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But in this case neither of the Courts below has tried the case upon the merits, with reference to the question how far the decree sought to be executed has been extinguished by reason of the purchase made by the judgment-debtors-respondents on the 21st September, 1886, and till that question is decided upon the merits, it is not possible to determine to what extent the decree can be executed by Kudhai, and what amount he should pay in order to secure possession of so much of the house as has not been purchased by the mortgagees judgment-debtors respondents. And in this connection I may state that the fifth ground of appeal before me, which proceeds upon the assumption that the decree-holder Kudhai appellant had already paid the mortgage-money as provided by the decree, is also a matter relating to the merits and cannot be dealt with by this Court as a Court of second appeal.

Under these circumstances, the proper course is to decree this appeal, setting aside the order of both the Courts below and to remand the case to the Court of first instance for disposal upon the merits, with reference to the observations which I have made. I order accordingly. Costs will abide the result.

Cause remanded.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

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June

DEBI PRASAD (PLAINTIFF) *v.* RUP RAM AND OTHERS (DEFENDANTS).*

Act XXII of 1881 (*Excise Act*), *ss.* 5, 12, 35, 42—*License—Sub-lease—Breach of conditions of license—Consideration forbidden by law—Immoral consideration—Consideration opposed to public policy—Act IX of* 1872 (*Contract Act*), *s.* 23.

The plaintiff obtained from the excise authorities a license to manufacture and sell country liquor, such license containing a condition against sub-letting the benefits of the license. By s. 42 of the Excise Act (XXII of 1881) the violation of any condition of a license granted under the Act is made a punishable offence. The plaintiff sub-let the license to defendants who on the 5th of September, 1884, executed an agreement to pay to the plaintiff a certain sum of money, in which was included the sum of Rs. 1,500, which the defendants had undertaken to pay to plaintiff as rent reserved on the sub-lease. The plaintiff instituted the suit for recovery of the amount due to him on the agreement and it was decreed by the Court of first instance but dismissed by the lower appellate Court.

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* Second Appeal No. 83 of 1887, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 6th November, 1886, reversing a decree of Maulvi Shah Ahmad-ulla Khan, Subordinate Judge of Gorakhpur, dated the 15th March, 1886.

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On second appeal the plaintiff contended on the authority of *Gauri Shankar* v. *Mumtaz Ali Khan* (1), that his suit had been wrongly dismissed.

Held, that the sub-letting of license to manufacture and sell country liquor having been made punishable as an offence is to be deemed as an act contrary to law within the meaning of s. 23 of the Indian Contract Act (IX of 1872), and the claim to recover money due on such sub-lease was therefore not enforceable in a Court of justice.

Gauri Shankar v. *Mumtaz Ali* (1) distinguished.

THE facts of this case are stated in the judgment of the Court.

The T. Hon. *Conlan*, Maulvi *Zahur Husain* and Munshi *Lalta Prasad*, for the appellant.

Mr. J. E. *Howard* and Pandit *Sundar Lal*, for the respondents.

BRODHURST and MAHMOOD, JJ.—This was a suit for recovery of Rs. 1,043-15-1½, principal and interest, due upon a *sarkhat* (agreement) executed by the defendants on the 5th September, 1884. In that agreement is included a sum of Rs. 1,500, which the defendants promised to pay to the plaintiff as the sub-lessees of a license obtained by the plaintiff from the revenue authorities under the Excise Act for distillery. The suit was defended upon various grounds, but it was decreed by the Court of first instance.

Upon appeal the lower appellate Court reversed the decree of the first Court upon a question of law, which has to be considered by us here, as it is the main point upon which this second appeal has been preferred to us. The learned Judge of the lower appellate Court has held that the sum of Rs. 1,500 included in the *sarkhat* could not be lawfully taken into account, because it represented money due upon a contract of sub-leasing a license, which contract was opposed to the Excise Act (XXII of 1881), by s. 5 of which enactment it is only persons to whom the license has been granted who can take benefit of it, and by s. 12 of the same enactment such licensee can take advantage of the license subject to the terms of the license itself and not in contravention thereof. Again, s. 35 and the following sections provide for regulations which bind the licensee and subject the license to certain conditions, and s. 42 in general terms says that any person who breaks any rule made under the Act, or any condition of a license granted under the Act, for the breach of which rule no other penalty is herewith provided, shall be punished with a fine of Rs. 50.

(1) I. L. R., 2, All., 411.

In this case the license which had been obtained by the plaintiff in 1883, contained in para. 12 express prohibition against sub-letting the benefits of the license, and there can be no doubt that the sub-letting of the license by the plaintiff to the defendants was an action in contravention of the terms of the license above-mentioned, and was so punishable under s. 42 of the Excise Act (XXII of 1881).

We therefore hold that the sub-letting of the license was an action contrary to law within the meaning of s. 23 of the Contract Act (IX of 1872), and as such not enforceable by us as a Court of justice.

Mr. *Conlan* in arguing the case on behalf of the appellant has relied upon a Full Bench ruling of this Court in *Gauri Shankar* v. *Mumtaz Ali Khan* (1), and the learned counsel contends that that case is an authority to support the proposition that the restrictions upon sub-leasing a license are intended only for the protection of the public revenue and do not vitiate the contract entered into by a licensee with a third party. So far as that case is concerned it is enough to say that Regulation VI of 1819, upon which the case proceeded, is in many respects different, both in point of nature and policy, from the Excise Act (XXII of 1881) with which this case is concerned, and that the ruling cited is one in which there was a case of partnership, and the license did not contain any express prohibition against such partnership being entered into.

Pandit *Sundar Lal* in supporting the case for the respondents has called our attention to certain English cases—*Ritchie* v. *Smith* (2); *Cundell* v. *Dawson* (3); *Smith* v. *Mawhood* (4); *Taylor* v. *The Crowland Gas & Coke Co.* (5)—for supporting the contention that in connection with Excise Acts, the person to whom the license is given is the only person who can avail himself of such license, and that it would be defeating the policy of such enactments if such licensee is allowed to sub-lease the license by any agreement. Again, the learned pleader relies upon a ruling of the Calcutta High Court in *Judoonath Shaha* v. *Nobin Chunder Shaha* (6), where Sir Richard Couch, in dealing with the Bengal Excise Act, held that "a contract by which a licensee lets the shop and the

(1) I. L. R., 2 All., 411.
(2) 18, L. J. C. P., 9.
(3) 17, L. J. C. P., 311.
(4) 15, L. J. Exch. 149.
(5) 23, L. J. Exch. 254.
(6) 21, W. R., 289.

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use of the license for a fixed term, receiving rent, is contrary to the policy of the law, and comes within the rule that a contract which is illegal, or is contrary to public policy, cannot be enforced."

We are of opinion that the general effect of those cases and especially the last mentioned case is that no licensee under the excise laws can transfer the license or sub-lease it to any person, and that it would be defeating the policy of the law if such contracts were to be allowed. This view is based not only upon the general principle that anything which defeats statutory provisions or is against the public morals should not be allowed, but upon the especial matters of the excise law that the capacity of the licensee is a matter to be taken into account, and that the consideration of the public morals also forms part of the granting of such license with reference to the character of such licensee. We hold therefore that the lower appellate Court was right in holding that the suit, taking into account the sum of Rs. 1,500 as rent due under the license which the plaintiff had taken from the revenue authorities and sub-leased to the defendants, was not maintainable. That Court has also found that once the item of Rs. 1,500 is kept out of account nothing of the account proffered by the plaintiff himself remains due to him. This being so, we dismiss the appeal with costs.

Appeal dismissed.

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July 7.

CRIMINAL REVISION.

Before Mr. Justice Straight.

EMPRESS *v.* NIADAR.

Act XLV of 1860 (*Penal Code*), *s.* 498—*Detaining with criminal intent a married woman.*

The words "such woman" in s. 498 of the Indian Penal Code do not mean such a woman as has been so enticed as mentioned in that section but mean such woman whom the accused knows or has reason to believe to be the wife of any other man; the detention of such a woman with the particular intent defined in the section is one of the offences made punishable under that section.

THIS was an application for revision on behalf of Niadar, convicted under s. 498 of the Indian Penal Code.

The evidence in the case proved that the wife of the complainant ran away from him and was eventually found residing with the petitioner. Complainant claimed back his wife, but petitioner persisted