

Venkatachalam Vs. State

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Court : Kerala

Decided On : Sep-22-2011

Reported in : 2011(4)KLT222; 2011(4)KLJ264; 2011(4)ILR(Ker)550

Judge : S.S. Satheesachandran

Appeal No. : Crl.R.P.Nos.2457 of 2010 & 3137 of 2010

Appellant : Venkatachalam

Respondent : State

Judgement :

Crl.R.P.No.2457/10 is by accused Nos.4 and 8 and Crl.R.P.No.3137/10 is by the 3rd accused in C.C.No.1/08 on the file of the Special Judge for C.B.I. Cases, Lakshadweep.

2. Accused, nine in number, are proceeded with for offences punishable under S.120B read with Ss.468 and 417 of the Indian Penal Code and Ss.7, 12, 13(2) read with S.13(1)(d) of the Prevention of Corruption Act (for short "the Act"), on a report filed by the Inspector of Police, Central Bureau of Investigation, Kochi.

3. Petitioners in the aforesaid revisions (accused 3, 4 and 8) had filed petitions, separately, seeking their discharge raising various grounds contending that the prosecution against them is unsustainable. Accused 4 and 8, in these petitions, had raised challenges as to want of sanction under S.197 of the Code of Criminal

Procedure (for short “the Code”) and also S.19 of the Act, as interdicting the court from taking cognizance of the offences imputed against them in the case. The learned Special Judge had dismissed all the aforesaid petitions, with another petition moved by the 2nd accused, by a common order. Propriety and correctness of that order is challenged in these revisions by three of the accused (3rd accused separately and accused 4 and 8 jointly).

4. Prosecution case, in brief, is that the Directorate of Education of Union Territory of Lakshadweep, directed to supply read-made uniforms for the school children free of costs for the academic year 2005-06. A Uniform Tender Evaluation, Sample Selection and Procurement Committee, consisting of 5 persons, who included accused 1 to 3, was formed for evaluation and finalization of the tenders for supply of ready-made uniforms. Pursuant to a conspiracy by the members of the aforesaid committee with one Nagendran, who later turned out to be an approver, substandard uniforms, supplied by the 5th accused and the aforesaid approver, in the name of one Emporium, violating all the tender conditions, and, making false and forged entries on record, were purchased, and, thereby, they caused wrongful loss to the Lakshadweep Administration. The aforesaid accused persons had conspired with the other accused, some of whom are private persons, doing textile business and another a tailoring instructor, to obtain wrongful gain for themselves in purchasing substandard goods, causing wrongful loss to the Lakshadweep Administration. Annexure A1 in CrI.R.P.No.3137/10 is a copy of the charge sheet filed against the accused in the case, imputing the offences under S.120B read with Ss.468 and 417 of the Indian Penal Code and Ss.7, 12, 13(2) read with S.13(1)(d) of the Act.

5. Annexure A1 charge sheet would disclose that sanction has been accorded by the competent authority under S.19(1)(c) of the Act against accused 2, 3 and 9. As on the date when the charge was laid before the court, accused 4 and 8, the revision petitioners in CrI.R.P.No.2457/10 had retired from service and as such, for their prosecution for the offences, no sanction under S.19(1)(c) of the Act is needed, has also been recorded in the final report presented before the court. Though the aforesaid petitioners (accused 4 and 8) have raised a plea that want of sanction under S.19(1)(c) of the Act is fatal to their prosecution, admittedly, as

both of them, retired from service when the final report was presented before the court, there is no merit in that objection canvassed to impeach the order of the court below, declining their plea of discharge (see Parkash Singh Badal v. State of Punjab (2007 (1) SCC 1)). So much so, in the present case, the short question that emerges for consideration is whether sanction under S.197 of the Code is required to prosecute the revision petitioners (accused 3, 4 and 8) in these two revisions.

6. As already stated, the 3rd accused as against whom Annexure A1 report would indicate that sanction had already been issued for prosecution under S.19(1)(c) of the Act by the competent authority, has not raised any ground in his petition for discharge, for want of sanction under S.197 of the Code, nor in the memorandum of revision, challenging the order declining his plea for discharge. The challenges on behalf of that petitioner (3rd accused) canvassed by his counsel related to factual aspects involved in the case, and also non-inclusion of some others connected with the crime for want of sanction as co-accused while proceeding against 3rd accused and others in the case, to impeach the correctness of the order challenged in the revision. I do not find any merit in such grounds canvassed for, as in an enquiry under S.239 of the Code, if the materials placed by the prosecution satisfies the Magistrate/Judge that the accused are to be proceeded with for the offences imputed against, other circumstances that the investigating agency has not included all who are stated to be involved in the crime, for want of sanction or for any other reason, cannot be given any significance. At that stage, the court is required to consider only the police report and the materials sent under S.173 of the Code. So much so, the challenges canvassed by the 3rd accused, the revision petitioner in CrI.R.P.No.3137/10 that the prosecution records would itself show that his role was only that of a member of the Tender Evaluating Committee, and that he had raised objections at the initial stages, but his objections were overruled in relation to the purchase of ready-made uniforms, and some others connected with the crime have not been implicated as co-accused, all of them, are matters to be considered in the trial where the materials on record produced by the prosecution indicated his culpability with the other accused in the offences imputed. As to the role played by the aforesaid petitioner/accused, where the prosecution has got a definite case that he was a co-conspirator with the other accused in the perpetration of the offences imputed, at the stage of consideration

of framing of charge, a microscopical scrutiny cannot be gone into by the court, and so much so, I find no merit in the challenges raised by the 3rd accused/petitioner in CrI.R.P.No.3137/10 as against the order passed by the learned Judge, turning down his plea of discharge.

7. Learned counsel appearing for the petitioners in CrI.R.P.No.2457/10, inviting my attention to some judicial precedents over the question of sanction under S.197 of the Code, has contended that the court below has not considered the challenge canvassed, by the aforesaid accused that cognizance of the offences against them could be made only after obtaining sanction of the competent Government. The offences imputed against them were done while acting or purporting to act in the discharge of their official duty, and as such, previous sanction under S.197 of the Code was required for their prosecution, is the submission of the counsel. Though the petitioners have raised several legal and factual contentions to sustain their plea of discharge including want of sanction, none of them was considered by the court while turning down their plea, is the submission of the counsel.

8. Per contra, the learned standing-counsel appearing for the CBI countered the arguments advanced to assail the order of the court below contending that the materials tendered would clearly demonstrate the acts committed by the petitioners as public servants were illegal and as such they would not get protection under S.197 of the Code. Only such acts, which could be canvassed as legally done while in the discharge of official duty would be covered by the protection, and not criminal acts like cheating, forgery and that too for obtaining wrongful pecuniary advantage, is the submission of the learned counsel.

9. The learned counsel on both sides have sought to reinforce the rival submissions made with respect to the applicability of sanction under S.197 of the Code to prosecute the accused who is/was a public servant, placing reliance on some judicial precedents. The learned counsel for the revision petitioners relied on State of Madhya Pradesh v. Sheetla Sahai (2009 Scale (10) 632), People's Council For Civil Rights v. State of Kerala and Ors. (2009 (1) KLT 831 = CDJ 2009 Ker. H.C. 128) and Moosa Vallikkadan v. State of Kerala and Another (2010 (3) KLT 437 = CDJ 2010 Ker. H.C.549) to press the contention that prosecution of the

revision petitioners, accused 4 and 8, for the acts done by them by virtue of their office as public servants could be proceeded only with previous sanction of the Government as mandated under S.197 of the Code. On the other hand, the learned counsel appearing for the CBI, relying on State of Orissa v. Debendra Nath Padhi (2005 (1) KLT 80 SC = (2005 (1) SCC 568) and State Anti-Corruption Bureau, Hyderabad and Anr. v. P. Suryaprakasam (2008 (14) SCC 13), contended that at the stage of consideration of framing of charge, the court has to look into the report and materials produced under S.173(2) of the Code by the investigating agency and as such, if such materials disclose criminal acts done by the public servants for the various offences imputed, especially those covered forging and falsification of records, the office of 'public servant' held by them could only be considered as an enabling circumstance for them to perform such mischievous acts and such acts cannot be considered as done or purported to have been done in the discharge of official duties. Reliance is also placed by the counsel for the C.B.I. on Centre for Public Interest Litigation and Anr. V. Union of India and Anr. (2005 (8) SCC 202), to contend that the protection under S.197 of the Code is available to a public servant only when the alleged act done by him is reasonably connected with his official duty and not merely a cloak for doing an objectionable act. The test to be followed to determine the reasonable connection between the act complained of and 'official duty' given expression to in the aforesaid decision is pointed out by the counsel to contend that the concept of S.197 cannot get immediate attraction on institution of the complaint case.

10. After giving anxious consideration to the submissions made by the counsel on both sides, with reference to the facts and circumstances involved in the case and more particularly the common order impugned in the revisions passed by the learned Special Judge, I find, consideration as to whether accused 4 and 8, the revision petitioners in CrI.R.P.No.2457/10, are entitled to the protection under S.197 of the Code cannot be gone into by this court as that question canvassed in the petitions moved by those accused for their discharge under S.239 of the Code has not been examined by the learned Special Judge. Whatever be the reasons, whether arguments were advanced or not, at the time of considering the petitions for discharge moved by the aforesaid accused, in respect of the protection from prosecution under S.197 of the Code, when they had specifically taken up a

contention on that ground in their petitions, the learned Special Judge should have adverted to it and expressed his views thereof while rejecting their application for discharge. In the order impugned the only reason stated by the learned Judge is that “at this incipient stage”, he would not be justified “in forming an opinion about the innocence or otherwise of the accused in the commission of the alleged offence.” When S.197 of the Code mandates of sanction for prosecution of a public servant, where he is accused of any offence alleged to have been committed by him while acting or purporting to act in discharge of his official duty, to take cognizance of such offence by the court, and a defence is taken by the accused so proceeded against that the acts imputed in relation to the offences were done while acting or purporting to act in discharge of his official duty, that plea necessarily has to be looked into. The challenge is one raising the question of jurisdiction of the court to take cognizance of the offence. That issue, if raised, has to be considered and decided one way or other recording the reasons thereof. When such a question is raised by an accused proceeded on a police report for offences requiring warrant trial, at a stage before evidence is let in, then, it has to be decided solely on that report and the materials accompanying such report produced by the prosecution. Even if the court, on such materials is of opinion, at that stage, the charges imputed cannot be considered as groundless, and the trial has to proceed framing a charge, for which recording of reasons is not required, that does not absolve it from expressing its opinion recording reasons over the plea of jurisdiction raised by the accused. In the context, it would be appropriate to take note of the observations made by the Apex Court in Lalu Prasad v. State of Bihar (2007 (1) KLT 47 (SC) = (2007 (1) SCC 49), which read thus:

“... where the question of jurisdiction is raised and the Trial Court is required to adjudicate that issue, it cannot be said that reasons are not to be recorded. In such a case reasons relate question of jurisdiction and not necessarily to the issue relating to framing of charge. In such a case reasons dealing with a plea relating to jurisdiction have to be recorded.”

11. The broad principles and the parameters to be taken for consideration of the question whether sanction under S.197 of the Code is applicable or not in the case of such an accused proceeded against, have been spelt out in para.9 and 10 in

Centre for Public Interest Litigation and Anr. v. Union of India and Anr. (2005 (8) SCC 202). The Apex Court in the aforesaid decision has stated thus:

“9. The protection given under S.197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before S.197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act, can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would 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 duty. If the answer to this question is in the affirmative, it may be said 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. This aspect makes it clear that the concept of S.197 does not get immediately attracted on institution of the complaint case.

10. Use of the expression “official duty” implies that the act or omission must have been done by the public servant in the course of his service and that it should have been in discharge of his duty. The section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty.”

12. So much so, looking into the materials tendered by the prosecution, which alone can be looked into at the stage of considering the question whether a charge has to be framed against the accused as enunciated in the decisions in *State of Orissa v. Debendra* and *State Anti-corruption Bureau, Hyderabad v. R. Suryaprakash* (both cited supra), the court has to examine whether the act or omission of the accused, public servant, has reasonable connection with the discharge of his official duty. The quality of the act as to whether it falls within the scope and range of official duty or whether it is an objectionable criminal act using the cloak of the office of ‘public servant’ requires to be considered. The question is whether the act committed by the public servant acting or purporting to act as such in discharge of his official duty, and not the use of his office as public servant as a cloak for doing the objectionable act. At the stage of framing of charge if the materials produced by prosecution prima facie indicate that the objectionable criminal acts were done or purported to have been done not in discharge of official duty, but, the position held by the accused as a public servant was abused to commit such acts, the plea of discharge canvassed, claiming protection under S.197 of the Code cannot be entertained, and any defence thereof can be adjudged and decided on its merits, only at a later stage, with reference to the evidence in the case. It is open to such an accused to raise that plea, if he is so entitled to, at subsequent stages, on the evidence tendered. Any view formed by the Judge, solely on the basis of the prosecution materials, at the time of framing of the charge, whether sanction is required or not to prosecute the accused, would

not deprive the accused, a public servant from showing at a later stage after evidence is collected that the case in hand required sanction under S.197 of the Code for his prosecution.

13. In this connection, it is apposite to take note of the views expressed by the Apex Court in K. Kalimuthu v. State (2005 (3) KLT SN 28 (C.No.32) SC = (2005 (4) SCC 512). “The question relating to the sanction under S.197 is not necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein. The question may arise at any stage of the proceeding. The question whether sanction is necessary or not may have to be determined from stage to stage.”

14. Since the learned Special Judge has not considered the challenge canvassed by the revision petitioners, accused 4 and 8, on the question of sanction under S.197 of the Code, with reference to the materials tendered in the case, the order passed in their petitions (Crl.M.P.No.28/09 and Crl.M.P.No.29/09) under the common order shall stand set aside. The learned Special Judge shall consider that limited question alone and pass appropriate orders taking note of the observations made above and in accordance with law. No other ground for discharge canvassed by such accused need again be considered on remission of the case.

15. Crl.R.P.No.3137/10 is dismissed. Crl.R.P.No.2457/10 is disposed of, subject to the direction, as indicated above. Parties are directed to appear before the court below on 10.10.2011.

The learned Special Judge shall decide the question of sanction raised by accused 4 and 8, as expeditiously as possible, at any rate, within a period of one month from the date of appearance of the parties as fixed above.

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