(2018) 04 OHC CK 0009

In the Orissa High Court

Case No : CRLMC No. 979 Of 2002

Puranmal Agarwala and Others — APPELLANT

Vs

State of Orissa and Ors. — RESPONDENT

Date of Decision : 02-04-2018

Acts Referred:

Code of Criminal Procedure, 1973 — Section 482
Bihar and Orissa Excise (Orissa Amendment) Act, 1998 — Section 2
Bihar and Orissa Excise Act, 1915 — Section 2, 2(12a), 47(a), 47(g), 55, 89

Citation : (2018) 04 OHC CK 0009

Hon'ble Judges : S.K. SAHOO

Bench : Single Bench

Advocate : Ashok Mohanty, Prem Kumar Pattnaik

Final Decision : Allowed

Judgement

S. K. SAHOO, J.

1. This is an application under section 482 of Cr.P.C. filed by the petitioners Puranmal Agarwala, Bamadev Sahoo and Jayanta Kumar Sahoo with a

prayer to quash 2(a) C.C. Case No.216 of 2001/T.R. No.2542 of 2001 pending in the Court of learned S.D.J.M., Sambalpur in which after filing of the

prosecution report under section 47(a)(g) read with section 55 of the Bihar and Orissa Excise Act, learned Court has taken cognizance of such

offences vide order dated 14.12.2001 and issued process against the petitioners.

2. As per the prosecution case, on 10.12.2001 the Excise Officials on suspicion detained one old oil tanker vehicle bearing registration no. OR-02A-

2791 at Maneswar forest check gate and found the petitioner no.2 Bamadev Sahoo as the driver and petitioner no.3 Jayanta Kumar Sahoo as the

helper of the said vehicle were transporting 16.500 metric ton of Guda molasses in the tanker. The oil tanker, the Guda molasses, R.C. book of the

tanker, driving licence of petitioner no.2 and one bill were seized and seizure list was prepared. The prosecution report was submitted against

petitioners nos.2 and 3 on 14.12.2001 by Sub-Inspector of Excise, Sadar, Mobile.

3. The petitioner no.1 is not an accused as per the prosecution report submitted in the case and process has been issued only against the petitioner

no.2 Bamadev Sahoo and petitioner no.3 Jayanta Kumar Sahoo. Therefore, the petitioner no.1 who is a third party has no locus standi to challenge the

criminal proceeding against petitioners nos.2 and 3.

4. Mr. Ashok Mohanty, learned Senior Advocate appearing for the petitioners contended that petitioner no.1 filed a writ petition bearing O.J.C. No.

12304 of 1999 before this Court to strike down section 2 of the Bihar and Orissa Excise (Orissa Amendment) Act, 1998 (Orissa Act 2 of 1999) as

ultravires the Constitution of India. An interim order dated 15.10.1999 was passed in Misc. Case No. 11305 of 1999, inter alia, observing that as a

temporary measure, the inclusion of â??molassesâ?? in Bihar & Orissa Excise Act (Amendment Act 2 of 1999) will not apply to the petitioner no.1

who deals in molasses. The interim order was made absolute as per the order dated 01.06.2000. It is submitted that the petitioner nos. 2 & 3 were the

driver and helper of the oil tanker respectively in which the molasses are being transported and they were carrying it on behalf of the petitioner no.1

and therefore, in view of the order passed in the writ petition, there was no justification for effecting seizure of Guda molasses and the vehicle and the

submission of the prosecution report against them under section 47(a)(g) read with section 55 of the Bihar & Orissa Excise Act for unlawful

possession of Guda molasses and its transportation without valid transport pass is not proper and justified. It is further contended that even though

â??molassesâ?? was included in the definition of â??intoxicantâ? by Orissa Act 2 of 1999 in section 2(12-a) of the Bihar and Orissa Excise Act,

1915, in absence of any Rules or executive instruction relating to issuance of license for possession and sale of molasses for industrial use at the

relevant point of time when the offence was allegedly committed, no culpability can be found against the petitioners. It is further contended that a

similar case was filed before this Court by one Parag Agarwalla in CRLMC No. 1179 of 2010 and the criminal proceeding against him was quashed and therefore, inherent power under section 482 of Cr.P.C. should be invoked to quash the criminal proceeding in order to prevent abuse of process of

the Court. Mr. Prem Kumar Pattnaik, learned Addl. Govt. Advocate on the other hand contended that there is nothing on record that petitioners nos. 2

& 3 were carrying Guda molasses on behalf of the petitioner no.1 and since they are not the petitioners in the writ petition, an order passed in the writ

petition filed by the petitioner no.1 will not apply to them. It is further contended that the exercise of power conferred by the statute does not depend

on the existence of Rules or guidelines and the authority is not precluded from exercising the power conferred by the statute even if no Rule is

framed.

5. Section 47(a) of the Bihar and Orissa Excise Act, 1915 prescribes punishment for a person who in contravention of the Act, or of any Rule,

notification or order made, issued or given, or of any licence, permit or pass granted under the Act imports, exports, transports, manufactures, collects,

possesses or sells any intoxicant. Section 47(g) of the Bihar and Orissa Excise Act, 1915 prescribes punishment for a person who removes any

intoxicant from any distillery, brewery, warehouse or other place of storage, established, licenced or continued under the Act. Section 55 of the Bihar

and Orissa Excise Act prescribes penalty for possession of any quantity of any intoxicant knowing, or having reason to believe, the same to have been

unlawfully imported, transported or manufactured or knowing or having reason to believe that the prescribed duty has not been paid thereon. By virtue

of the Bihar and Orissa Excise (Orissa Amendment) Act, 1998 (Orissa Act 2 of 1999) which was published in the Orissa Gazette dated 23.02.1999, in

section 2 of the Bihar and Orissa Excise Act, 1915, in clause (12-a), after the words â??mahua flowerâ?, the words â??and molassesâ? was

inserted. Thus after amendment, as per section 2(12-a) of the Bihar and Orissa Excise Act, â??intoxicantâ? means any liquor or intoxicating drug and

includes mahua flower and molasses.

The petitioners no.2 and 3 were found transporting 16.500 metric ton of Guda molasses in the oil tanker on 10.12.2001. In view of the amendment to

section 2(12-a) of the Bihar and Orissa Excise Act, such possession/ transportation is illegal. On perusal of the case records, it appears that there is no

material on record that the petitioners nos. 2 & 3 were carrying Guda molasses in a tanker on the date of occurrence for petitioner no.1. Therefore,

the order passed in O.J.C. No. 12304 of 1999 will not be applicable in this case so far as petitioners nos. 2 & 3 are concerned. Since they are not the

writ petitioners in that case nor they have filed any separate writ petitions and as the order passed in O.J.C. No. 12304 of 1999 relates to petitioner

no.1 Puranmal Agarwala only who is not an accused in the case, the criminal proceeding against the petitioners nos. 2 and 3 cannot be quashed

merely because of passing of interim order in the writ petition.

It appears that for the first time, issuance of provisional license for use of molasses came by way of an executive instruction issued on 04.05.2007 by

the Excise Commissioner, Orissa. The prescribed proforma for issue of provisional licence for possession and sale of molasses for industrial use was

also introduced. Similarly the prescribed proforma for application for licence for possession and sale of molasses to large and small scale industries for

industrial use was introduced. Similarly on 07.10.2009 the Excise Commissioner of Orissa issued the format for pass for transport of molasses inside

the State. Therefore, it is clear that when the case against the petitioner was instituted, there was neither any Rule nor executive instruction relating to

grant of provisional licence for possession and sale of molasses for industrial use nor any application format for licence for possession and sale of

molasses to large and small scale industries for industrial use and there was also no provision for issuance of pass for transport of molasses inside the

State.

6. Now the question that crops up for consideration is as to whether in absence of any Rules or executive instruction, the inclusion of molasses in the

definition of â??intoxicantâ? as per section 2(12-a) of the Bihar and Orissa Excise Act, 1915 will attract the ingredients of the offences under section

47(a)(g) read with section 55 of the Bihar and Orissa Excise Act?

In case of Surinder Singh -Vrs.- Central Government reported in 1986 (4) Supreme Court Cases 667, the Central Government had not framed rules in

respect of disposal of property forming part of the compensation pool as contemplated under the provisions of the relevant Act. It was claimed by one

of the parties that the authority constituted under the Act had no jurisdiction to dispose of urban agricultural property by auction sale in absence of

Rules. The contention was repelled with the following observations:

6......Where a statute confers powers on an authority to do certain acts or exercise power in respect of certain matters, subject to rules, the exercise

of power conferred by the statute does not depend on the existence of rules unless the statute expressly provides for the same. In other words,

framing of the rules is not condition precedent to the exercise of the power expressly and unconditionally conferred by the statute. The expression

subject to the rules"" only means, in accordance with the rules, if any. If rules are framed, the powers so conferred on authority could be exercised in

accordance with these rules. But if no rules are framed, there is no void and the authority is not precluded from exercising the power conferred by the

statute....."" In case of Orissa State (Prevention and Control of Pollution) Board -Vrs.- Orient Paper Mills reported in (2003) 10 Supreme Court Cases

421, it is held as follows:-

â??21. In view of the discussion held above, in our view it would not be correct to say that simply because the rules have not been framed prescribing

the manner, it would render the Act inoperative. The area was notified as air pollution control area by the State Government as authorized and

provided by virtue of the powers conferred under Section 19 of the Act. The declaration is provided to be made by means of a notification published in

the official gazette. No other manner is prescribed nor exists. The relevant notifications issued by the government cannot be said to be contrary to any

rules in existence as framed by the Government. The respondent had knowledge of the notification and had also applied for consent of the Board

which was granted to the respondent. But it may be clarified that this is not the reason for taking the view that we have taken, it is mentioned only by

way of an additional fact and nothing more. The whole working and functioning of the Act which is meant for controlling the air pollution cannot be

withheld and rendered nugatory only for the reason of absence of the rules prescribing the manner declaring an air pollution control area which

otherwise is provided to be notified by publication in an official gazette which has been done in this case.â??

Section 89 of the Bihar and Orissa Excise Act, 1915 empowers the State Government to make rules to carry out the objects of the Act or any other

law for time being in force relating to the excise-revenue. The mandate of the Act is that the Rules will apply if framed. The rule making power conferred on the State Government, for carrying out all or any of the purposes of the Act, must be confined to such of the purposes as are indicated in

any of the provisions of the Act. (Board of Directors -Vrs.- Chittoor Primary Coop. Bank reported in (1974) 1 Supreme Court Cases 608). A

statutory rule, while ever subordinate to the parent statute, is, otherwise, to be treated as a part of the statute and as effective. Rules made under the

statute must be treated for all purposes of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained

in the Act and are to be judicially noticed for all purposes of construction or obligation.

(State of U.P. -Vrs.- Babu Ram Upadhya reported in (1961) 2 SCR 679; Maxwell: Interpretation of Statutes, 11th Edn. pp. 49-50; State of Tamil

Nadu -Vrs.- Hind Stone reported in A.I.R. 1981 S.C. 711). Thus it would not be correct to say that simply because the Rules or executive instructions

have not been framed prescribing the manner for regulating the possession, transport or grant of licence of intoxicant Guda molasses till the detection

in this case, it would render the inclusion of molasses in the definition of â?? intoxicantâ? as per section 2(12-a) of the Bihar and Orissa Excise Act,

1915 Act inoperative and anybody can at his whim and pleasure possess and transport any quantity of Guda molasses.

7. Therefore, I am of the humble view that since the Bihar and Orissa Excise Act, 1915 was amended as per Orissa Act 2 of 1999 which was notified

in the Orissa Gazette on 23.02.1999 and molasses was introduced under the definition of â??intoxicantâ?, even in absence of framing of Rules or

executive instruction, possession or transportation molasses from the date of notification is in contravention of the Act and becomes an offence as per

section 47(a) of the Bihar and Orissa Excise Act, 1915 as it was expressly and unconditionally conferred by the statute. However, on perusal of the

records, there is nothing to show that the intoxicant Guda molasses which the petitioners nos.2 and 3 were transporting, were removed from any

distillery, brewery, warehouse or other place of storage, established, licenced or continued under the Act and therefore, the ingredients of offence

under section 47(g) of the Bihar and Orissa Excise Act, 1915 will not be attracted. Similarly, there is no material on record that the petitioners nos.2

and 3 were in possession of intoxicant Guda molasses knowing, or having reason to believe, the same to have been unlawfully imported, transported or manufactured or knowing or having reason to believe that the prescribed duty has not been paid thereon. The Act nowhere lays down such

presumption and therefore, the ingredients of offence under section 55 of the Bihar and Orissa Excise Act, 1915 will also not be attracted. The

decision of this Court placed by the learned counsel for the petitioners passed in CRLMC No. 1179 of 2010 in case of Parag Agarwalla -Vrs.- State

of Orissa is not applicable in this case so far as petitioners nos. 2 and 3 are concerned as they are not the petitioners in the writ petition filed by the

petitioner no.1 Puranmal Agarwala and interim order passed in that case is specific that the inclusion of â??molassesâ?? in Bihar & Orissa Excise

Act (Amendment Act 2 of 1999) will not apply to the petitioner no.1 who deals in molasses.

8. In view of the foregoing discussions, I am inclined to accept the prayer made by the petitioners nos.2 and 3 in part and quash the impugned order

dated 14.12.2001 passed by the learned S.D.J.M., Sambalpur in 2(a) C.C. Case No. 216 of 2001/T.R. No. 2542 of 2001 in taking cognizance of

offences under sections 47(g) and 55 of the Bihar and Orissa Excise Act, 1915. However, the proceeding against the petitioners nos.2 and 3 in 2(a)

C.C. Case No. 216 of 2001/T.R. No. 2542 of 2001 for commission of offence under section 47(a) of the Bihar and Orissa Excise Act, 1915 shall

continue in the Court of learned S.D.J.M., Sambalpur. Any observation made in this judgment shall not influence the learned trial Court in adjudicating

the case and the learned trial Court shall go by the evidence to be adduced by the respective sides during course of trial. In the result, CRLMC

application is allowed in part.Â Â