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they must have been within the knowledge of any one occupying the *kothri*, and the articles were being used by persons occupying the *kothri*.

We do not wish to lay down any general proposition of law, but on the facts of this case we think there can be no doubt but that all three of the accused persons were in possession of the articles in question, and were also keeping and using them, and therefore they have been rightly convicted under section 60(*f*) of the Excise Act.

It has been urged that the sentences of 9 months' rigorous imprisonment each and fines of Rs.15 each are excessive in the case of first convictions. Undoubtedly the sentences are severe and would not ordinarily be passed in the case of a first conviction, but the Magistrate has stated that illicit distillation is rampant in that district and for that reason he considered it necessary to pass a deterrent sentence. We do not feel called upon to interfere with the sentences of the two senior members of the family but we think that Ram Prasad is less responsible than his father for the illicit distillation, although he no doubt took an active part in the distillation. We accordingly reduce the sentence passed upon Ram Prasad to one of six months' rigorous imprisonment and set aside the sentence of fine passed upon him.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice King

EMPEROR *v.* DASRATH RAI AND OTHERS*

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November, 17

Criminal Procedure Code, sections 16, 350*A*—*Bench of Honorary Magistrates—Bench of three, with quorum of two —Case tried, and accused convicted, by all three—Absence of one Magistrate on one day during trial—Irregularity—Failure of justice—Criminal Procedure Code, section* 537.

Three Honorary Magistrates constituted a Bench, two forming a quorum. In the course of a trial before all the three, on one particular day one of them was absent; and some

*Criminal Reference No. 409 of 1933.

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witnesses were examined and cross-examined on that day. The absentee Magistrate rejoined on the next date and continued to be present all along and took part in delivering and signing the judgment, which was an unanimous one of conviction. *Held* that there was an irregularity which had occasioned a failure of justice; the conviction was set aside and a retrial ordered.

Section 350A of the Criminal Procedure Code is not very happily worded, but apparently it is intended to apply to only such cases where one or more members drop out altogether and the remaining Magistrates who constitute the Bench which passes the order or judgment have been present on the Bench throughout the proceedings. There can be no doubt that if any of the Magistrates constituting the Bench which pronounces the judgment or the order has not been present throughout the proceedings, then section 350A is not complied with. In such a case there would at least be an irregularity in the trial.

It is difficult to hold that such a defect is illegal and vitiates the whole trial. Section 350A does not directly prohibit or declare invalid such a trial; that section, in terms, is a saving clause only. When there is no specific provision in the Act requiring that all the Honorary Magistrates constituting the trial Bench must be present at all the hearings and if they are not present the trial shall be illegal, it can only be inferred that such a defect is not anything more than an irregularity within the meaning of section 537 of the Code and it is, therefore, necessary to see whether it has occasioned a failure of justice.

Where an Honorary Magistrate, who has not heard the whole evidence and has not been present throughout the proceedings, takes part in the deliberations and joins the others in arriving at the final decision, there is every likelihood of his influencing his colleagues. By reason of his absence on some of the material dates he becomes incompetent to form a true opinion on the merits of the case, and if he joins in the deliberations there is likelihood of a failure of justice. Accordingly, in the present case the irregularity was not curable under section 537, and the conviction must be set aside.

Mr. *Krishna Murari Lal*, for the applicants.

Dr. *M. H. Faruqi*, for the opposite party.

SULAIMAN, C. J., and KING, J.—This is a criminal reference by the Sessions Judge of Azamgarh recommending that the conviction of the accused persons

should be set aside and a retrial ordered. It is not necessary to state the facts of the case itself, as for the purpose of the reference it will be quite sufficient to state what happened in the proceedings.

At Azamgarh three Honorary Magistrates constituted the Bench which had power to try this case. On most of the hearings all the three Honorary Magistrates were present, but on the 5th of December, 1932, one of them was absent. The case however was not taken up on that day and was adjourned. On the 8th of December, 1932, the next day of hearing, one of the Honorary Magistrates happened to be absent. He rejoined on the next date and then continued to be present all along and ultimately took part in delivering and signing the judgment. On the 8th of December, when one of the Magistrates was absent, some witnesses were examined and cross-examined.

All the three Honorary Magistrates unanimously came to the conclusion that the accused were guilty and convicted them. Their appeal was dismissed by a Magistrate of the first class. On revision, a point was raised before the learned Sessions Judge that inasmuch as one of the Honorary Magistrates was absent on one day, the whole trial was vitiated and the conviction could not stand. It is on this point that the case has been referred to the High Court. It came up before a single Judge of this Court who has referred it to a Division Bench.

Under section 15 of the Criminal Procedure Code the Local Government may direct any two Magistrates to sit together as a Bench and they exercise the powers of a Magistrate of the highest class to which any one of its members belongs. Section 16 empowers the Local Government or the District Magistrate (subject to the control of the Local Government) to make rules for the guidance of such Benches in respect of the constitution of the Bench for conducting trials, among other matters. For Azamgarh, a Government notification was issued on

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the 5th October, 1926, under which it was provided that two of these three Honorary Magistrates shall form a quorum. It is therefore not disputed that any two of the three Honorary Magistrates, if present, would constitute the Bench and would be empowered to try the case.

Prior to 1923 there was some conflict of opinion as to what would be the effect if one of the members of such a Bench were absent on some of the hearings. The legislature has now intervened and added section 350A. It provides that "No order or judgment of a Bench of Magistrates shall be invalid by reason only of a change having occurred in the constitution of the Bench in any case in which the Bench by which such order or judgment is passed is duly constituted under sections 15 and 16, and the Magistrates constituting the same have been present on the Bench throughout the proceedings."

We are not now concerned with the trend of rulings prior to this addition, but there are three recent cases of this Court in which this added section has been interpreted.

The case of *Chiteshwar Dube* v. *King-Emperor* (1) was somewhat similar to the present case, inasmuch as one of the three Magistrates had been absent on a few occasions but was present at the time of the delivery of the judgment. The learned Judge set aside the conviction and ordered a retrial. So far as the facts go, there can be no question that the conclusion was right. But there are certain observations in the judgment which have been strongly relied upon by the learned advocate for the accused. The learned Judge accepted the view of the Sessions Judge that the presence of all the Magistrates constituting the Bench on all the hearings was indispensable for a valid trial of a case pending before it and observed (at page 43) that "The concluding part of section 350A makes it perfectly clear

(1) [1932] A.L.J., 42.

that all the Magistrates for the time being constituting the Bench must take part in the proceedings, though if during the pendency of the case the personnel of the Bench undergoes a change, the new member can replace an outgoing member without necessitating a fresh trial." It was further observed that "If any member of the Bench was not present on any hearing no properly constituted Bench can be said to have been in existence."

We are not sure whether the learned Judge intended to lay down that if a number of Honorary Magistrates constitute a Bench and if only a few of them, sufficient to form a quorum, are present and try the case, the trial is altogether illegal. Apparently his attention was not drawn to the notification fixing a quorum which would obviate the necessity of the presence of all the Honorary Magistrates at the trial. If the learned Judge meant to lay down that all the Honorary Magistrates, irrespective of the quorum, must be present at all the hearings, then we would certainly not agree with that view. Furthermore, if it was intended to lay down that a newly appointed member can replace an outgoing member on the Bench trying the case, without necessitating a fresh trial, even where his presence is necessary for the purpose of a quorum, we would not agree with that view.

In *Ram Khelawan* v. *Sheo Nandan* (1), another learned Judge had a case before him in which one of the three Magistrates was not present on some of the days of the hearing, and the two Magistrates who had been present throughout actually differed in their conclusions. The third Magistrate who had been present on some days joined them and agreed with the Magistrate who was in favour of the acquittal. It was on account of his opinion that the accused were acquitted. The learned Judge set aside the acquittal and ordered a retrial. That obviously was a case where the opinion of the Magistrate who had not been present throughout

(1) (1931) I.L.R., 54 All., 413.

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the proceedings actually turned the scale and it was on account of his opinion that the accused were acquitted. There can be no doubt that in that case the order of acquittal was rightly set aside.

Lastly there is the case of *Emperor* v. *Mathura* (1), decided by another Judge who agreed with the view that where two Magistrates formed a quorum, the same two Magistrates must hear that particular case from start to finish and sign the judgment. The learned Judge did not interfere in that case because the third Magistrate who had been absent at some of the intermediate hearings had not joined in delivering the judgment which had been pronounced by the two Magistrates who had been present throughout.

It seems to us that section 350A is a saving section which provides that no order or judgment of a Bench shall be invalid by reason of a change in the constitution of a Bench, provided "the Magistrates constituting the Bench have been present on the Bench throughout the proceedings." Unfortunately the section is not happily worded and it is not easy to see how the constitution of the Bench can be changed and at the same time the Magistrates constituting the Bench be present on the Bench throughout the proceedings. The only two possible cases where a change in the constitution may arise would be (1) where one or more of the Honorary Magistrates completely drop out and never rejoin, so that although there has been a slight change in the constitution of the Bench by the dropping out of the member or members, the remaining members continue to be Magistrates who constitute the Bench and who are present on the Bench throughout the proceedings. (2) Another possible case, which is not likely to have been in the contemplation of the legislature, is where a change in the constitution of the Bench may take place in the sense of a replacement of some of the members of the Bench who take no part in the trial of

(1) (1933) I.L.R., 55 All., 459.

the case at all; but for such a contingency no special provision was necessary.

It seems most likely that the section is intended to apply to only such cases where one or more members drop out altogether and the remaining Magistrates who constitute the Bench which passes the order or judgment have been present on the Bench throughout the proceedings. There can be no doubt that if any of the Magistrates constituting the Bench which pronounces the judgment or the order has not been present throughout the proceedings, then section 350A is not complied with. In such a case there would at least be an irregularity in the trial.

No case has been cited before us in which the question has been raised whether a non-compliance with the provisions of section 350A would amount to a mere irregularity or would be an illegality so as to invalidate the whole trial. No doubt there are cases prior to 1923 in which trials were considered to have been invalid on account of such defects. But inasmuch as section 350A in terms is a saving clause and does not directly prohibit or declare invalid the trial of a case where one of the Honorary Magistrates has not been present throughout the proceedings, but only indirectly or by implication assumes that the trial would be irregular if all the Magistrates constituting the Bench have not been present throughout the proceedings, it seems difficult to hold that such a defect is illegal and vitiates the whole trial. When there is no specific provision in the Act requiring that all the Honorary Magistrates constituting the trial Bench must be present at all the hearings and if they are not present the trial shall be illegal, we can only infer that such defect would be irregular. The defect is not such as involves a direct infringement of any specific provision of the Act, but is contrary to the spirit and the principle underlying section 350A. We think that we cannot regard it as anything more than an irregularity in the judgment or proceeding within

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the meaning of section 537 of the Act. But under that section no irregularity in the judgment or proceeding would justify a reversal or alteration of the order, unless "such irregularity has in fact occasioned a failure of justice."

It is therefore necessary to see whether in this particular case there has been a failure of justice. Cases of the type of *Ram Khelawan* v. *Sheo Nandan* (1), where the Magistrates have differed, are obviously cases where a failure of justice would be occasioned on account of the third Magistrate taking part in the delivery of the judgment or order. On the other hand, there may be cases where an Honorary Magistrate may happen to be absent on one day and may be present on other days of the hearing and then may absent himself and not take any further part in the proceedings. In such cases it may be most difficult to hold that there has been a failure of justice on account of his presence on some days of the hearing. Similarly, there may be cases where after a full hearing by all the Magistrates, one of the Magistrates absents himself at the final deliberations and a judgment is pronounced by two of the Honorary Magistrates who have been present throughout the proceedings and is signed by them, and then the judgment is sent on by the reader for being signed by the third Magistrate as well; it may in such a case be very difficult to hold that the accused has been in any way prejudiced by the superfluous signature of the third Magistrate. But where an Honorary Magistrate, who has not heard the whole evidence and has not been present throughout the proceedings takes part in the deliberations and joins the others in arriving at the final decision, there is every likelihood of his influencing his colleagues. By virtue of his absence on some of the material dates he became incompetent to form a true opinion on the merits of the case, and if he joins

(1) (1931) I.L.R., 54 All., 413.

in the deliberations there is likelihood of a failure of justice.

The learned advocate for the complainant has urged before us that the Explanation to section 537 emphasises that in order to determine whether there has been a failure of justice, an omission to raise objection at an early stage of the proceeding is very material. It is pointed out that in the grounds of appeal before the first class Magistrate no point was taken that there had been a failure of justice on account of the third Honorary Magistrate rejoining at the later stage. But it is rightly pointed out on behalf of the accused that in view of the rulings of this Court, particularly that of *Chiteshwar Dube* v. *King-Emperor* (1), it was not necessary to put forward a further ground that there had been an irregularity and it was quite sufficient to point out that there had been an illegality.

No doubt the Magistrates in their explanation have expressed their opinion that there being unanimity, their decision would not have been different if the third Magistrate also had not joined. But we do not think that we can take this subsequent explanation as sufficient to justify the conclusion that there could not have been a failure of justice.

It seems to us that it is very necessary that the Honorary Magistrates should know that it is their duty to be present throughout the proceedings when they are trying a criminal case. If owing to some unforeseen and unavoidable reason, any of the Honorary Magistrates happens to be absent on any one day, he should take care not to take any part in the final deliberations, nor take part in the delivery of judgment. But the trial must of course proceed if the remaining members are sufficient in number to form a quorum. It should be clearly understood that only those members of the Bench who have been present throughout the proceedings and who form a quorum should arrive at their final conclusions to write the judgment and pronounce and sign it.

(1) [1932] A.L.J., 42.

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We accordingly accept this reference and setting aside the order convicting the accused, direct that they should be retried. The fines if paid should be refunded.

REVISIONAL CIVIL

Before Mr. Justice Kendall

1933 *November*, 21

GAURI SHANKAR BHARGAVA (DEFENDANT) *v.* JAGAT NARAIN SHAHGAL (PLAINTIFF)*

Civil Procedure Code, order IX, rule 13—Ex parte *decree by small cause court—Revision by plaintiff for additional interest—Defendant party to revision and contesting it—Decree modified in revision—Application to trial court for setting aside* ex parte *decree after the decree has been modified by higher court—Merger—Jurisdiction.*

Where an *ex parte* decree for money was passed by a court of small causes and on an application in revision to the High Court by the plaintiff for future interest the decree was modified after contest by the defendant and future interest was allowed, and after the decree of the High Court the defendant applied to the small cause court under order IX, rule 13 to have the original *ex parte* decree set aside, it was *held* that the original *ex parte* decree of the small cause court had merged in that of the High Court and it was no longer open to the trial court to entertain the application to set its decree aside.

Mr. *Gajadhar Prasad Bhargava*, for the applicant.

Mr. *J. Swarup*, for the opposite party.

KENDALL, J.:—This is a defendant's application for the revision of an order of the Judge of the small cause court of Agra, disallowing his application under order IX, rule 13 of the Civil Procedure Code to set aside an *ex parte* decree passed against him. A suit for money had been brought against the applicant in the small cause court, and as he is a resident of Ajmere, service of summons on him was allowed to be effected by publication in the "Leader", and an *ex parte* decree was given against him. Subsequently the plaintiff applied in the High Court for a revision of this *ex parte* decree on the

*Civil Revision No. 415 of 1933.