Tirtha Naik Vs. State

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Court : Orissa

Decided On : Feb-13-1991

Reported in : 1991CriLJ2182

Judge : S.C. Mohapatra, J.

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

Appeal No. : Criminal Revn. No. 254 of 1987

Appellant : Tirtha Naik

Respondent : State

Advocate for Def. : D.K. Mishra, Addl. Standing Counsel

Advocate for Pet/Ap. : D.P. Dhal and ;D. Nayak, Advs.

Disposition : Revision dismissed

Judgement :
ORDER

S.C. Mohapatra, J.

1. Petitioner in this revision has assailed appellate order confirming his conviction Under Section 47(a) of the Bihar and Orissa Excise Act (hereinafter referred to as 'the Act') and modified sentence.

2. Prosecution case is that at about 1-30 p.m. on 21-8-1983, P.W. 4 the Sub-Inspector of Excise in course of is patrol duty detected the accused carrying a bag. On suspicion, he detained the accured and on search of the bag, he recovered one rubber bladder containing 10 litres of I.D. liquor and one bottle containing 0.375 mili-litre of I.D. liquor. Bag with bladder and bottle having I.D. liquor were seized from the accused whereupon prosecution report was submitted. Plea of accused in defence is one of complete denial.

3. At the trial, prosecution examined four witnesses, proved the seizure list and produced bag, rubber bladder and the bottle as material objects. Appreciating evidence on record, trial court convicted the accused and sentenced him to simple imprisonment for 6 months and to pay a fine of Rs. 500/- in default to suffer simple imprisonment for 15 days more. In appeal by the accused, appellate court confirmed the conviction and modified the sentence to three months rigorous imprisonment with fine of Rs. 300/- in default of which for undergoing rigorous imprisonment for two weeks.

4. Mr. P. K. Dhal, learned counsel for the petitioner assailed the appellate order on the ground that conviction cannot be sustained on basis of evidence of official witnesses and liquor seized not having been produced, there is no evidence that accused was in possession of I.D. liquor.

5. P.W. 1 is a seizure witness. He stated that he does not know the accused and signed on a paper being asked by Excise staff. P.W. 2 is also a seizure, witness who stated similarly but admitted his signature on the seizure list. P.W. 3 is the Excise Constable accompanying P.W. 4. He fully supported the prosecution case. P.W. 4 is the Inspector of Excise. While speaking about seizure, he stated that the liquor was tested with blue litmus paper which turned red. He also tested the liquor with hydrometer and from the strength found, he came to the conclusion that the same is I.D. liquor. He also relied upon the smell of the liquid. He is an officer who has undergone distillery training. He stated that he has eight years of experience in Excise Department and from the smell and other tests conducted, he came to the conclusion that the liquor seized is I.D. liquor.

6. Possession of intoxicant is an offence Under Section 47 of the Act. I.D. liquor is an intoxicant. Production of such liquor at trial tends assurance to the fact of possession. If I.D. liquor is not produced, it cannot be conclusively held that accused was not in possession of it. Without such production also, court can convict a person if otherwise it accepts the evidence that accused was in possession of I.D. liquor.

7. In this case, there is no material on record to come to conclusion that the bladder and bottle were empty at the time of seizure. If the accused would have suggested the same in cross-examination question might have been considered from a different angle. No such suggestion was given to the witnesses and no argument was also advanced in both the courts below to that effect. Evidence of P.Ws. 3 and 4 are clear that the bladder and bottle contained I.D. liquor which were seized from accused.

8. Question is whether on evidence of official witnesses (P.Ws. 3 and 4) alone conviction can lie when the seizure witnesses (P.Ws. 1 and 2) did not prove such seizure. No suggestion was given to the two official witnesses why they would falsely implicate the accused. If some circumstances would have been brought to record for drawing the conclusion that the official witnesses are likely to be motivated to prosecute the accused. I would have considered if their evidence ought to be accepted since both courts have not considered this appeal. In absence of such suggestions, when trial court which had the advantage of marking the demeanour of such witnesses accepted their version and when appellate court accepted such evidence to be truthful version notwithstanding the witnesses to seizure speaking that they have not seen any seizure in exercise of revisional power. I am not inclined to interfere with the same specially when Parliament has not vested right of an appeal from an appellate judgment to a person convicted of an offence. It is hard to accept in absence of further materials that P.W. 1 would sign a paper without understanding it and P.W. 2 would sign Ext. 1 as a witness to seizure although he has not seen the seizure himself.

9. Decisions have been rendered by this Court where findings have been either interfered with or confirmed in exercise of revision power. In (1990) 32 OJD (Cri)

123 (Biswanath Sahu v. State of Orissa no independent witness was examined and no explanation was forthcoming why such witnesses were not examined. Only the jerry can was produced without I.D. liquor. It was held that there was no evidence that the jerry can produced was the same jerry can which was seized. In such circumstances, uncorroborated testimony of official witnesses was held not to be sufficient to convict the accused. In (1988) 1 O Cri Rep R 287 Kodanda Dehuri v. State of Orissa non-examination of independent witnesses was held to be a circumstance for acquitting the accused. This is a matter of prudence and not of law. In (1990) 70 Cut LT 747 (Bharata Sahu v. State) conviction based on official witnesses was upheld. In (1989) 68 Cut LT 257 Sukuru Behera v. State witnesses to seizure-list expressed no knowledge of seizure. Despite the same, conviction was confirmed on basis of evidence of official witnesses. In (1989) 67 Cut LT 712 State v. Jaladhar Majhi Excise staff were held to be competent witnesses. Thus, acceptance of evidence of official witnesses is a rule of prudence and not a rule of law. There is no bar for conviction of an accused if on evidence of official witnesses it can be held that accused was in possession of intoxicant. It would depend upon facts and circumstances of each case and no earlier decision of this Court would (SIC) any assistance as a precedent in appreciating evidence. When two courts of fact have come to the conclusion that accused was in possession of 10.375 litres of I.D. liquor in rubber bladder and bottle, I have no reason to interfere with the same.

10. Coming to question of sentence, I find that the offence is of the year 1983. By passage of time, accused has advanced in his age. There is no material that accused is in habit of being in possession of such intoxicant in violation of law. It is to be remembered that every saint had a past and every sinner had a future. No doubt offence Under Section 47(a) of the Act is anti-social and minimum sentence is provided for. However, discretion has been given to a Court to consider the question of sentence where less than minimum can be imposed.

11. In this case, I find that there is no material that petitioner is carrying on business in I.D. liquor. No recurrence of such possession has been brought to my notice. Seven years have passed in the meantime. For preferring a revision, petitioner has surrendered to custody and has undergone substantive sentence for

some days. No useful purpose would be served in imposing such sentence as a result of which, accused has to go back behind prison bar to serve the remaining part of the sentence. If accused would have been a person economically affluent or would have a social status for having followers in the society, I would have considered the question of sentence differently so that image of judiciary in estimation of the society would be lightened and it would serve as an example to others that position in society is not a mitigating circumstance on the question of sentence in anti-social offences. In view of the aforesaid discussion, I modify the sentence imposing substantive sentence for the period already undergone and fine of Rs. 500/- (five hundred) which is to be paid within two months, in default of which accused shall undergo R.I. for fiteen days more apart from recovery of fine amount from him.

12. In the result, revision is dismissed subject to modification of sentence.