

ORISSA HIGH COURT: CUTTACK.

CRLMC No. 2564 OF 2010

In the matter of application under Section 482 of the Code of Criminal Procedure.

Hemanta Kumar Patra Petitioner

-Versus-

State of Orissa and another Opp. parties

For Petitioner : M/s. S.K. Sahoo, G. Sahoo
and A. Mohanty.

For Opp. Parties : M/s. H. S. Satpathy, A. N. Sahu,
M. Panda, M.M. Swain,
S. Biswal & H.K. Behera
(For O.P. 2)

Addl. Government Advocate

Date of Judgment: 27.02.2012

PRESENT :

THE HONOURABLE SHRI JUSTICE M.M. DAS

M. M. Das, J. The petitioner in this application under Section 482 Cr.P.C. is the accused in Balliguda P.S. Case No. 89 (3) of 2009 corresponding to G.R. Case No. 253 of 2009 now pending in the court of learned S.D.J.M., Balliguda and has prayed to set aside the order dated 4.5.2010 passed by the learned S.D.J.M., Balliguda in G.R. Case No. 253 of 2009 taking cognizance of the offence under Section 409 I.P.C. against the petitioner and issuing process to him.

2. Facts reveal that the petitioner was working as Branch Post Master of Mahasinghi Branch Post Office, Balliguda. On 8.11.2009, one Satya Narayan Mishra, Inspector of Post Office, Balliguda Sub-Division, Balliguda lodged an information before the I.I.C., Balliguda

Police Station alleging that when the petitioner was working as Branch Post Master of Mahasinghi Branch Office has committed the offence of misappropriation as detailed in the F.I.R., with regard to various account holders in the said Branch Post Office i.e. recurring deposit account of one Sudarsan Patra, one Dhan Singh Mallick, one Smt. Aaran Kothadalai, one Namita Patra and one Surasingh Kothadalai. The petitioner was alleged to have committed irregularities by making wrong entries in their accounts thereby misappropriating amounts of Rs. 1100/-, Rs. 1826/-, Rs. 6000/- and Rs. 16,00/- respectively from the aforesaid accounts. The F.I.R. also discloses that the informant Shri Mishra, who was the Inspector of Post Office, Balliguda Sub-Division, stated that all the connected records relevant to the allegations are with the Superintendent Post Office, Phulbani Division for departmental enquiry against the petitioner. The informant also requested to call for those records and seize the same from the Superintendent Post Office.

3. On the above allegations, after completion of the investigation, a charge-sheet was submitted against the petitioner by the Investigating Officer for commission of the alleged offence under Section 409 I.P.C. upon which the order taking cognizance of the said offence against the petitioner has been passed, which is impugned in this application. Affidavits have been annexed to the Crl. Misc. Case Petition and all the five account holders from whose accounts, it is alleged that the petitioner has misappropriated the amounts as stated above, in those affidavits, have stated that they have no grievance

against the petitioner and the petitioner has never misappropriated any amount from their accounts, which they deposited. The case diary was called for during hearing of this petition, which has been produced by the learned counsel for the State. It appears from the case diary that except the audit report, no other documents have been seized by the Investigating Officer during investigation of the case and the entire allegation in the F.I.R. is based on the audit report. The learned counsel for the State also on instruction, submitted that no other documents or materials have been seized during the course of investigation.

4. Mr. S.K. Sahoo, learned counsel appearing for the petitioner vehemently contended that since the Investigating Officer has not seized any other registers of the Branch Post Office where the petitioner was working as Branch Post Master, such as, copy of the ledger accounts of the alleged account holders from whose account it is alleged that money has been misappropriated by the petitioner and the cash book of the said post office or any other relevant register to show that the amount deposited by the depositors was misappropriated by the petitioner. He further contended that the audit report can by no stretch of imagination be held to be a conclusive evidence with regard to any irregularity pointed out by the auditor. Such irregularity, if pointed out by an auditor, the person who is stated to be responsible for commission of such irregularities, is required to be asked to show cause or explain such irregularities found during any audit. Mr. Sahoo also contended that in the present case, all the five depositors named

above have sworn affidavits stating that the petitioner has never misappropriated any amount deposited by them in the post office inasmuch the audit report annexed to the F.I.R. clearly mentioned that the loss has been made good by the charged officials. Out of all the witnesses named in the charge-sheet, five witnesses are the depositors, who have sworn their affidavits stating that they have no allegation against the petitioner. At this stage, it may be made clear that as stated above, the Investigating Officer has not seized any other register or documents during investigation of the case. Mr. Sahoo further submitted that basing only on the audit report, the Investigating Officer could not have filed the charge-sheet against the petitioner and even if such charge-sheet is filed, the court below could not have passed the order taking cognizance of the offence under Section 409 I.P.C. against the petitioner.

5. The question as to whether an audit report can be considered to be of conclusive nature and without any order evidence can form the basis of conviction has come up before this Court in various cases. In the case of **State of Orissa –vrs.- Chamara Panda**, 1985 CLR 308, this Court categorically laid down that an audit report of an inconclusive character which notes down some statements of objection cannot, by itself, saddle any person with criminal liability. In the case of **Okila Luha –vrs.- State of Orissa**, Vol. 58 (1984) CLT 80, this Court held that an order of conviction cannot be based on an audit report, which is of an inconclusive character, as an Auditor notes some objection therein and until the objections are brought to the notices of

the persons concerned and the liabilities are fixed by the authorities after proper enquiry, no legal culpability can be fixed. Law was made further clear in the case of **Bainkunthnath Mishra –vrs.- State of Orissa**, (1998) 15 OCR 137 where it was held by the Court that conviction under Section 409 I.P.C. cannot be based merely on the basis of an audit report in the absence of any independent evidence with regard to entrustment. It would be profitable to note the observation and the ratio laid down by the Apex Court in the case of **Jiwan Das –vrs.- State of Haryana**, AIR 1999 SC 1301 where the Supreme Court categorically held as follows:

“Mr. Ajay Siwach, the learned counsel appearing for the State of Haryana, however, very strenuously argued that Jiwan Dass being a senior officer and having been deputed with the bank draft for the purpose of taking delivery of the oil and the letter of authority being in favour of Jiwan Dass, it must be held that the entrustment of diesel had been made to Jiwan Dass or at least he had the dominion over the same. Mere fact that Jiwan Dass had taken the bank draft and that an authorization had been given in his favour by his superior officers to take delivery of the diesel, cannot be the basis for coming to a conclusion that in fact the diesel had been entrusted to said accused-Jiwan Dass or he had dominion over the same. When in point of fact it is established beyond reasonable doubt that delivery had been taken by accused Mittar Pal Yadav and in token of the same he had signed the relevant papers and register, Jiwan Dass being a senior officer may be responsible for dereliction of his duty in not taking delivery of the diesel himself. But on that score, it cannot be said that in-fact the prosecution has been able to establish that diesel had been entrusted to Jiwan Dass and there has been shortage of the said diesel to the tune of 4300 litres. In our considered opinion the gravamen of the charge being misappropriation of 4300 litres of diesel oil which was found to be in shortage while measuring the diesel that had been brought and the said diesel having been delivered to Mittar Pal Yadav, who had signed the relevant documents in token thereof, the entrustment to or dominion over the diesel by Jiwan Dass has not been established and as such the prosecution has not been able to establish the charge under Section 409, I.P.C. beyond reasonable doubt as against

accused Jiwan Dass in respect of the shortage of diesel to the tune of 4300 litres. It is no doubt true that Jiwan Dass appears to have given in writing on 2.3.1982 that he would be completing the quantity of 10,000 litres of oil but that writing neither can be held to be a confession or admission of the guilt on the part of the accused Jiwan Dass, nor that can form the basis of convicting the accused-Jiwan Dass for an offence under Section 409 I.P.C. In a prosecution for offence of criminal breach of trust if there is absence of legal and independent evidence with regard to the entrustment, then it would be improper either to put a question with regard to the entrustment to the accused and if put and an answer is obtained, partially admitting entrustment, the same does not establish the case of entrustment. In the aforesaid premises and in view of our conclusion that the prosecution has failed to establish entrustment of diesel to accused-Jiwan Dass, the conviction of Jiwan Dass under Section 409, I.P.C. cannot be sustained and we, accordingly set aside the conviction and sentence against the accused-Jiwan Dass and acquit him of the charge levelled against and Criminal Appeal No. 990 of 1995 is accordingly allowed and his bail bonds stand discharged.”

6. Recently in the case of ***Nikhil Merchant -v- C.B.I. and another***, (2008) 41 OCR (SC) 427, the Hon’ble Apex Court relying upon various decision of the said court took note of the fact of compromise between the parties and held that continuing with the allegation would only amount to misuse the process of the Court and quashed the criminal proceeding by setting aside the order of the High Court which dismissed the petitioner’s revision for quashing of the same.

7. As this Court after perusing the case diary and finding that the entire case is based on the audit report and no conviction can lie on such audit report as the same cannot be considered to be of conclusive character, continuance of the criminal proceeding against the petitioner would amount to abuse of the process of court, moreso when the account holders from whose accounts misappropriation against the petitioner as alleged, have already stated on oath that they have no

grievance against the petitioner, who has never misappropriated any amount from their accounts. This Court, therefore, while setting aside the impugned order by which the learned S.D.J.M., Balliguda took cognizance of the offence under Section 409 I.P.C. against the petitioner quashes the G.R. Case No. 253 of 2009 in its entirety.

The CRLMC is accordingly allowed.

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M.M. Das, J.

Orissa High Court, Cuttack.
Dated the 27th February, 2012/Bks.