

1913

BAKSHI
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LILADHAR.

from that occupied by the purchaser in the case of *Muhammad Muzamil-ullah Khan v. Mithu Lal* (1). In that case it was held by the majority of the Court that the purchaser was entitled to challenge a mortgage made by one member of a Hindu family, because he had acquired title to the property, by adverse possession against all the members. We must, therefore, hold that the appellant is not entitled to raise the question of the validity of the mortgage.

With regard to the third ground of appeal we think there ought to be a further inquiry by the lower appellate Court. It appears that there were three supposed attesting witnesses to the mortgage. One named Raghunath Prasad, who was called, said that Kallu did not sign the deed in his presence, therefore, he was not an attesting witness. There is evidence that another supposed attesting witness named Sundar Lal is dead. Nothing is known about the third attesting witness. The respondent in all probability relied on a decision of this Court according to which the evidence of Raghunath Prasad, if believed, was sufficient evidence of the execution. In view of a recent decision of the Privy Council it must be held on the record as it stands that the bond in suit has not been proved. In the circumstances we think that the respondent should be given a further opportunity of producing evidence. We direct that the record be returned to the court below for a fresh finding on the question whether the mortgage deed of the 15th of March, 1890, has been proved. Further evidence will be taken; and on return of the finding ten days will be allowed for objections.

Issue remitted.

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March, 19.

APPELLATE CRIMINAL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamber.

EMPEROR v. ALLAHDAD KHAN.*

Act (Local) No. IV of 1910 (United Provinces Excise Act), section 63—Criminal Procedure Code, section 537—Unlawful possession of excisable article—Search warrant—Conviction not invalidated owing to absence of warrant.

Where the superintendent of police and a sub-inspector searched the house of a person suspected of being in illicit possession of excisable articles and such

* Criminal Appeal No. 123 of 1913 by the Local Government, from an order of R. G. Tute, additional Sessions Judge of Meerut, dated the 30th of November, 1912.

articles were found in the house searched, it was *held* that the conviction of the owner of the house under section 63 of the United Provinces Excise Act, 1910, was not rendered invalid by the fact that no warrant had been issued for the search, although it was presumably the intention of the Legislature that in a case under section 63, where it was necessary to search a house, a search warrant should be obtained beforehand.

IN this case the house of one Allahdad Khan was searched by the superintendent of police and a sub-inspector on suspicion that the owner was in illicit possession of excisable articles within the meaning of section 63 of the United Provinces Excise Act, 1910, and a mixture of cocaine with another drug was found in it. No search warrant had been obtained for the search. The finding of the cocaine was established by evidence and the accused was convicted under the Excise Act. On appeal the Sessions Judge held that the search was illegal and that the illegality vitiated the proceedings, and he acquitted the accused. The Local Government appealed.

The Government Advocate (Mr. A. E. Ryves), for the Crown :—

The police officers who conducted the search had a right to do so without a search warrant. Section 50 of the United Provinces Excise Act (IV of 1910) authorized them to do so. They had authority to make the search also under the provisions of the Criminal Procedure Code. Secondly, the irregularity in conducting the search is covered by the provisions of section 537 of the Code of Criminal Procedure. The words, " other proceedings before or during trial " in clause (a) of that section cover the case. Thirdly, an irregular search does not vitiate the trial and render the conviction illegal. It does not affect the question whether the accused was guilty or not. If the facts found establish his guilt the conviction is perfectly legal.

Mr. Hameed-ullah, for the accused :—

Section 50 of the Excise Act provides for immediate action only in urgent cases. This appears to have been intended from a consideration of the words " found committing an act &c." in that section and of the succeeding sections 51, 53 and 54. If there is time to get out a search-warrant then a warrant should be obtained. In the present case there was ample time to get out a warrant. Section 537 is not meant to cure erroneous or illegal proceedings of the police but only of courts.

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GRIFFIN and CHAMIER JJ :— One Allahdad Khan was convicted of an offence punishable under section 63 of the United Provinces Excise Act, No. IV of 1910, which provides as follows :—

“Whoever, without lawful authority, has in his possession any quantity of any excisable article knowing the same to have been unlawfully imported, transported or manufactured, and knowing the prescribed duty not to have been paid thereon, shall be punished with imprisonment for a term which may extend to three months or with fine which may extend to one thousand rupees or with both.”

The Superintendent of Police and the Sub-Inspector in charge of the city police station, on information received, searched the house of Allahdad Khan and discovered there a mixture of cocaine and another drug. The accused was convicted by a magistrate and sentenced to six weeks' rigorous imprisonment and a fine of Rs. 50. On appeal the Additional Sessions Judge held that the search of the accused's house was illegal and that the absence of a search warrant was fatal to the case for the prosecution. He therefore acquitted the accused. The Local Government has appealed against the order of acquittal. It is doubtful whether the case is one which comes under the provisions of section 50 of the Excise Act, and we would have some hesitation in holding that the search was legal. Whether the search was legal or not, we have, however, the evidence of the finding in the accused's house of a certain quantity of cocaine, which is an excisable article under the provisions of the Excise Act, for possession of which the accused had no licence. On the facts found we are satisfied that the accused must have known that the cocaine had been unlawfully imported and that no duty had been paid on it. We allow the appeal, set aside the order of acquittal passed by the Additional Sessions Judge and restore the order of conviction. We reduce the sentence passed on the accused to the term of imprisonment already undergone by him and we set aside the order of fine. We may add that we think that it was the intention of the Legislature that in a case under section 63, where it is necessary to search a house, a search warrant should be obtained beforehand.

Appeal allowed and sentence reduced.