

order no:82

Dated 14.09.22

Today is fixed for passing order. The order is taken up for passing order.

A petition was filed on behalf of accused persons praying for their discharge of not obtaining the previous sanction as enshrined u/s 197 of CrPC.

The petitioners/ accused persons have come with a petition stating inter alia that the complaint filed by Ashim Das against accused persons is not maintainable due to lack of sanction and the complaint was filed to harass the accused persons.

The accused persons stated inter alia that on 13.07.13 at about 11.30 pm the accused persons had held raid in the house of the complainant wherein the accused persons forcefully entered into the house and asked the complainant whether Ashok Das was in the house or not to which they got an answer that Ashok Das was not in the house, though he was present himself and then Ashok Das came out and seeing the police he fled away from the back door of the house with the help of the complainant and other inmates. The accused persons further stated that it was alleged by the complainant that the accused persons assaulted the complainant brutally and had abused him and when the wife of the complainant came to rescue, the accused persons pushed her down and outraged her modesty and thereafter both the accused persons ransacked and damaged the household articles of the complainant and thereafter the accused persons took the complainant to the police station, assaulted him and forced him to put signature on some blank papers for which the complainant had filed the instant case.

After the complaint was filed, the complainant and other witnesses were examined u/s 200 CrPC but the issuance of process were postponed and this court had passed an order u/s 202 CrPC directing the IC, Dinhata PS to investigate the matter and submit the report vide order dated 04.04.14 and against this order the complainant preferred revisional application and the Ld. Revisional Court had set aside the order of this court and directed this court to conduct the enquiry himself. Thereafter, the evidence were taken on S/A and summons were issued u/s

448/427/323/330/355 IPC and the case was fixed on 18.07.22 and evidence of the complainant and other witnesses were recorded and the case was fixed for consideration of charge on 18.07.22.

The petitioners had further stated that the two accused persons are public servants and the alleged offence as stated by the complainant were committed by them while acting or purporting to act in discharge of their official duties and so no court shall take cognizance of such offence without the previous sanction from the appropriate authority as mentioned in section 197 of the Code of the Criminal Procedure. The petitioner further stated that the brother of the complainant was an accused in CR case no. 52/11 and warrant was issued against him. Further the petitioners stated that the extract copy of the GD submitted by them would show that “the accused persons while holding raid against the warrantee Ashok Das of Ward no. 2, Dinhata which was issued from the Ld. JM, Balurghat, Dakshin Dinajpur these SI Kajal Sarkar along with other official force had been to the house of Ashok Das to execute the W/A. On call the brother of the warrantee Ashim Das and his mother, wife and warrantee came out from their house and after seeing police personnel the warrantee Ashok Das got back with the assistance of the other family members. And all the family member started abusing to the police without any provocation and tried to push police personnel to out from their house and taking these advantages of the situation the warrantee fled away from the house.”

It is further asserted by the petitioners that the police personnels were in proper uniform and was carrying the warrant of arrest and still all the family members of the complainant obstructed the police officers from discharging their official duties and so for the purpose of maintaining peace in the locality the complainant was taken into custody and the matter was entered in the GDE being Dinhata PS GDE entry no. 788 dated 13.07.13 at 12.25 hrs and thereafter permission was sought from the then Ld. ACJM, Dinhata and after the enquiry PR was drawn up against the complainant and his family members specifically his wife and mother vide NGR no. 906/13.

The petitioners state that as no sanction was sought for by the complainant before filing of the instant complaint and so the accused should be discharged on that score and prays to allow the petition .

No written objection was filed on behalf of the complainant against the petition but the Ld Advocate for the complainant has raised oral objections at the time of hearing of the application.

During the course of hearing , the Ld. Advocate for the petitioners/ accused persons had submitted before this court that the act complaint of against the accused persons relates to the actions taken by them in course of official duty as the same was done on the basis of a process issued by a Court of law but the complainant has filed the instant complaint without obtaining previous sanction from appropriate authority. The Ld. Advocate appearing on behalf of the accused persons also submits before this court that there is not previous enmity expressed from the materials on record which will show that the acts on the part of the accused persons were done under the colour of his office. The Ld. Advocate for the accused persons further submitted that there was a breach of peace so the accused persons had taken the complainant in their custody and had diarised he incident and after obtaining permission for enquiry from the then Ld. ACJM, Dinhata had submitted a prosecution report and a NGR case was registered. The Ld. Advocate for the accused persons had filed the photocopy of the prayer of enquiry report from Court Sub-inspector , extract copy of GD, prosecution report and had cited one judgment of Hon'ble Supreme Court reported in AIR 2006 Supreme Court 820.

Per-contra the Ld. Advocate appearing for the complainant had submitted before this court that the accused persons have not filed any petition u/s 245 CrPC and had come up with an application praying for discharge at a much belated stage when cognizance was already taken. The Ld. Advocate for the complainant submits that there is no enmity between the complainant and the accused persons

but still the complainant had to file the instant complaint due to excesses of the police personnels . The Ld. Advocate for the complainant has cited the judgments reported in 2003 CRI L. J. 1145, 2003 CRI L.J, 2462, 2002 CRI L.J. 866, 1967CRI L. J.1463 and has also filed certified copy of the order of the Hon’ble Court in CRR no. 2362/15 wherein the Hon’ble Court was pleased to stay the proceeding in NGR 906/13.

I have perused the entire materials on record.

It is necessary to go through the relevant portions of Section 197 of the Code of the Criminal Procedure .

Section 197 of CrPC lays down that *Prosecution of Judges and public servants*.

(1) When any person who is or was a Judge or Magistrate or 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;

(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, of the State Government.....”

If we carefully go through the contents of Section 197 CrPC, we will find that Section 197 CrPC deals with prosecutorial sanction in form of permission from appropriate authorities to proceed against judges and public servants as these sovereign authorities require an amount of liberty to fulfill the ends of justice and to meet up the requirement of administration. So, there might be situations where in execution of their duties, citizens may be required to be treated prejudicially by the authorities to meet the ends of justice and here a security cover is necessary for the

public servant for giving them assurance that they would not be victim of maliciously initiated prosecutions. But at the same time, law determines that they cannot practice untrammelled power to do anything to meet the ends of justice and liability must be placed when the alleged offence which is complained of is explicitly separated from the execution of their duties. Therefore, law demands that the balance needs to be struck so as to ensure that offences are not committed with impunity, while disguising themselves as an execution of duties of a public servant.

I have categorically perused the judgments cited by the accused persons wherein the Hon'ble Supreme Court reported in AIR 2006 Supreme Court 820 was pleased to set aside the order of the Ld. Magistrate taking cognizance and was pleased to hold that when the complainant alleged that search by the police officer was motivated and was for the purpose of humiliating and harassing him as the concerned official had no search warrant, then the Hon'ble Court was pleased to hold that the cognizance of the offence is barred because of the mandatory character of protection afforded to a public servant as enshrined in expressed u/s 197 CrPC. I have also diligently perused the judgment cited by the complainant one after the other and reported in 2003 Cri. L. J. 1145: 2003 Cri. L.J, 2462: 2002 Cri. L.J. 866: 1967, Cri. L. J.1463.

Perusal of the judgments of the Hon'ble Courts would specifically show that the judgments cited have diverse factual aspects but harmonious reading of the judgments would show that the judgments laid emphasis on the basic principle of law enshrined in section 197 of the Code of the Criminal procedure wherein protection is given under this section to responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they were acting or purporting to act as public servants. It is protection to ensure that the public servants are not prosecuted for anything done by them in discharge of their official duties without reasonable cause. This protection as brought out by the series of judgments of the Hon'ble Courts would specifically show that, the said protection has certain limits and is available only when the alleged act done by the public servant is reasonably

connected with discharge of his official duty and is not merely a covering for doing any objectionable act.

In the instant case, the question to be determined is that the accused persons has acted in course of their official duty and the complainant has filed the instant case alleging objectionable acts against them without obtaining proper prior sanction and whether in absence of sanction the accused persons should be discharged or not?

I have meticulously perused all the judgments cited by the Ld. Advocates of the accused persons and the petitioners.

Considering the materials on record, it appears to this court that the complainant in his complaint has asserted some actions on the part of the accused persons when they have come in the house of the complainant on 13.07.13 at about 11.30 in the night. The complainant as I have stated has made a specific averment that the accused persons had entered their house and had assaulted the complainant brutally and had abused him and when the wife of the complainant came to rescue, the accused persons pushed her down and outraged her modesty and thereafter both the accused persons ransacked and damaged the household articles of the complainant and thereafter the accused persons took the complainant to the police station, assaulted him and forced him to put signature on some blank paper for which the complainant had filed the instant case. On the other hand the petitioners/ accused persons had specifically stated before this court that they had been in the house of the complainant to execute a process and there were serious breach of peace committed by the complainant and his family members for which they were compelled to take the complainant in custody and diarise the incident.

The Ld. Advocate for the accused persons had specified in the petition that thereafter the said incident was inquired with the permission of the Ld. ACJM, Dinahata and a specific NGR case was initiated against them.

Before Section 197 CrPC can be invoked, it has to be shown that the concerned officer was accused of an offence alleged to have been committed by him while acting or purporting to act in discharge of his official duties and the official act can be performed both in discharge of his official duty as well as dereliction of it. So, the act complained of must fall within the purview and range of the official duties of the concerned public servant. It is pertinent to mention herein that the judgments cited before me relates to diverse activity of public servants on diverse occasion for which they have faced prosecution. It is true that a public servant requires a protection from harassive proceedings with regard to an act done while in discharge of their duty but at the same time a public servant is not entitled to indulge in criminal activities under the garb of his discharge of official duties.

The main contention raised by the accused persons by filing the instant application is that this court should not have taken cognizance of the offence without prior sanction of State Govt. u/s 197 of CrPC and on that sole ground the accused is required to be discharged.

Perusal of the case record shows that the case was initiated on the basis of a complaint filed by Ashim Das on 12.09.12 and on that date the complaint was registered and cognizance was taken. Thereafter, the complainant and his two witnesses were examined u/s 200 CrPC. The record further shows that on 04.04.14 an order was passed by this court wherein this court had postponed the issuance of process and directed the IC, Dinhata PS to investigate the matter himself and file a report u/s 202 CrPC by 02.05.14. The complainant moved the Ld. Revisional Court against the said order being order no. 7 dated 04.04.14 and the Ld. Revisional Court had been pleased to allow the said revision and set aside the order dated 04.04.14 and directed the then Ld. Addl. Chief Judicial Magistrate, Dinhata to conduct the enquiry himself or herself and decide whether the process can be issued or not on the basis of the evidence recorded or ought to be recorded or by him or her.

Thereafter, on considering the materials on record and hearing the complainant, summons were issued against the accused persons namely Soumalya Aich and Kajal Sarkar u/s 323/355 of Indian Penal Code. The accused persons thereafter surrendered before this court and was granted bail and the recording of the evidence of the complainant and his witnesses commenced. During the course of recording of evidence before charge, it appears that on 07.06.18 the Ld. Advocate appearing for the accused persons informed this court that one criminal revisional application being CRR 999/18 was filed by them before the Hon'ble Court and prays for time for filing the stay order obtained by them from the Hon'ble Court which was allowed by my Ld. Predecessor in chair. It appears that since 07.06.18 few opportunities were given to the accused persons to bring forth the order of the Hon'ble Court but they could not and so the evidence of the complainant before charge was recorded. Perusal of the case record shows specifically that no order in connection with CRR 999/18 was filed by the Ld. Advocate for the accused persons nor any order of stay was obtained by them from the Hon'ble Court. After recording of the evidence of the complainant and the witnesses, the case was fixed for framing of charge against the accused persons on 18.07.22 and at this stage of the proceeding, the Ld. Advocate for the accused persons has come up with an application praying for discharge of the accused persons on the sole ground that sanction under 197 CrPC has not been obtained before filing of the instant complaint for which the accused persons can be discharged.

I have already discussed the purview and the purpose of the sanction specified u/s 197 CrPC as has meticulously gone through several judgments of Hon'ble Apex Court as well as Hon'ble High Courts. Section 197 CrPC gives protection against prosecution with respect to acts which are done in exercise of official duty and is under the colour of office. From the principles of law laid down by Hon'ble Court, it is apparent that Section 197 CrPC is construed strictly while determining its applicability to an act or omission in course of service and its operation is absolutely limited to those duties which are to be discharged in course of official work or duty and on the other hand this section does not give an

entitlement to a public servant to indulge in criminal activities. Therefore, two aspects are to be taken into consideration i.e. once an act is found to be done by a public servant in discharge of his duty then it must be given a wide and liberal construction as far as the official nature of duty is concerned and at the same time any criminal activity done by a public servant under the garb of his official duty has to be construed in a narrow and restricted manner otherwise the entire purpose of affording protection to a public servant for acts done by him in course of his official duty would be frustrated.

Keeping in mind the specific section laid down in the Code of Criminal Procedure and in the light of the judgments passed by the Hon'ble Apex Court and Hon'ble Courts and the factual aspect of the instant case, we can very well come to a specific inference that whether acts complained of which constitutes an offence and done by a public servant in course of his official duty falls under the purview of the sanction as mentioned in Section 197 CrPC or not is purely a question of fact or law.

In the instant case, whether Section 197 CrPC is required or not is to be determined in this context of facts applying the law laid down by the Legislature and the Hon'ble Courts. Needless to mention that it is mixed question of facts and law.

On perusal of the case record , this court finds that the complainant and his witnesses were examined before charge. As far as this stage of proceeding is concerned, this court finds that none of the witnesses has faced the acid test of cross examination and only the evidence in chief of the prosecution witnesses were recorded. So as far as the evidence is concerned this court finds that the witnesses have not faced cross examination as yet, and so this Court can hardly ascertain the genuinity or truthfulness of the witnesses who have come up before this court and deposed as witnesses.

Further the accused persons by filing the instant application has produced few documents which they relied upon. These documents produced before this court at the time of hearing are all in photocopies. Now the question is whether this court can give an sacrosanct approach towards the photocopies of these documents without giving the opportunity to the complainant to controvert the same ? The answer is definitely in the negative. The photocopies though was filed at the time of hearing of the application by way of firisti but again this court cannot ascertain the genuineness or veracity of the documents if they are not produced and made a part of the record in accordance with law. So there is requirement of the accused persons to bring those documents by way of their defences in a appropriate stage by adducing the evidence on their behalf.

This court finds that the cognizance of the offence was taken way back on 12.09.2013 . Thereafter the said order was not challenged before any upper forum. The order still holds good. There is nothing on record wherein it would be apparent that the accused persons had tried to obtain their redressal before ld upper forum against the order of taking cognizance by this court on 12.09.2013 . Needless to mention herein that if we peruse section 197 CrPC with section 246 of the CrPC we will find that these two provisions are not contradictory or conditional to each other. So , I am of the considered opinion that there is no embargo in framing of charge against the accused persons on the sole ground that cognizance was taken against the offence without any prior permission. This court is inclined to place reliance on a very recent judgment of our Hon'ble High Court decided on 02nd September , 2022 in the matter of Kingshuk Biswas and Anr. Vs. State of W.B. in CRR 2941/19 wherein the Hon'ble Court has described the various principles of law with regard to Section 197 CrPC. The Hon'ble Court has been pleased to hold that ;--

“.....Considering the aforesaid principles in case, the version of the prosecution is found to be correct. There is no requirement of any sanction. However it would be open to the accused persons to adduce the evidence in defence and to submit such other materials on record indicating that the incident has taken place in

discharge of their official duties and orders passed earlier would not come in the way of Trial Court to decide the question afresh in the light of the aforesaid principles from stage to stage or even at the time of the conclusion of the trial at the time of judgment.....” The Hon’ble Court had also been pleased to lay down that” having regards to the observations made by the Ld Magistrates in its order dated 22.12.15 and the present stage of the case wherein charge is required to be framed by the Ld. Sessions Court. In view of the order passed in CRR 1811/19 passed on the materials available in the record, I am of the opinion that presently for framing charges there is no requirement for sanction for proceeding with the trial. If the factual circumstance so demand the petitioner shall be at liberty to canvas the issue relating to sanction at a stage which would be commensurate with the principles laid down in Devinder Singh’s Case”

On perusal of the judgment very meticulously, I am of the considered opinion that the petition filed by the accused praying for discharge on the ground of not obtaining prior sanction is not tenable in law and in such form before this court as cognizance of the offence was already taken way back in the year 2003 and this court has no jurisdiction to review or modify the own order and evidence on the part of the prosecution before charge was also recorded. However, it is pertinent to mention that the question of the acquiring of the sanction is kept open to be decided at the final stage of proceeding.

Hence, it is,

ordered,

that the petition filed by the accused persons be and the same stands rejected at this stage giving liberty to the accused to place documents at an appropriate stage of the proceedings as the plea taken by the accused at this stage before this court of prosecutorial sanction is a question of fact and law to be decided in the light of all the evidence of the prosecution as well as the defence.

To 20.10.22 for framing of charge.

D./C by me,

ACJM, Dinhata

ACJM, Dinhata

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