

Santosh Kumar Dash Vs. the State of Orissa and anr.

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Court : Orissa

Decided On : Mar-24-1992

Reported in : 1992(I)OLR498

Judge : B.L. Hansaria, C.J. and ;B.N. Dash, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 457

Appeal No. : Criminal Misc. Case No. 73 of 1991

Appellant : Santosh Kumar Dash

Respondent : The State of Orissa and anr.

Advocate for Def. : B. Panda, ;D. Panda and ;R. Acharya, Advs. in Crl. Misc. Case No. 73 of 1991 and ;D. Mishra, ;R.N. Naik, ;Anil Deo, ;B.S. Tripathy and P. Panda, Advs. in Crl. Misc. Case No. 412 of 1991

Advocate for Pet/Ap. : S.P. Mishra, ;J.N. Ray and ;A.R. Dash, Advs. in Crl. Misc. Case No. 73 of 1991 and ;M. Misra, ;A.K. Mishra, ;K. Kar and ;B. Mishra, Advs. in Crl. Misc. Case No. 412 of 1991

Judgement :

B.L. Hansaria, C.J.

1. These cases have been referred to a Division Bench to decide whether while exercising power under Section 457 of the Code of Criminal Procedure relating to

delivery of property following seizure by any police officer, and while deciding the question as to who is 'the person entitled to the possession thereof', the Magistrate can consider the accused, from whose custody the property was seized as one of such person.

2. The reference owes its origin to the fact that a view was taken by a learned single Judge of this Court in *M.S. Jaggi v. Subash Chandra*, ILR (1977) 2 Cut. 188 : 44 (1977) CLT 139 that while exercising the power under Section 457, if a person from whom the property was seized is charged with an offence or is suspected of having committed an offence and the police launches an investigation, he cannot be a person entitled to possession until after the final report is submitted.....To treat such a person who is suspected of having committed a crime and against whom the police investigation is still pending as a person entitled to possession is against the rules of justice, equity and good conscience.' This view was followed by another learned single Judge in *Srinivas Babu v. State*, 33 (1991) OJD 192 (Cr.): 1991 Cr. L. J. 2052. It may be stated that still another teamed single Judge of this Court in *Gadadhar v. Srinivas*, 31(1989) OJD 469 (Cr.) : 1990 Cr. L. J. 1190, took the same view by observing that until the accused is cleared of the suspicion of having committed the crime, his possession cannot be deemed to be lawful and as such even though the property was seized from him, such possession would not be construed to be lawful until the crime is wiped off either by submission of a final report or by discharge or acquittal.

3. When the present cases came before the learned single Judges who have, made these references, they did not feel inclined to agree with the aforesaid proposition and desired reference to a larger Bench to decide the question.

4. Before proceeding to examine the question at hand, it would be necessary to observe that though in the cases of *M. S. Jaggi* and *Gadadhar*, the learned Judges have referred to the decision of the apex Court in *Kasturi Lai v. State of U. P.*, AIR 1965 SC 1039, indicating as if the view taken by them is founded on what was held in that case relating to disentitlement of an accused to be considered for this purpose, a statement has been made from the bar by the learned counsel appearing for all the parties that in the case of *Kasturi Lal*, this point had not come

up for examination, and no observation in this regard had been made. We have also checked up the case of Kasturi Lal and we do not find anything of the present nature in that case.

5. So, we shall have to examine the question at hand on our own. The only decision of the apex Court which has been brought to our notice in this regard is *Ram Prakash v. State of Haryana*, AIR 1978 SC 1282, in paragraph 4 of which it has been stated that though the concerned Court has power to release the seized property, it cannot be said that whenever the claimant asks for the property back, he should get back the same ; that question has to be decided on its own merits in each case and the discretion of the Court has to be exercised after due consideration of the interest of justice including the prospective necessity of production of the seized articles at the time of trial. This decision, therefore, does not really throw any light on the controversy at hand.

6. Shri D. Misra contends that the question to be decided being entitlement of the person concerned to possession of the property, what has to be looked into is as to whether when the property was seized from that person he was in lawful possession of the same or not, irrespective of the fact whether he had title to the property. If the possession of the person concerned could be said to be lawful, he can claim to get back the possession, even if he be the accused in the case.

In this connection, our attention has been invited to a number of decisions of this Court in which the view taken by the learned single Judge was that the person who could be said to be in 'lawful possession', as distinguished from 'possession' can claim to get back possession of the property and the Court would be justified in ordering so. Of course, in these cases, the question with which we are seized had not come up directly for examination, but the property had been delivered to the accused persons also on the satisfaction of the Court that the same before seizure was in their 'lawful possession'. It is, however apparent that possession of the property cannot be delivered to a thief or cheat, but can be so done to a person who has right to hold it. These decisions are : (1) *Prabhat Kumar Das v. Bijoy Prasad Das*, 50(1980) CLT 415 : (2) *Chandra Sekhar Misra v. Pravat Nalini Misra*, 53 (1982) CLT 240; (3) *Debendra Kumar Nayak v. Abdul Rahaman Khan*,

60 (1985) CLT 72; (4) Mahemmed Zariff v. Sk. Zinaullah, 64 (1987) CLT 547; (5) Balaram Nayak v. Bijaya Kumar Nayak, 69 (1990) CLT 142; (6) Pramod Kumar Mukherjee v. State, 1989 (II) OLR 89; (7) Ph. Arunachalam v. State of Orissa, (1989) 2 OCR 6 and (8) Rankanath Pradhan v. Ratikanta Mohapatra; 1990(II) OLR 572,(1990) 3 OCR 302.

7. In Ramachandra v. Gourahari, 1989 (I) OLR 352, a learned single Judge of this Court went to the extent of stating that in the absence of anything to show title to the property, it should be ordered to be delivered to the person in whose possession it had been, since there is a presumption that a person actually in possession of the property unless the contrary is shown, is in lawful custody of the same. As to this decision, we would like to observe that according to us, the burden of establishing the legality of possession should be on the person claiming possession, and the other party opposing such a claim should not be asked to prove the contrary. In other words, the person who claims to take possession of the property must satisfy the Court about his entitlement, for which purpose he shall have to establish that he was in lawful or rightful possession of the property in question.

8. Shri D. Misra has also brought to our notice a decision of the Kerala High Court in T.A. Kamaluddin v. N.A. Salim, 1972 Cr. L. J. 1160, in which it was stated that where the claim relating to possession of the property seized by the police during investigation is between the accused and the complainant, an order entrusting the property to a third party is improper; and in such a case the Magistrate should decide one way or the other as regards the entitlement of possession as between the accused and the complainant. In Alikunju v. Alikunju, 1960 Cr. L. J. 1462 and Emperor v. Haribandhu, AIR 1948 Patna 180, the property had been delivered to the accused persons on the Court being satisfied about their entitlement in this regard.

9. Finally, Shri D. Misra refers to Anama Rout v. Trilochan Das, AIR 1969 Orissa 75, in which a learned single Judge opined that an accused persons should always be considered to be innocent person till the criminal acts alleged against him are satisfactorily proved, and that the presumption of innocence continues all

throughout the trial and till the disposal of the case in the Court of appeal. (See paragraph 4). With respect, we do not agree with that part of the observation which is related to the presumption of innocence 'till the disposal of the case in the final Court of appeal'. Once an accused is found guilty by a competent Court, the presumption of his innocence is destroyed and to treat him as innocent for all purposes despite his conviction does not seem permissible, according to us. Of course, till the final Court disposes of the appeal, the guilt cannot be said to be finally established, and the appellate Court while deciding the appeal would not take the view that the charge stands proved, and for that limited purpose, the presumption of innocence would be made available to the accused.

10. Before closing, we may say that Shri M. Misra appearing for the informant in Criminal Misc. Case No. 412 of 1991 and Shri Panda appearing for the informant in Criminal Misc. Case No. 73 of 1991 have fairly agreed that just because an accused person comes forward to get possession, his case cannot be rejected on the ground that he is an accused, and the same shall have to be considered on its merit it is a different matter that on the facts of the case the claim of the accused to take back the property may not be accepted, which would be so, inter alia, when the Magistrate would not be satisfied that at the relevant time the accused was in lawful possession of the property.

11. We ourselves agree with the agreed stand taken at the bar, because a mere suspicion of commission of a crime by a person resulting in his having been made an accused in a case cannot be regarded as decisive of the question as to whether he was in lawful possession of the property or not when it was seized from him. Any other view would destroy the basic principle of our criminal jurisprudence that till a person is found guilty, he must be deemed to be innocent. This apart, denial of the right to claim possession of the property seized from an accused would, in some cases, cause great injustice because, as rightly pointed out in the order of reference, incidents are not more where criminal cases are instituted against financiers who had taken possession of the property in terms of the contract; and in such cases, to deny possession to the financiers only because they had been made accused in the case would be unjust. A long rope would be given to unscrupulous complainants. This has to be avoided.

12. We therefore, answer the reference by stating that in law there is no bar to consider the claim of an accused to get back the property and, on such a claim being made, the Magistrate shall apply his mind to the relevant facts and circumstances and he would be within his rights to concede to the prayer of the accused if he would be satisfied that the accused was in lawful possession of the property when it was seized from him. As to when an accused could be said to be in lawful possession of the seized property is a question which has to be decided on the facts of each case, about which no prescription can be made.

13. Let the cases be now placed before the learned single Judges for disposal of the petitions keeping in mind the aforesaid view expressed by us.

B.N. Dash, J.

14. I agree.

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