
(2009) 08 KL CK 0069

In the High Court Of Kerala

Case No : Criminal R.P. No. 2039 of 2003

Navaikulam Cashew Workers Industrial Co-op. Society Ltd.

APPELLANT

Vs

Enforcement Officer

RESPONDENT

Date of Decision : 28-08-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 197(1)
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14(1), 6
Kerala Cashew Factories (Acquisition) Act, 1974 — Section 3, 3(3), 8
Penal Code, 1860 (IPC) — Section 21

Citation : (2009) 3 KLT 1039

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : Pirappancode V. Sreedharan Nair, for the Appellant; N.N. Sugunapalan and C.S. Hrithwik, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Thomas P. Joseph, J.—Indisputably, when a public servant not removable from his office except by or with the sanction of the Government is accused of any offence said to have been committed by him while acting or purporting to act in discharge of his official duty no court could take cognizance of such offence except with the previous sanction of the Government concerned. But, then, will that protection be available to such a public servant if his services is lent to a separate legal entity by way of deputation even when management of property belonging to the Government is entrusted for management to such legal entity, when offence is committed while acting or purporting to act in the discharge of his official duty as an Officer of such legal entity? That is the question raised for a decision in these petitions in revision.

2. Petitioner No. 1 is the Cashew Workers Industrial Co-operative Society Ltd., (for short, "the Society") registered under the provisions of the Kerala Co-operative Societies Act (for short, "the Societies Act"). Petitioner No. 2 is the Managing Director and petitioner No. 3, Secretary of that Society. They were sent

on deputation to that Society to work as Managing Director and Secretary, respectively from their parent department, the Industries Department of Government of Kerala. Petitioners Nos. 2 and 3 are in the pay and service of the Society. It is alleged that petitioners failed to pay the employees' deposit pension fund contribution for various periods as required u/s 6(c) of the Employees' Provident Fund Act (for short, "the EPF Act") and paragraphs 7 and 8 of the Employees' Deposit Linked Insurance Scheme, 1976 and thus committed offence punishable u/s 14(1) of the EPF Act. On the complaints preferred by respondent No. 1, learned Judicial First Class Magistrate took cognizance against petitioners for the said offence. Petitioners by filing separate petitions in the respective cases pleaded for their discharge contending that sanction of the appropriate Government has not been obtained as required u/s 197(1) of the Code of Criminal Procedure (for short, "the Code") to prosecute them and hence cognizance taken against them is illegal. Court below found against that contention. It is contended by learned Counsel for petitioners that the cashew factories which stood transferred to and vested in the Government of Kerala as per provisions of the Kerala Cashew Factories (Acquisition) Act, 1974 (for short, "the Acquisition Act") as amended by Act 25 of 1985 are entrusted to the Society for management. Since the duty of petitioners Nos. 2 and 3 is to manage those cashew factories on behalf of the Government of Kerala, they are "public servants" as defined in Clause ninthly of Section 21 of the Indian Penal Code (for short, "the IPC") and hence they are entitled to the protection of Section 197(1) of the Code. Learned Counsel for respondent No. 1 would contend that petitioners Nos. 2 and 3 are not Officers managing the cashew factories on behalf of the Government of Kerala but they are in the pay and service of a separate legal entity, the Society, their duties and responsibilities are prescribed and governed by the provisions of the Societies Act and the Bye-laws of the Society and hence they are not Officers acting on behalf of the Government of Kerala so that, Section 21 (ninthly) of the IPC would apply. It is therefore contended that petitioners Nos. 2 and 3 are not entitled to the protection u/s 197(1) of the Code. Before going to the contentions raised on either side I shall advert to the relevant provisions relied on by counsel on both sides.

3. Section 197(1) of the Code reads,

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.

4. The expression "public servant" is not defined in the Code. Definition for that expression is given in Section 21 of the I.P.C. In these cases Clause ninthly of Section 21 alone is pressed into service. Relevant provision is as under:

21. "Public Servant".- The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely:

Ninth.-Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue-process, or to investigate, or to report, on any matter affecting the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government.

(emphasis supplied)

5. It is not disputed that petitioner No. 1 is a Society registered under the provisions of the Societies Act. It is as per the Acquisition Act as amended by Act 25 of 1985 that certain cashew factories were acquired by the Government of Kerala. In the Statement of Objects and Reasons of Act 25 of 1985 it is stated that 65 cashew factories owned by private persons remained closed during 1983 season causing hardship to a large number of workers. It was felt that some of the those closed cashew factories may not be opened during 1984 season also causing great hardship to the workers and non-utilisation of resources of such factory building, equipments, etc. The Objects and Reasons further say that in order to deal with that situation it was considered essential that the Acquisition Act should be amended to enable the State Government to entrust the management of cashew factories acquired under the Acquisition Act to the Workers' Co-operative Society or Kerala State Marketing Federation or any other Institution as may be approved by Government for the purposes. Section 3 of the Acquisition Act deals with the acquisition of such Factories and Sub-section (3) states,

On the making of a declaration under Sub-section (I), the cashew factory to which the declaration relates, together with all machinery, other accessories and other movable properties as were immediately before the appointed day in the ownership, possession power or control of the occupier in relation to the factory and all books of accounts, registers and other documents relating thereto shall stand transferred to, and vest in, the Government.

Section 8 of the Acquisition Act states,

8. Power of Government to direct vesting of cashew factory in the Corporation-

(1) Notwithstanding anything contained in Section 3, the Government may, by order in writing:

(b) entrust a cashew factory vested in them under this Act to the Federation or to a Workers' Co-operative Society or to any other institution approved by the Government in this behalf for management for such period and on such terms and conditions as may be specified in the order.

Thus going by the above provisions of the Acquisition Act it is clear that ownership and possession of certain cashew factories, by virtue of Section 3(3) of the Acquisition Act stood transferred to and vested in the Government of Kerala on and from the appointed day. As per Section 8(b) of the Acquisition Act some of those factories were entrusted to the Workers Co-operative Society for management for such period and on such terms and conditions as specified in the order.

6. The Society in these cases is a body which came into existence and is governed in accordance with the provisions of the Societies Act. In *S.S. Dhanoa Vs. Municipal Corporation, Delhi and Others*, the distinction between a body created by a statute and a body coming into existence and governed in accordance with the provisions of the statute was considered. So far as the latter category is concerned, it is not as if the body itself is created by the statute but is only that it came into existence and is governed in accordance with the provisions of the statute. The Society in this case is not created by the Societies Act; it is a body which came into existence and is governed in accordance with the provisions of the Societies Act. The Society is a separate legal entity governed by the provisions of the Societies Act and its Bye-laws.

7. It is not disputed that petitioners Nos. 2 and 3 are otherwise "public servants". But their services have been lent to the Society on deputation and they are in the pay and service of the Society. Their duties and responsibilities are prescribed and governed by the Societies Act and the Bye-laws of the Society. Then the question is whether as stated in Clause 9thly of Section 21 of the I.P.C. petitioners Nos. 2 and 3 are entrusted with the duty to take, receive, keep or expend on behalf of the Government the cashew factories and accessories attached to it and which otherwise belonged to the Government. Clause ninthly of Section 21 of the I.P.C. to apply, the duty of petitioner Nos. 2 and 3 as Managing Director and Secretary respectively of the Society should be to take, receive, keep or expend the property of the Government "on behalf of the Government".

8. The expression "on behalf of" connotes some benefit to the person on whose behalf another person may act (See *Uttam Chandel v. Emperor* 15 IC 1007. In *The State Vs. Gangamma (A-4) and Others*, the expression "on behalf of" was interpreted and it was held,

thus the words, "on behalf of" connote an agency; when one person act on behalf of the other, the former acts as the agent of the latter. No doubt, originally, an

agency, i.e., the relationship of principal and agency is the result of a contract express or implied; but an agency may also be created by a statute.

In *Kripa Shankar D. Worah Vs. Commissioner of Wealth Tax*, it was held that the difference between the two expressions "on behalf of" and "for the benefit of" is well known and recognized in law. In the former case holder of property will be only a representative of the real owner and in the latter case the holder is the real owner himself. Therefore to act "on behalf of" the Government it must be shown that there is an agency between petitioners Nos. 2 and 3 and the Government concerned.

9. Learned Counsel for respondents placed reliance on the decision in *G.A. Monterio Vs. The State of Ajmer*, . There, Clause 9thly of Section 21 of the IPC was considered. It was held that the true tests in order to determine whether a person is an Officer of the Government are: (1) whether he is in the service or pay of the Government and (2) whether he is entrusted with the performance of any public duty. In this case it is not disputed that petitioners Nos. 2 and 3 are in the service and pay of the Society which itself is governed by the provisions of the Societies Act and its own Bye-laws. In *S.L. Narasimayya v. State of A.P.* 1971 Madras Law Journal (Crl.) 678 the Secretary of a Co-operative Society when prosecuted for an offence claimed protection of Section 197(1) of the Code. It was held that the Secretary of a Co-operative Society does not act on behalf of the Government, instead, he acted on behalf of the Society. The Secretary could only discharge the duties entrusted to him under the provisions of the Co-operative Societies Act and Bylaws of the Society. Hence it was found that the Secretary of the Society was not entitled to the protection of Section 197(1) of the Code.

10. In *S.S. Danoa's* case referred supra, accused was a member of the Indian Administrative Service but his services were placed at the disposal of a Co-operative Stores Ltd., a society registered under the provisions of the Bombay Co-operative Societies Act. He was prosecuted for offence punishable under the Prevention of Food Adulteration Act. It was held that as the accused was acting on behalf of the Society which is a legal entity, his case did not come within Clause 12thly of Section 21 of the IPC and he is not entitled to the protection of Section 197 of the Code. In *Mohd. Hadi Raja Vs. State of Bihar and Another*, it was held that accused is a separate legal entity which must be held to have an independent status distinct from the status and cannot be stated as governed for all purposes. Hence even if the Officer of such instrumentality or agency keeps, receives, expends any property such action cannot be construed as an action of the Government. It is apposite to refer to paras. 22, 24 and 26 of the said decision.

22. It is to be noted that though through the contrivance or mechanism of corporate structure, some of the public undertakings are performing the functions which are intended to be performed by the State, ex facie, such instrumentality or agency being a juridical person has an independent status and

the action taken by them, however important the same may be in the interest of the State cannot be held to be an action taken by or on behalf of the Government as such within the meaning of Section 197 Cr.P.C.

24. The importance of the public undertaking should not be minimised. The Government's concern for the smooth functioning of such instrumentality or agency can be well appreciated but on the plain language of Section 197 of the Code of Criminal Procedure, the protection by way of sanction is not available to the officers of the public undertaking because being a judicial person and a distinct legal entity, such instrumentality stands on a different footing than the Government departments.

26. It will be appropriate to notice that whenever there was a felt need to include other functionaries within the definition of "public servant", they have been declared to be "public servants" under several special and local Acts. If the Legislature had intended to include officers of an instrumentality or agency for bringing such officers under the protective umbrella of Section 197 Cr.P.C., it would have done so expressly.

11. Petitioner No. 1 being a Society registered under the provisions of the Societies Act is a separate legal entity. Petitioners Nos. 2 and 3 during the relevant time were Officers working under and on behalf of the Society exercising the duties and responsibilities assigned to them by that Society under the provisions of the Societies Act and/or its own Bye-laws even in spite of the fact that the cashew factories which stood transferred to and vested in the Government were entrusted to the Society for management. Petitioners Nos. 2 and 3 were answerable and accountable not to the Government in the matter, but to the Society. Nor where they dealing with the cashew factories "on behalf of" the Government. To come within Clause ninthly of Section 21 of the I.P.C. the duty of the Officer concerned should be to take, receive, keep or expend the property on behalf of the Government. The Officer concerned should have been acting on behalf of the Government. In these cases management of the cashew factories is not given to petitioners Nos;2 and 3 but to petitioner No. 1, the Society which is a separate legal entity. It cannot therefore be said that petitioners Nos. 2 and 3 during the relevant time acted in the name of, on account of, benefit, advantage or interest of the Government.

There was no agency between petitioners Nos. 2 and 3 and the Government. Going by the provisions of the Acquisition Act it is clear that though Factories stood transferred to and vested in the Government of Kerala by virtue of Section 3(3) of the Acquisition Act, it is only that its management was entrusted to the Society. It is not as if petitioners Nos. 2 and 3 while on deputation were Officers in the service or pay of the Government. Nor were they acting on behalf of the Government. As such petitioners are not entitled to the protection of Section 197 of the Code. I find no reason to interfere with the view taken by the learned Magistrate in that regard.

Petitions are dismissed.