IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC NO.174 OF 2022

(An application under Section 482 Cr.P.C. read with Section 457 of Cr.PC.)

Aswini Kumar Das ... **Petitioner**

-versus-

State of Odisha ... **Opp. Party**

Advocates appeared in the case through hybrid mode:

For Petitioner : Mr. B.N. Mohapatra & S. Mohapatra

-versus-

For Opposite Party : Mr. P. Tripathy, Addl. Standing Counsel

CORAM:

JUSTICE SASHIKANTA MISHRA

J U D G M E N T
12.08.2022

Sashikanta Mishra, J. The present application filed under Section 482 of Cr.P.C. is the second journey of the petitioner to this Court seeking release of his vehicle seized in connection with a case instituted under Section 52 (a) of the Odisha Excise Act.

2. Bereft of unnecessary details, the facts of the case are that basing on a report lodged by the OIC of Bahalda Excise Station on 18.07.2021, a Mahindra Bolero Pick-up bearing registration No.OD-11-T-7743 was seized for allegedly transporting 60.480 ltrs. of IMFL. Accordingly, E.C. Case No.32 of 2021-22 was registered corresponding to 2(a)CC Case No. 187 of 2021 of the Court of learned S.D.J.M., Rairangpur. The petitioner, being the registered owner of the vehicle moved an application under Section 457 of Cr.P.C. before the learned S.D.J.M., Rairangpur with prayer to release the vehicle in his favour which was kept at Rairangpur Excise office premises. Learned S.D.J.M., Rairangpur rejected such prayer on the ground that the I.O. had already prayed to the Superintendent of Excise for initiation of confiscation proceeding against the seized vehicle and therefore, release of the vehicle was barred under Section 72 of the Odisha Excise Act. The petitioner challenged such order of the learned S.D.J.M., Rairangpur before this Court in CRLMC No.2119 of 2021. After hearing the parties and on

going through the materials on record, this Court, by order dated 08.12.2021 held that a request made to initiate confiscation proceeding is not the same thing as initiation of the confiscation proceeding and that the statutory scheme requires not only initiation of such proceeding, but also in dealing with it as per Section 71 of the Act. Accordingly, the impugned order was quashed and the matter was remitted to learned S.D.J.M., Rairangpur to pass order on the petition under Section 457 of Cr.P.C. afresh after recording satisfaction with regard to initiation or otherwise of the confiscation proceeding. After remand, the petitioner filed another application under Section 457 of Cr.P.C. *inter alia* stating that in the meantime, Final PR has been submitted and cognizance has been taken for which there is no necessity of detaining the vehicle any further. Learned S.D.J.M. called for necessary reports from the I.O. as well as the Authorized Officer and was satisfied that the confiscation proceeding had already been initiated and that the vehicle owner had been noticed to submit show cause and to appear in person for hearing. Thus, referring to the bar under Section 72 Cr.P.C, learned SDJM, Rairangpur, by order dated 03.01.2022 rejected the petition under Section 457 once again. The said order is impugned in the present application.

3. Heard Mr. B.N. Mohapatra, learned counsel for the petitioner and Mr. P. Tripathy, learned Additional Standing Counsel for the State.

4. It is forcefully contended by Mr. Mohapatra that the finding of learned SDJM that the confiscation proceeding is pending is factually erroneous. It is further argued that the vehicle has neither been produced before the Authorized Officer nor the petitioner has ever received notice to appear as claimed by the Authorized Officer. It is also contended that the proceeding as envisaged under Section 71 of the Odisha Excise Act has to be in terms of the said provision and merely by making some correspondence or issuing a notice, the statutory requirement cannot be said to have been fulfilled. It is further submitted by

Mr. Mohapatra that the petitioner had purchased the vehicle by availing private finance and the vehicle stands hypothecated to the financer. Because of non-plying of the vehicle, the petitioner is unable to pay the monthly installments of the loan, which has adversely directly affected his livelihood.

5. Mr. P. Tripathy, learned Additional Standing Counsel has argued that once the confiscation proceeding is initiated, the bar under Section 72 of the Odisha Excise Act automatically comes to play and therefore, the petitioner's prayer for release of the vehicle by invoking the provision under Section 457 of Cr.P.C. is not maintainable in the eye of law.

6. Before adverting to merits of the rival contentions it would be relevant to note at the outset that this Court, by orders dated 19.07.2022 and 02.08.2022 had directed the confiscation proceeding file to be produced for perusal. However, instead of producing the file, certain documents, which include inter-office correspondence between learned SDJM,

Rairangpur and the Superintendent of Excise, Mayurbhanj and between other functionaries have been produced. It is not explained as to why the proceeding file was not produced. On query, learned State Counsel fairly submits that he had communicated this Court's order to the Superintendent of Excise, but instead of producing the proceeding file only the documents have been produced. Be that as it may, this Court has perused the documents produced by the Superintendent of Excise to ascertain, if the confiscation proceeding is actually pending. After perusing the documents and the facts of the case, the following position emerges:-

(i)	*17.07.2021*	*The vehicle was seized by the OIC of Bahalda Excise Station.*
(ii)	*29.07.2021*	*The OIC of Bahalda Excise Station requested the Superintendent of Excise to initiate*

		confiscation proceeding in respect of the said vehicle.
(iii)	*27.09.2021*	*Learned SDJM, Rairangpur wrote to OIC of Bahalda Excise Station to intimate whether the seized vehicle has been produced before the concerned authority as per Section 71 (2) of the Act.*
(iv)	*28.09.2021*	*The Authorized Officer issued notice to the petitioner (owner of the vehicle) to appear in person on 05.10.2021 and to show cause as to why the vehicle shall not be confiscated to the State*
(v)	*27.12.2021*	*Learned SDJM wrote to the Superintendent of Excise to submit a report as to whether any confiscation proceeding has been initiated and if so to submit the proceeding*

reference number.

(vi)	*28.12.2021*	*The Superintendent of Excise wrote to learned SDJM informing that the vehicle owner was noticed to appear and submit show cause, but he did not do so for which the confiscation proceeding is pending.*
(vii)	*27.12.2021*	*Learned SDJM wrote to OIC, Bahalda Excise Station to submit a report on the affidavit filed by the owner regarding removal of two wheels of the vehicle.*
(viii)	*31.12.2021*	*The OIC, Bahalda Excise Station wrote to learned SDJM that the vehicle is now kept safely in the premises of Rairangpur Excise Station due to non-availability of parking space at Bahalda Excise*

Station and due to apprehension of theft of the vehicle, two wheels, i.e., front right side and left rear wheel have been removed and kept inside the office in his custody without any tampering.

7. From the above correspondence one thing is clear; there is absolutely nothing to show that the vehicle in question was produced before the Authorized Officer at any point of time and that the vehicle is still lying in the Rairangpur Excise Station premises. At this stage, it would be apt to refer to the provision under Section 71 of the Odisha Excise Act, which is extracted herein below in extenso:

> "***71. Seizure of property liable to confiscation*** *:– (1) (a) When there is reason to believe that any offence under this Act has been committed, the intoxicant, materials, stills, utensils, implements, apparatus, receptacles, package, coverings, animals, carts, vessels, rafts, vehicles, or any other conveyances or articles or materials used in committing any such offence may be seized by the Collector or any Officer of the Excise Police, Customs or Revenue Departments.*

(b) any intoxicant lawfully imported, transported, manufactured in possession or sold alongwith, or in addition to, any intoxicant which is liable to seizure under clause (a) and the receptacles, packages and coverings in which any such intoxicants as aforesaid, or any such materials, stills, utensil, implement or apparatus as aforesaid, is found and the other contents, if any, of such receptacles or packages, and the animals, carts, vessels, rafts, vehicles or other conveyances used in carrying the same, shall likewise be liable to seizure.

(2) Every officer seizing any property under this section shall, except where the offender agrees in writing to get the offence compounded under Section 75, produce the property seized before the Collector, or an officer, not below the rank of a Superintendent of Excise, authorized by the State Government in this behalf by notification (hereinafter referred to as 'Authorized Officer').

(3) Where the Collector or the Authorized Officer seized any property under Sub-section (1) or where the property seized is produced before him under Sub-section (2) and he is satisfied that an offence under this Act has been committed in respect thereof, he shall, without prejudice to any other punishment to which the offender is liable under this Act, order confiscation of the property so seized or produced together with all other materials, articles, vehicles or conveyances used in committing such offence, whether or not a prosecution is instituted for the commission of such an offence.

(4) No order confiscating .any property shall be made under Sub section (3) unless the person from whom the property is seized is given-

(a) a notice in writing informing him of the grounds on which it is proposed to confiscate such property;

(b) an opportunity of making a representation in writing within such reasonable time as may be specified in the notice; and

(c) a reasonable opportunity of being heard in the matter.

(5) Without prejudice to the provisions of Sub-section (4), no order of confiscation under Sub-section (3) of any articles, materials, vehicles or conveyances shall be made if the owner thereof proves to the satisfaction of the Collector or the Authorized Officer, as the, case may be, that it was used without his knowledge or connivance or the knowledge or connivance of his agent, if any, or the person in charge of such property, in committing the offence and that each of them had taken all reasonable and necessary precautions against such use.

(6) Any person aggrieved by an order passed under Sub-section (3) may, within thirty days from the date of such order, appeal to the Excise Comissioner, who shall after giving an opportunity to the parties to be heard, pass such order as he may think fit.

(7) The property seized under this Section shall be kept in the custody of the Collector, the Authorized Officer or the other officer seizing such property or with any third party, until the amount for compounding the offence or the sum equal to the prevailing market value of the seized property or both are paid or until it is confiscated as the case may be :

Provided that the seized property shall not be released during pendency of the confiscation proceedings even on the application of the owner of the property for such release.

(8) Whenever property seized is liable to confiscation under this section and the offender or the person entitled to possession is not known or cannot be found, the case shall be inquired into and determined by the Collector or the Authorized Officer, who may order confiscation :

Provided that no such order shall be made until the expiration of one month from the date of seizing of the property to be confiscated, or without hearing any person who may claim any right within the said period and the evidence if any, which he produces in support of his claim.

(9) If the property seized is liable to speedy and natural decay, or if the Collector or the Authorized Officer, as the case may be, is of the opinion that sale would be for the benefit of its owner, such officer may, at any time, direct it to be sold and the provisions of this section shall, as nearly may be practicable, apply to the net proceeds of the sale.

(10) Subject to the rules as may be made by the State Government under Section 90, the Collector or the Authorized Officer, while making an order of confiscation, may also order that such of the properties to which the order of confiscation relates, which in his opinion to be recorded in writing cannot be preserved or not fit for human consumption, may be destroyed.

(11) Where the Collector or the Authorized Officer after passing an order confiscation under Sub-section (3) is the opinion that, it is expedient in the public interest so to do, he may order the confiscated property or any part thereof to be sold by public auction or dispose of departmentally.

(12) The Collector or the Authorized Officer shall submit a full report of all particulars of confiscation to the Excise Commissioner within twenty-four hours of such confiscation.

(13) The Collector or the Authorized Officer shall, for the purposes of this Act, have the same powers as are vested in the Civil Court under the Code of Civil Procedure, 5 of 1908, while making inquiries under this section in respect of the following matters namely :–

(a) receiving evidence on affidavit;

(b) summoning and enforcing the attendance of any person and examining him on oath; and

(c) compelling the production of documents."

8. Sub-section-2 of Section 71 mandates that the seized property (vehicle) shall, except where the offender agrees in writing to get the offence compounded under Section 75, produce the property seized before the Authorized Officer. In the case of ***Kalpana Sahoo and another vs. State of Orissa,*** reported in 2019 (III) ILR-CUT 160, this Court held that if an authority fails to discharge his duty assigned to him under the statute and such failure is not attributable to the party, who on account of such failure is deprived of exercising his own right of defence, the statutory bar cannot be made operative to the prejudice of such party in condonation of the unexpected latches or negligence on the part of the public officer. Since in that case there was nothing on record to show that the seizing officer had produced the vehicle before the Authorized Officer in compliance of Sub-Section 2 of Section 71 of the Act, it was held

that the Authorized Officer cannot be said to have been seized with the matter of confiscation and consequently the bar under Section 72 cannot be said to have come into operation.

9. As already stated, no material has been placed before this Court to show that the vehicle in question was produced before the Authorized Officer.

10. As it further appears, on the request of the seizing officer, the Superintendent of Excise purportedly initiated a confiscation proceeding bearing Excise Confiscation Case No.42 of 2022. Surprisingly, no order sheet has been submitted either before learned SDJM or before this Court to show the day to day steps taken and orders passed in the said confiscation proceeding. A notice is said to have been issued vide No.1608/EX dated 28.09.2021 fixing the case to 05.10.2021, but there is nothing to show whether such notice was actually served upon the petitioner owner. Assuming that the notice was served, then there is no reason as to why the proceeding has

been kept pending since 05.10.2021 as the Authorized Officer could have proceeded *ex parte*. What has transpired thereafter is not forthcoming at all. Faced with such situation, the question that naturally arises for consideration is, whether any such proceeding is pending as claimed and if so, can it be treated as a proceeding within the meaning of Section 71 of the Odisha Excise Act. The expression 'confiscation proceeding' has not been used as such in Section 71, but has been so used in the heading of Section 72, which is quoted herein below:-

> *"**72**. **Bar of other proceedings during pendency of confiscation proceedings** :– Notwithstanding anything contained in the Code of Criminal Procedure 2 of 1974, when the Collector or the Authorized Officer or the Appellate Authority is seized with the matter of confiscation of any seized property under Section 71, no Court shall entertain any application in respect of the same property and the jurisdiction of the Collector or the Authorized Officer or the Appellant Authority with regard to the disposal of the same shall be exclusive."*

11. What is the 'proceeding' referred in the title of Section 72? Can mere exchange of communication

from one authority to other and even issuance of notice fixing a date be held to be a proceeding in the eye of law?

12. The word 'proceeding' has not been defined anywhere in the Act. Hence, it would be proper to refer to other authorities for such purpose. Black's Law Dictionary Seventh Edition defines 'Proceeding' as follows:-

> ***'Proceeding' is 'the regular and orderly progression of a lawsuit including all acts and events between the time of commencement and the entry of judgment. Further the 'proceeding' is a word much used to express the business done in courts. A proceeding in court is an act done by the authority or direction of the court, express or implied. It is more comprehensive than the word 'action', but it may include in its general sense all the steps taken or measures adopted in the prosecution or defence of an action, including the pleadings and judgment. As applied to actions, the term 'proceeding' may include-(1) the institution of the action; (2) the appearance of the defen-dant; (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, write of ne exeat; (4) the pleadings; (5) the taking of testimony before trial; (6)***

all motions made in the action; (7) the trial; (8) the judgment; (9) the execution; (10) proceedings supplementary to execution, in code practice; (11) the taking of the appeal or writ of error; (12) the remittitur, or sending back of the record to the lower court from the appellate or reviewing court; (13) the enforcement of the judgment, or a new trial, as may be directed by the court of last resort." Edwin E.Bryant, The Law of pleading Under the Codes of Civil Procedure 3-4 (2d ed. 1899)."

13. True, the Authorized Officer is not a Court in the strict sense of the term, but is a quasi-judicial authority having all the trappings of a Court. Sub-Section 13 of Section 71 provides that the Authorized Officer shall have the same powers as are vested in the Civil Court under the CPC in respect of certain matters. Therefore, a proceeding in which no order sheet is maintained to show its day-to-day progression, action taken, order passed etc. can it be said to be a proceeding in the eye of law? The answer can only be in the negative. In the instance case, the bunch of correspondence produced before this Court only reveals exchange of certain information between

different authorities, which are nothing, but purely administrative acts, and cannot, per se be proof of a quasi-judicial proceeding as envisaged under Section 71 of the Act. Merely assigning a number to the so called proceeding and thereafter not acting as per the dictates of Section 71 cannot confer on the same any validity.

14. Apart from the aforementioned inadequacy and incongruity, it is also evident that the vehicle in question has been lying idle in the Rairangpur Excise Station premises, since more than a year. True, Section 71 does not prescribe any time limit for disposal of confiscation proceeding, but then the ratio of the decision of the Apex Court in the case of ***Sunderbhai Ambalal Desai vs. State of Gujarat,*** reported in (2003) 24 OCR (SC) 444 cannot at all be ignored, wherein it was observed as under:-

> *"17. In our view, whatever be the situation, it is of no use to keep such-seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and*

guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of applications for return of such vehicles."

It was therefore, incumbent on the concerned authorities to initiate and conclude the confiscation proceeding expeditiously and in any case, within a reasonable period of time, say three months at the earliest. Since the same has not been done, it amounts to acting contrary to the ratio of ***Sunderbhai (supra)***.

15. Thus, from a conspectus of the analysis made herein before, the following position emerges:-

(i) The vehicle in question has not been produced before the Authorized Officer.

(ii) The so called confiscation proceeding is no proceeding in the eye of law.

(iii) The vehicle is lying unused and exposed to the elements for more than a year.

(iv) The bar under Section 72 shall not apply to the case at hand for which the provision under Section 457 of Cr.PC. can be invoked for interim release of the vehicle.

16. For the above reason therefore, this Court is persuaded to hold that the impugned order passed by learned SDJM in rejecting the application for interim release of the vehicle cannot be sustained in the eye of law and hence, warrants interference.

17. In the result, the CRLMC is allowed. The impugned order dated 03.01.2022 passed by learned S.D.J.M., Rairangpur is hereby quashed. Learned SDJM is directed to pass necessary order, pending final disposal of 2(a)CC Case No.187 of 2021, for release of the vehicle in favour of the petitioner without any further delay on such terms and conditions as it may deem fit and proper to impose.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack.
The 12th August, 2022/ B.C. Tudu