

Darshan Kumar Vs. Sushil Kumar Malhotra and ors.

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Court : Himachal Pradesh

Decided On : Jul-11-1979

Reported in : 1980CriLJ154

Judge : T.R. Handa, J.

Appellant : Darshan Kumar

Respondent : Sushil Kumar Malhotra and ors.

Judgement :

ORDER

T.R. Handa, J.

1. The petitioner herein filed a criminal complaint under Sections 143, 148, 149, 379, 380, 382, 452, 453, 454, and 461 I. P. C. against all the 63 respondents in the court of Sub Divisional Magistrate, Chamba which complaint was later on with the enforcement of the Code of Criminal Procedure, 1973 transferred to the Court of Chief Judicial Magistrate, Chamba. Respondents Nos. 1, 3 and 4 are admittedly public servants not removable from office save by or with permission of the State Government. The learned Chief Judicial Magistrate after recording the preliminary evidence of the petitioner, vide his order dated 10-6-1976 summoned only 21 out of 63 respondents under Sections 143, 379, 380 and 461 read with Section 149, Indian Penal Code. As regards respondents 'Nos. 1, 3 and 4 the learned Chief Judicial Magistrate observed that he could not take cognizance against these

respondents without the sanction of the State Government as contemplated by Section 197 of the Code of Criminal Procedure as the act complained of against them was committed by them while acting or purporting to act in the discharge of their official duties. He accordingly refused to summon these three respondents.

2. The petitioner has now approached this Court in revision and has challenged the order of the Chief Judicial Magistrate dated 10-6-1976 in so far only as it lays down that he could not take cognizance of the offences against respondents Nos. 1, 3 and 4 without the prior sanction of the State Government under Section 197, Cr. P.C.

3. Thus the sole question that falls for consideration in this revision is with regard to the application of the provisions of Section 197, Cr P. C. on the facts of the present case. The very nature of the case, therefore, demands that the facts should be set out at some length.

4. The petitioner is the Director In-charge of Messrs. Stee-Men Limited. This company entered into a contract with the President of India through the then Executive Engineer, Chamba Division, H.P. P. W. D. Chamba for the construction of a 300 ft. span stiffened suspension bridge across Ravi at Chamba vide agreement No. 10 of 1969-1970, As both the parties relied upon Clauses 16 to 18 of this agreement, it is considered expedient to quote these Clauses in extenso and the same are reproduced as under:

Clause 16 : - The works comprised in this tender are to be commenced after 15 days on receipt of written orders from the Divisional Officer to commence work. The time allowed 'for carrying out the work as entered in the tender shall be strictly observed by the contractor on the part of the Contractor and shall be reckoned from the fifteenth day after the date on which the order to commence the work is issued to the contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence and the contractor shall pay as compensation an amount equal to one per cent, or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the amount of the estimated cost of the whole work shown in the tender for every day that work remains uncommenced, or unfinished after the proper dates. And

further, to ensure good progress during the execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceeds, one month (save for special jobs) to complete one-eighth of the whole of the work before one-fourth of the whole of the time allowed under the contract has elapsed, three-eighths of the work before one-half of such time has elapsed, and three-fourths of the whole of the work before three-fourths of such time has elapsed. However, for special jobs if a time schedule has been submitted by the contractor and the same had been accepted by the Engineer-in-Charge, the contractor shall comply with the said time schedule. In the event of the contractor failing to comply with this condition he shall be liable to pay as compensation an amount equal to one per cent or such smaller amount as Superintending Engineer (whose decision in writing shall be final) may decide on the said estimated cost of the whole work for every day that the due quantity of work remains incomplete, provided always that the entire amount of compensation to be paid under the provisions of this clause shall not exceed ten per cent on the estimated cost of the work as shown in the tender.

Clause 17 : -- In any case in which under any clause or clauses of this contract the contractor(s) shall have rendered himself/themselves liable to pay compensation amounting to the whole of his/their security deposit (whether paid in one sum or deducted by instalment) or committed a breach or a persistent breach of any of the terms contained in Clause 16, the Divisional Officer on behalf of the President of India, shall have power to adopt any of the following courses, as he may deem best suited to the interests of Government,

(a) To rescind the contract of which rescission notice in writing to the contractor(s) under the hand of the Divisional Officer shall be conclusive evidence, and in which case the security deposit of the contractor(s) shall stand forfeited, and be absolutely at the disposal of the Government.

(b) To employ labour paid by the P. W. D. and to supply materials to carry out the work or any part of the work, debiting the contractor(s) with the cost of the labour and the price (certificate of the Divisional Officer shall be final and conclusive) against the contractor (s) and crediting him them with the value of the work done,

the certificate of the Divisional Officer as to the value of the work done shall be final and conclusive against the contractor (s) of the material of the amount of which costs and price.

(c) After giving notice, to the contractor to measure up the work of the contractor and to take such part of the work as shall remain unexecuted out of his/their hands and to give it to another/other contractors to complete in which case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor (s) if the whole work had been executed by him/them (of the amount of which excess the certificate in writing of the Divisional Officer shall be final and conclusive) shall be borne and paid by original contractor(s) and may be deducted from any money due to them by Government. Under the contractor or otherwise or from his/their security deposit or the proceeds of the sale thereof or a sufficient part thereof.

In the event of any of the above courses being adopted by the Divisional Officer the contractor (s) shall have no claim to compensation for any loss sustained by him/them by reasons of his/their having purchased or procured any materials or entered into any engagements or made any advances on account of or with a view to the execution of the work or the performances of the contractor. And in case the contract shall be rescinded under the provision aforesaid the contractor (s) shall not be entitled to recover or be paid any sum for any work therefor actually performed under this contract unless and until the Divisional Officer will have certified in writing the performance of such work and the value payable in respect thereof and he/they shall only be entitled to be paid the value so certified.

Clause 18: - In any case in which any of the powers conferred upon the Divisional Officer, by Clause 17 hereof, shall have become exercisable and the same shall not be exercised the non-exercise thereof shall not constitute a waiver of any of the conditions hereof and such powers shall notwithstanding be exercisable in the event of any future case of default by the contractor(s) for which by any clause or clauses hereof he is/they are declared liable to pay compensation amounting to the whole of his/their security deposit and the liability of the contractor (s) for -past and future compensation shall remain unaffected. In the event of the Divisional

Officer putting in force either of the power (s) or/and (c) vested in him and the preceding clause he may if so desired take possession of all or any tools, plant materials and stores in or upon the works or the site thereof or belonging to the contractor procured by him/them are intended to be used for the extension of the work or any part thereof paying or allowing for the same in account at the contract rates or in case of these not being applicable at current market rates to be certified by the Divisional Officer whose certificate thereof shall be final otherwise the Divisional Officer may by notice in writing to the contractor (s) or his/their clerk or the works foreman or other authorised agent require him/them remove such tools, plant, materials or stores from the premises (within a time to be specified in such notice) in the event of the contractor (s) failing to comply with any such requisition the Divisional Officer may remove them at the contractor's expenses or sell them by auction or private sale on account of the contractor (s) and at his/their risk in all respect and the certificate of the Divisional Officer as to the expense of any such sale shall be final and conclusive against the contractors.

5. In pursuance of this agreement the site for the construction of the aforesaid bridge was handed over to the company by the then Executive Engineer, Chamba for execution of the 'work. The company after taking possession of the site brought the requisite machinery etc. for the construction of the said bridge except some items like cement, steel, C. I. ropes etc. which were to be supplied by the Department in accordance with the terms of the agreement. On 5-7-1971 however, the then Executive Engineer, Chamba Division, rescinded the contract referred to above on the ground of 'slow progress of the work'. The company thereupon approached the Government as a result whereof the order of rescission passed by the Executive Engineer was revoked. An intimation to that effect was conveyed to the company by the Executive Engineer on 5-11-1971. The dispute that arose between the company and the Department at the time of the original rescission of the contract were referred to the arbitrator. After the rescission order was withdrawn, the company restarted the construction work and made considerable progress. The then Executive Engineer, Chamba, Shri S. P. Punani, however, vide his order dated 5-6-1972 levied a penalty of Rs. 63,000/- on the company on the ground of slow progress. Two days later on 7-6-1972 the said Executive Engineer again issued an order rescinding the contract on the pretext of 'slow progress'. The

company thereupon approached the arbitrator with its grievances as the proceedings were still pending before the arbitrator.

6. On 13-6-1972 the then Executive Engineer, Chamba for the first time made an attempt to take forcible possession of the site of the bridge along-with the property lying thereon from the company with the assistance of his own men. That attempt of the Executive Engineer was successfully resisted by the petitioner who on coming to know of the designs of the Executive Engineer had arranged for police protection in advance. Thereafter on 13-9-1972 respondent No. 1 who had then taken over as Executive Engineer, Chamba sent a telegram to the petitioner . stating therein that under Clause 18 of the agreement, respondent No. 1 would be implementing the order of rescission dated 7-6-1972 on 15-9-1972 at 10.30 a.m. Respondent No. 1 further directed vide the aforesaid telegram to the petitioner to depute some representatives as respondent No. 1 intended to take final measurements and also the control of the property. In pursuance to that telegram respondent No. 1 accompanied by respondents 3 and 5 and some other 50 Beldars duly armed with Gents, Belchas and Jhabbals actually came to the spot at 10.30 a.m. on 15-9-1972 to take forcible possession from the company. The petitioner, however, did not permit them to enter upon the site unless they showed him some order of a competent court. The petitioner had also arranged for police force and the A. S. I. present on the spot also told respondent No. 1 that he could help respondent No. 1 in taking over possession only after respondent No. 1 produced orders from some competent Court to that effect. As respondent No. 1 insisted to take possession, the A. S. I. informed the District authorities of his difficulties on which the Sub-Divisional Magistrate, Chamba reached the spot by about 12.30 p. m. where he held a conference with respondent No. 1 and the Managing Director of the company. After holding some talks the Sub Divisional Magistrate left at about 1.30 p. m. without passing any order. Respondent No. 1, after the departure of the Sub Divisional Magistrate again tried to take forcible possession of the site and the material which the petitioner was again successful in resisting with the help of the police. Respondent. No. 1 along with his men had to go back without success. Respondent Nos. 3 and 5, however, on that day made a written complaint to the A. S. I, respondent No. 6 who on that complaint wrongfully arrested the petitioner under Section 353, I. P. C.

7. On the following day, that is, 16-9-1972 respondent No. 1 accompanied by the other respondents again visited the spot at about 1 p.m. to take forcible possession. It was a local holiday on that day and for that reason the company was also having an off day and no work was in progress on the site. Only three Chowkidars of the company were present to guard the site on that day. The respondents after wrongfully arresting those three Chowkidars on duty, entered upon the site where they broke open the locks of the office, store room, almirahs and Chowkidars' quarters and dishonestly removed movable property of the company from its possession and without its consent. Besides other movables, cash amount of Rs. 14,365-00 which was lying in the office of the company was also removed by the respondents. Thus according to the petitioner, the respondents after forming themselves into an unlawful assembly with intent to take forcible possession from the company had committed the offences as stated in the complaint.

8. The learned Chief Judicial Magistrate examined four witnesses including Darshan Kumar petitioner, who were produced before him in the course of preliminary enquiry. Out of them P. W. 1 is Shri Darshan Kumar, Director Incharge of the company and P. W. 4 is Shri Gopi Krishan - the Managing Director of the Company. Neither of them was present on the spot at the time of the alleged occurrence and as such ,they are not in a position to, depose as to what actually happened on the spot. The other two witnesses, namely, P. W. 2 Hanif-Ula and P. W. 3 Kesar Singh are stated to be the eye witnesses who witnessed the occurrence. According to versions of these two P. Ws, which are almost identical, respondents 1, 3 and 4 along-with their Beldars and a police party reached the site of the work in the afternoon of 16-9-1972 where only three Chowkidara were present at that time. As the Chowkidars refused to allow entry to the respondents, the police party accompanying the respondents arrested all the three Chowkidars. Thereafter the respondents entered upon the site where they fixed their own locks and started construction work. Neither of these witnesses stated if the respondents broke open the locks on the spot or if they removed any article from the site.

9. The petitioner, Shri Darshan Kumar Vig, appearing as P. W. 1 and the Managing Director of the Company Shri Gopi Krishan Khanna appearing as P. W.

4 deposed about the events which are alleged to have taken place prior to the date of actual occurrence, that is 16-9-1972. They reiterated the allegations made in the complaint which have already been referred to in details in the earlier part of this judgment.

10. Now to clear the ground for consideration of the application of the provisions of Section 197 Cr. P. C. to the facts of the instant case, it may be stated that from the preliminary evidence produced by the petitioner, the following facts were established before the learned Chief Judicial Magistrate when he passed the impugned order:

(i) That respondents 1, 3 and 4 who were officers of the Public Works Department of the Himachal Pradesh Government were then posted in Chamba Division and they were public servants not removable from office save by or with the permission of the State Government.

(ii) That the company entered into an agreement with the President of India through the Executive Engineer, Chamba which post at the relevant time was held by respondent No. 1, for the construction of a bridge over the river Ravi at Chamba.

(iii) That the work of construction of such bridge was of very urgent nature and for that reason time had been made the essence of the contract between the Government and the Company.

(iv) That respondent No. 1 was the officer responsible to ensure that the progress of the work was effected in accordance with the time schedule.

(v) In case of breach in the time schedule for construction of the bridge, respondent No. 1 had been empowered under the contract aforesaid to:

(a) rescind the contract;

(b) employ Departmental labour and to supply Departmental material at the expense of the company in order to maintain the progress of the work.

(c) After giving notice to the company to measure up the work of the company and to take up the unexecuted part of the work in his own hand for completion either through some other contractor or through Departmental labour.

(vi) That in exercise of such powers, the then Executive Engineer, Chamba for the first time on 5-7-1971 rescinded the contract on the ground of slow progress of work which rescission was however, later on withdrawn on 5-11-1971.

(vii) Again for the some reason, the then Executive Engineer, Chamba, the predecessor-in-interest of respondent No. 1 imposed a penalty of 63.000/- on the company on the ground of slow progress on 5-6-1972 and two days later the same , officer rescinded the contract again on the ground of slow progress of work.

(viii) That on 13-6-1972 the then Executive Engineer in pursuance of his order rescinding the contract made an attempt to take over the control of the work from the company but that attempt was resisted by the company and hence the Executive Engineer could 'not take control over the work.

(ix) That on 13-9-1972 respondent No. 1 sent telegraphic intimation to the company expressing his intention to take over control of the work as per Clause 18 of the agreement in implementation of the order of rescission dated 7-6-1972 passed by his predecessor. In his telegram respondent No. 1 notified 15-9-1972 as the date and 10.30 a.m. as the hour for taking such action and further advised the company to depute some of his representatives so that final measurements could also be taken along with the control of the property in terms of Clause 18 of the contract.

(x) That as notified earlier vide the telegram referred to above, the respondent No. 1 along with his men visited the site to take measurements and control of the construction work but the company resisted and respondent No. 1 therefore had to return without accomplishing his object.

(xi) That on the following day, that is, 16-9-1972 respondent No. 1 again with his men and after securing the police help visited the site in order to take possession and this time only three chowkidars of the company were found present who

refused to surrender. The police accompanying the party of respondent No. 1, accordingly put all the three Chowkidars under arrest whereafter there was nobody to offer resistance on the site. Respondent No. 1 and his men then entered upon the site, affixed their own locks and started construction work to complete the incomplete portion.

(xii) That no, machinery, material, cash or any other article was removed by any of the respondents from the site as is apparent from the evidence of the two eye witnesses examined by the petitioner.

11. The provisions of Section 197 (1), Cr, P. C. which have been attracted by the Chief Judicial Magistrate in his impugned order read as under:

Section 197 (1) : - 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.

(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 affairs of a State, of the State Government.

12. The effect, meaning, scope and interpretation of this provision has been the subject matter of several decisions announced by both the Privy Council as also the Supreme Court from time to time. The Privy Council as early as in 1948 in case H. H. B. Gill v. The King reported as AIR 1948 PC 128 while explaining the circumstances under which the protection afforded by this section to a public servant is available observed that the test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office. The matter again came up for consideration before the Supreme Court in

the case of Matajog Dobey v. H. C. Bhari reported as : [1955]28ITR941(SC) wherein it was observed that in order to attract the protection of this section it must be shown that '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...There must be a reasonable connection between the act and the official duty...What the Court must 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 the official duty, though possibly in excess of the needs and requirements of the situation.' Again in the case Prabhakar V. Sinari v. Shanker Anant Verlekar reported as : 1969 CriLJ1057 the Supreme Court while explaining the scope of Section 197(1) and the circumstances under which this provision can be attracted observed as under:

What has to be found out is whether the act complained of and the official duty in the performance of which such act is alleged to have been committed are so interrelated that one could postulate reasonably that it was done by the accused in the performance of the official duty though possibly in excess of the needs and requirements of the situation. Of course it is not every offence committed by a public servant which required sanction for prosecution under Section 197 (1), Cr, P. C. nor even every act done by him while he was actually engaged in the performance of his official duties. But if the act complained of was directly concerned with his official duty so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary and that would be so, irrespective of whether it was in fact, a proper discharge of his duty or not.

In the case of Bhagwan Prasad Srivastava v. N.P. Mishra reported as : 1970 CriLJ1401 . Hon'ble Justice Dua who delivered the main judgment observed that 'S. 197 is neither to be too narrowly construed nor too widely....' There must be a reasonable connection between the act and the discharge of official duty. The act must fall within the scope and range of the official duties of the public servant concerned.

13. Thus the crux of the matter is that in order to determine whether in a particular case a public servant is entitled to the protection of Section 197, Cr. P. C. all that has to be considered is whether the act complained of against the public servant which is alleged to constitute the offence, was committed by him while discharging his official duty and that such act had a reasonable connection with his official duty. It is not material whether in discharging such official duty, the public servant acted somewhat in excess of his limits.

14. The pertinent question that next arises is as to what considerations should prevail and what tests need be applied for determining as to whether there was a reasonable connection between the act complained of and the official duty of the concerned public servant. Whereas it is not possible to lay down any hard and fast rules of universal application for the determination of this question, one safe and sure test in this regard would in my view be, to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duties. A negative answer to this question may not clinch the issue but if the answer to this question is in the affirmative, it may be said without the least hesitation and without any further probe that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant.

15. If we apply the above test in the instant case, there would be no difficulty in upholding the view taken by the learned Chief Judicial Magistrate that he could not take cognizance against respondents Nos. 1, 3 and 4 without the prior sanction of the State Government under Section 197, Cr. P. C. As already stated, respondent No. 1 is the Executive Engineer who is entrusted with the work of construction of the Bridge at River Ravi at Chamba for the construction of which the contract had been given to the Company. It is apparent from Clause 16 of the agreement referred to above that this construction work was of urgent nature and accordingly time had been made the essence of the contract between the Government and the Company. It was to ensure that there was no delay in the construction of this work that certain powers had been vested by virtue of Clauses 16 to 18 of the agreement in the Executive Engineer who had been fixed with the responsibility of

getting the bridge completed in time. It was towards the discharge of this duty of getting the construction work completed in time that the predecessors of respondent No. 1 had on two earlier occasions rescinded the contract and one of them had actually made an effort on 13th June, 1972 to take control of the work. Respondent No. 1 towards the discharge of the same duty and in exercise of the power vested in him under Clause 18 of the agreement issued telegraphic notice to the Company conveying his intention to take measurements as also the control of the work for its expeditious completion. Respondent No. 1 then actually proceeded to the spot on 15th September, 1972 in pursuance of his telegraphic notice but like a disciplined public servant he came back when resistance was offered to him on behalf of the Company. On the next day after taking police help, he again went to the spot and entered upon the site when no resistance was offered and immediately thereafter started the construction work for which purpose he had gone to take possession of the site. I have no doubt in my mind that all that was done by respondent No. 1 with the aid of his staff was done in the discharge of his duties. In case respondent No. 1 had not acted in such a manner and let the things lie as they were, he would certainly have been answerable to his superiors for the delay in the construction of the bridge which could be attributed to inaction on his part. The circumstances as brought on the record fully establish that it was the duty of respondent No. 1 to see that the progress of the construction work was in accordance with the time schedule and that in case of delay he could take immediate action and take over control of the work for completing the same through some other contractor or, through departmental aid. Respondent No. 1 in doing the act complained of did nothing beyond what he was required to do as a matter of his official duty. The case of respondents Nos. 3 and 4 is not different.

16. I thus find that the act complained of against respondents No. 1, 3 and 4 was committed by them in the discharge of their official duties and it was reasonably connected with their official duty so as to require prior sanction of the State Government for prosecuting them in respect of the offence, if any, made out from the commission of such acts.

17. In the result, I find no force in this Revision Petition which is hereby dismissed.

