

Ch. Mallesham Vs. the Commissioner of Proh. and Excise and ors.

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Court : Andhra Pradesh

Decided On : Aug-08-2003

Reported in : 2003CriLJ4689

Judge : L. Narasimha Reddy, J.

Acts : Andhra Pradesh Excise Act, 1968 - Sections 2(19), 34(5), 46(2) and 63(2)

Appeal No. : Writ Petition No. 14132 of 2003

Appellant : Ch. Mallesham

Respondent : The Commissioner of Proh. and Excise and ors.

Advocate for Def. : Gov. Pleader

Advocate for Pet/Ap. : D. Bhaskar Reddy, Adv.

Disposition : Writ petition allowed

Judgement :

ORDER

L. Narasimha Reddy, J.

1. The petitioner is the owner of an Auto Trolley. He was issued a show cause notice dated 16-10-2000 by 3rd respondent, alleging that on 31-8-2000 the vehicle was found transporting 28 lumps of black jaggery and he was asked to show

cause as to why the vehicle should not be confiscated. Observing that the petitioner did not submit any explanation and claiming to be acting in exercise of the powers under Section 46(2) of the A.P. Excise Act, (hereinafter referred to as 'the Act') the second respondent the Deputy Commissioner of Prohibition and Excise, Karimnagar, had confiscated the vehicle of the petitioner together with the goods, through his proceedings dated 30-10-2001, on the ground that it was involved in transportation of 'Jaggery'. The violation is said to be of Section 34(a) of the Act. The petitioner carried the matter in appeal before the first respondent the Commissioner of Prohibition and Excise. He affirmed the order of the second respondent. Hence this writ petition.

2. Learned counsel for the petitioner contends that jaggery or black jaggery is not intoxicant as defined under the Act, that he did not involve in import, manufacture, collection, possession of the intoxicant and, as such, the penalty imposed under Section 34(a) of the Act is unsustainable. It is also his case that he did not have the knowledge of the trolley having been used in transporting black jaggery. The petitioner complains that he was not given an opportunity before the order of confiscation came to be passed.

3. Learned Government Pleader of Prohibition and Excise, on the other hand, submits that reference to Section 34(a) of the Act in the order of confiscation is only a typographical mistake. According to him, the confiscation was on the ground that the vehicle of the petitioner was used in transporting black jaggery, which is used in manufacture of illicit liquor and the confiscation is valid in view of the judgment of a Full Bench of this Court in *Ganesh Traders (Kirana and General Merchants), Dherampuri, Karimnagar District v. District Collector, Karimnagar*, (2002) 1 Andh LD 210 : (2002 Cri LJ 1105) (FB) and Section 34(f) of the Act.

4. On the allegation that the vehicle of the petitioner was used in transportation of black jaggery, the 3rd respondent seized it on 31-8-2000 and a crime was registered. Challenging the seizure, the petitioner filed W.P. No. 21303 of 2000. An interim order was granted on 7-11-2001 directing release of the vehicle. The petitioner was issued a show cause notice dated 16-10-2000. The petitioner contends that in view of pendency of W.P. No. 21303/2000, he did not submit his

explanation. It is also his case that he was not served with any notice or date of hearing.

5. Be that as it may, the 3rd respondent passed order dated 30-10-2001 within the following observations :--

'The point for consideration is whether the vehicle is involved in transportation of jaggery, I have perused the records produced before me such as P.R. and panchanama and other relevant documents. The facts of the case reveal that the Prohibition and Excise Officials have detected a case of illegal transportation of jaggery at about 7.30 p.m. at Jagtial (Gollapalle road) and seized the property i.e. auto trolley No. A.P. 15-U-715 along with 28 lumps of jaggery.

It is clearly established beyond any doubt that an offence of illegal transportation of jaggery is committed which is punishable under Section 34(a) of A.P. Excise Act, 1968 and therefore the property seized is liable for confiscation under Section 45 of the said Act.

Therefore, in exercise of the powers vested in me under Section 46(2) of A.P. Excise Act 1968 I hereby confiscate the following, seized property to the Government of Andhra Pradesh.

One auto trolley bearing No. A.P. 15U9715 along with (28) lumps of jaggery.'

From a reading of this, it is evident that the 3rd respondent had confiscated the vehicle of the petitioner on the ground that it was involved in transportation of jaggery. The provision under which the confiscation is made is Section 34(a) of the Act.

6. The 3rd respondent was sure that what was transported through the vehicle of the petitioner is jaggery. The name of the commodity assumes significance for two reasons. Firstly, jaggery is not an item, which is treated as intoxicant, within the meaning of Section 2(19) of the Act. Secondly it is only the black jaggery that was treated as a potential raw material for manufacture of illicit liquor and a Full Bench of this Court in Ganesh Traders' case (2002 Cri LJ 1105) (supra), held that confiscation of that commodity, subject to certain conditions, is sustainable.

7. In this regard, it needs to be observed that Hon'ble Chief Justice S.B. Sinha, as he then was, held that unless the black jaggery is brought within the purview of the A.P. Excise Act or the rules made thereunder of the commodity as such is regulated or prohibited under the Act and Rules, it cannot be seized or confiscated. Majority comprising of the Honourable Justice Goda Raghuram and Justice V.V.S. Rao held that it is permissible in law to fill the legislative vacuum on procedural aspects and thereby enable the excise authorities to seize and confiscate the black jaggery if it is used in manufacture of illicit liquor.

8. From the ratio laid down by the majority, it is evident that black jaggery per se cannot be treated as a contraband and therefore cannot be seized and confiscated straightway. It is only after a legislative measure is taken, chemical analysis is undertaken by the concerned authorities and opinion is formed to the effect that the commodity seized is such that it is not useful for any other purpose except for manufacture of black, jaggery, that the punitive steps can be resorted to. This is evident from the following observations of Hon'ble Justice Raghuram who is party to the majority view. In Paras 32 and 33 of his Lordship's separate judgment, it was observed as under :--

'32. As potential hardship and grave inconvenience would ensure in the absence of a clear prescription as to what constitutes 'Black jaggery' within the meaning of the 1968 Act, the State Government is directed to prescribe, by an appropriate instrument, the description, character and composition of 'Black Jaggery' that would have no other use except for the manufacture of an intoxicant, prescribe procedures for prompt and speedy analysis of 'Black Jaggery' seized, duty specifying the authority or agency for conduct of such analysis, prescribe the time frame within which the report of such an analysis should be submitted to the regulatory agency and shall further specify that on such report recording that the commodity seized is not 'Black Jaggery' within the meaning of the 1968 Act as interpreted by this Court above, the seized material and the vehicles carrying the same shall be released forthwith and further proceedings dropped.'

33. As 'Black Jaggery' in general may include 'black jaggery' within the meaning of the 1968 Act and as the question is whether a specific sample of black jaggery

includes 'black jaggery' as comprehended within the meaning of the 1968 Act and as this identification is possible only after the analysis of the sample, I hold that the satisfaction of the regulatory agency/authority under the Act that a specific material is 'black jaggery' within the meaning of this Act, would justify the seizure thereof for the purpose of further proceedings, which shall of course, be subject to the result of the analysis.'

A reading of these two Paragraphs discloses that black jaggery, as a commodity is required to be brought within the fold of the Act 'by an appropriate instrument'. Obviously, this, can be only by amendment to the A.P. Excise Act. It is not permissible to bring the commodity within the purview of the Act through the exercising of framing of Rules, because the term 'intoxicant', etc., are not left to be defined or supplemented through the Rule Making Process. A harmonious reading of Paragraphs 32 and 33 indicates that it is only as and when the necessary legislative procedure is undertaking to bring the black jaggery within the purview of the Act and if it emerges thereafter, in a given case, that on a chemical analysis the sized product conforms to the characteristic of the proscribed product, that further punitive action can be taken. Such an exercise has not at all been undertaken. The respondents are not able to satisfy this Court that ever since the Full Bench of this Court rendered its decision, any exercise was undertaken as contemplated in Para 32 referred to above.

9. The 2nd aspect of the matter is that even assuming that the vehicle of the petitioner was used in transporting black jaggery and the steps directed by this Court in Ganesh Traders case (2002 Cri LJ 1105) (supra) were undertaken, the only provision under which the petitioner could have been proceeded against is Section 34(f). However, the 3rd respondent had confiscated the vehicle in exercise of its powers under Section 34(a) of the Act. It reads as under :--

'34. Penalties for illegal import etc : Whoever, in contravention of this Act or of any rule, notification or order made, issued or passed thereunder or of any licence or permit granted or issued under this Act,--

(a) imports, exports, transport, manufactures, collects or possesses or sells any intoxicant; or

So far as black jaggery is concerned even the majority of the Full Bench in Ganesh Traders case (supra) did not treat it as intoxicant. It was treated as potential material for manufacture of illicit liquor and it was indicated that it is capable of being brought within the purview of Sections 13(f) and 34(f) of the Act, subject, of course to the exercise indicated above. As long as the commodity that was transported through the vehicle was not an intoxicant, the question of confiscating the vehicle under Section 34(a) does not arise.

10. The facility of saving an order, which is passed by invoking a wrong provision, if it is sustainable on another provision, is not available, in cases where the citizens face penal consequences on account of such orders. If the authority, which passed the order, had luxury of being indifferent to or ignorant of the provisions, the citizens cannot be made to pay for it.

11. An attempt was made by the 1st respondent the appellate authority to cover up the lapses committed by the 2nd respondent. The appellate authority cannot be permitted to cure the lapses committed by the original authority. Further, the appeal preferred by the aggrieved party cannot becomes suicidal to him, in that the material lapses committed by the original authority cannot be permitted to be cured in appeal nor can it be supplemented with fresh reasons by the appellate authority.

12. Viewed from any angle, the seizure and confiscation of the vehicle of the petitioner cannot be sustained. Therefore, the writ petition is allowed and the order dated 30-10-2001 passed by the 2nd respondent, as confirmed by the 1st respondent in his order dated 20-3-2003 is set aside. No costs.