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Court : Chennai

Decided On : Jan-13-1999

Reported in : 1999(2)ALD(Cri)743; 1999(3)CTC25

Judge : B. Akbarbashakhadiri, J.

Acts : Code of Criminal Procedure (CrPC) , 1973 -- Sections 197, 239 and 397; Prevention of Corruption Act, 1988 -- Sections 19; Constitution of India -- Articles 105, 134, 141 and 356; Indian Penal Code (IPC), 1860 -- 21, 120-B, 409, 467 and 477-A; Prevention of Corruption Act, 1989 -- Sections 7, 10, 11, 13, 13(1) and 15; Criminal Procedure (Amendment) Act, 1993; Wakf Act, 1995 -- Sections 20; General Clauses Act, 1897 -- Sections 3(60)

Appeal No. : Crl.R.C.No. 1244 of 1998 and Crl.M.P.No. 9484 of 1998

Appellant : Mohammed Asif

Respondent : State by Additional Superintendent of Police Cb, Cid. Chennai

Advocate for Def. : Mr. R. Shanmugasundaram, Public Prosecutor

Advocate for Pet/Ap. : N. Jyothi, Adv.

Judgement :
ORDER

1. This revision is to quash the orders passed in the petition filed under Section 239 of the Code of Criminal Procedure seeking to discharge the petitioner from the charges levelled against him.

2. This revision has arisen in this way:

The petitioner is the fourth accused in C.C.No. 13 of 1997 pending on the file of the XIII Additional Special Judge, Madras. The petitioner herein was the Minister for Rural Industries of the Government of Tamil Nadu from 24.6.1991 to 14.2.1992, during which period, the alleged offence are said to have been committed. Later, the petitioner was appointed as Member of the Tamil Nadu Wakf Board on 24.3.1993 and on 30.3.1993, he was elected as the Chairman of the Wakf Board which post he relinquished on 9.6.1997. The respondent instituted criminal proceedings against the petitioner and others for alleged commission of offence under sections 120-B, 409, 467 and 477-A I.P.C. and also under Section 13(1) (c) & (d) of the Prevention of Corruption. According to the prosecution, the petitioner who was a Minister, abusing his official capacity had sanctioned the sale of lands and machineries belonging to TANSI for a paultry sum to Accused Nos.1 and 2 who are partners of M/s. Jeya Publications, and thereby committed offences punishable under Section 120-B, 409, 467 and 477-A I.P.C. and also under section 13(1)(c) & (d) of Prevention of Corruption Act 1989. The sanction has been obtained under Section 197 Cr.P.C. But the sanction is not a valid sanctioned in that certain facts have not been placed before the Governor of Tamil Nadu. There had been suppression of facts. No sanction has been obtained under saction 19 of the Prevention of Corruption Act. According to the petitioner, failure to obtain sanction under Section 19 of the Prevention of Corruption Act would vitiate the proceedings. The learned XIII Additional Special Judge has held that the offence was not committed by the petitioner in his capacity as Chairman of Wakf Board and only as Ex. Minister, and therefore, sanction is not necessary under Section 19 of P.C. Act.

3. Heard both the sides. Perused the documents. The learned public prosecutor raised a preliminary objection that the order of dis-missal of discharge petition is an interlocutory order and no appeal or revision lies against the interlocutory order.

Mr. Shanmugasundaram, public prosecutor,drew my attention to the ratio laid down by the Honourable Supreme Court in V. Shukla v. State, : 1980 CriLJ690 . On the other hand, the learned counsel for the petitioner submitted that the dismissal of a petition for discharge cannot be equated with an interlocutory order in that it affects or adjudicates the rights of the accused or a particular aspect of the trial and therefore, the order cannot be stated to be an interlocutory order. In support of his contention, the learned counsel for the petitioner cited the following authorities:

(i) Fakruddin v. State Police , : AIR 1962 AP236 . (ii) State of H.P. v. S. Harbans Singh, (iii) Amar Nath v. State of Haryana, : 1977 CriLJ1891 . (iv) Madhu Limave v. State of Maharashtra, : 1978 CriLJ165 and (v) State v. Devarajan and Maruthakonar, 1990 L.W. Cri. 213.

4. In Amar Nath v. State of Haryana, : 1977 CriLJ1891 , Their Lordships of the SC have observed as follows:The term 'interlocutory order' in S. 397(2) has been used in a restricted sense and not in any broad or artistic sense. It merely denotes orders of a purely interim or temporary nature which do not decide or tough the important rights or the liabilities of the parties. Any order which substantially affects the right of the accused, or decides certain rights of the parties cannot be said to be an interlocutory order so as to bar a revision to the High Court against the order, because that would be against the very object which formed the basis for insertion of this particular provision in S. 397. Thus, for instance, orders summoning witnesses, adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceeding, may no doubt amount to interlocutory orders against which no revision would lie under Section 397(2). But orders which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory order so as to be outside the purview of the revisional jurisdiction of the High Court.

5. In Madhu Limaye's case, : 1978 CriLJ165 , Their Lordships of the Supreme Court have stated the principles in relation to exercise of the inherent power of the High Court. Their lordships have referred to Section 397(2) of the Code of Criminal

Procedure and have pointed out that the purpose of putting a bar on the power of revision in relation to any interlocutory order passed in an appeal, inquiry, trial or other proceedings is to bring about expeditious disposal of the cases finally..... But in case of impugned order clearly brings about a situation which is an abuse of the process of the court or for the purpose of securing the ends of justice interference by the High court is absolutely necessary, then nothing contained in Section 397(2) Crl.P.C. can limit or affect the exercise of the inherent power by the High Court. Their Lordships have also pointed out that the label of the petition filed by an aggrieved party is immaterial. In fact, referring to the clause and kinds of the orders, Their Lordships have enunicated as follows: .....'On the one hand, the legislature kept intact the revisional power of theHigh Court and, on the other, it put a bar on the exercise of that power inrelation to any interlocutory order. In such a situation it appears to us that the real intention of the legislature was not to equate the expression 'interlocutory order' as invariably being converse of the words 'final order'. There may be an order passed during the course of a proceeding which may not be final in the sense noticed in Kuppuswami's case, A.I.R. 1949 SC 1, but, yet it may not be an interlocutory order - pure of simple. Some kinds of Order may fail in between the two. By a rule of harmonious construction , we think that the bar in sub-s (2) of Section 397 is not meant to be attracted to such kinds of intermediate orders. They may not be final orders for the purposes of Art. 134 of the Constitution, yet it would not be correct to charcterise them as merely interlocutory orders within the meaning of Section 397(2). It is neither advisable, nor possible, to make a catalogue of orders to demonstrate which kinds of orders would be merely, purely or simply inter locutory and which kinds of orders would be final, and then to prepare an exhaustive list of those types of orders which will fall in between the two. The first two kinds are well known and can be culled out from many decided cases. We may, however, indicate that the type of order with which we are concerned in this case even though it may not be final in one sense, is surely not interlocutory so as to attract the bar of sub section (2) of Section 397. In our opinion it must be taken to be an order of the type falling in the middle course.

6. In Mathu Limave's case, : 1978 CriLJ165 , Their Lordship of the SC observed that an order rejecting the plea of the accused on a point which, when accepted,

will conclude the particular proceeding , will surely he not an interlocutory order within the meaning of section 397(2).

7. In State v. Devonjan and Maruthakonar, 1990 L.W. 213. Arunachalam, J. has pointed out that any order passed by the court to be conclusive with reference to the stage of the proceeding is not an interlocutory order. The noble Judge has followed the ratio laid down in Madhu Limave's case, : 1978 CriLJ165 .

8. In Fakruddin v. State Police, : AIR 1962 AP236 , the Andhra Pradesh High Court has laid down that the revision lies against an order of discharge because that aggrieves a finally to the case against the accused. The same view has been expressed by the Himachala Pradesh High Court in State of H.P. v. S. Harbahs Singh, .

9. An order of discharge cannot be equated with an order of dismissal of discharge, because by dismissal of discharge petition, finality is reached.

10. In V.C. Shukla's case, : 1980 CriLJ690 , Their Lordships have observed as follows:

'The order of framing the charges is purely an interlocutory order as it does not terminate the proceedings but the trial goes on until it culminates in acquittal or conviction. It is true that if the Special Court would have refused to frame charges and discharged the accused, the proceedings would have terminated but that is only one side of the picture. The other side of the picture is that if the Special Court refused to discharge the accused and framed charges against him, when the order

would be interlocutory because the trial would still be alive.

What has been stated by Their Lordships regarding the order framing of charges squarely applies to the order of dismissal of discharge petition. If adischarge petition is allowed, a finality is reached there. When a discharge petition is allowed, the accused stands discharged and the proceedings would get terminated. But the other side of the picture is that if the petition is dismissed. So finality is reached and therefore, the order cannot be said to be an intermediate,

quasi-final order. It is pertinent to note that the learned counsel for the revision petitioner could not site any direct authority to show that the order dismissing the discharge petition is not an interlocutory order.

11. Coming to the facts of the case, the learned counsel for the revision petitioner questions the competency of the Governor in granting sanction under Section 197 Cr.P.C. Section 197 Cr.P.C. recites as under :

197. Prosecution of Judges and Public Servants: (1) When any person who is or was a Judge or Magistrate or a public servant not removal from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction:

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence of the Union, of the Central Government:

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government.

Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the constitution was in force in a State, clause (b) will apply as if for the expressions 'State Government' occurring therein, the expression 'Central Government' were substituted.

(2) No court shall take congnizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Force

charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression Central Government occuring therein, the expression 'State Government' were substituted.

(3A) Notwithstanding anything contained in sub-section (3), no court shall take cognisance of any offence, alleged to have been committed by any member of the process charged with the maintenance of Public order in a State while acting or purporting to act in the discharge of his official duty during the period while a proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government:

(3B) Notwithstanding anything to the contrary contained in this code or any other law, it is hereby declared that any sanctioned accorded by the State Government or any cognisance taken by a court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1993, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the court to take cognisance thereon.'

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the court before which the trial is to be held.'

12. In R. Balakrishna Pillai v. State of Kerala, : AIR 1996 SC901 , the Apex Court has laid down the following propositions:

(i) A Minister of a State is paid from the public exchequer for performing the public duty and therefore is a public servant, and therefore is entitled to protection under Section 197(1) Cr.P.C.

(ii) Protection under section 197 Cr.P.C. is attracted, if there is direct nexus or relation with the official duties of a public servant:

(iii) Where the act complained had direct nexus with the official duty will depend on the facts of each case.

Referring to an earlier decision in B. Saha, v. M.S. Kohar, : 1979 CriLJ1367 .

Their Lordships have reiterated that the words any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty' are capable of both narrow and a wide interpretation and that if they are construed too narrowly, the section will be rendered altogether sterile, for, it is no part of an official duty to commit an offence, and never can be', but if the wider construction should take under their umbrella every act constituting an offence committed in the course of the same transaction in which the official duty is performed or is purported to be performed.

(iv) Sanction for prosecution is necessary even if the public servant sought to be prosecuted has ceased to be a public servant on the date of taking cognizance of the offence.

13. Adverting the attention to the facts as stated by the learned counsel for the petitioner, the petitioner was sworn in as a State. Minister on 24.6.1991, he resigned his post on 14.2.1992, then he became a member of the Wakf Board on 24.3.1993, and he became the Chairman of the Wakf Board on 30.3.1993. He tendered his resignation on 22.5.1996, which was accepted on 9.6.1997. The alleged act of misconduct is said to have been committed on 13.1.1992. The sanction under Section 197 Cr.P.C. to prosecute the petitionerhad been obtained on 24.2.1997, i.e., after he demitted office as a Minister. As per the provision of Section 197 Cr.P.C., sanction is necessary, even the person had ceased to be a public servant.

14. Now, the learned counsel for the petitioner questioned the sanction on two grounds:

(1) that there had been suppression of vital facts and non- application of mind by the sanctioning authority. According to the Learned Counsel the authorities have not brought the fact that the petitioner was the chairman of the Wakf Board to the knowledge of the sanctioning authority. The sanctioning authority had not applied its mind to the facts of the case, Therefore, sanction under section 197 Cr.P.C. is vitiated. The sanctioning authority was not placed with the correct particulars about the position of the petitioner, and if really it was brought to the knowledge of the sanctioning authority, it would not have accorded the sanction. The Learned Counsel also Submitted that as per the provision of Section 20 of the Wakf Act. 1995, the petitioner was not removeable by the Government of Tamil Nadu except the three grounds mentioned in Section 20 of the Wakf Act. Section 20 of the Wakf Act recites as under:

20. Removal of Chairperson and members: (1) The State Government may, by notification in the Official Gazette, remove the Chairperson of the Board or any member thereof if he:

(a) is or becomes subject to any disqualifications specified in section 16; or

(b) refuse to act or is incapable of acting or acts in a manner which the State Government, after hearing any explanation that he may offer, considers to be prejudicial to the interests of the wakfs: or

(c)fails in the opinion of the Board, to attend three consecutive meetings of the Board, without sufficient excuse.

(2) Where the Chairperson of the Board is removed under sub- section (1), he shall also cease to be a member of the Board.

15. The learned counsel submits that the petitioner had not suffered with any of the disqualification and therefore, he was not removable, consequently, no sanction can be accorded for his prosecution. It should be pointed out that the act complained was not done by the petitioner qua member or Chairman of the Wakf Board. If the misconduct alleged in this case had been committed, when the petitioner was holding the office as Chairman of the Tamil Nadu Wakf Board,

different considerations might have arisen. But, it is alleged that the misconduct was committed while he was holding office as the Minister and therefore non-disclosure of the fact that the petitioner was the Chairman of the Wakf Board, would not go to the root of the sanction; nor it can be said that the Governor has not applied his mind.

16. The learned counsel for the petitioner submitted that whether the Governor is competent to grant sanction to prosecute a Chief Minister is pending in the Supreme Court and the petitioner will be entitled to the benefits of the decision, if it is decided in favour of the petitioner in that case.

17. The learned counsel referred to the decision reported in P.V. Narasimha Rao v. State (CBI/SPE), : 1998 CriLJ2930 .

In Balakrishna Pillai's case, : AIR 1996 SC901 , the Honourable Apex Court have held that it is the Governor who can accept the resignation of the Ministry of Minister and it is the Governor again, who can dismiss or remove the Minister from office. It has also been observed that by virtue of Section 3(60)(c) of the General Clauses Act, the expression 'State' is to mean the Governor in case of a State Minister. Their Lordships have referred to the decision reported in M. Karunanidhi v. Union of India, 1979 SCC 691 to consider whether a Chief Minister was a public servant within the meaning of Section 21 of the Indian Penal Code and Section 197 Cr.P.C. Following the earlier decision of the Bombay High Court in Namdeo Kahinath Aher v. H.G. Vartak, : AIR1970 Bom385 , Their Lordships have held that the Chief Minister is paid from the public exchequer for performing the public duty and is therefore a public servant within the meaning of Section 197 Cr.P.C. and therefore, the expression Government used in section 197 would mean the Governor in case of a Chief Minister or a Minister.

18. The learned counsel referring to the decision reported in P.V. Narasimha Rao's case, : 1998 CriLJ2930 cited supra , argued that competency to grant sanction of prosecuting a Chief Minister in pending in the Supreme Court. In P.V. Narasimha Rao's case, the points decided by the Supreme Court were:

(i) Whether the M.P.s and M.L.As. had immunity under Article 105 of the Constitution?

(ii) Whether the M.L.As. and M.Ps. are public servants under the Prevention of corruption Act and if so who was the competent authority to grant sanction under section 19 of the Prevention of Corruption Act. There had been divergence of opinion between the Honourable Judges as to who is the competent authority for granting sanction for prosecuting the M.L.As. and M.Ps. and therefore, the matter has been referred to the constitution Bench left the question of competent authority and necessity of sanction under Section 197 Cr.P.C. to be decided by the Division Bench, which referred the case to the Constitution Bench. The question whether the Governor has to sanction prosecution of the Chief Minister only with the aid and advice of the counsel of the Ministers or whether the Governor himself, without reference to the cabinet, can grant sanction for prosecuting the Chief Minister, is pending before the Apex Court. But, till the finality is arrived, it cannot be said that the earlier pronouncement are nullified. Therefore, as on today, the Governor is the competent authority to sanction prosecution of a State Minister. The contention raised by the learned counsel does not appear to be accept-able.

19. Nextly, it is contended by the learned counsel for the petitioner that even for prosecution of an offence under Prevention of Corruption Act, previous sanction under section 19 of the Prevention of Corruption Act isrequired so far as the petitioner is concerned Act. Section 19(1) and (2) of the Prevention of Corruption Act is recited as under:

20. Previous sanction necessary for prosecution (1) No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction:

(a) in the case of a person who is employed in connection with the affiars of the Union and is not removable from his office save by or with the sanction of the Central Government of that Government.

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State

Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office.

(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3)... ... ...

A careful reading of the section would show that the provisions applies to a person who is employed in presenti. It does not refer to a person, who had demitted the office. In R.S. Nayak v. A.R. Antulay. : 1984 CriLJ613 , Their Lordships of the Supreme Court have held that if a public servant holds two offices and is accused of having abused the one and from which he is removed, but continues to hold the other, which is neither alleged to be misused nor abused, the sanction of the authority to remove him from the office which is neither alleged nor shown to have been abused or misused, is not necessary. It is pertinent to note that section 297 Cr.P.C. offers protection to the persons who continue to hold office and who had ceased to hold the office. Section 19 of the Prevention of Corruption Act applies to the person who continues to hold office, but does not apply to a person who had seized to hold the office. I have already pointed out that the purported criminal act is said to have been committed by the petitioner while holding office as a Minister and not in his capacity as the Chairman of the Wakf Board. Therefore, he having ceased to be a Minister, sanction under section 19 of the prevention of Corruption Act is not one necessary.

21. In the light of the observation made above, this revision is dismissed. Consequently, the stay petition is also dismissed.

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