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Court : Orissa

Decided On : Nov-12-1964

Reported in : AIR1965Ori124; 1965CriLJ57

Judge : R.L. Narasimham, C.J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 439 and 495(4); Bihar and Orissa Excise Act, 1915

Appeal No. : Criminal Revn. No. 18 of 1964

Appellant : The State

Respondent : Raghunath Sahu

Advocate for Def. : Y.S.N. Murty, Adv.

Advocate for Pet/Ap. : Standing Counsel

Disposition : Revision dismissed

Judgement :

ORDER

R.L. Narasimham, C.J.

1. This is a revision by the State of Orissa against the appellate judgment of the Sessions Judge of Berhampur, setting aside the conviction and sentence passed

on the respondent by a First Class Magistrate of Digapahandi for an offence under Sections 47(a) and 47(1) of the Bihar and Orissa Excise Act, on the sole ground that the prosecution was conducted by the very Excise Officer who had investigated the case. The learned Sessions Judge observed that Section 495(4), Cr. P. C. was directly contravened and that consequently the entire trial was vitiated. He, therefore, directed a retrial and observed that the prosecution should be conducted by any other officer, i.e., other than the Excise Officer who investigated the case.

2. In view of the recent judgment of the Supreme Court in *Raja Ram v. State of Bihar*, AIR 1964 SC 828 holding that an Excise Officer functioning under the Bihar and Orissa Excise Act of 1915 is a police officer for the purpose of Section 25 of the Evidence Act, it may be reasonable to hold that he is also a police officer for the purpose of Section 495(4), Cr. P. C. Hence the Excise Officer who investigated the Excise offence should not be permitted to conduct the prosecution in Court. There is thus no doubt that the provisions of Section 495 (4), Cr. P. C. have been contravened.

3. But the question as to whether such contravention is an illegality or a mere irregularity is not free from doubt. The leading decision in favour of the view that such a trial is illegal is that of the Madras High Court, reported in *In re Sellamuthu Padayachi*, AIR 1954 Mad 313 which has been followed by the Andhra High Court in *In re Dusari Veerraju*, AIR 1959 Andh 29 and in some other decisions. Learned Standing Counsel, on behalf of the State, referred to a Kerala decision reported in *Joseph v. State of Kerala*, AIR 1961 Ker 28 where it was held that the provisions of Sub-section (4) of Section 495, Cr. P. C. were only directory and not mandatory. The learned Judges referred to the observations of their Lordships of the Supreme Court in *Willie (William) Slaney v. State of Madhya Pradesh*, AIR 1956 SC 116 and held that the Madras view was not correct.

4. In view of this conflict of judicial opinion, the question for consideration is whether the order of the Sessions judge should be interfered with or not. The very Investigating Excise Officer has figured as P. W. 1. I do not know how he examined himself in chief. Subsequently he appeared as an officer on behalf of

the Government to conduct the prosecution when the other witnesses were examined and discharged. Prejudice appears to be implicit in the way in which prosecution was conducted in this case. Hence, I do not think this is a fit case for me to interfere with the order of the Sessions Judge directing retrial.

5. For these reasons without expressing my definite opinion as to whether the Madras view or the Kerala view mentioned above should be followed I would hold that this is not a fit case for interfering with the order of the learned Sessions Judge in the circumstances of this case. The revision petition is therefore dismissed.

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