**IN THE HIGH COURT OF JUDICATURE AT PATNA**
**CRIMINAL MISCELLANEOUS No.55130 of 2019**

Arising Out of PS. Case No.-131 Year-2016 Thana- RAMPUR District- Gaya

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Manorma Devi Wife of Shri Bindi Yadav @ Bindeshwari Prasad Yadav Resident of 51, A.P. Colony, P.S.- Rampur, Distt - Gaya.

... ... Petitioner/s

Versus

The State of Bihar

... ... Opposite Party/s

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**Appearance :**

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| For the Petitioner/s | : | Mr. P.K. Shahi, Sr. Advocate<br>Mr. Satyabir Bharti, Advocate<br>Mr. Alok Chandra, Advocate<br>Mr. Abhimanyu Singh, Advocate |
| For the Opposite Party/s | : | Mr. Shyam Kumar Singh, APP |

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**CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR**
**ORAL JUDGMENT**
**Date : 23-09-2019**

Heard learned counsel for the parties.

2. Petitioner is one of the accused in connection with Rampur P.S. Case No.131 of 2016, registered under Sections 47(a)/48/53(c)/54/63 of the Bihar Excise (Amendment) Act, 2016. During investigation name of the petitioner surfaced and charge sheet was submitted accordingly under Section 173 Cr.P.C., which gave rise to Sessions Trial No.1 of 2017.

3. By the impugned order dated 01.04.2017 passed by the learned Additional Sessions Judge-V-cum-Special Judge,

Gaya, the charges were ordered to be framed.

4. The challenge is on the ground that no offence is made out against the petitioner on bare perusal of the FIR and the material collected during investigation. Hence, criminal prosecution is abuse of the process of the Court.

5. According to FIR, on 09.05.2016 the police raided the house of Bindi Yadav, the husband of the petitioner, and from a bedroom foreign liquor in different bottles total quantity 4.45 liters was recovered in absence of the family members. The two domestic helps available at the time of recovery disclosed that the liquor was for consumption of Bindi Yadav and his son Rocky @ Rakesh Ranjan Yadav as well as for consumption of their friends. The bodyguard of the petitioner, who was available there at the time of recovery, was handed over a copy of the seizure list. During investigation, it revealed that the house was in the name of the petitioner. Hence, the petitioner was also charge sheeted in the case.

6. Submission of learned counsel for the petitioner

is that Bihar Excise Amendment Act, 2016 amended the provisions of Bihar Excise Act, 2015, and the amendment was made vide notification dated 31.03.2016 effective from 01.04.2016, a copy of the gazette notification is at Annexure-1. Under the amended provision absolute ban was imposed in the State of Bihar on manufacture, bottling, distribution, sale, purchase, possession and consumption of country-made liquor by any manufacturing, bottling plant, licence holder or any person in the whole of State of Bihar.

7. Thereafter, by the subsequent amendment made on 5th of April, 2016, a copy of gazette notification at Annexure-3, ban was imposed on wholesale or retail trade and consumption of foreign liquor by any licence holder or any person in the whole of the State of Bihar with immediate effect.

8. Submission is that mere possession of foreign liquor within permissible limit was not banned till the date of alleged search and seizure on 09.05.2016. A Division Bench of this Court had occasion to consider this issue in the case of **Ram**

**Sumir Sharma Vs. State of Bihar** reported in **2016(4) PLJR 435.** The search and seizure in **Ram Sumir Sharma's case** was made on 21.05.2016. The search and seizure was not from conscious possession of anyone and this Court after examining the provisions of Section 19(1) of the Act held in paragraph-9 of the judgment as follows:

> *"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.*
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> *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………..."*

9. Petitioner has stated on oath in paragraph-45 that three liters (four bottles of 750 ml) of foreign liquor and 5.2 liters of beer (8 bottles of 650 ml) was permissible limit for retail sale.

10. Evidently, the recovery of liquor was not made from conscious possession of any of the accused including the petitioner; rather the petitioner was not present there at the time of recovery. The servants and others who were present had free access to the place of recovery.

11. Bihar Prohibition and Excise Act, 2016 was made enforcible with effect from $2^{nd}$ October, 2016 by publication in the official gazette. Section 13 thereof, for the first time prohibited possession of any intoxicant or liquor. Therefore, on the alleged date of recovery no offence was committed by anyone as no one was found to be in conscious possession of the recovered liquor beyond prescribed limit.

Under Section 32 of the Act certain presumptions were incorporated in respect of commission of offences in certain cases and the owner or occupier of any building etc. was made to be presumed to be guilty of such offence and such owner or occupier was made liable to be prosecuted and punished accordingly. The aforesaid Section 32 was again amended by Bihar Prohibition and Excise (Amendment) Act, 2018. Sub-section (3) of Section 1 of the Amendment Act, 2018 provided that the provisions of the Amendment Act shall apply to all pending cases and Section 4 of the Amendment Act 2018 substituted the old Section 32 as follow:

> ***"32- Presumption as to commission of offence in certain cases.-***
>
> *(1) In prosecution of an offence under this Act, the accused person would have to account for the possession of any liquor, intoxicant, material, utensil, implement or apparatus involved in manufacture or storage or such liquor.*
>
> *(2) In the event of a failure to offer a satisfactory explanation, there shall be a presumption that the accused person is*

*guilty of the commission of such offence, unless proved otherwise.*

*(3) Where any equipment, machinery, animal, vessel, cart, vehicle, conveyance or any premises are used in the commission of an offence under this Act, and are liable to confiscation and/or liable to be sealed, the owner or occupier thereof would need to account satisfactorily, and in the absence of a satisfactory explanation the presumption that accused person committed the offence shall arise, unless proved otherwise."*

12. Contention of learned counsel for the petitioner is that the new amendment was applicable to all the pending cases under the Act. The present case is also pending and in the matter of presumption relaxation has been given to the extent that the owner or occupier of the building of recovery has to account for satisfactorily and in absence of satisfactory explanation, the presumption would be drawn. In the present

case, the petitioner was not allowed any opportunity to explain nor during investigation any such material was collected leading to the trial. As such, the whole trial stands vitiated.

13. Learned counsel for the State Opposite Party No.2 submits that since the question involved in this application relates to application of law on the date occurrence and there is no dispute on the factual matrix of this case. Hence, legal consequences would follow accordingly.

14. On careful consideration of the material available on the record and discussions made above, it is evident that the offences for which charge has been ordered to be framed were apparently not an offence on the date of occurrence nor the recovery of liquor was made from the conscious possession of any of the accused who were sent up for trial. Furthermore, the presumption of involvement in commission of offence drawn against the owner of the premise in the Old Act was diluted by the amendment of 2018.

15. Hence, in my view, no offence is made out

against the petitioner. As such, the impugned order is an abuse of the process of the Court. Accordingly, the same is quashed.

16. The application stands allowed.

**(Birendra Kumar, J)**

Mkr./-

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| **AFR/NAFR** | NAFR |
| **CAV DATE** | NA |
| **Uploading Date** | 25.09.2019 |
| **Transmission Date** | 25.09.2019 |

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