

The conviction must be set aside, the accused must be acquitted and discharged and the fine, if paid by him, must be refunded to him.

SHAH, J.:—I am of the same opinion.

*Conviction set aside.*

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## CRIMINAL APPELLATE.

### FULL BENCH.

*Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Beaman, Mr. Justice Heaton and Mr. Justice Macleod.*

EMPEROR v. NAZAR MAHOMED.\*

*Scheduled Districts Act (XIV of 1874), section 7—Rule 44—Rule 44 not ultra vires—Jurisdiction of High Court over conviction and sentences by Mewas Agent.*

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Rule 44 framed by the Government of Bombay under the Scheduled Districts Act, 1874, is not *ultra vires*.

The High Court of Bombay may, therefore, take cognizance of any case decided by the Mewas Agent on the petition of a convicted party, and if it thinks fit send for the proceeding and pass a fresh decision.

CRIMINAL appeal from convictions and sentences passed by J. A. G. Wales, Mewas Agent, West Khandesh.

The accused were tried by the Mewas Agent for the offence of causing grievous hurt (sections 326 and 114 of the Indian Penal Code); in that they cut off the nose of the complainant.

The Mewas Agent convicted the accused of the offences charged, and sentenced accused No. 1 to suffer

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three years' rigorous imprisonment, and each of the remaining eight accused to suffer rigorous imprisonment for two years.

- The accused appealed to the High Court.

The following rules framed by the Government of Bombay under section 3 of Act XI of 1846 and kept in force by section 7 of Act XIV of 1874, are material :—

35. The absolute jurisdiction of the Agent in criminal cases shall extend to fine and imprisonment for five years, with or without hard labour ; and sentences involving a punishment beyond that period, or of greater severity, must be submitted for the confirmation of the Sadar Faujdari Adalat.

37. The Agent will obey all injunctions and orders of the Sadar Faujdari Adalat, and will return process duly executed as required by that Court, and will forward from time to time such periodical or other returns as may be called for by the Judges of the Sadar Fauzdari Adalat.

43. *First.*—If the punishment deemed to be suitable by the Agent shall exceed his own absolute jurisdiction, he shall record the punishment he would award, but shall forward the case in original to the Sadar Fauzdari Adalat which Court shall proceed to take cognizance of the case and to pass such sentence or orders as they may think proper, and the instructions conveyed to the Agent from the superior Court shall be carried into effect by him.

*Second.*—And in the event of a sentence passed by the Agent being referred for the confirmation of the Superior Court, the prisoner shall be kept in simple confinement, under a warrant addressed to that effect to the officer deputed to officiate as Nazir, which temporary warrant shall give place to the final orders of the Superior Court.

44. The Sadar Fauzdari Adalat shall be empowered to call for the Agent's proceedings in any case, on petition being made to that Court by any party against whom a sentence may have been passed by the Agent, and the Sadar Court may hereafter proceed according to the provisions of section 4 of Act XI of 1846.

The appeal was heard by Batchelor and Shah JJ., when their Lordships made a reference to a Full Bench in the following terms :—

BATCHELOR, J. :—This is an appeal from the judgment of the Mewas Agent, West Khandesh, by whom

the appellants have been convicted under sections 326 and 114 of the Indian Penal Code, and have been sentenced to various terms of imprisonment, each term being less than five years.

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The appeal gives rise to a preliminary question of some difficulty, that is to say, the question whether this Court has jurisdiction to entertain an appeal from a convicted prisoner who has been sentenced by the Court of the Mewas Agent to a term not exceeding five years' imprisonment. The question was answered in 1890 by a Division Bench of this Court in *Queen-Empress v. Sarya*<sup>(1)</sup>, where it was held that such an appeal did not lie to the High Court. This decision was noticed and commented on in *Imperatrix v. Ratnya*<sup>(2)</sup>, where, however, no doubt appears to have been thrown on the authority of the earlier case. The authority of that case is, however, exposed to some doubt and uncertainty owing to the recent decision of this Court in *Emperor v. Khalpa Ranchod*<sup>(3)</sup>. For the decision in *Sarya's case*<sup>(1)</sup> proceeded mainly upon the view that Rule 44 of the Rules published under section 3 of Act XI of 1846 was *ultra vires*, and consequently was of no avail to furnish this Court with jurisdiction to entertain an appeal in a case such as the present. But in *Khalpa Ranchod's case*<sup>(3)</sup> the validity of Rule 44 came under the consideration of the Court, and the Chief Justice and Mr. Justice Heaton, after referring to section 4 of Act XI of 1846, observed that Rule 44 appeared to them to permit this Court to entertain the appeal of the accused and, if necessary, to resort to the provisions of section 428 of the Criminal Procedure Code for the purpose of obtaining any additional evidence that might be necessary. It is true that in this case the Court's attention does not appear to have been directed to the decision in

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(2) (1897) 25 Bom. 667.

(3) (1916) 18 Bom. L. R. 789.

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*Queen-Empress v. Sarya*<sup>(1)</sup> and that there was also a reference to this Court from the Mewas Agent, the accused having been sentenced to death. At the same time it is, I think, apparent that there is real conflict between the decision in *Khalpa Ranchod's case*<sup>(2)</sup> and the grounds upon which the decision was rested in *Sarya's case*.<sup>(3)</sup> That conflict is the more noticeable, because the circumstances that Khalpa Ranchod was sentenced to death, and was not sentenced to a term of five years' imprisonment or less, formed no part of the *ratio* of the Court's judgment. Moreover, after such argument as we have heard to-day, it appears to me that some grounds do exist for re-considering the decision in *Queen-Empress v. Sarya*<sup>(4)</sup>. For even if, as the learned Judges in that case thought, Rule 44 was beyond the powers conferred by section 3 of Act XI of 1846—a point which is not wholly free from difficulty—yet it may still be necessary to consider what effect, if any, Act XIV of 1871 may have in the direction of saving this Rule 44 and preserving it as a valid rule.

On the whole, therefore, there being this divergence between the decisions, some inherent difficulty in the question itself, and some reason to suppose that apart from the latter case the decision in *Queen-Empress v. Sarya*<sup>(5)</sup> may be incorrect, it appears to me desirable that the question should be referred to a Full Bench. The question referred will be that which I have stated at the beginning of this judgment.

SHAH, J.:—I agree. I only desire to add that I feel some difficulty in accepting the conclusion in *Queen-Empress v. Sarya*<sup>(6)</sup> that Rule 44 of the Rules made under Act XI of 1846 is *ultra vires*. The words of section 3 of the Act are at least equally reasonably susceptible of a construction which would save the Rule, and, in my opinion,

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that construction ought to be preferred. Taking the rules as a whole, particularly Rules 43 and 44, it seems to me that the Government have provided that every case shall be liable to the control of the Sadar Fauzdari Adalat referred to in section 4 of the Act, subject to the condition that in a certain class of cases the Agent himself should submit the papers to that Court and that in other cases he is to submit the papers, if required to do so by that Court on the petition of the accused. The extent of the power of the Sadar Fauzdari Adalat in all cases is the same. If the rules in terms provided that all cases must be submitted by the Agent to the Sadar Fauzdari Adalat, it would be difficult to say that the Government had no power under section 3 of the Act to make such Rules. I am unable to see why the result should be otherwise, when that is the effect of the present rules with this difference only that in certain cases the papers must be submitted by the Agent to the Sadar Fauzdari Adalat, whereas in other cases he is to do so if required by that Court on the petition of the accused.

The reference was heard by a Full Bench consisting of Scott C. J., Beaman, Heaton and Macleod JJ.

*S. S. Patkar*, Government pleader, for the Crown :—I submit this Court has no jurisdiction to entertain the appeal; the accused in this case were sentenced to a term of imprisonment less than five years and therefore the case falls within the absolute jurisdiction of the Mewas Agent. The case of *Queen-Empress v. Sarya*<sup>(1)</sup> supports my view.

The Rule 44 made under Act XI of 1846 which empowers the High Court to call for the Agent's proceedings in any case and to proceed to pass a final judgment as if the trial had been sent up in the ordinary course from a Sessions Judge is *ultra vires* for the following

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reasons : The Regulation 13 of 1827 related to the criminal procedure of subordinate Courts and superintendence of Sadar Fauzdari Adalat and the first 26 Regulations of 1827 were made applicable to the District of, Khandesh by Regulation 29 of 1827 in the Appendix of which the parganas of Nandurbar (from which this case comes) Sooltanpur and Kokurmoonda have been mentioned. But subsequently in the year 1846 Act XI of 1846 was passed by which section 27 of the Regulation 13 of 1827, which gave the Sadar Fauzdari Adalat superintendence of criminal justice, was repealed as by the application of section 1 of the Act of 1846 the first 26 Regulations were repealed so far as the aforesaid parganas were concerned, and by section 2 the civil and criminal jurisdiction in the said parganas was vested in the Mewasi Agent. Section 3 of the said Act makes a distinction between civil and criminal cases and it provides that in civil cases the Governor-in-Council shall determine by rules to what extent the decision of the Agent in civil suits shall be final and in what suits *an appeal* will lie to the Sudder Dewany Adalat; and as regards criminal cases shall define the authority to be exercised by the Agent in criminal trials and what cases he shall submit to the decision of the Sudder Fauzdari Adalat. But no provision is made for making Rules in criminal cases by the Governor-in-Council and therefore, Rule 44 is *ultra vires*.

[SCOTT C. J.—Do you say it is *ultra vires* for the reasons given by Mr. Justice Jardine in *Queen-Empress v. Sarya*<sup>(1)</sup> ?]

Yes: The Act itself makes a distinction between appeal in civil cases and reference in criminal cases.

[SCOTT, C. J.—If section 3 of the Act XI of 1846 gives the Governor-in-Council power by the Rules to define

<sup>(1)</sup> (1890) 15 Bom. 505.

what cases shall be submitted by the Agent, it would naturally invest the Governor-in-Council with power to make rules for the purpose].

My submission is that the word 'submit' is used in the section in a technical sense and in the case of *Queen-Empress v. Saraya*<sup>(1)</sup> Mr. Justice Jardine also observes (p. 510) that the word is so used in the section. The reference is only for confirmation only.

Section 3 further goes on to say that the appeal shall lie in civil cases only and not in criminal cases. There is a distinction between civil and criminal cases.

[HEATON J.—The criminal procedure in those days did not provide for an appeal. In some cases there was absolute jurisdiction given and in some the Judge had to submit the case for confirmation; and if at that time there was no provision for an appeal under the procedure then section 3 would not provide for power to appeal.]

Mr. Justice Jardine at p. 510 has gone into the history of the legislation and the words "submit" and "refer" must be understood in the sense they were used in contemporary legislation, viz., Act XIII of 1827, XXX of 1827, III of 1830 and VIII of 1831. It is not, therefore, correct to say that every case could be submitted except only cases for confirmation of sentence.

Even under the Criminal Procedure Code (Act XXV of 1861), section 445 provided that the Act should not take effect in any part of British India not subject to the general Regulations unless extended thereto by a Government Notification and in this case no such Notification was issued. So also Local law is saved by Act X of 1872, section 2 and Act X of 1882, section 1, and by the present Code, Act V of 1898, section 1, cl. 2.

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In the case of *Emperor v. Khalpa Ranchod*<sup>(1)</sup> the present point was not before the Court. But the Court wanted to know whether the Agent had absolute jurisdiction before the High Court could exercise its jurisdiction and so additional evidence was taken under section 428 of the Criminal Procedure Code.

In the case of *Imperatrix v. Ratnya*<sup>(2)</sup> the power of the Court for the purposes of reference for confirmation of sentence above five years only was recognised but the case lays down that there was to be no appeal if the punishment was less than five years: see Fulton J.'s judgment, p. 673.

Section 7 of the Scheduled Districts Act kept certain Rules which had been issued under the repealed Acts in force. It kept in force Rule 35 but not Rule 44, because section 7 applied only to Rules that were *intra vires* of some Acts: see section 11 (b) of Act XIV of 1874 and the remarks of Jardine J. in *Queen-Empress v. Sarya*<sup>(3)</sup>, at p. 513.

*Y. V. Bhandarkar*, for the appellants, was not called upon.

SCOTT, C. J.:—By section 2 of Act XI of 1846 it was enacted that the administration of criminal justice within the territory referred to by the Act should vest in the Agent to the Governor of Bombay, and by section 3 it was enacted that it should be competent to the Governor-in-Council to prescribe such Rules as he might deem proper for the guidance of the Agent, and to define the authority to be exercised by the Agent in criminal trials and what cases he should submit to the decision of the Sudder Faujdaree Adawlut. By section 4 it was enacted that upon the receipt of any criminal trials referred by the Agent under the Rules

<sup>(1)</sup> (1916) 18 Bom. L. R. 789.

<sup>(2)</sup> (1897) 25 Bom. 667.

<sup>(3)</sup> (1890) 15 Bom. 505.

which might thereafter be prescribed by the Governor-in-Council the Sudder Faujdaree Adawlut should proceed to pass a final judgment, or such other order as might after mature consideration seem to the Court requisite and proper, in the same manner as if the trial had been sent up in ordinary course from a Sessions Judge. Under section 3 of the Act the Governor of Bombay on the 17th of March 1854 prescribed certain Rules for the civil and criminal administration in the villages of six Mewasi Chiefs mentioned in the Schedule to the Act of 1846. Chapter III of those Rules relates to the criminal administration. Rule 35 provides that the absolute jurisdiction of the Agent in criminal cases shall extend to fine and imprisonment for five years, and sentences involving a punishment beyond that period, or of a greater severity, must be submitted for the confirmation of the Sudder Faujdaree Adawlut. Rule 37 provides that the Agent will obey all injunctions and orders of the Sudder Faujdaree Adawlut, and Rule 43 that if the punishment deemed to be suitable by the Agent shall exceed his own absolute jurisdiction, he shall record the punishment he would award, but shall forward the case in original to the Sudder Faujdaree Adawlut, which Court shall proceed to take cognizance of the case and to pass such sentence or orders as they may think proper, and the instructions conveyed to the Agent from the superior Court would be carried into effect by him. Rule 44 provides that the Sudder Faujdaree Adawlut shall be empowered to call for the Agent's proceeding in any case, on petition being made to that Court by any party against whom a sentence may have been passed by the Agent, and the Sudder Court may thereafter proceed according to the provisions of section 4 of Act XI of 1846. Rules 43 and 44 are thus rules which provide for cases in which the Agent shall, under the first Rule of his own motion and under the second Rule upon requisition by the Superior Court,

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submit the case for the decision of that Court. The power to call for and deal with a case given to the Superior Court implies a direction that the Agent shall refer in compliance with the requisition. Section 4 of the Act of 1846 lays down what shall be done by the Sudder Faujdaree Adawlut upon the receipt of any criminal trial referred by the Agent under the Rules. The Sudder Court may proceed to pass a final judgment or such other order as may seem to the Court requisite and proper. This procedure is imperative in relation to any case received from the Agent. Such cases may under the Rules either be referred by the Agent of his own motion or on requisition by the Court empowered under the Rules to make such requisitions. The Rules framed by the Governor-in-Council must be read as a whole and although Rule 35 states that in a particular class of cases the Agent shall have absolute jurisdiction, that is not inconsistent with, but subject to, the provision in Rule 44 that the Sudder Court on petition by any party convicted by the Agent may call for the proceedings and pass a decision thereon. It is immaterial whether the power of the Superior Court is called appellate or revisional, the result is that that Court, now the High Court, may take cognizance of any case on the petition of a convicted party, and if it thinks fit send for the proceedings and pass a fresh decision. In our opinion, therefore, Rule 44 is not *ultra vires*.

*Answer accordingly.*

J. G. R.

*Note.*—The case was then heard by Batchelor and Shah JJ. on the 4th April 1917, when their Lordships confirmed the convictions and reduced the sentences in the case of some convicts. [Ed.]