B. SAHA AND ORS. A

v.

M. S. KOCHAR

July 27, 1979

[R. S. SARKARIA, P. N. SHINGHAL AND O. CHINNAPPA REDDY, JJ.] B

Criminal Procedure Code 1898, *Sec.* 197—*Scope of.*

The act complained of is dishonest misappropriation or conversion of goods by the appellants which they had seized and as such were holding in trust to be dealt with in accordance with law. This gave a *bona fide* apprehension to the respondent that the goods have been criminally mis-appropriated C by the appellants. The S.D.M. conducted a preliminary enquiry and found a ***prima facie*** case under S. 120B/409 IPC against the appellants. The S.D.M. summoned the appellants who appeared before him and prayed for their immediate discharge, which was accepted on the ground that he had no jurisdiction and he discharged the appellants. A revision petition before the Addl. Sessions Judge was dismissed on the ground that since the shortage of the goods was discovered at the time when they were produced before the Customs House, D there was absolutely nothing to show that the shortage, if any, was due to the act of the appellants. The respondent went in further revision to the High Court which was allowed on the ground that no sanction was required for the prosecution of the accused-appellants because they were certainly not acting in the discharge of their official duties, when they misappropriated these goods.

It was argued on behalf of the appellants that— E

(i) It had been falsely alleged in the complaint that when the S.D.M. inspected the goods and noticed the condition thereof, it was found that the seals of the four boxes were broken while the remaining three packages were completely empty but sealed; that the inventory itself, prepared by the S.D.M. falsified the prosecution allegation;

(ii) That it was not alleged in the complaint with particularly as to what F goods had disappeared or were removed, nor that the disappearance of some of the goods, if any, occurred after their seizure and before their deposit in the Customs House by the appellant;

(iii) That even if for the sake of argument it is assumed that some of the goods were removed and set apart by the appellants after seizure, then also sanction for prosecution u/s 197 Cr.P.C. was absolutely G necessary because, the seizure and removal being integrally connected with each other, the alleged act constituting the offence of criminal mis-appropriation/criminal breach of trust could but reasonably be viewed as an act which includes dereliction of duty-done or purporting to be done in the discharge of their official duty by the appellants;

(iv) That section 197 Cr.P.C. cannot be construed too narrowly, in the H sense that since the commission of offence is never a part of the official duty of a public servant, an act constituting an offence can

A never be said to have been done or purportedly done in the discharge of official duty, as such a narrow construction, will render the section entirely *otiose.*

Dismissing the appeal,

HELD : The question of sanction u/s 197 Criminal Procedure Code can be raised and considered at any stage of the proceedings. [116H, 117A]

B

The words "Any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty" in section 197(1) of the Code, are capable of a narrow as well as wide interpretation. If these words are construed too narrowly, the section will be rendered altogether sterile, for it is no part of an official duty to commit an offence, and never can be. In the wider sense, these words will take under their umbrella every act C constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between these two extremes. While it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of sec. 197(1), an act constituting an offence *directly and reasonably* connected with an official duty will require sanction for prosecution under the said provision. The D *sine qua non* for the applicability of this section is that the offence charged, be it one of commission or omission, must be one which has been committed by the public servant either in his official capacity or under colour of the office held my him. [118D-H, 119A]

In the instant case, there was some foundation for the allegation that the goods in question had been misappropriated by the appellants sometime after E their seizure and before their deposit in the Customs House. There can be no dispute that the seizure of the goods by the appellants and their being thus entrusted with the goods or having dominion over them, was an act committed by them while acting in the discharge of their official duty. But the act complained of is subsequent dishonest, misappropriation or conversion of those goods by the appellants, which is the second necessary element of the offence of criminal breach of trust under section 409, Indian Penal Code. It F could not be said that the act of dishonest, misappropriation or conversion complained of bore such an integral relation to the duty of the appellants that they could genuinely claim that they committed it in the course of the preformance of their official duty. [119E-H-120A]

There is nothing in the nature or quality of the act complained of which attaches to or partakes of the official character of the appellants who allegedly did it. Nor could the alleged act of misappropriation or conversion be reasonably G said to be imbued with the colour of the office held by the appellants. Therefore, on the facts of the present case, the alleged act of criminal misappropriation complained of was not committed by them while they were acting or purporting to act in the discharge of their official duty, the commission of the offence having no direct connection or inseparable link with their duties as public servant. At the most, the official status of the appellants furnished them with an opportunity or occasion to commit the alleged criminal act. Sanction of H the appropriate Government was therefore not necessary for the protection of the appellants for an offence under section 409/120B Indian Penal Code.

[120A-B, 121D-F]

Om Parkash v. *State of Uttar Pradesh*, 1957, S.C.R. 423, *Amrik Singh* v. *The State of Pepsu*, [1955] 1 SCR 1302, *Shreekantiah Rammayya Munipalli and Ors.* v. *State of Bombay*, A.I.R. 1955, S.C.R. 187; distinguished. A

Baijnath v. *State of Madhya Pradesh*, A.I.R. 1966, S.C. 220 at page 222 and *Harihar* v. *State of Bihar*, [1972] 3 S.C.R. 89; referred to.

B

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 21 of 1973.

Appeal by Special Leave from the Judgment and Order dated 3-5-1972 of the Delhi High Court in Criminal Revision No. 450/69.

D. Mukherjee, S. K. Dholakia and *R. C. Bhatia* for the Appellants. C

Respondent *in person.*

The Judgment of the Court was delivered by

SARKARIA, J. This appeal by special leave directed against a judgment, dated May 3, 1962, of the Delhi High Court, arises out of these circumstances : D

M. S. Kochar, the respondent herein, filed a complaint in the Court of the Sub-Divisional Magistrate, Delhi, alleging that the appellants herein, who are officers of the Customs Department, had committed offences under Sections 120B/166/409, Indian Penal Code. It was stated in the complaint as follows : E

The complainant was the sole representative in India of various manufacturing concerns in West Germany, and was carrying on business under the style of "House of German Machinery". He imported certain items of machinery from the German firms for displaying them in the International Industries Fair held in New Delhi in November, F 1961. In spite of the fact that he had obtained a valid Customs Clearance Permit for the import of these items of machinery, the Customs Authorities prevented him from clearing the goods from the Railway Station. Ultimately, the complainant was able to clear the goods by obtaining the necessary permission from the Government. G He was allowed to retain the imported goods with him till the first of June, 1962. The goods were to be re-exported from India, thereafter. The respondent applied for extension of the period, but his request was declined.

On June 16, 1962, the accused (appellants) raided the premises of the complainant at 30, Pusa Road, New Delhi, and seized some of those H imported goods which were meant for display in the International Industries Fair. The appellants also seized certain other goods kept by

A the complainant at the site of the Fair, itself. Inventories of the goods were prepared by the appellants at the time of their seizure. The goods were then packed in boxes and sealed by the appellants with their own seals which were signed by the complainant as well as the appellants. One copy of the inventories, duly signed by the appellants and the complainant, also was handed over to him.

B

On November 20, 1963, the complainant made an application before the Sub-Divisional Magistrate, praying that the goods seized by the appellants be handed over to him on Superdari as they were likely to deteriorate unless kept safely under proper conditions. The Sub-Divisional Magistrate, on January 22, 1964, made an order directing that C all the goods seized by the appellants be handed over to the complainant on Superdari.

The Customs, however, felt aggrieved by this order of the Magistrate and went in revision against it before the Additional Sessions Judge, Delhi, who, on February 7, 1964, passed an order staying D delivery of possession. Subsequently, by order dated April 3, 1965, the Additional Sessions Judge dismissed the revision-petition and vacated the stay order. In spite of the order of the Magistrate, confirmed by the Additional Sessions Judge, the Customs handed over to the complainant on Superdari only a part of the goods seized, and in respect of the remaining goods, the Customs Authorities went in E further revision to the High Court and obtained an interim stay of the order of the Additional Sessions Judge.

Subsequently, on August 22, 1966, the High Court made an order directing that all the goods which had been seized by the Customs Authorities from the complainant, including those which had been F returned to him on Superdari, should be produced before the Sub-Divisional Magistrate, who was seized of a case under Section 5 of the Import and Export (Control) Act and Section 166(81) of the Sea Customs Act, regarding the goods, pending against the complainant. Accordingly, Shri H. L. Sikka, Sub-Divisional Magistrate, G prepared two inventories of these goods on November 16, 1966 and thereafter. The boxes were opened before Shri Sikka, who got inventories of the goods found therein prepared, and after noting the condition of those goods, he got the same repacked and sealed in proper boxes in the presence of the parties with a seal of the Court. Before resealing, the Magistrate noted down the condition of the four packages H which were produced before him by the appellants and which remained in their possession since the seizure (16-6-1962). "It was then found by the Magistrate that the seals of these boxes were tampered. One

wooden box was broken and the seal on it was also broken; while the remaining three packages were completely empty but sealed". A

The goods of Consignment No. 1 of M/s. Gebr. Ruhstrat, concerning the complaint filed by the Assistant Collector of Customs under Section 5 of the Import & Export (Control) Act, and Section 117(81) of the Sea Customs Act, which were also seized by appellant No. 1, who had obtained their delivery from the Railway Station, were not produced before Shri H. L. Sikka, Magistrate, along with the other goods when the inventories were prepared. This gives "a *bona fide* apprehension to the complainant that the said goods have been criminally misappropriated by the accused." B

C

"The accused by their act in illegally tampering and breaking the seals of the consignment seized by them and removing some of these goods and further abusing their positions and seizing some of the personal articles of the complainant under the colour of search warrant issued by the S.D.M. Karol Bagh and illegally holding those goods of the complainant uptil.....have committed offences under Sections 120B/166/409 IPC." D

The Sub-Divisional Magistrate before whom the complaint had been filed, examined the complainant under Section 200 and further held a preliminary enquiry under Section 202, Cr.P.C., in the course of which, he examined Shri H. L. Sikka, Magistrate, also. After considering the statements recorded in the preliminary enquiry, and the documents produced by the complainant, the Magistrate found a *prima facie* case under Sections 120B/409, I.P.C. against the three appellants. He, therefore, directed that the accused (appellants herein) be summoned. E

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On receiving the summons, the appellants appeared before the Magistrate and made an application praying for their immediate discharge, *inter alia,* on the ground that the Magistrate had no jurisdiction to take cognizance of the complaint in the absence of sanction under Section 197 of the Code of Criminal Procedure, 1898, and under Section 155 of the Customs Act, 1962, for prosecution of the appellants. G

The Magistrate accepted this objection and held that in the absence of sanction for the prosecution of the present appellants, he had no jurisdiction to take cognizance of the complaint. He purportedly relied on the decision of this Court in *Shreekantiah Rammayya Munipalli & Anr.* v. *State of Bombay*(1). In the result, he discharged the accused (appellants, herein). H

(1) A.I.R. 1955 SC 187; [1955] 1 S.C.R. 1177.

A Aggrieved, the complainant filed a revision petition which was dismissed by the Additional Sessions Judge, on December 6, 1968, on the ground that since the shortage of goods was discovered at the time when they were produced before the Customs House, and there was absolutely nothing to show that the goods in question remained in the personal custody of the appellants, "it was difficult to hold that the shortage, if B any, was due to the act of the accused."

The complainant went in further revision to the High Court, which was heard and allowed by a learned Judge by his judgment now under appeal before us. After an elaborate discussion, the learned Judge has held that no sanction was required for the prosecution of the accused-C appellants for an offence under Sections 120B/409, Indian Penal Code, because "they were certainly not acting in the discharge of their official duties, when they misappropriated these goods".

The first contention of Mr. Mukerjee, learned Counsel for the appellants is that the complainant has falsely alleged in the complaint that D when the Sub-Divisional Magistrate, Shri Sikka, in compliance with the order of the High Court, inspected the goods and noted the condition thereof, "it was found that the seals of four boxes were broken, while the remaining three packages were completely empty but sealed". It is maintained that the inventory itself, prepared by Shri Sikka, falsifies this allegation. It is further pointed out that in the complaint it is not E alleged with particularity as to what goods disappeared or were removed, nor that the disappearance of some of the goods, if any, occurred after their seizure and before their deposit in the Customs House by the appellants, and that the allegation made by the complainant during arguments before the High Court, to the effect, that the goods in question were misappropriated sometime after seizure and before their F deposit in the Customs House, was not based on any facts or circumstances appearing in the statements of the complainant and Shri Sikka recorded during the preliminary enquiry. Learned counsel also repeatedly urged that the allegations regarding the commission of the offence of criminal breach of trust by the appellants, were false and groundless. For this purpose, it is stressed, the Court should not con-G fine itself to the allegations in the complaint but also consider all the evidential material on the record including that brought on the record by the appellants. In support of the contention that the question of sanction can be raised from stage to stage, Mr. Mukherjee relied on certain observations of this Court in *Matajog Dobey* v. *H. C. Bari*(1).

H We have no quarrel with the proposition that the question of sanction under Section 197, Cr.P.C. can be raised and considered at any

(1) [1955] 2 S.C.R. 925.

stage of the proceedings. We will further concede that in considering the question whether or not sanction for prosecution was required, it is not necessary for the Court to confine itself to the allegations in the complaint, and it can take into account all the material on the record at the time when the question is raised and falls for consideration. Now, in paragraph 20 of the complaint, it was clearly alleged that the Sub-Divisional Magistrate, Shri H. L. Sikka found that the seals of four boxes had been tampered with and one of the boxes broken, while the remaining three packages "were completely empty but sealed". Mr. Mukherjee has not read out or referred to any portion of the statement of Shri H. L. Sikka recorded under Section 202, Cr.P.C., to show that the same contradicts or falsifies the allegations in paragraphs 19, 20 and 21 of the complaint. Indeed, no copy of the statements of the complainant and Shri Sikka recorded in proceedings preliminary to the issue of process, has been furnished for our perusal. It is true that the precise time and manner or the misappropriation and the detailed particulars of the items of goods alleged to have been misappropriated, are not given in the complaint. But it seems that some foundation for the allegation that the goods in question had been misappropriated by the appellants sometime after their seizure and before their deposit in the Customs House, had been laid during the preliminary enquiry made by the Magistrate. This allegation was made not only before the High Court, but has been reiterated by the complainant in paragraph 12 of his counter-affidavit that he had filed in this Court in opposition to the special leave petition of the appellants. For this averment, he relied on a certain letter/notice dated January 30, 1963 addressed to him by the Customs Authority.

A B C D E

Thus, the material brought on the record upto the stage when the question of want of sanction was raised by the appellants, contained a clear allegation against the appellants about the commission of an offence under Section 409, I.P.C. To elaborate, it was substantially alleged that the appellants had seized the goods and were holding them in trust in the discharge of their official duty, for being dealt with or disposed of in accordance with law, but in dishonest breach of that trust, they criminally misappropriated or converted those goods. Whether this allegation or charge is true or false is not to be gone into at this stage. In considering the question whether sanction for prosecution was or was not necessary, these criminal acts attributed to the accused are to be taken as alleged.

F G H

For these reasons, we overrule the first contention canvassed on behalf of the appellants.

A The second contention advanced by Mr. Mukherjee is in the alternative. It is submitted that even if for the sake of argument, it is assumed that some of the goods were removed and set apart by the appellants after seizure, then also, the seizure and the removal being integrally connected with each other the alleged act constituting the offence of criminal misappropriation/criminal breach of trust could B but reasonably be viewed as an act which includes dereliction of duty—done or purporting to be done in the discharge of their official duty by the appellants. It is argued that S. 197, Cr. P. C. cannot be construed too narrowly, in the sense that since the commission of offence is never a part of the official duty of a public servant, an act C constituting an offence can never be said to have been done or purportedly done in the discharge of official duty. Such a narrow construction, it is submitted, will render the Section entirely *otiose*. For law on the point, the learned counsel referred to several decisions of this Court. He took us through the relevant passages of the judgment in *Matajog's case* (supra), and strongly relied on the *ratio* of *Shreekantiah Rammayya's* D case (ibid) and *Amrik Singh* v. *The State of Pepsu*(1).

The words "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty" employed in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too E narrowly, the Section will be rendered altogether sterile, for, "it is no part of an official duty to commit an offence, and never can be". In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between F these two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197(1), an act constituting an offence, *directly and reasonably* connected with his official duty will require sanction for prosecution under the said G provision. As pointed out by Ramaswami J. in *Baijnath* v. *State of M.P.*(2) "it is the quality of the act that is important, and if it falls within the scope and range of his official duties, the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted."

In sum, the *sine qua non* for the applicability of this Section is H that the offence charged, be it one of commission or omission, must

(1) [1955] 1 S.C.R. 1302.
(2) A.I.R. 1966 S.C. 220 at p. 222.

be one which has been committed by the public servant either in his official capacity or under colour of the office held by him. A

While the question whether an offence was committed in the course of official duty or under colour of office, cannot be answered hypothetically, and depends on the facts of each case, one broad test for this purpose, first deduced by Varadachariar J. of the Federal Court in *Hori Ram* v. *Emperor,* (1) is generally applied with advantage. After referring with approval to those observations of Varadachariar J., Lord Simonds in *H.H.B. Gill* v. *The King.*(2) tersely reiterated that the "test may well be whether the public servant, if challenged, can reasonably claim, that what he does, he does in virtue of his office." B C

Speaking for the Constitution Bench of this Court, Chandrasekhar Aiyer J., restated the same principle, thus :

".....in the matter of grant of sanction under Section 197, the offence alleged to have been committed by the accused must have something to do, or must be related in some manner, with the discharge of official duty.....there must be a *reasonable connection* between the act and the discharge of official duty; the *act must bear such relation to the duty that the accused could lay a reasonable claim, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty*". D

(Emphasis supplied) E

Let us now apply this broad test to the facts of the case as alleged and sought to be proved by the complainant.

The allegation against the appellants is about the commission of offences under Sections 409/120B, Indian Penal Code. To be more precise, the act complained of is dishonest misappropriation or conversion of the goods by the appellants, which they had seized and as such, were holding in trust to be dealt with in accordance with law. There can be no dispute that the *seizure* of the goods by the appellants and their being thus entrusted with the goods or dominion over them, was an act committed by them while acting in the discharge of their official duty. But the act complained of is subsequent dishonest misappropriation or conversion of those goods by the appellants, which is the second necessary element of the offence of criminal breach of trust under Section 409, Indian Penal Code. Could it be said, that the act of dishonest misappropriation or conversion complained of bore such an integral relation to the duty of the appellants F G H

(1) [1939] F.C.R. 159.
(2) A.I.R. 1948 P.C. 128.

A that they could genuinely claim that they committed it in the course of the performance of their official duty? In the facts of the instant case, the answer cannot but be in the negative. There is nothing in the nature or quality of the act complained of which attaches to or partakes of the official character of the appellants who allegedly did it. Nor could the alleged act of misappropriation or conversion, be B reasonably said to be imbued with the colour of the office held by the appellants.

As pointed out by Varadachariar J. in *Hori Ram* (supra), generally, in a case under Section 409, Indian Penal Code, "the official capacity is material only in connection with the 'entrustment' and does C not necessarily enter into the later act of misappropriation or conversion, which is the act complained of."

This, however, should not be understood as an invariable proposition of law. The question, as already explained, depends on the facts of each case. Cases are conceivable where on their *special* facts it D can be said that the act of criminal misappropriation or conversion complained of is inseparably intertwined with the performance of the official duty of the accused and therefore, sanction under Section 197(1) of the Code of Criminal Procedure for prosecution of the accused for an offence under Section 409, Indian Penal Code was necessary.

E *Shreekantiah Rammayya* (supra) was a case of that kind. The act complained of against the second accused in that case was, dishonest *disposal of the goods.* The peculiarity of the act was that from its very nature, in the circumstances of that case, it could not have been done lawfully or otherwise by the accused save by an act done or purporting to be done in an official capacity. In other words, the F very charge, was the dishonest doing of an official act by the accused. Whether the act was dishonest or lawful, it remained an official act because the accused could not dispose of the goods save by the doing of an official act, namely, officially permitting their disposal; and that he did. It was in view of these special facts of the case, it was held that the offence under Section 409, Indian Penal Code was committed G or purported to be committed by the accused in the discharge of his official duty, and, as such, sanction under Section 197(1) Cr. P.C. was a prerequisite for his prosecution. The facts of the case before us are entirely different. The *ratio* of *Shreekantiah Rammayya* has therefore, no application to the facts of the case before us.

H In *Amrik Singh v. The State of Pepsu,*(1) it was laid down that whether sanction is necessary to prosecute a public servant on a charge

(1) [1955] 1 S.C.R. 1302.

of criminal misappropriation, will depend on whether the acts complained of hinge on his duties as a public servant. If they do, then sanction is requisite. But if they are unconnected with such duties, then no sanction is necessary. *Amrik Singh's* case also stands on its own facts, which were materially different from those of the present case. The correctness of that decision was doubted in *Baijnath* v. *State of Madhya Pradesh* (supra), and its authority appears to have been badly shaken. In any case, its ratio must be confined to its own peculiar facts.

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There are several decisions of this Court, such as, *Om Parkash Gupta* v. *State of Uttar Pradesh,*(1) *Baijnath* v. *State of Madhya Pradesh* (supra), *Marihar Prasad* v. *State of Bihar,*(2) wherein it has been held that sanction under Section 197, Criminal Procedure Code for prosecution for an offence under Section 409, Indian Penal Code was not necessary. In *Om Parkash Gupta's* case (ibid) it was held that a public servant committing criminal breach of trust does not *normally* act in his capacity as a public servant. Since this rule is not absolute, the question being dependent on the facts of each case, we do not think it necessary to burden this judgment with a survey of all those cases.

C

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In the light of all that has been said above, we are of opinion that on the facts of the present case, sanction of the appropriate Government was not necessary for the prosecution of the appellants for an offence under Sections 409/120-B, Indian Penal Code, because the alleged act of criminal misappropriation complained of was not committed by them while they were acting or purporting to act in the discharge of their official duty, the commission of the offence having no direct connection or inseparable link with their duties as public servants. At the most, the official status of the appellants furnished them with an opportunity or occasion to commit the alleged criminal act.

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In the result, the appeal fails and is dismissed.

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N.K.A. *Appeal dismissed.*

(1) [1957] S.C.R. 423.
(2) [1972] 3 S.C.R. 89.