
(2018) 09 UK CK 0112

In the Uttarakhand High Court

Case No : Criminal Misc. Application (C-482) No. 509 of 2013

Major Ajay Kothiyal (Now Coln.)

APPELLANT

Vs

State of Uttarakhand

RESPONDENT

Date of Decision : 28-09-2018

Acts Referred:

Code of Criminal Procedure, 1973 — Section 197, 202, 482

Wild Life (Protection) Act, 1972 — Section 2(15), 2(17), 27, 28(2), 30, 35(6)(8), 52

Constitution of India, 1950 — Article 356

Citation : (2018) 09 UK CK 0112

Hon'ble Judges : V.K. Bist, J

Bench : Single Bench

Advocate : Vipul Sharma, V.K. Jemini, Dinesh Chauhan

Final Decision : Allowed

Judgement

V.K. Bist, J.

1. This criminal miscellaneous application filed under Section 482 of Cr.P.C., is directed against the order dated 08.02.2006 passed by the learned

Chief Judicial Magistrate, Chamoli in Criminal Complaint Case No.1178 of 2005, as also the order dated 25.04.2013 passed by the learned Sessions

Judge, Chamoli in Criminal Revision No.49 of 2010. Further, prayer has been made in the present criminal miscellaneous application for quashing the

proceedings of Criminal Case No.1178 of 2005, pending before the learned Chief Judicial Magistrate, Chamoli.

2. Facts relating to the present case, in brief, are that the applicant is serving as a Colonel in the Indian Army. In the year 2005, he was posted as

Major in the Fourth Gorkha Rifles in Gurdaspur (Punjab). In May 2005, the Army Wing of Garhwal Scouts Joshimath planned expedition to mount

Trishool-Nanda Devi peak, wherein Colonel Sunil Kotnala was attached as Team Leader by the Indian Army with prior permission of Principal

Conservator of Forest (Wild Life) dated 23.04.2005. Pursuant to the said permission of Forest Department dated 23.04.2005, Army Adventure Wing

of Military Training, Army Head Quarters, New Delhi issued a letter dated 12.05.2005 to the Central Head Quarter Commandant, Lucknow and

sanction was accorded to conduct Mountaineering cum Skiing expedition by Garhwal Scouts to mount Trishool within time schedule given in the letter.

In the said letter, it was directed that the expedition will be led by Colonel Sunil Kotnala and applicant will be leader of climbing team. Certain

conditions were also mentioned in the said letter which were required to be followed by them. The expedition was completed within the frame of time

schedule and, after completion of the same, the team returned to the parent regiment. When the applicant and others returned to their parent regiment,

applicant came to know that a Criminal Complaint Case No.1178 of 2005 was filed by Mr. Madan Lal Rahi, Forest Range Officer, Nand Devi,

National Park against the applicant and Colonel Sunil Kotnala (Team Leader) under Section 2(15), 2(17), 27, 28(2), 30, 35(6)(8), 52 of Wild Life

(Protection) Act, 1972 in which, after taking cognizance, summoning order was passed by the learned Chief Judicial Magistrate, Chamoli against the

applicant as well as Colonel Sunil Kotnala. A Criminal Revision No.49 of 2010 was preferred against the said order by the applicant before the

Sessions Judge, Chamoli, which was dismissed on 25.04.2013. Aggrieved by these orders, present criminal miscellaneous application under Section

482 of Cr.P.C. has been preferred by the applicant.

3. Learned counsel for the applicant submitted that the applicant went on military expedition which was mountaineering cum skiing expedition by

Garhwal Scout. The expedition was led by Colonel Sunil Kotnala Commanding Officer of Garhwal Scouts. The applicant was a member of the

climbing team. Entire exercise was done after taking due permission from Army Adventure Wing of Military Training, Army Head Quarter, New

Delhi. Prior permission of Principal Conservator of Forest (Wild Life) was also taken. It is submitted that in such a matter, previous sanction from

Competent Authority is mandatory before prosecuting the public servant. Sanction is required to be taken under Section 197 of Cr.P.C., before taking

cognizance. He submitted that in the present case, since no sanction was ever taken from the Central Government, which is the appropriate authority

in the case, therefore, the proceedings are liable to be quashed. In order to buttress his argument, learned counsel for the applicant relied upon the

judgment of the Honâ??ble Apex Court in the matter of N.K. Ganguly vs. C.B.I., reported in (2016) 2 SCC 143 and D.T. Virupakshappa vs. C.

Subash, reported in (2015) 12 SCC 231.

4. On the other hand, learned State counsel submitted that though the applicant got a permission from the Principal Conservator of Forest (Wild Life)

on 23. 04.2005, but the permission was granted only in respect to 5 +5 persons groups. The applicant who was the leader of the Group managed to

enter into the forest area with 76 Army Officers and Soldiers plus 25 porters. When the staff of the concerned Forest Range tried to stop them, they

did not follow the directions of the Forest staff and continuously moved ahead, as such they violated the terms and conditions of the permission

granted to them by the Forest Department. Thereafter, a case was filed against the applicant-Major Ajay Kothiyal and Colonel Sunil Kotnala (C.O.)

by the respondents on the basis of the report received from Range Officer, Joshimath Range, Nanda Devi National Park. The same was registered as

Compliant Case No.1178 of 2005. The learned Chief Judicial Magistrate, after considering the complaint as also the statement recorded of the

witnesss under Section 202 of Cr.P.C., passed summoning order.

5. I have considered the submission advanced by the learned counsel for the parties and have perused the papers available on record.

6. Preliminary question to be decided by the Court is whether the learned Chief Judicial Magistrate, Chamoli was legally correct in taking cognizance

of alleged offence against the applicant, who is a member of the Armed Forces, without previous sanction of the Central Government. Section 197

provides that no Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Indian Army

while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

7. Section 197 of Cr.P.C., is being referred hereinafter:

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 Court 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 affairs 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 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression"" State Government"" occurring therein,

the expression"" Central 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) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of

the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of

that sub- section will apply as if for the expression"" Central Government"" occurring therein, the expression"" State Government"" were substituted.

(3A) 1 Notwithstanding anything contained in sub- section (3), no court shall take cognizance of any offence, alleged to have been committed by any

member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty

during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction

of the Central Government.

(3B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State

Government or any cognizance taken by a court upon such sanction, during the

period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the court to take cognizance thereon.]

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held.â??

8. The Honâ??ble Supreme court in the matter of D.T. Virupakshappa vs. C. Subash, reported in (2015) 12 SCC 231 has held that act committed by the government servant in discharge of his official duty, prior sanction of the Government is necessary. Paragraph no.5 & 6 of the said judgment are quoted hereinunder:

5. The question, whether sanction is necessary or not, may arise on any stage of the proceedings, and in a given case, it may arise at the stage of inception as held by this Court in Om Prakash vs. State of Uttarakhand, reported in (2012) 12 SCC 72; Para 41:

â??41. The upshot of this discussion is that whether sanction is necessary or not has to be decided from stage to stage. This question may arise at

any stage of the proceeding. In a given case, it may arise at the inception. There may be unassailable and unimpeachable circumstances on record

which may establish at the outset that the police officer or public servant was acting in performance of his official duty and is entitled to protection

given under Section 197 of the Code. It is not possible for us to hold that in such a case, the Court cannot look into any documents produced by the

accused or the public servant concerned at the inception. The nature of the complaint may have to be kept in mind. It must be remembered that

previous sanction is a precondition for taking cognizance of the offence and, therefore, there is no requirement that the accused must wait till the

charges are framed to raise this plea.â??

6. In the case before us, the allegation is that the appellant exceeded in exercising his power during investigation of a criminal case and assaulted the respondent in order to extract some information with regard to the death of one Sannamma, and in that connection, the respondent was detained in the police station for some time. Therefore, the alleged conduct has an essential connection with the discharge of the official duty. Under Section 197 Cr.P.C., in case, the government servant accused of an offence, which is alleged to have been committed by him while acting or purporting to act in discharge of his official duty, the previous sanction is necessary.

9. This Court finds that the following allegations are made against the applicant in the body of the complaint-

(i) The expedition team entered into Nanda Devi National Park through Bufkini Dhar whereas they had to take the route through Nanda Devi Biosphere Reserve.

(ii) The expedition team did not include members of Forest Department in the expedition. Major Ajay Kothiyal, threatened and shouted at a Forest Guard (Raj Singh Kunwar) when he insisted for being member of the expedition.

(iii) The members of the expedition team had lit fire by burning branches of tree for cooking in the National Park.

(iv) The expedition team which was for Mountaineering cum Skiing Expedition had conducted Skiing.

(v) The expedition team had not deposited the requisite fee.

(vi) The expedition team had not submitted form 1/declaration as per the provision of Uttaranchal Mountaineering Directory. The expedition team had also not submitted a declaration to DFO, Nanda Devi.

(vii) The team had done video recording and used generator in the National Park.

(viii) After completion of expedition, team did not deposit inorganic garbage.

10. It appears from the record that the forest department did not write to the Central Government or the competent authority about the irregularities committed by the applicant and his team. Instead a complaint was filed before the Chief Judicial Magistrate, Chamoli. It was open to them to seek prior sanction from the Central Government before filing a complaint against the applicant. It is not in dispute that at the relevant time the applicant was Major in the Indian Army. He was chosen as a member of the expedition

team. Another officer Colonel Sunil Kotnala was selected as team leader of the expedition team. Permission was accorded for conducting of mountaineering cum skiing expedition by the Army Adventure Wing, Military Training, Army Head Quarters, New Delhi. Prior permission of Conservator of Forest (Wild Life) was also taken for the said purpose. It is not a case where the applicant committed any breach in private capacity. Work of expedition was assigned to him under the directions of the Army Adventure Wing of Military Training, Army Head Quarters. It cannot be said that the entire exercise of expedition was not done by him in discharge of his official duty. It is undisputed fact that no prior sanction was taken from the Central Government. In view of these facts, it is held that the work of mountaineering and skiing expedition of the applicant was part of his official duty. Since, no prior sanction was taken from the Central Government, therefore, this Court is of the view that the criminal proceedings initiated against the applicant could not have been initiated as the same are not legal and are in violation of the provision of law.

11. Another thing to be considered is that the expedition team undertook an expedition to mount Trishool-Nanda Devi Peak and took the extremely challenging route for their expedition. It has come on record that as the tracking route was inaccessible, the team deemed it fit that the forest officials should not accompany them as all the team members were thorough professionals and possessed requisite skills and training to undertake the said expedition. The team members, comprising of Army personnel, were highly skilled and trained in accomplishing such covert operations and expeditions. It is supposed that they should accomplish the task assigned to them and return back quickly at once, as such, the expedition team chooses to ski down to their base camp after completion of the expedition. As far as, filming of videography of the expedition is concerned, it is a thing of common knowledge that the recording may be used for imparting future training to other army personnel for future expeditions. It is quite obvious that the Army Personnel are well trained in executing such covert operation and nothing has to be left behind after completion of such operation/ expedition so that the enemy could not get an idea that such expedition/task ever took place. There is another aspect of the matter. The operations/expeditions of the Army are always kept secret from the general

public. Any criticism or allegation which comes in between their line of duty has a highly demoralizing affect on the morale of the Army.

12. In view of above discussion, the present criminal miscellaneous application under Section 482 of Cr.P.C., would stand allowed. Summoning order

dated 08.02.2006 passed by the Chief Judicial Magistrate, Chamoli in Criminal Complaint Case No. 1178 of 2005 as well as the order passed by

Sessions Judge, Chamoli dated 25.04.2013 in Criminal Revision No. 49 of 2010 are set aside. The proceedings of Criminal Complaint Case No.1178 of

2005, pending in the Court of Chief Judicial Magistrate, Chamoli, are hereby quashed.

13. No order as to costs.