HIGH COURT OF ORISSA: CUTTACK.

CRLMC NO.985 OF 2020

(In the matter of an application under Section 482, Criminal Procedure Code, 1973)

RATNAKAR BEHERA ..... **Petitioner**

Versus

STATE OF ODISHA ..... **Opp. Party**

For Petitioner: M/s Anjan Kumar Biswal & R.K.Muduli, Advocates

For Opposite Party: Mr. Anupam Rath Additional Standing Counsel

PRESENT

THE HONOURABLE SHRI JUSTICE S.K. PANIGRAHI

Date of Hearing – 13.07.2020 **Date of judgment –05.08.2020**

1. The Present Application is filed U/s. 482 Cr.P.C to challenge the order dated 05.02.2020 passed by the learned District & Sessions Judge, Mayurbhanj, Baripada in Criminal Revision No. 11 of 2019 whereby the order dated 4.11.2019 in Criminal Misc. Case No. 132 of 2019 passed by the learned S.D.J.M., Baripada was affirmed. Learned S.D.J.M. had rejected the petition filed under Section 457 of the Cr.P.C. for delivery of the vehicle seized in connection with the offences under sections 52(a) and 62(1) of the Odisha Excise Act.

2. The petitioner is admittedly the registered owner of the TATA ACE Pick Up bearing Regd. No. OD-11M-9933, and the aforesaid vehicle has been referred to as the 'vehicle'. The vehicle was seized by the Police as it was found to be illegally transporting 51.8 litres of IMFL near Tanki Sahi of Baripada town. In the P.R. report No. 49/2019-20 no allegation has been made against the petitioner. The Inspector of Excise has submitted his report vide D.B. No. 680 dated 28.01.2020 regarding initiation of confiscation proceeding of seized vehicle. The petitioner filed his statement on 04.10.2019 stating his ignorance of the illegal transportation of IMFL in his vehicle.

3. Mr. Anjan Kumar Biswal, learned counsel for the petitioner strenuously contended that the Petitioner has no role in the alleged commission of offence. He has cited the P.R. No. 49/2019-20 wherein no allegation has been made against the petitioner and he has not been arrayed as an accused. He has submitted that the petitioner had no knowledge about the illegal transportation of IMFL in his vehicle and that a person named Sanjeeb Behera had taken his vehicle on rent for transportation of cement and rod from Baripada. He has also contended that the Superintendent of Excise or the Authorised Officer is the competent authority to initiate the confiscation proceeding in respect of the seized vehicle but in the present case the former Inspector of Excise has unjustifiably initiated the proceedings. Further the vehicle should not be left exposed to sun, rain, and other external

hazards which could irreversibly damage and decay the vehicle. Hence, the petition may be allowed, and direction may be issued for the release of the vehicle.

4. *Per contra*, Mr.Anupam Rath, learned Additional Standing Counsel vehemently opposed the release of the vehicle of the petitioner contending that the vehicle in question was used by the accused in committing offence under section 52(a) and 62(1) of the Odisha Excise Act, and therefore, is liable to be confiscated under section 72 of the Odisha Excise Act. Further, since confiscation proceedings have already been initiated, the order of rejection passed by learned lower court is correct. The Inspector of Excise through the report vide D.B. No.680 dated 28.01.2020 has submitted that the confiscation proceeding against the vehicle has been initiated by former Inspector of Excise Sri Ajay Kumar Behera, Sadar Range, Baripada. Thus, in view of the bar provided under proviso of Section 71(b)(7) of the Odisha Excise Act, the seized vehicle cannot be released during pendency of the confiscation proceedings even on the application of the owner of the seized vehicle for such release. Further, Section 72 of the Odisha Excise Act bars the jurisdiction of any other court from entertaining application in respect of the property.

5. Heard Sri Anjan Kumar Biswal, learned Counsel appearing for the petitioner, Sri Anupam Rath, learned Additional Standing Counsel for

opposite party and perused the case records. It is a prima facie view that the vehicle in question has been seized on the ground of illegal transportation of IMFL and the confiscation proceeding of the vehicle has been initiated by the former Inspector of Excise. However, the former Inspector of Excise cannot be considered as the competent authority under Section 71 of the Odisha Excise Act and therefore, the contentions against the petitioner, are not sufficient to restrict the delivery of his vehicle under the Act.

6. The provision of Section 71 of the Odisha Excise Act provides that the Investigating Officer must produce the seized vehicle before the Superintendent of Excise, Collector (section 71(2)) or the Authorised Officer for the initiation of the confiscation proceedings. The Inspector of Excise is not empowered to initiate a confiscation proceeding as provided in the Act. This ratio has been iterated by this Court in paragraphs-4 and 5 of the judgment in the case of ***Kalpana Sahoo and Anr. v. State of Orissa***:[1]

> *"**4.** In the cases at hand, the seizures have been made by the Excise Officer or Police Officer, as the case may be, and there is nothing on record to show that the seized vehicle have been produced before the Collector or the Authorized Officer as required under sub-section (1)(a) of Section 71 of the Act. In view of sub-section (3) of Section 71 of the Act, the Collector or the Authorized Officer, as*

[1] 2019 (III)ILR-CUT160.

the case may be, assumes power to proceed with confiscation of the seized property either where the seizure has been affected by him or where the seized properties are produced before him. That apart, a conjoint reading of sub-section (1)(a) and sub-section (3) of Section 71 of the Act would make it clear that although seizure can be made when there is reason to believe commission of any offence under the Act, the same reason ipso facto will not suffice an order of confiscation of the seized property. The Collector or the Authorized Officer, as the case may be, before passing an order for confiscation has to satisfy himself that an offence under the Act has been committed in respect of the property in question. The bar as contemplated under Section 72 of the Act will come into play only when the Collector or the Authorized Officer or the Appellate Authority is seized with the matter of confiscation of any property seized under Section 71 of the Act, but not merely because any seizure has taken place. Further, as per sub-section (5) of Section 71 of the Act, the owner of the vehicle or conveyance has a right to participate in the confiscation proceeding to prove his ignorance or bona fides to defend his property. If a particular officer or authority fails to discharge his duty as assigned to him under the statute, and if such failure on his part 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 unexplained laches or negligence on the part of the public officer.

> ***5.*** *In the present cases, there is no denial from the side of the learned Addl. 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. The vehicles in question cannot be left in a state of damage and decay being exposed to sun, rain, and other external hazards."*

7. In addition to this, several High Courts have held that mere initiation of confiscation proceeding cannot act as a bar for delivery of the vehicle to its owner when the owner of the registered vehicle has not been found guilty. Allahabad High Court in the cases of ***Kamal Jeet Singh v. State***[2],***Mohd. Hanif v. State of U.P.***[3] and ***Jai Prakash Sharma vs. State of U.P.***[4] have iterated the same. The ratio decidendi as provided in ***Jai Prakash Sharma vs. State of U.P.*** (*supra*) is as follows:

> *"**5.** The revisionist had no knowledge or information of the liquor alleged to have been recovered from the truck.*

[2]1986 UPCri 50.
[3] 1983 UPCr 239.
[4] 1992 AWC 1744.

> *He is not a party to the aforesaid two cases pending before the District Magistrate, Etawah nor has any notice been issued to him the revisionist Jai Prakash Sharma, therein. The mere pendency of the confiscation proceedings is no bar to the release of the truck. The matter is still under investigation. The truck lying at the police station will, if not released, yet damaged, ruined and rusted, not only this, but it will also ultimately become un-useable and un-serviceable for various obvious reasons."*

8. Further several jurisdictional High Courts have decided against keeping the vehicles in custody for a prolonged period. The general law relating to release of vehicles seized in connection with a crime pending investigation or trial by the Magistrate, in the most universal of its dimension has been laid down by the Hon'ble Supreme Court in ***Sunderbhai Ambalal Desai vs. State of Gujarat***[5]:

> *"**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.*
>
> ***18.** In case where the vehicle is not claimed by the accused, owner, or the insurance company or by third*

[5]2002 (10) SCC 283.

> *person, then such vehicle may be ordered to be auctioned by the Court. If the said vehicle is insured with the insurance company then the insurance company be informed by the Court to take possession of the vehicle which is not claimed by the owner or a third person. If the insurance company fails to take possession, the vehicles may be sold as per the direction of the Court. The Court would pass such order within a period of six months from the date of production of the said vehicle before the Court. In any case, before handing over possession of such vehicles, appropriate photographs of the said vehicle should be taken and detailed panchnama should be prepared."*

9. The issue where confiscation proceedings in relation to a vehicle are pending under Section 72 of the Excise Act on the basis of a crime registered under the said Act, the Magistrate has jurisdiction under Section 451 Cr.P.C. to release a seized vehicle pending investigation or trial notwithstanding the pendency of confiscation proceedings before the Collector was dealt with by Allahabad High Court in ***Nand vs. State of U.P.***[6] , where it was held:

> *"**7.** I think it is not proper to allow the truck to be damaged by remaining stationed at police station. Admittedly, the ownership of the truck is not disputed. The State of Uttar Pradesh does not claim its ownership. Therefore, I think it will be proper and in the larger interest of public as well as the revisionist that the*

[6]1997 (1) AWC 41.

> *revisionist gives a Bank guarantee of Rs. 2 lakhs before the C.J.M., Kanpur Dehat and files a bond that he shall be producing the truck as and when needed by the criminal courts or the District Magistrate, Kanpur Dehat, and he shall not make any changes nor any variation in the truck."*

10. The above-mentioned ratio has also been iterated by this Court in the case of ***Dilip Das vs. State of Odisha,***[7] wherein this Hon'ble Court has held that since no confiscation proceeding has yet been initiated in accordance with the law, the vehicle in question cannot be left in a state of damage being exposed to sun, rain and without proper maintenance.

11. Having considered the matter in the aforesaid perspective and guided by the precedents cited hereinabove, this Court sets aside the order dated 05.02.2020 passed by the learned District & Sessions Judge, Mayurbhanj, Baripada in Criminal Revision No.11 of 2019 and allows the prayer of the petitioner on the following conditions:

1. The petitioner is directed to make the vehicle available as and when required during investigation of the case and thereafter in the court concerned.
2. The petitioner is directed not to make any changes or any variation to the vehicle during the pendency of the trial in the court concerned.

[7] 2019 (III) ILR-CUT 386.

12. However, it is made clear that any of the observation made hereinabove with respect to the fact of the case, shall not come in the way or prejudicially affect the fair trial of the present case.

For the aforesaid reasons, the present application is allowed.

[S.K. PANIGRAHI, J.]

Orissa High Court, Cuttack.AKP
The 5th day of August, 2020.