

1912
 THE BOMBAY
 Co., LD.
 v.
 THE
 NATIONAL
 JUTE MILLS
 Co., LD.
 CHITTY J.

to me to be without foundation. It is immaterial that the Registrar called upon the parties for their statements before the arbitrators were nominated, or at least had consented to act. It was always open to the arbitrators to require the parties to supply further information, written or verbal. For these reasons I am of opinion that the petitioners are entitled to the order prayed for, and the award must be filed. The National Jute Mills Company must pay to the Bombay Company their costs of this application.

C. B.

Rule absolute.

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

1912
 Feb. 8

SEW KARAN

v.

CORPORATION OF CALCUTTA.*

Adulteration—Adulterated ghee, sale of—Master and servant—Sale by servant or partner—Liability therefor of master or co-partner of a firm of Commission Agents—Calcutta Municipal Act (Beng. III of 1899), ss. 494 and 574.

Section 495 of the Calcutta Municipal Act imposes a positive prohibition against the sale of adulterated articles of food or drink, and covers the case of an agent or firm as well as that of a master and servant.

A master is liable under the section for the sale by his servant of such as adulterated articles at his shop without his connivance. The partners of a firm carrying on business as agents of the manufacturers of *ghee*, in shops bearing their names, are each responsible for everything sold therein in contravention of the section.

Brown v. Foot (1), followed.

* Criminal Revision Nos. 29 and 30 of 1912 against the orders of Amrita Lal Mukerjee, Municipal Magistrate of Calcutta, dated Nov. 13, 1911.

ON 23rd September 1911 an application for summons was filed on behalf of the Corporation of Calcutta, before the Municipal Magistrate, against the petitioner and one Lalchand, under sections 495 and 574 of the Calcutta Municipal Act (Beng. III of 1899), for selling a quantity of buffalo *ghee* adulterated with 10 per cent. of foreign fat. It appeared that, on the 31st August, Dr. Sen, Food Inspector of the Corporation, purchased 4½ annas worth of buffalo *ghee* at the petitioners' shop, No. 2, Ram Kumar Rokhit's Lane, in the town of Calcutta. He divided the quantity purchased into three parts, each of which he bottled, labelled and sealed. He delivered a bottle to Lalchand as counter sample, forwarded another to Dr. Ghose, the Analyst of the Corporation, and kept the third himself. Dr. Ghose found the sample sent him to contain 10 per cent. of foreign fat, but Dr. Briggs, who analyzed the counter sample, was of opinion that it was adulterated with *til* seed oil to the extent of 8 to 10 per cent.

The petitioner, Sew Karan, was said to be a commission agent for certain manufacturers of *ghee* up-country, which was sold at certain shops bearing the names of Lalchand Sew Karan, in Ram Kumar Rokhit's Lane. The *ghee* in question was actually sold to the Food Inspector by Lalchand himself, whom the Magistrate treated as the servant of the petitioner. Lalchand did not appear, but the petitioner did and was tried and convicted, under the above sections, on the 13th November, and fined Rs. 100. There was another similar conviction against him in respect of *ghee* sold at another shop bearing the same names. He thereupon moved the High Court and obtained the present two Rules in identical terms, as set forth in the judgment of the High Court.

1912

SEW
KARAN
v.
CORPORATION
OF
CALCUTTA.

1912
 SEW
 KARAN
 v.
 CORPORATION
 OF
 CALCUTTA.

The Standing Counsel (Mr. B. C. Mitter) (with him *Babu Debendra Chunder Mullick*), for the Corporation, showed cause. As to the second part of the Rule which relates to the liability of a master for the acts of his servant, see the Sale of Foods and Drugs Act (38 and 39 Vict. c. 63) s. 5, the provisions of which are substantially the same as those of section 495 of the Calcutta Municipal Act. The section contains an absolute prohibition irrespective of the person who sells the adulterated article. The master is liable for the act of the servant: *Brown v. Foot* (1). As to whether the fact of the petitioner being a commission agent alters his position in this respect, the answer is in the negative: see *Ireland v Livingstone* (2).

Mr. K. N. Chaudhuri (with him *Babu Debendra Narain Bhattacharjee*), for the petitioners. In view of the ruling in *Brown v. Foot* (1), I cannot contend that master is not so liable, but the real question is as to what Lalchand was. The license of the shop, in the names of Lalchand Sew Karan, shows that the former was a partner. A prosecution against one of the partners is not maintainable: *Pearks, Gunston & Tee v. Ward* (3). The case being a criminal one, the principle of civil liability should not be extended to it.

HOLMWOOD AND SHARFUDDIN JJ. These were two Rules calling upon the Municipal Magistrate of Calcutta and the Chairman to show cause why the conviction and sentence passed upon Sew Karan, proprietor, should not be set aside on the ground that he did not sell, or cannot be said to have sold, the *ghee* himself, and to determine whether section 495 of the Calcutta Municipal Act applies to any person other than the actual hand employed in the sale.

(1) (1892) 17 Cox C.C. 509.

(2) (1871) L. R. 5 H. L. 395, 408.

(3) [1902] 2 K. B. 1.

Now, as regards the first question, we can have no doubt, on the authority of *Brown v. Foot* (1), that on the law, which in England is exactly the same as in this country, indeed, section 495 appears to have been based entirely on section 6 of the English Act, it has been held that a servant, employed by his master to sell any article, who adulterates it, thereby renders his master liable under the section, although there is no connivance of the master; and non-connivance of the master is no defence, though the entire absence of connivance on his part might in the discretion of the convicting Magistrate be a ground for mitigation of the penalty. Now, the ground upon which Mr. Justice Wills proceeds in that case is one which equally covers the case of an agent or a firm, because it is not directed as a prohibition against a person, but, as Wills J. says, it imposes a positive prohibition against the sale of adulterated articles. This was the point upon which we had doubt when we issued the Rule, owing to the wording of the law both in England and in India, the section saying "no person shall sell." But it appears to be settled law that the prohibition is positive, as we have seen, against the sale of adulterated articles, and any person who is legally responsible for such a sale comes within the section.

But it has been argued that this Sew Karan is only a commission agent for certain producers of *ghee* up-country, that he collects *ghee* and other things from them and, as they sell in Calcutta at certain shops which go in the names of Lalchand Sew Karan, the Health Officer appears to have taken proceedings against Lalchand Sew Karan, and we see that the licensee for wholesale dealers in *ghee* at No. 2, Ram Kamar Rakhit's Lane and for selling *ghee* at No. 9, Ram Kumar Rakhit's Lane is Lalchand Sew Karan.

(1) (1892) 17 Cox C.C. 509.

1912
 SEW KARAN
 v.
 CORPORATION
 OF
 CALCUTTA.

The Magistrate, however, treated the case as if Lalchand was the servant of Sew Karan, and the finding on the evidence is that Lalchand was the hand that actually sold the *ghee* to the Inspector. On the view we take of the law, if Lalchand and Sew Karan are partners, they are both responsible for everything which is sold in their name at shops bearing both their names; and if they are master and servant, it is clear on the English authorities that the master is liable for the act of his servant.

We do not think it necessary to go further into the question of what their precise relations are. It is sufficient to say that Lalchand did not appear in the lower Court, and that the conviction in both the cases has been held against Sew Karan.

There are two matters in the Act itself which convince us that the Legislature intended that the beneficial owner of the article should be responsible for its purity. For, when the Health Officer goes to make enquiries about food exposed for sale, there is the provision in section 507 that he can compel the seller to give him enough as is reasonably requisite for analysis, and that this quantity shall be divided into three parts to be then and there separated, and the Chairman forthwith will notify to the seller or his agent selling the article his intention to have the same analysed. Now, it is clear that in this passage the word "seller" means the owner of the shop or the person who has license to sell goods or who carries on business through his servant or agent, and he is contrasted with the agent actually selling the article. This is one point which convinces us of the intention of the Legislature. Then we turn to the condition of punishment under section 574. We find that the fine which may be imposed is Rs. 100 for the

first offence and Rs. 500 for any subsequent offences. Now, it is perfectly clear that this must have reference to the master and not to the servant, because it would not be always the same servant who would be in the shop selling articles, and by changing his servant every week a dishonest proprietor could continue to sell adulterated goods without incurring any further penalty.

We, therefore, think, taking the view that the Magistrate took, that Lalchand was the seller or agent, and Sew Karan the owner or principal, that the convictions are right; or taking the view which has been urged upon us by the learned counsel for the defence, who obtained the Rule, that they were partners, the convictions will be equally right.

The Rules are, therefore, discharged.

E. H. M.

Rules discharged.

1912
SEW KARAN
v.
CORPORATION
OF
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CIVIL RULE.

Before Justice Sir Cecil Brett and Mr. Justice Carmuff.

SURENDRA MOHINI DEBI

v.

AMARESH CHANDRA CHATTERJEE.*

1912
Feb. 22

Second appeal—Sale, application for confirmation of, by auction-purchaser against judgment-debtor, under s. 312 of the Code—Auction-purchaser, if a necessary party in a proceeding under s. 311 of the Code—Civil Procedure Code (XIV of 1882), ss. 311, 312.

No second appeal lies against an order refusing an application by the auction-purchaser against the judgment-debtor, for confirmation of sale,

* Civil Rule, No. 4178 of 1909, against the order of H. E. Ransom, District Judge of Nadia, dated July 29, 1909, confirming the order of Tarapada Chattopadhyaya, Munsif of Nadia, dated March 15, 1909.