

The petitioner, therefore, did not furnish the District Judge with all the materials which he reasonably required in order to enable him to form a correct opinion as to whether the lease was for the benefit of the infants or not.

We must dismiss the appeal, but at the same time we think it right to intimate that this dismissal will not prevent a second application from being made to the District Judge under s. 18, based upon further and better materials; and that if these materials shew that the granting of the proposed patni lease is for the benefit of the infants, the Court should give the necessary power to the guardian to make or join in the grant. In dealing with these materials, the Court will consider the allegation of the guardian that the granting of the patni lease is necessary to avert the disposal of the property by the creditors of the infants' father.

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IN THE  
MATTER OF  
THE  
PETITION OF  
SHRISH  
CHUNDER  
MOOKHOPA-  
DHYA.

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## CRIMINAL REFERENCE.

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*Before Mr. Justice Tottenham and Mr. Justice Maclean.*

THE EMPRESS v. NISTAR RAUR.\*

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June 28.

*Contagious Diseases Act (XIV of 1868), ss. 11, 21—Rules 13 and 27 passed under the Act—Magistrate, Competency of—Jurisdiction.*

Any woman desirous of ceasing to carry on the business of a common prostitute is, under the provisions of the Indian Contagious Diseases Act, 1868, absolutely entitled to have her name removed from the register; and any rule, or portion of a rule, purporting to have been framed under the provisions of that Act which places any obstacle on the way of her doing so, is *ultra vires*, and therefore void.

Where a woman is prosecuted before a Magistrate under s. 11 of Act XIV of 1868, she is not precluded from pleading that she has ceased to be a common prostitute, and that she has taken steps, under s. 21 and the rules framed thereunder, for the removal of her name from the register; and the Magistrate is competent to entertain such a defence.

*In the matter of Lakhimani Raur (1) approved.*

\* Criminal Reference, No. 106 of 1880, from B. L. Gupta, Esq., C. S., Presidency Magistrate of Calcutta, Northern Division, dated the 29th May 1880.

(1) 3. B. L. R., A. Cr., 70.

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THIS was a reference from the Presidency Magistrate for the Northern Division of Calcutta, in which it appeared that the defendant, Nistar Raur, was registered as a common prostitute under Act XIV of 1868, and her name was still borne on the register, which was produced in evidence before the Magistrate. She was several times convicted and fined for failing to appear in due time for periodical medical examination, and her fifth and last conviction was on the 23rd of March 1880.

It would seem, however, from the records of the Police office, produced in evidence, that, in February 1880, an application on behalf of Nistar was presented to the Deputy Commissioner of Police, informing him that she had ceased to be a common prostitute, and was living under the protection of a certain individual, and praying that her name might be removed from the register. The application was rejected. Later on, a second application on her behalf, claiming exemption on the same grounds, was presented to the Commissioner of Police by her attorney, Mr. Leslie, in person. A Police enquiry was ordered, and pending the result of such enquiry the woman presented herself for examination on one occasion. No orders on the petition were received for some time after this, and Mr. Leslie deposed that he made more than one attempt, but failed to obtain a hearing for his client. Upon this he intimated to the Commissioner that he would advise his client not to appear at her next examination, so that in case of a prosecution she might have an opportunity of contesting her rights before the Court. The result of these proceedings was the arrest of the woman by the Police without a warrant from any Magistrate, and this prosecution under s. 11. of the Act.

The first question raised related to the legality of the arrest. The Police are expressly authorized, by rule 27 of the Government rules, to arrest all registered women defaulting at the medical examination. But before the Magistrate it was contended that the rule itself, which purports to have been made under s. 11 of the Act XIV of 1868, was unauthorized by that Act, and was therefore *ultra vires*.

The next question raised related to the jurisdiction of the Magistrate in the case, and to the validity of rule 13 passed un-

der s. 21 of the Act. Rule 13 provides that applications by women to have their names removed from the register should be made in writing to the Commissioner of Police, who, if satisfied, on enquiry, that the applicant has really ceased to practise as a prostitute, "may cause her name to be removed from the register." Neither the Act nor the rules indicate any other mode by which a woman once registered may procure her exemption, and the rules provide no appeal from the Commissioner's orders. It was contended, therefore, that the Commissioner's orders were final, and the Magistrate had no jurisdiction to go into the question as to whether the woman had ceased to be a common prostitute. On the other hand it was contended, that s. 21 of the Act confers an absolute right on every registered woman to withdraw her name at her option from the register, and leaves it to the Government only to prescribe the procedure or mode by which she may do so; so that as no woman's name, not even that of a declared common prostitute, can be placed on the register against her will, or without her consent; so no woman's name can continue on the roll after she has, in the manner prescribed by Government, applied for the removal of her name; and that if a woman, after the removal of her name from the book, still continues to carry on the business of a common prostitute, the only course left to the Police is to prosecute her for each repetition of the offence under s. 4 of the Act. It was, therefore, urged that rule 13, investing the Commissioner of Police with a discretionary power to reject applications made under s. 21, was inconsistent with the real import of that section, and therefore null and void. The ruling of the High Court in *In the matter of Lakhimani Raur* (1) was referred to.

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On the evidence before him, the Magistrate found, as a fact, that the accused had ceased to be a common prostitute within the meaning of the Act; and he referred the following questions of law for the opinion of the High Court under s. 240 of Act IV of 1877:—

1st—Is rule 27 of the rules passed by the Government of Bengal, under Act XIV of 1868, valid in law; and is a woman registered under that Act legally liable to arrest by a Police

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officer without a warrant, for omitting to attend at the periodical medical examination ?

2nd—Is rule 13 of the said rules consistent with the Act, and can the Commissioner of Police, in his discretion, lawfully refuse to remove from the register the name of a woman who declares herself desirous of ceasing to practise as a common prostitute, and applies for such removal ?

3rd—In either case, is a registered woman, whose application to the Commissioner of Police for the removal of her name from the register has not met with success, precluded from pleading before the Magistrate, on a prosecution under s. 11 of the Act, that she is not, or has ceased to be, a common prostitute, and is the Magistrate competent to enquire into such a plea ?

Mr. R. Allen and Mr. R. N. Mitra for Nistar Raur.

The following judgments were delivered :—

MACLEAN, J.—This is a reference made by one of the Presidency Magistrates of Calcutta, under s. 240, Act IV of 1877, submitting for the opinion of the Court three questions of law arising out of a prosecution under Act XIV of 1868, s. 2.

The first question raises a point which does not affect the case before the Magistrate, who has to decide whether the person charged before him has committed the offence imputed. We think it unnecessary to express any opinion on this point.

We think that, as every woman registered under the Act has an absolute right to have her name removed “from the book,” if she is desirous of ceasing to carry on the business of a common prostitute, any rule which raises any obstacle to the exercise of that right is not in accordance with s. 21 of the Act. Part of the 13th rule referred to by the Magistrate, commencing “may postpone” and ending “satisfied he,” appears to be *ultra vires*. We answer the second question in the negative.

The third question refers to the Magistrate’s competency to entertain a woman’s plea that she is no longer lawfully retained on the register, and is therefore not liable to be punished for breach of the rules applicable to registered women. In our opinion, a woman prosecuted for an offence under s. 11 is not pre-

cluded from pleading that she has ceased to carry on the business of a common prostitute ; that she has taken the steps prescribed by s. 21 and the rules framed in accordance therewith to obtain the removal of her name from the register ; and that, if it is still retained there, it is retained contrary to law. This opinion is, we think, supported by the authority of this Court in the case to which the Magistrate refers—*In the matter of Lakhimani Raur*(1). It was there held, that the Magistrate was bound to enquire into the plea that the woman before him had not been lawfully registered, because she had not consented to it ; and on the same principle, we think that, in the present case, it is the Magistrate's duty to determine whether or not the woman has been lawfully retained upon the register ; and if not, whether she had, in fact, ceased to carry on the business of a common prostitute or not when the proceedings were taken against her.

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TOTTENHAM, J.—I have no doubt that rule 27 is legal in authorizing arrest without warrant, but the Magistrate cannot go into this question. I think that rule 13 is beyond the scope of s. 21 of the Act in allowing the Commissioner of Police to retain a woman's name on the register as long as it pleases him to do so. I read the law as leaving it at the option of the woman to be put on the register and to remain on it. She comes off at her own peril, but there is no authority given by law for keeping her name on the register against her will.

I also think that a woman brought before the Magistrate for breach of rules under s. 11 of the Act is entitled to plead that she has conformed to the procedure by Government under s. 23 of the Act ; that she is not a common prostitute ; and that if she is still on the register, she is kept there against the law, and is not liable to be punished for neglecting to attend for examination. The Magistrate, I think, should acquit her if he finds her plea to be true.

(1) 3 B. L. R., A. Cr., 70.