

But if we have no jurisdiction to entertain this suit, it would be obviously improper for us to express any opinion on the merits of the questions discussed before us, though that discussion was necessary before we could determine the issue as to jurisdiction: *cf. Pritchard v. Mayor, &c., of Bangor.*<sup>(1)</sup>

Still the arguments before us show that the language of the Act is in more than one respect needlessly ambiguous, and, as it is of paramount importance that in matters relating to elections there should be as little obscurity as possible, it may be worthy of consideration whether the Act should not be so amended as to remove the ambiguities which the discussion before us has disclosed.

My finding on the first issue involves the consequence that the suit must be dismissed with costs.

Attorneys for the plaintiff: *Messrs. Bhaishankar, Kanga & Girdharlal.*

Attorneys for defendants Nos. 1 and 2: *Messrs. Crawford, Brown & Co. and Messrs. Little & Co.*

*Suit dismissed.*

R. N. L.

## CRIMINAL REVISION.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

EMPEROR v. A. M. JEEVANJL.\*

*Indian Emigration Act (XXI of 1883, amended by Act X of 1902), sections 6, 107, 111—Magistrate—Magistrate, First Class, in section 111, includes Presidency Magistrate—Agreement with Native of India to depart out of India by sea to work as an artisan—Agreement made without the permission of the Protector of Emigrants—Liability of master for criminal acts done by servant on the master's behalf—Master liable for agreements entered into on his behalf by his servant in violation of section 111—Protector of Emigrants has power to impose reasonable terms before he can issue permission applied for—Summons, issue of—Fresh summons issued on the same information—Irregularity in procedure—Criminal Procedure Code (Act V of 1898) section 537.*

The term "Magistrate of the First Class" used in section 111 of the Indian Emigration Act, 1883, means a Magistrate appointed to exercise the highest

(1) (1888) 13 App. Cas. 241.

\* Criminal Application for Revision No. 152 of 1907.

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Magisterial powers ordinarily prescribed by the Criminal Procedure Code within his jurisdiction and includes a Presidency Magistrate.

Where on an information a summons is issued to the accused, and owing to its disclosing no offence, a fresh summons is issued without any fresh or supplemental information, the error, omission or irregularity in the fresh summons, is not sufficient, under section 537 of the Criminal Procedure Code, to upset the finding and sentence unless it has in fact occasioned "a failure of justice," that is, unless it has unfairly affected the accused's defence on the merits.

Sub-section (2) of section 111 of the Indian Emigration Act hits at not merely entering into an agreement but also at any attempt to enter into it. An attempt consists in some external act which shows that progress is made in the direction of it or towards maturing and effecting it, that is, something tangible and ostensible of which the law can take hold, which can be alleged and proved.

Where penal statute has been infringed by servants and criminal proceedings are taken against the master, although it lies upon the prosecutor to establish the master's liability, yet the question whether he is liable turns necessarily upon what is the true construction to be placed upon the statute. The statute should be construed, not merely with reference to its language, but also its subject-matter and object.

Sub-section (1) of section 111 of the Indian Emigration Act, 1883, does not break in upon the rule of law embodied in the maxim *qui per alium facit per seipsum facere videtur*. The word "whoever" in the clause means whoever either by himself or through his agent. In other words, the Act leaves untouched the right of every person to enter into such agreements through an agent. It merely provides that such agreements shall not be entered into without the previous permission of the Local Government. The intention of the section is to hold the master liable for his servant's act, provided the act was done by the servant so as to bind the master according to the law of contract.

The coupling of the word "conditions" with the word "terms" in section 107 of the Act shows the intention of the Legislature to be that the officer authorized to grant the permission should have power to impose any reasonable terms and conditions he thinks proper as conditions precedent to the grant, whether they relate to the terms of the agreement itself or being extraneous to it relate to the execution or other considerations which have to be taken into account in order to protect the interests of the Native of India departing out of it by sea.

Section 29 of the Indian Emigration Act, 1883, makes it compulsory that the execution of the agreement therein referred to should be in the presence of the Protector. In section 108 of the Act the power conferred on the Local Government, who have delegated their power to the Protector, is discretionary, and it is left to that Government to decide whether in any particular case any agreement referred to in section 107 shall be executed or not in its presence, that is, in the presence of the Protector acting as its delegated authority. The

two sections being thus distinguishable, the language of one cannot be invoked to aid the construction of the other, especially where the language of each is plain.

THIS was an application for revision under section 435 of the Criminal Procedure Code (Act V of 1898) from conviction and sentence recorded by A. H. S. Aston, Chief Presidency Magistrate of Bombay.

The facts as stated by the Magistrate were as follows.

In June 1906 certain workmen applied to the Protector of Emigrants for passes to proceed from Bombay to Mombassa and their applications were rejected. Mr. Jeewanjee, against whom the present complaint was filed, then wrote a letter, dated June 26th, stating that the men were his workmen, that they had been working at Mombassa for about seven years and had come to Bombay on leave and that they had to proceed to Mombassa to resume their work there. The letter was followed by a personal interview on June 27th at the Protector's office. At this interview Mr. Jeewanjee, on being asked whether the men were his workmen, replied that the men worked for him, but were under no agreement or contract and had not been promised work. It was difficult to reconcile this statement with the allegation contained in the letter of June 26th that the men were "on leave" and Mr. Boyd retorted that in his own letter Mr. Jeewanjee had stated the men were his workmen and referred to the provisions of the Emigration Act. Mr. Jeewanjee annoyed at being contradicted left the Protector's office and subsequently complained through his solicitors, Messrs. Thakurdas & Co., that he had been insulted and intimidated and threatened to report the matter to Government.

In the meanwhile, in 1906, Mr. Jeewanjee had entered into an agreement with Messrs. J. and E. Hall for the supply of two ice machines destined for Goa and Mombassa respectively and Messrs. C. H. B. Forbes as the Agents of Messrs. J. and E. Hall agreed to provide drivers for the machines.

On the 17th August 1906 Mr. Jeewanjee wrote to Messrs. C. H. B. Forbes asking them to furnish two experienced native drivers so that he might employ the men on their recommenda-

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tion. In the letter he stated that the man required for Mombassa had to proceed there in time to erect the machine.

On the 22nd August Messrs. C. H. B. Forbes replied that the two native drivers promised by Mr. Lee could scarcely be entrusted to erect the machines, they understood that Mr. Jeewanjee had arranged with Messrs. J. and E. Hall to send a qualified man to erect the machine at Mombassa, and that Mr. Lee or some qualified man from Bombay, the cost of whose services should be defrayed by Mr. Jeewanjee, would be sent to Goa.

On the 1st November 1906, Messrs. C. H. B. Forbes wrote they gathered that Mr. Jeewanjee intended erecting the machines with his own fitters and pointed out that under Mr. Lee's promise they had long retained two experienced Second Class Engineers. As they had received no instructions about these men they could not retain them any longer.

On the same date Messrs. C. H. B. Forbes again wrote that they understood that as Messrs. Jeewanjee and Co. were going to erect the machines with their own fitters Messrs. J. and E. Hall were freed from all responsibility with regard to the guarantee.

On the 9th January 1907 Messrs. C. H. B. Forbes wrote that Shaik Ismail, who was about to erect Messrs. Jeewanjee's ice machine, was ready to sail next day; he would call at Messrs. Jeewanjee's office for his passage ticket and Emigrant certificate and he wished to draw an advance of Rs. 100 and arrange that half his pay should be drawn by his mother from Messrs. Jeewanjee's office. Messrs. C. H. B. Forbes were sure Mr. Jeewanjee would find him a good workman and hoped Mr. Jeewanjee would grant his request; they understood Mr. Jeewanjee would have to obtain a permit or certificate from the Inspector of Emigrants or Shaik Ismail would not be allowed to land in British East Africa.

On the same day, Shaik Ismail called at Messrs. Jeewanjee's office. Shanker Laxuman, a clerk, took him to Mr. Jeewanjee and said "this is the man sent by Messrs. C. H. B. Forbes." He

also informed his master that he had been sent as an engineer for erecting a machine and Mr. Jeewanjee replied "All right, send him to get a permit." Shaik Ismail was accordingly sent to the Protector's office but returned in the evening saying a permit could not be granted until the agreement was signed.

On the following day, viz., on the 10th January, Shankar Laxman accompanied Shaik Ismail to the Protector's office and interviewed Mr. Smith, Mr. Boyd's Assistant, and Mr. Smith gave him certain forms to fill in.

On Shankar's return to Mr. Jeewanjee's office a letter was received from Messrs. C. H. B. Forbes in which they requested Mr. Jeewanjee to apply for a pass from the Protector of Emigrants as they understood the latter refused to give a pass unless Mr. Jeewanjee as his employer applied for one.

Mr. Jeewanjee wrote in reply: "we cannot apply to the Protector of Emigrants as we have a firm there. We may suggest you to apply to him stating that you are sending the man to erect your machinery under the contract with us."

On the 11th January, Messrs. C. H. B. Forbes replied they regretted they were unable to comply with his suggestion as it would not be in accordance with the facts of the case. They considered they had complied with their undertaking when they provided Messrs. Jeewanjee with a competent man in Bombay. Messrs. Jeewanjee were to pay his salary and all expenses connected with his journey to Mombassa and the simplest way was for Mr. Jeewanjee to make an agreement with Shaik Ismail. The letter ended thus: "We do not understand why the fact of your having a firm at Mombassa precludes you from applying to the Protector of Emigrants for the necessary pass or permit to enable Shaik Ismail to proceed there."

On the 23rd January, Shaik Ismail went to Messrs. Jeewanjee's office. On Mr. Jeewanjee's arrival at 1-30 Shaik Ismail was brought before him. Certain terms were agreed upon and it was arranged that he should have an advance of Rs. 100.

After the interview Shankar Laxuman paid Shaik Ismail Rs. 100 after having drawn up the document Exhibit T and

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taken Shaik Ismail's signature on it. The agreement ran as follows:—

BOMBAY, 23rd January 1907.

I, Shaik Ismail Shaik Jaman, hereby agree and bind myself with Messrs. A. M. Jeewanjee & Co. to erect their Ice Machinery of 2 tons at Mombassa and to return back on completion of the erection on the following terms:—

That Messrs. A. M. Jeewanjee & Co. to pay me a salary of Rs. 150 per mensem without Boarding and Lodging. That Messrs. A. M. Jeewanjee & Co. to supply me with free passage from Bombay to Mombassa and back on completion of the erection of the ice machinery.

(Sd.) SHAIK ISMAIL.

A copy of the agreement was given to Shaik Ismail.

In the evening of the same day, viz., on the 23rd January, Shaik Ismail returned to Shankar Laxuman, stated that he was unwilling to go to Mombassa and offered to return the Rs. 100 advanced.

On the 24th January, Shaik Ismail again went to Messrs. Jeewanjee's office and after seeing Mr. Jeewanjee returned the Rs. 100.

On the same day, Mr. Jeewanjee wrote to Messrs. C. H. B. Forbes: "You had sent us a man to be sent to Mombassa to erect an ice machinery there on a salary of Rs. 150 per mensem, and accordingly we made an agreement with him yesterday and also paid him in advance Rs. 100, but the man now refuses to go there."

Messrs. C. H. B. Forbes replied on the same day that Shaik Ismail was quite willing to go to Mombassa as arranged with Messrs. Jeewanjee and Company provided the latter made an agreement with him and obtained a pass from the Protector. The Protector has intimated his intention to prosecute whoever was concerned in evading the regulations for the protection of emigrants. Messrs. C. H. B. Forbes were not conversant with the regulations but they much feared that the course suggested by Messrs. Jeewanjee of sending Shaik Ismail to Goa so as to enable him to re-embark for British East Africa would be held to be an infringement of the regulations. Messrs. C. H. B.

Forbes would consult the Protector of Emigrants and arrange matters with him.

On the 25th January, Mr. Jeewanjee replied: "If your Engineer did not approve our agreement he should have said so when we made the agreement and paid him advance and at the time of steamer's sailing he came and returned the money advanced. If he had anything to say he should have done so at the time of signing the agreement and taking advance."

On the 25th January, Messrs. C. H. B. Forbes again wrote saying they had seen the Protector and enclosed forms which the Protector required Messrs. Jeewanjee to fill up.

On the same day Mr. Jeewanjee returned the forms requesting Messrs. C. H. B. Forbes to fill them up and return them for his signature.

On the 26th January, Messrs. C. H. B. Forbes returned the forms filled up to Mr. Jeewanjee.

On the same day, the Protector of Emigrants filed an information in the Court of the Chief Presidency Magistrate of Bombay, charging Mr. Jeewanjee with having infringed the Act on January 10th.

The Chief Presidency Magistrate issued a summons on Mr. Jeewanjee to answer a charge of having engaged Shaik Ismail Shaik Jamal to depart by sea from Bombay under an agreement dated 10th instant, without having first obtained the permission of the Local Government.

At the hearing it was objected that the summons served on the accused did not disclose any offence. The learned Magistrate, thereupon, ordered a fresh summons to issue. It was as follows:—

"Whereas your attendance is necessary to answer to a charge of having on or about the 10th January and of on or about the 23rd January 1907 without having first obtained the permission referred to in section 107 (1) of the Indian Emigration Act of 1883 entered or attempted to enter into an agreement with one Shaik Ismail Shaik Jamal purporting to bind him to depart by sea out of India for the purpose of working as an Engineer in contravention of section 111 of Act XXI of 1883 as amended by Act X of 1902."

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At the hearing, the learned Magistrate raised the following points for determination :

1. Was Exhibit T an agreement, purporting to bind a Native of India to depart by sea out of India for the purpose of working as an artisan within the meaning of section 111?
2. Had the permission of the Local Government referred to in section 107 (1) been obtained when Exhibit T was executed?
3. Is Mr. Jeewanji liable under the Act?

At the conclusion of the evidence the learned Public Prosecutor pointed out that there was no reason to believe from the evidence that Mr. Jeewanjee committed an offence on January 10th. He contended that the document exhibit T dated the 23rd January 1907, was an agreement which purported to bind Shaik Ismail to depart by sea from Bombay to Mombassa, there to work as an artisan. That under the Indian Emigration Amendment Act 1902, the necessity to prove guilty knowledge did not arise. That the Act involved a prohibition of contingent agreement, or agreements, made by an employer with an employée subject to the consent of the Protector of Emigrants and that the cases *Betts v. Armstead* (20 Q. B. D. 771), *Brown v. Foot* (66 L. T. at page 649), *Davies v. Harvey* (L. R. 9 Q. B. 433), *Commissioners of Police v. Cartman* (1893, 1 Q. B. 655), *Collman v. Mills* (1897, 1 Q. B. 396), *Coopen v. Moore* (No. 2) (1898, 2 Q. B. 306 at page 312), *Christie, Manson, &c., Woods v. Cooper* (1900, 2 Q. B. 522), *Dyke v. Elliott* (L. R. 4 P. C. 184) showed that under an Act of the nature of the Indian Emigration Act a master would be liable for an agreement entered into by his servant without the master's knowledge or consent.

For the defence it was contended that there was a *bona fide* dispute between Mr. Jeewanjee and Mr. Forbes as to who should send Shaik Ismail to Mombassa, that the evidence showed that a written application to the Protector of Emigrants for a permit was unnecessary and the Act did not require that the agreement should be signed in his presence. That by approving the terms under which Shaik Ismail was to go and supplying forms the Protector had given an implied permission, subject to the formalities being complied with. That Exhibit T was not an agreement within the meaning of section 111 of the Act; it was

merely a memorandum of the terms under which Shaik Ismail was willing to go subject to the formalities being complied with. That it was drawn up by Shankar Luxman on his own initiation when he paid the advance. That Exhibit T did not refer to a departure by sea. That it was reasonable that terms should be arranged with a man before the parties went before the Protector. That Shankar Luxman in drawing up Exhibit T was not acting within the scope of any general or special authority. That no connection had been shown between Jeewanjee and Exhibit T and that the cases *Emperor v. Cooverji Nusserwanji* (9 Bom. L. R. 159) and *Newman v. Jones* (17 Q. B. D. 132) showed that Mr. Jeewanjee could not be held responsible.

The learned Magistrate found the first and third question in the affirmative and the second in the negative.

The accused applied to the High Court under its criminal revisional jurisdiction.

*Robertson* (with *Thakurdas and Co.*) for the accused:— Three facts appear very clearly from the evidence: (1) Mr. Jeewanjee did consider that he was discourteously treated by Mr. Boyd, the Protector of Emigrants; (2) there was, during the time of the negotiations with the Protector, a *bond fide* dispute going on between Mr. Jeewanjee and Messrs. Forbes & Co. as to who ought to make the application for permission under the Indian Emigration Act; and (3) a general vagueness in the minds of all as to the exact provisions of the Act. The evidence in the case so far as it goes discloses no offence: and nothing has been done contrary to the terms of the Act.

The application under section 107 of the Act is, according to Mr. Boyd, generally made orally. Both section 107, clause (v) and section 109 clause (2) contemplate that the agreement should be entered into before the permission mentioned in the section is obtained. This construction seems to be warranted by the phrase "the terms of the agreement under which such Native of India has been engaged" used in section 109; and also by the different phraseology employed in sections 29, 31 and 35 of the Act. On the facts of the case, the application should be taken as made when Shaik Ismail waited upon Mr. Boyd. This must

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be treated as an application, because Mr. Boyd did afterwards send Mr. Smith to make inquiries, presumably under section 108 of the Act. The terms of section 108 show that an application must have been previously made. Again section 107 does not say for what purpose the permission is required.

The agreement in this case (Exhibit T) does not go beyond the step indicated in clause (v) of section 107. At the most, it is a memorandum of the terms on which Shaik Ismail was to go. The agreement is not binding on any person, neither Shaik Ismail nor Jeevanjee.

[CHANDAVARKAR, J.—The accused has really gone beyond merely talking over the terms. The terms are reduced to writing: the writing is stamped, and a part payment is made under its terms.]

In interpreting a document you must look at the intention of the parties. Here it is obvious that Jeevanjee's clerk knew perfectly well that the agreement could not possibly bind any one, and that a formal agreement would subsequently have to be executed.

The first question is, is Exhibit T an agreement at all? We submit it is not. First of all, its very form shows that it was conditional. It could not be binding. It clearly contemplates that before it began to operate, the executant would have to be supplied with free passage, which means that all the formalities of the Indian Emigration Act have to be complied with. This was fully known to all the parties. Further, nobody ever treated the agreement as a binding one; for when Shaikh Ismail returned Rs. 100, they were accepted without protest. Taken all in all, we have not gone beyond settling the heads of agreement.

The next question is, had Shankar any authority to enter into the contract on Jeevanjee's behalf. There is not a shred of evidence to show that Jeevanjee knew of the agreement. It has not been shown that Shankar held any authority in this matter general or special. Jeevanjee cannot be held liable on the basis that it was within the scope of Shankar's duties. The liability is sought to be fixed upon him on the authority of certain

English cases. Refers to *Betts v. Armstead* <sup>(1)</sup>; *Newman v. Jones* <sup>(2)</sup>; and *Hearne v. Garton* <sup>(3)</sup>.

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[*Raikes* referred to *Sherras v. De Rutzen* <sup>(4)</sup>.]

Here, there is no course of conduct: no general authority. The authority is a specific one: and that specific authority is only to do all that is necessary to send Sheikh Ismail off, that is to act according to law. The authority was not to make this particular agreement.

Further, the Chief Presidency Magistrate had no jurisdiction to entertain the present proceedings. Section 111 refers to a Magistrate of the First Class. And a Presidency Magistrate is obviously not a Magistrate of the First Class. See *Kedar Nathkar v. Emperor* <sup>(5)</sup>.

[CHANDAVARKAR, J., referred to the definition of "Magistrate" in section 6 (4) of the Act.]

The definition in question does not say anything about the Magistrate of the First Class. In fact the Code of Criminal Procedure makes a distinction between the two. Again, the Legislature has in the Lepers Act (III of 1898), section 30 (3) mentioned Presidency Magistrate and Magistrate of the First Class side by side.

There is no possible motive suggested why the accused should have any intention of evading the Act. Everything is done perfectly openly. No attempt even is made to send the man away.

*Raikes*, acting Advocate General, with *Nicholson*, Public Prosecutor, for the Crown:—First as to jurisdiction. The definition in the Indian Emigration Act of 1883 is very comprehensive: and it applies to Chapter XIV which was added by Act X of 1902 and which forms but a part of the original Act. The Presidency Magistrate and Magistrate of the First Class have the same powers under the Code of Criminal Procedure.

<sup>(1)</sup> (1888) 20 Q. B. D. 771.      <sup>(2)</sup> (1836) 17 Q. B. D. 132 at p. 137.

<sup>(3)</sup> (1859) 2 E. & E. 66.      <sup>(4)</sup> [1835] 1 Q. B. 918.

<sup>(5)</sup> (1905) 3 Crim. L. J. 329.

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The next point is, was permission given under the Act? The offence under section 111 is "whoever . . . enters or attempts to enter into an agreement." The other side has argued that permission was given by Mr. Boyd: but on that point we are concluded by a finding of fact by the Magistrate that the permission had not been given. And the evidence is also to the same effect. We submit that what passed between Shaikh Ismail and Mr. Boyd could not be treated as an application under section 107, for the employer did not appear before Mr. Boyd. No application was ever made to Mr. Boyd, much less was any permission granted.

[The Advocate General was not heard on other points.]

CHANDAVARKAR, J.—This is an application by the petitioner, A. M. Jeewanjee, for revision of the judgment of the Chief Presidency Magistrate, convicting him of the offence under sub-section 1 of section 107 of the Indian Emigration Act of 1883, as amended by Act No. X of 1902. Under that provision, "whoever without having first obtained the permission of the Local Government referred to in section 107, sub-section 1, enters or attempts to enter into an agreement purporting to bind any Native of India to depart by sea out of India for any of the purposes specified in the said sub-section . . . shall, on conviction by a Magistrate of the First Class, be punishable with fine which may extend to Rs. 250 for each Native of India in respect of whom the offence is committed."

The learned Chief Presidency Magistrate has held that the petitioner Jeewanjee entered into such an agreement (which is exhibit T in the case) with one Shaikh Ismail Shaikh Jamal, on the 23rd of January 1907, without having first obtained the permission.

The conviction is assailed before us on several grounds, some of law and others of fact.

To deal with the grounds of law first, it is urged that the Chief Presidency Magistrate, being not a Magistrate of the First Class, had no jurisdiction to convict the petitioner. It is true that the offence, with which the petitioner was charged, is

triable exclusively by a Magistrate of the First Class, and that, in the Code of Criminal Procedure, such a Magistrate is in terms specified or described, for the purposes of criminal jurisdiction outside a Presidency town, as one distinct from a Presidency Magistrate in that town. But the question is whether the term "Magistrate of the First Class" in section 111 of the Emigration Act was intended by the Legislature to include or to exclude a Presidency Magistrate. Section 6, clause 4, of the Act defines the term "Magistrate" to mean, "in the Presidency towns, a Presidency Magistrate, and elsewhere a District Magistrate, or a sub-divisional Magistrate". A Presidency Magistrate, being thus brought in under the denomination of "Magistrate," must belong to one or other of the three classes into which those falling within the general description have to be divided, according to the express provisions and scheme of the Code of Criminal Procedure. He does not belong to the second or the third class, because he is the highest class of Magistrates in a Presidency town—there is no Magistrate exercising there higher Magisterial powers. And, though in the Criminal Procedure Code there is no definition of the term "Magistrate of the First Class", it is used in the Code to mean a Magistrate exercising within his jurisdiction the highest Magisterial powers, which are ordinarily conferred under it upon such Magistrates. That is the sense also in which the term is used in section 111 of the Emigration Act. The whole scheme of Chapter II of the Code is in fact so arranged as to signify that a Presidency Magistrate belongs to what is, generally speaking, the highest class of Magistrates, and that is the First Class. This is specially clear from section 32 of the Criminal Procedure Code, by which the Courts of Presidency Magistrates and of Magistrates of the First Class are put upon the same footing in respect of sentences which Magistrates may pass. The omission of the term "Presidency Magistrate" in section 111 of the Emigration Act, being accounted for by these considerations, should not be treated as a *casus omissus*, as to which the law is that it ought not to be created by interpretation save in some case of strong necessity or where the words of the Statute are so plain as to lead to an irresistible inference of it: see the dicta of Lord FitzGerald in *Mersey Docks and Harbour*

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*Board v. Henderson Brothers*<sup>(1)</sup>. We are of opinion, therefore, that the term "Magistrate of the First Class" in section 111 of the Emigration Act means a Magistrate appointed to exercise, within his jurisdiction, the highest Magisterial powers ordinarily prescribed by the Criminal Procedure Code, and includes a Presidency Magistrate.

The Chief Presidency Magistrate had, therefore, jurisdiction to try this case and convict the petitioner.

It is next contended that the conviction is illegal, because section 111 of the Emigration Act, on which it rests, applying only where the agreement referred to therein is one purporting to bind a *Native of India*, there is no evidence in this case to show that Shaik Ismail Shaik Jamal is such a native. No doubt there is no oral evidence, but the term "evidence" is not confined to that and includes circumstantial or documentary evidence. The correspondence between Messrs. C. H. B. Forbes and Co. and the petitioner in respect of the engagement of Shaik Ismail Shaik Jamal, which is admitted as evidence in the case (Exhibits J, K, O, Q and R), was conducted upon the basis of his being a "Native of India." Messrs. Forbes and Co. wrote on the 9th of January to the petitioner that he would have to obtain a permit or certificate from the Protector of Emigrants for Shaik Ismail; otherwise he would not be allowed to land in British East Africa. It is an admitted fact in the case that the petitioner sent his clerk with Shaik Ismail to the office of the Protector of Emigrants for taking the steps required by sections 107 and 111 of the Act; that there the clerk obtained the necessary forms to be filled up under the Act. On the 10th of January 1907, Messrs. Forbes and Co. informed the petitioner that the Protector had refused to give Shaik Ismail a pass unless the petitioner as his employer applied for one (Exhibit K). In reply the petitioner suggested to them that *they*, not he, should apply to the Protector. It is unnecessary to set out the rest of the correspondence here but the effect of it and other evidence in the case is clear. The petitioner and Messrs. Forbes and Co. dealt with each other in the matter of the engagement of Shaik

(1) (1888) 13 App. Cas. 595 at p. 607.

Ismail on the distinct understanding that section 107 of the Emigration Act applied to him. Shaik Ismail also conducted himself likewise in the same matter to the knowledge of the petitioner. He went and saw the Protector, informed him of his intention to depart out of India by sea and asked for the necessary permission. All this is evidence of conduct from which, under section 114 of the Evidence Act, it is competent for the Court to presume that Shaik Ismail is a Native of India. And the presumption was not challenged before the Magistrate. The point as to absence of evidence is taken before us for the first time. This objection also must be overruled.

The third objection to the conviction is this. On the 26th of January 1907 the Chief Presidency Magistrate issued a summons against the petitioner, charging him with an offence alleged to have been committed on the 10th of January 1907. The petitioner appeared before the Magistrate in obedience to it and submitted that the summons disclosed no offence. Thereupon the learned Magistrate ordered a fresh summons to issue. The trial now complained of was upon that fresh summons, which was to answer the charge relating to an offence alleged to have been committed on the 23rd of January 1907. The objection raised is that this second summons was issued without any fresh or supplemental information. Assuming that there was that defect in the summons, it is an error, omission or irregularity, which under section 537 of the Code of Criminal Procedure, is not sufficient to upset the finding and sentence unless it "has *in fact* occasioned a failure of justice"—that is, unless it has unfairly affected the petitioner's defence on the merits. No such failure has even been hinted at in argument before us.

Passing now to the merits on the facts of the case, the learned Magistrate has found upon the evidence that on the 23rd of January 1907 the petitioner did enter into the agreement, evidenced by Exhibit T, with Shaik Ismail Shaik Jamal, purporting to bind the latter to depart by sea out of India for one of the purposes specified in section 107 of the Indian Emigration Act. That is a finding of fact which this Court, acting under its revisional jurisdiction, will not revise unless it is vitiated by any error of law or based upon a gross misconception of the evidence.

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What is urged for the petitioner by his learned Counsel is that Exhibit T is not an agreement of the kind mentioned in sub-section 1 of section 111 of the Emigration Act, but is merely a memo. of an agreement which was to be entered into. This argument ignores two important considerations. First, sub-section 1 of section 111 hits at not merely entering into an agreement, but also at *any attempt to enter into it*. And an attempt consists in "some external act which shows that progress is made in the direction of it or towards maturing and effecting it"—that is, "something tangible and ostensible of which the law can take hold, which can be alleged and proved" (Broom's Legal Maxims, page 254, Eleventh Edition). Judged by this test, there was, here, as the learned Magistrate finds proved, an advance paid by the petitioner to Shaik Ismail in respect of his engagement, and a writing drawn up on a stamped paper, Exhibit T. That is sufficient to fall within an attempt to enter into an agreement of the kind specified in the section. Secondly, the terms of Exhibit T are that Shaik Ismail agrees and binds himself. In that view it is an agreement on the face of it. Whether it was valid and legal is not the question. It is enough under the section if it purported to bind Shaik Ismail. And it did so purport. In either view, the question is one of fact and we see no good reason to interfere with the learned Magistrate's finding based on his appreciation of the evidence.

But it is urged that the agreement was entered into, not by the petitioner, but by his clerk, without the consent or knowledge of the former, and that, this being a criminal case, the petitioner is not liable for his servant's act. There again the Magistrate has found on the evidence that the petitioner authorised his servant "to make the necessary arrangements, and after the agreement, Exhibit T, was entered into he expressly ratified it by his letter Exhibit N." The direction to "make the necessary arrangements" would of course not authorise the servant to enter into the agreement on his master's behalf without first obtaining the Protector's permission according to law. And if, without that authority, the servant entered into the agreement, a subsequent ratification of it might not render the master liable under section 111, sub-section 1. On that point it is unnecessary

for the purposes of this case to express any opinion. But the direction given to the servant "to make the necessary arrangements" coupled with the money paid in advance to Shaik Ismail by the petitioner, and the letter Exhibit N, are strong evidence that what the servant did was done as the petitioner's agent duly appointed for the purpose of entering into the agreement.

The question, then, is whether the petitioner is criminally liable for the agreement entered into on his behalf by his servant. The law on the subject is "where a penal statute has been infringed by servants and criminal proceedings are taken against the master, although it lies upon the prosecutor to establish the master's liability, yet the question whether he is liable turns necessarily upon what is the true construction to be placed upon the statute" (Broom's Legal Maxims, Eleventh Edition, page 252, citing *Coppen v. Moore* (No. 2)<sup>(1)</sup>). And the Statute should be construed not merely with reference to its language, but also its subject-matter and object.

Now, sub-section 1 of section 111 of the Emigration Act has for its object the protection and safeguarding of the interests of a certain class of the public. The subject matter dealt with is an agreement made, for the purpose specified there, between any person falling within that class and any other person. Such an agreement, according to the Contract Act, is legal and binding even if it is entered into by a party represented by his agent acting within the scope of his employment. In that respect the Contract Act merely follows the well-known principle, *qui per alium facit per seipsum facere videtur* (he who does an act through another is deemed in law to do it himself). Sub-section 1 of section 111 of the Emigration Act does not break in upon that rule of law, in respect of the agreements affected by it. When it says that "whoever . . . . enters or attempts to enter into an agreement, &c.," the natural construction of the word "whoever", according to the rule just mentioned, is, whoever either by himself or through his agent. In other words, the Act leaves untouched the right of every person to enter into such agreements through an agent. It merely provides that such agreements shall not

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be entered into without the previous permission of the Local Government. Whether, therefore, we have regard to the language of the section or the subject matter of it or its object, the manifest intention is to hold the master liable for his servant's act, provided the act was done by the servant so as to bind the master according to the law of contract. Were it otherwise, it would be possible for any person to employ a servant to enter into such agreements on his behalf and thereby defeat the object of the Act.

The last objection urged in support of this application is that the petitioner had obtained such permission as the section requires before the agreement, Exhibit T, was entered into. For the purposes of this objection reliance is placed on the evidence of Mr. Boyd, the Protector, on which the learned Chief Presidency Magistrate has proceeded in arriving at the conclusion. According to that evidence, Shaik Ismail having seen Mr. Boyd and informed him of his intention to go to Mombassa and the terms upon which the petitioner intended to send him there for employment, Mr. Boyd told Shaik Ismail "that before he would be allowed to go, a proper agreement would have to be made out by Mr. Jeewanjee" before him (Mr. Boyd) and a deposit left with him. Mr. Boyd further states: "I told him that until this agreement was made out, I could not let him go." These conditions prescribed by Mr. Boyd were never complied with before the execution of Exhibit T. That is conceded. What is contended is that Mr. Boyd was not within his legal rights in prescribing those conditions. Section 108 authorised him to grant the permission applied for "on such terms and conditions (if any)" as he might think fit. That vested in him a discretionary power to be exercised reasonably, not arbitrarily. The argument of the learned Counsel for the petitioner that the words "terms and conditions" in section 108 mean "the terms of the agreements" mentioned in clause (v) of section 107 is opposed to the plain meaning of the words. Had the Legislature intended to limit the discretionary power to an approval or disapproval of the terms of the agreement between the person applying for the permission and the native of India he was going to engage, they would have said "on approval of the terms of the agreement

referred to in clause (v) of section 107". The coupling of the word "conditions" with the word "terms" in section 107 makes out the intention of the Legislature to be that the officer authorised to grant the permission should have power to impose any reasonable terms and conditions he thinks proper as conditions precedent to the grant, whether they relate to the terms of the agreement itself, or, being extraneous to it, relate to its execution or other considerations which have to be taken into account in order to protect the interests of the native of India departing out of it by sea. But it is urged that, in any case, section 108 should not be construed as authorising the Protector to require that the agreement shall be properly executed in his presence, as a condition precedent to the permission, because, had the Legislature intended to so authorise him, they would have said so expressly, as they have said in section 29 in regard to "every agreement to emigrate". But in section 29 the execution of the agreement (referred to there) in the presence of the Protector is made compulsory in every case. In section 108 the power conferred on the Local Government, who have delegated their power to the Protector, is discretionary, and it is left to that Government to decide whether in any particular case any agreement referred to in section 107 shall be executed or not in their presence; that is, in the presence of the Protector, acting as their delegated authority. The two sections being thus distinguishable, the language of one cannot be invoked to aid the construction of the other, especially where the language of each is plain.

All the objections urged to the judgment of the learned Chief Presidency Magistrate failing, we confirm the conviction and sentence and discharge the rule.

*Rule discharged.*

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