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IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLREV No. 692 of 2018

An application under Section 401 Cr.P.C. 1973 read with Section 397 of Cr.P.C. arising out of the order dated 20.07.2018 passed by the learned Special judge (Vigilance), Jeypore in G.R Case No 04 of 2012 (V).

1. Ramesh Chandra Panda

2. Subhashree Panda @ Sahu **Petitioners**

-versus-

State of Orissa (Vigilance) **Opp. Party**

Advocates appeared in this case through Hybrid Mode :

For Petitioners : *Mr.M.K.Mohapatro Advocate
on behalf of Mr. P.K Behera, Advocate*

For Opp. Party : *Mr. Sangram Das,
Standing Counsel, Vigilance*

CORAM:

JUSTICE SAVITRI RATHO

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Date of Judgment : 25.07.2022
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Savitri Ratho, J. In this Criminal Revision, the petitioners have challenged the order dated 20.07.2018 passed by learned Special Judge (Vigilance), Jeypore in G.R. Case No. 04 of 2012 rejecting

the application filed for discharge by the petitioners and framing charge against them for commission of offences punishable under Section 13 (2) read with Section 13 (1) (e) of the Prevention of Corruption Act, (in short, “the P.C. Act”) and Section 109 of the Indian Penal Code (in short “the IPC”).

2. The prosecution case in brief is that on the allegation of possession of disproportionate assets to the known source of income of the petitioners, Koraput Vigilance P.S. Case No. 5 of 2012, under Section 13 (2) read with Section 13(1) (e) of the P.C. Act, 1988 was registered by the Koraput Vigilance Division. During investigation, it was found that Petitioner No.1 (Ramesh Chandra Panda) completed A.M.I.E. from Madras in the year 1989 and joined in the PH Division, Rayagada on 04.10.1989 as a stipendiary Engineer with consolidated pay of Rs.2000/- per month, and from 2005 his consolidated pay was enhanced to Rs.7000/- per month up to August, 2009. At the time of institution of this case, on 10.02.2012 he was posted as Asst. Engineer, PHD, Koraput, NAC. In 1991, Petitioner No.1 got married to Petitioner No.2 Subhashree Sahu and at the time of marriage cash of Rs.16,000/- for conveyance, and Rs.15,000/- towards purchase of scooter was received by accused-petitioner No.1. Accused No.2 was engaged as a radio artist from July, 1994 up to 10.07.2011 and her total

income during that period is stated to be Rs.22,452/-. The total income of both the petitioners constituting a family from known sources for the check period is stated to be Rs.16,90,182/-, and expenditure is stated to be Rs.10,88,994/-. The assets acquired by the accused persons during the check period are stated to be one three storied building constructed over plot Nos.255, 249, 256 in Khata No.263/76 situated at mouza Jeypore L.R., donger land-II of Ac.1.73 cents situated at Tumbarla mouza, under Nabarangpur Tahasil vide plot Nos.151, 152, 153 in Khata No.283 vide document No.951/2004 of D.S.R., Nabarangpur for Rs.22,490/-, donger land-II of Ac.0.74 situated in Tumbarala mouza under Nabarangpur Tahasil covered by plot No.809, in Khata No.185, plot Nos.140,141, in Khata No.95 purchased in the name of Subhashree Sahu vide document No.950 of 2004 of D.S.R., Nabarangpur for Rs.9,620/-, house site measuring 60'X60' (0.08 cents) situated at Tumbarala mouza, under Nabarangpur Tahasil covered by plot No.809, in Khata No.185, plot Nos.64, 807, 808, 810 in Khata No.186 purchased in the name of Subhashree Sahu on 06.07.2007 vide document No.863 of 2007 of D.S.R., Nabarangpur for Rs.1,38,900/-, and other house hold articles, electrical gadgets, furniture, gold and silver ornaments, vehicle, bank deposits and postal deposits. The total value of the movable and immovable

assets has been worked out as Rs.39,16,826/-. Neither of the accused persons have filed any income tax return for the check period. After completion of investigation, charge sheet under Section 13 (2) read with 13 (1) (e) of the P.C. Act against Petitioner No.1 - Ramesh Chandra Panda and under Section 13 (2) read with 13 (1) (e) of the P.C. Act and Section 109 of the Indian Penal Code (in short “the IPC”) against the Petitioner No. 2 - Subhashree Sahu, has been filed.

3. The petitioners filed an application under Section 239 Cr.P.C for discharge which the learned Sessions Judge-cum-Special Judge (Vigilance), Jeypore has rejected vide order dated 20.07.2018 holding that the necessity of sanction for prosecution against the accused persons and occasion of grave prejudice caused to them may be the subject matter of appreciation of evidence and it was to be seen prima facie if the accused No.1 along with accused No.2 wife had acquired immovable and movable properties cost of which is shown to be Rs.39,16,826/- as against his probable income from all known sources shown to be Rs.16,19,182/- and there was nothing to show that the materials available on record were insufficient to frame charge against them for commission of offences under Section 13(2) read with Section 13(1)(e) of the P.C.

Act, 1988, read with Section 109 of the I.P.C and accordingly framed charge under the aforesaid Sections against them.

4. The representation dated 14.01.2013, chargesheet under Section – 207 CrI.P.C, petition for discharge and the impugned order dated 20.07.2018 have been filed alongwith the Criminal Revision Application as Annexure-1 Annexure-2, Annexure-3 and Annexure-4 respectively. Mr. M.K. Mohapatro, learned counsel on behalf of Mr. P.K. Behera, learned counsel for the petitioners has filed a written note of submission dated 02.12.2021 and a date chart dated 05.07.2022 along with six annexures (Annexures-5 to 10). Annexure-5 is the order dated 11.08.2014 passed by the learned Odisha Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.2327(c) of 2014, Annexure-6 is the letter no.1587 dated 03.02.2015 issued by Chief Engineer, P&H (Urban), Annexure-7 is the order no.7 in O.A. No.2327(c) of 2014, Annexure-8 is the cognizance order in Vigilance P.S. Case No.05 of 2012, Annexure-9 is the judgment passed by the learned tribunal in O.A. No.2327(c) of 2014 dated 06.01.2017 and Annexure-10 is the order passed in W.P.(C) No.27128 of 2017 dated 30.01.2018.

5. Mr. Sangram Das, learned Standing Counsel for the Vigilance Department has filed a note dated 01.12.2021 and a memo dated 04.07.2022 along with-

- i.) Copy of disengagement order dated 02.08.2014 from which it is apparent that the petitioner has been disengaged from service with immediate effect for his involvement in Koraput Vigilance P.S. Case No.42 dated 15.07.2011, and
- ii.) Copy of order dated 06.01.2017 passed by the learned OAT in O.A. No. 2327 (C) of 2014.

6. Mr. Mohapatra, learned counsel on behalf of the petitioners has submitted that during investigation, the petitioners had submitted the documents before the I.O. showing their income and expenditure. But without considering the same, the I.O. proceeded in an illegal and arbitrary manner with the investigation. Petitioner no.1 had submitted a detailed representation to his employer and prayed to consider his case before granting of sanction of prosecution or any action. The I.O. without considering the documents submitted by the petitioners and without obtaining sanction from the competent authority, submitted charge sheet against the petitioners on 08.05.2015. After receipt of the charge sheet in the absence of sanction, the learned trial Court took cognizance vide order dated 23.09.2015 and issued summon to the petitioners. On their appearance, the petitioners were granted bail. After receipt of police papers, the petitioners found that neither the

I.O. had considered the documents submitted by them during investigation nor obtained sanction for prosecution.

His further submission is that Petitioner No.1 had joined in the Housing and Urban Development Department as Asst. Engineer on DLR basis on 4.10.1989. His pay was enhanced from time to time and on 15.12.2005 his appointment was made contractual and he was appointed against regular vacant sanctioned post. Koraput Vigilance Case No.5 of 2012 was registered on 10.12.2012 and disengagement letter was issued on 01.08.2014 and the termination letter was stayed vide order dated 11.08.2014 (Annexure-5) passed by the learned Orissa Administrative Tribunal, Cuttack. The tribunal had directed that the impugned order of termination dated 01.08.2014 if not implemented so far, would be stayed till filling of the counter. The order of termination has not been implemented as it was not received by the petitioner no-1's authority before the interim order was passed by the learned Tribunal on O.A. No 2327(C)/2014 and the interim order has been extended till disposal of the Original Application. Vide order dated 12.05.2015 (Annexure-7), the learned tribunal directed for sanctioning and disbursing his current salary from August 2014. The O.A. was finally allowed on 06.01.2017 and the order of termination of the petitioner No 1 was quashed (Annexure-9.) The

State had approached this Court in W.P.(C) No. 27128/2017 wherein the Hon'ble High Court confirmed the order passed by the learned Tribunal vide order dated 30.1.2018 (Annexure-10). He was finally relieved from service with effect from 30.6.2020 on attaining the age of superannuation vide letter no.11449/HUD, Bhubaneswar dated 26.6.2020. The learned Tribunal while extending the service of the petitioner from 23.12.2011 to 25.12.2012 has mentioned in the said order that, " *He would be appointed against the regular post of Assistant Engineer by the cadre controlling Department provided he is found eligible and recommended for such posts by the O.P.S.C.*" Referring to orders of the learned Tribunal he submitted that the petitioner no.1 was for all purposes was in service when order of cognizance was passed on 23.09.2015 and therefore it was necessary to obtain sanction for his prosecution and in absence of sanction, the case cannot proceed. He relies on the judgment of the Supreme Court in the case of ***State (SPE Hyderabad) Vs. Air Commodore Kailash Chand*** reported in ***AIR 1980 SC 522***, stating that the Apex Court upheld the judgment of the Andhra Pradesh High Court which had quashed the proceeding under the PC Act due to lack of sanction in case of an Air Force Officer who had been appointed temporarily after retirement. He has also submitted that Petitioner No.2, the

wife of petitioner, has been tagged in this case for abetting the principal accused for committing the offence. She is entitled for discharge in the event the order of cognizance as well as charge is not sustainable against the principal accused petitioner no-1.

7. Mr. Sangram Das, learned Standing Counsel (Vigilance) relying on the decisions in the case of ***R.R. Chari vrs. The State of Uttar Pradesh*** reported in ***AIR 1962 SCC 1073*** and in the case of ***Bipin Chandra Moharana vrs. Republic of India*** reported in ***AIR 1964 Odisha 152*** submitted that a 'public servant' is a person who is a permanent employee. The Petitioner No.1 who was working on contractual basis in Koraput NAC, was therefore not employed permanently by the Government of Odisha in the Department of Housing and Urban Development. Thus, the petitioner being a contractual employee and not a permanent employee, standing in the footing of a temporary employee, no sanction was required for his prosecution. Even assuming that sanction was necessary in case of the petitioner who was a contractual employee, it is apparent from order dated 02.08.2014 that the petitioner had been disengaged from service, much before 23.09.2015, the date when cognizance of the offences was taken and summons was issued for appearance of the petitioners. As the petitioner No.1 was not in service on that date, it was not

necessary to obtain sanction for prosecution of the petitioner who had been disengaged on 01.08.2014. This order of disengagement has been set aside by order dated 06.01.2017 passed in O.A. No.2327 of 2014. But whether the petitioner No.1 was working after his dis-engagement and the nature of work being discharged by him on the date cognizance was taken and necessity of obtaining sanction in these circumstances, can only be considered at the time of trial by adducing evidence and not by the High Court in an application under Section 397 read with Section 401 of the Cr.P.C . His alternate submission is that as petitioner No.1 was working as a contractual Assistant Engineer on the date the offence was committed and as an estimator subsequently when the cognizance of the offences was taken, therefore, no sanction was required for his prosecution as both the posts are different. In support of his submission, he relied on the decisions in the case of *L.Narayana Swamy vs. State of Karnataka & Others* reported in (2016) 9 SCC 598 and *Asian Resurfacing Of Road Agency vs. Central Bureau Of Investigation* reported in (2018) 16 SCC 299. In exercise of power under Sections 397 and 482 of Cr.P.C, this Court should interfere in framing of charge only in the rarest of rare cases and this is not such a case and there being no patent error in jurisdiction and as the plea of lack of sanction can be raised and

considered during trial, the impugned order does not call for any interference.

8. I have heard the learned counsels , gone through date chart, written note of submission and documents (Annexures) filed by the learned counsel for the petitioners, and the note and documents filed by the learned Standing Counsel Vigilance.

9. The expression public servant is defined in Section 2 (c) of the PC Act and provides as follows :

“2 (c) *"Public servant"* means,--

- (i) *person the service or pay of the Government or remuneration by the Government by fees or commission for the performance of any public duty .*
- (ii) *any person in the service or pay of the local authority;”*

The Supreme Court in ***R.R. Chari vrs. The State of Uttar Pradesh*** reported in ***AIR 1962 SCC 1073*** has interpreted the term “employed” to mean permanently employed” but the same is not relevant for the purpose of this case as petitioner No.1 may not have been a permanent employee, but that he is covered under this definition cannot be disputed as on the date of registration of the case, his pay was being paid by the State Government. So it is not necessary to delve on that aspect.

10. The provision relating to grant of sanction which is contained in Section 19 of the Prevention of Corruption Act , which provides as follows :

“Section – 19 Previous sanction necessary for prosecution.

(1) No court shall take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction,

(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office.

(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),

(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.

Explanation. For the purposes of this section,

(a) error includes competency of the authority to grant sanction;

(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature.”

11. Sub-section (1) provides that no Court should take cognizance of the offences punishable under Sections 7, 10, 11, 13 and 15 without previous sanction and the Government or authority who is to give the sanction. Sub-section (2) provides that if doubt arises as regards the Government or authority who is to accord sanction, the Government or authority who would have been competent to remove the accused when the offence was committed, should accord sanction. A combined reading of sub-sections (3) and (4) make the position clear that notwithstanding anything contained in the Cr.P.C., no finding, sentence and order passed by a Special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in the sanction required under sub-Section (1), unless in the opinion of that Court a failure of justice has in fact been occasioned thereby.

12. In the case of *Bipin Chandra Moharana* (supra) reported in: *AIR 1964 Odisha 152*, the petitioner therein was working as a temporary employee in the postal department and his

services were terminated before cognizance of the offences under Section 5 (1) (c) of the PC Act were taken against him for which this High Court relying on the decisions in ***Ram Dhayan Singh vs. State :AIR 1953 All 470, State of Bombay vs. Vishvakant Srikant : AIR 1954 Bom 109***, held that no sanction was required for proceeding against him under the PC Act. It was further held referring to the decision in ***RR Chari*** (supra) that the word “employed” that no sanction was necessary and the trial was not illegal. This Court also held as follows :

....“8. Learned counsel for the appellant also contended that in the absence of sanction as required under Section – 6 of the Prevention of Corruption Act , the trial is illegal . But here by the time the cognizance of the offence was taken , the services of the accused were already terminated (Ex. 14) and as such , he had ceased to be a public servant on the date when cognizance was taken . It is well settled that no sanction is necessary to such cases, vide *ram Dhyan Singh vs State , AIR 1953 All 470 State of Bombay vs Viswakant Srikant , AIR 1954 Bom 109*”...

In the case of ***Air Commodore Kailash Chand*** (supra), the accused a member of the Indian Air Force after retirement had been reemployed for a period of two years with effect from 16.06.1965 in the Auxiliary Air Force. A charge-sheet

was submitted against the respondent for having committed offences under section 5 (2) of the Prevention of Corruption Act, 1947, during the period 29.03.1965 and 16th March 1967. Considering the nature of duties assigned to him, the Supreme Court held that he was a public servant and sanction was required for his prosecution and did not interfere with the order of the High Court which had quashed the proceedings against him. But while doing so, the Supreme Court has held as follows :

“.....It follows therefore, that the prosecution must prove that at the time when the cognizance of the offence was taken, the respondent ceased to be a public servant . In the instant case, the Special Judge appears to have taken cognizance on June 19, 1969 at a time when the respondent continued to be a public servant having been re-employed and as referred to above his services were terminated only on 01.04.1968 8 but he continued to be a member of the Auxiliary Air Force upto 15.06.1970 that is to say, a long time after the cognizance of the offence was taken”

In the case of ***Kalicharan Mahapatra v. State of Orissa*** reported in ***(1998) 6 SCC 411***, the Supreme Court has held as follows:

"A public servant who committed an offence mentioned in the Act, while he was a public servant, can be prosecuted with the sanction contemplated in Section 19 of the Act if he continues to be a public servant when the court takes cognizance of the offence. But if he ceases to be a public servant by that time, the Court can take cognizance of the offence without any such sanction."

It went on to further hold that the High Court was wrong in quashing the prosecution proceedings in so far as they related to offences under the P.C. Act as the petitioner was no longer in service on the date cognizance was taken .

In the case of ***L.Narayana Swamy vs. State Of Karnataka & Ors*** reported in ***(2016) 9 SCC 598***, two questions of law arose for consideration. The second question is relevant for this case, i.e. : .

...“ (2) Whether a public servant who is not on the same post and is transferred (whether by way of promotion or otherwise to another post) loses the protection under Section 19(1) of the P.C. Act, though he continues to be a public servant, albeit on a different post? ”....

The relevant portions of the decision are extracted below :

.....“20. Likewise, in the case of **Prakash Singh Badal & Anr. v. State of Punjab & Ors** , the contention of the appellant in that case that permission to obtain sanction throughout service was necessary, was negatived in the following manner:

“24. The plea is clearly untenable as Section 19(1) of the Act is time and offence related.

Section 19(1) of the Act has been quoted above.

25. The underlying principle of Sections 7, 10, 11, 13 and 15 have been noted above. Each of the above sections indicates that the public servant taking gratification (Section 7), obtaining valuable thing without consideration (Section 11), committing acts of criminal misconduct (Section 13) are acts performed under the colour of authority but which in reality are for the public servant's own pleasure or benefit. Sections 7, 10, 11, 13 and 15 apply to aforesaid acts. Therefore, if a public servant in his subsequent position is not accused of any such criminal acts then there is no question of invoking the mischief rule. Protection to public servants under Section 19(1)(a) has to be confined to the time-related criminal acts performed under the colour or authority for public servant's own pleasure or benefit as categorised under Sections 7, 10, 11, 13 and 15. This is the principle behind the test propounded by this Court, namely, the test of abuse of office.”

21. It clearly follows from the reading of the judgments in the cases of **Abhay Singh Chautala** and

***Prakash Singh Badal** that if the public servant had abused entirely different office or offices than the one which he was holding on the date when cognizance was taken, there was no necessity of sanction under Section 19 of the P.C. Act. It is also made clear that where the public servant had abused the office which he held in the check up period, but had ceased to hold 'that office' or was holding a different office, then sanction would not be necessary. Likewise, where the alleged misconduct is in some different capacity than the one which is held at the time of taking cognizance, there will be no necessity to take the sanction. However, one discerning factor which is to be noted is that in both these cases the accused persons were public servants in the capacity of Member of Legislative Assembly / by virtue of political office. They were not public servants as government employees. However, detailed discussion contained in these judgments would indicate that the principle laid down therein would encompass and cover the cases of all public servants, including government employees who may otherwise be having constitutional protection under the provisions of Article 309 and 311 of the Constitution.....”*

*.....“23 In the case of the present appellants, there was no question of the appellants' getting any protection by a sanction. The High Court was absolutely right in relying on the decision in **Prakash***

Singh Badal to hold that the appellants in both the appeals had abused entirely different office or offices than the one which they were holding on the date on which cognizance was taken and, therefore, there was no necessity of sanction under Section 19, P.C. Act. Where the public servant had abused the office which he held in the check period but had ceased to hold “that office” or was holding a different office, then a sanction would not be necessary. Where the alleged misconduct is in some different capacity than the one which is held at the time of taking cognizance, there will be no necessity to take the sanction.”

In the case of *Asian Resurfacing Of Road Agency vs. Central Bureau Of Investigation* reported in (2018)16 SCC 299, the Supreme Court has held that :

....“34. Thus, we declare the law to be that order framing charge is not purely an interlocutory order nor a final order. Jurisdiction of the High Court is not barred irrespective of the label of a petition, be it under Sections 397 or 482 Cr.P.C. or Article 227 of the Constitution. However, the said jurisdiction is to be exercised consistent with the legislative policy to ensure expeditious disposal of a trial without the same being in any manner hampered. Thus considered, the challenge to an order of charge should be entertained in a rarest of rare case only to correct a patent error of jurisdiction and not to reappreciate the matter.

13. The position of law is thus clear that challenge to an order of charge should be entertained only in the rarest of rare cases an accused facing prosecution for offences under the P.C. Act cannot claim any immunity on the ground of want of sanction, if he ceased to be a public servant on the date when the court took cognizance of the said offences or was working in a different post.

14. In the present case the accused had admittedly been disengaged from service after registration of the case and before the date when the Court took cognizance of the offences. Learned counsel for the petitioner has stated that he continued in service till his superannuation recently on account of orders passed by the learned OAT while the learned Standing Counsel for the Opposite party has submitted that petitioner No.1 was working as a contractual assistant engineer on the date the offence was committed and as an estimator when the cognizance of the offences was taken which is in a different capacity. The documents relied upon by learned counsel for the petitioners have been filed alongwith the date chart. Therefore, whether petitioner No.1 was continuing in service on the date cognizance of the offences or had been re-engaged / reemployed in a different capacity / job when order taking cognizance of the offences was passed is a question which should be considered by the learned trial Court on the basis

of evidence adduced before it by the parties. The question whether in the absence of sanction, there has been any real failure of justice cannot be decided unless the evidence has been recorded.

15. I am therefore not inclined to interfere with the impugned order, rejecting the application for discharge and framing charge against the petitioners for the offences punishable under Section 13 (2) read with Section 13 (1) (e) of the P.C. Act and Section 109 of the IPC .

16. The Criminal Revision is accordingly dismissed.

17. As the case is of the year 2012 and charge has been framed since five years, the learned Special Judge (Vigilance), Jeypore shall do well to proceed with the trial expeditiously.

A copy of this order be sent to the learned Special Judge (Vigilance), Jeypore for compliance.

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(Savitri Ratho)
Judge

Orissa High Court, Cuttack
Dated 25th July 2022 /Sukanta