

Criminal Ref

FS/1940



CJ

In His Majesty's High Court of Judicature,  
Appellate Side, Bombay

CRIMINAL JURISDICTION

Appeal  
Application for Revision No. 75 of 1940.  
Reference  
Confirmation Case

IMPERATOR vs.

The Presidency Magistrate, 4th Court, Girgaum,

Bombay - K. J. Khambata, Esquire, submits under Sec. 432 Criminal Pro. Code the Record and Proceedings of his own Court in the case of Emperor Vs. Saver Manual Dantes, wherein the accused has been charged under Sec. 43(1)(a) of the Bombay Abkari Act, 1878, read with Notification No. 374/39/C dated the 17th July 1939 issued under Sec. 14 B of the same Act as amended by Bombay Act VI of 1940 for the opinion of this High Court on the following points:

Offence

Sentence

Date of Sentence

Court

Order in Appeal

Date of Order in Appeal

Passed by

(1)(a) Has the Provincial Legislature power, under Item 31 of List II of the 7th Schedule to the 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 or in certain areas thereof and (b) whether S. 3 and Sec. 6(b) of Bombay Act VI of 1940 are intra vires in particular with regard to total prohibition of possession of liquor and of intoxicating drugs, and if this is answered in the affirmative (2) whether there is in existence any effective Notification under Section 14 B(2) of the Bombay Abkari Act, 1878 absolutely prohibiting the possession of intoxicants by persons generally in the city of Bombay, he (the Presidency Magistrate) being of the ~~opinion~~ opinion that both the questions should be answered in the negative.

Coram:- (Beaumont C.J. and Divatia, J.).

~~Previous Order of the High Court~~ Accused appears and waives notice.  
Notice to Government. Date to be fixed on Monday. D/- 14-6-1940.

Coram:- (Beaumont C.J. & Wassoodew, J.) Date fixed is Wednesday the 26th of June 1940. D/- 17th June 1940.

52

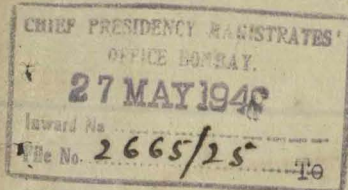


2665/25

No. 416 of 1940.

From

K. J. Khambata, Esquire, M.A., LL.B., Advocate, (O.S.),  
Presidency Magistrate,  
4th Court, Girgaum, Bombay.



The Registrar,  
Appellate Side, High Court,  
Bombay.

Girgaum Police Court:

Bombay, 21st May 1940.

Subject: Case No. 292/P of 1940.

King-Emperor

vs.

Saver Manuel Dantes.

Charge:- Under S.43(1)(a)

of the Bombay

Abkari Act 1878

read with Notifi-

cation

No. 374/39/C d/-

17th July 1939

issued under S.

14B of the same

Act as amended

by Bombay Act 6

of 1940.

---:o:---

*Submitted for perusal.  
This together with  
the proceedings may  
be forwarded to the  
High Court.  
Dec 28-5-40*

Sir,

I have the honour to state that in the above case certain questions of law have arisen, which, under Sec: 432 of Criminal Procedure Code, I have the honour to refer to Their Lordships the Chief Justice and the Judges of the High Court, for their opinion.

The facts of the case, and the two questions on which opinion of the High Court is desired, have been fully set out in the accompanying Order of Reference.

In the same Order I have also taken the liberty of expressing my own views on the questions referred.

The original charge-sheet of the case, containing the proceedings, is also sent herewith.



A copy of the order of the High Court may kindly be furnished to me as soon as the Reference is disposed of.

Pending receipt of the High Court's order, the case is postponed (for passing final orders) to 4th July 1940.

I have the honour to be,

Sir,

Your most obedient servant,

*K. J. Khandale*

Presidency Magistrate,

4th Court, Girgaum,

Bombay.

Through:

The Chief Presidency Magistrate,

Bombay.

MAY 30 1940

No. 1777/25 of 1940.

Chief Presy. Magistrate's Court,

Bombay, 28th May 1940.

*29/5*

Forwarded with compliments to the Registrar,  
High Court, Appellate Side, Bombay.

*J. N. Mehta*

Chief Presidency Magistrate,

Bombay.







Judgment recorded by the High Court in  
Criminal Reference No. 75 of 1940 in the case of  
Imperator Vs. Saver Manual Dantes.

-----  
Counsel Sir Jamshedji Kanga with Mr. S.G.Velinkar,  
Mr. R.J.Kolah and Dr. B.R.Ambedkar instructed  
by Messrs. Gagrat & Co. for the Accused.

Advocate General with Messrs. V.F.Taraporewalla and  
G.N.Joshi and Mr. R. A. Jahagirdar,  
Government Pleader, for the Crown.

Coram:- Beaumont, C.J., N.J.Wadia, Wassoodew and Sen, JJ.

1st July 1940.

Judgment of Court (Per Beaumont, C.J.) --

This is a reference made by the Presidency  
Magistrate, 4th Court, under section 432 of the Criminal  
Procedure Code, 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 the 17th of July 1939 the Government of ~~Bombay~~  
Bombay issued a Notification under sub-section (2)  
of section 14B of the Bombay Abkari Act, 1878, pro-  
hibiting 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 the 11th of 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 section 14B of the Abkari Act Govern-  
ment 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 VI of 1940 amending the



Abkari Act..The material sections of that Act, which we will refer to as "the Amending Act," are sections 6 and 7. Section 6 amends ~~section~~ section 14B of the Abkari Act, and in order to appreciate the amendment it is necessary to state the terms of section 14B, 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 authorised 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 section 17 may declare to be the limit of retail sale, except under a permit from the Collector:

provided that nothing in sub-section (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-section (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 section 6 of the ~~XXXXX~~ Amending Act the proviso to sub-section (1) was deleted. One object of the proviso would seem to have been 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, 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-section (2) of section 14B was amended by enabling the Prohibition to extend to "any individual or a class ~~of~~ 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 the 17th of July 1939 to be invalid.

Section 7 of the 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 the 19th of 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 ~~foreign~~ country liquor containing admittedly less than the limit fixed by the Provincial Government under section 14B(1) of the Abkari Act. He was charged under section 43(1)(a) of the 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 the 17th<sup>th</sup> 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 the 7th Schedule to the Government of India Act, 1935, or otherwise, to pass a law of which the object is to introduce a



~~ask~~ Policy of total Prohibition in the Province of Bombay or in certain areas thereof; and (b) whether section 3 and section 6(b) of Bombay Act VI 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 section 14B(2) of the 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 section 7 of the Bombay Act VI of 1940.

In our ~~opinion~~ view the first question does not really arise in connection 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 the 17th of 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 section 7 of the 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" 8th Edn. 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 section 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 other~~y~~ might. In our opinion section 7 of the Amending Act does not embrace the Notification of the 17th of 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 the 17th of July 1939, since it had been declared invalid. In our view, therefore, section 7 of the Act does not apply to the Notification in question.

Upon the second point, if section 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 section 41 of the 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 ~~fit~~ to have been issued under the 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 section 100 of the Government of India Act, 1935, and item 31 in List II of the 7 Schedule. 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*



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 ~~to~~ so to ~~do~~ 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 the 7th Schedule, 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 the 1st of 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 Legislature. 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 section 14B (1) of the 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 section 14B (2) as amended, the power to prohibit any individual or a class ~~of~~ 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 the 17th of 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~~ 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 Attorney-General of ~~Manitoba~~ Manitoba v. Manitobas Licence Holders' Association (1902) A.C. 73. 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 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 none the less 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 the 17th of July 1939 on the basis that it is still in force and was passed under the 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 question propounded by the learned Magistrate by saying that in our opinion there is not in existence any effective Notification under section 14B (2) of the Bombay Abkari Act, 1878, prohibiting

the



the possession of intoxicants by persons generally  
in the City of Bombay.

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By the Court,

*m.g. Rao*

Deputy Registrar.

*Ma*

A.M.H.



*Criminal Reference*  
Appeal No. 75 of 1940 from Original Appellate Decree.

Date of decision 1<sup>st</sup> July 1940.

For approval and signature

The Hon'ble *the Chief Justice*

*The Hon'ble Mr. Justice N. J. Wadia*

The Hon'ble Mr. Justice *Wassoodew*

*The Hon'ble Mr. Justice Sen.*

Whether Reporters of Local Papers may be allowed to see the judgment?

To be referred to the Reporter or not?

Whether Their Lordships wish to see the fair copy of the judgment?

Whether this case involves a substantial question of law as to the interpretation of the Government of India Act, 1935, or any Order in Council made thereunder?

*Madagar.*

HIGH COURT.

Appellate Side.

Criminal Reference No. 75 of 1940.

Counsel Sir Jamshedji Kanga with Mr. S.G.Velinkar,  
Mr. R.J.Kolah and Dr. B.R.Ambedkar with Messrs. Gagrath  
& Co. for the Accused.

Advocate General with Messrs. V.F.Taraporewalla and G.N.  
Joshi and the Government Pleader for the Crown.

Coram: Beaumont, C.J., N.J.Wadia, Wassoodew and Sen, JJ.

1st July 1940.

*f. Court*  
Judgment: ((Per Beaumont, C.J.) -

This is a reference made by the Presidency Magistrate,  
4th Court, under sec. 432 of the Criminal Procedure Code,  
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 the 17th of July 1939 the Government of Bombay issued a Notification under sub-section (2) of sec. 14B of the 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 the 11th of 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 sec. 14B of the 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 VI of 1940 amending the Abkari Act. The material sections of that Act, which we will refer to as "the Amending Act," are secs. 6 and 7. Section 6 amends sec. 14B of the Abkari Act, and in order to appreciate the amendment it is necessary to state



the terms of sec. 14B, 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 authorised 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 section 17 may declare to be the limit of retail sale, except under a permit from the Collector:

provided that nothing in sub-section (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-section (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 sec. 6 of the ~~amending~~ Amending Act the proviso to sub-section (1) was deleted. One object of the proviso would seem to have been 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, 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-section (2) of sec. 14B 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 the 17th of July 1939 to be invalid.

Section 7 of the 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 the 19th of 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 sec. 14B(1) of the Abkari Act. He was charged under sec. 43(1)(a) of the 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 the 17th of 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 the 7th Schedule to the 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 or in certain areas thereof; and (b) whether Sec. 3 and Sec. 6(b) of Bombay Act VI 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 Sec. 14B(2) of the 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 Sec. 7 of the Bombay Act VI of 1940.

In our view the first question does not really arise in connection 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 the 17th of 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 sec. 7 of the 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" 8th Edn. 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 sec. 7, it would render illegal acts committed before the Act was passed and which were legal when committed. The <sup>present</sup> ~~actual~~ accused no doubt does not fall within that category, but others might. In our opinion sec. 7 of the Amending Act does not embrace the Notification of the 17th of 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 the 17th of July 1939, since it had been declared invalid. In our view, therefore, sec. 7 of the Act does not apply to the Notification in question.

Upon the second point, if sec. 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 sec. 41 of the 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 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 sec. 100 of the Government of India Act, 1935, and item 31 in List II of the 7th Schedule. 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 the 7th Schedule, 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 the 1st of 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 Legislature. 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 sec. 14B(1) of the 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 sec. 14B(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 the 17th of 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~~ upon it by the Government of India Act, and he relies on Attorney-General of Manitoba v. Manitoba Licence Holders' Association (1902) A.C. 73. 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 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



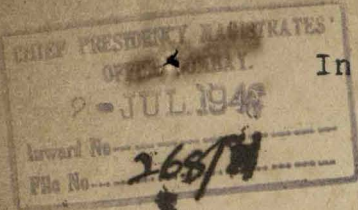
subject to the rights of the Central Government. The absolute prohibition against possession goes much further than merely incidentally diminishing the revenue of the Central Government; it destroys, indirectly no doubt but none the less effectively, the right to import and export intoxicants across 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 the 17th of July 1939 on the basis that it is still in force and was passed under the 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 sec. 14B(2) of the Bombay Abkari Act, 1878, prohibiting the possession of intoxicants by persons generally in the City of Bombay.

*M. Madigan.*  
1-7-1940.





In His Majesty's High Court of Judicature, Appellate Side  
B O M B A Y.

Criminal Reference No. 75 of 1940.

No. 1819 of 1940. The 1<sup>st</sup> day of July 1940.

To

The Presidency Magistrate, 4th Court, Girgaum,  
B O M B A Y.

Upon reading a letter No. 416 dated the 25th May 1940 from the Presidency Magistrate, 4th Court, Girgaum, Bombay, - K.J. Khambata, Esquire, forwarded by the Chief Presidency Magistrate, Bombay, I.N. Mehta, Esquire, under his No. 1777/25 dated the 29th May 1940, - submitting under Section 432 Criminal Procedure Code the Record and Proceedings of his own Court in the case of Imperator versus Saver Manual Dantes, wherein the accused has been charged under Section 43(1) (a) of the Bombay Abkari Act, 1878 read with Notification No. 374/39/C dated the 17th July 1939 issued under Section 14 B of the same Act as amended by Bombay Act No. 6 of 1940 for the opinion of this High Court on the following points :-

- (1) (a) Has the Provincial Legislature power, under item No. 31 of List II of the 7th Schedule to the 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 or in certain areas thereof and
- (b) Whether Section 3 and Section 6 (b) of Bombay Act VI of 1940 are intra vires in particular with regard to total prohibition of possession of liquor and of intoxicating drugs; and if this is answered in the affirmative
- (2) Whether there is in existence any effective Notification under Section 14 B (2) of the Bombay Abkari Act, 1878 absolutely prohibiting the possession of intoxicants by persons

generally

Submitted for  
perusal. It  
may be sent  
to the 4th  
Court Girgaum.

Dec  
2/7/40

J. K.  
2/7.



in

generally in the city of Bombay,  
he (the Presidency Magistrate) be-  
ing of the opinion that both the  
questions should be answered in  
the negative.

And upon hearing Counsel Sir Jamshed Kanga, <sup>with</sup> Mr.S.G.Velinkar  
Mr. R.J. Kolah and Dr. Ambedkar <sup>instructed by</sup> ~~with~~ Messrs Gagrat and Com-  
pany Attorneys for the Accused; and the Advocate General with  
~~and~~ Messrs V.F. Taraporewala and G.N. Joshi and the Govern-  
ment Pleader for the Crown the Court passes the following  
order in the case :-

For the reasons stated in the accompanying judge-  
ment the Court answers the questions <sup>(2)</sup> propounded by the  
learned Magistrate by saying that in its opinion there is  
not in existence any effective Notification under Section  
14B (2) of the Bombay Abkari Act, 1878 prohibiting the  
possession of intoxicants by persons generally in the City  
of Bombay.

By the Court  
*mg. Rao*  
Deputy Registrar.

*mg. Rao*  
Sealer.

Forwarded through the Chief Presidency  
Magistrate, Bombay.



CHIEF PRESIDENCY MAGISTRATE'S  
COURT  
6 - JUL 1940  
Forward No  
File No 268/21

No. 268/21 of 1940  
CHIEF PRESIDENCY MAGISTRATE'S COURT,  
Bombay 1-7-1940

Forwarded with compliments to the  
Presidency Magistrate, Fourth Court, Bombay.

*J. N. Mehta*  
Chief Presidency Magistrate,  
Bombay.

No. 544 of 1940.  
Presidency Magistrate's 4th Court,  
Girgaum, Bombay, 4th July 1940.

Duly noted and returned with compliments.

*K. J. Khandale*  
Presidency Magistrate,  
4th Court, Bombay.

Through:  
The Chief Presidency Magistrate, Bombay.

To be returned please  
*جی. بی. 2/7/40.*

CHIEF PRESIDENCY MAGISTRATE'S COURT,  
Bombay, 6-7-1940  
Returned with compliments to the Registrar,  
S. N. High Court, Appellate Side, Bombay.  
*J. N. Mehta*  
Chief Presidency Magistrate  
Bombay

JUL 8 1940



CRIMINAL JURISDICTION

Confirmation Case No. \_\_\_\_\_ of 193  
Appeal No. \_\_\_\_\_ of 193  
Reference No. 75 of 1940.  
Review No. \_\_\_\_\_ of 193  
Application for Revision No. \_\_\_\_\_ of 193

IMPERATOR vs. Saver Mammal Dantès

Decided on 1st July 1940.

1. Placed in the Record Room, Shelf  
No. \_\_\_\_\_, on the

*V. G. G. G.*

Court Sheristedar.

2. Received and entered in the Catalogue  
of Criminal Cases, Class

*G. M. Shukrawar*  
Record Keeper.

Bombay,

9/8/1940.