

1901  
 KING-  
 EMPRESS  
 v.  
 JAYRAM.

commenced with only one assessor, we must hold that there was no legal trial (sections 284, 285, Criminal Procedure Code). See the cases of *Queen-Empress v. Bastiano*<sup>(1)</sup> and *Queen-Empress v. Babu Lal*.<sup>(2)</sup> The error is one which vitiates the proceedings. The Government Pleader drew our attention to section 537, Criminal Procedure Code, but in our opinion the provisions of that section are not applicable to this case in which the Court of Sessions was not properly constituted and thus there was no legal trial.

We must set aside the proceedings and direct a trial before a properly constituted Court.

As the Sessions Judge of Sholapur has already expressed an opinion on the merits of the case, we direct that the case be transferred to the Court of Sessions at Bijapur.

*Re-trial ordered.*

(1) (1890) 15 Bom. 514.

(2) (1898) 21 All. 103.

## APPELLATE CIVIL.

*Before Mr. Justice Candy, Mr. Justice Fulton and Mr. Justice Chandavarkar.*

SAMARATMAL UTTAMCHAND, PLAINTIFF, v. GOVIND AND ANOTHER, DEFENDANTS.

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 April 18.

*Stamp—Indian Stamp Act (II of 1899), schedule I, article 5 (b)—Agreements to deliver goods in exchange for goods—Price.*

Agreements or memoranda of agreements to deliver goods in exchange for goods are not agreements of sale under article 5, schedule I, of the Indian Stamp Act (II of 1899), and are liable to stamp duty of eight annas each as agreements "not otherwise provided for."

REFERENCE by Ráo Sáheb S. S. Wagle, Subordinate Judge of Bhadgaum in the Khándesh District, under section 60 of the Indian Stamp Act (II of 1899) in a Small Cause suit.

The reference was made in the following terms :

This suit has been brought by the plaintiff on two entries in his book which may be translated as follows :

\* Civil Reference No. 1, of 1901.

"Account (of) Govinda valad Lakshman Patil and Bhika valad Govinda Patil, inhabitants of Neri, cyclical year 1822, Vaishakha Shudha 2.

Credit. Rupees.  
No. I.

Debit.

Rupees.

2 maunds 5 shers.

Date, cyclical year 1822, Vaishakha Shuda 2 (1st May 1900). Cotton seeds 1 *palla* in lieu of this.

2 maunds 5 shers of cotton have agreed to be given: the *dhadi* (weight) to be of 23 shers: cotton seeds have been received: cotton remains to be given: we shall give (the cotton) of the first picking: in the handwriting of Sakharam Ravji.

1. Signature (of) Govinda Lakshman Patil.

1. Signature (of) Bhika Govinda Patil.

No. II.

1 maund  $2\frac{1}{2}$  shers.

Date, cyclical year 1822, Jeshta Vad 9 (21st June 1900). On (this day) cotton seeds, half a *palla* in lieu of that, 1 maund  $2\frac{1}{2}$  shers of cotton has been agreed to be given: we shall give the cotton by a *dhadi* (weight) of 23 shers: we have received the cotton seeds: cotton remains to be given: we shall give the cotton of the first picking: in the handwriting of Rajaram Vithoba Set Wani.

1. Signature (of) Govinda valad Lakshman.

1. Signature (of) Bhika valad Govinda."

The questions referred for the opinion of the Honourable High Court are,—

1. What is the nature of the above instruments Nos. I and II?
2. What stamp do they require?

My opinion is that the instruments in question are agreements or memoranda of agreements to give cotton in exchange for cotton seeds received and require a stamp of 8 annas each.

My reasons are as follows:

1. The instruments in question are governed by the present Stamp Act II of 1899. It has been contended by plaintiff's pleader that they are agreements for or relating to the sale of goods or merchandise and as such are exempt from stamp duty under schedule I, article No. 5. I cannot yield to this contention. "Sale" is defined in the Contract Act (section 77) as "the exchange of property for a price." In the instruments under consideration cotton is agreed to be given in exchange for cotton seeds received, not in exchange for a price. The transactions evidenced by the instruments Nos. I and II are therefore legally not sales: and the instruments are not agreements or memoranda of agreements for or relating to the sale of goods or merchandise. They are merely agreements or memoranda of agreements to deliver cotton in exchange for cotton seeds received.

2. If this view is correct, the instruments in question cannot be exempted

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from stamp duty. They are chargeable with a stamp duty of 8 annas each under schedule I, article No. 5 (b), as being agreements or memoranda of agreements "not otherwise provided for."

The questions, however, are not free from doubt and demand an authoritative adjudication. They are of general importance, as instruments like those which form the subject of this reference are of frequent occurrence in this district.

There was no appearance for Government or for the parties.

CHANDAVARKAR, J.:—We think the Subordinate Judge's view is correct. Though the word "price" is capable of being understood either as money or any other recompense in value, it is clear from the illustrations to section 78 of the Contract Act that it is used there in the former sense. In regard to the sale of goods "the price must consist of *money* paid or promised." (Benjamin on Sale, 4th Edition, pages 2 and 89.) "The difference between a *sale* and an *exchange* is this, that in the former the price is paid in money, whilst in the latter it is paid in *goods* by way of barter." (Chitty on Contracts, 12th Edition, page 430.) This distinction has been observed by the Legislature in this country, as will appear on a reference to section 118 relating to exchange and the sections relating to sales in the Transfer of Property Act. The Subordinate Judge's view is also supported by the decisions of the Madras High Court in *Queen Empress v. Appavu*<sup>(1)</sup> and in *Volkart Brothers v. Vettivelu*.<sup>(2)</sup>

Order accordingly.

<sup>(1)</sup> (1885) 9 Mad. 141.

<sup>(2)</sup> (1887-88) 11 Mad. 459, 467.