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step in aid, and if the decree could not be executed at all otherwise than by means of a temporary delay, a step which ensures the ultimate execution, though at the expense of a temporary delay, may well be described as a step in aid of execution. Following *Haridas Nanabhai v. Vithaldas Kisandas*, we reverse the decree and remand the *darkhast* to be decided on its merits with costs throughout.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Chandavarkar.

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November 21.

KARSAN WALAD SADASHIV PATIL AND ANOTHER (ORIGINAL PLAINTIFFS),
APPELLANTS, v. GATLU SHIVAJI PATIL AND OTHERS (ORIGINAL DEFEND-
ANTS), RESPONDENTS.*

Abkari Act (Bom. Act V of 1878), sections 16, 43—License under the Act to sell country liquor—Prohibition to sell, transfer or sub-let the licensee's right—Partnership not prohibited.

Defendant 1 obtained a license under the Abkari Act (Bom. Act V of 1878) to sell country liquor. One of the conditions of the license was that the "licensee shall not sell, transfer to another person, or sub-let his right to sell country liquor obtained under the license and he shall enter into no kabulayat for the exercise of the said right, which, in the opinion of the Collector, is of the nature of a sub-lease." By the preamble of the license the licensee was given, subject to the conditions expressed subsequently, an exclusive right to sell country liquor in the shop for one year from the 1st April 1904.

After obtaining the license the defendants admitted the (deceased) plaintiff as a partner in the business and the latter brought a suit for an account of what was due upon the partnership. A question having arisen as to whether the contract for partnership was forbidden by law and opposed to the policy and general tenor of the Act and, therefore, not enforceable in a Court of law,

Held, that the omission in the license sanctioned by Government in the year 1903 of all reference to the question of sub-letting a part of the right to vend

* Second Appeal No. 664 of 1911.

or of admitting persons into the business only pointed to the inference that the Abkari authorities had decided not to prohibit the taking up of other persons into partnership in the profits derived from the selling of liquor under an Abkari license.

• **SECOND** appeal against the decision of J. D. Dikshit, District Judge of Khandesh, confirming the decree of S. A. Naik, Subordinate Judge of Nandurbar.

The plaintiff sued to recover whatever money might be found due on taking account of the partnership between the parties in respect of a license to sell liquor. The plaintiff alleged that on the 28th February 1904 an agreement written on a plain paper was made between him and defendant 1 to the effect that the latter should take in his own name a license from Government for the exclusive privilege of selling country liquor in the Nandurbar Taluka and Navapur Petia during the year 1904-05 and should then carry on the business of selling the liquor in partnership with the plaintiff, both equally contributing to the capital and equally sharing the resulting profit or loss, that the said agreement on plain paper provided that a formal instrument of partnership should be executed by the parties after the tenders were accepted, but no such formal document was, however, drawn after the acceptance of the tender as defendants 1 and 2 said that no such document was necessary and the agreement on plain paper would be sufficient and that shortly after the expiration of the period of the license, the plaintiff called upon defendant 1 to make up the accounts and pay over to him his share of the capital and profits, &c., but the defendant refused to do so, and hence the suit. The plaintiff further stated that the plaintiff was unable to state the exact amount due as he was not in possession of the accounts of the business, but he believed that the amount would not be less than Rs. 4,500.

Defendants 1, 2 and 3, who were members of an undivided family, admitted the fact of the agreement to

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enter into partnership and the genuineness of the writing dated the 28th February 1904, but contended *inter alia* that after the writing was passed, defendant 1 having learnt that partnership in a business in liquor was prohibited by the terms of the license was an offence under the Abkari Act, he gave intimation to the plaintiff and revoked the agreement, that as the proposed partnership could not be entered into, no document on stamped paper was passed by the defendant in plaintiff's favour, that the proposed partnership was never formed and that the agreement of the 28th February 1904 was unlawful under section 23 of the Contract Act and was, therefore, not enforceable.

The plaintiff answered that the writing of the 28th February 1904 was intended to create and did actually create partnership between him and the defendants from its date and was not merely an agreement to enter into such partnership in future.

The important clause of the license issued to defendant 1 was as follows :—

19. The said licensee shall not sell, transfer to another person, or sub-let his right to sell country liquor obtained under the license ; and he shall enter into no kabulayat (agreement) for the exercise of the said right, which, in the opinion of the Collector, is of the nature of a Pôt Kaul (sub-lease).

The Subordinate Judge found that the writing of the 28th February 1904 was not intended to actually create partnership from its date, that the parties did not subsequently enter into the partnership proposed as alleged by the plaintiff, that they did revoke the agreement in the belief that it would not be legal as alleged by the defendants and that the agreement was not illegal inasmuch as the license in suit only prohibited a sub-lease and not partnership. The Subordinate Judge, therefore, dismissed the suit. He further found that in case the partnership between the plaintiff and the defendants be held proved, plaintiff would be entitled to recover from the defendants Rs. 6,135-5.

On appeal by the heirs of the plaintiff who died in the meanwhile, the District Judge confirmed the decree holding that the alleged partnership was illegal and plaintiff could not recover anything under it. He gave no findings on the issues as to whether the alleged partnership was proved and what amount, if any, was due to the plaintiff.

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The plaintiffs preferred a second appeal.

D. A. Khare and *P. D. Bhide*, for the appellants (plaintiffs) :—The decision of the lower appellate Court is erroneous. The terms of the license do not prohibit the taking of a partner. If the Collector wanted to have this prohibition, he would have inserted a condition to that effect. In this respect, the cases of *Hormasji Motabhai v. Pestanji Dhanjibhai*⁽¹⁾ and *Ganesh Vithal v. Shripad Dattoba*⁽²⁾ are distinguishable.

Coyajee with *P. B. Shingne*, for the respondents (defendants) :—A reference to the plaint will show that the partnership in this proceeding was for selling the liquor. If so, the case is entirely prohibited by the Abkari Act. The terms of the partnership clearly prohibit a transfer of the license, and this is a case in which a transfer *pro tanto* exists. The omission to have a condition against the admission of a partner is not at all significant, because the general and broad language of the license is clearly expressive of a prohibition to admit a partner. The appeal, if allowed, would enable the appellant to defeat the policy of the law :—*Behari Lall Shaha v. Jagodish Chunder Shaha*⁽³⁾.

SCOTT, C. J. :—The suit was instituted by the plaintiffs for an account of what was due upon a partnership between them and the defendants in respect of a certain liquor-selling business.

⁽¹⁾ (1887) 12 Bom. 422.⁽²⁾ (1895) 20 Bom. 668.⁽³⁾ (1904) 31 Cal. 798.

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The business of selling liquor in the Bombay Presidency is regulated by the provisions of the Abkari Act, Bombay Act V of 1878. It is provided by section 16 that "except as is hereinafter otherwise provided, no liquor and no intoxicating drug shall be sold without a license or pass from the Collector". Section 43 imposes penalties upon whomsoever in contravention of the Act or of any rule or order made under the Act or of any license obtained under the Act sells liquor.

Now the license under the Act was obtained by the defendant 1. It has many conditions expressed in it but the only material one for the purpose of this suit is condition 19 which provides:—"The licensee shall not sell, transfer to any person or sub-let his right to sell country liquor obtained under the license, and shall enter into no Kabulayat or agreement for the exercise of the said right which, in the opinion of the Collector, is in the nature of a sub-lease." By the preamble of the license the licensee was given, subject to the conditions expressed subsequently, an exclusive right to sell country liquor in the shop at Navapur or in the group or groups of shops mentioned in Schedule B for a period of one year from the 1st of April 1904.

The learned District Judge has not gone into the question which was decided by the Subordinate Judge whether a partnership-agreement had actually been concluded. The Subordinate Judge thought on the evidence that he must hold that a partnership-agreement had not been concluded. But the District Judge thought it was sufficient to deal with the question of the legality of the agreement, assuming it to be in existence, and he has come to the conclusion that the contract for partnership would be forbidden by law and opposed to the policy and general tenor of the Act and, therefore, cannot be enforced in a Court of law. The first point he takes is that the preamble shows that the right given

therein to sell liquor was a non-transferable right, and he points out that section 43 of the Act and clause 19 of the license provide that no licensee shall sell or transfer to another's name or sub-let the right which he is granted. He says that by admitting the plaintiffs as partners the defendants transferred part of that right to the plaintiffs without their obtaining a license to sell the liquor.

The license is presumably granted by the Abkari authorities in order that they may have control over the person who is authorised to sell the liquor and in order that the sale of the liquor may not pass out of his control to unauthorised persons. The license with that view prohibits sale, transfer or sub-letting of the right. The authorities are by no means blind to the possibility of partnerships being entered into by licensees in which other persons may become interested in the sale of liquor. In the case of *Hormasji Motabhai v. Pestanji Dhanjibhai*⁽¹⁾, the licensees were, by the terms of their license, forbidden to take partners, and as pointed out by Mr. Justice Parsons in *Ganesh Vithal v. Shripad Dattoba*⁽²⁾, the 15th rule of the Abkari Act in force in 1895 provided that the lessee was not without the previous written permission of the Collector to sub-let, in whole or in part, the right to vend conferred upon him by the license or admit persons into his business.

Now here we have a license sanctioned by Government in the year 1903 which omits all reference to the question of sub-letting a part of the right to vend or of admitting partners into the business. What conclusion are we to draw? Are we to infer that the taking in of partners into the business of a licensee is objected to by the Abkari authorities or that it is not? It appears to us that the only inference must be that the Abkari authorities have decided not to prohibit the

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⁽¹⁾ (1887) 12 Bom. 422.⁽²⁾ (1895) 20 Bom. 668 at p. 672.

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taking in of other persons into partnership in the profits derived from the selling of liquor under an Abkari license.

For these reasons we are of opinion that the decree of the District Judge must be set aside. But that does not dispose of the case; for the question still remains whether the Subordinate Judge was right in holding that there was in fact no partnership-agreement. It is much to be regretted that the District Judge did not thoroughly try the case in the first instance instead of necessitating an appeal to this Court on a point of law and a remand, now that we have disagreed with his judgment.

We remand the case for disposal on evidence.

Costs to be costs in the appeal in the lower appellate Court.

Decree set aside and case remanded.

G. B. R.

PRIVY COUNCIL.*

MAJMUNDAR HIRALAL ICHHIALAL AND OTHERS (DEFENDANTS) v.
DESAI NARSILAL CHATURBHUJDAS AND OTHERS (PLAINTIFFS).

[On appeal from the High Court of Judicature at Bombay.]

Limitation—Suit for redemption of mortgage made in 1793—Act XIV of 1859, section 1, clause 15, and section 4—Act IX of 1871, section 20, and Schedule II, Article 148—Act XV of 1877, section 19, and Schedule II, Article 148—Acknowledgment of title—Receipt by mortgagees—Interest after date of suit—Damdupat—Discretion as to award or not of interest—Assumed exercise of discretion not interfered with.

Asuit was brought, by the predecessors-in-title of the respondents, for redemption of a mortgage, dated 4th November 1793, in favour of the predecessors-in-title of the appellants. The deed mortgaged with possession a certain desaigiri

* *Present* : Lord Shaw, Lord Moulton, Sir John Edge and Mr. Ameer Ali,

1913.*
February 5,
6. 25.