



GAHC010092682019

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Pet./451/2019

BASANTA KUMAR MISHRA
S/O LT. BHABANI MISHRA, R/O VILL. BARBHITHA, BELSOR, P.O. BELSOR
NALBARI, P.S.- BELSOR, DIST.-NALBARI, ASSAM

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY THE PP, ASSAM

2:RANJIT MISHRA
NOW THE PRESENT DOLOI SRI SRI BILLESWAR DEVALAYA
BELSOR
BARBHITHA
NALBARI
PIN-781

Advocate for the Petitioner : MR. R J DAS

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

JUDGMENT & ORDER (CAV)

Date : 22-04-2024

The Heard Mr. R.J. Das, learned counsel for the petitioner, Mr. P. Borthakur,

learned Additional Public Prosecutor for The respondent No. 1 and Ms. S.G. Baruah, learned counsel for the respondent No. 2.

2. The petitioner in this case is Basanta Kumar Mishra, who has filed an application under Section 482 of the Code of Criminal Procedure, 1973 (CrPC for short) with prayer for quashing the Charge Sheet No. 60/2018 dated 23.06.2018 in connection with Belsor Police Station Case No. 169/2017 under Sections 406 of the Indian Penal Code, 1860 (IPC for short) and also for quashing the order dated 25.03.2019 passed in connection with PRC Case No. 281/2018 arising out of the aforementioned Belsor Police Station Case. An FIR (ejahar) was lodged by Sri Ranjit Mishra (Doloi) contending *inter-alia* that he is the present Doloi of Sri Bileswar Devalaya (Belsor). The Ex-Doloi Sri Basanta Kumar Mishra-petitioner herein had misappropriated an amount of Rs.20,98,722.57/- (Rupees Twenty Lacs Ninety Eight Thousand Seven Hundred Twenty Two and Fifty Seven Paisa) during the period from 01.04.2013 to 01.04.2016. After submission of audit report by the C.A., Mr. Dipak Bajaj, a general meeting was held on 22.07.2017 in the premises of the Bileswar Devalaya and it was resolved in the said meeting to lodge an FIR against the petitioner. The informant Sri Ranjit Mishra (Doloi) is arrayed as respondent No. 2 and the State of Assam is arrayed as respondent No. 1 in this petition.

3. It is submitted by the petitioner that he was the Doloi of Sri Sri Bileswar Devalaya, Belsor, Nalbari (the Devalaya for short) from the period between 16.05.2013 to 16.09.2016 and he had performed his duty with utmost dedication and devotion. On 16.09.2016, a resolution was passed by the Devalaya trustees/members directing the petitioner to relinquish his duties as Doloi and immediately, he conceded to the resolution. His resignation was accepted by the Deputy Commissioner, Nalbari (DC for short).

4. It is further submitted by the petitioner that all the finances of the Devalaya were handled by him. The DC, in the capacity of the President of the Devalaya Managing Committee, directed to hold an internal audit of the finances of the Devalaya and accordingly, an internal audit was held on 16.09.2016 by Sri Lakhi Patowary, the President of Jagya Committee and Sri Umesh Barman. The petitioner has further submitted that on 16.09.2016, it was resolved that if there were any anomalies (as averred by certain persons), the same would be investigated through an official enquiry and the petitioner was asked to deposit the cash in hand, amounting to Rs.1,27,235.65/- (One Lac Twenty Seven Thousand Two Hundred Thirty Five and Sixty Five Paisa) as found in the internal audit in the PS account of the Devalaya. The petitioner was to refund, if any discrepancies would be detected. Annexure-1 of the petition is the resolution adopted on 16.09.2016.

5. In compliance to the order of the DC, the petitioner deposited the cash in hand into the bank account of the Devalaya on 21.09.2016 and the petitioner also asked for verification of the cash deposit vide his letter dated 20.10.2016 (Annexure-2). The DC directed a firm of the Chartered Accountants vide his letter dated 02.11.2016 to conduct the official audit of the funds of the Devalaya for the period mentioned below:

2013-14,

2014-15,

2015-16 (upto September, 2016).

6. The DC also informed the firm that they would be assisted by Sri G. Deka and Sri D. Mena as local auditors. The petitioner was also instructed to hand over all the documents of the Devalaya to the newly appointed Doloi Sri Ranjit

Mishra/respondent No. 2. This direction was reiterated by the ADC through his letter dated 16.11.2016.

7. The petitioner complied with the orders dated 19.11.2016 and 20.11.2016 and communicated the same through his letter dated 26.12.2016 (Annexure-4).

8. The petitioner has submitted that on 05.01.2017, M/S D.K. Bajaj and Co. submitted the internal audit report prepared pursuant to the aforementioned letter dated 02.11.2016 (Annexure-3). On 13.04.2017, a general meeting was called and the meeting was presided by Lakhi Patowary, and it was resolved to translate the documents/audit report submitted by the Official Auditor, into vernacular. Five persons of the Devalaya namely Sri Girin Deka, Sri Dilip Mena, Sri Kobi Modiar, Sri Biren Patowary and Sri Ranjit Mishra were inducted into a committee, entrusted with the responsibility of translation.

9. It is contended by the petitioner that the audit report was not provided to him and he had to apply to the PIO, Office of the DC, Nalbari, seeking the information under the Right to Information Act, 2005 (RTI Act for short) on 24.07.2017. No reply was provided under the RTI Act and the petitioner had to file an appeal on 24.07.2017 before the DC, Nalbari but there was no response from the appellate authority (DC) and the petitioner approached the Assam State Information Commission vide petition dated 08.11.2017. Annexure-5 is the copy of the RTI query dated 24.04.2017.

10. Meanwhile the respondent No. 2 lodged an FIR. Subsequently, the petitioner was provided with a copy of the audit report of M/S DK Bajaj and Co., vide forwarding letter dated 05.04.2018, as part of the reply to his RTI application and as directed by the State Information Commission. The petitioner then learnt that in the internal audit, an amount of Rs.16,767.45/- (Rupees

Sixteen Lacs Seven Hundred Sixty Seven and Forty Five Paisa) was paid to the Ex-Doloi (petitioner) as temporary loan. On re-audit by the same internal auditors, it was found that the surplus balances had increased, but, surprisingly, Rs.16,767.45/- (Rupees Sixteen Thousand Seven Hundred Sixty Seven and Forty Five Paisa) was shown as payable to the Ex-Doloi. A huge amount of funds was alleged to have been mismanaged by the President Lakhi Patowary and the Secretary Anup Deka for construction of Belborn House and expenses incurred for a Maha Rudra Jagya. It is further stated on behalf of the petitioner that in the audit report balance sheet on 31.03.2014, a clear entry of Rs.3,81,791/- (Rupees Three Lacs Eighty One Thousand Seven Hundred and Ninety One) is shown as temporary loan from the Doloi, i.e. the petitioner. This loan on 31.03.2015 had increased to Rs.4,36,738/- (Rupees Four Lacs Thirty Six Thousand Seven Hundred and Thirty Eight) on account of loans and advances and expenditures incurred by the petitioner for the Devalaya. Finally, on 31.03.2016, the amount has shot up to Rs.5,46,837/- (Rupees Five Lacs Forty Six Thousand Eight Hundred and Thirty Seven) and on 30.06.2016, the amount is shown as Rs.5,77,301/- (Rupees Five Lacs Seventy Seven Thousand Three Hundred and One). This figure is the total amount owed to the petitioner by the Devalaya on account of expenditures and advances made by him to finance the Devalaya operations. Annexure-9 is the copy of the audit report submitted to the petitioner on 05.04.2018.

11. It is averred by the petitioner that the petitioner is yet to receive certain amount from the Devalaya. The audit report belies the contentions raised in the FIR that the petitioner has misappropriated Rs.20,00,000/- (Rupees Twenty Lacs) from the Devalaya, but surprisingly, the police submitted charge sheet on 23.06.2018 against the petitioner. The learned Magistrate vide order dated

10.09.2018, was pleased to take cognizance and issued process to the petitioner. On 05.12.2018, the petitioner appeared before the Magistrate and the copies were furnished to the petitioner (Annexure-10 and 11).

12. The petitioner filed an application under Section 239 of the CrPC with prayer to be discharged from the charges levelled against him but the learned Magistrate vide the impugned order dated 25.03.2019 framed charge under Section 406 of the IPC. Annexure-12 of the petition is the order dated 25.03.2019 passed by the Magistrate.

13. On being aggrieved by this order, the petitioner has filed this petition.

14. It is further contended that the learned trial Court, without adequately advertng to the materials on record for considering whether there is sufficient ground presuming the commission of the offence by the petitioner, mechanically framed the charge relying on the prosecution's version and on the documents forwarded along with the charge sheet. This conduct of the trial Court renders the charge framed as illegal and perverse. It is also contended that without an iota of evidence, the learned Magistrate presumed the involvement of the petitioner in the commission of offence under Section 406 of the IPC.

There is no incriminating evidence in the statement of the witnesses under Section 161 of the CrPC and the documents forwarded under Section 173(2) of the CrPC to presume that the petitioner had committed any offence. On the contrary, the audit report of M/S D.K. Bajaj unequivocally demonstrates the facts contradicting the charge framed by the learned trial Court.

15. The documents on the other hand reveal the following:

Rs.3,81,791/- (Rupees Three Lacs Eighty One Thousand Seven Hundred and Ninety One) was due to the petitioner on the year ending 31.03.2014,

An amount of Rs.54,947/- (Rupees Fifty Four Thousand Nine Hundred and Forty Seven) was due to the petitioner on the year ending 31.03.2015,

An amount of Rs.1,10,099/- (Rupees One Lac Ten Thousand and Ninety Nine) was due to the petitioner on the year ending 31.03.2016.

16. Referring to the audit report of M/S D.K. Bajaj and Co., it is submitted by the petitioner that the petitioner is yet to receive Rs.5,77,301/- (Rupees Five Lacs Seventy Seven Thousand and Three Hundred One) from the Devalaya and as such, the impugned order dated 25.03.2019 is liable to be set aside and quashed.

17. It is further contended that the auditors of M/S D.K. Bajaj and Co. were never asked to clarify whether the audit report discloses any amount of misappropriation by the petitioner and this is evident from the statement of the witnesses under Section 161 of the CrPC. Five out of ten witnesses namely Sri Ranjit Mishra, Sri Dilip Mena, Sri Utpal Patowary, Sri Lakhi Patowawry and Sri Umesh Barman have categorically stated under Section 161 of the CrPC that the instant case was based on the audit report of D.K. Bajaj and individually they have no knowledge of any amount being misappropriated by the petitioner in any manner whatsoever. It is further contended that as the audit report of the M/S D.K. Bajaj forms the substratum of the prosecution case and as the audit report reveals that Rs.5,77,301/- (Rupees Five Lacs Seventy Seven Thousand and Three Hundred One) is due to the petitioner, the order dated 25.03.2019 is liable to be set aside and quashed.

18. Two witnesses namely Sri Anup Deka and Sri Manoj Mena have stated under Section 161 of the CrPC that as per the audit report of D.K. Bajaj and Co., the petitioner has not misappropriated any amount of money from the

Devalaya. It is also submitted on behalf of the petitioner that the listed witnesses namely Sri Anup Deka, Sri Umesh Barman and Sri Manoj Mena have categorically stated about the existence of rampant groupism, which clearly indicates that the FIR was lodged with malafide to wreak vengeance due to the prevailing personal vendetta against the petitioner. This tantamounts to an abuse of the process of the law and the petition is thereby liable to be dismissed. The amount of Rs.20,98,772.59/- (Rupees Twenty Lacs Ninety Eight Thousand Seven Hundred Seventy Two and Fifty Nine Paisa) is a non-existent figure and the closest reference to this figure is found in the statement of the respondent No. 2, who succeeded the petitioner.

19. It is further submitted on behalf of the petitioner that the documents seized, viz, charge handover of Devalaya dated 16.11.2016 and charge order copy from the ADC reveals a general meeting convened by the DC wherein it was resolved that the respondent No. 2 would be the new Doloj and then an internal audit was conducted. It was observed in the internal audit that only an amount of Rs.1,27,235/- (Rupees One Lac Twenty Seven Thousand and Two Hundred Thirty Five) was due from the petitioner and the petitioner deposited the same. Nowhere, the humongous amount of Rs.20,98,772.59/- surfaces.

20. The ingredients that are required for an offence under Section 406 of the IPC are:

- (a) A person should have been entrusted with property, or entrusted with dominance over property;
- (b) That a person should dishonestly misappropriate or convert into his own use that property,

or dishonestly use or dispose of that property or wilfully suffer any other

person to do so; and

(c) That such misappropriation, conversion, use or disposal should be in violation of any direction of law, prescribing the mode in which trust is to be discharged,

or of any legal contract which the person has made, touching the discharge of such trust.

21. It is further submitted that the instant case is based solely on the audit report, that too, prepared by an expert, and the bare perusal of the report nowhere discloses any misappropriation by the petitioner. It is further submitted that it emerges on the evaluation of the materials on record, that there is no ground to presume or even assume that the offence under Section 406 of the IPC has been committed by the petitioner.

22. The petitioner has made out a prima facie case of illegality, lack of application of judicial mind and violation of the mandate of Section 239 and 240 of the CrPC by the trial Court while framing charge against the petitioner. The learned counsel for the petitioner has prayed to dismiss that petition.

23. It is further contended on behalf of the petitioner that although DK Bajaj has submitted an audit report, there was no statement from M/S D.K. Bajaj and Co. recorded under Section 161 of the CrPC to be found in the Case Diary.

24. *Per contra* it is submitted on behalf of the respondent No. 2 by the learned counsel Ms. S.G. Baruah that the internal audit report of Belsor Devalaya by D.K. Bajaj, more particularly, Annexure-9 of the petition clearly reveals that :

The cash book was not maintained,

The ledgers were not maintained,



The vouchers were not properly passed for payment.

All the payments were made in cash,

The vouchers were not maintained chronologically,

The stock register was not maintained,

The cheque issue register was not maintained,

The coupon books were not issued chronologically and so on and so forth.

25. It was also observed that in the audit report, the cash balance could not be verified without properly maintaining the cash books or the books of accounts. The sudden increase in the cash balance of the same period provides a sense of doubtfulness on the genuineness of the accounts submitted by the internal auditors. It is also further submitted on behalf of the respondent No. 2 that the seizure list reveals three MR numbers. MR-56/2018 reflects that the audit report was not part of the RTI and was thus not provided. The accountant Dipak Kumar Bajaj's name is reflected as witness No. 8 in the charge sheet marked as Annexure-11 of the petition. Thus after considering the statement of the witnesses, charge sheet has been submitted against the petitioner. The accountant Dipak Kumar Bajaj was also interrogated during investigation. It is submitted that this case cannot be decided at this juncture. In fact, charges can be altered at any stage under Section 216 of the CrPC. It is further submitted that it is intriguing how can a Dolo loan such huge amount of funds for the purpose of running the Devalaya. It is not believable that the Dolo i.e. the petitioner is yet to receive an amount of Rs.5,77,301/- (Rupees Five Lacs Seventy Seven Thousand and Three Hundred One) from the Devalaya.

26. Indeed the learned counsel for the respondent No. 2 has prayed to dismiss this petition

27. The learned Additional Public Prosecutor has submitted that the learned Magistrate had considered all the materials on record and was pleased to reject the petition under Section 239 of the CrPC. The learned Magistrate on two occasions decided to proceed against the petitioner. Earlier, cognizance was taken and summonses were issued against the petitioner and thereafter, after considering all the materials on record, the learned Magistrate dismissed the petition filed by the petitioner under Section 239 of the CrPC.

28. It is further submitted that there are two reports against the petitioner. The internal audit report by the members of the trust and thereafter, an official report by D.K. Bajaj which clearly reflects the nonchalant and apathetic manner adopted by the petitioner in dealing with the funds of the Devalaya.

29. The learned counsel for the respondent No. 2 has submitted that the aforesaid RTI is not the sole document which was relied upon to proceed against the petitioner. A resolution was also adopted by the members of the trust who relied on the internal audit report of the trust to discharge the petitioner from his responsibility as the Dolo of the Devalaya. Thus the Chartered Accountant's report is not the edifice of the entire case.

30. I have considered the submissions at the bar with circumspection.

31. The learned counsel for the petitioner has relied on the decision of the Hon'ble Supreme Court in Satish Mehra Vs. State of N.C.T. of Delhi and Ors. reported in AIR 2013 SC 506 wherein it has been held that:

"19. The view expressed by this Court in Century Spinning's case (supra) and in L. Muniswamy's case (supra) to the effect that the framing of a charge against an accused substantially affects the person's liberty would require a reiteration at this stage. The apparent and close proximity between the framing of a charge in a criminal proceeding and the paramount rights of a person arrayed as an accused under Article 21 of the Constitution can be ignored only with peril. Any

examination of the validity of a criminal charge framed against an accused cannot overlook the fundamental requirement laid down in the decisions rendered in Century Spinning and Muniswamy (supra). It is from the aforesaid perspective that we must proceed in the matter bearing in mind the cardinal principles of law that have developed over the years as fundamental to any examination of the issue as to whether the charges framed are justified or not. So analysed, we find that in the present case neither in the FIR nor in the charge sheet or in any of the materials collected in the course of investigation any positive role of either of the appellants, i.e., G.K. Bhat and R.K. Arora has been disclosed in the matter of renewal and encashment of the fixed deposits. All that appears against the aforesaid two accused is that one was the Chief Manager of the Bank whereas the other accused was at the relevant time working as the Senior Manager. What role, if any, either of the accused had in renewing the two fixed deposits in the sole name of Anita Mehra or the role that any of them may have had in the payment of the amount due against FD No. 21/91 to Anita Mehra or in cancelling the FD No.9/92 renewed in the sole name of Anita Mehra and thereafter making a fresh FD in the joint Anita Mehra and Satish Mehra, is not disclosed either in the FIR filed or materials collected during the course of investigation or in the charge sheet filed before the court. There can be no manner of doubt that some particular individual connected with the Bank must have authorized the aforesaid acts. However, the identity of the said person does not appear from the materials on record. It is certainly not the prosecution case that either of the accused-Appellants had authorised or even facilitated any of the aforesaid action. In such a situation to hold either of the accused-Appellants to be, even prima facie, liable for any of the alleged wrongful acts would be a matter of conjecture as no such conclusion can be reasonably and justifiably drawn from the materials available on record. A criminal trial cannot be allowed to assume the character of fishing and roving enquiry. It would not be permissible in law to permit a prosecution to linger, limp and continue on the basis of a mere hope and expectation that in the trial some material may be found to implicate the accused. Such a course of action is not contemplated in the system of criminal jurisprudence that has been evolved by the courts over the years. A criminal trial, on the contrary, is contemplated only on definite allegations, prima facie, establishing the commission of an offence by the accused which fact has to be proved by leading unimpeachable and acceptable evidence in the course of the trial against the accused. We are, therefore, of the view that the criminal proceeding in the present form and on the allegations levelled is clearly not maintainable against

either of the accused – appellant G.K. Bhat and R.K. Arora.”

32. This is case is however distinguishable from the case of Satish Mehra (supra) relied upon by the petitioner. In this case there are specific allegations against the petitioner. The petitioner was a Doloi of the Devalaya and he was entrusted with the property of the Devalaya and had dominance over the property. At this stage, a roving and fishing enquiry cannot be made but, there are prima facie materials that the Doloi was in charge of the Devalaya and audit report by the Internal Audit and the CA reveal discrepancies in the accounts managed by the Doloi.

33. As there are specific allegations against the Doloi of having misappropriated the funds of the Devalaya, this case cannot be considered to be a case which will be an abuse of the process of the Court. At this juncture, it cannot be conclusively decided that no case under Section 406 of IPC has been made out against the petitioner. An in-depth scrutiny is indispensable to exonerate the petitioner of the charges levelled against him. The inherent jurisdiction under Section 482 of the CrPC is to be invoked sparingly on the attending circumstances.

34. In the wake of the foregoing discussions, petition is hereby dismissed. No order as to costs.

JUDGE

Comparing Assistant