

IN THE HIGH COURT OF ORISSA, CUTTACK

CRLREV No.107 of 2022

From the order dated 25.02.2022 passed by Special Judge (Vigilance), Balangir in C.T.R. Case No.03 of 2012.

Sibaram Sahoo Petitioner

-Versus-

State of Odisha (Vig.) Opp. Party

For Petitioner: - Mr. Himanshu Sekhar Mishra

For Opp. Party: - Mr. Sangram Das
Standing Counsel(Vig.)

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing: 10.08.2022 Date of Order: 05.09.2022

S.K. SAHOO, J. The petitioner Sibaram Sahoo, who was the Octroi Peon of Subarnapur Municipality, has filed this revision petition challenging the impugned order dated 25.02.2022 passed by the learned Special Judge (Vigilance), Balangir in C.T.R. Case No.03 of 2012 under Annexure-3 which arises out of Sambalpur

Vigilance P.S. Case No.24 of 2011 in rejecting the discharge petition filed by him under section 239 of Cr.P.C.

2. On 04.03.2011, on the first information report submitted by one A. Kar, the Deputy Superintendent of Police, Vigilance, Sambalpur Unit before the Superintendent of Police, Vigilance, Sambalpur Division, Sambalpur, the case was instituted.

It is stated in the F.I.R. that on receipt of reliable information about misappropriation of Government money by the petitioner, the informant took up an enquiry and during course of enquiry, it was found that the petitioner and other three octroi peons were entrusted with task of collection of revenue of Subarnapur Municipality. As per order dated 11.03.2008 of the Revenue Officer, the petitioner was directed to perform the work of old age pension, widow pension, approval of building plans, unauthorized construction, license fee etc and was issued with money receipt books Nos.213 and 241 for collection of revenue which were acknowledged by the petitioner. The petitioner accordingly collected fees under different headings from different consumers and issued money receipts to the tax payers. The petitioner was supposed to deposit the collected revenue before the cashier of the Municipality after collection along with the

money receipt book and Daily Collection Register (hereafter 'DCR'). He collected fees from different persons as per M.R. Book No. 213, but deposited a part of it and similarly he collected fees as per M.R. Book No. 241 and issued money receipts to the tax payers but did not maintain DCR nor deposited the money collected with the cashier and thus misappropriated a sum of Rs.1,33,158/- (rupees one lakh thirty three thousand one hundred fifty eight only).

On the basis of such first information report, Sambalpur Vigilance P.S. Case No.24 of 2011 was registered on 04.03.2011 against the petitioner for commission of offences under section 13(2) read with section 13(1)(c)(d) of the Prevention of Corruption Act, 1988 (hereafter 'P.C. Act') and section 409 of the Indian Penal Code and on completion of investigation, charge sheet has been submitted against the petitioner for all such offences under which the F.I.R. was registered and cognizance of offences was taken.

3. As it appears, the petitioner earlier approached this Court in Criminal Revision No.816 of 2014 challenging the order dated 16.07.2014 of the learned trial Court in rejecting the petition under section 239 of Cr.P.C. for discharge. This Court vide order dated 13.12.2021 allowed the revision petition in part

and set aside the order dated 16.07.2014 of the learned trial Court and directed the learned trial Court to pass a fresh order on the discharge petition only to the extent of the grounds urged in paragraph-3 of the discharge petition i.e. relating to absence of the basic ingredients of the offence under section 409 of the Indian Penal Code. It was made clear that the finding relating to validity of the order of sanction was not interfered with.

4. The petition filed by the petitioner before the learned trial Court to discharge him was accordingly heard afresh and after hearing the learned counsel for both the parties, the learned trial Court has been pleased to observe that there are statements of the official witnesses which clearly speak about the entrustment of tax collection work to the petitioner and posting of the petitioner in Subarnapur Municipality. The petitioner acknowledged two M.R. Books for collection of taxes and there are details of collection made by the petitioner during his tenure after his entrustment for collection work. The audit report of the year 2008-09 indicated misappropriation of cash by the petitioner and a request was made for recovery of the same. Accordingly, it was held that from the facts emerged, prima facie there is existence of all the ingredients of the offences under section 409 of the Indian Penal Code as well as section 13(2)

read with section 13(1)(c)(d) of the P.C. Act to proceed against the petitioner after framing charge in order to put him in trial and the discharge petition was rejected.

5. Mr. H.S. Mishra, learned counsel appearing for the petitioner emphatically contended that the petitioner earlier approached this Court in Criminal Revision No.816 of 2014 challenging the letter of sanction as well as absence of ingredients of the offence under section 409 of the Indian Penal Code as well as under the P.C. Act and this Court vide order dated 13.12.2021 remanded the matter to the learned trial Court on the findings arrived at in paragraph-14 of the said order to find out the existence or otherwise the essential ingredients of the offence under section 409 of the Indian Penal Code and P.C. Act and on remand, the learned trial Court has not only completely failed in its legal duty to re-examine the availability of the basic ingredients of the offences under section 409 of the Indian Penal Code and under P.C. Act but also failed to give reasons as required on the availability of the ingredients of the offence under section 409 of the Indian Penal Code particularly the materials regarding misappropriation of funds so also offences under P.C. Act rather solely relying upon the audit report, dismissed the discharge petition. It is further argued that

the impugned order is illegal, unjust and improper and has been passed in a mechanical manner without application of mind and therefore, the same should be set aside. In support of such contention, Mr. Mishra placed reliance in the cases of **Okila Luha -Vrs.- State of Orissa reported in 1984 (1) Orissa Law Reviews 585**, **Hemanta Kumar Patra -Vrs.- State of Orissa and another reported in 2012 (II) Orissa Law Reviews 253** and **Managobinda Mohapatra -Vrs.- State of Odisha reported in (2020) 79 Orissa Criminal Reports 787**.

Mr. Sangram Das, learned Standing Counsel for the Vigilance Department, on the other hand, supported the impugned order passed by the learned trial Court and contended that the observation of the learned trial Court that there are ingredients of the offences under section 409 of the Indian Penal Code as well as P.C. Act is based on consideration of statements of the witnesses, seized M.R. Books, audit report and acknowledgment of the petitioner collected by I.O. during investigation which is quite justified and therefore, the revision petition should be dismissed. He placed reliance in the cases of **State of Delhi -Vrs.- Gyan Devi reported in (2000) 8 Supreme Court Cases 239** and **Amit Kapoor -Vrs.- Ramesh Chandra reported in (2012) 9 Supreme Court Cases 460**.

6. Section 239 of Cr.P.C. provides that if upon considering the police report and the documents sent with it under section 173 of Cr.P.C. and making such examination, if any, of the accused and after giving prosecution and accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused and record his reasons for so doing.

At this stage, the Court is not expected to go deep into the matter to examine the probative value of the police report and the documents sent with it under section 173 of Cr.P.C. The Court should not examine those documents to find out whether a ground for convicting the accused has been made out and whether the materials would warrant a conviction. On the basis of the materials on record, if the Court thinks that the accused might have committed the offence, it can frame the charge. Even very strong suspicion founded on materials before Magistrate is sufficient for framing of charge. It is not a stage of detailed evaluation of the materials and for weighing the pros and cons of all the implications of the materials.

In the case of **Gyan Devi** (supra), it is held as follows:-

"7.....The legal position is well settled 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. At the stage of charge, the Court is to examine the materials only with a view to be satisfied that a prima facie case of commission of offence alleged has been made out against the accused persons. It is also well settled that when the petition is filed by the accused under Section 482 Cr.P.C. seeking for the quashing of charge framed against them, the Court should not interfere with the order unless there are strong reasons to hold that in the interest of justice and to avoid abuse of the process of the Court, a charge framed against the accused needs to be quashed. Such an order can be passed only in exceptional cases and on rare occasions. It is to be kept in mind that once the trial Court has framed a charge against an accused, the trial must proceed without unnecessary interference by a superior Court and the entire evidence from the prosecution side should be placed on record. Any attempt by an accused for quashing of a charge before the entire prosecution evidence has come on record should not be entertained sans exceptional cases."

In the case of **Amit Kapoor** (supra), it is held as follows:-

"12. Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinize the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits.

13. Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is

that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories aforestated. Even framing of charge is a much advanced stage in the proceedings under the Cr.P.C."

The object of discharge under section 239 of Cr.P.C. is to save the accused from unnecessary and prolonged harassment. When the allegations are baseless or without foundation and no prima facie case are made out, it is just and proper to discharge the accused to prevent abuse of process of the Court. If there is no ground for presuming that accused has committed an offence, the charges must be considered to be groundless. The ground may be any valid ground including the insufficiency of evidence to prove the charge. When the materials at the time of consideration for framing the charge are of such a nature that if unrebutted, it would make out no case whatsoever, the accused should be discharged.

7. The contention of the learned counsel for the petitioner that solely relying upon the audit report, the discharge petition was dismissed by the learned trial Court appears to be not correct. In the case of **Hemanta Kumar Patra** (supra), this Court after perusing the case diary observed that the entire case is based on the finding of the audit report. In the case of **Okila Luha** (supra), this Court held that no order of conviction can be based merely on the basis of an audit report of an inconclusive character as the audit notes some objections therein and until the objections are brought to the notices of the persons concerned and liability is fixed by the authorities after proper inquiry, no legal culpability can be fixed.

In the case in hand, when the matter was remanded for fresh consideration, the learned trial Court perused the case records and found as follows:-

"7.....it is seen that there are statements of the official witnesses including Jayakrishna Panda, Auditor of Local Fund Audit, Balangir, Accountant Dukhiram Naik, Cashier Gajendra Sahu, Sarjan Gajaria, Auditor of Local Fund Audit, Balangir, which clearly speaks about the entrustment of tax collection work to the petitioner. Posting of the present accused petitioner in Subarnapur Municipality also proves his service thereunder from his letter of joining

on 11.03.2008. Further, the petitioner has acknowledged two M.R. books vide No.213 and 241 for the work of collection of different taxes and received the same in original stock register in his own handwritings. Further, there is details of collection made by the present petitioner during his tenure after his entrustment for collection work. The audit report of the year 2008-09 clearly reflects in para 10.11 regarding misappropriation of cash by the present petitioner and in para 10.12 there is request for recovery of the same and so also recovery has also been made from the present petitioner.

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10.....on considerations of the statements of the witnesses, seized M.R. books, audit report and acknowledgment of the accused collected by the I.O. during investigation clearly show a prima facie case against the present petitioner under section 409 of I.P.C. On careful evaluation of the materials available on record and the facts emerged therefrom prima facie discloses existence of all the ingredients of the offence under section 409 IPC as well as section 13(2) read with 13(1)(c)(d) of the P.C. Act to proceed against the present petitioner after framing charge in order to put him in trial.....”

In the case of **Managobinda Mohapatra** (supra), it is held as follows:-

"10.....'Criminal breach of trust' has been defined under section 405 of the Indian Penal Code. To constitute the offence of criminal breach of trust, the ingredients are (i) entrustment of a person with property, or with any dominion over the property; (ii) the person so entrusted has (a) dishonestly misappropriated or converted the property to his own use, or (b) dishonestly used or disposed of the property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do.

Any breach of trust is not an offence; the dishonest intention is an essential factor. Wrongful gain or loss actually resulted is the consequence but not always a decisive factor....."

8. In view of the foregoing discussions, it is apparent that it is not only the notings made in the audit report, but also there are statements of witnesses, documentary evidence to show that the petitioner was entrusted with tax collection work of Subarnapur Municipality for a certain period and he was issued with two M.R. books for such purpose. The handwritings of the petitioner in the relevant documents indicate about the tax

collection by him. There are materials to show that he has not maintained daily collection register (DCR) properly during the relevant period and has not deposited the entire money collected towards revenue in the Municipality account. The cashier has stated about the actual deposit made by the petitioner. In view of the oral as well as documentary evidence on record, it is for the petitioner to adduce cogent evidence during trial as to what he did with the balance amount which were not deposited with the cashier and that he has not misappropriated the same. There is strong suspicion against the petitioner based on clinching material which makes out the ingredients of the offences under which charge sheet has been filed. Therefore, the learned trial Court rightly rejected the discharge petition.

Thus on a careful consideration, the impugned order appears to be in accordance with law and the judicial discretion has not been exercised by the learned trial Court arbitrarily or perversely. Accordingly, the criminal revision being devoid of merits stands dismissed.

Before parting, I would like to place it on record by way of abundant caution that whatever has been stated hereinabove in this order has been so said only for the purpose

of disposing of the prayer for discharge made by the petitioner. Nothing contained in this order shall be construed as expression of a final opinion on any of the issues of fact or law arising for decision in the case which shall naturally have to be done by the trial Court at the appropriate stage of the trial.

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S.K. Sahoo, J.

Orissa High Court, Cuttack
The 5th September 2022/PKSahoo

