

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 29th May, 2012

+ **W.P.(C) 8898/2011**

MANOJ KUMAR SINGH **Petitioner**

Through: Mr. Lalit Bhardwaj, Adv.

Versus

**THE NATIONAL CAPITAL TERRITORY OF
DELHI AND ORS**

..... **Respondents**

Through: Mr. L.K. Garg, Adv. for R-1 to R-3.

AND

+ **W.P.(C) 1012/2012**

RITA SHARMA **Petitioner**

Through: Mr. Lalit Bhardwaj, Adv.

Versus

**THE NATIONAL CAPITAL TERRITORY OF
DELHI AND ORS**

..... **Respondents**

Through: Mr. Shariq Mohammad, Adv. for R-2&3.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

JUDGMENT

A.K. SIKRI, ACTING CHIEF JUSTICE

1. These two petitions, besides impugning the *vires* of Section 59 of the Delhi Excise Act, 2009 also impugn the separate but similar orders of the

Commissioner, Excise dismissing the appeals preferred by each of the petitioners against the orders of the Deputy Commissioner, Excise confiscating vehicles of the petitioners and ordering the same to be sold in public auction. Mandamus is also sought for return of the vehicles.

2. The vehicle owned by each of the petitioners was intercepted and found carrying liquor and thus involved in an offence under Section 33 of the Act and was confiscated. The relevant part of Section 33 is as under:

“33. 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 or of any licence, permit or pass, granted under this Act -

(a) manufactures, imports, exports, transports or removes any intoxicant;

(b)

(c)

(d)

(e)

(f)

shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine, which shall not be less than fifty thousand rupees which may extend to one lakh rupees.”

3. The case of each of the petitioners is that they, as owner of the

vehicles are not involved in or charged with the offence and the use of the vehicle in committing the offence was without their knowledge and authority. While the petitioner in W.P.(C) No.8898/2011 claims to have allowed use of his vehicle for ferrying passengers of a call centre and misuse thereof by the driver for carrying liquor, the petitioner in W.P.(C) No.1012/2012 claims to have given her vehicle to a travel agent, to generate a source of income for herself and misuse thereof by the driver of the travel agent.

4. The vehicles were confiscated under Section 58 of the Act which is as under:

“58. Certain things liable to confiscation – Whenever an offence has been committed, which is punishable under this Act, following things shall be liable to confiscation, namely –

(a) any intoxicant, material, still, utensil, implement, apparatus in respect of or by means of which such offence has been committed;

(b) any intoxicant unlawfully imported, transported, manufactured, sold or brought along with or in addition to, any intoxicant, liable to confiscation under clause (a);

(c) any receptacle, package, or covering in which anything liable to confiscation under clause (a) or clause (b), is found, and the other contents, if any, of such receptacle, package, or covering;

(d) any animal, vehicle, vessel, or other conveyance used for

carrying the same.”

Orders of confiscation under Section 59 of the Act were issued by the Deputy Commissioner, Excise. The relevant paras of Section 59 of the Act are as under:

“59. Confiscation by Deputy Commissioner in certain cases.- (1) *Notwithstanding anything contained in this Act or any other law for the time being in force, where anything liable for confiscation under section 58 is seized or detained under the provisions of this Act, the officer seizing and detaining such property shall, without any unreasonable delay, produce the said seized property before the Deputy Commissioner.*

(2) *On production of the said seized property under subsection (1), the Deputy Commissioner if satisfied that an offence under this Act has been committed may, whether or not prosecution is instituted for the commission of such an offence, order confiscation of such property, otherwise he may order its return to the rightful owner.*

(3) *While making an order of confiscation under sub-section (2), the Deputy Commissioner may also order that such of the properties to which the order of confiscation relates, which in his opinion cannot be preserved or are not fit for human consumption, be destroyed. Whenever any confiscated article has to be destroyed in conformity with these provisions, it shall be destroyed in the presence of the excise officer not below the rank of an inspector.*

- (4) *Where the Deputy Commissioner, after passing an order of confiscation under subsection (2), is of the opinion that it is expedient in the public interest so to do, he may order the confiscated property or any part thereof to be sold by public auction or dispose it of otherwise.*
- (5) *When an order for confiscation of any property has been passed under section 59 and such order has become final in respect of the whole or any portion of such property, such property or portion thereof, as the case may be, shall vest in the Government free from all encumbrances.”*

The Deputy Commissioner, Excise while issuing orders of confiscation also formed an opinion that it was expedient in public interest that the vehicles be sold by public auction.

5. Aggrieved therefrom, the petitioners preferred appeals to the Commissioner, Excise. It was the case of each of the petitioners that they were not involved in any manner with the offence in which the vehicles were involved and the use of the vehicles for committing the offence was without their authority and knowledge. The Commissioner, Excise however dismissed the appeals holding that since the involvement of the vehicles in the offence was not disputed, the question whether the offence has been committed with or without the knowledge of the owner is immaterial to the

aspect of confiscation.

6. Notice of the petitions was issued on the argument of the counsel for the petitioner that interpretation of Section 59(2) of the Act (*supra*) in the manner done by the Commissioner, Excise would render the same liable to be struck down and by interim order in the petitions, the sale by auction of the vehicles was stayed.

7. The respondents have filed a counter affidavit reiterating that once the vehicle is used for commission of offence, it is liable for confiscation and the plea that the owner had no knowledge of use of the vehicle for commission of offence is immaterial. It is further contended that the jurisdiction of the Court is barred under Section 61 of the Act and the vehicle cannot be released on *superdari*. During the arguments, it has also been contended that the petitioners, if aggrieved by the order of the Commissioner, Excise have remedy of second appeal to the Financial Commissioner and for which reason also, the writ remedy is not available.

8. Per contra, the counsel for the petitioners contends that the owner of the vehicle who is not responsible for use thereof in commission of offence cannot be punished and Section 59(2) of the Act if so interpreted is violative

of the petitioners fundamental rights under Article 19(1)(g) of the Constitution of India.

9. The counsel for the respondents has argued that experience has shown that such vehicles when released on *superdari* are misused for the same purpose over and over again and the provision for confiscation and sale has been made to curb the tendency of repeated misuse of vehicle for commission of offence. Attention is also invited to Rules 132 to 134 of the Delhi Excise Rules, 2010 to contend that the interest of the innocent persons is protected thereby; that if the order of confiscation and sale is reversed in appeal, the sale proceeds of the vehicle, after deduction of expenses incurred thereon are to be released in favour of the owner with interest at 6% per annum.

10. On a plain reading of Sections 33, 58 and 59 supra, we find ourselves unable to hold that a vehicle, merely for the reason of having been used in commission of an offence, would be liable to be confiscated, naturally to the detriment of the owner thereof, even if the owner had no role in commission of offence and had merely parted with the vehicle to the offender for use for lawful purposes. Such confiscation and sale of vehicle is undoubtedly a punishment and the law does not punish an innocent. For confiscation and

sale of the vehicle, the elements of *mens rea* i.e. of intent to use or allow use or knowledge of likelihood of use, of the vehicle for commission of offence appears to be essential. The counsel for the respondents has been unable to satisfy us as to why *mens rea* be not read as an essential ingredient in the provisions aforesaid, even in the absence of any express words to that effect. The Supreme Court in ***State of Maharashtra Vs. Bharat Shanti Lal Shah*** (2008) 13 SCC 5 has reiterated that, insofar as criminal law is concerned, *mens rea* is always presumed as integral part of penal offence unless it is specifically and expressly or by necessary intendment excluded by the legislature. To uphold the contention of the respondents, would tantamount to the vehicle being confiscated and sold even if, at the time of commission of offence, had been stolen from the owner thereof.

11. However, though the counsel for the respondents has not cited but we find the Supreme Court, in ***Commissioner, Prohibition and Excise, A.P. Vs. Sharana Gouda*** (2007) 6 SCC 42 to have on an interpretation of *paramateria* provision (Section 45(2)) of the Andhra Pradesh Excise Act, 1968 held that the question of *mens rea* is irrelevant. However, the only reason given for so holding is that the proviso, which earlier existed in the Andhra Act exempting confiscation if the offender was not the owner of the vehicle

or if the owner had no reason to believe that such offence was being or was likely to be committed, had been deleted. It was held that the legislature having consciously decided to amend the Act by deleting the proviso, the provision could not be interpreted in the same manner as with the existence of the proviso.

12. The Delhi Act is a recent one, of the year 2009 and there never was any such proviso therein. However, prior to enactment thereof, the Punjab Excise Act, 1914 as extended to Delhi covered the same field. A perusal thereof shows a similar proviso therein to *para materia* Section 78 thereof, as earlier existed in the Andhra Act. The position in Delhi thus appears to be the same as in Andhra Pradesh. The Legislature while enacting a new statute for Delhi has intentionally deleted the proviso which exists in the Punjab Act earlier applicable to Delhi.

13. Though in view of the binding judgment aforesaid of the Apex Court, no further discussion would have been necessary but our conscience compels us to look further.

14. Sections 58 and 59 supra use the expressions “shall be liable to confiscation” and “may.....order confiscation of such property”. We

wondered whether the use of such expressions is indicative of confiscation being not mandatory and an option having been vested in the authority concerned, to confiscate or not to confiscate. However we find the Supreme Court, in *Superintendent and Remembrancer of Legal Affairs to Government of West Bengal Vs. Abani Maity* 1979 (4) SCC 85, to have also considered the same expressions in relation to Bengal Excise Act, 1909. Though the Supreme Court noticed that the words ‘liable’ and ‘may’, even where used along with the words "shall be", have been held by the Courts as not conveying the sense of an absolute obligation or penalty but merely importing a possibility of attracting such obligation, or penalty, but proceeded to observe that a statute is not to be interpreted merely from the lexicographer's angle and the Court must give effect to the will and inbuilt policy of the Legislature as discernible from the object and scheme of the enactment and the language employed therein. The language and scheme of the Bengal Act was held to show the purpose thereof as not only to raise revenue but also to control and restrict the import, export, transport, manufacture and sale of intoxicants. Accordingly, the expressions, ‘shall be liable to confiscation’ and ‘may’ were held to have a compulsive force. The said judgment does not leave us with any option to construe the same

expressions in the Delhi Act, covering the same field, differently.

15. However we find Section 52 of the Delhi Act, to which again no reference is made by either counsel, providing as under:

“52. Presumption as to commission of offence in certain cases –

(1) In prosecution under Section 33, it shall be presumed, until the contrary is proved, that the accused person has committed the offence punishable under that section in respect of any intoxicant, still, utensil, implement or apparatus, for the possession of which he is unable to account satisfactorily.

(2) Where any animal, vessel, cart or other vehicle is used in the commission of an offence under this Act, and is liable to confiscation, the owner 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 he had exercised due care in the prevention of the commission of such an offence.”

It is worth mentioning that in the *para materia* Sections 76 and 76A of the Punjab Act there is no equivalent to Sub-section (2) supra; perhaps need therefor was not felt owing to the proviso to Section 78 supra thereof.

16. Section 52(2) supra of the Delhi Act, though raises a presumption of guilt of the owner of the vehicle but grants an opportunity to such owner to rebuttal of this presumption. Though Section 52(2) is concerned with prosecution for the offence and not with confiscation but inclusion therein specifically of ‘confiscation’ is indicative of the same being applicable to

confiscation proceedings also. Moreover, it will be against the grain of logic and reasonableness that though such owner of vehicle is to be given opportunity to rebut the presumption of guilt, but would nevertheless be punished by confiscation.

17. We therefore do not find the Delhi Act, for the reason of dropping the proviso which existed in the earlier applicable Punjab Act, to have not done away with the ingredient of *mens rea*, in as much as the proviso in the earlier applicable legislation finds expression in Section 52(2).

18. Else, the Supreme Court in *Nathulal Vs. State of Madhya Pradesh* AIR 1966 SC 43 had observed that though a statute may exclude the element of *mens rea* but it is a sound rule of consideration to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded *mens rea*. It was further held that mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of an offence. *Mens rea* was held to be permitted to be excluded from a statute by necessary implication only where it was absolutely clear that the implementation of the object of the statute

would otherwise be defeated.

19. Sections 58 and 59 supra of the Delhi Act are placed under Chapter V titled “Offences and Penalties” of the Act. The Supreme Court in *Hindustan Steel Ltd. Vs. State of Orissa* (1969) 2 SCC 627 held that an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or acted in conscious disregard of its obligation. It was further held that penalty will not also be imposed merely because it is lawful to do so and whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. The Supreme Court again, in *Employees State Insurance Corporation Vs. H.M.T. Ltd.* (2008) 3 SCC 35, held that a penal provision should be construed strictly and only because a provision has been made for levy of penalty, the same by itself would not lead to the conclusion that penalty must be levied in all situations. Though the line of authorities laying down that in considering a question of penalty *mens rea* is not a relevant consideration were noticed but it was still held that an element of *mens rea* is needed before penalty can

be imposed and existence of *mens rea* or *actus reus* to contravene a statutory provision was held to be necessary ingredient for levy of damages and / or quantum for default under the Employees State Insurance Act, 1948.

20. We may notice that confiscation of property on ground of use thereof in crime is a more severe penalty, than for tax delinquency which has in *Assistant Commercial Taxes Officer Vs. Bajaj Electricals Ltd.* (2009) 1 SCC 308 been held to be a civil obligation.

21. Mention at this stage may also be made of two other dictas which appear to have a bearing on the matter. In *Inder Sain Vs. State of Punjab* (1973) 2 SCC 372, the offence of possessing was held to connote some sort of knowledge of such possession. The argument that the provision would become otiose if the prosecution was required to prove conscious possession was met by observing that possession only raised a presumption of commission of offence unless the accused can specifically prove that he was not knowingly in possession or other circumstances which will exonerate him. In our view, the aforesaid offers a complete solution to the problem at hand also. The language of Sections 58 and 59 coupled with Section 52(2) *supra* only raise a presumption of use of vehicle in commission of offence,

with the knowledge of the owner of vehicle. However the same cannot be stretched to taking away from the owner even the right of proving his innocence.

22. The Supreme Court in ***Kailash Prasad Yadav Vs. State of Jharkhand*** (2007) 5 SCC 769 was concerned with confiscation of vehicle under the Essential Commodities Act, 1955. In that case also, the owner of the vehicle had given the same on hire for transportation of food grains but the vehicle was intercepted carrying wheat belonging to the Food Corporation of India and intended for Public Distribution System and which was alleged to being diverted for sale in the black market; the truck was seized. It was held that confiscation amounted to deprivation of property and a valid seizure is the *sine qua non* for confiscation of property. The Apex Court held that the appellants in that case were not concerned with the wheat in question and were concerned with the vehicle. It was further observed that the order of confiscation is not passed only because it would be lawful to do so and without the authorities arriving at a clear finding in regard to violation of the provisions of the statute. Since all the said questions had not been gone into by the authorities concerned, the Supreme Court allowed the appeal setting aside the judgment of the High Court dismissing the writ

petition against forfeiture. The said dicta of the Supreme Court also appears to suggest that there can be no confiscation without *mens rea*.

23. We therefore hold that confiscation of vehicle cannot be affected without giving an opportunity to the owner of the vehicle to establish that use of the vehicle in commission of offence was without his knowledge / permission / intent. We may highlight that there is no law requiring the owner of a vehicle to always drive the vehicle himself / herself or to always keep the vehicle in his / her custody. If the use of vehicle is allowed by such owner to another, for lawful purposes, unauthorized use by such other of the vehicle for commission of offence cannot befall on the owner the punishment of confiscation of the vehicle. The Commissioner (Excise) in the present case, exercising power as Appellate Authority thus misconstrued the provisions of Sections 58 and 59 of the Act in treating the liability of the owner of the vehicle to be absolute and in not adjudicating whether the petitioners had placed sufficient material to rebut the presumption. The petitions thus have to be allowed and the matters to be remanded to the Commissioner (Excise) for adjudication afresh.

24. As far as the argument of alternative remedy before the Financial Commissioner is concerned, we are of the view that in view of the complex

legal position aforesaid, the same was not a sufficient remedy and does not come in the way of entertaining the present petitions. Similarly Rule 134, in providing for reimbursement of auction proceeds, is not found to be compensation enough for deprivation of the property.

25. We therefore allow these petitions and set aside the orders of the Commissioner (Excise) in both the petitions and remand the matters for decision afresh in the light of the interpretation aforesaid of Section 58 and 59 of the Act.

No order as to costs.

ACTING CHIEF JUSTICE

RAJIV SAHAI ENDLAW, J

MAY 29, 2012

‘gsr’..