
(1972) 11 OHC CK 0012
In the Orissa High Court

Chakrapani Naik		APPELLANT
	Vs	
State of Orissa		RESPONDENT

Date of Decision : 02-11-1972

Acts Referred:

Penal Code, 1860 (IPC) — Section 425, 430

Citation : (1973) 39 CLT 11 : (1973) CriLJ 1052

Hon'ble Judges : S. Acharya, J

Bench : Single Bench

Judgement

S. Acharya, J.—The petitioner stands convicted u/s 39 (1) of the Orissa Irrigation Act of 1959 (hereinafter referred to as the Act) and has been sentenced thereunder to pay a fine of Rs. 50/- in default to undergo S. I. for seven days. He has also been ordered to remove the obstruction in question and repair the damage caused to the irrigation work by the petitioner.

2. The prosecution case, in short, is that the petitioner unauthorisedly removed at a particular place the Bund of the Nala in question, alleged to be an irrigation work, and diverted the water of the said Nala by putting across Bund on survey plot No. 168 into the Pata lands of one Dandapani Naik of village Bankatira, as a result of which his lands were damaged due to sand coating on the same. The accused by the aforesaid act damaged the irrigation source and also caused considerable damage to the pata lands situated in that locality.

3. The petitioner denied the allegation and stated that a false case was foisted against him.

4. The court below on a consideration of the evidence on record finds the prosecution allegations to be true, and convicted the petitioner as stated above.

5. Mr. Swamy, the learned Counsel for the petitioner, contends that the complained-of-act of the petitioner, on the prosecution allegation itself, amounts to an offence u/s 430, Indian Penal Code and so the petitioner cannot be sconvicted of an offence u/s 39 of the Act, as specifically provided in the last paragraph of

the said section.

6. The accused in the present case-was prosecuted only u/s 39 (1) of the Act. The relevant portion of Section 39 is as follows:

39. Whoever voluntarily and without proper authority

(1) damages, alters, enlarges, reduces or obstructs any irrigation work;

(2) to (13) xx xx xx shall, when such act shall not amount to the offence of committing mischief within the meaning of the Indian Penal Code, on conviction" before a Magistrate, be punished for each such offence with fine which may extend to two hundred rupees, or with imprisonment for a term which may extend to one month or with both.

7. The prosecution allegation has been stated in brief in paragraph 2 above. In paragraph 4 of the complaint petition, filed by the Irrigation Officer-cum-Tahasildar, it is specifically stated that the accused by acting in the aforesaid manner has not only damaged the irrigation source, but also caused considerable damage to the Pata lands, situated nearby. The Revenue Inspector, P. W. 6, in his deposition has stated that the accused closed the Nala by about two chains in length at one point, and therefore the water of the Nala was diverted into the lands of P. W. 2 making it sand cast. He also cut the cross-Bund which was meant to divert the water from the old Nala to the new Nala. P. W. 2 states that as the accused closed the Nala, the water of the Nala entered into P. W. 2's land casting sand thereon, hereby impairing the value of his land. P. Ws. 3, 4 and 5 corroborate P. W. 2 and P. W. 6 so far as their evidence refers and relates to the act of the accused.

The prosecution allegations, as contained in the complaint petition and as stated by P. Ws. 2 to 6 in their examination-in-chief, plain and simple, apart from the other considerations as to whether they have been established or not, constitute an offence of mischief as defined u/s 425, Indian Penal Code. Section 39 would be applicable only when the act of an accused does not amount to an offence of mischief under the Indian Penal Code, as specifically provided in the underlined portion of the section quoted above.

8. Mr. Patnaik, the Standing Counsel, concedes that if and when the act of an accused amounts to the offence of committing mischief within the meaning of the Indian Penal Code he cannot be convicted u/s 39 of the Act. Mr. Patnaik, however, submits that the aforesaid act of the accused is capable of being split up into several parts. According to him, the first part of the offence, i.e., the removal of the existing Bund of the Nala, per se, without anything else, does not amount to an offence of mischief, as defined u/s 425, Indian Penal Code, and so far as that part of his act, the accused can be convicted of the offence u/s 39 of the Act. I am unable to accept the above contention. Apart from the consideration as to whether the aforesaid part of the act amounts to an offence of mischief or not, the act of the nature committed by the accused, as seen from

the facts of this case, cannot and should not be split up into different parts, as urged by Mr. Patnaik, only for the purpose of prosecuting and/or upholding the conviction of the accused u/s 39 of the Act. The underlined portion of Section 39 very clearly states that when the act of the accused amounts to the offence of committing mischief within the meaning of the Indian Penal Code, he cannot be punished u/s 39 of the Act. In my opinion Section 39, as provided, does not permit splitting up of the act into several parts, enabling the prosecutor to pick and choose, at his discretion or sweet will, only those parts out of the same which would not amount to an offence of mischief, and to prosecute the offender u/s 39 of the Act for the picked out part or parts of the Act. In my opinion, the Legislature, by inserting the above underlined words in Section 39, intends that if the accused commits any act which amounts to an offence of mischief under the Indian Penal Code, which comparatively is a graver offence than an offence u/s 39 of the Act, then he should be prosecuted for committing that act, instead of the minor offence or offences envisaged u/s 39, so that he can be adequately punished. Section 39 is provided only to punish persons who commit the minor offences enumerated therein, when the complained of act does not amount to an offence of mischief as provided in the Indian Penal Code. I am of the view that neither the prosecutor has the option to prosecute nor the court has the discretion to convict an offender for an offence enumerated u/s 39, if the act committed by the offender amounts to an offence of mischief as understood and provided in the Indian Penal Code.

9. On the above considerations I am satisfied that the prosecution of the accused for an offence u/s 39 (1) of the Act was ill conceived in view of the facts alleged against him. and his conviction under this section cannot be maintained.

In the result, therefore, the conviction of the petitioner u/s 39 fl) of the Act and the sentence passed thereunder are set aside and he is acquitted of the same. The revision, therefore, is allowed. Fine imposed on the petitioner, if paid, be refunded to him.