

Phool Kumar and Others Vs. Vijay Kumar and Others

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Court : Delhi

Decided On : Nov-19-1998

Reported in : 1998VIIAD(Delhi)229; [1999]1CompCas32(Delhi); 1999CriLJ988; 1999(1)Crimes444; 76(1998)DLT844; 1998(47)DRJ712; ILR1998Delhi974

Judge : D.K. Jain, J.

Acts : [Code of Criminal Procedure \(CrPC\), 1973](#) - Sections 197 and 482; [Indian Penal Code \(IPC\), 1860](#) - Sections 427, 451 and 506

Appeal No. : Crl.M (M) No. 1899/97

Appellant : Phool Kumar and Others

Respondent : Vijay Kumar and Others

Advocate for Def. : Mr. S.S. Gandhi, Adv.

Advocate for Pet/Ap. : Mr. S.S. Vats, Adv

Judgement :

ORDER

D.K. Jain, J.

1. This petition under section 482 of the Code of Criminal Procedure, 1973 (for short the Code) is directed against the judgment dated 7 December 1996 of

Sh.Raghubir Singh, Additional Sessions Judge, Delhi, passed in respondent no.1 and 2's criminal revisions no.132/96 and 134/96, setting aside the summoning order dated 24 July 1996 passed by Sh.Sudhir Kumar Jain, Metropolitan Magistrate, in petitioners' complaint under sections 451, 427 and 506 IPC, inter alia, against the Sub Divisional Magistrate, Kotwali, (respondent no.1) and Patwari Halka, Nangal Thakran, Delhi (respondent no.2) for want of sanction under section 197 of the Code.

2. It is pleaded that there was no material before the learned Additional Sessions Judge to set aside the summoning order; the impugned order being illegal, arbitrary and without jurisdiction, the same may be set aside and that of the Metropolitan Magistrate be restored.

3. Petitioners herein filed a complaint under the affronted sections against respondents no.1 and 2 and some others, alleging that they came to their village with police force on 29 February 1996 and in conspiracy with others, in the absence of the petitioners, illegally bulldozed and demolished their houses in village Nangal Thakran, built by them between the years 1954 to 1964, on the land belonging to them, under orders of respondent no.1, who threatened and intimidated them and thus committed offences punishable under sections 451, 427 and 506 IPC. The learned Metropolitan Magistrate, after recording preliminary evidence, under section 202 of the Code, by order dated 24 July 1996, summoned the accused including respondents no.1 and 2, who respectively filed Criminal Revisions No.132/96 and 134/96 for quashing the summoning order passed by the Metropolitan Magistrate, dubbed as illegal for want of sanction, requisite under section 197 of the Code. Respondent no.1 claimed that he was Sub Divisional Magistrate, Kotwali and Revenue Assistant, Kanjhawala as also Deputy Director, Panchayat (exercising judicial and executive powers) and as such a custodian of gaon sabha land, charged with duty to protect it, and duly authorised as such to remove the encroachments on gaon sabha land. He also claimed this authority under section 18 (i) of the Delhi Panchayat Raj Act, 1954; section 133 of the Code and section 86 of the Delhi Land Reforms Act, 1954. Respondent no.2 claimed that he was Patwari Halka, Nangal Thakran; was ordered by the Block Development Officer to remain present in the village on 29 February 1996 along

with the revenue record of the village; he did so; pointed out the encroachments on the gaon sabha land in Khasra No.166, mentioned in his earlier report, of which measurements were again taken and it was confirmed under the supervision of Kanungo that the structures already mentioned in the site plan still existed and were on the gaon sabha land; he only pointed out the encroachments and had nothing to do with demolition. Both the respondents thus claimed that what they did was in the discharge of their official duties and as such they could not be prosecuted without prior sanction under section 197 of the Code, which having not been obtained the summoning order was illegal and be quashed. The learned Additional Sessions Judge by his impugned order, dated 7 December 1996, held that the protection of public land and removal of encroachments thereon was a part of the general duty of the Sub Divisional Magistrate/Revenue Assistant and the act of demolition, if constituted an offence, was committed in the course of the duty or under colour of office; Prior sanction under section 197 of the Code was necessary to the cognizance of offence being taken, which being not there, the order dated 24 July 1996, summoning the two respondents was bad in law and he thus set aside the same. Against this order the complainants have filed the present petition, stating that their houses are thirty years old and there was no encroachment on gaon sabha land; there was not even a single document before the Additional Sessions Judge to even remotely suggest that the two respondents had the authority or territorial jurisdiction to demolish the houses; in any case service of any notice for removal of encroachment or demolition order on the petitioners or their family members has also been denied and it is asserted that no sanction under section 197 of the Code was required to prosecute the said respondents.

4. I have heard Mr. S.S. Vats, learned counsel for the petitioners and Mr.S.S. Gandhi, learned Additional Standing Counsel (Criminal) for the contesting respondents and have thoughtfully considered the matter.

5. Section 197 of the Code protects some specified categories of public functionaries, not removable from office, save by or with the sanction of the Government, from false, vexatious or malafide prosecutions in order to see that they may discharge their onerous functions fearlessly. The section lays down that

when a public servant of the category specified in the section is accused of any offence alleged to have been committed by him : i) while acting or purporting to act as such, and ii) in the discharge of his official duty no court shall take cognizance of such offence except with the previous sanction of the Government concerned (Central or State).

6. The bar laid down in the Section is mandatory and absolute and can be raised at any stage of trial. However, it is not every offence committed by a public servant, while engaged in performance of his official duty, which is entitled to protection of section 197 of the Code. This protection is available only if :a) the impugned act or omission by the public servant etc; has been committed by him in the course of service and b) it was done in the discharge of his official duty. It is only if these two conditions co-exist that the case will fall within the ambit of section 197 of the Code. The term 'purported act' does not bring in its embrace an act unrelated to his official duty. To attract applicability of the section, the act complained of must fall within the scope and range of his duty and should be one directly concerned or reasonably connected with his official duty (See: *Bajinath v. State of Madhya Pradesh* AIR 1996 SC 220, *S.B. Saha and others Vs . M.S. Kochar* : 1979 CriLJ1367 and *State of Maharashtra Vs . Dr. Budhikota Subbarao* : [1993]2SCR311).

7. If the act in question is too remote or so totally unconnected with the official duties of such a person, the provisions of section 197 of the Code cannot apply. The test would be whether a public servant could, if challenged, show that what he did was by virtue of his office and in the discharge of his duty. If both these conditions co-exist, merely because the act complained of was done negligently or with a dishonest intention would not cease to be done or purported to be done in execution of his duty (See: *Director of Inspection and Audit and Ors Vs . C.L. Subramaniam*, : AIR 1995 SC866 .

8. It is in the light of the above stated broad principles that the question of protection claimed has to be decided. It would appear that on the trial court making summoning order, dated 24 July 1996, against the two respondents, instead of putting in appearance and claiming protection under section 197(1) of the Code

they filed revision petitions assailing the said order claiming protection under the said section. As noticed above, in his revision petition respondent no.1 had claimed that he was the SDM and Revenue Assistant; was a Deputy Director, Panchayats, exercising judicial and executive functions under the Delhi Panchayat Raj Act and as such a custodian of gaon sabha land, charged with a duty to protect public property and acted to remove the encroachment on it. Respondent no.2 - Patwari Halka claimed to have reported about the alleged encroachment on gaon sabha property falling in Khasra No.166. The petitioners-complainants deny the allegations of encroachment and the authority of the respondents to do what they did. It seems that no attempt was made to place any document/material on record to support the plea in defense, particularly that respondent no.1 was a Deputy Director and a custodian of gaon sabha land, obstruction and encroachment whereon was removed by him as pointed out by respondent no.2 and verified on the spot. Surely some documents evidencing the proceedings in the matter must have been prepared. Instead of dealing with or recording a finding on the claim set up on the basis of Delhi Panchayat Raj Act or Delhi Land Reforms Act etc., the learned Additional Sessions Judge completely skipped over the plea raised in support and allowed the revision petitions holding (without indicating how) that it was the general duty of the SDM/Revenue Assistant to remove encroachment on public property and thus, the act complained of was committed in the course of their official duties. How, under what provision of law or authorisation was this duty cast, and was exercised, is not indicated. It cannot be assumed. Merely because the respondents raised a defense of the act having purported to be done in execution of duty would by itself be not sufficient to justify the complaint being thrown out for want of sanction. There has to be some material on record to show what were the duties of the respondents and also that the acts complained of were so interrelated with their official duties as to attract the protection under section 197. I am constrained to observe that at present no such material exists on the record of the lower courts. Mr.Gandhi, appearing for the respondents, when pointedly asked, was not able to clarify but stated that the relevant documents could not be placed on record to establish the authority in law on the basis of which respondent no.1 purportedly acted. He stated that it could be shown that the action taken fell within the scope of and in the discharge of

respondents' official duties, and, therefore, protection of section 197 of the Code was available to them. Obviously, the finding recorded by the learned Additional Sessions Judge is not based on any material on record and is therefore, not sustainable. The vital issue raised cannot, in the absence of relevant material on record, be decided here.

9. For the foregoing reasons, the impugned order of learned Additional Sessions Judge is not sustainable in law. The petition is accordingly allowed; the impugned order is set aside and that of the Metropolitan Magistrate, dated 24 July 1996, is restored. The respondents are directed to appear before the trial court on 6 January 1999.

10. Since the question of protection claimed under section 197(1) of the Code remains still at large, it would be open to the respondents to raise it before the trial court with supporting material, and when raised it will be decided by the trial court in accordance with law.

The petition stands disposed of in the above terms but with no order as to costs.