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COMMISSIONER OF INCOME-TAX, BOMBAY v. THE AHMEDABAD NEW COTTON MILLS CO., LTD.

Kemp, J.

Under the circumstances I am of opinion that the question referred for our opinion should be answered in the way suggested by the Chief Justice.

Answer accordingly.

J. G. R.

CRIMINAL REVISION

Before Mr. Justice Fawcett and Mr. Justice Mirza.

1928
March 13

BANSILAL GANGARAM WANI, APPLICANT (ORIGINAL ACCUSED) *v.* EMPEROR.*

Criminal Procedure Code (Act V of 1898), sections 428, 537—Report of Excise Analyst—Report put in at the trial without objection—Judge in appeal proposing examination of Excise Analyst—Admission of pleader as to evidence in appeal—Appellate Court acting on the admission.

An accused person was charged under section 43 (1) (*a*) of the Bombay Abkari Act, 1878, for having committed an offence of possessing cocaine. During the trial, a report of a person called the Excise Analyst, was tendered in evidence and was admitted under section 510 of the Criminal Procedure Code. On appeal to the Sessions Judge, the accused's pleader contended that the report of the Excise Analyst was inadmissible in evidence. The Sessions Judge, thereupon, proposed to have the Excise Analyst examined under section 428 of the Criminal Procedure Code. The pleader, for the accused, however, admitted the genuineness of the certificate, and the Sessions Judge confirmed the conviction of the accused. On an application by the accused to the High Court :—

Held, (1) that as at the trial the certificate was put in without any objection the provisions of section 428, Criminal Procedure Code, were properly availed of in appeal to have the legal evidence as to the contents of the bottle;

(2) that, assuming that the Sessions Judge should not have acted upon the admission of the applicant's pleader, such action on his part amounted to an irregularity which had not caused a failure of justice, and which could properly be held to fall under section 537 of the Criminal Procedure Code.

Mahadev v. *Sundrabai*,[1] applied.

THIS was an application to revise the order of the Sessions Judge at Jalgaon.

The complainant, an excise inspector, got information that the accused was selling betel leaves with chunam containing cocaine applied to them at the fancy price of Rs. 5 or 10 per leaf. In July 1927, the excise inspector attached from the shop of the accused a bottle

*Criminal Revision Application No. 24 of 1928.

[1] (1901) 3 Bom. L. R. 467.

containing four grains of some white powder. The bottle was sent to the Excise Analyst and he having certified that the powder in the bottle contained cocaine, the accused was charged under section 43 (1) (*a*) of the Abkari Act for being in possession of cocaine without license. It was contended on behalf of the accused that the bottle found to contain cocaine was not the same as was attached in the shop.

The First Class Magistrate, Jalgaon, relying on the certificate of the Excise Analyst and the evidence for the prosecution held that the offence against the accused was proved. The accused was, therefore, convicted and sentenced to suffer rigorous imprisonment for six months and to pay a fine Rs. 300.

On appeal before the Sessions Judge, a point, though not mentioned in the petition of appeal, was raised at the argument that the certificate of the Excise Analyst *per se* was inadmissible in evidence without proof under section 510 of the Criminal Procedure Code, and that if the certificate be eschewed, there was no evidence to prove that the powder in the bottle contained cocaine. The learned Sessions Judge, therefore, proposed to examine the Excise Analyst in the appeal Court or to send down the case for his evidence. The appellant's pleader, however, stated that he was prepared to admit that the powder in the bottle sent to the Excise Analyst contained cocaine and wanted the appeal to be decided on its merits. The Sessions Judge, therefore, found that the powder in the bottle contained cocaine and also held that the defence had not succeeded in proving that the bottle found in the house of the accused was tampered with. He, therefore, confirmed the conviction and sentence and dismissed the appeal.

The accused presented a revisional application to the High Court.

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BANSILAL GANGARAM v. EMPEROR

G. N. Thakor, with *V. N. Chhatrapati*, for the applicant.

P. B. Shingne, Government Pleader, for the Crown.

FAWCETT, J. :—The applicant in this case was accused of possessing cocaine and so having committed an offence under section 43 (1) (*a*) of the Bombay Abkari Act, 1878. During the trial the report of a person called the Excise Analyst, Government Central Distillery, Nasik Road, that one bottle which had been sent to him contained cocaine, and that some other things contained no cocaine, was tendered in evidence and exhibited by the Magistrate. No objection appears to have been raised to this being done, and the Magistrate appears to have considered that the report fell under section 510, Criminal Procedure Code. It is quite clear, however, that the report does not come under that section; and the Magistrate was presumably misled by the fact that this Excise Analyst was referred to in the evidence as a Chemical Analyser. The accused was subsequently convicted of the offence. On appeal to the Sessions Judge the point arose that the report of the Excise Analyst was inadmissible in evidence. The Sessions Judge records in his judgment that this point was not taken in the petition of appeal, but cropped up in the arguments. He further says that, if that certificate be discarded, there was no other evidence to prove that the powder in the bottle in question contained cocaine, and accordingly he proposed to have the Excise Analyst examined under section 428, Criminal Procedure Code. Upon this the pleader for the appellant stated that he did not want to challenge the genuineness or the correctness of the certificate, and that he was prepared to admit that the powder in the bottle sent to the Excise Analyst was cocaine. The pleader further stated that he thought that it would be a sheer waste of

time and money to call the Excise Analyst, and wanted the appeal to be decided upon the merits. Upon this the Sessions Judge found that the powder in the bottle contained cocaine.

In this application for revision it is contended that the learned Judge had no right to act on the admission of a pleader, and that any such admission was not binding upon the applicant. Further it is contended that the Sessions Judge was wrong in supplying a gap in the prosecution evidence by having the Excise Analyst examined under section 428, Criminal Procedure Code. Mr. Thakor for the applicant has argued this question very clearly and fully. The Government Pleader for the Crown submits that, although the certificate was inadmissible in evidence, the accused did not in the original trial really deny that the bottle in question contained cocaine, and that the objection is a purely technical one, in regard to which further evidence can properly be taken under section 428, Criminal Procedure Code.

It is certainly true that no stress was laid at the trial upon the denial that is now made that the bottle in question contained cocaine. It is true that the accused did not admit that it contained cocaine. But his main contentions, as shown by the Magistrate's judgment, were that the contents of the bottle had been substituted, so that its containing cocaine did not show that the accused had possessed cocaine, and also that the bottle had been tampered with, in that it was originally intact, whereas now it has a hole at the bottom of it. Then again, as noted by the Sessions Judge, the point as to the inadmissibility of the certificate was not taken in the petition of appeal, and only cropped up in argument. Even assuming that Mr. Thakor is right in his contention that the Judge should not have acted upon the admission of the pleader of the appellant, the case is,

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Fawcett, J.

I think, one where clearly such action on his part amounts to an irregularity, which has not caused a failure of justice, and which, therefore, can be properly held to fall under section 537, Criminal Procedure Code.

Apart from this, I am of opinion that this is a case where the provisions of section 428, Criminal Procedure Code, can properly be availed of in order to have legal evidence as to the contents of the bottle. There is no question of surprise. The certificate was put in; and no objection was taken, nor any suggestion made, that the Excise Analyst should be called. It is not a case of the prosecution having had ample opportunities to produce certain evidence at the original trial, which was not called, and its being sought to rectify the omission in appeal; here evidence was tendered, but it was evidence that should not have been admitted by the Court. It is very much on the same footing as a confession, which is inadmissible in evidence, because the Magistrate recording it has not given a proper certificate, or for some similar reason; and in such cases the law expressly allows the omission to be supplied by the examination of the Magistrate, who recorded the confession. This is provided for by section 533, Criminal Procedure Code, and sub-section (2) of that section says that a Court of appeal or revision can also have such further evidence taken. The mere fact that the Code makes provision for this particular case does not, in my opinion, involve the conclusion that in no other similar case can a Sessions Judge act under the very wide provisions of section 428, Criminal Procedure Code.

I am also not satisfied that in fact the Sessions Judge could not legally act upon the admission of the applicant's pleader in the appeal. It is not a case of something being done at the trial or of acting upon an admission at the trial, but upon an admission in the appeal; and the two cases are not quite on the same

footing. Of course in the original trial the requirements in the Code of Criminal Procedure have to be properly followed, and in a warrant case (as this was) the accused could not be convicted merely upon the admission of his pleader. But when in the appeal the question arose whether such further evidence should be taken, I cannot see any rule, authority or principle which ties us down to holding that the Judge could not properly act upon the pleader's admission. A pleader's authority to admit a certain fact so as to dispense with the necessity of further proof is clearly laid down in regard to a civil case in *Mahadev* v. *Sundrabai*,[1] and I think the same principle applies in regard to this particular case in the appellate Court. The fact that it was a criminal case does not really make any difference, because, had the pleader not made this admission, what would have happened would have been that the Court would have taken the evidence of the Excise Analyst, and there is no reason to suppose that that evidence would not have substantiated the statements contained in this report, and there would be no reason, in my opinion, for this Court to interfere in revision with such an order under section 428, Criminal Procedure Code.

Furthermore, I am not convinced that section 58 of the Indian Evidence Act does not apply to justify the action of the Sessions Judge. No doubt in England an admission by an accused, which falls short of his pleading guilty, is not taken into account and is not binding against him. But section 58 makes no exception in regard to criminal proceedings; and while I do not say that it can be availed of to cure a clear contravention of any directions of the Criminal Procedure Code as to the course of a trial, yet I think it can apply in a case like this, which relates only to the proceedings of an appellate Court. In the particular circumstances of the

[1] (1901) 3 Bom. L. R. 467.

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present case, I see no sufficient reason to interfere with the conviction or the sentence passed by the Magistrate upon the applicant.

MIRZA, J. :—I agree. The admission made by the pleader in this case was not an admission on law point, but was an admission of a fact, and was made with the object of saving time and expense to his client. The pleader was not appointed by the Court but was engaged by the accused. In *Queen-Empress* v. *Sangaya*,[1] the Court held that admissions made by a pleader appointed to help the accused in his defence are not binding on him to his prejudice. The Court drew a distinction between a pleader appointed by the Court to defend a prisoner, accused of murder, and a pleader the accused would himself authorise to act for him. In the case before us the accused himself had engaged the pleader. It follows that the accused must be held to have authorised the pleader to conduct the appeal on his behalf according to his best discretion and judgment. The admission made by the pleader does not appear to have been unreasonable, or to have resulted in an injustice to the accused or to have created a prejudice which could have been reasonably avoided. The point now relied upon by the accused that the bottle did not contain cocaine, was not put forth during the trial of the case. The pleader in the exercise of his discretion could reasonably come to the conclusion that the admission of the fact that it did contain cocaine would not prejudice his argument in appeal.

At the time the pleader made the admission he was made aware of the Judge's intention to take further evidence or to remand the case for further evidence on the point. The pleader could reasonably anticipate that the result of such action would be to establish the fact he admitted, and that by admitting the fact he

[1] (1900) 2 Bom. L. R. 751.

would save time and expense to his client. Under the circumstances, at the most it may be urged that in waiving the formal proof of an essential fact in the prosecution case and in relying on the admission only of that fact made by the pleader of the accused, the Court has committed an irregularity. There is no illegality. I agree with my learned brother that this application should be dismissed.

Conviction and sentence confirmed.

J. G. R.

APPELLATE CIVIL

Before Mr. Justice Madgavkar.

AHMED HASSAN (ORIGINAL DEFENDANT), APPELLANT *v.* HASSAN MAHOMED MALEK (ORIGINAL PLAINTIFF), RESPONDENT.*

1928 *March* 30

Contract—Indian Contract Act (IX of 1872), section 23—Agreement in consideration of compounding a compoundable offence not forbidden by law—Application to compound signed by husband of complainant—Unregistered agreement—Doctrine of part-performance.

Plaintiff passed an unregistered agreement in favour of his son (defendant) under which defendant was allowed to continue in occupation of plaintiff's house in which he was then staying free of rent for life in consideration of the defendant's wife withdrawing a criminal prosecution for grievous hurt against plaintiff's wife and another daughter-in-law of his. The criminal case was accordingly compounded. The application was not signed by the complainant but by her husband (defendant). Nearly a year after the case was compounded, plaintiff sued to evict the defendant on the grounds that the agreement was void under section 23 of the Indian Contract Act and that it was inoperative for want of registration.

Held, (1) that an agreement the consideration of which was the compounding of a compoundable offence was not forbidden by law and was valid.

Amir Khan v. *Amir Jan*,[1] followed;

(2) that an agreement to compound a non-compoundable offence is void in law.

Majibar Rahman v. *Muktashed Hossein*,[2] followed;

(3) that the mere fact that the application to compound was not made by the complainant but by her husband (defendant) cannot render the agreement void under section 23 of the Indian Contract Act.

Emperor v. *Rahmat*,[3] distinguished;

(4) that the agreement though unregistered being acted upon, could be supported on the doctrine of part-performance.

* S. A. Nos. 266 and 285 of 1927 from the decision of K. B. Wassoodew, Esq., District Judge of Surat, in appeal Nos. 29 and 30 of 1926.

(1) (1898) 3 Cal. W. N. 5. (2) (1912) 40 Cal. 113.

(3) (1915) 37 All. 419.