

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLREV No. 424 of 2022

An application under Sections 397 and Section 401 of Code of Criminal Procedure, 1973, challenging the order dated 11.08.2022 passed by the learned C.J.M., Bhadrak in G.R. Case No. 137 of 1996.

AFR **Uma Charan Pattnaik** **Petitioner**

-Versus-

State of Odisha **Opp. Party**

Advocate(s) appeared in this case:-

For Petitioner : Mr. Somadarsan Mohanty

For Opp. Party : Mr. P. Tripathy,
Addl. Standing Counsel

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT

6th December, 2022

SASHIKANTA MISHRA, J.

The petitioner challenges the order dated 11.08.2022 passed by learned Chief Judicial Magistrate, Bhadrak in G.R. Case No. 137 of 1996 in refusing to

discharge him from the case as per provision under Section 239 Cr.P.C.

2. The petitioner, being the Executive Officer of Lord Akhandalamani Temple lodged FIR on 29.01.1996 before the Dhusuri Police Station leading to registration of P.S. Case No. 10 of 1996 corresponding to aforementioned G.R. Case in the file of learned S.D.J.M., Bhadrak. It was alleged that there was shortage of gold in the Kothabhandar of the deity, which came to light during weighment of the entire stock. The Ex-Managing trustee, Govinda Chandra Sahoo was the accused. The FIR was registered under Section 409 of Indian Penal Code. Upon completion of investigation, charge sheet was submitted against the accused for the aforementioned offences. During trial, the petitioner-informant was examined as P.W.-1. Basing on his statement in examination-in-chief, learned CJM took suo motu cognizance of the offence under section 409, 120-B and 34 of IPC by exercising power under Section 319 of Cr.P.C. vide order dated 03.09.2012 and as such, added the petitioner and two

others as accused. The petitioner approached this Court in an application under Section 482 Cr.P.C being CRLMC No. 2821 of 2012 challenging the said order. By order dated 19.11.2014, this Court rejected the petition. The petitioner approached the Supreme Court in SLP(Crl.) No. 1332 of 2015 but the same was also dismissed vide order 23.02.2015. The petitioner thereafter filed an application under section 239 of Cr.P.C for discharge mainly claiming immunity from prosecution as per the provision under section 132 of the Indian Evidence Act. The said petition came to be rejected by the impugned order.

3. Heard Mr. S. Mohanty, learned counsel for the petitioner and Mr. P. Tripathy, learned Addl. Standing Counsel for the State.

4. Assailing the impugned order, Mr. Mohanty contends that the proviso to Section 132 of the Indian Evidence Act grants immunity to a witness from being prosecuted in a case on the basis of the statements made by him while deposing as a witness. In the instant case, the petitioner was the informant and had deposed as the

main witness on behalf of the prosecution. Mr. Mohanty further contends that while the court has the power to add any person as an accused in the case under Section 319 of Cr.P.C but the same cannot be on the basis of the statements made by the said person as a witness in the case. He can be added only if there are other materials on record showing his culpability. Mr. Mohanty has relied upon several decisions to buttress his contentions which will be discussed later.

5. Per contra, Mr. P. Tripathy contends that firstly, it is no longer open to the petitioner to raise the point canvassed by him in the present application because the same has already been decided by this Court as per order passed in CRLMC No.2821 of 2012, which was also confirmed by the Apex Court. Mr. Tripathy alternatively contends that Section 319 of Cr.P.C confers ample power on the Court to add any person as an accused if materials come up against him during trial to secure the ends of justice. In the instant case, after going through the testimony of the petitioner (P.W.-1) in his

examination-in-chief, the trial court found enough materials to show his involvement in the occurrence and therefore, he was rightly added as an accused. As regards the applicability of the proviso to Section 132 of the Indian Evidence Act, Mr. Tripathy contends that the same would be applicable, if at all, had the witness been compelled to give any answer, but in the instant case there was no compulsion as the petitioner had testified voluntarily moreso as he had never objected to the questions put to him during his examination-in-chief.

6. The question of maintainability of the petition having been raised, it is deemed proper to deal with the same at the outset.

7. It has been argued that the order of the trial court adding the accused in the case as per Section 319 of Cr.P.C was challenged by the petitioner before this Court, but without success. The order of dismissal passed by this Court was also confirmed by the Apex Court. The petitioner is therefore, estopped to claim discharge, which is nothing but an indirect challenge to the order passed

under Section 319 Cr.P.C. To the above contentions raised by learned Additional Standing Counsel, Mr. S. Mohanty, learned counsel for the petitioner has forcefully argued that the earlier order of the High Court must be treated as *per incuriam* inasmuch the question of applicability of the proviso to Section 132 of the Indian Evidence Act was not considered. Therefore, notwithstanding the fact that the said order was confirmed by the Apex Court it is still open for the petitioner to raise the question as also for this Court to consider the same. Mr. Mohanty has relied upon a decision of the Apex Court in the case of **A.R. Antulay v. R.S. Nayak**, reported in (1988) 2 SCC 602: AIR 1988 SC 1531. Mr. Mohanty further argues that even otherwise in dismissing the SLP filed by the petitioner against the order passed by this Court, the Apex Court has not passed any reasoned or speaking order and therefore, the same cannot be treated as a confirmation of any law laid down by the High Court.

8. A brief reference to the relevant facts becomes necessary at this stage. By order dated 03.09.2012 the

trial court added the petitioner and two other persons as accused in the case, which was challenged by the petitioner in CRLMC No. 2821 of 2012. While dismissing the application, this Court, inter alia, held as follows:

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Learned counsel for the accused-petitioner submits that the learned trial Court erred in exercising his power under Section 319 Cr.P.C. and taking cognizance of offence under Section 409/34 IPC during trial, in respect of the present petitioner, only on the basis of evidence of the informant (P.W.3), recorded during his examination-in-chief. It is submitted that as the word ‘evidence’ includes examination-in-chief and cross-examination, learned trial court could not have exercised his power under Section 319 Cr.P.C., only on the basis of materials brought forth by P.W.3 in his examination in-chief, without being tested by cross-examination. It is further submitted that even otherwise on merit, there is no cogent and credible material on record to implicate the present petitioner in the alleged offence. In this regard it is submitted that while exercising power under Section 319 Cr.P.C., the test that has to be applied is more than mere prima facie case as exercised at the time of framing charge. Therefore, the impugned order of cognizance cannot be sustained.

Learned counsel for the petitioner further submits that as the petitioner is the informant, he cannot be implicated as an accused during trial, in purported exercise of power under Section 319 Cr.P.C, as he cannot be compelled to give evidence implicating himself, as provided under Article 20(3) of the Constitution. In this regard, learned counsel for the petitioner has relied upon the Constitution Bench decision of the apex Court in **M.P. Sharma and others V. Sathish Chandra, District Magistrate, Delhi and others**, AIR 1954 SC 300.

The plea of the petitioner that the word 'evidence' includes examination-in-chief and cross-examination is erroneous and misconceived, in

view of the recent Constitution Bench decision of the apex Court in **Hardeep Singh v. State of Punjab & others**, (2014) 57 OCR (SC) -455, where the Honb'le Court has held that the power under Section 319 Cr.P.C can be exercised at the stage of completion of examination-in-chief and the Court is not required to wait till the said evidence is tested on cross-examination, for it is the satisfaction of the Court which can be gathered from the reasons recorded by the Court in respect of the complicity of some other person(s) not facing the trial in the offence.

The legal proposition advanced by the learned counsel that the petitioner being the informant in the case, he cannot be implicated as an accused at a later stage, during trial of the case, is fallacious. There is no legal bar for an informant being implicated as an accused during trial, if there are evidence on record to prima facie establish his complicity in the alleged offence. To hold otherwise would amount to encouraging and enabling a wily accused person to abuse the legal process and thereby evade the rigors of law.

The question of the petitioner being compelled to give evidence implicating himself does not arise as, he being now an accused in the case, is entitled to the immunity against being compelled to furnish any kind of evidence which is likely to support the case of the prosecution against him. The prosecution is required to prove its case against the accused-petitioner beyond all reasonable doubt. No doubt, the accused-petitioner has the liberty to adduce rebuttal evidence in defence of his case.

In the present case, from the findings of the learned trial Court as detailed above, it reveals that the evidence of the informant (P.W.1) recorded during his examination-in-chief and the documents available on record does prima facie establish the complicity of the accused-petitioner in the alleged offence.

For the reasons, as aforesaid, I do not find any infirmity in the impugned order so as to warrant any interference.

CRLMC and Misc. Case being devoid of merits, the same are accordingly dismissed.

Interim order dated 09.10.2012 stands vacated.

Issue urgent certified copy as per rules.”

9. Referring to the above judgment it was urged that the order adding the petitioner-accused was erroneous as it was based on the statement given by the witness in his examination-in-chief without being tested by cross-examination and that there is no cogent or credible material on record to implicate the petitioner in the alleged offence. It was also argued that the petitioner cannot be compelled to give evidence implicating himself as provided under Article 20(3) of the Constitution of India. While rejecting the contentions raised by the petitioner, this Court held that the question of the petitioner being compelled to give evidence implicating himself does not arise as being an accused he is entitled to immunity against any such compulsion to furnish evidence likely to criminate him. Thus, this Court finds that while the provision under Article 20(3) of the Constitution of India was raised and considered yet the specific protection granted under the proviso to Section

132 of the Indian Evidence Act was not considered, apparently not being raised. It must be noted that the petitioner's claim for immunity is in the capacity of a witness and not as an accused. Article 20(3) of the Constitution protects an accused from stating anything that may implicate him in the offence. Same immunity is available to a witness under proviso to Section 132 of the Indian Evidence Act. Thus, to reiterate, while the effect of Article 20(3) of the Constitution was considered, the effect of the proviso to Section 132 of the Indian Evidence Act was not specifically considered by this Court in the previous proceeding.

10. It would be profitable at this stage to examine the law relating to the binding nature of previous orders/judgments. In the case of **State of Punjab v. Surinder Kumar**, reported in (1992) 1 SCC 489 it was held that a decision is available as a precedent only if it decides a question of law.

11. There are exceptions to the rule of precedence in the form of *per incuriam* and *sub silentio*. In the case of

State of U.P. v. Synthetics and Chemicals Ltd.,

reported in (1991) 4 SCC 139 it was held as follows:

“In practice, per incuriam appears to mean per ignoratiam. The ‘quotable in law’ is avoided and ignored if it is rendered, ‘in ignoratium of a statute or other binding authority’.”

12. A decision is passed *sub silentio* when the particular point of law involved in the decision is not perceived by the court or present to its mind or is not consciously determined by the Court and it does not form part of the ratio decidendi and is not binding. Reference in this regard may be had to the decision of the Apex Court in ***Synthetics and Chemicals Ltd.*** (supra). In the case of ***Arnit Das (1) v. State of Bihar***, reported in **(2000) 5 SCC 488**, it was held as under:

“20. A decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the judgment is not the ratio decidendi. This is the rule of sub silentio, in the technical sense when a particular point of law was not consciously determined.”

13. In the case of ***A.R. Antulay*** (supra) the Apex Court observed as follows:

“80. In giving the directions this Court infringed the constitutional safeguards granted to a citizen or to an accused and injustice results therefrom. It is just and proper for the court to rectify and recall that injustice, in the peculiar facts and circumstances of this case.

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83. The basic fundamentals of the administration of justice are simple. No man should suffer because of the mistake of the court. No man should suffer a wrong by technical procedure of irregularities. Rules or procedures are the handmaids of justice and not the mistress of the justice. Ex debito justitiae, we must do justice to him. If a man has been wronged so long as it lies within the human machinery of administration of justice that wrong must be remedied.

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238. Suffice it to say that the court can grant relief where there is some manifest illegality or want of jurisdiction in the earlier order or some palpable injustice is shown to have resulted.....

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14. Undoubtedly, the proviso to Section 132 of the Indian Evidence Act confers statutory protection to a witness from being implicated in the case only on the basis of the statement given by him as a witness. Thus, the contentions advanced by the petitioner regarding availability of the statutory immunity granted under the proviso to Section 132 of the Indian Evidence Act was

obviously not considered in the earlier decision. Therefore, this Court has no hesitation in holding that the earlier decision of this Court in CRLMC No. 2821 of 2012 must be treated as *per incuriam* and *sub silentio* and therefore, not binding on this Court.

15. Another aspect needs to be considered. While this Court holds that the earlier decision rendered by a coordinate Bench is *per incuriam*, it has been argued that the same being confirmed by the Apex Court, it is no longer open for another Bench to take a different view. As already stated hereinbefore, the judgment of the coordinate Bench was not confirmed as such, but the SLP filed against it was dismissed in limine. In other words, such dismissal was not by way of a detailed judgment/order of the Apex Court specifically confirming/approving/upholding the judgment. It is well settled that in such cases, it cannot be said that the impugned judgment was confirmed by the Apex Court. Reference in this regard may be had to the decision of the Apex Court in the cases of ***Union of India v. M.V.***

Mohanan Nair, reported in (2020) 5 SCC 421 and **Khoday Distilleries Ltd. v. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd.**, reported in (2019) 4 SCC 376.

16. Having held as above, this Court shall now proceed to dwell upon the merits of the case. According to Mr. Mohanty, the petitioner being a witness could not have been implicated in the case as an accused solely on the basis of the statements made by him while deposing before the trial court. Mr. Mohanty of course, fairly concedes that the petitioner can be so implicated if there is other evidence against him.

17. In order to appreciate the contentions of Mr. Mohanty, it would be apposite to refer to the statutory provision. Section 132 of the Indian Evidence Act is quoted hereinbelow:

“132. Witness not excused from answering on ground that answer will criminate. — A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it

will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Proviso. — *Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.”*

18. A plain reading of the language employed in the proviso reveals that ordinarily the witness is protected from giving any answer which may implicate him in the case. Learned additional standing counsel has contended that the proviso would be applicable only if the witness is compelled to give the answer. But in the instant case there was no such compulsion, rather the statement of the witness must be treated as purely voluntary in nature.

19. Given the rival contentions as above, it becomes necessary to first determine whether there is any question of compulsion involved in the process of examination of a witness. It must be remembered that when a witness is summoned to depose in a case the same obviously involves a compulsion. Such compulsion is of course not akin to putting the witness into a state of duress or coercion but is a statutory compulsion to testify

regarding the case. The question of compulsion can be answered by posing another question - Can a witness refuse to testify? Obviously not. Once he has received a summon from the court he has to testify, regardless of the nature of his answers but fact remains he cannot simply excuse himself from testifying, rather he is bound by oath to answer all questions that may be put to him. The right to remain silent as available after the 5th Amendment to the American Constitution is not available to a witness in India. In fact, the very opening words of Section 132 of Indian Evidence Act viz, “a witness shall not be excused from answering any question” clearly indicate that he is under a lawful compulsion to state about the matters relevant to the case. The word ‘compel’ employed in the proviso must therefore, be understood in light of the above discussion.

20. In the case of ***R. Dineshkumar alias Deena Vs. State. Rep. by Inspector of Police***, reported in AIR 2015 SC 1816, relied upon by the petitioner, it has been stated as under:

“45. *The rule against self-incrimination found expression in Indian law much before the advent of the Constitution of India [under Article 20(3)]. Facets of such rule are seen in (i) Section 161 CrPC, 1898—Sub-section (1) authorised a police officer investigating a case to examine any person “supposed to be acquainted with the facts and circumstances of the case”. Sub-section (2) exempted such person from answering the questions “which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture”. Section 161 CrPC, 1973 corresponds to Section 161 CrPC, 1898. Sub-sections (2) of both the old and new Codes are substantially identical.*

(ii) Another facet of the rule against self-incrimination finds expression in Sections 25 and 26 of the Evidence Act which make a confession made to a police officer or a confession made while in the custody of the police inadmissible in evidence.

(iii) The proviso to Section 132 of the Evidence Act, in our opinion, embodies another facet of the rule against self-incrimination.

46. *Section 132 existed on the statute book from 1872 i.e. for 78 years prior to the advent of the guarantee under Article 20 of the Constitution of India. As pointed out by Muttusami Ayyar, J. in Gopal Doss [ILR (1881) 3 Mad 271] , the policy under Section 132 appears to be to secure the evidence from whatever sources it is available for doing justice in a case brought before the court. In the process of securing such evidence, if a witness who is under obligation to state the truth because of the oath taken by him makes any statement which will criminate or tend to expose such a witness to a “penalty or forfeiture of any kind, etc.”, the proviso grants immunity to such a witness by declaring that “no such answer given by the witness shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding”. We are in complete*

agreement with the view of Ayyar, J. on the interpretation of Section 132 of the Evidence Act.”

47. *The proviso to Section 132 of the Evidence Act is a facet of the rule against self-incrimination and the same is a statutory immunity against self-incrimination which deserves the most liberal construction. Therefore, no prosecution can be launched against the maker of a statement falling within the sweep of Section 132 of the Evidence Act on the basis of the “answer” given by a person while deposing as a “witness” before a court.”*

21. The Kerala High Court in the case of **Ramlath v. Nasar Abdul Razak** reported in 2009 SCC

OnLine Ker 3093; 2010 Cr.L.J. 80 held as follows:

“ A Division Bench of this Court in Gangadharan v. S.I. of Police (1989 (2) KLT 448) dissented from the decision of the Madras High Court in Elavarathi Peddatha Reddi's case and affirmed the decision of a learned Single Judge of this Court in Kunhappan v. State of Kerala (1987 (2) KLT 222). Division Bench held that protection under the proviso to Sec. 132 of the Act is available to a witness whose presence is required by the court either by issuance of a summons or by other means and answer given by such witness cannot be characterised as voluntary statement and without compulsion. It is immaterial whether he has objected to the question. So much so, petitioner who was summoned as a witness for the prosecution was bound under law to answer the questions put to her. Hence for application of proviso to Sec. 132 of the Act it is immaterial whether petitioner had objected to the questions put to her. Evidence given by petitioner as P.W. 3 cannot be used for the purpose of prosecuting her. It is a different matter whether she is liable to be proceeded against for perjury. On the evidence given by her if such a situation arose.”

22. The Rajasthan High Court in the case of **M.C. Taneja and others vs. State and others** reported in 1968 SCC OnLine Raj 87 : 1970 Cr.L.J. 945 held as follows:

“11. The proviso to this section affords protection to answers which a witness objects to give or which he has been asked to be given and which thereafter he has failed to give. Under this section a witness shall not be excused from answering any question as to any matter relevant to the matter in question in any criminal proceeding on the ground that his answer would incriminate or may tend directly or indirectly to expose him to a penalty or forfeiture of any kind. In other words, if these three petitioners were cited as witnesses, they were bound to answer all questions and they could not be prosecuted for their answers. In India the privilege of refusing to answer has been removed with a view that temptation to tell a lie may be avoided and, therefore, protection of the witness has been provided in S. 132, Evidence Act. The protection under S. 132, Evidence Act, gets further support from Article 20(3) of the Indian Constitution. In support of this proposition reliance is placed on Laxmipat Choraria v. State of Maharashtra, AIR 1968 SC 938. Therefore, the testimony of these witnesses being that of competent witnesses is protected by proviso to S. 132, Evidence Act.”

23. The Bombay High Court in the case of **Uday Ashokrao Joshi & Anr. Vs. State of Maharashtra**, reported in 2010 (6) AIR Bom R 658 held as follows:

“.....Reading of the above provision to my mind clearly shows that Uday could not have excused himself from answering the questions about

signatures as attesting witnesses on forged Will on the ground that the answer to such questions will criminate him and his mother. Therefore, proviso to this Section provides for a protection to such witnesses. After providing a mandate to a witness by substantive provision under Section 132 of Indian Evidence Act not to excuse from answering, care has been taken to protect such a witness vide proviso above who may become vulnerable to criminal proceedings or prosecution due to truthful answers given by him. Thus there is a specific object in incorporating the proviso to the said section and affording protection to such witness to encourage the witness to come forward and help in the administration of justice. The purpose is obvious that the State must get the witnesses while making its efforts in investigation to testify the truth before Court. The protection is however not available if the witness give false evidence by such answer.”

24. From an analysis of the ratio decidendi of the cases referred above it becomes manifestly clear, firstly that on being asked to testify as a witness the petitioner could not have refused and therefore, the same amounts to a lawful compulsion and secondly, he cannot be implicated in the case solely basing on the evidence given by him while testifying as a witness.

25. As is seen from the foregoing discussion, in India the privilege of refusing to answer has been removed but at the same time protection has been provided to the witness under Section 132 of the Indian Evidence Act.

Such protection is unqualified and not to be construed in the narrow sense by holding that the same is applicable only if the witness is compelled to give an answer against himself. To reiterate, the compulsion referred to in the proviso to Section 132 of Indian Evidence Act is a statutory and lawful compulsion to which all witnesses are bound.

26. Reading of the impugned order reveals that the learned trial Court has proceeded on the erroneous premise that the witness (P.W.-1) was not compelled to give any answer for which the proviso to Section 132 can be attracted. It was further held that the court found material to proceed against the accused. In view of the forgoing discussion, it can be safely held that the above reasoning of the trial court is erroneous. Further, the trial court has not referred to any evidence against the petitioner other than his statement given in examination in chief. Of course, it is open to the Court to consider adding the petitioner as an accused in the event there are materials and evidence against him from other sourced

but such an exercise cannot be undertaken solely on the basis of his testimony. Therefore, this Court has no hesitation in holding that the impugned order cannot be sustained in the eye of law.

27. In the result, the revision is allowed. The impugned order is set aside. The learned trial court is directed to pass orders discharging the petitioner accused from the case. It is made clear that if the court finds other evidence and material showing culpability of the petitioner it would still be open for it to consider adding him as an accused as per provisions under Section 319 of Cr.P.C..

28. The CRLREV is disposed of accordingly.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 6th December, 2022/ A.K. Rana.