

tract Magistrate in granting or refusing permission for opening new markets under the Bombay Markets and Fairs Act of 1862. It may well happen that where two different municipal areas are adjacent to each other, the opening of a market in one area, though perfectly unobjectionable from the point of view of that Municipality, may nevertheless be open to serious objection from the point of view of the District Magistrate as likely to cause inconvenience to the inhabitants of the adjacent municipal area or as likely to occasion a breach of the peace because of the new market being too near a market in the adjacent municipal area. There may thus be very good reasons for retaining the control of both authorities as regards the opening of markets even within municipal limits. We therefore see no reason for interfering with the conviction of the accused. It may be mentioned that the only ground on which the application has been argued before us was not urged at all either before the Sessions Judge or the trying Magistrate. The rule is discharged and the application dismissed.

D.S./R.K.

Rule discharged.

**A. I. R. 1940 Bombay 307
SPECIAL BENCH**

BEAUMONT C. J., N. J. WADIA,
WASSOODEW AND SEN JJ.

Emperor

v.

Saver Manuel Dantes — Accused.

Criminal Ref. No. 75 of 1940, Decided on 1st July 1940, made by Presidency Magistrate, Fourth Court, Girgaon, Bombay.

(a) **Bombay Abkari Amendment Act (6 of 1940), S. 6—S. 6 deleting proviso to S. 14-B (1) of Abkari Act—Object of deletion stated.**

By S. 6 of the Amending Act the proviso to S. 14-B (1), Bombay Abkari Act was deleted. One object of the proviso was to facilitate import and export into and from the port of Bombay by enabling warehouse-keepers and railway companies on the docks to possess any quantity of foreign liquor. The object of the Legislature in deleting the proviso is to destroy, or at any rate render very difficult, import and export into and from the Port of Bombay. [P 308 C 1, 2]

(b) **Bombay Abkari Amendment Act (6 of 1940), S. 7 — Construction—S. 7 is not retrospective — Notifications effective at date of passing of amending Act alone fall under S. 7 — S. 7 does not affect notifications already rescinded or declared invalid — Notification declared ultra vires by High Court falling within S. 7—S. 7 cannot revive notification.**

The Court leans strongly against a construction which gives to an Act retrospective action because

it manifestly shocks one's sense of justice that an act legal at the time of doing it, should be made unlawful by some new enactment. The only notifications which fall within S. 7 are notifications effective at the date of the passing of the amending Act. S. 7 is not intended to affect the construction of notifications already rescinded, still less of a notification which had been declared invalid, and therefore had never had any effect, and was a mere nullity. Even if S. 7 applied to a notification already declared ultra vires by the High Court S. 7 cannot have the effect of reviving the invalid notification. [P 309 C 1, 2]

(c) **Bombay Abkari Act (5 of 1878), S. 14-B — Notification under S. 14-B (2) declared ultra vires and invalid by High Court is invalid according to law—Every one can act on that view of law.**

A notification under S. 14-B (2) declared by the High Court to be ultra vires and invalid, is invalid according to the law in force in the Province of Bombay and everybody can act upon that view of the law. The only manner in the absence of an appeal in which the law as declared by the High Court could be altered would be by an Act of the Legislature. [P 309 C 2]

(d) **Government of India Act (1935), S. 100 and Sch. 7, List II, item 31 — Effect of, stated — Provincial Legislature has right to prohibit possession of intoxicants—Its right to legislate as to possession of intoxicants must be exercised subject to right of Central Legislature to legislate in respect of import and export across custom frontiers (Obiter).**

The effect of S. 100 and Sch. 7, List II, item 31 is to enable the Provincial Legislature, subject to the right of the Central Legislature, to make laws in respect of the matter enumerated in List I, to make laws relating to intoxicating liquors and narcotic drugs. A right to legislate as to possession of intoxicating liquors must necessarily involve a right to prohibit possession. The Provincial Legislature has power so to limit possession, provided that in so doing it does not encroach upon the legislative powers of the Central Legislature. The Central Legislature is the authority to legislate in respect of import and export of intoxicants across the sea frontier of Bombay, and the powers of the Provincial Legislature under item 31 in List II must be exercised subject to this right of the Central Legislature. The Provincial Legislature has no power to legislate in respect of possession of intoxicants in such a way as to encroach upon the right to import and export across the customs frontiers. [P 310 C 1, 2]

Consequently, the power under S. 14-B, Bombay Abkari Act as amended by Act 6 of 1940 to prohibit any individual or a class or body of individuals or the public generally from possessing intoxicants would be valid, but the power must not be exercised so as to encroach upon the rights of the Central Government. No doubt any legislation which restricts possession or consumption of intoxicants is likely to have a prejudicial effect upon the customs revenue of the Central Government, and that fact would not prevent the Provincial Government, from exercising the power conferred upon it by item 31. But the power of the Provincial Government to legislate as to possession is a qualified, and not an absolute, power; it is subject to the rights of the Central Government: (1902) A C 73, Ref. [P 310 C 2; P 311 C 1]

M. C. Setalvad (Advocate-General), V. F. Taraporewala, G. N. Joshi and R. A. Jahagirdar (Government Pleader) —

for the Crown.

Sir Jamshedji Kanga, S. G. Velinker, R. J. Kolah and Dr. B. R. Ambedkar

— *for Accused.*

Beaumont C. J. — This is a reference made by the Presidency Magistrate, Fourth Court, under S. 432, Criminal P. C., which entitles him to refer any question of law arising in the hearing of a case before him. The facts giving rise to the reference are as follows: On 17th July 1939 the Government of Bombay issued a Notification under sub-s. (2) of S. 14-B, Bombay Abkari Act, 1878, prohibiting the possession by any person in the area specified, which was in substance the Town and Island of Bombay, without a permit or a license issued by an Abkari Officer, of any intoxicant specified in the schedule thereto in excess of the amount therein mentioned. On 11th April 1940, a Full Bench of this Court held that the said Notification was "ultra vires and of no effect," the basis of the decision being that under S. 14-B, Bombay Abkari Act, Government could not prohibit the possession of intoxicants by the public generally. On the same day, but after the Court's decision had been pronounced, the Governor of Bombay, being the then legislative authority in Bombay, passed Bombay Act 6 of 1940 amending the Bombay Abkari Act. The material sections of that Act, which we will refer to as "the Amending Act," are Ss. 6 and 7. S. 6 amends S. 14-B, Bombay Abkari Act, and in order to appreciate the amendment it is necessary to state the terms of S. 14-B, which were as follows:

(1) No person not being a licensed manufacturer or vendor of any intoxicant or hemp and no licensed vendor except as authorized by his license shall have in his possession any quantity of any intoxicant or hemp in excess of such limit as the Provincial Government under S. 17 may declare to be the limit of retail sale, except under a permit from the Collector:

Provided that nothing in sub-s. (1) shall extend to any foreign liquor, other than denatured spirit, in the possession of any common carrier or warehouseman as such, or purchased by any person for his bona fide private consumption and not for sale.

(2) Notwithstanding anything contained in sub-s. (1) the Provincial Government may by Notification in the Official Gazette prohibit the possession by any person or class of persons, either throughout the whole Presidency or in any local area, of any intoxicant, either absolutely or subject to such conditions as it may prescribe.

By S. 6 of the Amending Act, the proviso to sub-s. (1) was deleted. One object of the proviso would seem to have been to facili-

tate import and export into and from the Port of Bombay by enabling warehouse-keepers and railway companies on the docks to possess any quantity of foreign liquor, and it is difficult to see what object the Legislature had in deleting the proviso except to destroy, or at any rate render very difficult, import and export into and from the Port of Bombay. Then sub-s. (2) of S. 14-B was amended by enabling the Prohibition to extend to "any individual or a class or body of individuals or the public generally," thus removing, in the case of notifications issued under the Amending Act, the ground upon which this Court had held the Notification of 17th July 1939 to be invalid. S. 7, Amending Act, provided that the amendments to the Preamble and the provisions of the Act should have effect from the date on which the said Preamble and the said provisions were respectively enacted, and then proceeds in these terms:

"And any rule, order or notification made or issued under the said Act" (i. e. the Abkari Act) "before the commencement of this Act shall be deemed to have been made or issued under the said Act as amended by this Act.

On 19th April 1940, the accused in the case before the learned Magistrate giving rise to this reference arrived at Dadar Station on the B. B. & C. I. Railway and was found to be in possession of a bottle of country liquor containing admittedly less than the limit fixed by the Provincial Government under S. 14-B(1), Bombay Abkari Act. He was charged under S. 43 (1) (a), Bombay Abkari Act, with being in possession of an intoxicant in contravention of a rule or order made under the Act. The only order which he is alleged to have broken is that contained in the said Notification of 17th July 1939, and the learned Magistrate has submitted to this Court the two following questions:

First question: (a) Has the Provincial Legislature power, under item 31 of List II of Sch. 7, Government of India Act, 1935, or otherwise to pass a law of which the object is to introduce a policy of total Prohibition in the Province of Bombay of in certain areas thereof; and (b) whether S. 3 and S. 6 (b), Bombay Act 6 of 1940 are intra vires, in particular with regard to total prohibition of possession of liquor and of intoxicating drugs.

Second question: In the event of the first question being answered in the affirmative, whether there is in existence any effective Notification under S. 14-B (2), Bombay Abkari Act, 1878, absolutely prohibiting the possession of intoxicants by persons generally in the City of Bombay; in other words, whether Notification No. 374/39(c), dated 17th July 1939, which was declared by the

High Court to be ultra vires and of no effect, is to be considered as in force by virtue of S. 7, Bombay Act 6 of 1940.

In our view the first question does not really arise in connexion with the prosecution. It is admitted that the accused has not infringed any provision of the Abkari Act; he is alleged to have infringed the provisions of the said Notification of 17th July 1939, and the only question therefore which arises is whether that Notification is valid and in force. No doubt the Notification might be invalid by reason either of a defect in the Notification itself or of some invalidity in the Act under which it was passed, but it is only in that indirect sense that the validity of the Act can be called in question. We propose therefore to confine ourselves to the second question.

Two objections are taken to the Notification itself: first, that it does not fall within the ambit of S. 7, Amending Act, and, secondly, that, if it does so fall, the Notification having been declared by this Court to be of no effect, the accused cannot be convicted under it. The first point is one of construction of the Amending Act, and in dealing with it we have to bear in mind the rule that the Court leans strongly against a construction which gives to an Act retrospective action because, as stated in Maxwell's "Interpretation of Statutes," Edn. 8, p. 5, "it manifestly shocks one's sense of justice that an act legal at the time of doing it, shall be made unlawful by some new enactment." If the Notification in question falls within the scope of S. 7, it would render illegal acts committed before the Act was passed and which were legal when committed. The present accused no doubt does not fall within that category, but others might. In our opinion S. 7, Amending Act, does not embrace the Notification of 17th July 1939. We think that the only notifications which fall within the Section are notifications effective at the date of the passing of the Amending Act. We cannot suppose that the Section was intended to affect the construction of notifications already rescinded, still less of a Notification which had been declared invalid, and therefore had never had any effect, and was a mere nullity. This view is supported by the Preamble to the Amending Act, which recites that it is expedient to amend the Abkari Act so as to remove doubts as to the validity of certain notifications issued under the Act; there was no doubt whatever about the validity of the Notification of 17th July

1939, since it had been declared invalid. In our view therefore S. 7 of the Act does not apply to the Notification in question.

Upon the second point, if S. 7 does apply to the Notification in question, it has not, in our opinion, the effect of reviving that Notification. It was argued by the learned Advocate-General that the declaration of this Court having been made in favour of another accused, the present accused cannot take advantage of it, since the judgment of this Court is not a judgment in rem within S. 41, Evidence Act. But the notification having been held by this Court to be invalid, it is invalid according to the law in force in this Province, and everybody can act upon that view of the law. There having been no appeal from the decision of this Court the only manner in which the law as declared by this Court could be altered would be by an Act of the Legislature. The Legislature could no doubt have enacted that notwithstanding the decision of this Court the Notification in question should be treated as being still in force, and as having been issued under the original Act as amended. But the Legislature has not done that. All it has done is to say that the Notification shall be deemed to have been issued under the Bombay Abkari Act as amended. That is to say, the original Notification is not revived, or deemed to have been passed on a different date to that on which it was passed; it is merely deemed to have been passed under a law different from that which in fact existed at its date. Such a provision cannot revive a Notification which is a nullity; the most it can do is to challenge the grounds on which the Notification was held to be invalid. But an order of the Court is valid, although the reasons upon which it is based no longer apply; there may well be other grounds of invalidity. In our opinion, the Notification in question having been held by this Court to be of no effect, and not having been revived, no one can be convicted under it. That really disposes of the whole reference. But as the question as to the validity of the Notification, on the assumption that it has been revived and is to be treated as passed under the original Act as amended by the Amending Act, has been argued, and as the learned Advocate-General has asked us to indicate our views upon the subject, we proceed to do so. But it must be understood that our views on this point are not intended to form part of our decision, and must be regarded as obiter only.

The learned Magistrate expressed the view that the Provincial Legislature had no power to prohibit the possession of intoxicants in this Province, and that view has been pressed upon us by Sir Jamshedji Kanga for the accused. The right of the Provincial Legislature to legislate on the subject is derived from S. 100, Government of India Act, 1935, and item 31 in List II, Sch. 7. The effect of those provisions is to enable the Provincial Legislature, subject to the right of the Central Legislature to make laws in respect of the matters enumerated in List I, to make laws relating to intoxicating liquors and narcotic drugs, that is to say, (in the words of item 31), the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs. The learned Magistrate was of opinion that the words of item 31 have a positive import and do not cover prohibition. The argument is that the Provincial Government is given control of the matters enumerated in item 31, and that prohibition destroys the subject-matter of control.

We are not in agreement with that view. It seems to us clear that a right to legislate as to possession of intoxicating liquors must necessarily involve a right to prohibit possession. We have not in fact to deal with total prohibition, because the Notification now in question does not prohibit possession throughout the whole province; it only enforces prohibition within the Town and Island of Bombay. We see no reason to doubt that the Provincial Legislature has power so to limit possession, provided that in so doing it does not encroach upon the legislative powers of the Central Legislature. Now, under item 19 of List I of Sch. 7, which contains the subjects on which the Central Government can legislate, is included "import and export across customs frontiers as defined by the Federal Government." By a Notification of 1st April 1937, the Federal Government for the purpose of item 19 in List I has defined the "customs frontier" as the frontier, whether one or more than one, whether sea or land, whether exterior or interior, of British India.

It is therefore clear in our view that the Central Legislature is the authority to legislate in respect of import and export of intoxicants across the sea frontier of Bombay, and the powers of the Provincial Legislature under item 31 in List II must be exercised subject to this right of the Central Legis-

lature. It is settled that in cases of conflict between the items in List I and List II it is the duty of the Court to endeavour to reconcile those items before having recourse to the non-obstante clause under which the powers of the Central Legislature must prevail in the event of an irreconcilable conflict. We see no difficulty in reconciling the two items now in question by holding that the Provincial Legislature has no power to legislate in respect of possession of intoxicants in such a way as to encroach upon the right to import and export across the customs frontiers. No question arises in this case as to the validity of the prohibition contained in S. 14-B (1), Bombay Abkari Act, because admittedly the accused did not fall within such prohibition, though it is obvious that that Section makes it virtually impossible to import or export intoxicants without obtaining a license from the Provincial Government, which may or may not be granted.

Turning to S. 14-B (2) as amended, the power to prohibit any individual or a class or body of individuals or the public generally from possessing intoxicants would seem to us to be valid, but the power must not be exercised so as to encroach upon the rights of the Central Government. The Notification of 17th July 1939, if effective, in prohibiting possession by any person in Bombay, would in our view render import and export across the sea frontier of Bombay impossible without breaking the law or obtaining a license which the Provincial Government is under no obligation to grant. It is impossible to land goods on the docks of Bombay, if no one in Bombay is entitled to be in possession of such goods.

The learned Advocate-General has contended strenuously that the Amending Act, does not deal, or purport to deal, with import and export across customs frontiers, and the mere fact that one consequence of the Act may be to discourage, or even prevent, such import and export does not deprive the Provincial Legislature of the power conferred upon it by the Government of India Act and he relies on (1902) A C 73.¹ No doubt any legislation which restricts possession or consumption of intoxicants is likely to have a prejudicial effect upon the customs revenue of the Central Government, and we agree that

1. *Attorney-General of Manitoba v. Manitoba License Holders' Association*, (1902) A C 73= 71 L J P C 28=85 L T 591=50 W R 431=18 T L R 94.

that fact would not prevent the Provincial Government from exercising the power conferred upon it by item 31. But, as we have pointed out, the power of the Provincial Government to legislate as to possession is a qualified, and not an absolute, power; it is subject to the rights of the Central Government. The absolute prohibition against possession goes much further than merely incidentally diminishing the revenue of the Central Government; it destroys, indirectly no doubt, but nonetheless effectively, the right to import and export intoxicants across the sea frontier of Bombay; and Bombay is the principal port of British India.

If therefore we were at liberty to consider the validity of the Notification of 17th July 1939, on the basis that it is still in force and was passed under the Bombay Abkari Act, as amended by the Amending Act, we should still be of opinion that the Notification was invalid, because it goes beyond the powers of the Provincial Legislature. We answer the questions propounded by the learned Magistrate by saying that in our opinion there is not in existence any effective Notification under S. 14-B (2), Bombay Abkari Act, 1878, prohibiting the possession of intoxicants by persons generally in the City of Bombay.

G.N./R.K. *Answer accordingly.*

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KANIA AND WASSODEW JJ.

Gurusangappa Basappa Hokrani and others — Defendants — Appellants.

v.

Baslingappa Basappa Hokrani and others — Plaintiffs — Respondents.

First Appeal No. 134 of 1936, Decided on 8th December 1939, from decision of First Class Sub-Judge, Bijapur, in C. S. No. 52 of 1934.

(a) *Res judicata*—Claim for possession of property as owner dismissed—Subsequent suit as mortgagee of same property to enforce mortgage is not barred.

Where a suit by the plaintiff filed as owner and limited to certain reliefs, viz. a declaration of title and a declaration that as owner the plaintiff was in possession is dismissed, a subsequent suit by him as mortgagee of the aforesaid property to enforce his mortgage is not barred as it is based on a different title and constitutes entirely different cause of action: *35 Bom 507, Rel. on; 19 All 517, Expl. and not applied.* [P 312 C 1, 2]

(b) *Dekhan Agriculturists' Relief Act (17 of 1879), S. 65*—Mortgagee's account books not regularly kept—He can prove consideration by other evidence.

In a mortgage suit the mere absence of regularly kept account books does not preclude the mortgagee from proving consideration by other evidence. [P 312 C 2]

R. A. Jahagirdar — *for Appellants.*

A. G. Desai — *for Respondents.*

Kania J.—This is a first appeal from the decision of the First Class Subordinate Judge at Bijapur in Civil Suit No. 52 of 1934. The plaintiffs claiming to be the mortgagees brought this suit to enforce their mortgage. In the written statement different defences are raised. The trial Court, after an investigation into all the disputes, found in favour of the plaintiffs. The amount found to be due is sixteen thousand odd rupees as stated in the decree. Before us the learned advocate for the appellants has urged only two points. The first is that this suit is barred because of the decree passed in suit No. 277 of 1926. The second is on the point of consideration.

In support of his contention on the first point it was urged that suit No. 277 of 1926 was filed by plaintiff 4 against defendants 1 and 2. The suit was for a declaration that plaintiff 4 was the owner of the property, that it should be declared that the houses in question were in his possession as owner, and if pending the suit possession was lost, an order should be made to replace the plaintiff in possession. Plaintiff 4 lost that suit. The Court held that plaintiff 4 was a benamidar, the real owners being plaintiffs 1 to 3. The Court also held that the transaction under which plaintiff 4 claimed title was not a sale but only a mortgage. As the suit was framed on the ground of ownership and a declaration to that effect only was sought, the suit was dismissed. The present suit is filed by the four plaintiffs. They claim to be the mortgagees of the property. There are five defendants. The first four of them are members of one family. Defendant 5 is an outsider and it is stated in the plaint that a hollow second mortgage deed on the suit property was executed by defendants 1 and 2 recently in favour of defendant 5. The plaintiffs claim that the said transaction is not binding upon them. In the alternative it is urged that even assuming that defendant 5 had advanced any money, the plaintiffs claimed priority over that transaction.

On behalf of the appellants it is urged that in the previous suit plaintiff No. 4 represented all the plaintiffs and as such he could, and ought to have in the alternative prayed for a mortgage decree. In support of