

IN THE HIGH COURT OF ORISSA AT CUTTACK
CRL REV No. 702 of 2013

An application under Section 401 of Cr.P.C., 1973 read with Section 397 of Cr.P.C. arising out of the order dated 19.06.2013 passed by the learned J.M.F.C., Motu in G.R. Case No.75 of 2010.

Binodini Panda

.... Petitioner

-versus-

State of Odisha

.... Opp. Party

Advocates appeared in this case through Hybrid Mode :

For Petitioner

: Mr.Purusottam Chuli, Advocate

For Opp. Party

: Mr.P.C.Das, ASC

Mr. S.S.Pradhan, AGA

CORAM:

JUSTICE SAVITRI RATHO

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Date of Judgment : 25.07.2022
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Savitri Ratho, J. In this CRLREV, the petitioner has challenged the order dated 19.6.2013 passed by the learned J.M.F.C., Motu at M.V. 79 in G.R. Case No.75 of 2010 corresponding to Kalimela P.S. Case No.34 of 2010 issuing summons to the petitioner under Section 319 Criminal Procedure Code (in short “Cr.P.C.”) to face trial as there was sufficient

material for the offence under Section 409/34 IPC against the petitioner and accused Keshab Kunda (who was facing trial).

2. The brief facts of the case is that one Smt. B.S.B.N. Bag, District Social Welfare Officer, Malkangiri lodged an F.I.R. before the Kalimela Poilce Station that 129.75 quintal of India mix was misappropriated by the staff at I.C.D.S., Project, Podia. As per direction of the Collector, Malkangiri, the F.I.R. was lodged against Sri Keshab Khillo, Ex.Jr. Clerk and SA Podia ICDS now working as Senior Clerk at Tahasil, Kudumulugumma and the present petitioner Smt. Binodini Panda, Supervisor and I/C. CDPO, Podia.

3. Learned counsel for the petitioner has submitted that the petitioner has never been appointed as C.D.P.O. at any point of time. As she was the senior most supervisor, she was directed by the BDO to remain in charge of CDPO with the formal function of signing monthly returns and reports of the post of CDPO, Podia. The B.D.O. was the drawing and disbursing officer of the aforesaid CDPO. At no point of time the petitioner had undertaken any financial power of the CDPO nor was in-charge of the food stuff. On 31.12.2009, while relieving the original accused Keshab Khillo, then Junior Clerk, the petitioner had directed him to hand over detail charges of his

assignment to Sri Maguni Mahapatra, Senior Clerk of the office and submit a copy to the petitioner for office record. But he did not comply with the aforesaid order of the petitioner but got relieved and joined at his new place of posting. She had been given a clean chit in the enquiry held by the Sub Collector and the I.O. also did not find any material against her to submit chargesheet against her. However on 19.06.2013, the learned trial court after referring to the evidence of P.W.7, P.W.8 (the petitioner) and P.W. 11 (the I.O.) has suo motu passed the impugned order, issuing summons to the petitioner under Section 319 Cr.P.C. to face trial on the ground that there is sufficient prima facie material for the offence under Section 409/34 of I.P.C. against the petitioner and accused No.1. He further submits that the learned trial court took it amiss when the petitioner who was examined as P.W. 8 stated in her cross examination, that she cannot say if the accused (Kesaba Khillo) had misappropriated India Mix food material and if a false case had been instated against him. In support of his contention, learned counsel for the petitioner has relied on the case reported in **2014 (57) OCR SC 455 (Hardeep Singh v. State of Punjab and others)** and **AIR 1990 SC 2158 (Sohanlal and others v. State of Rajasthan)**.

4. The learned State Counsel has supported the impugned order submitting that the trial court has ample power to proceed against any person if the evidence recorded makes out a case to proceed against such a person. In the present case as the petitioner was in charge of the post of CDPO, Podia and was signing the monthly returns and reports, she is equally responsible alongwith the Junior Clerk Kesaba Khillo as it was her duty to verify if the returns and reports were correct before signing them. The learned trial court after perusing the evidence of P.Ws 7, 8 and P.W 11 has found that during the period, the India Mix was misappropriated, the petitioner was the CDPO, so she was responsible with the original accused for shortage.

5. The learned trial court relying on the evidence of P.Ws 7, 8 and P.W. 11 found that the petitioner was the CDPO in Podia Block from 01.03.2009 to 20.03.2010. On the date the stock was verified, even though she claimed to be absent, she was the CDPO and during her tenure, 2525.75 qtl of Indian Mix was received and 2211 qtl was supplied to anganwadi worker center and surplus was 175 qtl instead of 340.75 qtl but form D revealed surplus of 175 qtl instead of 304.75 qtl. As per evidence of the P.W.11, the I.O. receipt and supply of stock is done with the knowledge of the CDPO and is distributed as

per her direction. So she was responsible alongwith the dealing assistant for the shortage.

6. Section-319 Cr.P.C provides as follows:

Section – 319 .Power to proceed against other persons appearing to be guilty of offence.

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then-

(a) *the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;*

(b) *subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.*

7. The Supreme Court in the case of **MCD vs Ram Kishan Rastogi** reported in **(1983) 1 SCC 1**, has held as follows :

...."19. In these circumstances, therefore, if the prosecution can at any stage produce evidence which satisfies the Court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence Court can take cognizance against them and try them along with the other accused. But, we would hasten to add that this is really an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken. More than this we would not like to say anything further at this stage. We leave the entire matter to the discretion of the Court concerned so that it may act according to law. We would, however, make it plain that the mere fact that the proceedings have been quashed against respondents 2 to 5

will not prevent the Court from exercising its discretion if it is fully satisfied that a case for taking cognizance against them has been made out on the additional evidence led before it.”

In the case of ***Michael Machado & Anr. v. Central Bureau of Investigation & Ors.*** (2000) 3 SCC 262 , the Supreme Court has held as follows :

... “11. But even then, what is conferred on the court is only a discretion as could be discerned from the words the court may proceed against such person. The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the court should turn against another person whenever it comes across evidence connecting that another person also with the offence. A judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence. It must be remembered that there is no compelling duty on the court to proceed against other persons.”

... “14. The court while deciding whether to invoke the power under Section 319 of the Code, must address itself about the other constraints imposed by the first limb of sub- section (4), that proceedings in respect of newly

added persons shall be commenced afresh and the witnesses re-examined. The whole proceedings must be re-commenced from the beginning of the trial, summon the witnesses once again and examine them and cross-examine them in order to reach the stage where it had reached earlier. If the witnesses already examined are quite a large in number the court must seriously consider whether the objects sought to be achieved by such exercise is worth wasting the whole labour already undertaken. Unless the court is hopeful that there is reasonable prospect of the case as against the newly brought accused ending in conviction of the offence concerned we would say that the court should refrain from adopting such a course of action.” ...

... “16. The statements of those three witnesses were placed before us. No doubt the statements may create some suspicion against the appellants. But suspicion is not sufficient to hold that there is reasonable prospect of convicting the appellants of the offence of criminal conspiracy.

17. We strongly feel that a situation has not reached as to waste the whole massive evidence already collected by the trial court thus far, against the 4 accused arraigned in the case. Hence the order of the trial court in exercise of Section 319 of the Code has to be interfered with for enabling the trial to proceed to its normal culmination.”

In the case of **Hardeep Singh** (supra), a five judge Bench was deciding a reference which arose due to a variety of views expressed by the Supreme Court and several High Courts on the scope and extent of the powers of the courts to arraign any person as an accused during the course of inquiry or trial as contemplated under Section 319 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.'). Five questions had been framed and answered by the Court. Question IV is relevant for the purpose of deciding this application. The question and the answer of the Court are extracted below:

.... “ Q.IV What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319 (1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted? ”

“A. Though under Section 319(4)(b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused

and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial - therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different”

The larger Bench of the Supreme Court also held as follows :

“98. Power under Section 319 Cr.P.C is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

99. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to

conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if “it appears from the evidence that any person not being the accused has committed any offence” is clear from the words “for which such person could be tried together with the accused”. The words used are not “for which such person could be convicted”. There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused.”

8. From a careful reading of the aforesaid judgments of the Supreme Court and the provisions contained in Section-319 Cr.P.C., it is apparent that power to summon a person not before it to face trial, is available with the trial court which can be exercised on the basis of an application or even suo motu. The trial court has the discretion whether or not to exercise such power even if materials surface against a person who is not before it, as the words appearing in Section 319 (1) of the Cr.P.C are “*may proceed*” and not “*shall proceed*”. Apart from scrutinizing the evidence, the trial Court is also required to consider the other factors before issuing summons, as issuance of summons under Section 319 Cr.P.C. entails a denovo trial. Therefore the trial court, has to exercise the discretion vested in it with great care and caution and not as a matter of course and not in a “cavalier” manner. If

during trial, convincing materials surface against a person (i.e. from the evidence of witnesses) who is not facing trial or is not before the court, summons can be issued to such a person, even if such person had named in the FIR but was not chargesheeted and also against a person who has been discharged. In the case of **Hardeep Singh** (supra), the Supreme Court has held that as regards a person who has been discharged, proceedings cannot be commenced against him directly under Section 319 Cr.P.C., recourse has to be taken to provisions of Section 300 (5) read with Section 398 Cr.P.C.

9. Therefore for deciding if any case is made out for interfering with the impugned order, it would be necessary to examine requirements of Section 405 and Section 409 IPC and to peruse the evidence of the witnesses examined during the trial, especially those on whom the learned trial Court has placed reliance on, for proceeding against the petitioner.

Section 405. Criminal breach of trust.—*Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that 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 wilfully suffers any other person so to do, commits “criminal breach of trust”.

Section – 409. Criminal breach of trust by public servant, or by banker, merchant or agent.—*Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

P.W.7 was the District Social Welfare Officer, Malkangiri who had lodged FIR. She has interalia stated that on 16.03.2010, she had been to Podia Block and ICDS office, Podia and on that day, the successor of the accused, one Mr. William was in charge of the stock register and the stock of India. On physical verification, shortage of 129.75 qtls was found in the stock. She informed the Collector and lodged a report against the accused and the petitioner in the Kalimela Police Station. In cross examination, she agreed that when fresh stock

is brought it is entered in the register maintained by the CDPO and kept under responsibility of the CDPO and CDPO has knowledge of supply of quantity of India Mix to anganwadi centres and the CDPO is the immediate authority of the Junior Clerk.

P.W.11, was the S.I. of Police Kalimela, who has stated that in his examination in chief that on the transfer of the accused from Podia block, the then CDPO Malkangiri had directed the accused through letter to hand over the charge of the stock register and SNP emergency register to Maguni Patra his successor in office. In cross examination, he admitted that the case had been registered against the petitioner alongwith the accused and that whenever any stock is received and supplied it is with the knowledge of the CDPO and distributed as per her direction.

P.W. 8 is the petitioner herself. In her examination in chief, she has stated that she was not present in Headquarters when the case was initiated by the complainant and came to know later that she had verified the stock register relating to India Mix and found shortage of about 129 qtls. In cross examination she stated that she cannot say if the accused had misappropriated India Mix and a false case had been foisted against him.

10. After considering the submissions of the learned counsels, the provisions of Section 405 and 409 IPC, the provisions of Section – 319 Cr.P.C and the decisions of the Supreme Court referred to above and careful perusal of the depositions of the witnesses referred to above, I find that the conduct of the petitioner gives rise to a suspicion regarding commission of the offence under Section 409 IPC by her, but the evidence relied on by the learned trial court, is not of such a nature or standard so as to justify proceeding against the petitioner under Section – 319 Cr.P.C and to hold a denovo trial. The impugned order warrants interference. The impugned order dated 19.6.2013 passed by the learned J.M.F.C., Motu at M.V. 79 in G.R. Case No.75 of 2010 corresponding to Kalimela P.S. Case No.34 of 2010 issuing summons to the petitioner under Section 319 Criminal Procedure Code (in short “Cr.P.C.) to face trial alongwith the original accused, is accordingly set aside.

11. Perusal of the ordersheet in this Criminal Revision reveals that vide interim order dated 26.08.2013, the further proceedings in the trial had been stayed. This interim order of stay has been extended from time to time but after 08.11.2013 the case was listed after eight years on 08.10.2021. In other words, the case had not been listed/taken up for about eight years and the trial remained stayed all this.

12. This however is not a unique situation and has happened in many cases all over the country for which, in the case of ***Asian Resurfacing of Road Agency Private Limited and Another vrs. Central Bureau of Investigation***, reported in ***(2018) 16 SCC 299***, the Supreme Court has directed as follows :

.....“36. In view of the above situation of proceedings remaining pending for long on account of stay needs to be remedied. Remedy is required not only for corruption cases but for all civil and criminal cases where on account of stay, civil and criminal proceedings are held up. At times, proceedings are adjourned sine die on account of stay. Even after stay is vacated, intimation is not received and proceedings are not taken up. In an attempt to remedy this situation, we consider it appropriate to direct that in all pending cases where stay against proceedings of a civil or criminal trial is operating, the same will come to an end on expiry of six months from today unless in an exceptional case by a speaking order such stay is extended. In cases where stay is granted in future, the same will end on expiry of six months from the date of such order unless similar extension is granted by a speaking order. The speaking order must show that the case was of such exceptional nature that continuing the stay was more important than having the trial finalized. The trial Court where order of stay of civil or criminal proceedings is produced, may fix a date not beyond six months of the order of stay so that on expiry of period of

stay, proceedings can commence unless order of extension of stay is produced”

The trial courts should therefore strictly follow the directions of the Supreme Court in the case of **Asian Resurfacing** (supra) so that proceedings before them do not remain stayed indefinitely for years together due to orders passed by higher courts and subsequent non listing or disposal of the cases.

As the trial is pending since 2013, the learned trial Court is requested to proceed with the trial against the original accused in accordance with law, without further delay.

13. The Criminal Revision is allowed with the aforesaid observations.

14. Copy of this order be sent to the learned J.M.F.C., Motu at M.V. 79, by the registry forthwith.

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(Savitri Ratho)
Judge

*Orissa High Court, Cuttack
Dated 25th July 2022/Bichi*