

(2017) 12 DEL CK 0018

In the Delhi High Court

Case No : 574 of 2017 & CM Nos 2640 of 2017 & 28558 of 2017

DR. VARUNVEER Vs FINANCIAL COMMISSIONER, DELHI?AND ORS

Date of Decision : 13-12-2017

Acts Referred:

Delhi Excise Act, 2009, Section 33, Section 58, Section 52(2)

Citation : (2017) 12 DEL CK 0018

Hon'ble Judges : Vibhu Bakhru

Bench : SINGLE BENCH

Advocate : S.N. Gupta, ?Sanjoy Ghose, ?Rhishabh Jetley

Final Decision : Disposed off

Judgement

1. The petitioner has filed the present petition, inter alia, challenging an order dated 04.11.2016 (hereafter "the impugned order") passed by respondent no. 1 (hereafter "the Financial Commissioner"), whereby, the petitioner's appeal against an order dated 19.10.2015 passed by respondent no. 2 (hereafter "the Excise Commissioner") was rejected. By the aforesaid order dated 19.10.2015, the Excise Commissioner had upheld the decision of the Deputy Commissioner, Excise, Entertainment & Luxury Tax for confiscation of the petitioner's vehicle - Mitsubishi Pajero bearing No. DL- 2FHP-0011 (hereafter "the vehicle").

2. The principal controversy in the present petition is whether the vehicle could be confiscated under Section 58 of the Delhi Excise Act,

2009 (hereafter "the Act") for an offence alleged to have been committed under Section 33 of the Act, even though, the petitioner (the owner of the vehicle) and the person who was driving the vehicle at the material time had been acquitted of the said offence. It is the petitioner's case that he had no role to play in the commission of the offence; his vehicle cannot be confiscated under the Act.

3. Briefly stated, the relevant facts necessary to address the controversy are as under:-

3.1 The respondents state that on the night of 29.07.2012, the police received a

secret information that a vehicle transporting alcohol without authorisation would be arriving at a farm house known as Gulab Vatika. Based on the aforesaid information, the petitioner's vehicle was stopped by the raiding party and it was found that 384 bottles of liquor of varying types and makes were being transported in the vehicle. The vehicle was being driven by one Sh Jai Singh. The vehicle as well as the alcohol was seized.

3.2 An FIR was registered for an offence under Section 33 / 58 of the Act. Subsequently, a charge sheet was also filed against the petitioner and Jai Singh for an offence under Section 33 / 58 of the Act. During the trial, Mr Rahul Arya, the elder brother of the petitioner deposed that he had taken the petitioner's vehicle to attend his friend's (Sidhant Dhingra) party at Gulab Vatika. He stated that after reaching the venue, an employee (driver) of Sidhant Dhingra, namely, Jai Singh requested for the keys of the vehicle stating that he required to pick up some guests and believing the same, the keys of the vehicle were handed over to Jai Singh at the instance of Mr Sidhant Dhingra.

3.3 The petitioner and Jai Singh were tried and were acquitted of the offence by the learned Metropolitan Magistrate (MM) principally on the ground that there were several public witnesses and there was no plausible explanation as to why such independent witnesses had not been produced. The MM also observed that since seal remained with a junior police official, the possibility of the samples being tempered with could not be ruled out. Accordingly, both the accused persons (petitioner and Jai Singh) were acquitted of the offence under Section 33 / 58 of the Act.

3.4 In the meanwhile, on 27.01.2014, the Deputy Commissioner of Excise passed an order seizing the vehicle under Section 59 of the Act, after hearing the petitioner. Aggrieved by the said order, the petitioner filed an appeal before the Excise Commissioner on 04.06.2014. The said appeal was dismissed by an order dated 09.06.2015 on the grounds of delay as the said appeal was not filed within the period of 30 days from the date of communication of the order dated 27.01.2014.

3.5 Aggrieved by the said decision, the petitioner preferred a writ petition before this Court being W.P. (C) 6394/2015. The petitioner also contended that he had been acquitted of the alleged offence under the Act and the said fact had been ignored by the concerned authority while upholding the order of confiscation. The said petition was disposed of by an order dated 13.07.2015; the order dated 27.01.2014 passed by the Deputy Commissioner of Excise and the order dated 03/09.06.2015 passed by the Excise Commissioner were set aside and the matter was remanded to the Excise Commissioner to decide afresh. The petitioner was also directed to file a fresh application within a period of two weeks from the said order.

3.6 In compliance with the aforesaid directions, the petitioner was heard at length and the Excise Commissioner passed an order dated 19.10.2015

(impugned herein) upholding the decision to confiscate the vehicle. Aggrieved by the said decision, the petitioner preferred another writ petition being W.P. (C) 11156/2015, which was disposed of by an order dated 01.12.2015 permitting the petitioner to file an appeal before the Financial Commissioner in terms of the proviso to Section 73(4) of the Act. It was further directed that if such appeal is filed before 11.12.2015, the same would be entertained on merits without entering into the aspect of limitation.

3.7 In view of the aforesaid order, the petitioner preferred an appeal against the order dated 19.10.2015 passed by the Excise Commissioner, which was dismissed by the impugned order.

4. It is the petitioner's case that his vehicle was borrowed by his elder brother, Rahul Arya, who had informed the petitioner that he was taking the vehicle to attend a party in the village, Jonapur. The petitioner was informed on the next day that his vehicle had been seized by the police along with the alleged illegal liquor. The petitioner stated that he had no concern with the alleged liquor or with the driver Jai Singh, who was arrested. The petitioner further contended that the FIR had recorded that the vehicle seized by the police was bearing a Haryana Registration No. HR-2-FHP-0011 and the petitioner's vehicle had a Delhi Registration No. DL-2FHP-0011. The petitioner also contended that he had been acquitted of the offence under Section 33 of the Act and, therefore, his vehicle ought to be released.

5. The Excise Commissioner considered the facts of the case and also

noted the clarification provided by the learned counsel for the respondent that the vehicle seized was that of the petitioner but due to a typographical mistake, the FIR mentioned the registration number as HR-2-FHP-0011 at one place but in subsequent paragraphs of the FIR, the correct registration number had been mentioned. The Financial Commissioner further observed that there was no dispute that the liquor was being transported without permit in the vehicle on the day of its seizure and, therefore, seizure of the said vehicle under Section 58 of the Act was justified.

6. Mr S.N. Gupta, learned counsel appearing for the petitioner has assailed the impugned order essentially on two grounds. First, he submits that the impugned order proceeded on an erroneous premise that there was no dispute that liquor was transported in the vehicle in question. He submitted that the petitioner as well as the driver (Jai Singh) had been acquitted of the offence under Section 33 of the Act because the prosecution had failed to make out any case. He submitted that since the offence itself had not been established, the question of confiscating the vehicle on the basis of the said offence did not arise.

7. Second, he contended that the evidence brought on record clearly established that the petitioner was not involved in the alleged offence. He stated that it was also the prosecution's case that the vehicle was used for transportation of liquor without the knowledge of the petitioner. He submitted that therefore, the

petitioner could not be penalised by confiscation of the vehicle.

8. The case of the prosecution was that they had received information that a vehicle carrying illicit liquor from Haryana would be going towards Gulab Vatika Farm House, where a birthday party had been arranged.

Based on the aforesaid secret information, the vehicle was intercepted and the Driver, Jai Singh was apprehended. Jai Singh's statement was recorded. He stated that he was working as a driver with Mr Sidhant Dhingra and he had asked him to take the vehicle of his friend and bring liquor from a licensed shop. He further stated that he had, at the instance of his employer, asked for the keys of the vehicle in question from one of the guests and had driven the vehicle to purchase liquor. He further stated that he had purchased liquor from Haryana instead of Delhi because the same was cheaper in Haryana.

9. The statement of Sidhant Dhingra was also recorded and he confirmed that he had asked his driver Jai Singh to go to the liquor shop in Delhi and purchase some liquor. He claimed that he was not aware that Jai Singh had purchased liquor from Haryana instead of Delhi.

10. Sh Rahul Arya, the elder brother of the petitioner, also gave his statement. He confirmed that on 28.07.2012, he took the vehicle from his brother to attend a party of Mr Sidhant Dhingra in Gulab Vatika Farm House. He stated that Mr Sidhant Dhingra's driver, Jai Singh had asked him for the keys of the vehicle as he had to pick some guests and bring them to the party and he, accordingly, handed him the keys of the vehicle.

11. It is apparent from the statements recorded as well as the case set up by the prosecution, that the petitioner had no role to play in the transportation of illicit liquor. The petitioner had also given his statement stating that the vehicle in question was borrowed by his brother to attend a party and he had no knowledge that the same was used for any other purpose.

12. There is no material or evidence that has been placed on record that would even remotely cast a doubt on the statement made by the petitioner. The statement of all other persons including the driver of the vehicle clearly indicates that the petitioner had no role to play in transporting the illicit liquor.

13. The Court of Metropolitan Magistrate has also acquitted both, the driver of the vehicle (Jai Singh) and the petitioner of an offence under Section 33 of the Act principally on the ground that the evidence of independent witnesses, who were present at the site had not been produced. Without going into the merits of the said decision, it is plainly clear that although the petitioner's vehicle was used, the petitioner had no role to play in the transportation of liquor from Haryana.

14. The Financial Commissioner had proceeded on that basis that there was no dispute that the petitioner's vehicle had been used for transportation of liquor and that itself was sufficient to justify its confiscation under Section 58 of the

Act. The Financial Commissioner also held that the decision of the learned Metropolitan Magistrate acquitting the driver of the vehicle and the petitioner of an offence under Section 33 of the Act had no bearing in the case, since involvement of the vehicle in question had not been denied. The operative part of the impugned order dated 04.11.2016 passed by the Financial Commissioner reads as under:-

"11. I observe that there is no dispute that liquor was being transported without permit in vehicle No. DL-2FHP-0011 on the day of confiscation of said vehicle therefore the seizure of said vehicle under section 58 of Delhi Excise Act is justified and as per the spirit of the law. Further, wrong mentioning of registration No. of vehicle at one place in FIR can also not be the ground for release of vehicle. As

regards acquittal of accused persons in FIR, I am of the considered view that proceedings of that case has no bearing on this case because judgement of Id. M.M. has nowhere denied the involvement of vehicle No. DL-2FHP- 0011 in transporting the liquor without permit."

15. The contention that FIR did not record the registration number of the petitioner's vehicle and, therefore, no action could be taken for confiscation of the vehicle, is unpersuasive. It was pointed out that there was a typographical error in the FIR and this Court finds no infirmity with the decision of the Financial Commissioner in accepting the same.

16. The contention that the Financial Commissioner had erred in proceeding on the basis that there was no dispute that liquor was being transported without permit, is also unmerited. The statement made by Jai Singh and Mr Sidhant Dhingra (which are also relied on by the respondent) do not leave any room for doubt that the petitioner's vehicle was used for transportation of liquor from Haryana.

17. The only question, thus, remains to be answered is whether the involvement of the vehicle in an offence under Section 33 of the Act is sufficient to warrant its confiscation.

18. The relevant extract of Section 33 of the Act is set out below:-

"33. Penalty for unlawful import, export, transport, manufacture, possession, sale etc. - whoever, in contravention of provision of this Act or of any rule or order made or notification issued or of any licence, permit or pass, granted under this Act -

(a) manufactures, imports, exports, transports or removes any intoxicant;

(b)

(c)

(d)

(e)

(f)

shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine, which shall not be less than fifty thousand rupees which may extend to one lakh rupees."

19. Section 58 of the Act provides for confiscation and reads as under:-

"58. Certain things liable to confiscation - Whenever an offence has been committed, which is punishable under this Act, following things shall be liable to confiscation, namely -

(a) any intoxicant, material, still, utensil, implement, apparatus in respect of or by means of which such offence has been committed;

(b) any intoxicant unlawfully imported, transported, manufactured, sold or brought along with or in addition to, any intoxicant, liable to confiscation under clause (a);

(c) any receptacle, package, or covering in which anything liable to confiscation under clause (a) or clause

(b), is found, and the other contents, if any, of such receptacle, package, or covering;

(d) any animal, vehicle, vessel, or other conveyance used for carrying the same."

20. Section 59 of the Act provides for orders of confiscation.

21. The question whether any mens rea was required to be established for attracting the provisions of Section 58 of the Act was considered by a Division Bench of this Court in Manoj Kumar Singh v. The National Capital Territory of Delhi & Ors: W.P.(C) 8898 of 2011, decided on 29.05.2012. The Court referred to Section 52(2) of the Act and held as under:-

"16. Section 52(2) supra of the Delhi Act, though raises a presumption of guilt of the owner of the vehicle but grants an opportunity to such owner to rebuttal of this presumption. Though Section 52(2) is concerned with prosecution for the offence and not with confiscation but inclusion therein specifically of "confiscation" is indicative of the same being applicable to confiscation proceedings also. Moreover, it will be against the grain of logic and reasonableness that though such owner of vehicle is to be given opportunity to rebut the presumption of guilt, but would nevertheless be punished by confiscation.

17. We therefore do not find the Delhi Act, for the reason of dropping the proviso which existed in the earlier applicable Punjab Act, to have not done away with the ingredient of mens rea, in as much as the proviso in the earlier applicable legislation finds expression in Section 52(2) .

18. Else, the Supreme Court in Nathulal Vs. State of Madhya Pradesh AIR 1966 SC 43 had observed that though a statute may exclude the element of mens rea but it is a sound rule of consideration to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded mens rea. It was further held that mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of an offence. Mens rea was held to be permitted to be excluded from a statute by necessary implication only where it was absolutely clear that the implementation of the object of the statute would otherwise be defeated."

22. In view of the above, the mere fact that the vehicle was used to transport liquor would not be sufficient for confiscating the same, if the

owner of the vehicle is able to establish that he/she was not involved in the offence.

23. In the present case, there appears to be no dispute that the petitioner was not involved in the offence under Section 33 of the Act and had no knowledge that his vehicle was used in transporting liquor from Haryana. Therefore, the petitioner could not be visited with the punishment of confiscation of his vehicle.

24. In view of the above, this Court does not consider it necessary to remand the matter to the Financial Commissioner and it would be apposite to direct the respondents to release the vehicle to the petitioner.

25. For the reasons stated above, the petition is allowed and the impugned orders dated 04.11.2016 and 19.10.2015 passed by the Financial Commissioner and the Excise Commissioner are set aside. The respondents are directed to return the petitioner's vehicle forthwith to the petitioner. All the pending applications are disposed of.

26. The parties are left to bear their own costs.