

1902  
 BROJENDRA  
 NATH  
 MULLICK  
 v.  
 LUCKHIMONI  
 DASSEE.

Then arises the question whether the plaintiff is or is not entitled to any relief in the present action with regard to the work actually done by him, and to his just and proper professional remuneration. *Mr. Robinson* for the defendants contended that to give him relief on that basis would be altering the nature of the action.

There is a prayer for general relief in the plaint; and although the action is brought on the promissory note, the circumstances show that the plaintiff undoubtedly did some work for *Mutty Lall Paul*, and I am inclined to hold that, instead of referring the plaintiff to another action, I ought to give him relief on that basis in the present suit.

I would therefore refer it to the Registrar, who is also the Taxing Officer, to enquire what was the work done by the plaintiff and what is the just and fair professional remuneration to which he is entitled for his services to *Mutty Lall Paul* in connection with the matters referred to in this suit.

The Registrar will then call on the plaintiff to submit his bill of costs and will thus be able to dispose of the matter in accordance with the practice.

A final decree will be made when the report is submitted.

The question of costs is reserved.

*Case referred to the Registrar.*

Attorney for the plaintiff: *B. C. Dutt.*

Attorneys for the defendants: *Swinhoe & Co.; R. C. Mitter.*

B. D. B.

## FULL BENCH

*Before Sir Francis William Maclean H.C.I.E., Chief Justice, Mr. Justice Prinsep, Mr. Justice Ghose, Mr. Justice Hill and Mr. Justice Henderson.*

1902  
 April 30.

IN THE MATTER OF KALU MAL KHETRI.\*

*Excise—Commission by servant of licensed manufacturer or vendor of act in breach of conditions of license—Liability of servant—Bengal Excise Act (Bengal Act VII of 1878) s. 59.*

*Held*, that the servant of a manufacturer or vendor under Bengal Act VII of 1878 is not liable under s. 59 of the Act to the penalty provided by that section for

\* Reference to Full Bench in Criminal Revision No. 1067 of 1901.

the commission of an act in breach of any of the conditions of the license of such manufacturer or vendor not otherwise provided for in the Act.

*The Empress v. Nuddiar Chand Shaw* (1), and *In the matter of Nomullu Akond* (2) approved; *Ishur Chunder Shaha* (3) distinguished, and *Empress v. Baney Madhub Shaw* (4) overruled.

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IN THE  
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IN this case the petitioner Kalu Mal Khetri was the servant of Jet Mal Prem Chand, licensed vendor of country liquor at Marioni in the district of Sibsagar. Under the conditions of his license Jet Mal Prem Chand was not allowed to sell liquor at less than six annas per bottle, and not after 9 P.M. The petitioner was prosecuted under s. 59 of the Bengal Excise Act for breach of the conditions of his master's license by selling two quart bottles of country liquor at two annas each to a goala on the 20th August 1901 at 11 P.M., and was on the 2nd September 1901 convicted by the Assistant Commissioner of Jorhat and fined Rs. 50.

On revision it was contended, under the authority of *Empress v. Nuddiar Chand Shaw* (1) and *In the matter of Nomullu Akond* (2), that the conviction of the petitioner was bad because s. 59 of Bengal Act VII of 1878 provided for the punishment only of a manufacturer or vendor under the Act and not of a servant of such manufacturer or vendor. The Assistant Commissioner in the explanation which he submitted to the High Court referred to the case of *The Empress v. Baney Madhub Shaw* (4), in which it was held that the conviction of the servant of a licensed vendor of a breach of license held by the vendor was not necessarily illegal.

The Judges composing the Criminal Bench of the High Court (STEVENS and HARRINGTON JJ.), in consequence of the authorities being in conflict on the point, referred the matter to a Full Bench on the 17th March 1902.

The order of reference was as follows:—

The petitioner is the servant of a licensed vendor under Bengal Act VII of 1878. He has been convicted by the Assistant Commissioner of Jorhat under s. 59 of the Act of committing an act in breach of one of the conditions of his employer's license, and has been sentenced to pay a fine of Rs. 50, and in default of payment to be imprisoned for 10 days.

(1) (1881) I. L. R. 6 Calc. 832.

(3) (1873) 19 W. R. Cr. 34.

(2) (1882) 11 C. L. R. 416.

(4) (1881) I. L. R. 8 Calc. 207.

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S. 59 of Act VII provides for the punishment by a fine not exceeding fifty rupees of "every manufacturer or vendor under this Act" who is guilty of certain contraventions of the Act, including the commission of any act in breach of any of the conditions of his license not otherwise provided for in the Act, and the concluding clause of the section provides that "such fine shall be recoverable from such manufacturer or vendor, notwithstanding that such breach may have been owing to the default or carelessness of the servant or other persons employed by him."

It has been contended before us that the conviction of the petitioner is bad because s. 59 provides for the punishment only of a manufacturer or vendor under the Act and not of a servant of such manufacturer or vendor.

In our opinion this contention is sound, but the Assistant Commissioner in the explanation which he has submitted has referred us to the case of *The Empress v. Baney Madhub Shaw* (1). In that case two servants of a licensed vendor had been convicted under s. 59 of Bengal Act VII of 1878, and PRINSEP and TOTTENHAM JJ., following the ruling in *Ishur Chunder Shaha* (2) and dissenting from that in the case of *The Empress v. Nuddiar Chand Shaw* (3), held that the conviction of the servant of a licensed vendor for a breach of license held by the vendor was not necessarily illegal.

The case of *Ishur Chunder Shaha* (2) was decided by COUCH C.J. and GLOVER J. on the 18th February 1878, under the provisions of s. 43 of Act XXI of 1856, which corresponded generally to s. 59 of Bengal Act VII of 1878, but did not contain any provision expressly declaring responsibility of a licensed manufacturer or vendor for the default or carelessness of his servant. It is not quite clear what the exact facts of the case were, but we observe that it was found by the Magistrate that the person whose conviction was in question "was not the actual vendor, but the recognized agent of the vendor, and that he admitted that he effected the sales under cover of the license which was taken out in the name of the person for whom he was acting as agent." If we rightly understand the judgment of this Court, it proceeded on the ground that the accused person was on the horns of a dilemma. Either he was responsible for breach of the license, if it was to be considered as equivalent to a license to himself, or he was breaking the law by selling liquor without a license, if it was not to be so considered.

In the case of *The Empress v. Nuddiar Chand Shaw* (3) under s. 60 of Bengal Act VII of 1878, PONTIFEX and FIELD JJ. expressed themselves as "clear that the licensed retail vendor himself is the only person liable to the penalty provided by s. 60, and that the servant of such vendor is not liable to conviction under this section." The same principle would apparently apply to s. 59 of the Act.

In the case of *In the matter of Nomullu Akond* (4), the question whether the servant of a licensed vendor was liable for contravention of Bengal Act VII of 1878 was considered by CUNNINGHAM and TOTTENHAM JJ., who expressed the

(1) (1881) I. L. R. 8 Calc. 207.

(3) (1881) I. L. R. 6 Calc. 892.

(2) (1878) 19 W. R. Cr. 34.

(4) (1882) 11 C. L. R. 416.

opinion that "it is clear that the person prosecuted under s. 53 (*sic*) for need (*sic*) of license should be the licensed vendor and not his servant." We presume that for "53" should be read "59" and for "need" should be read "breach," as the sentence does not seem intelligible as it stands and a licensed vendor could scarcely be convicted under s. 53, which provides for the punishment of persons selling excisable articles without a license. The decision seems to agree in principle with that in the case of *Empress v. Nuddiar Chand Shaw* (1) and to conflict with that in the *Empress v. Baney Madhub Shaw* (2).

With great respect we find ourselves unable to concur in the view expressed by the learned Judges who decided the case of *Empress v. Baney Madhub Shaw* (2). It seems to us that by the terms of s. 59 only the manufacturer or vendor himself is liable for the commission of an act in breach of any of the conditions of his license; and as the authorities appear to be in conflict on the point, we refer to a Full Bench of the Court the question—

Is the servant of a manufacturer or vendor under Bengal Act VII of 1878 liable under s. 59 of the Act to the penalty provided by that section for the commission of an act in breach of any of the conditions of the license of such manufacturer or vendor not otherwise provided for in the Act?

*Babu Bycant Nath Dass* for the petitioner. The question in this case is whether my client, who is the servant of a licensed vendor of country liquor, can be convicted under s. 59 of Bengal Act VII of 1878 for having sold liquor contrary to the conditions of his master's license.

Under the license the master was not allowed to sell liquor at less than six annas a bottle, nor was he allowed to sell any liquor after 9 P.M. The servant is alleged to have sold the liquor at two annas a bottle, and after the time mentioned in the license.

I submit the servant cannot be punished under s. 59, but only the manufacturer or vendor.

The cases against my contention are *Ishur Chunder Shah* (3) and *Empress v. Baney Madhub Shaw* (2).

**MACLEAN C. J.** In my opinion the question submitted to us ought to be answered in the negative. I agree with the views expressed in the cases of *The Empress v. Nuddiar Chand Shaw* (1) and with that expressed in the case of *In the matter of Nomallu Akond* (4). I think it would be difficult to hold, having regard to the language of the section, especially to the words "such fine

(1) (1881) I. L. R. 6 Calc. 832.

(2) (1881) I. L. R. 8 Calc. 207.

(3) (1873) 19 W. R. Cr. 34.

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shall be recoverable from such manufacturer or vendor, notwithstanding that such a breach may have been owing to the default or carelessness of the servant or other persons employed by him," that the servant or the person employed can be properly held liable.

With respect to the cases which take an opposite view, and with all respect to the opinions expressed in the case of *Empress v. Baney Madhub Shaw* (1), which followed that decided by SIR RICHARD COUCH C. J., and GLOVER J., in the case of *Ishur Chunder Shaha* (2), it is sufficient to point out that the language of the Act under which the latter of these decisions was given is clearly distinguishable from the language of the present Act, and in the important particular that the words, to which I have referred, are not to be found in the earlier Act.

**PRINSEP J.** I am of the same opinion.

**GHOSE J.** I am of the same opinion.

**HILL J.** I am of the same opinion.

**HENDERSON J.** I am of the same opinion.

D. S.

*Before Sir Francis William Maclean F.C.I.E., Chief Justice, Mr. Justice Prinsep, Mr. Justice Ghose, Mr. Justice Hill and Mr. Justice Henderson.*

1902  
May 1st.

RANIJULLA

v.

ISHAB DHALI\*

*Bengal Tenancy Act (VIII of 1885), Schedule III, Article 3.—Limitation—Suit by an occupancy raiyat where the landlord has no hand in the ouster.*

When an occupancy raiyat is dispossessed and the landlord has had no hand in the ouster, the period of limitation applicable is twelve years, and not two years under Article 3, Schedule III of the Bengal Tenancy Act.

The case of *Hara Kumar Nath v. Sheikh Nasaruddin* (3), so far as the question of limitation was concerned, was not rightly decided.

THIS case was referred to a Full Bench by Rampini and Gupta JJ. on the 2nd August 1901, with the following opinion:—

This is a second appeal against a decision of the Subordinate Judge of Tipperah; the suit out of which the appeal arises is one

(1) (1881) I. L. R. 8 Cal. 207.

(2) (1878) 19 W. R. Cr. 34.

\* Reference to a Full Bench in Appeal from Appellate Decree N. 748 of 1899: (3) (1900) 4 C. W. N. 665.