# Bhup Narain Saxena vs State Through District Co-Operative ... on 18 September, 1951

## Equivalent citations: AIR1952ALL35, AIR 1952 ALLAHABAD 35

## Author: Raghubar Dayal

## Bench: Raghubar Dayal

JUDGMENT

Raghubar Dayal, J.

1. This is an application under Section 561A read with Section 435, Criminal P. C. for the setting aside of the charge and the entire proceedings in Sessions Trial No. 77 of 1950 and the convictions and sentences in Sessions Trials NOS. 76 and 78 of 1950.

2. The applicant was prosecuted for offences under Sections 409, 420, 465, 468, 471 and 477A, Penal Code, in three cases. He was duly committed in all the three cases. Two of these cases ended in his conviction under Section 467 read with Section 471 and Section 420, Penal Code. The applicant filed appeals against his convictions and sentences before the Sessions Judge of Gorakhpur. His appeals are pending. The third caae is pending in the Sessions Court.

3. The ground for the prayer for action under Section 561A is that the Court could not have taken cognizance of the offences in the absence of sanction as required by Section 6, Prevention of Corruption Act (Act II [2] of 1947) It is admitted that the applicant has not been prosecuted for any offence to which that Act applies and for which sanction is necessary. The contention seems to be that the conduct could have amounted to an offence to be dealt with under that Act, that he should have been prosecuted for that offence and that such prosecution could not have been launched without sanction.

4. So far as the two appeals against his convictions and sentences are concerned, I am of opinion that no good reason exists to take action under Section 561A, Criminal P. C. The appellate Court will deal with the legal question and decide it according to law. The conviction is not to be set aside under Section 561A, Criminal P. C. and can be set aside according to the regular procedure.

5. It has been held in Kripa Shankar v. State, Cri Misc. No 506 of 1951, decided on 5-6-1951, by Brij Mohan Lall J. that prosecution under Section 409, Penal-Code could nob be allowed against a person who could also be prosecuted for criminal misconduct under Section 5 of Act II [2] of 1947, the Prevention of Corruption Act, without the sanction contemplated by Section 6 of the Act. I find it difficult to follow this view and would like the point to be considered by a larger bench,

6. I, therefore, reject this application with respect to the prayer for the setting aside of the convictions and sentences in the two cases and order that this application with respect to the prayer for the setting aside of the charge in Sessions Trial No. 77 of 1950 be laid before a larger bench.

Malik, C.J.

7. The applicant Bhup Narain Saxena was an Inspector in the Rural Development Department and was posted in Agra. In the year 1945 he was transferred to Deoria. On 3-12-1948, he was transferred from Deoria to Jaunpur. While he was in Jaunpur he was arrested on 6-1-1949, and on 25-5-1949, three charge-sheets were submitted against him, On 15-7-1950, the Magistrate, who had taken cognizance of the case, framed charges against the applicant under various sections of the Indian Penal Code. In two of the case, the applicant was convicted and he baa filed appeals against his convictions which are pending in the Court of the learned Sessions Judge, The prayer that this Court should under Section 561A, Criminal P. C., set aside the conviction was refused by the learned single Judge when referring this case to this Bench with the following observations :

> "The appellate Court will deal with the legal question and decide it according to law. The conviction is not to be set aside under Section 561A, Criminal P. C., and can be set aside according to the regular procedure."

The third case is still pending. An objection has been taken in this ease that the prosecution cannot proceed against the applicant as no sanction of the District Co-operative Officer, Jaunpur, was taken to prosecute the applicant as required by Section 6, Prevention cf Corruption Act (II [2] of 1947). A learned single Judge of this Court had in Kripa Shankar v. State, Cri. Misc. No. 506 of 1951, decided on 5-6 1951, held, that a person, who could be prosecuted for criminal misconduct under Section 5 of Act II [2] of 1947, could not be prosecuted of offences under the Indian Penal Code. The accused in that case was prosecuted under Sections 409, 467 and 471A, Indian Penal Code. While the case was pending in the Court of the Assistant Sessions Judge of Mathura an application was moved in this Court that the offences with which the accused was charged came under the definition of 'criminal misconduct' in Section 5, Prevention of Corruption Act (II [2] of 1947) and it was, therefore, not open to the prosecution to disregard the provisions of that Act and without obtaining the requisite sanction under Section 6, Prevention of Corruption Act, prosecute the applicant under the Indian Penal Code. The learned single Judge following a previous decision of this Court in Ram Nath v. Emperor, 47 ALL. 268, held that it was not open to the prosecution to disregard the provisions of the Prevention of Corruption Act by proceeding with the prosecution under the Indian Penal Code.

8. The learned single Judge before whom this case came was not inclined to agree with this view and referred the application to a Bench for decision whether the sessions Trial No. 77 of 1950 in which the accused was charged under various sections of the Indian Penal Code could proceed in the absence of sanction under Section 6, Prevention of Corruption Act when the accused could be charged under Section 5 (2) of that Act.

9. We have heard learned counsel for the applicant at some length and with great respect to the learned Judge who decided that case we are not inclined to agree with the view expressed in Kripa Shankar's case, Cri. Misc. No. 506 of 1951, mentioned above. The learned single Judge's attention was not drawn to a later decision of this Court in Emperor v. Joti Prasad, 53 ALL. 642, where the correctness of the view expressed in Ram Nath's case, 47 ALL. 268, was doubted and it was pointed out that the learned single Judge who had decided Sam Nath's case had not given any reasons for his view and had not cited any authorities.

10. Learned counsel for the applicant has urged that the applicants is a public servant. The offences he is alleged to have committed can all be grouped under the heading 'Criminal misconduct' and the applicant could, therefore, be convicted under Section 5 (2), Prevention of Corruption Act, which is as follows :

> "Any public servant who commits criminal misconduct in the discharge of his duty shall be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both."

Section 6 of the Act provides that no Court shall take cognizance of an offence punishable under Section 161, or Section 165, Penal Code, or under Sub-section (2) of Section 5 of this Act, alleged to have been committed by a public servant except with the previous sanction of persons mentioned in the section. In effect the argument of learned counsel is that where a public servant is guilty of an offence which can amount to 'criminal misconduct' as defined in Section 5 (1), the prosecution must be deemed to be uader Section 5 (2), Prevention of Corruption Act, whether the accused is charged under that section or under appropriate sections of the Indian Penal Code, and the provisions of the Prevention of Corruption Act should, therefore, apply.

11. The Act was passed in 1947 with the avowed object of making more effective provision for the prevention of bribery and corruption by a public servant. Sections 3 and 6 of the Act make certain amendments in the procedure, while Sections 4 and 7 make certain amendments to the rules prescribed in the Evidence Act. Sections 3 and 4 apply to cases under Ss 161 and 165, Penal Code, only. The definition of criminal misconduct in Section 5 and Sub-sections (b) and (c) can include cases which would not fall under any provision of the Penal Code. Where, therefore, a new offence has been created under this Act there can be no doubt that the accused must be proceeded against in accordance with the provisions of this Act. Where, however, the offence is one which was punishable under the Penal Code and is now made punishable under this Act also, the question arises whether it is open to the prosecution to proceed against the accused under the general law, that is, under the Penal Code, or under the special provisions contained in this Act. Sub-section (2) of Section 5 provides for seven years' rigorous imprisonment for criminal misconduct by a public servant, or fine, or both, while some of the sections of the Penal Code, which deal with offences which might come under the definition of 'criminal misconduct', provide for heavier or lighter punishments.

12. The general rule generalia specialibus non derogant oa which reliance has been placed has not been held to be of universal application by Courts in India. As far back as 1873 in the Queen v. Hussun Ali, 5 N. W. P H. C. R. 49 the High Court set aside the conviction under the Cattle Trespass

Act but maintained the conviction under the Penal Code, though the accused could be convicted under the Cattle Trespass Act as well as under Section 169, Penal Code. The same view was taken in Proceedings of the High Court, 22.2-1876, l Mad 55 where it was held that the permission of the Board of Eevenue was required only for the procedure prescribed in the special Acts, Regulations of 1817 or Act XX [20] of 1863 ; these provisions could not be taken out of those Acts and applied as a restriction to the ordinary operation of the criminal law.

13. In the Queen v. Ramchandrappa, 6 Mad, 249 conviction under the Penal Code was upheld though the accused could have been convicted under Section 16 (3) of Regulation IV of 1816.

14. The point was considered at some length by a Bench of the Bombay High Court in Emperor v. Bhalchandra Trimbak, 54 Bom. 35, Patkar J., observed:

> "I think, therefore, that though the disobedience of the order of the Police Commissioner under Section 23, Sub-section (3), is an offence punishable under Section 127, Police Act, it would be equally punishable under Section 188, Penal Code, if all the conditions laid down by that section are fulfilled ....."

and the other learned Judge--Wild J.--discussing the minority judgment of Das J. in Emperor v. Abdul Hamid, 2 Pat. 134 pointed out that the principle enunciated in Hawkins's Pleas of the Crown applied only to a statute making a new offence which was not an offence under the common law before the statute was passed and agreed with the view that the accused could be convicted under Section 188, Penal Code, though he could have also been punished under Section 127, City of Bombay Police Act.

15. The Calcutta High Court took the same view in Kuloda Prosad Majumdar v. Emperor, 11 Cal. W. N. 100 where the accused was prosecuted under Section 417, Penal Code, though he could be punished under Section 112, Railways Act, for travelling without ticket. The learned Judges, in discussing the rule quoted by Lord Esher, M R., in Lee v. Dangar, (1892) 2 Q. B. 337 at p. 348. 'If one statute make the doing of an act felonious and & subsequent act make it only penal, the latter is considered as a virtual repeal of the former', observed:

> "We are not, however, disposed now to lay clown broadly in this country tbat in every case a special penal law repeals by implication a previously existing general law relating to an offence of the same nature, and in this case it is not necessary for us to do so. If we were to do so, we might infringe the rule of interpretation in Section 26 General Clauses Act."

Section 26, General Clauses Act (x [10] of 1897) is as follows :

> "Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished wider either or any of those enactments but shall not be liable to be punished twice for the same offence."

The applicant is being prosecuted under various sections of the Penal Code, some of which provide for a sentence of more than seven years, white the others provide for a much lesser sentence. In the charge-sheet no mention has been made of the Prevention of Corruption Act and the trial, so far as we can see, has proceeded in accordance with the provisions of the Criminal Procedure Code and the charge-sheet mentions only sections of the Penal Code, At the conclusion of the trial the accused must be convicted, if his guilt is proved, in accordance with the pro visions of the Penal Code and it cannot be said that the Court convicting the accused can apply sub Section (2) of Section 5, Prevention of Corruption Act and sentence him to seven years' rigorous imprisonment where the section under which he is charged provides for a lesser sentence. The applicant not having been charged under Sub-section (2) of Section 5, Sections 4 and 7 of the Act cannot be made applicable to him so that no presumption can be made against the accused nor can ho be examined as a witness at his own request.

16. We may also point out that Section 6, Prevention of Corruption Act, provides that the rule as regards sanction shall apply to a case under Section 161 or 165, Penal Code. Neither Section 6 nor Sections 4 and 7 make any mention of any other section of the Penal Code and if the accused is, therefore, not charged under Section 161 or 165, Penal Code, but under certain other sections of the Penal Code, it cannot be said that to these sections also the provisions of the Prevention of Corruption Act was intended to apply.

17. There is, therefore, no force in this application and we dismiss it.