

vendor in the sale-deed. He need not distinctly mention this fact in the plaint, because the right of water enjoyed by the owner or occupier of the land as such is also included in the definition of land. If he could successfully pre-empt the agricultural land, the right of water therein would automatically be pre-empted by him. His failure to include this right definitely in the plaint will not result in partial pre-emption. It may be stated that the learned counsel for the respondent could not cite any decided case taking a contrary view. Moreover, a reading of the plaint will also show that the plaintiff was pre-empting the entire bargain and was not giving up any part thereof. He was prepared to pay the entire sale price, which, according to him, had actually been paid by the vendee.

(12) I would, therefore, hold that the suit in the present case was not one for partial pre-emption, if the plaintiff had omitted to specifically mention the right of *khal* water in the plaint. That was the only question debated before us.

(13) The result is that the appeal is accepted, the judgment of the learned Single Judge reversed and the case sent back to the trial Court for disposing of the suit after deciding the other issues framed therein. The parties are, however, left to bear their own costs.

GOPAL SINGH, J.—I agree.

B.S.G.

REVISIONAL CRIMINAL

Before S. S. Sandhawalia and Bhopinder Singh Dhillon, JJ.

RACHHPAL,—Petitioner.

versus

STATE OF HARYANA,—Respondent.

Criminal Revision No. 1047 of 1968.

August 6, 1971.

Essential Commodities Act (X of 1955)—Sections 3 and 7—Punjab Coarse Grains (Export Control) Order (1966)—Sections 2(d) and 3—Preparation

Rachhpal v. State of Haryana (Sandhawalia, J.)

and an attempt to commit an offence—Test for determination of—Stated—Apprehension of a person at a place one mile away from another State, driving a bullock cart containing Coarse grains, the export of which prohibited to that State—Such person—Whether guilty of an attempt to commit offence of illegal export.

Held, that the line that divides the acts of preparation from those of an attempt to commit an offence is invariably thin. The test for determining whether acts of a person constitute an attempt or preparation is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless. Where a person is apprehended at a place a mile away from the border of another State driving a bullock cart containing quantity of coarse grains, the export of which is prohibited to that State without the requisite permit under the Punjab Coarse Grains (Export Control) Order, 1966, promulgated under section 3 of the Essential Commodities Act, 1955, such a person cannot be said to have attempted the export of the prohibited grains to that State. It is quite possible that he may have been warned that he has no license to carry the prohibited commodity and he may have changed his mind at any place between the place of his arrest and the boundary of the State. He may not have proceeded further in his journey and hence his act amounts to only preparation and not to an attempt to commit offence of illegal export under section 3 of the Order. (Para 9).

EDITOR'S NOTE : A. I. R. 1950 Orissa 114, A. I. R. 1951 Orissa 284 and A.I.R. 1952 Orissa 164 held to be no longer good law in view of the decision in A.I.R. 1970 S.C. 713.

Case referred by Hon'ble Mr. Justice S. S. Sandhawalia, on 17th March, 1971 to a larger Bench for decision of an important question of law involved in the case. The case was finally decided by a Division Bench consisting of Hon'ble Mr. Justice S. S. Sandhawalia and Hon'ble Mr. Justice Bhopinder Singh Dhillon on 6th August, 1971.

Petition under section 439 of Criminal Procedure Code for revision of the order of Shri B. S. Yadav, Additional Sessions Judge, Rohtak, dated 27th June, 1968 affirming that of Shri D. R. Goel, Judicial Magistrate, 1st Class, Rohtak, dated 15th September, 1967, convicting the petitioner.

U. D. GOUR, ADVOCATE, for the petitioner.

A. S. NEHRA, ADVOCATE FOR ADVOCATE-GENERAL, HARYANA, for the respondent.

JUDGMENT

Sandhawalia, J.—(1) The interesting question of law arising in this criminal revision turns on the nice and subtle distinction which

divides mere preparation from an attempt to commit an offence. The matter is before us on a reference and the issue arises in the particular context of the export of prohibited commodities in violation of the Punjab Coarse Grains (Export Control) Order, 1966, promulgated under section 3 of the Essential Commodities Act, 1955.

(2) The facts relevant for the purposes of the law point are in a narrow compass. A police picket had detected the petitioner whilst driving his bullock cart along the kutchra path leading from village Balaur in the State of Haryana towards village Jharoda situated in the State of Delhi. It is the prosecution case itself as appearing in the evidence of Phul Singh (P.W. 2) that the border of the State of Delhi was at a distance of approximately one mile from the spot when the petitioner was apprehended. The cart driven by the petitioner contained 540 kilograms of Bajra and he did not have any permit to export the same from the State of Haryana to the State of Delhi. He was arrested for the infraction of the Punjab Coarse Grains (Export Control) Order, 1966, whereby the export of Bajra to a place outside the State had been prohibited and in the subsequent trial that followed the petitioner was convicted under section 7 of the Essential Commodities Act, 1955 and sentenced thereunder. This conviction and sentence on an appeal was affirmed by the Sessions Judge. The present revision directed against the conviction abovesaid came up before me sitting singly. As the issues raised presented some difficulty and were of considerable importance, the matter was referred by me for decision by a Division Bench.

(3) Before us the merits and details of the prosecution case have not been agitated or assailed. Mr. U. D. Gour, learned counsel for the petitioner, in support of the petition has primarily argued the point that on the established facts no offence is made out against his client and at the very highest his act amounts to preparation only which has not been made punishable under the statute with the violation of which he has been charged. It is highlighted on behalf of the petitioner that the prosecution's own case is that the petitioner was apprehended on a slow moving bullock-cart at a distance of one mile from the border of Delhi and he may well have been warned and may have changed his mind at any moment before crossing the border. It has been forcefully contended that the facts proved do not constitute an attempt to commit the offence alleged.

(4) The line that divides the acts of preparation from that of an attempt to commit an offence is invariably thin. It has given rise to a conflict of judicial opinion. Dr. Glanville L. Williams in his celebrated work on the Criminal Law notice this succinctly in the following terms:—

“No exhaustive test can be stated: the only general rule is that mere ‘preparation’ for the crime is not enough—but this is only the proximity rule in negative form. So also is a rule stated in terms of ‘remoteness.’

‘Acts remotely leading towards the commission of an offence are not to be considered as attempts to commit it, but acts immediately connected with it are.’

Such nebulous formulations lead one to look at specific decisions in the hope of further enlightenment. The authorities will be found to be in some confusion.”

(5) To appreciate the rival contentions, it is first necessary to set down the relevant provisions of the Punjab Coarse Grains (Export Control) Order, the infraction of which has led to the prosecution—

“Section 2. Definitions.—In this Order, unless the context otherwise requires,—

- (a) * * *
- (b) * * * *
- (c) * * * *
- (d) ‘export’ means to move or transport, or cause to be moved or transported, by any means whatsoever, from any place within the State of Punjab to any place outside the State of Punjab;
- (e) * * *
- (f) * *

Section 3. Restriction on export of coarse grains.—No person shall export or attempt to export or abet the export of coarse grains except under and in accordance with a permit issued by the Government or Director or any Officer authorised in that behalf by the Government; provided that nothing contained herein shall apply to export of coarse grains—

- (i) not exceeding one kilogram in weight of each kind of coarse grains by a *bona fide* traveller as part of his luggage; or
- (ii) on Government account; or
- (iii) for defence services under and in accordance with Military Credit Notes.”

(6) In the present case it cannot be said that the argument on behalf of the respondent-State (namely that the act of the petitioner clearly amounted to an attempt) is either implausible on principle or unsupported by authority. Indeed there is a string of authorities of the Orissa High Court which appear strongly to favour the view canvassed on behalf of the State. A special Bench of the said High Court consisting of Chief Justice Ray, Jagannadhadas and Narasimham JJ. in *State v. Haricharan Rakshit*, (1) had to consider the case of an accused person who was travelling in a through train from Puri to Howrah and was carrying with him new cloth weighing about 14 lbs, the export of which from within the State was prohibited. Narasimham J. who wrote the main judgment and Chief Justice Ray held that the act of the accused clearly fell within an attempt to commit even though he was detected at a considerable distance from the border. It was observed as follows:—

“Here the placing of the contraband cloth in a compartment of the through train from Puri to Howrah with the intention of taking it to Howrah renders the attempt complete, because that act would inevitably lead to the commission of the offence. What the offender might do at subsequent stages of the journey for frustrating the completion of the offence, due to fear of detection or other reasons, is quite immaterial.”

(1) A.I.R. 1950 Orissa 114.

Das, J. also concurred with the two other learned Judges of the Bench, but for slightly different reasoning took notice that the conviction was under section 121 of the Defence of India Rules.

(7) An even more categorical and forthright opinion has been delivered by the Division Bench of the Orissa High Court consisting of Chief Justice Ray and Narasimham, J. in **The King v. Tustipada Mandal and others**, (2) in the subsequent decision. In that case the prosecution case was that 21 heads of cattle were being taken from out of Province of Orissa in violation of the Orissa Livestock (Control and Movement and Transactions) Order, 1947. It was laid down as follows:—

“The movement and transport being contrary to law the offence must commence as soon after their purchase of the cattle as they begin to move them even a step. The act of movement or transport is to be accomplished between two termini, one is **terminus a quo** and the other is **terminus ad quem**. Any slightest movement from the former towards the latter amounts to movement of transport within the mischief of the clause. * * * * *

* * * * *

The test, therefore, is whether the overt acts, already done, are such that if the offender changes his mind and does not proceed further in its progress, the act already done would be completely harmless. But where the thing done is such as, if not prevented by any extraneous cause, would justify into commission of the offence, it would amount to an attempt to commit an offence. In the present case, clause (3) makes an attempt to move or transport without a permit as good an offence as the completed acts of movement or transport from inside the Province to a place outside. As I have said the least movement from one terminus towards the other must constitute an attempt and will be punishable under section 10 of the Act. The contention must fail.”

Earlier the Division Bench in repelling the contention that the offence of attempt would be complete only when the border is reached or crossed it observed—

“The submission is that the offence is committed only when the provincial borders are crossed and not before that. To

(2) A.I.R. 1951 Orissa 284.

accede to this contention would amount to virtual abrogation of law."

In **Vaikuntham Jaganadham v. State of Orissa**, (3) the facts were that the motor lorry was detected whilst proceeding towards the border of Madras but as yet was 28 miles therefrom and the rice bags were seized from the said lorry. The owner and the driver were charged for violation of the Orissa Food Grains Control Order, 1947, and upholding the conviction it was held that the act amounted to an attempt. **Narasimham, J.** held as follows :—

"The mere possibility that before the lorry crossed Orissa border the petitioner might have changed his mind and thrown away the rice somewhere in Orissa will not I think suffice to indicate that the act complained of was still in a preparatory stage and had not ripened to an attempt."

(8) Reliance has also been placed on a Division Bench judgment in **State of Madhya Pradesh v. Ram Charan Kishan**, (4) where in also the offence of the attempt was held to have been completed even though the border of the States of M.P. and U.P. had not yet been crossed.

(9) Though the abovesaid view canvassed on behalf of the respondent-State has been forthrightly expressed, we now deem it an exercise in futility to examine in detail the correctness or otherwise of the reasoning of the Orissa decisions above-quoted. To us, it appears that the matter is now covered in favour of the petitioner by the recent binding precedent in **Malkiat Singh and another v. The State of Punjab**, (5). It is true that the authorities above noticed in support of the contrary view were not cited before their Lordships but nevertheless the rule that they have enunciated has been laid down with sufficient clearness and fully covers the present case. In **Malkiat Singh's** case (5) (supra), the offending truck was carrying a consignment of paddy bags booked from Malerkotla to Delhi and carried necessary papers to the same effect. The documents carried and the intention to transport the contraband material

(3) A.I.R. 1952 Orissa 164.

(4) A.I.R. 1969 M.P. 96.

(5) A.I.R. 1970 S.C. 713

out of the State did not appear to be in serious dispute. The truck had moved a distance of more than 150 miles from Malerkotla towards Delhi till it was intercepted at Samalkha Barrier at a distance of 18 miles from Delhi-Punjab Border. Reversing the conviction of the appellants recorded and upheld by the Courts below, their Lordships took the view that the act was merely preparation on the part of the appellants and did not amount to an attempt. The rule was formulated in the following terms:—

“The test for determining whether the act of the appellants constituted an attempt or preparation is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress the acts already done would be completely harmless. In the present case it is quite possible that the appellants may have been warned that they had no licence to carry the paddy and they may have changed their mind at any place between Samalkha Barrier and the Delhi-Punjab boundary and not have proceeded further in their journey.”

(10) In view of the clear enunciation abovesaid, we are inclined to the view that the earlier Orissa cases referred to above are no longer good law. The case of the present petitioner comes well within the ratio of *Malkiat Singh's case* (5). It is significant to note that a slow-moving bullock-cart traversing a *kutchra* path would take as much if not a longer time than the truck on the G.T. Road would have taken to cover 18 miles from Samalkha barrier to the border in the Supreme Court case above. The present petition consequently must succeed and is allowed. The conviction and sentence of the petitioner are set aside and the fine, if paid, shall be refunded. The order of confiscation of the grain and of the cart and the bullocks is also quashed.

Dhillon, J.—I agree.

B.S.G.

CIVIL MISCELLANEOUS

Before D. K. Mahajan and H. R. Sodhi, JJ.

GURDEV SINGH,—Petitioner.

versus

THE STATE OF PUNJAB ETC.—Respondents.

Civil Writ No. 447 of 1971.

August 10, 1971.

*Punjab Co-operative Societies Act (XXV of 1961)—Section 55(2)(c)—
Whether ultra vires the Constitution of India.*