

GAHC010007462023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Pet./28/2023

NURUL ISLAM
JUNIOR ENGINEER, PWD ROADS, RURAL DIVISION, HAILAKANDI, S/O-
ABID ALI, VILL- NUKUSHI, P.O, P.S AND DIST- HAILAKANDI, ASSAM, PIN-
788151

VERSUS

THE STATE OF ASSAM AND 3 ORS
REP. BY THE PP, ASSAM

2:DILWAR HUSSAIN LASKAR
S/O- SUNDAR RAJA LASKAR
VILL- PALOICHERRA-I
P.O- KATLICHERRA
P.S- RAMNATHPUR
DIST- HAILAKANDI
ASSAM

3:TIPU SULTAN KHAN
S/O- LATE AFTAB UDDIN KHAN
VILL- PALOICHERRA-I
P.O- KATLICHERRA
P.S- RAMNATHPUR
DIST- HAILAKANDI
ASSAM

4:TAYABUR RAHMAN BARBHUIYA
S/O- LATE NIMAR ALI BARBHUIYA
VILL- BOLDA BOLDI-I
P.O- ZAMIRA BAZAR
P.S- RAMNATHPUR
DIST- HAILAKANDI

ASSA

Advocate for the Petitioner : MS. S B CHOUDHURY

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

Date : 11.06.2024

Heard Ms. S.B. Choudhury, learned counsel for the petitioner. Also heard Mr. R.J. Baruah, learned Additional Public Prosecutor for the State/opposite party No.1 and Ms. D. Barpujari, learned counsel for the opposite party Nos. 2, 3 and 4.

2. This application has been preferred under Section 482 r/w Section 401 Cr.P.C. praying for quashing of FIR dated 21.02.2017, charge-sheet dated 29.06.2022 as well as the criminal proceeding in GR Case No. 313/2017, pending in the court of learned CJM, Hailakandi.

3 The case of the petitioner is that the petitioner is a Government servant working as a junior engineer in P.W.D. Assam. On the basis of the tender, the co-accused Nabajit Gupta had been given the contract of performing the works of PMGSY for construction of some roads namely, Jhalnacherra road, Bablaboldi road, Sultanicherra road, Nandagram N.C. road and Baldaboldi Panji in Hailakandi district and the petitioner had been engaged by the authorities of the P.W.D., Hailakandi for supervision of the said construction works.

4. The opposite party Nos. 2, 3 and 4 filed a complaint case against the petitioner and two others before the learned CJM, Hailakandi vide C.R. Case No. 91/2017 and the learned CJM, Hailakandi forwarded the complaint case to the police station for registering a case under proper section of law. Accordingly, on receipt of the said complaint case, a case was registered vide Ramnathpur P.S. Case No. 46/2017 under Section 120(B)/420/506/409/34 IPC and investigation was initiated. After completion of investigation, charge-sheet has been submitted under the aforesaid sections of law.

5. It was urged by the learned counsel for the petitioner that the impugned criminal proceeding vide G.R. Case No. 313/2017 is not maintainable against the petitioner as he had been acting in connection with discharge of his official duty. The petitioner is not the drawing and disbursing authority in connection with payment of contractors' bills. His duty is to supervise the construction works. So, the question of misappropriation of Government funds by criminal conspiracy or criminal intimidation does not arise in case of the petitioner.

6. It is further submitted that in the instant case, the charge-sheet was submitted after lapse of more than five years as such, there has been violation of section 167 of Cr.P.C.

7. The learned counsel for the petitioner also contended that the petitioner being a Government servant, working as a junior engineer of P.W.D. Assam and as per the provision of 196(b)/197(b) of Cr.P.C., 1973, prior sanction under such Sections by the State Government is mandatory before taking cognizance against such a Government employee.

8. The learned counsel for the petitioner has also pointed out the guidelines formulated by the Hon'ble Apex Court in the case of State of Haryana vs. Bhajanlal, reported in 1992 Supp. (1) SCC 325 in regard to quashing of the proceeding by the High Court in exercise of the provision under Section 482 Cr.P.C.

9. According to learned counsel for the petitioner, the instant case is covered by the guidelines rendered by the Hon'ble Supreme Court as follows-

(i) The allegations made in the complaint/FIR dated 21.02.2017 (GR Case No.313/2017) under Section 120(B)/420/506/409/34 IPC against the petitioner, even if they are taken at their face value and accepted in its entirety, does not prima face constitute or make out any case against the petitioner.

(ii) The allegation made in the complaint/FIR dated 21.02.2017 are so absurd and improbable on the basis of which no prudent man can reach a just conclusion that there is sufficient ground for the alleged offences so far as the petitioner is concerned.

(iii) The impugned complaint/FIR dated 21.02.2027 as well as the charge-sheet dated 29.06.2022, so far as the petitioner is concerned, has been manifestly attended with malafide and ulterior motive for wrecking vengeance on the petitioner.

Learned counsel for the petitioner has prayed that while interfering with this matter, this Court may be pleased to take into consideration the above features which are covered by the guidelines laid down by the Hon'ble Apex

Court.

10. In order to counter the argument of the petitioner regarding sanction, learned Additional Public Prosecutor as well as the learned counsel for the respondent Nos. 2, 3 and 4 has submitted that the accused/petitioner was a supervising authority of construction work of the concerned roads in Hailakandi area, without completion of the work, the petitioner issued completion certificate. It is also submitted that the materials used by the contractor under the supervision of the accused/petitioner are below quality. It is further submitted that the allegation made against the petitioner is not connected with the discharge of his official duty, neither allowing the contractor to use such below quality materials for construction of the roads and which are also not associated with the official function of the petitioner.

11. The learned counsel for the opposite party Nos. 2, 3 and 4 has further submitted that this Court has to determine whether the allegation levelled against the petitioner are actions attributable to him, purporting to have been done in the discharge of an official duty. The learned Additional Public Prosecutor for the State has also stated that the requirement for sanction under Section 197 Cr.P.C. can be looked into at the stage of trial itself. He has also submitted that the case is at an incipient stage where the charges have also not been framed. The learned Additional Public Prosecutor as well as the learned counsel for the opposite party Nos. 2, 3 and 4 have prayed for dismissal of the quashing petition.

12. Having heard the learned counsel for the parties, the only question which arises for consideration in this case is whether there ought to have been

sanction under Section 197 Cr.P.C. from the State before cognizance have been taken of the offences alleged to have been committed by the petitioner. The other question which arises is whether the requirement of a sanction under Section 197 Cr.P.C. should be looked into by this Court by exercising its power under Section 482 Cr.P.C. or would it be in the interest of justice if the same is left to the trial court to examine during the course of trial.

13. The question whether sanction under section 197 Cr.P.C. is a mandatory requirement preceeding every action taken by the authority has been the subject matter for consideration in a catena of decisions. Section 197 of the Cr.P.C. provides that, no court shall take cognizance of an offence involving a public servant who was accused of an offence alleged to have been committed by him, while acting or purporting to act in discharge of his official duty, except with the previous sanction of the concerned competent authority. The question whether every act done by the public servant called for a protection under section 197 of the Cr.P.C. was the subject matter of those decisions.

14. One of the earliest decisions of the Supreme Court on this point was in *Baijnath Gupta & Ors v. State of Madhya Pradesh* (AIR 1966 SC 220). The question that came up before the Supreme Court was, whether a public servant charged with offences punishable under section 477A read with sections 109 and 409 IPC required previous sanction from the competent authority, as contemplated under section 197 of Cr.P.C., 1898. Supreme Court referred to two earlier decisions in *Hori Ram Singh v. Emperor* (AIR 1939 SC 43) as well the decision reported in *H.B. Gill & Another v. the King* (AIR 1948 PC 128). In the latter case, the accused was charged under section 161 of IPC with taking bribes and under section 120B IPC with criminal conspiracy. On the question

whether sanction was necessary under section 197(1) Cr.P.C., it was held by the judicial committee that, there was no difference in the scope of that section and the one under section 270 of the Government of India Act, 1935. In *Hori Ram's case* (supra), it was held that a public servant can be said to act or purported to act in discharge of his official duty, if it was such as to lie within the scope of his official duty. Thus, act of a judge receiving bribe, though the judgment which he delivers may be an official act, taking bribe does not become an official act, it was held. It was also held that Government Medical officer does not act or purport to act as a public servant, in picking the pocket of a patient whom he was examining, though examination itself may be such an act. The court laid down the crucial test to determine whether a public servant, acts or purports to act in official capacity by holding that, if challenged, he can reasonably claim that, what he did was, by virtue of his office.

15. This view was approved in *R.W Mathams v. State of West Bengal* (1954 AIR 455), wherein it was held that it was not every offence committed by public servant that required sanction or prosecution. Under section 197(1) of the Code of Criminal Procedure, it was not every act done by him while he was actually engaged in the performance of the official duties; that, but if the act complained of, was directly concerned with his official duty and, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary. It is the quality of the act that was important and if it falls within the scope and ambit of his official duties, protection contemplated under section 197 of Cr.P.C. will be attracted.

16. In *S.B. Saha & Ors. vs. M.S. Kochar* (AIR 1979 SC 1841), a three judges Bench of the Supreme Court had occasion to consider the question whether in

the case of alleged offences under criminal conspiracy and breach of trust, sanction under section 197(1) of the Criminal Conspiracy was required. Supreme Court held that the words "any offence alleged to have been committed by him while acting or purporting to act in discharge of his official duty" employed in section 197 (1) are capable of a narrow as well as wide interpretation. It was the quality of the act that was important and if it falls within the scope and range of "official duties", the protection contemplated under section 197 Cr.P.C. will be attracted. It was held that for prosecuting public servant for dishonest misappropriation or conversion of goods, which they had seized, sanction was not essential.

17. In Harihar Prasad v. State of Bihar (1972 3 SCC 89) it was held that sanction under section 197 Cr.P.C. for prosecution of offence under section 409 IPC, was not necessary. In Om Prakash Gupta v. State of U.P. (1957 SCR 423), it was held that public servant committing criminal breach of trust, does not normally act so, in his capacity as a public servant.

18. In Prakash Singh Badal & another v. State of M.P.(AIR 2007 SC 1274), Supreme court had occasion to consider the scope and ambit of expression "official duty" that appears in section 197 of the Cr.P.C. It was held that section 197 extends only to those acts or omissions done by the public servant while discharging the official duty. It was held that on facts, if it was prima facie found that the act or omission for which the accused was charged, had reasonable connection with the discharge of his duty, then it must be held to be official, to which, applicability of section 197 Cr.P.C. cannot be disputed.

19. In State of U.P. v. Paras Singh (2009) 6 SCC 372, the question that arose

was whether sanction was required for prosecution of a public servant charged with sections 409 and 468 of IPC. It was held that, the use of expression "official duty" implies that, act or omission must have been done by the public servant in the course of his service and that it should have been in discharge of his duties. Court relied on the decision of the Supreme Court in *Matajog Dobey v. H.C.Bhari* (AIR 1956 SC 44), wherein it was held that the offence alleged to have been committed by the accused must have something to do or must be related in some manner with the discharge of official duty. There must be a reasonable connection between the act and the discharge of the official duty. The act must bear such relation to duty that the accused could lay a reasonable claim but not a pretended or fanciful claim that he did it in the course of performance of his duty.

20. In *Shambhoonath Mishra v. State of U.P. & others* (AIR 1997 SC 2102), the question that arose was whether the prosecution of an accused charged with offences of fabrication of records and misappropriation of public fund needs sanction under section 197(1) of the Cr.P.C. It was held that, it was not an act done in discharge of his official duty and fabrication of record and misappropriation of funds do not form part of his duty. Hence, sanction was not required. Same issue was considered by the Supreme Court in *Rajib Ranjan & Others v. R.Vijayakumar* (2015 (1) SCC 513), wherein it was held that even while discharging the official duties, if a public servant enters into criminal conspiracy or indulges in criminal misconduct, such misdemeanor on his part is not to be treated as an act in discharge of his official duties and therefore, the provisions of section 197 Cr.P.C. will not be attracted.

21. The question, whether the prosecution of a public servant charged with

an offence under IPC for breach of trust needs sanction, was the subject matter of consideration in Punjab State Warehousing Corporation v. Bhushan Chander & another (AIR 2016 SC 3104). In State of Kerala v. V.Padmanabhan Nair (AIR 1999 SC 2405) the question was whether prosecution for charges under section 406 IPC read with section 120B of IPC requires sanction. It was held that prior sanction was not required for prosecution. The same position was reiterated in Dr.Subramanian Swamy v. Director CBI and another (AIR 2014 SC 2140).

22. The above decisions consistently laid down a clear division between those acts which constitute an offence and those acts, though done while discharging the official duties of the public servant, does not ipso facto constitute an act done or purported to be done in discharge of his official duties, as contemplated under section 197 (1) Cr.P.C. The law laid down seems to be consistent that if a criminal offence is committed by a public servant, which is unconnected with his duty, sanction under section 197 of Cr.P.C.was not required, since it undoubtedly does not form part of his official duty or purported to be done, in discharge of his official duty.

23. Reverting to the case in hand, it reveals that the petitioner along with two other co-accused were entrusted with the supervision of construction works of different roads in Hailakandi district which was allotted in the year 2009 and the said works were supposed to be completed by two years i.e. in the year 2011. Till 2016, the works were not completed for which there were numbers of agitation made by the public demanding completion of the works under the scheme. On the basis of the protest and agitations of the local people, 30 % work completion report was issued. Subsequently, the works of the culvert have been done by using low quality materials. It was alleged that the works of the

culvert have been done by using 8 mm rod instead of 16 mm rod and the other materials have also been used disproportionately and somehow completed 30% works and withdrawn the amount of 60% to 70 % works falsely and thereby misappropriated the funds.

24. In view of the aforesaid legal mandates, tested on the touchstone of the said principles, it cannot be said that in the obtaining factual matrix, sanction under Section 197 Cr.P.C. was necessary.

25. In the result, criminal petition is dismissed and disposed of accordingly.

JUDGE

Comparing Assistant