
(1940) 10 BOM CK 0009
In the Bombay High Court
Case No : Criminal Appeal No. 242 of 1940

Emperor	Vs	APPELLANT
Kunverji Kavasji Kavarana		RESPONDENT

Date of Decision : 01-10-1940

Acts Referred:

Bombay Abkari Act, 1878 — Section 45(c)
Sales of Goods Act, 1930 — Section 21, 23

Citation : AIR 1941 Bom 106 : (1941) 43 BOMLR 95

Hon'ble Judges : Wassodew, J;Broomfield, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Wassoodew, J.—This is an appeal by the Government of Bombay against the order of acquittal passed by the Sessions Judge of Surat in an appeal by the accused. The latter, who is a licensed vendor of country liquor, was convicted and sentenced to pay a fine of Rs. 200 u/s 45(c) of the Bombay Abkari Act (Bom. V of 1878) by the First Class City Magistrate of Surat for contravening a term of his license.

2. It was alleged by the prosecution that the accused sold a quantity of country liquor outside the building or shop mentioned in the license to three different persons, according to the orders placed by each of them, between April 1 and June 11, 1938, in contravention of Clause (2) of the license. That clause provides as follows:--

Under this license the license-holder will be entitled to keep or sell country liquor in the building or premises mentioned hereunder. . . .that is to say, in the building or premises known as... and situate on... Road and numbered as... and he will not be entitled to keep or sell the same at any place except the aforesaid place. This building or premises is henceforth regarded as the place of license.

3. The prosecution led evidence of the servants of the accused to show that they

were asked to tout for customers and canvass orders, and that they went round the place, obtained orders and carried them to the shop,, delivered the liquor to the customers at their respective places of residence and recovered there the price of the liquor sold. One of the servants examined by name Soma (exhibit 3) stated as follows:--

I would go and inform the accused about the orders given to me and then the accused would himself give the liquor, and if he was not present, his servant would fill up the bottles. Then I would give the liquor to the customers." houses and would recover the money and give it over to the accused.

4. The prosecution maintained that that evidence if believed would inevitably lead to the inference that the sale took place outside the licensed place and therefore in violation of Clause (2) of the license. The learned Magistrate accepted the evidence of the accused's servants as true and convicted the accused. The learned Sessions Judge in appeal took a contrary view of the facts and acquitted the accused holding that the statement of the servants that the price of liquor was not paid at the shop could not be acted upon without independent and reliable corroboration, as the servants were no better than accomplices, and the memoranda of the supposed orders received by the accused could not be regarded as sufficient corroboration.

5. It is unnecessary in the view we take of the legal position, which was not properly appreciated in the Courts below, to examine that evidence of the prosecution. The question is whether upon the allegation in the complaint the sale could be said to have been completed outside the place of license.

6. The learned Government Pleader has argued that the sale was completed upon delivery of liquor at the buyers" houses and not before, and upon notice given to them that the liquor was bottled from the casks and put into a deliverable state. He says that this case would be governed by the provisions of Section 21 of the Indian Sale of Goods Act (III of 1930). That section provides that:--

Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.

7. The argument of the learned Government Pleader assumes that a contract of sale of a quantity of liquor out of a large cask or cistern is a contract of sale of specific goods. I find the greatest difficulty in holding that a contract to sell some liquor out of a big cask containing much larger quantity, the required quantity not being separated or bottled, would be a contract of sale of specific goods within the meaning of Section 21. The expression " specific goods". necessarily means goods capable of being ascertained with certainty--certum est quod certum reddi potest. A sale of some specified quantity of liquor out of a store-house or cask would not be capable of ascertainment until it was removed or

separated. The words " specific goods" would according to their natural interpretation mean goods whose delivery can be demanded in specie. Consequently in my opinion Section 21 would be inapplicable.

8. The appropriate section applicable to the facts alleged in this case would be Section 23 of the Indian Sale of Goods Act. Sub-section (I) of that section provides as follows:--

Where there is a contract for the sale of unascertained goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

9. In my opinion a contract of sale of a small quantity of liquor stored in bulk could more properly be regarded as a contract for sale of unascertained goods. The ownership will not pass till the quantity ordered by the purchaser is ascertained and appropriated. The bottling of the liquor would be an act of ascertainment and appropriation. That is what the evidence suggests. It is argued that it could not be said that the goods are ascertained until the appropriation by one party is assented to by the other, that there is no evidence that the purchaser had assented to the appropriation, and that such assent could not be implied till the liquor was delivered to the purchaser into his house or place named. The section itself provides that the assent may be express or implied, and may be given either before or after the appropriation is made. The question whether the assent was implied must necessarily depend upon the circumstances of each case. In this particular case it appears that the customer had assented that the goods should be delivered to the shop's servants for delivery to him. That is what Soma has suggested: If the prosecution intended to prove that the contract was different, it was open to them, and in fact necessary, to call the best evidence on the point namely, that of the customer, who could say what the terms of the contract were. That has not been done in this case.

10. In view of the provisions of Sub-section (2) of Section 23 of the Act it is immaterial whether the delivery of the goods took place at the house of the purchaser. Sub-section (2) of Section 23 provides that:--

Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

11. The servant of the seller in the circumstances could very well be treated as a bailee for the purpose of transmission to the buyer; and delivery to such servant, which admittedly took place in the licensed place, would be effective delivery to the buyer himself. Nor would it be material for the purpose of the charge to ascertain whether the price of the liquor was paid in the shop, for the completion

of sale does not depend upon payment of the price of the goods sold. It seems, according to the statement of Soma, that upon delivery of the liquor to the customers at their houses money was paid to him and he delivered the same to the accused in his shop, and that in some cases money was recovered later on. It has been pointed out to us that under clause. (10) of the license sale on credit of country liquor is prohibited. That is so provided in that clause. But assuming that there has been a transgression of that term of the license, the accused has not been charged with breach of it. All that he is charged with is that he has offended against clause. (2) of the license which relates to the sale outside the premises. In the view we take, the sales in question were completed within the premises and therefore the accused could not be convicted of the offence with which he was charged. We therefore dismiss the appeal.

Broomfield, J.

12. I agree.