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complaint *de novo*. If he is satisfied that the defendants' contention that the way in question is not a public way is *bond fide*, and not a mere pretence, he should set aside the Magistrate's conditional order. If he finds, having reasonable and probable cause for his decision, that the contention is not *bond fide*, he should confirm the conditional order.

H. T. H.

Order reversed.

Before Mr. Justice Norris and Mr. Justice Macpherson.

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 March 17.

QUEEN-EMPRESS v. HARRIDAS SAN.*

*Bengal Excise Act (Bengal Act VII of 1878), sections 53, 59, 60—
 Sale by servant of licensed vendor in presence of master—
 Liability of servant.*

The accused, who was the servant of a licensed retail vendor of spirituous and fermented liquors under Bengal Act VII of 1878, was convicted of an offence under section 53 of that Act for selling exciseable liquor without a license. The sale charged against him was of a quantity of *puchwai* in excess of that allowed to be sold under the license of his master. The sale was made in the presence of the master, the licensee, the accused merely handing the liquor to the purchaser at his master's request. *Held* that the conviction was bad, as the facts did not establish a *sale* by the accused, the mere mechanical act of handing the liquor to the purchaser not constituting a *sale* by the accused.

THIS was a reference by the Sessions Judge of Birbhoom under the provisions of section 438 of the Code of Criminal Procedure. The terms of the reference were as follows:—

“The petitioner Harridas San has been convicted under section 53, Bengal Act VII of 1878, and sentenced to pay a fine of Rs. 15, or in default to undergo simple imprisonment for two weeks.

* Criminal reference No. 53 of 1890, made by J. Whitmore, Esq., Sessions Judge of Birbhoom, dated the 24th February 1890, against the order passed by N. K. Sarkar, Esq., Joint-Magistrate of Birbhoom, dated the 17th of January 1890.

“One Bama Charan Saha is a licensed vendor of *puchwai*. Sriram Jugi purchased 5 seers (*pucca*) at his shop, the person who served him being the petitioner. The head-constable regarding petitioner as a partner with Bama Charan San reported petitioner for prosecution for sale of a quantity of *puchwai* in excess of that which the license permitted, namely 4 seers. The petitioner was accordingly summoned, not indeed under section 60, but under section 59 of the Act. At the trial, the prosecution gave no evidence of partnership. On the contrary the witnesses examined and the petitioner himself all agreed in saying that petitioner was the servant of Bama Charan, the licensee. Accordingly the Magistrate convicted neither under section 60 nor section 59, but under section 53 for selling without license.

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“No doubt it has been repeatedly held that servants of licensees are not, as such, exempt from responsibility under the Bengal Excise Act. *In re Ishar Chander Shaha* (1), *Empress v. Baney Madhub Shaw* (2), *Empress v. Ishan Chundra De* (3). But I do not find that in any of the cases quoted the facts resemble those of the present case. For here the evidence shows that the sale was in substance the act not of the *shop-man*, but of the *shop-keeper*; that is to say, the licensee was himself present, and even personally directed his servant, the petitioner, to deliver the pot of *puchwai* to the purchaser Sriram Jugi.

“The person responsible under the Bengal Excise Act for such a sale would, I consider, be the licensee himself. As for petitioner, his responsibility would seem to be little, if at all, greater than that of the coolie in *Empress v. Ishan Chundra De* (3).

“In this view of the case I would recommend that the order of the Joint-Magistrate, dated 17th January 1890, convicting petitioner Haridas San of an offence under section 53, Bengal Act VII of 1873, and sentencing him to pay a fine of Rs. 15, or in default to be simply imprisoned for two weeks, be set aside, and that a refund be directed of the fine or any part of it realized.”

No one appeared on the reference.

(1) 19 W. R., Cr. 34.

(2) I. L. R., 8 Calc., 207; 10 C. L. R. 389.

(3) I. L. R., 9 Calc., 847; 12 C. L. R. 451.

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The order of the High Court (NORRIS and MACPHERSON, JJ.) was as follows :—

This case comes before us on a reference from the Sessions Judge of Birbhoom ; the facts are as follows :—

Bama Charan Saha is a licensed retail vendor of spirituous and fermented liquors under Bengal Act VII of 1878, and under the terms of his license he is not allowed to sell a larger quantity of *pachwai* than four seers. The accused Haridas San is a servant in the employ of Bama Charan Saha. Sriman Jugi went to the shop of Bama Charan and purchased 7½ *katcha* (5 seers *purra*) of undiluted *pachwai*. The *pachwai* was handed to Sriman Jugi by the accused in the presence of his employer and at his (the employer's) request.

The police regarding the accused as a partner with Bama Charan reported him (accused) for prosecution for sale of a quantity of *pachwai* in excess of that permitted to be sold under Bama Charan's license, an offence punishable under section 60 of the Act, which says, *inter alia*, that "every licensed retail vendor who sells by wholesale shall be liable for every such offence to a fine not exceeding two hundred rupees."

The accused was summoned not under section 60, but under section 59, which enacts that "every manufacturer or vendor under this Act who fails to produce his license on the demand of any Excise Officer, or who commits any act in breach of any of the conditions of his license *not otherwise provided for in this Act*, or who artfully contravenes any rule made by the Board under section 10, otherwise than as provided in the last preceding section, shall be liable for every such offence to a fine not exceeding fifty rupees."

The Joint-Magistrate convicted the accused under section 53 of the Act, for selling excisable liquor without a license.

The judgment is as follows :—

"The evidence of the witnesses for the prosecution proves that the accused sold more than 4 seers of undiluted *pachwai* to Sriman Jugi, who had no license to purchase such a large quantity of *pachwai*. The accused himself holds no license. His statement is that he sold as a servant of Bama Charan. But the pottah of Bama Charan has not been produced. It is not in evidence that the name of the accused is endorsed on the pottah authorising him to sell *pachwai* as a servant under him. I therefore find that he

sold *pachoni* without a license. I convict him under section 53, Act VII of 1878, and sentence him to pay a fine of Rs. 15, in default to undergo simple imprisonment for two weeks."

We are of opinion that the conviction cannot stand.

No doubt there are cases which say that the servants of licensees are not as such exempt from responsibility under the Bengal Excise Act.

In *In re Ishur Chunder Shaha* (1), Couch, C. J., says :—" But there is another reason why it (the conviction) ought not to be interfered with. Supposing there is an error here in the Magistrate's holding that this must be considered as his license, and that he was practically the vendor, there is no doubt that he did sell the liquor; if this was not his license, he has been guilty of a breach of the law in selling liquor without any license."

In *Empress v. Baney Madhub Shaw* (2), the petitioner, the servant of a licensed vendor of spirits, was convicted for selling a bottle of brandy which was carried off and not drunk on the premises. It was contended for the petitioner that the master, the licensed vendor, was alone liable. Prinsep, J., in giving judgment, says :—" Two judgments of this Court have been considered by us on this point: *In re Ishur Chunder Shaha* (1) and the other recently delivered by Mr. Justice Pontifex and Mr. Justice Field, *The Empress v. Nuddiar Chand Shaw* (4). These decisions are in conflict. Our opinion inclines to the decision in *In re Ishur Chunder Shaha*; and having regard to the fact that that decision was not brought to the notice of the Judges who decided the more recent case, we think we are justified in following it."

The case of the *Empress v. Ishan Chandra De* (3) followed the decisions in *In re Ishur Chunder Shaha* (1) and *Empress v. Baney Madhub Shaw* (2). In the *Empress v. Nuddiar Chand Shaw* (4), Pontifex and Field, JJ., held that the licensed retail vendor himself is the only person liable to conviction under section 60 of the Act.

(1) 19 W. R. Cr. 34.

(2) I. L. R., 8 Calc., 207; 10 C. L. R. 389.

(3) I. L. R., 9 Calc., 847; 12 C. L. R. 451.

(4) I. L. R., 6 Calc., 832; 8 C. L. R. 162.

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In our opinion it is unnecessary to express any opinion as to which of these decisions is correct. The facts proved in this case do not establish a sale by the accused. The master was present in the shop at the time the order was given by the purchaser, and directed the accused to give the article ordered to the purchaser. The mere mechanical act of handing the liquor to the purchaser cannot, under the circumstances, be regarded as a *sale* by the accused.

U. T. H.

Order reversed.

MATRIMONIAL JURISDICTION.

Before Mr. Justice Wilson.

1890
 May 1 & 5.

STEPHEN (PETITIONER) v. STEPHEN (RESPONDENT).*

Divorce Act (IV of 1869), s. 16, cl. (c)—Divorce—Intervenor—Procedure after decree nisi on application by respondent for liberty to intervene.

A wife sued for dissolution of her marriage on the grounds of her husband's adultery and cruelty. The respondent did not appear or file an answer, and the case was heard *ex parte* and resulted in a decree *nisi* being passed. Subsequently and before the decree was made absolute, the respondent applied for liberty to intervene under the provisions of clause (c), section 16, of the Divorce Act, the application being based on affidavits alleging *inter alia* collusion on the part of the petitioner.

Held, following *King v. King* (1), that the respondent could not be allowed to intervene or be heard when the decree came on to be made absolute, but that the affidavits should be filed, and that notice should be given to the petitioner that the decree would not be made absolute until the matters set out in the affidavits as regarded the collusion had been cleared up.

On the 12th December 1889, the petitioner presented a petition praying for a decree for the dissolution of her marriage with the respondent on the ground of the respondent's adultery and cruelty towards the petitioner. The respondent did not appear or file any answer, and the case came on to be heard *ex parte* on the 23rd January 1890 before Mr. Justice Wilson. At the hearing evidence was given to prove numerous acts of cruelty on the part of the respondent, and also his adultery, and on the 23rd January 1890 the usual decree *nisi* was passed, dissolving the marriage unless sufficient cause

* Suit No. 6 of 1889.

(1) I. L. R. 6 Bom., 416.