

State Vs. Samar Dutta and ors.

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Court : Kolkata

Decided On : Jul-28-2004

Reported in : 2004(4)CHN390

Judge : Ashok Kumar Ganguly, ;S.P. Talukdar and ;Sadhan Kumar Gupta, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) 1973](#) - Sections 193, 197, 209, 395(2), 407 and 462; ;[Constitution of India](#) - Articles 226 and 227; ;Indian Penal Code (IPC) - Sections 120B and 364

Appeal No. : Cr. R. No. 1 of 2000

Appellant : State

Respondent : Samar Dutta and ors.

Advocate for Def. : Pulak Modal and ;Bandana Das, Advs. for the respondent No. 2, ;Partha Sarathi Bhattacharya, Adv. for the respondent Nos. 1 and 3 and ;Milon Mukherjee and ;Sandipan Ganguly, Advs. for the respondent No

Advocate for Pet/Ap. : Kalyan Bandyopadhyay, Kazi Safiullah and ;;Jayanta Narayan Chatterjee, Advs.

Judgement :

Sadhan Kumar Gupta, J.

1. This reference has been made by the learned Additional Sessions Judge, 6th Court, Alipore by passing Order No. 5 dated 1.4.2000 in SC 22(3) of 2000.
2. The fact, that led to the said reference by the learned Additional Sessions Judge, is that a writ petition in the nature habeas corpus bearing No. CO15487W of 1993 was filed before this High Court under Article 226 of the [Constitution of India](#) by one Lakkhi Chand Paswan and Smt. Lalti Debi wherein they alleged that Bhikari Paswan, the husband of the petitioner No. 2 was illegally detained by the Police Authority and as such by filing the writ petition they prayed for production of said Bhikari Paswan before the Magistrate. The Division Bench, consisting of the then Chief Justice and another learned Judge, heard the said writ application extensively and in the process report was called for from the Central Bureau of Investigation. Evidence of the parties was also taken before the said Writ Court and ultimately while disposing of the said writ application the Division Bench directed that the said writ petition and all the materials on record which were filed on behalf of the petitioners shall be forwarded to the Court of the learned Chief Judicial Magistrate, Alipore who will register a complaint under Section 200 of the Code of Criminal Procedure on the basis of the allegations as made in the writ petition and also directed that the Chief Judicial Magistrate, Alipore shall be the 'Competent Court' for deciding the case in question. It was further directed that the said Magistrate will examine the petitioners and other witnesses on solemn affirmation and also take into consideration the statement of the witnesses, except in cross-examination, recorded before the Writ Court. It was further directed that the enquiry report, conducted by the C.B.I. Officer, be forwarded to the learned Magistrate for consideration. At the time of enquiry, the Chief Judicial Magistrate, Alipore may appoint Shri Nazrul Islam, D.C.D.D., Calcutta Police to investigate and submit report as quickly as possible. Liberty was also given to the petitioners to inform the District Magistrate, 24-Parganas (South) about their choice of an Advocate as the prosecutor. It has clearly been laid down by the Writ Court, while passing such directions, that the Chief Judicial Magistrate, Alipore, 24-Parganas (South) shall be the 'Court of competent jurisdiction'.
3. The said order of the Writ Court was communicated to the learned Chief Judicial Magistrate, Alipore along with all the relevant papers and complaint case C-

1046/98 was registered. It was stated in the petition of complaint before the learned Magistrate that Bhikari Paswan, husband of the complainant Smt. Lalti Devi was a worker of M/s. Victoria Jute Mill, Telinipara within the District of Hooghly. There was a dispute in between the management and the workers over non-payment of the wages/salaries for a long period. On 21.10.93 there was a demonstration by the workers and in order to disperse them, police had to use force. However, on 30.10.93 at the intervention of the District Magistrate, Hooghly some payments were made to the workers including Bhikari Paswan. On that night Bhikari was sleeping in his room when some persons knocked the door from outside. The complainant opened the door and found that S.I. Samar Dutta and other Police Officers of Telinipara outpost were standing in uniform outside the premises. The police personnel caught hold of Bhikari Paswan and started assaulting him ruthlessly in presence of the complainant and other members of the family and as a result of that Bhikari started bleeding from his mouth and nose. They then took away Bhikari Paswan forcibly with them. Subsequently, father of Bhikari went to Telinipara outpost and found him lying injured on the floor. The father of Bhikari then approached Mr. H. P. Singh, the then Additional Superintendent of Police, Hooghly, who was at that time present in the outpost, to allow him to talk with Bhikari. But Mr. Singh ruthlessly asked the father of Bhikari to leave the outpost and threatened him. However, he was asked to come to the outpost in the morning. When in the next morning the father of Bhikari had been to that outpost, he was told by a constable that Senior Police Officials took away Bhikari from the said outpost. The father of Bhikari then contacted his lawyer of Chandannagore Court in order to secure bail for his son. But he was informed that Bhikari was not produced in the Court. As such, he searched for his son in the Bhadreswar Police Station as well as in the Srirampore Police Station. As he could not find out his son, he approached the O.C., Bhadreswar Police Station and requested him to record a diary regarding kidnapping of Bhikari Paswan by the Police Officers. But when the O.C., Bhadreswar Police Station refused to receive any diary he then met the Additional Superintendent of Police, Hooghly. Said Officer also refused to entertain the complaint of the father of Bhikari and instead asked him to write on a plain blank paper that his son was missing. As the father of Bhikari did not get any assistance whatsoever from the police officers, so he

submitted a written complaint to the Chief Minister, West Bengal with a copy to the Home Secretary and S.P., Hooghly. In the said complaint, the father of Bhikari clearly stated that police officers under the leadership of Additional Superintendent of Police, Hooghly kidnapped his son, Bhikari from his residence on the night of 30.10.93 illegally. The complainant alleged that the police officers abducted her husband Bhikari Paswan and subsequently, in all probability, have murdered him. As such, by filing the said petition of complaint, the complainant prayed for issuing process against the accused persons, who are all police officers. Proceeding on the basis of the direction in the Division Bench judgment of this Court and on the basis of the aforesaid complaint the learned Magistrate took cognizance of the matter and thereafter recorded statements of the witnesses on solemn affirmation. Subsequently, from the materials on record the learned Chief Judicial Magistrate was of the opinion that there was a strong prima facie case for proceeding under Section 364/120B IPC against all the four accused persons and as the offence was triable exclusively by the Court of Sessions, so he, by his order dated 14.02.2000 committed the case to the Court of learned Sessions Judge, South 24-Parganas, Alipore. The learned Sessions Judge, Alipore, after taking cognizance under Section 193 Cr. PC, transferred the case to the Court of learned Additional Sessions Judge, 6th Court, Alipore for disposal. It appears from Order No. 5 dated 01.04.2000 that the learned Additional Sessions Judge, pointed out that offence in question took place within the Sessions Division of Hooghly and as per provisions of Sections 177 to 185 Cr. PC the Court of the Additional Sessions Judge, Alipore is not empowered to take cognizance of such offence ordinarily. He also pointed out that he did not receive any-order under Section 407(1) Cr. PC transferring the case in question from Hooghly Sessions Division to the Sessions Division of South 24-Parganas. Secondly, he further pointed out that one of the accused H.P. Singh is a public servant not removable from his office save by or with the sanction of the Government and the offence alleged against him was apparently committed while acting or purporting to act in the discharge of his official duty as Additional S. P., Hooghly. According to the learned Court below, under such circumstances, sanction of the State Government is necessary for proceeding against that accused as per provisions of Section 197 Cr. PC. In order to avoid future legal complications over these two matters, the learned Additional Sessions Judge felt it

necessary to refer the matter to the High Court under Section 395(2) Cr. PC for decision before the trial is undertaken. Two questions were referred to this Court for decision as per provisions of Section of 395(2) Cr. PC and they are as follows :

1. Whether the cognizance and subsequent trial of the case in a different Sessions Division is maintainable in law,

2. and whether the Sessions case is maintainable against accused H. P. Singh who happens to be a public servant against whom no sanction as contemplated under Section 197 of the Code of Criminal Procedure has been obtained.

4. Said order of the learned Additional Sessions Judge referring those two questions before the High Court for decision, was placed before the Hon'ble Chief Justice who was pleased to constitute a Division Bench for answering the reference. It appears that several Division Benches were entrusted with the matter from time to time and ultimately the matter was taken up by the Division Bench of Hon'ble Justice Nure Alam Chowdhury and Hon'ble Justice Prodyot Kumar Sen. The said Division Bench, by its order dated 19.07.2000 was of the opinion that the Writ Court did not make any reference with regard to the provisions of Section 407(1) Cr. PC while directing that the Court of the learned Chief Judicial Magistrate, Alipore will be the Competent Court for disposing of the matter. So, the Division Bench observed :

'Thus, we had every doubt as to whether the Sessions Judge of South 24-Parganas was competent to take cognizance and to transfer this case to different Court for trial when there is no specific order made under Section 407(1) of the Code of Criminal Procedure.

2. We cannot make any final order in this matter because it may impair the judicial discipline and also there may be conflict of decision between what was already observed by a Division Bench of this Court sitting in writ jurisdiction and by us in the criminal jurisdiction of the same High Court.

3. We are, therefore, of the view that the reference should be decided by a Special Division Bench, appointed by the Hon'ble Chief Justice.....'

5. The said Division Bench also observed that as the major point was referred to the Special Bench, so it did not make any observation with regard to the other point i.e. whether sanction is necessary in respect of the accused H. P. Singh, who is a public servant. That question was also referred to the Special Bench.

6. Pursuant to that order, the Hon'ble Chief Justice constituted the present Special Bench.

7. Learned Advocates appearing for the respective parties made their submission in respect of their respective claims.

8. Mr. Kalyan Banerjee, Advocate for the complainant argued that there is no illegality in the commitment order of the learned Chief Judicial Magistrate and consequently the Sessions Judge, Alipore was also perfectly justified in taking cognizance of the matter on the basis of the said commitment order. On the other hand Mr. Milon Mukherjee, Advocate for the accused H. P. Singh argued that the Sessions Court, Alipore have no jurisdiction to take cognizance of the matter and consequently the case in question cannot proceed. At the very outset Mr. Mukherjee, Advocate for accused H. P. Singh argued that the writ petition did not disclose any offence at all and while passing the direction on the learned Magistrate the Writ Court overlooked the provisions as laid down in Chapter XIV of the Cr. PC. He further argued that the Writ Court could not take away the established Criminal Procedure as laid down in the Code. In this respect he cited various irregularities in the order as passed by the learned Writ Court in giving direction upon the learned Magistrate. In support of his contention he has cited decisions reported in AIR 1995 SC page 287, Shreekantiah Ramayya Munipalli and Anr. vs . State of Bombay; : [1955]28ITR941(SC) , Matajog Dobey vs . H. C. Bhari; : AIR1961 Cal461 , Saurendra Mohan Basu vs . Saroj Ranjan Sarkar; : AIR 1962 SC876 , Pramatha Nath Talukdar vs . Saroj Ranjan Sarkar; : (1970)11LLJ284SC , Union of India vs . J. N. Singha; : AIR 1976 SC1695 , State of Gujrat vs. Sardarbegum and Ors.; 1984 SCC (Cri) page 172, R. S. Nayak vs . A. R. Antulay; : [1984]1SCR904 , Sebastian M. Hongray vs . Union of India and Ors.; AIR 1984 SC page 1026, Sebastian M Hongray vs, Union of India; , Mahesh Chand vs. State of Rajasthan; 1988 SCC (Cri) page 372, A. R. Antulay vs . R. S.

Nayak and Anr.; : (1995)IILLJ108SC , State of Haryana vs . Naresh Kumar Bali; : AIR 1996 SC901 , R. Balakrishna Pillai vs. State of Kerala and Anr.; 1999 Criminal Law Journal page 3101, Champabai vs. N. Girijapathy and Ors.; 2000 SCC (Cri) page 135, State of Karnataka vs. Arun Kumar Agarwal and Ors.; 2000 SCC (Cri) page 147, State of H. P. vs. Lekh Raj and Anr.; 2000 SC page 3517, Gouri Shankar Prasad vs . State of Bihar; : 2001 CriLJ2587 , Mohindro vs. State of Punjab and Ors.; 2002 SCC (Cri) 789, S. P., Forest Cell, Adyar and Anr. vs. Kannans Company.

9. We have heard the submissions of the learned Advocates for all the parties. It appears that the present reference case arises out of the reference made by the learned Additional Sessions Judge, on two points viz. whether the cognizance and subsequent trial of the case is maintainable in law and whether the Sessions case is maintainable against accused H. P. Singh who is a public servant and for whom no sanction has been obtained under Section 197 of the Cr. PC. Regarding the first point, Mr. Mukherjee, learned Advocate for Mr. H. P. Singh argued that the cognizance as taken by the learned Chief Judicial Magistrate, Alipore is bad and as such subsequent trial of the case in a different Sessions Division is not maintainable in law. In support of his contention the learned Advocate pointed out that originally a writ petition was filed by the wife and father of Bhikari Paswan praying for issue of the writ of Imbeds corpus. Said writ petition was considered by a Division Bench consisting of the then Chief Justice as well as by another learned Judge. During the hearing of the said writ petition, evidence was taken and also Central Bureau of Investigation was directed to enquire and C.B.I. in compliance with that direction submitted a report before that Court. According to the learned Advocate, during the course of taking of that evidence whatever defence his client as well as other police officers had, were disclosed. As such, he submits that his clients will be highly prejudiced if the present Sessions Trial is allowed to be continued. According to him the Writ Court gave direction to the learned Magistrate for examining the complainant and others under Section 200 Cr. PC. At the same time it directed that the cross-examination part of the evidence that was recorded during the hearing of the writ petition could not be taken into consideration. He further argued that as per direction of the Writ Court there was no option left for the learned Magistrate regarding the taking of cognizance under

Section 190 Cr. PC as the Writ Court preferred to direct the learned Magistrate to take cognizance of the alleged offence. As such, Mr. Mukherjee argued that his client has been deprived of a valuable right. That apart, the Writ Court further directed the learned Magistrate to take step under Section-202 Cr. PC for investigation into the matter by a particular police officer which according to him is not permissible in a Sessions triable case. He has further pointed out that the Hon'ble Division Bench further directed the District Magistrate to enquire about the choice of public prosecutor from the complainant and to appoint him to conduct the Sessions Trial. By pointing out all those things, the learned Advocate argued that those directions are against the established procedure of the Criminal Procedure Code and as such are totally illegal and as on the basis of those illegal directions cognizance was taken by the learned Magistrate and as subsequently the case was committed to the Court of Sessions, the entire proceeding is void and as such it is a fit case that it should be quashed. In this respect Mr. Mukherjee drew our attention to the decision reported in : (1970)11LLJ284SC , Union of India vs. J. N. Singha and Anr., where it has been laid down that in case of conflict between rules and natural justice and statutory provision, latter will prevail. It appears that the said decision was in respect of applicability of the fundamental rules 56(J). Of course, there cannot be any dispute regarding the said principle as decided by the Hon'ble Apex Court. Certainly any illegal direction in the name of natural justice, if it is issued in violation of the statutory provision, then that direction should be held to be illegal. But so far as the present case is concerned, we should not forget about the peculiar nature of the case and the circumstances in which the Hon'ble Division Bench had to pass such directions. It is the admitted position that in spite of best efforts by the Division Bench, the missing person viz. Bhikari Paswan could not be traced and as such the Division Bench thought it prudent and in conformity with natural justice that a case should be started against the persons who were allegedly responsible for the missing of the said Bhikari Paswan. This order was passed by the Division Bench in a writ jurisdiction. The power as provided under Article 226 of the Constitution is very wide. In this respect, the decision reported in : AIR 1997 AP179 (Full Bench), Secretary and Correspondent, Badruka College of Commerce and Arts (Day) Hyderabad vs. State of Andhra Pradesh and Ors., is very much relevant. It has been clearly laid down in the said decision to the effect

that 'Article 226 of the Constitution is a storehouse or a reservoir or even a dam of justice, equity and good conscience which are meant for exercising within the discretionary power of the Court vested in that Article to do full and complete justice, the whole justice and nothing but the justice and such a forebay of all the contents may consist of any law, any rule of law and the rule of human law and human justice and none can restrict such a power', In the decision reported in : (2002)ILLJ465SC , Roshan Deen vs. Pritee hall, the Hon'ble Supreme Court also held that the power conferred on the High Court under Articles 226 and 227 of the Constitution is to advance justice and not to thwart it. The very purpose of such Constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The approach of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If we look into the provisions of Article 226 of the [Constitution of India](#), then it will appear clearly that very wide power has been given to the High Court. This Article confers upon the High Court power to issue the writs for the enforcement of fundamental rights as well as for other purpose. So, it appears that the High Court has got enough power to issue any direction which according to it, will serve the purpose of natural justice. So far as the present case is concerned, we have already pointed out that a person was allegedly taken away from his home in the night by the police officers and since then said person was missing. The High Court in exercise of the power under Article 226 tried its best to find out the said missing person with the help of the State machinery but as that attempt failed, so in order to do complete justice to the aggrieved persons, the High Court decided that appropriate criminal action should be started against the alleged offenders. Keeping that in mind, the Division Bench passed certain directions upon the learned Magistrate. May be, the directions in the Division Bench judgment to some extent are not in strict conformity with all the procedures of the Cr. PC. But it is difficult for us to decide the legality of the judgment of the Division Bench which has attained finality between the parties in the absence of any challenge to the same.

10. However, we are of opinion that it cannot be said that by passing such direction any prejudice has been caused to the client of Mr. Mukherjee. In the case

reported in : [1965]57ITR349(SC) , Dwaraka Nath vs. Income Tax Officer, it has been decided that High Court can issue writs of any nature. Article 226 confers a wide power on the High Court to reach injustice wherever it is found but this does not mean that High Court can function arbitrarily under this Article. So far as the direction given by the Division Bench, it does not appear to us that those directions can be termed as 'arbitrary' and to our mind it did not cause any prejudice to the accused persons. Mr. Mukherjee, learned Advocate for Mr. H. P. Singh further argued that the Division Bench was not at all justified in declaring the Chief Judicial Magistrate, Alipore to be the 'Competent Court' for taking cognizance and as such, as the offence took place in the Hooghly District, so the said offence cannot be tried in a Sessions Division of 24-Parganas (South) unless there is a clear order of transfer of the case under Section 407 Cr. PC. But at the outset, it must be pointed out that the Hon'ble Division Bench did not transfer any case from one Sessions Division to another Sessions Division because when the order was passed at that time there was no existence of any case. So, question of transferring the case from one Sessions Division to another, by exercising the provisions of Section 407 Cr. PC does not arise at all so far as the present matter is concerned. What the Division Bench directed in respect of the alleged kidnapping of Bhikari Paswan by the police officers, was that there should be a petition of complaint and for that reason the Division Bench directed that learned Chief Judicial Magistrate, Alipore will be the proper Court for taking cognizance of the offence and to take further steps in that respect. It should be borne in mind that the present case has got very peculiar facts. A worker of the Jute Mill was allegedly kidnapped by the police officers of the police station with the active aid and assistance of a high police official of the Hooghly District. If we look into the order passed by the Division Bench, then it will appear that probably it was in the mind of the Court that if the petition of complaint is filed in the Hooghly District where those police officers were posted, then the complainant would not be in a position to proceed with the petition of complaint properly and freely. Under the present day situation of our country, this apprehension in the mind of the Court cannot be said to be baseless and improper. There are many instances where a complainant or a witness to the occurrence could not depose freely in the Court out of fear. We have already pointed out that it is the duty of the Writ Court to see

that proper justice is done in all the cases and a complainant should not be denied of justice simply because of the presence of some influential persons on his other side. Keeping this in mind, the Division Bench passed the said order which in our opinion was proper and appropriate, under such circumstances.

11. Mr. Mukherjee, learned Advocate for Mr. H. P. Singh also drew our attention to the question No. 1 of the reference as made by the learned Additional Sessions Judge as to whether the Sessions Court of Alipore could try the offence which allegedly took place in the Sessions Division of Hooghly. According to Mr. Mukherjee, unless there is order of transfer under Section 407 Cr. PC the Sessions Court of Alipore cannot try the offence which took place in the Hooghly District. Of course, Section 407 of the Cr. PC provides for such a transfer. But it appears that when the Division Bench passed that order, at that time there was no existence of a case and the Division Bench directed the Chief Judicial Magistrate, Alipore to take step under Section 200 Cr. PC and thereafter to proceed according to law. It appears from the record that the learned Chief Judicial Magistrate recorded the initial statements of the witnesses and thereafter, as a prima facie case under Section 366/120B of the IPC was made out, so he committed the case to the learned Sessions Judge, Alipore. The order as passed by the learned Chief Judicial Magistrate in committing the case to the Sessions Judge, Alipore appears to us to be in conformity with the direction of the Division Bench. As a Chief Judicial Magistrate, he is subordinate to the Sessions Judge, Alipore and naturally when a prima facie Sessions triable case has been made out, the said Magistrate has got no other alternative but to commit the same to the learned Sessions Judge to whom he was subordinate, as per the provisions of the Criminal Procedure Code. If we look into order of the Division Bench, then it will appear that direction was given to the learned Magistrate to take all steps as per law. We could easily gather the intention of the Division Bench in passing that order that the case should be tried in the Sessions Division of Alipore and not in the Sessions Division of Hooghly, just because of the fact that there is no specific mention of this in the order of the Division Bench, it cannot be said that the order of commitment as passed by the learned Judicial Magistrate, Alipore is bad in the eye of law. Moreover, if we look into the provisions of Section 462 Cr. PC which runs as follows :

'No finding, sentence or order of any Criminal Court shall be set aside merely . on the ground that the inquiry, trial or other proceedings in the course of which it was arrived at or passed, took place in a wrong sessions division, district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice'.

Then it would appear that no order of a Criminal Court can be set aside on the ground that the trial took place in a wrong Sessions Division. Of course, it has been provided in the said section that if there is a failure of justice then and then only the order of that Sessions Division can be set aside. So, main thing that is to be considered, is, whether by this order of the Division Bench there was any 'failure of justice' or not. We have already pointed out that in order to secure proper justice the Division Bench passed the said order and uptil now it appears that the accused persons also participated in the conducting of the case. No objection has yet been raised. As such, it cannot be said that the accused persons are prejudiced under any circumstances due to the change of the Sessions Division. It cannot be said that change of the Sessions Division in any way has caused failure of justice. Moreover, this plea was not taken by the accused persons. We fail to understand what prompted the learned Additional Sessions Judge, to raise this point when the accused persons preferred not to challenge the said order of the Division Bench.

12. It further appears that the order of the Division Bench, as discussed above, was not at all challenged by any of the parties. As such, the said order, which was passed by a competent Division Bench of the High Court, has reached its finality and it cannot be said now that the order in question suffers from illegality. Mr. Mukherjee further argued that when this matter is now appearing before the Special Bench, the legality and propriety of the order of the Division Bench can be considered by this Special Bench is higher in status. In this respect, he drew our attention to the order passed by the Division Bench consisting of Hon'ble Justice Nure Alam Chowdhury and Hon'ble Justice P. K. Sen, as Their Lordships then was, while referring the matter to the Hon'ble Chief Justice. It appears from the said order that the said Division Bench while considering the reference in question was of the opinion that it would be appropriate that the matter should be headed

by a Special Bench to be formed by the Hon'ble Chief Justice. We have already pointed out the Hon'ble Chief Justice assigned this matter to this Special Bench for hearing out the reference in question. But that does not mean that this Special Bench consisting of us should be considered to be the appellate authority of the Division Bench. The exercise of judicial power by a Division Bench under Article 226 of the [Constitution of India](#) is only amenable to correction by the Hon'ble Supreme Court under Article 136 of the Constitution. The Division Bench judgment cannot be assailed before any other forum. The Hon'ble Chief Justice simply assigned the matter to this Bench for hearing out the reference in question. No further authority has been given or could be given to this Bench to consider whether the order passed by the Division Bench was legal or not. Mr. Mukherjee in support of his argument drew our attention to the decision reported in : AIR1961 Cal461 Saurendra Mohan Basu vs. Saruj Ranjan Sarkar. We have perused the said decision. It appears that in that case the Hon'ble Chief Justice referred a matter to the Full Bench to consider as to whether the decision of a Division Bench was good in law or not. But this decision can in no way be applicable so far as the present matter is concerned. This Special Bench has not been formed to consider the legality of the decision of the Division Bench. It is formed only to consider the reference as made by the learned Additional Sessions Judge. Apart from that in the case of Saurendra Mohan Basu (supra), the Court was not dealing with its jurisdiction under Article 226 or with a Division Bench judgment delivered in exercise of that power.

13. We have already pointed out that while disposing of the said reference this Special Bench is not competent to look into the validity of the directions issued by the Division Bench whose order has not been challenged by the concerned parties. As such, we do not accept this submission of Mr. Mukherjee.

14. So the fact remains that this Special Bench is to consider the reference as made by the learned Additional Sessions Judge. We have already pointed out that the first question that has been placed before us by the learned Court below is whether it is permissible for the said Sessions Court to try the offence although it took place in another Sessions Division. In our above discussion we have already pointed out that the purpose and spirit of the order of the Division Bench was that

the case in question should be tried in the Sessions Division of 24-Parganas (South) and not in the Sessions Division of Hooghly. As the said decision of the Division Bench has not been challenged and as it has not yet been set aside by any Competent Court, so there cannot be any bar for the learned Additional Sessions Judge, Alipore to continue with the trial of the said case in his Court. So the first question is answered accordingly.

15. The second question that has been referred by the learned Additional Sessions Judge, Alipore is that whether the case can proceed against Mr. H. P. Singh, who is a public servant, without obtaining any sanction from the Government. It is the admitted position that this Mr. H. P. Singh is a public servant and at the material time he was posted as Additional Superintendent of Police, Hooghly District. It is also the admitted position that no sanction has been taken in prosecuting Mr. Singh in connection with this case. In this respect 197 Cr. PC is relevant, it runs as follows :

'When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction-(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government.'

16. Mr. Mukherjee learned Advocate for Mr. Singh cited several decisions reported in AIR 1995 Supreme Court, page 287, Skreekantiah Ramayya Munipalli vs . State of Bombay; : [1955]28ITR941(SC) , Matajog Dobey vs. H. C. Bhari; 1984 Supreme Court Cases (Cri) page 172, R. S. Nayak vs . A. R. Antulay; : AIR 1996 SC901 , R. Balakrishna Pillai vs. State of Kerala and Anr., 1999 Criminal Law Journal page 3101, Champabai vs . M. Girijapathy and Ors. and : 2000 CriLJ4031 , Gouri Shankar Prasad vs. State and Anr., in support of his contention. We have perused those decisions wherein it has been laid down that under given circumstances sanction for prosecuting a public servant for a criminal offence is necessary. As

against this learned Advocate Mr. Kalyan Banerjee, the learned Counsel for the de facto complainant cited decisions reported in : 2000 CriLJ4041 , P. P. Unnikrishnan and Anr., vs . Puttiyottil Alikutty and Anr.; : 2001 CriLJ3505 , P. K. Pradhan vs . State of Sikkim, In the decision reported in : 2000 CriLJ4041 (supra) it has been clearly laid down at page 132 :

'Even under Section 197 Cr. PC no protection has been granted to public servants for the type of acts alleged in the case against the appellants. If a police officer dealing with law and order duty uses force against unruly persons, either in his own defence or in defence of others and exceeds such right it may amount to an offence. But such offence might fall within the amplitude of Section 197 Cr. PC as well as Section 64(3) of the KP Act, But if a police officer assaults a prisoner inside a lock-up he cannot claim such act to be connected with the discharge of his authority or exercise of his duty unless he establishes that he did such acts in his defence or in defence of others or any property. Similarly, if a police officer wrongfully confines person in the lock-up beyond a period of 24 hours without the sanction of a Magistrate or an order of a Court it would be an offence for which he cannot claim any protection in the normal course, nor can he claim that such act was done in exercise of his official duty. A policeman keeping a person in the lock-up for more than 24 hours without authority is not merely abusing his duty but his act would be quite outside the contours of his duty or authority'.

17. So, it appears from this decision that if a police officer commits an offence which is not within the purview of his official duty then he cannot claim protection in the normal course. In the decision reported in : 2001 CriLJ3505 (supra) it has been laid down:

'The legislative mandate engrafted in Sub-section (1) of Section 197 touches the jurisdiction of the Court itself. It is a prohibition imposed by the statute from taking cognizance. Different tests have been laid down in decided cases to ascertain the scope and meaning of the relevant words occurring in Section 197 : 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty'. The offence alleged to have been committed must have something to do, or must be related in some manner, with the discharge of

official duty. No question of sanction can arise under Section 197, unless the act complained of is an offence; the only point for determination is whether it was committed in the discharge of official duty. There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What a Court has to find out is whether the act and the official duty are so interrelated that one can postulate reasonably that it was done by the accused in the performance of official duty, though, possibly in excess of the needs and requirements of the situation. An official act can be performed in the discharge of official duty as well as in dereliction of it. For invoking protection under Section 197 of the Code, the acts of the accused complained of must be such that the same cannot be separated from the discharge of official duty, but if there was no reasonable connection between them and the performance of those duties, and the official status furnishes only the occasion or opportunity for the acts, then no sanction would be required. If the case as put forward by the prosecution fails or the defence establishes that the act purported to be done is in discharge of duty, the proceedings will have to be dropped'.

18. This decision also considered some of the decisions as cited by Mr. Mukherjee. It is the well-settled principle of law that a public servant can only be said to act or to purport to act in the discharge of his official duty, if his act within the scope of his official duty. It is always open for a public servant, if challenged, to prove reasonably that what he did was done by virtue of his office. At para 15 of the said decision the Hon'ble Supreme Court has held :

'Thus, from a conspectus of the aforesaid decisions, it will be clear that for claiming protection under Section 197 of the Code, it has to be shown by the accused that there is reasonable connection between the act complained of and the discharge of official duty. An official act can be performed in the discharge of official duty as well as in dereliction of it. For invoking protection under Section 197 of the Code, the acts of the accused complained of must be such that the same cannot be separated from the discharge of official duty, but if there was no reasonable connection between them and the performance of those duties, the

official status furnishes only the occasion or opportunity for the acts, then no sanction would be required. If the case as put forward by the prosecution fails or the defence establishes that the act purported to be done is in discharge of duty, the proceedings will have to be dropped. It is well-settled that question of sanction under Section 197 of the Code can be raised any time after the cognizance; may be immediately after cognizance or framing of charge or even at the time of conclusion of trial and after conviction as well. But there may be certain cases where it may not be possible to decide the question effectively without giving opportunity to the defence to establish that what he did was in discharge of official duty. In order to come to the conclusion whether claim of the accused that the act that he did was in course of the performance of his duty was a reasonable one and neither pretended nor fanciful, can be examined during the course of trial by giving opportunity to the defence to establish it. In such an eventuality, the question of sanction should be left open to be decided in the main judgment which may be delivered upon conclusion of the trial.'

19. As such, it appears from the said decision, which is the latest one, that under the circumstances it would be proper that the question of sanction should be left open to be decided in the main judgment which will be delivered upon conclusion of the trial. To our mind, the reference as made by the learned Additional Sessions Judge, in this respect should be answered accordingly.

20. Therefore, the questions as referred by the learned Additional Sessions Judge are answered accordingly as per above discussion. It is held that the Sessions case in question, is maintainable in the Sessions Division of Alipore. It is further held that question regarding the maintainability of the case against accused H. P. Singh who happens to be a public servant and against whom no sanction is obtained under Section 197 of the Cr. PC, is left open and is to be decided by the learned Trial Judge at the time of the passing of the judgment after considering the entire evidence on record and after taking into consideration the discussion in this respect as made above. The reference case is thus disposed of.

21. A copy of this judgment be sent to the learned Court below at once.

22. Xerox certified copy, if applied for, may be handed over to the party on an urgent basis.

Ashok Kumar Ganguly and S.P. Talukdar, JJ.

23. We agree.

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