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## STATE OF MADHYA PRADESH

v.

## AZAD BHARAT FINANCE CO. &amp; ANR.

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July 28, 1966

[K. SUBBA RAO, C. J. AND S. M. SIKRI, J.]

Opium Act (10 of 1878) as modified by the Opium Madhya Bharat Amendment Act 1955—Use of 'shall' in s. 11 of the Madhya Bharat Act—Truck found carrying opium—Confiscation of truck whether obligatory under section.

C H took a truck on hire from the respondent company. The truck was found to contain contraband opium and H was tried for offences under ss. 9A and 9B of the Opium Act (10 of 1878) as modified by the Opium (Madhya Bharat Amendment) Act 1955. The company made an application for the release of the truck but the magistrate while acquitting H on the ground that he had no knowledge that the truck was carrying opium, confiscated the truck under s. 11 of the Madhya Bharat Act. He took the view that the use of the word 'shall' in that section gave him no option but to confiscate the truck. The Sessions Judge took the same view but the High Court held that the word 'shall' in the context of the section was not mandatory and in the circumstances of the case the truck should not have been confiscated. The State appealed to this Court by special leave.

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HELD: The word 'shall' is not always mandatory; it depends upon the context in which the word occurs and the other circumstances. [475H]

E Three considerations are relevant in construing s. 11. First it would be unjust to confiscate the truck of a person if he has no knowledge whatsoever that the truck was being used for transporting the opium. Secondly it is a penal statute and it should if possible be construed in such a way that a person who has not committed or abetted any offence should not be visited with a penalty. Thirdly, if confiscation was obligatory under the section, the section may have to be struck down as imposing an unreasonable restrictions under Art. 19 of the Constitution. [476 A-D]

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Section 11 of the Madhya Bharat Act is not therefore to be construed as obligatory and it is for the court to consider in each case whether the articles in which the contraband opium is found or is being transported should be confiscated or not having regard to all the circumstances of the case. [476 D-E]

G *Tirath Singh v. Bachittar Singh*, [1955] 2 S.C.R. 457, referred to.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 97 of 1964.

Appeal by special leave from the judgment and order dated January 29, 1964 of the Madhya Pradesh High Court (Gwalior Bench) in Criminal Revision No. 5 of 1963.

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*I. N. Shroff*, for the appellant.

*R. L. Anand and S. N. Anand*, for the respondents.

The Judgment of the Court was delivered by

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**Sikri, J.** This appeal by special leave is directed against the judgment of the Madhya Pradesh High Court (Gwalior Bench) in a Criminal Revision filed by M/s. Azad Bharat Finance Company, one of the respondents in this appeal. The revision arose out of the following facts. On May 3, 1961, truck No. M.P.E. 1548, while it was parked at the bus-station, Guna, was searched by the Excise Sub-Inspector and he found contraband opium weighing about three seers in it. Five persons were challaned for the alleged illegal possession of contraband opium and for its transport, under ss. 9A and 9B of the Opium Act (I of 1878) as modified by the Opium (Madhya Bharat Amendment) Act, 1955, hereinafter referred to as the Madhya Bharat Act. Harbhajan Singh, one of the accused, is alleged to have absconded, and, therefore, he was tried separately later on. The Additional District Magistrate, Guna, convicted three persons and acquitted one person. Regarding the truck, he ordered that the final orders regarding the disposal of the truck would be passed later, on the conclusion of the trial of Harbhajan Singh. It may be mentioned that Harbhajan Singh had taken this truck under a hire-purchase agreement from M/s. Azad Bharat Finance Co. and he was not present in or near the truck when the contraband opium was taken possession of by the Excise Officer.

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On May 28, 1962, M/s. Azad Bharat Finance Co. applied in the Court of Shri M. C. Bohre, in which the trial of Harbhajan Singh was going on, for the release of the truck. On September 7, 1962, Harbhajan Singh was acquitted by the Magistrate but he ordered that the truck be confiscated to the State. The Magistrate was of the opinion that s. 11 of the Madhya Bharat Act showed clearly that the truck in which the opium was carried had to be forfeited in all circumstances. He observed:

“By the use of the word “shall” this Court was compelled that the truck be seized, may be there was the hand of the owner in it or not and neither there is any provision that the truck owner had the knowledge or not of the opium being carried.”

Both Harbhajan Singh and M/s. Azad Bharat Finance Co. filed revisions in the Court of the Sessions Judge. The Sessions Judge also held that the word “shall” in s. 11(d) was mandatory and not directory. He observed:

“Though it is correct that the truck was not used for carrying opium with the knowledge or connivance of the owner but section 11(d) as applicable in this state does not give discretion to the Court in not ordering the confiscation of the conveyance used for carrying contraband opium.”

**A** M/s. Azad Bharat Finance Co. filed a revision in the High Court. The High Court held as follows:

“The word “shall” occurring in Sec. 11 of the M.P.

Opium Act means “may” and that it confers discretion on the court to confiscate the conveyance provided it belongs to the offender. But where it is not so, and, the owner of the truck has neither authorised the offender to transport opium, nor is there any reason to believe that the owner knew that his vehicle was likely to be used for transporting contraband opium, the conveyance should not be confiscated because confiscation in such circumstances would be tantamount to punishing one, who has not committed any offence under the Opium Act.”

**C** The learned counsel for the appellant, Mr. Shroff, contends that the Opium (Madhya Bharat Amendment) Act, 1955 (15 of 1955) which amended the Opium Act, 1878, deliberately employed a different phraseology with the intention of making it obligatory on a Court to confiscate a vehicle in which contraband opium had been transported. He points out that in the Opium Act, 1878, in s. 11, the relevant words are as follows:

“S. 11 Confiscation of opium.—In any case in which an offence under section 9 has been committed,—

The vessels, packages and coverings in which any opium liable to confiscation under this section is found, and the other contents (if any) of the vessel or package in which such opium may be concealed, and the animals and conveyances used in carrying it, shall likewise be liable to confiscation.”

**E** He stresses the words “liable to confiscation” which according to him and certain authorities clearly give a discretion to the Court whether to confiscate the vehicle or not. In the Madhya Bharat Amendment Act the section providing for confiscation is as follows:

“S. 11. In any case in which an offence under Sections 9, 9A, 9B, 9C, 9D, 9E, 9F and 9G has been committed, the property detailed herein below shall be confiscated:—

**G** (d) the receptacles, packages and coverings in which any opium liable to confiscation under this Section is found, and the other contents (if any) of the receptacle or package in which such opium may be concealed, and the animals, carts, vessels, rafts and conveyances used in carrying it.”

**H** In our opinion, the High Court was correct in reading s. 11 of the Madhya Bharat Act as permissive and not obligatory. It is well-settled that the use of the word “shall” does not always

mean that the enactment is obligatory or mandatory; it depends upon the context in which the word "shall" occurs and the other circumstances. Three considerations are relevant in construing s. 11. First, it is not denied by Mr. Shroff that it would be unjust to confiscate the truck of a person if he has no knowledge whatsoever that the truck was being used for transporting opium. Suppose a person steals a truck and then uses it for transporting contraband opium. According to Mr. Shroff, the truck would have to be confiscated. It is well recognised that if a statute leads to absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. (Vide *Tirath Singh v. Bachittar Singh*)<sup>(1)</sup>.

Secondly, it is a penal statute and it should, if possible, be construed in such a way that a person who has not committed or abetted any offence should not be visited with a penalty.

Thirdly, if the meaning suggested by Mr. Shroff is given, s. 11(d) of the Madhya Bharat Act may have to be struck down as imposing unreasonable restrictions under Art. 19 of the Constitution. Bearing all these considerations in mind, we consider that s. 11 of the Madhya Bharat Act is not obligatory and it is for the Court to consider in each case whether the vehicle in which the contraband opium is found or is being transported should be confiscated or not, having regard to all the circumstances of the case.

Mr. Shroff then contends that if the matter is discretionary, the High Court should not have interfered in the discretion exercised by the learned Sessions Judge. But apart from the question that this point was not raised before the High Court, both the Magistrate and the Sessions Judge ordered confiscation of the truck on the ground that they had no option in the matter.

Mr. Shroff then raises the point that M/s. Azad Bharat Finance Co. was a third party in the case and was not entitled to apply for setting aside the order of confiscation or request for the return of the truck. This point was not raised before the High Court and, therefore, cannot be allowed to be raised at this stage.

In the result the appeal fails and is dismissed.

*Appeal dismissed.*

<sup>(1)</sup> [1955] 2 S.C.R. 457 at 464.