

(2012) 04 DEL CK 0067

In the Delhi High Court

Case No : Writ Petition (Criminal) No. 262 of 2010

C.K. Jaffer Sharief

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 11-04-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 197, 197(1)
Penal Code, 1860 (IPC) — Section 120B, 409
Prevention of Corruption Act, 1988 — Section 13(1), 13(2), 19, 5(2), 7

Citation : (2012) 4 AD 214 : (2012) 191 DLT 479

Hon'ble Judges : M.L. Mehta, J

Bench : Single Bench

Advocate : Dinesh Mathur, with Ms. Rebecca M. John and Mr. Vishal Gosain, for the Appellant; Mohan Parasaran, ASG with Mr. P.K. Sharma and Mr. D.L. Chidananda, for the Respondent

Final Decision : Dismissed

Judgement

M.L. Mehta, J.—The present writ petition assails the order dated 27.01.2010 of the Ld. Special Judge whereby he dismissed the application of the petitioner seeking discharge under the Prevention of Corruption Act, 1988 (for short "the PC Act") on the ground of lack of sanction u/s 197 Cr.P.C. The allegations against the petitioner are that during the year 1995, while functioning as the Union Railways Minister, he dishonestly arranged foreign visits of four officials besides the officials allowed by the Government, for his personal use, through Public Sector Undertaking, namely IRCON and RITES, after temporarily placing their services with these undertaking. It is alleged that the petitioner dishonestly made M.D's of RITES and IRCON to approve the journey of B.N. Nagesh, the then Additional P.S. to the Railway Minister, Sh. S.M. Masthan and Sh. V. Murlidharn, both stenos in the Railway Minister Cell to go to London with him, after placing their services in Railway Board to the aforesaid Public Undertakings. The above persons allegedly did not perform any special assignment on behalf of RITES or IRCON. Apart from these three persons, one Sh. C.H. Samaulla, a

driver of Railway Ministry, on co-terminus basis, also visited London on Government expenditure, for the personal services of the petitioner. An FIR being FIR No. 2(A) /98 was registered against the petitioner. A closure report was filed by the CBI on 22.10.2005 citing refusal of sanction u/s 19 of the PC Act, to prosecute the petitioner. The closure report was declined by the Ld. Special Judge with these observations:

The documents and the evidence adduced and collected which is in the form of oral statements of PW4 S.A.A. Zaidi working as Additional General Manager, Northern Railway, statement of PW5 Sh. O. Ravi earlier P.S. to the then Minister of Railways, working as Director of Industrial Policy and Promotion, statement of PW6 M.D. Khattar the then Deputy General Manager with IRCON, statement of PW7 Vijay Tanwar, the then Managing Director, RITES, have been perused. There appears to be a prima facie evidence for the offence u/s 13(2) read with 13(1) (d) of the P.C. Act. However, sanction has not been granted. It probably appears that the entire material collected by the prosecution had not been placed before the sanctioning authority. Further investigation be carried out. Closure report is declined.

2. Thereafter, a supplementary closure report was again submitted citing the reason of lack of sanction u/s 19 of the PC Act. The Ld. Special Judge, CBI again declined the closure report and now took cognizance of the offence vide order dated 26.07.2008 observing that sanction u/s 19 of the PC Act is not required as the petitioner had ceased to be a public servant on 10.11.2000. Thereafter, an application dated 04.09.2008 was submitted by the petitioner in the Court of Ld. Special Judge seeking discharge on the ground of lack of sanction u/s 197 Cr.P.C. to prosecute the petitioner, which came to be dismissed vide order dated 27.01.2010. The learned Special Judge reasoned as under:

Thus, the act of accused, being beyond the scope and range of his official duty, would not be covered under the purported discharge of his duty. The application dated 04.09.2008 for discharge is thus dismissed.

3. Hence the present petition assailing the order of the Ld. Special Judge dated 27.01.2010.

4. The Ld. Senior Counsel for the petitioner submitted that the prosecution had failed to obtain sanction to prosecute the petitioner u/s 19 of the PC Act, as a result of which a closure report was filed by the CBI on 22.10.2005. Since sanction was not accorded, a revised closure report was filed on 01.08.2007 again citing lack of sanction u/s 19 of the PC Act. It is submitted that sanction u/s 19 of the PC Act could not have been reviewed by the sanctioning authority unless new evidence had come on record. Reliance is placed on the case of State of Himachal Pradesh v. Nishant Sareen (2011) 3 SCC 836. It is further submitted that the Ld. Special Judge was wrong in taking cognizance of the offence vide order dated 26.07.2008 observing that sanction u/s 19 of the PC Act is not required to prosecute the petitioner as, the petitioner on 10.11.2000, ceased to

be Union Minister of Railways or Member of Parliament.

5. The Ld. Senior Counsel submitted that the personnel who accompanied the petitioner performed only official duties. My attention was drawn to the statements of PW Shri S.A.A Zaidi and PW Vijay Kanwar who stated that both Sh. Nagesh and Sh. Murlidharan helped the petitioner to communicate with the Ministry in India and updated him with the day to day developments in India. PW Shri S.A.A Zaidi further stated that the deputation of officers/ officials of the Railway Board/ Ministry of Railways to Public Sector Undertaking is within the competence of the petitioner i.e. the Union Railway Minister and there was no violation of deputation rules in the act of the petitioner. PW Vijay Kanwar further stated that the deputation of Sh. S.M. Masthan and Murlidharan was accorded post-facto sanction by the full board of directors of RITES and after completion of the deputation, a full report was sent to the Railway Ministry. In his statement, Sh. M.D. Khatter stated that the decision of deputation of Sh. Nagesh through IRCON was that of the Railway Board. In the light of these statements it is contended that the alleged act of the accused fell within the scope of his official duty and the sanction u/s 197 Cr.P.C. is necessary for the prosecution of the petitioner. Reliance is placed on the judgment of this court in C.P. Thakur (Dr.) v. CBI 2009 4 AD (Del) 477. Further relying upon Yogesh @ Sachin Joshi v. State of Maharashtra, 2008 (2) Crimes 263 SC and Dilawar Balu Kurane v. State of Maharashtra, 2002 (1) JCC 172, it is also contended that if two views are possible, the view in favour of the accused should be accepted.

6. Per Contra, the Ld. ASG contended that the act of the petitioner cannot be said to be done under the colour of his official duty as the act was a consequence of misuse of the power by the petitioner and does not come within the scope of discharge of his official duty. It is submitted that the act of the petitioner is not covered within the scope of the discharge of his official duty and thus he does not enjoy the protection as provided u/s 197 Cr.P.C. It is submitted that from the evidence available on record it is evident that the petitioner misused his power and circumvented the procedure to take the unauthorized officials of the Railways to London for his personal services on Government expenditure. Relying upon State of Madhya Pradesh Vs. Sheetla Sahai and Others, it was submitted that where the act done by the public servant is merely a cloak for doing the objectionable act, the protection u/s 197 Cr.P.C. is not available and that even if two views are possible from the material produced on record, the charges can be framed against the petitioner.

7. I have heard the learned senior counsel for the petitioner, the learned ASG appearing for the respondent CBI and perused the records.

8. The petitioner had demitted his office as Minister on 10th November, 2000. It was during his tenure as Minister that the offence was alleged to have been committed. The cognizance was taken by the learned Special Judge vide his order dated 26th July, 2008. It is settled proposition that if the accused ceased to hold the office by the date the court takes cognizance of the offence alleged to

have been committed by him as a public servant, no sanction u/s 19 of the PC Act was required. It would be immaterial even if the accused becomes public servant thereafter in some other capacity.

9. The Prevention of Corruption Act was enacted in the year 1988, much after the Code of Criminal Procedure, 1973 came into force. The acts of the legislature are not intended to be superfluous and the legislature is presumed to be aware and conscious of all statutory enactments when it passes a particular legislation. Hence, if the legislature, despite pre-existence of similar provision in Section 197, Code of Criminal Procedure, chose to make a specific provision in Prevention of Corruption Act, it could not have intended to have the applicability of the Section 197 Cr.P.C. to corruption cases and to make the provision of Section 19 of the PC Act as redundant. Therefore, the legislative intent, obviously, was to give different meaning to sanction that was required u/s 19 of the P.C. Act in the cases involving corruption under the P.C. Act than the requirement of the sanction for the ordinary offences u/s 197 Cr.P.C.

10. In view of above interpretation, it was Section 19 of the PC Act which was applicable in the case of the petitioner and not Section 197 Cr.P.C. Any other interpretation to invoke the applicability of Section 197 Cr.P.C. would make Section 19 of the PC Act as redundant and not applicable in the cases falling under the P.C. Act. The P.C. Act was a Code in itself and Section 19 thereof was to govern the field of sanction of the public servants.

11. Having said so as above, I could not find any infirmity or illegality in the order dated 26th July, 2008 of the Special Judge whereby he recorded that no sanction was required u/s 19 of the PC Act since the petitioner was not a public servant at the time of taking of cognizance.

12. It appears that after the cognizance was taken by Special Judge vide his order dated 26th July, 2008, the petitioner not being satisfied, invoked the applicability of Section 197 Cr.P.C. and filed an application in this regard, which came to be dismissed by the Special Judge vide the impugned order. When the allegations against the petitioner were u/s 13(1) (d) and 13(1)(e) of the Act, I failed to understand as to how an application was filed by the petitioner to invoke the applicability of Section 197 Cr.P.C. to scuttle the provisions of Section 19 of the PC Act. Though Section 197 Cr.P.C. was not attracted, but having regard to the facts as set out hereinbefore, it was rightly recorded by the Special Judge in the impugned order that the acts of the accused also did not fall within the ambit of Section 197 Cr.P.C. From the statements of the witnesses as recorded by the CBI, as have been noted by the Special Judge in the impugned order, it would be seen that the four persons were taken by the petitioner to London by flouting all the rules/procedures and the formalities. The four officials went abroad, but never indicated the details of the works done at U.K. in their utilization reports. There was no specific purpose and business activities of IRCON and RITES at London at the relevant time. As said by the Director of IRCON, the said persons were sent due to political pressure from the petitioner. One of the persons

namely Samaulla was relative of the petitioner and was working with him as a driver. The nature of works which were taken from him at London such as procuring foods, grocery items etc were purely personal. All these do not fall within the colour of official duty of the petitioner and are apparently beyond the scope and range of his official duty. They would not be covered under the purported discharge of his official duty. Thus, they would not fall within the ambit of Section 197 Cr.P.C.

13. It is settled law that irrespective of the nature of charge, it was to depend upon the facts of each case as to whether the sanction was required or not u/s 197(1) Cr.P.C. The Supreme Court in the case of Amrik Singh Vs. The State of Pepsu, very categorically held that "if the acts complained of are so integrally connected with the duties attaching to the office as to be inseparable from them, then sanction u/s 197(1) Cr.P.C. would be necessary; but if there was no necessary connection between them and the performance of those duties, the official status furnishing only the occasion or opportunity for the acts, then no sanction would be required."

14. Likewise, in the case of P. Arulswami Vs. The State of Madras, the Supreme Court, after discussing various decisions on the subject held thus

...A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus, a judge neither acts nor purports to act as a judge in receiving a bribe, though the judgment which he delivers may be such an act; nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office.

15. In State of Kerala v. V. Padmanabhan Nair, (1999) 5 SC 690, while relying upon Harihar Prasad, etc. Vs. State of Bihar, it was observed:-

The correct legal position, therefore, is that an accused facing prosecution for offences under the PC Act cannot claim any immunity on the ground of want of sanction, if he ceased to be a public servant on the date when the court took cognizance of the said offences. So the High Court was at any rate wrong in quashing the prosecution proceedings insofar as they related to offences under the PC Act.

Hence, a public servant who committed offence within the meaning of PC Act while he was a public servant can be prosecuted with the sanction contemplated u/s 19 of the PC Act if he continues to be a public servant when the court took cognizance of the offence and he cannot seek protection u/s 197 Cr.P.C. The plea that he was discharging his official duties as a public servant and therefore no prosecution u/s 120B IPC could have been lodged against him without obtaining sanction of the appropriate authorities u/s 197 Cr.P.C. does not hold water since a person who is involved in offence u/s 19 of the PC Act cannot be said to be

discharging his official duties at the time when the alleged offences were committed to seek protection u/s 197 Cr.P.C., as it is not part of the duty of the public servant to enter into a criminal conspiracy to commit an offence of bribery.

16. In *Dharambir Khattar and others vs. Central Bureau of Investigation (supra)*, the accused persons were charged with the offence, u/s 120B read with Sections 7, 8, 13(2), 13(1)(d) of the PC Act. Similar submissions were made regarding absence of sanction u/s 197 Cr.P.C. as well as that of sanction u/s 19 of the PC Act. This Court while dealing with these questions of sanction u/s 19 of the PC Act and absence of sanction u/s 197 Cr.P.C. observed as under:

43.3. It requires to be noticed that in *Prakash Singh Badal v. State of Punjab (2007) 1 SCC 37* it was pointed out that "there is distinction between the absence of sanction and the alleged invalidity on account of non application of mind. The former question can be agitated at the threshold but the latter is a question which has to be raised during trial."

43.4. In *Lalu Prasad @ Lalu Prasad Yadav Vs. State of Bihar through CBI (AHD), Patna*, the question as to the sanction u/s 197 Cr.P.C. and the one u/s 19 PC Act was explained in para (10):

10. It may be noted that section 197 of the Code and section 19 of the Act operate as conceptually in different fields. In cases covered under the Act, in respect of public servants are of little or no consequence. Conversely, in a case relatable to Section 197 of the Code, the substratum and basic features of the cases have to be considered to find out whether the alleged act has any nexus with the discharge of duties. Position is not so in case of Section 19 of the Act.

43.9. There is merit in the contention of the learned counsel for CBI that the sanction u/s 197 Cr.P.C. is actually not required when the offences committed are under the PC Act. It is submitted that a criminal conspiracy to commit an offence under the PC Act cannot be cloaked with any immunity by requiring prior sanction to be obtained u/s 197 Cr.P.C. for prosecuting a public servant accused for such offences. In *AIR 1948 128 (Privy Council)* it was observed in para 30 as under:

30. A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a Judge neither acts nor purports to act as a Judge in receiving a bribe, though, the judgment which he delivers may be such an act; nor does a Government medical officer act or purport to act as a public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office. Applying such a test to the present case, it seems clear that Gill could not justify the acts to respect of which he was charged as acts done by him by virtue of the office that he held. Without further examination of the authorities their Lordships, find themselves in general agreement with the opinion of the Federal court in the case cited thing it sufficient to say that in their opinion no sanction u/s 197. Cr.P.C., was needed.

As far as the offence of Criminal conspiracy punishable u/s 120B read with section 409, Indian Penal Code is concerned and also section 5(2) of the Prevention of Corruption Act, are concerned, they cannot be said to be of the nature mentioned in section 197 of the Code of criminal Procedure. To put it shortly, it is no part of the duty of a public servant, while discharging his official duties, to enter into a criminal conspiracy or to indulge in criminal misconduct. Want of sanction u/s 197 of the Code of Criminal Procedure is, therefore, no bar.

17. The sum and substance is that it is not every offence committed by the public servant while he is actually engaged in the performance of his official duties that would require sanction for prosecution u/s 197(1) Cr.P.C. However, if the act complained of is directly connected with his official duty, so that it could be claimed to have been done by virtue of his office, then the sanction would necessarily be required. In other words, if the offence is entirely unconnected with the official duty, there can be no protection but, if it is committed within the scope of the official duty or in excess of it, then the protection is certainly available. In the case of *Sheetla Sahai & ors.* (Supra) it was held that,

There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and secure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty. If the answer to this question is in the affirmative, it may be said that such act was committed by the public servant in the discharge of his official duties and there was every connection with the act complained of and the official capacity of the public servant. This aspect makes it clear that the concept of section 197 Cr.P.C. does not get immediately attracted on institution of the complaint case.

18. The reliance placed by the learned counsel for the petitioner on the case of *C.P. Thakur* (supra) is highly misplaced. In the said case, the petitioner acted at the relevant time in his capacity only in discharge of his official duties and the act which was the subject matter of the alleged offence, was committed by him in such capacity and in those peculiar facts it was held that prosecution was bad for want of sanction u/s 197 Cr.P.C.

19. Now, applying the dictum of the law to the instant case, it would be noted that there is sufficient material against the petitioner to demonstrate that the acts complained of were not a part of his duty as a public servant. The services of the officials were placed at the disposal of RITES and IRCON at the instance of the petitioner with the sole purpose of sending them to London for his personal services during his heart operation on Government expenditure. Undisputedly, no permission was obtained from the Government to send these four persons along with the petitioner to London during his visit. Sh. Nagesh, then Additional P.S to the petitioner was sent to London through IRCON although nothing pertaining to IRCON was pending in London at that time. The services of

Shri. Murlidharan and Shri S.M. Mastan were placed with RITES for the temporary period so that they could be sent to London with the petitioner. There was no business requirement of RITES in London at that time. The entire expenditure incurred by Shri. Nagesh and Sh. C. Samaullah was disbursed to them by IRCON under political pressure and certain official formalities were not complied with. The details of works performed by V. Murlidharan and S.M. Mastan were not mentioned in their utilization reports. All these allegations are substantiated from the statements of prosecution witnesses u/s 161 Cr.P.C. Therefore, from the statements of these witnesses if read as a whole, it is evident that the act of deputation of the 4 officials was at the instance of the petitioner with the motive of using them for his personal requirements in London. Therefore, the contention of the learned senior counsel for giving the petitioner the benefit of two possible views, is misconceived.

20. In view of the above observations it can safely be concluded that the act of the petitioner did not require sanction u/s 197 of P.C. Act. Even if we presume that there is no sanction u/s 197 Cr.P.C. that does not vitiate the proceedings as the offences of criminal conspiracy punishable u/s 120B IPC and also under sections 7/13(2)/13(1)(d) of PC Act cannot be said to be of the nature mentioned in Section 197 Cr.P.C. It is not the part of the duty of a public servant while discharging his official duty to enter into a criminal conspiracy or to indulge in criminal misconduct. Want of sanction u/s 197 Cr.P.C. is, therefore, no bar under the facts and circumstances of the case. Thus, I find no illegality or infirmity in the impugned order of the learned Special Judge, CBI. Petition is accordingly dismissed.