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no period of limitation at all, by improperly obtaining a combined decree under Sections 88 and 90, contrary to the procedure of the Transfer of Property Act.

There is apparently only one decision against this view, *viz.*, that of *Jadunath Prasad* v. *Jagmohan Das* (1). But this decision is not binding on us, and we regret that we cannot assent to it, for in it the learned Judges, who decided it, have not noticed the fact that a combined decree under Sections 88 and 90 is one passed in contravention of the provisions of the Transfer of Property Act [797] and that it would therefore not be just that a decree-holder by obtaining such a decree should gain an advantage, to which he would not have been entitled, if he had strictly followed the procedure prescribed by the Act. Moreover, Aikman J. in his judgment in that case has relied on two cases, in neither of which the point now discussed arose. But in the case decided by this Court, to which he has referred, *viz.*, *Kartick Nath Pandey* v. *Juggernath Ram Marwari* (2), one of the reasons given for holding that the execution of the decree was not barred was that the decree for the balance due after the sale of the mortgaged properties had been obtained on the 5th July 1889, that is, only nine years previously to the application for execution in that case, which had been made on the 5th November 1897.

Another case, *viz.*, *Fazil Howladar* v. *Krishna Bundhoo Roy* (3) has been cited to us. The question now under consideration was not mooted in that case. The application in that case was, "for the realization of the mortgaged debt by sale of the mortgaged property." It had been held by the Court below that "so much of the decree as authorizes the decree-holder to realize the judgment-debt out of any property of the judgment-debtor other than the mortgaged property was barred under section 230 of the Code" and this finding was not impugned before the learned Judges, who decided that case.

For these reasons we agree with the Subordinate Judge in holding that the execution of the decree in this case is barred and we dismiss this appeal with costs.

Appeal dismissed.

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31 C. 798 (=8 C. W. N. 635)

[798] ORIGINAL CIVIL.

Before Mr. Justice Sale.

BEHARI LALL SHAHA *v.* JAGODISH CHUNDER SHAHA.*

[20th, 25th & 30th May, 1904.]

Excise Act (III of 1856) and II (B. C.) of 1903—Sale of liquor—License—Agreement in contravention of Excise Act.

The object of the Excise Act is to prohibit persons from selling or carrying on the business of selling exciseable articles without a license.

The prohibition by the Act of the sale of liquor without a license is based upon the principle of public policy, and on moral grounds, and the purpose of the Act is not confined to the protection of the Revenue.

Boistub Churn Naun v. *Wooma Churn Sen* (4) referred to.

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* Original Civil Suit No. 4 of 1903.

(1) (1903) I. L. R. 25 All. 541.
(2) (1899) I. L. R. 27 Cal. 285.
(3) (1897) I. L. R. 25 Cal. 580.
(4) (1899) I. L. R. 16 Cal. 436.

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The principle deduced from the licensing Act of 1856 clearly underlies the later Act that an agreement which contravenes the policy of the Act or which has for its object the carrying on of a business in contravention of the excise law, is illegal.

Jadoo Nath Shaha v. *Navin Chunder Shaha* (1) referred to.

[Ref. 35 Mad. 582; 21 M. L. J. 425=10 I. C. 125; 29 I. C. 460.]

THIS was a suit brought by the plaintiff to recover the sum of Rs. 2,725-12-6 under the following circumstances.

The plaintiff in the month of January 1890 was the owner and licensee of several liquor shops in the town of Calcutta and carried on the business under the name and style of Behari Lal Shaha. In June 1890, the plaintiff entered into a verbal agreement with the defendant Jagodish Chunder Shaha and one Basanto Coomar Shaha, to pay off all existing debts incurred by him in carrying on the shop, and to sell the stock-in-trade of his shop and make it over together with the furniture to the defendant and Basanto Coomar, and they were to carry on the business of the shop on their own account and responsibility, and were not to contract any debts in the name of the plaintiff or his [799] said firm, and they were to keep the plaintiff and his estate and effects always indemnified against all debts, liabilities, claims and demands whatsoever in respect of the said shop. It was further agreed in order to enable the defendant and Basanto Coomar to sell the liquor without obtaining a license, that they should be at liberty to use the name of the plaintiff in the sale of liquor, and that in consideration of the plaintiff permitting the defendant and Basanto Coomar to use his name in the sale of liquor the defendant and Basanto Coomar should pay to the plaintiff the sum of Rs. 100 per annum, and it was also agreed that the arrangement should be determinable upon either party giving to the other a month's previous notice.

The plaintiff on the 1st July 1894 made over the business to the defendant and Basanto Coomar. On the 1st July 1896 on account of disputes and differences arising between the defendant and Basanto Coomar, the latter severed his connection with the shops, and the defendant carried on the business on his own account and responsibility and upon the same terms, as aforesaid, except that the sum of Rs. 100 a year was increased to Rs. 25 a month, which the defendant paid to the plaintiff from the 1st July 1896 to the 31st March 1898. That thereafter the agreement between the plaintiff and the defendant was again altered by increasing the monthly rent from Rs. 30 to Rs. 50, and the defendant carried on the business from the 1st July 1899 up to the 31st March 1902, when by mutual consent the agreement was determined, and on the 1st April 1902, the plaintiff took over possession of the shop and furniture from the defendant and has since been carrying on the same on his own account. On the 5th April 1902 a suit was instituted by one A. Grossman against the plaintiff for the recovery of Rs. 1,197-14, being the amount due for the price of certain wines sold and delivered between the 28th September and 20th December 1901, and such amounts were covered by certain promissory notes executed in the name of the plaintiff by one Nanda Lal Chatterjee, an employee of the defendants and a decree was made on the 28th May 1902 of Rs. 1,382-8.

On the 11th April 1902 Mohendro Nath Lahiry and others, who carried on business in the name and style of Kally Das Lahiry & Co., instituted a suit in the Small Cause Court against [800] the plaintiff for

(1) (1874) 21 W. R. 280.

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the recovery of Rs. 156-12 for the price of spirit sold and delivered between the 14th April 1901 and 4th March 1902, and they obtained a decree.

On the 28th April one L. W. A. Herbert also instituted a suit against the plaintiff in the Small Cause Court to recover Rs. 270-11 for the price of wine sold and delivered on the 20th December 1901, and he also obtained a decree.

The plaintiff in his plaint contended that he never appointed Nundo Lal Chatterjee as his manager or gomasta or authorised him to buy the goods, and was not aware that the defendant had contracted any other debts in the name of the plaintiff in breach of the agreement between them. The defendant in his written statement contended that it was at the request of the plaintiff that he paid Nundo Lal Chatterjee the various sums required for the shop. That Nundo Lal throughout had been the manager of the plaintiff and had the sole charge of the books and documents, cash and stock, and had full authority from the plaintiff to borrow money and sign all necessary documents on his behalf for the purposes of the shop, and that it was wholly untrue that he was at any time an employee of the defendant, or his gomasta. That the plaintiff owed to the defendant the sum of Rs. 2,822-13-9, and he submitted this suit had been brought merely to put obstacles in the defendant's way of recovering the amount due to him, and that therefore the suit was vexatious and ought to be dismissed with costs. At the hearing a preliminary objection was raised that the suit as framed was bad.

Mr. *Chakravarti* (Mr. *A. Chowdhury* with him) for the defendant.

The business which the plaintiff transferred to the defendant was to be carried on by the defendant, he using the name of the plaintiff the license-holder. It was in fact a benami transaction. The agreement under which the plaintiff sued was based under a license, which was to remain in the name of the plaintiff. Under the Excise Act such an agreement is illegal, see s. 59 of the Excise Act.

A person must take out a license from the Collector before he can make a transfer, which was not done in this case. *Judoo* **[801]** *Nath Shaha* v. *Nobin Chunder Shaha* (1), *Debi Prasad* v. *Rup Ram* (2), *Hormasji Motabhai* v. *Pestanji Dhanjibhai* (3), and *Boistub Churn Naun* v. *Wooma Churn Sen* (4) referred to. Section 23 of the Excise Act clearly shows that an agreement is lawful, unless forbidden by law or is of such a nature as to defeat the provisions of the Excise Act. The whole of this suit is based upon this agreement, which, I submit, is illegal, and therefore the case must fail.

Mr. *Knight* (Mr. *S. P. Sinha* with him) for the plaintiff.

Every case cited by the other side is distinguishable from the present case. This is a suit for indemnity and can be decided without reference to the Excise Act at all. Sections 47, 57, and 59 of the Excise Act referred to.

This is not in any way a benami transaction. The license has been renewed in my name. I am therefore the responsible party.

The matter of license only arises incidentally in the agreement. The English case of *Johnson* v. *Hudson* (5) shows that it is a matter which touches the revenue and is a contract of indemnity. Section 24 of the Contract Act and *Smith* v. *Mawhood* (6) cited. As to when a con-

(1) (1874) 21 W. R. 289.
(2) (1888) I. L. R. 10 Mad. 577.
(3) (1887) I. L. R. 12 Bom. 422.
(4) (1889) I. L. R. 16 Cal. 436.
(5) (1809) 11 East 180.
(6) (1845) 14 M. & W. 452.

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tract is divisible, see Anson on Contracts (9th edn.), p. 212. The same rule applies in the case of *Pickering* v. *Ilfracombe Railway Co.* (1).

[SALE, J. Is it your argument that you can always separate the indemnity from the contract set out ?]

If the indemnity was upon a transaction directly touching the property, then there would be some difficulty, but that is not this case.

The policy of the Act is the securing of a responsible person ; if you have that the law has no possible complaint. Such a person the law has had all along in the person of the plaintiff, who has accepted full responsibility for the license. The other side have not shown what the public policy of the Act is. The theory of the licensing Act is to get a responsible person.

[802] The Excise Manual of 1891 governs this case and not the Excise Act Manual of 1903.

See Excise Act Manual, 1891, pp. 99, 105, 115, 210, and Excise Act Manual, 1903, vol. I, p. 81, referred to. I submit there is no substance in the objection raised, but should the Court think there is, then I say it is separable from the Act.

Mr. *A. Chowdhury* in reply.

Cur. adv. vult.

SALE, J. This is a suit brought by the plaintiff to recover certain sums alleged to be due by the defendant to the plaintiff by virtue of an Indemnity contained in a verbal agreement set out in the 2nd paragraph of the plaint. The plaintiff alleges he carried on the business of a vendor of liquor in certain shops in Calcutta, and that in 1894 he was desirous of relinquishing his business in the shop, 148, Bow Bazar Street, and he entered into agreements with the defendant and one Basanto Coomar Shaha whereby the plaintiff was to sell the stock-in-trade of the shop and furniture to the defendant and Basanto Coomar Shaha, and that thereafter the defendant and Basanto Coomar Shaha should carry on the business of vendors of liquor on their own account and responsibility. It is stated that the object of the agreement was to enable the defendant and Basanto Coomar Shaha to sell the liquor without obtaining a license, and in order to carry out this purpose, this agreement was entered into and the defendant and Basanto Coomar Shaha undertook not to contract any debt in the name of the plaintiff, and further that they were to keep the plaintiff and his estate and effects indemnified against all claims and demands against the shop, and that in further consideration of the liberty to use the name of the plaintiff to carry on the business the defendant and Basanta Coomar Shaha agreed to pay the plaintiff Rs. 100 per annum. The plaintiff alleges the agreement was carried out and that he paid off all existing debts in the business carried on in the shop, and sold to the defendant and Basanto Coomar Shaha all the goods, stock-in-trade and entire furniture at a valuation, and made over the shop from July 1894 to the defendant and to Basanto Coomar Shaha, who thenceforward carried on the business as vendors of liquor in the plaintiff's **[803]** name, but on their own joint account and responsibility. The business was carried on by the defendant and Basanto Coomar Shaha up to the end of June 1896, and disputes having arisen between them, the latter severed his connection with the business and the defendant carried

(1) (1868) L. R. 3 C. P. 235,250.

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on the business from the 1st July 1896 to the 1st March 1902. The plaintiff alleges that throughout this period the terms of the agreement were adhered to, except that the annual payment was increased from Rs. 100 per annum to Rs. 25 and then Rs. 30 per month, and finally to Rs. 50 per month. The plaintiff further alleges that Rs. 50 per month was paid up to January 1902, and that the instalments for the months of February and March are still due. The plaintiff alleges that, during the time the defendant carried on the business on his own account and responsibility, he contracted debts contrary to the terms of the original agreement, in the plaintiff's name and those debts he (the plaintiff) has had to pay. The plaintiff therefore claims these amounts and also expenses which he has incurred in respect of suits instituted for recovering the same from him, and also the instalments of Rs. 50 per month for February and March, altogether amounting to Rs. 2,725-12-6.

The defendant in his written statement denies all the material allegations in the plaint, and denies he has carried on the business on his own account either solely or jointly with Basanto Coomar Shaha. He says he had only interfered to assist his brother the plaintiff, and the business was throughout done for the plaintiff and in his name, and that the plaintiff is responsible for all debts and that he has advanced money to the plaintiff for the business, and states that there is a sum exceeding the plaintiff's claim due to him in respect of advances made and expenses incurred by the defendant in carrying on the business on the plaintiff's account. At the hearing the defendant raised a defence in the nature of a demurrer. It is not suggested that the plaintiff has been taken by surprise by the defence, nor has any application to adjourn the suit on that ground been made.

The defence is that the contract on which the plaintiff relied is one opposed to the policy of the Excise law, and, being contrary to public policy, is illegal and void. The plaintiff on the other hand relies on the fact that the suit is based on an indemnity [804] which, it is contended, is separable from the rest of the contract, and it is said that, even if the monthly instalments are not recoverable by reason of the contract being illegal, there is nothing in the Excise law to prevent his recovering under the indemnity the sum due thereunder. It seems to me that it is impossible to differentiate the claim in respect of the two monthly instalments from the claim under the indemnity. Both claims form part of the considerations for the agreement, the object of which was to enable the business to be carried on at 148, Bow Bazar Street by the defendant and Basanto Coomar Shaha trading under the plaintiff's name without the necessity of taking out a license. The plaintiff in consideration of the permission to trade in his name stipulates, first, for the payment of a money consideration, and, secondly, for an indemnity against all losses, claims, demands and expenses in respect of the business. The claim therefore in respect of the two monthly instalments and the claim under the indemnity must stand or fall together as parts of the same agreement. It remains for me to consider whether the agreement, having regard to its general purpose and object, is illegal and void: I think it is clear that the object of the Excise Act, VII of 1878, is to prohibit persons from selling or carrying on the business of selling exciseable articles without a license, and, I think, two principles are laid down by the cases cited, which have an important bearing on the present case.

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1st.—The case of *Boistub Churn Naun* v. *Wooma Churn Sen* (1) lays down the principle that the prohibition by the Act of sale of liquor without a license is based upon public policy and on moral grounds, and that the purpose of the Act is not confined to the protection of the revenue. That conclusion was arrived at by the Court after a careful analysis of the sections of the Act.

2nd.—In another case, that of *Jadoo Nath Shaha* v. *Nabin Chunder Shaha* (2) it was decided that an agreement, which contravened the policy of the Act, or which has for its object the carrying on of a business or trade in contravention of the Excise law is illegal. It is true that the decision in question was arrived [805] at not in connection with the present Act, but with reference to the Act of 1856; but the distinction is immaterial. I think the principle which is deduced from the earlier Act, clearly underlies the later Act also. The question is whether the agreement in suit contravenes public policy. It is said there is nothing in the agreement of indemnity against the policy of the Act and that no such agreement of indemnity is prohibited by the Act, and it is contended that, inasmuch as the plaintiff is not suing to recover the price of articles sold to the defendant without a license, nor has the plaintiff infringed the rule that a licensee may not transfer his license nor sub-let his shop, it cannot be said that the claim in suit is in contravention of the Act. It is to be remarked that the provisions against transfer of licenses and the sub-letting of shops for the sale of liquor show that the object and purpose of the Excise law is to make the license a personal privilege, which the Excise authorities have the sole right of granting or withholding and that the rights or privileges conferred by the license cannot be transferred by one private individual to another. But this is what the plaintiff seeks to do by the instrumentality of the agreement. It is true that the plaintiff has transferred his license, but the defendant is permitted to use the plaintiff's name and license and carry on business in every way uncontrolled by the plaintiff as if he were the licensee himself. The contract of indemnity is the means used to gain this end. The license is not to be transferred, and so far the plaintiff's responsibility in the eye of the law continues, but on the other hand the defendant is to have all the benefit of the license as if it were transferred to him, he agreeing to hold the plaintiff indemnified from all claims and demands made in respect of the business. The contract of indemnity is therefore a vital and necessary part of the arrangement and essential for the purpose of allowing the defendant to use the plaintiff's name. Section 11 says no person shall sell any exciseable article without the Collector's license. The plaintiff's object was to permit the defendant and Basanto Coomar Shaha to sell such articles without a license. I am of opinion therefore that the object of the agreement is to enable the defendant to carry on the business of vendor of liquor in contravention of [806] the Excise Law, and that as the indemnity was an essential part of the machinery for attaining that end, the agreement and the indemnity are both illegal and void. The suit must therefore be dismissed with costs.

Attorneys for the plaintiff: *G. C. Chunder & Co.*

Attorneys for the defendant: *Leslie & Hinds.*

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(1) (1889) I. L. R. 16 Cal. 436. (2) (1874) 24 W. R. 289.