

(2009) 03 DEL CK 0322

In the Delhi High Court

Case No : Writ Petition (Criminal) 1073 of 2008

Akhand Pratap Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 05-03-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 197
Delhi Police Special Establishment Act, 1946 — Section 3, 5, 5(1), 6
Penal Code, 1860 (IPC) — Section 109, 120B, 161, 162, 163
Prevention of Corruption Act, 1947 — Section 5(2), 6, 6(1)
Prevention of Corruption Act, 1988 — Section 13(1), 13(2), 19, 19(1), 2

Citation : (2009) ILR Delhi 514 Supp

Hon'ble Judges : S.L. Bhayana, J

Bench : Single Bench

Advocate : U.V. Lalit and H.K. Sharma, for the Appellant; P.P. Malhotra, A.S.G. and R.M. Tewari, for the Respondent

Final Decision : Dismissed

Judgement

S.L. Bhayana, J.—This writ petition has been filed under Article 226 of the Constitution of India for issuance of a writ of mandamus to the Respondents, to enforce the provisions of Section 6 of Delhi Special Police Establishment Act 1946 (herein after to be referred as D.S.P.E Act) and further for quashing all acts of the Respondent No. 3/ CBI, acted upon by them in violation of specific mandate of law including the registration of FIR No. 2 (A)/2005/CBI/SPE-ACU- V, dated 19th of March 2005 and all consequential proceedings.

2. The factual matrix germane in the context for better understanding of the matter and for eventual adjudication may be thus stated that, CBI has filed a charge sheet on 28.03.2008 against the present Petitioner for the alleged offence punishable u/s 13(2) read with Section 13(1)(e) of the Prevention of Corruption Act, 1988 (for short the P.C Act.) and Sections 109, 120-B, 467, 471 of I.P.C. The Petitioner had joined the Indian Civil Services on 15.7.1967 and retired from

Government Service on 4th December 2003 from the post of Chief Secretary to the Government of Uttar Pradesh. The main grievance of the Petitioner is that CBI/ Respondent No. 3 without following the mandate of law, registered a regular case against the Petitioner and therefore consciously disregarded the provisions of D.S.P.E. Act. Notifications/ Orders including the Notification of Government of India/ Central Government dated 23.8.1990 bearing No. 228/40/88-AVD.II (I) is reproduced below.

No. 228/40/88-AVD. II (I)

Government of India

Ministry of Personnel, P.G. & Pensions

(Department of Personnel & Training)

....

New Delhi, the 23 August, 1990

O R D E R

S.O...in supersession to department of Personnel & Training order No. 228/40/88 - AVD II dt. 6.7.89 and in exercise on the powers conferred by Sub-section (1) of Section 5 read with Section 6 of the Delhi Special Police Establishment Act, 1946 (Act No. 25 of 1946). The Central Govt. with the consent of the State Government of Uttar Pradesh (vide consent order No. Home (Police) Section I No. .3442/VIII - 1 - 84/88 dated 15.6.89 hereby extends the powers and jurisdiction of the members of the Delhi Special Police Establishment to the whole of the State of Uttar Pradesh for investigation of offences mentioned here under:

(a) Offences under Prevention of Corruption Act, 1988. (Act No. 49/88)

(b) Attempts, abetments and conspiracies in relation to or in connection with one or more of the offences mentioned above, and any other offence or offences committed in the course of the same transaction arising out of the same facts.

Provided that this notification will not be applicable to the cases relating to the public servants under the control of the State Government.

Sd/-

(C. SITARAMAN)

Under Secretary to the Govt. of

New Delhi, the 23 August 1990.

No.. 228/40/88 - AVD. II (I)

To

1. The Chief Secretary, Govt. of Uttar Pradesh, w.r.t. the State Govt. order

quoted above.

2. The Director, CBI, New Delhi.
3. DIG of Police, CBI, Lucknow, Uttar Pradesh.
4. Ministry of Law (Officials Language Wing) New Delhi.
5. CBI (Legal Division) New Delhi, with 5 spare copies.
6. AVD. II for Guard File.
7. 5 spare copies.

Sd/-

(C. SITARAMAN)

Under Secretary to the Govt. of
New Delhi.

Sri S.C. Tewari,
Dy. Secretary, DP&T,
AVD. II, North Block.

3. Learned senior counsel for the Petitioner raised an objection contending that the alleged offence if any was committed in U.P. and CBI had no power, authority or jurisdiction to institute proceedings. It was also contended that before initiating proceedings under D.S.P.E. Act, consent of the State Government is required. No such consent had been given by the State of U.P. and proceedings initiated against the Petitioner by CBI were without jurisdiction. To buttress his case, he argued that the Government of U.P. on June 15, 1989, communicated its consent for extension of jurisdiction of D.P.S.E. Act under P.C. Act to whole of the State of U.P. subject to the condition that "No such investigation shall be taken up in cases relating to Public Servants under the control of the State Government except with the prior permission of the State Government".

4. It was contended by learned senior counsel for the Petitioner that in this case when accused was holding office, on more than one occasion, Government of India asked for permission to initiate investigation by CBI against the Petitioner, and it was refused twice. First such refusal was on 16th September 2002 and second refusal was on 5/6 October 2003, resulting in refusal of permission requested by Government of India for CBI investigation yet, without any permission CBI on 19th March 2005 registered an FIR against the Petitioner and therefore, it is clear that CBI has acted without jurisdiction knowing fully well that the State Government not only not authorized them to exercise this jurisdiction in the general authorization but expressly conveyed their refusal as well.

5. On the other hand, learned Additional Solicitor General, appearing on behalf of the Respondents, at the outset, pointed out that the Petitioner in this writ is guilty of suppressing material facts and therefore this writ petition deserves to be dismissed. The Petitioner has not approached this Court with clean hands. The Petitioner is not correct in stating on oath that the Petitioner has filed no similar petition when similar petition was in fact filed before the Lucknow Bench, which was dismissed on merits by a detailed judgment dated 13 of March 2005. In view of the conduct of the Petitioner he is not entitled to any relief from this Court and therefore this petition deserves to be dismissed.

6. Learned Additional Solicitor General further submitted that the State of U.P. had consented vide Notification of 15th June 1989 (which has been reproduced below in Para 9) for expansion of jurisdiction of the D.S.P.E. for investigation of some offences. A reference was also made to a Notification of the Central Government dated 23rd August 1990 vide which the Central Government notified the classes of offences under Prevention of Corruption Act to be investigated by DSPE. And since the Petitioner is no longer a Public Servant, the benefit of Section 6 of DSPE Act would not be attracted to his advantage.

7. These arguments have raised two main issues namely (i) Whether the proceedings initiated against the Petitioner by Respondent No. 3 under the DSPE Act were without jurisdiction; (ii) Does a retired Public Servant come under the definition of Public Servant as in this case, and is entitled for the benefit of notification dated June 15, 1989. Regarding 2nd issue learned Counsel for the Petitioner placed certain documents before this Court issued by CBI to U.P. Government for issuance of directions to the Petitioner in the year 2007, followed by an act of the U.P. Government making the Petitioner to furnish details of his movable/immovable properties for the respective period and submit the same to its Secretary. According to the learned Counsel for the Petitioner, this act of the U.P. Government reflects that the Petitioner despite being retired in the year 2003 still remained a "Public Servant. under the control of U.P. Government.

8. Now, with regard to the first issue, preamble of the DSPE Act states that it is an Act to make provision for the constitution of special force in Delhi for the investigation of certain offences in the Union Territory and for the extension to other areas of the power and jurisdiction of the aforesaid force in regard to the investigation of certain offences. Plain reading of the provisions of the Act go to show that for exercising of jurisdiction by the CBI in a state (other than U.T.) consent of the State Government is necessary. The following conditions must be fulfilled:

(i) A notification must be issued by the Central Government specifying the offences to be investigated by the DSPE (as provided by Section 3)

(ii) An order must be passed by the Central Government extending the powers and jurisdiction of DSPE to any state in respect of the offences specified u/s 3 (as provided by Section 5)

(iii) Consent of the State Government must be obtained for the exercise of powers by DSPE in the State (provided by Section 6). Now, so far as the conditions are concerned, they have been complied with properly in the present case and the requisite material is on the record of the case.

9. It is apposite to reproduce the notification dated 15th June 1989 for reference here:

GOVERNMENT OF UTTAR PRADESH

Home (Police) Section -1

No. 3442/VIII-1-84/88

Lucknow, Dated: June 15; 1989

NOTIFICATION

In pursuance of the Provisions of Section 6 of the Delhi Special Police Establishment Act, 1946 (25 of 1946) the Governor of the State of Uttar Pradesh is pleased to accord consent to the extension of powers and jurisdiction of the members of the Delhi Special Police Establishment in whole of the State of Uttar Pradesh, of investigation of offences punishable under the Prevention of Corruption Act, 1988 (49 of 1988), and attempts, abetments and conspiracies in relation to all or any of the offence or offences mentioned above and any other offence or offences committed in the course of the transaction and arising out of the same facts, subject however to the condition that no such investigation shall be taken up in cases relating to the Public Servants, under the control of the State Government except with the prior permission of the State Government.

BY ORDER AND IN THE NAME OF THE GOVERNOR.

Sd/-

(S.K. TRIPATHI)

HOME SECRETARY TO THE GOVT.

OF UTTAR PRADESH

10. After going through both the above mentioned Notifications, it is apparently clear that the Government of U.P. on 15th June 1989 communicated its consent for extension of jurisdiction of DPSE Act under P.C Act to the whole of the State of U.P.; but subject to condition that no such investigation shall be taken up in cases relating to Public Servants under the control of the State Government except with the prior permission of the State Government. And since on account of his superannuation the Petitioner is no longer a Public Servant, therefore, the benefit of Section 6 of the DSPE Act is not available to the Petitioner.

11. Now, on the second issue, but then before this issue is answered, we shall have to know as to what precisely is meant by Public Servant? What does it

imply? What does it signify? For the purpose of discerning the real meaning of the word "Public Servant. necessary to the facts and scenario in this case, Section 2(c) of the P.C Act needs to be explored. Section 2(c)(i) is particularly relevant and worth noting; it is therefore, reproduced as under:

2. (c) "Public Servant" means, -

(i) any person in the service or pay of the Government or remunerated by the Government by fees or commission for the performance of any public duty;" There are two Explanations accorded to Section 2(c) of the P.C Act of which the second one explains that every person who holds an office by virtue of which he is required to perform any public duty in the discharge of which, the state is interested would be deemed to be as Public Servant. Explanation 2 has been reproduced as under -

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 hold that situation.

Public duty implies a duty in the discharge of which the state, public or the community at large has an interest. Office means no more than a position to which certain duties are attached, as held by Constitution Bench in *Statesman (Private) Ltd. Vs. H.R. Deb and Others*, . It is no doubt that a retired Public Servant does not come under the purview of the definition of Public Servant and their receiving of pension cannot certainly be equated with either pay or salary. I have also gone through all the documents placed before this Court but by no stretch of imagination it can be held that certain directions issued by State Government of U.P. to the Petitioner requiring him to give details regarding his movable or immovable property would make him a Public Servant after retirement and therefore I am not able to find any material support from them.

12. It is fairly well settled position in law that a Government Servant, who has retired from service, can no longer be called a Public Servant as in his post retirement period; he is neither in subordination nor in control of the said Government. Grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to the Government Servant against frivolous prosecutions and must therefore be strictly complied with before any prosecution can be launched against the Public Servant concerned, but it is also well settled that sanction for prosecution of an ex-Public Servant is not necessary when the concerned Public Servant ceases to be in office.

13. In *Kalicharan Mahapatra Vs. State of Orissa*, , wherein the Apex Court held that:

14...A Public Servant who committed an offence mentioned in the Act while he was a Public Servant, can be prosecuted with the sanction contemplated in Section 19 of the Act if he continues to be a Public Servant when the court takes

cognizance of the offence. But if he ceases to be a Public Servant by that time the court can take cognizance of offence without any such sanction. In other words, the Public Servant who committed the offence while he was a Public Servant is liable to be prosecuted whether he continues in office or not at the time of trial or during the pendency of the prosecution.

14. Above views are reiterated in *State of Kerala Vs. V. Padmnabhan Nair*, , following the *Kalicharan's* case (supra), the Apex Court held in para 8 as under:

The correct legal position, therefore, is that an accused facing prosecution for offences under the Prevention of Corruption Act cannot claim any immunity on the ground of want of sanction, if he ceased to be Public Servant on the date when the Court took cognizance of the said offence. So the High Court was at any rate wrong in quashing the prosecution proceedings in so far as they related to offences under Prevention of Corruption Act.

15. Similarly in *K. Veeraswami Vs. Union of India (UOI) and Others*, , it was held:

13. It is also necessary to mention in this connection that the appellant resigned his post of Chief Justice when FIR was lodged by the CBI and so he ceased to be a Public Servant on the date of lodging the FIR against him by the CBI. The scope and applicability of Section 6 of the Prevention of Corruption Act came to be considered in the case of *R.S. Nayak Vs. A.R. Antulay*, , before a Constitution Bench of this Court where it has been observed:

Section 6 bars the Court from taking cognizance of the offences therein enumerated alleged to have been committed by a Public Servant except with the previous sanction of the competent authority empowered to grant the requisite sanction.... Section 6 creates a bar to the court from taking cognizance of offences therein enumerated except with the previous sanction of the authority set out in Clause (a) (b) & (c) of Sub-section (1). The object underlying such provision was to save the Public Servant from the harassment of frivolous or unsubstantiated allegations. The policy underlying Section 6 and similar Sections is that there should not be unnecessary harassment of Public Servant *C.R. Bansi Vs. The State of Maharashtra*, . Existence thus of a valid sanction is a pre-requisite to the taking of cognizance of the enumerated offences alleged to have been committed by a Public Servant. The bar is to the taking of cognizance of offence by the court. Therefore, when the court is called upon to take cognizance of such offences, it must enquire whether there is a valid sanction to prosecute the Public Servant for the offence alleged to have been committed by him as Public Servant.

Undoubtedly the accused must be a Public Servant when he is alleged to have committed the offence of which he is accused because Sections 161, 164, 165 IPC and Section 5(2) of the 1947 Act clearly spell out that the offences therein defined can be committed by a Public Servant. If it is contemplated to prosecute Public Servant who has committed such offences, when the court is called upon to take cognizance of the offence, a sanction ought to be available otherwise the

court would have no jurisdiction to take cognizance of the offence. A trial without a valid sanction where one is necessary u/s 6 has been held to be a trial without jurisdiction by the court. *R.R. Chari v. State of U.P.* and *S.N. Bose v. State of Bihar*. In *Mohd. Iqbal Ahmed v. State of A.P.*, it was held that the terminus a quo for a valid sanction is the time when the court is called upon to take cognizance of the offence. Therefore, when the offence is alleged to have been committed the accused was a Public Servant but by the time the court is called upon to take cognizance of the offence committed by him as Public Servant, he has ceased to be Public Servant, no sanction would be necessary for taking cognizance of the offence against him. This approach is in accord with the policy underlying Section 6 in that a Public Servant is not to be exposed to harassment of a frivolous or speculative prosecution. If he has ceased to be a Public Servant in the meantime, this vital consideration ceases to exist.

In the present appeal the appellant ceases to be a Public Servant as he resigned from the office. Therefore at the time of filing the FIR the appellant ceases to be a Public Servant and so no sanction u/s 6(1)(c) of the said act is necessary. The main plank of the argument regarding sanction is, therefore, nonexistent.

16. In *R.S. Nayak Vs. A.R. Antulay*, , it was rendered in the context of the Prevention of Corruption Act, 1947 (in short the Old Act.), it is clear from the judgment that the provisions contained in Section 6 of the Old Act thereof are in pari materia to Section 19 of the Present Act so far as relevant for the purpose of this case. The decision in *R.S. Nayak's* case (supra) was to the effect that if an accused is a Public Servant who has ceased to be a Public Servant and/ or is a Public Servant of different category then no sanction in terms of Section 19(1) of the Act corresponding to Section 6(1) of the Old Act is necessary.

17. Recently Apex Court in *Parkash Singh Badal and Another Vs. State of Punjab and Others*, observed:

The Law Commission of India in its 41st Report recommended amendment to Section 197 of the Code suggesting to grant protection of previous sanction to a Public Servant who is or was a Public Servant at the time of cognizance. Following the report of the Law Commission of India, Section 197 of the Code was amended in 1969. The Act was enacted on 9.9.1988 and the Statement of Objects and Reasons indicated widening of the scope of the definition of "Public Servant" and the incorporation of offences already covered under Sections 161 to 165A of the IPC in the Act. New Section 19 as was enacted virtually the same as Section 6 of the Old Act. Earlier to *R.S. Nayak's* case (supra) this Court had occasion to deal with the issues in *S.A. Venkataraman Vs. The State*, . In para 14 it was stated as follows:

14...There is nothing in the words used in Section 6(1) to even remotely suggest that previous sanction was necessary before a court could take cognizance of the offences mentioned therein in the case of a person who had ceased to be a Public Servant at the time the Court was asked to take cognizance, although he had

been such a person at the time the offence was committed.... A Public Servant who has ceased to be a Public Servant is not a person removable from any office by a competent authority....

The use of expression "is" in Section 19 of the Act vis-a-vis the expression "is" or "was" is indicative of the legislative intent. There is nothing in the words used in Section 19 of P.C Act to even remotely suggest that previous sanction is necessary before a Court could take cognizance of the offence mentioned therein in the case of a person who had ceased to be a Public Servant after retirement, although he had been such a person at the time the offence was committed. A Public Servant who has ceased to be a Public Servant (retired) is neither a person removable from any office by a competent authority nor under the command/control of the Government. If a person ceases to be a Public Servant the question of harassment does not arise. The object underlying Section 19 of the P.C Act, Section 197 Cr. P.C. and other similar Sections is that there should not be unnecessary harassment of Public Servant.

18. Prima facie it shows that the Prevention of Corruption Act 1988 was enacted and Notification dated 23 August 1990, notified to make provisions of the Prevention of Corruption Act more effective in order to deal with the cases of corruption in India. The economic, social and cultural structure of our country is very strong however, due to the menace called corruption; it has been adversely affected and has become defenseless against the anti- social elements. Indisputably, the provisions of the Act and intent of the notification must therefore, receive such interpretations at the hands of the Court as would advance the object and purpose underlying the Act and at any rate not defeat it.

19. It is not acceptable that after retirement a Public Servant would escape the clutches of law without any action for all acts, commissions and omissions relating to corruption cases. No doubt after retirement he is neither in subordination nor in command of the said Government Service but he can still be made liable for his previous misconduct.

20. In view of the above discussion, I am in respectful agreement with the views expressed by the Lucknow Bench that the continuance of the proceedings in this case would not amount to abuse of the process of law and are not without jurisdiction.

21. In the net result, the writ petition sans merit and is accordingly dismissed. No order as to costs.