IN THE HIGH COURT OF ORISSA AT CUTTACK

AFR

CRLMC No.2416 of 2021

Santosh Kumar Das .... Petitioner
Mr. Amit Prasad Bose, Advocate

-Versus-

State of Orissa .... Opposite Party
Mr. S.S. Mohapatra, Additional Standing Counsel

CRLMC No.2417 of 2021

Somanath Jena .... Petitioner
Mr. Amit Prasad Bose, Advocate

-Versus-

State of Orissa .... Opposite Party
Mr. S.S. Mohapatra, Additional Standing Counsel

CORAM:
JUSTICE R.K. PATTANAIK

DATE OF JUDGMENT:18.10.2022

1. Both the petitions have been clubbed together and disposed of by the following order since a common question of law is involved.

2. CRLMC No.2416 of 2021: The petitioner by invoking the inherent jurisdiction of this Court has challenged the correctness, legality and judicial propriety of the impugned order dated 11th

November, 2021 passed in Criminal Revision No.26 of 2021 by the learned Sessions Judge, Jajpur for having confirmed order dated 20th September, 2021 passed in CRLMC No.137 of 2021 arising out of C.T. Case No.1120 of 2021 by the learned S.D.J.M., Jajpur, who declined to release the vehicle in his custody as it was prayed for by filing an application under Section 457 Cr.P.C.

3. **CRLMC No.2417 of 2021**: Similarly, the petitioner herein challenged the revisional order passed by the learned Sessions Judge, Jajpur in Criminal Revision No.25 of 2021 which affirmed the order dated 28th September, 2021 passed in CRLMC No.138 of 2021 corresponding to C.T. Case No.1120 of 2021 by the learned S.D.J.M., Jajpur with regard to release of the vehicle which was denied.

4. The petitioners contend that the learned courts below fell into serious error by refusing to release the vehicles seized in connection with Ramachandrapur P.S. Case No.126 of 2021 registered under Section 294 read with 34 IPC and Section 52(e) of Odisha Excise Act, 2008 (herein after referred to as 'the Excise Act') in their temporary custody without appreciating the fact that they are lying idle inside the P.S. premises exposed to sun and rain and other external hazards.

5. The vehicles are two-wheelers bearing registration Nos. OD 04 Q 2741 and OD 04 N 0959 in respect of which release and custody in favour of the petitioners was sought for by applying in terms of Section 457 Cr.P.C. which was rejected by the orders of the learned S.D.J.M., Jajpur and further confirmed by the revisional court.

6. As per the prosecution case, on the basis of a written report lodged, the above seizures were made with the allegation that on 4th June, 2021 at about 7 P.M. one of the petitioners, namely, Somanath Jena and his brother, namely, Biswanath Jena were allegedly found selling liquor, for which, the locals registered protest and sometime thereafter, the village men assembled near the spot, later to which, both of them left the place leaving the scooters which were then brought to the PS and there, from its dickey, liquor bottles were recovered and seized and finally on completion of investigation, chargesheet was filed, whereupon, the learned S.D.J.M., Jajpur took cognizance of the alleged offences. In the meanwhile, the petitioners applied for release of the seized vehicles but as mentioned above, it was refused by the courts below.

7. Heard Mr. Bose, learned counsel for the petitioners and Mr. Mohapatra, learned ASC appearing for the State.

8. It is contended by Mr. Bose that the seized vehicles are kept inside the P.S. and exposed to severe climatic conditions and therefore, the learned courts below should have released it in favour of the petitioners. Mr. Bose submits that the vehicles have not been produced before the Authorized Officer, who is competent to confiscate the same, the fact which is revealed from the reports of the IIC of the P.S. submitted before the court of learned S.D.J.M., Jajpur and also supported by an affidavit dated 7th January, 2022 filed by him in the court. According to Mr. Bose, it is a statutory mandate that the seized articles shall have to be produced before the confiscating authority in view of Section 71(3) of the Excise Act, however, in the case at hand, both the vehicles were never produced. It is further submitted that despite reports dated 17th August, 2021 and 9th September, 2021 of the

IIC, Bali Ramchandrapur P.S. received by the learned S.D.J.M., Jajpur to the effect that the vehicles had not been produced either before the Collator or Authorized Officer, its release should have been directed but instead, the same was rejected and even stood confirmed by the Sessions Court which is not legally tenable. Mr. Bose contends that the vehicles having not been produced before the Authorized Officer, it could not be said that the authority was seized of the matter so as to apply the bar under Section 72 of the Excise Act referring to which the learned S.D.J.M., Jajpur declined to exercise jurisdiction under Section 457 Cr.P.C. which was lastly confirmed by the revisional court.

9. Mr. Mohapatra, learned ASC on the other hand submits that the confiscation proceeding in respect of the vehicles have been initiated which is revealed from the record and reports of the concerned IIC of the P.S. and therefore, rightly learned S.D.J.M., Jajpur did not exercise the jurisdiction in view of the bar under Section 72 of the Excise Act. It is further submitted by Mr. Mohapatra that even though the reports dated 17th August, 2021 and 9th September, 2021 suggest that the seized vehicles had not been produced before the concerned Authorized Officer but from Annexure-6, it is made to understand that such production before him was ensured on 18th August, 2021 in connection with the proceedings in Excise Case Nos.17 & 18 of 2021, wherein, it was directed that they are to be kept in P.S. Malkhana until its disposal and also requested the RTO, Jajpur to furnish upset price of the vehicles which was stated to have been received on 26th October, 2021 and therefore, it cannot be said that there was no confiscation proceedings pending by the time the learned S.D.J.M., Jajpur was dealing with the applications under Section 457 Cr.P.C. Mr. Mohapatra lastly submits that when the

confiscation proceedings were commenced in terms of Section 71(1) of the Excise Act, the learned S.D.J.M., Jajpur did not have any jurisdiction in view of the bar under Section 72 thereof, hence, the impugned orders are perfectly justified and in accordance with law.

10. As per sub-section of Section 71 of the Excise Act, when there is a reason to believe that an offence has been committed under the said Act in respect of vehicles and other materials, it may be seized by the Collector or the officer of the Excise, Police or Customs or Revenue and the Authorized Officer or for that matter, the Collector shall proceed to pass orders to confiscate it after providing an opportunity of hearing to the person from whom the property is seized. A vehicle or such property seized in connection with an excise offence is liable to confiscation under Section 71 of the Act. After the Collector or the Authorized Officer seized the property or the seizing officer, who made the seizure, produced it before the Collector or the Authorized Officer, as the case may be, in such situation, the confiscating authority shall proceed to order confiscation of the same. An elaborate procedure is prescribed in Section 71 of the Excise Act vis-à-vis confiscation of the properties seized by the seizing authority or the Collector or Authorized Officer. In view of the restriction in Section 72 of the Excise Act, which has an overriding effect, the properties seized and are produced before the Collector or Authorized Officer are said to be seized of the matter and once it happens, no court shall have the jurisdiction to entertain any application in respect thereof. The non-obstante clause as appearing in Section 72 of the Excise Act clearly ousts the jurisdiction of any court to deal with the property in respect of which either the Collector or the Authorized Officer is seized of for the purpose of its confiscation under Section 71 of the Excise Act. The above are the provisions in precise which are related to the confiscation as well as the exclusion of jurisdiction of other courts dealing with the matters in respect of the property liable to confiscation.

11. Mr. Bose submits that the seized vehicles have not been produced before the Authorized Officer which is revealed from the reports of the IIC as well as the affidavit dated 7th January, 2022 filed before this Court. It is alleged that the Authorized Officer passed the orders dated 18th August, 2021 by falsely claiming that the vehicles had been produced before him on the said date, whereas, it was not till 7th January, 2022 which is evident from the affidavit of the IIC of P.S. It is submitted that if the vehicles are produced, the Authorized Officer could be said to have been in session of the matter but in absence, the bar under Section 72 of the Excise Act would not be applicable. It is contended by Mr. Bose that the learned Sessions Court though acknowledged the fact regarding non-production of the vehicles as on the date of filing of the applications under Section 457 Cr.P.C. but then held that much before the rejection orders were passed, its production was accomplished and therefore, bar under Section 72 of the Excise Act was applicable.

12. Mr. Bose relied upon the decision of this Court in **Kalpana Sahoo and another Vrs. State of Odisha** reported in 2019 (II) OLR 568 and contended that if the seized vehicles were not produced before the Authorized Officer, the statutory bar under Section 72 of the Excise Act shall not apply. In the decision (supra), there was no confiscation proceeding nor the seized vehicle was ever produced before the Collector or Authorized Officer and therefore, it was held that the release could have been directed by the Magistrate since bar under Section 72 of the Excise Act was inapplicable. The relevant extract of the decision in **Kalpana Sahoo** (supra) reads as under:

> "5. In the present cases, there is no denial from the side of the learned Additional Standing counsel appearing for the Government that no confiscation proceeding has been started in respect of the seized vehicles in question. There is also nothing on record to show that the concerned seizing officers have produced the respective vehicles before the concerned Collectors or the Authorized Officers in compliance with sub-section (2) of Section 71 of the Act. Hence, the Collectors or the Authorized Officers concerned cannot be said to have been seized with the matter of confiscation. Consequently, the bar under Section 72 of the Act cannot be said to have come into operation."

13. In the aforesaid case, since the confiscation proceeding had not been initiated nor the seized vehicle had been produced before the Authorized Officer in compliance of Section 71(3) of the Excise Act, this Court held that the bar under Section 72 of the said Act would not apply. In the present case, immediately after the seizure of the vehicles, the I.O. concerned intimated the Authorized Officer with a request for its confiscation and the same was entertained and action was initiated vide Excise Case Nos.17 & 18 of 2021 corresponding to Bali Ramachandrapur P.S. Case No.126 dated 5th June, 2021. In fact, from the order dated 18th August, 2021 of the Authorized Officer, it has been made to appear that the seized vehicles were produced before him on the said date. No doubt, the fact that the vehicles had not been produced so reported by the IIC of the P.S. and again confirmed by him in the shape of an affidavit runs counter to the claim of the Authorized Officer by his order dated 18th August, 2021.

14. As per Section 71(3), the property so seized after being produced before the Collector or the Authorized Officer by the seizing authority, order of confiscation is passed but by following a procedure as specified in sub-section (4) thereof. If the seizing officer requisitioned the authority competent to confiscate the seized property, consequent upon which, a proceeding is initiated by the Collector or the Authorized Officer as per Section 71 of the Excise Act, it would be said that the confiscating authority is seized of the matter for the purpose of Section 72. The decision in **Kalpana Sahoo** (supra) is not an authority to say that only upon production of the seized vehicle, it has to be held that the Collector or the Authorized Officer can be said to be in session of the matter in order to apply the bar under Section 72 of the Excise Act so as to exclude the jurisdiction of other courts. In another decision of this Court in **Sunil Sethy Vrs. State of Odisha** (CRLMC No.1279 of 2019) disposed of on 1st December, 2020, it has been held that if there is nothing on record to show about the confiscation proceeding started or the seized properties produced before the Collector or Authorized Officer, bar under Section 72 of the Excise Act shall not apply. Likewise, in **Priyabrata Sahu Vrs. State of Odisha** (CRLMC No.1451 of 2020) decided on 7th January, 2021, it has been held that where the owner was not implicated as an accused; or property seized has not been produced before the Collector or the Authorized Officer; or where the confiscation proceeding has not been initiated, the Magistrate is empowered under Section 457 Cr.P.C. to deal with its disposal. Hence, the sum and substance of the ratio in both **Sunil Sethy** and **Priyabrata Sahu** (supra) is that unless the confiscation proceeding is initiated or the vehicle is produced before the authority concerned, bar under Section 72 of the Excise Act shall not come into force. In the said decisions, it was held that since no confiscation proceedings were pending, the Magistrate was required to exercise jurisdiction under Section 457 Cr.P.C. If Section 71(1) and sub-section (3) thereof are read conjointly and properly understood, it would mean that a property seized in relation to an excise case shall be liable to confiscation and if produced before the Collector or the Authorized Officer, order of confiscation shall be passed after due procedure followed with an opportunity of hearing provided to the person from whom it was seized. It is a step or process by which a seized property is produced before the authority, who thereafter, proceeds to confiscate it after hearing the other side. In any case, it has been claimed by the Authorized Officer that the vehicles were produced before him on 18th August, 2021 though contradicted by the reports of the IIC of the concerned P.S. The Authorized Officer is also appeared to have called for set off price vis-à-vis the vehicles and even received it from the RTO. Considering the reports and affidavit of the IIC of the PS, the Court is inclined to either believe or disbelieve the respective claims or to hold an enquiry for that purpose. Since it is made to show that the confiscation proceeding has been initiated in respect of the vehicles, it has to be held that the courts below did not err in applying the bar contained in Section 72 of the Excise Act.

15. The Apex Court In **State of West Bengal Vrs. Sujit Kumar Rana** reported in AIR 2004 SC 1851 while dealing with a matter under the provisions of Indian Forest Act, 1927 and a similar subject related to confiscation has held and observed that jurisdiction under Section 482 Cr.P.C. cannot be invoked for interim release of property once the confiscation proceeding is initiated since the criminal court's power ceases thereafter, however, it may only be exercised in case of judicial review. In the facts and circumstances narrated herein above, the Court thus reaches at a logical conclusion that the impugned orders call for no interference.

16. Accordingly, it is ordered.

17. In the result, the petitions stand dismissed. As a consequence, in order to ensure release of the seized vehicles, for the reasons discussed herein above, the petitioners shall have to approach the Authorized Officer-cum-SE, Jajpur in connection with Excise Case Nos.17 & 18 of 2021 and participate therein by taking such defence as available to them in terms of Section 71(5) of the Excise Act.

(R.K. Pattanaik)
Judge

U.K. Sahoo