
(2016) 09 PAT CK 0041

In the Patna High Court

Case No : Criminal Writ Jurisdiction Case No. 533 of 2016 Arising Out of P.S.
Case No. - null Year-null Thana-null District-Aurangabad

Ram Sumir Sharma

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 30-09-2016

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 68 G

Citation : (2016) 3 BBCJ 398 : (2016) 4 BLJud 259 : (2017) 1 ECrC 130 :
(2016) 4 PLJR 434

Hon'ble Judges : I.A. Ansari, CJ. and Mr. Navaniti Prasad Singh, J.

Bench : Division Bench

Advocate : Mr. Ramakant Sharma, Senior Advocate, for the Petitioner; Mr. P.N. Shahi, AAG, for the Respondents

Final Decision : Allowed

Judgement

Mr. Navaniti Prasad Singh, J.—By the present writ petition, the petitioner has sought for quashing of the sealing of his entire residential premises, as were done on 21.05.2016, pursuant to Annexure-1. The premises was sealed and pursuant to powers conferred on the authorities under Section 68 - G of the Bihar Excise Act, 1915, as amended with effect from 31.03.2016.

2. The primal question involved is : whether, in view of provisions of Section 68 G of the Bihar Excise Act, 1915 (hereinafter referred to as the Act), the authorities have jurisdiction to seal the entire premises, even though the alleged recovery of liquor, in the quantity exceeding prescribed limit, was found only in one of the rooms of the premises, which is in joint occupation of various family members.

3. Before dealing with the statutory provisions relevant to this writ petition, it is necessary to notice the facts of the case.

4. It appears that Sub - Inspector of Police, Aurangabad, Sri Shiv Shankar

Kumar, in course of investigating Aurangabad Town P.S. Case No. 164 of 2016, dated 14.04.2016, instituted under Section 302, 120 B of the Indian Penal Code and Section 27 of the Arms Act, received information that F.I.R. named accused, Manish Sharma, is hiding in the house of Sanjay Sharma, son of Chandrika Sharma, in Chandralok Bhawan, in the Aurangabad town. In order to apprehend the said accused Manish Sharma, the said Sub - Inspector of Police came to the house of Sanjay Sharma. In course of search of the house, from one of the rooms situated in south-east of the premises, in the loft, a large number of bottles of Indian Made Foreign Liquor (hereinafter in short as IMFL) of different brands were found, for which the owner of the premises, allegedly, Sanjay Sharma, could not produce any paper. Accordingly, on 14.04.2016 itself, at about 3:30 pm a seizure list was prepared of IMFL found and, later, on alleging that it was an offence punishable under Section 47 of the Act, as amended, apart from other sections of the Indian Penal Code, on the self statement of the Sub - Inspector recorded at about 4:15 pm on 14.04.2016, Aurangabad Town P.S. Case No. 127 of 2016 was registered, which is Annexure-3 to the writ petition.

5. The said Sanjay Sharma, who was alleged to be the owner of the house and was present, came to be arrested. Thereafter, on 21.05.2016, allegedly, a truck load of police officials arrived and without notice, sealed the entire residential house, as per sealing memo (Annexure-1), in exercise of powers under Section 68 - G of the Act, on allegation that a huge quantity of IMFL was recovered from the premises. After sealing the entire premises, one Sudhir Sharma was given the responsibility as caretaker.

6. As the premises were residential premises, where ladies and children had also been residing, even without giving time to them, to remove their household articles and make other arrangements, the premises were sealed, this writ petition was filed challenging the powers of the authorities in this regard.

7. Pursuant to interim order passed by this Court, apparently, realising the hardship caused to the family members residing therein, the premises were directed to be unsealed, which the authorities obeyed. Respondents were directed to file detailed counter affidavit, which have been filed. There is a counter affidavit by the District Magistrate, Aurangabad, the Superintendent of Police, Aurangabad and the Excise Inspector, Daudnagar, Aurangabad, respondent nos. 4, 5 and 7 respectively.

8. Petitioner has pleaded that the mother of the petitioner had purchased the land on 10.12.2001, admeasuring about 10.05 decimals, on which the residential house for the family has been built consisting of several rooms, in which, different family members stayed. The family consists of four brothers, being the sons of the landlady, namely, Dhananjay Sharma, Ram Krishna Sharma, Sanjay Sharma (alleged to be the owner of the premises as per the F.I.R. and the accused) and Ram Sumir Sharma (the writ petitioner). They have separate rooms, where they reside with their families, which include ladies and children.

9. The petitioner's case is that his eldest brother, Dhananjay Sharma, has a son, Nilesh Kumar, who had a retail licence for dealing in IMFL, valid for the year 2015-16, being licence No. 139, granted by the District Magistrate-cum-Collector, Aurangabad, in Aurangabad town itself ; but the shop premises were at a distance from the said house. The seized stocks of liquor belonged to the said Nilesh Kumar, which were kept there, upon liquor licenses not having been renewed for the year 2016-17, pursuant to the notification issued by the State Government on 05.04.2016. It was stored, in a room, in the loft thereof, by the said Nilesh Kumar, who, as stated above, was the son of Dhananjay Sharma to whom the room was allotted in the joint premises. At the time of inspection, no other male members were present, except Sanjay Sharma. The entire premises were shown to be of Sanjay Sharma and Sanjay Sharma was made accused. Later, after more than a month, the entire premises, including all the rooms, were sealed in purported exercise of powers under Section 68 G of the Act.

10. I may, now, refer to Section 68 - G of the Act, which is reproduced herein below :

68-G. Premises liable to be sealed. - If it comes to the notice of any Excise Officer or any police officer not below the rank of a Sub Inspector that a particular premises or a part thereof is or has been used for committing any offence under this Act, he may immediately seal the premises and send a report to the Collector for the confiscation of the same.

Provided that if the said premises are temporary structures which cannot be effectively sealed, then the Excise Officer or the police officer, with the order of the Collector, may demolish such temporary structures.

(emphasis supplied)

11. The submission, on behalf of the petitioner, is that a reference to Section 68 G of the Act itself would show that the legislature has advisedly used the expression "a particular premises or a part thereof", which clearly means not the whole premises, but only that part, which is used for violating the Excise Law and, as such, sealing of the entire premises, which were in occupation of different members of the family, was grossly in excess of powers conferred and was, thus, ultra vires the Act.

12. The first thing to be noted is that there is no challenge as to the authority of the respondents to seize the liquor found in the loft of one of the rooms of the premises inasmuch as the stocks found therein were stored beyond permissible limit as contemplated under Section 19 (1) of the Act.

13. In the counter affidavits filed by the District Magistrate and the Superintendent of Police separately, both have accepted the position, as stated by the writ petitioner. Paragraphs 8 and 9 of the counter affidavit are being quoted hereunder :

8. That it is stated that in course of inquiry it has been transpired that during the

financial year 2015-16 one Nilesh Kumar who is own nephew of Sanjay Sharma was licensee of Aurangabad foreign liquor shop no. 1 which was situated about 2 KM away from the house in question. At the end of the financial year 2015-16 i.e. on 31.03.2016 the stock of the said excise shop was nil.

9. That it is stated that in course of inquiry it has also been learnt that the house in question is in the name of one Shanti Devi. She has four sons namely, Dhananjay Sharma, Sanjay Sharma, Ram Krishna Sharma and Ram Sumir Sharma (writ petitioner) and all of them use to reside in the said house. The aforesaid licensee Nilesh Kumar is son of Dhananjay Sharma.

14. Thus, there is no dispute, in fact, that the house stands in the name of the mother of the writ petitioner and all her four sons, as aforesaid, reside in the said house and Nilesh Kumar, who was earlier the liquor licensee, is the son of one of the brothers.

15. In order to appreciate the submission, we have, first, to look to the provisions of the Act, which have been introduced by amendment effective from 31.03.2016.

48. Presumption as to commission of offence in certain cases. - (1) ??.

(2) Where any animal, vessel, cart or other vehicle and any premises is used in the commission of an offence under this Act, is liable to confiscation and/or liable to be sealed, the owner or occupier thereof shall be deemed to be guilty of such offence and such owner shall be liable to be proceeded against and punished accordingly, unless he satisfies the court that the offence was committed without his knowledge or that he had exercised due care in the prevention of the commission of such an offence.

68A. Certain things liable to confiscation.

- (a) ?..

(b) ??

(c) ?

(d) ??.

(e) Any premises or part thereof that may have been used for committing any offence under this Act.

16. The provisions are drastic and harsh authorising not only sealing of the premises or part thereof, but its confiscation. The first thing, I would like to notice is that so far as criminal jurisprudence and criminal law is concerned, there is no question of vicarious or constructive liability unless the law so specifically provides and when the law so provides, the law being harsh and drastic, it has to be very strictly construed so that injustice may not be perpetuated. When the law itself provides that the premises or any part thereof may be sealed, it predicates a sense of responsibility with which the power is to

be exercised in regard the manner of exercise thereof.

17. On the facts aforesaid, when the law itself provides for sealing a particular premises or part thereof, the authorities, on the said finding, could have only exercised power in respect of the room in which offending liquor was found as other part of the premises was in occupation of other independent members. The Act does not create any vicarious or constructive liability in respect of all the persons occupying the premises. A reference may be made to Section 47 of the Act, which is quoted hereunder :

47. 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 under this Act or in contravention of any condition of any license or permit or pass, granted under this Act or without a valid license, permit or pass issued under this Act ?

(a) manufactures, possesses, sells, distributes, bottles, imports, exports, transports or removes any intoxicant ; or

(b) cultivates any hemp plant ; or

(c) constructs or establishes or works any manufactory, distillery, brewery or warehouse ; or

(d) bottles any liquor for the purpose of sale ; or

(e) uses, keeps or has in his possession any material, still, utensil, implement or apparatus, or premises, whatsoever, for the purpose of manufacturing any intoxicant ; or

(f) possesses any material or film either with or without the State Government logo or logo of any State or wrapper or any other thing in which liquor can be packed or any apparatus or implement or machine for the purpose of packing any liquor ; or

(g) sells any intoxicant, collects, possesses or buys any intoxicant beyond the prescribed quantity ; or

(h) removes any intoxicant from any distillery, brewery, warehouse, other place of storage licensed, established, authorised or continued under this Act ; Shall be punishable with imprisonment for a term not less than ten years but which may extend to imprisonment for life and with fine which shall not be less than one lakh rupees but which may extend to ten lakh rupees.

18. A reference to the aforesaid provision, inter alia, would show that the person liable is the person, who is found to be in possession of liquor without valid licence or permit. Section 19 (1) of Act in terms, permits, possession in quantities not in excess of those permitted by the Board of Revenue by Section 5 thereof. Under Section 19 (4) of the Act, the notification issued by the State Government, on 05.04.2016, reads as follows :

Notifn. No. 11/Nai Utpad Niti - 01-03-2016 - 1485, dated 5th April, 2016. - In exercise of the powers conferred under Section 19 (4) of the Bihar Excise Act, 1915 (as amended by Bihar Excise (Amendment) Act, 2016), the State Government hereby impose ban on wholesale or retail trade and consumption of foreign liquor by any license holder or any person in the whole of the State of Bihar with immediate effect.

19. A reference to the aforesaid Section 19 (1) of the Act and the notification would show that the notification does not prohibit possession simplicitor. Possession of liquor above the prescribed limit is, thus, an offence by the person, who is found in possession thereof. Possession has to be conscious possession of a person.

20. Thus seen, there is no concept of vicarious or constructive liability. That being so, the position in law would be that only the person, who is in conscious possession of liquor beyond the prescribed limit, can be prosecuted and only that part of the premises can be sealed, which is consciously used for committing an offence by the person, who has committed the offence provided that he is the owner thereof, otherwise the provision would be arbitrary. The reason can be explained by a simple illustration. A premise is given on rent to a tenant or is in permissive possession of a person other than the landlord. That tenant or that person in permissive possession violates the law by storing unauthorized quantity of liquor. There being no vicarious liability created by law, can the premises be sealed and/or confiscated? The answer obviously has to be no ; unless prosecution alleges and is able to establish that the violation was with the knowledge of, and in connivance with, the landlord ; otherwise, it would be too harsh and arbitrary to permit that for a violation committed by the tenant, the landlord would lose his property. of course, even if vicarious liability is created, its validity may be questioned on ground of fair procedure.

21. In the facts of the present case, the liquor was found stored in a loft in one of the rooms of premises, which had many rooms occupied by different members of a family. Then the sealing of the entire premises, i.e. all the rooms, would surely be beyond the powers conferred by the Act and cannot be sustained. In other words, for the fault of Nilesh Kumar, if any, other family members cannot be visited with the drastic consequences of sealing or confiscation, which the law does not contemplate, in absence of vicarious or constructive liability.

22. Thus, in my view, vicarious or constructive liability, being a legal fiction and unless created by statute, the validity of which itself could be questioned, it cannot be inferred. The provisions as they stand cannot be used as a measure of arm twisting. The premises must belong to the accused or to the person from whose conscious possession liquor is found as no one can be held criminally liable for an act of another unless law so provides.

23. Here, I may, first, refer to a decision of the Apex Court in the case of P.J. Agro Tech. Ltd. and others v. Water Base Limited, since reported in AIR 2010

Supreme Court 2596. This case relates to an offence punishable under Section 138 of the Negotiable Instruments Act. An employee of the appellant company issued a cheque from his personal account purporting to be in discharge of liability of the appellant company, which was dishonoured. Apart from the said employee, the appellant company and its Directors were being prosecuted and the prosecution not having been quashed by the High Court, they have appealed to the Apex Court. The Apex Court, while allowing the application, held thus in paragraph 9, the relevant part whereof, is being reproduced hereunder :

9. ???An action in respect of a criminal or a quasi-criminal provision has to be strictly construed in keeping with the provisions alleged to have been violated. The proceedings in such matters are in personam and cannot be used to foist an offence on some other person, who under the statute was not liable for the commission of such offence.

24. I may then refer to the judgment of the Apex Court in the case of S.M.S. Pharmaceuticals Limited v. Neeta Bhalla and another since reported in (2005) 8 Supreme Court Cases 89 and this is what their Lordships held in paragraph 4 of the judgment, the relevant part whereof, is being reproduced hereunder :

4. In the present case, we are concerned with criminal liability on account of dishonour of a cheque. It primarily falls on the drawer company and is extended to officers of the company. The normal rule in the cases involving criminal liability is against vicarious liability, that is, no one is to be held criminally liable for an act of another. This normal rule is, however, subject to exception on account of specific provisions being made in the statutes extending liability to others. Section 141 of the Act is an instance of specific provision which in case an offence under Section 138 is committed by a company, extends criminal liability for dishonour of a cheque to officers of the company. Section 141 contains conditions which have to be satisfied before the liability can be extended to officers of a company. Since the provision creates criminal liability, the conditions have to be strictly complied with. The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused is the company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable. In other words, persons who had nothing to do with the matter need not be roped in???

25. Thus seen, the action of the authorities in sealing the entire premises, which they, now, themselves admit belonged to other family members as well, and had been in occupation of other family members, was totally unjustified in fact and in law. Thus, the interim order, dated 26.05.2016, passed by this Court, for unsealing the premises, consequent to which, as per the affidavit of the Superintendent of Police, the premises has been unsealed, is made absolute.

26. This writ petition is, accordingly, allowed.

I.A. Ansari, C.J. - I agree.