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(2010) 02 CHH CK 0029

In the Chhattisgarh High Court

Case No : Criminal Appeal No''s. 332, 335, 336, 338, 339 and 341 of 2001

State of Chhattisgarh APPELLANT

Vs

Bahadur and Others RESPONDENT

Date of Decision : 02-02-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 31, 34, 34(A), 36, 38
Criminal Procedure Code, 1973 (CrPC) — Section 377, 397, 401

Citation : (2010) 2 CGLJ 329

Hon'ble Judges : Pritinker Diwaker, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Pritinker Diwaker, J.—Since all the aforementioned appeals arise out of the common judgments dated 17.1.2001, 18.1.2001 and 22.1.2001, passed by the Judicial Magistrate First Class, Raigarh, they are disposed of by this common judgment.

2. The aforementioned appeals are filed u/s 377 of the Code of Criminal Procedure. The appellant/State being aggrieved by the aforementioned judgments delivered by the learned Judicial Magistrate First Class, Raigarh, convicting the respondents/accused u/s 36 of the C.G. Excise Act and sentencing them till rising of the Court and pay fine of Rs. 15 (in criminal appeals No. 336/2001, 338/2001, 339/2001), Rs. 5 in (criminal appeal No. 341/2001), Rs. 20 in (criminal appeal No. 335/2001) and Rs. 25 in (criminal appeal No. 332/2001), has preferred these appeals.

3. Counsel for the State submit that though present are the cases where the State has filed appeals u/s 377 of the Code of Criminal Procedure, this Court must exercise its power u/s 397/401 of the Code of Criminal Procedure because the Court below illegally framed the charges u/s 36 of the C.G. Excise Act while in fact the prosecution has come with the case that each of the accused was answerable to charge u/s 34 of the Excise Act. They also submit that from the

proceedings recorded by the learned Judicial Magistrate, it would clearly appear that without assigning any reasons the said Magistrate instead of framing charges u/s 34 of the C.G. Excise Act, had framed the charge u/s 36 of the Act. They submit that these are the fit cases for setting aside the orders passed by the learned Court below.

4. Counsel for the respondents/accused on the other hand submit that as the State has not filed any appeal against the framing of the charge u/s 34 nor had challenged the orders for not framing the charge u/s 34 of the Excise Act, there is no scope for interference in these proceedings.

5. Heard counsel for the parties at length.

6. Before appreciating the rival contentions it would be important to have a reference of Sections 34 and 36 of the Excise Act. Sections 34 and 36 of the Excise Act read as under:

34. Penalty for unlawful manufacture, transport, possession, sale etc. (1) whoever, in contravention of any provisions of this Act, or of any rule, notification or order made or issued there under, or of any condition of a licence permit or pass granted under this Act,

(a) manufacturers, transports, imports, collects or possesses any intoxicant;

(b) save in the cases provided for in Section 38, sells any intoxicant; or

(c) cultivates bhang; or

(d) taps any toddy producing tree/or draws toddy there from; or

(e) constructs, or works any distillery, brewery or vintnery; or

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

(g) removes any intoxicant from any distillery, brewery, vintnery or warehouse licensed, established or contained, under this Act;

(h) Bottles any liquor;

shall subject to the provisions of sub- Section (2), be punishable for every such offence with imprisonment for a term which may extend to one year and fine which shall not be less than five hundred rupees but which may extend to five thousand rupees;

Provided that when any person is convicted under this Section of any offence for a second or subsequent time he shall be punishable for every such offence with imprisonment for a term which shall not be less than two months but which may extend to twenty four months and with fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees.

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(2) Notwithstanding anything contained in sub-Section (1), if a person is convicted for an offence covered by Clause (a) or Clause (b) of sub-Section (1) and the quantity of the intoxicant being liquor found at the time or in the course of detention of the offence exceeds fifty bulk liter, he shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than twenty five thousand rupees but may extend to one lac rupees;

Provide that when any person is convicted under this Section for an offence for second or subsequent time, he shall be punishable for every such offence with imprisonment for a term which shall not be less than two years but which may extend to five years and with fine which shall not be less then fifty thousand rupees but may extend to two lac rupees.

(3) When an offence covered by Clause (a) or Clause (b) of sub-Section (1) is committed and the quantity of liquor found at the time or in the course of detection of such offence exceeds fifty bulk liters, all intoxicants, articles implements, utensils, materials, conveyance etc. in respect of or by means of which the offence is committed, shall be liable to be seized and confiscated. If such an offence is committed by or on behalf of a person who holds a licence under the Act for manufacturing or stocking or storing liquor for sale on which duty at the prescribed rate has not been paid then notwithstanding anything contained in Section 31 the licence granted to him shall be cancelled in case he is convicted for the offence as aforesaid.

(4) The seizure or confiscation of the intoxicants, articles, implements, utensils, materials and conveyance and the cancellation of licence as provided under Sub-section (2) above shall be in addition and without prejudice to any other action that may be taken under any provisions of the Act or rules made there under.

36. Penalty for illegal possession - Whoever, without lawful authority, has in his possession any quantity of any intoxicant knowing the same to have been unlawfully imported, transported, manufactured, cultivated or collected knowing the prescribed duty not to have been paid thereon, shall be punishable with imprisonment for a term which may extend to six months or with find may extend to one thousand rupees, or with both.

7. Section 36 would apply to a case where some- body possesses any quantity of any intoxicant knowing the same to have been unlawfully imported, transported, manufactured, cultivated or collected knowing the prescribed duty not to have been paid thereon. A bare perusal of Section 36 of the Act would make it clear that Section 36 applies to a case where a person is found in possession of any quantity of any intoxicant in spite of the knowledge that the prescribed duty has not been paid thereon. In the present case the Police did not come with the case that the accused persons were found in possession of the intoxicant on which prescribed duty was not paid. Present certainly would be a case u/s 34 of the Excise Act. Section 34 of the Act provides that whoever, in contravention of any

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provisions of this Act, or of any rule, notification or order made or issued there under, or of any condition of a licence permit or pass granted under this Act, manufactures, transports, imports, exports, collects or possesses any intoxicant shall be liable to be punished for every such offence with imprisonment for a term which may extend to one year and fine which shall not be less than five hundred rupees but which may extend to five thousand rupees. In the present cases, the prosecution had alleged that in presence of the accused persons search was effected and illicit country made liquor was recovered. The possession of country made liquor would certainly be an offence punishable u/s 34 of the Excise Act.

8. The order passed by the learned court below shows absolute non application of mind. In the proceedings recorded by the learned trial Court, it has been mentioned that challan u/s 34A of the Excise Act was filed but all of a sudden the learned Court below framed a charge u/s 36 of the Act. If the Court was of the opinion that the accused could not be charged with the offence punishable u/s 34 or 34A of the Act, it was required to assign reasons in stead of simply saying that the accused is charged with Section 36 of the Excise Act.

9. It has been argued on behalf of the respondents that the respondents/accused may be released on bail as has been done in the matter of State of Chhattisgarh v. Bhugdev reported in 2001 (2) CJLJ 84.

10. In the considered opinion of this Court, the present are the fit cases where power u/s 397/401 of the Code of Criminal Procedure must be exercised to set at naught the illegality committed by the Court below.

11. The orders passed by the learned Court below are liable to be set aside and they are set aside as such. It is, however, directed that as the accused persons had already undergone the sentence awarded to them and have deposited the fine, the Court below shall refund the amount deposited by them and in case of conviction while awarding the sentence shall take into consideration the sentence already suffered by the respondents.

12. Though the offence u/s 34 of the Excise Act is non bailable, looking to the totality of the circumstances, it is directed that each of the respondents be released on bail on his furnishing a personal bond in the sum of Rs. 500 with one surety in the like amount to the satisfaction of the trial Court. The trial Court shall restore all the cases to their original numbers and shall proceed with the matters in accordance with law.

13. Consequently, the appeals are allowed with the directions as made above.

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