
(1974) 02 OHC CK 0003

In the Orissa High Court

Case No : Criminal Appeal No. 20 of 1971

Executive Officer, Notified Area Council

APPELLANT

Vs

K. Suryanarayana Subudhi

RESPONDENT

Date of Decision : 05-02-1974

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 417(3)
Orissa Municipal Act, 1950 — Section 263, 266, 273, 337, 347

Citation : (1974) 40 CLT 851

Hon'ble Judges : S. Acharya, J

Bench : Single Bench

Advocate : R.K. Patra, for the Appellant; D. Sahu, for the Respondent

Final Decision : Allowed

Judgement

S. Acharya, J.—This is an appeal u/s 417(3), Code of Criminal Procedure against the judgment in Criminal Appeal No. 15/68-G passed by Sri A.K. Patra, Sessions Judge. Ganjam-Boudh, acquitting the accused (Respondent herein) of an offence u/s 358-A of the Orissa Municipal Act of which he was convicted by the trial Court.

2. The accused was prosecuted for having constructed the second story of his house without obtaining the required permission from the Municipality and thus violating the provisions of Section 266 of the Orissa Municipal Act (hereinafter referred to as the Act), punishable u/s 385A of the Act.

3. The accused took the plea that he submitted a revised plan to the Executive Officer for approval, but the same was returned to him without according approval of the same.

4. Trial Court on a consideration of the evidence on record and the statement of the accused arrived at the finding that the accused constructed the second storey of his house without taking any permission from the Municipality and thus contravened the provisions of Section 266 of the Act. It also discarded the plea

taken by the accused as there was no evidence in support of the same. On the aforesaid findings the trial Court convicted the accused u/s 385A of the Act and sentenced him to pay a fine of Rs. 100/-, in default to undergo S.I. for ten days.

5. The appellate Court acquitted the accused only on the sole finding that the complaint in the case was filed beyond the time ,of three months as prescribed under the first part of Section 347 of the Act.

6. On a perusal of the evidence on record and its discussion in the trial Court judgment I have no doubt that the accused constructed the second storey of his house without any permission from the Municipality and had also encroached upon a portion of the Municipal drain by putting a slab thereon. Mr. Sahu, the learned Counsel for the Respondent has not made any submission on this aspect of the matter though the finding of the trial Court on this aspect has been left undisturbed and unassailed by the appellate Court. I also find that there is nothing on record to sustain the above plea of the accused. The learned Sessions Judge, in acquitting the accused on the question of limitation as stated above, has merely taken into consideration only the first part of Section 347 of the Act and has not cared to see or examine all that is contained in the proviso to the said section. It has also not taken into account the decision of this Court on this point Municipal Council Vs. Ghanasbyam Das, . For the proper appreciation of the matter Section 347 of the Act is quoted below:

347. Save as otherwise expressly provided in this Act, no person shall be tried for any offence against the provisions of this Act, or of any rule, regulation or by-laws made under it, unless a complaint is made by the police or the Executive Officer of a municipal council, or by a person expressly authorised in this behalf by the municipal councilor its Executive Officer, within three months of the commission of the offence. But nothing herein shall affect the provisions of the Code of Criminal Procedure 1898, in regard to the power of certain Magistrates 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 dimmed 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.

It is evident therefrom that the time limit of three months, prescribed under the first paragraph of Section 347 is applicable to all types of delinquencies against the different provisions of the Act or of the rules, regulations or by laws made under the Act, whereas the time, limit of twelve months, as prescribed under the proviso, is applicable only to the cases of failure to take out a licence or permission under the Act in matters in which one is legally bound to take out licence or obtain permission, under the Act. Thus it is evident that the provisions made in the main section are of general nature, whereas special provisions have

been made in the proviso to the said section with regard to certain particular types of cases in which licence or permission has to be taken under the Act. As the proviso specifically prescribes an extended time limit for certain categories of cases, any case coming within the proviso "cannot be governed" by the shorter time limit prescribed under the main section even though such special types of cases may also come within the general provisions made in the main section. My above view gets support from the following passage in the decision in *Municipal Council Vs. Ghanasbyam Das*, :

It is, therefore, clear from the reading of this section that while the first part of Section 347 which is general in nature provides that a prosecution should be launched within 3 months of the commission of the offence, the proviso applies to those cases where it would be necessary to take out a licence or to obtain permission under the Act. In those cases the offence should be deemed to be a continuing offence until the expiration of the period if any, for which licence or permission is required. If no period is specified for which such licence is to be obtained as in the case of construction of a building, a complaint may be made at any time within twelve months from the commencement of the offence. It is not disputed in this case that the prosecution had been launched within seven or eight months of the commencement of the offence. The period of limitation prescribed in the proviso to Section 347 applies to this case and it, therefore, follows that the prosecution had been launched within time.

7. Mr. Sahoo, the learned Counsel for the Respondent, at first contended that the proviso to Section 347 of the Act would apply only to those cases in which a licence or permission u/s 337 was granted, but something was done contrary to or not in conformity with the said licence or permission. I do not see any force in the above submission. The said proviso, as worded applies to all cases of failure to take out a licence or obtain permission in matters in which licence or permission is required by or under this Act. There is nothing in the proviso to limit its application only to the cases of contraventions mentioned by Mr. Sahoo.

8. Mr. Sahoo has also contended that the proviso to Section 347 will apply only to those cases where a licence or permission is or is to be granted with a specification of time therein. I do not see anything in the said proviso to limit its scope only to a licence or permission of the above nature. The proviso, as stated above, applies to all cases of failure to take out licences or permissions under the Act. The clause "until the expiration of the period, if any for which the licence or permission is required" in that proviso applies only to those cases in which a licence or permission is required for a particular period. But the proviso, read as a whole is not confined in its application only to those types of cases; the latter part of the proviso applies to other types of cases for which "no period is specified" as specifically mentioned therein. The period of twelve months limitation for filing complaints prescribed under the proviso is independent of the above-quoted clause "until the expiration of the period, if any, for which the licence or permission is required" and is no way governed by the same. I do not

therefore see any force or substance in this contention also.

9. It is further contended by Mr. Sahoo that even if the proviso applies to this case, the date of the commencement of the complained-of construction having not been established in this case, there is no basis on which it can be said that the complaint was filed within 12 months of the commencement of the offence. It is clear from the proviso to Section 347 of the Act and it is also well settled that an unauthorised construction shall be deemed to be a continuing offence and the liability for making the unauthorised construction continues till its existence, and every moment of the existence of the unauthorised construction constitutes a fresh offence. In the above view of the matter, for the purpose of this proviso, each moment of the existence of the unauthorised construction will give a fresh cause of action and so on each such moment it can be said that the offence has commenced from that point of time. Accordingly, a complaint can be held against the offender within a period of twelve months from the date of the unauthorised construction. The above view gets support from the decision, in *Marchia Oram. v. Executive Officer, Notified Area Council Rourkela* 33 (11167) C.L.T. 350, where after quoting the proviso to Section 347 of the Act, it has been held:

For the purposes of this section therefore the construction of any building without the permission of the Executive Officer is to be construed as a continuing offence. In other words this provides that the liability for the unauthorised construction continues until the expiration of the period, if any, for which the licence or permission is required. Thus that limitation as provided in the main body (sic) of the Section 347 will, commence to run from moment to moment during this period. In that way the proviso has a two-fold implications (1) on that it extends the period of limitation to the extent as stated therein, and, (2) that it constitutes every moment of the existence of the an authorise construction during that period. As such in view of the latter concept the contemner may be convicted to each of the moments of the existence of the unauthorised construction during that period as if he is committing a new offence every moment he reference to the ?main body of the Section 347" (marked sic) in the above quoted passage is obviously a clerical error as all that has been stated there is with reference only to the proviso to the said section.

10. Under the Municipal law, construction or reconstruction of buildings shall not be begun and any addition thereto or alteration thereof shall not be made unless and until permission for the execution of the work is taken from the Municipal authorities (see Sections 263, 266 and 273 of the Act). Any such construction made without permission of the Municipality constitutes an offence punishable u/s 385A of the Act. Every moment of the existence of the unauthorised construction constitutes a fresh offence, and the offender can be prosecuted within twelve months from the time of the detection of the unauthorised construction, as found above.

11. On the above considerations the order of acquittal, based purely on the question of limitation, is entirely wrong and illegal, and hence is liable to be set

aside.

12. In the, result, therefore, the order of acquittal passed, in Criminal Appeal No. 135/68-G by the Court below is set aside and the accused-Respondent herein, is convicted of an offence u/s 385A of the Orissa Municipal Act. As, for his aforesaid conviction he was sentenced by the trial Court to pay a fine of Rs. 100/- only, in default to undergo S.I. for ten days, I do not propose to enhance that sentence at this stage, though that sentence appears to be rather inadequate in a matter of this nature. Accordingly; the accused-Respondent is sentenced to pay a fine of Rs. 100/- and in default to undergo S.I. for ten days.

13. The appeal accordingly is allowed. The prosecution has not placed any definite material on record to enable the Court to impose a daily fine as provided under the last paragraph of Section 385A of the Act. If the unauthorised construction is still in existence, legal action can even now be instituted for the imposition of daily fine against the offender. *Marchia Oram v. Executive Officer Notified Area Council Rourkela* 33 (11167) C.L.T. 350 and *Rajballav Misra v. Executive Officer N.A.O. Bhubaneswar* 32 (1956) C.L.T. 202.