

Basudev Pradhan Vs. State of Orissa

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Court : Orissa

Decided On : Feb-18-2000

Reported in : 2000CriLJ2553

Judge : R.K. Patra, J.

Acts : Bihar and Orissa Excise Act, 1915 - Sections 47 and 48; [Evidence Act, 1872](#) - Sections 45

Appeal No. : Criminal Revision No. 160 of 1996

Appellant : Basudev Pradhan

Respondent : State of Orissa

Advocate for Def. : Addl. Standing Counsel

Advocate for Pet/Ap. : S.P. Mishra, ;A.K. Mishra and ;S.K. Mishra, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

R.K. Patra, J.

1. The petitioner, undaunted with the dismissal of his appeal in the Court of the Addl. Sessions Judge, Puri has filed this revision challenging the validity of his

conviction and sentence of six months r.i. imposed under Section 47(a) of the Bihar and Orissa Excise Act, 1915 (hereinafter referred to as the Act').

2. On 25-9-1995 the Sub-Inspector of Excise (PW-2) and the Excise Constable (PW-3) were on patrol duty at Nimapara bus-stand. At about 1 p.m. the bus bearing registration No. ORG 7672 bound for the new capital arrived at Nimapara bus-stand from which the petitioner got down with a cloth bag in his hand. The Excise officials suspecting that he was in possession of some contraband excise articles nabbed him and recovered 500 grams of non-duty paid bhang and 50 grams of non-duty paid ganj a from the bag which he was carrying. As he failed to produce any document in support of possession of such articles, the Excise officials seized the same and placed him on trial on the allegation that he contravened the provision of Section 47(a) of the Act being in possession of non-duty paid bhang and ganj a without licence.

3. The plea of the petitioner was one of denial.

4. The prosecution examined three witnesses to prove its case. PW-1 although was examined as a witness to the seizure, he denied his knowledge about any such seizure. PW-2 was the Sub-Inspector of Excise who seized the non-duty paid bhang and ganja from the possession of the petitioner. PW-3 was the Excise Constable who was on patrol duty along with PW-2 at the relevant time and was a witness to the seizure. On the basis of their (P.Ws. 2 and 3's) evidence the learned Trial Judge and the learned Addl. Sessions Judge in appeal held that the petitioner was in illegal possession of non-duty paid bhang and ganja and convicted him under Section 47(a) of the Act.

5. The counsel for the petitioner raised the following two points in support of the revision:-

(1) The independent seizure witness (PW-1) having not supported the prosecution, the allegation that the petitioner was in possession of the seized articles has to be rejected.

(2) In the absence of any chemical examination of the seized bhang and ganja, no conviction under Section 47(a) of the Act can be made merely basing on the bald statement of the Excise official to the effect that the seized articles were non-duty paid bhang and ganja.

6. POINT NO. 1 :No doubt PW-1 who was examined to prove seizure of the contraband articles turned hostile and did not support the prosecution. But the evidence of PWs 2 and 3 cannot be jettisoned solely on the ground that they are official witnesses. If their evidence inspires confidence, the official tag cannot brand them as unreliable. PW-2 the Sub-Inspector of Excise stated that on the date of occurrence the petitioner was searched and from the cloth bag which he was carrying 500 grams of non-duty paid bhang and 50 grams of non-duty paid ganja were recovered. He seized them, prepared a seizure list and made-over its copy to him who in token of its receipt put his signature thereon. He proved the seized articles in the Court which were marked as M.O. II (bhanga) and M.O.III (ganja). He has successfully stood the test of cross-examination and nothing substantial was brought out to discredit his evidence, PW-3, the Excise Constable in his evidence fully supported PW-2. He was a witness to the seizure and put his signature on the seizure list as Ext. 1/2. There is nothing in his evidence to suggest that for any extraneous reason he falsely implicated the petitioner. For the aforesaid reasons, I have no hesitation to hold that prosecution has proved seizure of the excise articles from the possession of the petitioner.

7. POINT NO. 2: The counsel for the petitioner submitted that in the absence of chemical examination, M.Os II and III cannot be held to be non-duty paid bhang and ganja as PW-2 being an expert witness had to testify that he had special skill to identify them as contraband articles. In support of his submission the Counsel placed reliance on the judgment of a single Judge of this Court in *Suma Das v. State of Orissa* (1993) 6 DCR 612. May it be noted that the case of *Suma Das* (supra) was one of seizure of illicit distilled liquor. Although litmus and hydrometer tests were conducted, contention of the accused in that case was that the officer conducting such tests must have been qualified to do so. After considering the cases cited at the Bar the learned Judge in paragraph-5 of the judgment observed as follows:-

A resume of the different authorities of this Court will show that though in principle the Court has accepted chemical test to be the surest test to establish the character of the seized article as illicitly distilled liquor, yet the view has been adopted that in the absence of such test, other evidence is admissible to reach the same conclusion and that where both the litmus and hydrometer tests are done by experienced and specially trained officer, opinion of such officer is acceptable to establish the identity of the seized article as illicitly distilled liquor.

In paragraph-6 of the judgment it was further observed that unless it is shown that the Excise Officer has special skill which may be resultant of special training on the line, he would not be acceptable as an expert as contemplated under Section 45 of the Indian [Evidence Act, 1872](#). On careful perusal of the judgment in the case of Suma Das, I am of the opinion that the facts of that case are distinguishable and its ratio cannot be made applicable to the fact situation of the case at hand. At this stage it is relevant to keep in view the weighty observations of the Supreme Court in Baidyanath Mishra v. State of Orissa (1968) 34 CLTP. 1. It was a case of recovery of opium as well as non-duty paid bhang and ganja. Hidayatullah, J (as he then was) in para 4 of the said judgment observed as follows:-

Opium is a substance which once seen and smelt can never be forgotten because opium possesses a characteristic appearance and a very strong and characteristic scent. It is possible for people to identify opium without having to subject the product to a chemical analysis. It is only when the opium is in a mixture so diluted that its essential characteristics are not easily visible or capable of being apprehended by the senses that a chemical analysis may be necessary.

From my long 33 years of experience and training I could know the seized ganja and bhang to be non-duty paid ganja and bhang. From quality and smelling duty paid ganja and bhang and non-duty paid ganja and bhang can be differentiated.

The aforesaid categorical assertion of PW-2 strikes right against the defence plea and there is nothing on record to reject it. In the face of such statement of the Excise official read with the provision of Section 48 of the Act which allows raising of presumption which the person in possession must repel, no fault can be found with the finding that the petitioner was in illegal possession of non-duty paid bhang

and ganja.

8. Counsel for the petitioner submitted that instead of awarding substantive sentence, the petitioner should be let off on probation. On the facts and circumstances of the case, I am not inclined to accede to such prayer. However, having due regard to the facts such as recovery of small quantity, absence of any evidence that petitioner has had previous conviction, and the occurrence being of the year 1985, the sentence of six months r.i. is reduced to one month r.i.

With the modification of sentence, as indicated the revision is dismissed.

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