SUPREME COURT OF INDIA

Raghunath Anant Govilkar

Vs

State of Maharashtra and Ors

(Dr. Arijit Pasayat and D.K.Jain)

(Arising out of S.L.P. (Crl.) No.5453 of 2007)

08/02/2008

JUDGEMENT

DR. ARIJIT PASAYAT, J.

1. Leave granted.

2. The challenge in this appeal is to the order passed by the learned Single Judge of the Mumbai High Court dismissing the Criminal Writ Petition filed bytheappellant for quashing the proceedings pending before the Addl. Chief Metropolitan Magistrate, 37th Court, Eaplanade. The appellant was the accused No.10 in the said case. The allegation against the appellant was that while working with Maharashthon Housing and Area Development Authority (in short 'MHADA') the appellant allotted premises to various persons under his signature, issued rent receipts so that the said persons could claim that they were in possession of thetenements, though in fact, the tenements, in question, were vacant and were not in possession of MHADA.

3. According to the prosecution, the appellant committed offences punishable under Sections 420, 465, 466, 467, 468 and 471 of the Indian Penal Code, 1986 (in short 'IPC'). Before the Trial Court, the appellant filed an application for discharge in terms of Section 228 of the Code of Criminal Procedure, 1973 (in short the 'Cr.P.C.') primarily on the ground that sanction was necessary for his prosecution. It was also submitted that proceedings could not have been initiated after his retirement in view of what has been stated under Rule 27 of the Maharashtra Civil Services (Pension) Rules, 1982 (in short 'Pension Rules'). Theapplication was dismissed by the Trial Court. It was noted that the appellant was in Government service till 31.8.1989. The complaint was filed on 17.7.1989 which wastreated as an FIR and, therefore, Rule 27 of the Pension Rules have no application. As regards the requirement of sanction in terms of Section 197 Cr.P.C. it was held that acts done by the accused did not fall within the ambit of official duty and, therefore, question of sanction did not arise.

4. The High Court by the impugned order dismissed the petition affirming the view taken by the Trial Court. It was held that on 10.8.1992 when the cognizance was taken, the appellant had ceased to be a public servant.

5. Learned counsel for the appellant submitted that the acts done had clearly link with the official duty. The language of Section 197 Cr.P.C. is very clear that if the impugned acts were done when the accused was in service, sanction in terms of Section 197 Cr.P.C. is necessary.

6. Learned counsel for the State supported the orders impugned.

7. The pivotal issue i.e. applicability of Section 197 Cr.P.C. needs careful consideration. In Bakhshish Singh Brar v. Gurmej Kaur (1987 (4) SCC 663), this Court while emphasizing on the balance between protection to the officers and the protection to the citizens observed as follows:

"It is necessary to protect the public servants in the discharge of their duties.In the facts and circumstances of each case protection of public officers and public servants functioning in discharge of official duties and protection of private citizens have to be balanced by finding cut as to what extent and how far is a public servant working in discharge of his duties or purported discharge of his duties, and whether the public servant has exceeded his limit. It is true that Section (sic197) states that no cognizance can be taken and even after cognizance having been taken if facts come to light that the acts complained of were done in the discharge of

the official duties then the trial may have to be stayed unless sanction is obtained. But at the same time it has to be emphasised that criminal trials should not be stayed in all cases at the preliminary stage because that will cause great damage to the evidence."

8. The protection given under Section 197 Cr.P.C. is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or adequate protection to public servants to ensure that they are not prosecuted for anything done by them, in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if it chooses to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 Cr.P.C. can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official capacity. It is not the duty which requires examination so much as the act, because the official act can be performedboth in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of the section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty: if the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of Section 197 Cr.P.C. does not get immediately attracted on institution of the complaint case.

9. At this juncture, we may refer to P. Arulswami v. State of Madras (1967) 1 SCR 201, wherein this Court held as under :

"It is not therefore every offence committed by a public servant that requires sanction for prosecution under Section 197(1) of the Criminal Procedure Code; nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary. It is the quality of the act that is important and if it falls within the scope and range of his official duties the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted. An offence may be entirely unconnected with the official duty as such or it may be committed within the scope of the official duty. Where it is unconnected with the official duty there can be no protection. It is only when it is either withthe scope of the official duty or in excess of it that the protection is claimable".

10. It would be appropriate to examine the nature of power exercised by the Court under Section 197 Cr.P.C. and the extent of protection it affords to public servants, who, apart from various hazards in discharge of their duties, in the absence of a provision like the one mentioned, may be exposed to vexatious prosecutions. Sections 197(1) and (2) of the Code and as under:

"197. (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:

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(2) No court shall take cognizance of any offence alleged to have been committed by arty member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government."

11. The section falls in the chapter dealing with conditions requisite for initiation of proceedings. That is, if the conditions mentioned are not made out or are absent, then no prosecution can be set in motion. For instance, no prosecution can be initiated in a Court of Session under Section 193, as it cannot take cognizance, as a court of original jurisdiction, of any offence unless the case has been committed to it by a Magistrate or unless the Code expressly provides for it. And the jurisdiction of a Magistrate to take cognizance of any offence is provided by Section 190 of the code, either on receipt of a complaint, or upon a police report or upon information received from any person other than a police officer, or upon his knowledge that such offence has been committed. So far public servants are concerned, the cognizance of any offence, by any court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression "no court shall take cognizance of such offence except with the previous sanction". Use of the words 'no' and 'shall'

make it abundantly clear that the bar on the exercise of power by the court to take cognizance of any offence is absolute and complete. Very cognizance is barred. That is, the complaint cannot be taken notice of. According to Black's Law Dictionary the word "cognizance" means 'jurisdiction' or "the exercise of jurisdiction" or power to try and determine causes'. In common parlance it means taking notice of. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have been committed during the discharge of his official duty.

12. 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 act" or "official duty" means an act or duty done by an officer in his official capacity. In B. Saha v. M.S Kocha (1979 (4) SCC 177) it was held (SCC pp.184-85, para 17)

"17. 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(l) 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 these 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 under the said provision."

13. Use of the expression 'official duty' implies that the act or omission must have been done by the public servant in the course of his service and that it should have been in the public service and 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.

14. It has been widened further by extending protection to even those acts or omissions which are done in purported exercise of official duty; that is under the colour of office. Official duty, therefore, implies that the act or omission must have been done by the public servant in the course of his service and such act or omission must have been performed as part of duty which further must have been official in nature. The section has, thus, to be construed strictly, while determining its applicability to any act or omission in the course of service. Its operation has to be limited to those duties which are discharged in the course of duty. But once any act or omission has been found to have been committed by a public servant in the discharge of his duty then it must be given liberal and wide construction so far its official nature is concerned. For instance a public servant is not

entitled to indulge in criminal activities. To that extent the section has to be construed narrowly and in a restricted manner. But once it is established that an act or omission was done by the public servant while discharging his duty then the scope of its being official should be construed so as to advance the objective of the section in favour of the public servant. Otherwise the entire purpose of affording protection to a public servant without sanction shall stand frustrated. For instance a police officer in the discharge of duty may have to use force which may be an offence for the prosecution of which the sanction may be necessary. But if the same officer commits an act in the course of service but not in the discharge of his duty and without any justification therefor then the bar under Section 197 of the Code is not attracted. To what extent an act or omission performed by a public servant in the discharge of his duty can be deemed to be official was explained by this Court in Matajog Dobey v. H.C. Bhari (1955 (2) SCR 925).

15. The offence alleged to have been committed (by the accused) must have something to do, or must be related in some manner, with the discharge of official duty.

16. There must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable (claim), but not a pretended or fanciful claim, that he did it in the course of the performance of his duty.

17. If on facts, therefore, it is prima facie found that the act or omission for which the accused was charged had reasonable connection with discharge of his duty then it must be held to be official, to which applicability of Section 197 of the Code cannot be disputed.

18. In S.A. Venkataraman v. State (1958 SCR 1040), this Court has held:

"There is nothing in the words used in Section 6(1) to even remotely suggest that previous sanction was necessary before a court could take cognizance of the offences mentioned therein in the case of a person who had ceased to be a public servant at the time the court was asked to take cognizance, although he had been such a person at the time the offence was committed."

19. The above position was illuminatingly highlighted in State of Maharashtra v. Dr. Budhikota Subbarao (1993 (3) SCC 339).

20. When the newly worded section appeared in the Code (Section 197) with the words, 'when any person who is or was a Judge or Magistrate or a public servant' (as against the truncated expression in the corresponding provision of the old Code of Criminal Procedure, 1898) a contention was

raised before this Court in Kalicharan Mahapatra v. State of Orissa (1998 (6) SCC 411) that the legal position must be treated as changed even in regard to offences under the old Act and new Act also. The said contention was, however, repelled by this Court wherein a two-Judge Bench has held thus:

"A public servant who committed an offence mentioned in the Act, while he was a public servant, can be prosecuted with the sanction contemplated in Section 197 of the Act if he continues to be a public servant when the court takes cognizance of the offence. But if he ceases to be a public servant by that time, the court can take cognizance of the offence without any such sanction."

21. The correct legal position, therefore, is that an accused facing prosecution for offences under the old Act or new Act cannot claim any immunity on the ground of want of sanction, if he ceased to be a public servant on the date when the court took cognizance of the said offences. But the position is different in cases where Section 197 of the Code has application.

22. Section 197(l) 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 of, 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.

23. We may mention that the Law Commission in its 41st Report in para 15.123 while dealing with Section 197, as it then stood, observed:

"It appears to us that protection under the section is needed as much after retirement of the public servant as before retirement. The protection afforded by the section would be rendered illusory if it were open to a private person harbouring a grievance to wait until the public servant ceased to hold his official position, and then to lodge a complaint. The ultimate justification for the protection conferred by Section 197 is the public interest in seeing that official acts do not lead to needless or vexatious prosecution. It should be left to the Government to determine from that point of view the question of the expediency of prosecuting any public servant."

24. It was in pursuance of this observation that the expression "was" came to be employed after the expression "is" to make the need for sanction applicable even in cases where a retired public servant

is sought to be prosecuted.

25. The above position was highlighted in R. Balakrishna Pillai v. State of Kerala (1996 (1) SCC 478), State of H.P. v. M.P. Gupta (2004 (2) SCC 349), State of Orissa v. Ganesh Chandra Jew (2004 (8) SCC 40), S.K. Zutshi v. Bimal Debnath (2004 (8) SCC 31) and Rakesh Kumar Mishra v. State of Bihar and others (2006 (1) SCC 557).

26. The High Court, therefore, was in error in observing that sanction was not necessary because the expression used is "was".

27. But the question is really of academic nature because the alleged offences cannot be related to any official duty.

28. The State of Kerala v. V. Padmanabhnan Nair (1999 (5) SCC 690) it was observed as follows:

"5. In S.A. Venkataraman v. State (AIR 1958 SC 107) and in C.R. Bansi v. State of Maharashtra (1970 (3) SCC 537) this Court has held that:

"There is nothing in the words used in Section 6(1) to even remotely suggest that previous sanction was necessary before a Court could take a cognizance of the offences mentioned therein the case of a person who had ceased to be a public servant at the time the court was asked to take cognizance, although he had at the time the offence was committed."

29. That apart, the contention of the respondent that for offences under Sections 406 and 409 read with Section 120-B of IPC sanction under Section 197 of the Code is a condition precedent for launching the prosecution is equally fallacious. This Court has stated the correct legal position in. Srreekantiah Ranatta Munnipslli v. State of Bombay (AIR 1955 SC 287) and also Amrik Singh v. State of Pepsu (AIR 1955 SC 309) that it is not every offence committed by a public servant which requires sanction for prosecution under Section 197 of the Code, nor even every act done by him while he is actually engaged in the performance of his official duties. Following the above legal position it was held in Harihar Prasad (1972 3 SCC 89) as follows:

"66. The next point was with regard to consent or sanction. There is no doubt that in respect of B.P.

Sinha consent was properly given by the Deputy Commissioner. So consent was also given in respect of N.K. Banerjee and Harihar Prasad by the Chief Secretary. This is not a case of sanction or consent under Section 196-A of the Code of Criminal Procedure. On the question of the applicability of Section 197 of the Code of Criminal Procedure, the principle laid down in two cases, namely, Shreekantiah Ramayya Munipalli v. State of Bombay and Amrik Singh v. State of Pepsu was as follows: "It is not every offence committed by a public servant that requires sanction for prosecution under Section 197(1) of the Criminal Procedure Code; nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary." The real question therefore is whether the acts complained of in the present case were directly concerned with the official duties of the three public servants. As far as the offence of criminal conspiracy punishable under Section 120-B, read with Section 409 of the Indian Penal Code is concerned and also Section 5(2) of the Prevention of Corruption Act, are concerned they cannot be said to be of the nature mentioned in Section 197 of the Code of Criminal Procedure. To put it shortly, it is no part of the duty of a public servant, while discharging his official duties, to enter into a criminal conspiracy or to indulge in criminal misconduct. Want of sanction under Section 197 of the Code of Criminal Procedure is, therefore, no bar."

30. Learned Single Judge of the High Court declined to follow the aforesaid legal position in the present case on the sole premise that the offence under Section 406 of IPC has also been fastened against the accused besides Section 409 of IPC. We are unable to discern the rationale in the distinguishment. Section 406 and 409 of IPC are cognate offences in which the common component is criminal breach of trust. When the offences in which offence under Section 406 is a public servant (of holding any one of the position listed in the Section) the offence would escalate to Section 409 of the Penal Code. When this Court held that in regard to the offence under Section 409 of IPC read with Section 120-B it is no part of the duty of the public servant to enter into a criminal conspiracy for committing breach of trust, we find no sense in stating that if the offence is under Section 406 read with Section 120-B, IPC it would make all the difference vis-a-vis Section 197 of the Code.

31. Though, we have held that view of the High Court about the need for sanction in the case of retired Government servant was erroneous, in view of the finding that the charged offences are not relatable to any official duty, the appeal fails and deserves to be dismissed which we direct.