

(2002) 11 OHC CK 0008

In the Orissa High Court

Case No : Criminal Appeal No. 236 of 1988

The Executive Officer Berhampur Municipality

APPELLANT

Vs

Madhuri Mohapatra

RESPONDENT

Date of Decision : 20-11-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 255A, 347, 433A, 437, 468

Limitation Act, 1963 — Section 14(2)

Orissa Municipal Act, 1950 — Section 264, 266, 273, 273A, 347

Citation : (2002) 11 OHC CK 0008

Hon'ble Judges : B.P. Das, J

Bench : Single Bench

Advocate : N.K. Mishra and C.R. Kar, for the Appellant; B. Rath, S.N. Mohapatra and K.R. Mohapatra, for the Respondent

Judgement

B.P. Pas, J.—This appeal is directed against an order of acquittal passed by the Judicial Magistrate, 2nd Class, Berhampur in a proceeding u/s 385A of the Orissa Municipal Act.

2. The fact as it appears from the prosecution case, in short, is that on 3.10.1985 and thereafter it was found that the present respondent unauthorisedly constructed a building at Chandrasekhar Temple Street, Berhampur in Ward No. 8 and thereby contravened Sections 264 and 266 of O.M. Act.

3. The plea of defence was that of denial.

4. In order to bring home the charge, prosecution examined two witnesses and none was examined for the defence. The trial Court on looking into the evidence on record ultimately came to the conclusion that the witnesses were not able to say the date of commencement of construction. Secondly there was nothing to show that Ext. 2 i.e., notice u/s 273 of the Municipal Act had even been served on the accused before initiating the proceeding u/s 273A of the Act. Basing on the aforesaid finding an order of acquittal was recorded in terms of Section

255(1) Code of Criminal Procedure That order is challenged before this Court in appeal.

5. Mr. Mishra, Learned Counsel for the Appellant submits that the trial Court has gone wrong in holding that the absence of specific date of commencement of construction is fatal to the case of the prosecution. It was a continuing offence; secondly, the compliance of the provisions u/s 273A of the Municipal Act was "No. sine qua non to proceed u/s 385A of the Municipal Act, because the prosecution report indicated that the municipality had proceeded against the Respondent for alleged unauthorised construction which came within the scope and ambit of Section 385A of the Act. Section 385A speaks as follows:

385A 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 completed 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 273A fails 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 fine which may extend in the case of a building to five hundred 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.

6. So according to the Learned Counsel for the Appellant the trial Court has fallen into an error by acquitting the Respondent on the ground of non-compliance of the mandate of Section 273A of the Act.

7. In course of argument Mr. B. Rath, Learned Counsel for the Respondent, while supporting the order of acquittal passed by the learned Magistrate, submits that the Appellant had proceeded against the respondent under Sub-section (2) of Section 273A of the Municipal Act, which provides that the Executive Officer shall serve a copy of the provisional order made under Sub-section (1) on the owner of the building 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 and in terms of Sub-section (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 which he may think fit to make and such order shall then be binding on the owner. Further, he draws my attention to Section 385A of the Municipal Act and submits that the prosecution can be launched, in the event

any person fails to obey direction given by the Executive Officer in terms of Section 273A. According to him, when there was clear-cut finding of fact that No. notice had been served on the Respondents in terms of Section 273A, No. prosecution could therefore be launched u/s 385A.

8. While considering the rival contention of the parties, it is necessary to have a look to Section 347 of the Municipal Act, which speaks as follows:

347. Persons empowered prosecute-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 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 authorised in this behalf by the Municipality or its Executive Officer, within three months of the commission of offence. But nothing herein shall affect the provisions of the Code of Criminal Procedure, 1898 (Act 5 of 1989) 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 purpose of this Section, be deemed a continuing offence until 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.

9. On a bare perusal of Section 347 of the Municipal Act it is seen that prosecution can be launched within three months of the commission of offence, and when No. period is specified, complaint may be made at any time within twelve months from the commencement of the offence and the offence shall be deemed to be a continuing one, in case of failure to take out a licence or obtain permission under the Act until the expiration of the period, if any, for which the licence or permission is required.

10. According to Mr. Rath, because of failure on the part of the prosecution to give the exact date of construction, the proceeding could not be sustained in the eye of law and according to him there is also No. evidence on record to show that it was" a continuing offence. The sum and substance of the argument of the Learned Counsel for Respondent is that the prosecution had not been launched either within three months or twelve months from the date of commencement of the offence because the date of commencement of the offence had not been disclosed in absence of which the trial Court had No. other way out than to record an order of acquittal.

11. Counsel for the responde-At also draws my attention to a decision reported in 1905(11) OLR, 437 (Executive Officer, Berhampur Municipality v. Padma Ch. Mishra), wherein this Court interpreting Section 347 of the Act held that a complaint should be filed within the period of limitation so prescribed u/s 347 of the Act and submits that appeal preferred by the Executive Officer was not maintainable as the prosecution had been launched beyond the period of

limitation as prescribed u/s 347 of the Act.

12. In support of his contention, Learned Counsel for the Respondent refers to a decision reported in 1995(11) OLR 508 (The Executive Officer, Berhampur Municipality v. Gurunath Panigrahi) where this Court came to the conclusion that as per the proviso to Section 347 of the Act the 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 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.

He further relied on a decision in Executive Officer, N.A.C. Vs. Jagannath Mallik, , where a Division Bench of this Court deciding the same issue held that the existence of an unauthorised construction was not the basis for the prosecution, but the commencement of the unauthorised construction was the real basis, and the extension contemplated under the proviso on the basis of continuing offence is only a further relevant feature.

13. Relying upon all these decisions Mr. Rath submits that in the present case, it cannot be said that the prosecution has been launched within the period of limitation, because there is nothing in evidence to indicate the date of commencement of unauthorised construction, which is the sinecure non for prosecution as modified by the proviso to Section 347,

14. There is force in the submission that within twelve months of detection of the unauthorised construction, a prosecution can be initiated, because for example, if a building has been completed several years before but the Municipal authorities detect the unauthorised construction within a period of twelve months before initiating the prosecution, in my considered opinion the prosecution cannot be valid, The date of detection by the Municipal authorities is not a relevant aspect for computing limitation, which is the sine qua non as incorporated in the proviso to Section 347.

15. Mr. Mishra, Learned Counsel for the Appellant further submits that after the amendment, of the Code of Criminal Procedure, Section 469 provides as follows:

469. Commencement of the period of Limitation

(1) the period of limitation in relation to an offence, shall be (a) on the date offence: or (b) where the commission of the offence was not known to the person aggrieved by the offence or to any police officer, the first day on which offence comes to the knowledge "of such person or to any police officer, whichever is earlier; or (c) where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the police officer making investigation into the offence, whichever is earlier.

(2) In computing the said period, the day from which such period is to be completed shall be excluded.

16. Learned Counsel relying on the aforesaid provision submits that the date on which P.W. 1 detected the unauthored construction can be construed to be the date of commencement of the offence, wherefrom the period of limitation would run, because Section 468 Code of Criminal Procedure bars taking cognizance of an offence after lapse of the period of limitation and in this case, the prosecution has been launched within six months only. Learned Counsel for the respondent submits that the aforesaid provision of the Code of Criminal Procedure is not applicable to the facts and circumstances of the present case as there is specific provision under the statute; that is Section 347 Code of Criminal Procedure, which provides the period of limitation within which a proceeding can be initiated.

17. In this regard the decision of the Apex Court in AIR 1976 S.C. 1039 (The Commissioner of Sales Tax, Uttar Pradesh v. Parson Tools and Plants, Kanpur) may be looked into, wherein the SC interpreting the provision of the V.P. Sales Tax Act held as follows:

Thus the principle that emerges is that if the legislature in a special statute prescribes a certain period of limitation for filing, a particular application thereunder and provides in clear terms "that such period on sufficient cause being shown may be extended, in the maximum only up to a specified time limit and no further, then the tribunal concerned has no jurisdiction to treat within limitation, an application filed before it beyond such maximum time limit specified in the statute by excluding the time spent in prosecuting in good faith and due diligence any prior proceeding on the analogy of Section 14(2) of the Limitation Act.

Learned Counsel for the Appellant further relies on a decision of the SC reported in *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, wherein it was held as follows:

It is a well known rule of the interpretation of statutes that a "particular enactment is not repealed by a general enactment in the same statute." (Beal on the Cardinal Rules of Legal Interpretation. 3rd Edn., Part VII, S. IX-p. 516) Reliance is placed in support of the above proposition on the following observations of *Best Cochin Churchill v. Crease*, (1828) 5 Bing. 177, at p. 180 (L):

The rule "is that where a general intention is expressed, and the Act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception.

18. In this regard Mr. Mishra draws my attention to a decision of the Apex Court reported in *Maru Ram and Others Vs. Union of India (UOI) and Others*, wherein dealing with the challenge to the vires of Section 433A of the Code of Criminal Procedure vis-a-vis the provision of Rules under the Prisons Rules, 1984, a Constitution Bench came to a conclusion that there are three components to be separated. Firstly, the Code of Criminal Procedure, generally governs matters covered by it. Secondly, if a special or local law exists covering the same area, this later law will be saved and will prevail. The short sentencing measures and

remission schemes promulgated by the various States are special and local laws and local laws must override. Now comes the third component which may be clinching. If there is a specific provision to the contrary then that will override the special or local law.

19. Now it is to be seen whether Section 469 Code of Criminal Procedure is a specific law contrary to the special provision in Section 347 of Orissa Municipal Act. The word "Specific" is defined in Murray's New English Dictionary as precise or exact in respect of fulfilment of conditions or terms; definite, explicit, which has been dealt with by the Apex Court is the case of Maru Ram v. Union of India (supra). Section 437 is a special law but Section 469 Code of Criminal Procedure being a specific, definite, explicit provision dealing with the particular situation will hold even against the special local law. Thus, the period of limitation is to be computed from the date of knowledge of the Municipality as would be found from records as provided u/s 469 Code of Criminal Procedure Ext. 1 indicates the first date on which the offence came to the knowledge and the period of limitation shall run from that date. Accordingly I find that the prosecution was filed within the time prescribed.

20. The next question that falls for consideration is whether non-compliance with the provision of Section 273 of the Municipal Act shall render the prosecution null and void.

Section 385A of the Orissa Municipal Act provides penalty for unlawful building. Section 385A of the Act consists of three parts of which Clause is to the effect that if a person fails to obey any direction given by the Executive Officer to demolish a building or well u/s 273A of the Act, he makes himself liable for prosecution u/s 385A of the Act. So before a prosecution can be launched in terms of the said provision, it is necessary that a direction must have been given by the Executive Officer u/s 273A of the Act and the notice must have failed to obey the direction (See Executive Officer, Baripada Municipality Vs. Mahesh Prasad Saha, .

21. The question of fulfilling the mandatory provisions of Section 273A arises when the prosecution is under the third part, i.e., Clause (c) of Section 385A. A bare looking to the prosecution report filed by the Municipal authorities transpires that the prosecution was for unauthorised construction contravening Sections 264 and 266 of the Orissa Municipal Act, for which the Respondent was punishable u/s 385A of the said Act. The fact remains that when the prosecution is under Clause (a) of Section 385A of the Act, the question of going through the requirements of Section 273A absolutely does not arise. The present proceeding was u/s 385A simpliciter on the allegation of unauthorised construction for which there is No. necessity of notice u/s 271 or Section 273 of the Act.

However, looking into the facts and circumstances of the case even though the prosecution report appears to have been launched under Clause (a) of Section 385A of the Act, the trial proceeded and prosecution led evidence as if that was a

case u/s 273A and Clause (c) of Section 385A of the Act.

22. In view of this the trial Court rightly found that No. notice had been served on the Respondent by the Municipality before giving him any direction. The order of the trial Court is not vitiated by any irregularity in recording order of acquittal of the present Respondent.

The Criminal Appeal accordingly fails. The impugned order of acquittal of the Respondent is confirmed.