

(2005) 04 OHC CK 0040

In the Orissa High Court

Case No : Criminal Appeal No. 213 of 1988

Executive Officer, Berhampur Municipality

APPELLANT

Vs

Smt. Bishnu Priya Bisoi and Others

RESPONDENT

Date of Decision : 25-04-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Orissa Municipal Act, 1950 — Section 264, 266, 271, 273, 273A

Citation : (2005) 99 CLT 778 : (2005) CriLJ 3787 : (2005) OLR 179 Supp

Hon'ble Judges : I.M. Quddusi, J

Bench : Single Bench

Advocate : Y.S.N. Murty, S.K. Mohapatra and K.T. Rao, for the Appellant; Biplab Bahali, M.R. Panda, D.K. Pani and S.K. Sahu, for the Respondent

Judgement

I.M. Quddusi, J.—This Criminal appeal has been filed against the Judgment and Order dated 7.7.1987 passed by the 1st Addl. Sessions Judge, Berhampur, in Criminal Appeal No. 2/1987 (Criminal Appeal No. 233 of 1986 (GDC) allowing the appeal and setting aside the order passed by the Learned Judicial Magistrate Second Class, Berhampur in 3(a) C.C. No. 175 of 1985 convicting Respondent No. 1 u/s 385-A of the Orissa Municipal Act and sentencing her to pay a fine of Rs. 384/- and further imposing daily fine at the rate of Re. 1/-for the period from 22.2.1985 till the date of judgment amounting to Rs. 616/- in all to pay a fine of Rs. 1,000/-, in default to undergo simple imprisonment for three months.

2. At the very outset, it is necessary to mention the facts. It was alleged that Respondent No. 1 had constructed a pucca building at the locality, namely Nilakantha Nagar Street in Ward No. 21 within Berhampur Municipal area without obtaining any valid permission or license from the Municipal authority. Neither the date of starting nor completion of the construction of the building was known the Municipal authority nor the such dates were not disclosed anywhere, and only the prosecution was started from the date the Municipal officials found that there was construction which was already completed when they inspected the

same on 22.2.1985. It was also not disclosed as to what was the age of the building at the time of inspection of the same, when the said officials found that the construction was already completed. On the report of the Amin P.W. 1, the matter was verified by the Town Surveyor after obtaining necessary order from the Municipal authorities. The prosecution report was filed before the Court of Sub-Divisional Judicial Magistrate, Berhampur on 2.7.1985 by the Town Surveyor being authorized by the Executive Officer u/s 99 of the Orissa Municipal Act. The said prosecution report is reproduced as under :

PROSECUTION REPORT

On dtd 22.2.85 and thereafter it was found that the above named accused person has constructed a pucca new building in Neelakanthanagar street abutting to road in Ward No. 21 within Berhampur Municipality area without obtaining permission of the complainant as required under the provision of O. M. Act. As such the accused person has contravened the Section 264, 266 of the O. M. Act and as such he/she is punishable u/s 385-A of the said Act.

Therefore it is prayed that the accused may be dealt with according to law and grant cost of the prosecution.

Sd/- Illegible 2.7.85 Town Surveyor, Berhampur Municipality. (Authorised by Executive Officer Under Section 99 of O.M. Act).

3. In order to prove its case, the prosecution examined three witnesses, namely, P.W.1-Kasinath Gouda, who was working as Amin of the Berhampur Municipality, stated in his deposition that on his inspection on 22.2.1985 he saw that the accused had already completed the construction of the ground floor of her building without permission of the Municipality. He prepared the report of the spot inspection and rough site plan and submitted the same to the Town Surveyor. Further he stated that he did not know the date of starting of the alleged construction nor its completion and he had also not seen any paper to ascertain who was the owner of the building or the land on which the said building stood. He also did not know the plot number, survey number of the land on the plinth area and the height of the building allegedly constructed unauthorizedly. P.W.2-Y. Mohan Rao who was working as Town Surveyor had stated in his deposition that he had received the report of P.W. 1 where after he had gone to the spot on the same day and found the report to be correct. Thereafter a show cause notice was issued on 27.3.1985 but the accused did not send any reply. Thereafter the A.E.O. issued confirmation order on 13.6.1985 which was received by the accused on the same day. But in spite of all these, the accused remained silent. The complaint was filed by him such power being delegated by the Executive Officer to file do so. He filed such authorization also. He had further stated that P.W. 1-Amin reported to him in writing on the date of his visit to the spot that the construction work was completed. He further stated that he did not know the patta number, survey number of the plot and also plinth area of the building. He described the height of the building as 11 feet but could

not say about the number of room in that building. He had verified the assessment register of the Municipality, from which he came to know that the accused was the owner of the building. He had further submitted that he did not know on which date the alleged construction was started. He did not mention in his prosecution report about the date of completion of the building. P.W. 3-Saiba Nayak, Chairman of the Berhampur Municipality who has stated that he had gone to the house of the accused (Respondent No. 1 in the instant appeal) on 29.4.1985 and had served the show cause notice on her. However, there was no endorsement by him that he had given the show cause notice for serving it on the accused. There was also no endorsement about service of show cause notice.

4. The statement of Respondent No. 1-accused u/s 313, Cr.P.C. was dispensed with by the Learned Magistrate as she had not produced any witness in her defence. The Learned Magistrate found the accused to have violate the provisions of Section 264 & 266 of the Orissa Municipal Act and convicted her u/s 385-A and sentenced her as mentioned above. Being aggrieved, Respondent No. 1 filed an appeal before the Learned Sessions Judge, Berhampur which was heard and decided by the Learned 1st Addl. Sessions Judge, Berhampur. As already mentioned above, Learned 1st Addl. Sessions Judge, Berhampur allowed the appeal on the ground that the prosecution was barred by limitation in view of Section 347 of the Orissa Municipal Act. For better appreciation Sections 264, 266 & 385-A of the said Act are reproduced as under :

"264. Application to construct or reconstruct buildings :

(1) If any person intends to construct or reconstruct a building he shall send to the Executive Officer :

(a) An application in writing for the approval of the site, together with a site plan of the land; and

(b) an application in writing for permission to execute the work together with a ground plan, elevations and sections of the buildings, and specification of the work :

Provided that the Executive Officer may on application in writing by the person concerned and on payment of a prescribed fee get such plan prepared within a reasonable period.

Explanation : "Building" in this Sub-section shall include a hut, a wall, foundation, plinth or fence or whatever height bounding or abutting on any public road.

(2) Every document furnished under Sub-section (1) shall contain such particulars and be prepared in such manner as may be required under rules or bye-laws."

266. Prohibition against commencement of work without permission : The construction or reconstruction of a building shall not begin unless and until the

Executive Officer has granted permission for the execution of the work.

385-A. Penalty for unlawful building : If the construction or reconstruction of any building or well :

- (a) is commenced without the permission of the Executive Officer; or
 - (b) is carried on or complete otherwise than in accordance with the particulars on which such permission was based; or
 - (c) is carried on or completed in contravention of any lawful order or in breach of any provision contained in this Act or in any rule or bye-law made hereunder or of any direction or requisition lawfully given or made; or
- if any alterations or additions required by any notice issued u/s 271 or Section 273 are not duly made; or

If any person to whom a direction is given by the Executive Officer to alter or demolish a building or well u/s 273-A failed to obey such direction. The owner of the building or well or the said person as the case may be, shall be liable on conviction to a fine which may extend in the case of a building to five hundred rupees and in the case of well or hut to fifty rupees and to a further fine which may extend in the case of a building to one hundred rupees and in the case of a well or hut to ten rupees, for each day during which the offence is proved to have continued after the first day."

Provisions of Section 273-A as well as Section 347 of the said Act are liable to be reproduced as above which are also quoted hereunder :

"273-A. Demolition or alteration of building work unlawfully commenced, carried on or completed : (1) If the Executive Officer is satisfied :

- (i) that the construction or reconstruction of any building or well :
 - (a) has been commenced without obtaining the permission of the Executive Officer or where an appeal has been preferred to the Municipality in contravention of any order passed by the Municipality in appeal, or
 - (b) is being carried on, or has been completed otherwise than in accordance with the plans or particulars on which such permission or order as based; or
 - (c) is being carried on, or has been completed in breach of any of the provisions of this Act or of any rule or bye-law made under this Act or of any direction or requisition lawfully given or made under this Act or such rules or bye-laws; or
- (ii) that any alteration required by any notice issued u/s 271 have not been duly made; or
- (iii) that alteration of or addition to any building or any other work made or done for any purposes in, to or upon any building, has been commenced or is being carried on or has been completed in breach of Section 273, he may make a

provisionally order requiring the owner or the builder to demolish the work done, or so much of it as, in the opinion of the Executive Officer, has been lawfully executed or to make such alteration may in the opinion of the Executive Officer be necessary to bring the work into conformity with the Act, bye-laws, rules, direction or requisition as aforesaid, or with the plans and particulars on which such permission or order was based, and may also direct that until the said order is complied with the owner or builder shall refrain from proceeding with the building or well.

(2) The Executive Officer shall serve a copy of the provisional order made under Sub-section (1) on the owner of the building or well together with a notice requiring him to show cause within a reasonable time to be mentioned in such notice why the order shall not be confirmed.

(3) If the owner fails to show cause to the satisfaction of the Executive Officer, the Executive officer may confirm the order with any modification he may think fit to make, and such order shall then be binding on the owner.

347. Persons empowered to prosecute : Save as otherwise wise expressly in this Act, no person shall be tried for any offence against the provisions of this Act, or of any rule, regulation or bye-law made under it, unless a complaint is made by the police or the Executive Officer of a (Municipality) or by a person expressly authorized in this behalf by the Municipality) or its Executive Officer, within three months of the commission of the offence. But nothing herein shall effect the provisions of the Code of Criminal Procedure, 1989 (Act 5 of 1989) in regard to the power of certain Magistrate to take cognizance of offences upon information received or upon their own knowledge or suspicion :

Provided that failure to take out a licence or obtain permission under this Act shall, for the purposes of this Section, be deemed a continuing offence until the expiration of the period, if any, for which the licence or permission is required, and if no period is specified, complaint may be made at any time within twelve months from the commencement of the offence."

5. Section 264 provides that for construction or reconstruction of building a person has to move an application in writing for the approval of the site plan and Section 266 prohibits starting of construction or reconstruction of a building without permission of the Executive Officer of the Municipal Board and violation or commencement of construction or reconstruction of any building without permission of the Executive Officer is an offence, and also a direction issued by the Executive Officer to alter or demolish a building u/s 273-A if disobeyed, the same would amount to an offence which is punishable u/s 385-A but the sentence is limited upto a fine, which may extend in the case of a building, to five hundred rupees and in the case of a well or hut to fifty rupees and the further fine which may extend in the case of a building to one hundred rupees and in the case of a well or hut to ten rupees for each day during which the offence is proved to have continued after the first day.

6. The allegation against Respondent No. 1 was that the construction was commenced without permission of the Executive Officer and further the same was completed otherwise in accordance with law, and she had failed to obey the direction issued u/s 273-A of the said Act.

7. Section 347 provides for limitation and there is complete prohibition for trial of an offence beyond the period of limitation. The contents laid down herein are that first the complaint should be made within three months from the date of commission of offence and failure to take out a licence or obtain permission is to be deemed to be a continuing offence until the expiration of the period, if any, for which the licence or permission is required and if no period is specified, complaint may be made within twelve months from the date of commencement of the offence. Hence, in the instant case, the alleged date of commencement of the offence and the other date relevant for the case was the date of completion of the unauthorized construction. Therefore both the aforesaid dates are very material, for the purpose of counting limitation. On perusal of the reports it is clear that neither the date of commencement of construction or the date of completion of construction has been mentioned at any place. As such, there was no scope for the Learned Magistrate to give his finding determining the date of commencement of construction or the date of completion of construction. The date of inspection is not relevant as the same could have been done at any time that is even after five years from the date of commencement of the construction or its completion. Therefore the date of inspection is not relevant for the purpose of counting the limitation as mentioned u/s 347 of the said Act.

8. Learned Counsel for Respondent No. 1 has placed reliance on the decision of a Division Bench of this Court in the case of Executive Officer, N.A.C. Vs. Jagannath Mallik, that ordinarily 3 months period from the commencement of the unauthorized construction would have been the requisite period within which a complaint could be lodged. By application of the Proviso, the cause of action is deemed to have arisen within the period for which licence or permission would have been taken or where no period is specified, within twelve months from the date of commencement of the offence. Therefore, the period of three months in the main portion of Section 347 could commence running in a case to which the proviso applies either from the end of the period for which the licence or permission is required to be taken or twelve months from the date of commencement of the offence. It is not correct to say that every moment of the existence of the unauthorized construction constitutes a fresh offence and the offender can be prosecuted within twelve months from the time of detection of the unauthorized construction. Existence of the unauthorized construction is not the basis for the prosecution the commencement of unauthorized construction is the real basis and the extension contemplated under the Proviso on the basis of continuing offences is the only further relevant feature. There is no justification for the submission that within twelve months from the time of detection of the unauthorized construction, a prosecution can be initiated. For instance, if a building has been completed several years before but the Municipal authorities

detect the unauthorized construction within a period of twelve months from initiating the prosecution, the prosecution would not be valid. The date of detection by the Municipal authorities is not a relevant aspect for computing limitation. The commencement of the unauthorized construction is the sine qua as modified by the Proviso.

9. In view of the above discussions, this Court comes to the conclusion that the Learned 1st Addl. Sessions Judge, Berhampur has rightly upheld the judgment of the Leaned Magistrate that the prosecution was barred by limitation. Hence there is no scope of interference of this Court in the impugned Judgment and Order passed on 7.7.1987 by the lower Appellate Court in Criminal Appeal No. 2/1987 [Criminal Appeal No. 233 of 1986 (GDC)].

In the result the Criminal Appeal is dismissed. No order as to costs.