

GAHC010088452022



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

Case No. : Crl.Pet./421/2022

ABDUL KARIM
S/O LATE RASTUM ALI
R/O VILL- NO. 2 LOHARKATHA
P.O. LOHARKATHA,
P.S. MUKALMUA
DIST. NALBARI, ASSAM, PIN -781126

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

2:THE EXECUTIVE ENGINEER (PHE)
BARPETA DIVISION
BARPETA
P.O. P.S. BARPETA
DIST BARPETA
PIN- 78130

Advocate for the Petitioner : MR Z KAMAR

Advocate for the Respondent : MR. I BORTHAKUR(ADDL.PP, ASSAM)

**BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI**

(JUDMENT AND ORDER) (CAV)

Date : 16.05.2024

Heard Mr. I. H. Saikia, learned counsel appearing for the accused/petitioner. Also heard Mr. I. Borthakur, learned counsel representing the respondent PHE.

2. By filing this application u/s 482 Cr.PC, the petitioner has prayed for quashing the impugned FIR in connection with Kachumara, PS case No. 58/2014 and the impugned charge sheet vide CS No. 38/2021 and the entire proceeding of GR case No. 4635/2014, and renumbered as PRC case No. 790/ 2021 pending in the court of learned Additional CJM, Barpeta.

3. The case of the petitioner is that the impugned FIR was lodged by the then Executive Engineer (PHE) Barpeta Division, alleging *inter-alia* that one Shaikh Mainul Haque, president of the NGO, namely Mohchara Luit Paria, Socio Economic Development Society, had misappropriated government money during construction of individual household latrine (in short IHHL) against the total sanitation campaign under Mahchara GP of Chenga Block. Accordingly, a case was registered vide Kachumara PS case No. 58/2014 u/s 406 IPC.

4. During investigation, while the police was in search of the petitioner, he approached before this court by filing pre-arrest bail, whereby an interim protection was granted to the petitioner and subsequently, the interim order was made absolute. After completion of investigation, charge sheet was

submitted against the accused/petitioner.

5. The petitioner joined at Barpeta PHE Division as Assistant Engineer. The IHHL work in question was allotted to the aforesaid NGO, while the petitioner was working as an Assistant Engineer under the said division. Under the said IHHL project, the government granted Rs. 3,000/- for construction of each IHHL with bamboo walls which were very temporary in nature. After completion of the works, the sectional assistant, the GP President as well as the petitioner himself in the capacity of Assistant Engineer, visited the various IHHL sites and after finding the existence of IHHLs, the bills were submitted by the petitioner to the superior officer for necessary action. The petitioner has no authority to make any kind of payment. Thereafter, the petitioner was promoted to the post of Assistant Executive Engineer and posted at Belosar. In the year 2021, he has been retired from his service on his attaining the age of superannuation as Executive Engineer.

6. The learned counsel for the petitioner has argued that the learned trial court has failed to appreciate the case in proper perspective and came to an erroneous conclusion in passing the impugned order dated 15/11/2021 in PRC case No. 790/2021, taking cognizance of the case against the accused/petitioner, as such the same is liable to be set aside.

7. It is also the submission of the learned counsel for the petitioner that the petitioner was the government employee when the incident occurred. The petitioner conducted the verification along with the concerned officials and submitted the bills without any malice. As such he cannot be prosecuted for the acts done in good faith.

8. It is further submitted that Section 197 Cr.PC, deals with sanction of the

government which is required for prosecuting any public servant but in the instant case no sanction was accorded for prosecuting the present petitioner who was a public servant at the relevant point of time. Hence, learned counsel for the petitioner prays for quashing of the FIR/charge sheet and entire proceeding of the PRC case No. 790/2021.

9. In support of his submission, learned counsel for the petitioner has relied on the following case laws –

- a. *(2004) 8 SCC 31 (S.K. Zutshi and another vs. Bimal Debanth and another).*
- b. *(2004) 8 SCC 40 (State of Orissa through Kumar Raghvendra Singh and others vs. Ganesh Chandra Jew).*
- c. *(1993) 3 SCC 339 (State of Maharashtra vs. Dr. Buddhikota Subba Rao).*

10. Per contra, learned counsel representing the respondent PHE has submitted that the allegation against the petitioner is that he has misappropriated the government money. The economic offences constitute a class apart and need to be dealt with a different approach. The economic offence having deep rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as a grave offence affecting the country as a whole and thereby posing serious threat to the financial health of the state. Accordingly, learned counsel submits that there is no question of quashing of the proceeding of the case at this initial stage of trial.

11. By referring the recent judgment of the Hon'ble Supreme court vide **Criminal Appeal No. 256/ 2024 (*Shadakshari vs. State of Karnataka and another*)**, learned counsel has submitted that whether the petitioner was

involved in misappropriating the public funds by misusing his official position as a public servant is a matter of trial. The object of such sanction for prosecution is to protect a public servant discharging official duties and functions from undue harassment by initiation of frivolous criminal proceedings.

12. It is further submitted that misappropriating of public funds cannot be a part of the official duty of a public servant as such prosecution sanction is not required in this case.

13. I have considered the submissions of the learned counsel for the parties.

14. The question involves in the case is that whether the petitioner indulged in the alleged criminal conduct while he had been working as public servant. The question is not whether the petitioner was in service or in duty or not, but whether the alleged offence has been committed by him while acting or purporting to act in discharge of his official duty.

15. In the case of ***Sambhu Nath Mishra vs. State of UP*** reported in **(1997) 5 SCC 326**, the Honble Supreme Court has held as follows:

“.....The question is: when the public servant is alleged to have committed the offence of fabrication of record or misappropriation of public fund etc. can be said to have acted in discharge of his official duties ? It is not the official duty of the public servant to fabricate the false record and misappropriate the public funds etc. in furtherance of or in the discharge of his official duties. The official capacity only enables him to fabricate the record or misappropriate the public fund etc. It does not mean that it is integrally connected or inseparably interlinked with the crime committed in the course of same transaction, as was believed by the learned Judge. Under these circumstances, we are of the opinion that the view expressed by the High Court as well as by the trial Court on the question of sanction is clearly illegal and cannot be sustained.”

16. In the case of ***Parkash Singh Badal v. State of Punjab*** and others,

reported in (2007) 1 SCC 1 , Hon'ble Supreme held that -

".....20. The principle of immunity protects all acts which the public servant has to perform in the exercise of the functions of the Government. The purpose for which they are performed protects these acts from criminal prosecution. However, there is an exception. Where a criminal act is performed under the colour of authority but which in reality is for the public servant's own pleasure or benefit then such acts shall not be protected under the doctrine of State immunity."

And thereafter, it was further held that:

".....The question relating to the need of sanction under Section 197 of the Code is not necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein. This question may arise at any stage of the proceeding. The question whether sanction is necessary or not may have to be determined from stage to stage."

17. In the case of ***Rajib Ranjan and others -vs.- R. Vijaykumar***, reported in (2015) 1 SCC 513, the Hon'ble Supreme Court has taken the view that ... "even while discharging his official duties, if a public servant enters into a criminal conspiracy or indulges in criminal misconduct, such misdemeanor on his part is not to be treated as an act in discharge of his official duties and, therefore, provisions of Section 197 of the Code will not be attracted".

18. Public servants have, in fact, been treated as special category under Section 197 Cr.P.C, to protect them from malicious or vexatious prosecution. Such protection from harassment is given in public interest; the same cannot be treated as shield to protect corrupt officials.

19. In ***Subramanian Swamy v. Manmohan Singh & anr***, reported in **(2012) 3 SCC 64**, it has been held that the provisions dealing with Section 197 CrPC must be construed in such a manner as to advance the cause of honesty, justice and good governance. To quote:

"74. ... Public servants are treated as a special class of persons enjoying the said protection so that they can perform their duties without fear and favour and without threats of malicious prosecution. However, the said protection against malicious prosecution which was extended in public interest cannot become a shield to protect corrupt officials. These provisions being exceptions to the equality provision of Article 14 are analogous to the provisions of protective discrimination and these protections must be construed very narrowly. These procedural provisions relating to sanction must be construed in such a manner as to advance the causes of honesty and justice and good governance as opposed to escalation of corruption."

20. In view of the aforesaid legal proposition, if we consider the case in hand, the alleged indulgence of the petitioner in misappropriation of government funds cannot be said to be in discharge of his official duty. The official duty is not to misappropriate public funds and cause loss to the Revenue.

21. Whether the sanction is required u/s 197 Cr.PC or not is to be considered during trial and it is the burden of the prosecution to prove that the accused/petitioner acted beyond in discharge of his official duties and there is no nexus between the acts committed and his official duties. At this stage, the question that the accused acted within his official duties cannot be decided in exercise of the jurisdiction of this court u/s 482 Cr.PC.

22. In the result, the criminal petition is dismissed and disposed of accordingly.

JUDGE

Comparing Assistant