

Orissa High Court

Sayad Hyder Hussain vs State Of Orissa And Anr. on 22 June, 1995

Equivalent citations: 1996 (1) ALT Cri 9, 1995 II OLR 105

Author: A Pasayat.

Bench: A Pasayat

JUDGMENT A. Pasayat. J.

1. The only point involved in this application under Sections. 397 and 401 of the Cods of Criminal Procedure, 1973 (in short, the 'Code') is whether the learned Subdivisional Judicial Magistrate, Sambalpur (in short. 'SDJM') was justified in holding that opp. party No. 2 was entitled to get possession of the seized bus during pendency of the proceeding in G. R. Case No. 1138 of 1994.

2. A brief reference to the factual aspects as presented by the petitioner is necessary.

Originally the bus bearing registration No. OSS 2411 which is the subject-matter of contention was owned by one Bichittar Singh. On 22-5-1992 said Bichittar Singh entered into an agreement for sale of the said vehicle with Uttam Dash and two of his associates, namely, Bishikeshan Behera and Akhtar Ali. Pursuant to the said agreement, possession of the vehicle was delivered to Uttam Dash and his two associates. As they could not manage the bus properly and sustained loss on account of their engagement in other business, they entered into an agreement for sale with petitioner on 21-7-1993. The consideration was fixed at Rs. 2,50,000/-. It was stipulated that initially Rs. 50,000/- was to be paid in cash. The amount was paid and Uttam and his associates acknowledged receipt of the same. So far as the balance amount is concerned, monthly instalment was fixed at Rs. 8,000/- to be paid by the first week of the succeeding month till the entire amount is cleared up. It was agreed that Uttam and his associates would transfer ownership of the bus in favour of the petitioner. In Clause 4 of the agreement it was stipulated that the petitioner was authorised to Pay any legitimate dues outstanding against the bus in Government records with the knowledge of Uttam and his associates, and such payments when made shall be adjusted from the balance sale consideration payable by the petitioner. In case there was default in making the payment of instalment, Uttam and his associates were entitled to take possession of the bus from the petitioner and the amount already paid was to be forfeited. Petitioner was liable to pay taxes; claims etc. in respect of the vehicle after 21-7-1993. Prior to that date it shall be responsibility of Uttam and his associates. -Petitioner took delivery of the bus along with the connected documents. The bus was plied for some time by the petitioner with assistance of his father guardian. Monthly instalments were being regularly paid and the last instalment was paid on 5-7-1994. It was noticed by the petitioner that a sum of Rs. 39,000/- was in arrears till 21-7-1993 for taxes, which was paid to the Regional Transport Officer on different dates after 21-7-1993. However, after payment of the arrear road tax, further liability to the extent of nearly Rs.80,000/-, i.e.,11,352/- towards arrear taxes and Rs. 68,526/-towards penalty, was outstanding. Strangely while the petitioner was in lawful possession of the bus, Uttam and his associates forcibly took away the same without informing the petitioner and his father. When the bus was stationed at a private bus stand at Sambalpur. When father of the petitioner came to know of such removal, he searched for the bus, but could not trace out the same. He, therefore, lodged a report at the Town Police Station, Sambalpur on 23-9-1994 and the vehicle was sized and a case under Section 379/34 of the Indian Penal Code, 1860 (in short,

'IPC' ) was instituted against Uttam and his associates. The case originally registered as Town P. S. case No. 329 dated 23-9-1994 was numbered as G. R. case No. 1138 of 1994 in the file of learned SDJM, Sambalpur. The bus was seized at Katapalli under Surla Police Station from the possession of Uttam and his associates. While investigation was going on, notice was issued under Section 160 of the Code directing Uttam and his associates to produce the R. C. Book, road permit, insurance document etc. Uttam filed an application before the learned SDJM styling it as one under Section 457 of the Code for release of the vehicle, and some was registered as Criminal Misc. Case No. 148 of 1994. Similar application was filed by the petitioner for release of the bus in his favour. A report was called for from the Inspector-in-charge, Town Police Station, Sambalpur relating - to seizure of the bus in question. It was reported by the Inspector-in-charge that Uttam and his associates took away the bus in question forcibly from the bus stand without knowledge of the petitioner, it was also reported that the petitioner was in physical possession of the bus for about 13 months. The learned SDJM considered both the applications and the materials placed relating to seizure of the vehicle and directed release of the vehicle in favour of Uttam and his associates on execution of a bond of Rs. 1 lakh with a direction to produce the same as and when directed. The said order is under challenge.

3. According to learned counsel for petitioner the course adopted by the learned Magistrate was uncalled for. The facts of the case are tell-tale and bona fides of the petitioner in repaying the amounts as per the agreement are apparent. Even if there was any violation as claimed by the opposite parties, possession of the vehicle should have been delivered to the petitioner during trial. Learned counsel for opp. party No. 2 on the other hand submitted that in the agreement there was clear stipulation for seizure in case of, default.

4. The core point of controversy seems to be whether there was any default in payment, and therefore, justified seizure. Uttam's stand is that though the vehicle was delivered to the petitioner who was admittedly in possession for about more than a year and paid Rs. 50,000/- initially, and had also made some payments thereafter, on account of default on the part of petitioner, he has taken over possession of the vehicle as per the agreement executed between the parties. The question whether Uttam and his associates were justified in seizing the vehicle is a matter for trial and while considering the question of release of the vehicle interest of all concerned is to be looked into. Though there is no bar on the vehicle being given in the possession of the accused, yet in the peculiar circumstances of the case, I feel that the custody should have been given to the petitioner. Though faint attempt was made to show that there being no report by the Police to the Court about the seizure. Section 457 of the Code has no application. The plea is clearly untenable. The said provision comes into operation whenever the seizure of property by any Police Officer is reported to a Magistrate under the provisions of the Code, and the property is not produced before a Criminal Court during enquiry or trial. It is more or less a residuary provision dealing with property not covered by Sections. 451 and 452. It is applicable when (i) the property has been seized by a Police Officer, (ii) such a seizure is reported to the Magistrate, and (iii) the property is not produced before a Criminal Court during an enquiry or trial.

5. Even if any report by the police regarding seizure had not been placed before the Magistrate, but the factum of seizure is brought to his notice by any party interested or even by one who applies for

delivery of such property. Section 457 of the Code has application. Similar view was taken by this Court in *M. S. Jaggi v. Subas Chandra Mohapatra*:44 (1977) CLT 139, and *Shri Krushna Chandra Mohanty v. State of Orissa* : 1938 (II) OLR 561 : (1988) 1 OCR 630. In law there is no bar to consider the claim of an accused to get back the property and, on such a claim being made, the Magistrate shall apply his mind to the relevant facts and circumstances and he would be within his rights to concede to the prayer of the accused on being satisfied that the accused was in lawful possession of the property when it was seized from him. There is a difference between Section 452 and Section 457 of the Code. In the former, the Court can feel almost sure as to who is the person to whom the property belongs on its own findings. But no such inference can be drawn when property is disposed of under Section 457. That is the reason why greater powers are given to Courts under Section 452 than under Section 457. The expression 'the person entitled to the possession thereof cannot be equated with actual possession. Nor they can be equated with the expression 'the person from whom the property is seized or taken'. It must be lawful possession. The test, therefore, is not the mere possession of property at the time of seizure but as to who is entitled to lawful possession. The person who claims to take possession of the property must satisfy the Court about his entitlement for which purpose he is required to establish that he was in lawful or rightful possession of the property in question. The expression 'entitled to possession' is the sine qua non for the delivery of property under Section 457. It was observed by this Court in *Mahammed Zariff and Anr. v. Sk. Zinaullah* : 64 (1987) CLT 547, that a mere possession is not decisive, and the possession should not be of a thief or a cheat, but of a person who has right to hold it. As observed by this Court in that case, what would be the effect of breach of commitment is to be adjudicated in trial. The person who claims to take possession of the property must satisfy the Court about his entitlement/for which purpose he shall have to establish that he was in lawful or rightful possession of the property in question. There is no bar even to consider the claim of an accused to get back the property. The Magistrate has to apply his mind to relevant facts and circumstances of each case. As to when a person could be said to be in lawful possession of the seized property is a question which has to be decided on the facts of each case about which no prescription can be made. A similar view was expressed by a Division Bench of this Court in *Santosh Kumar Dash v. The State of Orissa and Anr.* : (1992) 5 OCR 241.

6. Considering the fact that there is no dispute about agreement for sale, payment of Rs. 50,000/- initially and certain amounts thereafter, it would be, in the peculiar circumstances of the case, appropriate if the vehicle which was in possession of the petitioner before it was taken over is given to the petitioner.

7. In the result, the revision application is allowed and the impugned order is set aside. The vehicle in question be delivered petitioner on his furnishing security of Rs. 1,00,000/- (one lakh) and on filing an undertaking to produce the vehicle as and when required by the Court in relation to G.R case No. 1138 of 1994 referred to above. It shall not be construed as if I have expressed any opinion about merits on the conflicting claims