

HIGH COURT OF ORISSA, CUTTACK

GOVERNMENT APPEAL NO.51 OF 1990

From the judgment dated 27.01.1990 passed by Smt. R.R. Das,
J.M.F.C., Cuttack in 2(c) C.C. No.171 of 1982 (Trial No.54 of 1988).

Assistant Sub-Inspector,
R.P.F., Cuttack
Appellant

.....

Versus

Sambhunath Shaw

.....

Respondent

For appellant : Standing Counsel

For respondent : M/s D.P.Sarangi,
P.C.Patnaik &
B.C.Das

PRESENT :

THE HONOURABLE SHRI JUSTICE PRADIP MOHANTY

Date of hearing and judgment : 09.08.2006

PRADIP MOHANTY, J. This appeal is directed against the judgment and order dated 27.01.1990 passed by the Judicial Magistrate First Class, Cuttack in 2(c) C.C. No.171 of 1982 acquitting the accused-respondent of the charge under section 3(a) of the Railway Property (Unlawful Possession) Act.

2. Prosecution case, in short, is that on 21.06.1982 at about 6.30 P.M., the O.C.R.P.F. got information that the accused-

respondent was in unlawful possession of railway properties, which were kept in his shop near Bombay Hotel. The O.C.R.P.F. along with other staff proceeded to the spot, searched the shop of the accused-respondent after observing all formalities and recovered some railway properties. The properties were seized and seizure list prepared in presence of witnesses. After completion of enquiry, prosecution report was filed against the accused-respondent.

3. The plea of the accused-respondent was complete denial of the allegation and his false implication in the case.

4. In order to prove its case, prosecution examined as many as seven witnesses, proved seven exhibits and produced 13 material objects. The defence did not choose to examine any witness. The learned Magistrate, after considering the evidence and other materials available on record, acquitted the accused-respondent with the finding that the statement of prosecution witnesses is confusing and on such evidence, no clear decision can be taken.

5. Mr. Misra, learned Standing Counsel, submitted that the evidence of P.Ws.2 to 7 is consistent with the prosecution case and basing upon the same, an order of conviction can be passed. He further submitted that some railway properties were also recovered from the possession of another person, who was not arrayed as an accused. But, on that ground the learned Magistrate should not have acquitted the present respondent.

6. Perusal of the evidence shows that the evidence of P.W.1 was expunged by order dated 21.07.1986 as he did not turn up for cross-examination after charge. P.Ws.2 to 7 are members of R.P.F. staff and railway officials. The prosecution has examined no independent witness though the spot from which recovery of railway properties were made is a busy place. Besides, there are major contradictions in the statement of prosecution witnesses. P.W.7, the

A.S.I. attached to the R.P.F. post, in his cross-examination has stated that he did not remember how the seized properties were carried to the R.P.F. post and who carried the same. P.W.6, another A.S.I., in his cross-examination has stated that all the M.Os. were kept in sealed cover in the Malakhana. But, in Court he found that no sealed covers were there. P.W.4, the O.I.C. of the R.P.F. Post, who went to the spot and was all along present during the search and seizure, has stated in his cross-examination that he did not know whether some railway properties were also recovered from one Kalandi Behera on the same day. Prosecution has placed much reliance on the statement of the said Kalandi Behera recorded under section 164 Cr.P.C., which has been marked as Ext.3. But he has not been arrayed as an accused, nor has he been cited as a witness. No explanation has been offered by the prosecution for non-examination of independent witnesses.

7. For the aforesaid reasons, this Court feels that the prosecution has not come up with a clean hand. Therefore, this Court does not think it proper to interfere with the impugned order.

8 In the result, this Government Appeal being devoid of any merit is dismissed.

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PRADIP MOHANTY, J.

Orissa High Court, Cuttack
 August 9, 2006 / *Nayak*