

just rights on the part of the Defendant, denies the aid of the law to enforce those of the Plaintiff. Procedure is but the machinery of the law after all, the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to subserve."

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*Nanavutty  
and  
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These remarks apply with full force to the frame of mind of the learned trying Magistrate, who has looked upon the rules framed in respect of house-searches as being too sacrosanct for words and as overriding the claims of common sense and of justice. In our opinion the judgment of acquittal passed by the learned trial Magistrate was against the weight of evidence on the record and against the plea of guilty made by the accused and cannot be sustained.

We accordingly allow this appeal, set aside the order of acquittal passed by the trial Magistrate against Chanduwa Pasi and convict him of offences under clauses (a) and (f) of section 60 of the United Provinces Excise Act, and taking into consideration all the circumstances of the case and the fact that the accused has been in the jail lock-up for several weeks now, sentence him for each offence under section 60 of the United Provinces Excise Act to undergo one month's rigorous imprisonment, the sentences to run concurrently.

*Appeal allowed.*

## MISCELLANEOUS CRIMINAL

*Before Mr. Justice Bisheshwar Nath Srivastava*

RANI HAZOOR ARA BEGAM (APPLICANT) v. DEPUTY  
COMMISSIONER OF GONDA (OPPOSITE-PARTY)\*

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April, 16

*Criminal Procedure Code (Act V of 1898), section 491(1)(b)—  
Lady not allowed to see anybody she wants to see—No*

\*Criminal Miscellaneous Application No. 41 of 1934, under section 491, Criminal Procedure Code, for issue of the writ of *habeas-corpus*.

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*restraint on her personal movements—Habeas-corpus order, whether to be issued—“Detained” and “custody”, meaning of—Dispute regarding possession or ownership of property—Section 491, applicability of.*

Where no restriction of any kind is placed on the personal movements of a lady but there is restraint imposed on her right to see anybody whom she wants to see, it is not sufficient to entitle her to relief under clause (b) of sub-section (1) of section 491 of the Code of Criminal Procedure. The important words in that clause to be considered are “detained” and “custody”. The restriction upon her right to see anybody she wants does constitute a curtailment of her liberty but it is impossible to hold that it constitutes a detention in custody. The words quoted above imply some sort of confinement or physical restraint on the liberty of movement of the detenu. The use of the words “be set at liberty” also supports this construction. *Ashugbayi Eleko v. The Officer Administering the Government of Nigeria* (1), *Jitendra Nath Ghosh v. The Chief Secretary to the Government of Bengal* (2), and *In the matter of Rudolf Stalimann* (3), distinguished.

The disputes between the parties as regards the possession or ownership of the moveable or immoveable properties are outside the purview of section 491 of the Code of Criminal Procedure.

Messrs. *Ali Zaheer and Ghulam Imam*, for the applicant.

The Government Advocate (Mr. G. H. Thomas), for the Crown.

SRIVASTAVA, J.:—This is an application by Rani Hazoor Ara Begam widow of Raja Mohammad Mumtaz Ali Khan of Utraula, District Gonda, for directions of the nature of a *habeas-corpus* under section 491 of the Code of Criminal Procedure.

The admitted facts of the case are that on the 12th of February, 1934, Raja Mohammad Mumtaz Ali Khan was declared by the local Government to be incapable of managing his property and the Court of Wards assumed superintendence of his estate from that date. The Raja died on the 4th of March, 1934 and subsequently the Court of Wards assumed superintendence of the estate

(1) (1931) 35 C.W.N., 755.

(2) (1932) 36 C.W.N., 1089.

(3) (1311) I.L.R., 39 Cal., 164.

and other properties on behalf of the two minor sons of the late Raja. The Deputy Commissioner of Gonda as manager in charge of the Court of Wards has locked and sealed the valuables in the residential house of the deceased Raja at Utraula in which the applicant Rani had been residing during his lifetime and continues to reside till now.

The allegations made on behalf of the applicant are that the deceased Raja in his lifetime had on the 15th of February, 1934, created a trust of his immoveable properties and had made a gift in her favour of the moveables including household effects. Her complaint is that in spite of the trust and the gift, the Deputy Commissioner has taken possession of all the properties and has placed a guard on the house and has prohibited anybody from entering the house or from seeing the applicant. It is also alleged that some of her servants have been turned out and are not allowed access to her. The application is supported by a few affidavits in which it is alleged that her brother Nawab Mohammad Shikoh and her cousin Mohammad Kazim Ali Khan, Babu Avadh Behari Lal, a legal practitioner of Gonda and the sub-registrar at Gonda went to Utraula but were prevented from seeing her.

The Deputy Commissioner of Gonda in his explanation sent to the Court, states that no restrictions have been placed on the personal movements of the Rani. He admits that a guard has been posted at the house for the protection of the property and in order to prevent unauthorized persons getting access to the place. He adds that anybody who wants to enter the house can do so after obtaining permission from the authorities and that in all reasonable cases, permission would not be refused.

It is quite clear and was rightly conceded before me by the learned counsel for the applicant that the disputes between the parties as regards the possession or ownership of the moveable or immoveable properties are

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outside the purview of section 491 of the Code of Criminal Procedure. There is no affidavit or evidence in support of the allegation that some of the Rani's servants have been turned out and are not allowed access to her. The allegation has also been denied by the Deputy Commissioner who says that no restrictions have been imposed on the movements of her personal servants and attendants. The whole controversy therefore is reduced to this, namely, that according to the applicant's case no third persons whether her relations, friends or legal advisers are allowed to go and see her in the house whereas according to the Deputy Commissioner such persons are not absolutely prohibited from seeing her but can do so after getting permission from the Court of Wards authorities.

Assuming that the applicant's allegations are correct, the question arising for determination is whether those allegations bring the case within the terms of section 491 of the Code of Criminal Procedure. It is not denied that no restriction of any kind whatever has been placed on her personal movements. But it is argued that the restraint imposed on her right to see anybody whom she wants to see, is sufficient to entitle her to relief under clause (b) of sub-section (1) of section 491 of the Code of Criminal Procedure which provides that a High Court may whenever it thinks fit direct that a person illegally or improperly detained in public or private custody within the limits of its appellate criminal jurisdiction be set at liberty. The important words to be considered are "detained" and "custody." Can it be said that the applicant is detained in custody because she is prevented from seeing certain people whom she wants to see? The restriction upon her right to see such people does constitute a curtailment of her liberty but I find it impossible to hold that it constitutes a detention in custody. The words quoted above, in my opinion, imply some sort of confinement or physical restraint on the liberty of movement of the detenu. The use of the words "be set at

liberty" also supports this construction. On the admitted facts, there is a complete absence of any restraint on the applicant's personal liberty of movement.

The learned counsel for the applicant has not been able to refer me to any authority in support of his contention that the powers conferred by clause (b) can be exercised in respect of a person who enjoys the fullest liberty of movement but whose liberty of other sorts is curtailed as alleged in the present case. Three cases have been cited on the applicant's behalf but none of them is in point.

*Ashugbayi Eleko v. The Officer Administering the Government of Nigeria* (1) is a decision of their Lordships of the Privy Council on appeal from the Supreme Court of Nigeria. In this case the appellant who was the descendant of a ruling chief had been deposed under an ordinance of Nigeria and ordered to leave the colony and on his failure to comply with the order was deported. The facts show that it was clearly a case of detention in custody.

*Jitendra Nath Ghosh v. The Chief Secretary to the Government of Bengal* (2) is the case of a person who had been arrested under the Bengal Criminal Law Amendment Act. *In the matter of Rudolf Stalimann* (3) an application was made for an order in the nature of a writ of *habeas corpus* by a person who had been arrested under an extradition warrant.

Thus it will be seen that all the cases referred to by the counsel for the applicant are cases in which the relief of the nature of *habeas corpus* was sought on behalf of persons who had been deprived of their physical liberty and were detained in custody.

I am therefore of opinion that clause (b) of subsection (1) of section 491 has no application to the case. I accordingly reject the application.

*Application rejected.*

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