

1875.

JIBIA'I  
MAHIPATI  
v.  
PARBHU  
BAPU.

We may observe that, if the order made on the previous application of the respondent is still unexhausted by there being matter to which its terms apply in particulars as to which these terms have not yet been satisfied, it is apparently open to the Court to give effect to that order, notwithstanding that any new application for execution is barred.

The order of the District Judge is reversed, and that of the Subordinate Judge restored, but we make no order as to costs of this appeal.

*Order accordingly.*

## [APPELLATE CRIMINAL JURISDICTION.]

*Reference No. 138 of 1875.*

REG. v. DEVA'MA' AND SOMSHEKHAR.

Dec. 8

*The Code of Criminal Procedure (Act X. of 1872), Sections 215 and 296—Compounding of offences—Revival of Prosecution—"Dismissal" of a warrant case—Practice—Counsel.*

A warrant case of a nature not compoundable under Section 214 of the Indian Penal Code was "dismissed" on the parties coming to an amicable settlement.

*Held* that the "dismissal" was equivalent to a discharge under Section 215 of the Code of Criminal Procedure, and the composition did not affect the revival of the prosecution, if that should otherwise be thought necessary or expedient.

Counsel cannot claim as of right to be heard on a reference to the High Court under Section 296 of the Criminal Procedure Code.

THIS was a reference from A. R. Macdonald under Section 296 of the Code of Criminal Procedure for the orders of the High Court.

The facts of the case are briefly as follows :—

Some time in 1874, Subhadrá, widow of the late Rájá of Bilgi, in the district of North Kanara, complained to Mr. Middleton, Magistrate, F.C., that her residence had been broken into, and her ornaments, valued at about Rs. 7,000, abstracted by one Devámá and her son Somshekhar. The latter asserted that, having been adopted by the complainant, he was the owner both of the palace and the property, which he admitted he had removed. After the inquiry had proceeded a certain length, Mr. Middleton disposed of the case by the following order :—

“They (the parties) have now come to an agreement, and Subhadrá has withdrawn her complaint on condition that she receives certain ornaments and a certain ‘sári’, which the other party agree to give her. I have, therefore, given these articles to her, and the rest to Šomshekhar and Devámá, and I dismiss the case.”

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This was on the 18th of January 1875. Mr. Middleton quoted no authority in the body of the order, but in submitting his monthly return he remarked that the accused persons were discharged under Section 215 of the Code of Criminal Procedure.

Disagreements having since arisen between the parties, it was thought expedient to revive the prosecution. An application was accordingly made to that effect to Mr. Jervoise, the successor of Mr. Middleton in office. It was then urged before him that what Mr. Middleton really intended to do, was to allow the offence to be compounded under Section 188 of the Criminal Procedure Code, and that Mr. Middleton's remark in the Criminal Return was of non-effect. Mr. Jervoise allowed the contention; but, in view of the illegality of Mr. Middleton's order, allowing a non-compoundable offence to be withdrawn, and of its impropriety in not having effected the desired reconciliation, he submitted the proceedings to the High Court, through the Magistrate of the District, under Section 296 of the Code of Criminal Procedure.

The reference was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

*Branson*, instructed by *Shámráv Vithal*, applied to be heard on behalf of Somshekhar and Devámá before the Court disposed of the reference, but it was decided that he was not entitled to appear under the Code of Criminal Procedure.

No one appeared in support of the reference.

PER CURIAM :—The accusation made against the accused in this case constituted it a warrant case falling under the provisions of Sections 213 *et seq.* of the Code of Criminal Procedure. The Magistrate, Mr. Middleton, after an arrangement had been come to between the parties, divided the property between them and dismissed the complaint. By “dismiss the case” we understand the Magistrate to have meant the same thing as is indicated by Section 215 of the Code of Criminal Procedure, where it says that

1875. "the Magistrate, if he finds that no offence has been proved  
 REG. against the accused person, shall discharge him." "Dismissal of  
 DEVA'MA', a complaint" is a phrase properly applicable only to a summons  
 SOMSHEKHAR. case under Chapter XVI. of the Code, and incapable of being  
 applied, as Section 212 shows, to any complaint, "except in so  
 far as it refers to a summons case." The provisions of Section  
 215 are highly useful in many cases. They enable a Magistrate,  
 when circumstances make it expedient, to dispose of an accusa-  
 tion without proceeding to an actual conviction or acquittal where  
 a strict application of the criminal law would be undesirable. But  
 these provisions are open to abuse, and, to guard against their per-  
 version, it is explained (Explanation II.) that a discharge is not  
 equivalent to an acquittal, and does not bar the revival of a pro-  
 secution. In the present case, therefore, the course pursued by  
 Mr. Middleton, and which seemed to him the more just and ex-  
 pedient, does not bar the renewal of the proceedings, if to Mr.  
 Jervoise or the Magistrate of the District such a renewal should  
 appear absolutely necessary or highly desirable.

The composition entered into between the parties cannot affect  
 the revival of the prosecution if that should otherwise be thought  
 necessary. House-breaking in order to commit theft is not an  
 offence which, according to Section 214, Indian Penal Code, can  
 be legally compounded, and a withdrawal from the prosecution in  
 such a case has not, according to Section 188 of the Code of  
 Criminal Procedure, the effect of an acquittal. Section 212 of  
 the Criminal Procedure Code cannot be applied to the case,  
 because it is not a summons case, and there is no such provision  
 as that contained in Section 212 in the following chapter on  
 warrant cases.

There is no occasion for any order on the part of this Court.  
 The case stands free for the exercise of the Magistrate's discre-  
 tion, which he will naturally not exercise to the supersession of  
 his predecessor's order, unless it should appear that justice requires  
 him to adopt that course.

*Record and Proceedings to be returned.*