(2018) 08 J&K CK 0018

In the Jammu And Kashmir High Court

Case No : Criminal Miscellaneous Case No.. 83 Of 2017

Najam-Ud-Din Lone @APPELLANT@Hash State Of Jammu & Kashmir And Others

Date of Decision : 06-08-2018

Acts Referred:

Jammu and Kashmir State Ranbir Penal Code, 1989 — Section 195, 301, 409, 420, 465, 468, 471
Code of Criminal Procedure 1973, — Section 195, 197, 561A
General Clauses Act, 1977 — Section 26
Prevention of Corruption Act, 1988 — Section 6
Indian Penal Code, 1860 — Section 120B, 409

Citation : (2018) 08 J&K CK 0018

Hon'ble Judges : M. K. Hanjura, J

Bench : Single Bench

Final Decision : Disposed Off

Judgement

1. The moot questions raised for determination herein this case are first, whether by subverting the process of the provisions of the Prevention of

Corruption Act, and second, the Code of Criminal Procedure which require the sanction of the competent authority as a condition precedent for the

initiation of prosecution against an erring accused can be diluted when the factual aspect prima facie disclose the commission of an offence that falls

within the fours of the Provisions of the Prevention of Corruption Act or relates to the discharge of official duties. In order to find out an answer to

these questions a brief resume of the facts of the case require to be narrated herein below and they are as under:-

2. Najam-ud-din Lone, the petitioner while working as Zonal Education Officer, Budgam, was placed under suspension by an Order bearing No.

1088-Edu of 2013 dated 31.12.2013 issued by the Secretary to Government, School Education Department, Jammu and Kashmir. Simultaneously, an

FIR bearing No: 333/2012 for the commission of offences under Section 409/420 RPC came to be registered against the petitioner at Police Station

Budgam on the basis of a complaint of the complainant, namely, Jehangir Abdullah Dar, a resident of Beerwah, addressed to the Inspector General of

Police, Crime Branch, J&K, who implicated the petitioner and others in a number of cases involving fake appointments, misappropriation of school

funds and midday meals etc. (reckoned and calculated at Rs 5 lakhs approximately) with which the investigation ensued. On the completion of the

investigation of the case a charge sheet was laid against the petitioner before the court of the learned Chief Judicial Magistrate, Budgam, for the

commission of the aforesaid offences. By order dated 25.03.2017 of the trial court, the petitioner was charged for the commission of offences under

sections 420, 409 RPC.

3. Aggrieved by the order of charge dated 25.03.2017 of the Ld. Chief Judicial Magistrate, Budgam , the petitioner filed a petition before this Court

under and in terms of Section 561-A of Code of Criminal Procedure on the grounds, inter alia, that the prosecution could not have been launched

against him for the offences alleged to have been committed by him while discharging the duties in official capacity otherwise than by a sanction from

the Government as required under Section 197 Cr.P.C. especially in presence of the contemplated departmental enquiry which has been initiated

against him. It is further stated that the trial court had no jurisdiction to take cognizance of the case in absence of the sanction which has caused

severe prejudice to him and therefore, the proceedings are liable to be quashed.

4. Heard and considered.

5. Dealing with the first question it needs to be stated that the crux of the arguments of the learned counsel for the petitioner is that the accusations

levelled against the petitioner herein this case squarely falls within the canons of the provisions of the Corruption laws which require the sanction of

the competent authority and without which prosecution cannot be commenced. It has further been argued that by adhering to a mode, i.e., in

prosecuting the petitioner for offences under the penal code, the petitioner has been deprived of a valuable right that would accrue to him , had he

been prose3cuted under the Corruption Laws inasmuch as the competent authority was obliged to apply its mind to the facts and circumstances of the case so as to ascertain, whether or not, initiation of prosecution against the petitioner is warranted. This subterfuge in prosecuting a public servant for

the offences under the ordinary provisions of the Penal Code by giving a complete goby to the provisions of the Special enactment has the effect of

the demolition of the whole prosecution edifice as per the submission of the Ld. counsel for the petitioner who has placed reliance on a catena of

judicial pronouncements to canvass his argument which will be dealt with hereinafter.

6. The learned counsel for the respondents on the other hand is of the view that the arguments as preferred by the learned counsel for the petitioner

are not in tune with the enactment of General Clauses Act, which provides that where an act of omission constitutes an offence under two or more

enactments, then the offender shall be liable to be prosecuted and punished under either of those enactments, but shall not be liable to be punished

twice for the same offence. This being so the learned Additional Advocate General has characterized the argument of the counsel for the petitioner as

a spurious argument which becomes redundant in the face of what is postulated by General Clauses Act as said herein before. As per the learned

counsel for the respondents, thus the Court has to proceed with the trial of the case for offences under section 409 and 420 RPC without the

requirement of sanction.

7. To resolve the question raised hereinbefore counsel for the petitioner has placed reliance on the law laid down in 1988 Cr.L.J. 1363 delivered by

Honâ??ble Mr. Justice B. L. Hansaria (later Judge of the Supreme Court of India) and 1992 Cr.L.J. 1672. Both these authorities have been taken

note of by His Lordship Honâ??ble Mr. Justice T. S. Doabia, as he then was, while dealing with an identical matter titled as Central Bureau of

Investigation, through Superintendent of Police v. Sh. Romesh Kumar in case 561-A Cr.P.C. No. 19/97 decided by a lucid judgement dated

20.09.2000 which runs as follows:

â??Respondent, Romesh Kumar, happened to be a Stenographer / Confidential Assistant with the then Chairman of Railway Recruitment Board,

Jammu, Panel No. 243 of 18 candidates for the post of Ticket Collector was prepared on 24th July, 1992. The allegation against the respondent was

that later on, ten more candidates were added to the said panel. Thus, instead of

18 candidates, the names of 29 candidates with the application forms

were sent to the Divisional Officer, Parampur. This was done on 27th July, 1992. Not only this, another fake panel No. 243-A dated 31st July, 1992

containing the forged signatures of the then Chairman of the Board, is also said to have been prepared by the respondents. The names of three more

candidates were included in this panel. This as shown to have been issued by the Chairman of the Board. In all, thirteen application forms of the

candidates who never came to be selected, came to be forwarded to the Parampur Office. It was alleged that the respondent had received handsome

amount for this act of his. Evidence was collected, one Lalit Kumar is said to have deposed that the respondent had demanded a sum of Rs.60,000/-

from him. He stated that an amount of Rs. 30,000/- was paid to the respondent by him. The trial court came to the conclusion that, no doubt, the

respondent has been charged under sections 420, 465, 468, 471 and 301 of the Penal Code, but the case also fell within the parameters of Prevention

of Corruption Act, and therefore, unless and until there is sanction of the competent authority, it would not be apt to continue with the trial. The

proceedings were quashed at the challan stage. This order was challenged in a revision petition before the Court of Session. The court of Session

upheld the order passed by the trial Magistrate and in doing so, relied upon the view expressed by Gauhati High Court in case reported as SH

Choudhary v. State, 1992 Cr.L.J. 1472 and also the view expressed in the case of Sudhandra Kumar Bhattacharjee v. State 1988 Cr. L.J. 1563.â??

8. The learned counsel for the respondents placing reliance on a Full Bench decision of the Bombay High Court reported as â??State v.

PandurangBaburao, AIR 1955 Bombay 451, submits that the sanction is not necessary as the prosecution under the penal provisions of the Penal

Code can go on notwithstanding the fact that the case fell within the parameters of Prevention of Corruption Act.

9. The question which arises is as to whether a particular act falling within two statutory provisions, one requiring sanction for prosecution and the

other not requiring, can be tried without obtaining sanction. The present case involves the conduct of the petitioner as a public servant for having

abused of his official position for which the sanction to prosecute is necessary under the provisions of Prevention of Corruption Act. Therefore, the prosecution launched for the offences under RPC cannot be resorted to for avoiding the necessary sanction as per the principle of law emerging from

the judgement of the Honâ??ble Apex Court supra.

10. The Full Bench of the Bombay High Court decision on which reliance has been placed by the learned counsel for the respondent does support the

view sought to be projected by him. As a matter of fact, there was an earlier Full Bench decision of Bombay High Court reported as State v.

Sahebrao, AIR 1954, Bombay 549. In this decision, it was pointed out that it was open to the State to prosecute a person under section 409 of the

Penal Code, according to the procedure laid down in the Criminal Procedure Code, 1898, notwithstanding the special provisions contained in the

Prevention of Corruption Act. Later on, another Division Bench of the Bombay High Court took a view that if one enactment constituting a certain

offence required sanction and another enactment constituting an offence do not require sanction, then it was obligatory upon the prosecution to

continue under the enactment which required a sanction. The view taken was that if the prosecution did not do so, it would amount to evading a

provision of law which required a sanction, which was the procedure laid down for the benefit of an accused. As a matter of fact, it was on account

of the aforementioned decision of the Division Bench that the necessity to constitute another Full Bench arose. This Full Bench, i.e., in the case of

State v. PandurangBaburao, AIR 1955 Bom 451, expressed an opinion that it was open to the prosecution to prosecute a person under the Penal Code

and it is not necessary to obtain a sanction. Reliance was placed on Section 26 of the General Clauses Act. It was observed that there is a clear

Legislative Sanction in favour of the option to be exercised by the prosecution where an act or omission constitutes an offence under two different

enactments and the Legislature has made it quite clear that if offender is liable under the one or other enactment then he can be tried under either of

them. It was indicated that the only prohibition contained in Section 26 was to the effect that the offender is not liable to be punished twice for the

same offence.

11. Now the point of view put across by the petitioner be examined.

12. The counsel for the petitioner has basically placed reliance on a decision of Gauhati High Court reported as 1988 Cr. L.J. 1563, Sudhandra Kumar

Bhattacharjee v. State. In the above cases, the prosecution was launched under the Prevention of Corruption Act as also under Section 409 of the

Penal Code. The allegation was that the appellant in this case had misappropriated a total amount of Rs. 2,281,82, B. L. Hansaria, Jâ??, later Judge

of the Supreme Court of India, expressed an opinion to the effect that the salutary requirement of obtaining previous sanction cannot be set at naught

by prosecuting a public servant for an offence under the Penal Code for which no sanction is necessary, though the offence attracts the mischief of

provision (a) of law mentioned in Section 6 of the Prevention of Corruption Act. As per the Learned Judge, â??such a course would really frustrate

the purpose for which previous sanction has been deemed necessary by the Legislatureâ?. In doing so, the learned Judge placed reliance on a decision

of Andhra Pradesh High Court reported AIR 1957 Andhra 663, A. Veeraiah v. State, in which Subha Rao, C.J. (later Chief Justice of India), was

summarized in the following words:

â??If the facts constitute an offence requiring either the sanction of a superior authority or the filing of a complaint by a Court, it cannot be evaded by

adopting the device of omitting one of the ingredients of the offence and prosecuting him under some other section. This was illustrated by saying that

if a public servant received an amount on behalf of the State and dishonestly misappropriated the same, the offence directly fell under Section 5(1)(c)

of the Act and he could be prosecuted only with the previous sanction of the authority and the prosecution could not, by adopting the device of ignoring

the fact that the accused was a public servant, evade the requirement of previous sanction by filing a complaint under S. 400 of the Penal Code.â??

13. Another decision on which reliance was placed by the Gauhati High Court in the case of Sudhandra Kumar Bhattacharjee (supra), is reported as

K. P. Sinha v. Aftabuddin, AIR 1955 Pat 453, wherein again the view expressed was that the law relating to obtaining of previous sanction cannot be

evaded by prosecuting the accused under a Penal Provision which does not require sanction.

14. The learned counsel for the petitioner has also placed reliance on the decision of the Supreme Court of India, reported as Hazir-ul-Haq v. State of

West Bengal, AIR 1963 SC 293. In this case the scope of Section 195 of the Penal Code was examined. What was observed is being quoted below:

â??Though, in our judgement Section 195 does not bar the trial of an accused person for a distinct offence disclosed by the same facts and which is

not included within the ambit of that section, it has also to be borne in mind that the provisions of that Section cannot be evaded by resorting to devices

of camouflages. The test whether there is evasion of the section or not is whether the facts disclose primarily and essentially an offence for which a

complaint of the court or the public servant is required. In other words, the provisions of the section cannot be evaded by the device of charging a

person with an offence to which that section does not apply and then convicting him of an offence to which it does, upon the ground that such latter

offence is a minor offence of the same character.â??

15. The above decision is again an authority for the proposition that if a particular offence falls within two statutory enactments, one requiring sanction

and the other not requiring it, then the provision which requires sanction cannot be evaded by resorting to devices of camouflages. In this regard, it

would be apt to refer to a decision of Punjab High Court reported as â??State v. Gurcharan Singh, AIR 1952 Punj 89. This decision takes note of

General Clauses Act also. It was pointed out that whereas under Section 409 of the Penal code, no sanction is required when a person is prosecuted,

the Prevention of Corruption Act requires a sanction in the case of every accused. It was observed that as Prevention of Corruption Act has

introduced various important procedural changes, an accused cannot be deprived of the same, some other decisions which are for the proposition that

if a particular condition is a condition precedent for launching the prosecution, then it is not open to prosecution to ignore that provision by saying that

the offence also falls under another provision, be also noticed.

16. These are â??Ram Nath v. King Emperor, 1925 Allahabad 230. This case dealt with the impact of Section 195 of the Code of Criminal Procedure

and AIR 1929 Madras 21. Perianna Muthirian v. M. Vengu Ayyar and others. This was also a case arising under Section 195 of the Code of Criminal

Procedure.

17. After having gone through the judgements noticed above, I am of the opinion that, that interpretation which helps a citizen in a criminal case should

be preferred. Therefore, following the view expressed by the Andhra Pradesh and Patna High Courts, which view was, in fact, noticed by the Gauhati

High Court, referred to above, and on which decision reliance was placed by the Court of Revision, I am of the view that the prosecution of the

respondent is not possible unless sanction is obtained. This view is also supported by one of the earliest decision of Punjab High Court, â??State v.

Gurcharan Singh (supra).

18. This petition as such is found to be without merit and is dismissed.â??

19. Taking a cue from the law laid down above the irresistible conclusion that can be drawn is that the prosecution of the petitioner cannot be

launched without obtaining a prior sanction as envisaged by the provisions of the Code of Criminal Procedure because the act of the accused

constitutes an offence in discharge of the public duties. Sanction is not a mere adherence to the laws but intended to act as a shield to a public servant

when prosecuted for an offence which puts his honesty and integrity at stake. Prosecution will not be in accordance with law where sanction is

required but is given a goby and in that context it will affect the jurisdiction of the Court to take cognizance.

20. Looking at the petition of the petitioner from yet another perspective the question for consideration is as to whether the cognizance in a matter like

the present one can or cannot be taken on the analogy of Section 197 of the Code of Criminal Procedure which requires to be extracted herein below

verbatim et literatim :-

â?? 197.Prosecution of Judges and public servants.- (1) When any person who is Judge within the meaning of Section 19 of the Ranbir Penal Code or

when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of the State Government or the

Government of India, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official

duties, no Court shall take cognizance of such offence except with the previous sanction-

(a) in the case of persons employed in connection with the affairs of the Union of the Government of India; and

(b) in the case of persons employed in connection with the affairs of the State, of the Government.

(2) The Government of India or the State Government , as the case may be, may determine the person by whom, the manner in which, 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 heldâ??.

21. Section 197 Cr.P.C extracted above has been interpreted and dealt with quite efficaciously by the Honâ??ble Apex Court of the country in case

titled Ajay Kumar v. M. K. Aiyappa and another reported as AIR 2014 SC (Supp) 1801, the relevant excerpts of which are extracted herein below:

â??The expression â??cognizanceâ?? which appears inSection197Cr.P.C. came up for consideration before a three-Judge Bench of this Court inState

of Uttar Pradesh v. Paras NathSingh(2009) 6 SCC 372, and this Court expressed the following view:

â??6. .....And the jurisdiction of a Magistrate to take cognizance of any offence is provided bySection 190of the Code, either on receipt of a

complaint, or upon a police report or upon information received from any person other than a police officer, or upon his knowledge that such offence

has been committed. So far as public servants are concerned, the cognizance of any offence, by any court, is barred bySection197of the Code unless

sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section

not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available

and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the

expression, â??no court shall take cognizance of such offence except with the previous sanctionâ??. Use of the words â??noâ?? and â??shallâ??

makes it abundantly clear that the bar on the exercise of power of the court to take cognizance of any offence is absolute and complete. The very

cognizance is barred. That is, the complaint cannot be taken notice of. According to Blackâ??s Law Dictionary the word â??cognizanceâ?? means

â??jurisdictionâ?? or â??the exercise of jurisdictionâ?? or â??power to try and determine causesâ??. In common parlance, it means taking notice

of. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant

who is accused of an offence alleged to have been committed during discharge of his official dutyâ??.

22. The ramifications of the dilution of statutory sanction has been elucidated in the judgement of the Honâ??ble Supreme Court delivered on 19th

November, 2015 in the case of Prof. M. K. Ganguly v. CBI reported as 2016 (II) SCC 143 the relevant paragraph of which is detailed below:

â??The case against them was registered underSection 120Bread withSection 409of IPC. While considering the contention advanced that the said

acts could not be said to have been committed in discharge of official duty, Bose, J. placed reliance upon the observations made by the Federal Court

in the case ofDr. Hori Ram Singh v.Emperor, wherein Vardachariar, J observed that in respect of a charge underSection 409of IPC, the official

capacity is relevant only for entrustment, and not necessarily in respect of misappropriation or conversion which may be the act complained of. It was

held by this Court that the correct position of law was laid down in the case of Hori Ram Singh, which is as under:-

â??I would observe at the outset that the question is substantially one of fact, to be determined with reference to the act complained of and the

attendant circumstances; it seems neither useful nor desirable to paraphrase the language of the section in attempting to lay down hard and fast

tests.â? Bose, J., further held in Shreekantiah case referred to supra that there are cases and cases and each must be decided on its own facts. It was

held as under:

â??Now it is obvious that ifSection 197of the Code of Criminal Procedure is construed too narrowly it can never be applied, for of course, it is no part

of an officialâ??s duty to commit an offence and never can be. But it is not the duty we have to examine so much as the act, because an official act

can be performed in the discharge of official duty as well as in dereliction of it.â?? (emphasis laid by this Court) While considering the facts of the case,

Bose J. observed that the offence in question, could not have been committed any other way, and held as under:

â??...If it was innocent, it was an official act; if dishonest, it was the dishonest doing of an official act, but in either event the act was official because

the second accused could not dispose of the goods save by the doing of an official act, namely officially permitting their disposal; and that he did. He

actually permitted their release and purported to do it in an official capacity, and apart from the fact that he did not pretend to act privately; there was no other way in which he could have done it. Therefore, whatever the intention or motive behind the act may have been, the physical part of it

remained unaltered, so if it was official in the one case it was equally official in the order, and the only difference would lie in the intention with which

it was done: in the one event, it would be done in the discharge of an official duty and in the other, in the purported discharge of it.â? (Emphasis laid by

this Court) Mr. Gopal Subramanium, the learned senior counsel on behalf of some of the appellants has further rightly placed reliance upon the

judgement of a three judge bench of this Court in the case ofAmrik Singh v. State of Pepsuto buttress the contention that the issue of requirement of

prior sanction underSection 197of Cr.P.C. can be raised at any stage of the proceedings, and not just at stage of framing of charges. The decision in

the case of Hori Ram Singh (supra) was also quoted with approval, especially the categorisation of situations in three scenarios, as under:

â??a) Decision which held that sanction was necessary when the act complained of attached to the official character of the person doing it;

b) Judgments which held that sanction was necessary in all cases in which the official character of the person gave him an opportunity for the

commission of the crime; and Those which held it was necessary when the offence was committed while the accused was actually engaged in the

performance of official duties.â??

From the gravamen of charge it becomes manifest that the case falls within the specie of the cases classified for the grant of statutory sanction as per

the principle of law laid down and evolved in the above referred judgments. Therefore, there being no sanction, the cognizance taken by the learned

Chief Judicial Magistrate, Budgam is bad in law and unless the same is quashed, it will be an abuse of the process of the Court.

23. Viewed thus, for all that have been said and done above the petition of the petitioner is allowed as a sequel to which both the charge dated

25.03.2017 framed against the petitioner for the commission of offences under sections 420/409 RPC and the prosecution initiated against him by the

Court of the learned Chief Judicial Magistrate, Budgam, in File No. 208 are quashed.

24. Disposed of along with connected MP.

25. Record of the trial court be remitted by the Registry.

