HIGH COURT OF ORISSA : CUTTACK

CRLMC No.328 of 2006

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

Gurudas Kundu and others … Petitioners

-Versus-

State of Orissa and another … Opp. Parties

For Petitioners : M/s. Jagannath Patnaik, B.Mohanty, T.K.Patnaik, P.K.Nayak, S.Pattnayak, A.Patnaik, M.Panda.

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

Mr.P.Mohanty(for O.P.No.2)

P R E S E N T :

THE HON'BLE DR. JUSTICE D.P. CHOUDHURY

Date of hearing: 21.12.2017| Date of Judgment: 23.02.2018

Dr. D.P. Choudhury, J. This is an application under Section 482, Cr.P.C. to quash the order of taking cognizance dated 5.10.2005 passed by the learned S.D.J.M., Cuttack in ICC Case No. 736 of 2005.

FACTS

2. The adumbrated facts leading to the case of prosecution is that on 22/23.06.2005 at about 12.15 A.M., the complainant found a

police jeep being parked outside gate of her house wherein petitioner no.1 was sitting in the driver's seat and all other petitioners were standing close to the outer main gate of the complainant. Then the complainant asked for their visit to her house, but the petitioner no.1 instructed the other petitioners to make forcible entry into the house. The petitioner no.1 did not listen to her. Hearing her cry, her son Prafulla asked as to why she was crying. Before Prafulla came to know the reason, petitioner nos.2, 3 and 4 assaulted Prafulla and dragged him to the jeep after abusing him in filthy language. Petitioner nos.2 and 3 also assaulted Prafulla with fist blows and slaps. Then petitioner no.1 declared that he is under arrest. On being asked about the reason of arrest and giving some time to contact his lawyer, the petitioners forcibly carried Prafulla to the police station in the jeep. Petitioner No.1 abused him in filthy language saying "MAGIHA SALA AMAKU OKILA DEKHOUCHU-AME KETE OKILA KETA LAW DEKHICHU-ETC.

3. In the police station, they allowed Prafulla to sit in the verandah of the police station and petitioner no.1 only said that he is arrested due to issuance of non-bailable warrant of arrest. It is further alleged inter alia that the petitioner no.1 also demanded bribe of Rs.2,000/- for registering F.I.R. lodged by Prafulla for the theft of his motorcycle on 02.04.2005. The complainant had only paid Rs.500/-, but did not pay the rest amount as demanded by petitioner no.1.

4. It is the further allegation in the complaint that petitioner no.1 demanded Rs.1500/- from the complainant for immediate release of her son Prafulla. After detaining Prafulla for two hours, petitioner no.1 asked the other petitioners to put him inside Hazat till the complainant agreed to pay the demanded amount. Finding no other way, the complainant paid Rs.500/- to petitioner no.1 only to get her son saved. Then petitioner no.1 asked the complainant to give the rest money on the next day morning. On the next day, witnesses came and raised voice against such illegal action of the petitioners, after which the complainant's son was allowed to leave the police station. Hence, the fact was brought to the notice of the Superintendent of Police, Cuttack and Director General of Police. As no action was taken by the senior police officials, the complaint has been filed.

5. Learned S.D.J.M., Cuttack took initial statement of the complainant and recorded the statements of the witnesses. After finding a prima facie case under Sections 294,323,384/34, IPC, learned Magistrate took cognizance of the said offences and issued process against the present petitioners.

SUBMISSIONS

6. Mr. J.Patnaik, learned Sr.Counsel appearing for the petitioners submitted that petitioner no.1 was the Inspector-in-charge of Lalbag Police Station and the other petitioners were the police

officers attached to the said police station. According to him, warrant of arrest was issued against Prafulla Kumar Singh, the son of the complainant in U.I. Case No. 1961 of 1998 by learned Judicial Magistrate, Second Class, Cuttack for the commission of offence under Sections 192 and 196 of the M.V. Act and the petitioners had gone to execute the warrant issued against said Prafulla. He further submitted that the entire allegations of the complainant about use of obscene language and demanding money are all fabricated and false. Since the petitioners had gone to execute the warrant of arrest in official capacity, they are to be protected under Section 197, Cr.P.C. as the act complained of was within due discharge of official duty. In support of his submissions, he has relied on the decision of the Hon'ble Apex Court in **Sankaran Moitra v. Sadhna Das and another, (2006) 4 SCC 584**.

7. Learned Counsel appearing for the petitioners further submitted that there is contradiction between the averments made in the complaint and the statements made by the complainant before the Court and also with the witnesses examined under Section 202, Cr.P.C., for which prima facie case is not made out against the petitioners. However, in toto, he submitted that the impugned order of taking cognizance being illegal and irregular, should be quashed.

8. Learned Addl. Standing Counsel and Mr.P.Mohanty, learned counsel appearing for opposite party no.2 submitted that there is no such proof of warrant of arrest issued against Prafulla at the investigation stage. The petitioners-police officers having acted beyond their authority as per complainant, cannot be said to have discharged their duties. The use of obscene language, assault on Prafulla and demand of money as bribe cannot be taken as nexus with discharge of duty by the petitioners. It is further submitted that since prima facie case is well made out against the petitioners, protection under Section 197, Cr.P.C. is not required. As such order of taking cognizance of offence needs no interference. In support of their submission, they relied on **Raj Kishor Roy v. Kamleshwar Pandey and another, (2002) 23 OCR(SC), 510, Somanath Dixit v. Smt.Pratima Sahu and another, (2001) 21 OCR 687, Satyanarayan Dash v. Rankanidhi Sethi, 2013(II) OLR 717 and Pranab Kumar Pradhan and others v. State of Orissa and others, 2016(I) OLR 855.**

DISCUSSIONS

9. In **Sankaran Moitra (supra)**, the Hon'ble Supreme Court in paragraphs 22 and 23 has observed as follows :

> "22. Learned counsel for the complainant argued that want of sanction under Section 197(1) of the Code did not affect the jurisdiction of the Court to proceed, but it was only one of the defences available to the accused and the accused can raise the defence at the appropriate time. We

> are not in a position to accept this submission. Section 197(1), its opening words and the object sought to be achieved by it, and the decisions of this Court earlier cited, clearly indicate that a prosecution hit by that provision cannot be launched without the sanction contemplated. It is a condition precedent, as it were, for a successful prosecution of a public servant when the provision is attracted, though the question may arise necessarily not at the inception, but even at a subsequent stage. We cannot therefore accede to the request to postpone a decision on this question.
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> 23. x x x x But still, it would be an offence committed during the course of the performance of his duty by the appellant and it would attract Section 197 of the Code. Going by the principle, stated by the Constitution Bench in **Matajog Dobey v. H.C.Bhari (1955) 2 SCR 925**, it has to be held that a sanction under Section 197(1) of the Code of Criminal Procedure is necessary in this case."

10. In the decision reported in **Rakesh Kumar Mishra v. State of Bihar and others, (2006) 1 SCC 557**, the Hon'ble Apex Court in paragraph 18 observed as follows :

> "18. Section 197(I) provides that when any person who is or was a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction (a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government, and (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, or the State Government."

11. With regard to the aforesaid decision, it appears that Section 197, Cr.P.C. is a shield against the act complaint of, which should have nexus with the discharge of duty by public servant.

12. In **State of Orissa and others v. Ganesh Chandra Jew, AIR 2004 SC 2179,** the Hon'ble Apex Court in paragraph 11 observed as follows :

> "11. Such being the nature of the provision the question is how should the expression, 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty', be understood? What does it mean? 'Official' according to dictionary, means pertaining to an office, and official act or official duty means an act or duty done by an officer in his official capacity. In **B.Saha and others v. M.S.Kochar, (1979 (4) SCC 177**), it was held : (SCC pp. 184-85, para 17)
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> "The words 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty' employed in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the section will be rendered altogether sterile, for, 'it is no part of an official duty to commit an offence, and never can be'. In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197(1), an Act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution and the said provision."
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> Use of the expression, 'official duty' implies that the act or omission must have been done by the public in the course of his service and that it should have been in discharge of his duty. The Section does not extend its protective cover to every act or omission done by a public

> servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty."

13. With regard to the aforesaid decision, it appears that those acts and omissions, which have been done by the public servant in due discharge of duty can only be segregated but not every act or omission done by the public servant. It is clear that sanction for prosecution is a condition precedent to prosecute a public servant. So, Section 197, Cr.P.C. has got two pre-conditions:

(i) That the concerned public servant is removable by sanction obtained from the State Govt./ Central Govt.

(ii) That the act complained of must have nexus with discharge of duty or in due discharge of official duty.

14. But at the same time, learned counsel for opposite party no.2 cited the decision in **Raj Kishor Roy v. Kamleshwar Pandey (supra)**, wherein in paragraph 11, the Hon'ble Supreme Court has observed as follows :

> "11. In this case, as indicated above, the complaint was that the 1st Respondent had falsely implicated the Appellant and his brother in order to teach them a lesson for not paying anything to him. The complaint was that the 1st Respondent had brought illegal weapon and cartridges and falsely shown them to have been recovered from the Appellant and his brother. The High Court was not right in saying that even if these facts are true then also the case would come within the purview of Section 197, Cr.P.C. The question whether these acts were committed and/or whether 1st Respondent acted in discharge of his duties could not have been decided in this summary fashion. This is the type of case where the prosecution must be given an opportunity to establish its case by evidence and an opportunity given to the defence to establish that he had been acting in the course of his

> official duty. The question whether the 1st Respondent acted in the course of performance of duties and/or whether the defence is pretended or fanciful can only be examined during the course of trial. In our view, in this case the question of sanction should be left open to be decided in the main judgment which may be delivered upon conclusion of trial."

15. The aforesaid decision only shows that the Hon'ble Apex Court left the trial court to decide whether the defence plea is fanciful or pretended or there is real fact behind it. The facts of the said decision are different from the facts of the present case, for which the same is not applicable.

16. With due respect to the decisions made by the Hon'ble Apex Court it is clear that twin conditions for invoking Section 197, Cr.P.C. should be fulfilled and in all cases protection cannot be made available if the act complained of is fanciful and pretention only. Not only this but also the Crime Branch has issued a circular that protection under Section 197, Cr.P.C. would be applicable to all police personnel, who are engaged in public order either being member of the Orissa Police Act or the Orissa State Armed Police Act.

17. Keeping in view the aforesaid principle, let me find out whether the petitioners are entitled to protection under Section 197, Cr.P.C. The complaint shows that on 22/23.6.2005 at about 12.15 A.M. the petitioners went to the house of the complainant in spite of the objection of the complainant. Further, the complaint shows that

after tracing out the son of the complainant, they took away him in the police jeep stating that they have come to execute the warrant of arrest issued against Prafulla, the son of the complainant. In course of exchange of words, the petitioners have used obscene language. It is also alleged that in the police station the police officers demanded Rs.1500/- and Rs.500/-. On being paid, the son of the complainant was let off. Annexure-2 shows that there was warrant of arrest issued by the learned JMSC to execute the same against the son of the complainant, Prafulla. So, no doubt the petitioners have gone to the house of the complainant to arrest Prafulla, the son of the complainant in due discharge of their duty to execute the warrant of arrest. The allegation of taking away in the jeep, hurling of obscene language and demand of money at the police station are all interlinked with execution of warrant of arrest against the petitioners even if there is excessive overt-act as alleged. In view of aforesaid decision, the protection under Section 197, Cr.P.C. is available to petitioners.

18. Moreover, the initial statement of the complainant departs the complaint in material particular because in the complaint she stated about hurling of abuses by the petitioners in her house and in the police station, but during the initial statement, she simply stated that the petitioners forcibly went inside the house and dragged

her son Prafulla to the jeep and took away him. In the complaint, she stated that the petitioner no.1 demanded Rs.1500/- as chanda for immediate release of her son and she paid Rs.500/- to petitioner no.1 to get her son saved, but the demand of Rs.1500/- by petitioner no.1 has not been revealed from the initial statement of the complainant. The alleged assault causing hurt to Prafulla has also not been revealed from the complaint and initial statement of the complainant. The statement of Prafulla, who was examined under Section 202, Cr.P.C. only shows that the petitioners came to their house and forcibly took him away to the police station and there petitioner nos.2 and 3 demanded Rs.1500/- and the complainant gave Rs.500/- to them. He has contradicted his mother to the extent which of the petitioners demanded money and to whom Rs.500/- was paid. Thus, there is material discrepancy between the statement of the witnesses and the statement of the complainant, the alleged occurrence is not found to be proved prima facie case against the petitioners.

CONCLUSION

19. From the aforesaid discussion, it is clear that the petitioners have gone to the house of the complainant to execute the warrant of arrest in U.I.Case No. 1961 of 1998 issued by the learned J.M.S.C., Cuttack and the petitioners have executed the same in due discharge of duty and the rest of the allegations are conjectures and

being not proved prima facie. In absence of any sanction under Section 197, Cr.P.C. and prima facie case, the learned SDJM has failed to apply judicial mind to the fact of the case and took cognizance of the offence. Hence, the CRLMC is allowed and the order of taking cognizance and issuance of process are quashed.

The interim order passed earlier stands vacated.

Registry is directed to communicate this order along with the L.C. R. to the Court below immediately by Special Messenger.

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Dr. D.P. Choudhury, J.

ORISSA HIGH COURT: CUTTACK
Dated the 23rd February, 2018/**PKSahoo**