

(2012) 02 GUJ CK 0023
In the Gujarat High Court
Case No : S.C.A. No. 1605 of 2008

Babubhai Raghavbhai Mer, at Present Superintending Engineer
Vs
State of Gujarat

APPELLANT
RESPONDENT

Date of Decision : 13-02-2012

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 197
Penal Code, 1860 (IPC) — Section 166, 21

Citation : (2012) CriLJ 3861

Hon'ble Judges : M. R. Shah, J

Bench : Single Bench

Advocate : P.M. Thakkar with Lilu K. Bhaya, for the Appellant; L.B. Dabhi, Assistant Public Prosecutor and Hashim Qureshi, for the Respondent

Final Decision : Dismissed

Judgement

M.R. Shah, J.—Present Special Criminal Application under Articles 226, 227 of the Constitution of India has been preferred by the petitioner herein-original accused to quash and set aside the impugned judgment and order dated 28.05.2008 passed by the learned Sessions Judge, Porbandar in Criminal Revision Application No. 25/2007 as well as the order dated 11.09.2007 passed by the learned Chief Judicial Magistrate, Porbandar below application Exh. 8 in Criminal Case No. 940/2007. Respondent No. 2 herein-original complainant has filed the complaint being Criminal Case No. 940/2007 in the Court of learned Chief Judicial Magistrate, Porbandar against the petitioner-Executive Engineer, City Division, Pashchim Gujarat Vij Company Limited, Porbandar (hereinafter referred to as "PGVCL") for the offences punishable under Sections 166 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") read with Section 140 of the Indian Electricity Act, 2003. That in the said complaint, the learned Magistrate by order dated 03/13.02.2007 has directed to issue process against the petitioner--original accused for the offence u/s 166 of the IPC read with Section 140 of the Indian Electricity Act, 2003.

1.1 Thereafter, the petitioner-original accused submitted the application Exh. 8 to dismiss the said complaint on the ground that as, at the relevant time the petitioner was the public servant, without any prior sanction as required u/s 197 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC"), no complaint can be filed against him and/or the learned Magistrate could not have taken the cognizance of the offence/complaint against the petitioner in absence of any sanction u/s 197 of the Cr.P.C. Therefore, it was requested to dismiss the complaint. That the learned Chief Judicial Magistrate, Porbandar by impugned order dated 11.09.2007 dismissed the said application Exh. 8 observing that petitioner is not entitled to the protection u/s 197 of the Cr.P.C. as he is not removable from the office by the State Government. Being aggrieved and dissatisfied with the order dated 11.09.2007 passed by the learned Chief Judicial Magistrate, Porbandar below Exh. 8 application in Criminal Case No. 940/2007, the petitioner preferred Criminal Revision Application No. 25/2007 before the learned Sessions Court, Porbandar and the learned Principal Sessions Judge, Porbandar by impugned judgment and order dated 28.05.2008 has dismissed the said Revision Application confirming the order passed by the learned Chief Judicial Magistrate, Porbandar below Exh. 8 application in Criminal Case No. 940/2007. Being aggrieved and dissatisfied with the aforesaid two orders, the petitioner herein-original accused has preferred the present Special Criminal Application under Articles 226, 227 of the Constitution of India.

2. Shri P.M. Thakkar, learned Senior Advocate appearing on behalf of the petitioner-original accused has vehemently submitted that the learned Magistrate has materially erred in dismissing the application Exh. 8. It is submitted that the learned Magistrate has materially erred in holding that before prosecuting the petitioner who was the public servant and/or before taking any cognizance of complaint/offence against him, sanction as required u/s 197 of the CrPC would not be applicable.

2.1 It is further submitted by Shri Thakkar, learned counsel appearing on behalf of the petitioner that at the relevant time, the petitioner was the Executive Engineer working with PGVCL and was conferred with powers of "Assessing Officer" by the State Government and/or at the relevant time he was the "Assessing Officer" pursuant to the Notification issued by the Government of Gujarat vide order No. GU 2004 (36) ELA-1103-9539-K dated 05.06.2004, to deal with the cases u/s 126 of the Indian Electricity Act, 2003. Therefore, it is submitted that when the petitioner was the "Assessing Officer" pursuant to the Notification issued by the Government of Gujarat, in view of Section 169 of the Indian Electricity Act, 2003, the petitioner can be said to be a public servant within the meaning of Section 21 of the IPC, acting or purporting to act in pursuance of the provisions of Section 126 of the Indian Electricity Act, 2003. Therefore, it is submitted that when the petitioner was the public servant within the meaning of Section 21 of the IPC being the "Assessing Officer" pursuant to the notification issued by the State Government, it can be said that the petitioner as an "Assessing Officer" can be removed from the said office of "Assessing

Officer" by the State Government and therefore, bar u/s 197 of the CrPC would be applicable.

2.2 Shri Thakkar, learned counsel appearing on behalf of the petitioner has further submitted that both the Courts below have materially erred in not properly appreciating the scope and ambit of the sanction required u/s 197 of the CrPC. It is further submitted by Shri Thakkar, learned counsel that both the Courts below have materially erred in not appreciating the distinction between public servant not removable from his employment and a public servant not removable from his office by the State Government. It is submitted that only in a case when it is found that the concerned accused is not removable from his office save by or with the sanction of the Government, in that case, the sanction to prosecute him as required u/s 197 of the CrPC would not be required. It is submitted that in other words if the concerned accused, though he may be removable from his employment by his employer (other than the State Government or Central Government) but is removable from his office (in the present case as "Assessing Officer") with the sanction of the State Government, in that case, Section 197 of the CrPC would be attracted. It is submitted that in the present case as, pursuant to the notification of the State Government dated 05.06.2004, he will be performing the duty as an "Assessing Officer" and therefore, before prosecuting him, sanction as required u/s 197 of the CrPC would be required/attracted. It is submitted that in the present case, no such sanction is obtained before taking cognizance of offence against the petitioner and therefore, relying upon the decision of the Hon"ble Supreme Court in the case of P.K. Choudhury Vs. Commander, 48 BRTF (GREF), , it is requested to allow the present Special Criminal Application and quash and set aside the order passed by both the Courts below by further submitting that any cognizance of offence taken by the Court against a public servant without obtaining the sanction u/s 197 of the CrPC would be illegal and the Court's jurisdiction will be barred.

2.3 Shri Thakkar, learned counsel appearing on behalf of the petitioner has vehemently submitted that in the present case as the petitioner acted and disconnected the electricity connection of the original complainant in exercise of powers u/s 126 of the Indian Electricity Act, 2003 as an Assessing Officer and acted bonafidely and pursuant to the powers conferred by the State Government vide its notification dated 05.06.2004 and therefore, in view of Section 169 of the Indian Electricity Act, 2003, when an Assessing Officer is deemed to be a public servant within the meaning of Section 21 of the IPC, before prosecuting the petitioner and/or taking cognizance of offence against the petitioner by the Court, sanction as required u/s 197 of the CrPC is must. It is submitted that sanction u/s 197 of the CrPC is provided with a view to see that a public servant who has acted bonafidely and in good faith while performing his statutory duty is not unnecessarily harassed by such frivolous prosecutions.

By making above submissions and relying upon above decision, it is requested to

allow the present petition.

3. Petition is opposed by Shri Hashim Qureshi, learned advocate appearing On behalf of the original complainant. It is submitted that as such the petitioner is the employee of PGVCL and the constitution of PGVCL is not disclosed. It is submitted that in any case, it can be said to be a company/a Body Corporate and bar u/s 197 of the CrPC would not be attracted in case of an employee of a company/a Body Corporate. It is submitted that as such the petitioner who is serving as an Executive Engineer is removable by the PGVCL and not by the State Government. It is submitted that by notification dated 05.06.2004 of the State Government, all Executive Engineers of PGVCL are designated as "Assessing Officers" to perform the duties under the Act as "Assessing Officer" and they are entrusted to discharge their duty as "Assessing Officer". It is submitted that however, he will still be working as Executive Engineer of the Company and the moment he is removed as an Executive Engineer, he will cease to be an Assessing Officer. It is submitted that by notification of the State Government, he is designated and conferred the power to discharge duty as Assessing Officer, however, he will be still the Assessing Officer of the Company and is not removable from his office either as Executive Engineer and/or as Assessing Officer with the sanction of the Government only. It is submitted that nothing is on record that the petitioner is removable from his office i.e. as an Assessing Officer only with the sanction of the Government. It is submitted that merely because pursuant to the notification of the State Government dated 05.06.2004, he is designated as Assessing Officer being an Executive Engineer, it cannot be said that he is removable from the office of Assessing Officer by the State Government. It is submitted that he may be a public servant pursuant to the provision of Section 169 of the Indian Electricity Act, 2003 read with Section 21 of the IPC, however, with respect to all public servants the bar u/s 197 of the CrPC would not be attracted or applicable. It is submitted that the bar of taking cognizance of the offence against the public servant as provided u/s 197 of the CrPC would be attracted and/or applicable only in a case when any person/accused who is a public servant not removable from his office save by or with the sanction of the Government and such offence is alleged to have been committed by him while acting or purporting to act in discharge of his official duty. It is submitted that therefore, when the petitioner being an Executive Engineer who is designated as Assessing Officer of the Company pursuant to the notification issued by the State Government dated 05.06.2004, no sanction is required to prosecute him and/or before taking cognizance of offence by the Court against him for the offences alleged to have been committed by him while acting or purporting to act in discharge of his official duty. It is submitted that considering Section 197 of the CrPC, such an immunity and/or sanction is required with respect to the public servant removable with a sanction of the Government only and not with respect to any public servant of any Company, may be a Government Company if the employee of such Government Company is not removable save by or with the sanction of the State Government. Therefore, it is

submitted that the Courts below have not committed any illegality and/or error in dismissing the application submitted by the petitioner to dismiss the complaint for want of sanction u/s 197 of the CrPC.

3.1 Shri Qureshi, learned advocate appearing on behalf of the original complainant has also tried to submit the case on merits by submitting that despite the fact that the complainant paid the entire dues still with malafide intention and illegally the petitioner disconnected the electricity connection, however as, in the present petition, what is challenged is the order passed by both the Courts below rejecting application Exh. 8 and rejecting the prayer of the petitioner to set aside the complaint for want of sanction u/s 197 of the CrPC, and this Court is required to consider whether in the case of petitioner, before taking cognizance of any offence by the Court against him, a sanction u/s 197 of the CrPC is required or not and therefore, this Court does not propose to consider the allegations and averments in the FIR on merits.

Making above submissions, it is requested to dismiss the present petition.

4. Shri L.B. Dabhi, learned Additional Public Prosecutor appearing on behalf of the State has submitted that a bar u/s 197 of the CrPC would be attracted only in a case when such public servant is not removable from his office save by or with the sanction of the Government and is accused of any offence alleged to have been committed by him while acting or purporting to act in discharge of his official duty. It is submitted that the bar u/s 197 of the CrPC would not be attracted with respect to any public servant and will be applicable if such public servant is removable from his office with the sanction of the Government.

5. Heard the learned advocates appearing on behalf of the respective parties at length. The short question which is posed for consideration of this Court is whether bar u/s 197 of the CrPC would be attracted to any public servant who is accused of any offence alleged to have been committed by him while acting or purporting to act in discharge of his official duty? and/or whether the bar u/s 197 of the CrPC would be applicable in case of the petitioner who is the Executive Engineer working in PGVCL/a Body Corporate and discharging his duty as an Assessing Officer pursuant to the powers conferred by the State Government to act as an Assessing Officer u/s 126 of the Indian Electricity Act, 2003?

5.1 At the outset it is required to be noted that the petitioner is the employee of PGVCL, a company-Body Corporate and its an independent company and nothing is on record that it is a Government Company. It appears that PGVCL is an independent body corporate having its own constitution and Board of Directors, Petitioner is serving as an Executive Engineer in the said Company. Considering the provisions of the Indian Electricity Act, 2003, powers u/s 126 of the Indian Electricity Act, 2003 can be exercised only by the Assessing Officer of the Company. As per sub-section (6) of Section 126 of the Indian Electricity Act, 2003, "Assessing Officer" means an officer of State Government or Board or licensee, as the case may be, designated as such by the State Government. The

State Government by its notification dated 05.06.2004 has conferred the powers upon the Executive Officers of the Company to act as Assessing Officer for exercising powers u/s 126 of the Indian Electricity Act, 2003. Therefore, as such all Executive Engineers of the PGVCL, as Executive Engineers are designated as Assessing Officers of the Company (licensee) for the purpose of Section 126 of the Indian Electricity Act, 2003. Therefore, as such by such a notification, they are designated as "Assessing Officer" of the PGVCL Company and they are not the Assessing Officer of the State Government. By holding the post as an Executive Engineer in the Company, they are designated as "Assessing Officer" and are entrusted the power to discharge duty as Assessing Officer u/s 126 of the Indian Electricity Act, 2003. Therefore, the moment such an Executive Engineer is removed by the Company as Executive Engineer, he ceases to be the "Assessing Officer" of the Company. As stated herein above by notification dated 05.06.2004, petitioner Executive Engineer of the PGVCL company is designated as "Assessing Officer" of the company to perform the duty as "Assessing Officer" u/s 126 of the Indian Electricity Act, 2003. Therefore, as such it cannot be said that the petitioner-Executive Engineer of the PGVCL Company, may be designated as Assessing Officer to perform the duties u/s 126 of the Indian Electricity Act, 2003, he is removable as Assessing Officer with the sanction of the State Government only. As stated herein above, as such being the Executive Engineer of the PGVCL Company by virtue of the notification issued by the State Government dated 05.06.2004, he is designated as Assessing Officer that too of the PGVCL Company and to perform the duty as "Assessing Officer" as conferred u/s 126 of the Indian Electricity Act, 2003. It cannot be disputed that the petitioner serving as Executive Engineer and designated as "Assessing Officer" to exercise powers u/s 126 of the Indian Electricity Act, 2003, he is a public servant as per Section 169 of the Electricity Act, 2003 i.e. a public servant defined u/s 21 of the IPC. However, considering Section 197 of the Cr PC, the bar u/s 197 of the Cr PC will not be applicable and/or attracted with respect to any public servant. A sanction u/s 197 of the CrPC before taking any cognizance against a public servant who is accused of any offence alleged to have been committed by him while acting or purporting to act in discharge of his official duty is required only in a case when such public servant is not removable from his office save by or with the sanction of the Government. Therefore, on fair reading of Section 197 of the CrPC, it appears that Section 197 of the CrPC would be attracted and/or applicable only with respect to a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government. In other words, sanction as required u/s 197 of the CrPC would not be required with respect to any public servant more particularly a public servant like the petitioner employee of a Body Corporate-Company who by holding the post as an Executive Engineer is designated as Assessing Officer to perform the duty of Assessing Officer u/s 126 of the Indian Electricity Act, 2003.

5.2 As stated herein above, petitioner by holding the post as Executive Engineer is designated as "Assessing Officer" of the Company to perform the duty as

required u/s 126 of the Indian Electricity Act, 2003. Therefore, as such he is designated as an Assessing Officer on holding his post as an Executive Engineer in the Company and that too as Assessing Officer of the PGVCL Company. Therefore, though he is designated as "Assessing Officer" of the PGVCL Company, he will be removable by the PGVCL Company only and for which a sanction of the State Government is not required. It is also required to be noted that the moment the petitioner is removed as Executive Engineer by the PGVCL Company, he ceases to be the Assessing Officer, as while holding post of Executive Engineer by virtue of notification of State Government dated 05.06.2004, he is designated as "Assessing Officer" of the PGVCL Company. Under the circumstances, as the petitioner is not removable from his office, may be as an "Assessing Officer" save and except with the sanction of the Government, sanction u/s 197 of the CrPC would not be attracted and there will not be any bar of taking cognizance of offence against him by the Court as is required u/s 197 of the CrPC. Under the circumstances, no illegality has been committed by the trial Court in rejecting the application Exh. 8 submitted by the petitioner and in dismissing the complaint for want of sanction u/s 197 of the CrPC, confirmed by the Revisional Court.

In view of the above and for the reasons stated above, petition fails and the same deserves to be dismissed and is, accordingly dismissed. However, it is observed that this Court has not considered the allegations and averments made in the complaint filed against the petitioner on merits and whether the learned Magistrate was justified in directing to issue process/summons against the petitioner for the offence u/s 166 of the IPC and Section 140 of the Indian Electricity Act, 2003 or not, as the same is not under challenge in the present proceedings and the only dispute raised in the present petition is whether the learned Magistrate was justified in taking cognizance of offence against the petitioner without obtaining the sanction as required u/s 197 of the CrPC or not. Therefore, the aforesaid questions on merit are kept open. Rule is discharged. Ad interim relief, if any, granted earlier stands vacated forthwith.