

(1983) 12 MP CK 0002

In the Madhya Pradesh High Court

Case No : Criminal Revision No. 524 of 1979

Maheshwar Vishambhar Sahai

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 16-12-1983

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 401

Penal Code, 1860 (IPC) — Section 161

Prevention of Corruption Act, 1947 — Section 5(1)(d), 5(2)

Citation : (1985) JLJ 424 : (1985) MPLJ 337

Hon'ble Judges : S.K. Seth, J

Bench : Single Bench

Advocate : S.C. Datt, for the Appellant; M.V. Tamaskar for State, for the Respondent

Final Decision : Allowed

Judgement

S.K. Seth, J.

This petition by accused Maheshwar Sahai u/s 397/401 of the Code of Criminal Procedure is directed against order dated 18-8-1979 passed by the Special Judge, Jabalpur in Special Case No. 5 of 1978 whereby certain preliminary objection taken by him against his prosecution u/s 161 of the Indian Penal Code and section 5(2) read with section 5(1)(d) of the Prevention of Corruption Act, 1947 were rejected by the Special Judge. The petition is also u/s 482 of the Code of Criminal Procedure and it is prayed that the entire proceedings relating to his prosecution under the abovesaid provisions be quashed.

The relevant facts, briefly stated, are these: In pursuance of an agreement dated 3-3-1973 executed between him and the Central Government one Rewachand had obtained a lease of a shop forming part of Ordnance Factory Khamaria Estate in Jabalpur. The agreement contained the arbitration clause to the following effect:

All disputes and differences arising out or in any way touching or concerning this agreement whatsoever (except as to matter the decision of which is specifically provided for) shall be referred to the sole Arbitration of any person nominated by the Director General of Ordnance Factories at the time of such nomination, or if there be no Director General, the Administrative Head of Ordnance Factories at the time of such nomination. It will be no objection to any such appointment that the person appointed is a Government servant, that he had to deal with the matters to which the agreement relates, and that in the course of his duties as such Government servant he has expressed the views on all or any of the matters in dispute or difference. The award of such Arbitrator shall be final and binding on the parties to this agreement. It is a term of this agreement that in the event of such Arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, the Director General or Administrative Head as aforesaid at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as Arbitrator in accordance with the terms of this agreement. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this agreement that no person other than a person nominated by the Director General or Administrative Head of the Ordnance Factories as aforesaid should act as Arbitrator and for any reason that is not possible, the matter is not to be referred to arbitration at all.

It is not in controversy that there did arise a dispute between the lessor and the lessee i. e. the Central Government and Rewachand in respect of certain matters covered by the abovesaid arbitration clause under the agreement. It is also not in controversy that in the circumstance the Director General of Ordnance Factories acting in exercise of his right under the arbitration clause nominated accused Maheshwar Sahai who was at the material time working under him as Assistant Director of Ordnance Factories to act as the sole arbitrator in the matter and to resolve the dispute.

According to the case of the prosecution, it was while accused Maheshwar Sahai was conducting the proceedings between the parties in his capacity as the sole arbitrator nominated in the manner mentioned herein above that on 8-8-1977, he demanded Rs. 10,000 as illegal gratification from the representative of one of the parties i. e. Rewachand for showing favour to it in the said proceedings. According to the further case of the prosecution, thereafter, a trap having been arranged by the Central Bureau of Investigation the accused was caught red-handed on 10-8-1977 accepting Rs. 3,000 as illegal gratification from the representative of the party.

After the investigation in the matter was complete and after the Central Government vide its order dated 3-4-1978 passed in the Ministry of Home Affairs accorded its sanction u/s 197(1) of the Code of Criminal Procedure and section 6(1)(a) of the Prevention of Corruption Act, the challan for the prosecution of the accused u/s 161 of the Indian Penal Code and section 5(2) read with section 5(1)

(d) of the Prevention of Corruption Act was put up before the Special Judge, Jabalpur on 24-4-1978. Upon considering the challan and the documents submitted therewith, the Special Judge vide his order passed on 19-5-1979 was of the opinion that there was ground for presuming that the accused had committed the offences alleged against him. He, accordingly, vide his said order, framed charges u/s 161 of the Indian Penal Code and section 5(2) read with section 5(1)(d) of the Prevention of Corruption Act against the accused.

It was thereafter on 3-8-1979 before recording of evidence was commenced by the Special Judge that an application raising certain preliminary objections to his prosecution under the above said section was made by the accused and the same after hearing of arguments was rejected by the Special Judge by his order dated 10-8-1979.

Now, it is no doubt true that in his position or capacity as Assistant Director of Ordnance Factories the accused was in the pay and service of the Government and was as such a "public servant" under the relevant clause of section 21 of the Indian Penal Code. But, then, the position or capacity in which he was acting at the time when the acts complained of were committed by him was not that of Assistant Director of Ordnance Factories i. e. a person who was in the pay and service of the Government but that of an arbitrator who was appointed by one of the parties to a contract to resolve certain dispute between it and the other party in accordance with the terms and conditions of the contract. His said position or capacity as an arbitrator was altogether a different and independent one and had nothing to do with his position or capacity as Assistant Director of Ordnance Factories i. e. the person who was in the pay and service of the Government. In his said position or capacity as an arbitrator he was not covered under any of the clauses contained in section 21 of the Indian Penal Code and as such could not be regarded as a "public servant". It is no doubt true that Clause Sixth of section 21 did include within the definition of that term "every arbitrator to whom any cause or matter has been referred for decision by any Court of justice". But, then, as pointed out in section 20 of the Code, the words "Court of Justice" denote a judge who is empowered by law to act judicially alone, or a body of judges which is empowered by law to act judicially as a body, when such judge or body of judges is acting judicially. It is clear that the accused to whom the matter was referred for decision by the private act of the parties to the contract and not by any "court of justice" did not fall under Clause Sixth of section 21.

It is bearing in mind the abovesaid fact that though the accused was a "public servant" he was not acting in his position or capacity as a "public servant" when the acts complained of were committed by him that it is to be considered whether the Special Judge was justified in forming the opinion on the basis of the challan and the documents submitted therewith that there was ground for presuming that the accused had committed offences u/s 161 of the Indian Penal Code and section 5(2) read with section 5(1)(d) of the Prevention of Corruption Act and in framing the charges under the said sections against the accused.

Now, one of the essential ingredients of the offence punishable u/s 161 of the Indian Penal Code is that the accused must be a public servant or expect to be a public servant at the time when the offence was committed. Another essential ingredient of the said section is that he must have accepted illegal gratification as a motive or reward for (a) doing or forbearing to do an official act, (b) doing or forbearing to show favour or disfavour to someone in the exercise of his official functions, or (c) rendering or attempting to render any service or disservice to someone with the Central or any State Government or Parliament or the Legislature of any State or any public servant. In the present case, as already explained above, when the acts complained of were committed by the accused, he was acting in his position or capacity as an arbitrator appointed by one of the parties to the contract and the said position or capacity had nothing to do with his being Assistant Director of Ordnance Factories i. e. a "public servant" within the meaning of the relevant Clause u/s 21 of the Indian Penal Code. It cannot, therefore, be said that he was a "public servant" or expected to be a "public servant" at the time when the offence was committed. For the same reason, it cannot also be said that the acts complained of were committed by him as a motive or reward for doing or forbearing to do an "official act" or doing or forbearing to show favour or disfavour to someone in the exercise of his "official functions". The third contingency i. e. "rendering or attempting to render any service or disservice to someone with the Central Government or any State Government or Parliament or the Legislature of any State or any public servant" was not relevant in the present case and as such the question of the same being attracted did not arise. It is thus clear that the challan and the documents submitted therewith did not contain any material on the basis of which the Special Judge could form an opinion that there was ground for presuming that the accused had committed an offence punishable u/s 161 of the Indian Penal Code and framed a charge under the said section against him.

Coming to section 5(1)(d) of the Prevention of Corruption Act, it cannot be disputed that the provisions thereof are more comprehensive and wider in amplitude than those of section 161 of the Indian Penal Code. u/s 5(1)(d) of the Prevention of Corruption Act, a public servant is said to commit the offence of criminal misconduct if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage. (Emphasis supplied). By the Central Act 40 of 1964, the words "in the discharge of his duty" were omitted from the section. But even before such omission it was held by their Lordships of the Supreme Court in *Dhaneshwar Narain Saxena Vs. The Delhi Administration*, overruling their earlier decision in *The State of Ajmer (Now Rajasthan) Vs. Shivji Lal*, that in order to constitute an offence u/s 5(1)(d) of the Prevention of Corruption Act it is not necessary that the public servant should do something in this discharge of his own duty and thereby obtain valuable thing or pecuniary advantage. He would be equally guilty of an offence under the said section if he obtained valuable thing or pecuniary advantage for a third person by corrupt or

illegal means or otherwise abusing his official position as a public servant in order to corrupt some other public servant, without their being any question of his misconducting himself in the discharge of his own duty.

But, then, as thereafter pointed by their Lordships in *State of Gujarat v. Manshankar Prabhashankar Dwivedi* A I R 1962 S C 330, the question whether for the commission for an offence u/s 5(1)(d) of the Prevention of Corruption Act abuse of position as a public servant was of the essence or the essential ingredient of the offence was not argued or decided by them in *Dhaneshwar Narain Saxena's* case (supra). The said question was specifically considered by their Lordships in *State of Gujarat v. M.P. Dwivedi's* case (supra). Placing reliance on certain observations made in their earlier decision in *M. Narayanan Nambiar Vs. State of Kerala*, it was held by them that the abuse of the position as a public servant would be the necessary ingredient of the offence - the abuse being either by corrupt or illegal means or by other means of the nature mentioned in *Narayanan Nambir's* case (supra).

In fact, the facts of the case before their Lordships in *State of Gujarat v. M.P. Dwivedi's* (supra) were in all essential respects more or less similar to the facts of the present case. As in the present case, accused Dwivedi in that case had two positions --(i) he was a lecturer in a Government college and (ii) he was an examiner appointed by the Gujarat University for doing examination work on remuneration paid by the University. As a lecturer in Government College he fell within the definition of "public servant" but the Act of corruption attributed to him was in his capacity as an examiner. The question arose whether section 5(1)(d) of the Prevention of corruption Act would apply to the case of a Government servant who committed an act punishable under the said provision even though when the act was committed by him he was holding a different position which was not that of a Government servant and in which capacity alone he could fall within the definition of a "public servant". It was held by their Lordships that as Dwivedi was not a "public servant" when he was acting as an examiner it could not be said that there had been any abuse by him of his position as a "public servant". In the present case also, accused Maheshwar Sahai had two positions-- (i) he was Assistant Director of Ordnance Factories and (ii) he was an arbitrator appointed by one of the parties to a contract to resolve certain dispute between it and the other party in accordance with the terms and conditions of the contract. As Assistant Director of Ordnance Factories he certainly fell within the definition of a "public servant" but the act of corruption attributed to him was in his capacity as an arbitrator appointed by one of the parties to the contract in which capacity he was not "public servant". In the circumstances, following *State of Gujarat v. M.P. Dwivedi* (supra), it could not be said that there had been any abuse by him of his position as a "public servant". It is thus clear that the challan and the documents submitted therewith did not contain any material on the basis of which the Special Judge could form an opinion that there was ground for presuming that the accused had committed an offence punishable u/s 5(2) read with section 5(1)(d) of the Prevention of Corruption Act and frame a charge

under the said section against him.

For the reasons stated above, it has to be held that the challan and the documents submitted therewith did not contain any material on the basis of which it could be presumed by the Special Judge that the accused had committed any offence punishable u/s 161 of the Indian Penal Code or u/s 5(2) read with section 5(1)(d) of the Prevention of Corruption Act. It is noteworthy that the jurisdiction to try any other offence under the Penal Code becomes available to a Special Judge only when he acquires the power to try the offences enumerated in section 6 of the Criminal Law (Amendment) Act, 1952. In the present case, as stated above, he had no jurisdiction to try the accused, u/s 161 of the Indian Penal Code or section 5(2) read with section 5(1) of the Prevention of Corruption Act or for any other offence enumerated in section 6 of the Criminal Law (Amendment) Act. In the circumstances, there was no jurisdiction in him to try the accused for any other offence punishable under the Penal Code.

Accordingly, the petition is allowed. The proceedings taken against the accused in Special Case No. 5 of 1978 pending in the Court of the Special Judge, Jabalpur are quashed.