

(2018) 05 OHC CK 0030
In the Orissa High Court
Case No : CRLMC No.2287 of 2004

RAKHAL KISHORE MOHANTY

APPELLANT

Vs

STATE OF ORISSA VIGILANCE

RESPONDENT

Date of Decision : 17-05-2018

Acts Referred:

Code of Criminal Procedure, 1973 — Section 197, 319, 397, 397(2), 482
Indian Penal Code, 1860 — Section 120B, 420, 468, 471, 477A
Prevention of Corruption Act, 1988 — Section 5(2), 5(1)(a)

Citation : (2018) 05 OHC CK 0030

Hon'ble Judges : DR. D.P. CHOUDHURY

Bench : Single Bench

Advocate : Dharanidhar Nayak, M.Mohanty. R.K.Pradhan, U.K.Jena, P.S.Nayak, B.Rout, .P.K.Pani

Final Decision : Disposed of

Judgement

Dr.D.P.Choudhury, J.

1. This is an application filed under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as "the Code") to quash the order

dated 23.04.1994 of taking cognizance of offence under Sections 477-A/420 of the Indian Penal Code (in short "the IPC") passed by the learned

Judicial Magistrate First Class, Kamaskhyanagar in G.R. Case No.8/86 and issuance of process against the present petitioner.

2. The factual matrix leading to the case of the prosecution is that the principal accused (Daitari Samanta Singhar @ Sahu) filed an application before

the District Industrial Centre, Dhenkanal on 9.9.1983 for grant of loan of Rs.58,800/- for construction of bricks kiln in his village and thereafter on the

recommendation of the Assistant Manager, Orissa State Financial Corporation (in short "OSFC"), the petitioner verified the immovable assets of

the loanee and submitted the report of feasibility to take loan of Rs.39000/-. Accordingly, the loan was sanctioned but the State Vigilance, finding some foul play in the sanction of the above loan, lodged FIR against the original accused Daitari Samanta Singhar, the present petitioner and other officials. After due investigation, charge-sheet was submitted against the original accused under Sections 468/471 of IPC. While evidence was led, the learned Magistrate found that the present petitioner and other two officials of the OSFC are also involved with the commission of offence for which he added them for committing offence under Sections 447-A/420 of IPC in exercise of his power under Section 319 of the Code. The said order dated 23.04.1994 passed by the learned Magistrate is under challenge in this CRLMC filed under Section 482 of the Code.

3. Mr.D.Nayak, learned Senior Advocate for the petitioner submitted that the learned Magistrate has erred in law by applying the provision of Section 319 of the Code inasmuch as there is no evidence led to implead the present petitioner as an accused because it is the material available on record to show that before recommending or sanctioning of loan, the present petitioner had visited the spot and not only he made spot visit, but also other officials made favourable note after which the loan was sanctioned in favour of the original loanee.

4. Mr.Nayak, learned counsel for the petitioner further submitted that purport of Section 319 of the Code is that it should be exercised sparingly and under compelling circumstances. There is no iota of material for the offence under Sections 477-A/420 of IPC against the present petitioner. The learned Magistrate has only based on the examination of the past-I.O (P.W.6) who stated in examination in chief that he has lodged FIR against the original accused and the other accused persons including the present petitioner, who are added subsequently during trial. But he has not supported the charge-sheet but the learned Court below has forgotten to see this aspect while relying upon his statement made in chief.

5. Mr.Nayak, learned counsel for the petitioner submitted that when there is no prima facie case established for taking cognizance or framing charge of such offence under which the petitioner was summoned to face trial, the impugned order of adding such petitioner is per se illegal and void.

6. Mr.Nayak, learned counsel for the petitioner further contended that since the learned Magistrate has taken cognizance of the offences under

Sections 477-A/420 of IPC on the allegation of abetment to the original accused to obtain loan, the act complained of has got close nexus with the discharge of duty of the petitioner as public servant. Thus Section 197 of the Code also protects the present petitioner. Learned Magistrate has committed error in law by not asking for sanction of prosecution by the State Government while taking cognizance of such offence against the present petitioner and call upon him to face trial. So on whole, the entire impugned order of taking cognizance is illegal and invalid for which the same should be quashed.

7. Mr.Pani, learned Standing Counsel Vigilance submitted that after framing of charge against the original accused Daitari Samanta Singhar, learned Court below examined six witnesses. After examination of P.Ws.5 and 6, the evidence was found against the present petitioner and two other accused persons, namely, Sri A.K.Basa and Sri Nepal Bihari Ghosal that they have committed offence under Sections 477-A/420 IPC prima facie and accordingly, the learned Magistrate took cognizance vide impugned order. Since the evidence of these two witnesses are very clear to implead the present petitioner, no wrong has been committed by the learned Magistrate in passing the impugned of taking cognizance.

8. Mr.Pani, learned Standing Counsel Vigilance further submitted that Section 319 of the Code is the prerogative of the learned Magistrate to add any accused even if no charge-sheet was submitted against him or no FIR is also lodged against him. But in the present case, there is clear evidence of P.W.6 that the FIR has been lodged against the present petitioner along with two other accused persons but during investigation, his name was dropped. But, when the evidence is led and his name cropped in, learned Magistrate, in exercise of his power under Section 319 of the Code and on the application of the learned APP for the Vigilance Department, added the present petitioner as co-accused which cannot be said to be illegal at all.

9. It is submitted by the learned counsel for the State Vigilance that Section 319 of the Code can be exercised if there is prima facie evidence or more and it is not necessary to wait for completion of the entire evidence examined by the prosecution. Since the present petitioner and two others have abetted the original accused to take loan of Rs.39,000/- without having any brick kiln or any structure on the case land as per the FIR being supported

by the witnesses, there is not only a prima facie case but also more than a prima facie has been amply found against the present petitioner resulting to

proceed against him under Section 319 of the Code.

10. Mr.Pani, learned Standing Counsel Vigilance has submitted that in the case of Prakash Singh Badal and another â?V- State of Punjab and others;

(2007) 36 OCR (SC) 233, the Hon?ble Supreme Court has observed that the offence of cheating under Section 420 of IPC or the offences relatable

to Sections 467/468/471/120-B of IPC can be no stretch of imagination by their very nature been regarded as having been committed by any public

servant while acting or purporting to act in discharge of official duty for which Section 197 of the Code would not apply in such cases. According to

him, in the present case, protection under Section 197 of the Code would not apply.

11. Mr.Pani, learned Standing Counsel Vigilance further submitted that the instant CRLMC is filed under Section 482 of the Code long after 10 years

of passing of the impugned order. The impugned order is revisable under Section 319 of the Code but the present petitioner did not take recourse of

such provision for the simple reason that the revision is barred by limitation. Relying upon the ratio decided by the Hon?ble Supreme Court in the case

of Mohit @ Sonu and another â?V- State of U.P. and another; AIR 2013 SC 2248, he submitted that where the petitioner could not have challenged

the impugned order before this Court in a revision but he failed to do so and invoking the inherent jurisdiction of this Court under the Code, the same is

not maintainable. On the other hand, in order to avoid the time barred revision, the petitioner has come forward to file this petition under Section 482 of

the Code which is not maintainable. So, he prays to dismiss the same.

DISCUSSIONS

12. Section 319 of the Code is as follows:

â??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. The aforesaid provision has been well dealt with by the Hon^{ble} Supreme Court in the

case of Hardeep Singh v- State of Punjab and others; (2014) 57 OCR (SC) 455 where Their Lordships, in Constitution Bench, have observed in

the following manners:

“69. Ordinarily, it is only after the charges are framed that the stage of recording of evidence is reached. A bare perusal of Section 227 Cr.P.C.

would show that the legislature has used the terms “record of the case” and the “documents submitted therewith”. It is in this context that the

word “evidence” as appearing in Section 319 Cr.P.C. has to be read and understood. The material collected at the stage of investigation can at best

be used for a limited purpose as provided under Section 157 of the Evidence Act i.e. to corroborate or contradict the statements of the witnesses

recorded before the court. Therefore, for the exercise of power under Section 319 Cr.P.C., the use of word “evidence” means material that has come

before the court during an inquiry or trial by it and not otherwise. If from the evidence led in the trial the court is of the opinion that a person not

accused before it has also committed the offence, it may summon such person under Section 319 Cr.P.C. 71. It is, therefore, clear that the word

“evidence” in Section 319 Cr.P.C. means only such evidence as is made before the court, in relation to statements, and as produced before the

court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or the Court to decide whether power under

Section 319 Cr.P.C. is to be exercised and not on the basis of material collected

during investigation.

84. Further, in our opinion, there does not seem to be any logic behind waiting till the cross-examination of the witness is over. It is to be kept in mind

that at the time of exercise of power under Section 319 Cr.P.C., the person sought to be arraigned as an accused, is in no way participating in the trial.

Even if the cross-examination is to be taken into consideration, the person sought to be arraigned as an accused cannot cross examine the witness(s)

prior to passing of an order under Section 319 Cr.P.C., as such a procedure is not contemplated by the Cr.P.C. Secondly, invariably the State would

not oppose or object to naming of more persons as an accused as it would only help the prosecution in completing the chain of evidence, unless the

witness(s) is obliterating the role of persons already facing trial. More so, Section 299 Cr.P.C. enables the court to record evidence in absence of the

accused in the circumstances mentioned therein.

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 Cr.P.C. In Section 319

Cr.P.C. 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 Cr.P.C. to form any opinion as to the guilt of the accused.

109.xx xx xx xx

Â 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.

13. With due regard to the aforesaid decision, the Constitution Bench of the Hon'ble Supreme Court have vividly propounded the law under Section

319 of the Code. It is absolutely clear that at any stage during trial, the provision under Section 319 of the Code can be used although it should be used

sparingly and under compelling circumstance. While reading the evidence, it need not be concerned even cross-examination must have been done but

the evidence should be there implicating the proposed accused. That apart, it is also made clear that the Court exercised jurisdiction under Section 319

of the Code must distinguish the accused in original against whom the cognizance has been taken and the accused against whom, the notice has

been issued under Section 319 of the Code to face trial. On the other hand, the material, which is perused by the Court below at the time of taking

cognizance somewhat must be in higher degree required for framing of charge for adding the accused to face trial under Section 319 of the Code.

Therefore, the Court, while exercising jurisdiction under Section 319 of the Code, must be vigilant to the material basing on which he/she find strong

material to compel proposed accused to appear to face trial. Keeping in mind all these principles, let the case of the petitioner be discussed.

14. The relevant portion of the impugned order dated 23.4.1994 is placed in the following manner:

â??23.4.1994 In the result, I take cognizance against Asit Kumar Basa, Nepal Hibari Ghosal and Rakhal Ch. Mohanty U/s 477(a) I.P.C. and 420

I.P.C. Summon them for appearance on 30.5.94 and for further order. The State Prosecutor appearing in the case is instructed to give the address of

the accused persons within 7 days. Accused Daitari Sahu is present.â??

15. The aforesaid impugned order shows that P.W.6, the I.O., has clearly maintained that the present petitioner along with other accused persons

abetted the principal accused Daitari to commit offence under Sections 468/471 of IPC for which he took cognizance of offence under Sections 477-

A/420 of IPC and issued process. The evidence of P.W.6 is gone through.

16. It transpires from the evidence of P.W.6 that as per the direction of the SP, Vigilance, he made preliminary investigation and on field verification, he did not find any trace of brick kiln or machinery for which the money was advanced to the principal accused. Then, he made FIR involving the original accused and examined four official witnesses including the present petitioner and registered the case under Section 5(2) of the P.C.Act read with Section 5(1)(a) of the said Act and Sections 468/471/120-B of IPC. He has also examined some witnesses but he has not been cross-examined at all. Of course, it is not material whether crossexamination is completed or not in view of the decision of the aforesaid Constitution Bench but the question arises whether the evidence of past IO and informant is enough to put the petitioner to face trial while after investigation, charge-sheet was not submitted against him. Apart from this, the registration of the FIR for the offences, are not the offences for which the present petitioner is asked to face trial by the learned trial Court. 17. In this case, it further appears that the present petitioner and two other accused against whom the cognizance has been taken to face trial have been arrayed as witnesses in the original charge-sheet. So, learned Court below, instead of being moved with the evidence of P.W.6, should have examined more witnesses to find out whether there is a prima facie material made out in the FIR or not to invoke the jurisdiction of the Court under Section 319 of the Code. On the other hand, P.W.5 has clearly stated that after he visited the spot and ascertained about the feasibility of the nature, gave his report and then the present petitioner, being the Manager of the OSFC, made visit for disbursement of the loan amount. There is no witness examined to implicate the petitioner till examination of P.W.6. Apart from this, Sections 420/477-A of IPC has got following ingredients:

â??The essential ingredients to attract Section 420 IPC are:

(i) cheating; (ii) dishonest inducement to deliver property or to make, alter or destroy any valuable security or anything which is sealed or signed or is capable of being converted into a valuable security, and (ii) mens rea of the accused at the time of making the inducement. The making of a false representation is one of the ingredients for the offence of Cheating under Section 420.

The essential ingredients to attract Section 477-A of IPC are:

1. The person coming within its purview must be a clerk, officer, or servant or acting in the capacity of a clerk, officer or servant.

2. He must willfully and with intent to defraud:-

(i) destroy, alter, mutilate, or falsify and book, paper, writing, valuable security, or account which:-

(a) belongs to, or is in possession of, his employer; or

(b) has been received by him for or on behalf of his employer; or

(ii) make or abet the making of any false entry in, or omit or alter or abet the omission or alteration of any material particular from or in, any such

book, paper, writing, valuable security, or account.â?? by deceiving him;

(ii)(a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or

(b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and

(iii) in cases covered by (ii)(b), the act of omission should be one which causes or is likely to cause damage or harm to the person induced in body,

mind, reputation of property.â??

18. The impugned order does not disclose how the ingredients of the aforesaid offences are prima facie available to issue process against the present

petitioner under Section 319 of the Code even if he relied on the FIR made by the P.W.6, who admittedly did not disclose such offences.

19. In terms of the above discussion, it appears that the learned Magistrate has exercised his jurisdiction without the material, which is necessary for

framing of charge because the cognizance of offences had been taken at the time of purportedly exercising power under Section 319 of the Code, as

above. This view is taken relying upon the decision of the Hon?ble Supreme Court in the case of Hardeep Singh (Supra). As per the decision of the

Hon?ble Supreme Court in the case of Prakash Singh Badal and another (Supra), the Hon?ble Supreme Court, at paragraph57, have observed in the

following manner:

â??57. The offence of cheating under Section 420 or for that matter offences relatable to Sections 467, 468, 471 and 120B can by no stretch of

imagination by their very nature be regarded as having been committed by any public servant while acting or purporting to act in discharge of official

duty. In such cases, official status only provides an opportunity for commission of the offence.â??

20. With due regard to the aforesaid decision, it appears that Section 197 of the Code will not protect the officials who are involved with the aforesaid

offences even if committed during discharge of duty. So, the petitioner is not protected under Section 197 of the Code for the offence alleged against

him under Sections 477-A/420 IPC.

21. Learned Standing Counsel for the Vigilance, relying upon the decision of the Hon?ble Supreme Court in the case of Mohit @ Sonu and another

(Supra), submitted that in order to defeat the provisions for revision, the present petition has been filed. The decision of the Hon?ble Supreme Court

relates to the case where the petition was filed to summon additional accused under Section 319 of the Code and it was rejected. In that case, the

Additional Sessions Judge rejected the revision against which a petition under Section 482 of the Code has been filed before the High Court of Judicature at

Allahabad to circumvent the sub-section 2 of section 397 of the Code. Here, the case is not on the same fact. Here section 482 of the Code has been

invoked to challenge the order passed under Section 319 of the Code where the cognizance has been taken against the present petitioner. No doubt,

he could have filed the revision before the Sessions Court or this Court but that does not debar him to file the present CRLMC under Section 482 of

the Code. It is well settled in law that a party can seek remedy of revision under Section 397 or the inherent jurisdiction under Section 482 of Code.

Although the jurisdiction of the High Court under Section 397 of the Code is limited but the jurisdiction of the High Court under Section 482 of the

Code is wide enough where the elements are to be gone through. For exercising jurisdiction under Section 482 of the Code, the Court is to find out if

there is abuse of process of Court or for the ends of justice, the impugned order is to be interfered. Therefore, the submissions of the learned Standing

Counsel Vigilance sans merit in this respect.

22. In terms of the above discussions, the Court is of the opinion that the order passed by the learned trial Court under Section 319 of the Code, being

abuse of process of Court, cannot be allowed to stand. Adding to this, it appears that even if the case is remanded to the Court below to pass fresh

order by considering the further material after 24 years of passing such order, it

will be further abuse of process of Court. Hence, the order dated 23.4.1994 passed by the learned J.M.F.C., Kamakhyanagar in G.R. Case No.8/86 is quashed under Section 482 of the Code in so far as the petitioner is concerned. The CRLMC is disposed of accordingly. The interim order dated 14.01.2005 stands vacated and the learned trial Court is directed to conclude the trial of the case and dispose of the same by the end of July, 2018. A copy of this judgment along with LCR be immediately sent back to the concerned Court by Special Messenger.