Mustt Hasina Banu Vs State of Assam

Court: Gauhati High Court

Date of Decision: June 20, 2002

Citation: (2003) 2 GLR 676 : (2002) 3 GLT 347

Hon'ble Judges: I.A. Ansari, J

Bench: Single Bench

Advocate: J.M. Choudhury, D. Talukdar, I. Gogoi, H.R.A. Choudhury, M.U. Mandal and A. Begum, for the Appellant; PP, for the Respondent

Judgement

I.A. Ansari, J.
By this common order and judgment, I propose to dispose of Criminal Appeal No. 312/2001 (Mustt. Hasina Banu v. The

State of Assam) and Criminal Appeal No. 330/2001 (Md. Moyassam Hussain v. The State of Assam), which have arisen out of the common

judgment and order, dated 11.9.2001, passed by learned Special Judge, Dhubri, in Special Case No. 04/98, convicting the accused-appellants u/s

7 of the Essential Commodities Act hereinafter referred to as ""the E.G. Act"") for violation of the provisions of Clause 3 of the Assam Trade

Articles (Licensing and Control) Order, 1982 (hereinafter referred to as ""the said Order of 1982"") and sentencing each one of them to suffer

simple imprisonment for a period of three months and to pay a fine of Rs. 1000 and in default, to undergo simple imprisonment for a further period

of one month.

2. Prosecution''s case, as unfolded at the trial, may, in brief, be stated thus :

On 30.12.1997, Md. Tobrijul Sajit Hussain, Sub-Inspector of Food and Civil Supplies (F&CS), Sapatgram Camp, (hereinafter referred to as ""the

complainant""), on being directed by S.D.O. (Civil), Bilasipara, visited the house of the accused-appellant No. 1, viz., Mustt. Hasina Banu and

found 180 bags weighing 72 quintets of wheat lying at the veranda of her house. The appellant No. 1 could not produce any cash memo or licence

to justify her storage of the said wheat, but she offered her explanation for the wheat, which had been so found, by saying that Md. Moyazzen

Hussain (appellant No. 2) had taken Rs. 50,000, in cash, from her and had kept the said 72 quintets of wheat at her house for about 15 days and

had promised to take away the same by repaying the said loan amount of Rs. 50,000. This statement was reduced into writing in the form of Ext.

3, on 30.12.1997, itself by the complainant. Subsequent inquiry revealed that the appellant No. 2 did not have any licence to function as a dealer

under the said Order of 1982. The said 180 hags of wheat were seized by seizure list (Ext. 1) and the zimma thereof was given to appellant No. 1

by a Zimmanama (Ext. 2). However, on his subsequent visit, on 10.1.1998, to the house of the appellant No. 1, the complainant found the said

wheat missing and was informed by appellant No. 1 that on 9.1.1998, the entire seized wheat had been, once again, seized by police. Further

inquiry in this regard revealed that the said wheat had been seized by police in connection with Bilasipara Police Station Case No. 10/98 under

sections 406/420 IPC. The complainant aforementioned, then, laid a complaint in the learned Court below seeking prosecution and punishment of

the accused-appellants u/s 7 of the E.G. Act for violation of Clause 3 of the said Order of 1982.

3. During trial particulars of offence u/s 7 of the E.G. Act were explained to the accused-appellants, but both of them, pleaded not guilty thereto

and the trial proceeded.

4. In all, prosecution examined two witnesses, viz., Sri Tabrijul Sajid Hussain (PW 1) and Sahidur Rahman (PW 2). The accused-appellants were,

then, examined u/s 313 Cr.PC. In their examination aforementioned, the appellants denied that they had committed the offence alleged to have

been committed by them. While so denying the accusations, the appellant No. 1 stuck to her plea that the said wheat had been kept at her house

by the appellant No. 2 as security for the loan of Rs. 50,000 taken by the appellant No. 2 from her, whereas the case of the appellant No. 2, as

projected at the trial, was that he had been falsely implicated by appellant No. 1, though he did not have even casual connection with the wheat

seized from her house and that false allegations had been levelled against him by appellant No. 1, because the daughter of the appellant No. 1 had

eloped with appellant No. 2.

5. No evidence was, however, adduced by the defence.

6. At the conclusion of the trial learned, Special Judge, Dhubri, found both the appellants guilty of the offence committed u/s 7 of the E.G. Act for

violating the provisions of Clause 3 of the said Order of 1982 and convicted them accordingly and passed sentence against them as hereinabove

mentioned.

7. The moot point, which has been raised in both these appeals, is as follows : Whether the findings of guilt reached by the learned trial Court were

justified on the basis of the evidence on record and the law relevant thereto ?

8. I have carefully perused the relevant records including the impugned judgment and order. I have heard Mr. J.M. Choudhury, learned senior

counsel for the appellant No. 1, and Mr. H.R.A. Choudhury, learned counsel for the appellant No. 2. I have also heard the learned Additional

Public Prosecutors, who has appeared on behalf of the respondent.

9. It has been submitted by Mr. J.M. Choudhury that the evidence on record was grossly inadequate to hold that the appellant No. 1 had stored

the wheat for the purpose of carrying on business, as a dealer. It has been contended by Mr. Choudhury that in Manipur Administration Vs. M.

Nila Chandra Singh, while dealing with the presumption clause as it contained in Sub-clause (2) of Clause 3 of the said Order of 1982, the Apex

Court clearly laid down that what the presumption clause helped the prosecution in establishing was merely that the stock found in the possession

of the accused can, at best, be presumed to have been stored for sale, but this solitary storage for sale will not in itself make the accused a dealer,

because the prosecution will still have to prove that the accused has been carrying on business of sale, purchase or storage for sale of any trade

article. A single act of sale or storage for sale will not, points out Mr. Choudhury, make a person a dealer inasmuch as a dealer means, under

Clause 2(f) of the said Order of 1982, as follows :

(f) ""dealer"" means a person, a firm, as association of persons or a cooperative society other than a National and State level Co-operative Society,

engaged in the business of purchase, sale or storage for sale of any trade article whether or not in conjunction with any other business and includes

his representative or agent.

10. In the case at hand too, contends, Mr. Choudhury, even if one were to assume that the appellant had kept the said wheat stored, Sub-clauses

(2) of Clause (3) helps prosecution''s case by raising presumption that the said wheat was kept stored for sale by Appellant No. 1, hut it does not

mean nor can it be stretched to mean that she was a dealer.

11. At any rate, submits Mr. Choudhury, the evidence on record was wholly inadequate to hold that the appellant No. 1 was a dealer within the

meaning of Clause 2(f) of the said Order of 1982 and hence, she could not have been legally and justifiably convicted.

12. As far as Mr. H.R.A. Choudhury, learned counsel for the appellant No. 2, is concerned, his submission is that the appellant No. 2 has been

found guilty on the basis of statement made by a co-accused, which is wholly exculpatory in nature, and as far as PW 2 is concerned PW 2 is,

admittedly, brother-in-law of appellant No. 1, with whom the appellant No. 2, admittedly, had developed enimical relation on the account of the

fact that the daughter of the appellant No. 1 had left her house and had started living with the appellant No. 2. On the solitary evidence of such an

enimical witness, no reliance could have been safely placed for convicting the appellant No. 2 and if the evidence of appellant No. 2 is excluded as

unsafe, there remains no evidence on record to hold that the wheat found at the house of appellant No. 1, belonged to, or had been stored by, the

appellant No. 2. There was thus, contends Mr. H.R.A. Choudhury, ho justification for convicting the appellant No. 2.

13. Controverting the above submissions made on behalf of the appellants, Mr. K. Moonir, learned Additional Public Prosecutor, has submitted

that the evidence on record was sufficient to hold both the appellants guilty of the offence and their convictions deserve to be maintained.

14. While considering the submissions by Mr. J.M. Choudhury, it is of paramount importance to note that the presumption clause, which the Apex

Court had considered in Manipur Administration''s case (supra) is distinctly different from the one that we presently have under Sub-clause (2) of

Clause 3 of the said Order of 1982, In the case of Manipur Administration''s case (supra), the relevant Sub-clause (2) read as follows :

(2) For the purpose of this clause, any person who stores any foodgrains in quantity of one hundred mounds or more at any one time shall, unless

the contrary is proved, be deemed to store the foodgrains for the purpose of sale.

15. In contrast, Sub-clause (2) of Clause 3 of the said Order of 1982 read as follows :

(2) For the purpose of this clause, any person, firm, association of person or a Co-operative Society, who stores any trade article at any one time

in quantities exceeding the limits prescribed in Sub-clause (1), shall, unless the contrary is proved by him, be deemed to be carrying on business as

dealer and to store the same for the purpose of sale.

16. A bare reading of the two sub-clauses will show that under Sub-clause (2) of the Manipur Administration''s case (supra), the presumption,

which could have been raised, was that the person found in possession of foodgrains, in quantities exceeding the permissible limit, shall be deemed

to have stored the goodgrains for the purpose of sale, but it did not necessarily mean, as laid down by the Apex Court, that the individual

concerned had stored the same for the purpose of carrying on business as dealer. This aspect of the matter becomes clear from the following

observations of the Apex Court in Manipur Administration''s case (supra) :

What does this presumption amount to ? It amounts to this and nothing more that the stock found with a given individual of 100 or more mounds

of the foodgrains had been stored by him for the purpose of sale. Having reached this conclusion on the strength of presumption, the prosecution

would still have to show that the store of foodgrains for the purpose of sale thus presumed was made by him for the purpose of carrying on the

business of store of the said foodgrians. The element of business which is essential to attract the provisions of Clause 3(7) is thus not covered by

the presumption raised under Clause 3(2).

17. In contrast, Sub-clause (2) of Clause 3 shows that when a person is found to have stored any trade articles in any quantity exceeding the

permitted limit, then, such a person shall be deemed to have been carrying on business as a dealer and he shall be deemed to have stored the trade

article for the purpose of sale. In other words, this presumption clause shows that if a person is found to have stored any trade article in quantity

exceeding the limit fixed by the said order, the person concerned shall not only be deemed to have stored the trade article for the purpose of sale,

but that he must also be deemed to be carrying on business as a dealer.

18. Thus, once a person is found to have stored for sale any trade article in quantities exceeding the permissible limits fixed under the said Order,

then, this fact, in itself, will be sufficient for the Court to hold, that the person concerned is a dealer within the meaning of Clause 2(f) and the onus

will, then, shift to the accused to prove that such a presumption is not correct or cannot be drawn and/or that he is not a dealer.

19. Before entering into the merit of the appeal, it is apposite to deal with some other provisions of law governing the facts of the present appeal.

20. It may be pointed out that both the appellants have been tried, as already indicated above, for violating the provisions of Clause 3 of the said

Order of 1982.

21. A bare reading of Clause 3(1) shows that no dealer shall carry on business of purchase and sale or storage of any of the trade articles

mentioned in Schedule-I except under and in accordance with the terms and conditions of the licence issued by the licencing authority. The proviso

to Clause 3(7) makes it clear that no licence shall be required if one stores for sale, at any one time, any of the trade articles in quantities not

exceeding the limit specified in Schedule-III. Under Schedule-III, it may be noted that the permissible limit for storing wheat is 10 quintets. Hence,

is the appellants are proved to have stored for the purpose of sale 180 bags of wheat weighting 72 quintets, provisions of Clause 3(1) can be

safely held to have been contravened by them.

22. For enabling the prosecution to prove its case with the help of statutory presumption, Sub-clause (2) of Clause 3 of the said Order of 1982, as

already indicated above, lays down that a person, who is found to have stored any trade article in any quantity exceeding the permissible limit, shall

not only be deemed to have been carrying on business as a dealer but he shall also be deemed to have stored the trade article, in question, for the

purpose of sale as a dealer.

23. What, thus, transpires from the above discussion is that the statutory presumption of law raised under the said Order of 1982 will not only be

that the storage was for the purpose of sale, but that the person, who is found to have stored the trade article, will be presumed to have been

carrying on business as a dealer. The reliance placed by Mr. Choudhury on the Apex Court''s decision in Manipur Administration''s case (supra)

has, therefore, no application to the case at hand inasmuch as had Clause 3(2) merely raised the presumption that the storage was for the purpose

of sale, prosecution would have been still required to prove, as laid down in Manipur Administration (supra), that the person storing the trade

article was actually carrying on business as a dealer, but in the light of the provisions of Clause 3(2), presumption can straight away be raised

against the person found in possession of any trade articles in quantities exceeding permissible limit that the person concerned has been carrying on

business as a dealer.

24. Keeping in view the above aspects of law, let me, now revert the evidence on record.

25. According to the evidence of PW1, Tabrijul Sajid Hussain, while he was posted at Bilasipara as Sub-Inspector of Food and Civil Supplies,

be, as per direction of S.D.O. (C), Bilasipara, visited the house of accused Hasina Banu at Surryakhata village and found 72 quintets of wheat,

kept in 180 gunny bags, lying at the veranda of accused Hasina Banu, he seized the said wheat in presence of witnesses and kept the same in the

zhnma of accused Hasina Banu vide zimmanama executed by her, Ext. 1 being the relevant seizure list and Ext. 2 being the relevant zimmanama.

26. PW 1 has also deposed that accused Hasina Banu gave a statement before him (PW 1), which was reduced into writing, the same was read

over to her and, then, she put her signature thereon, Ext. 3 being the said statement and Ext. 3(1) being her signature, PW 1 has clarified that

Hasina made the said statement in presence of witnesses, namely, Saidur Rahman and Mostafa Hussain, who too had put their signatures thereon,

Ext. 3(2) and 3(4) being their signatures respectively.

27. It is in the evidence of PW 1 that Hasina Banu stated before him that the wheat, so found, belonged, in fact, to accused Moazzem Hussain,

who had kept the same in her house with her permission and that accused Moazzem Hussain had so kept the same, at her house, as a pledge, that

is, as security against an amount of Rs. 50,000 taken by him on loan from her to invest in his business. It is also in the evidence of PW 1 that after

completion of the inquiry, he submitted a report to the S.D.O. (C), Bilasipara, and, then, he submitted Offence Report through S.D.O. (C),

Bilasipara, Ext. 4 being the said report and Ext. 4(1) is his signature.

28. In his cross-examination, PW 1 has clarified that before the date of his visit to her hose, accused Hasina Banu had filed a written complaint

before SDO(C), Bilasipara to the effect that accused Moazeem Hussain had kept the wheat at the veranda of her house and that this fact was told

to him by SDO(C), Bilasipara, Sri Abinash Joshi, PW 1 has also clarified that on his visit to Hasina''s house, Hasina told him too that the wheat, in

question, did not belong to her and that it was accused Moazzem Hussain, who had kept the same at the veranda of her house.

29. From the above evidence of PW 1, it clearly transpires that before PW 1 visited the house of Hasina Banu, the machinery of law was actually

set into motion by accused Hasina herself by lodging a complaint before the SDO(C), Bilasipara, that the appellant No. 2 had kept the said wheat

at the veranda of her house. Whether this complaint was true or not is a separate question, but the fact remains that it was this information given by

accused Hasina, which had brought PW 1 (Complainant) to the house of the accused.

30. Couple with the above, the evidence of PW 2 is that it was the appellant No. 2, who had stored 180 bags of wheat at the veranda of the

appellant No. 1''s dwelling house. Though PW 2 is brother-in-law of accused Hasina, prosecution relies upon his evidence and this witness''s

evidence shows that the wheat, which was found kept, accused Hasina''s house, actually belonged to appellant No. 2.

31. In the face of the above evidence on record, there is no escape from conclusion that the prosecution''s own case and the evidence adduced by

it is that the said seized wheat did not belong to the appellant No. 1. The plea that the appellant No. 1 has taken may not be completely true, but

the possibility that the plea may be true cannot be boldly ruled out. It may be noted that the standard of proof on the part of the defence for

discharging the presumption raised under the proviso to Clause 3 cannot be as high as rests on the prosecution to prove its case beyond all

reasonable doubt. It is worth emphasising that while prosecution has to prove its case beyond all reasonable doubt, the defence can discharge its

burden by probabilising the plea that the accused takes or even by preponderance of probabilities. Though the explanation offered by the appellant

No. 1, for the wheat found stored in the veranda of her house, may not be entirely true, yet in the face of the evidence given by PW 2, the burden

of the appellant No. 1 stands discharged.

32. In fact, in the impugned judgment, even the learned Special Judge has, I find, observed that there is no reason to reject the testimony of PW 2

that accused Moyazzam Hussain had kept the 72 quintets of wheat in the veranda of accused Hasina Banu. In the face of such positive conclusion

reached by the learned trial Court, there can be really no justification for ignoring the positive evidence on record and/or rejecting the same on the

basis of a presumption, which the learned Special Judge appears to have raised to the effect that it was not conceivable that for an amount of Rs.

50,000, the appellant No. 1 would have not obtained any receipt or written proof thereof from the appellant No. 2.

33. Because of what have been discussed above, I am firmly of the view that though, undisputedly, wheat contained in 180 bags, weighting 72

quintets were found and seized from the veranda of appellant No. 1, she had explained that the wheat did not belong to her nor had she stored the

same for the purpose of sale. There was, therefore, no clinching evidence on record to hold that the appellant No. 1 had stored the said wheat for

the purpose of sale and/or that the appellant No. 1 had acted as a dealer within the meaning of Clause 3.

34. Turning to the case of the appellant No. 2, it is worth noticing that the case of the appellant No. 2, as already indicated above, is that he had

been falsely implicated in this case by Hasina by making baseless accusations against him, because he had eloped with Hasina"s daughter. I notice

that it is in evidence of PW 2 that the appellant No. 1 informed the SDO(C), Bilasipara, about the said storage of wheat after the appellant No. 2

had kidnapped the daughter of the appellant No. 1. In the face of such clear evidence, there can be no escape from conclusion that the relationship

between the appellant Nos. 1 and 2, at the time when the alleged seizure took place, was enimical and when PW 2 is, admittedly, younger brother

of the husband of the appellant No. 1, his evidence, unless corroborated by any independent evidence, cannot be safely and readily relied upon.

35. In the face of the enimity existing between the two appellants, all possibilities of appellant No. 2 having been falsely implicated in this case have

to be ruled out before placing reliance on the evidence of PW 2. In this regard, however, prosecution had adduced no other evidence except the

solitary testimony of PW 2 and the statement (Ext. 3) of the appellant No. 1 to show that the said wheat belonged to the appellant No. 2. Since

the contents of Ext. 2 do not, admittedly, amount to confession, on the strength of the contents of Ext. 2 alone, it cannot be boldly held that it was

the appellant No. 2, who had stored the wheat at the veranda of the house of appellant No. 1.

36. Couple with the above, it is also very curious to note that the evidence on record offers no explanation at all as to why the appellant No. 1

informed SDO(C), Bilasipara, about the storage of the said wheat. The irresistable conclusion, therefore, has to be that the appellant No. 1 lodged

the information aforementioned with the SDO(C), Bilasipara, as a result of the enimical relation that she had developed with the appellant No. 2.

Based on the exculpatory nature of the statement . made by accused Hasina as to who actually owned the wheat, it could not have been safely

held to have been proved beyond all reasonable doubt that the said wheat belonged to the appellant No. 2. Similarly, based on the sole testimony

of PW 2 too, it could not have been for reasons discussed about safely and confidentially held to have been proved beyond all reasonable doubt

that the seized wheat actually belonged to the appellant No. 2. There being no other evidence on record, in this regard, the conviction of the

appellant No. 2, on the sole testimony of PW 2, could not have been founded.

37. It deserves to be carefully noted and emphasised that in a given case, on the basis of particular pieces of evidence on record, Court may hold

that since the plea, which accused ""A"" has taken stands discharged, but on the same set of evidence, unless the evidence proves the guilt of the

other accused ""B"" beyond all reasonable doubt"", the same Court may also hold that on the basis of such evidence (since the evidence does not

satisfy the standard of proof, which rests on the prosecution) the case of the prosecution cannot be taken to have been proved against the other

accused ""B"" beyond all reasonable doubt. The result will be that both the accused may have to be acquitted. The present one is one of such rare

but classic cases, where both the accused-appellants were, in my firm view, entitled to acquitted under, at least, benefit of doubt.

38. Considering, therefore, the matter in its entirely, I am firmly of the view that the evidence adduced by the prosecution was not wholly unsafe to

place implicit reliance upon and, on the basis of such evidence, conviction of the accused-appellants could not have been founded.

39. In the result and for the reasons discussed above, both the appeals succeed. The impugned judgment and order shall stand set aside and the

appellants are held not guilty of the offence u/s 7 of the E.G. Act and they are acquitted accordingly under benefit of doubt.

40. The appellants need not surrender to their bail bonds. Their bail bonds as well as their surities stand discharged.

41. Send back the case record to the learned Court below with a copy of this judgment and order.