1881

BALMAKUND v. ANKI AND ANOTHER.

Balmakund appealed to the High Court from the District Court's order, contending that it was proved that the minor was his wife.

Lala *Jokhu Lal*, for the appellant.

Munshi *Hanuman Prasad*, for the respondents.

The Court (OLDFIELD, J., and STRAIGHT, J.,) delivered the following judgment:—

OLDFIELD, J.—Act IX of 1861 does not apply to a case of this kind, where the appellant asserts his right to the custody of the respondent on the ground that she is his wife, and the latter denies that she is so. The applicant's course is to establish his claim in a Civil Court by regular suit. We dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

1880
April 19.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

EMPRESS OF INDIA *v.* HAIT RAM.

EMPRESS OF INDIA *v.* CHEDA KHAN.

Illicit possession of liquor—Guilty knowledge—Presumption—Act XI of 1870, *s.* 2—*Act X of* 1871 (*Excise Act*), *ss.* 19, 63—"*Ser.*"

Held, in a prosecution under ss. 19 and 63 of Act X. of 1871, that the definition of "ser" given in s. 2 of Act XI. of 1870 was not so intelligible and clear as to be capable of general application and that it did not supersede the local customary weight of a ser. *Held*, therefore, the local customary weight of a ser being ninety-five tolahs (the Government ser weighing eighty tolahs), and the accused having been found in possession of ninety-six tolahs only, that the excess of one tolah over the local weight was not such as to warrant the presumption of the guilt of the accused (1).

THESE were appeals by the Local Government from judgments of acquittal passed by Mr. W. Tyrrell, Sessions Judge of Bareilly, dated the 10th and the 27th September, 1879, respectively. One Hait Ram and Cheda Khan his servant were convicted by Mr. R. G. Hardy, exercising the powers of a Magistrate of the

(1.) Reported under the orders of the Hon'ble the Chief Justice. Since this decision was given a Bill (Excise Act, 1881) has been introduced into the Legislative Council by which it is proposed to alter the excise law, and, among other things, to define more clearly the weight of the "ser" as meaning eighty tolahs.

1880

EMPRESS OF INDIA v. HAIT RAM AND CHEDA KHAN.

first class in the Pilibhit district, of an offence under s. 63 of the Excise Act of 1871, in that, not being licensed manufacturers or vendors, or persons duly authorized to supply licensed vendors, they had in their possession one and a quarter sers of country spirits, being a larger quantity than might legally be sold by retail under the provisions of s. 19 of that Act, *viz.*, one ser. The Magistrate, in trying the case, apparently took the "ser" in Act X of 1871 to mean the Government ser of eighty tolahs. On appeal by Hait Ram the Sessions Judge on the 10th September, 1879, acquitted him, on the ground that, as the quantity of liquor in his possession was only one tolah in excess of the Bareilly ser, which contained ninety-five tolahs, and that ser was in practice frequently used in the weighment of liquor and was accepted as a proper ser, the liquor was so very nearly a ser that it was not proper to assume that he was knowingly in possession of an illegal excess quantity. For the same reasons the Sessions Judge, on appeal, acquitted Cheda Khan on the 27th September, 1879.

The Local Government appealed on the same grounds in both cases, such grounds being (i) that the ser mentioned in Act X of 1871 was the Government ser of eighty tolahs, and, inasmuch as the quantity of liquor found in the possession of the accused persons weighed nearly ninety-six tolahs, the accused persons were clearly guilty of the offence charged against them; and (ii) that it was not necessary to prove guilty knowledge as laid down by the Sessions Judge, the fact of possession of an illegal quantity being sufficient to justify a conviction under the Excise Act.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

The respondents did not appear.

The following judgments were delivered by the Court:—

STUART, C. J.—The order of the Judge is clearly right and we must dismiss this appeal. It is not only an unsustainable but an unreasonable appeal, for it is based on a very strange law, and one still more strangely expressed, and which I must be allowed to say the people of this country cannot understand, showing thus a limit to the aphorism *ignorantia juris neminem excusat*. The accused are

1880

EMPRESS OF INDIA v. HAIT RAM AND CHEDA KHAN.

Hait Ram who keeps a liquor shop and Cheda Khan his servant, and they were both convicted under s. 63 of the Excise Act, which provides:—"Every person, other than a licensed manufacturer or vendor, or a person duly authorized to supply licensed vendors, who has in his possession any larger quantity of country spirits, or tárí, or pachwái, or intoxicating drugs, except opium, than may legally be sold by retail under the provisions of s. 19,"—and by s. 19 it is enacted that the quantity of country liquor unlicensed vendors may sell shall not be more then "one ser." The two accused were convicted of being illegally possessed of more than one ser of country spirits; Cheda being sentenced to imprisonment for three months, and to pay a fine of Rs. 10, or in default to suffer one month's imprisonment in the civil jail, and Hait Ram to one month's imprisonment in the civil jail, and to pay a fine of Rs. 100, or suffer two months' imprisonment in the civil jail in default. These sentences appear to be warranted by s. 76 of the Excise Act X of 1871. On appeal to the Judge the convictions of the two accused and the sentences on them were annulled. In his judgment the Judge states that a ser of the Bareilly weighment, which he says in practice is frequently used in weighment of spirits and is accepted as a proper ser, contains nearly ninety-five tolahs, while the quantity traced to the accused was found to be as nearly as possible ninety-six tolahs of the *sirkárí* or Government weight. In regard to this fact the Judge says that the quantity of liquor found on Cheda (and for which both the accused must be taken to be responsible) was so very nearly a ser that it was improper to assume that he was guilty and that he knew that he was possessed of an illegal excess quantity of the spirits. Against this judgment the Government appealed to this Court on grounds the principal of which is that the ser mentioned in the Excise Act is the Government ser of eighty tolahs, which was of course materially less than ninety-six tolahs which the accused were responsible for. It becomes material, therefore, to know whether the Government ser was eighty tolahs. The Judge tells us that in his opinion the Bareilly ser containing nearly ninety-five tolahs was the proper measurement, while it is contended on behalf of the Government that the ser is the standard of weight mentioned in s. 2, Act XI of 1870, and which it is there provided "shall be a weight of

1880

EMPRESS OF INDIA v. HAIT RAM AND CHEDA KHAN.

metal in the possession of the Government of India, which weight, when weighed in a vacuum, is equal to the weight known in France as the "*Kilogramme des Archives.*" Now I would really beg to ask how the natives of this country can be be expected to understand such language, and to be informed by it of the exact weighment in tolahs of a ser? It was explained at the hearing that the difficulty had certainly been experienced, and it had been endeavoured to be met by the assumption, which to some extent had been acted on, that the Government ser was eighty tolahs, and that it had been found convenient that the tolah should be considered of the weight of one rupee. Now all this may be very well, but is it reasonable to hold that the convictions and sentences in these cases can be upheld under such a state of the law? I think not. The practical view of the matter taken by the Judge based on the ascertained weight of the ser of the district of Bareilly, where the alleged offence was committed, is reasonable and tangible, and so much cannot be said of the calculation based on the French admeasurement and in the French language as provided by s. 2 of Act XI of 1870.

The appeals must, therefore, be dismissed, but it is not to be regretted that they have been brought before this Court if their decision will direct the attention of the Government and the Legislature to the very unsatisfactory state of the law, especially as provided by Act XI of 1870, with reference to which they have been considered by us.

STRAIGHT, J.—I am of opinion that the Sessions Judge was right in quashing the convictions of Cheda Khan and Hait Ram, and that the evidence was unsatisfactory and insufficient to sustain the charge against them of being in illegal possession of a larger quantity of country-made spirits than one ser. In cases of this kind it is necessary to establish guilty knowledge, and no doubt the presumption of it may be inferred with more or less force from the mere fact of possession, according as the quantity of liquor found with the person charged is to a larger or smaller extent in excess of the quantity defined in ss. 19 and 63, Act X of 1871. No doubt cases might arise in which from surrounding and collateral circumstances a conviction might be had, where but a

1880

EMPRESS OF INDIA v. HAIT RAM AND CHEDA KHAN.

few tolahs of liquor beyond the legitimate ser are found in a person's possession. But in the present instance there was no such evidence, and the Judge very reasonably argues that the Bareilly ser being about ninety-five tolahs and the liquor discovered in Cheda Khan's possession only weighing ninety-six, the presumption of guilty knowledge should not be drawn. It is not very clear what is the precise weight intended by the expression "one ser" as mentioned in s. 19 of the Excise Act. I think it would be reasonable to assume that it contemplated the ordinary and generally accepted ser of eighty tolahs or in other words the weight of eighty rupees. It seems to me that this is a more comprehensible standard of weight by which to be guided and certainly one much more likely to be understood by the natives of this country than the "*Kilogramme des Archives*" referred to in s. 2 of Act XI of 1870. I am unaware whether this last-mentioned Act, though it has become law, has been put into practical operation, and whether the authorizations, notifications, and rules to be made under it by the Governor-General in Council have ever been issued. Under any circumstances it would seem to me expedient that for the purpose of working the penal provisions of the Excise Act as to the possession of liquor, the weight of the ser therein mentioned should be statutably defined. The appeal is dismissed.

Appeals dismissed.

APPELLATE CIVIL.

1881
January 4.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

BEHARI LAL (PLAINTIFF) *v.* BENI LAL (DEFENDANT).*

Mortgage—Foreclosure—Demand for payment of mortgage-debt—Power of a minor to take a mortgage—Regulation XVII of 1806, *s.* 8.

A conditional mortgagee applied for foreclosure omitting previously to demand from the mortgagor payment of the mortgage-debt. On foreclosure of the mortgage he sued for possession of the mortgaged property. The lower appellate Court dismissed the suit on the ground that the foreclosure proceedings were invalid and ineffective by reason of such omission, and in so doing directed that the demand which the mortgagee should make prior to a fresh application for

* Second Appeal, No. 1208 of 1879, from a decree of P. White, Esq., Deputy Commissioner of Jalaun, dated the 11th June, 1879, reversing a decree of Munshi Kalka Prasad, Tahsildar of Jalaun, dated the 16th December, 1878.