

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1916
July, 17.

SIAM BIHARI LAL (PLAINTIFF) v. MALHI AND OTHERS (DEFENDANTS).
Act (Local) No. IV of 1910 (United Provinces Excise Act), section 40—Rules framed under Act—Transfer or sub-lease of licence—Agreement to share profits.

The plaintiff entered into an agreement with the defendant, who was a drug contractor, in consideration of a sum of money advanced by him to the defendant, that he would be entitled to a share in the profits or responsible for the losses of the drug business to an extent therein set forth. *Held* that such an agreement was neither a transfer nor a sub-lease of the drug contractor's licence and did not constitute a violation of rule 82 of the rules framed under the United Provinces Excise Act, 1910.

THE plaintiff sued the defendant on the allegation that the defendant and his two brothers had taken a licence to sell exciseable drugs in the name of Kali Charan and others and that the plaintiff had a share in the profits of the licence. The court of first instance decreed the claim. The lower appellate court reversed the decree on the ground that a sub-lease or transfer of a licence without the sanction of the Collector was illegal. The plaintiff appealed to the High Court.

Babu *Krishna Narain Laghate*, for the appellant :—

The transaction is neither a transfer nor a sub-lease of the licence. We claim that we had a share in the partnership firm in whose favour the licence was issued. That certainly was not illegal. If we had joined the partnership after the issue of the licence it would have been a different case. Rule 80 of the Excise Manual does not contemplate that a number of persons cannot combine to take a licence; *Gauri Shankar v. Mumtaz Ali Khan*(1).

Babu *Piari Lal Banerji*, for the respondent :—

The licence was issued to particular persons. They and they only could sell the drugs. The plaintiff could not sell the drugs without a licence. If he made any contract with the licensees that was illegal; *Nalain Palmanabham v. Sait Badrinadh Sarda* (2). Taking a partner in an established business is certainly transferring an interest in the business.

* Second Appeal No. 305 of 1916, from a decree of Mubarak Husain, Subordinate Judge of Banda, dated the 10th of January, 1916, reversing a decree of Tufail Ahmad, Munsif of Hamirpur, dated the 19th of November, 1914.

(1) (1879) I. L. R., 2 All., 411. (2) (1911) I. L. R., 35 Mad., 582.

1916

SHIAM
BIHARI LAL
v.
MAHJI.

Babu *Krishna Narain Laghate*, for the appellants, was not heard in reply.

RICHARDS, C. J., and BANERJI, J.:—This appeal arises out of a suit in which the plaintiff alleged that the defendants obtained a licence from Government to sell drugs, and that they thereupon entered into a contract with the plaintiff to the effect that in consideration of the plaintiff advancing some money, the defendants would give the plaintiff the profits derived to the extent of one anna out of six annas, and in the event of there being a loss, the plaintiff would suffer the loss to the extent of one anna. The court of first instance found that the contract had been entered into and gave the plaintiff a decree. The lower appellate court has reversed the decree of the court of first instance, holding that the contract was illegal having regard to the provisions of the Excise Act and the rules made thereunder. The rule which is alleged to have been violated by the alleged contract is rule 82 which is in the following terms:—"Transfers and sub-leases of licences are not permitted, except under sanction of the Collector. The Collector shall not allow a transfer or sub-lease unless good and sufficient reason be shown to his satisfaction and unless the transferee or sub-lessee is in his opinion fit and qualified to hold such licence." The contract alleged by the plaintiff does not seem to us to be either a "transfer" or a "sub-lease" of the licence. The alleged contract would not entitle the plaintiff to sell any goods of any sort or description covered by the licence. As between Government and the defendants, the latter would remain solely liable for the non-performance of the contract and the conditions under which the licence was granted. The case of *Hormasji Motabhai v. Pestanji Dhanjibhai* (1) is relied upon. In that case the licensee had taken in a partner. It was part of the conditions of his licence that he should not take a partner. What he did, therefore, was contrary to the express conditions of his licence. The case of *Nalain Padmanabham v. Sait Badri-nadh Sarda* (2) has also been relied upon. In that case the rule was that the licensees should not sell, transfer or sub-rent their "privileges" without the permission of the Collector. There is a marked distinction between the words used in that rule and in

(1) (1887) I. L. R., 12 Bom., 422.

(2) (1912) I. L. R., 35 Mad., 582.

the present case, which, as we have mentioned, only forbids the "transfer" or "surrender" of the licence. The concluding words of the rule show that they refer to a person who was by virtue of the contract actually to be the holder of the licence. In our opinion, if the contract be as is alleged by the plaintiff, it is not void by virtue of rule 82. We accordingly allow the appeal, set aside the decree of the lower appellate court and remand the case to that court with directions to re-admit the appeal under its original number and to proceed to hear and determine the same according to law having regard to what we have said above. Costs here and heretofore will be costs in the cause.

Appeal decreed and cause remanded.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

RAM DEI (DEFENDANT) v. MUNNA LAL (PLAINTIFF).*

Act No. I of 1872 (Indian Evidence Act), sections 68, 69—Act No. IV of 1882, (Transfer of Property Act) section 50—Proof of execution—Document proved to have been executed in the presence of one attesting witness who was examined.

One of the attesting witnesses to a mortgage deed was dead. The other attesting witness was called and proved that the mortgage deed was signed by the mortgagor in his presence and that he signed the deed as an attesting witness. It was not expressly proved that there was another attesting witness present who saw the mortgagor sign, but it was not proved to the contrary that there was not another attesting witness. *Held* that the mortgage was sufficiently proved according to the requirements of sections 68 and 69 of the Indian Evidence Act.

THIS was a suit on a mortgage. The defence was that the mortgage-deed was not properly attested inasmuch as one attesting witness only was produced and he did not state that the mortgagor signed the document in his presence as well as in the presence of the other attesting witness, who had since died. The court of first instance dismissed the suit. The lower appellate court reversed the decree. The defendant appealed to the High Court.

Pandit *Kailas Nath Kutju*, for the appellant:—

According to the authorities since the Privy Council so decided a mortgage-deed must be attested by two witnesses, who

* Second Appeal No. 768 of 1915, from a decree of S. R. Daniels, District Judge of Allahabad, dated the 15th of February, 1915, reversing a decree of V. N. Mehta, Subordinate Judge of Mirzapur, dated the 26th of February, 1914.

1916

SHIAM
BIHARI LAL
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MALHI.

1916

July, 18.