

Dilip Kumar Saikia Vs. State

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Court : Guwahati

Decided On : May-04-1999

Reported in : 1999CriLJ3543

Judge : A.K. Patnaik, J.

Acts : Indian Penal Code (IPC) - Sections 21, 120B 409, 420 and 468; ;[Prevention of Corruption Act, 1988](#) - Sections 13, 13(1), 13(2), 19 and 19(2); ;[Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 197, 197(1), 397(1) and 401; ;[Prevention of Corruption \(amendment\) Act, 1947](#) - Section 6, 6(1) and 6(2); ;[Constitution of India](#) - Articles 14, 192 and 227

Appeal No. : Criminal Revn. No. 333 of 1998

Appellant : Dilip Kumar Saikia

Respondent : State

Advocate for Def. : D.K. Das, Spl. Public Prosecutor C.B.I.

Advocate for Pet/Ap. : D.K. Mishra, ;H. Roy, ;B.D. Das and ;N. Singha, Advs.

Disposition : Petition dismissed

Judgement :

ORDER

A.K. Patnaik, J.

1. This is an application under Section 397(1) read with Section 401 of the Code of Criminal Procedure, 1973 and Article 227 of the Constitution praying for quashing the order dated 18-8-98 of the learned Special Judge, Assam at Guwahati in Special Case No. 16(C)/98 taking cognizance of the offences under the Indian Penal Code and the [Prevention of Corruption Act, 1988](#) against the petitioner.

2. The relevant facts briefly are that on or about 3-7-93 FIR No. 12/93 was registered under Sections 409, 468, 420 and 120B, Indian Penal Code (for short, 'IPC') and Section 13(2) read with Section 13(1)(d) of the [Prevention of Corruption Act, 1988](#) (for short, 'PC Act, 1988') by the Anti-Corruption Branch, Assam, Guwahati. The case was thereafter transferred by the Government of Assam to the Central Bureau of Investigation (for short, 'CBI') for further investigation and registered afresh as RC-3 (A)/94-ACU (II). After further investigation, the CBI filed a charge-sheet dated 15-7-98 in the Court of Special Judge, Assam, a Guwahati against 39 accused persons including Sri P. K. Mahanta, Chief Minister of Assam and the petitioner. So far as the allegations against the petitioner are concerned, it is stated in the said charge-sheet that as per the investigation of the CBI, the petitioner was Minister, Veterinary, Government of Assam during 1986 to 1990 and he knew very well that Sri R.P. Borah was withdrawing money from ICDP, Demow on the basis of bogus and fictitious bills and he conspired with Sri R.P. Borah and others and took large sums of money from the defrauded funds of ICDP, Demow from Sri R. P. Borah. He took two flats in Jewel House, Andheri (West), Bombay and one Ice Cream Parlour in Varsova, Bombay in his name, in the name of his wife and in the name of Sri Pranjal Choudhury, his brother-in-law, from the funds illegally withdrawn by Sri R.P. Borah from ICDP, Demow. He took CI sheets amounting to Rs. 8 lacs approximately and also Demand Drafts amounting to Rs. 13 lacs from these funds which were distributed in various schools, institutions, clubs, naamghars in the constituency of Dhemaji from where he fought election during 1986 and 1991. He abetted Sri R.P. Borah to commit the offence of cheating by giving protection to him. He therefore committed offences punishable under Section 120B read with Section 420, IPC and Section 13(2) read with Section 13(1)(d), PC Act, 1988. After perusing the said charge-sheet, and the

materials filed along with the charge-sheet, the learned special Judge, Assam at Guwahati took cognizance against the accused persons including the petitioner by the impugned order dated 18-8-98. But by the said order dated 18-8-98, the learned special Judge did not take cognizance against Sri P. K. Mahanta, the present Chief Minister of Assam as the authority had not accorded sanction. The petitioner's case is that since he was the Minister, Veterinary Department, Government of Assam and is presently a Member of Legislative Assembly, the learned Special Judge had no jurisdiction to take cognizance against, the petitioner without sanction by the competent authority under Section 19 of the PC Act, 1988 and under Section 197, Code of Criminal Procedure (for short, 'Cr. P.C.').

3. Mr. D.K. Mishra, learned counsel appearing for the petitioner, submitted that Section 19 of the PC Act, 1988, provided that no Court would take cognizance of an offence punishable under Section 13 alleged to have been committed by a public servant, except with the previous sanction of the competent authority, and in a long line of cases, the Courts have held that previous sanction of the competent authority would be required under Section 19 of the PC Act, 1988 if the person sought to be prosecuted was a public servant at the time of commission of the offence and was a public servant at the time when the cognizance of the offence was taken by the Court. He explained that the petitioner was the Minister, Veterinary Department, Government of Assam at the time when the offence under Section 13 of the PC Act, 1988 was alleged to have been committed and was therefore a public servant at the time of commission of the offence. He further explained that the petitioner was a Member of Legislative Assembly of Assam at the time when cognizance was taken by the learned Special Judge, Assam, by his impugned order dated 18-8-98. Mr. Mishra submitted that it had been decided by the Supreme Court in *P.V. Narasimha Rao v. State (CBI/SPE)*, (1998) 4 SCC 626 : (1998 Cri LJ 2930), that Members of Parliament were public servants for the purposes of the PC Act, 1988, and could not be prosecuted for offences under the said Act without the previous sanction of the competent authority under Section 19 of the said Act. Mr. Mishra contended that the petitioner was also a public servant as he was a Member of the Legislative Assembly of the State of Assam and the learned Special Judge could not have taken cognizance of the offence under

Section 13 of the PC Act, 1988 against the petitioner without the previous sanction from the competent authority under Section 19 of the said Act. Mr. Mishra submitted that Sub-section (2) of Section 19 of the PC Act, 1988 contemplated situations where a public servant had ceased to hold office under one Government or authority and had assumed office under another Government or authority and clarified that the Government or authority competent to give sanction would be one who was competent to remove a public servant from his office at the time when the offence was alleged to have been committed. He explained that the petitioner was the Minister, Veterinary, Government of Assam at the time when the offence was alleged to have been committed and was presently holding the office of ML A under the Speaker of the Legislative Assembly of Assam, and it was the Governor of Assam who was competent to remove him from the office of Minister which he was holding at the time when the offence was alleged to have been committed by him and therefore under Section 19(2) of the PC Act, 1988 it was the Governor of Assam who was the competent authority to sanction for prosecution. For this proposition, Mr. Mishra cited the decision of the Supreme Court in *S. A. Venkataraman v. The State*, AIR 1958 SC 107 : (1958 Cri LJ 254), which was a decision on Sub-section (2) of Section 6 of the Prevention of Corruption Act, 1947, (for short, 'PC Act, 1947'), and argued that since Sub-section (2) of Section 19 of the PC Act, 1988 is identically worded as Sub-section (2) of Section 6 of the PC Act, 1947, the said decision equally applies to Section 19 of the PC Act, 1988.

4. Mr. Mishra next contended that Section 197 of the Cr. P.C. provided that a person who was a public servant not removable from his office save by or with the sanction of the Government was 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 would take cognizance of such offence except with the previous sanction of the competent authority. He submitted that since the petitioner was the Minister of Veterinary Department, Government of Assam and was a public servant not removable from his office save with the sanction of the Governor and was accused of the offence under the IPC alleged to have been committed by him while acting or purporting to act in the discharge of his official duty as such Minister, learned Special Judge could not have taken cognizance of the offences under the IPC except with the previous sanction of the Governor of Assam. He

relied on the decision of the Supreme Court in *Shreekantiah Ramayya Munipalli v. State of Bombay*, AIR 1955 SC 287 : (1955 Cri LJ 857), in which it has been held that if Section 197, Cr. P.C. was construed too narrowly it could never be applied and submitted that the Court should not put a narrow construction on Section 197 of the Cr. P.C. and hold that it is no part of the official duty of a Minister to commit the offences under the IPC. He also cited the decision of the Supreme Court in *State through CBI v. B.L. Verma*, (1997)10 SCC 772, in which the Supreme Court upheld the order of the High Court which directed dropping of the proceedings against a public servant who was an officer of the Directorate of Enforcement on the ground that the trial Court could not have taken cognizance of the offence against him without the sanction from the competent authority as provided in Section 197(1), Cr. P.C.

5. In reply, Mr. D.K. Das, learned Special Public Prosecutor, CBI, appearing for the opposite party, relied on the averments in paragraph-5.5 of the Affidavit filed on behalf of the respondent-CBI, and submitted that the allegation against the petitioner was that he (the petitioner) in conspiracy with Sri R.P. Borah and others cheated the Government of Assam through Veterinary department to the tune of Rs. 48,81,50,932.45 by submission of forged bills without supplying the materials and without execution of the works and the petitioner also got his share out of the said defrauded amount and was therefore liable for prosecution under Section 120B read with Section 420, IPC and under Section 13(2) read with Section 13(1)(d) of the PC Act, 1988. Mr. Das explained that so far as the offence under Section 120B read with Section 420, IPC was concerned, the acts of conspiracy on the part of the petitioner with Sri R.P. Borah and others in cheating the Government of Assam to the tune of Rs. 48,81,50,932.45 were not the acts done by him in the discharge of his official duty so as to attract the provisions of Section 197(1), Cr. P.C. and therefore no previous sanction was required for prosecution of the petitioner for the said offence under Section 120B read with Section 420, IPC. In support of this submission, Mr. Das relied on the decision of the Supreme Court in *Harihar Prasad v. State of Bihar*, (1972) 3 SCC 89 : (1972 Cri LJ 707), in which the Supreme Court held that it was no part of the duty of a public servant, while discharging his official duties, to enter into a criminal conspiracy or to indulge in criminal misconduct and therefore want of sanction under Section 197, Cr. P.C.

was not a bar for prosecution of a public servant for the offence of criminal conspiracy under Section 120B. Mr. Das also cited the decisions of the Supreme Court in *State of Bihar v. P.P. Sharma*, AIR 1991 SC 1260 : (1991 Cri LJ 1438), and *Shambhoo Nath Misra v. State of U.P.*, (1997) 5 SCC 326 : (1997 Cri LJ 2491), in which it was held that no sanction was required under Section 197 , Cr. P.C. for prosecuting a public servant for offences such as misappropriation, falsification of accounts, criminal conspiracy, etc. as they were not integrally connected with the official duties of the public servant.

6. Regarding sanction under Section 19 of the PC Act, 1988, for the offence under Section 13 of the said PC Act alleged to have been committed by the petitioner, Mr. Das explained relying on the averments in paragraphs 5.5 and 5.6 of the affidavit filed on behalf of the CBI that the said offence under Section 13 of the PC Act, 1988 was alleged to have been committed by the petitioner while he was holding the office of Minister, Veterinary, Government of Assam during 1986 to 1990, but he had ceased to be such Minister since November, 1990 and is presently a member of Legislative Assembly of Assam. He submitted that the petitioner being a Member of Legislative Assembly of Assam may be a public servant for the purpose of the PC Act, 1988, as has been held by the Supreme Court in *P. V. Narasimha Rao* (1998 Cri LJ 2930) (supra), but the offence under Section 13(2) read with Section 13(1)(d) of the PC Act, 1988, alleged to have been committed by the petitioner does not relate to any act committed by him in his capacity as a Member of Legislative Assembly of Assam but relates to the abuse of his office as Minister, Veterinary, Government of Assam during the period 1986 to 1990. Mr. Das submitted that the decision of the Supreme Court in *P.V. Narasimha Rao* (supra) did not relate to misuse or abuse of the office of Minister and therefore did not apply to the facts of the present case. He placed strong reliance on the case of *R.S. Nayak v. A.R. Antulay*, AIR 1984 SC 684 : (1984 Cri LJ 613), in which the Supreme Court clearly held, interpreting Section 6 of the P.C. Act, 1947, that sanction of that competent authority alone would be necessary which was competent to remove the public servant from the office which he was alleged to have misused or abused for corrupt motive and for which a prosecution was intended to be launched against him. Since the Governor of Assam was the competent authority to remove the petitioner from the office of Minister, Veterinary

which the petitioner was alleged to have misused and abused for corrupt motive and for which prosecution had been launched against him, sanction of the Governor would have been necessary in the instant case if the petitioner had continued to be a Minister in the Government of Assam and not ceased to be a Minister. But as the petitioner had ceased to be a Minister in the Government of Assam, no such sanction was necessary. Mr. Das submitted that following this proposition of law laid down in *R. S. Nayak v. A. R. Antulay*, (supra) the Supreme Court held in *Habibulla Khan v. State of Orissa*, AIR 1995 SC 1124 : (1995 Cri LJ 2071), that no sanction was necessary to prosecute an MLA for offences alleged to have been committed during his tenure as Minister if he had ceased to be a Minister. Mr. Das explained that in view of the clear law laid down by the Supreme Court in *R.S. Nayak v. A.R. Antulay*, (supra) and *Habibulla Khan v. State of Orissa*, (supra), no sanction was necessary for prosecuting the petitioner who had ceased to be a Minister and was a Member of Legislative Assembly for the offences alleged to have been committed during his tenure as Minister, Veterinary, Government of Assam from 1986 to 1990.

7. Mr. Mishra, however, pointed out that in *R.S. Nayak v. A.R. Antulay*, (1984 Cri LJ 613) (supra), the Governor had already accorded sanction for prosecution of Sri A.R. Antulay and the question which arose for decision before the Court was whether sanction of other authorities for prosecution of Sri A.R. Antulay was required when he ceased to be Chief Minister of the State of Maharashtra and held other offices from which he was removable not by the Governor but by other authorities, and it is on these facts that the Supreme Court held that sanction of such other authorities was not required for prosecution of Sri A.R. Antulay for offences alleged to have been committed by him during his tenure as Chief Minister of the State of Maharashtra. Whereas, in the instant case, no sanction had been accorded by the Governor of Assam for prosecution of the petitioner for the offences alleged to have been committed by him during his tenure as Minister, Veterinary, Government of Assam. According to Mr. Mishra, therefore, the facts of the case of *R.S. Nayak v. A.R. Antulay* (supra) are distinguishable from the facts of the present case. Mr. Mishra further submitted that in *R.S. Nayak v. A.R. Antulay*, the Supreme Court held that a member of Legislative Assembly was not a public servant within the meaning of expression in any of the clauses of Section 21

of the IPC and that the Apex Court had not decided till then whether a Member of Legislative Assembly was a public servant for the purpose of the P.C. Act, 1947. But after the decision of the Supreme Court in *P.V. Narasimha Rao v. State (CBI/SPE)* as reported in (1998) 4 SCC 626 : (1998 Cri LJ 2930), Members of Legislative Assembly are public servants for the purpose of the PC Act, 1988 and are entitled to protection of Section 19 of the PC Act, 1988 against their prosecution. In this context, he pointed out that when it was argued that Section 6 of the PC Act, 1947 which was similarly worded as Section 19 of the PC Act, 1988, was violative of Article 14 of the Constitution as it did not afford protection to a public servant who had retired from office, the Supreme Court held in *State of W. B. v. Manmal Bhutoria*, (1977) 3 SCC 440: (1977 Cri LJ 1164), that a public servant who had ceased to be in office was in a separate category than a public servant continuing in office and, therefore, Section 6 of the PC Act, 1947 was not violative of Article 14 of the Constitution. Finally, Mr. Mishra argued that the decision in *R.S. Nayak v. A.R. Antulay*, (supra), AIR 1984 SC 684: (1984 Cri LJ 613), was per incuriam as the Supreme Court did not consider at all Sub-section (2) of Section 6 of the PC Act, 1947. He relied on the proposition in Paragraph 25.108 of *Constitutional Law of India*, Fourth Edition, Vol. III by HM Servai, that a Supreme Court judgment rendered in ignorance of a relevant constitutional or statutory provision is not binding on any Court in India. Regarding the decision of the Supreme Court in *Habibulla Khan v. State of Orissa*, (supra), AIR 1995 SC 1124 : 1995 Cri LJ 2071, Mr. Mishra submitted that the said decision was rendered solely on the basis of the proposition of law laid down in *R.S. Nayak v. A.R. Antulay* (supra) and not on the basis of any fresh consideration of Section 19 of the P.C. Act, 1988 and in particular Sub-section (2) thereof. According to Mr. Mishra, after the decision of the Supreme Court in *P.V. Narasimha Rao* (1998 Cri LJ 2930) (supra), to the effect that members of Parliament are public servants, a fresh decision has to be given by the Court in this case as to whether or not sanction was required for prosecution of a Member of Legislative Assembly who had ceased to be a Minister for offences alleged to have been committed by him during his tenure as such Minister keeping in mind the provisions of Sub-section (2) of Section 19 of the PC Act, 1988.

8. The first question therefore which needs to be decided by this Court in the present case is as to whether sanction was necessary under Section 19 of the P.C. Act, 1988 for prosecution of the petitioner who was a Member of Legislative Assembly for the offence under Section 13(2) read with Section 13(1)(d) of the PC Act, 1988 alleged to have been committed by him while he was Minister, Veterinary, Government of Assam from 1986 to 1990. Sub-sections (1) and (2) of Section 19 of the PC Act, 1988, is quoted herein below :

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

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

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

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

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

Clause (a) of Sub-section

(1) quoted above provides that in case of a person who is employed in connection with the affairs of the Union, sanction of the Central Government is necessary for his prosecution. This is because it is the office held under the Central Government which is alleged to have been abused or misused by the public servant. Similarly,

clause (b) of Sub-section

(1) provides that a person who is employed in connection with the affairs of a State can be prosecuted with the previous sanction of the State Government. This is again because it is the office held under the State Government which is alleged to have been abused or misused by the public servant. So also, Clause (c) of Sub-section

(1) provides that in case of any other person, previous sanction is necessary for his prosecution of that authority who is competent to remove him from office because the office alleged to have been abused or misused by the public servant is under the said authority. This would be further clear from Sub-section

(2) of Section 19 of the PC Act, 1988 which states that where any doubt arises as to which is the Government or authority whose previous sanction is required for prosecution of a public servant, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when offence was alleged to have been committed. The statutory scheme as contained in Sub-section

(1) of Section 19 of the PC Act, 1988 and as clarified in Sub-section

(2) of Section 19 of the said Act therefore is that where a public servant has held different offices under the Central Government or the State Government or under any authority, previous sanction for his prosecution under Sub-section

(1) would be necessary of that Government or authority under whom the public servant held the public office which he is alleged to have abused or misused and committed the offence under the PC Act. In the aforesaid statutory scheme as contained in Sub-section

(1) of Section 19 and as clarified in Sub-section

(2) of Section 19 of the PC Act, 1988 therefore where a person ceases to hold an office which he is alleged to have abused or misused and committed the offence sanction of the Government or authority which is competent to remove such a

public servant from the office which he has misused or abused for commission of the offence does not arise. This was also the statutory scheme of Sub-sections

(1) and

(2) of Section 6 of the PC Act, 1947 and there is nothing in the decision of the Supreme Court in *S. A. Venkataraman v. The State*, (1958 Cri LJ

254) (supra), cited by Mr. Mishra which lays down a different proposition of law.

9. The aforesaid position of law was also laid down by the Supreme Court in *R.S. Nayak v. A.R. Antulay*, (supra) (AIR 1984 SC 84: (1984 Cri LJ 613) on an interpretation of Section 6 of the PC Act, 1947. In the said case of *R. S. Nayak*, (supra), it is true, as has been submitted by Mr. Mishra, learned counsel for the petitioner, that the Supreme Court did not discuss at length the effect of Sub-section (2) of Section 6 of the PC Act, 1947 though it quoted the entire Section 6 of the said Act including Sub-section (2) thereof in the judgment. But on an interpretation of Clauses (a), (b) and (c) of Sub-section (1) of Section 6 of the PC Act, 1947, the Supreme Court held that sanction of that competent authority alone would be necessary which was competent to remove the public servant from the office which he was alleged to have misused or abused for corrupt motive and for which a prosecution was intended to be launched against him. This conclusion of the Supreme Court was thus based on the interpretation of Sub-section (1) of Section 6 of the PC Act, 1947. Relevant portions from the said judgment of the Supreme Court in *R.S. Nayak v. A.R. Antulay*, (supra), AIR 1984 SC 684: (1984 Cri LJ 613), are quoted herein below: Each of the three clauses of Sub-section (1) of Section. 6 uses the expression 'office' and the power to grant sanction is conferred on the authority competent to remove the public servant from his office and Section. 6 requires a sanction before taking cognizance of offences committed by public servant. The offence would be committed by the public servant by misusing or abusing the power of office and it is from that office, the authority must be competent to remove him so as to be entitled to grant sanction. The removal would bring about cessation of interrelation between the office and abuse by the holder of the office. The link between power with opportunity to abuse and the holder of office would be severed by removal from office.... The expression 'offices'

in the three sub-clauses of Section 6 (1) would clearly denote that office which the public servant misused or abused for corrupt motives for which he is to be prosecuted and in respect of which a sanction to prosecute him is necessary by the competent authority entitled to remove him from that office which he has abused. This inter-relation between the office and its abuse if severed would render S. 6 devoid of any meaning....

Thus according to the Supreme Court, Section 6 of the PC Act, 1947 would be rendered devoid of any meaning if the inter-relation between the office and its abuse is severed. Sub-section (1) of Section 19 of the PC Act, 1988 is similarly worded as Sub-section (1) of Section 66 of the PC Act, 1947 and as discussed above, there is a clear inter-relation between the office and its abuse and if such inter-relation is severed, Section 19 of the PC Act, 1988 would be rendered devoid of any meaning. Sub-section (2) of Section 19 of the PC Act, 1988 on which great reliance was placed by Mr. Mishra, learned counsel for the petitioner, clarifies beyond doubt the aforesaid inter-relation between the office and its abuse or misuse and makes it abundantly clear that a sanction would be required only of the Government or authority which is competent to remove a public servant from the office which the public servant is alleged to have abused or misused for commission of offence under the PC Act, 1988. Thus when the aforesaid inter-relation between the office and its abuse or misuse is severed by the public servant ceasing to hold the office abused or misused, and the public servant holds another office, the sanction of the Government or authority under whom the public servant held the office which was alleged to have been abused or misused, is no longer necessary. Sub-section (2) of Section 19 of the PC Act, 1988 therefore only reinforces the proposition of law laid down by the Supreme Court in *R.S. Nayak v. A.R. Antulay* (1984 Cri LJ 613) (supra), and the contention of Mr. Mishra that the proposition of law in the said decision of the Supreme Court is per incuriam is not correct.

10. It is again true as has been submitted by Mr. Mishra that in the said case of *R.S. Nayak v. A.R. Antulay*, (1984 Cri LJ 613) the Supreme Court proceeded as if a member of Legislative Assembly was not a public servant. But in *Habibulla Khan v. State of Orissa*, (1995 Cri LJ 2071) (SC) (supra) the appellants were Ministers in

the Council of Ministers of the State of Orissa during the period in which they were alleged to have been found in possession of pecuniary resources or property disproportionate to their known sources of income but subsequently they ceased to be Ministers due to the change of Government but were elected as Members of Legislative Assembly of the State, and they contended that they could not be prosecuted for the offences under the PC Act, 1988 without the previous sanction of the competent authority under Section 19 of the PC Act, 1988 as they were public servants for the purpose of the said Act, but the Supreme Court rejected the said contention of the appellants. The reasons given by the Supreme Court in the said case of *Habibulla Khan v. State of Orissa*, (supra), AIR 1995 SC 1124 : (1995 Cri LJ 2071), are:

Assuming, however, that the procedure to be followed before launching criminal prosecution is that under the Act, the admitted facts are that the appellants are being prosecuted for the misconduct alleged to have been committed by them during their tenure as the Members of the Council of Ministers and not in their capacity as the MLAs. Hence the provisions of Section 19 of the Act are inapplicable to the facts of the present case as held in *R.S. Nayak v. A.R. Antulay*, (1984) 2 SCR 495 : AIR 1984 SC 684: (1984 Cri LJ 613).. ... It was, therefore, contended that although the offence alleged to have been committed was during the appellants' tenure as ministers, the appellants continued to be MLAs and, therefore, as public servants on the day of the launching of prosecution and hence sanction of the Governor under Article 192 of the Constitution was necessary. This question has also been answered in *R.S. Nayak v. A.R. Antulay*, AIR 1984 SC 684 : (1984 Cri LJ 613) (supra).. ... Assuming therefore, that the MLA is a public servant within the meaning of Section 2(c)(viii) of the Act, in view of the aforesaid proposition of law laid down in *R.S. Nayak v. A.R. Antulay*, AIR 1984 SC 684 : (1984 Cri LJ 613), (supra), this contention also does not merit any consideration.

This as per the law laid down in *Habibulla Khan* (1995 Cri LJ 2071) (SC), where a person is prosecuted for misconduct alleged to have been committed by him during his tenure as a Minister and not in his capacity as MLA and such person on the day of the launching of prosecution ceased to be a Minister but continued as an MLA, no previous sanction for his prosecution is necessary under Section 19 of

the PC Act, 1988.

11. The aforesaid law was laid down by the Supreme Court in *Habibullah Khan v. State of Orissa* (1995 Cri LJ 2071) on the assumption that MLA was a public servant within the meaning of Section 2(c)(viii) of the PC Act, 1988. The position of law therefore will not be different after the judgment of the Supreme Court in *P.V. Narasimha Rao v. State (CBI/SPE)* (supra) (1998) 4 SCC 626: (1998 Cri LJ 2930), to the effect that a member of Parliament was a public servant for the purpose of the PC Act, 1988. In fact, in the said decision of the Supreme Court in *P.V. Narasimha Rao*, the question as to whether sanction under Section 19 of the PC Act, 1988 would be required to prosecute a Member of Parliament for an offence under the said Act alleged to have been committed by him during his period as Minister, after he had ceased to be a Minister, did not arise for decision. A Member of Legislative Assembly of a State like a Member of Parliament would be a public servant for the purpose of the PC Act, 1988 and would be entitled to protection under Section 19 of the said Act as has been held in the aforesaid case of *P.V. Narasimha Rao* (supra). But the fact that he is a public servant by itself would not attract Section 19 of the PC Act, 1988 unless the offences for which such Member of Legislative Assembly is sought to be prosecuted are alleged to have been committed in his capacity as such Member of Legislative Assembly. This is because under the statutory scheme in Sub-section (1) of Section 19 as clarified by subsection (2) of Section 19 of the PC Act, 1988, as discussed above, there is a clear inter-relation between the office held by a public servant and the abuse or misuse of the said office for the commission of offence and only when the office of the member of Legislative Assembly is alleged to have been abused or misused for commission of offence under the PC Act, 1988 that sanction of the competent authority would be necessary under the said Section 19 of the PC Act, 1988. Thus, the petitioner being a Member of Legislative Assembly continues to be a public servant for the purpose of the PC Act, 1988 and is therefore entitled to protection under Section 19 only against prosecution for offences under the said Act alleged to be committed by him which relate to abuse or misuse of his office as MLA and not to abuse or misuse of his office as a Minister which he had ceased to hold since 1990. Since the case of the CBI in the charge-sheet is that the petitioner committed the offences under Section 13(2) read with Section 13(1)(d) of the PC

Act, 1988 when he held the office of Minister, Veterinary, Assam, from 1986 to 1990 and that the said offences were not committed by the petitioner in his present capacity as an MLA, no previous sanction was required under Section 19 of the PC Act, 1988 for prosecuting the petitioner for the said offences under Section 13(2) read with Section 13(1)(d) of the said Act.

12. The next question to be decided in this case is as to whether sanction was necessary under Section 197 , Cr. P.C. for prosecution of the petitioner for the offences under S. 120B read with S. 420, IPC. Under the said Section 197 , Cr. P.C, sanction for prosecution of a person was required only for offences alleged to have been committed by him 'while acting or purporting to act in the discharge of his official duty'. In Harihar Prasad v. State of Bihar (1972 Cri LJ 707) (SC) (supra), cited by Mr. Das, the Supreme Court quoted the following principle on the question of applicability of Section 197 , Cr. P.C. laid down in the two cases of Shreekantiah Ramayya Munipalli v. State of Bombay, AIR 1955 SC 287 : (1955 Cri LJ 857) and Amrik Singh v. State of Pepsu, AIR 1955 SC 309 : (1955 Cri LJ 865):

It is not every offence committed by a public servant that requires sanction for prosecution under Section 197(1), Criminal Procedure Code; nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary.

After quoting the aforesaid principle, the Supreme Court further held in Harihar Prasad v. State of Bihar, (supra), (1972) 3 SCC 89 : (1972 Cri LJ 707), that it was no part of duty of a public servant while discharging his official duties to enter into a criminal conspiracy or indulge in criminal misconduct. This position of law has been reiterated by the Supreme Court in State of Bihar v. P.P. Sharma (1991 Cri LJ 1438) and Shambhoo Nath Misra v. State of U. P. (1997 Cri LJ 2491) (supra), and it has been held therein that it is not the official duty of a public servant to fabricate false record and misappropriate public servant to fabricate false record and misappropriate public funds, etc. and, therefore, no sanction was required under Section 197(1) of the Cr. P.C. for prosecuting a public servant for offences

of fabrication of false records or misappropriation of public funds.

13. As per the case of the CBI in the charge-sheet, the petitioner as the Veterinary Minister, Government of Assam during the period 1986 to 1990 knew very well that Sri R.P. Borah was withdrawing money from ICDP, Demow on the basis of bogus 'and fictitious bills and he abetted Sri R.P. Borah to commit the offence of cheating by giving protection to him and in conspiracy with him took part of the defrauded funds of ICDP, Demow from Sri R.P. Borah and in particular took two flats in Jewel House, Andheri (West), Bombay and one Ice Cream Parlour in Varsova, Bombay, in his name and in the name of his wife and in the name of Sri Pranj al Choudhury, his brother-in-law, from the funds illegally withdrawn by Sri R.P. Borah from ICDP, Demow and that he also took CI sheets amounting to Rs. 8 lacs approximately and Demand Drafts amounting to Rs 13 lacs from these funds which were distributed in various schools, institutions, clubs, naamghars in the constituency of Dhemaji from where he fought election during 1986 and 1991. Thus the allegations against the petitioner in short were that while acting as Minister, Veterinary, Government of Assam during the period 1986 to 1990 he conspired with one Sri R.P. Borah to cheat the Government to the tune of crores of rupees and in fact received part of the said public funds through Sri R.P. Borah and was therefore guilty of the offences of criminal conspiracy and cheating under Sections 120B and 420, IPC. The aforesaid alleged acts of the petitioner cannot be part of the official duty of the petitioner as Minister, Veterinary, Government of Assam even on a broad interpretation of Section 197, Cr. P.C. and therefore no sanction was required under section 197, Cr. P.C. for prosecution of the petitioner for the said offences under Section 120B read with Section 420, IPC as per the aforesaid law laid down by the Supreme Court in cases of Harihar Prasad (1972 Cri LJ 707), P. P. Sharma (1991 Cri LJ 1438) and Shambhoo Nath Mishra (1997 Cri LJ 2491) (supra). The facts of the cases in Ramayya v. State of Bombay, (supra), AIR 1955 SC 287 : (1955 Cri LJ 857) and State through CBI v. B.L Verma, (supra), (1997) 10 SCC 772, cited by Mr Mishra were entirely different and in those cases the Supreme Court found that the acts for which the public servants were sought to be prosecute were done in execution or purported execution of their official duties and, accordingly, held that in the absence of sanction under Section 197, Cr P.C. of the competent authority the Court could not take

cognizance of the said offences. The said two decisions therefore have no application whatsoever to the facts of the present case in which offences under Section 120B read with Section 420, IPC alleged to be committed by the petitioner cannot be held to have been committed by him 'while acting or purporting to act in the discharge of his official duty' as Minister, Veterinary Department, Government of Assam.

14. In the result, I hold that no sanction was required either under Section 19 of the PC Act, 1988 or under Section 197, Cr. P.C. for prosecution of the petitioner for the offences alleged to have been committed by him as Minister, Veterinary, Government of Assam, during 1986 to 1990, and the cognizance taken by the learned special Judge, Assam, by his order dated 18-8-98 in Special Case No. 16(C)/98 against the petitioner on the basis of the charge-sheet submitted by the CBI, therefore, is not without jurisdiction. This revision petition is accordingly dismissed.

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