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Court : Kolkata

Decided On : Jan-28-1881

Reported in : (1881)ILR6Cal621

Judge : Mitter and ;Maclean, JJ.

Appellant : The Empress

Respondent : Nobocoomar Pal

Judgement :

Mitter, J.

1. The Magistrate of Howrah having convicted the petitioner, Nobocoomar Pal, of an offence under Section 53, Beng. Act VII of 1878 (The Beng. Excise Act), and sentenced him to a fine of Rs. 200, and rigorous imprisonment in default of payment, an application was made to the Judge of Hooghly, in order that the proceedings might be referred to this Court under Section 296, Criminal Procedure Code.

2. In his application Nobocoomar Pal raised two objections to his conviction and sentence: first, that he held a retail license for sale of spirits, and could not, therefore, be convicted under Section 53 of the Act; second, that he was not liable to rigorous imprisonment in default of payment of the fine.

3. The Judge has referred the case to this Court, and his opinion is, that Section 59, and not Section 53, of the Act applies. He brings to notice certain informalities in the proceedings of the Magistrate, and recommends that the proceedings may be set aside, or the fine reduced to Rs. 50.

4. We have carefully considered the papers sent up to us, and have come to the conclusion, that Section 53 of the Act does not apply to this case. It is not disputed, that Nobocoomar Pal held a license for retail sale of imported spirituous and fermented liquors, which is one of the two classes of licenses to which the Act refers. The license, however (No. 49-4A) restricts him to sale by the glass, and Article vi of the license confines the sale to his shop, and directs that the spirits, &c., shall be drunk on the premises. The Magistrate thinks, that because Nobocoomar had not a simple Retail Vend License (Form 4b), and because he sold liquor by the bottle for consumption off the premises, he was justified in convicting him under Section 53.

5. We concur with the Judge in his view, that Section 53 does not apply to sales by a licensed vendor contrary to the terms of his license. This seems to follow from a consideration of Section 60 with Section 53. If Section 53 were to be applied to wholesale sales by a retail licensed vendor, a fine of Rs. 500 might be imposed, whereas by Section 60, the maximum fine is Rs. 200 for that offence. Section 60 would be redundant if the construction put by the Magistrate upon Section 53 is correct, whereas it is, upon the construction we put upon it, quite consistent with the previous section and provides for a breach of the conditions of a license not covered by the second clause of Section 59.

6. As has been said already, Nobocoomar held a license for retail sale. An ordinary retail licensee might sell up to twelve quart bottles; but under its powers under Section 28, the Board of Revenue has regulated the conditions of Nobocoomar's license, and limited him to selling by the glass, with a condition that the liquor shall be drunk in his shop. The information laid against him was, that he had, on seven dates in April, May, and July 1880, sold liquor by the bottle without a bottle license. This seems to be another modification of the ordinary retail license.

7. The proceedings before the Magistrate were held under chap, xviii of the Criminal Procedure Code. It is therefore difficult to say, whether there was legal evidence for any conviction. In his summary and reasons the Magistrate alludes to account-books, orders, and bills, as satisfying him that the offence was committed. It would have been better if the Magistrate had summed up the evidence by which the orders and bills were proved; for their mere production is no evidence. Two of the orders refer to lemonade, and we are not aware that this is an excisable article.

8. We are unable to say for what offence the prisoner really was tried. The complainant was not examined as required by Section 144 of the Procedure Code, and it is certain, that the seven offences mentioned in the information could not be dealt with in one trial, vide Section 453:-When a person is accused of more offences than one one of the same kind committed within one year of each other, of same kind may be charge he may be charged and tried at the same time for any numbered within a year of each of them not exceeding three.other.Explanation.-Offences are said to be of the same kind under this section if they fall within the provisions of section four hundred and fifty-five.] Procedure Code. The omission to record the date of the commission of the offence in the register as required by Section 229, Procedure Code, is, therefore, a material error, and the whole case shows the necessity of recording the few particulars required by law in trials under chap, xviii.

9. As we are unable, on the record as it stands, to say, that any offence has been made out for which the petitioner ought to have been convicted, we must set aside the conviction under Section 53, Beng. Act VII, 1878.