

(2019) 07 GAU CK 0065

In the Gauhati High Court

Case No : Criminal Revision Petition No. 245 Of 2018

Rakib Ahmed @ Rakibuddin Ahmed

APPELLANT

Vs

Rafiqul Awal

RESPONDENT

Date of Decision : 31-07-2019

Acts Referred:

Indian Penal Code, 1860 — Section 397, 401, 409, 420, 506
Code Of Criminal Procedure, 1973 — Section 197

Citation : (2019) 07 GAU CK 0065

Hon'ble Judges : Rumi Kumari Phukan, J

Bench : Single Bench

Advocate : S Chamaria, J Ahmed

Final Decision : Allowed

Judgement

1. Heard Mr. S. Chamaria, learned counsel for the petitioner as well as Mr. J. Ahmed, learned counsel appearing on and behalf of the respondent/complainant.
2. Challenging the order dated 27.06.2018 passed by the learned SDJM, North Salmara, Abhayapuri of taking cognizance under Section 409 IPC in C.R. Case No.585/2011, this revision under Section 397/401 of Code of the Criminal Procedure has been filed by the petitioner.
3. Learned counsel for the petitioner narrated the factual scenario behind the matter and has also drawn attention of this Court to the documents that have been annexed herein in support of his contention that the learned trial court while passing the order dated 27.06.2018 did not apply his judicial mind as well as in framing charge under Section 409 IPC against the petitioner while admittedly the present petitioner (accused in the aforesaid case) is a public servant working in the capacity as an Assistant Executive Engineer in Agriculture Department, Government of Assam.
4. Necessary facts that can be discussed herein is that on 05.11.2011, the respondent has filed a complaint petition before the court of learned SDJM, North

Salmara alleging that the accused has embezzled/ misappropriated an amount to the tune of Rs.2.10 Lakhs out of the sanctioned amount of Rs.3 Lakhs under the BRGF scheme. It was alleged that the fund was allegedly withdrawn by the petitioner in the name of constructing building of Farming Mechanical Training Centre at Abhayapuri while working as Assistant Executive Engineer in the office of Sub-Divisional Agricultural Officer, North Salamara, Abhayapuri. According to the complainant, he got the information through RTI that there is no such building of any such training centres at Abhayapuri. Pursuant to the aforesaid complaint lodged by the complainant, the learned trial court after examining the complaint including two other witnesses, took cognizance under Section 420/506 IPC and thereafter, by the order dated 25.11.2018 has framed charge under Section 409 IPC against the petitioner to which the accused/petitioner pleaded not guilty. Thereafter, a challenge has been made by the accused/petitioner against the framing of charge on the basis of being a public servant and requirement of sanction from the concerned authority.

5. Considered the submission of the petitioner, who has annexed bunch of documents along with his petition to show that the aforesaid amount of Rs.3 Lakhs was issued by the then Chief Executive Officer (CEO), Zilla Parishad, Bongaigaon on 26.03.2008 and also to show that Rs.2,10,000/- was released as first installment towards infrastructure tools/prototypes to develop Farm Machinery Training Centres at Abhayappuri, with a direction to submit utilization certificate to the said authority. While releasing the said amount, the aforesaid CEO has also imposed certain conditions towards the implementation of the scheme vide Annexure-4. In this aspect, the petitioner communicated with the said CEO regarding imparting training on the subject to development of farming machinery training centres at Abhayapuri, for which the Deputy Commission, Bongaigaon gave a sanction for Rs.2.10 Lakhs from MLALAD for infrastructure/ prototypes vide Annexure-3. In the said communication, petitioner has formulated the module for training dated 26.03.2008. Another document vide Annexure-5 is the details about the expenditures incurred while conducting such training by the present petitioner along with details of expenditures vide Annexure-6.

6. While submitting the said report to the CEO, the petitioner has also annexed all the details of the purchase of machineries and the cost incurred in the training imparted (vide Annexure-6 onwards to Annexure-9).

7. The petitioner has also pressed into another document vide Annexure-10 whereby the petitioner has written for recalling the RTI report that was wrongly provided by the officer concerned, of the department with wrong information of construction.

8. Thus, on the basis of the aforesaid documents, now it has been contended that whatever may have been done by the petitioner that was done in discharge of his official capacity but not on personal capacity and simply under some fabricated allegations of the complainant and without there being no iota of

documentary evidence about such embezzlement/misappropriation etc., learned trial court took cognizance of the offence against the petitioner and also framed charge against the petitioner, is bad in law and liable to be interfered into.

9. In support of his contention, learned counsel for the petitioner has also relied upon the decision of the Hon'ble Supreme Court in the cases of (i) Abdul Wahab Ansari vs. State of Bihar and others reported in AIR 2000 SC 3187, (ii) Ashoke Basak vs. State of Maharashtra and others reported in (2011) 1 SCC (CrL.) 85 and (iii) N.K. Ganguly vs. CBI, New Delhi reported in (2016) 2 SCC 143 wherein it has been categorically held that ".....if the act complained of is directly concerned with his official duties so that, 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 is important and if it falls within the scope and range of his official duties the protection contemplated by Section 197 of the Code of Criminal Procedure will be attracted."

10. Learned counsel for the respondent has, however, justified the order of the learned trial court on the ground that learned trial court has examined the complainant as well as other witnesses while taking cognizance and also basically relied upon the report of RTI with no such information about construction of building of training centres in the aforesaid area. Respondent's side has not challenged any of documents filed by the petitioner's side.

11. On a query made by this Court, learned counsel for the respondent/complainant has admitted that save and except verbal complain, he had no other documents to establish about such embezzlement and misappropriation on the part of the accused-petitioner in the present case. The evidence adduced by the complainant is on record indicates that apart from such verbal allegation, no any document has been produced in support of allegation, except RTI report. Now things remain that the petitioner is a public servant and his entire act is associated with his official duties and the aforesaid fund has also been released in his official capacity and there is the authority i.e. Zilla Parishad, Bongaigaon to speak about such misappropriation, if any and about non-functioning, non-utilization of the fund etc. by the petitioner while performing his act.

12. Learned trial court has not adhered to any such proper procedure to ascertain the authenticity of the allegation as to whether petitioner being a public servant acted in excess or in violation or misused the power or kept the matter in dark and has framed the charge against the petitioner without having any supporting document on the allegation in the complainant that too on a verbal one, and complaint is no way related to the work in question.

13. Regarding taking cognizance, the Hon'ble Supreme Court in (2008) 17 SCC 157 (Fakhruddin Ahmed vs. State of Uttranchal and another), has held that "..... it is well settled that before a Magistrate can be said to have taken cognizance of an offence, it is imperative that he must have taken notice of the accusations and applied his mind to the allegations made in the complaint or in the police

report or the information received from a source other than a police report, as the case may be, and the material filed therewith. It needs little emphasis that it is only when the Magistrate applies his mind and is satisfied that the allegations, if proved, would constitute an offence and decides to initiate proceedings against the alleged offender, that it can be positively stated that he has taken cognizance of the offence. Cognizance is in regard to the offence and not the offender".

14. The requirement of protection under Section 197 of the Code of the Criminal Procedure has been discussed in catena of decisions. The observation of the Hon'ble Supreme Court in (1997) 10 SCC 772 (State through the CBI vs. B.L. Verma and another), (2004) 8 SCC 40 (State of Orissa vs. Ganesh Chandra Jew) and (2015) 12 SCC 231 (D.T. Virupakshappa vs. C. Subash) can be reproduced below:

".....The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the Page No.# 11/12 official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty, if the answer to his question is in the affirmative, it may be said that such act was

committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case".

15. Thus, the Hon'ble Apex Court is of view that even if the public servant acted in excess of his duty, if there exist reasonable connection between the act complained of and the official duty, the excess will not deprive him of protection. In State through the CBI vs. B.L. Verma (Supra), it has been held that where the actions alleged against the public servant and the constituting offence had been done in purported discharge of his duties, even though amounting to abuse of power, held, the trial court could not, in absence of sanction under Section 197 of CrPC, take cognizance of the said offence.

16. The protection given to the public servant which is a statutory one unless it is shown that there is an extreme illegalities and excess in the work discharged by a public servant illegally, protection under Section 197 of Code of the Criminal Procedure cannot be diluted to a public servant. Cognizance taken by the learned trial court as well as framing of charge without any sanction, is bad in law, in the given facts and circumstances.

17. The present petition stands allowed.

18. Resultantly, the entire proceedings in C.R. Case No.585/2011 pending in the court of learned SDJM, North Salmara, Abhayapuri, is hereby set aside and quashed.