

**HIGH COURT OF ORISSA,
CUTTACK**

CRIMINAL APPEAL NO. 128 OF 1989

From the judgment dated 21.01.1987 passed by Sri A.B. Das, 2nd Addl. Sessions Judge, Berhampur in Criminal Appeal No.21/1986 (1/86 GDC) reversing the judgment dated 09.12.1985 passed by Sri M.S.Dhal, J.M.S.C., Berhampur in 3(a) C.C. No.140 of 1982 (T.R. No.14 of 1985)

Executive Officer,
Berhampur Municipality

.....

Appellant

Versus

Konchada Visweswar Rao
Subudhi

.....

Respondent

For appellant : M/s A. K. Choudhury,
K.K.Das & C.R. Behera

For respondent : M/s G. S. Bohidar,
G.N.Mohapatra, and
T.N. Senapati

PRESENT :

THE HONOURABLE SHRI JUSTICE PRADIP MOHANTY

Date of hearing and judgment : 26.07.2006

PRADIP MOHANTY, J. This appeal is directed against the judgment and order dated 21.01.1987 passed by the learned 2nd Addl. Sessions Judge, Berhampur in Criminal Appeal No.21/1986 (1/86 GDC) setting aside the judgment of conviction and sentence dated 09.12.1985 passed by the

J.M.S.C., Berhampur in 3(a) C.C. No.140 of 1982 (T.R. No. 14 of 1985) and acquitting the respondent of the offence under Section 385-A of the Orissa Municipal Act.

2. The case of the prosecution is that the respondent had obtained permission for construction of a building for the purpose of running a hotel, whereas he had constructed a building not in accordance with the approved plan but in a different manner violating the plan approved. Further, instead of the purpose for which sanction was granted for the construction of a building, namely, for starting of a hotel, the respondent had started a private market in the newly constructed building giving shop rooms to various dealers for selling food grains, ghee, etc. Therefore, the appellant had filed a prosecution report against the accused-respondent.

3. The plea of the accused-respondent was complete denial of the allegation.

4. In order to prove its case, the prosecution examined as many as two witnesses and relied on six exhibits. The accused-respondent examined none in support of his plea.

5. Learned J.M.S.C., Berhampur, who tried the case, after considering the evidence and materials available on record, found that the accused-respondent had opened a private market without permission of the Municipality. Therefore, by his judgment dated 09.12.1985, he held the accused-respondent guilty for commission of offence under Section 385(A) of the Orissa Municipal Act, convicted him thereunder and sentenced him to pay a fine of Rs.250/-, in default to undergo S.I. for two months. Against that judgment, the accused-respondent preferred an appeal vide Criminal Appeal No.21 of 1986 and the learned 2nd Addl. Sessions Judge, Berhampur, who heard the appeal, acquitted the accused-respondent of the above offence with the finding that there is no iota of evidence to show that

the accused-respondent had used the house in question as a private market.

6. Mr. Choudhury, learned counsel appearing for the appellant submitted that the lower appellate court erred in law in holding that the prosecution has failed to prove that the accused-respondent was running a private market in the disputed house. It also committed a mistake in holding that it was not proved by sufficient corroboration that the rooms were let out to the dealers for the market purpose. He further submitted that the accused-respondent has contravened the provisions of the Orissa Municipal Act violating the sanction/approval for raising a particular structure and also running a private market without obtaining the requisite licence therefor.

7. Perused the LCR and the statement of the witnesses cited on behalf of the prosecution and relevant provisions of the Orissa Municipal Act. Section 297 of the Orissa Municipal Act provides that in order to open a new private market, it is necessary to obtain a licence from the Municipality. Section 3(17) thereof defines market as "Market includes any place where persons are daily or periodically assembled for the sale of meat, butter, ghee, fish, fruit, vegetable or livestock". The prosecution report does not indicate what articles were being sold at the relevant time in the disputed private market. P.W.1, B. Jagannatham, is silent about this fact and there is nothing in his evidence to show that the accused-respondent, his agent or servant effected any transaction of sale in the said market. P.W.2 in his evidence has stated that different shop owners were selling food grains, ghee, etc. But he has not stated the names of the different shopkeepers and the specific articles sold by them. Any independent witness does not corroborate P.W.1's evidence. There is no other evidence to show sale of any particular kind of commodities specified in the definition of 'market' in the disputed market. Mere let out of number of rooms to different persons is not sufficient to establish that the accused-respondent

had opened a private market. There is also no material or evidence on record to show that any transaction of sale was effected by the accused-respondent or his agent or servant. In view of the above, this Court is of the considered opinion that the prosecution has failed to establish that the accused-respondent was running a private market in the disputed building. Therefore, there is no illegality, infirmity or manifest error in the impugned judgment so as to warrant interference by this Court

8. In the result, this appeal being devoid of any merit is dismissed and the impugned judgment and order passed by the learned Second Additional Sessions Judge, Berhampur is hereby confirmed.

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PRADIP MOHANTY, J.

Orissa High Court, Cuttack
 July 26, 2006 / *Samal*