State Of Maharashtra vs Dr. Budhikota Subharao on 16 March, 1993

Equivalent citations: 1993 SCR (2) 329, 1993 SCC (2) 567

Author: R.M. Sahai

Bench: R.M. Sahai, S.R. Pandian

PETITIONER:
STATE OF MAHARASHTRA

Vs.

RESPONDENT:
DR. BUDHIKOTA SUBHARAO

DATE OF JUDGMENT16/03/1993

BENCH:
SAHAI, R.M. (J)
BENCH:
SAHAI, R.M. (J)
PANDIAN, S.R. (J)

CITATION:
1993 SCR (2) 329 1993 SCC (2) 567
JT 1993 (3) 389 1993 SCALE (2)44

ACT:
Code of Criminal Procedure 1973 : Section 197--Cognizance of offence by public servants--Nature of power exercised by Courts--Extent of protection afforded to public servants--Sanction to prosecution--Requirement of.
Words and Phrases--Meaning of 'Official'--Official Duty'.

HEADNOTE:
The respondent in the appeal was an ex-Naval Captain who achieved notable success in the field of computer science and software during the period be was attached with the Bhabha Atomic Research Centre and had voluntarily opted out of service in 1987. He was arrested on 30th May, 1988 just, when he was about to board a plane for New York. His residence was searched on the next day. From the documents recovered from search of the hand bag on 30th and residence on 31st and his interrogation, it appeared that he was guilty of violating provisions of the Official Secrets Act,

1923 and Atomic Energy Act, 1962 and, therefore, a complaint was riled, against him after obtaining permission, under Section 3(1)(c), 3(1)(c) read with Sections 9, 6(2)(a) and 6(2)(b) of the O.S. Act and 24(1)(d) read with 18(2) and 24(2)(d) read with Section 19(b) of the A.E. Act before the Metropolitan Magistrate who being prima facie satisfied of the offences and their gravity committed the accused to stand trial before the Court of Sessions.

The accused assailed the framing of charge contending that, on facts, no offence under either of the Statutes was made out, and if any offence for which he could be charge-sheeted could be under Section 5 of the O.S. Act. The Trial Judge turned down the plea by order dated 24/27th February, 1989 and fixed date for framing the charge.

A revision against this order was dismissed by the High Court on 6th June, 1989, and was challenged by way of Special Leave Petition in this Court, but it was permitted to be withdrawn.

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The accused thereafter invoked the inherent jurisdiction of the High Court seeking review of the order dated 6th June, 1989 and although the application was rejected on 18th September, 1989 but an observation was made that there was no impediment in the way of the Trial Judge in altering or modifying or reviewing any of the charges or even framing new or additional charge. This provided an occasion to the accused for starting proceedings, afresh, for his discharge and claim in the alternative to framecharge under Section 5 of O.S. Act instead of under Section 3, for which purposed he moved an application which was allowed by the Trial Judge on 15th January, 1990, and the charges under A.E. Act were dropped. The charge under the O.S. Act was altered to one under Section 5of the Act. This order was set aside on 3rd/4th April', 1990 by a Single Judge and the Trial Judge was directed to frame charges both under Sections 3 and 5 of the O.S. Act.

The accused approached the Division Bench against the aforesaid order by way of an application speaking to the Minutes for clarification of the order passed by the High Court on 3rd/4th April, 1990 as the Single Judge who passed the order on 3rd/4th April, 1990 did not appreciate the observations made by the Division Bench, but it was rejected on 24th July, 1990 as there was no system of speaking to the Minutes by doing which the order could be reviewed in criminal proceedings. The Division Bench dismissed this application and observed that remedy of the accused was to approach the court in proper forum.

When the matter 'was thereafter taken up for framing the charge the accused, once again, claimed that he was entitled to be heard at stage of Section 227 of the Code of Criminal Procedure and he was entitled to be discharged. The Trial Judge by order dated 6th August, 1990 rejected the application, restored the earlier charges and framed a

charge under Section 5 as well.

The validity of the aforesaid framing of charges was challenged by way of a Writ Petition (Criminal) under Articles 226 and 227 of the Constitution, and it was claimed that the entire proceedings being violative of Article 21 of the Constitution were liable to be quashed. The High Court did not find any substance but by its order dated 24th March, 1991 directed the ASJ to decide if sanction under Section 197 of the Code was required, and also to determine whether the authorisation under Section

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5 of the O.S. Act and 7 of the Atomic Energy Act was in accordance with law.

Pursuant to the aforesaid direction the ASJ examined the material on record and observed that authorisation was not proper, but refrained from expressing any opinion in view of the direction of the High Court to ,decide the requirement of sanction under Section 197 of the Code of Criminal Procedure, first, and the effect, in law, of its absence. It was held that the documents seized from the possession of the accused indicated that they were inseparably interwined with performance of his official duties and therefore, the prosecution could not have been initiated without sanction.

The High Court in revision decided both the questions in favour of the accused, holding that the authorisation for institution of prosecution, for offences allegedly committed under either Statute, was invalid as even though authorisation was issued, in favour of the Prosecuting Inspector who was also the Investigating Officer, but it having been issued by an authority other than the Central Government it was not in accordance with law. On the question of sanction under Section 197 of the Code, the High Court agreed with the A.SJ. that the charges itself indicated that the offences were committed during the period the accused was a serving officer, therefore, in absence of the sanction no cognizance of any of the offences could have been taken.

In the appeal to this Court on the question whether the judgment of the High Court, affirming the order of the Trial Judge discharging the accused, is if the absence of sanction, by the appropriate authority, under Section 197 Cr. P.C. for prosecuting a retired public servant, vitiates the proceedings.

Dismissing the appeal, this Court,

HELD : 1. Section 197 Cr. P.C. falls in the Chapter dealing with conditions requisite for initiating of proceedings. If the conditions mentioned are not made out or are absent then no prosecution can be set in motion. [321C]

2. So far as public servants are concerned cognizance of any offence, by any Court, is barred by Section 197 unless sanction is obtained from appropriate authority, if the offence, alleged to have been committed,

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was in discharge of the official duty. The Section not only specified 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. [321E]

3. 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 of 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. [321F-G]

3(i). In common parlance 'cognizance' 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 discharge of his official duty. [321H]

(ii)'Official' means pertaining to an office. An official act or official duty means an act or duty done by an officer in his official capacity. 'Official duty' implies that an act or omission must have been done by the public servant in 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'. [322G]

S.B. Saha v. M.S. Kochar, AIR 1979 SC 1841 and P. Arulswami v. State of Madras, [1967] 1 SCR 201 =AIR 1967 SC 776, referred to. [322B-G]

4. Section 197 has 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 restricted manner. But once it is established that an act or omission was done by the public

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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. [323F-G]

5. 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 then the bar under Section 197 of the Code is not attracted. [323H]

Baijnath v. State of Madhya Pradesh, AIR 1966 SC 220, referred to.

[324A]

6. If on facts, 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. [324D]

In the instant case, five charges were framed against the respondent accused. First two related to Section 3(1) and 3(1)(c) of the O.S. Act. Third and fifth related to Sections 6 (2) (a) and 5 of the O.S. Act and fourth related to violation of Section 18(2) and 19 of A.E. Act. In the very first charge after narrating the period when the accused was employed and when he opted for voluntary retirement it is stated that it was during the course of this period that he was in communication with foreign agents, within or without India and for purpose prejudicial to the safety or interest of the State he obtained and collected top secret and secret official documents. The High Court and the Trial Judge, both, found that it was clear that the documents which were seized from possession of the accused and were subject matters of indictment were obtained by him when he was in service prior to his retirement in 1987. [324F-G]

7. In respect of charge 2, the High Court rightly found that the use of words, 'during the said time and place' related back to what was stated in charge no. 1, namely, to the period when the accused was in service. It was rightly found that ambiguity. If any, in charges I to 4 stood completely removed by charge no. 5 which left no doubt that the intention and purpose of framing the charge against the accused was to indict him for whatever he had done during the period when he was employed in the Navy

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as the alternative charge clearly stated that during his deputation between 1976 and 1987 with BA.R.C. he had access to secret documents which he communicated to the persons other than those who were authorised to receive such information, Charge no. 3 related, to retention of Identity Card during service and charge no. 4 was in respect of taking out information in form of books pertaining to atomic energy the information of which had been obtained illegally, obviously when the accused was in service. Therefore, the act or omission which furnished foundation for indicating the accused either under O.S. Act or A.E. Act were related to the period when he Was in service. The narrow or the stricter test to determine if the sanction for prosecuting the accused was necessary was thus satisfied. [325B-E]

8. As is clear from the charge itself the accused was, selected in course of his employment in the Navy to study the feasibility of nuclear power, propelled submarine vessel along with a team of officers and was attached with B.A.R.C. as second officer in command. He joined the project in 1976 and was associated with the Centre for nearly 10 years. The accused while working with B.A.R.C. not only obtained Ph. D. but was even awarded gold medal for his achievements in computer technology and control engineering and a special Herbert Lott Memorial Award for his inventions in improving the existing, fighting devices of the Navy. The thesis written by the accused on which he was awarded Ph. D. were seized by the prosecution. The papers were written and the books published when the accused was attached with B.A.R.C. as a Second Officer-in-Command and, therefore, the material or documents which were found by him cannot be said to have been collected or procured by him by going out of way and beyond the discharge of his duties as an officer in the Naval Department. May be some of them were secret, confidential or unclassified items. But the accused came across them and obtained their copies in course of his duty as an officer attached to B.A.R.C. Charge No. 2 is in respect of classified information obtained by him when he was in Naval Service. Taking out of information obtained in course of employment was thus squarely covered by Section 197. Whether it was for communication or not is not material. Retention of Identity Card issued during service may be dereliction of duty but it was committed when the accused was in service and it was issued to him while discharging his duties as a Naval Officer.
[326F-H, 327A-F]
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9. The High Court and the Trial Court appear to have, rightly, inferred that whatever material came in possession of the accused was as a result of discharge of his duty as a Naval Officer. If this be so then even the second and the most important requirement of acting in discharge of official duty was satisfied. Therefore, without expressing any opinion on merits we are of the opinion that it was necessary for the prosecution to have obtained sanction for prosecuting the accused. [327H, 328A]
10. The courts below did not commit any error of law in coming to conclusion that the entire proceedings were vitiated as no cognizance of the offences could have been taken against the accused without complying with provisions of Section 197 of the Code. [328D]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 276 of 1993.

From the Judgment and Order dated 12.10.1991 of the Bombay High Court in Crl. Revision Application No. 123 of 1991. Altaf Ahmed, Addl. Solicitor General, B.R. Handa, Mrs. Manjula Rao, S.M. Jadhav, A.S. Bhasme and A.M. Khanwilkar for the Appellant.

Dr. B. Subba Rao Respondent-in-person.

V.M. Tarkunde, A.M. Khanwilkar and A.K. Panka for the Inter- venor.

The Judgment of the Court was delivered by R.M. SAHAI, J. The principal question of law, and, an important one, that arises for consideration in Appeal No. 276 of 1993 [arising out of S.L.P.(Crl.) No. 986 of 1992] which shall reflect on Appeal No. 277 of 1993 [arising out of S.L.P. (Crl.) No. 987 of 1992], as well, filed by the State of Maharashtra against the judgment and order of the Bombay High Court, affirming the order of the Trial Judge discharging the accused, is if the absence of sanction, by the appropriate authority, under Section 197 Criminal Procedure Code (in short 'the Code') for prosecuting a retired public servant, vitiates the proceedings. Although facts are brief and simple too, but the High Court, unfortunately, instead of confining itself to the legality of discharge, either for lack of the sanction under Section 197 of the Code or for the improper authorisation under the Official Secrets Act 1923 (in brief 'the O.S. Act') and Atomic Energy Act 1962 (referred to as 'A.E.Act') the two statutes for violation of which the accused was charged, was led away to record findings as if the accused was deliberately subjected to undue harassment by the State aided by the alleged unreasonable attitude of the Public Prosecutor. So much so that the learned Judge allowed an application of the accused, in the revision filed by the State against his discharge, and set aside the order of Additional Sessions Judge (in brief 'ASJ') framing charges against him as it was vitiated by fraud, merely because the State did not file any counter-affidavit and insisted that the argument being same as were advanced in the revision it was not necessary to file any reply, even though the learned Judge was aware that the accused had earlier approached the High Court against the order rejecting his application that no charge was liable to be framed against him without any success. Not only that the learned Judge did not spare, even, this Co- art, for cancelling bail of the accused at earlier stage. Needless to say that the first was unnecessary' the second illegal and is subject matter of appeal No. 277 of 1993 [arising out of S.L.P. (Crl.) No. 987 of 1992] and the third improper.

Since the accused was discharged by the Trial Judge, mainly, due to technical defects and the decision was rendered as a preliminary issue on direction of the High Court, suffice it to say that the accused, an ex-Naval Captain who achieved not able success in the field of computer science and software during the period he was attached with Bhabha Atomic Research Centre, (in short B.A.R.C.) had voluntarily opted out of service in 1987, was arrested on 30th May, 1988, just, when he was about to board a plane for New York. His residence was searched on the next day. From the documents recovered, from search of the hand bag on 30th and residence on 31st and his interrogation, it appeared that he was guilty of violating provisions of O.S. Act and A.E. Act, therefore, a complaint was filed, against him after obtain- ing permission, under Section 3(i)(c), 3(1)(c) read with Sections 9, 6(2)(a) and 6(2)(b) of the O. S. Act and 24(1)(d) read with Sections 18(2) and 24(2)(d) read with Section 19(b) of the A.E. Act before the Metropolitan Magistrate who being prima facie satisfied of the offences and their gravity committed the accused to stand trial before the Court of Sessions. Effort was made by the accused to assail the framing of charge, as

according to him, on facts, no offence under either of the Statutes was made out. And offence if any for which he could be charge- sheeted could be under Section 5 only. The Trial Judge turned down the plea by order dated 24/27th February, 1989 and fixed date for framing the charge. A revision, against this order, was dismissed by the High Court, on 6th June, 1989. It was challenged by way of Special Leave Petition in this Court. But it was permitted to be withdrawn. The accused however invoked inherent jurisdiction of the High Court seeking review of the order dated 6th June, 1989. Although the application was rejected, on 18th September 1989 but an observation was made that there was no impediment in way of the Trial Judge in altering or modifying or reviewing any of the charges or even framing new or additional charge. This provided an occasion to the accused for starting proceedings, afresh, for his discharge and claim in the alternative to frame charge under Section 5 of O.S. Act instead of under Section

3. The application was allowed by the Trial Judge on 15th January 1990, and the charges under A.E. Act were dropped. The charge under the O.S. Act was altered to one under Section 5 of the Act. The order was set aside on 3rd/4th April, 1990 by a learned Single Judge and the Trial Judge was directed to frame charges both under Sections 3 and 5 of the O.S. Act. Against this order the accused approached the Division Bench, by what is described as, speaking to the Minutes for clarification of the order passed by the High Court on 3rd/4th April, 1990 as the learned Single Judge who passed the order on 3rd/4th April, 1990 did not appreciate the observations made by the Division Bench, but it was rejected on 24th July 1990 as there was no system of speaking to the Minutes by doing which the order could be reviewed in criminal proceedings. The Bench however observed that remedy of the accused was to approach the court in proper forum. Therefore when the matter was taken up for framing the charge the accused, once again, claimed that he was entitled to be heard at stage of Section 227 of the Code and he was entitled to be discharged. The Trial Judge by order dated 6th. August 1990 rejected the application, restored the earlier charges and framed a charge under Section 5 as well. Validity of the charges, thus, framed was challenged by way of Writ Petition (Criminal) under Articles 226 and 227 of the Constitution and it was claimed that entire proceedings being violative of Article 21 of the Constitution were liable to be quashed. The High Court did not find any substance in it but it directed the ASJ by its order 24th March, 1991 to decide if sanction under Section 197 of the Code was required and also to determine if authorisation under Section of O.S. Act and A.E. Act was in accordance with law.

In pursuance of this direction the ASJ examined the material on record and observed that authorisation, was not proper but refrained from expressing any opinion in view of the direction of the High Court to decide the requirement of sanction under Section 197 of the Code, first, and the effect, in law, of its absence. The ASJ held that the documents seized from possession of the accused indicated that they were inseparably interwined with performance of his official duties whilst in Navy, therefore, the prosecution could not have been initiated without sanction. In revision filed by the State the High Court, decided both the questions in favour of the accused. It was held that the authorisation for institution of prosecution, for offences allegedly committed under either Statute, was invalid as even though authorisation was issued, in favour of the Prosecuting Inspector who was the Investigating Officer, but. it having been issued by an authority other than the Central Government it was not in accordance with law. On the question of sanction under Section 197 of the Code the High Court agreed with the ASJ that the charges itself indicated that the offences were

committed during the period the accused was a serving officer, therefore, in absence of the sanction no cognizance of any of the offences could have been taken.

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-
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> (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;
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> (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 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 of 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.

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 S.B. Salta v. M.S. Kochar, AIR 1979 SC 1841, 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 inter- pretation. 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.
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> 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."

Use of the expression, 'official duty' implies that act or omission must have been done by the public servant in 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. In P. Arulswami v. State of Madras, [1967] 1 SCR 201 = AIR 1967 SC 776 this Court after reviewing the authorities right from the days of Federal Court and Privy Council held, "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 s.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 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 he 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 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 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 Baijnath v. State of Madhya Pradesh, AIR 1966 SC 220 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 i n 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 be official to which applicability of Section 197 of the Code cannot be disputed.

On the law, thus, settled two questions arise for consideration one if the offence for which the accused was charged and of which cognizance was taken was committed by him during the period he was in Naval service and if it be so then whether the violations were in discharge of official duty or they were beyond it. For this purpose it may be mentioned that five charges were framed against the accused. First two related to Section 3(i) and 3(1)(c) of the O.S. Act. Third and fifth related to Sections 6(2)(a) and 5 of the O.S. Act and fourth related to violation of Sections 18(2) and 19 of A.E. Act. In the very first charge after narrating the period when the accused was employed and when he opted for voluntary retirement it is stated that it was during the course of this period that he was in com- munication with foreign agents, within or without India and for purpose prejudicial to the safety or interest of the State he obtained and collected top secret and secret official documents. The High Court and the Trial Judge, both, found that it was clear that the documents which were seized from possession of the accused and were subject matters of indictment were obtained by him when he was in service prior to-his retirement in 1987. Even the reference to the documents in the charge because of which the Government was of opinion that the accused had violated provisions of O.S. Act are mentioned to have been procured by the accused during course of his employment. In view of these averments, in the charge itself, it is very difficult to say that the offence for which the accused had been charge- sheeted were not committed when he was in service. In respect of charge

2, the High Court found and in our opinion rightly that the use of words, 'during the said time and place' related back to what was stated in charge no. 1, namely, to the period when the accused was in service. The High Court further found and again in our opinion rightly, that ambiguity, if any, in charges 1 to 4 stood completely removed by charge no. 5 which left no doubt that the intention and purpose of framing the charge against the accused was to indict him for whatever he had done during the period when he was employed in the Navy as the alternative charge clearly states that during his deputation between 1976 and 1987 with B.A.R.C. he had access to secret documents which he communicated to the persons other than those who were authorised to receive such information. Charge no. 3 related to retention of Identity Card during service and charge no. 4 is in respect of taking out information in form of books pertaining to atomic energy the information of which had been obtained illegally, obviously, when the accused was in service. Therefore, the act or omission which furnished foundation for indicting the accused either under O.S. Act or A.E. Act were related to the period when he was in service. The narrow or the stricter test to determine if the sanction for prosecuting the accused was necessary was thus satisfied. What remains to be examined is if the documents which were found in possession of the accused and were collected or obtained by him when he was in service were procured by him in discharge of duty. But before undertaking this exercise it may be stated that Section 197 of the Code as it stands after 1973, extends the protection even to a retired public servant as is clear from use of the words, 'is or was' provided the accusation is in respect of an act or omission done or purported to have been done when such public servant was in office. By legislative fiction the officer is deemed to be a public servant under Section 197 of the Code irrespective of his retirement if the accusations against him are for act or omission done by him when he was in service. The purpose is to avoid exposing a public servant to vexatious or frivolous prosecutions merely because he has demited his office. The submission of the learned Additional Solicitor General that if a public servant ceases to hold the office by the time the Court is called upon to take cognizance cannot claim any protection, being in teeth of the section, does not need any further elucidation.

Reverting to the main issue the two courts below have found it as a fact that the acts or omissions for which the accused has been charged were committed by him in discharge of his official duty. To steer clear of the effect of such finding the learned Additional Solicitor General urged that in view of the charges framed under O.S. Act the accused could not claim any protection under Section 197 of the Code as espionage can by no stretch be taken to be official duty. The learned counsel submitted that the documents which were recovered from possession of the accused were such as could not have been in his possession when he had already retired and the proper custodian of those documents being the Central Government, no sanction was required for prosecuting the accused for possessing such documents. As a matter of law no exception can be taken to the submission that no public servant can indulge in espionage. But mere allegation of spying cannot deprive a public servant of the legal protection provided for in Section 197 of the Code. Section 3 of the O.S. Act, no doubt, provides penalty if any person acts in any manner prejudicial to the safety or interest of the State. This appeal is not concerned if the accused acted in such manner which can give rise to an inference in law that he was guilty of spying or acted in any manner to affect sovereignty and integrity of the country. The limited question is if the documents which were seized from the accused either at the airport or from his residence are such that they could have been obtained or procured by him while acting as Naval Officer in discharge of his duty. As is clear from the charge

itself the accused was, selected in course of his employment in the Navy to study the feasibility of nuclear power, propelled submarine vessel along with a team of officers and was attached with B.A.R.C. as second officer in command. He joined the project in 1976 and was associated with the Centre for nearly 10 years. The accused while working with B.A.R.C. not only obtained Ph. D. but was even awarded gold medal for his achievements in computer technology and control engineering and a special Herbert Lott Memorial Award for his inventions in improving the existing, fighting devices of the Navy. It is not the case of prosecution that the documents which were seized either from the airport or the residence of the accused could not have been dealt by him when he was in service. Amongst various documents which were seized were the Identity Card of the Indian Armed Forces bearing his photograph and name, the eight files containing different types of maps of India, diagrams and computer information, a book by name 'Nuclear Power Plan' Modelling and Design, one brown envelope containing. lamination papers with diagrams, one book MWT Nuclear Submarine Propulsion Plant Design and one book Multi Point Satellite Links in Navnet System were also recovered from him. The documents which were found at his residence on. 31st May were computer communication on HF Links in Navnet and Advanced Technology Adaptation Centre, C-3 I System Development for Armed Forces Advanced Technology Adaptation for Defence, Multi Point Satellite Links in Navnet System, Government of India publications project report of Nuclear propulsion for Marine Application, one book about Sea on Control Radar and Display System for Land Design. Certain plan design of B.A.R.C. were also recovered from his possession. Most of the documents which can be said to be sensitive which were recovered from the accused were admittedly either the book written by him or the paper read by him as is clear from the Punchanama and the Statement of Witnesses who were produced on behalf of the prosecution to prove the same. Even the thesis written by the accused on which he was awarded Ph. D. by the Bhabha Institute of Technology was seized by the prosecution. The purpose of stating all this is to demonstrate that these papers were written and the books published when the accused was attached with B.A.R.C. as a Second Officer-in-Command and, therefore, the material or documents which were found by him cannot be said to have been collected or procured by him by going out of way and beyond the discharge of his duties as an officer in the Naval Department. May be some of them were secret, confidential or unclassified items. But the accused came across them and obtained their copies in course of his duty as an officer attached to B.A.R.C. Charge No. 2 is in respect of classified information obtained by him when he was in Naval service. Taking out of information obtained in course of employment was thus squarely covered by Section

197. Whether it was for communication or not is not material. Retention of Identity Card issued during service may be dereliction, of duty but it was committed when the accused was in service and it was issued to him while discharging his duties as a Naval officer. The Trial Court found that even though the Punchnama shows that two Identity Cards were recovered from the possession of the accused, but from their perusal it appeared that the Identity Card was issued to the accused as a retired officer and consequently the claim of the prosecution that the accused acted in violation of the provisions of the Act was not justified. But assuming there was violation since it was done when the accused was in service he was entitled to protection under Section 197 of the Code. The High Court and the Trial Court appear to have, rightly, inferred that whatever material came in possession of the accused was as a result of discharge of his duty as a Naval Officer. If this be so then even the second and the most important requirement of acting in discharge of official duty was

satisfied. Therefore, without expressing any opinion on merits we are of the opinion that it was necessary for the prosecution to have obtained sanction for prosecuting the accused. Similarly so far charge no. 4 is concerned we do not propose to examine if it was properly framed against the accused and if there was any material in support of it. But the alleged information which the accused was taking with him to United States having been obtained by him in course of employment and in discharge of his duty the High Court did not commit any error of law in recording the finding that no prosecution could be initiated unless sanction under Section 197 was obtained. Same applies to charge no. 5. Therefore, we are of opinion that the courts below did not commit any error of law in coming to conclusion that the entire proceedings were vitiated as no cognizance of the offences could have been taken against the accused without complying with provisions of Section 197 of the Code.

Since the appeal fails for non-compliance of Section 197 and the order discharging the accused has to be upheld we do not propose to examine the finding if authorisation under O.S. Act and A.E. Act to prosecute the accused was valid or not. In the result this appeal fails and is dismissed. Since the respondent was discharged for failure of mandatory requirement yet the State went on filing revision before the High Court and appeal before this Court and keeping in mind the mental sufferings and financial loss caused to the respondent we are of opinion that the respondent is entitled to costs which we assess in peculiar facts and circumstances of this case at Rs. 25,000.

N.V.K. Appeal dismissed.