

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.371 of 2022

Brajesh Kumar Malik *Petitioner*
-versus-
State of Odisha *Opposite Party*

CORAM: JUSTICE S. PUJAHARI

ORDER
12.08.2022

Order
No.

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1. This matter is taken up through hybrid mode.
2. This application under Section 482 of Cr.P.C. has been filed by the Petitioner with a prayer to quash the order dated 11th June, 2021 passed by the learned J.M.F.C., Pattamundai, in G.R. Case No.565 of 2020 wherein cognizance has been taken under Sections 323/376-B/307/448 IPC against him.
3. Learned counsel for the Petitioner submits that since the ingredients of the offence under Section 376-B IPC are not made out against the Petitioner and the entire allegation being false and concocted, the impugned order is liable to be quashed. During the course of hearing, learned counsel for the

Petitioner submits that Section 376-B IPC is attracted when a public servant commits sexual intercourse with a woman in his custody. Since the Petitioner is not a public servant, the Investigating Officer appears to have submitted the charge-sheet for the said offence without applying his mind to the facts alleged. It is his further submission that the charge-sheet filed for other offences being also based on no material is liable to be quashed.

4. However, learned counsel for the State vehemently opposes such contention with submission that the materials on record clearly make out the aforesaid offences inasmuch as Section 376-B IPC, as is presently in the statute, makes sexual intercourse by a husband with his own wife against her will, who is living separately during their separation either by a decree of divorce or otherwise, to be punishable. The materials on record clearly indicate that while the wife was living separately from the Petitioner in her parental home, the Petitioner committed sexual

intercourse with her forcibly and also made an attempt to kill her by making criminal trespass into her residential premises. Hence, the prayer made is liable to be dismissed.

5. As it appears, the learned counsel for the Petitioner on a misconception that Section 376-B IPC relates only to sexual intercourse by public servant with a woman in his custody, advanced his submission. No doubt, such a contention is based on the statutory provision under Section 376-B of IPC was there earlier, but in the meanwhile Indian Penal Code has gone through an amendment and Section 376-B now reads as thus;

“376-B. Sexual intercourse by husband upon his wife during separation.-Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.”

6. The wife in this case has categorically stated that while she was living separately from the Petitioner in her parental home, the Petitioner

trespassed into her residence and forcibly committed rape on her and made an attempt to kill her. Since the aforesaid materials on record prima facie disclose commission of cognizable offences and the Court at the stage being not required to thrash out the materials in extenso, but to find out as to whether or not there is a prima facie case to proceed against the accused and there is no statutory bar to proceed against him, the prayer made for quashment of the cognizance and the proceeding against the Petitioner is without any substance.

7. I am in this regard fortified to the decision of the apex Court in the case of **Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd.**, reported in **(2000) 3 SCC 269**, the apex Court have held as follows:-

“Exercise of jurisdiction under the inherent power as envisaged in Section 482 of the Code to have the complaint or the charge-sheet quashed is an exception rather than a rule and the case for quashing at the initial stage must have to be treated as rarest of rare so as not to scuttle the prosecution. With the lodgement of first information report the

ball is set to roll and thenceforth the law takes its own course and the investigation ensues in accordance with the provisions of law. The jurisdiction as such is rather limited and restricted and its undue expansion is neither practicable nor warranted. In the event, however, the court on a perusal of the complaint comes to a conclusion that the allegations leveled in the complaint or charge-sheet on the face of it do not constitute or disclose any offence as alleged, there ought not to be any hesitation to rise up to the expectation of the people and deal with the situation as is required under the law. To exercise powers under Section 482 of the Code, the complaint in its entirety will have to be examined on the basis of the allegation made in the complaint and the High Court at that stage has no authority or jurisdiction to go into the matter or examine its correctness. Whatever appears on the face of the complaint shall be taken into consideration without any critical examination of the same. But the offence ought to appear ex facie on the complaint. The truth or falsity of the allegations would not be gone into by the Court at this earliest stage. Whether or not the allegations in the complaint were true is to be decided on the basis of the evidence led at the trial."

- 8.** So, it is only in the cases when the allegations in the complaint/charge sheet do not make out any case against the accused or do not disclose the ingredients of the offence(s) alleged against the accused or the allegations are patently absurd and inherently improbable so that no prudent person can ever reach to such a conclusion or that there is no

sufficient ground for proceeding against the accused, the power under Section 482 Cr.P.C. has to be exercised by the High Court to quash the prosecution. This is also the view in the case of **Medchl Chemicals & Pharma (P) Ltd.** (supra). Besides the same, if any statutory bar is there to proceed against the accused, the Court shall also not proceed against him. The case of the Petitioner is not covered by any of the circumstances as stated for quashment.

9. Hence, for the aforesaid reasons and in the aforesaid facts and circumstances, the prayer made by the Petitioner for quashment of the cognizance on the ground stated, is devoid of merit and, accordingly, the CRLMC stands dismissed.

(S. Pujahari)
Judge

DA/PKS/MRS