

have been made, and ought to have been made, by the lower appellate court. We frame the following issue:—

“ Is there a family or tribal custom, binding on the parties to this suit, by which the adoption of a daughter's son is validated in spite of the ordinary rule of Hindu law prohibiting the same.”

The burden of proof will be on the defendants, but both parties should be allowed to produce evidence. We think the trial court should comply with the order of remand by trying out, not only this issue, but also the remaining issues framed by it and should pass a decree after recording findings upon all the issues. The costs of this appeal will be costs in the cause.

Order modified.

REVISIONAL CRIMINAL.

Before Mr. Justice Piggott.

EMPEROR V. MAHADEO *

Act No. III of 1867 (Public Gambling Act), sections 3, 4, 5, 10 and 11—Search warrant—Endorsement of warrant by officer to whom it was issued—Procedure—Examination under section 10 of persons sent up as accused under section 4—Effect of order passed under section 11.

When a search warrant has been issued by a Magistrate under the provisions of section 5 of the Public Gambling Act, 1867, the police officer to whom it is addressed may endorse it over to another police officer, provided that the latter is an officer to whom such a warrant might have been issued in the first instance. *Emperor v. Kashi Nath* (1) followed.

Effect of an order under section 11 of the Public Gambling Act, 1867, and procedure necessary to terminate the legal liability of persons in whose favour such an order is passed whilst proceedings under section 4 of the Act are still pending against them discussed.

THIS was an application in revision against an order of the Sessions Judge of Allahabad, refusing to interfere with the conviction and sentence of the applicant under section 3 of the Public Gambling Act, 1867. The facts of the case sufficiently appear from the judgment of the Court.

Mr. C. Ross Alston and Munshi Ram Nama Prasad, for the applicant.

The Assistant Government Advocate (Mr. R. Malcolmson), for the Crown

* Criminal Revision No. 97 of 1920, from an order of B. J. Dalal, Sessions Judge of Allahabad, dated the 24th of January, 1920.

(1) (1907) I. L. R., 30 All., 60.

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PIGGOTT, J. :—This is an application in revision by one Mahadeo who has been convicted of the offence which may be broadly described as that of keeping a common gaming house, punishable under section 3 of the Public Gambling Act, Act No. III of 1867, and has been sentenced to rigorous imprisonment for two months. The case was tried summarily and no appeal lay under the law. The matter was brought in revision before the Sessions Judge, who has written a careful order dealing with the points raised before him and has found no cause for interference. Before me the following points have been urged:—

(1) That the search as conducted was irregular and invalid in law, and could not operate so as to give rise, against the persons accused, to the presumption referred to in section 6 of Act III of 1867, by reason of the fact that the Magistrate's warrant, authorizing the search, had been endorsed by the police officer to whom (by virtue of his office) it was originally issued, to another police officer of rank qualifying him to conduct searches under section 5 of the Act. As pointed out by the learned Sessions Judge, this point is covered by authority in this Court, *vide Emperor v. Kashi Nath* (1). I have been asked to re-consider the soundness of this decision and my attention has been called to cases from other High Courts in which analogous questions have been considered. I think it sufficient to say that the courts below were bound to follow the decision of this Court on the point and that I am not prepared to reconsider it.

(2) It has been contended that the house searched by the police was not the house designated in the warrant. This is a matter of evidence, and I have no doubt that the house searched was the one intended by the warrant, also that it is adequately described in the said warrant so as to make the search valid and effective for all purposes.

(3) It has been contended that there was an irregularity in the conduct of the trial, because two distinct cases were taken before the Magistrate, one against the applicant, Mahadeo, under section 3 of Act III of 1867, and the other against a number of persons under section 4 of the same Act, and it is suggested that the Magistrate, while purporting to try the two

(1) (1907) I. L. R., 30 All., 60.

cases separately, only heard the evidence once. There is nothing on the record to support this contention and no affidavit has been filed. A statement has been laid before me by the Assistant Government Advocate as to what the Magistrate actually did. I cannot take judicial notice of that statement, neither am I bound to presume, in the absence of anything in the way of record or affidavit to justify the contention, that the conduct of the trial was marred by any irregularity in the examination of the witnesses.

(4) It is contended that Mahadeo was not proved to be the owner of the house in question, or at any rate that evidence not legally admissible was relied upon on behalf of the prosecution to prove his ownership. This point has to be considered quite apart from the question whether the house searched was the one described in the warrant. It is sufficient to say that there is abundant evidence on the record that, whether Mahadeo was the owner of this house or merely its occupier, he was at any rate a person who had the use of the house, and on the evidence, he was using the same as a common gaming house. There is, therefore, no force in this contention.

(5) The most serious point taken, however, is with reference to the evidence given at the trial by two persons named Govind Pragwal and Mohan, who were examined as witnesses called by the court under section 540 of the Code of Criminal Procedure at the trial of Mahadeo. These persons had been found by the police in the house in question at the time of the raid, and they were sent up as accused persons in the case under section 4 of Act III of 1867. Within the meaning of section 10 of the same Act they were undoubtedly persons brought before the Magistrate who had been found in the house which had been entered under the provisions of this Act. The Magistrate was authorized to require these persons to be examined on oath before him and they were under an obligation to answer truly all questions put to them. Nor could they excuse themselves from being examined as witnesses on the ground that if they made a true statement their evidence would tend to criminate themselves. It would have been lawful for the Magistrate to examine as witnesses in the case against Mahadeo, not only

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these two men but any or all of the remaining persons who had been found by the police inside the house in question at the time when it was entered under a search warrant lawfully issued under the provisions of the Act. I find it difficult, therefore, even to formulate with precision the grounds on which it is sought to be contended that the examination of these two persons as witnesses at the trial of Mahadeo was illegal. In part the contention is based upon the suggestion, which I have already dealt with separately, that the trial court in reality conducted one single trial, although going through the form of keeping the proceedings against Mahadeo separate from those taken under section 4 of the Act. In the main, however, the objection pressed upon me to the procedure followed in the court below turns upon the fact that the Magistrate concluded by recording a formal order of acquittal in favour of these two men, Govind and Mohan, in respect of the case under section 4 of Act III of 1867. I incline to the opinion that a formal order of acquittal is required to be recorded, although it should probably have been done in a wholly separate proceeding. These two men had been produced before a Magistrate by a police officer as the result of an investigation conducted under the provisions of the Code of Criminal Procedure and of the Public Gambling, Act No. III of 1867. Section 11 of this latter Act merely says that the Magistrate, if satisfied that any person examined by him as witness under the provisions of the preceding section has made a true and faithful discovery of all things as to which he has been examined, shall give such person a certificate in writing to that effect. Such person is thereby freed from all prosecution under Act III of 1867 for anything done before that time in respect of any gaming in which he may have been concerned contrary to the provisions of the Act. This section in itself throws no light on the nature of the order required for the purpose of terminating the proceedings which have already been instituted against any such person as a consequence of the police investigation. It may be that the Legislature which passed Act No. III of 1867 intended that the case of any such person should be treated as something *sui generis* and that the proceedings against him should be brought to a close by the

mere granting of the certificate under section 11 of the Act. The Code of Criminal Procedure, however, would seem to require something more than this, if the proceedings initiated by the investigating police officer are to be brought to a formal conclusion under the provisions of the said Code. The probability is that the provisions of section 494 or of section 248 of the Code of Criminal Procedure should be brought into operation; but so far as the matter now before me is concerned, I do not think the point of much importance, because the effect of withdrawal of the prosecution under either of these sections would be an order of acquittal. So far as the question raised regarding the examination of these two men as witnesses and their acquittal subsequently to such examination has any bearing on the merits of this case, the point taken seems to be that Govind and Mohan were in the position of accused persons on their trial before the court when they were, it is suggested, transferred from the dock to the witness-box for the purpose of being examined as witnesses, and then replaced in the dock for the completion of their trial. The suggestion is that they were thereby kept under duress, or at any rate under strong inducement, to give such evidence as they conceived the prosecution would desire of them. On the merits I see no particular force in this contention. Whatever the procedure adopted may be in respect of a person whom the Magistrate takes it upon himself to examine under section 10 of Act No. III of 1867, that person remains liable to a prosecution in respect of the offence alleged against him when he was brought before the Magistrate until he has succeeded in satisfying the Magistrate that he has made a true and faithful discovery. Evidence given by such persons must of course be received with caution. It is usually the evidence of an accomplice, and is always evidence given by a person who is under a certain inducement to make a statement favourable to the prosecution case in order to secure a certificate of indemnity for himself. These considerations bear upon the weight to be attached to such evidence but have nothing to do with the question of its admissibility. In the present case there may have been a definite irregularity committed with regard to the examination of these persons, Mohan and Govind,

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as witnesses in the case under section 4 of Act III of 1867, but whether this was so or not I am unable to say. On the materials before me I do not see that the applicant, Mahadeo, has any ground for complaint as to the examination of these witnesses in the proceedings taken against him.

I dismiss this application; Mahadeo must surrender to his bail and undergo the unexpired portion of his sentence.

Application rejected.

REVISIONAL CIVIL.

Before Justice Sir Pramada Charan Banerji.

MUTSADDI LAL (PLAINTIFF) v. BOMBAY, BARODA AND CENTRAL INDIA RAILWAY COMPANY AND ANOTHER (DEFENDANTS).*

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 31—Limitation—Suit by consignee for damages on account of non-delivery of goods—Effect of offer to compromise claim on the part of the Railway Company.

On the 16th of January, 1913, the plaintiff left at the Ramnagar station on the Rohilkhand and Kumaun Railway, a bundle of gunny bags to be delivered to the Salt Superintendent, Sambhar, on the Bombay, Baroda and Central India Railway. The bundle was not delivered. The plaintiff was subsequently informed that it was lying in the lost property office of the latter Railway, and that the plaintiff might take delivery of it if he liked. On the 17th of March, 1916, the Bombay, Baroda and Central India Railway wrote to the plaintiff and offered him Rs. 20 as compensation. The plaintiff did not accept this offer; but on the 7th of July, 1919, sued the Railway Company for Rs. 50 damage for non-delivery of the bundle of gunny bags.

Held that article 31 of the first schedule to the Indian Limitation Act, 1908, applied and the suit was barred by limitation. The plaintiff could not pray in aid the Railway Company's letter of the 17th of March, 1916, as it was written long after the expiry of the period of limitation and could not be construed as a promise to pay anything. It was at best an offer made without prejudice to compromise the plaintiff's claim.

Great Indian Peninsula Railway Co. v. Ganpat Rai (1); *Haji Ajam Goolam Hoosein v. Bombay and Persia Steam Navigation Co.* (2) referred to.

THIS was an application in revision from a decree of the court of Small Causes at Meerut. The facts of the case are fully set forth in the judgment of the Court.

Munshi *Damodar Das*, for the applicant, submitted that article 30 of the Limitation Act did not apply, as it contemplated

* Civil Revision No. 79 of 1919.

(1) (1911) I. L. R., 33 All., 544. (2) (1902) I. L. R., 26 Bom., 562.