

Oriental Bank of Commerce Vs. Delhi Development Authority and anr.

Oriental Bank of Commerce Vs. Delhi Development Authority and anr.

SooperKanoon Citation : sooperkanoon.com/693342

Court : Delhi

Decided On : Jul-16-1982

Reported in : [1984]55CompCas81(Delhi); 1982CriLJ2230; ILR1983Delhi419

Judge : Rajindar Sachar and; M.L. Jain, JJ.

Acts : [Delhi Development Act, 1957](#) - Sections 29; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 197 and 407(3);

Appeal No. : Criminal Revision Appeal Nos. 259 and 260 of 1981

Appellant : Oriental Bank of Commerce

Respondent : Delhi Development Authority and anr.

Advocate for Pet/Ap. : A.N. Mulla,; D.C. Mathur and; Usha Kumari, Advs

Judgement :

M.L. Jain, J.

(1) This reference has arisen in the following circumstances: Cr. R. 259/1981 : In re The Oriental Bank of Commerce.

(2) On 29/12/1980 the Junior Engineer of the Delhi Development Authority (D.D.A. for short) inspected the premises No. D-985, New Friends Colony, in development Zone No. I, which is a residential area and found that in the said premises the

Oriental Bank of Commerce is running its Staff Training College-cum-Hostel. Upon a report being made, the Assistant Engineer (Prosecution) issued notices to the said Bank and its Chairman on 8/1/1981 asking them to show cause within 15 days why action should not be taken against them under section 14 read with section 29(2) of the [Delhi Development Act, 1957](#) (in brief 'the Act'). The Principal of the College and the Joint General Manager of the Bank in separate replies of 24/1/1981 stated that the premises were in most part being used as residential and requested for permission to continue to do so and for withdrawal of the notice. The Dda did not agree and after some more correspondence its Additional Secretary acting under sections 49/52 of the Act read with its resolution dated 15/7/1978 issued on 12/6/1981, sanction for the prosecution of the said Bank and its Chairman Mr. M.K. Vig for non-conforming user under section 29(2)(2) read with sections 14 and 32 of the Act. In pursuance of this sanction, a complaint was lodged on 14/7/1981 in the court of the Metropolitan Magistrate by the Additional Secretary (Prosecution) with Delhi Development Authority shown as the complainant. That very day, the learned Metropolitan Magistrate exempted the Additional Secretary from personal attendance, since he was a public servant. This was done under clause (a) of the first proviso to section 200 Cr. P C. because the complaint was made in writing by a public servant acting or purporting to act in discharge of his official duties and in such a case the Magistrate need not examine the complaint. After perusal of the complaint and the documents, he directed issue of process against the accused. The- accused filed a revision petition Cr. R. 259 of 1981 on 26/8/1981 in this court against the said order of the Magistrate. Cr. R. 260/1981 : In re The Punjab National Bank:

(3) The premises No. D-72, Malviya Nagar were inspected by the: Junior Engineer of the Delhi Development Authority on 13/1/1981 and it was found that the Punjab National Bank was running a branch in the said premises which were earmarked exclusively for residential use. Fifteen days show cause notices were issued on 30/1/1981 to the said Bank and its Chairman Mr. S.L. Chopra by the Assistant Engineer, D.D.A. to which a reply was sent by the Manager on 8/2/1981 requesting regularisation of the non-conforming user upon payment of compensation fee. Acting under the powers delegated to him by the D.D.A. by its resolution of 15/1/1978 its Secretary issued sanction dated nil under section 49 of

the Act for prosecution of the Bank and its Chairman Mr. S.L. Chopra under section 29(2) read with sections 14 and 32 of the Act for non-conforming user. A complaint was consequently lodged by the DDA's Assistant Engineer for such prosecution on 14/7/1981. The learned Metropolitan Magistrate on 14/7/1981 after perusing the complaint and documents summoned the Bank and its Chairman Mr. Chopra and exempted the Assistant Engineer from personal attendance under section 200 Criminal Procedure Code . to which reference has just been made. The accused filed a revision petition No. 260/81 on 26/8/1981 against the said order of the learned Magistrate.

(4) Both the aforesaid revision petitions came up before Charanjit Talwar J. He made this reference to a Division Bench because he was not able to agree with the judgment of Prithvi Raj J. in Gurmeet Kaur v. Delhi Development Authority, 1980 Rlr 63, and he was further of the view that the questions raised in the petitions were of far reaching importance as similar questions were likely to arise in many more cases.

(5) It would have been extremely useful if the learned Judge .had expressed his opinion in the issues involved. However, the learned counsel rendered considerable assistance in expounding the rival contentions. The petitioners were represented by Mr. A.N. Mullah and Mr. D.C. Mathur, while the Delhi Development Authority by Mrs. Usha Kumar. We took time to consider. The contentions of the petitioners were :

1. That the record of the court below shows that the sanctions and the complaints for prosecution and the orders of summoning were all made on pre-prepared cyclostyled papers by filling up the blanks and that ex facie most certainly evidences that there is nonapplication of mind both on part of the sanctioning and the complaining authorities and on the part of the learned Magistrate. That vitiates the proceedings at the very threshold.

2. That the business of banking is a public utility which is a permissible user in a residential area under the master plan.

3. That in case of Staff Training College of Oriental Bank of Commerce there was no non-comforming user because a hostel was being run which is a permitted user in a residential area according to the master plan and the zonal plan.

4. The punishment prescribed for the offence they are charged with is only fine. The complaints were, therefore, barred by limitation under section 468(2)(a) Cr. P C. because either of them were instituted after expiry of six months.

5. That the Chairmen who were also the Managing Directors and Chief Executives of the said Banks were public servants within sub- clause(b) of clause 12 of section 21 of the I P.C. In case of the Oriental Bank it was further urged that on 29/12/1980, accused Vig was a Custodian and, therefore, a statutory public servant in virtue of section 14 of the Banking Companies (Acquisition & Transfer of Undertakings) Act, 1970 (herein the Banks Act). They cannot be prosecuted without sanction of the Central Government Under section 197 of the Criminal Procedure Code ,

(6) It was on these grounds that the prosecutions were sought to be quashed.

(7) With regard to the cyclostyled sanctions, the complaints and the impugned orders, it appears to me that this in itself does not at all disclose that the sanctioning or the complaining authority or the Magistrate did not apply their minds. Rather, they did. It was in fact only after considering the record that the sanctions, the complaints and the process orders were made. I am rather inclined to appreciate that carefully worded drafts of sanctions, complaints and summoning orders were prepared in advance so that no loopholes could later on be found in the wordings of the sanctions, the complaints and the summoning orders. In case of a large number of similar prosecutions, it saves lot of precious time involved in writing or typing each time a case is handled. It is well to remember that self same are the reasons which prompt the enacting and the rule making authorities to prescribe standard forms. The executive and judicial authorities can also resort to use of standard forms. I see no legal infirmity in doing so. The filling of the necessary facts in the blank space clearly indicates consideration and proper application of mind.

(8) As regards the contention that the premises were in fact being used for permitted users as a hostel or a public utility these are matters of fact and require to be investigated upon evidence by the court below. Yet I have no hesitation in saying that banking is purely a commercial activity and cannot be considered a public utility. Indeed, it was so held in *Indian Bank v. Delhi Development Authority*. 15 Dlt (1979) 209. If the concept of public utility were permitted to be widened, then all types of shops catering to the needs of the inhabitants will have to be allowed in the residential premises. That I think will be opposed to what urban planning seeks to achieve.

(9) Use of the premises for a Staff Training College-cum-Hostel for which the bank, it is said, is paying rent to the tune of Rs. 20,000.00 per month does not prima facie appear to be a premissible residential use. Whether it amounts to a school, a permissible use according to master plan, how much of the premises are being used for training how much for the hostel are all questions to be decided at the relevant time by the court below. I do leave all these facts in the first instance to be determined there, if need be. For this view I have the support of *Delhi Development Authority v, Smt. Lila D. Bhagat : AIR 1975 SC495* , and *Delhi Development Authority v Principal, Vocational Training College* .

(10) As a matter of fact, that part of the contentions which related to limitation and sanction under section 197 Criminal Procedure Code . mainly engaged our attention. I now propose to deal with them.

(11) The case of the petitioners is that in the case of the Oriental Bank of Commerce, the complaint is barred by fifteen days and in case of the Punjab National Bank by one day. It was urged before the learned single Judge on behalf of the Delhi Development Authority that the period of limitation in such a case shall commence on the first day on which the offence came to the knowledge of the person aggrieved by the offence and that in view of the decision of this court in *Gurmeet Kaur (supra)*, the Delhi Development Authority can be said to have the knowledge only when the fact comes to the knowledge of the officer empowered to sanction prosecution and file complaint and the limitation shall be counted from the date when the report of the offence was made to the Secretary of the DDA. He

was the person aggrieved. The petitioners, on the other hand, contended that the limitation shall begin to run from the date of inspection by the officers authorised to do so under section 28 of the Act. The knowledge of the inspecting officer shall be deemed to be the knowledge of the Dda, the complainant.

(12) These arguments are made because clause (b) of sub-section (1) of section 469 Criminal Procedure Code . provides that where the commission of the offence was was not known to the person aggrieved by the offence, the period of limitation shall commence on the first day on which such offence comes to the knowledge of the person aggrieved or of any police officer whichever is earlier. Now, in this case, there is no question of a police officer and the pertinent question therefore, firstly, is as to who in this case is a person aggrieved and secondly, when the offence did come to the knowledge of such a person. The meaning of the expression 'person aggrieved' has not been defined, though it occurs in other sections of Cr. PrC. as well, such as sections 198 and 199. It was considered twice by the Supreme Court, once in *Adi Pherozshah v. N.H.* See *vai. : [1971]1SCR863* , and second time in *Bar Council of Maharashtra v. Debholkar.* *Air 1975 Sc 2098*, but this was done in the context of an appeal to be preferred by a person aggrieved under section 37 of the Advocates Act, 1961. *Agamin Manisubrat. Jain v. State of Haryana and others, : [1977]2SCR361* , it was observed that a person can be said to be aggrieved only when a person is denied a legal right by some one who has a legal duty to do something or to abstain from doing something. But these cases do not seem to apply in construing section 468 Criminal Procedure Code . 'The words person aggrieved', are of wide import and should not be subjected to restrictive interpretation. They do not include, of course, a mere busy body who is interfering in things which do not concern him : but they do include a person who has a genuine grievance because something has been done or omitted to be done contrary to what the law requires'. *Denning M.R. in Regina v. Inland Revenue Commissioner, (1980} 2 W.L.R. 579.* The simple meaning of the words 'person aggrieved' in the context of this section, therefore, should be a person having suffered loss or injury, a victim of the crime. This will also include a person or an authority who is by or under any law charged with the duty to administer it and to prosecute those who violate its provisions As a matter of fact, in a criminal case, any person can set the law into motion and in case of a

non-conforming user, besides the Dda, a neighbour or even a local resident will be a 'person aggrieved', it is a sort of public interest prosecution. I am, therefore, with respect, unable to subscribe to the view taken in *Sulochana v State Registrar of Chits*. 1978 Cr. L.J. 116, that the words 'person aggrieved by the offence' occurring in section 469(1) (b) & (c) should be given a limited or restricted coverage, viz. one who is personally and directly affected by an offence, and not to any member of the public or even an officer who is charged with the duty of enforcing the prohibitory regulations, under a statute. This view was based upon *Ex parte Sidebotham*, (1880) 14 Ch. D. 458, which was overthrown in *Attorney General of Gambia, v N Jie*, (1961) A.C. 617.

(13) The learned counsel for the petitioners, however, urged that in both the complaints, the Dda, and not the public servant who actually lodged the complaint, is the complainant and it is so mentioned specifically therein at the beginning of the complaint, and, therefore, the Delhi Development Authority should be deemed to be the person aggrieved. He relies in this connection upon a Division Bench decision of this court in *Delhi Development Authority v Punjab National Bank and others*, : 19(1981)DLT353 . It was held there that whosoever may lodge a complaint on its behalf, the Delhi Development Authority was the real complainant within the meaning of section 378(5) Criminal Procedure Code . But that is a cases which does not interpret 'person aggrieved', it only tried to discover the real complainant. The word "complainant" though it occurs at several places in the Code, notably sections 170(2) and 171 which deal with police reports, has not been defined. Only 'complaint' has been defined. It is defined to mean as any allegation made orally or in writing to a Magistrate with a view to his taking action under the Code, that some person, whether known or unknown, has committed an offence, but it does not include a police report, vide section 2(d), Criminal Procedure Code . It appears, therefore, that any person who makes the complaint will be complainant. Subject to exceptions such as contained in sections 195, 198 and 199 Cr. PC. or in any other special law, the general rule is that any person, having knowledge of commission of an offence may set the law in motion by a complaint even though he is not personally interested in or affected by the offence or has not suffered any particular injury : In *Re Ganesh Narayan Sathe*, Lir (1889)13 Bom. 600, and *Gajn j Singh and others v. Emporor*, (1936) 37 Cr. L.J.

56. But in *Municipal Corporation of Delhi v Jagdish Lal and another*, : 1970 CriLJ1 , and *Dhain Stngh v. Municipal. Board*, : 1970 CriLJ492 , relied upon in *Delhi Development Authority v. Punjab National Bank (supra)* while interpreting section 20 of the Prevention of Food Adulteration Act, 1954, it was held that where the complaint was filed by a person authorised by the Municipal Corporation, the Corporation is the complainant. Thus, the Dda will no doubt be deemed (but only deemed to be) the complainant, but it cannot be said that the person who actually filed the complaint or who is aggrieved by the act of the accused will not be the complainant. I draw support for this proposition from *S.P Dubey v. Narsingh Bahadur*, : AIR1961 All447 . In practice too they are all usually described as complainants and rightly so because they are either victims of the offence or desire or are enjoined to see that the offender be dealt with. If that were not so, how will the Magistrate apply the first proviso to section 200 Criminal Procedure Code . If the Delhi Development Authority is the sole compainant and the public servant who files the complaint is not the complainant, then shall the Magistrate call all the members of the Delhi Development Authority to be examined on oath That certainly will be embarrassing in the most for all those who will be concerned. I am, thereforee, of the view that both the Dda and the public servant who files the complaint will be considered complainants. Assuming that the Delhi Development Authority is the sole complainant and thus, a person aggrieved, and that it has to act through its officers authorised by it, can the knowledge of the inspecting officer be imputed to the DDA? It cannot be, because until the matter comes to the notice of the proper person who is authorised to file a complaint, it cannot be said that the knowledge of the inspecting officer is the knowledge of the DDA. To that extent, I am in respectful agreement with Prithvi Raj J. in *Gurmeet Kaur (supra)*. It will be a matter of inquiry into facts as to when the authority which sanctioned the prosecution came to acquire the knowledge of the offence. Such an enquiry cannot be undertaken over here.

(14) I may, however, add that the provisions of Pfa Act, S. 20, are different from those of s. 49(1) of the Act. Under s. 20 of the Pfa Act, no prosecution can be instituted except by or with the written consent of the Central Government, or the State Government or a local authority or a person authorised by any of them or by the person referred in s. 12 thereof. Section 49(1) of the Act on the other hand

provides only that no prosecution under section 29(2) can be lodged without the previous sanction of the Delhi Development Authority or any person authorised by it: see *M.K. Vasurai v. DDA & others*. One cannot fail to observe that the word 'by' has been omitted in s. 49 of the Act. That omission makes a vital difference in determining as to by whom the complaint was virtually made. Unlike the provisions of Pfa Act, the Delhi Development Authority either by itself or by its authorised officer has not been specifically authorised to file a complaint. If it does, it does so under a general rule of criminal jurisprudence, and as an authority charged with the pursuit of the objects of planned development of Delhi specified in section 6 of the Act. It does not, therefore, appear to me appropriate to apply the interpretation of section 20, Pfa Act, to the provisions of section 49(1) of the Act. It may further be noted that in *Dhian Singh (Supra)* and *Jagdish Lal (supra)*, what the Supreme Court said was that in filing the complaint, the officer was acting as an agent authorised by the Delhi Municipal Corporation to file the complaint and it must, therefore, be deemed in the contemplation of law that Dmc was the complainant in the case; but it did not purport to say that the officer who filed the complaint was not the complainant. I am, therefore, inclined to hold that in these two cases the officer who was authorised to file the complaint was the aggrieved person the period of limitation should commence from his knowledge

(15) The point that was more seriously agitated in this connection was whether an offence under section 29(2) of the Act is a continuing offence and the provisions regarding limitation cannot apply in case of an offence which continues on the date the Magistrate takes cognizance thereof. According to section 469(I)(a) Criminal Procedure Code, the period of limitation in relation to an offender in the first instance shall commence on the date of the offence. Section 472 Cr. P.C. provides that in case of a continuing offence a fresh period of limitation shall begin to run at every moment of the time during which the offence continues. The bar of limitation under section 468 Cr. P.C., it must be clearly understood, is imposed not on the filing of the complaint but on taking cognizance thereof by the court, that is when the Magistrate applies his mind to the contents of the complainant, information or police report or on his own knowledge with a view to deal with the offence. And, therefore, it is correct to urge that what the court has to examine is whether on the date of taking cognizance by it, the offence was or was not within the period of

limitation prescribed by section 468. If the offence is a continuing one, and continues at the moment of taking cognizance thereof, then cognizance will be within limitation irrespective of when the offence came to be committed for the first time or when the complaint was lodged. This position was more or less conceded by Mr. Mullah In these two cases, since the offence was a continuing offence and continues and admittedly unceasingly, even at this moment then the date of inspection, the date of sanction and the date of filing the complaint become irrelevant because when the Magistrate had taken cognizance, the offence had not ceased six months before. In Gurmeet Kaur (supra) it was held that the offence under section 29 of the Act was not a continuing offence. Rather, the learned Judge appears to have proceeded on the basis that it was a continuing offence but he thought that the lower court went wrong in appreciating the concept of a continuing offence. He said :

'IT is thus evident that for every offence so committed on each occasion separate prosecution has to be launched within the period of limitation. But if a prosecution launched in respect of such an offence is found to be barred by limitation, the complaint cannot be sustained on the plea that the offence alleged to have been committed was being continued to be committed even after the filing of the complaint.'

(16) It does not, with respect, appear to me to be a correct statement of the law. According to Emperor v. Karsandas : AIR1942 Bom326 , and State of Bihar v. Deokaroh Nenshi another, : 1973 CriLJ347 , to which the learned Judge had also made reference :

'THE distinction between the two kinds of offence is between an act or omission which constitutes an offence once and for all and an act or omission which continues and therefore, constitutes a fresh offence every time or occasion on which it continues.'

(17) This has been so enacted by section 472 of the Code. But what the learned Judge appears not to have noticed is the effect of amendment of section 29(2) of the Act which provides for the mode of punishment of a continuing offence. It also escaped his notice that the bar of limitation is not raised on the filing of the

complaint but on the taking of cognizance by the Magistrate. There should be no doubt that the offence of non-conforming user is a continuing offence and was always regarded so. But it raised a problem : how to punish such an offence It has now been solved by an amendment made in 1964 that after the first conviction, if the offence continues, then the offender shall be required to pay a daily fine. It clearly implies further that this is an offence which is committed de die in diem so long as the misuse does not discontinue. The amendment has been made just to overcome the type of procedure suggested by the learned Judge that in case of a continuing offence a succession of complaints must be continued to be filed. I have had an occasion to examine this matter in *Narain Dutt Jhamb v M C D. & State* , wherein I have held that continued use of a building without completion certificate issued by the M.C.D. is a continuing contravention because it was susceptible of continuance and is distinguishable from the one which is committed once and for all. It arises out of a failure to obey or comply with a rule or its requirements and involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with.

(18) There is no substance in the argument made by the learned counsel for the petitioners that unless a conviction is first obtained, there is no continuity of the offence within the meaning of section 29. What section 29 provides is how to punish a continuing offence. If the amendment in the section were not made, then the Delhi Development Authority could be entitled to continue to lodge several complaints against the offender leading to harassment of the accused and considerable embarrassment to the DDA. I would, therefore, uphold the contention that the non-conforming user will never be barred by limitation if it continues on the date the court is called upon to take cognizance of the offence.

(19) More effective answer to the objection of the petitioners was, however, provided by the learned counsel for the Delhi Development Authority by reference to subsection (3) of section 470 Criminal Procedure Code . which is as follows :

'(3)Where notice of prosecution for an offence has been given, or where, under any law for the time being in force, the previous consent or sanction of the Government or any other authority is required for the institution of any prosecution

for an offence, then, in computing the period of limitation, the period of such notice or, as the case may be, the time required for obtaining such consent or sanction shall be excluded.

Explanation.-In computing the time required for obtaining the consent or sanction of the Government or any other authority, the date on which application was made for obtaining the consent or sanction and the date of receipt of the order of the Government or other authority shall both be excluded.'

(20) Now, it is clear that notice of prosecution was given in these cases of more than 15 days and if that time is excluded, then the complaints will be within limitation. Similarly, the time consumed in obtaining sanction of the authority will also have to be excluded. If either is done, then without doubt the limitation is saved. The learned counsel for the petitioners controverted the argument by urging that where the sanctioning authority and the complainant are one and the same person, then the period of sanction cannot be excluded. He placed reliance on Indian Bank (supra) which held that in a case where the Delhi Development Authority itself is the complainant, the prosecution does not require any sanction under section 49 of the Act. I cannot support such a contention for the simple reason that neither section 49 of the Act nor section 470(3) Criminal Procedure Code provides that way. Section 470(3) Criminal Procedure Code simply says that where previous consent or sanction is required the period for obtaining such consent or sanction shall have to be excluded. Therefore, if the time taken in obtaining sanction from 29/12/1980 in one case and from 13/1/1981 in the other to the date of issue of sanction, as is obvious and from the record, is excluded, the plea of limitation cannot be sustained in view of the provisions of sub-section (3) of section 470 Criminal Procedure Code. I have, therefore, no hesitation in holding : (1) In case of Dda, when the case is sought to be covered by section 469(I)(b) Criminal Procedure Code, the period of limitation shall be counted from the date when the matter comes to the knowledge of the sanctioning authority. (2) The offence under section 29(2) of the Act is a continuing offence and in fact it continued indisputably on the date the cognizance was taken. Therefore, the bar of limitation cannot be raised in view of section 469(I)(a) read with section 472 Cr. P.C. (3) The period spent in giving the notice where such notice is in fact given

and the time taken in obtaining sanction where such sanction is necessary, has to be excluded in computing the period of limitation.

(21) Tested on any of the aforesaid conclusions, both the prosecutions will be found within limitation.

(22) Before concluding this part of the case, I may also invite attention to section 473 Criminal Procedure Code . which empowers the court to take cognizance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice. Had the objection as to limitation been raised before the learned Magistrate, he could be invited to condone the delay either under this section or even under section 5 of the Limitation Act, 1963 : .Mangu Ram v. M.C.D., : 1976 CriLJ179 . In the face of these overriding provisions, it is highly inappropriate on the part of the petitioners to have raised this question in a petition of revision straight in this court because it is clearly a matter to be decided upon facts.

(23) Now comes the last and the most vexed question of sanction under section 197 Cr. P.C. The learned counsel for the Delhi Development Authority pointed out that in order to get the protection of the provisions of section 197 Criminal Procedure Code . the accused must satisfy the following conditions :

(1)that the accused is a public servant ; (2) that he is a public servant not removable from his office save by or with the sanction of the appropriate Government ; (3) the offence should have been committed by him while acting or purporting to act in the discharge of his official duty ; (4) the accused is employed or was at time of commission of the alleged offence, employed in connection with the affairs of the Union or the State, as the case may be.

(24) These propositions do obviously spell out of the section itself. As regards the first point, a fierce debate was raised. The learned counsel for the Delhi Development Authority urged that as held in Thiru V. Thanigachalam v. State of Tamil Nadu, : 1976 CriLJ1756 , whether an accused is a public servant or not, is a mixed question of fact and law and cannot be decided in a reference or a revision

because it requires evidence for its determination. That is true. But the petitioners contend that it can be decided on the basis of the provisions of the Banks Act, the scheme noticed there under, and the facts stated in the complaint and notifications of the appointments of the accused. The petitioners canvass that they are public servants within the meaning of sub-clause (b) of clause 12 of section 71 of the Indian Penal Code. They are not statutory public servants like the Custodian who was declared so by section 14 of the Banks Act. Here, I may as well before I discuss other matters, dispose of the contention raised by the learned counsel for the petitioners that in the case of the Oriental Bank of Commerce, on the date of offence is said to have been detected the present Chairman Mr. Vig was the Custodian and, therefore, was entitled to the protection of section 197 Criminal Procedure Code. This contention could not be upheld because what we are here concerned with is a continuing offence and by the time the Magistrate took cognizance of the offence, the accused had long since ceased to be a Custodian and, therefore, public servant within the meaning of the section 14 of the Banks Act. Resuming the principal argument, let us read clause (12)(b) of section 21 of the Indian Penal Code :

'The words 'public servant' denote a person falling under any of the descriptions hereinafter following, namely :- xx xx xx xx Twelfth - Every person-- xx xx xx xx (b) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in section 617 of the Companies Act, 1956.'

(25) The precise contention of the Chairmen petitioners is that they are in the service/pay of a corporation established by the Banks Act and, therefore, public servants entitled to the protection of section 197 Cr P.C.

(26) The question as to what a corporation established by under an Act is, came to be examined by the Supreme Court in S. S Dhanoe v. Municipal Corporation of Delhi, : 1981 CriLJ871 . It laid down : (1) Corporation in its widest sense, may mean any association of individuals entitled to act as an individual (para 9). But in the context of clause Twelfth, section 21 1.P.C. the expression 'corporation' must be given a narrow legal connotation (para 9). (2) Clause Twelfth does not uses the

words 'body corporate', but uses the word 'corporation'. And a corporation is an artificial being created by law having a legal entity entirely separate and distinct from the individuals who compose it with the capacity of continuous existence and succession notwithstanding changing in its membership. They also quoted a passage from the judgment of Chief Justice Marshall in *Dartmouth College v. N H. Woodward*, 1816 4 Whe 518: 4 L. Ed. 629 : 'A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality ; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the preplexing intricacies, the hazardeous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with those qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being'. (3) Stc, Lic, Ongc, Ifc, etc. are examples of the corporations which are covered by the said clause Twelfth. (4) The Super Bazar was a 'body corporate' established in pursuance of the Bombay Co-operative Societies Act, 1925 but was not a Corporation, established by or under the statute within the meaning of the said clause Twelfth. (5) The manager of the Super Bazar was not employed in connection with the affairs of the Union, because the Super Bazars though heavily financed by the Government are not owned by the Central Government but are owned and managed by the Co-operative Stores Ltd.

(27) Let us then examine the case of the Chairman petitioners in the light of the observations of the Supreme Court. By sub-section (1) of section 3 of the Banks Act, new Banks were constituted and sub-section (4) thereof provided:-

'EVERY corresponding new bank shall be 'body corporate' with perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property, and to contract and may sue and be sued in its name.'

(28) Now, we have to inquire what has the legislature thought fit to enact by these words. There is no doubt as the enactment says so in express terms that the petitioner Banks are 'bodies corporate' and, therefore, covered by the provisions of section 32 of the Act. There is also no doubt that they are so declared (in fact not established in terms) by or under the Banks Act. The crucial question that follows is : is it a corporation within the arrow meaning of the aforesaid clause Twelfth of section 21 of the Indian Penal Code . Reverting to the law laid down by the Supreme Court, it is necessary to see that in order that the Corporation is covered by clause Twelfth, it must be proved to be a legal entity entirely separate and distinct from the individuals who compose it That is a doctrine firmly rooted in our notions derived from common law : A. P. State Road Transport Corporation v. Income-tax Officer, Air 1964 Sc 1436. Our inquiry has, therefore, to be directed to answer the question : the New Bank is a entity separate from whom The Banks Act does not provide for the individuals who will compose or constitute the New Bank, in contra-distinction to the Acts which have established the Corporations, such as Stc, Lic, etc. and have specified the individuals (indicated by name or by designation) which will constitute or compose these corporations or of which the corporation shall consist. I have also scanned several statutes of the United Kingdom and I have found that in all of them the legislature has taken care to provide the human sub-stratum for creating a separate artificial and fictional entity. The Banks Act makes no such provision except saying in sub-section (2) of its section 7 that the general superintendence, direction and management of the affairs and business of a New Bank shall vest in a Board of Directors which shall be entitled to exercise all such powers and do all acts and things as the corresponding New Bank is authorised to exercise and do. It cannot, therefore, be said that the Board of Directors are the individuals who compose the Corporation. The human components or constituents are thus missing there in the petitioner Banks. Strictly speaking, therefore, one has to say that the petitioner Banks are not corporations within the meaning of clause 12. But then how to

describe such a 'body corporate' The learned counsel for the Dda submitted that a similar question in an identical situation came to be examined by Salmond. In a footnote (k) in para 67 in Chapter X relating to Corporations in his celebrated treatise 'Jurisprudence', Ed. 1966, page 66, he has said: 'Occasionally in the statute book we find the so-called Corporations which are in truth not corporations at all-having no incorporated members, but are merely personified institutions. The Commonwealth Bank of Australia constituted by an Act of the Federal Parliament of Australia is an example. See the Commonwealth Bank Act, 1911, s. 5. 'A Commonwealth Bank to be called the Commonwealth Bank of Australia is hereby established' Section 6

'THE Bank shall be a body corporate with perpetual succession and a common seal, and may hold land and may sue and be sued in its corporate name.'

(29) The petitioner Banks, therefore, can be described a personified institution, an artificial legal person no doubt but not because they are corporations. I agree and it seems to me to be correct to say that the petitioner Banks are not 'corporations', though they are "bodies corporate' personified institutions.

(30) Even if one will hold that the petitioner Banks are corporations, the next question that will arise is whether their Chairmen are in the service or pay of the Banks. In order that a person can claim to be in the service of or in the pay of the corporation, he must establish a master and servant relationship between the corporation and himself. The learned counsel for the Dda contends that the Directors in whom the control, superintendence and management of the Bank vest cannot be considered to have a master and servant relationship vis-a-vis the Bank. The counsel relies upon *Manshankar Prabha Shanka Dwivedi and another v. The State of Gujarat* Air 1970 Guj. 7. This decision was subsequently upheld by the Supreme Court in *State of Gujarat v. M.P. Dwivedi*, : 1972 CriLJ1247 . It was held in the Gujarat case that the expression 'in the service of implies a relationship of master and servant. The important test whether there is such a relationship or not is the existence of rights of controlling the manner in which the other does the work. The expression 'in the pay of means 'in the employment of. It was submitted that there is no such relationship between the Bank and its directors or its

chairman for the bare reason that the Corporation does not control the manner of their work. The Corporation cannot even appoint them. They are appointed by the Central Government on the salary fixed by it. As is claimed, which claim shall be discussed later on, the corporation cannot remove them. That completely negates the employer and employee relationship between the corporation and the petitioners. These expressions again came to be considered in *M Karunanidhi v. Union of India*, : 1979 CriLJ773 . It was observed there that 'in the service of' undoubtedly signifies a relationship of master and servant. The expression 'in the pay of' is of wider amplitude so as to include within its ambit even a public servant who may not be a regular employee receiving salary from his master. This by, itself, however, does not lead to the inference that a relationship of master and servant must necessarily exist in all cases where a person is paid a salary. (Also see the last sentence of para 6 of *Hargovind Pant v Raghukul Tilak*, : [1979]3SCR972). The mere fact that the Chairman-cum-Managing Director gets his pay or salary out of the funds of the Bank will not in itself make him servant or employee of the Bank. Explaining the position of a director in *Tesco Super-Markets Ltd v. Nattras*, 1972 Ac 153, Lord Reid said that he is not acting as servant, representative, agent or delegate. He is an embodiment of the company. He is the very ego and centre Haldane in *Lennasd's Carrying Co. Ltd v. Asiatic Petroleum Co. Ltd*. 1915 A.C. 705. As pointed out in *Delhi Development Authority v. Punjab National Bank*, (supra) their action is the very action of company itself. If that is so, then they cannot claim to be servants or employees of the corporation. This contention stands reinforced by the provisions of cls. (d), (e), (f) & (K) of sub-section (2) of section 19 of the Banks Act under which regulations are required to be made by the Board of Directors to provide for appointment and other conditions and benefits of service of the officers and employees of the Bank. In other words, directors are not envisaged to be employees or officers of the Bank and that is why their appointment and emoluments etc. are regulated separately by the provisions of the Scheme made under section 9 of the Banks Act. Section 16 of the Banks Act has made provisions for indemnity separately for the directors, on the one hand, and for officers and employees of the Banks, on the other. The Act itself has thus distinguished between the directors and employees of the Banks. I, therefore, see little option but to uphold this contention.

(31) The learned counsel for the Delhi Development Authority next painted out that the Dda is not prosecuting the managing directors but the Chairman who is appointed under clause 5 of the Nationalised Banks (Management & Miscellaneous Provisions) Scheme, 1970 (herein the Scheme). Chairman is appointed under clause 5 by the Central Government out of the several directors appointed under clause 3 of the Scheme, but in the Scheme there is no provision of his removal. thereforee, a Chairman cannot be said to be a person who cannot be removed from office except by the Central Government She further suggested hat it implies that he may be removed otherwise than by the Central Government for example one can envisage his removal by a motion of no confidence passed against him by a maJority of other members of the Board. The Learned counsel for the petitioners, on the other hand, produced a gazette notification, (of which judicial notice under sections 57 and 81 of the Evidence Act has to be taken) in order to show that the petitioners are Managing Directors-cum-Chairmen and draw specified salary from the Banks as whole-time managing directors and in virtue of clause 6 of the Scheme they are also Chief Executives of the Banks. The Scheme does provide that a managing director cannot be removed except by the Central Government. If he is removed from the position of a managing director, he automatically will stand removed from the office of the Chairman. thereforee, if cannot be urged by the Delhi Development Authority that he is not an officer removeable only by the Government. I have carefully considered the rival contentions. The words 'save or by' occurring in section 197 Cr P.C. mean that the section will apply only in cases where removal can be made by the Government and by no other. The word 'removeable' has not been defined and though in cases like Pukhraj v. Umaidram, , and Ladhu Ram v. Rameshwar and others, Air 1966 Raj. 136 arestricted meaning was sought to be given to the word same as in case of civil services, but I am in respectful agreement with the approach adopted in the State v. B. Chikkavenkatappa and another, Air 1965 Mys. 253, I M Pendse v. Chandragopal Pyarelal Mahajan, , and isher Dass v. Amamath, , for the reasons given therein that removal cannot be construbd in a limited sense and it must mean removal by an act of some agency or authority apart from the automatic vacation of office under some statutory provision. Though under section 16 of the General Clauses Act, 1897, the appointing authority can remove a person

appointed by it, but the provisions of the General Clauses Act are not made applicable to the Scheme. Nor do I find any such general proposition, apart from Art. 311 of the Constitution, that a person cannot be removed by an authority subordinate to that by which he was appointed. It is one thing to urge that the Government which appoints, can dismiss him as it is the privilege of the employer but in the absence of any provision, it is quite another to say that no person other than the Government can remove him. It cannot be said categorically that the Chairman is a person who cannot be removed save by or under the authority of the Central Government. That lacuna is there in the Scheme and it is not possible for this court to supply the *casus omissus*. It seems to me to be an extraordinary device to suggest that whenever the Government desired to remove the Chairman, it will or shall have to remove him from the position of a director, even where he is a good director though not an efficient Chairman. There is nothing in the Scheme to show that such a course would be permissible in law. It was next urged that sanction under section 197 Cr. P.C. will all the same be needed, because the Chairman is also the managing director or the director removeable only by the Central Government and the cannot be prosecuted without prior sanction. No doubt, some authorities are available for such a view in *Pendse* (supra) and *Shrilal v Manmath Kumar Misra*, , but these authorities are overridden by *Dhanoo* (supra) where the officer concerned was a civil servant and was still allowed to be prosecuted without sanction because at the relevant time he was working in a different capacity.

(32) The next question is-Is the Chairman acting or purporting to act in the discharge of official duty in opening a branch in a residential area-in committing the offence of non-conforming user This raises a further question what is an office The answer to this question is material in more ways than one. Does the Chairman at all hold an office and has he committed the offence in discharging the duties of his office. It must be noted that the offence is committed by the body corporate and not by the Chairman. He is being prosecuted in virtue of section 32 of the Act which makes him too a person liable for an offence under the Act : *Central Bank of India v D.D.A.* 1981 Rlr 78, and *Ram Kumar v. Municipal Corporation of Delhi*, 1979 (11) Fac 56.

(33) In *Smt. Kama Khaturia v. Manak Chand Sunaia*, : [1970]2SCR835 , and *Statesman (P) Ltd v H R. Deb* : [1968]3SCR614 , it was held that office means 'a position or place to which certain duties are attached, especially one of a more or less public character' (vide *New English Dictionary*). I would think that the word 'office' occurring in section 197 Cr. P.C. should be construed to mean not a private office but a public office- an agency for the state the duties of which involve in their performance the exercise of some portion of sovereign power, either great or small, either in making, executing or administering the laws (*Black's law Dictionary-5th Edn.*). According to *Earl Jowitt's Dictionary of English Law* a public office is one which entitles a man to act in the affairs of others without their appointment or permission, I am singularly doubtful if one can say that the Chairman, or for that matter, any director of the Bank, can be considered to hold any position exercising any bit of sovereign power acting in the affairs of others without their permission. The whole business of the Bank is being carried on by the body corporate. If the state itself had directly done the business, it could be considered as an exercise of sovereign executive power. But that is not so. Then, it is extremely difficult to describe the duties or functions performed by the petitioners as official duties or functions. More important is the other aspect that the Chairman is not being prosecuted because he has committed the offence. The offence has been committed by the Bank but the Chairman is being prosecuted because the Board of Directors is responsible for the management and control of the business of the Bank, vide *D D.A. v. Punjab National Bank* (supra).

(34) Granting that the offence was committed by the Chairman in his official capacity, while holding an office, it cannot yet be said that while doing so he was employed in connection with the affairs of the Union. There is no doubt that he is employed in the affairs of the body corporate, the Bank, but not of the Union. This expression occurs in Article 309 of the constitution. It has not been defined. But it is clear that no Act is enacted and no rules are made under that Article to regulate the recruitment and conditions of service of the persons appointed to services and posts of the Banks. Generally speaking. Banking will be an affair of the Union, if the business of the Banks was directly administered by the Government. Even if such a body being an instrumentality or agency of the state is a state or authority for the purpose of Article 12 of the Constitution, yet it cannot be said that the

employees of the corporation or its directors are employed in the affairs of the Union. The construction of Article 12 has to be confined to that Article alone. If the concept were applied too widely, than in the context of the expanded meaning activities of the State, every activity whether undertaken even by private parties may be called an affair of the Central Government or the State Government, which is a proposition I am not inclined to accept. it

(35) It is true that the share capital after the abolition of the banking companies as such, vest in the Government and the profits of the Banks also vest in the Central Government and the Central Government and the Reserve Bank exercise a lot of control upon their activities. A copy of the notification, published in the Gazette of India, dated 16-8-1980 appointing Mr. S.L. Chopra as the Managing Director of the Punjab National Bank for a year shown to us shows that all such notifications are issued by the Government of India in the Banking Division of the Department of Economic Affairs. Yet, the Banks are entities entirely distinct and separate from the Union and their affairs at least their internal affairs and activities cannot be considered affairs of the Union. It has been consistently held that employees of the Corporations or the Companies even though they are under the State Control and almost the entire capital is held by the States are not entitled to protection no Article 311 of the Constitution, vide *Chini Mazdoor Sangh and others v. The State of Bihar and others*, : AIR1971 Pat273 . That being so, the employees of the Banks cannot be held to be employees of the Union and that leads to the inevitable inference that the Chairman and directors of the Banks are not employed in the affairs of the Union. To make their appointments and to exercise control over them is an Economic Affair of the Union, but the hiring of the premises by the Banks in pursuance of their business cannot be called an affair of the Union.

(36) Stage has now come when I should consider the three rulings relied upon by the learned counsel for the petitioners in order to show that the petitioners are public servants employed in the affairs of the Union. He first relied on *Chini Mazdoor* (supra) wherein the employees were held to be employed in connection with the affairs of the State, but that was because the sugar factory was purchased by the State Government and, was directly administered by it and not by or

through any corporation or company. This case has, therefore, no application here.

(37) He next referred to Dr. A.S. Rao. v.C. N N Kutty and another, 1978 Cr. L.J. Noc 65. It was held in this case that the Managing Director of the Electronics Corporation of India Ltd. in which the Central Government had one lac shares minus three, and full control, was a public servant, and the functions of the Electronics Corporation are part of the affairs of the Union ; of the Central Government because the development of electronics is most essential for the growth of industrial and other activities. The full report is not available, but this case appears to me to be covered by the second limb of clause (b) of clause Twelfth of section 21 Indian Penal Code . which relates to Government companies. Here it is nobody's case that the Banks are Government companies. Furthermore, this decision was given long before and appears to me to be contrary to, the Supreme Court decision in S S Dhanoa (supra). For the same reason I also disagree with the view taken in D N Baria v.Labshankar Hari Ram Mehta. 1972 (75) Blr 493, that requirement of section 197 will be satisfied if the activity has some connection with the affairs of the Union in general.

(38) In the third decision, Kurian V. Slate of Kerala. 1982 Cr. L.J. 780. the Central Bank of India was held to be a corporation within the meaning of section 21 Indian Penal Code . on the grounds :- (i) that it is a government company within section 617 of the companies Act; (ii) it is also a body corporate established under a Central Act ; (iii) it is an authority under Article 12 of the constitution.

(39) The learned Judges, however, did not take into account and rightly so the aspect of Article 12 of the Constitution (vide para 7 of the report) and rested their decision upon the first two propositions. With due respect, I must say, the first proposition is obviously inappropriate because there is no question of share capital in the case of a nationalised Bank, there being no share as such so as to make them a company much less a Government company. They are Indian companies only for the purpose of the Income-tax Act, 1961, vide section 11 of the Banks Act. That does not make them companies incorporated under the Companies Act: Lachman Das Agarwal v The Punjab National Bank and others,

1978 Lab. I.C. 423. That apart, I am in respectful agreement with the view of this court reported in M/s National Insurance Co. Ltd v. Union of India and others; 1978 Tax L.R. 2238, which held that the identity of the Government company remains distinct from the Government. The Government company is not identified with the Union. To the same effect are the observations in Regional Inspector of Mines Parsia v. K. K. Sengupta and others, 1973 Cr. L.J. 1671. As regards whether a nationalised Bank is a corporarion or not, with utmost respect, I disagree with the observations made in Kurian (supra). The learned Judges have given no reasons for their view, as I have attempted to do, as to why I consider though the nationalised Bank is a body corporate, it is not a corporation within the meaning of section 21 Indian Penal Code .

(40) I must, thereforee, uphold the contention of the Dda that the Chairman or the directors of the said two Banks do not satisfy the conditions of section 197 Cr. P.C. I have come to this conclusion after weeks spent in attempting to come to another.

(41) Having considered in detail the available facts, enactments, precedents and arguments, I answer the reference in following manner : (1) The bar of limitation will not be attracted in these cases ; (2) No sanction under section 197 Cr. P.C, is required for prosecution of the accused.

(42) The only grounds on which the prosecution was challenged in these revisions were these two. Since these are being decided against the petitioners the revision petitions are hereby dismissed. Sachar J.- I agree that these revision petitions be dismissed.

(43) My learned brother M.L. Jain J. has in his judgment given the reasons in detail for doing so. I have nothing but appreciation for the arguments made in this case at the bar. There are broadly two main points argued by the counsel for the petitioners ; (a) that the complaints were bared by limitation ; (b) that without obtaining sanction from the Central Government under section 197 Cr. P.C., 1973 no prosecution could be proceeded with.

(44) Regarding (a) my learned brother has given three independent reasons for holding that the prosecutions are with in time. I agree with his conclusion and

reasons, firstly, that the offence is a continuing one and the bar of limitation does not apply because of the provision of section 468(1)(a) and section 472 Cr. P.C. Secondly, the time spent in giving notice and obtaining sanction has got to be excluded, in computing the period of limitation, vide section 470(3) Cr. P.C. As that is sufficient to repel the petitioners' contention on this point I do not further consider it necessary to examine whether the time shall run from the knowledge of the aggrieved person in these cases. Regarding (b) before section 197 Cr. P.C. can apply the accused Chairman must have committed the offence while acting or purporting to act in the discharge of his official duty. Dealing with this aspect my learned brother has observed : 'It must be noted that the offence is committed by the body corporate and not by the Chairman. He is being prosecuted by virtue of section 32 of the Act which makes him too a person liable for an offence under the Act,' and again 'More important is the other aspect that the Chairman is not being prosecuted because he has committed the offence. The offence has been committed by the Bank but the Chairman is being prosecuted because the Board of Directors is responsible for the management and control of the Bank.'

(45) As this finding is sufficient to repel the petitioner's plea raised on the basis of absence of sanction under section 197 Cr. P.C., I, need not discuss the other aspects which are so elaborately dealt with by my learned brother.