

(1969) 06 GUJ CK 0006
In the Gujarat High Court

Harilal Gangaram and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 10-06-1969

Acts Referred:

Bombay Prohibition Act, 1949 — Section 98, 99

Citation : (1970) CriLJ 1163 : (1970) GLR 617

Hon'ble Judges : D.A. Desai, J

Bench : Single Bench

Judgement

D.A. Desai, J.

1-17. ...

18. It was urged on behalf of original accused No. 4 Hiralal Gangaram that the motor truck belongs to him and even though it was used for transport of contraband liquor, there is nothing to show that it was done with his consent, connivance or knowledge or at his instance and therefore, the motor truck was not liable to confiscation. On behalf of Jethanand Ishvardas it was contended that he entered into an agreement with Hiralal Gangaram accused No. 4 for the purpose of the said truck on 9-11-66 for Rs. 20,000/- and towards the purchase price he had paid Rs. 5,000/- in cash to Hiralal Gangaram and the balance of Rs. 15,000/- was to be paid in 15 monthly instalments each of Rs. 1,000/-. It was contended that this agreement was reduced to writing, and executed by the parties. On the basis of this agreement it was contended that since 2-11-66 ownership of the motor truck had passed to Jethanand Ishvardas and there is nothing to show that this truck was used in transporting or importing contraband liquor with his consent, connivance or knowledge or at his instance and, therefore, the truck was not only not liable to confiscation but it should have been returned to him.

19. It was contended on behalf of original accused No. 4 that there is not an iota of evidence to show that the truck was used for transporting or importing

contraband liquor or any prohibited article with his consent or connivance or knowledge or at his instance and the same was not liable to confiscation. Section 98 of the Bombay Prohibition Act provides as under:

98. (1) Whenever any offence punishable under this Act has been committed,

(a) any intoxicant, hemp, mhowra flowers, molasses, materials, still utensil, implement or apparatus in respect of which the offence has been committed;

(b) where in the case an offence involving illegal possession, the offender has in his lawful possession any intoxicant, hemp, mhowra flowers or molasses other than those in respect of which an offence under this Act has been committed, the entire stock of such intoxicant, hemp, mhowra flowers or molasses,

(c) where, in the case of an offence of illegal import, export or transport, the offender has attempted to import, export or transport any intoxicant, hemp, mhowra flowers, or molasses, in contravention of the provisions of this Act, rule, regulation or order or in breach of a condition of a licence, permit, pass or authorization the whole quantity of such intoxicant, hemp, mhowra flowers or molasses which he has attempted to import, export or transport;

(d) where in the case of an offence of illegal sale, the offender has in his lawful possession any intoxicant hemp, mhowra flowers or molasses other than that in respect of which an offence has been committed, the whole of such other intoxicant, hemp, mhowra flowers or molasses

shall be confiscated by the order of the Court.

(2) Any receptacle, package or covering in which any of the articles liable to confiscation under Sub-section (1) is found and the other contents of such receptacle, packet or covering and the animals, carts, vessels or other conveyances used in carrying any such article shall likewise be liable to confiscation by the order of the Court.

The scheme of Section 98 would show that the things mentioned in clauses (a) to (d) are straightway to be confiscated. But in respect of any receptacle, package or covering in which any of the articles liable to confiscation under Sub-section (1) are found and the animals, carts, vessels, or other conveyances used in carrying any such articles they are not to be confiscated straightway but they are liable to confiscation. . There is understandable distinction between the things which must be straightway confiscated as provided by Section 98(1) and the things which are liable to confiscation. This should be in the very nature of things. Things like intoxicant, hemp, mhowra flowers, molasses, materials, still utensil, implement or apparatus in respect of which offence appears to have been committed under the Bombay Prohibition Act should straightway be confiscated because their possession per se is prohibited. They must be confiscated because they cannot be returned otherwise to the person to whom it is returned would be committing the same offence over again. They are articles, the possession of which is per se prohibited in view of the provisions contained in the Bombay

Prohibition Act. But vessels, conveyances, carts and animals used for transport of such prohibited articles are not per se prohibited and therefore, they cannot be straightway confiscated. They are liable to confiscation in view of the use made of such things. Section 99 pro. vides the procedure to be followed by the Court in respect of the things liable to confiscation before they are confiscated. Section 99 provides as under:

99. When during the trial of a case for an offence under this Act the court decides that anything is liable to confiscation under the foregoing section, the Court may after hearing the person, if any, claiming any right thereto and the evidence if any, which he produces in support of his claim order confiscation, or in the case of any article other than an intoxicant, hemp, mhowra flowers or molasses give the owner an option to pay fine as the court deems fit in lieu of confiscation:

Provided that no animal, cart, vehicle or other conveyance shall be confiscated if the owner thereof satisfies the court that he had exercised due care in preventing the commission of the offence.

It appears that the articles which are liable to confiscation can only be confiscated after hearing the person claiming any right thereto and the evidence if any which he produces in support of his claim. The proviso to Section 99 makes it abundantly clear that vessel or vehicle or other conveyance cannot be confiscated if the owner satisfies the Court that he had exercised due care in preventing the commission of the offence. Therefore, when anything liable to confiscation is to be confiscated the Court has to hear the person claiming any right thereto. Such a person has a right to lead evidence in support of his claim. He has also an option to pay fine in lieu of confiscation. In respect of the vehicle or conveyance the same cannot be confiscated if the owner shows that he had taken sufficient care to prevent the commission of the offence. He can do so by leading evidence. Therefore, before the Court proceeds to confiscate a vehicle, vessel or a conveyance, it must give an opportunity to the owner thereof to show whether he had used sufficient care to prevent the commission of the offence. In the instant case, the learned Magistrate has not given any opportunity to the owner namely Hiralal Gangaram to show that he has taken sufficient care to prevent commission of the offence. In fact before an order of confiscation is passed an inquiry as contemplated by Section 99 would be made. Such an inquiry is to be made in respect of the articles liable to confiscation and not those which are required to be confiscated as a necessary corollary as provided in Section 98(1), The learned Magistrate has not even stated anywhere in the order confiscating the vehicle that he was satisfied that the owner had not taken sufficient care to prevent the commission of the offence. In fairness to the learned Magistrate it must be stated that as he convicted accused No. 4 the owner of the motor truck for the commission of the offence, no question of further inquiry arose. If the conviction of accused No. 4 would have been upheld the order of confiscation could not have been interfered with. But as the appeal

of accused No. 4 is being allowed, it would mean that he is the owner of motor truck which has been confiscated and he should be given an opportunity to show that he had taken sufficient care to prevent the commission of the offence. The only obvious thing to do would be to set aside the order of confiscation of the motor truck bearing No. GTF 753 and to remand the case to the trial Court for passing appropriate order under Sections 98 and 99 of the Bombay Prohibition Act after giving opportunity to any person claiming any right to the motor truck No. GTF 753.

20. Mr. G. M. Vidyarthi, learned Assistant Government Pleader urged that the order of confiscation is a consequential order which must follow the findings of fact in the case and a duty is cast on the Court to confiscate anything in respect of which the offence appears to have been committed. In fact this line of approach ignores certain distinction made by the Legislature between Sections 98(1) and 98(2) of the Bombay Prohibition Act. Section 98(1) provides for confiscation of certain things in respect of which an offence appears to have been committed. In respect of those things such as intoxicant, hemp, mhowra flowers, molasses, materials, still utensil, implement or apparatus in respect of which an offence appears to have been committed they are straightway to be confiscated. As soon as the Court comes to the conclusion that in respect of the articles set out above the offence appears to have been committed, under the Bombay Prohibition Act, the Court has no option but to confiscate those articles. No other order could be passed and to that extent Mr. Vidyarthi is right in saying that there is a duty cast on the Court to confiscate such articles. Sub-section (2) makes a distinct departure in respect of these things or articles which are not to be confiscated straightway but which are liable to confiscation and the things which are liable to confiscation have to be dealt with as provided by Section 99. Therefore, in respect of the things which are not to be confiscated but which are liable to confiscation the Court has to follow the procedure prescribed in Section 99 before the order of confiscation in respect of such things could be passed, It cannot, therefore, be said that the order of confiscation is a mere consequential order following the findings of fact recorded by the Court. It may be that a person may be held guilty of possession of liquor imported in the motor truck and yet the truck need not be confiscated if it is found that it belongs to some other person who had exercised due care for preventing the commission of the offence. To take a simple illustration, a person in transport business was approached with a request that the truck is to be hired for transporting vegetables and while loading vegetables a few bottles of liquor were also loaded. If a search of the truck is taken and bottles are recovered the person who hired the truck and transported vegetables would be in possession of the bottles and would be liable for possession of liquor. But in such circumstances, it is unconceivable that the motor truck could also be straightway confiscated. Therefore, before the motor truck could be confiscated the Court must make an inquiry as envisaged by Section 99 and give an opportunity to the owner of the motor truck to show that he had exercised due care for preventing the commission of the offence and if

the Court is satisfied that he had exercised due care, the truck cannot be confiscated. Therefore, it cannot be said that in all cases! the order of confiscation is a consequential order or that there is a duty cast on the Court to confiscate every article coming before the Court trying the offences under the Bombay Prohibition Act.

21. It was lastly urged that the language of Section 99 shows that anyone claiming any right to a vehicle liable to confiscation must appear before the Magistrate and lodge a claim and only then the Magistrate has to inquire about the validity of the claim and further if it is shown that the claimant is the owner of the vehicle liable to confiscation and he had exercised due care in preventing the commission of the offence only then his claim can be upheld. It was urged that the gist of the requirement is that the claim has to be made before a Magistrate before the Magistrate can be expected to undertake an inquiry as contemplated by Section 99. It appears that anyone claiming any right to any vehicle liable to confiscation must appear before the learned Magistrate and lodge his claim. But that does not mean that any formal claim by any specific application is required to be lodged before the learned Magistrate. If the owner of the vehicle is accused of the offence and is before the Court and he claims that he is the owner of a vehicle, it would be a duty of the Magistrate to inquire whether the owner has established his claim and has further established that he had exercised due care in preventing the commission of the offence. In the instant case, the accused No. 4 Hiralal Gangaram did state that he is the registered owner of the motor truck and he has not committed any offence with which he was charged. As the learned Magistrate convicted him for abetting transport of liquor the learned Magistrate was perfectly justified in confiscating the motor truck. But as the appeal of accused No. 4 is being allowed and he is being acquitted of the charge of abetting import of liquor, certainly, his claim that he is the owner of the motor truck and that it is not liable to confiscation will have to be inquired. The very statement u/s 342, Criminal P. C. would be in the nature of an application putting forth his claim to the vehicle, Therefore, there is a claim of accused No. 4 before the Court in respect of the vehicle which is confiscated and which in view of the fact that the conviction of accused No. 4 is being set aside will have to be inquired into by the learned Magistrate. It would be open to the learned Magistrate to confiscate the motor truck if the accused No. 4 fails to satisfy the Court that he had exercised due care in preventing the commission of the offence. Therefore, as stated earlier, the order confiscating motor truck No. GTF 753 will have to be set aside and the matter to that extent will have to be remanded to the trial Court for considering the claim of accused No. 4 keeping in view the provisions of Sections 98 and 99 of the Bombay Prohibition Act.