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 MUKERJEE,

No doubt, as the District Magistrate points out, section 90 of the Criminal Procedure Code empowers him to issue a warrant in any case in which he is competent to issue a summons, but we observe that the Code makes no provision for the issue of a summons by a Magistrate requiring a person to appear before a Police Officer. The investigation in the present case was being made by the Police under chapter XIV of the Criminal Procedure Code, and accordingly the Sub-Inspector was empowered under section 160 by an order in writing to require the attendance of Monmohini before him, and on her failure to comply with the order she might have been prosecuted for disobedience under section 174 of the Penal Code; but we think that no warrant of arrest could under such circumstances be lawfully issued against her. We are also of opinion that inasmuch as the issue of the warrant was illegal the convictions under sections 143 and 186 of the Penal Code cannot be sustained, and the authorities above cited support this view. The District Magistrate relies on section 99 of the Penal Code; but we think that this section has no application to a case like the present in which the Police Officers were acting under a warrant, the issue of which was altogether illegal. For the above reasons we set aside the conviction and sentences, and direct that the fines, if realised, be refunded.

C. B. G.

## CRIMINAL REVISION.

*Before Mr. Justice Ghose and Mr. Justice Gordon.*

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 January 19.

JAGARNATH MANDHATA AND OTHERS (PETITIONERS) v. QUEEN |  
 EMPRESS (OPPOSITE PARTY).<sup>o</sup>

*Bengal Excise Act (Bengal Act VII of 1878), sections 4, 40, 75—Bengal Excise Act Amendment Act (Bengal Act IV of 1881), section 3—Right of Search—Gurjat-ganja—Exciseable article—Foreign exciseable article.*

In a case where an Excise Sub-Inspector attempted to search a house for *gurjat-ganja*, a "foreign exciseable article," under the Excise Act, (Bengal Act VII of 1878) and resistance was offered:—

*Held*, that *gurjat-ganja* being a "foreign exciseable article" under

<sup>o</sup> Criminal Revision No. 665 of 1896, against the order passed by F. E. Pargiter, Esq., Sessions Judge of Cuttack, dated the 7th of November 1896, affirming the order passed by N. Bhattacharjee, Deputy Magistrate of Puri, dated the 7th of October 1896.

section 4 of the Act as amended by Bengal Act IV of 1881, the excise officer had no legal authority to enter and search the house under section 40 of the Act; he had authority only to enter and search for any "exciseable article" as defined in section 4 of the Act: and that no offence, either under section 141 or section 353 of the Penal Code, was committed.

*Held*, also, that section 75 of the Act does not apply to a "~~foreign~~ exciseable article."

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ON 26th August 1896 the Excise Sub-Inspector of Puri received information through an informer that *gurjat ganja* was concealed in the house of accused No. 1, Jagarnath Mandhata. After taking down this information in writing, in accordance with section 40 of the Excise Act (VII of 1878) the Sub-Inspector went to the village where Jagarnath lived, taking with him a head constable and a constable of the Khurdah Police Station, in accordance with section 40 of the Excise Act, also four excise peons and the carter in whose cart they travelled. On arrival at the village the Sub-Inspector, taking with him in addition two of the villagers, as witnesses, proceeded to the house of Jagarnath. In an out-house, forming the entrance to the inner apartments, they found Jagarnath and Bisunath accused No. 3. Bisunath was pounding the *ganja*. The Sub-Inspector arrested Bisunath and gave the pounded *ganja* into the custody of one of the excise peons, himself keeping possession of the loose *ganja*. Jagarnath then interfered and told the Sub-Inspector he must not arrest Bisunath. The Sub-Inspector thereupon told Jagarnath, who he was and what he had come for. The party then went into the second courtyard, where the Sub-Inspector pointed out to Jagarnath the room which he suspected contained *ganja*, and asked for the key, the door being locked.

Jagarnath told his son, Satyabadi, to go and fetch the key. Satyabadi went away, and after some delay they heard a noise of some one jumping down into the room. The Sub-Inspector insisted on Jagarnath getting the key, and at this moment Satyabadi returned, and both he and Jagarnath then ordered the Sub-Inspector and his party to leave the house, stating that they would not allow it to be searched. The Sub-Inspector thereupon ordered his peon to break open the door, and while he was attempting to do so, he was twice pushed aside by Jagarnath. In the

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meanwhile 40 or 50 other villagers had assembled, and the Sub-Inspector, fearing that he would be attacked and beaten, went away with the three accused to a Delary police outpost, which was six miles distant, and there lodged an information with the head constable in charge against the three accused.

Jagarnath, in his defence, stated that no resistance was offered to the search made in his house, and that they did not find any *ganja*, and pleaded not guilty.

Accused No. 2 and No. 3 pleaded *an alibi*.

The Deputy Magistrate found all three accused guilty under sections 147 and 353 of the Penal Code, and sentenced them to rigorous imprisonment for two months.

On appeal to the Sessions Judge of Cuttack, the Sessions Judge upheld the conviction, and on 7th November 1896 delivered the following judgment:—

4. "The appellants have been convicted under sections 147 and 353 of the Penal Code of having attacked a special Excise Sub-Inspector and his attendants when he visited the appellant Jagarnath's house and found *gurjat-ganja* there. The facts are quite clear, and there is no reason to disbelieve the witnesses for the prosecution. The common object is quite clear; it was to prevent the house from being searched. It is contended on the appellant's behalf that the Excise officers exceeded their duty in making the search, and were not protected by section 99 of the Indian Penal Code. This contention rests on the argument that they made the search under section 40 of the Excise Act, and that applies only to 'exciseable articles' and not 'foreign exciseable articles.' But reading sections 4 and 17 and 17A. together, I am of opinion that 'exciseable article' includes 'foreign exciseable articles,' and that the latter is only a particular sub-class under the former class. Section 75, therefore, applies to the *gurjat-ganja* which is admittedly a 'foreign, exciseable article,' and section 40 therefore covers the proceedings of the Excise officers; and even if it did not, they acted in good faith under colour of their office, and the rulings *Bhawoo Jivaji v. Mulji Dayal* (1), and *Queen-Empress v. Dulip* (2) shew that section 99 covers their conduct. I think, therefore, the convictions are right. The appeal is therefore dismissed."

The accused thereupon moved the High Court to set aside the conviction and sentences.

Babu *Monmotho Nath Mitter* for the petitioner.—The Excise officer had no authority to enter and search the house of the

(1) I. L. R., 12 Bom., 377.

(2) I. L. R., 18 All., 246.

petitioners. Section 40 of the Excise Act (Bengal Act VII of 1878) empowers him to enter and search the house of a man, when he is suspected of having kept concealed in his house any *exciseable articles* which are liable to confiscation under section 75 of the Act. In the present case, according to the finding of both the lower Courts, *gunjat-ganja*, which the petitioners were suspected of having kept concealed in their house, is a "foreign exciseable article," and not an "exciseable article." Under the Act "exciseable" and "foreign exciseable" articles are different from each other, and the Sessions Judge is in error in holding that "exciseable article" includes "foreign exciseable article." There was no such term as "foreign exciseable article" in Bengal Act VII of 1878 when it was originally passed, but that term was introduced by the amending Act (Bengal Act IV of 1881), and that introduction was not by an amendment of the definition of the term "exciseable article" as given in section 4 of Act VII of 1878, but by the addition of a separate definition altogether. It also appears from the different sections of the amending Act that, whenever the Legislature had occasion to deal with "foreign exciseable articles," they have added new sections, *vide* sections 17A and 61A. Section 75, as it originally stood in the Act of 1878, has been amended by section 10 of Act IV of 1881, but there is nothing in that amendment to indicate that "exciseable article" includes "foreign exciseable article." The Excise Officer had therefore no authority under section 40 to enter and search the house of the petitioners, who were legally justified in offering such resistance to the Excise Officer and his party as was necessary to prevent the house from being searched. The *common object of the assembly being to offer lawful resistance*, there was no unlawful assembly as defined by section 141 of the Penal Code. Section 99 of the Penal Code has no application to the facts and circumstances of the present case.

The following judgment was delivered by the High Court (GHOSH and GORDON, JJ.):—

The petitioners have been convicted by the Deputy Magistrate of Puri of offences punishable under sections 147 and 353 of the Penal Code, and have been sentenced each to two months' rigorous imprisonment. On appeal the conviction and sentences have

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been affirmed by the Sessions Judge. The facts found by both lower Courts are that Janki Nath Basu, Special Excise Sub-Inspector of Puri, having received information that *gurjat-ganja* was concealed in the house of the petitioner, Jagarnath Mandhata, went to his house to search it, accompanied by certain Police Officers and Excise peons, and that he and his party were opposed by the petitioners and others in their attempt to search the house in question, and were at the same time assaulted. The main ground urged in support of the rule, which we granted on the application of the petitioners, is that, inasmuch as *gurjat-ganja* is a "foreign exciseable" article as defined in section 4 of Bengal Act VII of 1878 (as amended by Bengal Act IV of 1881), it is not included in the term "exciseable article" as used in sections 75 and 4 of that Act; and consequently the Excise Officer had no legal authority under section 40 to enter and search the house of Jagarnath Mandhata. We have considered the terms of the various sections referred to, and the definitions of "exciseable" and "foreign exciseable" article, as given in the Act, and we are of opinion that the Excise Officer had no legal authority to search the petitioner's house. Section 4 of the Act, as amended by Bengal Act IV of 1881, contains separate and distinct definitions of "exciseable article" and "foreign exciseable article," and therefore, we think, that, whenever either of these expressions occurs in the Act, it is used in the sense and with the meaning given to it in the definitions. The words used in section 75 are "exciseable article" and the words "foreign exciseable article" do not occur therein, so that in the view we take the Excise Officer in the present case had no authority under section 40 to enter and search the petitioner's house; he had authority only to search for any exciseable article as defined in section 4 of the Act.

The learned Judge has expressed the opinion that, reading sections 4, 17 and 17A together, "exciseable article" includes "foreign exciseable article," and that the latter is only a "particular sub-class," under the former class; and that section 75 is therefore applicable to *gurjat-ganja*. We are, however, unable to adopt that view. As already stated, section 4 distinguishes between, "exciseable" and "foreign exciseable" articles.

Section 17 refers to exciseable articles only, while section

17A gives to the Board of Revenue, with the sanction of the local Government, the power to declare by notification that the possession of any "foreign exciseable article" is prohibited within districts and tracts specified in the notification. No doubt, it appears from the Deputy Magistrate's explanation that a notification has been duly published prohibiting the possession of any "foreign exciseable article" without a license from the Collector in the District of Puri, but all the law provides with reference to such articles is that the person in possession thereof shall be liable to a fine (see section 61A). There is nothing to indicate, as far as we can discover, that "foreign exciseable articles" are meant to be a sub-class of "exciseable article;" and, indeed, we do not find that such articles are liable to seizure and confiscation as exciseable articles are under section 75 of the Act. It follows, therefore, that the Excise Officer had no authority to proceed under section 40 of the Act. We may also refer to section 82 of the Act, in which a distinction is drawn between an "exciseable article" and a "foreign exciseable article," thus indicating that the Legislature did not mean foreign exciseable articles to be a sub-class of exciseable articles. We also think that section 99 of the Penal Code, and the authorities referred to by the Sessions Judge in his judgment, are not applicable to the facts and circumstances of the present case. The common object of the assembly was to resist the search of the house, which, as we have already said, the Excise Officer had no legal authority to make; and that being so, we are unable to say that such assembly was an "unlawful assembly," as defined in section 141 of the Penal Code, and that when force was used the offence of resisting was committed. Similarly, we are of opinion that the conviction under section 353 of the Penal Code cannot be supported, because the Special Excise Sub-Inspector, when assaulted, was not acting in lawful discharge of his duty. [See *In re Raktmaji* (1)] We observe that the Sessions Judge is of opinion that the Excise Officer was protected by section 99 of the Penal Code; and he cites two cases [*Bhawoo Jiwaji v. Mulji Dayal* (2) and *Queen-Empress v. Dalip* (3)] in support of this view. But the facts of those cases are essentially

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(1) I. L. R., 9 Bom., 558.

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different from the facts of the present case, and we do not think that the law laid down therein is applicable here; or that section 99 of the Penal Code can protect the Excise Officer, when his conduct was altogether illegal. For the above reasons we set aside the conviction and sentences.

We might, however, hold that the petitioners are guilty of the offence of ordinary assault punishable under section 352 of the Penal Code, but we are not quite sure whether the resistance offered or the force used was not necessary to resist the Excise Officer in what he attempted to do, *viz.*, to break open the door of the petitioner's house. But in any view of the matter, it seems to us that the incarceration, which the petitioners have already suffered under the sentence imposed by the Magistrate, is sufficient in the circumstances of the case, and that there need not therefore be any formal conviction for assault under section 352.

C. E. G.

*Rule made absolute.*

## APPELLATE CIVIL.

*Before Mr. Justice Banerjee and Mr. Justice Rampini.*

1896  
 December 8.

GOBIND CHUNDER NUNDY AND ANOTHER (PLAINTIFFS) v. SRIGOBIND CHOWDHRY AND ANOTHER (DEFENDANTS).\*

*Contribution, Suit for—Joint wrong-doers—Decree for costs—Evidence—Proceedings in former case not between same parties—Admissibility in evidence of finding in former case.*

*S* granted to *G* and *A* a *putni* of a certain share in a zemindari, and thereupon *P* brought a suit against *G*, *S* and *A* for specific performance of an agreement to grant to him (*P*) a *putni* of the same share. That suit was decreed with costs, the whole of which were realized from *G*. In a suit for contribution brought by *G* against *S* and *A*, the lower Appellate Court found that *G*, *S* and *A* had conspired in setting up a false defence in the former suit in order to defeat *P*'s claim.

\*Appeal from Appellate Decree No. 1237 of 1895, against the decree of K. N. Roy, Esq., District Judge of Pubna and Bogra, dated the 20th of April 1895, affirming the decree of Babu Rash Behari Bose, Munsif of Serajunge, dated the 10th of September 1894.