

Present : Pereira J.

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SOLICITOR-GENERAL v. PERERA.

504—P. C. Avissawella, 16,774.

Excise Ordinance, No. 8 of 1912, ss. 17, 26 and 30—Arrack renter failing to pay instalment of rent—Cancellation by Government Agent of license to sell arrack under s. 26 (1) (a)—'Fee'—Appeal—Points of law not stated in the petition of appeal urged at the hearing of the appeal—Criminal Procedure Code, s. 340.

Where, in a criminal case, a party has no right of appeal except on a matter of law, the petition of appeal should contain a statement of the matter of law to be argued, and the appellant should at the argument confine himself to the matter stated in the petition; but where a party has a general right of appeal under section 338 of the Criminal Procedure Code, he is not subject to be restricted to the grounds urged in the petition of appeal.

Where the Governor had delegated to the Excise Commissioner the power under section 24 of the Excise Ordinance to determine the conditions and restrictions for the grant of licenses under the Ordinance, and a certain condition in a license had the sanction of the Excise Commissioner,—

Held, that the condition was valid, and a breach of it justified the cancellation of the license.

The term "fee" used in the Excise Ordinance means a sum paid on the issue of a license for the license. The money stipulated to be paid by the buyer of an exclusive privilege to sell arrack cannot be regarded as a fee for the issue of a license.

THE facts are set out in the judgment.

Elliott (with him *B. F. de Silva*), for accused, appellant.—The renter, Perera, did not pay one instalment of the sum for which he had purchased the exclusive privilege of selling arrack. That was not a ground for cancelling the license under section 26 of the Excise Ordinance.

Under section 18 the Governor has the right to grant to any person the exclusive right of selling arrack subject to such conditions

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as he may impose. The conditions of this license were not imposed by the Governor.

The Governor cannot cancel a license except on grounds specified in the Ordinance. The default in paying an instalment is not a ground falling under section 26 (1) (a), under which the Government Agent purported to act.

Where a lump sum is required for granting an exclusive privilege for sale of arrack no duty or fee is due (see section 18).

The terms "duty" and "fee" cannot apply to an instalment of the sum for which the privilege was sold. Fee is given for obtaining licenses, and not for obtaining a monopoly. The term "duty" means excise duty.

The license is issued free of any fee in a case like the present.

The Government Agent can cancel the license only under section 26 (1) (d), and that when the renter surrenders his right. Subsections (b) and (c) have no application to this case.

Bertram, K.C., A.-G., for the respondent.—The appellant cannot argue any point of law other than the point certified (see Criminal Procedure Code, section 340 (2)).

[*Pereira J.*—That section applies to cases when no appeal lies as of right except on a point of law.] The section is wide enough to cover an appeal on points of law in any case.

Elliott.—In the present case an appeal lies as of right on facts, as the accused has been sentenced to a fine of Rs. 100. The appellant's proctor need not have certified any point of law. The fact that one point of law has been certified does not preclude the appellant from raising other points.

Where a renter makes default of payment on an instalment, the procedure to be followed is laid down in section 30. Section 26 does not apply to such a case.

Bertram, K.C., A.-G. (with him *Mahadeva, Acting C.C.*), for the respondent.—It was open to the Government Agent to insert in the license issued by him the conditions of arrack rent sale published in the *Gazette* of February 6, 1913. The Governor has by notification under section 7 (f) delegated his powers under section 24 to the Excise Commissioner. The conditions were framed by the Excise Commissioner under the powers conferred on him by the Governor.

Section 26 (d) does not touch the present case; that refers only to cases where the renter himself surrenders the right.

The term "fee" has been used in many sections of the Ordinance to mean the price for which an exclusive privilege to sell arrack was sold. See section 30, section 31 (2) (f). The same use of the word is to be found in several notifications made under the Ordinance.

The purchase price is a consolidated fee. Non-payment of any instalment of the fee falls under section 26 (1) (a).

It is open to the Government Agent to suspend or cancel the license under section 26 (1) (b) for any breach of conditions subject to which the license was issued. The cancellation may be justified under sub-section (b) also.

It is open to the Government Agent to proceed under section 30, but that is not the only course open to him.

Cur. adv. vult.

July 2, 1914. PEREIRA J.—

This is a prosecution under the Excise Ordinance, No. 8 of 1912. The accused has been convicted of selling an excisable article, to wit, arrack, without a license from the Government Agent, in contravention of section 17 of the Ordinance, an offence punishable under section 43 (h). The accused was a salesman under one J. B. M. Perera, to whom the Governor had, under section 18 of the Ordinance, granted the exclusive privilege of selling arrack in the Three Korales and Lower Bulatgama from July 1, 1913, to September 30, 1914. Perera made default in the payment of an instalment of the consideration due in respect of the grant, and the Government Agent thereupon cancelled the license issued to him, and the sale by the accused referred to above took place after the cancellation of the license. Practically the only ground of appeal set forth in the petition of appeal is that, under section 26 of the Ordinance, the license of a holder of an exclusive privilege can be suspended only on the requisition in writing of the person enjoying the privilege. The appellant's counsel proceeded to urge other grounds, and objection was taken thereto by the Attorney-General, who contended that the appellant should be restricted to the grounds of appeal mentioned in the petition of appeal, and cited section 340 (1) of the Criminal Procedure Code. In this connection that section does no more than provide that the petition of appeal shall state shortly the grounds of appeal. I do not think that that is an authority for saying that in the argument of the appeal the appellant should be restricted to the grounds set forth in the petition of appeal. Sub-section (2) of section 340 provides that where the appeal is on a matter of law, the petition of appeal shall contain a statement of the matter of law, to be argued. That section has, so far as I am aware, been treated as applying only to cases in which a party has no right of appeal except on a matter of law. I am inclined to think that that is the correct interpretation of the sub-section. Otherwise I should have expected the provision to be expressed in totally different terms. I over-ruled the Attorney-General's objection, and in view of the decision that I have come to in this case nothing more need be said about it.

The crucial question in the case is whether the Government Agent acted *ultra vires* in cancelling the license issued by him to J. B. M. Perera, the so-called renter. This license is filed of record in the case, and it will be seen that it is subject to the "arrack rent sale

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conditions published in the *Ceylon Government Gazette* No. 6,546 of February 6, 1913." The question was debated whether it was within the power of the Government Agent to insert in a license issued by him under the Excise Ordinance such a condition as that referred to above. Under section 24 of the Excise Ordinance every license issued under it shall be granted (to quote material words only) subject to such restrictions and on such conditions as the Governor may direct generally or in any particular case. The Governor himself does not appear to have prescribed any conditions and restrictions under this section; but under section 7 (f) of the Ordinance the Governor had the power by notification to delegate to any Excise Officer any of his powers under section 24, and by Notification No. 1 published in the *Government Gazette* No. 6,536 dated December 13, 1912, paragraph 5, the Governor has delegated to the Excise Commissioner the power under section 24 of the Ordinance to determine from time to time the restrictions and conditions for the grant of licences under the Ordinance, and in view of the defence set up in this case and the statement in the petition of appeal, especially the statement in paragraph 2 (e), I presume that the insertion of the condition referred to above in the license that we are concerned with in this case had the sanction of the Excise Commissioner.

The defence seriously pressed in appeal was that the Government Agent had written to the renter that he had cancelled his license under section 26 (1) (a) of the Ordinance, which speaks of default of payment of a fee, and that the sum for which the exclusive privilege to sell arrack was purchased by the renter could not be deemed to be a "fee." At the argument in appeal I was not inclined to agree with the appellant's counsel, but on a fuller consideration of the matter I think that he is right. "Fee" as used in the Ordinance (see section 24) is a sum paid on the issue of a license for the license; the sale of an exclusive privilege to sell arrack takes place quite independently of the issue of licenses, although the grantee is bound to take a license after his purchase. But clearly by the non-payment of an instalment the renter committed a breach of a condition of the license under sub-section (b) of section 26 of the Ordinance. The reason given by the Government Agent in his letter to the renter dated March 9, 1914, for the threat to cancel his license was tantamount to default in payment of part of the purchase money, and the fact that sub-section (a) of section 26 was cited did not render the cancellation of the license any the less effectual. The Government Agent was not bound to cite any section at all.

The contention that in view of the provision of section 30 of the Ordinance it was not open to the Government Agent to take action under section 26 I do not think is at all tenable.

For the reasons given above I dismiss the appeal.

Appeal dismissed.