
(1970) 02 OHC CK 0037

In the Orissa High Court

Mulsankar Ojha

APPELLANT

Vs

Bhagaban Misra and Others

RESPONDENT

Date of Decision : 03-02-1970

Acts Referred:

Penal Code, 1860 (IPC) — Section 352, 448

Citation : (1970) 36 CLT 873 : (1971) CriLJ 442

Hon'ble Judges : B.K. Patra, J

Bench : Single Bench

Judgement

B.K. Patra, J.—The question involved in this revision petition is whether u/s 197, Criminal P.C., sanction of the State Government is necessary for the prosecution of the opposite parties for offences Under Sections 448 and 352, Indian Penal Code alleged to have been committed by them. In March, 1958, Government granted a loan of Rs. 40,000/- to the petitioner under the Bihar and Orissa State Aid to Industries Act, 1923 on the condition that he would repay the same in twenty half-yearly installments, the first instalment being payable one year after the date of the receipt of the loan with interest as stipulated in the bond. In accordance with the terms of repayment, the petitioner repaid the instalments due on 30-3-1959, 30-9-59 and 31-3-1960-Rs. 6,000/- towards principal and Rs. 2,310/- towards interest As he defaulted to pay the instalments which subsequently fall due, the Director of Industries filed a certificate case on 16-2-62 in the court of the Certificate Officer, Cuttack for recovery of the balance amount of Rs. 34,000/ towards principal and Rs. 2,020/- towards interest due up to 31-1-1962. from the order sheet of the certificate Case it is seen, that the notice of institution of the case was issued by the Court and was served on the petitioner by 27-10.1962. But as no payment was made, distress warrant was issued, On the first occasion when such a warrant was issued the petitioner paid Rs. 2,000/ to the process server. Distress warrant was issued a second time and only a sum of Rs, 1,000/- was collected. On 12-12-1964, distress warrant and also a warrant of arrest were issued against him. The petitioner was produced in Court, and on his application, Rs. 2,000/- which he offered immediately, was

accepted and he was given time to pay the balance at the rate of Rs. 2,000/- per month. Obviously no further payment was made as agreed and therefore by order dated 18-4-1961 a warrant of arrest was issued against him. On this occasion he paid Rs. 500/-. Arrest warrants and distress warrants were issued thereafter against him, but they could not be executed because the petitioner was found absent from his house. This went on till 9-8-1966 on which day, opposite party No. 1, the Certificate Officer accompanied by opposite party No. 2, the Assistant Director of Industries personally went to the house of the petitioner to realise the balance dues from him. The order recorded on that day by the Certificate Officer shows that the petitioner was absent from his house and therefore they had to wait for two hours there and when he came back the amount due from him was demanded. But he expressed his inability to pay the same and hence he was brought to Court under arrest. After he was brought to Court, he submitted a petition through his Advocate to give him three months time to pay the dues and he was released from detention. A few days thereafter that is, on 22.3. 1966, an application was filed on behalf of the petitioner praying for cancellation of the certificate on the ground that notice of the institution of the case had never been served on him, and that in any case, the State aid given to him having not been terminated by the State Government, no certificate case could be instituted against him. On 4-4-1966, the Certificate Officer set aside the certificate on the ground that the State Aid had not been terminated u/s 19A of the Bihar and Orissa State Aid to Industries Act and as such the certificate filed is not regular.

2. On 14-7-1966, the petitioner filed a complaint petition in the Court of the Sub-divisional Magistrate, Cuttack alleging that on 9.8.1966, the two opposite parties had trespassed into his house at a time when the petitioner was not there, that they abused his mother and threatened to attach his moveables, and that when the petitioner returned home, they demanded payment of the loan amount. When he pointed out the illegality of the initiation of the certificate case and expressed his inability to pay the amount he was physically dragged by the opposite parties to a jeep under arrest in presence of several persons, who, by then, had gathered near his house and thereby his prestige was also lowered. The Sub-divisional Magistrate sent the complaint for enquiry to another Magistrate, who, after enquiry, found that a prima facie case Under Sections 448 and 352, IPC, had been made out against the opposite parties. After receipt of this report and before cognizance was taken by the S. D. M., the case was transferred to another Magistrate for disposal before whom it was urged on behalf of the opposite parties that in the circumstances in which they are alleged to have acted in the case they cannot be prosecuted without obtaining sanction u/s 197, Cr.PC. The learned Magistrate accepted this contention and ordered the acquittal of the opposite parties u/s 249, Cr.PC. The correctness of the order passed by him is being challenged in the present case.

3. Section 197, Cr.PC, as far as is relevant may be quoted.

197. Prosecution of Judges and public servants.

(1) * * * when any public servant who is not removable from his office save by or with the sanction of a State 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) * * * (b) in the case of a person employed in connection with the affairs of a State of the State Government.

(a) * * *

The object of the Section is to guard against vexatious proceedings against public servants and to secure the opinion of the superior authority whether it is desirable that there should be a prosecution. Before the Section can be invoked in the case of a public servant, two conditions must be satisfied :

(1) That the accused is a public servant who is removable from his office only with the sanction of the State Government or Central Government; and

(2) He must be accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty.

The interpretation of the words "accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty" is not free from difficulty. The difficulty is felt more in the actual application of the principle underlying Section 197, Cr.PC, rather than in enunciation of the principle itself. The leading case on the subject; is *Dr. Hori Ram Singh v. Emperor* AIR 1939 P C 43, where Varadachariar, J, after referring to the case law on the subject classified the decisions as falling into three groups so far as they attempted to state something in the nature of a test. In one group of cases, it is insisted that there must be something in the nature of the act complained of that attaches it to the official character of the person doing it. In the second group, stress is laid on the official character or status of the accused which gives him the opportunity to commit the offence. In the third group of cases, stress is laid al. most exclusively on the fact that it was at a time when the accused was engaged in his official duty that the alleged offence was said to have been committed. His Lordship with reference to the principle enunciated in the three groups of cases opined that the test laid, down in the first group of cases is the correct test. In the course of his judgment the learned Judge observed that the question was substantially one of fact and required to be determined with reference to the act complained of and the attendant circumstances and that it was not desirable to attempt to lay down any hard and fast test. The views of Varadachariar, J. were approved by the Privy Council in *H. H. B. Gill v. The King*, AIR 1948 P C 123. Their Lordships while accepting that in the circumstances prevailing in India, a large measure of protection from harassing proceedings may be necessary for public officials, proceeded to point out that 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 such duty. The illustrate the point *" it was stated therein that a Judge could not be said to act or purport to act in the discharge of his official duty in receiving a bribe in connection with a judgment delivered by him, although the judgment was as official act, and that similarly, a Government Medical Officer could not be said to have acted or purported to act as a public servant in picking the pocket of a patient whom he was examining, although the examination itself was an official act. According to their Lordships, the test is whether the public servant, if challenged, can reasonably claim that, what he did, was by virtue of his office.

4. In *Amrik Singh Vs. The State of Pepsu*, while dealing with Section, 197, Criminal P.C.(Venkatarama Ayyar J. observed :

It is not every offence committed by a public servant that requires sanction for prosecution u/s 197 (1), Criminal Procedure Code; nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his-official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary; and that would be so irrespective of whether it wa³, in fact, a proper discharge of his duties, because that would really be a matter of defence on the merits, which would have to be investigated at the trial, and could not arise at the stage of the grant of sanction, which must precede the institution of the prosecution.

In the following year, Chandrasekhara Aiyar J. in *Matajog Dobey v. H. O. Bhari* AIR 1996 S C 41 after examining the decisions on the subject including the previous decision of the Supreme Court laid down that the result of the authorities was that there must be a reasonable connection between the act and the discharge of official duty and that the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty. That case arose in connection with search of certain premises in certain proceedings before the Income Tax Investigation Commission. The Commission issued a search warrant to certain officials who had assisted in the search. During such assistance, a scuffle ensued between the officials and the complainants as a result of which the latter were injured. The complainants filed a complaint under 8a. 323, 841, 3)2 and 109, IPC. against the officials. The proceedings were quashed by the High Court on the ground that sanction u/s 197, Criminal P.C. was necessary. On appeal to the Supreme Court, the appeal was dismissed and the Supreme Court held that the act³ of the public servants engaged in the search were not entirely divorced from or unconnected with the discharge of their duty, that it could be said to be an independent act maliciously done and that the officials could reasonably claim that what they did was by virtue of their official duty irrespective of the fact whether the claim was ultimately to be well-founded or not. The belief of the accused that they had a right to get rid of the obstruction then and there by binding down the

complainants or removing them from the place might be mistaken, but, they were definitely related to the performance of their official duties.

5. It is unnecessary to refer to a large number of other cases cited at the bar which more or less are on the lines of the decisions referred to above. The principle deducible from these decisions appears to me to lead to the following conclusion: -

In the first place, the policy of the Legislature is to afford reasonable protection to public servants acting or purporting to act in the discharge of their duties and in the second place, this protection has certain limits and can only be claimed in the circumstances where the acts complained against and alleged to have been done by the public servants are reasonably connected with the discharge of their official duties and are not merely a cloak for doing the objectionable act. The circumstance that while so acting, the public servants acted in excess of their duty will not be a sufficient ground for deprivation of such protection so long as there is a reasonable connection between the impugned act and the performance of the official duty. Lastly, whether a particular act can be said to be done in the exercise of official duty or in the purported exercise of such duty is essentially and substantially a question which will have to be determined on the facts and circumstances of each case and it is neither easy nor possible to lay down any hard and fast formula for the ascertainment of this question.

6. Bearing these principles in mind, if the facts of the present case are examined, the conclusion appears to be inevitable that the impugned acts were done by the opposite parties in the purported exercise of their official duty. Mr. Kanungo appearing for the petitioner laid considerable emphasis on three circumstances on the basis of which he contends that the impugned acts cannot be said to have been done in the discharge of the official duties of the opposite parties. Firstly the starting of the proceedings under the Public Demands Recovery Act against the petitioner is itself illegal. No such proceeding is maintainable before the State Government terminated the State aid on account of default under 3. 19A of the Bihar and Orissa State Aid to Industries Act. Secondly assuming that the proceedings are maintainable, the formalities required to be complied with before a warrant of arrest is issued have not been complied with. Thirdly that very fact that the Certificate Officer himself went to execute the warrant of arrest instead of entrusting the warrant, as is usually done, to the bailiff of the Court shows his mala fide.

7. Chapter III of the Bihar and Orissa State Aid to Industries Act, 1923 contains provisions regulating the giving of State aid otherwise than by the supply of machinery under the hire purchase system. It is under this Chapter that State aid is given to the Industries by way of loans. Section 20 which also occurs in Chap. III provides that all moneys recoverable under that Chapter may be recovered by the Director of Industries from the person aided and his surety, as if they were arrears of land revenue. Section 19A of the Act gives power to the State Government to terminate the State Aid in respect of an industry on certain

grounds mentioned therein and provides that on so terminating the aid, the Government may proceed to recover from the person aided the whole amount of any loan outstanding together with the interest due thereon as an arrear of land revenue. There is nothing in the Section to indicate that unless the State Aid is terminated, Government would not be able to recover from the person aided the loan in instalments as agreed at the time of the advance. That apart the very fact that towards his dues covered by the certificate, the petitioner had made several payments indicates that he had never any doubts about the legality of the certificate proceedings.

8. Sub-section (1) of Section 37 of the Public Demands Recovery Act provides that do order for the arrest and detention in civil prison of a certificate-debtor in execution of a certificate shall be made unless the Certificate Officer has issued and served a notice upon the certificate-debtor calling upon him to appear before him on a day to be specified in the notice and to show cause why he should not be committed to civil prison, and unless the Certificate Officer is satisfied about the existence of certain circumstances mentioned in Clause (a) and (b) thereof. But Sub-section (2) of Section 37 of the Act provides that notwithstanding anything contained in Sub-section (1), if the Certificate Officer is satisfied that the certificate debtor refuses or neglects or has refused or neglected to pay the dues, he may issue a warrant of arrest of the certificate debtor. The history of this case, as narrated earlier, would show that the petitioner not only has neglected to pay the dues but also that he refused to make any payment on the date of occurrence when the dues were "first demanded from him before he was arrested.

9. That the Certificate Officer: himself has proceeded to the petitioner's house to arrest him cannot be a circumstance either to affect the legality of the step taken or to indicate that the Certificate Officer was guilty of mala fides. On certain previous occasions when warrants were issued against the debtor, they were returned with the endorsement that he was not found at his house. A special drive for realisation of certificate dues appears to have been undertaken and in pursuance of that the Certificate Officer accompanied by a representative of the certificate creditor went to the petitioner's house, and finding him absent from his house waited there for some time and after he came back, they demanded the dues. It is only after he had expressed his inability to make the payment, as stated in the complaint petition itself, that he was arrested and brought to Court.

10. In any case, the Certificate Officer had jurisdiction to arrest the petitioner for realisation of the debt and even if -in the professed exercise of that jurisdiction he acts ultra vires his powers, he has nonetheless acted as such "public servant" within the meaning of Section 197, CrIPC. and will be entitled to the protection envisaged therein,

11. In the circumstances discussed above, I would hold that the opposite parties are entitled to the protection envisaged u/s 197, CrIPC. and that they cannot be

prosecuted without the sanction of the State Government.
The application fails and is dismissed.