A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.2818 of 2021

Raja @ Rajendra Prasad Swain @ Rajendra Pratap Swain … ***Petitioner***

Mr.G.K. Mohanty, Advocate

-versus-

Union of India, R.P.F. … ***Opposite Party***

Mr. U.R. Jena,, Advocate

CORAM:

JUSTICE G. SATAPATHY

DATE OF JUDGMENT : 21.08.2023

G. Satapathy, J.

1. This is an application U/S. 482 of the code of criminal procedure, 1973 (in short the "Code") by the Petitioner praying to quash the order passed on 09.07.2019 by the learned JMFC, Sundergarh in Railway Misc. Case No. 01 of 2019 taking cognizance of offence punishable U/S. 174(a) of the Railway Act, 1989 (in short the "Act") and consequently, the criminal proceeding arising therein against him.

2. An overview of the facts involved in this case are on 03.08.2016 at about 6.50 hours, around 150 supporters of Biju Janata Dala, Athagarh came to Rajathagarh Railway Station and squatted in front of the engine of train AKC-101, TLHR BOBRN and train No-IREL respectively and obstructed the moment of trains protesting against the action of Chhattisgarh Government for construction of Barrage over River Mahanadi. According to the agitators, it was a Railroko, but the Inspector RPF, Dhenkanal namely B. Singh alleging against the Petitioner to be the leader of agitators and claiming the agitators to have made the Railroko under the leadership of the Petitioner filed a complaint initially on 28.02.2019 before learned JMFC, Sundargarh. In such complaint, the Inspector of RPF claims that soon after the Railroko, the Manager Rajathagarh Railway Station lodged an FIR which was registered as C3C-134/16 for commission of offence U/S. 174(a) of the

Act against Raja Rajendra Prasad Swain (Petitioner), the local MLA of Athagarh and others. On the basis of such FIR, he conducted enquiry in which he examined and recorded the statement of witnesses, collected copy of Station Diary and other materials, which culminated in filing of complaint by him.

3. On being satisfied with the complaint, the learned JMFC, Sundergarh by the impugned order took cognizance of offence U/S. 174(a) of the Act and issued summons against the Petitioner, but before appearance of the Petitioner, the learned JMFC, Sundergarh transferred the case to JMFC, Angul on the ground that the later Court has been notified to try Magistrate Triable cases relating to MPs and MLAs for offences relating to Revenue District of Dhenkanal and some other Districts and thereafter, the learned JMFC, Angul, issued summons to the Petitioner for appearance. While the matter stood thus, the Petitioner approached this Court for the relief indicated in the first paragraph.

4. The petitioner seeks the relief indicated supra mainly on two grounds. Firstly, no offence is made out against him and secondly, the Officers submitting the PR was incompetent/not authorized by the act to do so. In support of aforesaid pleas, Mr. G.K.Mohanty, learned Sr. Counsel appearing for the Petitioner has relied upon the decision of the Patna High Court in ***Sushil Kumar Modi Vrs. State of Bihar; Criminal Revision No. 909 of 2018, disposed of on 18.06.2019.*** Accordingly, Mr.Mohanty learned Senior Counsel has prayed to quash the criminal proceeding against the petitioner.

5. In repelling the aforesaid submission of the learned Sr. counsel, Mr. U.R. Jena, learned counsel for the Union of India, RPF by relying upon the decision in ***Ezhilarsan Vrs. State; (2023) SCC Online Madras 869*** submits that a bare perusal of the allegation on record would go to disclose the commission of offence U/S.174(a) of the Act and thereby, the Petitioner being issued with summons

in a complaint lodged by Officer authorized by the Central Government, the aforesaid proceeding cannot be quashed in exercise of power U/S. 482 of the Cr.P.C.

6. Adverting to the rival contentions, this Court has no hesitation to hold that the pleas advanced by the Petitioner are not sustainable in the eye of law in view of the fact that the Government of India (Bharat Sarkar) Ministry of Railways (Rail Mantralaya) (Railway Board) vide No. 2004/TG-V/5/5 Delhi dated 11.08.2004 in commercial circular No.28 has made it clear about issue of notification by Ministry of Law and Justice on 17.05.2004 defining the Authorized Officer as 'all the Officers of and above the Rank of Assistant Sub-Inspector in Railway Protection Force' and appointing on 01.07.2004 as the date on which the said act would come into force. In view of the aforesaid circular, the present complaint being undisputedly instituted by a Inspector of RPF, cannot be considered to have been

lodged by a authorized officer/incompetent person. In addition, a bare perusal of allegation on record would disclose about Railroko made by the supporters of Biju Janata Dal, Athagarh under the leadership of the Petitioner which itself discloses the prima facie ingredients of the offence, but the same is subject to proof for determining the culpability of the Petitioner for the offence. This is because this Court cannot appreciate the materials on record at this stage in absence of any trial to find out the culpability of the Petitioner for the offence and, thereby, this proceeding cannot be quashed against the Petitioner qua the offence in exercise of power U/S. 482 Cr.P.C. on the two grounds as advanced by learned Sr. Counsel.

7. On the other hand, this Court while going through the admitted facts of the case found the plea of limitation in favour of the Petitioner which cannot be withheld inasmuch as merely because the Petitioner has not raised such plea would not deprive

this Court to address such plea as available in Law, since the enactment of Section 482 of the Cr.P.C. is itself with an object to make such orders to give effect to any order under Cr.P.C, or prevent abuse of the process of any Court or otherwise to secure the ends of justice. On the aforesaid analogy, this Court now proceeds to examine the plea found in favour of the Petitioner in the succeeding paragraph.

8. The period limitation for taking cognizance starts from the date of offence as provided under Section 469 of the Cr.P.C. While counting the said period, the date of offence is to be excluded as per sub-section 2 of Section 469 of the Cr.P.C. Neither the offence alleged against the Petitioner is a continuing offence nor would the provision of Section 472 of the Cr.P.C come into play. Albeit, the learned Magistrate is empowered to take cognizance of an offence in exercise of power U/S. 473 of the Cr.P.C. after the expiry of the period of limitation, but it has to be satisfied on the facts and in the circumstances

of the case that the delay has been properly explained or that it is necessary to do in the interest of justice. The impugned order does not show that the learned JMFC has applied its mind on this question of law nor is there any disclosure in the impugned order that the learned Magistrate has condoned the delay as it was necessary to do so in the interest of justice.

9. The scope and ambit of powers U/S. 473 of the Cr.P.C. was considered by the Apex Court in *State of Himachal Pradesh Vrs. Tara Dutt & Another; 2000 SCC (Cri.) 125* and in *Sanapareddy Maheedhar Seshagiri & Anr. v. State of Andhra Pradesh;AIR 2008 (SC)787.* The Apex Court has observed therein as follows:-

> ***"Section 473 confers power on the court taking cognizance after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained and that it is necessary so to do in the interest of justice. Obviously, therefore in respect of the offences***

for which a period of limitation has been provided in Section 468, the power has been conferred on the court taking cognizance to extend the said period of limitation where a proper and satisfactory explanation of the delay is available and where the Court taking cognizance finds that it would be in the interest of justice. This discretion conferred on the Court has to be exercised judicially and on well-recognized principles. This being a discretion conferred on the court taking cognizance, wherever the court exercises this discretion, the same must be by a speaking order, indicating the satisfaction of the court that the delay was satisfactorily explained and condonation of the same was in the interest of justice. In the absence of a positive order to that effect it may not be permissible for a superior court to come to the conclusions that the court must be deemed to have taken cognizance by condoning the delay whenever the cognizance was barred and yet the court took cognizance and proceeded with the trial of the offence."

10. Undisputedly, the date of occurrence of offence according to the prosecution case was 03.08.2016, but complaint was instituted on 09.07.2019 after 2 years 11 months 6 days, but the offence U/S.

174(a) of Act prescribes punishment of imprisonment up to 2 years or a fine of Rs. 2000/- or both, but in this case, the learned trial Court had taken cognizance of offence after the expiry of the prescribed period of limitation, which is of course two years because the offence U/S 174(a) of the Act is punishable up to imprisonment for two years and the learned Magistrate took cognizance of offence without addressing the necessary conditions as required U/S 473 of the Code which are subjective satisfaction of the Court with regard to explanation of delay or necessity to do in the interest of justice. In such situation, a question also automatically arises whether a right, which has accrued in favour of the accused in case cognizance of offence is taken after the statutory period of limitation, can be set at naught by necessary implication of deemed condonation of delay, but in the humble opinion of this Court, the accused in the circumstances is required to be noticed before taking cognizance of

offence. This question has been answered by Apex Court in the case of ***P.K. Choudhury Vrs. Commander, 48 BRTF (GREF); (2008) 13 SCC 229***, wherein the Apex Court has held as under:-

> *"10. The learned Judicial Magistrate did not apply his mind on the said averments. It did not issue any notice upon the appellant to show cause as to why the delay shall not be condoned. Before condoning the delay, the appellant was not heard. In* ***State of Maharastra Vrs. Sharadchandra Vinayak Dongre (1995) 1 SCC 42*** *this Court has held:*
>
> > *"5. In our view, the High Court was perfectly justified in holding that the delay, if any, for launching the prosecution, could not have been condoned without notice to the respondents and behind their back and without recording any reasons for condonation of the delay. However, having come to that conclusion, it would have been appropriate for the High Court, without going into the merits of the case to have remitted the case to the trial Court, with a direction to decide the application for condonation of delay afresh after hearing both sides. The High Court, however, did not adopt that course and proceeded further to hold that the trial Court could not have taken cognizance of the offence in view of the application filed by the prosecution seeking permission of the Court to file a supplementary charge-sheet on the*

basis of an incomplete charge-sheet and quashed the order of the CJM dated 21.11.1986 on this ground also. This view of the High Court, in the facts and circumstances of the case is patently erroneous.

11. Besides, *in* ***Sharadchandra (supra),*** *the Apex court has held* that delay in launching the prosecution cannot be condoned without notice to the accused**.** In the case at hand, the learned trial court while passing the impugned order had neither noticed the accused person nor had condoned the delay by a speaking order. Additionally, the prosecution had not filed any application to condone the delay nor the complaint made by the Inspector RPF contains any explanation for condoning the delay and there was no order passed by the learned JMFC to consider that it was necessary so to do in the interest of justice to condone the delay. The impugned order taking cognizance of offences was, therefore, barred by limitation and, as such, whole

subsequent proceeding was also bad in the eye of law.

12. In the circumstance it appears that mere issuance of process against accused does not automatically condone the delay in taking cognizance of offence. Additionally, this Court is also conscious of the fact that when a statue, while conferring power, prescribes mode of exercise of that power, the power has to be exercised in that manner, or not at all. This view was first expressed in Privy Council's decision in ***Nazir Ahmed Vs. King Emperor; AIR 1936 PC 253(1936 SCC On line PC 41).*** It therefore, very clear that "where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all". Why this Court is reminding this principle is because that the learned J.M.F.C., Sundergarh while taking cognizance of offence had ignored to address the issue of limitation and simply took cognizance of offence and issued process against the accused-

petitioner ignoring the valuable right of accused-petitioner which cannot be rectified since cognizance of offence after the statutory period is otherwise an abuse of process of Court and to secure the ends of justice, the impugned order taking cognizance of offence together with the criminal proceeding being unsustainable, is required to be quashed.

13. In the result, the CRLMC stands allowed on contest, but in the circumstance there is no order as to costs. Consequently, the criminal proceeding in Railway Misc. Case No. 01 of 2019 now pending before the learned J.M.F.C., Angul together with order taking cognizance of offence is hereby quashed.

(G. Satapathy)
Judge

Orissa High Court, Cuttack,
Dated the 21st of August, 2023/Priyajit