

ORISSA HIGH COURT : CUTTACK

CRLMC NO. 816 OF 2008

In the matter of an application under section 482 of the Code of Criminal Procedure.

Rohit Kumar That Petitioner

-Versus-

State of Orissa and another Opp. Parties

For Petitioner : Mr. P.K.Mishra & S.K.Dash.

For Opp. Parties : Addl. Standing Counsel
(for O.P.No.1)

M/s. Anirudha Das, G.P.Panda,
Dillip Kumar Samal,
Amarendra Das & A.Das.
(for O.P. No. 2)

Decided on 29.01.2010.

P R E S E N T :

THE HONOURABLE SHRI JUSTICE M. M. DAS

M.M. Das, J.

This application under section 482 Cr.P.C. has been filed by the petitioner seeking quashing of the order dated 12.5.2004 passed by the learned S.D.J.M., Dhenkanal in I.C.C. No. 129 of 2002 issuing process against the petitioner as well as for quashing of the said complaint case. On 12.7.2002, one Manoj Kumar Moharana lodged an F.I.R. making allegation of commission of offence under sections 341/323/294 IPC against

one Bishnu Moharana which was registered under the said sections of the Indian Penal Code. The petitioner was the Investigating Officer, who was posted as Officer-in-Charge of Motanga Police Station. In order to apprehend the said accused Bishnu Moharana, he went to the house of the opp. party no. 2 on the alleged date of occurrence and searched for him. It is the case of the petitioner that the opp. party no. 2 and his family members did not cooperate with him and rather, tried to misbehave with the petitioner and other police personnel accompanying him. The opp. party no. 2 lodged the complaint petition being I.C.C. No. 129 of 2002 before the learned S.D.J.M., Dhenkanal on 29.9.2002 against the petitioner as accused alleging commission of offence under sections 294/323/427/448/457/500/504/34 IPC. In the complaint petition, it was alleged by the complainant - opp. party no. 2 that on 22.9.2002 at about mid-night, the accused along with 4 to 5 persons entered inside the boundary of the house of the complainant and knocked the door uttering abusive language as mentioned in the complaint petition. On the complainant asking them regarding their identity, they did not disclose their names and identity. On the other hand, the accused persons abused the complainant. Apprehending danger to the life and property, the complainant did not open the entrance door of his house. Thereafter, the accused along with others broke upon the

entrance door of the house of the complainant and entered inside his house and searched for his son, namely, Bishnu Moharana. The complainant and his wife told the accused persons that their son is staying at Dhenkanal. Being vexed with the reply, the petitioner accused pushed the complainant as a consequence of which he fell down on the ground and thereafter the petitioner pulled his wife by holding her blouse in one hand and the blouse of his wife was torn and her modesty was out-raged. It has been further stated in the complaint petition that at that point of time, neither the accused no. 1 nor the unknown accused persons were in their uniform. The petitioner-accused also broke one Television set of the complainant by throwing the same from its stand thereby causing a loss of Rs.11,999/- to the complainant. Entering into the house of the complainant forcibly cannot be construed to be a part of the duty of the accused-petitioner.

2. After recording the initial deposition, the learned court below directed an enquiry under section 202 Cr.P.C. Thereupon, an enquiry under section 202 Cr.P.C. was conducted. The complainant produced one witness during such enquiry. The learned S.D.J.M. on 12.5.2004 recorded an order issuing process as follows:-

“Advocate for the complt. is present.
Perused the complt. petition, initial
statement of the complt.’s evidence
u/s.202 Cr.P.C. and found that there is a

case under Section 323/447/448/504/34 IPC and cog. is taken thereunder. Issue summons to accused fixing 24.7.04 for appearance. Complt. to take steps within 3 days.”

3. In the initial deposition, the complainant has not stated anything with regard to the offence of out-raging the modesty of his wife or the mis-behaviour of the petitioner as alleged in the complaint petition. The wife of the complainant examined during the enquiry under section 202 Cr.P.C. corroborated the statement of the complainant.

4. Mr. P.K. Mishra, learned counsel for the petitioner vehemently urged that no such incident, as alleged, took place and the petitioner in course of investigation of the F.I.R. lodged against Bishnu Moharana, the son of the opp. party no. 2 went to the house of the complainant to search for the said accused. This action on the part of the petitioner being in course of his official duty cannot be construed to be an offence. He further submitted that there being absence of sanction under section 197 Cr.P.C., a prosecution would not lie against the petitioner, who is a public servant. Mr. Mishra has relied upon several case laws in support of his contention.

5. Mr. A. Das, learned counsel for the opp. party no. 2, on the contrary, submitted that protection under section

197 Cr.P.C. is available to a public servant only when the alleged act done by the public servant was reasonably connected with discharge of his official duty and was not merely a cloak for doing the objectionable act. Mr. Das also relied upon various decisions in support of his contention.

6. In the case of ***Matajog Dobey v. H.C. Bhari***, A.I.R. 1956 SC 44, the Constitution Bench held that whether sanction is to be accorded or not is a matter for the Government to consider. The absolute power to accord or withhold sanction conferred on the Government is irrelevant and foreign to the duty cast on the Court which is the ascertainment of the true nature of the act. In this respect the Court has to see whether it can take cognizance of the case without previous sanction and for this purpose, the Court has to find out if the act complained against is committed by the accused while acting or purporting to act in the discharge of official duty. Once this is settled, the case proceeds or is thrown out. The Supreme Court further held that the offence alleged to have been committed must have something to do or must be related in some manner, with the discharge of official duty and no question of sanction can arise under section 197 unless the act complained of is an offence; the only point to determine is whether it was committed in the discharge of official duty. There must be a reasonable connection between the act and the official duty. It

does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What the Court must find out is whether the act and the official duty are so inter-related that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation.

(emphasis

supplied).

7. The Supreme Court on discussing the decision of the Federal Court reported in 1944 F.C. 66 held that the test laid down in the said case that it must be established that the act complained of was an official act appears unduly to narrow down the scope of the protection afforded by section 197 Cr.P.C. as defined and understood in AIR 1939 F.C. 43. In the case of ***Hori Ram Singh v. The Crown***, 1939 FCR 159, it has been observed as follows:-

“The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor is it necessary to go to the length of saying that the act constituting the offence should be so inseparably connected with the official duty as to form part and parcel of the same transaction.”

In the case of State of ***Bihar v. Kamal Prasad Singh and others***, AIR 1998 SC 2379, there was an allegation that on 30.3.1982, the police party headed by the accused raided the house of the complainant without a search warrant and respondent nos. 2 to 4 in the said case assaulted her wife and abused her and other inmates. The Supreme Court held that in the facts of the case, no cognizance could be taken without a proper sanction from the Government. In the case of ***Abdul Wahab Ansari v. State of Bihar and another***, AIR 2000 SC 3187, which was a case under section 302 and other sections of the Indian Penal Code, where allegation was made that during the course of magisterial duty, the accused gave orders of firing without authority and in the said process one person died and two were seriously injured, the Supreme Court held that the Legislative mandate engrafted in sub-section (1) of section 197 debars a court from taking cognizance of an offence except with a previous sanction where the acts complained of are alleged to have been committed by a police servant in discharge of his official duty or purporting to be in the discharge of his official duty and such public servant is not removable from his office save by or with the sanction of the Government. The question of applicability of section 197 Cr.P.C. and the consequential ouster of jurisdiction of

the court to take cognizance without a valid sanction is genetically different from prima facie constitution of offence alleged.

In ***Rizwan Ahmed Javed Shaikh and others v. Jammal Patel and others***, AIR 2001 SC 2198, the Supreme Court reiterated the position with regard to the test to be applied to attract the applicability of section 197 (3) Cr.P.C. The facts of the case in the decision rendered in the case of ***Sri Satyabadi Padhi v. Nepal Chandra Kar and others***, 2001 (I) OLR 238 are also similar to the facts of the present case, where the Court relied upon various earlier decisions of this Court, more specifically, on the decision ***of Kremjit Mohananda v. Mohanpani Karua and another***, 1995 (II) OLR 284 in which it was held that a middle line which is adopted to find out whether the protection under section 197 Cr. P.C. would be available to the accused or not is that it is not every offence committed by a public servant in course of performance of his official duty entitles him to the protection under section 197 Cr.P.C. but what comes under the protective umbrella is an act constituting an offence which directly or reasonably connects with his official duty. Protection of section 197 Cr.P.C. does not extend to acts done purely in a private capacity by a public servant and the allegation so made might be in excess of performance of official duty, but cannot be said to be

totally unconnected with the official duty or cannot be held to be in non-performance of his official duty.

8. Since the position of law, as stated above, is well settled with regard to the protection available under section 197 Cr.P.C., applying the same to the facts of the present case, it would be seen that on almost similar set of facts as are involved in the present case and similar nature of allegations, this Court in the case of *Sri Satyabadi Padhi* (supra) held that the petitioner therein is entitled to the protective umbrella under section 197 Cr. P.C. and the requirement of obtaining sanction for his prosecution being mandatory and admittedly, no sanction having been obtained, the order of cognizance, which was challenged in the said case was held to be bad in law and was set aside.

9. On close scrutiny of the facts of the present case also, it would appear that the petitioner, while performing his official duty of investigating a criminal case on an F.I.R. disclosing cognizable offence, went to the house of the complainant in search of the accused named in the said F.I.R. There are allegations of committing acts which exceed such official duty but it cannot be ruled out that it had no nexus to the performance of the official duty of the petitioner.

10. In view of the above, there was a mandatory requirement of obtaining sanction under section 197 Cr.P.C.

which admittedly, has not been obtained and, therefore, the order of cognizance taken by the court below is not sustainable in the eye of law. Accordingly, the impugned order of cognizance and issuing process to the petitioner by the learned S.D.J.M., Dhenkanal in I.C.C. Case No. 129 of 2002 passed on 12.5.2004 is set aside and the complaint case is quashed in its entirety.

11. In the result, the CRLMC is allowed.

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M.M. Das, J.

Orissa High Court, Cuttack.
January 29th ,2010/Biswal.