

J.E. Gubbay Vs. Emperor

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Court : Kolkata

Decided On : Mar-03-1939

Reported in : AIR1940Cal205

Appellant : J.E. Gubbay

Respondent : Emperor

Judgement :

Narsing Rau, J.

1. The petitioner J.E. Gubbay in this case was granted a rule calling upon the District Magistrate of the 24-Parganas to show cause

(1) why the conviction of the petitioner in respect of charges Nos. 13 and 16 in what is known as the Gariahat Excise Conspiracy case should not be set aside or otherwise varied

(2) why the order of confiscation passed by the trying Magistrate in the same case in respect of the petitioner's stock of liquor at 8, Lindsay Street should not also be set aside and

(3) why the sentence passed upon the petitioner should not be reduced. There were in all six charges against the petitioner: (a) A charge of criminal conspiracy to commit various excise offences and to cheat, (b) three charges of abetting various

excise offences in pursuance of the conspiracy and (c) two charges of cheating under Section 420, I.P.C., in pursuance of the conspiracy. It is the last two charges of cheating that we are concerned with in this rule: they are numbered 13 and 16 in the charge sheet. Charge No. 13 is to the effect that the petitioner in pursuance of the aforesaid conspiracy cheated one Bhupal Chandra Saha by selling him certain bottles of liquor with false labels representing the liquor to be genuine Scottish whisky, whereas in actual fact the petitioner knew that the liquor was made in India. Charge No. 16 is similar, the person cheated being one Jiban Krishna Saha and the liquor in this instance being falsely represented to be genuine French brandy. The Magistrate convicted the petitioner of all the charges and sentenced him as follows : (a) On the conspiracy charge, two years' rigorous imprisonment, (b) on each of the abetment charges, six months' rigorous imprisonment, (c) on each of the cheating charges two years' rigorous imprisonment, the sentences (b) and (c) being concurrent as between each other but consecutive to the sentence (a).

2. The learned Additional District and Sessions Judge, Alipore, in appeal, upheld all the convictions and sentences except the sentences on the cheating charges which were reduced to one year each. The net effect of all the sentences, as they now stand, is that the petitioner will suffer imprisonment for a total period of three years. In addition, the Magistrate has passed, and the Appellate Court has confirmed, an order confiscating certain stocks of liquor including the petitioner's stock of liquor at 8, Lindsay Street, which according to the petitioner was worth a lakh of rupees or more and which, again according to him, was not liable to confiscation. We are concerned in this rule only with the order relating to the stock of liquor at 8, Lindsay Street. We shall deal first with the convictions and sentences on the cheating charges. The learned Counsel for the petitioner contends that there was no cheating here within the meaning of Section 420, I.P.C, for the simple reason that the persons said to have been cheated suffered no loss at all on the other hand the evidence is that they used to re-sell at a profit the liquor which they used to buy from the petitioner. This contention appears to us to be untenable, even apart from the circumstance that the liquor which is the subject-matter of the cheating charges has not yet been re-sold by the persons who purchased it from the petitioner. Whether there has been, or is likely to be, a

resale at a profit by the purchaser seems to us to be wholly irrelevant to the question of cheating the cheating is complete as soon as the sale to him on a false representation is complete and the price paid. This is clear from the first part of Section 415, I.P.C., reinforced by illus. (b) to that Section. The illustration, it may be recalled, runs thus:

A, by putting a counterfeit mark on an article intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer and thus dishonestly induced Z to buy and pay for the article. A cheats.

3. There was clearly cheating in the present case by the sale of liquor bottles with false labels and the cheating was clearly of the description mentioned in Section 420, I.P.C. The requirement of dishonesty is satisfied if, as here, there was an intention to make wrongful gain on the part of the person cheating, even if there was no intention to cause wrongful loss to the person cheated. The conviction under Section 420 must therefore be upheld. On the question of sentence—however there is something to be said in favour of the petitioner. The Appellate Court has found that there is no direct evidence of the sales which are the subject-matter of the cheating charges having been effected by the petitioner; but has relied upon the facts that he was the proprietor of James Anderson & Co., and that he was one of the prime conspirators. In other words, the only evidence connecting the petitioner with these specific offences of cheating is his complicity in the general conspiracy. Since however he has been separately convicted and sentenced for the offence of conspiracy, we do not think that there should be any additional sentence for the specific offences under Section 420, I.P.C. We therefore direct that the sentences on the cheating charges run concurrently with the sentence on the charge of conspiracy. This will not affect the sentences on the abetment charges, which will continue to be consecutive to the sentence on the conspiracy charge, though concurrent inter se. The net result of this modification of the sentences is that the total effective imprisonment to be suffered by the petitioner will be two years and six months (two years on the conspiracy charge, and six months on the three abetment charges) instead of three years.

4. We now turn to the order of confiscation. The facts relating to this order have already been set out in our judgment in *E.E. Ezekiel v. Emperor* reported in : AIR1939 Cal346 . 346 and need not be repeated here. In that rule, we were concerned with the portion of the order relating to certain stocks of liquor belonging to Davidsons Ltd.; in the present rule, we are concerned with the portion relating to the stock of liquor at 8, Lindsay Street belonging to James Anderson & Co. The first point taken before us by learned Counsel for the petitioner is that he was not given an opportunity of showing cause before the order of confiscation was passed. Since however we have ourselves heard the petitioner very fully and since we have plenary powers in revision, he can no longer have any complaint on this score. The next point urged is that the Magistrate had no territorial jurisdiction to make the order in question. We have dealt with this point fully in *E.E. Ezekiel v. Emperor* reported in : AIR1939 Cal346 and for the reasons given there, we consider the contention to be erroneous. On the merits, the main contentions on behalf of the petitioner are (1) that it has not been established that any illicit liquor was found in any part of the premises at 8, Lindsay Street and (2) that even if any illicit liquor was found in the bottling godown at 8, Lindsay Street, that is no ground for confiscation of the entire stock of liquor, worth over a lakh of rupees, found in the foreign liquor shop and elsewhere at 8, Lindsay Street.

5. As to (1), we have the finding of the Appellate Court as well as of the trying Magistrate that the two samples of liquor - serial Nos. 48 and 50 of Mr. Bartlett's report taken from the bottling godown at 8, Lindsay Street, were pot still molasses spirit from the illicit distillery at 52, Gariahat Road. We accept this finding. As to (2), we have already pointed out in *E.E. Ezekiel v. Emperor* reported in : AIR1939 Cal346 that what is material is not identity of premises but identity of the possessor : here, the confiscated liquor and the illicit liquor were both in the possession of James Anderson & Co. at the same time, though one may have been in one part of 8, Lindsay Street and the other in another part. On the question of hardship, we have nothing to add to what we have said in *E.E. Ezekiel v. Emperor* reported in : AIR1939 Cal346 . The order of confiscation passed by the Magistrate and confirmed by the Additional Sessions Judge, so far as it relates to the stock of liquor at 8, Lindsay Street, must therefore stand.

Bartley, J.

6. I agree.

7. Further judgment dated 3rd March 1939.

Bartley, J.

8. This is an application arising out of what is known as the Gariahat Excise case and it is with regard to stocks of liquor belonging to the petitioner J.B. Gubbay held at present in Excise bond and in Customs bond. The application is to set aside the order of confiscation made by the learned Magistrate and confirmed by the learned Judge in the Court of Appeal below with regard to the liquor actually in Excise and Customs bond. In view of our decision in the case which has already been disposed of a decision to the effect that liquor in Excise and Customs bond was not liable to confiscation under any of the provisions of the Bengal Excise Act - we are satisfied that the liquor, which forms the subject-matter of the present application, that is to say, the liquor belonging to the petitioner J.E. Gubbay, which is in Excise and Customs bond, cannot be held liable to confiscation. It may be added here that the learned Counsel appearing on behalf of the Excise Authorities admits that in view of our previous decision the confiscation order with respect to this particular liquor cannot be upheld. We accordingly direct that the stocks of liquor belonging to the petitioner J.E. Gubbay, at present held in Excise and Customs bond, shall be declared exempted from confiscation.

Narsing Rau, J.

9. I agree.