

Krushna Chandra Behera Vs. State

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Court : Orissa

Decided On : Jul-06-1984

Reported in : 58(1984)CLT201; 1984(II)OLR698

Judge : D.P. Mohapatra, J.

Acts : Bihar and Orissa Excise Act, 1975 - Sections 47, 49, 55, 56 and 74

Appeal No. : Criminal Revision No. 458 of 1981

Appellant : Krushna Chandra Behera

Respondent : State

Advocate for Def. : Standing Counsel

Advocate for Pet/Ap. : S.C. Sahoo and B.B. Mohanty

Disposition : Petition allowed

Judgement :

D.P. Mohapatra, J.

1. This revision petition is directed against the order of the Second Additional Sessions Judge, Cuttack, in Criminal Appeal No. 53 of 1980, confirming the order of the Judicial Magistrate, Second Class, Cuttack in G. R. Case No 1366 of 1977, convicting the petitioner under Section 353, Indian Penal Code, and sentencing

him to undergo rigorous imprisonment for two months.

2. The gist of the prosecution case was that on 13. 6. 1977 Sri G. C. Lehka, Excise Sub-Inspector (P. W. 1) with his staff was patrolling at Govindpur Chhak under Tangi Police Station. At about 7. 30 A. M. a Land Master Car bearing registration number O. R. N. 903 approached the place. On suspicion the Excise staff stopped the vehicle. The petitioner was alleged to have come out with a sword and threatened to kill the staff in case the vehicle is searched. He aimed a blow at P. W. 1 with the sword, but the latter could escape being hit by dodging a little. Thereafter the Excise staff overpowered the petitioner and searched the vehicle. On search twelve tins of D. S. liquor were found from the car. The prosecution further alleged that while the petitioner was being escorted after being arrested he escaped from custody. After investigation charge sheet was submitted against the petitioner under Section 356/224, Indian Penal Code.

3. The prosecution examined as many as 11 witnesses to establish its case. Of these P. Ws. 1, 2 and 3 were the members of the Excise staff who deposed about the incident. P. Ws. 4 and 5 were the witnesses to seizure of the sword under Ext. 3. P. W. 9 was the Investigating Officer and P. W. 10 was also a member of the patrolling staff on the date of occurrence. The trial Court on consideration of the materials on record produced before him held that the prosecution successfully established its case under Section 353, Indian Penal Code, beyond all reasonable doubt and convicted the petitioner under that section and sentenced him to undergo rigorous imprisonment for two months. The Court acquitted him of the charge under Section 224, Indian Penal Code.

The order of the trial Court was confirmed by the appellate Court.

4. Sri B. B. Mohanty, learned counsel for the petitioner has raised two contentions, namely--

(a) The entire proceeding is vitiated for non-compliance with the provisions of Section 74 of the Orissa Excise Act ; and

(b) The appreciation of the evidence of the Courts below is palpable erroneous and unreasonable and hence their decisions are unsustainable.

Section 74 of the Bihar and Orissa Excise Act reads as follows :

'74. Power to search without a warrant:--Whenever any Excise Officer not below such rank as the (State Government) may, by notification, prescribe, has reason to believe that an offence punishable under Section 47, Section 49, Section 55, or Section 56 has been, is being, or is likely to be, committed or abated, and that a search-warrant cannot be obtained without affording the offender an opportunity of escaping or of concealing evidence of the offence,

he may, after recording the grounds of his belief, at any time by day or night, enter and search any place, and may seize anything found therein which he has reason to believe to be liable to confiscation under this Act ; and may detain and search, and, if he thinks proper, arrest, any person found in such place whom he has reason to believe to have committed or abated any such offence as aforesaid.'

Under this provision the Excise Officer is required to record the grounds of his belief that an offence punishable under Section 47, 49, 55, or 56 are being committed or abated if he wants to search a vehicle without obtaining a search-warrant. A pan materia provision of the Karnataka Excise Act came to be interpreted by the Supreme Court in the case of K.L. Subhayya v. State of Karnataka, 1979 Cr. L. J. 651. The Supreme Court held that the section provides a valuable safeguard for the liberty of the citizens in order to protect them from ill-founded or frivolous prosecution or harassment. The Court further held that the provision extended to search of a car also. The relevant portion of the judgment in para 4 reads as follows :

'4. This, therefore, renders the entire search without jurisdiction and as a logical corollary vitiates the conviction. We feel that both Sections 53 and 54 contain valuable safeguards for the liberty of citizens in order to protect them from ill-founded or frivolous prosecution or harassment. The point was taken before the High Court which appears to have brushed aside this legal lacuna without making any real attempt to analyse the effect of the provisions of Sections 53 and 54. The

High Court observed that these two sections were wholly irrelevant. With due respect, we are unable to approve of such a cryptic approach to a legal question which is of far-reaching consequences. It was, however, suggested that the word 'place' would not include the car, but the definition of the word 'place' under the Act clearly includes vehicle which would include a car. Thus the ground on which the argument of the petitioner has been rejected by the High Court cannot be sustained by us. We are satisfied that there has been a direct non-compliance of the provisions of Section 54 which renders the search completely without jurisdiction. In this view of the matter, the appeal is allowed, the conviction and sentence passed on the appellant is set aside and he is acquitted of the charges framed against him.

Appeal allowed.'

In the case of State v. Rehman, A. I. R. 1958 Rajasthan 296, the Court while considering a case under Section 353. I. P. C. held on the evidence that it was not proved to the satisfaction of the Court that the reasons were recorded before the Excise Officers proceeded to take the search. Therefore, the search attempted to be taken was not in accordance with law and if the accused resisted the search no offence under Section 353, Indian Penal Code, had been committed.

5. In the present case admittedly no material has been produced to show that any reason was recorded by the Excise Officer before taking the search of the car in which the petitioner was travelling. In view of the principles laid down in the decisions referred to above, it has to be held that the search was illegal and incompetent. The lower appellate Court erred in brushing aside this point without due consideration. Thus, the first contention of Mr. Mohanty succeeds.

6. Coming to the second contention raised by Mr. Mohanty, though it is not the practice of this Court to enter into appraisal of evidence in a revision petition in view of his submission that the appreciation of the evidence by the Courts below was palpably erroneous and unreasonable, I permitted him to place evidence. It is worth noting here that the sword with which the petitioner is said to have attempted to assault P. W. 1, though seized, has not been produced in the Court. P.W. 5, one of the witnesses to the seizure of the sword has stated in cross-

examination that he had seen the sword two days before 13. 6. 1977 and had again seen it in the police station on the previous morning, thus completely belying the prosecution case that the sword was seized from the petitioner at the time of search. P. W. 4, the other witness to the seizure, has stated in the cross-examination that he could not say from whose custody it was seized. P. Ws. 5, 7 and 8 who witnessed the occurrence did not state anything about the assault with the sword or any show of force by the petitioner. In view of such evidence, I am constrained to hold that the appreciation of evidence by the Courts below was palpably erroneous and unreasonable. As such, the second contention of Mr. Mohanty also succeeds. The learned Standing Counsel has accepted the above analysis.

7. Both the contentions raised on behalf of the petitioner having succeeded, the revision is allowed and the impugned order of conviction and sentence passed by the Courts below are set aside and the petitioner is acquitted of the charge under Section 353, Indian Penal Code. The bail bonds furnished are cancelled.

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