

1885.

BACHUBAI
AND L. A.
WATKINS
v.
SHAMJI
JADWJI.

which, therefore, the estate of the deceased partner was entitled to participate. Such contracts are in their nature assets of a partnership. But here there was simply a contract determinable at any time by the company, the profits of which would be derived entirely by the services of the surviving partners or partner, and in respect of which no liability could be incurred by the deceased partner. It cannot, therefore, in our opinion be regarded as an asset of the firm.

Under these circumstances we must reverse the decree of the Court below, and dismiss the suit with costs.

Appeal allowed.

Attorneys for the appellants.—Messrs. *Hore, Conroy and Brown.*

Attorneys for the respondents.—Messrs. *Little, Smith, Frere and Nicholson.*

REVISIONAL CRIMINAL.

Before Mr. Justice Nánabhái Haridás and Sir W. Wedderburn, Bart., Justice.
*In re THE PETITION OF LIMDA KOYA.**

1885
July 6.

Abkari (Bombay) Act V of 1878, Secs. 43, Cl. f, and 53—Mowra flowers, possession of—Liability of seller of the flowers where purchaser makes illicit use by distilling liquor therefrom—Burden of proof.

Mere possession of mowra flowers does not constitute an offence under section 43 of the Abkari Act V of 1878, unless such possession is made out by the prosecution to have been for the purposes of distilling liquor therefrom. Nor is a seller of these flowers criminally responsible for any illicit use of them after they have passed from his control.

This was a petition to set aside the order of conviction and sentence passed by Ráo Bahádur Oomedrá, a Magistrate of the First Class at Surat.

The petitioner was a dealer in mowra flowers, and in course of his business sold some flowers to one Khushál Vajiria, who distilled liquor therefrom, and was tried and punished for the offence. On inquiry by the chief police constable, as to the

* Criminal Review Petition No. 77 of 1885.

person from whom Khushál obtained the flowers, he pointed out the petitioner. The police thereupon searched the house of the petitioner, and found in it some maunds of mowra flowers. The petitioner was charged, under section 43 of the A'bkári Act (Bombay) V of 1878, with the offence of keeping mowra flowers in his possession for illicit distillation, and was convicted and sentenced by a Second Class Magistrate to a fine of Rs. 30. Against this decision the petitioner preferred an appeal to the First Class Magistrate at Surat, who confirmed the conviction and sentence.

The petitioner made the present application to the High Court under its revisional jurisdiction.

Mánekshá Jehángirshá for the petitioner.—Mere possession of the mowra flowers is not an offence under section 43, clause *f*, of the A'bkári Act, unless such possession is for the purpose of distilling liquor therefrom. It was for the prosecution to make out clearly that the petitioner's possession was for such purposes. The petitioner was admittedly a dealer in the flowers, and his possession was thus satisfactorily accounted for.

Hon. *V. N. Mandlik* for the Crown.—Under section 53 of the A'bkári Act the presumption arises that possession of the mowra flowers is for distilling liquor, and the burden of proving such possession as innocent is on the person in possession.

NÁNÁBHÁI HARIDÁS, J.—In prosecutions under section 43 of the Bombay A'bkári Act V of 1878, a presumption, under section 53 of the Act, no doubt arises that the person found in possession of such materials "as are ordinarily used in the manufacture of liquor" was in possession of them for the purpose of manufacturing liquor (section 43, clause *f*). But such a presumption under that section arises only when the accused is "unable to account satisfactorily" for his possession of them.

In the present case it appears, from the Appellate Court's judgment, that the accused is a dealer in mowra flowers, and the only act found against him is that of having sold the mowra flowers to Khushál Vajiria, who made an illegal use of them. It is not alleged that he has used such flowers for the purpose of manufacturing liquor. Being a dealer, his possession of mowra

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flowers in the course of his business is satisfactorily accounted for. The presumption, therefore, under section 53 cannot be said to arise in this case, and it lies upon the prosecution—no such presumption arising—to make out that the accused had in his possession mowra flowers for the manufacturing of liquor. The prosecution has failed to make it out.

The Magistrate from the evidence of the liquor-contractor's man, that illicit distillation is common in the Bulsár Táluka, presumes that the accused in this case kept the mowra flowers in his possession with the intention of using them for illicit distillation by himself or by other persons purchasing the same from him. We are unable to follow his reasoning. Also it is evident that the accused cannot be held responsible for the use made by purchasers of the materials after they have passed from his control.

The statement of the Magistrate in his judgment, that the mowra flowers are not used in the district as food for men or animals, is contrary to the statement on oath of witness No. 23 (Chotálál Vasandás).

The conviction and sentence are reversed. Fine, if levied, to be repaid.

Conviction and sentence set aside.

REVISIONAL CRIMINAL.

Before Mr. Justice Nánábhái Haridás and Sir W. Wedderburn, Bart., Justice.

In re THE PETITION OF RAKHMA'JI.*

1885.
July 6.

Penal Code (Act XLV of 1860), Secs. 353 and 352—Rules or executive orders of Government published in Mr. Nairne's Revenue Hand Book—Impressment of carts for the use of Government officers, how far legal.

The rules or executive orders of Government printed at pages 26 and 27 of Mr. Nairne's Revenue Hand Book have not the force of law, and a public servant, acting in obedience thereto, cannot be considered as acting in execution of his duty as a public servant, if his act is otherwise illegal.

Accordingly, where on a complaint by a sepoy in the Revenue Department deputed by a forest settlement officer to impress some carts for the use of the latter,

* Review Petition, No. 51 of 1885.