Supreme Court of India
Mohd. Hadi Raja vs State Of Bihar And Anr on 28 April, 1998
Bench: G.N. Ray, G.B. Pattanaik

PETITIONER:
MOHD. HADI RAJA

Vs.

RESPONDENT:
STATE OF BIHAR AND ANR.

DATE OF JUDGMENT: 28/04/1998

BENCH:
G.N. RAY, G.B. PATTANAIK

ACT:

HEADNOTE:

JUDGMENT:

[WITH CRIMINAL APPEAL NO. 449/87 S.L.P. (Crl.) Nos. 2501, 2502/93, 1710,1709/94, 2006,3689, 3856/94, 977, 1837, 1838, 3259//95, 1328/96, 69/95, 3816, 3751, 3971/96, 819, 892/97, 3632/96, 1182/97] J U D G M E N T G.N. RAY. J The common question of law that arises in all these matters is whether the provisions of sanction under Section 197 of the Code of Criminal procedure, 1973 are applicable for prosecuting officers of the public sector under takings or the Government companies when on account of deep and pervasive control of finance and administration of such undertakings and government companies, they are held as State within the meaning of Article 12 of the Constitution of India?

It will be appropriate at this stage to refer to the provisions of Section 197 of the Code of Criminal procedure:-

> " section 197: Prosecution of Judges and Public Servants : (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 Courts 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.

(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 affair of a State, of the State Government.

Provided that where the alleged offence was committed by a person referred to in Clause (b) during the period while a proclamation issued under Clause (1) of Article 350 of the Constitution was in force it a State Clause (b) will apply as if for the expression "State Government" were substituted.

(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.

(3) ..... (4) .....

Under the aforesaid provisions, in respect of prosecution of an accused who was or is a judge or Magistrate or a public servant and not removable from his office save by or with the sanction of the government and if such person is accused of any offence alleged to have been committed by him while acting or purporting to act in the official discharge of his duties, no Court would take cognizance of such offence except with the previous sanction as enumerated in Clauses

(a) and (b) of sub-section (1) of Section 197 of the Code of Criminal procedure. For the purpose of requirement of sanction under Section 197 of the Code of Criminal Procedure, the accused will not only be a public servant but he will be such public servant who can not be removed from his office except by or with the sanction of the Government. Further, the accused will not only be a public servant of above description but the offence alleged to have been committed by such officer must have been committed while such public servant had been acting or purporting to act in the discharge of his official duties.

It is, therefore, necessary to analyses whether an officer of public sector undertakings or the government companies being State within the meaning of Article 12 of the Constitution, who under the terms of the appointment or the articles of the association of the government companies are removal from their respective office save by the sanction of the government when the offence alleged against them had been committed while acting or purporting to act in the discharge of official duties.

What acts can be alleged to have been committed by a public servant while acting or purporting to act in the discharge of his official duties is a vexed question and had often troubled various courts including this Court. Broadly speaking, it has been indicated in various decisions of this Court that

the alleged action constitution the offence alleged to have been committed by the public servant must have a reasonable and rational nexus with the official duties required to be discharged by such public servant. It is, however not necessary to elaborate on this aspect of the purpose of deciding the question raised in these matters. The question for decision is that even if in a given case. The concerned officer of the public sector undertaking or the government company being State under Article 12 of the Construction is removable from office by or with the sanction of the government and such officer is alleged to have committed an offence by his action which can be construed as action taken while acting or purporting to act in the discharge of his official duties, whether for prosecuting such officer, sanction under Section 197 of the Code of Criminal Procedure is warranted or not.

It may be stated here that considering the importance of the question, notice was given to the learned Attorney General for his opinion as to the requirement of sanction under Section 197 (1) of the Code of Criminal Procedure in the case of officers of public sector undertakings or the government companies.

Mr. Altaf Ahmad, learned Additional Solicitor General appeared for the learned Attorney General and has submitted that the officials of the public sector undertakings and the government companies which are State within the meaning of Article 12 of the Constitution will enjoy the same protection as available to a public servant under Section 197 of the Code of Criminal Procedure, although the officials of the public sector undertakings and the government companies are not directly the employees of the State Government or the Central Government but they being employees of the instrumentalities of the government deserve to be treated at par with the government servant for the purpose of protection by way of requirement of sanction under Section 197 of the Code Criminal Procedure.

The learned counsel appearing for the appellants in other matters have also submitted to the same effect. The contentions of the learned counsel for the appellant, may be summarized as follows:

The government in these days are discharging some of the activities, intended to be performed by the State, not directly but through the instrumentality or the agency of State. In the early days, when the government had indulged in limited functions, it could operate effectively directly by its officers constituting the civil service and such employees directly under the government were found adequate to discharge governmental functions which were of traditional vintage. But with the advent of welfare state, government interventions have been multiplied and it was increasingly felt that the framework of civil service could not cope with the new tasks which were very often specialised and the technical in nature. In this connection, reference has been made to the decisions of this Court in Ajay Hasia Vs. Khalid Mujib Sehravadi (AIR 1989 (1) SCC

712). It has been held in the said decision that the inadequacy of the civil service to deal with these new problems came to be realised and it became necessary to forge a new instrumentality or administrative device for handling these new problems. It was in these circumstances and with a view to supplying this administrative need, that the corporation came into being as the third arm of the government and over the years it has been increasingly utilised by the government for setting up

and running public enterprises and carrying out other public functions. It has also been held in the said decision that with increasing assumption by the government of commercial ventures and economic projects, the corporation has become an effective legal contrivance in the hands of the government for carrying out its activities for it is found that this legal facility of corporate instrument provides considerable flexibility and elasticity and facilitates proper and efficient management with professional skills and on business principles and it is blissfully free from departmental rigidity, slow motion procedure and hierarchy of officers. It has also been held in Ajay Hasia's case that so far the said instrumentalities are concerned, the true owner is the State, real operator is the State and the effective controllorate is the State, real operator is the State and the effective controllorate is the state and the accountability for its action to the community and to parliament is of the State. This court has further indicated that it is undoubtedly true that the corporation is a distinct juristic entity with a corporate structure of its own and it carries on its functions on business principles with a certain amount of autonomy which is necessary as well as useful from the point of view of effective business management but behind the formal ownership which is case in the corporate mould, the reality is very much the deeply pervasive presence of the government. Therefore, in reality, the government acts through the instrumentality or agency of the corporation. Therefore, where the corporation is an instrumentality or agency of the government, it must be subjected to the same limitation in the field of constitutional law as the government itself, though in the eye of the law it would be a distinct and independent legal entity.

In support of the contention that sanction under Section 197 of the Code of Criminal Procedure is warranted in the case of officers of public undertakings and government companies having deep and pervasive control of the government, it has been submitted that the object of sanction under Section 197 of the Code of Criminal Procedure is to 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 prosecution against public servants satisfying the requirements of Section 197 (1) of the Code of Criminal Procedure. In this Connection, reference has been made to the decision of this Court in Director of inspection & audit and others Vs. C.L. Subramaniam (1994 Suppl. (3) SCC 615) and in Shambhoo Nath Misra Vs. State of U.P. & Others ( 1997 (5) SCC 326). In the said decisions, this Court has indicated that sanction by appropriate authority as contemplated in Section 197(1) of the Code of Criminal Procedure, is intended to protect public servant from needless harassment. Such protection by way of sanction renders assurance and protection to the honest officer to perform public duties honestly and to the best of his abilities because the threat of prosecution demoralises the honest officer.

It has been contended that if the public undertakings and the government companies which conform to various tests of deep and pervasive control of the government over such public undertakings or the government companies as indicated in some of the decisions of the Court, then the officer of such corporation must be held to be a public servant for all intents and purposes and for applicability of Section 197 of the Code of Criminal Procedure. If such public servant of public undertakings etc. is not removable from his office save by or with the sanction of the government , and if such officer is made accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties, then no Court shall take cognizance of such offence in the absence of sanction contemplated under Section 197 of the Code of Criminal

procedure even though ex facie, such officer is not directly a government servant because by piercing the veil of corporate structure, such officer must in reality be treated as a public servant holding office under the government.

The learned counsel have also submitted that since such public undertakings and government companies are third arm of the government, for the purpose of sanction under Section 197 of the Code of Criminal Procedure, the officers of such public undertakings must be placed at par with the government servants because such officers in fact, discharge the duties and functions of the State government.

In this connection, reliance has been made to the decision of this Court in C.V. Raman Vs. Management of Bank of India and another (1983 (3) SCC 105). In the said case, the employees of the State Bank and the nationalised banks contended that such banks cannot be treated to be owned by the Central Government and the expression 'Under the Central Government" appearing in the shops and Establishments Act would only mean under complete control of the Central Government in the sense of being owned by the Central Government. This Court, however, did not accept such contention by indicating that Article 12 of the Constitution occurs in Part III of the Constitution which deals with the fundamental rights. Therefore, the decisions in the case dealing with Article 12 of the Constitution or with the fundamental rights, cannot be made a basis for contending that the State Bank of India and the nationalised banks are establishments under the Central Government for the purpose of applicability of the provisions of Shops and Establishments Act. But it has been observed in C.V. Raman's case that although the decisions relating to Article 12 of the Constitution vis a vis public undertakings were rendered in connection with the enforcement of fundamental rights, it cannot be gainsaid that the salient principles which have been laid down in those cases with regard to the authorities having a corporate structure and exercising autonomy in certain spheres and discharging functions of the government under a corporate veil will certainly be useful for determining the question as to whether the State Bank of India and the nationalised banks are to be treated as establishments under the Central Government for the enforceability of the Shops and Establishments Act.

Relying on the said decision, it has been contended that when the instrumentality and the agency of the government through the corporate veil is the third arm of the government and such instrumentality is discharging the functions which the government had intended to do by evolving the mechanism or contrivance of a corporate structure, the officers of such corporate structure should not be treated differently for the purpose of requirement of sanction under Section 197 of the Code of Criminal Procedure. Such differentiation between the government servant employed in the departments directly run by the government and the officers of public undertakings discharging the functions intended to be performed by the government through the contrivance or veil of a corporate structure will frustrate the very purpose to protect the officers discharging the public duties intended to be performed by the State. Such officers of Corporate sector, therefore, must get the protection by way of sanction under Section 197 of the Code of Criminal Procedure, and the provisions of Sections 197 of the Code of Criminal Procedure should be interpreted not in a restricted manner hereby limiting its application only to the government servant setting in the departments directly run by the government. On the country, Section 197 must be interpreted

broadly so that the officers of the instrumentalities of the State having deep and pervasive control of the State and discharging the duties and functions intended to be performed by the government through the contrivance of corporate structure, get the desired protection under Section 197 of the Code of Criminal procedure. Such contentions have, however, been seriously disputed by Shri Sandal, learned senior counsel appearing for the State of Bihar and also Mr. Jain, learned senior counsel appearing for the prosecuting agency. It is contended by them that even though some of the public undertakings and the government companies may be treated as instrumentalities or agencies of the State in view of deep and pervasive control of the government but it cannot be held that they are employed in connection with the affairs of the Union of the State. A department directly run by the government has always been placed on a different footing and the employees of the public undertaking and the government company even when they are instrumentalities or agencies of the Stat, have never been treated at per with the government servants. In this connection, reference has been made to the decision of this Court in Dr. S. L. Agarwal vs. The General Manager, Hindustan Steel Ltd. (1970 (1) SCC 177). The Constitution Bench of this Court in the said decision had to consider whether Dr. Agarwal who was appointed as Asstt. Surgeon in Hindustan Steel Ltd. was holder of a civil post under the Union and whether Article 311 of the Constitution is applicable in respect of such employee. it has been held in the said decision that the Hindustan Steel Ltd. is not a department of the government nor the servants of it are holding posts under the State. The said concern has its independent existence and by law relating to corporation it is distinct even from its members. Therefore, employees of Hindustan Steel Ltd. do not answer the description of holder of civil post under the union as stated in Article 311 of the Constitution.

Reliance has also been made to the decision of this Court in Praga Tools Corporation Vs. C.V. Imanaul and others ( 1969 (1) SCC 58). It has been held that although Praga Tools Corporation was a concern in which 88 % of the capital was subscribed by the Union and the State Governments, even then it could not be regarded as equivalent to government department because being registered under the Companies Act, it had a separate legal existence and could not be a government concern run by or under the authority of the Union Government. In Praga Tool's case, this Court has approved the decision of the Patna High Court in Subodh Ranjan Ghosh Vs. Sindhri Fertilizers and Chemicals ltd. (AIR 1957 Patna 10). It was held by Patna High Court that Sindhri Fertilizers and Chemicals ltd. Was completely owned by the president of India who could also issue directions and the Directors were to be appointed by the President of India. Even then, in the eye of law, the Company was a separate legal entity and had a separate legal existence.

Reference has also been made to the decision of this Court in State of Bihar Vs. Union of India (1970 (1) SCC

67). It has been held that Hindustan Steel Ltd. was not a State for the purpose of Article 131 of the Constitution.

Reliance has also been placed on the decision of this court. In K. Jaymohan Vs. State of Kerala and another (1997 (5) SCC 170) . It has been held in the said decision that there may be deep and pervasive control of the government over the appellant company Hindustan Steel Works Co. Ltd. and on such account the said Company may be instrumentality or agency of the Central

Government, even then the said Company cannot be held to be department or establishment of the government of all cases. Another decision of this Court in S.S. Dhanu Vs. Municipal Corporation, Delhi (1981 (3) SCC

438) was placed for the consideration of this Court. In the said case, an I.A.S. Officer was sent on deputation to a government owned registered co-operative society and was appointed as General Manager of Super Bazar. The question arose whether for an offence alleged against such officer the protection under Section 197 of the Code of Criminal Procedure was available to such officer. It has been held in the said case that while the said officer was on deputation and discharging the functions as General manager of Super Bazar, he could not be held to have discharged the functions under the state for which sanction under Section 197 of the Code of Criminal Procedure is called for.

It has been contended that sanction contemplated under Section 197 of the Code of Criminal Procedure must be restricted only in respect of a Judge or a Magistrate or a Public Servant who is directly employed by the government and not by any instrumentality or agency of the government. When the Legislature has declined to render the same protection as available to public servant contemplated under Section 197 of the Code of Criminal Procedure to the officers of instrumentalities or the agencies of the State by expressly covering such officers, they cannot claim such protection under Section 197 of the Code of Criminal procedure and any liberal interpretation of Section 197 for covering such officer will amount to legislation by Court.

After giving our careful consideration to the question of law raised in these appeals and submissions made by the respective counsel of the parties, it appears that the justification for the protection under Section 197 of the Code of Criminal Procedure lies in the public policy to ensure that official acts performed by a public servant do not lead to needless and vexatious prosecution of such public servant and it is desirable that it should be left to the government to determine the question do expediency in prosecuting a public servant. The 41st Report of Law Commission observed that under Section 197 of the old Criminal Procedure Code, the protection given to the public servant applied only during his tenure in office and such protection did not apply after he had left the service. Such protection only during the tenure in service was considered insufficient because a person if he had any grievance against a public servant on account of discharging the of public duties, could lodge a complaint against the said public servant after he would cease to hold public office. Therefore, Section 197 Cr. P.C. was redrafted so as to given protection to a public servant even when he had ceased to hold office in respect of an alleged offence which had been committed when such officer was holding the public office.

'Public Servant' has not been defined in the Code of Criminal Procedure but Section 2 [Y] of the Code of Criminal Procedure provides that the words used in the Criminal procedure Code but not defined in the Criminal Procedure Code but defined in the Indian Penal Code shall be deemed to have the same meaning attributed to them in the Indian Penal Code. Section 21 of the Indian Penal Code defines 'public servant' and therefore, the expression 'public servant' will have the same meaning in the Criminal procedure Code. it will made appropriate to refer to clauses 9 and 12 of Section 21 IPC.

Ninth - Every officer whose duty it is as such officer to take, receive, keep or expand any property a behalf of the Government or to make any survey, assessment or contract on behalf of the government or to execute any revenue process or to investigate or to report on any matter affecting the pecuniary interests of the government or to make, authenticate or keep any document relating to the pecuniary interests of the government or to prevent the infraction of any law for the protection of the pecuniary interests of the government.

Twelth - Every person-

(a) in the service or pay of the government or remunerated by fees or commission for the performance of any public duty by the government;

(b) in the service or pay of a local authority, a corporation established by or under a Central , provincial or State Act or a Government company as defined in Section 617 of the Companies Act, 1956 91 of 1956.

Although the instrumentality or agency with a corporate veil, for all intents and purposes may be held to be a third arm of the government and such instrumentality discharges the duties and functions which the State intends to do as indicated in Ajay Hasia's case (supra), such instrumentality or agency is none the less juridical person having a separate legal entity. Therefore, such instrumentality must be held to have an independent status distinct from the State and cannot be treated as a government department he all purposes. Therefore, even if an officer of such instrumentality or agency takes or receives, keeps or expends any property or executes any contract, such acts even though in ultimate analysis may be held to have been done in the interest of the State, Such action cannot be construed, as of rule, an action of the government by its employees or by an authority empowered by the government. It may be indicated here that it is not necessary that persons falling under any of the descriptions given in various clauses under Section 21 of IPC need to be appointed by the government. If such person falls under any of the descriptions as contained in various clauses of Section 21 of the Indian panal code, such person must be held to be a public servant. Explanation 1 of Section 21 indicates that persons falling under any of the above descriptions are public servants whether appointed by the government or not Explanation 2 indicates that wherever the words 'public servant' occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to held that situation. Sub clause (b) of clause twelve of section 21 expressly makes the officers of local authority and corporation established by or under a Central, Provincial or State Act or a government owned company as defined in Section 617 of the Companies Act 1956, public servants. But protection under section 197 Cr. P.C. is not available to a public servant unless other condition indicated in that Section are fulfilled.

It is be noted that though through the contrivance or mechanism of corporate structure, some of the public under takings are performing the functions which are intended to be performed by the State, ex facie, such instrumentality or agency being a juridical person has or independent status and the action taken by them, however important the same may be in the interest of the State cannot be held to be an action taken by or on behalf of the governments as such within the meaning of Section 97

Cr. P.C.

For the purposes of enforcing the fundamental rights, the public undertakings which, on account of deep and pervasive control can be held to be a state within the meaning of Article 12 has been treated at par with the government department out in all its facets, public undertaking has not been equated with the department run directly by the government. it was on this account that the Surgeon appointed in Hindustan Steel Works Ltd. has not been equated with the government servant for the purpose of applicability of Article 311 of the Constitution. In Praga Tool's case (supra), even though Praga Tools was held to be an instrumentality or agency of the State, it has been indicated by this Court that Praga tolls Corporation had a separate legal existence and being a juridical person cannot be held to be a government concern run by or under t he authority of the government. Similar view was taken by the Patna High Court in Sindhri Fertilizer's case (supra) by indicating that even though the said concern was completely owned by the President of India who could also issue directions and the Directors were to be appointed by the President of India, in the eye of law, the company was a separate legal entity and had a separate legal existences. Such decision of Patna High Court has been approved by this Court. In Dhonoa's case (supra), an IAS officer when on deputation to a public undertaking having deep and pervasive control of the State, was not held to be a government officer entitled to protection under Section 197 of the Code of Criminal Procedure, even though such officer did not cease to be a government servant and had a lien in government service while on deputation. The protection which a government department was entitled to has also not been given to the Hindustan Steel Works Ltd. in K. Jaymohan's case (supra).

The importance of the public undertaking should not minimised. The government's concern for the smooth functioning of such instrumentality or agency cab be well appreciated but on the plain language of Section 197 of the Code of Criminal Procedure, the protection by way of sanction is not available to the officers of the public undertaking because being a juridical person and distinct legal entity such instrumentality stands on a different footing than the government departments.

It is also to be indicated here that in 1973, the concept of instrumentality or agency of state was quite distinct. The interest of the State in such instrumentality or agency was well known. Even then, the legislature, in its wisdom, did not think it necessary to expressly include the officers of such instrumentality or the government company for affording protection by way of sanction under Section 197 Cr. P.C.

It will be appropriate to notice that whenever there was felt need to include other functionaries within the definition of 'public servant', they have been declared to be 'public servants' under several special and local acts. If the legislature had intended to include officers of instrumentality or agency for bringing such officers under the protective umbrella of Section 197 Cr. P. C. It would have done so expressly.

Therefore, it will not be just and proper to bring such persons within the ambit of Section 197 by liberally construing the provisions of Section 197. Such exercise of liberal construction will not be confined to the permissible limit of interpretation of a statute by a court of law but will amount to legislation by Court.

Therefore, in our considered opinion, the protection by way of sanction under Section 197 of the Code of Criminal procedure is not applicable to the officers of Government Companies or the public undertakings even when such public undertakings are 'State ' within the meaning of Article 12 of the Constitution on account of deep and pervasive control of the government. The appeals are disposed of accordingly. It is , however, made clear that we have not taken into consideration various other grounds raised in these appeals challenging the maintainability of the Criminal proceedings initiated against the concerned officers of the public undertakings or the government companies. It will be open to the concerned accused to challenge the validity of the Criminal cases initiated against them on other grounds, if such challenge is available in law. Such questions, if raised, in these appeals are kept open to be considered in accordance with law by the appropriate authority.