

CRIMINAL REVISION:

Before Bartley and Rau J.J.

EZEKIEL

v.

EMPEROR.*

1939

Feb. 8.

Confiscation—Notice to show cause, if must be issued before making an order for confiscation—Confiscation of licit liquor along with illicit liquor, when can be made—Liquor in Excise or Customs Bond, if liable to confiscation—Bengal Excise Act (Ben. V of 1909), ss. 63, 64.

Before a Magistrate can make an order for confiscation under s. 64(1) of the Bengal Excise Act, he has to decide that the articles in question are liable to confiscation under s. 63, which necessarily implies the hearing of parties on notice. In ordinary circumstances, such omission would be fatal to the order, but when, in view of admissions contained in the petition for revision of such order, it appears that no real prejudice has been caused, the order may be upheld or varied as the case may require.

Under s. 63, sub-s. (2), any liquor lawfully "had in possession along "with or in addition to" any liquor liable to confiscation under sub-s. (1), is likewise liable to be confiscated. It is immaterial who is the person in possession or whether the licit liquor is in different premises. All that the sub-section requires is that some person should be in possession at some point of time subsequent to the commission of an excise offence, both of the illicit liquor and some licit liquor. The person in possession or even the owner need not be guilty of any offence. In proved cases of hardship the Government may mitigate the rigour of the law by making special rules under s. 86 (14).

The Magistrate has jurisdiction in a proper case to order confiscation even if the liquor liable to be confiscated be somewhere in Bengal beyond the territorial jurisdiction of the Magistrate trying the case.

Possession implies full and uncontrolled physical dominion. Hence liquor in Excise or Customs Bond under double lock, one lock being that of the Government, is not liable to confiscation under s. 63(2), being in the possession of both the party and the Government.

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The material facts and arguments appear from the judgment.

*Criminal Revision, No. 1099 of 1938, against the order of K. C. Das Gupta, Additional Sessions Judge of 24-Parganás, dated Sep. 22, 1938, confirming the order of S. C. Majumdar, Deputy Magistrate of Alipore, dated Feb. 14, 1938.

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Carden Noad, Suresh Chandra Talukdar and Sushil Kumar Bhattacharjya for the petitioners.

A. K. Basu and Bireswar Chatterjee for the Crown.

RAU J. In this Rule the District Magistrate of the 24-Parganás has been asked to show cause why the order of confiscation passed by the Deputy Magistrate of Alipore in the Gariahata Excise Conspiracy Case in respect of certain stocks of liquor at 4, Lindsay Street, 46, New Park Street and 17, Mangoe Lane (including the "Excise Bond" and the "Customs Bond") should not be set aside.

In Revision No. 1100 of 1938 (*J. E. Gubbay v. Emperor*) we shall deal with the trying Magistrate's order of confiscation so far as it relates to the stock of liquor at 8, Lindsay Street. In the present Rule we are concerned with that portion of the order which relates to the stocks of liquor at the other places named above.

The circumstances in which the Magistrate passed the order of confiscation are briefly these:—On February 14, 1938, immediately after he had delivered judgment in what is known as the Gariahata Excise Conspiracy Case (*Emperor v. C. N. Naidu and others*) an application was made before him by the Collector of Excise, Calcutta, submitting a list of articles "liable to confiscation under s. 63 (1) and (2) of the Bengal Excise Act and s. 517 (1) of the "Criminal Procedure Code" and praying that necessary orders of confiscation of the articles be passed. Upon this application the Magistrate recorded an order that very day in the single word "Confiscate". The list annexed to the application was a long one and comprised large stocks of liquor at 8, Lindsay Street (Foreign liquor shop and Bottling godown of James Anderson & Co.), 4, Lindsay Street (Foreign liquor shop of Davidsons, Ltd.), 46 New Park Street (another Foreign liquor shop of Davidsons, Ltd.),

17, Mangoe Lane (Bottling godown, Excise Bond and Customs Bond of Davidsons, Ltd.), and several other places. No opportunity to show cause against confiscation was given to any party, except such opportunity as the parties concerned in the conspiracy case had during the case itself.

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The petitioners in the present Rule are E. E. Ezekiel and Mrs. Reemah Ezekiel. It will be remembered that the Rule is concerned with certain stocks of liquor found at various premises belonging to Davidsons, Ltd. E. E. Ezekiel claims that he is the liquidator of this company appointed at a meeting of share-holders and creditors on January 27, 1937 (about 10 or 11 months before the order of confiscation) and Mrs. Reemah Ezekiel claims that as mortgagee and debenture-holder of the company she obtained on April 11, 1938 (about 2 months after the order of confiscation) a decree from the High Court whereby the entire assets of the company were vested in her. E. E. Ezekiel appealed against the order of confiscation to the Additional Sessions Judge of Alipore and subsequently Mrs. Reemah Ezekiel joined in the appeal, which the learned Judge dismissed on September 22, 1938.

An important point urged before us on behalf of the petitioners is that no notice was given to the interested parties before the order of confiscation was passed. To discuss this point we shall assume, as contended in the course of argument by learned counsel for the petitioners, that the order, so far as we are concerned with it in this Rule, was made wholly under the Bengal Excise Act. Now it is undoubtedly true that before a Magistrate can make an order of confiscation under s. 64 (1) of this Act, he has to decide that the articles in question are liable to confiscation under s. 63. A decision necessarily implies the hearing of parties and the petitioners' grievance is that no parties were heard in this case. In ordinary circumstances, the omission might have

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been fatal to the order; but as we shall show presently, facts sufficient for a decision of the question of liability to confiscation are stated by the petitioners themselves in the application on which this Rule was issued. It is therefore difficult to argue that the omission has caused any real prejudice and, in any event, since we have ourselves heard the petitioners very fully and since our powers in revision extend to altering or reversing the order as we think fit, any possibility of prejudice disappears.

We now turn to the admissions in the petitioners' application. Paragraph 3 of the application recites that on and after the first search of the premises of Davidsons, Ltd., on October 20, 1935, various suspected liquors were sampled and seized, but the large stock of genuine liquor found on the premises was allowed to be continuously sold down to the end of December 1935, after which date the genuine liquor was collected at various spots upon the premises in the Presidency-town and remained in the control of the Excise Department. Paragraph 4 sets out the premises upon which liquor was originally found; these were—

- (a) The shop and certain godowns at 3 and 4, Lindsay Street.
- (b) 5, Lindsay Street.
- (c) The Bottling and Blending godown at 17, Mangoe Lane.
- (d) The Customs Bond at 17, Mangoe Lane.
- (e) The Excise Bond at 17, Mangoe Lane.

The same paragraph states that no illicit liquor was found at (b), (d) or (e), but it contains the important admission that illicit liquor was found in (c), the Bottling and Blending Godown.

These two paragraphs thus contain two explicit statements: (1) that illicit liquor was found in the Bottling and Blending godown at 17, Mangoe Lane and (2) that at the same time or subsequently,

genuine liquor of considerable value was found at certain other premises of Davidsons, Ltd. There is no suggestion in these paragraphs or in the rest of the application that in the interval, if there was any substantial interval, between (1) and (2), additions were made to the genuine liquor. On the contrary, the allegation is that some of the genuine liquor was allowed to be sold before the Excise Department assumed control. It is the liquor of which the Excise Department assumed control that has been confiscated in this case. It follows therefore that the confiscated liquor formed part of the liquor which was on certain premises of Davidsons, Ltd., at the same time that illicit liquor was found in certain other premises of the same company, namely, the godown at 17, Mangoe Lane. This and certain other established facts are sufficient to enable us to decide how far the liquor is liable to confiscation under s. 63 of the Bengal Excise Act. Before going on to deal with this section, however, we should like to set out more precisely some of the evidence about the finding of illicit liquor in the bottling godown and for this purpose we propose to confine ourselves to what we consider the most relevant sample. In connection with charge No. 11 (unlawful transport of liquor) on which Granatstein and Naidu have been convicted in the Conspiracy Case, the Magistrate has found that on October 23, 1935, four tanks, three of them empty and one, namely, tank No. 37, full of liquor were found in the godown at 17, Mangoe Lane. A sample taken from this tank—serial No. 24 of Mr. Bartlett's Report—has been found to have contained pot still liquor made at the illicit distillery at 52, Gariahata Road. There can therefore be no doubt whatever that in this godown there was found on October 23, 1935, liquor in respect of which Granatstein and Naidu had committed an offence punishable under s. 46(a) of the Bengal Excise Act.

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Now let us turn to s. 63 of the Act. Under s. 63 (1) whenever an offence has been committed

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which is punishable under this Act, the liquor in respect of which the offence has been committed is liable to confiscation. Then we come to sub-s. (2) which provides, to mention only the relevant portion, that any liquor lawfully "had in possession along "with or in addition to" any liquor liable to confiscation under sub-s. (1) is likewise liable to confiscation. It follows, therefore, that any liquor lawfully "had "in possession along with or in addition to" tank No. 37 is likewise liable to confiscation. It is immaterial who is the person in possession; all that the sub-section requires is that some person should be in possession at some point of time subsequent to the commission of an excise offence, both of the illicit liquor and also of some licit liquor: when this condition is fulfilled, the licit liquor is confiscated, equally with the illicit liquor. The sub-section does not say that the person in possession need be guilty of any offence and the proviso to the sub-section distinctly implies that in the case of liquor even the owner need not be guilty. The whole of s. 63 is in very wide terms and it is not difficult to imagine cases where it may operate harshly, but revenue laws are often very harsh, because revenue offences are often very profitable. Possibly, in proved cases of hardship, the Provincial Government will mitigate the rigour of the law by making special rules under s. 86(14) of the Act (relating to the disposal of things confiscated under the Act) or otherwise: these, however, are extraneous considerations which can hardly affect the interpretation of s. 63. The section has to be construed according to its plain language. We have already stated what it says and what it does not say.

To proceed now to apply the section to the facts of this case. We have seen that an excise offence was committed (by Granatstein and Naidu) in respect *inter alia* of tank No. 37; therefore this tank of liquor is liable to confiscation under s. 63 (1). Again, when on October 23, 1936, this tank was in the possession of Davidsons, Ltd., in the godown at 17, Mangoe

Lane, the same company was at the same time lawfully in possession of the unbonded liquor which is part of the subject-matter of the present Rule, although on certain other premises. The fact that the latter liquor was on different premises from tank No. 37 is immaterial; the point is that it was lawfully "had in possession" (by Davidsons, Ltd.) "in addition to" tank No. 37. Therefore, the additional liquor is liable to confiscation under s. 63(2). The fact that Davidsons, Ltd. (as distinct from the members or employees of the company) has not been prosecuted for or convicted of any offence in this case is, as we have already stated, entirely irrelevant to the construction of s. 63(2).

Considering the enormous profits shown to have been made in this case by the group of companies of which Davidsons, Ltd., was one, we cannot say that the Magistrate was wrong in passing an order of confiscation under s. 64 (1) rather than an order of fine.

We must now notice some of the other objections taken before us on behalf of the petitioners; we have already dealt with the point that the Magistrate did not hear interested parties before passing his order. Next in importance is the point that the Magistrate had no territorial jurisdiction to pass the order: he was a Magistrate of the 24-Parganâs, whereas, it is said, the liquor confiscated was in various places in Calcutta outside that district. This argument is founded on s. 12 of the Code of Criminal Procedure; but it overlooks s. 1 (2) of the same Code, which states that, in the absence of any specific provision to the contrary, nothing in the Code shall affect any special jurisdiction or power conferred by any other law for the time being in force. It follows, therefore, that if any local or special Act has in any particular matter conferred on a Magistrate special powers, these powers are not to be limited by anything contained in s. 12 of the Code. There can thus be no question of the unfettered competence

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of the Bengal Legislature to confer these special powers within the Province; the only question is whether, as a matter of construction, s. 64 (1) of the Bengal Excise Act does confer them. The sub-section itself contains no territorial limitation: "When, "in any case tried by him, the Magistrate decides "that anything is liable to confiscation under s. 63, "he may *etc.*" So far as the language of the provision is concerned the thing liable to confiscation may be anywhere; it must, of course, be within the Province of Bengal, the Act being an Act of the Bengal Legislature, but otherwise there is no limitation. To read into the sub-section a limitation that the thing sought to be confiscated must be within the district for which the Magistrate has been appointed under the Code will lead to the following difficulty: Take an excise case where the offender is known and some of the articles liable to confiscation are outside the district where the offence is triable. These cannot be confiscated by the procedure laid down in s. 64 (2), because that procedure is not available where the offender is known; and if we accede to the present argument, they cannot be confiscated under s. 64 (1) as being outside the trying Magistrate's jurisdiction. There is thus a lacuna, which can hardly have been the intention of the framers of the Act. We, therefore, think that on the true construction of s. 64 (1), the Magistrate who tries the case has power to order confiscation of anything in Bengal which is liable to confiscation under s. 63, whether it is within or without the district where the case is tried.

A third point taken before us on behalf of the petitioners is that the liquor in the Excise Bond and the Customs Bond at 17, Mangoe Lane, was in the dual possession of the revenue authorities and Davidsons, Ltd. Accordingly, it is argued that liquor cannot be said to have been "had in possession "in addition to" any liquor in the sole possession of Davidsons. We accept this contention: possession implies full and uncontrolled physical dominion and

in this sense Davidsons, Ltd., was not in possession of the liquor in the Excise Bond or the Customs Bond. Liquor in bond, it must be remembered, is under double lock, one lock being a Government lock whose key is in the personal custody of the officer in charge. One quantity of liquor cannot be said to be "had in possession along with or in addition to" another, unless the possessor of both is the same. It follows that the bonded liquor is not liable to confiscation under s. 63 (2), and since there is no evidence that any portion of it is illicit, it is not liable to confiscation under s. 63 (1) either.

We must, therefore, set aside the order of confiscation so far as it relates to the liquor in the Excise Bond and the Customs Bond set out under heads D and E of the annexure referred to in para. 6 of the petitioners' application in revision; but in other respects the Rule must be discharged.

BARTLEY J. I agree.

Rule discharged.

A.C.R.C.

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