

APPELLATE CRIMINAL.

Before Jwala Prasad and James, JJ.

KING-EMPEROR

v.

GOBIND PANDEY.*

1929.

Jan., 30.
Feb. 1.
March 12.

Excise Act, 1915 (B. & O. Act II of 1915)—"excisable article", whether medicinal preparation containing alcohol, is.

A medicinal preparation containing alcohol is an "excisable article" within the meaning of the Excise Act, 1915, the manufacture or possession whereof in contravention of the Act is punishable.

Ganesh Chandra Sikdar v. Emperor(1), followed. *Ganesh Chander Sikdar v. Queen-Empress*(2), *Mati Lal Chandra v. Emperor*(3) and *Satish Chandra Roy v. King-Emperor*(4), distinguished.

The facts of the case material to this report are stated in the judgment of Jwala Prasad, J.

C. M. Agarwala, Assistant Government Advocate, for the Crown.

S. P. Varma (with him *B. Sahay*, *L. B. Lal*, *C. P. Sinha*, *N. K. Prasad*, *S. N. Rai* and *B. P. Varma*), for the accused.

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JWALA PRASAD, J.—Upon a search made by the Inspector of Excise (P. W. 2), amongst other things, a bottle containing liquid substance and a still were found in possession of Gobind Pandey. A sample of the liquid was sent to the Chemical Examiner, who reported that it was

"very crude pot-still spirits essentially different from the refined patentstill spirits made at the Government controlled distilleries of Bihar and Orissa"

and that it was of "illicit origin" the "alcoholic strength" being "51.8 per cent. proof" (vide Exhibit 4). Gobind Pandey was accordingly put on

*Government Appeal no. 9 of 1928, from an order of T. Luby, Esq., I.C.S., Sessions Judge of Patna, dated the 22nd June, 1928, setting aside that of S. N. Majumdar, Esq., Subdivisional Magistrate of Barh, dated the 15th March 1928.

(1) (1918) I. L. R. 45 Cal. 82. (3) (1912) I. L. R. 39 Cal. 1033.

(2) (1897) I. L. R. 24 Cal. 157. (4) (1912-13) 17 Cal. W. N. 939.

his trial under section 47, clauses (a) and (f), of the Bihar and Orissa Excise Act (Act II of 1915) for manufacturing liquor and being in possession of the same and also of the still.

The defence of the accused was that he was a Kaviraj or Ayurvedic medical practitioner and used to prepare medicines, and not liquor; and that the liquid substance found in his house was a well-known drug called " Mrit Sanjivani Sudha " prepared from ingredients, such as ginger, betel-nut, bark of acasia, etc., according to the pharmacopœa of the indigenous Hindu system of medicine and is used for several ailments, particularly in certain diseases of women. The still and the stillhead are used for the distillation of this drug. He claimed to be a Kaviraj or respectable medical practitioner of repute and that as such he was not liable to prosecution for manufacturing or being in possession of an alcoholic drug or medicine.

The Magistrate found that Gobind Pandey was a Kaviraj and that he prepared medicine, and not liquor, from the aforesaid ingredients and that the liquid discovered in his shop was a drug prepared for bonafide use and was being offered for sale at a price very much higher than the price at which the ordinary liquor was obtainable from a licensed shop. The price of the drug was Rs. 2-8-0 for a bottle as sold by the accused, or Rs. 1-12-0 per bottle of 12 oz., which is above the price at which liquor is obtainable from a licensed shop. But he found that as the medicine contained alcohol it was an " excisable article " which the accused was not entitled to manufacture. Accordingly, the Magistrate convicted the accused and sentenced him to pay a fine of Rs. 50 under each of the aforesaid clauses (a) and (f) of section 47 of the Act.

Gobind Pandey appealed to the Sessions Judge of Patna. The learned Sessions Judge, accepting the finding of the Magistrate that the accused was preparing medicine and not liquor and relying upon the

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decision in the case of *Ganesh Chandra Sikdar v. Queen-Empress*⁽¹⁾ and upon the judgment (Exhibit 1) of Mr. R. L. Ross (now Mr. Justice Ross), dated the 13th July, 1916, held that the preparation of medicine is not an offence under the Excise Act even though it is found to contain on an analysis a proportion of alcohol. Accordingly the learned Sessions Judge set aside the conviction of and the sentence passed on the accused, and acquitted him. Against this order of acquittal the Local Government through the Government Advocate has appealed to this Court.

The learned Assistant Government Advocate, who appears on behalf of the Government, contends that the view taken by the learned Sessions Judge is wrong in law. It is contended that since the aforesaid decision of the Calcutta High Court the Excise Act both in Bengal and in Bihar and Orissa has been amended so as to make it clear that any preparation containing alcohol will be an "excisable article" the manufacture or possession of which has been made punishable by the Act. A similar contention was raised before Mr. Ross (now Mr. Justice Ross) in a similar case which arose in 1916 after the amended Act came into force, but it did not find favour with him on the ground stated by him that

"If it had been intended by the legislature that medicines should be made excisable articles, I should have expected express provision to be made in that behalf. I find on the construction of section 2, subsection (14) that this medicine is not a liquor."

The contention of the learned Assistant Government Advocate is, however, supported by the later decision of the Calcutta High Court in the case of *Ganesh Chandra Sikdar v. Emperor*⁽²⁾. That case distinguishes the earlier cases in *Ganesh Chandra Sikdar v. Queen-Empress*⁽¹⁾, *Mati Lal Chandra v. Emperor*⁽³⁾ and *Satish Chandra Roy v. King-Emperor*⁽⁴⁾ upon the ground that they were decided prior to the amendment

(1) (1896) I. L. R. 24 Cal. 157. (3) (1912) I. L. R. 39 Cal. 1033.

(2) (1917) I. L. R. 45 Cal. 82. (4) (1912-13) 17 Cal. W. N. 939.

of the Bengal Excise Act made in 1914 and that under the amended Act "Mrit Sanjivani Sudha" containing alcohol was an excisable article, the manufacture or possession whereof in contravention of the Act was made punishable under the Act. The definition of "excisable article" read with the definitions of "spirituous liquor" and "fermented liquor" contained in the Bengal Excise Act (Act VII of 1878) gave rise to difficulties in holding that a medical preparation containing alcohol would come within the definition of an excisable article and the definition of "excisable article" was made wide enough to include such a preparation. The Bengal Excise Act used to apply to Bihar and Orissa before Act II of 1915 was enacted, and the intention of the Legislature to bring within the purview of the Act all liquid consisting of or containing alcohol was expressed by the definition of "excisable article" and "liquor" contained in section 2, clauses (6) and (14) respectively. There is therefore a good deal of force in the contention of the learned Assistant Government Advocate. The statement of objects and reasons of the amended Act in Bengal and of the new enactment in Bihar and Orissa seems to indicate the intention of the Legislature to make a medicinal preparation also, such as "Mrit Sanjivani Sudha" containing alcohol an excisable article, and the view taken by the learned Sessions Judge seems to be incorrect.

The contention of the accused, however, is that as a practising Kayiraj he was at liberty to manufacture drugs containing alcohol and could not be prosecuted for manufacturing "Mrit Sanjivani Sudha", which is a bona fide drug prepared according to the pharmacopœa of the indigenous Hindu system of medicine, and that his prosecution had been under a misapprehension on the part of the Inspector and the Sub-Inspector of Excise that he was not a Vaidya; and he relied upon Circular no. 1344-64—1-1 of 19-20-E., dated the 26th May, 1919, issued by the Commissioner of Excise and Salt to the Collectors and

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Deputy Commissioners of all districts in Bihar and Orissa, asking them to instruct the excise preventive staff

" not to institute prosecutions against respectable Ayurvedic practitioners on the ground that their preparations contain alcohol; unless there is reason to believe that they are endeavouring to cheat the excise revenue."

This circular was followed by another Circular no. 2983-3003—1-5 of 20/21-E., dated the 9th July, 1920, stating that the instructions contained in the former circular on the subject of manufacture of medical preparations containing alcohol by Ayurvedic practitioners should be followed until further orders. The existence of the circulars was admitted in cross-examination by the Excise Officers, the Inspector, the Sub-Inspector and the Superintendent of Excise (P. W.s 2, 3 and 5 respectively). They all admitted, particularly the last officer, namely, the Superintendent of Excise, that they would not prosecute a man who sells medical preparations containing alcohol unless he is endeavouring to cheat the Government of excise revenue and that the circular is respected and followed in the department. They, however, asserted that the accused was not a medical practitioner. Therefore if they had known that the accused was a respectable medical practitioner of repute, as has been found by the Courts below, they would not have prosecuted him. Hence the prosecution was started under a misapprehension and the circulars were not produced in the Court below. At our request the learned Assistant Government Advocate has produced the circulars quoted above and has also obtained information contained in letter no. 11041—1-1 of 28-29-E., dated the 4th February, 1929, that " they were issued on the authority of the Local Government ", but that they were not published in the Gazette because they were only executive instructions to the officers of the department. Section 94 empowers the Local Government to exempt any excisable article from the provisions of the Act either throughout the

province or in any specified area or as regards any specified class of persons. Under section 92 such notifications when published in the *Bihar and Orissa Gazette* shall have the effect as if enacted in the Act. Not so published the circulars in question have not the force of law. Yet the Government through the Commissioner of Excise having issued the circulars to the effect that a bonafide medical practitioner, such as the accused, for manufacturing or possessing medicines containing alcohol would not be prosecuted, it would not lie with the Government or with the Excise officers to institute a prosecution against a bonafide medical practitioner for such a preparation unless in the terms of the circular there is reason to believe that the medical practitioner is endeavouring to cheat the excise revenue. In the present case the finding is in favour of the accused that he was selling the medicine at a price much higher than the price at which liquor is sold at a licensed shop. It is not the case of the Excise officers that the petitioner cheated the excise revenue. On the other hand, their case throughout has been that he was not a medical practitioner and that if they had known that he was a bonafide medical practitioner of repute they would not have prosecuted him. The petitioner has succeeded in proving by means of unchallengeable evidence, both oral and documentary, and by the admission of one of the prosecution witnesses, that he is a Vaidya of reputation. The Courts below have also found that he is a bonafide medical practitioner and that the liquid though containing alcohol was a bonafide Ayurvedic medicine. Therefore, the prosecution was started under a misapprehension.

The accused having been acquitted by the learned Sessions Judge, perhaps the Government would not have appealed if the learned Sessions Judge had not laid down a wrong view of the law that a medical preparation containing alcohol* is not an excisable article for which a prosecution under the Act would lie, and the learned Assistant Government Advocate

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has been instructed to intimate to us that the Government only wants a finding of this Court correcting the erroneous view of the law taken by the learned Sessions Judge and that the Government is not anxious to punish the accused. This is a reasonable attitude taken by the Government. But it is difficult to extricate the anomalous position of the Government created by the circular issued under its authority letting the medical practitioners to believe that they would not be prosecuted for bonafide medical preparations containing alcohol and at the same time seeking the prosecution of the accused by filing this appeal and not withdrawing it inasmuch as the circular in question has not the force of law and the accused has technically committed the offence of which he has been charged, and we have no power but to inflict some punishment upon him. In the circumstances a technical punishment will meet the ends of justice and accordingly a fine of Re. 1 is imposed upon him.

JAMES, J.—I agree.

APPELLATE CIVIL.

Before Kulwant Sahay and Wort, JJ.

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Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 63, suit under—onus on the plaintiff to prove the right he claims.

In a suit under Order XXI, rule 63, Code of Civil Procedure, 1908, the plaintiff has to establish the right which he claims. Therefore, the onus is on the plaintiff, who relies

*First Appeal no. 128 of 1927, from a decision of Moulvi Ali Karim, Additional Subordinate Judge of Gaya, dated the 31st May, 1927.