Special Appeal No. 170 *of* 1865.

VINA'YAK DIVA'KAR, Deputy Magistrate F. P., Súrat District .... *Appellant.*

BA'I' ITCHA', wife of Maháshankar Haríshankar. *Respondent.*

Held that neither Act XVIII. of 1850, nor Sections 68 and 212 of the Code of Criminal Procedure protect a Magistrate who has failed to act reasonably, carefully and circumspectly in the discharge of his duties.

Vithobá Mulhárí v. *Corfield, Bom. Sup. Ct.*, (*see Appendix, post*) followed.

1865. September 18. S. A. No. 170 of 1865.

THIS was a special appeal from the decision of C. H. Cameron, District Judge of Súrat, in Appeal Suit No. 82 of 1864, confirming the decree of W. M. Coghlan, Senior Assistant Judge of Broach, who tried the original suit.

The following judgment was recorded by the Senior Assistant Judge:—

"This is an action brought by Itchá, wife of Maháshankar, a woman of the Bázkerává Bráhmín caste, to recover damages against Vináyakráo Divákar, Deputy Magistrate, holding the full powers of a Magistrate at Broach, for certain acts alleged to have been done by him in his magisterial capacity.

"The acts complained of are: the search of Báí Itchá's house in the absence of her husband; her being in the custody of the police for a night and a day; and her being ordered to find bail to the amount of Rs. 500, as a condition of release from custody.

"The defendant answers that he acted legally in taking the plaintiff's bail, under Sec. 212 of the Code of Criminal Procedure, on the complaint of one Rájárám Uderám, and on the report of the Fouzdar of Broach; that plaintiff was not in custody by his orders, and has suffered no loss at his hands. Defendant claims the protection of Act XVIII. of 1850.

1865.
September 18.
S. A. No. 170
of 1865.

"Two issues have been fixed for trial in this case :—(1) Has the plaintiff suffered injury, loss of character, or other damages, from the act or acts, or from the order or orders of the defendant, as recited in the plaint; (2) if the plaintiff have suffered as above set forth, is the defendant protected from a civil action by Act XVIII. of 1850, in that he acted as a Magistrate in good faith, believing himself to have jurisdiction to do or order the acts done or ordered by him.

"It will be well, in the first place, to lay hold of the facts which may be considered as common ground in the case,—facts either asserted, or assented to, by both parties. These facts are, that, on the 3rd of September last, one Rájárám Uderám presented a petition to the Fouzdar of Broach, stating that Maháshankar Haríshankar, the husband of the plaintiff, had, under a decree of a civil court, attached some property of his, and had taken it out of his house, but returned it afterwards in consideration of a money payment; and that on examining the property returned, he found that four ear-rings, a finger ring, and Rs. 2 in cash were missing; and that he suspected Maháshankar of having taken them.

"The Fouzdar sent this petition to the defendant for orders, and the defendant issued a warrant to search Maháshankar's house. Both parties to the suit are agreed that Maháshankar's house was searched on the night of the 3rd of September, and again on the morning of the 4th of September; and that the police found, or reported that they found, at the first search, a brazen cup of the value of some three annas, and, at the second search, a finger-ring which Rájárám identified as his own; the cup being found in an earthen recess in a corner, and the ring in a locked box, which had to be broken open, the key not being at hand. Both parties are agreed that Maháshankar was absent at the time, and that his wife, the plaintiff Itchá, was at home and present at the search. It is also agreed that Itchá was required to attend the Fouzdar's office the next day, and was sent by the Fouzdar to the defendant, the Deputy Magistrate, and was sent back to the Fouzdar by the defendant, with an order

1865.
September 18.
S. A. No. 170
of 1865.

that bail should be taken to the amount of Rs. 500; that the requisite bail was found, and that Itchá was released. So far is common ground: beyond this the parties are directly at issue.

"Plaintiff and her witnesses represent that she was under the close custody of a police guard, without food and without bedding, from the evening of the 3rd till the evening of the 4th; that she was taken publicly in custody of armed policemen from her house to the Fouzdar's office, thence to the Deputy Magistrate's office, and back again to the Fouzdar's office, when she was released on bail. The witnesses for the defence say that Itchá was at liberty—at any rate until the second search—that she slept in the inner room of her house on the night of the 3rd, and ate her morning meal at liberty. I must see which of these accounts is borne out by the evidence.

"Bálkrishná Jekrishná (1), next-door neighbour to Itchá, deposes that he saw her in custody of policemen, without a bed, in the verandah of her house, at midnight on the 3rd, and again at about 8 A. M. on the 4th; that he heard the Fouzdar order the police to take Itchá to his office; that he saw Itchá removed by the police from her house; and that he followed her, she walking between two policemen, as far as the old bazaar, where he left her; that he went to the Deputy Magistrate's office afterwards to see how matters were going, and saw Itchá stand between two policemen; that later in the day he heard the Deputy Magistrate order the police to take Itchá to the Fouzdar; and that he saw them take her away.

"Bhaíshankar (2), a witness called by both sides, and Gelábhai (3), neighbour of Itchá, who were called on by the police to witness the search of the house, depose to Itchá having been in custody in her verandah on the night of the 3rd and on the morning of the 4th of September; Gelábhai (3) further deposing to her having been in custody at the Deputy Magistrate's and the Fouzdar's offices, until bail was found, and to her weakness and exhaustion on her walk

home to her house. He describes Itchá as a young woman of about eighteen years of age.

"Jebhái Rámchandra (4), a brother-in-law of Itchá, deposes to having seen her in custody at the Deputy Magistrate's office, and to having petitioned the defendant to release her on his (Jebhái's) promise to produce Maháshankar Haríshankar when required. Rámchandra Kálidás (5) deposes to having been at the Deputy Magistrate's office when Itchá was brought there, and to having heard the defendant say 'Bring your husband, or you will be sent to the jail at Súrat;' and to having seen her kept in custody till evening, when she was bailed by Mánchárám at the Fouzdar's office, and the key of her house returned to her by a policeman. Mánchárám (6) deposes to the same effect as Rámchandra, adding that he found bail for Itchá. The witnesses speak of Itcha's husband as a man of good commercial status.

"The plaintiff herself, whose deposition was taken by commission, under Sec. 175 of the Code of Civil Procedure, states that she was in close custody for a night and a day, and did not eat nor sleep during that time; that the Deputy Magistrate asked her where her husband was, and told her that she should be sent to the jail at Súrat.

"The Fouzdár of Broach (7) deposes that he gave no orders for Itchá to be placed in custody on the 3rd of September; but that on the 4th of September, when the ring was found, he suspected her, and gave orders that she should attend at his office; he says that if Maháshankar, Itchá's husband, had been present, he would not have required Itchá to attend at his office. The two policemen (8 and 9) who were on guard at the house state that Itchá was not in custody on the night of 3rd of September, but slept inside the house apart from the police guard, and cooked her meal in the morning.

"The evidence of Rájárám Uderám, the person on whose complaint the search warrant was issued, is to the effect that Itchá was not in custody during the search, and was not in

1865. September 18. S. A. No. 170 of 1865.

the verandah of her house during the night of the 3rd of September, since he slept in a neighbouring verandah, and must have seen her, had she been there. His deposition was given in such an unsatisfactory manner that I place little, if any, reliance on it.

"Witnesses Nos. 11 and 12, neighbours of Itchá, depose to having seen the police in the verandah of Itchá's house, but that Itchá herself was not with them, and also to having seen her at liberty early next morning. Witness No. 13 deposes to having seen Itchá on the 4th of September at the Deputy Magistrate's office sitting apparently at liberty.

"The documentary evidence in the case (except on one point which will be noticed hereafter) goes to prove the facts admitted by both parties; and the further exhibits Nos. 35, 36 and 37 filed by the plaintiff refer to subsequent and different proceedings, and do not bear on the issues in this suit.

"The evidence is too contradictory to enable me to say, whether or not Itchá was kept without food and bedding in the verandah of her house on the night of the 3rd of September; but I think it is clearly proved that she was really in police custody from the evening of the 3rd until the evening of the 4th of September.

"The issue of the search warrant was legal under Sec. 114 of the Code of Criminal Procedure, and the defendant seeks to justify his other proceedings, by saying that he acted under the provisions of Sec. 212 of the same code; but this section in no way authorizes the retention in custody or holding to bail a person against whom no charge has been preferred. It runs thus: 'When any person shall appear or be brought before a Magistrate accused of any offence entered as not bailable in column 5 of the schedule annexed to this Act, such person shall not be admitted to bail if there appear reasonable ground for believing that he has been guilty of the crime imputed to him; but if the evidence given in support of the accusation shall, in the opinion of the

Magistrate, not be such as to raise a strong presumption of the guilt of the accused person and to require his committal, or such evidence shall be adduced on behalf of the accused person as shall, in the opinion of the Magistrate, weaken the presumption of his guilt, but there shall appear to the Magistrate in either of such cases to be sufficient ground for further inquiry into his guilt, the accused person shall be admitted to bail pending such inquiry.'

"The proceedings under consideration are those of a magistrate. With regard to them the maxim *Omnia presumuntur rite et solenniter acta* does not apply; the law requiring the magistrate to show the legality of his proceedings, and not presuming regularity as it would in regard to a superior court. Sec. 212, above quoted, certainly affords the defendant no warrant for keeping Itchá in custody at his office, and then ordering her to find bail. She was accused of no offence, and no evidence had been given against her.

"Sec. 68 of the Code of Criminal Procedure allows a magistrate to take cognizance of an offence without a complaint, but it cannot be held to cover such proceedings as those of the defendant; since Itchá is not shown to have been known or suspected to have committed any offence, nor was any warrant or summons issued against her. The Fouzdar in his deposition says that he would not have sent Itchá to the cutcherry at all, if her husband had been present; and two witnesses (5 and 14) say that the defendant asked her where her husband was, and threatened to send her to the Súrat Jail.

"The defendant in his order to the Fouzdar (45) writes thus:—'Itchá resides in the same house in which the stolen property was found. Complainant cannot adduce proof against her; still her security for appearance in the sum of Rs. 500 should be taken, until the accused appears.' It appears to me that Itchá was not suspected of any offence; and that the ostensible reason of her being arrested and held to bail was to secure the presence of her husband

1865. September 18. S. A. No. 170 of 1865.

Maháshankar. I am glad that the evidence permits this deduction; as I see no other, consistent with a belief in the honesty of purpose of the Fouzdar and of the Deputy Magistrate.

"Looking at the matter in its best light, the fact is apparent that a woman, not charged with any offence, has been kept in custody for some twenty-four hours, because her husband was suspected of having stolen property in his possession. The whole proceedings, from the moment that Itchá's liberty was trespassed on by the police on the evening of the 3rd until she was released on the evening of the 4th of September, were illegal.

"The maxim *respondeat superior* applies in this case; and renders the defendant answerable for the conduct of the police authorities. The arrest itself must be considered as his act. It was not ordered by him; but he ratified it by continuing the custody and taking bail. A subsequent ratification has a retrospective effect, and is equivalent to a prior command. The rule is not without an exception; and the exception is in favor of a magistrate, who is not held responsible for the wrongful or illegal acts of his subordinates, if he can show that he himself acted within the scope of his jurisdiction. The defendant has not shown this, and cannot come under the exception. He must be regarded as the cause of whatever injury Itchá suffered from being in custody on the 3rd and 4th of September.

"For the above reason, I find on the first issue that the plaintiff has suffered injury and loss of character from the acts and orders of the defendant, in that she was illegally kept in the custody of the police from the evening of the 3rd of September 1863 till the evening of the 4th of September 1863, when she was illegally held to bail by the defendant.

"With regard to the second issue, it will be well to consider, first, the meaning of Act XVIII. of 1850; and, second, whether it protects the defendant in this action. The Act is as follows:—

1865. September 18.
S. A. No. 170 of 1865.

"'*An Act for the Protection of Judicial Officers.*

"'For the greater protection of Magistrates and others acting judicially, It is enacted as follows:—1. No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any civil court, for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of: And no officer of any court or other person, bound to execute the lawful warrants or orders of any such Judge, &c., shall be liable to be sued in any civil court for the execution of any warrant or orders which he would be bound to execute if within the jurisdiction of the person issuing the same.'

"There are within my knowledge only two cases which bear on the interpretation of this Act (*Nujooshá* v. *Travers*, quoted by Vakil Sripatráo, does not bear on the interpretation of the Act), namely, *Vithobá Mulhárí* v. *Arthur King Corfield*, tried before *Yardley*, C.J., and *Jackson*, J., in the late Supreme Court at Bombay; and *Laing* v. *Gubbins*, referred to by the learned Chief Justice in the former case.

"In *Laing* v. *Gubbins*, *Peel*, C.J., is reported to have said that the words 'good faith' in the Act are equivalent to *bonâ fide*; and that the Act protected excusable errors only, and should not be extended to inexcusable errors. Sir *William Yardley*, in quoting this decision, said in the case of *Vithobá* v. *Corfield*, 'if this had been tried by a jury, I should have left it to the jury to say, whether the Magistrate had acted reasonably, circumspectly, and carefully; and I should have added that a man could not be said to have so acted, unless he tried to avoid errors.' Sir *Charles Jackson*, concurring with the Chief Justice, added: 'It would be hard that a Magistrate should be held liable on the ground of misconstruing a statute.' The authors of the Penal Code have shown the force which they understood to attach to the words 'good faith' by Sec. 52, which is as follows:—Nothing is

1865. September 18. S. A. No. 170 of 1865.

said to be done or believed in good faith, which is done or believed without due care and attention.

"It is not too much to assume that persons invested with magisterial powers are of an average intelligence and discretion; and it cannot be too much for the law to expect from them such an amount of care and circumspection in the discharge of their office, as ordinarily discreet persons are in the habit of bestowing on private transactions.

"In the defendant's conduct in regard to the woman Itchá, I look in vain for care, circumspection, or an apparent wish to avoid error, or even for the exercise of such care as discreet men usually exhibit in their private transactions. The errors committed are not said to be, nor do they appear to be, the result of misreading the law; and I am happy to add that they have not been shown to be the result of ill feeling or of enmity. I attribute the wrong done to want of care and want of trying to avoid error: common care would have prevented defendant from keeping the plaintiff in custody and ordering her bail to be taken in the absence of any charge or information against her; and would have prevented him postponing taking Rájárám Uderám's deposition till several days after Itchá's release from custody.

"For the above reason I find, on the 2nd issue, that the defendant is not protected in this action by Act XVIII. of 1850.

"The remaining question is, what amount of damages is the plaintiff entitled to? She is entitled to fair and temperate damages for the wrong she has suffered. I consider the amount claimed (Rs. 9,000) as excessive. The plaintiff, by fixing her claim at so large a sum, has only herself or her advisers to blame, if the amount granted by me does little more than cover the costs. I give judgment for the plaintiff for Rs. 500, with costs in proportion."

The special appeal was heard this day.

Dhirájlál Mathúrádás for the appellant.

Nánábhái Harídás for the respondent.

1865.
September 18.
S. A. No. 170
of 1865.

WESTROPP, J.:—In this case it appears that certain ornaments were taken possession of by Maháshankar, the husband of the plaintiff Itchá, in execution of a decree against one Rájárám, an act, upon the regularity or legality of which, we are not now called upon to pronounce any opinion. Those ornaments were, with certain alleged exceptions, returned in consideration of a satisfaction or part satisfaction of the decree by payment. The ornaments, alleged to be missing, were stated by Rájárám to have been improperly detained.

Under such circumstances, the proper course for Rájárám was to bring a civil action, in the nature of an action of detinue or trover, againt Maháshankar, or to have applied in the suit in which the decree had been made against him (Rájárám) for an order directing Maháshankar to restore those ornaments.

Instead, however, of taking that course, Rájárám repaired to the Fouzdar of Broach, and preferred a charge of theft against Maháshankar. The defendant, as a Full Power Magistrate, was applied to by the Fouzdar; and he (the defendant) ordered, first, a search of Maháshankar's house (in itself a very objectionable proceeding, inasmuch as the dispute as to the ornaments was purely of a civil character), and ordered, secondly, if not the original arrest, at least the detention of Maháshankar's wife, the plaintiff Bái Itchá, in custody, until she should give bail to the extent of Rs. 500, an order for which there was not a shadow of legal foundation, as, indeed, the defendant's own written order shows, mentioning, as it does, that Rájárám was unable to adduce any proof against her.

It is quite unnecessary for us, in considering whether or not the decree under appeal can stand, to look into the conduct of the Fouzdar previously to the appearance of the plaintiff before the defendant, or to resort to the doctrine of ratification. We find quite enough in the conduct of the defendant, so far as it affected the plaintiff, from the time of her appearance before him, to render him amenable to this

1865.
September 18.
S. A. No. 170
of 1865.

action. Knowing that Rájárám had no proof whatever against her of the commission of any offence, the defendant sent her in custody to the Fouzdar and substantially ordered him to detain her until she gave bail. We cannot come to any other conclusion than that he made that order for the purpose of placing undue pressure upon the husband, who was then absent; and as to whose absence I may observe that there has not been anything brought to our notice to indicate that it was caused by any improper motive.

Conduct so illegal and oppressive is, we think, quite inconsistent with the reasonable, careful, and circumspect discharge of the duties of a magistrate. We concur in the doctrine laid down by *Peel*, C.J., in the Supreme Court at Calcutta, and *Yardley*, C.J., in the Supreme Court at Bombay, in the cases cited by the Senior Assistant Judge, that if a magistrate fail to act reasonably, carefully, and circumspectly in the exercise of his duties, and if, by reason of such failure, he do that for which he has not any legal authority, he cannot be permitted to say that, at the time he thus acted, he in good faith believed himself to have jurisdiction to do the act complained of, and he, therefore, cannot obtain the protection of Act XVIII. of 1850, nor of Section 68, or 212 of the Code of Criminal Procedure.

It has been contended that the case would have warranted the award of heavier damages than Rs. 500 against the defendant. Possibly that may be so, but we do not feel bound to express any opinion on that point, as the plaintiff did not appeal against the Senior Assistant Judge's decree on the ground of inadequacy of damages, or give any notice of her intention to raise that question under Sec. 348 of Act VIII. of 1859.

We affirm the decree of the lower court with costs.

Tucker and Warden, JJ., concurred.

Decree affirmed.