State Of Orissa Through Kumar ... vs Genesh Chandra Jew on 24 March, 2004

Equivalent citations: AIR 2004 SUPREME COURT 2179, 2004 (8) SCC 40, 2004 AIR SCW 1926, 2004 CRI(AP)PR(SC) 224, 2004 SCC(CRI) 2104, (2004) 4 JT 52 (SC), 2004 (4) JT 52, 2004 (3) SCALE 608, 2004 ALL MR(CRI) 1492, 2004 (3) ACE 680, 2004 (2) BLJR 863, 2004 (4) SLT 93, 2004 (6) SRJ 250, (2004) 18 ALLINDCAS 603 (SC), (2004) 2 CTC 467 (SC), 2004 BLJR 2 863, (2004) 2 EASTCRIC 164, (2004) 1 ORISSA LR 621, (2004) 28 OCR 94, (2004) 2 SUPREME 757, (2005) 2 ALLCRIR 1201, (2004) 49 ALLCRIC 419, (2004) 3 CHANDCRIC 65, (2004) 2 CURCRIR 374, (2004) 2 RAJ LW 218, (2004) 2 RECCRIR 663, (2004) 3 SCALE 608, (2004) 2 UC 972, (2004) 2 BOMCR(CRI) 374, 2004 CHANDLR(CIV&CRI) 31, (2004) 2 CRIMES 404, (2004) 2 RAJ CRI C 595, (2004) 19 INDLD 230, (2004) 2 ALLCRILR 784, 2004 (2) ANDHLT(CRI) 71 SC, 2004 (1) ALD(CRL) 729, (2004) 2 ANDHLT(CRI) 71

Author: Arijit Pasayat

Bench: Doraiswamy Raju, Arijit Pasayat

```
           CASE NO.:
Appeal (crl.)  35 of 1998

PETITIONER:
State of Orissa Through Kumar Raghvendra Singh & Ors.

RESPONDENT:
Genesh Chandra Jew

DATE OF JUDGMENT: 24/03/2004

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT.

JUDGMENT:
```

J U D G M E N T ARIJIT PASAYAT, J.

Appellants have questioned legality of judgment rendered by a learned Single Judge of the Orissa High Court rejecting the petition under Section 482 of the Code of Criminal Procedure, 1973 (in short the 'Code'). Background facts essentially are as follows:

Grievances were made against six officers of the Orissa State Forest Department, the present appellants by the respondent (described hereinafter as the 'complainant') alleging that they had falsely implicated him for offences under the Orissa Forest Act, 1972 (in short 'the Act'), the Wildlife Protection Act, 1972 (in short 'the Wildlife Act') and being not content with the illegal acts, and that they seriously assaulted him thereby committing offences punishable under Sections 341, 323, 325, 506 and 386 read with Section 34 of the Indian Penal Code, 1860 (in short 'the IPC'). They also publicly humiliated him. The appellants questioned legality of the proceedings instituted by the complainant in ICC case No. 45/91 in the Court of Sub-Divisional Judicial Magistrate, Baripada (in short 'the S.D.J.M.'). Their primary stand was that the complaint was lodged as a counterblast and retaliatory measure because large quantity of ivory was seized from the complainant and he could not produce any material to justify the possession thereof.

According to the complainant he is a reputed Pharmacist, and also a man of means and the owner of a cinema hall and producer of films. While on 27.2.1991 he was engaged in the professional work, the present appellants along with some police personnel entered into his clinic and arrested him alleging that some elephant tusks were recovered from his possession. He is a man having good reputation and standing in the society. There was absolutely no reason for appellants to apprehend that he would flee away from custody. Nevertheless he was made to walk on the bazar roads with hand-cuff. He was taken to the range office and was made to sit under a tree with the intention to give an impression to the general public that he was an illicit trader in elephant tusks. An advocate requested the officials to allow the complainant to take insulin since he was a diabetic patient, but the request was not heeded to. Complainant was treated as a criminal. On the next day he was produced before the SDJM. Before doing that, some elephant tusks were put on his shoulders and photographs were taken. Appellants 5 and 6 assaulted him severely causing serious injuries. When he was produced before the SDJM before evening, he was not in a proper state of mind. Subsequently, after being released on bail he got himself medically examined and complaint was lodged after consulting lawyers. Appellants questioned legality of the proceedings. According to them, they were officials to whom protection under Section 197 of the Code was applicable. In any event, the complaint was lodged with oblique motive and intention to get out of the illegalities committed and as a retaliatory measure. There was absolutely no material to take cognizance of the case. The acts of search, seizure and arrest were done in pursuance of their official duty and they cannot be proceeded against without necessary sanction as contemplated under Section 197 of the Code. The Orissa High Court at the first instance permitted the appellants to make submission before the SDJM. But the SDJM took the view that there was no necessity for sanction under Section 197 of the Code.

Matter was again brought before the High Court which by the impugned judgment was of the view that Section 197 of the Code has no application to the facts of the case.

In support of the appeal, learned counsel for the appellants submitted that the complaint instituted by the respondent is nothing but an abuse of the process of the court. The High Court has not taken note of the factual positions which were highlighted to substantiate the prayer for quashing of the proceedings in terms of Section 482 of the Code, particularly in the background of Section 197 thereof. The alleged occurrence took place on 27.2.1991. On the next day i.e. 28.2.1991 the accused was produced before the Magistrate and prayer for remand to custody was made. Simultaneously, the respondent moved for bail. While hearing the bail application, the SDJM specifically asked the respondent as to whether there was any ill-treatment. As the order of the learned SDJM clearly shows, the accused did not make any grievance of any ill-treatment and on the contrary admitted that there was no ill-treatment. Interestingly, the respondent got himself examined after three days by a private doctor and the complaint was lodged after 13 days. These clearly establish the mala fides. In the complaint petition also there was no specific allegation against many of the appellants and vague statements were made about alleged assaults. To divert attention, respondent has filed several cases and the complaint in question is one of them. Acts done were in accordance with law and as part of official duty and the High Court was not justified in holding that Section 197 of the Code is not applicable.

In response, learned counsel for the respondent- complainant submitted that the assaults made by the appellants cannot be construed to be in pursuance of official duty. Seriousness of the injuries can be gauged from the materials brought on record. It is not correct to say that any mala fides are involved. A citizen's liberties were seriously trampled by these officials who committed series of illegal acts. Merely because respondent who was in a dazed stage on account of the ignominies brought upon by the acts of the appellants and both mentally and physically battered, could not take steps instantly, that is of no consequence; more particularly when the bail application indicated the illegalities committed. Section 197 of the Code has, therefore, rightly been held to be inapplicable.

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 196 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."

Prior to examining if the Courts below committed any error of law in discharging the accused it may not be out of place 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 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 : (SCC pp. 184-85, para 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(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 on 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, of 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) and in State of M.P. v. M.P. Gupta (2004 (2) SCC 349).

When the background facts of the case are considered the question regarding applicability of Section 197 of the Code takes a temporary back seat. The factual scenario as indicated above goes to show that on 28.2.1991 respondent was produced before the Magistrate. He was specifically asked as to whether there was any ill-treatment. Learned SDJM specifically records that no complaint of any ill-treatment was made. This itself strikes at the credibility of the complaint. Additionally, the doctor who has examined him stated that for the first time on 2.3.1991 he treated the complainant. Though there are several other aspects highlighted in the version indicated in the complaint and the materials on record are there, we do not think it necessary to go into them because of the inherent

improbabilities of the complainant's case and the patent mala fides involved. It is no doubt true that the threshold interference by exercise of jurisdiction under Section 482 of the Code has to be in very rare cases, and this case appears to be of that nature. It fits in with the category no.7 of broad categories indicated in State of Haryana v. Bhajan Lal (1992 Supp (1) SCC 335). It is to be noted that though plea regarding non-complaint before the Magistrate was specifically taken to justify interference, the High Court has not dealt with this aspect at all thereby adding to the vulnerability thereof.

The continuance of the proceeding by way of prosecution in this case would amount to abuse of the process of law.

The High Court's judgment and the proceedings in ICC No. 45/91 are quashed. We make it clear that we have not expressed any opinion about the merits of the cases instituted against respondent-complainant which shall be dealt with in accordance with law.

The appeal is allowed.