

Syed Mohammad Hasan Vs. K.C. Das, Deputy Chief Controller of Import and Export

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Court : Kolkata

Decided On : Mar-07-1991

Reported in : 1991(34)ECC20

Judge : Manoranjan Mallick and ; Manabendra Nath Roy, JJ.

Appeal No. : Criminal Revision No. 217 of 1990

Appellant : Syed Mohammad Hasan

Respondent : K.C. Das, Deputy Chief Controller of Import and Export

Advocate for Pet/Ap. : Mr. Pradip Ghosh, Mr. Ghosh

Judgement :

Manoranjan Mallick, J.

1. This is an application under Section 482, Criminal Procedure Code praying for quashing the proceeding being Case No. C. 2773/83 pending in the Court of 9th Metropolitan Magistrate, Calcutta under Section 429, 468/471 of the IPC, Section 135 of the Customs Act and Section 5 of the Import & Export (Control) Act, 1947 in which the charge has been framed by the learned Magistrate and is pending for disposal before the learned Trial Judge.

2. The petitioner has urged two points in quashing the proceeding. The first point is that on a complaint filed by the Prosecution Agency on 30.11.83 against the present petitioner, the petitioner appeared before the learned Magistrate on 27.1.84. Evidence before charge have not been completed within four years from that date and charge had only been framed on 12.12.89. But according to Sub-section (3) of Section 245 of the Criminal Procedure Code inserted in the Act by Criminal Procedure Code (West Bengal Amendment) Act, 1988 if all the evidence referred to in Section 244 of the Act are not produced in support of the prosecution within four years from the date of appearance of the accused, the Magistrate has to discharge the accused unless the prosecution satisfies the Magistrate that upon evidence already produced and for special reasons there is ground for presuming that it shall not be in the interest of justice to discharge the accused. It is contended that this provision came into force on 14.3.89 as on that date the assent of the President has been published for general information in the Calcutta Gazette Extraordinary, the Magistrate immediately on the above Sub-section (3) of Section 245 of the Criminal Procedure Code coming into force should have discharged the present petitioner under Sub-section (3) of Section 245 unless the prosecution satisfies the Magistrate that upon evidence already produced and for special reasons there is ground for presuming that it shall not be in the interest of justice to discharge the accused. It is contended that as the learned Magistrate before framing of the charge on 12.12.83 ignored the above provision, he committed a great illegality and the petitioner would be liable to be discharged from this case under Sub-section (3) of Section 245 of the Criminal Procedure Code.

3. Secondly, the sanction purported to be given by the Collector of Customs under Section 137(1) of the Customs Act was not in accordance with the law because on the face of the said sanction order it was in substance a sanction for prosecution but not a sanction to take cognizance. It is contended that Supreme Court in *Ram Kumar v. State of Haryana* : 1987 CriLJ703 has clearly observed that a sanction to prosecute as contemplated in Section 132 of the Criminal Procedure Code is not a substitute for sanction for taking cognizance under Section 197 of the Criminal Procedure Code and in view of the above Supreme Court decision the sanction is invalid and the taking of cognizance on the basis of the said sanction is also

invalid.

4. This petition under Section 482 of the Criminal Procedure Code is contested by the respondent. It is submitted on behalf of the respondent that when the Criminal Procedure Code (West Bengal Amendment), Act, 1988 came into force all the evidence before charge had been concluded on 7th February, 1989 and, therefore, on the date-on which Sub-section (3) of Section 245 incorporated in the Act by the above West Bengal Amendment came into force, there is no obligation for the Magistrate to consider as to whether he would discharge the accused or he would continue with the proceeding on being satisfied by the prosecution that upon the evidence already produced and for special reason there is ground for presuming that it shall not be in the interest of justice to discharge the accused.

5. As regards the second contention it is submitted on behalf of the respondent that a valid sanction under Section 137(1) of the Customs Act has been given by the Collector of Customs for prosecuting the petitioner under Section 135 of the Customs Act, that only one sanction was required to be granted by the Collector of Customs to prosecute the petitioner and consequently the sanction that has been granted under Section 137(1) of the Customs Act must be held to be a valid sanction for the learned Magistrate to take the cognizance against the petitioner and the principle laid down in above Supreme Court decision is not attracted because the Supreme Court in that decision held that if for prosecuting a member of Armed Force and sanction under Section 132, Criminal Procedure Code and a sanction under Section 197, Criminal Procedure Code were to be issued only one sanction under Section 132, Criminal Procedure Code would not be sufficient and sanctions both under Section 132, Criminal Procedure Code and 197, Criminal Procedure Code are required to be given and in the absence of both the sanctions the proceeding initiated against the members of Armed Force had to be quashed.

6. The first point for consideration in this case is whether there was any obligation for the Learned Magistrate to apply the provisions of Sub-section (3) of Section 245 before framing of charge against the accused on 12.12.89. The (West Bengal Amendment) Act, 1988 of the Criminal Procedure Code is extracted below:

GOVERNMENT OF WEST BENGAL

LAW DEPARTMENT

Legislative.

NOTIFICATION.

No. 548-L- 14th March, 1989. The following Act of the West Bengal Legislature, having been assented to by the President of India, is hereby published for general information:

THE CODE OF CRIMINAL PROCEDURE (WEST BENGAL AMENDMENT) ACT, 1988

West Bengal Act XXIV of 1988

(Passed by the West Bengal Legislature).

(Assent of the President of India was first published in the Calcutta Gazette, Extraordinary, of the 14th March, 1989).

An act to amend the Code of Criminal Procedure, 1973 in its application to West Bengal.

WHEREAS it is expedient to amend the Code of Criminal Procedure, 1973 (2 of 1974), in its application to West Bengal, for the purposes and in the manner hereinafter appearing;

It is hereby enacted in the Thirty-ninth Year of the Republic of India, by the Legislature of West Bengal as follows:

1. Short title and commencement.--(1) This Act may be called the Code of Criminal Procedure (West Bengal Amendment) Act, 1988.

(2) It shall come into force on such date as the State Government may, by notification in the Official Gazette, appoint.

2. Application of the Act.--The Code of Criminal Procedure , 1973 (hereinafter referred to as the principal Act) shall, in its application to West Bengal, be amended for the purposes and in the manner hereinafter provided.

* * * * *5. Amendment of Sub-section (2), Section 245.--In Section 245 of the principal Act, after Sub-section (2), the following sub-section shall be inserted:-

'(3) If all the evidence referred to in Section 244 are not produced in support of the prosecution within four years from the date of appearance of the accused, the Magistrate shall discharge the accused unless the prosecution satisfies the Magistrate that upon the evidence already produced and for special reasons there is ground for presuming that it shall not be in the interest of justice to discharge the accused.'

By order of the Governor,

S.N. Mukherjee

Secretary to the Govt, of West Bengal

7. It is clear from the above that the Code of Criminal Procedure (West Bengal Amendment) Act, 1988 has received the assent of the President on 15th March, 1989. But Sub-section 1(2) of the above Amendment Act has laid down that the said Amendment Act shall come into force on such date as the State Government may, by notification in the Official Gazette, appoint. The State Government by a relevant notification has brought the said Amendment into force from 2nd day of May, 1989.

8. On a perusal of Section 5 of the above Amendment Act by which a new Sub-section (3) has been inserted after Sub-section (2) of Section 245 we are of the view that it is a provision beneficial to the accused persons. Moreover, is a procedural statute and in view of the well settled principle of interpretation of statute such amendment provision whose primary object is to avoid delay in trial and is in consonance with the fundamental rights enshrined in Article 21 of the Constitution will be applicable to all pending Criminal Proceedings for trial of offences under Chapter 19 of the Criminal Procedure Code for trial of warrant

cases instituted otherwise than on police report.

9. Mr. Pradip Ghosh appearing for the petitioners submits that as soon as the Act came into force the Magistrate had the obligation to apply the provision of Sub-section (3) to decide the question of discharge of the accused regard being had to the position of the case as it stood on 26.1.88, that is, the date on which the period of four years from the date of the appearance of the accused expired. He has drawn our attention to the record of the case pending before the learned Magistrate and has pointed out that on 26.1.88 all the evidence before charge had not been concluded and therefore, when the Sub-section (3) came into force and when on that date no charge was framed, then the learned Magistrate had to apply the provision of Sub-section (3) of Section 245 and would either discharge the accused or on being satisfied by the prosecution that it would continue, it should pass appropriate order. But the learned Magistrate not having applied the Sub-section (3) of Section 245 of the Criminal Procedure Code which came into force admittedly prior to the date when the charge was framed. The accused has been seriously prejudiced and as he was entitled to be discharged the proceeding against the petitioner is liable to be quashed.

10. We are satisfied that Sub-section (3) of Section 245 of the Criminal Procedure Code which is a procedural enactment enacted for the benefit of the accused would apply to all warrant cases instituted otherwise than on police report on the date when the above provision came into force. Admittedly, on 2nd May, 1989 the charge has not been framed against the accused persons. But on behalf of the respondent it is contended that as long prior to the date on which the above provision came into force all the evidence before charge have been concluded on 7th February, 1989 then there was no obligation for the learned Magistrate as on 2nd May, 1989 to apply the provision of the Sub-section (3) of Section 245, Criminal Procedure Code because on the date charge had been concluded. There can be no doubt that in order to attract Sub-section (3) of Section 245 the primary condition is that all evidence before charge were not produced in support of the prosecution. There is no doubt as is gathered from the record of the learned Trial Judge that on 7th February, 1989 with the examination of the 26th witness of the prosecution the evidence before charge was concluded and the learned

Magistrate fixed a date for consideration of the framing of the appropriate charges against the accused. However, the record reveals that the said date for consideration of the framing of the proper charges were adjourned from time to time and the charges had admittedly been framed long thereafter that is on 12.12.89. So, it is clear that prior to the date on which Sub-section (3) of Section 245 came into force all the evidence before charge were produced by the prosecution. Mr. Ghosh, however, concedes that fact but he urges that when the Act came into force the learned Magistrate had to apply Sub-section (3) of Section 245 because when the period of four years from the date of appearance of the accused had expired on 26.1.88, all evidence before charge had not been concluded.

11. We are unable to hold that such a contention is acceptable. If that were to be acceptable then we shall have to hold that the Sub-section (3) of Section 245 have been given any retrospective effect. As there is nothing in the Act to suggest that it has been given a retrospective effect then we must hold that the amendment is prospective in nature and the learned Magistrate in the matter of such warrant cases instituted otherwise than on police report has to apply Sub-section (3) of Section 245 if on the date on which the above provision came into force, the period of four years had expired and the evidence before charge had not been concluded on the date on which the above provision came into force. When admittedly in this case Sub-section (3) came into force on a date before which all evidence before charge had been concluded, we are unable to hold that any right had accrued, to the petitioner in this case to be discharged under Sub-section (3) of Section 245 unless the Magistrate, regard being had to the evidence already produced and for special reasons, decides to continue the proceeding. On the date Sub-section (3) of Section 245 came into force there was no scope for the learned Magistrate to decide that question because evidence on that date had already been concluded and even prior to that date the date had already been fixed for framing of the charge. In that view of the matter we are unable to accept the first contention raised by the petitioner.

12. The second contention of the petitioner is that the sanction purported to have been issued by the Collector of Customs was not a valid sanction for taking

cognizance and on the basis of such sanction the Learned Magistrate could not have taken cognizance of the offence under Section 135 of the Customs Act and, therefore, the taking of sanction being invalid, the prosecution is liable to be quashed.

13. We find that over and above Section 135 of the Customs Act the petitioner is being prosecuted for other offences. Therefore, even if we accept the contention of the petitioner, the whole proceeding is not liable to be quashed, only the taking of cognizance under Section 135 of the Customs Act and the charge framed under that Section will be liable to be quashed.

14. However, it is for decision as to whether there is any such illegality in the sanction order issued by the Collector of Customs to hold that the Learned Magistrate was not justified in taking cognizance of the offence under Section 135 of the Customs Act on the basis of the said sanction.

15. Mr. Ghosh has drawn our attention to the decision of the Supreme Court as referred to above namely : 1987 CriLJ703 (Ram Kumar v. State of Haryana) in which Two Division Bench of Supreme Court consisting of M.P. Thakkar and B.C. Roy, JJ. has held that a sanction under Section 132, Criminal Procedure Code for prosecution of a member of Armed Force is not a substitute for sanction for taking cognizance under Section 197, Criminal Procedure Code. In the above reported decision for prosecution of the member of the Armed Force both the sanction under Section 132, Criminal Procedure Code for prosecution of a member of Armed Force and a sanction under Section 197(2), Criminal Procedure Code were necessary. Admittedly, there was only one sanction under Section 132, Criminal Procedure Code issued. The High Court, however, took the view that inasmuch as State Government itself had accorded sanction to prosecute the appellant in exercise of the powers under Section 132, Criminal Procedure Code there was no need for sanction under Section 197, Criminal Procedure Code. The Division Bench of Supreme Court set aside the above judgment of High Court and has clearly held that for prosecuting a member of Armed Force if sanction under Section 132 and that under Section 197 are required to be issued then regard being had to the purpose for which the two sanctions are contemplated in two

different provisions of the Criminal Procedure Code sanction under Section 132 cannot be a substitute for sanction for taking cognizance under Section 197 of the Criminal Procedure Code. Therefore, the Division Bench of Supreme court is of the view that if the sanctions under both Section 132, Criminal Procedure Code and under Section 197, Criminal Procedure Code are required then in the absence of a sanction under Section 197, Criminal Procedure Code taking of cognizance by the Magistrate would be illegal. Mr. Ghose has also drawn our attention to a Single Bench decision of this Court reported in [1989] 19 ECC 173 (Cal) : (1988) 2 Cal HN 455 (S.N. Bhowmick v. State) where the learned Single Judge relying on the above Supreme Court decision quashed a proceeding on the ground that the sanction purported to be under Section 137(1) of the Customs Act was not a valid sanction under that section by such sanction, sanction was given for prosecution and not for taking cognizance.

16. On carefully considering the Division Bench decision of Supreme Court reported in AIR 1987 SC 735 we are of the view that in that decision it has not been indicated as to in what form a sanction under Section 197, Criminal Procedure Code would be issued, Section 197(2) of the Criminal Procedure Code which was the subject matter of the above Supreme Court decision reads as follows:

(2) No Court shall take cognizance 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.

17. The above Sub-section (2) on the face of it does not show that the language of the sanction order must indicate that it is a sanction to take cognizance. Sub-section (2) of Section 197 clearly lays down that if no previous sanction by the Central Government is given under Sub-section (2) of Section 197 then no Court shall take cognizance. We have carefully considered the above Supreme Court decision. In order to decide that a sanction under Section 132, Criminal Procedure Code will not be a substitute for a sanction under Section 197 Criminal Procedure Code the Division Bench of Supreme Court high-lighted the different objects of the

two sanctions. But in that Division Bench it has not been indicated as to in what form a sanction under Section 197(2) would have to be issued. It is now well-settled that the Code of Criminal Procedure has not provided for any particular form of sanction. Even the Customs Act does not also provide the particular form under which a sanction under Section 137(1) will have to be issued. While dealing with a similar provision for sanction provided under Section 6 of the Prevention of Corruption Act under which for prosecuting an accused being a public servant, the sanction of the appropriate Government is necessary prior to taking cognizance of an offence under Section 161, IPC or Sub-section (2) of Section 5 of the Prevention of Corruption Act, 1947, the Three Bench Division of Supreme Court in *Biswa Bhusan Nayak v. State of Orissa* reported in : 1954 CriLJ1002 has held that it is not necessary for the sanction under the Prevention of Corruption Act to be in any particular form or in writing or for it to set out the facts in respect of which it is given. It has also been observed that the desirability of such a course is obvious because when the facts have not been set out in the sanction, proof has to be given aliunde that sanction was given in respect of the facts constituting the offence charged, but an omission to do so is not fatal so long as the facts can be, and are, proved in some other way. The sanction under Section 6 of the Prevention of Corruption Act, 1947 which was subject matter of challenge was in the following form:

GOVERNMENT OF ORISSA

Commerce and Labour Department

Order No. 4561/Com. dated 3.11.1948

In Pursuance of Section 6 of the Prevention of Corruption Act, 1947 (II of 1947) the Governor of Orissa is hereby pleased to accord sanction of prosecution of Sri B.B. Nayak, Inspector of Factories, Orissa, employed in connection with the affairs of the province under Sub-section (2) of Section 5 of the said Act.

(2) Nature of offence committed:

Criminal misconduct in discharge of official duty.

By order of the Governor,

(Sd.) V. Ramanathan

Secretary to the Government

18. Section 6 of the Prevention of Corruption Act is exactly in the same language in which Section 137(1) of the Customs Act has been enacted. The words beginning with 'No Court shall take cognizance' etc. have been used. The order of sanction, which was the subject matter of challenge before the Supreme Court in the above decision also indicates that the Secretary of the Government of Orissa issued the said sanction order 'To accord sanction for prosecution'. As the facts stating the offence were not indicated in the sanction order the same was challenged. But the letter of the District Magistrate asking for the sanction from the State Government was exhibited in that case which set out the grounds for which the sanction was asked for from the State Government. The Supreme Court approved the said sanction order as a valid sanction under Section 6 of the Prevention of Corruption Act and have also held that from the letter of the District Magistrate as well as from the other evidence it was clear that the facts placed before the Government could only relate to offence under Section 161 of the IPC and Clause (a) of Section 5(i) of the Prevention of Corruption Act and therefore upheld the above sanction order. In this particular case, however, all the facts disclosing the commission of offences under Sections 420, 468/471 IPC, Section 3 of the Import & Export (Control) Act, 1947 and Sections 132 and 135(i)(a) of the Customs Act, 1962 by both the accused persons have been set out and thereafter the sanction order reads as follows:

Now, therefore, in exercise of powers conferred on me by Section 137(i) of the Customs Act, 1962, I.T.S. Swaminathan, Collector of Customs, Calcutta hereby accord sanction for filing of complaint for offences punishable under Section 132 and 135 of the Customs Act, 1932 before the Court of Law in respect of accused No. (1) M/s. Syed Abdul Ahad & Co., 69, Phears Lane, Calcutta - 73 and (2) Syed Md. Hasan, Partner of accused No. 1.

19. Mr. Ghosh appearing for the petitioner submits that this is nothing but a sanction for prosecution but not for taking cognizance and therefore, the order of sanction is invalid.

20. In this case only one sanction under Section 137(i) of the Customs Act is required for the Magistrate to take cognizance.

21. Regard being had to the principle laid down in the Supreme Court decision of : 1954 CriLJ1002 we are of the view that what is necessary for the Court to decide as to whether a proper sanction is given or not as required under the law, is to see as to whether either from the order of sanction or from any other materials produced the facts in respect of which it is given have been set out or not. It is not necessary that the sanction will be in a particular form. It is only necessary that there should be a sanction stating the facts in respect of which it is given and the Court on the basis of the said sanction has to take cognizance. The particular language used in the order of sanction is not material. The only material thing to show is as to whether there is a previous sanction for the Court to take cognizance. It is not necessary that a sanction order under Section 137(1) shall have to be issued by the Collector to accord sanction for the Court to take cognizance, Under the Code of Criminal Procedure ordinarily the Criminal Courts on the basis of petition of complaint or police report or otherwise may take cognizance and initiate a criminal proceeding. No sanction of the executive authority is necessary for a Criminal Court to take cognizance. What 197, Criminal Procedure Code or 137(1) of the Customs Act provides is that for the offences contemplated under the said provisions there must be a previous sanction of the concerned authority for the Court to take cognizance. The language in which such sanction is worded is not in the least material when the Supreme Court has clearly held that there is no particular form of sanction. When the Customs Act has not specified the particular form of sanction under Section 137(1) of the Customs Act, then we are of the view that even if the Collector of Customs accords sanction for filing complaint for offences punishable under Section 132 and 135 of the Customs Act, 1962 before a competent Court of Law and when that sanction has been accorded in exercise of the powers under Section 137(i) of the Customs Act and when the sanction order clearly set out the facts in respect of which the said

sanction has been accorded, then only because the expression used in the sanction order that the sanction is accorded for filing complaint, we are unable to hold that such sanction which has been issued under Section 137(1) is invalid. We are unable to hold that the Collector of Customs has to accord a sanction to the competent Magistrate to take cognizance. We have already indicated that it is not the contemplation of the law that the Collector shall accord sanction to take cognizance. It is the contemplation of the law that there must be a previous sanction of the competent Authority for the Court to take cognizance.

22. We have unable to approve the decision of the Learned Single Judge reported in (1988) 2 Cal HN 455 in which the learned Single Judge even though he found that only the sanction under Section 137(i) of the Customs Act was necessary he quashed the proceeding on the ground that the sanction was accorded for prosecution of the accused and that it was not a sanction for taking cognizance. In the result we are unable to hold that the sanction order issued by the Collector of Customs in this case under Section 137(1) Criminal Procedure Code [Customs Act] is in any way invalid. Therefore, the taking cognizance by the Learned Magistrate on the basis of such sanction order is not in our opinion invalid.

23. As none of the contentions raised by the petitioner is acceptable, we find no merit in this petition. The petition is rejected. Let the Lower Court record be sent down to the Learned Magistrate for disposal of this case as expeditiously as possible.

Manabendra Nath Roy, J.

I agree.

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