

GAHC010243762017



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Pet./918/2017

BARNABAS MILTON QUEAH
S/O LT. PETER JOSEPH QUEAH, R/O 5-B, SUBANSIRI APARTMENT, GOVT.
PRESS ROAD, BAMUNIMAIDAN, P.O. BAMUNIMAIDAN, P.S. CHANDMARI
GUWAHATI - 781021 DIST. KAMRUP METRO, ASSAM

VERSUS

THE STATE OF ASSAM

Advocate for the Petitioner : MR.S M T CHISTIE

Advocate for the Respondent :

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

JUDGEMENT AND ORDER

Date : 01.02.2023

Heard Mr. R.P. Sarma, learned Senior counsel assisted by Mr. D. Doley, learned counsel for the petitioner. Also heard Mr. M. Phukan, learned Public Prosecutor for the State/respondent.

2. The petitioner has filed an application under section 482 Cr.P.C.,

1973 praying to quash the impugned criminal proceeding for taking cognizance as well as framing of charge by the learned Special Judge, Assam in connection with Special case No. 01/2011 under Section 420/468/471/120(B) read with section 13(1)(d)(ii)/13(2) of Prevention of Corruption Act, 1988.

3. The brief facts of the case is that a reference was made by the Chief Minister's Special Vigilance Cell being SVC RE No. 34/2002 against the District Rural Development Agency (herein after referred to as "DRDA") officials of Cachar for their alleged irregularities, anomalies, embezzlement of fund in implementation of some scheme from 1998 to 2002. An enquiry was conducted and on the basis of said enquiry, an FIR was lodged on 27.09.2005 by the Additional Superintendent of Police, Chief Minister's Special Vigilance Cell, Assam, which was registered and numbered as C.M. Vigilance P.S. Case No. 03/2005 under Section 420/468/471/120(B) of IPC read with Section 13(1)(d)(ii)/13(2) of Prevention of Corruption Act, 1988(herein after referred to as "P.C. Act,1988"). As many as 19 (nineteen) officials including the present petitioner who was then working as the Project Director of DRDA, Cachar was arrayed in the proceeding.

4. The investigating officer after completion of investigation approached the competent authority i.e. Personnel (A) Department for grant of the necessary sanction under Section 19 of the P.C. Act, 1988 and the Personnel Department on receipt of such request for grant of prosecution sanction, issued a letter dated 25.06.2010 to the Deputy Secretary to the Government of Assam, Political (Vigilance Cell)

Department, Dispur stating that before grant of sanction for prosecution against any Government servant, it is necessary on the part of the appointing/disciplinary authority to go through the record to see if a prima facie case exists against the said Government servant and accordingly, the Government directed the Political (Vigilance Cell) Department, Government of Assam to furnish relevant documents. Accordingly, in respond to that required documents were forwarded to the Personnel(A) Department. The approval was accorded to submit charge-sheet against the officials of DRDA, Cachar including the present petitioner along with 24 (twenty four) persons before the learned Special Judge, Assam which was registered as Special Case No. 1/2011. The learned Special Judge, accordingly issued summons to the accused persons including the present petitioner and the petitioner had appeared before the learned Special Judge, Assam and on his appearance before the court below, bail was granted to him. After hearing both sides on the question of maintainability of the proceeding before the learned trial court, charge was framed against the present petitioner on 20.10.2017 under Section 120(B)/468/471/420 IPC read with Section 13(1)(d)(ii)/13(2) of P.C. Act, 1988.

5. Being highly aggrieved and dissatisfied with the order of framing of charge, the petitioner has preferred the present petition seeking quashment of the proceeding of the Special case as aforesaid.

6. Mr. R.P. Sharmah, learned Senior counsel for the petitioner has argued that the petitioner was a State Government employee at the

relevant point of time by holding the post of Project Director, Cachar, Silchar and in the meantime he has been retired from the service. It is submitted that there being no previous/prior sanction for his prosecution as mandatorily required under Section 19 P.C. Act and Section 197(1)(b) of Cr.P.C. by the competent authority, the instant criminal proceeding so far against the petitioner is concerned, is not maintainable and is liable to be set aside and quashed.

7. It is also the submission of learned Senior counsel for the petitioner that any case instituted without a prior sanction must fail because this being a manifest defect in the prosecution, the entire proceeding is rendered *void ab-initio*.

8. It is further submitted that the grant of sanction is not an idle formality or an acrimonious exercise by a solemn and sacrosanct act which affords protection to the Government Servant against the frivolous prosecution and must therefore be strictly complied with before any prosecution can be launched against the public servant. In absence of any valid and legal sanction, the cognizance taken thereof and the criminal proceeding initiated on such invalid sanction, order is not tenable in the eye of law.

9. The learned Senior counsel has also submitted that on perusal of the purported Letter No. CMS(G)/46/2007/204 dated 21.06.2008 (annexure 7) issued by the Principal Secretary to Chief Minister, it is clearly revealed that the said letter was issued as an approval for filing of the charge-sheet against all the officials irrespective of their designation and the learned trial court on the basis of the said letter

took cognizance of the offence which is not tenable in the eye of law.

10. The learned Senior counsel also pointed out that Section 19 of P.C. Act, clearly mandates that no court shall take cognizance of an offence punishable under Section 13 of the P.C. Act alleged to have been committed by a public servant except with the previous sanction from the competent authority but in the instant case, it clearly reflects that there was no sanction at all and therefore, the cognizance taken and the charges framed thereon are wholly illegal and erroneous in the eye of law.

11. In support of his submission, learned Senior counsel for the petitioner has submitted the following case laws-

(i) (1960) 3 SCR 388 (R.P. Kapur vs State of Punjab).

(ii) AIR 1979 SC 677 (Mohd. Iqbal Ahmed vs State of A.P.).

(iii) (1992) Supp(1) SCC 335 (State of Haryana and Ors. vs Bhajan Lal and Ors.).

(iv) (2005) vol.8 SCC 130 (State of Goa vs Babu Thomas).

(v) GHC WP(C)/3616/2010 (Prabitra Kr. Das vs The State of Assam and Ors.).

(vi) 2012 CRI.L.J. 1265 (Noor Mohammed Panali vs Deputy Superintendent of Police and Anr.).

(vii) (2014) vol. 14 SCC 295 (Central Bureau of Investigation vs Ashok Kumar Aggarwal).

(viii) (2020) vol.7 SCC 695 (D. Devaraja vs Owais Sabeer Hussain).

(ix) (2022) vol.7 SCC 124 (Vijay Kumar Ghai and Ors. vs State of West Bengal and Ors.).

12. Per contra, Mr. M. Phukan, learned Public Prosecutor for the State/respondent by referring a judgment vide *(2014) vol. 11 SCC 388 State of Bihar and Ors. vs Rajmangal Ram*, has submitted that the object behind the requirement of grant of sanction to prosecute a public servant need not detain the court save and except to reiterate that the provisions in this regard either under [the Code](#) of Criminal Procedure or the Prevention of Corruption Act, 1988 are designed as a check on frivolous, mischievous and unscrupulous attempts to prosecute a honest public servant for acts arising out of due discharge of duty and also to enable him to efficiently perform the wide range of duties cast on him by virtue of his office. The test, therefore, always is—whether the act complained of has a reasonable connection with the discharge of official duties by the government or the public servant. If such connection exists and the discharge or exercise of the governmental function is, prima facie, founded on the bonafide judgment of the public servant, the requirement of sanction will be insisted upon so as to act as a filter to keep at bay any motivated, ill-founded and frivolous prosecution against the public servant.

13. By pointing out the observation of Hon'ble Supreme Court, learned Public Prosecutor has referred the case of Rajmangal Ram(supra) which is reproduced as follows-

“However, realising that the dividing line between an act in the discharge of official duty and an act that is not, may, at times, get blurred thereby enabling certain unjustified claims to be raised also on behalf of the public servant so as to derive undue advantage of the requirement of sanction, specific provisions have been incorporated in Section 19(3) of the P.C. Act, 1988 as well as in Section 465 of the Code of Criminal Procedure which, inter alia, make it clear that any error, omission or irregularity in the grant of sanction will not affect any finding, sentence or order passed by a competent court unless in the opinion of the court a failure of justice has been occasioned.”

14. The learned Public Prosecutor for the State has also referred the case of *Parkash Singh Badal vs State of Punjab* reported in (2007) vol. 1 SCC 1, wherein it was held that mere omission, error or irregularity in sanction is not to be considered fatal unless it has resulted in failure of justice.

15. The learned Public Prosecutor for the State has also pointed out that in *Parkash Singh Badal* case(supra), it was held that Section 19(1) of the P.C. Act is a matter of procedure and does not go to the root of jurisdiction as failure of justice can be established not at the stage of framing of charge but only after the trial has commenced and the evidence is led.

16. The learned Public Prosecutor for the State has also relied on the following case laws in support of his submissions-

(i) (1998) vol.1 SCC 226 (*Vineet Narain and Ors. vs Union o*

India and Anr.).

(ii) (2004) vol. 7 SCC 763 (State of Police Inspector vs T. Venkatesh Murthy).

(ii) (2009) vol. 15 SCC 533 (State of Madhya Pradesh vs Virender Kumar Tripathy).

17. I have considered the submissions of the learned counsel for the parties and I have also gone through the relevant case record as well as the documents available in the record and the order of the learned trial court.

18. Before to proceed further, I would like to refer some cases of similar nature.

19. In the case of Ahmad Ashfaque Karim Vs. The State of Bihar, (Criminal Writ No.1126/2013), wherein charge-sheet was submitted in the Court of the Special Judge, CBI, for offences punishable under Section(s) 384, 353, 406, 420, 467, 468, 469, 471 IPC read with 13(1) (d) and 13(2) of the Prevention of Corruption Act, 1988 coupled with some other provisions of law. Then the Special Judge passed the following order:

“Perused the record, case diary, evidence available on record, charge-sheet and all the documents. On perusal, it is evident that sufficient evidence is available for taking cognizance against the accused persons, named, in the charge-sheet. Hence, cognizance was taken under Sections

406/420/467/468/469/471/120B/353 of IPC, Section 7 read with Section 13(1)(d) and 13(2) P.C. Act. The sanction order under the PC Act has not been received as yet. It will be considered after receiving the sanction order.”

20. The Division Bench set aside the order and remanded the case on the ground that that Sanction was essential and fact of the matter was that the Special Judge had not taken cognizance of the offences punishable under the P.C. Act, 1988, even though he had said so, because he had awaited the order of Sanction being conscious that he could not take cognizance without receipt of the same. Further, being a Special Judge empowered to try special cases he could not even take cognizance unless he had firstly taken cognizance of the offences punishable under the provisions of the Special Act. The Division Bench while arriving at this conclusion examined the scheme of the Act and Section(s) 3 and 4 P.C. Act and the effect of omission of Sanction and allowed the Writ Application.

21. In my understanding the issue of Sanction is no longer *res integra* as is evident from the latest decision of the Apex Court which has considered the earlier decisions on the point of sanction in State of Bihar and others Vs. Rajmangal Ram (supra). The issue before the Hon'ble Supreme Court was sustainability of the orders passed by the High Court of Patna, the effect of which was that the criminal proceedings instituted against the respondents under various provisions of the Indian Penal Code as well as the P.C. Act, 1988, had been interdicted on the ground of an invalid Sanction.

22. It proceeded to take note of the provisions of Section 19 P.C. Act and Section 465 Cr.P.C. and relying on earlier decisions concluded as follows:

“In a situation where under both the enactments any error, omission or irregularity in the sanction, which would also include the competence of the authority to grant sanction, does not vitiate the eventual conclusion in the trial including the conviction and sentence, unless of course a failure of justice has occurred, it is difficult to see how at the intermediary stage a criminal prosecution can be nullified or interdicted on account of any such error, omission or irregularity in the sanction order without arriving at the satisfaction that a failure of justice has also been occasioned. This is what was decided by this Court in State by Police Inspector V.T. Venkatesh Murthy wherein it has been inter alia observed that..... Merely because there is any omission, error or irregularity in the matter of according sanction, that does not affect the validity of the proceeding unless the court records the satisfaction that such error, omission or irregularity has resulted in failure of justice"

23. Here, it would be useful to have a look at Section 19(3) of P.C. Act, 1988, which is reproduced below-

(3)Notwithstanding anything contained in the Code of Criminal Procedure, 1973----

“(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a Court in appeal, confirmation or revision

on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby;"

24. On a plain reading of the Section it is clear that the legislature in no uncertain terms and unambiguously prohibits interference by a Superior Court, unless in its opinion, there was failure of justice. Hence whenever a Court enters into the terrain of examining the point of sanction, its opinion, based on judicial discretion, is of paramount importance. This is the pivot on which the bar rests. Hence, even though it may be open to challenge in the superior courts as sufficiently serious, but keeping the social objective in mind, the requirement is to give such a finding in every circumstance. At this point it would be essential to look to the development of this particular provision.

25. There were similar provisions as to the bar of cognizance without sanction in the Code of Criminal Procedure, 1898, vide Section 197 which remained in Section 197 in the Cr. P.C. of 1973, with periodical amendments, but the essence has remained the same. In the process of enacting Prevention of Corruption Act, 1988, the law to control corruption has undergone a major overhaul and now it has become more explicit and comprehensive. The most important change is introduction of Section 19(3) reproduced above.

26. It is to be pointed out that Cr.P.C. has a similar provision, relevant portion of which is reproduced below-

"465. Finding or sentence when reversible by reason of error, omission or irregularity-

- (1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.
- (2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

27. We thus find that one major difference between Sections 19(3) P.C. Act and 465 Cr. P.C. is that whereas even absence of sanction is not amenable to challenge for prosecuting a Public Servant under the P.C. Act, Section 465 Cr. P.C. does not condone the same, but the similarity in both the Sections is that the issue of Sanction cannot be attacked unless in the opinion of the Court failure of justice has occasioned.

28. Chapter XLV of the old Cr.P.C. Act, 1898, contained Sections 529 and

530 which expressly spelt out two stark situations when the proceedings being irregular vitiated the trial and those which not. There was yet another and third category mentioned in Sections 531 (proceedings held in wrong territorial jurisdiction), Section 535 (when no charge was framed), Section 537 (errors, omissions, irregularities in charge). The present Cr.P.C. 1973 also dedicates Chapter XXXV to such situations. Sections 460 and 461 are similar to Sections 529 and 530 of the Old Act and Section 462 is similar to Section 531 and 464 combines Sections 535 and 537. Section 465 becomes more comprehensive when it includes almost the entire procedure of a trial and also introduces the effect of lapses in Sanction.

29. Importantly, this third category of cases is open to challenge only when there has been a "failure of justice" which words are common to all the above Sections as also Section 19(3) P.C. Act. Thus, the word, failure of justice would mean non adherence to the established principle of law or/and procedure, which would result in prejudice to a party. As also, prejudice has to be so grave that it will necessarily be implied and described as illegality. As commonly understood, if repugnancy is to law, the same can be examined at any stage but the position in cases of prejudice on account of not following procedure one has to examine its effect. In case of *Willie William Slaney v. State of M.P.* AIR 1956 SC 116, it was held that- "If the seriousness of the omission is of a lesser degree, it will be an irregularity and prejudice by way of failure of justice will have to be established."

Hence, prejudice on account of procedural irregularity being a question of fact it would naturally have to be determined only at the

end of trial and there cannot be a speculation to its effect even before the parties have had an opportunity to plead its case.

30. In the case of Willie William Slaney vs State of MP (supra) it was further observed that-

“It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in a labyrinth of unsubstantial technicalities. Broad vision is required, a nice balancing of the rights of the State and the protection of society in general against protection from harassment to the individual and the risks of unjust conviction.”

31. Moreover, now it is also settled that-

“The word “cognizance” indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons. It has, thus, reference to the hearing and determination of the case in connection with an offence (State of W.B. Vs. Mohd. Khalid), (1995) 1 SCC 684, 696, 697 (SC).”

32. In the context of the above, when we see the scheme of P.C. Act, we find that Section 3 empowers a special Judge to try certain category of cases specified therein. Further Section 4(3) permits joint trial and thus incorporates the provisions of Sections 219, 220 and 223 Cr.P.C

i.e. joinder of charges in certain eventualities. Section 4(3) is reproduced below;

"S.4(3) When trying any case, a Special Judge may also try any offence, other than an offence specified in section 3, with which the accused may, under the Code of Criminal Procedure, 1973 be charged at the same trial."

33. If at this stage, the Court feels that some persons or offences be clubbed together he is permitted to do so in terms of Section 4(3) PC Act. No doubt cognizance is a pre-condition but then Section 19 is controlled by Section 19(3) PC Act.

34. Further, it cannot be in dispute that part charge-sheet is permissible in law as a result of which a Magistrate staggers proceeding against different accused at different stages. In some situation, he may wait for the order of sanction so as to proceed against the Public Servant. It may also happen that between the time of submission of charge-sheet, its perusal by the Magistrate, and awaiting the communication of Sanction, Public Servant may retire, in which case no sanction would be required.

35. In such a situation like the above, if the Court sets aside the order of cognizance and framing of charge on the ground as pleaded in the present case, it would be grossly premature and derail the cause of Justice. One should keep in mind that Penal Statute has been enacted to bring an accused to book and not to let him off without considering the object of law. Also Criminal Jurisprudence is not plain mathematical deductions of two plus two. It is a complex branch of law which keeps in

mind the collective aspirations of a Civil Society within a Political State. Therefore, a Court has to tread very carefully through treacherous paths so as to ensure justice to all parties, without rushing in, or slanting in favour of any particular party.

36. So much for the point of law, whereas, facts are concerned, since it is premature to go into absurdity or otherwise of the prosecution case without giving the prosecution an opportunity to prove the same during trial and any finding on it at this stage may cause prejudice which cannot be taken into account under the provision of section 482 Cr.P.C.

37. In the result, the criminal petition is dismissed.

38. The learned Special Judge, Assam is directed to proceed with the case as per provision of law.

39. Interim order, if there be any, stands vacated accordingly.

40. Send back the LCR.

JUDGE

Comparing Assistant