

GAHC010094112022



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

Case No. : Crl.Pet./439/2022

DR. JOGESH BORAH
S/O LATE DOMBORUDHAR BORAH
RESIDENT OF VILLAGE METEKA POTHAR, PS SIVASAGAR, DIST
SIVASAGAR, ASSAM

VERSUS

THE STATE OF ASSAM AND 3 ORS
REPRESENTED BY THE COMMISSIONER AND SECRETARY, HOME
AFFAIRS, GOVT. OF ASSAM, DISPUR GUWAHATI , REPRESENTED BY PP
ASSAM

2:DR. DILIP KUMAR DEKA
S/O SRI NARENDRA CHANDRA DEKA
RESIDENT OF PHUKAN NAGAR
SHANTI PATH
PS AND DIST SIVASAGAR
ASSAM 785640

3:DR. PABAN KUMAR GOGOI
S/O LATE RATNESWAR GOGOI
RESIDENT OF GARGAON COLLEGE
PS SIMALUGURI
DIST SIVASAGAR
ASSAM 785686

4:MRS. IRINA KONWAR
W/O SRI ANANDA SAGAR DAS
RESIDENT OF QUARTER NO. 4
GARGAON COLLEGE
SIMALUGURI
PS SIMALUGURI
DIST SIVASAGAR
ASSAM 78668

Advocate for the Petitioner : MR. S K GOSWAMI

Advocate for the Respondent : PP, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN
JUDGMENT**

09.04.2024

Heard Mr. S.K. Goswami, learned counsel for the petitioner and also heard Mr. P.S. Lahkar, learned Additional Public Prosecutor, Assam, appearing for the State respondent No.1.

2. In this petition, under Section 482 read with Sections 397 and 401 of the Code of Criminal Procedure, 1973, the petitioner, namely, Dr. Jogesh Borah has challenged the correctness of otherwise of the order dated 06.05.2022 passed by the learned Judicial Magistrate First Class, Nazira, Sivasagar, in PRC Case No.143/2020, arising out of Simaluguri P.S. Case No.76/2019, under Sections 406/409/420 IPC. It is to be noted here that vide impugned order dated 06.05.2022, the learned Court below has framed charge against the present petitioner Dr. Jogesh Borah, under Sections 409/34 IPC.

3. The background facts leading to filing of the present petition are briefly stated as under:-

“The petitioner Dr. Jogesh Borah had served as Assistant Professor in the Gargaon College, Simaluguri and he was also the Vice Principal of the said college and he retired from the post of Associate Professor of Gargaon College on 31.01.2019. While he was serving as Vice Principal of the Gargaon College, he was the President of

Samabai Aru Rindan Samabay Sammittee (SARSS) Ltd., a society registered under the Assam Cooperative Societies Act, 2007 and one Smt. Irina Konwar, the respondent No.4, was the Secretary of the said Sammittee, which includes both teaching and non-teaching staff. As per Rule of the said Sammittee, Secretary has to conduct Annual General Meeting every year and as per direction of the President and the Secretary of the Sammittee has to maintain and submit audit and annual books of accounts of the Sammittee and the same have to place in the Annual General Meeting for approval and the Secretary has also the burden of looking after the accounts and to manage the funds. But Smt. Irina Konwar, respondent No.4, has failed to carry out the said duty properly and failed to make audit of the books of accounts of the Sammittee available for three consecutive terms i.e. 2015-16, 2016-17 and 2017-18 and failed to call Annual General Meeting for the consecutive terms showing her various reasons. She has also filed one Misc.(J) Case No.06/2018, arising out of Title Suit No.10/2018, before the learned Munsiff, Nazira and obtained ex-parte ad-interim injunction order on 31.07.2018, whereby the learned Court below has enjoined in convening and holding of Annual General Meeting of the Samabai Aru Rindan Samabay Sammittee of Gargaon College. Thereafter, the petitioner along with two others have challenged the aforesaid order before the learned Civil Judge, Sivasagar, in Misc. Appeal No.05/2018, but the learned Civil Judge, Sivasagar has dismissed the same vide order dated 20.09.2018. Thereafter, the petitioner along with one Shri Anil Tanti and Shri K.J. Handique and Smt.

Meghali Bora approached this Court by filing one CRP(I/O) No.328/2018, challenging the order dated 20.09.2018 passed by the learned Civil Judge, Sivasagar and this Court vide order dated 28.09.2018 was pleased to stay the operation of the impugned order dated 31.07.2018 passed by the learned Munsiff, Nazira, Misc.(J) Case No.06/2018, arising out of Title Suit No.10/2018. Thereafter, the Annual General Meeting was held on 08.10.2018 and the respondent No.4 Smt. Irina Konwar was called to submit the accounts details of the Sammittee and thereafter, the new Managing Sammittee has been formed and finally accounts were audited by appointing internal auditors and they found that Smt. Irina Konwar, Ex-Secretary of the Samabai Sammittee had misappropriated a sum of Rs.13,67,826/- during the period 2015-16, 2016-17 and 2017-18 and the aforesaid amount was deposited in her own bank account and thereafter, the President and Secretary of the new Sammittee filed one FIR before the Officer-in-Charge, Simaluguri Police Station on 27.05.2019 and thereafter, the Officer-in-Charge, Simaluguri Police Station registered Simaluguri P.S. Case No.76/2019 under Sections 406/409/420 IPC and carried out the investigation, which culminated in submission of charge-sheet against the present petitioner and Smt. Irina Konwar to stand trial in the Court under Section 406/420 IPC. Thereafter, the learned Judicial Magistrate First Class, Nazira, had taken cognizance upon the same and issued process to the accused persons, who appeared before the learned Court below to stand trial. Thereafter, hearing learned Advocates of both sides, the learned Court below has framed charge against the

present petitioner and also Smt. Irina Konwar to stand trial in the Court under Section 409 IPC read with Section 34 IPC. Then on being read and explained over, the petitioner and the respondent No.4 pleaded not guilty to the same and claimed to be tried.”

4. Being aggrieved, the petitioner approached this Court by filing the present petition on the grounds mentioned herein below:-

- (I) That the learned Court below without application of mind has framed charge against the petitioner, though no charge-sheet has been submitted against the present petitioner by the I.O.
- (ii) That the Investigating Officer has examined as many as 16 witnesses and none of the aforesaid witnesses whispered any word against the present petitioner that being the President of the Sammittee he has misappropriated the amount.
- (iii) That the Annual General Meeting could not be convened on account of the injunction order passed by the learned Munsiff, Nazira, in Misc.(J) Case No.06/2018, arising out of Title Suit No.10/2018, instituted by the respondent No.4, and
- (iv) That without application of mind, the learned Court below has framed charge against the present petitioner, and that the impugned order dated 06.05.2022 passed by the learned Judicial Magistrate First Class, Nazira, is legally unsustainable and therefore, it is contended to allow the petition.

5. Mr. Goswami, learned counsel for the petitioner submits that though the present petitioner was the President of the Samabai Sammittee, yet the financial affairs of the Sammittee was look after by the respondent No.4. During

the tenure of president ship of the present petitioner, he has asked the Secretary to call for the Annual General Meeting, but the Secretary, respondent No.4, has failed to call for any meeting instead she filed one Title Suit and one injunction petition before the Court of learned Munsiff, Nazira, wherein she has been able to obtain one stay order in convening the Annual General Meeting of the Sammittee and thereafter, the petitioner has preferred one petition before the learned Civil Judge Senior Division, Sivasagar, but the same came to be dismissed. Thereafter, the petitioner along with some other members of the Sammittee have preferred one appeal against the order of the learned Civil Judge, Sivasagar, wherein this Court was pleased to vacate the injunction order passed by the learned Munsiff, Nazira and thereafter, the Annual General Meeting was called for and auditors were appointed and anomalies of a sum of Rs.13,67,826/- came into light and the respondent No.4, the Secretary has manipulated the same and withdrawn the said amount and got the same deposited in her account.

6. Further, Mr. Goswami submits that though the I.O. has submitted charge-sheet against the present petitioner and the learned Court below has also framed charge against him, yet none of the witnesses so examined by the I.O. during investigation has whispered any word against the present petitioner and all the witnesses have deposed only against the respondent No.4, the then Secretary of the Samabai Sammittee and on such count the impugned order passed by the learned Court below failed to withstand the legal scrutiny and therefore, it is contended to set aside the same.

7. Mr. Goswami also referred following case laws in support of his submission:-

(I) **Union of India v. Prafulla Kumar Samal & Anr.**, reported in

(1979) 3 SCC 4;

(ii) Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia & Anr., reported in **(1989) 1 SCC 715;**

(iii) Sajjan Kumar v. Central Bureau of Investigation, reported in **(2010) 9 SCC 368.**

(iv) State of Karnataka v. L. Muniswamy, reported in **(1977) 2 SCC 699;**

(v) Bhawna Bai v. Ghanshyam & Ors., reported in **(2020) 2 SCC 217;**

(vi) Central Bureau of Investigation, Hyderabad v. K. Narayana Rao, reported in **(2012) 9 SCC 512;**

8. Per contra, Mr. Lahkar, learned Additional P.P. also referring to the materials available in the case diary submits that the witnesses examined by the I.O. has implicated the respondent No.4, the then Secretary, Smt. Irina Konwar only and no amount has been transferred in the account of the petitioner and the amount was transferred only in the account of Irina Konwar.

9. Having heard the submission of learned Advocates of both sides, I have carefully gone through the petition and the documents placed on record and also perused the impugned order passed by the learned Court below and also the case laws referred by Mr. Goswami, learned counsel for the petitioner.

10. Before a discussion is directed to the points raised in the revision petition, we deemed it appropriate to understand the law, regarding framing of charge, as has been laid down by the Hon'ble Supreme Court in catena of

decisions.

11. The lead case in this regard is **Union of India vs. Prafulla Kumar Samal & Anr.**, reported in **(1979) 3 SCC 4**, wherein the Hon'ble Supreme Court held that:-

“**7. [Section 227](#) of the Code runs thus:-**

"227. Discharge.- If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

The words "not sufficient ground for proceeding against the accused" clearly show that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities, which is really his function after the trial starts. At the stage of [section 227](#), the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. The sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him."

12. In the case of **Niranjan Singh Karam Singh Punjabi vs. J. Bhimraj Bijja**, reported in **AIR 1990 SC 1962**, Hon'ble Supreme Court, after considering its earlier case law on the subject has stated as under:-

- “(1) That the Judge while considering the question of framing the charges under Section 227 of the code has the undoubted power to shift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.
- (2) Whether the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.
- (3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence adduced before him while giving rise to some suspicion but not grave suspicion against the accused he will be fully within his rights to discharge the accused.
- (4) That in exercise his jurisdiction u/s 227 of the code the Judge which (sic) under the present Code is a senior and experienced Judge cannot act merely as a post office or a mouth-piece of the prosecution, but has to consider the broad possibilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting the trial.

13. Again in the case of **Superintendent and Remembrancer of Legal affairs, West Bengal vs. Anil Kumar Bhunja**, reported in **(1979) 4 SSC 247** Hon'ble Supreme Court observed in paragraph 18 of the judgment as under:

“The standard of test, proof and judgment which is to be applied

finally before finding, the accused guilty or otherwise is not exactly to be applied at the stage of Section 227 or 228 of the Criminal Procedure, 1973. At this stage, even a very strong suspicion found upon materials before the Magistrate which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged may justify in respect of the commission of that offence.”

14. In a later decision, in the case of **State of Maharashtra vs. Somnath Thapa**, reported in **AIR 1996 SC 1744**, the Hon’ble Supreme Court was of the view that:-

“If there is a ground for assuming that the accused has committed the offence, that Court can justifiably say that the prima facie case against him exist and frame charge against him for doing that offence.”

It was further observed that:-

“The aforesaid show that if on the basis of materials on record, a Court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the Court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of charge, probative value of the materials on record cannot be gone into the materials brought on record by the prosecution has to be accepted as true at that state.”

15. In the case of **State of West Bengal -vs.- Mohd. Khalid & Anr.**, reported in **(1995) 1 SCC 684**, Hon’ble Supreme Court quoted with approval its observation in **Stree Atyachar Virodhi Parishad case**, reported in **(1989)**

1 SCC, 715, held that while considering the question of framing of charge, the Court has to see as to whether materials brought on record reasonably connects the accused with the crime. No more is required to be enquired into.

16. In the case of **State of Delhi vs. Gyan Devi and Others**, reported in **(2002) 8 SCC 239** this Court reiterated that at the stage of framing of charge the trial court is not to examine and assess in detail the materials placed on record by the prosecution nor is it for the Court to consider the sufficiency of the materials to establish the offence alleged against the accused persons. In the case of **State of Madhya Pradesh vs. S.B. Johari**, reported in **(2002) 2 SSC 57** it was held that the charge can be quashed if the evidence which the prosecutor proposes to adduce to prove guilt of the accused, even if fully accepted, cannot show that the accused committed the particular offence. In that case, there would be no sufficient ground for proceeding with the trial.

17. In the case of **State of Maharashtra vs. Priya Sharan Maharaj and Others**, reported in **(1997) 4 SSC 393** it was held that at Sections 227 and 228 stage the Court is required to evaluate the materials and documents on record with a view to finding out if the facts emerging there from taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense of the broad probabilities of the case.

18. In the case of **State of Orissa vs. Debendra Nath Padhi**, on 29.11.2004, in **Appeal (Crl.) No. 497 of 2001**, a three judge bench of Hon'ble Supreme Court has held that-

“All the decisions, when they hold that there can only be limited evaluation of materials and documents on record and sifting of evidence to prima facie find out whether sufficient ground exists or not for the purpose of proceeding further with the trial, have so held with reference to materials and documents produced by the prosecution and not the accused. The decisions proceed on the basis of settled legal position that the material as produced by the prosecution alone is to be considered and not the one produced by the accused. The latter aspect relating to the accused though has not been specifically stated yet it is implicit in the decisions. It seems to have not been specifically so stated as it was taken to be well settled proposition.”

19. Again in the case of **Sajjan Kumar vs. Central Bureau of Investigation**, reported in **(2010) 9 SCC 368**, Hon’ble Supreme Court having taken into account various cases decided earlier on the subject of framing of charge has summarized the principle which are to be kept in mind by the Court at the stage of framing of charge for discharge of accused under Sections 227 and 228 of the Cr.P.C.

- “(i) The Judge while considering the question of framing the charges under [Section 227](#) of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.**
- ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.**
- iii) The Court cannot act merely as a Post Office or a mouthpiece of the**

prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

- iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.**
- v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.**
- vi) At the stage of [Sections 227](#) and [228](#), the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging there from taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.**
- vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.**

It is also held that:-

- a. It is clear that at the initial stage if there is a strong suspicion which led the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused;**
- b. If the evidence which the prosecution possess to adduce proves the guilt of the accused even if fully accept before it is challenged in cross examination or reverted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial.**

20. Thus, what can be crystallized from the aforesaid discussion that the requirement of law while framing charges are not the concrete evidences. The requirement is the *prima facie* case. If there is a strong suspicion which led the Court to think that there is ground for presuming that the accused has committed an offence, then the court can frame charge against the accused. If the evidence, which the prosecution possess to adduce proves the guilt of the accused even if fully accepted before it is challenged in cross examination or reverted by the defence evidence, if any, cannot show that the accused committed the particular offence, then there would be no sufficient ground for proceeding with the trial and the court can discharge the accused.

21. Now, having understood the proposition of law relating to framing charge, now an endeavor will be made to examine the correctness or otherwise of the impugned order dated 06.05.2022, passed by the learned Judicial Magistrate First Class, Nazira, Sivasagar, in PRC Case No.143/2020.

22. Here in this case, the record reveals that the learned Court below, vide impugned order dated 06.05.2022, had framed charge against the present petitioner along with the respondent No.4, under Section 409/34 IPC, considering the submission of learned Advocates of both sides and by holding that '*presence or absence of intention or knowledge regarding the alleged fund diversions are best left to be decided by way of trial. And at this juncture, I find that there exist sufficient incriminating materials against accused Irina Konwar and Jogesh Borah under section 409/34 IPC.*' However, the learned court below never indicates what the materials are; it had taken into account in arriving at such a finding.

23. A careful perusal of the charge-sheet, which is annexed with the petition as Annexure-X, reveals that the investigating officer, during investigation, had found a prima facie case well-established against the accused persons, namely, Smt. Irina Konwar and Shri Jogesh Borah, the present petitioner, under Sections 406/409/420 IPC. Except this nothing has been whispered in respect of the materials/evidence collected against the present petitioner.

24. And having gone through the statement of the witnesses examined by the I.O., during investigation, I find that none of the witnesses, examined by the I.O. had whispered any word against the present petitioner. All that they have deposed is against accused Irina Konwar, the respondent No.4, only. Mr. Goswami the learned counsel for the petitioner has rightly pointed this out during hearing. And the learned Addl. P.P. also fairly conceded to the said submission of Mr. Goswami, that the witnesses examined by the I.O. during investigation, has implicated only the respondent No.4.

25. It also appears from the materials placed on record that a sum of

Rs.13,67,826/- was diverted by the Secretary, respondent No.4, to her personal bank account, bearing SBI A/C No.11671521246 during her tenure as Secretary of Samabai Aru Rindan Samabay Sammittee (SARSS) Ltd., for the 3 consecutive years i.e. 2015-16, 2016-17 and 2017-18. The Auditors' report, which is annexed with the petition as Annexure - V(A), V(B) and V(C), clearly indicates the same. It also appears that during her tenure as Secretary she had neither convened the Annual General meeting nor had she taken any step for auditing the account of the SARSS.

26. It is admitted fact that at the said period i.e. 2015-16, 2016-17 and 2017-18, the present petitioner was the President of the said SARSS and as per Bye Laws of the SARSS, transaction has to be done under joint signature of the President and Secretary. Further, it appears from the materials placed on record that the petitioner, being the President has insisted upon the Secretary to convene the Annual General Meeting. But, the respondent No.4, the Secretary has willfully avoided the same and instead it appears that she had filed one Title Suit being T.S. No. 10/2018, and one Misc. (J) Case No. 06/2018 before the learned Munsiff at Nazira, wherein the learned Court below, vide order dated 31.07.2018, was pleased to grant interim injunction restraining the respondents from convening the Annual General Meeting and thereafter, at the instance of the present petitioner and two others, Misc. Appeal No. 05/2028 was preferred before the learned Civil Judge, Sivasagar, against the injunction order but the same came to be dismissed vide order dated 20.09.2018. Thereafter, the petitioner and two others have preferred CRP(I/O) No. 328/2018 against the order dated 20.09.2018 of the learned Civil Judge, Sivasagar before this court and this court vide order dated 28.09.2018, was pleased stay the order dated 31.07.2018, passed by the learned Munsiff at Nazira. And only thereafter,

Annual General Meeting was called for and a new Sammittee was formed and thereafter, the account was audited and after detection of anomalies the FIR has been lodged by the new President and Secretary.

27. From the aforementioned facts and circumstances on the record, this Court is unable to derive its satisfaction that the present petitioner had any intention or knowledge regarding the alleged fund diversions. Though the anomalies were committed by the respondent No.4, and though transaction in the account of the SARSS was done under the joint signatures of the respondent No.4 and the present petitioner, yet, the role of the present petitioner appears to be very limited and there is nothing on the record to show that he has derive any benefit from the same, since the entire amount was transferred to the personal bank account of the respondent No.4.

28. Thus, applying the proposition of law in respect of framing of charge, as discussed here in above, to the facts and circumstances of the present case, this Court is unable to find that there is ground for presuming that the present petitioner had committed an offence. Admittedly, none of the witnesses examined by the I.O. during investigation had whispered any word against the present petitioner. Whatever materials collected by the I.O., to prove the guilt of the present petitioner, even if fully accepted before it is challenged in cross examination or reverted by the defence evidence, fails to disclose that the present petitioner had committed the particular offence. Therefore, this court is unable to record concurrence to finding of the learned court below that there exist sufficient incriminating materials against present petitioner so as to frame charge against him under Sections 409/34 IPC. Thus, I find sufficient force in the submission of Mr. Goswami and the ratio laid down in the case laws referred by him and discussed herein above also, fortifies the same. And the ratio laid

down by Hon'ble Gauhati High Court in **Criminal Petition No. 895/2016 & 623/2017** and in **Criminal Petition No. 190/2015 & 620/2014** and in **Criminal Revision No. 183/1970 & 188/1970** and also the ratio laid down by Hon'ble Supreme Court in the case of **Sushil Sethi & Anr. Vs. State of Arunachal Pradesh & Ors.**, reported in **(2020) 3 SCC 240**, also supported the contention made by him.

29. In the result, I find this revision petition well merited and accordingly the same stands **allowed**. The impugned order, dated 06.05.2022, passed by the learned Judicial Magistrate First Class, Nazira, Sivasagar, in PRC Case No.143/2020, arising out of Simaluguri P.S. Case No.76/2019, stands set aside and quashed. The parties have to bear their own cost.

Comparing Assistant

JUDGE