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32 C. 552=2 Cr. L. J. 347 =1 C. L. J. 482.

to their respective claim to possession. On the 17th of August, however, after a certain amount of evidence had been recorded, the matter was on the joint petition of both parties referred to arbitration; but on the following day the second party, the petitioners, made an application to the Court to cancel the reference to arbitration. They stated that their witnesses had been threatened, and they feared that they would not dare to give evidence for fear of the *amlas* of the zamindar of Manbazar, who were looking after the case on the other side. The Magistrate refused to withdraw the case from the arbitrators.

The arbitrators having made an award on the 21st August finding that the first party was actually in possession, the Magistrate on the 26th of August passed an order in which, after stating that he had considered the effect of the evidence, he found that the first party was in actual possession and he went on to state that the arbitrators, to whom the parties had referred their dispute, made an award in support of that finding.

It appears that when the application was made by the pleaders that the matter might be dealt with under section 145, no proceeding was drawn up under sub-section (1) of that section. But from that point it would seem that the proceedings were treated as if they were being had under section 145.

It has been contended before us that, inasmuch as no proceeding under sub-section (1) of section 145 was drawn up, all the subsequent proceedings were without jurisdiction. It has been held in a number of cases that the making of a formal order under sub-section (1) is absolutely necessary to the initiating of proceedings under this Chapter. The question is one of jurisdiction, and we are of opinion that the objection taken is a valid one.

Apart from this, although it may not perhaps be a question of jurisdiction, we think that the Magistrate would have exercised a wiser discretion if, upon the application made by the second party to withdraw from the arbitration, he had cancelled the [556] reference. The procedure laid down by the section apparently does not contemplate that the question as to who is in actual possession should be delegated, even by consent of the parties to arbitrators. The section directs the Magistrate himself to receive the evidence produced by the parties and on a consideration thereof to come to a decision.

Upon the first ground mentioned by us, the Rule must be made absolute and the order set aside.

Rule absolute.

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32 C. 557 (=9 C. W. N. 719=2 Cr. L. J. 470.)

[557] CRIMINAL REVISION.

Before Mr. Justice Henderson and Mr. Justice Geidt.

KASHI NATH BANIA *v.* EMPEROR.*

[6th February, 1905.]

Opium—Opium, illegal possession of—Opium Act (I of 1878) s. 9, cl. (c)—Potential possession—Possession of railway receipt for an undelivered parcel containing opium—Guilty knowledge.

The possession of a railway receipt by the consignee of an undelivered parcel of contraband opium, under circumstances showing that he was aware of the

* Criminal Revision No. 1276 of 1904, against the order of Bazlul Karim, Third Presidency Magistrate, dated Nov. 29, 1904.

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contents of the parcel and that it was sent to him with his full knowledge amounts to "possession of opium," within the meaning of s. 9, cl. (*c*) of the Opium Act.

Reg. v. *Hill* (1) and *Reg.* v. *Wiley* (2) referred to.

[Fol. 36 Cal. 1016=14 C. W. N. 238=11 Cr. L. J. 29=4 I. C. 699; Ref. 42 Mad. 699=1919 M. W. N. 794=52 I. C. 380; Ref. 40 Cal. 990=14 Cr. L. J. 318=19 I. C. 1006; Dist. 41 Cal. 587=18 C. L. J. 514=18 C. W. N. 809=15 Cr. L. J. 4.]

RULE granted to Kashi Nath Bania.

On the 9th September 1904 one Sree Kissen despatched a parcel by rail from Benares to Sealdah, but by some mistake it was forwarded to the offices of the East Indian Railway Company at Fairlie Place, and arrived there two days later. Upon certain information received on the 15th instant the Excise Superintendent deputed a Sub-Inspector to inquire into the matter. The latter met the accused on the same day, and went with him to his house where a railway receipt No. 128, describing the consignee as Kashi Monib (found by the Magistrate to be another name of the accused), but not specifying the contents of the parcel, was discovered in a box belonging to the accused, which was kept locked inside his house and which was opened by a key produced by his wife at his request. On the next day the Excise Superintendent, accompanied by the accused, went to the Railway offices at Fairlie Place, and took delivery of the parcel covered by the receipt, which had till then been lying unclaimed and which was found to contain 2½ seers of contraband opium.

[558] The accused was tried and convicted by the Third Presidency Magistrate under s. 9, cl. (*c*) of the Opium Act, and sentenced to rigorous imprisonment for six months and a fine of Rs. 200, and in default to a further term of six weeks' rigorous imprisonment. He then moved the High Court and obtained this Rule upon the Chief Presidency Magistrate to show cause why the conviction and sentence should not be set aside on the grounds that the facts found by the Third Presidency Magistrate did not constitute "possession," and that the sentence was too severe.

Babu *Shama Charan Roy* for the petitioner. The accused was not in possession of the opium. He never took delivery of the parcel from the Railway office, but only held the railway receipt for the same. The Railway authorities, therefore, never parted with the possession of the opium. The word "possession" in s. 9, cl. (*c*) of the Opium Act, means actual or physical possession. The maximum non-appealable sentence has been passed in this case thereby depriving the accused of the right of appeal.

HENDERSON AND GEIDT, JJ. In this case the petitioner, Kashi Nath Bania, has been found guilty under section 9, cl. (*c*) of Act I of 1878 (Opium Act), of having been in possession of a quantity of opium without a pass or license. It has been found by the Magistrate that on the 15th September, on a search being made in the house of the petitioner, a railway receipt for a parcel, which proved to contain 2½ seers of opium consigned by one Sree Kissen from Benares to Sealdah to the petitioner himself in the name of Kashi Monib (a name by which he is also known) was found in a box belonging to the petitioner. The key of the box was produced by his wife at his request. The accused denied the finding of the receipt in his box, alleging that the case was false and that he was the victim of a conspiracy; but this allegation has been found to be false. The receipt is dated the 9th September, and the parcel was taken delivery of by

(1) (1849) 1 Den. C. C. 453. (2) (1850) 2 Den. C. C. 37.

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32 C. 557=9 C. W. N. 719 =2 C. L. J. 470.

the Excise Superintendent from the offices of the East Indian Railway in Fairlie Place to which it had gone apparently by mistake.

It must be taken on the finding of the Magistrate that the receipt was in fact found with the accused, and the only question [559] now to be determined is whether the possession of the railway receipt, by the production of which the petitioner might have obtained delivery and physical possession of the opium, is possession of the opium within the meaning of the section. By the possession of the railway receipt the petitioner had dominion or control over the parcel in the sense that he could have passed the right to take delivery of it to any other person. It is true that it was not in his actual or physical possession, but it was certainly in his potential possession. Such possession carrying with it, as it does, the control of the goods would apparently be sufficient in a case of dishonestly receiving possession of stolen goods, provided, of course, there was proof of knowledge of their nature: see *Reg.* v. *Hill* (1) and *Reg.* v. *Wiley* (2). We are not prepared to say that the mere possession of the railway receipt for a parcel containing opium would in all cases amount to possession of the opium. The possession of the receipt might be accounted for in various ways. It might be shown that the person, in whose possession it was found, had no knowledge of the contents of the parcel, or that the receipt had been "planted" by some one with a view to get him in trouble, or that he was a mere tool in the hands of others. Here, however, the receipt was in the name of the accused, it was carefully locked up and secreted in his box, and the suggestion that he knew nothing about it has been found to be untrue. It was hardly likely that the consignor would have sent as much as 2½ seers of opium, which is worth at least Rs. 100, if his object was merely to get the accused into trouble. The possession of the receipt in the circumstances mentioned being conceded, the petitioner's denial shows that he had a reason for denying the possession of the receipt.

The receipt, it should be stated, did not mention the contents of the consignment. It was for a parcel merely.

If the accused was innocent of its contents, his natural course was to have said so, and the explanation would have been at least a plausible one. His conduct, in our opinion, showed that he was aware of the contents of the parcel and that it was [560] sent to him with his full knowledge. Under these circumstances the possession of the railway receipt must, in our opinion, be taken as possession of the opium within the section under which he was charged. We, therefore, discharge the Rule.

Rule discharged.

32 C. 561.

[561] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Mitra.

AJOY KUMARI DEBI v. MANINDRA NATH CHATTERJEE.*

[22nd March, 1905.]

Compromise—Decree—Administration suit—Civil Procedure Code (Act XIV of 1882) Sch. IV, Form 130.

* Appeal from Original Decree, No. 193 of 1903, against the decree of Bhagabati Charan Mitter, Subordinate Judge of 24-Parganas, dated February 27, 1903.

(1) (1849) 1 Den C. C. 453. (2) (1850) 2 Den. C. C. 37.