Huding Singh Vs. State

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Court : Orissa

Decided On : Aug-01-1994

Reported in : 78(1994)CLT1031; 1995(I)OLR102

Judge : A. Pasayat, J.

Acts : Bihar and Orissa Excise Act, 1915 - Sections 47; Board's Excise Rules - Rule 2(17)

Appeal No. : Criminal Revision No. 576 of 1991

Appellant : Huding Singh

Respondent : State

Advocate for Def. : A.N. Misra, Addl. Govt. Adv.

Advocate for Pet/Ap. : Sangam Kumar Sahu, Adv.

Disposition : Revision dismissed

Judgement :

A. Pasayat, J.

1. Petitioner faced trial before learned Sub divisional Judicial Magistrate, Baripada (in short, 'SDJM') for having committed offences punishable under Section 47(a) and (f) of the Bihar and Orissa Excise Act, 1915 (in short, the 'Act'). He was found

guilty, convicted under the aforesaid provisions and sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs. 500/- on each count. In appeal the learned Sessions Judge, Mayurbhanj, Baripada confirmed the conviction under Section 47(f) of the Act, maintained the sentence, but set aside the conviction under Section 47(a) and consequentially the sentence imposed.

2. Accusations which led to the trial of the petitioner are as follows:

On 23-5-1987 at 8.30 am. Excise Sub-Inspector (PW 2) along with other members of his staff was holding patrol duty in village Gumudi. Having learnt reliably and entertaining reasonable suspicion about possession by, and distillation of illicit liquor in the house of accused, raided his house in presence of the witnesses. During raid, three plastic jars, in all containing 27 litres of illicitly distilled liquor, two aluminium cooking pots, in all containing 40 KGs. of mahua wash, nine earthen vessels, in all containing 180 KGs of fermented mahua wash and other instruments for distillation of liquor were recovered from possession of the petitioner. Aforesaid contraband materials were seized in presence of the witnesses observing due formalities. Litmus paper and hydrometer tests were conducted Apart from the tests conducted, the Excise Officer in view of his long departmental experience from the smell concluded the seized substance to be illicitly distilled liquor, and on examination of the instruments to be meant for distillation of the said liquor. Seizure was made in presence of the accused, and a copy of the seizure fist was handed over to him, who in token of acceptance gave signature in the seizure list. After other formalities of investigation were observed, prosecution report was submitted against the petitioner who faced trial.

3. The accused took the plea of denial of the allegations made by the prosecution.

4. The teamed SDJM, Baripada on consideration of the evidence of witnesses and materials on record, found the accused guilty and convicted and sentenced as aforesaid. The learned Sessions Judge in appeal came to hold that though the appellant-petitioner was distilling illicit liquor or in essence was working a distillery or brewery or manufactory in which liquor was being manufactured, which is punishable under Section 47(f). he was also in possession of the distilled product and therefore, it would not be proper to make two separate convictions for

offences punishable under Sections 47 (a) and 47 (f), as violation alleged under Section 47 (f) includes violation of offences covered under Section 47 (a).

5. The learned counsel for petitioner fairly accepted that Section 47 (a) and Section 47 (f) operate in two separate fields, and in a given case conviction both under Section 47 (a) and Section 47 (f) is permissible. He further fairly accepted that if the accusations made by prosecution are accepted, the petitioner can be convicted both under Section 47 (a) and Section 47 (f) of the Act. In my view, the concession is fair and is based on a proper appreciation of the legal position.

6. The learned counsel for petitioner, however, submitted that the conviction cannot be maintained because the Investigating Officer did not have any specialised training and experience in respect of liquor, and therefore, merely because of his departmental experience his evidence cannot be sufficient to fasten the guilt on the accused. Strong reliance is placed on a decision rendered by a learned Single Judge of this Court in Suma Das v. State of Orissa, 1993 (II) OLR 392 (1993) 6 OCR 612. It is further stated the except the evidence of official witnesses, there is no other evidence and therefore, the conviction should not have been made. The learned counsel for State on the other hand supported the conviction stating that the decision in Suma Das's case (supra) is clearly distinguishable and is not applicable to the facts of the case. He submitted that the petitioner did not raise a dispute about lack of experience of the concerned official either during trial or before the first appellate Court, and for the first time such a point should not be permitted to be urged before this Court.

7. Section 47 which is relevant for our purpose reads as follows :

'47. Penalty for unlawful import, export, transport, manufacture, possession, sale etc.

If any person, in contravention of this Act, or of any rule, notification or order made issued or given, or of any licence, permit or pass granted under this Act,

(a) imports, exports, transports, manufactures, collects, possesses or sells any liquor or an intoxicating drug, or

XX XX XX(f) constructs or works any distillery or brewery of other manufactory in which liquor is manufactured, or XX XX XX'

As indicated above, the clauses operate in different contexts, and there is no overlapping Learned Sessions Judge was, therefore, distinctly wrong in his conclusions.

8. It is trite law that on the evidence of official witnesses alone a conviction can be maintained. (See-Rodan Singh v. State of Rajasthan ; AIR 1978 SC 154, Subash Chandra Panda v. State of Orissa : 1989 (II) OLR 381, (1989) 2 OCR 473 and Subodh Sethi and Anr. v State : 73 (1992) CLT 28). Therefore, the plea that the evidence c official witnesses is not sufficient for conviction is without substance In the case at hand, their evidence clearly proves seizure and conduct c tests. Merely because they are official witnesses, in the absence of any material to show that they acted mala fide, conviction can be maintained on their evidence alone. I find no infirmity in the conclusions of Courts below by acting on the evidence of PW 2. Alleged lack of experience and effect thereof is essentially a question of fact. It cannot be laid down as a rule of universal application that a witness having departmental experience cannot state that the liquid seized is illicitly distilled liquor. It would all depend upon facts of a particular case. In fact in Suma Das's case (supra), it has been observed that from the smell and test a liquid can be held to be illicitly distilled liquor. An officer who has acquired sufficient experience as an official of the Excise Department can in a given case tender evidence in that regard.

9. Whoever uses, keeps or has in his possession any materials, still, utensil, implement or apparatus whatsoever for the purpose of manufacturing any intoxicant other then tari is guilty of the offence under Section 47 (f). Mere keeping for use of such articles insufficient to bring home the charge, even though actual distillation may not have taken place. Fermented Mahua wash was recovered from the petitioner. In Rule 2 (17) of the Board's Excise Rules. 1965, 'wash' has been defined to mean the material for distillation which is set for or has undergone formentation by the natural or by any artificial means or process. Since Mahua wash has undergone formentation stage, it goes without saying that process of

manufacture had already set in and offence under Section 7 (f) is clearly made out. Under almost identical fact situation, similar view was expressed in Sania Das v. State of Orissa: 77 (1994) CLT 733. There a plea relating to lack of qualification or specification or jurisdiction is raised for the first time in appellate or revisional Court, the same is not to be entertained, if any factual adjudication is necessary. In fact while dealing with a case under the Prevention of food Adulteration Act, 1954 where lack of qualification of the public analyst was alleged for the first time in the first appeal, the Supreme Court observed that the plea was not to be accepted.(Set. Rameshwar Das Chottey Lal and Ors. v. Union of India and Anr. ; 1979 PAJ 173).Similar view was also expressed by this Court in Abhimanyu Dash v. State of Orissa ; 6 9 (1990) CLT 589. In a case under the Act. similar view was taken in Palka Dusri v. State of Orissa (Criminal Revision No. 464 of 1993 disposed of on 28-1-1994). As indicated above, the question whether a person has sufficient experience or not falls within the domain of factual dispute. On perusal of the records, 1 find that no specific plea was taken in that regard before either the trial or appellate Court.

10. The Excise Official (PW 2) has stated that he tested the liquor and fermented Mahua wash with blue litmus paper which turned red and also tested the liquor with hydrometer. He has also categorically stated that besides those two tests, from his six years of departmental experience and from smell of liquor and Mahua wash he came to know that the contents of the plastic jars were illicit distilled liquor, and the fermented Mahua wash was meant for distillation of such liquor. There was not even any suggestion to the witness that the departmental experience was not relatable to liquor or distillery and therefore, was it no consequence, and he was not competent to state about the nature of the liquor. The relevant question was his experience of which he deposed. Therefore, the Courts below have rightly relied upon the evidence of PW 2.

11. The petitioner can be convicted for commission of offence punishable under Section 47(a) and Section 47 (f), more particularly In view of the concession made by the learned counsel for petitioner. But in the absence of any statutory challenge by the prosecution, legality of conviction under Section 47 (f) is adjudicated. The conviction and sentence as maintained by appellate Court do not need any

modification. Revision application fails and is dismissed.