

Urmila Sahoo Vs. State of Orissa

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Court : Orissa

Decided On : Oct-20-1992

Reported in : 76(1993)CLT581; 1993(I)OLR225

Judge : L. Rath, J.

Acts : Bihar and Orissa Excise Act, 1915 - Sections 47

Appeal No. : Criminal Revision No. 190 of 1989

Appellant : Urmila Sahoo

Respondent : State of Orissa

Advocate for Def. : S.S. Rao, Addl. Govt. Adv.

Advocate for Pet/Ap. : S. Misra, Adv.

Judgement :

L. Rath, J.

1. This revision assails the conviction of the petitioner Under Sections 47 (a) and (f) of the Bihar and Orissa Excise Act and the sentence to undergo S.I. for six months on each count and to pay a fine of Rs. 500/- in default to undergo S. I. for a further period of one month with direction that the sentences of imprisonment are to run concurrently. The petitioner stood the trial for recovery of one aluminium still

having smell of Mohua-wash, one plastic jerrican containing five litres of I. D. liquor, one still-head and eight earthen pots each containing twenty litres of Mohua-wash from her house. The prosecution against her was based upon a raid conducted by PW 3, the S. I, of Excise, Bhanjanagar on 27-8-1985 on the house of the petitioner after observing all formalities and finding the aforesaid articles there. At the time of the search only the petitioner was in the house. Prosecution report was submitted by the S. I. of Excise both against the petitioner and her husband. The order of the learned Magistrate in 2 (a) CC Case No. 19/86 shows him to have directed issue summons to both the accused directing their appearance on 28-2-1986 but on that date, only the petitioner appeared in Court and thereafter nothing is found on record as to how the Court dealt with the other accused who never appeared in the case and instead the order-sheet reveals the case to have exclusively proceeded against the present petitioner ending in her conviction. Mr. Misra, the learned counsel for the petitioner, has urged, in assailing the conviction and sentence, that there was absolute lack of evidence of the seizure of the articles to have been made from the conscious possession of the petitioner and that for such reason the very prosecution against the petitioner was misconceived.

2. The learned Addl. Government Advocate verily concedes that though the prosecution report was submitted against both the husband and wife, yet somehow or other the case continued only against the wife and that beyond the fact that the seizure is shown to have been made from her as appears from Ext. 1, the seizure-list, there is no other evidence to show that the recovery of the articles had been made from her possession. He however submits that as the petitioner was the lady of the house and the contraband articles were found in the house, her possession thereof is to be presumed and as such taking the aid of Section 48 of the Bihar and Orissa Excise Act, the commission of the offences by her is to be presumed.

3. It is far too well-settled in law that merely because the seizure of the contraband articles was made in presence of the wife residing with her husband, possession of such articles cannot be found with her. Possession means actual conscious possession with dominion and control over the articles. A mere passive

possession or passive awareness of the existence of the articles would not be exclusive possession as is required to be established for the purpose of Section 48 and Section 47 of the Act. When contraband articles are found in a house in possession of co-owners or in a joint family house, there is no presumption that all the members of the family or all the co-owners are in possession of the articles. If the seizure is made in presence of the head of the family, prosecution has to suggest that he must have been aware of the presence of the articles and a presumption is to be drawn of he having been in possession of the articles though it will be a rebuttable presumption and he may show that in fact the articles were in exclusive possession of any other member of the house. In AIR 1933 Patna 272 (*Lachminiya Thakurani v. Emperor*), with almost similar facts as in the present case, it was held that where the instruments-and materials are found in house and is sought to be fixed responsibility upon any member of the family other than the head of it, it is necessary to prove that possession and control was with the subordinate member alone or with the subordinate member also. It is equally so necessary, where the wife is sought to be made liable along with the husband with whom she is living, even if he also has a concubine in the house. In that case the appellant was living with her husband, the instruments and materials had been found in their bedroom and the appellant had pointed out some of the articles which the police had been unable to find. It was held that merely because the wife knew that certain implements and materials were in the possession of her husband and also where those implements and materials were to be found, it did not necessarily indicate that she herself was in subordinate possession or in any kind of possession of them and hence she could not be convicted on that evidence.

4. In AIR 1961 Madras 162 (*In re, Wahid Basha*), it was observed that where articles were recovered from places under joint family possession, the head of the family is presumed to be in possession of any illicit article found in the house though such presumption is rebuttable and the weight attached to it must vary according to circumstances. Where two or more persons are charged with joint illegal possession, it is incumbent on the State to prove, (a) that each of the accused had either physical or constructive possession of the property, or (b) that one or more of them had possession thereof, either physical or constructive, on

behalf of themselves and the other accused to the knowledge of the latter. Similar principles were also laid down in AIR 1951 Patna 296 (Mahabir Singh and Ors. v. The State) explaining that the presumption that arises against the head of the family is however a rebuttable one. Mr. Misra for the petitioner has relied on two decisions, 1985 (II) OLR 508 (Kashinath Behera v. The State of Orissa) and 1986 (I) OLR 576 (State of Orissa v. Lokanath Sahu and Anr.). These cases also reiterate the principle that possession to become an offence must be conscious and exclusive possession of the accused. In the latter case where Bhang was seized from betel shop and the store house where two brothers who were the accused lived, there was no material to show whether the shop and store were jointly owned by both of them and the benefit of doubt was given to the accused.

5. It has also been submitted by the learned Addl. Government Advocate that the petitioner having signed the seizure list showing the seizure to have been made from her, her possession both exclusive and conscious should be inferred and as such no infirmity can be found with her conviction. This submission is not to be accepted in view of the decision of this Court in 31 (1965) CLT 990 (State of Orissa v. Nilakantha Sahu and Anr.) wherein it was held, relying upon the decision in AIR 1964 SC 828 (wrongly printed 611) (Raja Ram Jaiswal v. State of Bihar), that mere signature of the accused in the seizure list prepared by the police is not evidence against the accused and in any case such admission is hit by Section 25 of the Evidence Act.

6. In view of such position of law and the frank concession of the learned Addl. Government Advocate that there is no independent evidence absolutely to show that the petitioner was in conscious and exclusive possession of the articles seized, it must be held that the prosecution has not been able to establish the charges against the petitioner.

7. In the result, the revision succeeds and the conviction and sentence of the petitioner are set aside. The bail-bond of the petitioner be discharged.