IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMP No. 1245 of 2024

1. Bibhuti Bhusan Mishra

2. Soudamini Mishra

….. ***Petitioners***

Mr. Asok Mohanty, Senior Advocate

-versus-

State (Vigilance) ….. ***Opp. Party***

Mr. Sangram Das, Standing Counsel
(for Vigilance)

CORAM:

THE HON'BLE MR. JUSTICE S.K. SAHOO
THE HON'BLE MISS JUSTICE SAVITRI RATHO

ORDER
04.03.2025

Order No.
07.

This matter is taken up through Hybrid arrangement (video conferencing/physical mode).

Heard Mr. Asok Mohanty, learned Senior Advocate for the petitioners and Mr. Sangram Das, learned Standing Counsel for the Vigilance Department.

The petitioners Bibhuti Bhusan Mishra and Soudamini Mishra, who are the husband and wife have filed this petition challenging the order dated 27.01.2024 passed by the learned Special Judge, Special Court, Bhubaneswar in T.R. No. 8/45 of 2015/2013 in rejecting the petition filed by the petitioners under section 239 of Cr.P.C. for discharge.

As per the charge sheet dated 19.08.2013, the petitioners were charge sheeted under section 13(2) read with section 13(1)(e) of the Prevention of Corruption Act, 1988 (hereafter '1988 Act') read with section 109 of the Indian Penal Code on the accusation

that the petitioner no.1 who was the then Additional Secy. to Govt., Water Resources Department, being a public servant had acquired assests both movable and immovable to the tune of Rs.30,30,683.84 or say Rs.30,30,684.00, both in his name and in the name of his family members during the check period from June 78 to 30.06.2008. During the said check period, he had incurred expenditure of Rs.27,50,730.45 or say Rs.27,50,730.00. Thus, on both counts, it comes to Rs.57,81,414.00. Against this, he had earned income of Rs.26,12,730.31 or say Rs.26,12,730.00 from all his known and lawful sources. Thus, he had acquired assets to the tune of Rs.31,68,684.00 as disproportionate to his known and lawful sources of income of Rs.26,12,730.00 during the check period.

Mr. Asok Mohanty, learned Senior Advocate appearing for the petitioners argued that the assests and expenditure as reflected in the charge sheet are highly inflated. Some salary received by the petitioner no.1 during the check period when he was the Financial Advisor -cum- Additional Secretary to Government, Water Resources Department, Bhubaneswar has not been taken into account. He further argued that the petitioners have got two sons and they have contributed a substantial amount for the construction of the house out of their income during the check period, but the same has not been taken into account. Several known sources of income of the petitioner No.1 as well as his family have been ignored in a malafide manner, even the D.A. amount has not been considered properly while submitting charge sheet. He further argued that the learned Court below has rejected the petition filed by the petitioner under section 239 of Cr.P.C. in a mechanical manner and therefore, the impugned order is liable to be set aside.

Mr. Sangram Das, learned Standing Counsel for the Vigilance Department on the other hand supported the impugned order and contended that in view of the limited scope on the part of the learned trial Court at the stage of consideration of discharge petition, it cannot be said that any illegality has been committed while passing the impugned order. He argued that the contentions raised that some amounts have been made highly inflated against the assets and expenditure headings and there is deliberate omission of some salary income, are required to be adjudicated at the time of trial on the basis of evidence and not at this stage. So far as the non-taking of some other income of the petitioners and their family is concerned, it is required to be proved by oral as well as documentary evidence. He argued that what was the income of the two sons of the petitioners, how much amount they had contributed for the construction of the house during the check period, are all the matters of evidence, which if adduced during trial from the side of the petitioners, will be adjudicated by the learned trial Court in accordance with law and therefore, the impugned order should not be interfered with.

In view of sub-section (1) of section 5 of 1988 Act, a Special Judge in trying the accused persons, shall follow the procedure prescribed by the Cr.P.C., for the trial of warrant cases by the Magistrates. Chapter XIX of Cr.P.C. deals with the trial of warrant cases by the Magistrates. Section 239 of Cr.P.C. which appears in the said chapter enumerates as to when the accused shall be discharged. In view of such provision, when the Magistrate considers the charge against the accused to be groundless which means without any basis or foundation, the accused can be

discharged. For arriving at such a conclusion, the Court has to consider the police report and the documents sent with it under section 173 of Cr.P.C. The Court can also make examination of the accused, if it is necessary. Opportunity of hearing has to be provided to both the prosecution and the accused at that stage. The truth, veracity and effect of the materials proposed to be adduced by the prosecution during trial are not to be meticulously adjudged. The likelihood of the accused in succeeding to establish his probable defence cannot be a ground for his discharge. The object of discharge under section 239 of Cr.P.C. is to save the accused from unnecessary and prolonged harassment. When the allegations are baseless or without foundation and no prima facie case are made out, it would be just and proper to discharge the accused to prevent abuse of process of the Court. If there is no ground for presuming that accused has committed an offence, the charges must be considered to be groundless. The ground may be any valid ground including the insufficiency of evidence to prove the charge. When the materials at the time of consideration for framing the charge are of such a nature that if unrebutted, it would make out no case whatsoever, the accused should be discharged.

In case of **Amit Kapoor -Vrs.- Ramesh Chander and another reported in (2012) 9 Supreme Court Cases 460**, it is held as follows:-

> "17. Framing of a charge is an exercise of jurisdiction by the trial Court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the Court is required to consider the

'record of the case' and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the Court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the Court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.

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19. At the initial stage of framing of a charge, the Court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him

guilty. All that the Court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage.

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27.3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

27.4. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts, even in such cases, the High Court should be loath to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

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27.13. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at the initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

In case of **State of Madhya Pradesh -Vrs.- Mohanlal Soni reported in A.I.R. 2000 S.C. 2583**, it is held that at the stage

of framing charge, the Court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence to conclude whether the materials produced are sufficient or not for convicting the accused. If the evidence which the prosecution proposes to produce to prove the guilt of the accused, even if fully accepted before it is challenged by the cross-examination or rebutted by the defence evidence, if any, cannot show that accused committed the particular offence then the charge can be quashed.

In case of **State of M.P. -Vrs.- Awadh Kishore Gupta reported in (2004) 1 Supreme Court Cases 691**, it is held that when charge is framed, at that stage, the Court has to only prima facie be satisfied about existence of sufficient ground for proceeding against the accused. For that limited purpose, the Court can evaluate materials and documents on records but it cannot appreciate evidence.

In case of **A.R. Saravanan -Vrs.- State reported in 2003 Criminal Law Journal 1140**, it is held as follows:-

> "7. Under section 239 of Cr.P.C., it is the duty of the trial Court to look into whether there is ground for presuming commission of offence or whether the charge is groundless. The trial court is required to see whether a prima facie case pertaining to the commission of offence is made out or not. At the stage of 239 of Cr.P.C., the trial court has to examine the evidence only to satisfy that prima facie case is made out or not. The Magistrate has to consider the report of the prosecution, documents of

both sides, hear the arguments of the accused and prosecution and arrive at a conclusion that the materials placed, on their face value would furnish a reasonable basis or foundation for accusation.

8. The words "groundless" employed in Section 239 means there is no ground for presuming that the accused is guilty. When there is no ground for presuming that the accused has committed an offence, the charge must be considered as groundless."

At the stage of framing of charge, in rare and exceptional cases, if the accused produces materials before the High Court which is based on sound, reasonable and indubitable facts and cannot be justifiably refuted by the prosecution and which are of sterling and impeccable quality or on the basis of admitted documents which would rule out and displace the assertions contained in the charges levelled against him, in order to prevent abuse of process of the Court and to secure the ends of justice, the High Court even at the stage of section 239 of Cr.P.C. can take into account such materials. However, the High Court at that stage should not enter into appreciation of evidence to verify if the defence plea can be established by the accused or not.

In case of **State of Orissa -Vrs.- Debendra Nath Padhi reported in (2005) 30 Orissa Criminal Reports (SC) 177**, it is held as follows:-

"7. Similarly, in respect of warrant cases triable by Magistrates, instituted on a police report, Sections 239 and 240 of the Code are the relevant statutory

provisions. Section 239 requires the Magistrate, to consider 'the police report and the documents sent with it under Section 173 and, if necessary, examine the accused and after giving accused an opportunity of being heard, if the Magistrate considers the charge against the accused to be groundless, the accused is liable to be discharged by recording reasons thereof.

8. What is to the meaning of the expression 'the record of the case' as used in Section 227 of the Code. Though the word 'case' is not defined in the Code but Section 209 throws light on the interpretation to be placed on the said word. Section 209 which deals with the commitment of case to Court of Session when offence is triable exclusively by it, inter alia, provides that when it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall commit 'the case' to the Court of Session and send to that Court 'the record of the case' and the document and articles, if any, which are to be produced in evidence and notify the Public Prosecutor of the commitment of the case to the Court of Session. It is evident that the record of the case and documents submitted therewith as postulated in Section 227 relate to the case and the documents referred in Section 209. That is the plain meaning of Section 227 read with Section 209 of the Code. No provision in the Code

grants to the accused any right to file any material or document at the stage of framing of charge. That right is granted only at the stage of the trial.

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16. All the decisions, when they hold that there can only be limited evaluation of materials and documents on record and sifting of evidence to prima facie find out whether sufficient ground exists or not for the purpose of proceeding further with the trial, have so held with reference to materials and documents produced by the prosecution and not the accused. The decisions proceed on the basis of settled legal position that the material as produced by the prosecution alone is to be considered and not the one produced by the accused. The latter aspect relating to the accused though has not been specifically stated, yet it is implicit in the decisions. It seems to have not been specifically so stated as it was taken to be well settled proposition. This aspect, however, has been adverted to in State Anti-Corruption Bureau, Hyderabad and Anr. Vs. P. Suryaprakasam : 1999 SCC (Crl.) 373 where considering the scope of Sections 239 and 240 of the Code, it was held that at the time of framing of charge, what the trial Court is required to, and can consider are only the police report referred to under Section 173 of the Code and the documents sent with it. The only right the accused has at that stage

is of being heard and nothing beyond that (emphasis supplied). The judgment of the High Court quashing the proceedings by looking into the documents filed by the accused in support of his claim that no case was made out against him even before the trial had commenced was reversed by this Court. It may be noticed here that learned counsel for the parties addressed the arguments on the basis that the principles applicable would be same - whether the case be under Sections 227 and 228 or under Sections 239 and 240 of the Code.

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18.....The scheme of the Code and object with which Section 227 was incorporated and Sections 207 and 207(A) omitted have already been noticed. Further, at the stage of framing of charge, roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. It is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi

taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police.

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23. As a result of aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. Satish Mehra's case holding

that the Trial Court has powers to consider even materials which accused may produce at the stage of section 227 of the Code has not been correctly decided."

In the case of **Hem Chand -Vrs.- State of Jharkhand reported in (2008) 40 Orissa Criminal Reports (SC) 272**, it is held as follows:-

"8. It is beyond any doubt or dispute that at the stage of framing of charge, the Court will not weigh the evidence. The stage for appreciating the evidence for the purpose of arriving at a conclusion as to whether the prosecution was able to bring home the charge against the accused or not would arise only after all the evidences are brought on records at the trial.

9. It is one thing to say that on the basis of the admitted documents, the appellant was in a position to show that the charges could not have been framed against him, but it is another thing to say that for the said purpose, he could rely upon some documents whereupon the prosecution would not rely upon.

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12. The learned counsel for the CBI is, thus correct in his submission that what has been refused to be looked into by the learned Special Judge related to the documents filed by the appellant along with his application for discharge.

The Court at the stage of framing charge

exercises a limited jurisdiction. It would only have to see as to whether a prima facie case has been made out. Whether a case of probable conviction for commission of an offence has been made out on the basis of the materials found during investigation should be the concern of the Court. It, at that stage, would not delve deep into the matter for the purpose of appreciation of evidence. It would ordinarily not consider as to whether the accused would be able to establish his defence, if any."

In the case of **Rukmini Narvekar -Vrs.- Vijaya Satarkekar and others reported in (2008) 41 Orissa Criminal Reports (SC) 853**, it is held as follows:-

"9. In my view, therefore, there is no scope for the accused to produce any evidence in support of the submissions made on his behalf at the stage of framing of charge and only such materials as are indicated in Section 227 Cr.P.C. can be taken into consideration by the learned Magistrate at that stage. However, in a proceeding taken therefrom under Section 482 Cr.P.C., the Court is free to consider material that may be produced on behalf of the accused to arrive at a decision whether the charge as framed could be maintained. This, in my view, appears to be the intention of the legislature in wording Sections 227 and 228 the way in which they have been worded and as explained in Debendra Nath Padhi case by the larger Bench

therein to which the very same question had been referred.

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28(17)…Thus in our opinion, while it is true that ordinarily defence material cannot be looked into by the Court while framing of the charge in view of D.N. Padhi's case, there may be some very rare and exceptional cases where some defence material when shown to the trial Court would convincingly demonstrate that the prosecution version is totally absurd or preposterous, and in such very rare cases, the defence material can be looked into by the Court at the time of framing of the charges or taking cognizance.

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29(18). In our opinion, therefore, it cannot be said as an absolute proposition that under no circumstances can the Court look into the material produced by the defence at the time of framing of the charges, though this should be done in very rare cases i.e. where the defence produces some material which convincingly demonstrates that the whole prosecution case is totally absurd or totally concocted. We agree with Sri Lalit that in some very rare cases the Court is justified in looking into the material produced by the defence at the time of framing of the charges, if such material convincingly establishes that the whole prosecution

version is totally absurd, preposterous and concocted."

After hearing the learned counsel for both the sides, we are of the view that the learned trial Court has examined the materials on record carefully and since it was satisfied that prima facie case is made out and it cannot be said that the charge against the two petitioners would be groundless, it has rightly rejected the petition filed by the petitioners under section 239 of Cr.P.C.

Learned counsel for the petitioners has annexed the income tax returns of petitioner no.2 from 1984-85 till 2006-07, the income tax returns of first son of the petitioners namely Chinmaya who is stated to a Computer Engineer from the year 2002 till the assessment year 2006-07, the income statement of second son of the petitioners namely Tanmay who is stated to have been served in UNITEL and BAJAJ ALLIANZ. Whether the petitioner no.2 had the income from known and lawful sources for which she was filing income tax returns, how much contribution the two sons of the petitioners had made from their salaries for the construction of the house as contended by the learned counsel for the petitioners are required to be proved by the petitioners during trial in accordance with law for the appreciation of the trial Court. Similarly if some other income from the known and lawful sources of the petitioners have been left out, the same are to be brought on record by the petitioners during trial so that the learned trial Court can consider the same. At this stage, we cannot consider those documents which are not admitted by the prosecution.

In view of the foregoing discussions, we find sufficient grounds exists for the purpose of proceeding further with the trial

against the petitioners and we do not find that any ground to interfere with the impugned order.

Accordingly, the CRLMP being devoid of merits, stands dismissed.

Interim order passed on 21.10.2024 stands vacated.

Learned trial Court shall do well to expedite the framing of the charge and proceed with the trial.

It is made clear that we have not expressed any opinion on the merits of the case and while adjudicating the guilt or otherwise of the petitioners, the learned trial Court shall strictly take into the evidence adduced by both the sides during trial.

A copy of this order be sent to the learned trial Court forthwith.

(S.K. Sahoo)
Judge

(Savitri Ratho)
Judge

Sukanta/Puspa