decide the case on the evidence taken before his predecessor, and heard the case *de novo*. Captain Hopkinson, who was a Magistrate of the first class, did not believe the evidence tendered on behalf of the prosecution, and discharged the petitioners.

The complainant thereupon applied to the Magistrate of the district, praying for a revival of the case, on the ground that all his witnesses were not examined by Captain Hopkinson. The District Magistrate, upon such *ex parte* statement, on the 10th of February 1876, ordered the revival of the case, holding that, "as the case was one triable under Chapter XVII of the Criminal Procedure Code, the order for the discharge of the accused persons should not have been passed without hearing all the witnesses for the prosecution." The Magistrate also added that he had no doubt that the High Court would quash the order of discharge if the case came before them; but he did not think it necessary to make any reference, inasmuch as a discharge under s. 215 was not equivalent to an acquittal, and did not bar a fresh enquiry into the same facts. He accordingly directed the Joint Magistrate to proceed afresh with the case against the petitioners under Chapter XVII of the Criminal Procedure Code.

The petitioners applied to the High Court, on the 1st of March 1876, to have the above order quashed as illegal and made without jurisdiction, and, upon such application, a rule was issued by Macpherson and Morris, JJ., on the prosecutor, to show cause why the order of the 10th of February should not be set aside, and the records were sent for under s. 294 of the Criminal Procedure Code. There being some doubt on the point raised before the High Court, owing to the case of *Sidya bin Satya*, decided by the Bombay High Court, and referred to in the notes to s. 215 in the 5th edition of Prinsep's Criminal Procedure Code, the rule came on for hearing on the 28th of

1876

IN THE MATTER OF THE PETITION OF MOHESH MISTREE.

March before three Judges, *viz.*, Macpherson, Markby, and Morris, JJ.

Baboo *Brojonauth Mitter* for the petitioners.

No one appeared for the Crown.

The judgment of the Court was delivered by

MACPHERSON, J.—It seems to us to be clear that this case came before the Magistrate of the 24-Pergunnas under s. 295 of the Criminal Procedure Code, and that it was in the first instance dealt with by the Magistrate under that section. That being so, his proper and only course was to proceed under s. 296, to report the case for orders to the High Court, which (under s. 297) might have ordered the accused persons to be tried, if of opinion that they had been improperly discharged.

A case *(re Sidya bin Satya)* quoted by Mr. Prinsep in his latest edition of the Criminal Procedure Code, as having been decided by the Bombay High Court, has been referred to as showing that the Magistrate was right in the course he adopted. But that case is not reported in the regular reports of the Bombay High Court: nor have we been able to find any report of it. The full facts with which the Bombay Court had to deal are not before us, and we are unable to say how far the Court may really have gone. The note we have of this decision is therefore of little value; and, taking it as it stands, we are not prepared to agree with it as regards cases coming before the Magistrate under s. 295.

Dealing with the matter under ss. 294 and 297, we think there is material error in the Magistrate's proceeding, and that his order, directing the Joint Magistrate to entertain the fresh complaint now made and all the subsequent proceedings, ought to be quashed.

Whatever may have led to the various delays which have occurred in the prosecution of this case since the 21st of July 1875, there is no doubt that every great and unfortunate delays have taken place. It is, as a rule, most unfair and undesirable

1876

IN THE MATTER OF THE PETITION OF MOHESH MISTREE.

in every way to order an accused person to be tried over and over again for the same offence, unless under very peculiar circumstances. In the present instance there is nothing peculiar in the circumstances to warrant a third trial: and it seems to us wrong and improper (within the meaning of s. 294) that an order should be made directing the prosecution to be now recommenced.

The order of the 10th of February and all the subsequent proceedings are quashed.

Order quashed.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

HARRIS *v.* HARRIS.

HARRIS *v.* KOYLAS CHUNDER BANDOPADIA.

1876
May 16.

Husband and Wife—Married Woman's Property Act (III of 1874), ss. 7 and 8—Succession Act (X of 1865), s. 4—Action for Trover—Wife against Husband.

The plaintiff was, at the time of her marriage in 1870, possessed in her own right of certain articles of household furniture, given to her by her mother. Since January 1875 she had lived separate from her husband, but the furniture remained in his house. In February 1875, her husband mortgaged the property to *B*, without the plaintiff's knowledge or consent. In June 1875, one *KCB*, a creditor, obtained a decree against the husband and *B*, in execution of which he seized the furniture as the property of the husband, and it remained in Court subject to the seizure. In July 1875, the plaintiff instituted a suit in her own name in trover to recover the articles of furniture or their value from her husband, on the ground that they were her separate property, and in August 1875 she preferred a claim in her own name to the property under s. 88 of Act IX of 1850. It was found on the facts that the furniture was the property of the plaintiff. The husband and wife were persons subject to the provisions of the Succession Act, s. 4, and the Married Woman's Property Act, 1874.

Held that, under s. 7 of the latter Act, the suit was maintainable against the husband.

Held also, that the judgment for the plaintiff in the suit, to recover the furniture or its value from the husband, could not, without satisfaction, have the