

**IN THE HIGH COURT OF ORISSA AT CUTTACK**

**CRLREV No. 249 of 2003**

An application under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973.

**AFR**                      **Basanta Kumar Das**                      -----  
.....                      **Petitioner**

**-Versus-**

**State of Odisha**                      .....                      **Opp. Party**

Advocate(s) appeared in this case:-

**For Petitioner** :                      M/s. G.N. Mishra & P.P.  
Mohanty, Advocates

**For Opp. Party** :                      Mr. Priyabrata Tripathy,  
Addl. Standing Counsel

**CORAM:**

**JUSTICE SASHIKANTA MISHRA**

**JUDGMENT**

**5<sup>th</sup> July, 2022**

**SASHIKANTA MISHRA, J.**

In the present revision the petitioner challenges order dated 23.12.2002 passed by Additional Sessions Judge, Malkangiri in Criminal Appeal No. 31 of 1999, whereby the order of conviction and sentence passed by learned C.J.M., Malkangiri in G.R. case No. 317 of 2019

on 22.09.19 95 was confirmed. By the said judgment, the trial court had convicted the petitioner accused for the offence under section 409 of IPC and sentenced him to imprisonment for 29 days.

2. The prosecution case, in a nutshell, is that the Divisional Forest Officer, Jeypore (KL) Division lodged an FIR before the Officer-in-charge of Orkel Police Station alleging that as per the audit report it was found that the petitioner while posted as the Range Officer, Balimela K.L. Range had misappropriated cash of rupees 4,52,491 .99. It was stated that he was entrusted with different amounts on different dates in advance for expenditure of Kendu leaves production, transportation, drying and storage etc. Basing on such report, investigation was taken up and charge sheet was submitted under section 409 of IPC.

The accused took the plea of denial during trial, wherein prosecution examined 13 witnesses and also exhibited 59 documents. The defence proved three documents from its side.

After analyzing the evidence on record the trial court found that the petitioner had submitted the accounts in question but after one year and two months from the date of lodging of the FIR and therefore he must be held to have temporarily misappropriated the amount for the said period. Accordingly, the petitioner was convicted and sentenced as aforesaid. Be it noted here that the petitioner had specifically taken the ground that he being a public servant it was necessary to obtain sanction of the appropriate authority before prosecuting him which was not done in the present case and therefore the prosecution was not valid in the eye of law. However learned trial court negatived the contention by referring to some decisions of the Apex Court as well as of this Court to hold that the act of misappropriation cannot be treated as part of official duty of the petitioner so as to obtain sanction.

3. The petitioner carried the matter in appeal to the Court of Session. The learned Sessions Judge after scanning the evidence on record found no reason to interfere with the judgment of conviction and sentence

passed by the trial court. As regards the question of sanction, it was held that the trial court had committed no error in rejecting the contention put forth by the petitioner. The lower appellate court also referred to the decisions relied upon by both sides and held that no sanction was necessary in the facts and circumstances of the case.

Feeling further aggrieved, the petitioner has approached this court in the present revision.

4. Heard Mr. G.N. Mishra learned counsel for the petitioner and Mr. Priyabrata Tripathy, learned Standing Counsel for the state.

5. Assailing the impugned judgment, Mr. Mishra has contended that both the courts below have committed illegality in rejecting the contention of the petitioner with regard to the requirement of prior sanction for prosecution. According to Mr. Mishra, both the courts below have held that the act of misappropriation cannot be treated as a part of official duty of the petitioner and thereby ignored the fact that the petitioner was entrusted with some amount which was part of his official duty and

he was required to account for the same, which was also part of his official duty. So submission of accounts being on official duty, non-submission of the same must come within the purview of the expression 'discharge of official duty' as per Section 409 of IPC. Mr. Mishra has relied upon a decision of this Court rendered in the case of ***Pramod Kumar Swain vs. State of Odisha***, reported in ***2022 (I) OLR 622*** to support his contention. It is further contended that the finding of the trial court that the petitioner had absconded is entirely contrary to the evidence on record which clearly shows that the petitioner had gone on leave which was duly sanctioned by the competent authority. The finding of temporary misappropriation is sought to be challenged by Mr. Mishra on the ground that no question was put to the accused petitioner in his examination under section 313 of Cr.P.C..

6. Mr. Tripathy, learned Addl. Standing Counsel has supported the impugned judgments by contending that misappropriation cannot be treated as part of official duty or an act done in due discharge of official duty for which no sanction for prosecution is necessary. It is

further contended that the concurrent findings of fact rendered by the courts below being based upon appreciation of evidence on record do not warrant any interference by this court in its revisional jurisdiction because more so as no illegality whatsoever has been committed.

7. As regards the requirement of prior sanction to prosecute, there is no dispute that the petitioner was working as a Range Officer at the relevant time under the administrative control of the Conservator of Forests, Bolangir Range. As such, he was a public servant at the relevant time. Section 197 of Cr.P.C. requires prior sanction of the competent authority for prosecution of public servants and reads as follows:

**197. Prosecution of Judges and public servants.—***(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction*  
*1 [save as otherwise provided in the Lokpal and Lokayuktas Act, 2013 (1 of 2014)]—*

*(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in*

connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:

[Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted.]

Explanation.—For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under section 166A, section 166B, section 354, section 354A, section 354B, section 354C, section 354D, section 370, section 375, section 376, section 376A, section 376C, section 376D or section 509 of the Indian Penal Code (45 of 1860).]

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

[(3A) Notwithstanding anything contained in sub-section (3), no court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a

*Proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.*

*(3B) Notwithstanding anything to the Contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991 (43 of 1991), receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the court to take cognizance thereon.]*

*(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held.*

From a reading of the above provision it is clear that no prosecution can be launched without sanction of the competent authority. Now, the question is, whether sanction was required in the present case. It is settled law that to decide this question reference to the facts and circumstances of the case along with the prosecution allegations are to be considered. In the instant case, the prosecution allegation is that the

petitioner was entrusted with some money which he failed to account for and therefore, was held guilty of misappropriation. There is no doubt that the money was entrusted to him in his official capacity and a part of his official duty. The petitioner was required to utilize the money in the work of Kendu leaf production, cultivation and transportation etc. and as such was required to fully account for the same. So what is important to note, the petitioner was duty bound to account for the money that was entrusted to him. Obviously, this was a part of his official duty. The allegation relates to something not done by him which was officially required to be done. It is held by both the courts below that not accounting for the amount in question within the stipulated period amounts to temporary misappropriation which cannot be treated as official duty.

Whether an act falls within the purview of official duty or not has been examined by the apex court in several cases including the case ***Shreekantiah***

***Ramayya Munipalli vs The State Of Bombay*** reported

in ***AIR 1955 SC 287*** wherein it was observed as under:

*“18. Now it is obvious that if Section 197 of the Code of Criminal Procedure is construed too narrowly it can never be applied, for of course it is no part of an official’s duty to commit an offence and never can be. But it is not the duty we have to examine so much as the act, because an official act can be performed in the discharge of official duty as well as in dereliction of it. xxxxxxxx”*

*19. Now an offence seldom consists of a single act. It is usually composed of several elements and, as a rule, a whole series of acts must be proved before it can be established. Now it is evident that the entrustment and/or dominion here was in an official capacity, and it is equally evident that there could in this case be no disposal, lawful or otherwise, save by an act done or purporting to be done in an official capacity.”*

The above observations were relied upon by the Apex Court in a subsequent decision reported in (2016) 2 SCC 143 that for the purpose of obtaining previous sanction from appropriate government under Section 197 Cr.P.C. it is imperative that the alleged offence is committed in discharge of official duty by the accused and that it is also imperative for the Court to examine the allegations against the accused, to decide whether previous sanction is required to be obtained before taking cognizance of the alleged offence against him.

8. This court had the occasion of dealing with a similar matter involving the offence under section 409 of IPC [**Pramod Kumar Swain** (supra)] wherein it was held that it would be fallacious to segregate different parts of the transaction that make up the official duty in question to hold that for the act committed in violation of a particular part thereof, it would not partake the nature of official duty. To elucidate, a person may be engaged as a night watchman in office and his duty obviously would be to keep watch over the building at night. In case theft is committed by him during the night and it is intended to prosecute the night watchman for such act, sanction would be necessary as it was his official duty to guard the premises during the night solely to prevent the occurrence of theft. However, if the same watchman commits any other offence not connected to his work, say murder or assault, during the night then obviously no sanction would be necessary as committing murder or for that matter any other offence in his private capacity would not come within the purview of official duty. Therefore, the act in question must have a nexus with his official duties. If it

does, sanction is necessary. If not, sanction is not necessary. So misappropriation, per se, cannot be treated as official duty undoubtedly but in the instant case misappropriation is sought to be inferred from the fact that the petitioner allegedly did not account for the money that was entrusted to him. As has been held in the case of ***Shreekantaiah Ramayya Munipalli*** (supra) an official act can be performed in the discharge of official duty as well as in dereliction of it. Here the petitioner is sought to be held guilty of dereliction of his duty to account for the amount entrusted to him. Had he done so it would have been his official duty. Therefore, in the considered view of this Court, non-furnishing of accounts by the petitioner of the amount entrusted to him has to be treated as dereliction of his official duty and therefore, prior sanction to prosecute him is absolutely necessary. The case laws relied upon by the trial court and the lower appellate court can be distinguished easily on facts. In the case of ***Dhulamani Behera vs State Of Orissa***, reported in ***1987 SCC OnLine Ori 102: 1988 Cri LJ 1027*** the decision was rendered keeping in mind the requirement of

section 6 of the Prevention of Corruption Act 1947 and Section 409 of IPC, which is not the case at hand. In the case of **B. Saha v. M.S. Kochar**, reported in **(1979) 4 SCC 177**, it was held that when a public servant acting in discharge of his official duty uses it as a cloak, and dishonestly converts the money in his trust to his own use, it could most certainly be said is not an act which is anticipated and in any way related to the duties assigned to him. In the instant case there is no such allegation that the petitioner had converted the money entrusted to him to his own use rather the only allegation against him is that he had failed to account for the same, as required, in time. There is a sea of difference between the case before the Apex Court and the case at hand which both **the courts below** seem to have overlooked.

Being entrusted with the money in his official capacity, it was incumbent on his part to explain as to what happened to it. In view of the very absence of the allegations that he converted it for his own use and in view of the evidence of P.W.-12 & 17, the only inference

that can be drawn that his failure to account for the entrusted amount in time is an omission on his part which he was officially bound to do. This omission can be treated as a gross failure of the discharge of his official duty and hence section 197 Cr.P.C has clear application to the facts of this case

9. From the above analysis of the settled position of law made in the background of the facts and circumstances of the case, this Court has no hesitation in holding that both the courts below have committed manifest error of law in rejecting the defence contention that sanction was necessary to prosecute the petitioner. In view of what has been observed here in before, this court holds that the prosecution was invalid for want of sanction from the competent authority as required under section 197 of Cr.P.C.

10. Even on merits it is observed that the courts below have not appreciated the evidence in the proper perspective particularly that of P.Ws. 17 and 12. It is in the evidence of P.W.-1 that the petitioner received the

money from him and disbursed it to the field staff on the same day which was duly reflected in the cash book marked Exhibit-30. P.W.-7 admits to have received the leave application of the petitioner as well as his request for extension of leave. Therefore the finding that the petitioner had absconded has to be treated as perverse. The I.O. being examined as P.W.-12 has admitted that he had received Exhibit-C submitted by the petitioner reflecting the accounts of the amount allegedly misappropriated by him. While this has been held to be an act of temporary misappropriation yet this Court finds that such a question was not put to the petitioner in his examination under section 313 of Cr.P.C. It is trite that an accused cannot be convicted on the basis of an incriminating circumstance appearing in the evidence against him if the same has not been put to him for explanation.

11. From the foregoing discussion it is clear that the trial court has committed an error of law in negating the contention of the petitioner regarding absence of sanction as also in holding the petitioner guilty of the

offence under section 409 of IPC and in sentencing him to imprisonment for 29 days for which the impugned order of conviction and sentence cannot be sustained in the eye of law. It is also clear that the lower appellate court has committed illegality in confirming the judgment of conviction and sentence passed by the trial Court.

12. In the result, the criminal revision is allowed. The impugned judgment of conviction and sentence passed by the trial court as well as the judgment passed by the lower appellate court in confirming the same are hereby set aside and the accused petitioner is acquitted of the charge under section 409 of IPC. The accused being on bail, his bail bonds be discharged.

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**Sashikanta Mishra,**  
**Judge**

**Orissa High Court, Cuttack,**  
**The 5<sup>th</sup> July, 2022/ A.K. Rana**