

Madho Prasad Vs. State

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Court : Madhya Pradesh

Decided On : Jan-13-1953

Reported in : 1953CriLJ932

Judge : Dixit, J.

Appellant : Madho Prasad

Respondent : State

Advocate for Pet/Ap. : Mr. Dey

Judgement :

ORDER

Dixit, J.

1. This is a petition to quash the proceedings and the charge in the trial of the applicant in respect of offences under Sections 409, 466 and 477A, I.P.C. The applicant Madho Prasad was formerly a clerk and accountant in Food Department, Basoda. The prosecution case against him is that on 6.5.1952 and 17.5.1952 the applicant in his capacity as an accountant and clerk received a total amount of Rs. 250/- from two persons in respect of licences and a deposit, but that he subsequently failed to deposit the amount in the treasury & gave false receipts to the payers showing that amounts paid by them had been credited in the treasury. During the course of the trial, the applicant raised an objection that as he was a

public servant, he could be prosecuted for his alleged act of dishonestly misappropriating the amounts paid to him by Bihari Lal and Babu Lai only under Section 5(2), Prevention of Corruption Act, 1947, and not under Section 409, I.P.C. and further that as the required sanction under Section 6 of the Act for his prosecution under Section 5(2) had not been obtained, the Magistrate had no jurisdiction to take cognizance of the case. The trial Magistrate rejected the objection and proceeded to frame charges against the applicant, for the offences under Sections 409, 466, 477A, I.P.C.. The applicant then preferred a revision petition to the Sessions Judge of Guna, which was rejected. He has now come up in revision to this Court.

2. Mr. Dey learned Counsel for the applicant contended that after the coming into force in Madhya Bharat of the Prevention of Corruption Act, 1947, and so long as it remained in force, Section 409, Penal Code, in so far as it related to offences by public servants stood repealed and that if a public servant was alleged to have committed an offence of criminal breach of trust, he could only be prosecuted for an offence under Section 5(2), Prevention of Corruption Act, 1947, after obtaining the requisite sanction under Section 6 of the Act. In support of this contention, Mr. Dey relied on a decision of the Punjab High Court in - State v. Gurucharan Singh AIR 1952 Punj 89 (A). It was said that no such sanction had been obtained for the applicant's prosecution under Section 5(2) of the Act. The argument of the learned Deputy Government Advocate in reply is that there is nothing in the Prevention of Corruption Act, 1947, to suggest that the provisions of Section 409, I.P.C., have been repealed impliedly by Section 5(1)(c) of the Act & that if a public servant is alleged to have committed an offence which falls either under Section 5(1)(c) of the Act or under Section 409, Penal Code, he is under Section 26, General Clauses Act, liable to be prosecuted and punished under either of these enactments.

It is further argued by the learned Government Advocate that the matter has been now set at rest by the Prevention of Corruption (Second Amendment) Act, 1952, by which Sub-section (4) of Section 5 of the principal Act was amended so as to make it clear that the provisions of Section 5 are in addition to, and not in derogation of, any other law for the time being in force and nothing contained therein exempts any public servant from any proceeding which might, apart from

Section 5 be instituted against him. Mr. Shiv Dayal learned Deputy Government further submitted that the view taken by the Punjab High Court that as long as Section 5, Prevention of Corruption Act, 1947, remained in force, the provisions of Section 409, I.P.C., so far as they concern offences by public servants are pro tanto repealed by Section 5(1)(c) of the Act is not correct and commended to me for acceptance of the contrary view taken by the Allahabad High Court in - *Bhupnarayan Saxena v. State* : AIR1952 All35 .

3. I am unable to accept the contention of the learned Counsel for the applicant and, in my opinion, this petition must be dismissed. For the purposes of this revision petition it seems to me unnecessary to examine at length and in detail all the provisions of the Prevention of Corruption Act, 1947. It is sufficient to say that the chief object of the Act, which was passed in 1947, is to make more effective provision for the prevention of bribery and corruption by public servants. The Act was amended twice in 1952. By the Amendment Act, II of 1952 (Act No. II of 1952), the duration of the Act was extended to a period of ten years from the commencement of the Act. By the Second Amendment Act No. LIX of 1952 Sections 3 to 6 of the principal Act were amended in some respects. Section 3 of the Act makes offences under Sections 161, 165, 165A, Penal Code cognizable offences. Section 4 permits the Court to draw certain presumption against the accused person in any trial of an offence punishable under Section 161 or Section 165 or Section 165A. Section 5 defines the offence of criminal misconduct by a public servant in the discharge of his duties. Section 5A deals with investigation into cases under the Act. Section 6 provides that the previous sanction of the competent authority mentioned therein shall be necessary for the prosecution of a public servant under Section 161, Section 165, Penal Code, or under Section 5(2) of the Act. Section 7 of the Act permits an accused person to give evidence on oath on his own behalf and says that no presumption shall be drawn if the accused declines to go into the witness-box. The provision of the Act, which is very material here, is Section 5. It is as follows:

5 (1) A public servant is said to commit the offence of criminal misconduct in the discharge of his duty:

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification (other than legal remuneration) as a motive or reward such as is mentioned in Section 161, Penal Code, or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do, or

(d) if he, by corrupt or illegal means or by otherwise abusing his position as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage.

(2). Any public servant who commits criminal misconduct in the discharge of his duty shall be punishable with imprisonment for a term which may extend to seven years or with fine or with both.

(3) In any trial of an offence punishable under Sub-section (2) the fact that the accused person or any other person on his behalf is in possession, for which the accused person cannot satisfactorily account of pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the Court shall presume, unless the contrary is proved, that the accused person is guilty of criminal misconduct in the discharge of his official duty and his conviction therefor shall not be invalid by Reason only that it is based solely on such presumption.

(4) The provisions of this section shall be in addition to, and not in derogation of any other law for the time being in force, and nothing contained herein shall exempt any public servant from any proceeding which might, apart from this section, be instituted, against him.

4. It will be seen from the above provisions of Section 5 of the Act that Clauses (a) and (b) of Sub-section (1) have as their basis Sections 161 and 165, Penal Code, but they cover cases which do not fall under any provision of the Penal Code. These clauses create new offences. So also Clause (d) of Section 5(1) creates a new offence of obtaining any valuable thing or pecuniary advantages by a public servant by corrupt or illegal means or by otherwise abusing his position. Clause (c) of Section 5(1) which makes the act of a public servant of dishonestly or fraudulently misappropriating or otherwise converting for his own use any property entrusted to him or under his control as a public servant or allowing any other person so to do, a criminal misconduct is not different from Section 409, Penal Code, in so far as it relates to an offence by a public-servant. This clause does not create any new offence. Read with Sub-section (2) of Section 5, it only makes an act already punishable under Section 409, I.P.C., punishable as a criminal misconduct under the Act with imprisonment for a term which may extend to seven years or with fine or with both. The difference between the offence under Section 5(1)(c) of the Act and the offence under Section 409, I.P.C., so far as it relates to an offence by a public servant lies in the different punishments. The offence under Section 5(2), Prevention of Corruption Act, 1947, as also the offence under Section 409, Penal Code, are both tried in accordance with the Criminal Procedure Code and there is no special procedure prescribed for an offence under Section 5(2) of the Act. It is true that no public servant can be prosecuted for an offence under Section 5(2) of the Act without the previous sanction of the competent authority and in a trial for that offence, the Court is empowered to draw a presumption against the accused under Section 5(3) and further the accused is also at liberty to give evidence on oath. But these special rules of sanction and evidence do not make the act of a public servant described in Section 5(1)(c) of the Act already punishable under Section 409, Penal Code, a new offence.

5. The question whether Section 5(1)(c) of the Act virtually repeals Section 409, Penal Code in relation to public servants is now concluded by the new Sub-section (4) of Section 5 of the Act which says that the provisions of that section are in addition to, and not in derogation of, any law for the time being in force and that nothing in that section shall exempt any public servant from any proceeding which might be instituted against him. This sub-section makes it amply clear that Section 5(1)(c) in no way prevents the prosecution of any public servant for an offence under Section 409, I.P.C. Even apart from Section 5(4) and on the language of Section 5, as it stood before it was amended by the Prevention of Corruption (Second Amendment) Act 1952, I do not think it could have been held that Section 409, Penal Code, so far as it related to offences by public servants stood pro tanto repealed by Section 5(1)(c) of the Act. On this point Section 26, General Clauses Act, 1897, is quite express. It says:

Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence.

6. In accordance with this rule where an act is punishable under a special law and also under a general statute, the offender can be proceeded with under either law but cannot be punished twice for the same act. The rule embodied in Section 26 is analogous to the rule contained in Section 36, Interpretation Act, 1889 (52 and 53 Vict C 63) and is in conformity with the principle laid down in Hawkins Pleas of the Crown and in numerous English decisions that where the offence was punishable before the enactment of a statute prescribing a particular method of punishing it, then such particular remedy is cumulative and does not take away the former remedy. In - *Lowe v. Dorling* (1906) 2KB 772 (C), Farwell L.J., observed:

Now, the distinction between a statute creating a new offence with a particular penalty and a statute enlarging the ambit of an existing offence by including new acts within it with a particular penalty is well settled. In the former case the new offence is punishable by the new penalty only; in the latter it is punishable also by all such penalties as were applicable before the act to the offence in which it is

included. The rule was recognised by Lord Mansfield in - Rex v. Wright (1758) 1 Burr 543 (D) and in a note to 2 Hawkins's Pleas of the Crown (1824 ed.), page 239, is thus stated : 'The true rule seems to be this : where the offence was punishable before the statute prescribing a particular method of punishing it, then such particular remedy is cumulative, and does not take away the former remedy; but where the statute only enacts 'that the doing an act not punishable before, shall for the future be punishable in such a particular manner' there it is necessary to pursue such particular method, and not the common law method of indictment.

7. Where, therefore, a new offence is created under any enactment, the accused must be dealt with in accordance with the provisions of that enactment. Where on the other hand, a statute makes an act already punishable under some former law, punishable and there is nothing in the later enactment to exclude the operation of the former one, then the accused person can be proceeded against under either of the enactments. The enquiry to which we have to address ourselves is, therefore, whether Section 5(1)(c) makes the act described therein an offence for the first time. Here, the act of a public servant in dishonestly or fraudulently misappropriating or otherwise converting to his own use any property entrusted to him or under his control as a public servant or of allowing any person so to do, is already punishable under Section 409, Penal Code. Even if the Prevention of Corruption Act, 1947, did not exist, a public servant would still be liable to punishment under Section 409, I.P.C., for dishonest or fraudulent misappropriation. No doubt, the punishment prescribed for an offence under Section 5(2) of the Act is different from that prescribed under Section 409, I.P.C.. But this difference in the punishment and the special rules of evidence and sanction for prosecution under Section 5(2) of the Act do not make Section 5(1)(c) and Section 409, Penal Code, in relation to public servants so repugnant to each other that effect cannot be given to both the provisions at the same time. It is evident from Section 6 of the Act that a prosecution under Section 5(2) of the Act depends on the previous sanction of the competent authority. Where on the circumstances of a particular case the sanctioning authority has in its discretion refused to sanction the prosecution, the liability of the public servant to punishment under Section 409, I.P.C., still remains. It cannot, therefore, be held that the provisions of Section 5(1)(c) and Section 409, Penal Code, so far as they concern public servants,

cannot stand consistently one with the other and, therefore, the provisions of Section 409, I.P.C., so far as they relate to public servants are impliedly repealed.

8. With great respect to the learned Judges of the Punjab High Court, I do not find myself in agreement with their decision in 'AIR 1952 Punj 89 (A)'. In that case Falshaw J., who delivered the judgment of the Court, regarded the provisions of the Prevention of Corruption Act, 1947, as to previous sanction of the appropriate authority, the right of the accused to give evidence as a witness and the sentence for an offence under Section 5(2) of the Act as indicating that Section 5(1)(c) was intended to supersede Section 409, Penal Code, so far as it relates to offences by public servants. He recognised the fact that if Section 26, General Clauses Act, is taken by itself, then a public servant who has committed an offence falling either under Section 409, Penal Code, or Section 5(1)(c) of the Act can be tried on a charge under either of these sections. But he observed that the provisions in the Act regarding sanction, the right of the accused to give evidence on oath and the sentence complicated the question.

It has not been made clear in that decision how these factors render inoperative the rule laid down in Section 26, General Clauses Act, which expressly provides that where an act or omission constitutes an offence under two or more enactments then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence. I do not see how when there is no provision in the Prevention of Corruption Act expressly repealing Section 409 as regards public servants and when there is nothing in that Act to suggest that the continuance of Section 409 in so far as it concerns public servants is inconsistent with Section 5(1)(c) of the Act, it can be inferred that Section 5(1)(c) was intended to supersede Section 409, Penal Code, as regards offences committed by public servants. The fact that the trial of a public servant for an offence under Section 5(2), Prevention of Corruption Act, 1947, the object of which is to prevent effectively bribery and corruption on the part of public servants, can only be with the sanction of the appropriate authority and the sanctioning authority is required to exercise its discretion in giving sanction on the facts and circumstances of each case and the fact that in a trial for that offence the stringent rule laid down in Section 5(3) as to presumption against

the accused is to be applied, far from indicating an implied repeal of Section 409, Penal Code, only emphasises the fact that the operation of the general criminal law is not excluded.

Section 5, Penal Code, also makes it clear that an act which is an offence within its definition does not become unpunishable under the Code if it is also punishable by some special law. In these circumstances, I think it is wrong to infer that an intention should be ascribed to Section 5(l)(c) to repeal the provisions of Section 409, Penal Code, in so far as they affect public servants. The one provision has not the effect of repealing the other. The two co-exist without conflict. I do not think that the passages from Maxwell and Craise relied on in the Punjab decision, contain the whole of the law on the subject. These passages must be read along with what has been said by the learned authors at other places in their books. For instance, with regard to Section 33, Interpretation Act, 1889, which is similar to Section 26, General Clauses Act, it is stated in Craies 'Statute Law' (Fifth Edition at page 343 that

the intention of the section of the Interpretation Act was by laying down a general rule, to avoid the necessity of inserting a particular provision to take effect in each new statute dealing with offences.... In accordance with this rule penalties imposed by statute for offences already punishable under a prior statute are regarded as cumulative or alternative and not as repealing the penalty to which the offender was previously liable.

Again at page 214, it is observed that by the contrary intention excluding the operation of this rule is meant 'some repugnancy between the two or more laws or express repeal of the prior law'. In Maxwell's 'Interpretation of Statutes' (9th edition) it is stated at page 193

that an Act which (without altering the nature of the offence, as by making it felony instead of a misdemeanour) imposes a new kind of punishment, or provides a new course of procedure for that which was already an offence, at least at common law, is usually regarded as cumulative and as not superseding the preexisting law.

From what Craises and Maxwell have said at various places in their publications, it appears to me that in dealing with an enactment imposing penalty for an act already punishable under an earlier statute, the rule laid down in Section 33, Interpretation Act, or Section 26, General Clauses Act, is to be Applied unless the intention to repeal the prior law is clear by express provision to that effect or by implication arising out of contrariety and incompatibility between the statutes. There is no express provision in the Prevention of Corruption Act, 1947, abrogating Section 409, Penal Code, as regards public servants and as I have pointed out before Section 5(1)(c) is not such as to make the continuance of Section 409, Penal Code, so far as it relates to public servants inconsistent with it.

9. The view that Section 5(1)(c), Prevention at Corruption Act, 1947, does not pro tanto repeal Section 409, Penal Code, so far as it relates to offences by public servants is supported by a decision of the Allahabad High Court in 'AIR 1952 All 35 (B)' and of the Madras High Court in the case of - Satyanarayan Murti In re AIR 1953 Mad 137 (E) and the cases referred to in those decisions.

10. For these reasons, I am disposed to think that there is no substance in the contention of the applicant that he is not liable to punishment under Section 409, Penal Code, and that he present prosecution against him for that offence is not maintainable. As the applicant has not been charged under Section 5(2), Prevention of Corruption Act, his prayer that he should be examined as a witness on his own behalf must be rejected.

11. In the result this revision petition is dismissed and the learned Magistrate is directed to proceed with the trial of the applicant for offences under Sections 409, 466 and 477A, Penal Code.