

A.K. Sahdev and Another Vs. Ramesh Nanji Shah and Another

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Court : Mumbai

Decided On : Oct-21-1997

Reported in : 1998(5)BomCR738; 1998CriLJ2645

Judge : A.S. Palkar, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 54, 190 and 197; [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 323, 345, 420 and 504; [Foreign Exchange Regulation Act, 1973](#) - Sections 40; COFEPOSA Act, 1974

Appeal No. : Criminal Writ Petition No. 549 of 1996

Appellant : A.K. Sahdev and Another

Respondent : Ramesh Nanji Shah and Another

Advocate for Def. : Prakash Naik, ;Amit Desai, ;M.B. Sabnis and ;D.A. Nalavade, A.P.P.

Advocate for Pet/Ap. : J.C. Satpute and ;H.V. Mehta, Advs.

Judgement :

ORDER

A.B. Palkar, J.

1. By this petition, the petitioners, who are the officers of Enforcement Directorate of the Government of India. Mumbai, seek quashing of Criminal Case No. 4/S of 1996 initiated against them in the Court of the Metropolitan Magistrate, 3rd Court, Esplanade, Bombay, at the instance of respondent No. 1.

2. According to the petitioners, respondent No. 1 is a Non-resident Indian. The Income-tax Department forwarded to the Enforcement Directorate for further proceedings certain diaries and documents which had been seized by the Income-tax Department from the premises of respondent No. 1 Ramesh Nanji Shah during their investigation. Respondent No. 1 had admitted in correspondence that the said diaries and documents belonged to him and are in his hand-writing. According to the petitioners the said diaries and documents revealed illegal transactions in the nature of 'havala' on a large scale running into crores of rupees. The said havala transactions were carried out by the respondent and his brother Dhirubhai Nanji Shah. According to the petitioners, in pursuance of the said documents, the Enforcement Officers recorded the statements of a number of persons who include Anwar Gulam Hussain Lalan, Suresh Dayalal Chablani of M/s. Rose Travels, Chimanbhai Ramji Savla and Velji G. Shah both of Benzer Departmental Stores, Bharat Shah of M/s. Roopam Departmental Stores, Rishi Kapoor, a well-known Cine star and various other persons and all of them were interrogated and admitted to have been beneficiary of large scale hawala racket run by respondent No. 1 from outside India and his brother Dhirubhai Shah, who was operating as his counter-part in India.

3. According to the petitioners, summons were issued under section 40 of the [Foreign Exchange Regulation Act, 1973](#) to the respondent No. 1 and his brother Dhirubhai Shah in order to give evidence and produce documents. The summons was duly served on the respondent No. 1 through the Indian High Commission in Dubai. However, instead of responding to the summons and appearing before the Enforcement Directorate, the respondent No. 1 sent a letter dated 20-12-1995 informing the Directorate that it will not be possible for him to appear before the Directorate due to his business in Dubai and also called upon the Directorate to give reasons for requiring his presence before the Enforcement Directorate. By another letter dated 20-1-1996 he informed the Directorate that he is not in a

position to help the Directorate in the investigation as the Directorate had failed to inform him the reasons requiring his presence before the Directorate and in case his statement is to be recorded, it should be recorded in the Indian High Commission in Dubai on a date convenient to the parties concerned. He was also sending copies of the letters to the higher authorities. He had also informed the Revenue Secretary, Government of India about the same and by letter dated 25-1-1996 he informed the Revenue Secretary of the Government of India that he was ready and willing to compensate the loss of foreign exchange suffered by the Government of India. According to the petitioner, respondent No. 1 was informed by letter dated 31-1-1996 by the Enforcement Directorate that his statement could not be recorded in Dubai and that he should respond to the summons of the Directorate, and by another letter dated 14-2-1996, the Enforcement Directorate denied all the false allegations made by respondent No. 1. Thereafter by another letter dated 10-2-1996, respondent No. 1 informed the Revenue Secretary of the Government of India that the flat at Vile Parle belonged exclusively to him. By another letter dated 8-3-1996 the respondent No. 1 informed the Revenue Secretary that he had been advised by his Doctor not to undertake any travel as he was not keeping well.

4. According to the petitioners, all their attempts to summon the respondent No. 1 and his brother Dhirubhai for the purpose of interrogation proved futile. Dhirubhai Shah who was operating as respondent No. 1's counter- part in India had absconded and therefore, an order of detention passed against him under the COFEPOSA could not be served and as a last resort the Enforcement Directorate was constrained to issue a red alert throughout the country for the apprehension of respondent No. 1 and his brother Dhirubhai. Respondent No. 1, who had informed on 8-3-1996 that he had been advised by his Doctor not to undertake any journey on the ground of ill-health, had in the meanwhile surreptitiously entered India and while trying to escape out of the country, he was accosted on 9-4-1996 at Sahar International Airport, Mumbai, by the Officers of the Immigration Department on the basis of the red alert issued by the Directorate. The Immigration authorities immediately apprised the Enforcement Directorate about respondent No. 1 and he was searched and some documents and currency were seized. His statement was thereafter recorded on 10-4-1996 wherein he gave clear and detailed admissions

of illegal hawala transactions. He was served with arrest memo on 10-4-1996 and thereafter produced before the learned Chief Metropolitan Magistrate on 11-4-1996 in Remand Application No. 77 of 1996 and prayer was made for judicial custody of respondent No. 1 for 14 days in order to facilitate further investigation. Before the teamed Magistrate, the respondent No. 1 retracted his statement given before the authorities stating that it was obtained under duress, respondent No. 1 also stated before the learned Magistrate that he was assaulted by the officers. The retraction of respondent No. 1 was duly replied by the Enforcement Directorate and it was also stated that since respondent No. 1 had earlier admitted the documents and the entries in the diaries being in his own handwriting, there was no question of extracting any false statement regarding the same from respondent No. 1.

5. According to the petitioners, on 11-4-1996 the Court time was over before the matter could be argued and the Advocate for respondent No. 1 stated that the respondent No. 1 be kept in judicial custody till 15-4-1996 and in the meanwhile he be medically examined by the Jail Doctor for the alleged assault as there were some marks of injury on the left side of his face and back. Thereafter the learned Magistrate passed an order directing the Medical Officer to examine the respondent No. 1 and report about the age, seriousness and probable cause of the injuries that may be found on his person. Respondent No. 1 remained in Judicial custody from 11-4-1996 to 15-4-1996 and he was medically examined and a report was submitted on 14-4-1996. For the period of four days prior to 14-4-1996 there were two holidays and therefore, it was not possible for the Directorate to interrogate the respondent No. 1. On 15-4-1996 when respondent No. 1 was produced before the learned Magistrate, he made a false statement that he was assaulted by 8 to 10 officers, who slapped him, inflicted stick blows and gave electric shocks and stated that he knew the names of two officers and he disclosed the names of the present petitioners. The medical examination certificate date 14-4-1996 disclosed that there were some minor abrasions and bruises on the body of respondent No. 1 and respondent No. 1 was well oriented, his blood pressure was normal and his general health condition was satisfactory. The injuries found on his person were simple in nature and may have been caused due to hard and blunt object within a week's duration preceding the examination.

6. According to the petitioners, on the basis of the said statement of respondent No. 1, the learned Chief Metropolitan Magistrate ordered issue of summons to the present petitioners to answer the charge under sections 323 r/w. 34 of the Indian Penal Code. According to the petitioners, the investigation had hardly begun by that time and the learned Magistrate in his order stated that the investigation had been completed and granted bail to respondent No. 1 in the sum of Rs. 3 lakhs with a condition of giving attendance in the office of the Enforcement Directorate for a period of 15 days. The said order of granting bail to respondent No. 1 was challenged before this Hon'ble Court by Criminal Application No. 1064 of 1996 and learned Single Judge of this Court (Lodha, J.) by order dated 2-5-1996 as an interim measure directed respondent No. 1 to attend the office of the Investigating Officer for a period of 15 working days.

7. By the present petition, the petitioners seek to quash the aforesaid order of the learned Magistrate issuing summons to the petitioners for answering the charge under sections 343 r/w. 34 of the Indian Penal Code as the complaint of the respondent No. 1 was completely false and concocted. Petitioner No. 1 was not present in office on 11-4-1996 when the respondent was examined. The said petitioner had merely issued the arrest memo and thereafter he was not even concerned with the respondent and it is obvious that on the basis of the arrest memo issued, respondent No. 1 named petitioner No. 1. Petitioner No. 2 took personal search of respondent No. 1 on the night of 9/10-4-1996 and seized certain documents and therefore the respondent No. 1 knew his name and thereby he named the two petitioners in his complaint to the Magistrate regarding the assault. The entire aim of respondent No. 1 was to affect the morale of the Investigating Officers and defeat the investigation. The so called injuries were minor in nature and that the same could be self-inflicted. There was no visible injuries on the left side of the face as alleged by respondent No. 1. Even otherwise, the petitioners being public servants, were noting in the discharge of their duties and therefore the learned Magistrate should not have proceeded against them in the absence of a valid sanction order and could not take cognizance of any offence. It is on these grounds that the petitioners have challenged the order of the learned Magistrate and have prayed that the criminal case, being No. 4/S of 1996 on the file of the Metropolitan Magistrate, 3rd sic

Court, Esplanade, Bombay, on the basis of the complaint of respondent No. 1 be quashed and set aside.

8. On being served with the notice, respondent No. 1 appeared through his Advocate Shri M.B. Sabnis and filed his affidavit-in-reply. In his reply, respondent No. 1 has denied the allegations made in the petition and it is his case that the officers were pressuring him in order to involve his brother Dhirubhai who has no concern with his business as the businesses of two brothers is different and separate. The petition is not maintainable as it is an attempt to make out a defence. He is an N.R.I. having business in hotel industry, electronic goods, films etc. and resides at Dubai. He is not concerned with the business activities of his brother Dhirubhai. The Income-tax people had carried out search of his premises in Mumbai and some jewellery, foreign exchange etc. were seized, and his statement was recorded. He had come to India in normal course. He admits receipt of summons from the Enforcement Directorate but since the purpose of being summoned was not mentioned, he addressed letters to the Enforcement Directorate and also wrote letters to the Revenue Secretary. He came to know that his brother had been interrogated by the Enforcement Directorate. He offered Enforcement Directorate to make himself available for interrogation but he wanted that the interrogation to be done in the office of the Indian High Commission at Dubai. He did not get response to the correspondence from the Enforcement Directorate. He was also willing to compensate loss of foreign exchange, if any suffered by the Government. The officers of the Enforcement Directorate wanted to confirm their conclusions which they had already reached which were unjust and baseless and wanted to harass him. Therefore, they wanted that he should come to Bombay office. He had voluntarily admitted the documents which had been recovered by the Income-tax Department. Although the Enforcement Directorate had commenced investigation, against him, his brother Dhirubhai has been dragged in by the Enforcement Directorate who has no concern with the same and if there was some violation of the FERA he would compensate the Government of India, but the officers of Enforcement Directorate were not interested in knowing the truth and with ulterior motive they were harassing him. His brother Dhirubhai was subjected to tremendous torture and coercion to give certain confessional statement regarding some cheques. In the anticipatory bail

application moved by his brother, the Enforcement Directorate has stated that there was no necessity of further interrogation of his brother but on the other hand they were coercing the present respondent No. 1 to involve his brother. Some persons were arrested on 13-10-1995 and were produced in Court. He has also made a grievance that he has been severely beaten. He came to know that number of persons were interrogated and their statements were recorded by the Enforcement Directorate and all those statements were obtained by coercion and duress. He therefore apprehended that he too would be coerced in the similar manner. That he was ready to co-operate with the Enforcement Directorate and therefore he insisted his interrogation being carried out in the Indian High Commission's Office at Dubai. His brother had lodged a complaint against the Asstt. Director Mr. K.K. Sharma and therefore, the Enforcement Officers were enraged against him and his brother. All the efforts of the Department was to pressurise him and it is for this reason that he was assaulted in order to extract some statement suitable to the officers and their purpose. He admitted that the hand written documents were all in his handwriting and he was willing to give proper explanation.

9. He had come to Bombay on 1-4-1996 for some religious ceremony and he resided in Mumbai in his flat and when he went to the Airport for boarding a flight he was arrested. He was accosted and when asked as whether he was brother of Dhirubhai, he replied in the affirmative and he was taken to the cell at the Airport and thereafter to the Enforcement Directorate Office for interrogation and he was beaten in an inhuman manner. He was slapped, beaten up with kick blows and sticks and belts and stripped upto undergarments and was given electric shock by 8 to 10 officers. This assault has left permanent mark of injury on his body and therefore, he succumbed to the pressure and wrote down the statement dictated by the Enforcement Officers. When produced before the Magistrate in criminal complaint, he retracted the same. According to him, this petition is filed in order to frustrate the action taken by the Magistrate against the officers and therefore, the petition is liable to be dismissed.

10. It is pertinent to note that on being served with the notice, the respondent No. 1 appeared through his Advocate Shri M.B. Sabnis, who filed his appearance in

the matter. However, when the petition was to be heard finally as per the orders of this Court, the Advocate of respondent No. 1 Shri Sabnis informed the Court that he be discharged from appearance and produced one letter along with acknowledgment by respondent No. 1. By this letter dated 7-8-1997 the respondent No. 1 was informed by his Advocate that since he had stopped contacting the Advocate after 1987 and all his efforts to get in touch with him had proved futile. The learned Advocate could not appear during the hearing in the absence of instructions from respondent No. 1 and therefore applied for withdrawal of appearance from the case with the permission of this Court. I have heard the argument of the learned Advocate appearing for the petitioners and the learned P.P. for the State. The learned Advocate for respondent No. 1 inspite of applying for withdrawal of his appearance, also made submissions on legal points involved in this case, which I will be discussing in the following paragraphs.

11. I have intentionally stated all the facts in detail in order to point out as to what type of person respondent No. 1 is and what is his conduct. The aforesaid facts clearly shows that respondent No. 1 was all the while attempting to evade arrest and investigation and he had the audacity to inform the Enforcement Directorate and the Revenue Secretary that he will not be in a position to appear before the Enforcement Directorate and his statement be recorded in the office of the Indian High Commission at Dubai. In his correspondence with the Department, he had clearly admitted that the entries in the diary and other documents seized were in his handwriting. His brother Dhirubhai was absconding and could not be arrested and after his release on bail by the learned Magistrate, respondent No. 1 has also jumped the bail and has not cared to appear in the case registered against him before the Investigating Officer and even in the present complaint initiated before the learned Magistrate against the present petitioners. Even the persons interrogated in pursuance of the entries in his diary have admitted the facts and therefore, there was no question of the Officers of Enforcement Directorate compelling him to give any statement under coercion or duress or to assault him for that purpose. The respondent No. 1 did not even file a private complaint making detailed statement regarding the manner of assault and merely made a complaint to the learned Magistrate that he was assaulted when his statement was recorded in order to compell him to disclose certain thing. The medical certificate

disclosed only one minor abrasion on left chin and swelling abrasion on right lower leg and a bruise on left thigh and further stated that the health of respondent No. 1 was otherwise normal. The said certificate falsified the earlier version of respondent No. 1 that on the ground of ill-health he was advised by the Doctors not to undertake any journey. In his statement recorded by the learned Chief Metropolitan Magistrate, the respondent No. 1 went to the extent of saying that 8 to 10 officers had assaulted him, some of them were slapping and other inflicting stick blows on various parts of his body and he was also given electric shocks. The injuries found on his person were not at all in consonance with this allegation of assault by 8 to 10 officers, some of whom were holding sticks and belt. Not a single stick blow was noticed on his person and therefore, the learned Magistrate had committed a serious error in taking cognizance of offence under section 323 r/w. 34, I.P.C. on the basis of such statement. The learned Magistrate wrongly exercised the jurisdiction vested in him by law while taking cognizance of the offence under sections 323 r/w. 34, I.P.C. on the basis of such statement made in the aforesaid background. In fact being a senior Magistrate, the Chief Metropolitan Magistrate ought to have taken into consideration the usual tendency of such persons to avoid arrest and detention, especially in the background of the facts on record and the statements made in the application. In any case, if the learned Magistrate felt that there was some truth in the respondent No. 1's version of assault, he should have taken into consideration that the respondent No. 1 was alleged to have assaulted by 8 to 10 officers and he could only name two persons whose names were known to him and therefore, an enquiry was necessary before taking cognizance of the offence.

12. Even according to the provisions of Criminal Manual when an allegation of ill-treatment is made by a prisoner, the Magistrate is then and there required to examine the prisoner's body if the prisoner consents, to see if there are any marks of injuries as alleged, and shall place on record the result of his examination and reasons therefor. The Manual further requires the Magistrate that if he finds that there is reason to suspect that the allegation is well founded, he shall at once record the complaint and cause the prisoner to be examined by a Medical Officer as provided in section 54 of the Cr.P.C. and shall thereafter make a report to the Sessions Judge. However, he has no power to take up the necessary enquiry

upon himself, he should forward the prisoner with the record to the Judicial Magistrate having jurisdiction to investigate the case, the examination of such prisoner's body is required to be carried out by the Medical Practitioner in case of his allegation that such examination of his body will afford evidence which will disprove the commission of any offence by him or any evidence which will establish commission of any offence committed by any other person against his body. It is obvious that in the present case the learned Magistrate did not follow the provisions of the Criminal Manual issued by the High Court and straightway proceeded to take cognizance of offence allegedly committed by the petitioners. I do not mean to say that the learned Magistrate has no jurisdiction to take cognizance of the matter, but in the facts and circumstances narrated in detail in the above paragraphs, it was absolutely necessary to have some enquiry or investigation into the allegations. The learned Magistrate with his vast experience should have taken into consideration that such allegations are made by such type of persons in order to avail of the facility of bail which is normally misused for avoiding not only their arrest but their further prosecution and thereby they get themselves released from the rigour of law as has happened in the present case. In fact for these reasons alone, it is necessary to quash the proceedings.

13. However, the learned Counsel for the petitioners has also contended that the petitioners being public servant no cognizance of offence could be taken against them as the same is alleged to have been committed by them during the discharge or purported discharge of their duties as public servant. The learned Counsel for the petitioners brought to my notice a number of judgments of the Apex Court and the High Courts. The learned Counsel for respondent No. 1 had in fact been permitted to withdraw, but when this point was urged before me by the learned Counsel for the petitioners, he stated that as a responsible officer of this Court, he would like to argue on the law point and bring to the notice of the Court the correct legal position so that the judgment does not suffer from error of law as a result of respondent No. 1 not being represented. He however did not argue anything on the facts of the case. Section 197 of the Cr.P.C., 1973 clearly lays down the conditions precedent for taking cognizance of offence in the following words :---

'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.

(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.

(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. In the judgment reported in : 1996(5)BomCR441 in the case of Anil Shet Gaonkar v. Abdulla Khan Karol, a learned Single Judge of this Court (T.K. Chandrashekhara Das, J.) has pointed out that 'Section 197 of the Cr.P.C., is mandatory and the conditions prescribed under that section are a pre-requisite for taking cognizance of a criminal complaint against a Government servant. The legislative object of this

section is not only to safeguard the interest of the Government servant from vexatious litigation or other harassment, but also to safeguard the interest of the State itself. Obtaining sanction from the Government to prosecute its servant amounts to notice to the Government about the alleged offence committed by its servant and gives the Government an opportunity to take corrective steps or appropriate action deemed fit in the circumstances in public interest. What is contended before me by the learned Counsel on behalf of respondent No. 1 is that when the complaint is of an offence under section 323, I.P.C., then there is no question of any sanction under section 197, Cr.P.C. as no public servant can in discharge of his duty as such public servant or even purported discharge of such duty be said to be authorised to assault anybody and when he assaults anybody and caused hurt, then he cannot seek protection under the umbrella provided by section 197, Cr.P.C. contending that being a public servant, he cannot be prosecuted for the said charge in the absence of a valid sanction from the appropriate Government. I am afraid that the argument is of a sweeping nature and cannot be accepted. There is a judgment of the Apex Court reported long back in : [1955]28ITR941(SC) , Matajog Dobey v. H.C. Bhari. The facts in that case were similar as in the present case. There were two criminal revisions before the High Court and the Apex Court was approached against the judgment in the said Revision Applications. The facts as stated in para 5 on page 46 show that the authorized officials went to the Kalakar Street premises of third floor on the morning of December, 1950. The Appellate Matajog Dobey in Criminal Appeal No. 67 stated that when he found them forcibly breaking open the entrance door of the flat he challenged them and requested them to desist. They did not pay any heed to him and broke open the door, went inside and interfered with some boxes and drawers of tables. Thereafter they tied him with a rope and assaulted him causing injuries. On these facts he filed a complaint against H.C. Bhari and three others (names unknown) under sections 323, 341, 342 and 109, I.P.C. The four officials and some policemen raided the Armenian Street premises on the evening of 26-12-1950. One Nandram Agarwal came to the place and found that they have been forcibly opened the lock of the door of the room in which there were several books and papers, which they were collecting and packing into bundles for removal. He protested, pointed out that their actions were illegal and oppressive, and he

wanted a proper search list to be prepared and proper receipts to be given to him for the books and documents sought to be seized and removed and thereupon two policemen held him down and he was assaulted mercilessly, kicked, dragged downstairs and taken to the Burra Bazar Thana where he was assaulted again before being sent to the hospital. He was then brought back and kept in the lock up till midnight when he was released on bail. These facts were set out in the complaint lodged against the four officials. Offences were registered under sections 323, 345, 504, I.P.C. It is pertinent to point out that the Apex Court (Constitution Bench) has held in the aforesaid facts and circumstances after referring to the number of decided cases as under:-

'The offence alleged to have been committed must have something to do, or must be related in some manner, with the discharge of official duty. No question of sanction can arise under section 197, unless the act complained of is an offence; the only point to determine is whether it was committed in the discharge of official duty. There must be a reasonable connection between the act and the official duty.

It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What the Court must find out is whether the act and the official duty are so inter-related that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs as requirements of the situation.'

In para 25 of the said judgment, the Apex Court has clearly pointed out as under:-

'Reading the complaints alone in these two cases, even without the details of facts as narrated by the witnesses at the judicial inquiries, it is fairly clear that the assault and use of criminal force etc. alleged against the accused are definitely related to the performance of their official duties. But taken along with them, it seems to us to be an obvious case for sanction.

The injuries---a couple of abrasions and a swelling on Nandram Agarwal and two ecchymosis on Matajog---indicate nothing more than a scuffle which is likely to have caused where there were angry protests against the search and a pushing

aside of the protestors so that the search may go on unimpeded.'

14. In fact till this date the Apex Court has not taken any different view and has every time followed the law laid down in the aforesaid case. In : AIR 1995 SC866 Director of Inspection and Audit v. C.L. Subramaniam, the Apex Court following the ratio in Matajog Dobey's case (supra) reiterated as follows :

'In order to apply the provisions of section 197, Cr.P.C. two conditions must be fulfilled; one is that the offence mentioned therein must be committed by a public servant and the other is that the public servant employed in connection with the affairs of the Union or a State is not removable from his office save by or with the sanction of the Central Government or the State Government, as the case may be. The object of the sanction is to provide guard against vexatious proceedings against Judges, Magistrates and public servants and to secure the opinion of superior authority whether it is desirable that there should be a prosecution. If on the date of the complaint itself it is incumbent upon the Court to take cognizance of such offence only when there is a previous sanction then unless the sanction to prosecute is produced the Court cannot take cognizance of the offence. Naturally at that stage, the Court taking cognizance has to examine the acts complained of and see whether the provisions of section 197, Cr.P.C. are attracted. If the above two conditions are satisfied then the further enquiry would be whether the alleged offences have been committed by the public servant while acting or purporting to act in discharge of his official duties. If this requirement also is satisfied then no Court shall take cognizance of such offence except with the previous sanction. For this purpose the allegations made in the complaint are very much relevant to appreciate whether the act complained of is directly concerned or reasonably connected with official duties so that if questioned the public servant should claim to have done these acts by virtue of his office, that is to say, there must be a reasonable connection between the act and the discharge of official duties. It is in this context that the words 'purporting to act in discharge of official duties' assume importance. The public servant can only be said to act or purporting to act in the discharge of his official duties if this act is such as to lie within the scope of his official duties.'

In a judgment reported in : 1997 CriLJ2491 . Shambhoo Nath Misra v. State of U.P., the Apex Court has no doubt pointed that fabrication of record and misappropriation of public fund by public servant is not his official duty and sanction for his prosecution for such alleged offence is not necessary. Similarly in another case reported in : 1983 CriLJ158 ; B.S. Sambhu v. T.S. Krishnaswamy, the facts were that the appellant, a Munsiff Magistrate by a letter to the District Judge submitted his remarks against the allegations made by the respondent, an Advocate in a transfer petition for transfer of a suit pending in appellant's Court and while doing so-called the respondent 'rowdy', 'a big gambler' and 'a mischievous element' and on this letter being read in open Court the respondent filed criminal complaint against the appellant without the sanction contemplated under section 197, Cr. P.C. and it was held that the act complained of had no connection with the discharge of his official duty by the appellant. In this case also the judgment in Matajog Dobey's case (supra) was referred to. Similar view is taken in the judgment reported in : 1965 CriLJ499 ; Somchand Sanghvi v. Bibhut Bhusan Chakravarty and held that any act illegally done in exercise of duty as a public servant, sanction for prosecution is necessary. In that case, an Asstt. Police Commissioner had refused to grant bail in respect of an offence under section 420, I.P.C. unless the accused did something which he was not bound to do and it was held that the sanction was necessary.

15. The learned Counsel for respondent No. 1 brought to my notice a judgment of a learned Single Judge of this Court, reported in ; Mrs. Mary Kutty Thomas v. State of Maharashtra. In that case also the offence complained of were punishable under sections 323, 506(1) I.P.C. against Deputy Commissioner of Police, Zone - IV, Shri Pawar and the complaint was filed in the Court of the Metropolitan Magistrate, Kurla. The learned Single Judge of this Court has pointed out that the gravamen of the allegations unmistakably takes the case out of the purview of the provisions of section 197 of the Code. In this case also reliance was placed on Matajog Dobey's case (supra). The learned Single Judge has narrated in detail the facts of the case which categorically show that the Deputy Commissioner of Police in the said case and had gone far beyond acting in discharge of his duty. He not only assaulted him but went on to give serious threat to the life and on some occasions threats were levelled by going to the shop of the complainant's husband

and similar threats were given to the complainant at her residence. It is therefore clear that on the facts and circumstances obtaining in the said case, the learned Single Judge found that the case is such that gravamen of the allegations unmistakably takes the case out of the purview of the provisions of section 197 of the Cr. P. C.

16. It must be noted that the protection is given to the public servant from prosecution for offences committed in discharge of his duty or purported discharge of his official duty. If that is so to say that whenever a person commits any offence he cannot be said to be acting in discharge of his duty or purporting to act in discharge of his duty would be tantamount to taking out the entire protection afforded to the public servant by section 197, Cr. P.C. Because no offence can be committed while acting in discharge of his duty by public servant or even in purported discharge of his duty as public servant and therefore, in every case the Court has to find out the facts and circumstances and thereafter to decide as to whether the act complained of was committed in discharge of his official duty or in purported discharge of his official duty. In the present case the officers were recording the statement of respondent No. 1. They had also issued arrest memo and thus they were acting in discharge of their duty as public servant. Therefore, even if it is assumed that there is some substance in the contention of respondent No. 1, there is a direct and reasonable connection between the act complained of and the discharge of official duty by the petitioners and as such it is a clear case in which sanction under section 197, Cr. P.C. was absolutely necessary before taking cognizance of the offence and the learned Magistrate did not take into consideration this aspect of the matter. The petition must therefore succeed. Hence the Order:

17. Petition is allowed. The order passed by the learned Magistrate in Case No. 4/S/96 pending on the file of Metropolitan Magistrate, 3rd Court, Esplanade Bombay is quashed and set aside and the order of the learned Chief Metropolitan Magistrate dated 15-4-1996 taking cognizance of the offence under section 323 r/w. Section 34 I.P.C. in R.A. No. 77/96 is also quashed. Rule made absolute in the above terms.

18. Petition allowed.

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