

THIRUMALAI
v.
SUNDARA.

Full Bench it was said: "The question which we have to consider is whether, when a payment has been made, or a new contract entered into for the purpose of satisfying a decree, and the object has failed by reason that the provisions of the law which are essential to its recognition as a payment or satisfaction of the decree have not been complied with, the person injured is deprived of a remedy by suit." This question was answered in the negative, it being held that full effect could be given to those provisions without construing them to debar the institution of a suit for the recovery of money paid or damages for breach of the contract to certify. The precise point decided was that the former suit would lie, viz., the suit to recover the money received by the defendant, the consideration for which had wholly failed. This decision is in no way inconsistent with the decision of the Bombay High Court and does not involve any recognition of the uncertified adjustment as an adjustment of the decree. On the contrary it is because there was no adjustment that the plaintiff was held entitled to recover the money, and, similarly, in the present case, it is because there has been an entire failure of consideration that we think, agreeing with the decision of the Bombay Full Bench, that the mortgage, which in the absence of such adjustment cannot be enforceable, should not prevail against the plaintiff.

We must, therefore, reverse the decree of the District Judge and restore that of the District Munsif. The defendant must pay the costs of this appeal and of the appeal to the District Court.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, and Mr. Justice Parker.

QUEEN-EMPRESS

against

SAMBOJI AND OTHERS.*

Abkari Act (Madras), ss. 9, 11, 55.

Under the Madras Abkari Act, 1886, a permit is not necessary where toddy is carried from the licensee's trees to his shop within the limits of his farm, or

1888.
March 23.
April 26.

* Criminal Revision Case No. 418 of 1887.

where, the licensee having a general permit, the persons carrying the toddy are in his employment.

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CASE referred under s. 438 of the Code of Criminal Procedure by H. G. Turner, District Magistrate of Vizagapatam.

The case was stated as follows :—

“In this case the Taluk Magistrate acquitted illegally, I should say, 14 persons charged by the Salt and Abkari Department with having transported toddy without permits under s. 55 of the Madras Abkari Act I of 1886.”

The facts of the case are shortly these :—

“A salt petty officer saw the accused conveying toddy which was 94 seers in all and asked them to show their permits. Four of them produced permits, but they turned out to be time-expired; the rest had no permits at all. They were then charged as stated above and placed before the Taluk Magistrate of Srungavarapukota, before whom they admitted they had no permits, but pleaded that they were the private shareholders of a licensed shop, and they were taking the toddy for sale to that shop. The Taluk Magistrate acquitted them on the grounds (1) that they had no intention to defraud the renter or the Government of revenue, and (2) that their omission to possess permits ‘though seemingly an offence under the strict letter of the law is yet not such under the spirit of it.’ The Sub-Magistrate’s grounds of acquittal are erroneous. Section 55 of Act I of 1886 under which the accused are charged does not contemplate a fraudulent or dishonest intention, and the High Court have lately held that under s. 11 a permit is required for the transport of toddy from a date garden to a licensed shop though it be by the shopkeeper himself, and that time-expired permits are no permits at all.—*Vide* High Court’s order, dated 25th April 1887, in Criminal Appeal 443 of 1886. I would therefore recommend that the acquittal may be set aside and such order passed in the case as the High Court may please.”

On the 14th December 1887, (Collins, C.J., and Muttusami Ayyar, J.) referred the case to a Full Bench.

The Public Prosecutor (Mr. *Powell*) for the Crown.

The Full Bench (Collins, C.J., Kernan, Muttusami Ayyar, and Parker, J.J.) delivered the following

JUDGMENT :—It is clear from s. 11 of Act I of 1886 that the holder of a license should take a general permit in addition to the

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license. It is also provided by that section that permits shall protect servants and other persons employed by those to whom they are granted. The accused, however, did not rely for their protection on any general permit held by the licensee to whose shop they said they were conveying the toddy from a certain date garden, and four of them produced time-expired permits, which were held to be no permits at all in Criminal Appeal No. 443 of 1886. But it was held in *The Queen v. Pottachi*(1) with reference to the old Act that the servants of a sub-renter might carry toddy from his trees to his shop within the limits of his farm though their inability to produce a pass from him at once might render them liable to be arrested and detained until it appears that they are protected. Reading s. 9 of Act I of 1886, which prohibits the transport of toddy from one local area into another, together with s. 55 which prescribes a penalty for unauthorised transport of liquor, it appears that a separate permit is necessary only when the toddy is carried from the area included in the licensee's farm to another local area. If it appears, therefore, that the accused were conveying toddy from the licensee's trees to his shop within the limits of his farm, or that he had a general permit, and that they were acting as his servants or persons employed by him, they are not liable to be convicted. As it is not shown that the accused were transporting toddy from the area included in the license into a different area and that the licensee had not a general permit, we decline to interfere.

(1) I.L.R., 7 Mad., 161.
