Rakesh Kumar Mishra vs State Of Bihar And Ors on 3 January, 2006

Equivalent citations: AIR 2006 SUPREME COURT 820, 2006 SCC(CRI) 432, (2005) 4 RECCRIR 678, (2006) 1 CHANDCRIC 301

Author: Arijit Pasayat

Bench: Arijit Pasayat, G.P. Mathur

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           CASE NO.:
Appeal (crl.)  12 of 2006

PETITIONER:
Rakesh Kumar Mishra

RESPONDENT:
State of Bihar and Ors.

DATE OF JUDGMENT: 03/01/2006

BENCH:
Arijit Pasayat & G.P. Mathur

JUDGMENT:
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JUDGMENT ARIJIT PASAYAT, J.

Leave granted.

Appellant calls in question legality of the judgment rendered by a learned Single judge of the Patna High Court dismissing the petition filed by the appellant under Section 482 of the Code of Criminal Procedure, 1973 (in short the `Code') seeking quashing of the order of cognizance taken by learned Judicial Magistrate, Patna, on a complaint filed by Ramesh Kumar Dubey (Respondent No. 2 in this Appeal). By order dated 11.1.2000 learned Judicial Magistrate took cognizance of offences punishable under Sections 342, 389, 469, 471 and 120(B) of the Indian Penal Code, 1860 (in short the `IPC'). Learned Chief Judicial Magistrate, Patna had transferred the case on 18.1.1997 to the learned Magistrate for enquiry and disposal and that is how the matter was placed before learned Judicial Magistrate, First Class. Primary stand taken by the appellant before the High Court was that in the absence of sanction as contemplated under Section 197 of the Code, the proceeding cannot be continued. The High Court by the impugned judgment rejected the prayer holding that since the requirement of Section 100(4) of the Code were not followed, while search was conducted in the respondent No.2's premises the provisions of Section 197 of the Code were not applicable.

Learned counsel for the appellant submitted that without noticing relevant factual background the High Court has held that the protection under Section 197 of the Code were not available. According to him a report about the commission of dacoity on 8/9-7-1996 was received and Jasidih PS Case No. 103 of 1997 was registered in respect of commission of offence punishable under Section 395 of the IPC. The Special Report in respect of the case was 250 of 1996. Supervision of the case was being done by the appellant. Source information was received about the involvement of certain persons, one of whom was Ratnesh Kumar Dubey - alias Chhotu, son of respondent No.2. On the basis of such information the appellant gave spot instruction to arrest the suspects and conduct search. Search was to be conducted in the house of respondent no.2. Three Sub-Inspectors were deputed for the purpose and the investigating officer of the case was directed to continue investigation on other lines. On 11.7.1996 the team constituted for the purpose of search requested the police officials of Shastri Nagar Police Station in Patna for cooperation. A requisition slip for the purpose was given. The team of three sub-inspectors and local police officials visited the house of respondent no.2 on 11.7.19992 for the purpose of search and to arrest Ratnesh, if necessary. Elder son of Respondent no. 2 told the police officials that Ratnesh had gone to Delhi and was not present. Though search was conducted no material of any substance was seized. Alleging that the search was motivated and was for the purpose of humiliating and harassing, as the concerned officials did not have a search warrant, the respondent no.2 and his son Chhotu, complaint was filed on 26.11.1996 in the Court of Chief Judicial Magistrate, Patna. Subsequently, as noted above, the appellant filed the application under Section 482 of the Code which came to be dismissed by the impugned judgment. It was submitted by learned counsel for the appellant that the factual scenario clearly proves the bonafides and in view of the fact that all possible procedure were taken to follow the mandate of law, Section 197 of the Code is clearly applicable. It is submitted that the High Court made reference only to the Section 100 of the Code, overlooking the powers available to be exercised under Sections 41, 165 and 166 of the Code and Rule 165 of the Bihar Police Manual. It was, therefore, submitted that the judgment of the High Court is indefensible. Learned counsel for the State of Bihar and Jharkhand supported the stand taken by the appellant.

Respondent no.2 who appeared in person submitted that no material has been brought on record as from what source the name of Ratneshwar cropped up. The acts done were clearly outside the scope of official duty and therefore, the protection under Section 197 of the Code is not available. Reference was made to certain alleged events to contend that the intention was to falsely implicate Ratnesh and, therefore, the police officials went to the extent of forging alleged confessional statement of one Sanjay Singh.

The pivotal issue i.e. applicability of Section 197 of the Code needs careful consideration. In Bakhshish Singh Brar v. Smt. Gurmej Kaur and Anr., AIR (1988) SC 257, 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 out 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 197 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."

The protection given under Section 197 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 purporting to act as public servants. The policy of the legislature is to afford 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 they choose 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 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 duties. It is not the duty which requires examination so much as the act, because the official act can be performed both 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 this 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 his 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 does not get immediately attracted on institution of the complaint case.

At this juncture, we may refer to P. Arulswami v. State of Madras, AIR (1967) SC 776, 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 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 within the scope of the official duty or in excess of it that the protection is claimable."

It would be appropriate to examine the nature of power exercised by the Court under Section 197 of the Code and the extent of protection it affords to public servant, who apart, from various hazards in discharge of their duties, in absence of a provision like the one may be exposed to vexatious prosecutions. Section 197(1) and (2) of the Code reads 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 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.
>
> * * * (2) No Court shall take cognizance of any offence alleged to have been committed by any 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."

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 Sessions 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 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 committed during discharge of his official duty.

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' according to dictionary, means pertaining to an office, and official act or official duty means an act or duty done by an officer in his official capacity. In B. Saha and Ors. v. M. S. Kochar, [1979] 4 SCC 177, it was held :

> "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(1) 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 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 and the said provision."

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

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 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 course of service. Its operation has to be limited to those duties which are

discharged in course of duty. But once any act or omission has been found to have been committed by a public servant in 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 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 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 course of service but not in 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 discharge of his duty can be deemed to be official was explained by this Court in Matajog Dobey v. H. C. Bhari, AIR (1956) SC 44 thus:

> "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 ... 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."

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 official to which applicability of Section 197 of the Code cannot be disputed.

In S.A. Venkataraman v. The State, AIR (1958) SC 107 and in C. R. Bansi v. The 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 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."

The above position was illuminatingly highlighted in State of Maharashtra v. Dr. Budhikota Subbarao, [1993] 3 SCC 339.

When the newly-worded section appeared in the Code (Section 197) with the words "when any person who is or was 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."

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.

Section 197(1) 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 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 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.

We may mention that the Law Commission in its 41st Report in paragraph 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". It was in pursuance of this observation that the expression `was' come to be employed after the expression `is' to make the sanction applicable even in cases where a retired public servant is sought to be prosecuted.

Above position was highlighted in R. Balakrishna Pillai v. State of Kerala, AIR (1996) SC 901, in State of M.P. v. M.P. Gupta, [2004] 2 SCC 349, in State of Orissa through Kumar Raghvendra Singh and Ors. v. Ganesh Chandra Jew [2004] 8 SCC 40, and in Shri S.K. Lutshi and Anr. v. Shri Primal Debnath and Anr., [2004] 8 SCC 31.

When the factual position is considered in the background of legal principles elaborated above the inevitable conclusion is that the High Court was not justified in holding that the Section 197 was not applicable to the facts of the case. In the instant case, therefore Section 197 of the Code had clear application. High Court only focused on the absence of the search warrant and totally ignored other relevant aspects. Though the allegations about alleged offences had their matrix on the absence of search warrant, the other circumstances noted above had a determinative role in the issue. The events, if any, which allegedly took place after 11.7.1996 on which emphasis was laid by the

respondent no.2 have really no relevance for the issue under consideration. Their effect, if any, can be considered at the appropriate stage. We make it clear that the view expressed by us is only in respect of applicability of Section 197 of the Code.

The appeal in the above said circumstances is allowed. The order of the Magistrate taking cognizance consequently is set aside.