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IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLREV No. 59 of 2021

Sailesh Muduli @ Sailesh Kumar *Petitioner*
Mr. R.N. Rout, Advocate

Versus

State of Orissa *Opposite Party*
Mr. S.S. Pradhan, A.G.A.

CORAM:
JUSTICE SAVITRI RATHO

Order No.

ORDER
29.04.2022

08. 1. This is an application under Section 401 read with Section 397 of Cr.P.C. challenging the order dated 18.11.2020 passed in C.M.C. No.80 of 2020 arising out of G.R. Case No.588 of 2019 pending before the learned S.D.J.M., Karanjia, rejecting the application of the petitioner filed under Section 457 of the Code of Criminal Procedure refusing to release the vehicle registered in his name which had been seized in G.R. Case No.588 of 2019 registered for commission of offence punishable under Section 272 of the IPC and Section 52(a) of Odisha Excise Act.
2. I have heard Mr. R.N. Rout, learned counsel for the petitioner and Mr. Sibani Shankar Pradhan, learned Addl. Govt. Advocate for the State through hybrid mode.

3. The petitioner is the registered owner of Indigo CS Car LX TCIC bearing registration No. OR-02-BF-2992 , which had been seized on 19.12.2019 by the I.O. in connection with Karanjia P.S. Case No.198 of 2019 registered for commission of offences punishable under Section 52 (a) of the Orissa Excise Act 2008 and Section 272 of the I.P.C against one Sailendra Muduli .

4. The prosecution allegations in brief are that on receipt of information that one Sailendra Muduli was procuring ID liquor and adulterating it at his house in ward No 10 , Karanjia and thereafter delivering it to various street sellers and at the relevant time was coming in Indigo CS Car LX TCIC bearing registration No. OR-02-BF-2992 with such liquor , on 19.12.2019 the vehicle was detained and was found to be driven by Sailendra Muduli loaded with about 100 litres of liquor kept in a big black tube concealed under a bag without any supporting documents . samples were drawn and the vehicle and liquor were seized and case registered .

5. Mr. R.N. Rout, learned counsel for the petitioner submits that, the petitioner had filed an application under Section 457 of Cr.P.C. for release of the vehicle No. OR-02-BF-2992 and this application was erroneously rejected vide order dated 18.01.2020 in CMC 6 of 2020 on the ground that confiscation proceeding has already started against the seized vehicle as per the report of the I.O. The petitioner

had thereafter filed CMC - 65 of 2020 , but it was dismissed as the petitioner had not filed anything to disbelieve the earlier report of the I.O. The petitioner thereafter filed another application under Section 457 of Cr.P.C. (CMC No.80 of 2020) with the report of the P.I.O cum Superintendent of Excise , Mayurbhanj which indicated that the confiscation proceeding was under process . On 18.11.2020 , this application was erroneously rejected .The learned counsel for the petitioner submitted that the impugned order is liable to be set aside and the vehicle released in favour of the petitioner as confiscation proceedings had not been initiated against the petitioner when the impugned order had been passed . His further submission was that since the date of seizure the vehicle is lying under the open sky exposed to the sun and rain for which its value is deteriorating every day and it would not be in the interest of the State even if the vehicle was ultimately directed to be confiscated .His final submission is that he is the registered owner of the vehicle and is ready to abide with any condition which may be imposed by the Court for granting interim release of the vehicle.

6. Mr. S.S. Pradhan, learned Addl. Govt. Advocate objects to the said prayer submitting that since the confiscation proceeding has in the meanwhile been initiated against the petitioner and notice has been issued to him , the petitioner can wait for outcome of the said

proceeding and his application under section -457 Cr.P.C cannot be entertained . Referring to section 71 of the Orissa Excise Act , he submits that there is bar for interim release of the vehicle during pendency of the confiscation proceedings and as the petitioner is the accused in the case, the vehicle should not be released his custody. He relies on the decision of this Court rendered in ***Ghasana Mohapatra v. State of Odisha*** reported in ***(2019) 73 OCR 663: (2019) 1 OLR 275*** , in support of his submissions.

7. Section 71 , Section 72 and Section 75 of the Orissa Excise Act are relevant for deciding this case. The provisions are extracted below :

Section – 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 along with, 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 Commissioner, 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 can not 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 of 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.*

Section 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.*

Section 75. Compounding of offences and releasing property liable to confiscation :- *(1) The Collector or any Excise Officer specially empowered by the State Government in this behalf, not below the rank of Superintendent of Excise may, subject to any restrictions as may be prescribed, accept from any person whose*

exclusive privilege, licence, permit or pass is liable to be cancelled or suspended under clause (a), (b) or (c) of Sub-section (1) of Section 47 or who is reasonably suspected of having committed an offence punishable under any section of this Act other than Sections 55,58,59 and 67, payment of a sum of money as may be prescribed in lieu of such cancellation or suspension or by way of composition for such offence, as the case may be, and in any case in which any property has been seized being liable to confiscation under Section 71, may release the property on payment of equal sum of the prevailing market value thereof as estimated by the Collector or such Excise Officer : Provided that where such person intended to evade excise revenue, the sum to be paid by such person in lieu of cancellation or suspension or by way of composition for such offence as aforesaid shall in no case be less than five times of such revenue intended to be evaded : Provided further that where the property so seized is a liquor manufactured in contravention of this Act, such liquor shall not be released but shall be disposed of in such manner as may be prescribed. (2) When the payments referred to in Sub-Section (1) have been duly made, the person, if in custody, shall be discharged, and the property seized if any, shall be released and no further proceedings shall be taken against such person or property.

8. A perusal of the proviso to Section 71 (7) reveals that there is a bar for release of the seized property during pendency of the confiscation proceedings and perusal of Section – 72 reveals that once the Collector or Authorised officer is seized with the matter of confiscation , their jurisdiction will be exclusive with regard to disposal of the property and

no court shall entertain any application in respect of the same property .
Under Section- 75 , the Collector or the Authorised Officer has the power to release such property which is liable for confiscation vehicle subject to payment “*payment of equal sum of the prevailing market value thereof as estimated by the Collector or such Excise Officer*”.

9. The Supreme Court in the case of ***Sunderbhai Ambala Desai*** (supra) has laid down the parameters for considering an application for interim custody expeditiously so that the owner of the article would not suffer because of it lying unused or by its misappropriation and court or the police would not be required to keep the vehicle in safe custody. It has observed as under:-

“7. In our view, the powers under Section 451 Cr.P.C. should be exercised expeditiously and judiciously. It would serve various purposes, namely:-

- 1. Owner of the article would not suffer because of its remaining unused or by its misappropriation;*
- 2. Court or the police would not be required to keep the vehicle in safe custody;*
- 3. If the proper panchanama before handing over possession of article is prepared, that can be used in evidence instead of its production before the Court during the trial. If necessary, evidence could also be recorded describing the nature of the property in detail; and*

4. This jurisdiction of the Court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles.”

This Court in several decisions has held that if this Court that unless the vehicle has been produced before the Collector or Authorised Officer and the confiscation proceeding has been initiated , the bar under Section 72 of the Orissa Excise Act, 2008 shall not apply . It has also been held that if the owner is an accused , the vehicle cannot be released in his favour .

This Court in the case of **Ghasana Mohapatra** (supra) after setting aside the order rejecting the application for interim release of the petitioner has remanded the matter to the learned SDJM inter alia holding as follows:

“...8. However, perusal of the order reveals that the learned S.D.J.M., Boudh has rejected the petition only on the ground that Section 72 of the Orissa Excise Act bars the criminal court from entertaining the petition. It was not ascertained by him whether actually the vehicle has been produced before the learned Collector or the Authorised Officer and a confiscation proceeding has been started. The law is very well settled that whenever valuable property like vehicle is seized then it should be produced before the officer, so authorised in this case. Collector or Authorised Officer duly notified, should be produced within a reasonable time and confiscation proceeding should be

started. Since right to property under Article 300-A of the Constitution of India is a legal right, though it is not a fundamental right, it is incumbent on the part of the Government Functionary to see that the confiscation proceeding is taken up as early as possible, especially, when there is a protection given to the innocent owner of the vehicle etc.

*9. In a case involving provision of Narcotic Drugs and Psychotropic Substances Act, 1985, a Bench of this Court having taking into consideration various judgments of this Court, in the case of **Kishore Kumar Choudhury v. State of Orissa, (2017) 66 OCR 1124**, has allowed interim release of vehicle seized. So, in that view of the matter, the CRLMC is allowed in part. The order dated 29.03.2018 passed by the learned S.D.J.M., Boudh rejecting the application is hereby set aside and the matter is remanded back to the lower Court for fresh hearing. The learned S.D.J.m Boudh shall first call for a report from the Investigation Agency whether the vehicle has been produced before the learned Collector Boudh or the designated Authorised Officer within a reasonable time and whether a confiscation proceeding has been initiated. If within a month, vehicle is not produced before the Collector or Authorised Officer and the confiscation proceeding is not completed within a reasonable period of three months from appearance of the owner of the vehicle after receiving notice as envisaged under Sub=section (4) and Section – 71 of the Orissa excise Act, then inspite of proviso to Sub – Section (7), the Criminal Courts shall have jurisdiction to entertain the application under Section 451 and 457 of the*

Cr.P.C and pass appropriate orders . But it is confined to cases where the owner of the vehicle is not an accused. ”....

But recently a Division bench of this Court in the case of ***Ashis Ranjan Mohanty vs State of Odisha and others*** reported in **(2022) 85 OCR 705 : 2022 SCC OnLine Ori 510** , a PIL filed by a practicing Advocate concerned about the ever-growing stock of seized vehicles and other properties in the various police stations in the State of Odisha, after the decision of this Court in ***Ghasana Mohapatra*** (*supra*) was brought to its notice has held as follows :

*“12. The Court's attention has been drawn to a judgment dated 4th January, 2019 passed by the learned Single Judge of this Court in ***Ghasana Mohapatra v. State of Odisha, (2019) 1 OLR 275***, wherein it was held that in excise cases when the accused is the owner of the seized vehicle, the same cannot be released in his favour.*

13. It is clarified that hereafter as far as release of the vehicle is concerned, the directions issued in this order would prevail.

*14. In light of the decisions of the Supreme Court referred to hereinbefore, and the directions issued in **Manjit Singh v. State** (*supra*), the following specific directions are issued:*

Articles/properties in general

15. (i) Within one week of their seizure, properties seized by the police during investigation or trial are to be produced before the Court concerned;

(ii) *the concerned Court shall expeditiously, and not later than two weeks thereafter, pass an order for its custody in terms of the directions of the Supreme Court in **Basavva Kom Dyamangouda Patil v. State of Mysore (1977) 4 SCC 358; Sunderbhai Ambalal Desai v. State of Gujarat (2002) 10 SCC 283, and General Insurance Council v. State of A.P. (2010) 6 SCC 768.***

(iii) *In any event, no property will be retained in the malkhana of the Court or in the police station longer than a period absolutely necessary for the purposes of the case; if it has to be longer than three months, the Court concerned will record the reasons in an order but on no account will the period of retention exceed six months.*

(iv) *In the event the property seized is perishable in nature, or subject to natural decay, or if cannot for any reason be retained, the Court concerned may, after recording such evidence as it thinks necessary, order the said property to be disposed of by way of sale, as the Court considers proper, and the proceeds thereof be kept in a separate account in a nationalized bank subject to orders of the concerned court.*

Vehicles

16. As regards the vehicles, the following directions are issued:

(I) Vehicles involved in an offence may be released either to the rightful owner or any person authorised by the rightful owner after

(a) preparing a detailed panchnama;

(b) taking digital photographs and a video clip of not more than 1 minute duration of the vehicle from all angles;

(c) encrypting both the digital photograph and the video clip with a hashtag with date and time stamp with the hash value being noted in the order passed by the concerned court;

(d) preserving the encrypted digital photograph and video clip on a pen drive to be kept in a secure cover in the file and preferably also uploading it simultaneously on a server kept either in the concerned Court premises or in the server of the jurisdictional District Court

e) preparing a valuation report of the vehicle by an approved valuer;

(f) obtaining a security bond.

(II) the concerned court will record the statements of the complainant, the accused as well as the person to whom the custody of the vehicle is handed over affirming that the above steps have taken place in their presence.

(III) Subject to compliance with (I) and (II) above, no party shall insist on the production of the vehicle at any subsequent stage of the case. The panchnama, the encrypted digital photograph and video clip along with the valuation report should suffice for the purposes of evidence.

(IV) The Courts should invariably pass orders for return of vehicles and/or accord permission for sale thereof and if in a rare instance such request is refused, then reasons thereof to be recorded in writing should be the general norm rather than the exception.

(V) In the event of the vehicle in question being insured, the concerned Court shall issue notice to the owner and the insurance company prior to disposal of the vehicle. If there is no response or the owner declines to take the vehicle or informs that he has claimed insurance/released his right in the vehicle to the insurance company and the insurance company fails to take possession of the vehicle, the vehicle may be ordered to be sold in public auction.

(VI) If a vehicle is not claimed by the accused, owner, or the insurance company or by a third person, it may be ordered to be sold by public auction.

General directions

17. The following general directions shall also be adhered to:

(i) The concerned Court may impose any other appropriate conditions which it may consider necessary in the facts and circumstances of each case.

(ii) The Court shall hear all the concerned parties including the accused, complainant, Public Prosecutor and/or any third party concerned before passing the order. The Court shall also take into consideration the objections, if any, of the accused.

(iii) If the Court is of the view that evidence in relation to the condition of the vehicle is necessary to be recorded even before its disposal in terms of the directions in paras 9 and 10 above, then such evidence be recorded, in the presence of the parties, forthwith and prior to disposal of the property.

(iv) Special features of the property in question could be noted in the Court's order itself in the presence of parties or their counsel. Besides, a mahazar clearly describing the features and dimensions of the movable properties which are the subject matter of trial could be drawn up.

(v) If a person to whom the interim custody of the property/vehicle is granted is ultimately found not entitled to it, and is unable to return it, its value shall be recovered by enforcing the bonds and the security taken from such person or recovering the monetary value from him as arrears of land revenue.

(vi) As regards the directions issued in 16 (I)(c) and (d) is concerned, the Registry of the High Court will communicate to each of the District Judges the detailed Standard Operating Procedure (SoP) that is required to be followed. The directions issued in 16(I) (c) and (d) will become operational as soon as the said SoP is received by the concerned District Judge.

(vii) Similar directions concerning the encryption of digital photographs and video clips will become effective on receipt of the SOP by District Judge from the registry of the High Court.

10. In the present case , in order to resolve the doubt regarding the date of initiation of confiscation proceedings , the learned State Counsel had been granted time to obtain instructions. Accordingly an affidavit dated 03.12.2021 had been filed on

04.12.2021, by the S.I of Karanjia Police Station enclosing letter No.1028 dated 09.07.2021 of the Superintendent of Excise, Mayurbhanj addressed to the IIC, Karanjia Police Station (Annexure-A/1) stating that Confiscation Proceeding had been registered at Sl. 38 of Confiscation register and was under process, without stating the date when the proceeding had been initiated. Copy of letter No 1877 dated 01.11.2021 of the Superintendent of Excise addressed to the IIC Karanjia Police Station (Annexure B/1) had been enclosed with the said affidavit and it was stated therein that Confiscation Proceeding had been initiated and recorded at serial No.39/2019-2020 of the Confiscation Register and the owner had been noticed to appear vide Notice No. 1029 dated 09.07.2021 and he had appeared on 27.07.2021 through counsel and had prayed for time and was repeatedly taking time in the case . The copy of the notice dated 17.11.2021 of the Court of the Authorised Officer cum Superintendent of Excise, Mayurbhanj addressed to the petitioner had also been enclosed as Annexure C/ 1 asking him to appear on 26.11.2021.

As the affidavit dated 03.12.2021 did not disclose the date of initiation of the confiscation proceedings, on 09.12.2021 officer concerned had been asked to produce the relevant page of the confiscation register or an attested photocopy thereof.

On 22.12.2021, Sri Satya Narayan Kallo, Sub-Inspector of Police Karanjia Police Station, Dist.- Mayurbhanj had appeared in court and produced the copy of letter no.3322 dated 20.11.2021 of the Superintendent of Excise , Mayurbhanj enclosing the attested copy of page 4 the Confiscation Register of Superintendent of Excise, Mayurbhanj which contained the details of Karanjia P.S. Case No.198 of 2019 at Sl. No.39 .

11. Perusal of the document –relevant page of the confiscation register reveals that the relevant entry is at Serial No 39 and dated of request has been mentioned to be 09.01.2020 and dated of request initiate has been mentioned as 09.07.2021 and the valuation of the vehicle has been indicated to be Rs 10,9000/-. From these entries, it is clear that confiscation proceeding had not been initiated when the first application under Section 457 of Cr.P.C. and was rejected on 18.01.2020 . By the time , the last application under Section 457 of Cr.P.C. was rejected on 18.11.2020, although the case had been entered in the confiscation register but confiscation proceeding had not been initiated and such proceeding was initiated only on 09.07.2021 which is about eight months after the impugned order dated 18.11.2020 was passed.

12. When the case was listed on 25.04.2022 under the heading, the learned Additional Govt. Advocate submitted that the petitioner had

appeared in the Confiscation Proceeding and was taking adjournment and the proceeding was still pending .

13. In view of the aforesaid discussion , although there is a bar in Section 71 of the Orissa Excise Act for interim release of the vehicle once the confiscation proceeding has been initiated , and ordinarily such an application filed by the owner who is an accused deserves to be rejected , but in the peculiar facts of the present case where the applications of the petitioner under section -457 of the Cr.P.C for interim release of the vehicle had been rejected on three occasions by the learned SDJM on the ground that confiscation proceedings were under process when in reality , it had not been initiated and as its has been urged that the vehicle in question is lying in the open being exposed to sun and rain since 19.12.2019 for which its value is going down every day and keeping in mind the decisions of the Supreme Court in the case of **Ambala Sundarbhai**(supra) and this Court in **Ashis Ranjan** (supra) , in order ensure that the vehicle is not reduced to a worthless piece of junk when it is ultimately confiscated / released at the end of the confiscation proceedings , I am inclined to set aside the order dated 18.11.2020 passed by the learned S.D.J.M., Karanjia in CMC No.80 of 2020 arising out G.R. Case No.588 of 2019 and direct for interim release of the vehicle i.e. Indigo CS Car LX TCIC bearing registration No. OR-02-BF-2992 in favour of the

petitioner subject to the following conditions and any other condition that may be imposed by the learned S.D.J.M., Karanjia keeping in mind the decision of this Court in *Ashis Ranjan* (supra), during pendency of the confiscation proceedings :-

- (i) the petitioner shall produce the original registration certificates, insurance papers before the concerned police station which shall be verified properly and true attested copies thereof shall be retained by the investigating officer/I.I.C. of the police station;
- (ii) the petitioner shall furnish cash surety as per the valuation of the vehicle which should be done within a period of two weeks from receipt of certified copy of this order .
- (iii) the petitioner shall keep the vehicle insured at all times till the conclusion of the trial and produce the insurance certificates before the Trial Court as and when required;
- (iv) the petitioner shall not change the colour of any part of the vehicle or engine or tamper with the engine and chassis numbers of the vehicles;
- (v) the petitioner shall furnish two photographs of the vehicle before taking delivery of the same;
- (vi) the petitioner shall not transfer the ownership of the vehicle during pendency of the Confiscation case and criminal case ;

(vii) the petitioner shall produce the vehicle before the trial Court or the Authorised Officer as and when called upon to do so ;

(viii) the petitioner shall not allow the vehicle to be used in the commission of any offence;

(ix) the order of interim release shall be subject to the final order to be passed in the confiscation proceeding.

14. The CRLREV is accordingly allowed.

15. Urgent certified copy of this order be granted on proper application.

Sukanta

