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to this Court and direct that the respondents Nos. 1 and 2 shall pay the plaintiff's costs of the appeal here and in the court below. As regards costs of the other defendants we do not interfere with the order of the court below.

BANERJI, J.:—I am of the same opinion and agree with the judgment of the learned Chief Justice on both the questions discussed in this appeal. The rule laid down by their Lordships of the Privy Council in *Girja Bai* v. *Sadashiv Dhundiraj* (1), to the effect that the institution of a suit for partition of joint family property has the effect of creating a separation of the joint family, cannot be applicable to a suit brought on behalf of a minor which has not matured into a decree. The reasons for the exception are stated in the judgment of the learned Chief Justice and I have nothing to add to them. The same view was held by the Madras High Court in *Chelimi Chetty* v. *Subbamma* (2). As regards the other point which has been raised in this appeal, there can be no dobut that the manager of a joint Hindu family cannot by will devise any portion of the joint family property to take effect after his death, inasmuch as upon his death he ceases to be the manager of the family and has no estate left in him which can pass to the legatee under the will. This is manifest from the authorities which have been referred to in the judgment of the learned Chief Justice. I agree with the order proposed.

PIGGOTT, J.—I concur.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Justice Sir Parmoda Charan Banerji.

1920
April, 8.

EMPEROR *v.* BHAGGI LAL*.

Act No. III of 1867 (*Public Gambling Act*), *sections* 3 *and* 10—*Act* (*Local*) *No. I of* 1917 (*United Provinces Public Gambling* (*Amendment*) *Act*), *section* 2—"*Instruments of gaming*"—*Cowries*—*Value of evidence of person examined under section* 10.

Cowries, if used for the purpose of carrying on gaming, are "instruments of gaming" within the meaning of section 1 of the Public Gambling Act, 1867, as amended by section 2 of Local Act No. I of 1917.

* Criminal Revision No. 61 of 1920, from an order of Gopi Nath, Magistrate, First Class, of Allahabad, dated the 26th of December, 1919.

(1) (1916) I. L. R., 43 Calc., 1031. (2) (1917) I. L. R., 41 Mad., 442.

A person examined as a witness under the provisions of section 10 of Act III of 1867 is not examined as an "approver" within the meaning of the Code of Criminal Procedure.

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THE facts of this case are briefly as follows:—

The accused was convicted of an offence under section 3 of Act III of 1867 for keeping a common gaming house. The City Kotwal having obtained a search warrant under section 5 of the Act raided the house and arrested the accused and 64 other persons. Cash, currency notes, and two sets of *solahis* (cowries) were found on the floor. The accused admitted the gambling but denied having received any profits out of it. One of the sixty-four persons arrested on the spot was examined as a witness under section 10 and stated that commission was paid to the accused for the privilege of playing. On these facts the accused was convicted and sentenced to pay a fine of Rs. 200 and in default, to undergo three weeks' rigorous imprisonment.

Mr. *C. C. Dillon*, (with him Mr. *Zahur Ahmad*), for the accused, submitted that section 3 of the Public Gambling Act, III of 1867, prescribed a penalty for keeping a common gaming house. 'Common gaming house' was defined in section 1 of the said Act and included any house in which instruments of gaming were kept or used for the profit or gain of the person owning the house. *Solahies* (cowries) were not instruments of gaming. He relied on *Queen Empress* v. *Bhawani* (1). He also referred to *Watson* v. *Martin* (2), where it was held that half pence were not "instruments of gaming." There was no evidence except that of the approver that the accused received profits out of the gambling that was going on. A conviction based upon the uncorroborated testimony of a co-accused who turns approver was a bad one. In order to sustain a conviction under section 3 it was necessary for the prosecution to prove not only that he owned the house and that instruments of gaming were kept or used in it but that the person owning the house received certain profits out of the gambling transactions. He relied on *Raghunath* v. *Emperor* (3).

(1) (1895) I. L. R., 18 All., 23. (2) (1864) 10 Cox's Cr. Cas., 56.
(3) (1918) 16 A. L. J., 760.

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The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown, submitted that Act III of 1867 had been amended by Local Act I of 1917 and defined "Instruments of gaming" which included any article used as a means or appurtenance of or for the purpose of carrying on or facilitating gaming. In this country *solahis* are recognized instruments of gaming and do facilitate it. Ordinarily speaking it might be incorrect to describe cowries as instruments of gaming, but if cowries are used in a particular case as a means of gaming they are certainly such instruments. He relied on *Queen Empress* v. *Bala Misra* (1). Moreover, the co-accused who had deposed that the accused received profits out of the gambling transaction was really not an approver as contemplated by the Code of Criminal Procedure. He was really a person whom the Magistrate might examine on oath under section 10 of the Act and make him free under section 11 from all prosecutions under the Act for anything done before that time in respect of gaming. Section 6 laid down that where instruments of gaming were found in any house entered or searched under section 5 there would be a presumption that such house was a common gaming house and that the persons found therein were present for the purposes of gaming. The burden of proof was on the owner who said that no profits were received by him. *Raghunath* v. *Emperor* (2) was not applicable, inasmuch as in that case no search was made as contemplated by section 5 and hence no presumption arose under section 6.

BANERJI, J. :—Bhaggi Lal, the applicant, has been convicted under section 3 of Act No. III of 1867 as amended by Act No. I of 1917 of the Local Council, for keeping a common gaming house. The applicants in the connected case No. 50 have been convicted under section 4 of the said Act. It has been found that in a house which was owned or kept by Bhaggi Lal a large number of persons (about 65) were discovered by the police gambling on a particular night. The police had obtained a warrant under section 5 of the Act and the validity of the warrant is not questioned. It is not disputed that gambling was going on in that house and that the persons who were arrested

(1) (1897) I. L. R., 19 All., 311. (2) (1918) 16 A. L. J., 769

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and who have been convicted were gambling there. The main contention is that the house was not a common gaming house within the meaning of the Act. That depends upon the further question whether instruments of gaming were found in the house. Under the definition of the expression "Instruments of gaming" as given in section 2 of Act No. I of 1917, an instrument of gaming includes any article used as a means or appurtenance of, or for the purpose of carrying on or facilitating gaming. In the present case certain articles were found in the house, called *solahis*, which are cowries, and these were used as a means for carrying on gambling. Therefore the articles found in the house were instruments of gaming. As the house was searched under a warrant properly issued and instruments of gaming were found in the house, that circumstance is, under section 6 of the Act, evidence that the house was used as a common gaming house, unless the contrary was proved. In the present case thereis no evidence to the contrary. Therefore under section 6 it must be presumed that the house in question was a common gaming house. In addition to this a witness was examined who deposed that Bhaggi Lal was making a profit and charging a commission for the use of his house for purposes of gambling on that particular night. It is stated that the witness was an approver and therefore his evidence ought not to be accepted without corroboration. It appears that the witness, whose name was Mujahid Khan, was examined under section 10 of the Act. The court was competent to examine him on oath, and his evidence, if believed, could be acted upon, and if the court was of opinion that he had made a true statement, it might grant him a certificate freeing him from prosecution in connection with the gambling. This, it seems, was done in the present case. Whether a certificate was granted or not is immaterial, but no pardon had been granted to the witness and he was not examined as an approver within the meaning of the Code of Criminal Procedure. As already stated, he was examined by the court in exercise of the authority which the court had under section 10 of the Act. Thus in the present case we have first of all the presumption that by reason of the discovery of instruments of gaming in the house occupied by Bhaggi Lal, the house was a common gaming

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house, and we have the additional fact that there is positive direct evidence that he used to make a profit by allowing his house to be used as a place for gambling. Bhaggi Lal has, therefore, been rightly convicted. It necessarily follows from the fact that the other persons were gambling in the common gaming house kept by Bhaggi Lal, that their conviction is legally correct. I have been asked to interfere with the sentence as being excessive. This was a bad case of gambling in which a large number of persons of various castes had assembled together and no less than Rs. 1,400 were found in the possession of the men who were carrying on the gambling. In these circumstances I do not think I should be justified in interfering with the sentence. I accordingly dismiss the application.

Application dismissed.

Before Mr. Justice Tudball.

EMPEROR v. RAM BARAN SINGH AND OTHERS*

1920
April, 14.

Criminal Procedure Code, sections 345, 438, *and* 439(*d*)—*Compounding of offences—Revision—Court exercising revisional jurisdiction not empowered to allow an offence to be compounded.*

It is not competent to a court exercising revisional jurisdiction to allow an offence to be compounded. *Emperor* v. *Ram Piyari* (1) not followed. *Emperor* v. *Ram Chandra* (2) referred to.

THE facts very briefly are these :—

The applicants were convicted of an offence under section 323 of the Indian Penal Code. They went up in revision to the Sessions Judge and while the case was pending before him, the parties came to terms and applied to the court for leave to file the compromise. The Sessions Judge held that a court in revision had no power to give leave to compound the offence and hence the case could not be referred to the High Court.

Mr. *A. P. Dube*, for the applicants :—

Section 438 of the Code of Criminal Procedure lays down that the Session Judge has power to refer any case coming up before him in revision under section 435 for reversing or altering any order passed by a subordinate court. Section 439

*Criminal Revision No. 113 of 1920, from an order of Abdul Halim, Additional Session Judge of Mirzapur, dated the 31st of October, 1919.

(1) (1909) I.L.R., 32 All., 153. (2) (1914) I.L.R., 57 All., 127.