

**AFR**

**ORISSA HIGH COURT, CUTTACK.**

**C.R.A No. 51 of 1997**

(An appeal under Section 378 of the Code of Criminal Procedure)

***Smt. Biseswari Biswal***

...

***Appellant***

Mr. J. Patnaik, Sr. Advocate  
Mr. H.M. Dhal,  
Mr. S.K. Patnaik,  
Mr. B.B. Ray.

**-versus-**

***Binodini Padhy & others***

...

***Respondents***

Mr. S.P. Choudhury  
& Mr. L. Samantray  
for Respondents No.1  
to 3.

CORAM :

**JUSTICE CHITTARANJAN DASH**

**DATE OF HEARING & JUDGMENT: 22.08.2023**

**Chittaranjan Dash, J.**

1. Heard learned counsel for the Parties.
2. Challenge in this Appeal is to the Judgment and order passed by the learned J.M.F.C., Koraput in 1CC Case No. 15 of 1985 wherein the learned court held the prosecution to have failed to establish the charge and acquitted the Respondent from the charges. Being aggrieved by the findings recorded in the impugned Judgment, the informant preferred the Appeal.

3. The main plank of the argument advanced by learned counsel for the Appellant against acquittal of the Respondents is that the court while assessing the evidence came to the conclusion that the Parties were in litigation since long with respect to the passage over which the boundary wall existed and there is no clear evidence adduced before the Court with regard to the mischief alleged vis-à-vis the respondent.

4. Having heard the argument advanced by the learned counsel for the Appellant, this court examined the case in great detail. Perusal of the impugned judgment reveals that the Respondent/Accused was facing charge in the offence U/s. 427 IPC.

5. The prosecution examined four witnesses in all before the learned trial court, whereas, the defense examined none. The only document proved from the side of the Complainant is the certified copy of the Criminal Misc. Case No. 75 of 1985 of the Court of Executive Magistrate, Koraput.

6. The evidence emerges that the youngest son of the Complainant namely Debdullar Biswal had witnessed the incident whereas he has not been examined in the case. No explanation has also been forwarded by the Complainant as to his non-examination. The entire complaint is based on the narration made by the Complainant who gathered the information with regard to the alleged mischief from P.W.1, who admittedly was not present at the time of occurrence.

7. The P.W.3 is the chance witness to the occurrence, who stated to have seen four boys within the age group of 16-17 years breaking the wall of the Complainant. In course of the cross-examination, it is elicited that

P.W.3 is not a resident of the locality where the alleged occurrence took place and he did not visit to the spot on earlier occasion. P.W.3 also deposed that he had never been in term with the Complainant and therefore, the sole evidence of the chance witness deposing four boys to have demolished the boundary wall cannot be attributed to the Respondents.

8. The testimony of P.W.4, who stated that on 21.03.1985, Binodini Padhy to have brought a crow bar and demolished the boundary wall bears no relevance in as much as the alleged occurrence is of 20<sup>th</sup> of March, 1985. In the entire gamut of prosecution evidence the last straw fail to the camels back when the Complainant failed to explain as to non-examination of the witnesses whom she appended in the list of witness in the Complaint Petition. It is for the above reason that the learned Trial Court held that there are series of litigations between the Complainant and Binodini Padhy-the Respondents relating to the plots where the boundary exists and in order to wreak her vengeance that the Complainant moved against the Respondents alleging she to have demolished the boundary wall. The Exhibit-A proved before the Trial Court that is the Order passed in Criminal Misc. Case No. 75 of 1985 of the Court of Executive Magistrate, Koraput unequivocally suggests that the land over which the boundary wall exists belong to the Respondents and the Complainant was prohibited from interfering with the right of passage enjoyed by the Respondents till a decree is passed by the Competent Civil Court.

9. The ingredients necessary to prove the charge U/s. 427 of IPC is whether the Respondents had intention to cause mischief and damage of

property worth more than rupees fifty. Evidence laid before the trial court nowhere establishes the Respondent to have caused the mischief.

10. The evidence is tell tale clear that the Appellant lodged the complaint presuming the respondent to have damaged the boundary wall of the Appellant whereas nothing could be brought in evidence vis-à-vis the Respondent showing him as the perpetrator of the mischief. Law is well settled that presumption, however, strong cannot take the place of proof. Consequently, while the factum as to damage of the boundary wall is established, nothing could be proved that the Respondents/Accused seen to have damaged the same. No other circumstances appearing in the evidence adduced through the witnesses to deduce the Respondents/Accused to have caused the mischief. In essence, the trial court rightly assessed the evidence and cannot be said to have misconstrued and/or failed to assess the testimony of the witnesses in the light of the charge. Therefore, there is absolutely no material to come to a different view than the one that the trial court has arrived at. Hence, this Court finds no reason to disturb the findings of the trial court. In that view of the matter, the Appeal fails and the same is dismissed being devoid of merit.

**(Chittaranjan Dash)**  
**Judge**

*B.K Sahoo/Jr. Steno*