

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice,
and Mr. Justice Heaton.*

PURSHOTTAM NARAYAN, APPLICANT, *v.* BALVANT BABAJI,
OPPONENT.*

1907
November 15.

*Bombay Abkari Act (Bom. Act V of 1878), section 16⁽¹⁾—Country-liquor—
Attachment in execution of a money decree—Sale.*

Country-liquor is not exempt from attachment and sale in execution of a money decree passed by a Civil Court.

Under section 16 of the Bombay Abkari Act (Bom. Act V of 1878) the Collector's permission is necessary for the sale, but it is not necessary to the attachment so far as the attachment can be made without removal of the liquor. But sale without the Collector's permission would apparently subject the seller to prosecution under the Bombay Abkari Act (Bom. Act V of 1878).

REFERENCE by P. V. Gupte, Judge of the Court of Small Causes at Poona, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The reference was made in the following terms:—

I have the honour to refer the following question to the Honourable High Court for its decision under section 617 of the Civil Procedure Code:—

1. Whether country-liquor is exempted from attachment and sale in execution of a money decree passed by a Civil Court?

* Civil Reference No. 2 of 1917.

(1) Section 16 of the Bombay Abkari Act (Bom. Act V of 1878) runs as follows:—

16. Except as is hereinafter otherwise provided, no liquor, no hemp and no intoxicating drug shall be sold without a license or pass from the Collector:

Provided that in the City of Bombay, and in such other places as Government may from time to time direct, no such license shall be necessary for the sale of any liquor not manufactured or produced in India, in its original casks or packages as imported, or in small quantities as *bond fide* samples.

Provided, further, that no such license shall be necessary for the sale—

(1) by a person holding a license under this Act for the possession or cultivation of hemp and making such sale in accordance with the terms of such license, or

(2) by a cultivator or owner of any plant other than hemp from which any intoxicating drug is produced, of those portions of the plant from which such intoxicating drug is manufactured or produced, to a person holding a license under this section for the sale of intoxicating drugs, or to a person duly licensed under this Act to manufacture or to export intoxicating drugs.

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2. If not, whether the Collector's permission is necessary for its attachment and sale?

One Balvant Raghoba obtained a money decree (No. 2236 of 1905) against one Balvant Babaji Gurav (a licensed liquor seller) in this Court, and his assignee Purushottam Narayan Jogelkar presented a darkhast (No. 262 of 1907) for its execution by attachment and sale of the judgment-debtor's moveable property that might be pointed out by him. A warrant was accordingly issued and entrusted to a bailiff of this Court for execution. When the bailiff went to execute the warrant the judgment-creditor pointed out to him three casks of country-liquor which were in the judgment-debtor's liquor-shop, and asked the bailiff to attach the same. The bailiff, accordingly, attached the casks and brought them into Court.

The Collector of Poona, however, objects to the attachment and sale of the said liquor on the grounds that his permission is necessary both for attachment and sale under the Bombay Abkari Act, 1878, and that, in the present case, he does not intend to give his permission (*vide* certified copies of his letters, No. 151, dated 25th January, and No. 194, dated 5th February 1907). It seems that he bases his objection on sections 12, 13 and 16 of the Act.

Liquor is not exempted from attachment and sale in execution of a decree (*vide* section 266 of the Civil Procedure Code). Whenever legislature have thought it expedient to exempt any property from judicial process they have embodied express provision to that effect in the legislation (*Vide*, for instance, Bombay Hereditary Offices' Act III of 1874, section 13; Pensions' Act XXIII of 1871, section 11; see also clauses (a) to (n) of the above-mentioned section 266 of the Civil Procedure Code.)

Neither the Abkari Act nor any other enactment contains any such express provision with regard to liquor, and as it is not exempt from attachment, the sanction for its removal to the Court-house after its attachment, is naturally implied. It thus appears that the provisions of the Abkari Act do not apply to judicial process or sale. Moreover, section 61 of the Act provides that "Nothing in this Act affects the Cantonments Act 1839, or Act XVI of 1863 (an Act to make special provision for the levy of the excise duty payable on spirits used exclusively in arts and manufactures or in chemistry), or any enactment passed by the Governor General in Council since the 16th November 1861, the date on which the Indian Councils Act came into force." As the present Code of Civil Procedure is an enactment passed by the Governor General in Council in 1882, its provisions are not affected by the Abkari Act and consequently processes issued under the said provisions are also not affected by the said Act. My opinion, therefore, on both the above-mentioned questions is in the negative.

J. R. Gharpure appeared for the applicant (assignee of the judgment-debtor):—Our first contention is that the present reference cannot lie. Section 617 of the Civil Procedure Code

refers only to matters which arise in a litigation between parties : 1907
Ghella Tarachand v. The Collector of Ahmedabad⁽¹⁾. A claim by a stranger cannot be inquired into under section 278 of the Code :
Ramanathan Chettiar v. Levai Marakayar⁽²⁾, see also *Murigeya v. Hayat Saheb*⁽³⁾ according to which section 278 and 283 have no reference to questions arising between judgment-creditor and judgment-debtor : see also *Varajlal v. Kachia*⁽⁴⁾ and *Mukarrab Husain v. Hurmat-un-nissa*⁽⁵⁾, which support our contention. The Collector is not a party to the suit and any objection by him, he being a stranger, cannot give rise to a reference. If the Collector feels aggrieved he can resort to the procedure laid down for third parties in the Civil Procedure Code.

Next, we contend that country-liquor can be attached and sold in execution of a decree. It has not been exempted from attachment under section 266 of Code, nor is it property not liable to attachment. There is no ruling exactly on the point, but a similar case had arisen under the Arms Act : *Wala Hiraji v. Hira Patel*⁽⁶⁾. It was held there that arms can be attached and sold in execution. It was, no doubt, a case decided specially with reference to the provisions of section 1 (b) of the Arms Act. In section 61 of the Abkari Act there is a similar reservation. The Abkari Act was passed in 1878 and the Civil Procedure Code in 1882. Therefore as liquor is not mentioned in section 266 of the Code, the Legislature did not intend that it should be exempted from attachment and sale.

Thirdly, it is not necessary to obtain the Collector's permission for the sale, see Cordeaux's Rules, pp. 432, 433, section 27 (1), 436 Form A (2). From these and the actual practice observed, it will be seen that all liquor is stored in the distillery and after the price of the liquor and Government dues are paid, a pass is furnished to the contractor and on the production of it he is allowed to remove the quantity of liquor mentioned therein. This procedure and the language of the conditions attached to the license show that the liquor is the property of the contractor and as such it is

(1) (1882) P. J., p. 257.

(2) (1899) 23 Mad. 195.

(3) (1898) 23 Bom. 237.

(4) (1896) 22 Bom. 473.

(5) (1895) 18 All. 12.

(6) (1885) 9 Bom. 518.

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liable to attachment: The Court can attach whatever belongs to the judgment-debtor and in the present case the judgment-debtor's property includes both the liquor and the power to sell under the license and the Court can command the judgment-debtor to sell under his license.

Under the rules, it will be seen, there is a further way of working out the sale in small quantities to each purchaser—say not more than six bottles to each purchaser—and for doing this no permission of the Collector would be necessary.

M. B. Chaubal (Government Pleader) appeared for the Collector of Poona:—The Judge is of opinion that country-liquor is liable to attachment because it is not specifically excluded by section 266 of the Civil Procedure Code; but under that section the Court can attach only that property which is saleable and we contend that country-liquor is not saleable without the Collector's certificate. It is only the license that makes it saleable. Therefore, in order to make it liable to attachment and sale, the Court must previously obtain a license from the Collector. We further contend that the liquor does not belong to the judgment-debtor as his absolute property. After his death it does not go to his heirs as his property, but it reverts to Government: *In the matter of Madho Pershad*⁽¹⁾.

W. B. Pradhan (*amicus curiæ*) appeared for the opponent (judgment-debtor).

HEATON, J. :—This reference has been made by the Judge of the Court of Small Causes in Poona in the course of execution proceedings wherein the judgment-creditor caused to be attached three casks of country-liquor which were in the judgment-debtor's shop. These casks were removed to the Court-house and it was presumably the intention of the judgment-creditor to have them sold.

The Collector at Poona intervened, his intervention taking the form of letters addressed to the Judge. He stated that the liquor should not have been removed without a transport or permit from his office; that it could not be sold without a permit under

(1) (1900) 22 All. 441.

the Abkari Act; and that the purchaser could not remove it without a permit which, the Collector stated, he did not intend to give, and he asked that attachment might be removed.

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This has caused the Judge of the Court of Small Causes to feel doubt as to the answers to the following two questions which he has referred to this Court:—

- 1st. Whether country-liquor is exempt from attachment and sale in execution of a money decree passed by a Civil Court, and
- 2ndly. If not, whether the Collector's permission is necessary for its attachment and sale.

The answer to the first question must, in my opinion, be in the negative. Nothing has been pointed out to us in the law from which we can infer that country-liquor is exempt from attachment and sale in execution. The liquor had admittedly been purchased and paid for by the judgment-debtor; it was his property. There was no doubt it could be sold by him though he had to deal with it in accordance with the terms of his license and the provisions of the Akbari Act. It is therefore clear that it is saleable property, and is covered by the provisions of the first part of section 266 of the Code of Civil Procedure.

But the answer to the second question is different. The Collector's permission is necessary for the sale as appears from section 16 of the Bombay Abkari Act. But it is not necessary to the attachment so far as the attachment can be made without removal. By the Collector's permission being necessary—I mean that the sale without his permission would apparently subject the seller to prosecution under the Abkari Act. Whether the seller would be able to make a good defence to such a prosecution is a matter on which it is unnecessary, even were it possible, to express any opinion now.

It was argued that the reference is bad because it arises out of the action taken by a third person not a party to the suit. But this argument is of no weight in this case. The Judge has to determine whether he can rightly order the liquor to be sold and is in doubt on the point, therefore he is entitled under section 617, Civil Procedure Court, to make the reference.

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The only other point which it is necessary to notice is the form in which the Collector's intervention has been made. In my opinion it was altogether irregular and contrary to the manner in which proceedings in Courts of justice should be conducted. If the Collector thought it necessary to bring to the notice of the Judge an objection to the sale of this country-liquor he should have done so in the ordinary manner by an application made in open Court, so that it could be dealt with by the Judge judicially.

Order accordingly.

G. B. R.

CRIMINAL REFERENCE.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

1908
 January 16. *EMPEROR v. CHINTO BHAIRAVA.**
Criminal Procedure Code (Act V of 1898), section 439—Reference to High Court—Enhancement of sentence—Practice of the High Court to accept the conviction as conclusive.

It has been the invariable practice of the Bombay High Court, in cases that come before it for enhancement of sentence, to accept the conviction as conclusive and to consider the question of enhancement of sentence on that basis.

This was a reference under section 438 of the Criminal Procedure Code (Act V of 1898), made by C. Hudson, District Magistrate of Dharwar.

The accused, a Municipal Secretary, was convicted of an offence punishable under section 162 of the Indian Penal Code. The trying Magistrate, "having regard to his position as a Secretary of the Municipality and also to his age (45)", sentenced him only to pay a fine of Rs. 200.

The District Magistrate of Dharwar being of opinion that the sentence was inadequate, referred the case to the High Court, observing:—

"Accused was Municipal Secretary in Gadag Bettigeri, an important place. He is a strongish looking man of 45. The offence is a serious one, and I can find no extenuating circumstances."

* Criminal Reference No. 100 of 1907.