
(2007) 12 OHC CK 0012
In the Orissa High Court
Case No : Government Appeal No. 13 of 1991

State of Orissa

APPELLANT

Vs

Nilamani Behera and Others

RESPONDENT

Date of Decision : 13-12-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 2A
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 147, 148, 149, 379, 427
Probation of Offenders Act, 1958 — Section 4

Citation : (2008) 1 OLR 116 Supp

Hon'ble Judges : R.N. Biswal, J

Bench : Single Bench

Advocate : Addl. Government Advocate, for the Appellant; Diptimayee Dhal,
(Legal Aid) Advocate, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Biswal, J.—This appeal is directed against the judgment and order dated 18.12.1990 passed by the Second Addl. Sessions Judge, Cuttack in Criminal Appeal No. 88 of 1986, wherein he allowed the appeal and set aside the order of conviction passed by the learned J.M.F.C., Cuttack in G.R. Case No. 2968 of 1981.

2. Respondent were the accused in G.R. Case No. 2968 of 1981. Shorn of unnecessary details, the prosecution case is that on 2.10.1981 at about 6.00 A.M. all the accused persons forming an unlawful assembly and being armed with deadly weapons, in prosecution of their common object forcibly entered upon plot Nos. 1215 and 1216, appertaining to khata No. 1096 of Talatelenga Bazar, belonging to the mother-in-law of the informant and demolished the newly constructed wall raised over it by the informant causing loss of Rs. 200/-. When protested by the informant and his family members, they abused them in the filthy language and threatened to do away with their lives. So, P.W.1 informed the incident over telephone to P.W.5, the then S.I. of Purighat P.S., Cuttack. On getting the information, P.W.5 along with his staff rushed to the spot, where

P.W.1 lodged a written report before him. Treating the written report as F.I.R., P.W.5 forwarded it to the I.I.C. of Purighat P.S. and took up investigation, in course of which he arrested the accused persons, examined the witnesses seized 250 number of bricks, three bamboos and one crowbar from the spot and prepared seizure list in respect thereof. After completion of investigation, P.W.5 submitted charge sheet against the accused persons and accordingly they faced trial under Sections 147/148/427/504/447/149 of I.P.C. before the J.M.F.C, Cuttack. The plea of the accused persons is complete denial of their involvement of the crime in question. It is their further plea that because of previous enmity this case has been foisted against them.

3. In order to bring home the charge, leveled against the accused persons, prosecution examined five witnesses, whereas the accused person examined only one witness to prove their innocence. After assessing the evidence on record, the trial Court acquitted the accused persons of the charge u/s 504 of I.P.C. but held them guilty of the offence under Sections 147/148/149/427/447 read with Section 149 of I.P.C. However, considering the nature of offence, the age and character of the accused persons, the trial Court released them u/s 4 of the P.O. Act.

4. Being aggrieved with the order of conviction, the accused persons preferred appeal before the Sessions Judge, Cuttack, which on being transferred, was heard and disposed of by the learned Addl. Sessions Judge, Cuttack, wherein, the appeal was allowed on the ground that P.Ws. 1 and 2 being highly interested for the prosecution and P.Ws.3 and 4 being chance witnesses it was not safe to rely on their evidence; that in violation Misc. Case No. 362 of 1981 of CPC of the file of Addl. Sub-Judge, Cuttack when accused persons were not found guilty, the trial Court ought not have convicted them and that if at all they damaged the wall in question, they did so by exercising their right of private defence to property. Being aggrieved with the order of acquittal, the State of Orissa has preferred the present appeal, as mentioned earlier.

5. Learned Addl. Government Advocate submits that the Appellate Court erred in holding that the evidence of P.Ws. 1 to 4 could not be relied upon. Admittedly, P.Ws. 1 and 2 are brothers, being the son of late Hadibandhu Mohapatra. So, naturally, they would be interested for the success of the prosecution. Of course, only because they are interested witnesses, their evidence cannot be brushed aside altogether, but the same requires to be examined with care and caution. On perusal of the evidence of P.W.1, it is found that the accused persons (hereinafter referred as Respondent) were armed with Bhala, spear, dagger. On the other hand, the evidence of P.W.2 in this regard is that Respondent-Dhira Dei was armed with a Paniki, Dllip with a Tenta and all other Respondent with Lathies. Again, it transpires from the evidence of P.W.3 that Respondent-Nilamani was armed with a Crowbar and one of his son with a Tenta. So, the evidence of P.Ws. 1 to 3 differs from one Anr. in respect of the weapon of offences the Respondent were said to be armed with. P.W.5 seized only one crow bar and

three bamboos. As found from the evidence of P.W.4, Sridhar Das, Khetra Mohan Swain and Ajit Prusty, are the immediate neighbours of P.W.1 and they were at the spot when the alleged occurrence took place. None of them has been examined by the prosecution. On the other hand, P.Ws 3 and 4 who were chance witnesses were preferred to be examined. When all these are carefully taken into consideration, it can not be said that the evidence of P.Ws. 1 to 4 are beyond all reasonable doubts. Accordingly, the finding of the lower Appellate Court that the evidence of P.Ws. 1 to 4 are doubtful can not be branded as unreasonable and illegal.

6. Admittedly, in Misc. Case No. 354 of 1981, status quo order in respect of the disputed property was passed on 30.9.1981 by the Additional Sub-Judge, Cuttack till disposal of Misc. Case No. 352 of 1981. It transpires from the evidence of P.W.3 that since one week prior to the occurrence, construction of the work of the wall was going on. He further specifically stated that on the date of occurrence also i.e., 2.10.1981 the construction was going on. Misc. Case No. 352 of 1981 having been disposed of on 2.7.1982, the status quo order was in force when the construction of the wall was made. So, in fact, the mother-in-law of P.W.1 who was a party to the injunction Misc. Case, violated the order of status quo first. She filed a Misc. Case under Order XXXIX, Rule 2A of CPC against the Respondent, Nilamani, Behera, Dilip Kumar Behera, Ashok Kumar Behera and Manoj Kumar Behera with prayer to punish them as they violated the order of status quo passed on 30.9.1981 in Misc. Case No. 354 of 1981. But learned Addl. Sub-Judge, after going on through the evidence adduced on behalf of the Petitioner therein, did not believe that in fact Nilamani Behera, Dilip Kumar Behera, Ashok Kumar Behera and Manoj Kumar Behera violated the order of status quo. Moreover, as stated earlier mother-in-law of P.W.1 first violated the status quo order by constructing a wall over the disputed land. So, even if, for academic point of view, it is presumed that the Respondent demolished that wall by entering upon the disputed land, they can not be liable for the offence u/s 447 of I.P.C. Furthermore, when the trial Court convicted the Respondent u/s 148 of I.P.C. which is graver than the offence u/s 147 of I.P.C, it ought not have convicted them u/s 147 of I.P.C. As stated earlier prosecution failed to bring home the charge leveled against the Respondent, beyond all reasonable doubts as such the lower Appellate Court rightly set aside the order of conviction passed by the trial Court and the order to execute bond pursuant to the release order passed u/s 4 of the P.O. Act and acquitted the Respondent.

In the result, the Government Appeal stands dismissed and the judgment and order of lower Appellate Court are hereby confirmed.