

AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLREV No. 229 of 2020

Tankadhara Mishra

....

Petitioner

Mr. Manoj Bihari Das, Advocate

Versus

Republic of India

....

Opp. Party

Mr. Sarthak Nayak, counsel for C.B.I.

CORAM:

JUSTICE SAVITRI RATHO

ORDER

18.05.2022

Order No.

08. 1. I have heard Mr. Manoj Bihari Das, learned counsel for the petitioner and Mr. Sarthak Nayak, learned counsel for the C.B.I. through hybrid mode.
2. This revision has been filed challenging the order dated 25.02.2020 passed by the learned Special Judge C.B.I., 1st Court, Bhubaneswar in T.R. Case No.39 of 2010 refusing to discharge the petitioner by rejecting the application filed by the petitioner and framing charge against him and the other accused persons for commission of offences punishable under Sections 120-B/420/471 of the Indian Penal Code (in short the "I.P.C.") and Section 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act 1988 (in short the "P.C. Act").
3. The prosecution allegations in brief are that on the basis of F.I.R. filed with the Superintendent of Police, C.B.I., Bhubaneswar by its officer, a case was instituted on 18.05.2009 against one Ashok Mohapatra for commission of offences under Sections 420/467/468 and Section 471 of I.P.C. on the allegation

that Ashok Ku. Mohapatra being the proprietor of a firm known as Reliance Udayog availed an overdraft facility to the extent of Rs.30.00 lakhs from the Indian Bank, (in short “the Bank”) Tulasipur Branch and submitting documents in respect of the property offered as collateral security by him and the two guarantors Jasoda Dei and Chiita Ranjan Jena, which were later found to be fabricated and the loan was not repaid and it became NPA on 31.3.2007 whereby the Bank had to sustain wrongful loss of an amount of Rs.36.69 lakhs as it could not proceed against the loanee or the guarantors as the papers were not genuine. The allegations against the petitioner is that without verifying the genuineness of the documents submitted by the main accused and relying on unacceptable materials and documents he deliberately gave a favourable opinion in favour of the loanee. The lease deed produced by the loanee in respect of a plot of land in CDA was not the original lease deed and the original lease deed had been submitted to Andhra Bank earlier but without verifying the original and on the basis of the forged copy, the petitioner had given a favourable opinion. As regards the property offered by guarantor Jasoda Dei, she was a co-sharer alongwith one Singa Rout, but the petitioner had given a favourable opinion stating that the co-sharer had sold his share as reflected in the encumbrance certificate, so the guarantor could offer the property as collateral security. As regards the property offered by guarantor Chittaranjan Jena, the ROR submitted by the guarantor had only his name and was a fake one as in the earlier ROR issued by the consolidation authority, the names of the mother and sister of Chittaranjan Jena were also there. But without verification, the petitioner intentionally misguided the Bank by giving his opinion that Chita Ranjan Jena was the

exclusive owner. Relying on his opinion that the property was free from encumbrances, the Bank accepted the three properties as collateral security and was put to loss. The Bank Manager was not empowered to sanction the loan. But all the accused persons conspired together to assist the main accused to avail the loan. Investigation revealed that a number of other cases on similar allegations were pending against the main accused Sri Ashok Mohapatra. After investigation chargesheet was filed against the loanee, one Fakir Mohan Sethi and the present petitioner for commission of offences under Sections 120-B/420/471 of I.P.C. read with Section 13 (2) and 13 (1) (d) of the P.C. Act.

4. The petitioner had earlier approached this Court in Criminal Revision No. 09 of 2012 challenging the order dated 16.12.2011 framing charge against the petitioner which was disposed of by order dated 23.09.2016 wherein the impugned order was set aside and liberty was granted to the petitioner to file application for discharge before the learned trial Court.

5. The said application has been rejected by the learned trial Court by order dated 25.02.2020 by a well reasoned order. The learned Court has also mentioned in the order that there was delay in disposal of the petition as the court was lying vacant till 29.10.2018 and after he joined after learning about the order of this court, he insisted that the parties remained present for consideration of the application for discharge. The learned Court has considered the allegations against the petitioner and stated that it could not be said at this stage that no prima facie case was made out against the petitioner and rejected the application filed for discharge and after perusal of the FIR, charge sheet, police papers and other materials on record found sufficient ground to frame charge against them and framed charge against them for

commission of offences under Sections 120-B/420/471 of I.P.C. read with Section 13 (2) and 13 (1) (d) of the P.C. Act.

6. Learned counsel for the petitioner submits that the petitioner is a practising Advocate and panel lawyer of the Bank and documents had been provided to him by the Bank on the basis of which he had to give his opinion. He has submitted that the learned trial Court went wrong in holding that his opinion was not based on the ROR submitted to the Bank as the up-to-date ROR on the government website indicated the name of Chittaranjan Jena so there was nothing wrong with his opinion regarding his exclusive ownership. He further submitted that the learned court below has without application of mind observed that the loanee submitted a forged lease deed bearing number 1452 dated 23.4.1998 executed between Ashok Mohapatra and C.D.A. authority which was within knowledge of the petitioner, where there is no material available on record that by lease deed No.1452 the ownership of the land mentioned therein has not been vested with the lease holder concerned. He has filed the copies of the opinion and clarification furnished by the petitioner to the Indian Bank for perusal of the court. He relies on the decisions reported in **2013 (1) OLR SC 74 (CBI Hyderabad v. K.Narayan Rao)**, (ii) **2010 (1) OLR 934 (Nrusingha Nath Mishra v. Republic of India)**, (iii) **2015 (1) Crime Orissa 780 (Nimai Charan Mohanty v. Union of India)**, (iv) **Criminal Revision No.1113 of 2014 (Anindya Kumar Mishra v. Republic of India)** decided on 04.04.2016.

7. Mr. Sarthak Nayak, learned counsel for the C.B.I. submitted that the accused-petitioner being a panel lawyer of the Bank furnished favorable opinion when he knew that the lease deed was not the original one and a copy had been given and the

original document had been submitted to another Bank for sanction of loan and the loanee had already availed a loan on the basis of that document. He also submitted that the petitioner has stated in his opinion dated 27.11.2003 that he had scrutinized the documents produced by the applicant and verified the same from the original records and stated that the main accused has a good clear and marketable title over the property and that it was free from all encumbrances and charges and liens, disputes whatsoever. Similar opinion was given by him on 27.12.2003 in respect of the property of the guarantor Chittaranjan Jena and on 14.01.2014 in respect of the property offered by guarantor Jasoda Dei. So the petitioner has intentionally given the opinions to help the main accused for which the decisions relied on by the petitioner can be of no assistance to him. He relies on the decision dated 29.09.2013 of the Delhi High Court in the case of **P. S Shetty vs CBI in W.P.(CRL) No.1380 of 2013** and submits that there is no merit in the revision application which should be dismissed.

On 06.11.2021, Mr. Nayak, learned counsel for the C.B.I has filed copies of eleven documents which includes a decision of the Delhi High Court for perusal of the Court, stating that the culpability of the petitioner is made out from these materials. He has however not filed any written note of submission.

1. Chargesheet 1-11
2. Affidavit by Chitaranjan Jena 12-13
3. Statement of Chitaranjan Jena 14-15
4. Statement of Jagabandhu Jena 16-17
5. ROR of Chitaranjan Jena 18-29
6. Legal Opinion dated 27.11.2003 30-35

7. Legal Opinion dated 27.12.2003 36-42
8. Legal Opinion dated 23.12.2003 43-49
9. Legal Opinion dated 24.12.2004 50-57
10. Letter dated 15.01.2014 of Shri Fakir Mohan Sethi 58
10. Lease deed 59-75
11. Decision of the Delhi High in P.S Shetty vs CBI in W.P (CRL) No. 1380 of 2013 76-80

8. I have carefully gone through the documents filed by both the counsels, the written note of submission filed on behalf of the petitioner and the impugned order. The learned trial Court after discussing the materials available against the petitioner has held that a prima facie case is made out against the petitioner and refused to discharge him.

9. I have also gone through the decision dated 04.04.2021 in W.P.(CRL) No.881 of 2009 of this Court in the case of ***Tankadhar Mishra vs State of Orissa*** reported in ***2018 (I) OLR 860***, where similar allegations had been made against the petitioner. In the said case, the proceedings against the petitioner therein in CID P.S case Nos.34 and 36 of 2008 have been quashed by this Court as it found that the petitioner had given his opinion fairly.

In the case of ***P.S. Sethy*** (supra), the Delhi High Court in paragraphs 18, 19, 20 and 26 has held as follows :-

“18. An undoubtful proposition about a lawyer's ethics would be an unflinching loyalty to the interests of the client. A legal opinion may not be binding on any authority but merely because such legal opinion is capable of being rejected also, a professional lawyer cannot be absolved of his responsibility if there are other materials to suggest that the wrong opinion or negligence in conducting research for giving an opinion was not inadvertent or because of incompetence of the

professional but only with an avowed purpose of defeating the claims and interests of the organisation as against the demands of other accused persons.

19. It has been submitted on behalf of the CBI that after the framing of charges, many witnesses have been examined and the deposition of some of the witnesses have been brought on record by the petitioner.

20. For the present, it can only be said that had the legal scrutiny report been otherwise, the loan would not have been advanced and in that event the Bank would not have been put to loss. The sale deed with respect to the property which was offered as collateral security was found to be forged and the firm had already availed of credit facilities from other Bank on the basis of same collateral security.

26. Merely, because the petitioner is a legal professional, full dress trial which is required in a case of this kind, ought not to be halted in between. It is only during trial that such materials regarding conspiracy of the petitioner with other accused persons would surface.”

10. I find no illegality in the impugned order which is a well reasoned one and based on materials on record and at the stage of framing of charge the learned trial Court could not have made a threadbare analysis of the materials appearing against the petitioner in order to reach a conclusion as regards his guilt.

11. The decision of the Delhi High Court supports the case of the prosecution. But after going through the decisions of the Supreme Court and this Court which have been relied on by the petitioner (the relevant portions are extracted below) and as it has not been brought to my notice that the decisions of this Court have been set aside by the Supreme Court, I am constrained to interfere with the impugned order.

The Supreme Court in the case of **K.Narayan Rao** (*supra*) found that the only allegation against the accused who

had given a false legal opinion to the Bank in respect of housing loans in the capacity of a panel advocate and did not point out the actual ownership of the properties contended on behalf of the accused that he had given his opinion based in the documents submitted by the Bank and it was not possible on his part to investigate into the genuineness of the documents. Paragraphs 22, 23, 24, 25, 26 and 27 of the judgment, which are relevant for the case are extracted below:-

“22) The High Court while quashing the criminal proceedings in respect of the respondent herein has gone into the allegations in the charge sheet and the materials placed for his scrutiny and arrived at a conclusion that the same does not disclose any criminal offence committed by him. It also concluded that there is no material to show that the respondent herein joined hands with A-1 to A-3 for giving false opinion. In the absence of direct material, he cannot be implicated as one of the conspirators of the offence punishable under Section 420 read with Section 109 of IPC. The High Court has also opined that even after critically examining the entire material, it does not disclose any criminal offence committed by him. Though as pointed out earlier, a roving enquiry is not needed, however, it is the duty of the Court to find out whether any prima facie material available against the person who has charged with an offence under Section 420 read with Section 109 of IPC. In the Banking sector in particular, rendering of legal opinion for granting of loans has become an important component of an advocate’s work. In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skills.

23) A lawyer does not tell his client that he shall win the case in all circumstances. Likewise a physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only

assurance which such a professional can give or can be given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him, he would be exercising his skill with reasonable competence. This is what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of the two findings, viz., either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess.

24) In *Jacob Mathew vs. State of Punjab & Anr.* (2005) 6 SCC 1 this court laid down the standard to be applied for judging. To determine whether the person charged has been negligent or not, he has to be judged like an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices.

25) In *Pandurang Dattatraya Khandekar vs. Bar Council of Maharashtra & Ors.* (1984) 2 SCC 556, this Court held that “...there is a world of difference between the giving of improper legal advice and the giving of wrong legal advice. Mere negligence unaccompanied by any moral delinquency on the part of a legal practitioner in the exercise of his profession does not amount to professional misconduct.

26) Therefore, the liability against an opining advocate arises only when the lawyer was an active participant in a plan to defraud the Bank. In the given case, there is no evidence to prove that A-6 was abetting or aiding the original conspirators.

27) However, it is beyond doubt that a lawyer owes an “unremitting loyalty” to the interests of the client and it is the lawyer’s responsibility to act in a manner that would best advance the interest of the client. Merely because his opinion may not be acceptable, he cannot be mulcted with the criminal prosecution, particularly, in the absence of tangible evidence that he associated

with other conspirators. At the most, he may be liable for gross negligence or professional misconduct if it is established by acceptable evidence and cannot be charged for the offence under Sections 420 and 109 of IPC along with other conspirators without proper and acceptable link between them. It is further made clear that if there is a link or evidence to connect him with the other conspirators for causing loss to the institution, undoubtedly, the prosecuting authorities are entitled to proceed under criminal prosecution. Such tangible materials are lacking in the case of the respondent herein.”

In the case of **Nrusingha Nath Mishra (supra)**, this Court has held as follows:-

“4. In the instant case, there is absolutely no allegation made by the prosecution with regard to the petitioner or the co-accused cheating the New India Assurance Company Ltd. and dishonestly inducing the said company to deliver any property. As a matter of fact, the prosecution has admitted that on lodging of the claim by the petitioner, the claim was settled and the prosecution never alleges that before settling the claim, due procedure was not followed. With regard to the offence under section 120-B IPC, there is absolutely no material or allegation made by the prosecution, prima facie, satisfying the ingredients of the said offence which relates to punishment of criminal conspiracy as defined in section 120-A IPC. No materials whatsoever have been brought out during the investigation to show any agreement or conspiracy between the two co-accused persons to commit any offence. At this juncture, it would be profitable to note that the other co-accused is an advocate, who was engaged by the New India Assurance Company Ltd. to investigate the case and while performing such professional work, he sent a report that he could not trace out any records regarding hospitalization of the petitioner at S.C.B. Medical College, Hospital. There is no material whatsoever to show prima facie that the co-accused in order to cause an illegal gain to either himself or the petitioner or to cause illegal loss to the company gave such a report. A report or opinion rendered by an advocate, to his client, if found to be incorrect, cannot

constitute an offence when nothing is shown that such report or opinion is purposefully given to commit any offence. The prosecution has also not come out with any material disclosing meeting of mind between the two accused persons to bring home the charge under section 120-B IPC. Rather, the allegation in the F.I.R. was made that the co-accused conspired with one Beni Madhan Dwivedi, who was functioning as a Divisional Manager and the said Beni Madhab Dwivedi is not an accused in the charge sheet filed.”

In the case of **Nimai Charan Mohanty (supra)**, this Court has held as follows:

*.... “9. Having gone through the order of the learned Special Judge, C.B.I., it appears that the learned Special Judge has entered into conjectures and surmises and has held that the petitioner has submitted a false legal opinion about the genuineness of the document in question. This finding regarding the legal opinion about the genuineness of the document in question does not arise in this case. The moot question that is to be decided at this stage is, if there are sufficient materials on record to find out if the present petitioner has entered into a criminal conspiracy with other accused persons to return the N.S.Cs. in favour of the main accused and in pursuance to such criminal conspiracy he deliberately rendered an illegal opinion. In the case of **Central Bureau of Investigation, Hyderabad v. K.Narayana Rao** supra, the Supreme Court has held that a lawyer owes an “unremitting loyalty” to the interests of the client. The Supreme Court has further held that merely because his opinion may not be acceptable, he cannot be mulcted with the criminal prosecution, particularly, in absence of tangible evidence that he associated with other conspirators. The Supreme Court has further held that at the most, he may be liable for gross negligence of professional misconduct if it is established by acceptable evidence and cannot be charged of the offence under Section 420 and 109 of the I.P.C.along with other conspirators without proper and acceptable link between them. It is further made clear by the Supreme Court that if there is a link or evidence to connect him with the other*

conspirators for causing loss to the institution, undoubtedly, the prosecuting authorities are entitled to proceed under criminal prosecution. Such tangible materials were lacking in the reported case... ”.

In the case of **Anindya Kumar Mishra** (*supra*), this Court has held as follows:

... “10. At this juncture, a reference may be made to the judgment of the Madras High Court in the case of S.Udayakumar vrs. State represented by Inspector of Police, CCIW CID/Chengai East Unit, Manu/TN/0197/2008 relied upon by the petitioner wherein in paragraph-6 it has been held as follows:-

“,, 6. An advocate is not a detective of forged documents or an expert to give opinion as to the forgery or otherwise of a document. The petitioner, having received the documents alleged to be originals, perused them and certified that he verified the original documents also. A, meticulous concoction of a document would outsmart the original thereof in its form and execution. It is only an expert or a detective in the field unearthing forgery of documents can bring to light the duplicacy or concoction applying his expertise. A Legal Advisor is not supposed to play the role of a document expert.”

11. Liability against an opining advocate arises only when the lawyer was an active participant in a plan to defraud the Bank. Even if some acts are proved to have been committed, it must be clear that they were so committed in pursuance of an agreement made between the accused persons who are parties to the alleged conspiracy. Inferences from such proved circumstances regarding the guilt may be drawn only when such circumstances are incapable of any other reasonable explanations. In other words, an offence of conspiracy cannot be deemed to have been established on mere suspicion and surmise or inference which are not supported by cogent and acceptable evidence. There is no material to show that the present petitioner was abetting or aiding the co-accused persons in commission of the offences. Merely because the petitioner had omitted to point out the discrepancy mentioned in the

*R.S.D. and Encumbrance Certificate, he cannot be mulcted with the criminal prosecution, particularly in absence of tangible evidence that he had conspired with other co-accused persons or to show that he was aware of the fact that the R.S.D. and the lease deed were forged documents. So, the petitioner cannot be charged under Sections 120-B/420/471 of I.P.C. Such view finds support from the decision of the Apex Court in the case of **K.Narayana Rao** (supra).”*

12. In the present case, the petitioner is a practising Advocate and was not named in the FIR and the evidence in the case is yet to be recorded. No doubt his opinion is defective and has caused loss to the Bank. But there is no allegation that ‘he was an active participant in a plan to defraud the Bank’ or that he was abetting or aiding the original conspirators for which in view of the observations of the Supreme Court and this Court in the aforesaid cases, I am constrained to set aside the impugned order dated 25.02.2020 passed by the learned Special Judge C.B.I., 1st Court, Bhubaneswar in T.R. Case No. 39 of 2010 where the learned trial court has refused to discharge the petitioner.

13. The Criminal Revision is accordingly allowed.

(Savitri Ratho)
Judge

Bichi