

Mohan Raj vs Dimbeswari Saikia & Anr on 10 November, 2006

Equivalent citations: AIR 2007 SUPREME COURT 232, 2006 AIR SCW 5636, 2006 (11) SCALE 330, (2007) 36 OCR 130, 2010 (2) SCC(CRI)782, 2007 (2) SRJ 269, (2006) 48 ALLINDCAS 20 (SC), 2006 (48) ALLINDCAS 20, (2007) 1 RECCRIR 139, (2007) 1 CURCRIR 369, (2006) 8 SUPREME 701, (2007) 1 ALLCRIR 1044, (2007) 57 ALLCRIC 430, (2007) 1 ALLCRILR 385, (2006) 11 SCALE 330, (2006) 4 CRIMES 371, (2007) 2 RAJ CRI C 412

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Bench: S.B. Sinha, Dalveer Bhandari

CASE NO. :

Appeal (crl.) 1137 of 2006

PETITIONER:

Mohan Raj

RESPONDENT:

Dimbeswari Saikia & Anr.

DATE OF JUDGMENT: 10/11/2006

BENCH:

S.B. Sinha & Dalveer Bhandari

JUDGMENT:

J U D G M E N T (Arising out of S.L.P. (Crl.) No. 1451 of 2006) S.B. Sinha, J.

Leave granted.

Interpretation and application of the provisions of the Criminal Procedure Code, 1973 as amended by the State of Assam by the Code of Criminal Procedure (Assam Amendment) Act, 1983 and the Criminal Procedure Code (Assam Repealing) Act, 1986 falls for consideration in this appeal which arises out of a judgment and order dated 8.3.2006 passed by the Gauhati High Court in Criminal Revision Petition No.748 of 2005. Appellant was working as a Superintendent of Police in Assam in the year 1983. The State of Assam, allegedly, witnessed ethnic violence in the said year. The entire State of Assam was engulfed in ethnic clashes as the elections were being opposed by a section of agitators. The incidence of violence including one at Nelli and other adjoining districts, viz., Nargaon and Gopur Sunitpur had left more than 3000 persons from all communities dead. A purported report was received that a large number of extremist elements were hiding in the jungle for the purpose of attacking the police post and the minority refugee camp. Appellant herein backed with other CRPF personnel, allegedly went to the place of hiding and were waylaid by 500-600

extremists. Police party was sought to have been attacked by the extremists with guns, bows, etc. The CRPF personnel returned the fire in which 7 miscreants died and 12 others were arrested. A First Information Report bearing No.235/83 was registered against 12 accused persons under Section 147/148/149/302/436/ 324/326 of the Indian Penal Code in relation to the said incident. A charge-sheet was filed in the Court of learned Magistrate upon completion of investigation. Charges were framed by the learned Sessions Judge. In regard to the death of the aforementioned 7 persons, however, first respondent, daughter of Dimbeswari Saikia, lodged a complaint before the Judicial Magistrate, 1st Class, Golaghat against appellant, who was at the relevant point of time Superintendent of Police and other police officials. In the said complaint petition, apart from Appellant one T.K. Nag, Inspector Police Camp, Rajabari Tea Garden was also made an accused. It was contended by the first respondent that her deceased husband was taken out from the house at 8.30 in the night. He was caught and assaulted and ultimately, Mony Saikia, Jiten Saikia, Tileswar Saikia, Reba Kr. Saikia, Tikhar Ch. Baruah, Hiren Saikia and Bhadreswar Saikia were killed. Only Kamal Hazarika, witness No.1, managed to escape although he sustained bodily injuries.

The Government of Assam promulgated an Ordinance on 7.7.1983 being Assam Ordinance No.III of 1983 (the Ordinance), in terms whereof the provisions of Sections 167, 197 and 439 of the Criminal Procedure Code were amended. The said Ordinance was repealed and replaced by the Code of Criminal Procedure (Assam Amendment) Act, 1983 (the Act), which was published in the Assam Gazette on 8.2.1984. The assent of the President of India was received in respect of the said Act.

Before embarking upon the issues involved in this appeal, we may, at this juncture, notice that by reason of 'the Ordinance' and 'the Act', in addition to the Judicial Magistrate, Executive Magistrates were also empowered to try cases involving offences specified therein. Amendments in the Code of Criminal Procedure to the said effect were carried out, as would be noticed immediately hereinafter.

In Sub-Section (1) of Section 167 of the Criminal Procedure Code, the reference to "Judicial Magistrate" was construed as reference also to "Executive Magistrate". In Section 190 of the Criminal Procedure Code, in Sub-Section (1) the words "any Executive Magistrate" were inserted after "any Magistrate of the first class". In Section 191 of the Criminal Procedure Code, the reference to "Chief Judicial Magistrate" in relation to an offence taken cognizance of by an Executive Magistrate, were construed as a reference to the District Magistrate. In Sub-Section (1) of Section 192 after the words "any" the words "District Magistrate" were inserted. Sub-Section (2) of Section 192 of the Code was substituted as follows :

"(2) Any Sub-divisional Magistrate or Magistrate of the first class empowered in this behalf by District Magistrate or Chief Judicial Magistrate, as the case may be, may, after taking cognizance of an offence, make over the case for enquiry or trial to such other competent Magistrate as the District Magistrate or Chief Judicial Magistrate may, by general or special order, specify, and thereupon such Magistrate may hold the enquiry or trial."

Sub-Section (5) of Section 197 of the said Amending Act contained a non-obstante clause, which reads as under :

"(5) Notwithstanding anything contained in this Code,-

(a) Where a complaint is made to a Court against a public servant belonging to any class or category specified under sub-section (3) alleging that he has committed an offence, the Court shall postpone the issue of process against the accused and make a reference to the State Government; or

(b) where an accused, either by himself or through a pleader, claims before a Court that he belongs to any class or category specified under sub-section (3) and that the offence alleged to have been committed by him arose out of any action taken by him while acting or purporting to act in or in connection with the discharge of his official duty, the Court shall forthwith stay further proceedings and make a reference to the State Government."

Clause (i) of Sub-Section (6) of Section 197 provides for that where a reference is received from a Court, the State Government shall issue a certificate to the Court stating that the accused person was or was not acting or purporting to act in, or in connection with discharge of his official duty. Clause (ii) thereof provides that if the State Government certifies that the accused was acting or purporting to act in or in connection with the discharge of his official duty, the Court shall dismiss the complaint or discharge the accused.

After Section 439, Section 439-A was added by reason whereof restrictions were imposed on the power of the Court to grant bail.

In terms of the aforementioned provisions contained in Sub-Section (6) of the Code of Criminal Procedure (Assam Amendment) Act, 1983, on or about 2.8.1993 a reference was made to the Government by the learned Magistrate purporting to be for issuance of a certificate as envisaged under Section 197(5)(a) of the Code as amended. It now appears that such certificate was granted by the State Government in the form prescribed under Section 197(6)(i), which reads as under :

"GOVERNMENT OF ASSAM HOME (A) DEPARTMENT NO. : HMA.465/83/31,
Dated Dispur, the 20th November, 1985 From : Shri H.O. Barooah, A.C.B., Deputy
Secretary to the Govt. of Assam To The Sub-Divisional Judicial Magistrate,
GOLAGHAT Sub : Issue of certificate under Cr.P.C. 197, 6(a) in C.R. Case No.688/83
(Golaghat Court).

Ref : Your letter no.6GJ.1965/83, dated 16.8.83.

Sir, In inviting a reference to your letter cited above, I am directed to state that whereas a reference has been received from the Court of the Sub-divisional Judicial Magistrate, Golaghat under Sub-section (5) of Section 197 of Code of Criminal Procedure, 1973 as amended, the State Govt. hereby issue the certificate under Sub-section 6(1) thereof that the accused Shri M. Mohan Raj, I.P.S., the then S.P., Sibasagar and other State Police Officers/Personnel and CRPF Personnel were acting

in the discharge of their official duty.

Yours faithfully, Deputy Secy. to the Govt. of Assam, Home (A) Department"

In the meantime, however, First Respondent filed a revision application before the High Court, inter alia, on the premise that the Government had not issued any certificate. A prayer was made to direct the Government to issue a certificate as envisaged under Sub-Section (6) of Section 197 of the Criminal Procedure Code. A prayer for stay of further proceedings in Sessions Case No.32(SG)/85 pending in the Court of Sessions Judge, Jorhat was also made.

Before the High Court the certificate issued by the State was produced. It, in the aforementioned fact situation, opined that it was for the Sub-Divisional Magistrate to pass an appropriate order in terms of Sub-Section 6(ii) of Section 197 of the Criminal Procedure Code. It was also observed that as the certificate has already been issued, the Criminal Revision became infructuous. It was directed:

"Therefore, this revision petition is disposed of being infructuous. The stay order passed in connection with Sessions Case No.32(SG)/85 is vacated. Send down the records of the courts below if received. Intimate both the courts namely Sub-Divisional Judicial Magistrate, Golaghat and Sessions Judge, Jorhat with copy of this order."

In the meanwhile, however, the State enacted the Criminal Procedure Code (Assam Repealing) Act, 1986. Section 2 thereof provides that the Code of Criminal Procedure (Assam Amendment) Act, 1983 shall stand repealed. Section 3 of the said Repealing Act provides for transfer of cases in the following terms :

"3. Notwithstanding any order passed by any authority under the Act repealed, all cases will be deemed to have been pending before the Court competent to try such cases under the Code of Criminal Procedure Act, 1973 and the said cases before any Executive Magistrate or before any other Court or authority shall stand transferred to the Court competent to try such cases under the Code of Criminal Procedure Act, 1973 and the said Court shall proceed to try such cases in accordance with the provisions of the Code of Criminal Procedure Act, 1973."

According to Appellant, he came to know that the State of Assam had accorded sanction on 27.4.1987 in the complaint case of the Second Respondent without taking into consideration the purported certificate which was issued on 20.11.1985. Pursuant and in furtherance of grant of sanction against Appellant the proceedings before the learned Sub-Divisional Judicial Magistrate, Golaghat were reopened on 16.5.1987.

Keeping in view the fact that the matter was also pending investigation, a plea for postponement of the proceedings in the complaint case was prayed for by another accused. By an order dated 9.9.1987, the complaint case was adjourned sine die, stating :

"The complaint against herself and another witness-named Kamal Hazarika. Thereafter, question of sanction for prosecution of some of the accused persons, who were Government servants arose and accordingly a reference was made to the State of Assam for sanction for prosecution of the said officers under provision of Section 197(S)(a) of the Cr.P.C. read with Assam Ordinance No.(iii) of 1983 and the proceeding was there upon remained postponed awaiting such sanction. Then on 16.5.87 the proceeding was re-opened on receipt of sanction for prosecution of said accused persons accorded by the Government of Assam (Home Department) vide its letter No.HMA.465/83/53, dated 27.4.87. Thereafter, the complainant appeared, but on behalf of Tarun Kanti Nag, a person named as accused in this case, let this court know that another case being Golaghat P.S. Case No.87/87 was registered in relation to the offence, which was the subject matter of the present enquiry and that an investigation by the police thereof was in progress. Certified copy of the F.I.R. of the said police case was also filed on behalf of said T.K. Nag. In pursuance thereof, a report in the matter was called for from the O/C of Golaghat Police Station, who also submitted a report attached with a copy of the F.I.R. that Golaghat P.S. Case No.87/87 was registered in relation to the same offence and investigation thereof was in progress.

That being the position, provision of section 210 of the Cr.P.C., I am alive in, in my opinion comes into operation to get the present proceeding of enquiry u/s 202 of the Cr.P.C. stayed so as to await a report to be made by the Investigating Police Officer under provision of section 173 of the said law.

In consideration of all these above, the proceeding of enquiry is hereby stayed till the receipt of report of Investigation Police Officer of Golaghat Police Station Case No.87/87 to be made u/s 173 of the Cr.P.C. The said Police Officer is hereby directed to submit his report under the aforesaid section of law with intimation of this court with reference to the present case within a period of 3 (three) months from today."

On or about 7.7.2005 the State Government refused to accord sanction to prosecute the accused including Appellant in connection with FIR No.87/87, whereafter a final report was also submitted by the Investigating Officer on 9.8.2005 on the premise that the Government had refused to accord sanction against the accused persons. As soon as the police case came to an end, the complaint case was re-opened purported to be on the basis of the sanction granted by the State on 24.7.1987.

Appellant approached the Gauhati High Court for quashing all the proceedings which prayer, by reason of the impugned judgment, has been refused. The High Court in its judgment, inter alia, opined that once sanction had been granted by the State of Assam, there was no bar in proceeding with the complaint case. In regard to the purported certificate granted by the State that Appellant was on his duty and therefore, could not have been proceeded against, it was opined that the said certificate having not been communicated to the Sub-Divisional Magistrate, Golaghat, the case remained pending and thus, it could have been lawfully reopened, stating :

"From the impugned order, we find that the learned Addl. Chief Judicial Magistrate, Golaghat did not accept the Final report as such and kept the same in abeyance and decided to proceed with the Case No.688/83.

In the present revision, the petitioner has prayed for quashing of the proceeding in CR Case No.688/83 in view of the certificate dated 20.11.85 stating inter alia, that the said proceeding is not tenable in law. On perusal of the materials available on record, we hold that the certificate dated 20.11.85 in itself was not sufficient to bring a judicial proceeding to an end. The court was required to pass appropriate order pursuant to the said certificate. Moreover, the certificate has become nonest in view of the repealing Act and in view of the provisions of section III of the repealing Act, the proceeding against the petitioner and others was pending. The State of Assam has also accorded necessary sanction in favour of the complainant to prosecute the accused persons and the sanction was made way back in 1987 itself. Hence, at this stage of the enquiry proceeding relating to the death of seven civilians in the year 1983; no interference is called for as the impugned order does not suffer from any infirmity or illegality."

Mr. K.T.S. Tulsi, learned Senior Counsel appearing on behalf of Appellant, inter alia, would submit that keeping in view the provisions of the Act, the entire prosecution stood vitiated, as the right to be discharged in terms of Section 6 of the State Act having accrued, keeping in view the provisions of Section 6 of the General Clauses Act, which is in pari materia with Section 6 of the Assam General Clauses Act, 1915, his vested or accrued right could not have been taken away.

Validity or otherwise of the Ordinance or the Act or Assam Repealing Act is not in question. The provisions of the Act, in terms whereof, Sub- Section (5) of Section 197 was inserted, Court was under a statutory obligation to postpone issue of process against the accused and make a reference to the State Government, if he was a public servant belonging to any class or category specified under Sub-Section (3). A further statutory obligation was also imposed upon the Court to stay further proceedings as against the public servant upon making a reference to the State Government. On receipt of a reference, the State Government has no other option, but, to issue a certificate one way or the other. Once the State Government certifies that the accused was acting or purporting to act in or in connection with the discharge of his official duty, it was imperative on the part of the Court to dismiss the complaint or discharge the accused, as the case may be. There cannot, however, be any doubt whatsoever that before such a final order is passed, the certificate is to reach the hands of the Court. The Certificate in question, as noticed hereinbefore, was addressed to the Sub-Divisional Magistrate, Golaghat. It appears that the same was sent under registered cover with acknowledgment due. However, there is no evidence on record to show that it was actually handed over to the postal authorities. Be that as it may, it is evident from the order dated 5.12.1985 passed by the High Court in Criminal Revision Petition No.386 of 1985 that a communication of the said order was directed to be made. We may, therefore, presume that the State of Assam did send the said communication. In any event the High Court communicated the said order to the Court of learned Magistrate where the matter was pending. The Sub-Divisional Magistrate, Golaghat was bound to act accordingly.

The sanction to prosecute the Appellant was refused in the police case. It was, however, granted in the complaint case. Under what circumstances the latter decision was taken is not known.

We are, however, concerned with the effect of grant of the certificate. The expression used in Clause (ii) of Sub-Section (6) of Section 197 of the Assam Amendment Act is "If the State Government certifies". Once such a certificate is given, the Court has no other option but to dismiss the complaint. In view of the phraseology used in Clause (ii) of Sub-Section (6) of Section 197, as inserted by the Assam Amendment Act, 1984, there cannot be any doubt whatsoever that the accused derives a vested or accrued right as soon as the said certificate is issued. However, the said right would be brought into effect only when the same is actually communicated.

In *State of Punjab vs. Khemi Ram* [AIR 1970 SC 214 : (1969) 3 SCC 28], a Bench of this Court opined :

"The last decision cited before us was that of *State of Punjab v. Amar Singh Harika* [AIR 1966 SC 1313] where one of the questions canvassed was whether an order of dismissal can be said to be effective only from the date when it is made known or communicated to the concerned public servant. The facts of the case show that though the order of dismissal was passed on June 3, 1949 and a copy thereof was sent to other 6 persons noted thereunder, no copy was sent to the concerned public servant who came to know of it only on May 28, 1951, and that too only through another officer. On these facts, the Court held, rejecting the contention that the order became effective as soon as it was issued, that the mere passing of the order of dismissal would not make it effective unless it was published and communicated to the concerned officer."

We may notice that therein this Court distinguished earlier decision of this Court in *State of Punjab vs. Amar Singh Harika* [AIR 1966 SC 1313], saying that in the former case the liability shall accrue only on communication.

Such is not the case here. Furthermore, the complainant was aware that a certificate had been granted. She could have preferred an appeal thereagainst within a period of 60 days from the date of communication of the said order. She did not choose to do so. Her right to appeal as against the correctness or otherwise of the order granting certificate is, thus, also lost. The High Court furthermore committed a manifest error in opining that by reason of Section 3 of the Assam Repealing Act the right of the appellant was taken away. When Act is repealed, Section 6 of the Assam General Clauses Act, 1915, subject to just exception shall come into force, which reads as under :

"6. Effect of repeal. Where any Act repeals any enactment hitherto made, or hereafter to be made, then, unless a different intention appears, the repeal shall not

a) revive anything not in force or existing at the time at which the repeal takes effect;
or

b) alter the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under any enactment so repealed; or

d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the Repealing Act had not been passed."

It is now well settled that such Repealing Act shall be construed to have not taken away the accrued right of a person. In G.P. Singh's Principles of Statutory Interpretation (10th Edn.) 2006 at Page 631, it is stated :

"Under the common law rule the consequences of repeal of a statute are very drastic. Except as to transactions past and closed, a statute after its repeal is as completely obliterated as if it had never been enacted. The effect is to destroy all inchoate rights and all causes of action that may have arisen under the repealed statute. Therefore, leaving aside the cases where proceedings were commenced, prosecuted and brought to a finality before the repeal, no proceeding under the repealed statute can be commenced or continued after the repeal."

In State of Punjab vs. Mohar Singh, son of Pratap Singh [(1955) 1 SCR 893], this Court held :

" Whenever there is a repeal of an enactment, the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them ."

In Pannalal Bansilal Pitti & Ors. vs. State of A.P. & Anr. [(1996) 2 SCC 498], this Court held :

" It is settled legislative device to employ non obstante clause to suitably alter the pre-existing law consistent with the legislative policy under the new Act to provide

the remedy for the mischief the legislature felt most acute."

"Words are the skin of the language. The language opens up the bay of the maker's mind. The legislature gives its own meaning and interpretation of the law. It does so employing appropriate phraseology to attain the object of legislative policy which it seeks to achieve."

In *Milkfood Ltd. vs. GMC Ice Cream (P) Ltd.* [(2004) 7 SCC 288], it was held :

" The court is to interpret the repeal and savings clauses in such a manner so as to give a pragmatic and purposive meaning thereto."

Submission of Mr. Rana Mukherjee that the doctrine of eclipse shall apply cannot be accepted. The said principle has no application in this case. By application of the said principle, a vested or accrued right cannot be taken away.

Furthermore, by reason of Section 3 of the Assam Repealing Act, the right of the accused accrued to him is not taken away. Section 3 deals with transfer of cases. Although, the marginal note of a statutory provision may not ordinarily be taken recourse to for interpretation thereof; in case of ambiguity, reference thereto would not be irrelevant. As Section 3 has been enacted only for the transfer of cases from the court of Executive Magistrate to a competent Court, the same, in our opinion, is a clear pointer to show that the State in enacting the Repealing Act, 1986 did not have any intention to deprive a person of his accrued or vested right. What would be a vested or accrued right has been dealt with in : (1) *Pitta Naveen Kumar & Ors. vs. Raja Narasaiah Zangiti & Ors.* [2006 (9) SCALE 298]; (2) *U.P. Raghavendra Acharya & Ors. vs. State of Karnataka & Ors.* [2006 (6) SCALE 23]; (3) *Dr. Saurabh Choudri & Ors. vs. Union of India & Ors.* [(2004) (5) SCC 618]; (4) *Prafulla Kumar Das & Ors. vs. State of Orissa & Ors.* [(2003) 11 SCC 614]. For interpretation of a statute of this nature, doctrine of purposive construction may have to be taken recourse to. {See (1) *Bombay Dyeing & Mfg. Co. Ltd. (3) vs. Bombay Environmental Action Group & Ors.* [(2006) 3 SCC 434]; (2) *Nathi Devi vs. Radha Devi Gupta* [(2005) 2 SCC 271]; (3) *Lalit Mohan Pandey vs. Pooran Singh & Ors.* [(2004) 6 SCC 626]; (4) *Indian Handicrafts Emporium & Ors. vs. Union of India & Ors.* [(2003) 7 SCC 589]; and (5) *Balram Kumawat vs. Union of India & Ors.* [(2003) 7 SCC 628].} For the reasons aforementioned, the impugned judgment cannot be sustained, which is set aside accordingly. The appeal is allowed. No costs.