

Director Of Inspection And Audit And ... vs C.L. Subramaniam on 16 September, 1994

Equivalent citations: AIR1995SC866, 1995(1)BLJR567, JT1994(6)SC50, 1994(4)SCALE138, 1994SUPP(3)SCC615, 1994(2)UJ666(SC), AIR 1995 SUPREME COURT 866, 1995 AIR SCW 669, (1994) 5 SERVLR 545, 1994 UJ(SC) 2 666, (1995) 1 EASTCRIC 58, (1995) 1 SCT 583, (1995) SC CR R 347, 1996 UP CRIR 156, 1994 SCC (SUPP) 3 615, (1995) 32 ALLCRIC 61, 1995 BLJR 1 567, 1995 CALCRILR 22, (1994) 3 RECCRIR 503, (1994) 6 JT 50 (SC), 1995 SCC (CRI) 121

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Bench: M.M. Punchhi

ORDER

K. Jayachandra Reddy, J.

1. These two appeals arise out of the same order of the High Court of Kerala dismissing two Cr.M.Ps filed by the Customs Officers under Section 482 Cr. P.C. The respondent herein Shri C.L. Subramaniam, who was a subordinate to the appellants, was common respondent in both those Cr. M.Ps. before the High Court. He filed two writ petitions under Article 226 of the Constitution of India against the appellants in connection with his promotion and transfer. The appellants herein who figured as respondents in those writ petitions filed counter affidavit making certain averments. Shri C.L. Subramaniam, the respondent herein filed two complaints under Section 200 Cr. P.C. before the Chief Judicial Magistrate, Ernakulam for offence punishable under Sections 500 read with 34 I.P.C. alleging that in the said counter affidavit, the appellants have made defamatory statements. The Chief Judicial Magistrate took cognizance of the offence complained of and issued process and summoned the appellants to face the trial. The appellants filed two Cr. M.Ps. under Section 482 Cr.P.C. in the High Court for quashing the complaints on the ground that the Chief Judicial Magistrate had no jurisdiction to take cognizance of the offence in the absence of any sanction under Section 197 Cr.P.C. by the Government and also on the ground that they were entitled to the benefit under the 9th Exception to Section 499 I.P.C. By the impugned judgment, the learned Single Judge of the High Court dismissed both the Cr.M.Ps. Hence the present appeals.

2. The appellants contended before the High Court that the affidavit was filed by them on behalf of the Customs authorities stating the facts and circumstances relating to the transfer of the

respondent and his non-selection purely in discharge of their official duties and therefore the same cannot be made the basis for cognizance of the offence without the necessary sanction being accorded by the Government and also that imputations, if any, in the counter affidavit were made in good faith for the protection of the interests of the Government and also for the public good and therefore it does not amount to defamation as per the 9th Exception to Section 499 I.P.C. The learned Single Judge firstly observed that the question whether sanction is required or not is a mixed question of law and fact and that the act constituting the offence must be directly and reasonably connected with the official duty. Then the learned Judge referred to some decisions. Thereafter the learned Judge observed that the sum and substance of the imputations in the counter-affidavit is that the respondent was corrupt and the motivation in asking for the transfer was to facilitate his corrupt practices and if there were to be no basis for such a statement or if it was not necessary to make such a statement for the sake of defence in that case then the plea of the respondent that such a statement was actuated by ill-will per se may not amount to acting or purporting to act in the discharge of the official duties and the question of sanction may not arise. Having taken this view the learned Judge held that the High Court under Section 482 Cr.P.C. can not collect materials to decide whether in making the alleged statements in the counter-affidavit the petitioners were acting or purporting to act in the discharge of their official duties and that it is open to the parties to place all the relevant materials before the Magistrate and make a request to decide whether the sanction was necessary or not. Regarding the 9th Exception of Section 499 I.P.C. the learned Judge held that the same cannot be decided by the High Court while exercising inherent powers and that the petitioners would have to prove before the Magistrate that they made the imputations in the counter-affidavit in good faith for protection of their official interests or for public good and that burden would be on the accused to prove the benefit of any exception taking away his act from the purview of the penal provisions.

3. In these appeals before us, we do not propose to go into the question whether the said 9th Exception to Section 499 I.P.C. is attracted or not. We shall however examine the respective contentions in respect of scope of Section 197 Cr.P.C. and the necessary sanction that is to be accorded thereunder in such cases. To appreciate the question precisely we may state few relevant facts. As we find from the records, the respondent was a senior grade Preventive Officer at the relevant time. In the month of May 1982 he was served with a transfer order issued by the Assistant Collector of Customs, who is one of the appellant herein, transferring him from Town Unit to Cochin Shipyard. He filed a writ petition before the High Court which was admitted and notice was ordered. In that Shri N. Sasidharan, Under Secretary, Ministry of Finance, Department of Revenue, one of the appellants herein, filed a counter-affidavit on his behalf as well as on behalf of other respondents. The writ petition was, however, dismissed. According to the respondent (complainant) certain imputations were made in the affidavit which amounted to defamation. In the complaint the averments in some of the paragraphs in the counter-affidavit have been extracted and it is alleged that the said statements in the counter-affidavit are nothing but a figment of imagination and that per se amounts to defamation punishable under Sections 500 read with 34 I.P.C.

4. To appreciate the points involved, we may refer to the averments in the said counter affidavit. In Paragraph 2 it is stated that the deponent was authorised to swear the affidavit on behalf of other respondents in the writ petition. Then in Paragraph 7 it is stated that posting of Preventive officers

by rotation to different units of the Prevent Department is generally made once in six months. Then in Paragraph 8 some averments regarding the conduct and performance of the respondent have been made. It is mentioned therein that in a departmental enquiry the respondent was removed from service for corruption and against the said order of removal from service, the officer filed writ petition which was dismissed by the High Court and therefore he approached the Supreme Court wherein the order of removal was set aside on the ground that the delinquent has not been given a reasonable opportunity to defend himself and the Supreme Court also directed that no fresh enquiry shall be held against him and that he should be restored to position which he would have been entitled to but for the impugned removal order. Accordingly the respondent was reinstated. Again the respondent was charge-sheeted for lack of integrity and misconduct and he filed a writ petition questioning the same which was dismissed and therefore a writ appeal was filed by him and an agreement was reached between the Department and the officer concerned. The respondent thereafter was transferred to Madras Airport and the enquiry proceedings were dropped. It is further stated in the counter-affidavit that the respondent after completion of his tenure at Madras was transferred to Cochin Customs House and was subsequently posted to the Town Unit. Thereafter he was posted to Cochin Shipyard by an order dated 21.5.92 and that the present writ petition was filed questioning that order and in the subsequent paragraph it is stated that the respondent was transferred from the Town Unit in the interest of service and the public interest and that it was not actually a transfer but only a posting. Then in Paragraph 15 while replying to Ex. P.2 filed alongwith the writ petition, it is stated in the counter-affidavit that the same was based on surmises and conjectures and that the department has its own valid reasons to transfer the respondent from a sensitive post in the Town Unit to the Cochin Shipyard. In Paragraph 10 a reference is made to the alleged prejudicial activities of the respondent as a Preventive Officer in the Town Unit and the investigations revealed that his integrity was under cloud and that further enquiry into his misconduct was necessary. These and some such similar averments in the counter-affidavit were made the basis of the complaints for an offence of defamation.

5. Viewed from another angle, from what has been stated above it is crystal clear that the counter-affidavit was filed on behalf of the accused-respondents in their defence to the allegations made in the writ petition by the respondent. Therefore whatever imputations that have been made in the counter-affidavit were made certainly while acting or purporting to act in the discharge of the official duties. The imputations which according to the complainant amounts to defamation cannot in any manner said to be not in connection with the official duty. The appellants made these alleged imputations only by virtue of their office while filing the counter-affidavit. The contents of the complaint and the averments in the counter-affidavit are so closely inter-related and no further material is necessary to examine this aspect.

6. If the provisions of Section 197 Cr.P.C. are examined, it is manifest that two conditions must be fulfilled before they become applicable; one is that the offence mentioned therein must be committed by a public servant and the other is that the public servant employed in connection with the affairs of the Union or a State is not removable from his office save by or with the sanction of the Central Government or the State Government, as the case may be. The object of the Section is to provide guard against vexatious proceedings against judges, magistrates and public servants and to secure the opinion of superior authority whether it is desirable that there should be a prosecution. If

on the date of the complaint itself it is incumbent upon the Court to take cognizance of such offence only when there is a previous sanction then unless the sanction to prosecute is produce the Court cannot take cognizance of the offence. Naturally at that stage, the Court taking cognizance has to examine the acts complained of and see whether the provisions of Section 197 Cr.P.C. are attracted, if the above two conditions are satisfied then the further enquiry would be whether the alleged offences have been committed by the public servants while acting or purporting to act in discharge of his official duties. If this requirement also is satisfied then no Court shall take cognizance of such offences except with the previous sanction. For this purpose the allegations made in the complaint are very much relevant to appreciate whether the acts complained of are directly concerned or reasonably connected with official duties so that if questioned the public servant could claim to have done these acts by virtue of his office, that is to say, there must be a reasonable connection between the act and the discharge of official duties. It is in this context that the words "purporting to act in discharge of official duties" assume importance. The public servant can only be said to act or purporting to act in the discharge of his official duties if his act is such as to lie within the scope of his official duties. In *Hori Ram Singh's case*, AIR 1939 FC 43, it was observed that "There must be something in the nature of the act complained of that attaches it to the official character of the person doing it." In *Matajog Dobey v. H.C. Bhari* it was observed as under:

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, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty.

Approving these principles this Court in *Pukhraj v. State of Rajasthan and Anr.* this Court observed as under:

The intention behind the section is to prevent public servants from being unnecessarily harassed. The section is not restricted only to cases of anything purported to be done in good faith, for a person who ostensibly acts in execution of his duty still purports so to act, although he may have a dishonest intention. Nor is it confined to cases where the act, which constitutes the offence, is the official duty of the official concerned. Such an interpretation would involve a contradiction in terms, because an offence can never be an official duty. The offence should have been committed when an act is done in the execution of duty or when an act purports to be done in execution of duty. The test appears to be not that the offence is capable of being committed by a public servant in an act done or purporting to be done in the execution of duty. The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor need the act constituting the offence be so inseparably connected with the official duty as to form part and parcel of the same transaction. What is necessary is that the offence must be in respect of an act done or purported to be done in the discharge of an official duty. It does not apply to acts done purely in a private capacity by a public servant. Expressions such as the "capacity in which the act is performed, "cloak of office" and

"processed exercise of the office" may not always be appropriate to describe or delimit the scope of section. An act merely because it was done negligently does not cease to be one done or purporting to be done in execution of a duty.

In *The State of Maharashtra v. Dr. Budhikota Subharao*, this Court held as under:

So for 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.

These principles are laid down in many cases and it may not be necessary to refer to all of them. Applying the above said principles to the facts of this case, we find that the counter-affidavit was filed only as a defence to the allegations made in the writ petition particularly in connection with the transfer of the respondent and on what grounds it was made. The paragraphs as extracted in the complaint would also show that averments therein were made only in respect of the action taken in transferring the respondent. Therefore the said reference with respect to the character and integrity, which according to the complaint-respondent amounted to defamation, can not in any manner be said to be unconnected or not reasonably connected with the official duties. These statements in the counter-affidavit were made by the appellants definitely while acting or atleast purporting to act in discharge of the official duties namely filing the same in their defence to the allegations made in the writ petition which they had to do.

7. The respondent, however, contended that he wrote a letter to the customs authorities by way of abundant caution asking for sanction for prosecuting the appellants and that the customs authorities replied that the permission sought by him was not necessary. A copy of the said reply dated 14.2.93 is placed before us for the first time. A similar contention was rejected by the High Court in the impugned order on the ground that no such papers were available in the case. However, we have perused the reply but from that alone it cannot be said that the provisions of Section 197 Cr.P.C. are not attracted under the facts and circumstances of the case. Except stating that "the permission sought by him on the above subject is not necessary in accordance with the Govt. of India decision No. 10 under Rule 3 of the C.C.S. (Conduct) Rules" there is nothing else to indicate that the said customs authorities have considered the question from the point of view of Section 197 Cr. P.C. As discussed above it is for the criminal Court to see whether cognizance can be taken or not in the absence of such a sanction. In the view we have taken namely that the sanction is necessary, we quash the criminal proceedings in C.C. Nos. 113/83 and 124/83. Accordingly these appeals are

allowed.