

**State of Chhattisgarh Vs. Bhugdev and Others**

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**Court :** Chhattisgarh

**Decided On :** Jul-09-2001

**Reported in :** 2001(3)MPHT116(CG)

**Judge :** Mr. R.S. Garg, J.

**Acts :** Madhya Pradesh Excise Act, 1915 - Sections 31, 34, 34(A), (1) and (2), 36 and 38; Code of Criminal Procedure (CrPC) , 1974 - Sections 377, 397 and 401

**Appeal No. :** Criminal Appeal No. 211/2001 with Cr. A. Nos. 212-216 and 320 of 2001

**Appellant :** State of Chhattisgarh

**Respondent :** Bhugdev and Others

**Disposition :** Appeal allowed

**Judgement :**

**R.S. Garg, J.**

1. This judgment shall also dispose of Criminal Appeals No. 212/2001 (State v. Dhaneswar Prasad), No. 213/2001 (State v. Ghanshyam), No. 214/2001 (State v. Roshanlal), No. 215/2001 (State v. Shyamlal), No. 216/2001 (State v. Phoolbai) and No. 320/2001 (State v. Lalmati).

2. Present are the appeals under Section 377 of the Code of Criminal Procedure. The appellant/State being aggrieved by the judgments dated 20-12-2000 delivered by the learned Judicial Magistrate, First Class, Raigarh, convicting the appellant under Section 36 of the M.P. Excise Act, 1950 and sentencing him till rising of the Court and pay fine of Rs. 10/-, has preferred these appeals.

3. Learned counsel for the State submits that though present are the cases where the State has filed an appeal under Section 377, Cr.P.C., but this Court must exercise its power under Section 397/401, Cr.P.C, because the Court below illegally framed the charges punishable under Section 36 of the M.P. Excise Act, while in fact the prosecution has come with the case that each of the accused was answerable to charge under Section 34 of the Excise Act. He also submits that from the proceedings recorded by the learned Judicial Magistrate, it would clearly appear that without assigning any reasons the said Magistrate instead of framing charges under Section 34 of the M.P. Excise Act, had framed the charges under Section 36 of the Act. He submits that present are the fit cases for setting aside the orders passed by the learned Court below.

4. Learned counsel for the accused persons, on the other hand, submit that as the State has not filed any appeal against the framing of the charge under Section 34 nor had challenged the orders for not framing the charge under Section 34 of the Excise Act, there is no scope for interference in these proceedings.

5. I have heard the parties at length.

6. Before appreciating the rival contentions it would be necessary to refer to Section 34 so also 36 of the Excise Act. Sections 34 and 36 of the Act read as under :--

'34. Penalty for unlawful manufacture, transport, possession, sale etc.-- (1) Whoever, in contravention of any provisions of this Act, or of any rule, notification or order made or issued thereunder, or of any condition of a licence permit or pass granted under this Act,--

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

- (b) save in the case provided for in Section 38, sells any intoxicant; or
- (c) cultivates bhang; or
- (d) taps any toddy producing tree/or draws toddy therefrom; or
- (e) constructs, or works any distillery, brewery or vintnery; or
- (f) uses, keeps or has in his possession any material, still utensil, implement or apparatus, whatsoever for the purpose of manufacturing any intoxicant other than toddy; or
- (g) removes any intoxicant from any distillery, brewery, vintnery or warehouse licensed, established or contained, under this Act,
- (h) Bottles any liquor;

shall subject to the provisions of sub-section (2), be punishable for every such offence with imprisonment for a term which may extend to one year and fine which shall not be less than five hundred rupees but which may extend to five thousand rupees: Provided that when any person is convicted under this Section of any offence for a second or subsequent time he shall be punishable for every such offence with imprisonment for a term which shall not be less than two months but which may extend to twenty four months and with fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees.

(2) Notwithstanding anything contained in sub-section (1), if a person is convicted for an offence covered by clause (a) or clause (b) of sub-section (1) and the quantity of the intoxicant being liquor found at the time or in the course of detection of the offence exceeds fifty bulk litre, he shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than twenty five thousand rupees but may extend to one lac rupees :

Provided that when any person is convicted under this Section for an offence for second or subsequent time, he shall be punishable for every such offence with imprisonment for a term which shall not be less than two years but which may

extend to five years and with fine which shall not be less than fifty thousand rupees but may extend to two lac rupees.

(3) When an offence covered by clause (a) or clause (b) of sub-section (1) is committed and the quantity of liquor found at the time or in the course of detection of such offence exceeds fifty bulk litres, all intoxicants, articles implements, utensils, materials, conveyance etc. in respect of or by means of which the offence is committed, shall be liable to be seized and confiscated. If such an offence is committed by or on behalf of a person who holds a licence under the Act for manufacturing or stocking or storing liquor for sale on which duty at the prescribed rate has not been paid then notwithstanding anything contained in Section 31 the licence granted to him shall be cancelled in case he is convicted for the offence as aforesaid.

(4) The seizure or confiscation of the intoxicants, articles, implements, utensils, materials and conveyance and the cancellation of licence as provided under sub-section (2) above shall be in addition and without prejudice to any other action that may be taken under any provisions of the Act or rules made thereunder.

36. Penalty for illegal possession.-- Whoever, without lawful authority, has in his possession any quantity of any intoxicant knowing the same to have been unlawfully imported, transported, manufactured, cultivated or collected knowing the prescribed duty not to have been paid thereon, shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both.'

7. Section 36 would apply to a case where somebody possesses any quantity of any intoxicant knowing the same to have been unlawfully imported, transported, manufactured, cultivated or collected knowing the prescribed duty not to have been paid thereon. A fair perusal of Section 36 of the Act would make it clear that Section 36 applies to a case where a person is found in possession of any quantity of any intoxicant inspite of the knowledge that the prescribed duty has not been paid thereon. In the present case the police did not come with the case that the accused persons were found in possession of the intoxicant on which prescribed duty was not paid. Present certainly would be a case under Section 34 of the

Excise Act. Section 34 of the Act provides that whoever, in contravention of any provisions of this Act, or of any rule, notification or order made or issued thereunder, or of any condition of a licence permit or pass granted under this Act, manufactures, transports, imports, exports, collects or possesses any intoxicant shall be liable to be punished for every such offence with imprisonment for a term which may extend to one year and fine which shall not be less than five hundred rupees but which may extend to five thousand rupees. In the present cases the prosecution had alleged that in presence of the accused persons search was effected and illicit country-made liquor was recovered. The possession of country-made liquor would certainly be an offence punishable under Section 34 of the Excise Act.

8. The order passed by the learned Court below shows absolute non-application of mind. In the proceedings recorded by the learned Trial Court, it has recorded that challan under Section 34-A of the Excise Act was filed but all of a sudden the learned Court below framed a charge under Section 36 of the Act. If the Court was of the opinion that the accused could not be charged with offence punishable under Section 34 or 34-A of the Act, then, it was required to give reasons, it simply could not record that the accused is charged with Section 36 of the Act.

9. In my opinion, present are the fit cases where this Court must exercise its power under Section 397/401 of the Cr.P.C., to set at naught the illegality committed by the Trial Court.

10. The orders passed by the learned Court below deserve to and are accordingly set aside. It is, however, directed that as the accused persons had already undergone the sentence awarded to them and have deposited the fine, the Court below shall refund the amount deposited by them and in case of conviction while awarding the sentence shall take into consideration the sentence already suffered by the respondents.

11. Though Section 34 of the Excise Act is non-bailable, but looking to the totality of the circumstances, I hereby direct that each of the applicants be released on bail on his furnishing a personal bond in sum of Rs. 500/- with one surety in the like amount to the satisfaction of the Trial Court. The Trial Court shall restore all

the cases to their original numbers and shall proceed with the matters in accordance with law.

12. The appeals are allowed with the directions aforesaid.

13. Criminal Appeals allowed.

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