

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ Crl.M.C.2718/2004

% Date of reserve : 28.10.2009
Date of decision : 30.11.2009

MADAN MOHAN KESAR ...PETITIONER
Through: Mr.Rupinder Pal Singh, Mr.Harsh Udai
Chandra, Advocates

Versus

STATE & ANR. ...RESPONDENTS
Through: Mr.Navin Sharma, APP for the State
Ms.Avinash Kaur, Advocate for R-2

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be
reported in the Digest? | Yes |

MOOL CHAND GARG, J.

1. By this petition filed under Section 482 Cr.P.C. the petitioner seeks quashing of Criminal Complaint No. 146 dated 02.05.1994 filed by respondent No.2/complainant against him under Section 342/506(1) IPC as well as the proceedings arising therefrom including the order dated 11.04.2002, whereby the petitioner was summoned to face the trial in that case. The petitioner is also aggrieved of the order dated 28.7.2004 passed by the Magistrate who has dismissed the application filed by him for recalling the order dated 11.04.2002 primarily on the ground that there was no

sanction granted to the complainant under Section 197 Cr.P.C. to prosecute the petitioner who was working as a SHO in view of the notification No. F.10/77/78/HP-2 dated 07.04.1980 under Section 197 Cr.P.C. It was submitted that all the proceedings initiated against the petitioner becomes null and void as all the ranks of the Delhi Police who were charged with the maintenance of Public Order were protected vide the aforesaid notification. It is also pleaded that the incident is dated 17.5.1994 whereas on that day he was not working as SHO inasmuch as the petitioner had discharged his duties as SHO only from 28.5.1990 to 11.4.1994.

2. I have heard the learned counsel for the parties and have perused the written submissions filed on behalf of the complainant/respondent. However, the petitioner has not come forward with any written submissions.

3. Briefly stating the facts giving rise to filing of the present petition are that the complainant has filed a complaint dated 2.5.1994 against the present petitioner, wherein he made the following allegations:-

2 That the complainant is the permanent Govt. Servant working as a Foreman in ITI, Tilak Nagar, Jail Road, New Delhi, under Delhi Administration, Delhi. He is an Income-tax payee, law-abiding and peace-loving citizen of India.

3A That the police of police station Naraina under the accused is in hand and gloves with Shri Arjun Singh a neighbour of the complainant and the accused is highly influenced by Arjun Singh and is in fact acting as per the pleasure of Arjun Singh and against the complainant, because the complainant had objected unauthorized and illegal construction carried out by Shri Arjun Singh in his house. Arjun Singh had virtually blocked the easement right of light and air of the complainant. A civil suit is pending in this regard at Tis-Hazari.

4 That Arjun Singh and his brothers and their sons had criminally trespassed the house of the complainant on 5.1.1994 and damaged his property and caused injury to the complainant and his wife etc. The complainant's report was not recorded at the police station at the instance of the accused under the influence of Arjun Singh. Ultimately the complainant filed a complaint case against Arjun Singh and others

which is pending in the court of Shri D.C. Anand, MM, New Delhi.

5 That the complainant had made several complaints against the activities of the police to higher authorities which had irked the accused particularly and as such the accused has become inimical and hostile towards the complainant and his family.

6 That the accused with mala fide intention to cause harm to the son of the complainant used the office of ACP in getting his name for being declared as B.C. His son Surender Pal Singh filed a criminal writ No. 92/94 in the Hon'ble High Court of Delhi in which the accused filed his counter-affidavit and in view of the same the Hon'ble High Court allowed the petitioner to withdraw the said writ petition with liberty to file again if occasion arises so. Thereafter, the accused again threatened the complainant's son who again filed a writ No. 260/1994 in the Hon'ble High Court of Delhi, against the accused and two others which is fixed for hearing on 10.05.1994.

7 That on 7.2.1994 the Directorate of Training and Technical Education, Delhi organized a function at ITI, Siri Fort, New Delhi and all the staff members working in ITIs Delhi were required to be present at the function because the Minister of Education & Development, Delhi Shri Sahib Singh Verma, besides the Director Shri K.B. Shukla, were to attend the same.

8 That the above function came to close at about 12.00 Noon on 7.2.1994. The complainant when reached near his house at about 1.10 PM, to his surprise he found police standing in front of his house and a police van nearby. Few persons of the village including Shri Gaya Prasad and Tej Pal were present there, besides the wife and daughter of the complainant. As soon as the complainant stopped his scooter SI Raj Singh of the police – station directed his constables to stop the complainant from entering his house and asked them to lift the complainant by force. The constables forcibly lifted the complainant and put into the police van No. DDV-3741 despite protest of the complainant, the police had no warrant or authority with them for the arrest of the complainant. The complainant was not involved in any case nor any complaint was against him.

9 That SI Raj Singh passed on message regarding the arrest of the complainant on wireless to the accused and when the van reached the gate of the police station, the accused was standing at the gate in a very angry, agitated and hostile mode. The complainant was pushed down from the van before the accused who immediately started barrage of abuses on the complainant in filthy language calling bad names to him his wife and daughters. The complainant requested the accused to behave properly but instead of stopping from hurling abuses, the accused threatened that the time has come when he would teach the complainant a good lesson for making complaints against him to the higher authorities. When the complainant asked the reason for his arrest, upon which the accused asked the constables in a highly tempered tone to bring him inside the police station and ordered the constables to make the complainant sit in a corner of room adjoining the room of the accused on floor like a criminal. The complainant was not allowed to move by the accused from that place at all.

10 That the complainant's wife, daughter came along with Gajraj Singh and Vijay Singh to the police station to enquire about the complainant. On seeing them the accused hurled filthiest language on them and the complainant and they were also threatened of arrest in case they dared to come near the complainant. No reason for the wrongful confinement and arrest were given by the accused. These persons were driven away by the accused after giving threats. A number of persons of the village and the locality who were present in the police station had seen all this happening.

11 That the complainant was wrongfully confined by the accused as mentioned above from 1.10 PM to 6.00 PM. The accused had threatened the complainant to sign blank papers if he wanted to be free from the police station, otherwise the accused would implicate the complainant in heinous crimes and thus get his services terminated. Under the threat the accused got certain blank papers signed from the complainant and only thereafter he was set free.

12 That the daughter Kumari Sunita of the complainant had already sent a telegram to the commissioner of police, and DCP, on 7.2.1994 at 2.15 PM about the lifting of the complainant by the police by force.

13 That the complainant on 8.2.1994 also sent his complaint to the commissioner of Police, narrating the entire matter. The complainant also informed the Principal of ITI, Tilak Nagar, New Delhi regarding his wrongful confinement by the accused at the Police Station from 1.10 to 6.00 PM on 7.2.1994.

14 That Brahm Singh and Palu Ram residents of village – Naraina were also present at the police station when the accused was abusing and threatening the complainant and was telling to them that the complainant is a criminal and his sons are also criminals. The complainant was humiliated in their presence to wreck personal vengeance against the complainant.

4. It is on the aforesaid allegations the complainant sought prosecution of the petitioner under Section 342/500/506 IPC by alleging that those offences were committed by the petitioner with malice on the ground of personal vengeance and with mala fide intention to cause harm to the complainant.

5. Along with the complaint the complainant had placed on record a copy of the complaint made to the Commissioner of Police dated 20.1.1994 showing enmity of Arjun Singh with the complainant, a certified copy of the

telegram sent to DCP Vasant Vihar regarding the unlawful detention of the complainant and the complaint lodged with the Police dated 8.2.1994 Ex.CW1/C. The trial court based upon the material placed on record and the statements given by the complainant, who appeared as CW-1, and other witnesses, who supported the allegation made by the complainant, found the allegations made by the complainant as sufficient to summon the accused i.e. the petitioner in this case.

6. Against the aforesaid order dated 11.4.2002, the petitioner filed an application before the same Magistrate asking him to review his order by recalling the summoning order on the plea that it was a case where there was bar under Section 197 Cr.P.C. and under Section 140 of the Delhi Police Act to take cognizance against the petitioner with respect to the offences as alleged because even if offences were to be taken as having been committed by the petitioner, these were committed during the course of his duties.

7. The trial court dismissed the aforesaid application of the petitioner by a detailed order dated 28.07.2004 relying upon the judicial pronouncement in the case of *P.K. Pradhan Vs. State of Sikkim 2001 V AD (SC) 465* and *Prem Chand Goyal Vs. Krishan Kumar & Ors., 111(2004)DLT477*. The relevant paragraphs of the order dated 28.7.2004 are reproduced hereunder-

“7. The bar contained in Section 140 of the Delhi Police Act would apply only where the act is done under the colour of duty authority or in excess of any such duty or authority. In the case of Prem Chand Goyal Vs. Krishan Kumar and Others 111 (2004) DLT 477 it was held by the Hon’ble Delhi High Court that allegations made in complaint that petitioners after he was taken into custody was subjected to beating and humiliation, are not act acts covered by provision under Section 140 of the Act, for same do not form acts done under colour of duty or in excess of such duty of authority. These are barbaric acts of total lawlessness. Such acts of police personnel cannot find any

protection under any law much less under Section 140 of the Delhi Police Act. In the present case also I have already discussed above that wrongful confinement of anybody and criminal intimidations to somebody by the police officer cannot be claimed to have been done under the colour of duty or authority not in excess thereof. Accordingly even bar under Section 140 of the Delhi Police Act does not apply.

8. So far as the other contentions regarding the complainant being motivated or vexatious is concerned and so far as the reliance upon the DD entries placed upon by the accused in which it is mentioned that on that day nobody was brought to the police station are concerned the same are a matter of evidence during the trial and cannot entitle the accused to recall the summoning order against him. The merits of the case cannot be minutely consider without putting the case into trial and without giving opportunity to the complainant to lead evidence.

8. The petitioner has reiterated his submissions made in the application for recall of summons by filing the present petition. In this petition, the petitioner has primarily submitted that :

2. That the petitioner moved an application before the Ld. M.M. for recalling of the summoning order on the plea that as per the allegations enumerated in the complaint the petitioner was discharging his official duties as police official, therefore, prior sanction under Section 197 Cr.P.C. was a condition precedent, which had not been complied with by the complainant and further the petitioner is also protected under Rule 16.38 PPR, therefore, the summoning orders were bad and prayed for recalling of the summoning orders. After hearing both the parties the Ld. M.M. vide its order dated 28.07.2004 dismissed the application of the petitioner and the case is now posted for pre-charge evidence for 19.03.2005. Copy of the order dated 28.07.2004 is annexed herewith as Annexure A.

4. That in the recent judgment of the Hon'ble Supreme Court, the Ld. Magistrate has been debarred to consider the application under Section 204 Cr.P.c. as the Ld. Magistrate cannot review his own orders, therefore, the petitioner seeks the indulgence of this Hon'ble Court under Section 482 Cr.P.C, and prays for quashing of the complaint as well as the proceedings pending before the Ld. Court of Shri Digvinay Singh, Ld.M.M, New Delhi on the following ground inter alia amongst others

9. The petitioner also raised the following grounds in this petition:

B.That the Ld. Trial court failed to appreciate that the petitioner was protected by the then Lt. Governor vide notification No. F/10/77/78/HP- dated 07.04.80 under Section 197 Cr.P.C., therefore, protection u/s 197 Cr.P.C. is available to the petitioner and without obtaining sanction u/s 197 Cr.P.C. all the proceedings initiated against the petitioner becomes null and void as all the ranks of Delhi Police

who were charged with the maintenance of Public Order were protected vide the aforesaid notification.

C. That the Ld. Trial Court failed to appreciate that the petitioner discharged his duties as SHO from 28.5.90 to 11.4.94 whereas the complainant is alleging the incident dated 17.5.1994 in his complaint, therefore, the allegations leveled against the petitioner are groundless as the petitioner was not performing his duties as SHO, P.S. Naraina on the alleged day.

10. I have considered the submissions made by the petitioner. The ground (c) taken by the petitioner is contrary to record inasmuch as the allegations made by the complainant are dated 7.2.1994 and are not dated 17.5.1994 as alleged in the aforesaid ground. Admittedly, the petitioner was working as a SHO in the said Police Station from 28.5.1990 to 11.4.1994.

11. The petitioner has not brought on record anything which may go to show that the complainant was required to be present in the Police Station on the relevant day in connection with any enquiry. Neither the copy of any complaint which might have been pending against the complainant on that day nor any notice served upon him under Section 160 Cr.P.C. has been filed along with the present petition nor it is the case of the petitioner in this petition.

12. There is admission on behalf of the petitioner that there were proceedings which were taken by one Arjun Singh against the complainant on the basis of which the proceedings were initiated against the complainant under Section 107/151 Cr.P.C. which prima facie proves that the petitioner had been working at the behest of Arjun Singh so as to harass the complainant. His submission that there was no mention about the complainant having been brought in the Police Station in the daily diary

register of the Police Station is of no consequence because those documents are prepared by the petitioner or by his staff and as such would certainly not contain the details of the person brought illegally and detained.

13. It is true that the protection granted under Section 197 Cr.P.C. and under Section 140 of the Delhi Police Act becomes available to any person working in the service of the Government of India or even Police, provided the allegation made against the said person, who is sought to be prosecuted, has any relation with his official duties. In the present case, it is apparent that the detention of complainant in the Police Station had no connection with the duties of the petitioner nor the petitioner in this petition makes out any such case. Nothing has been brought on record by the petitioner to show that there is any connection with the detention of complainant with his official duties. Even otherwise, defence, if any, can be brought on record by the petitioner during the cross-examination of the witnesses of the complainant at the stage of pre-charge evidence itself.

14. Further, the Apex Court in the case of *Parkash Singh Badal v. State of Punjab*, (2007) 1 SCC 1 has held that the need of sanction under Section 197 Cr.P.C. does not arise when offences alleged have nothing to do with the duty of the accused. The relevant paragraphs of the judgment are reproduced hereunder:-

20. The principle of immunity protects all acts which the public servant has to perform in the exercise of the functions of the Government. The purpose for which they are performed protects these acts from criminal prosecution. However, there is an exception. Where a criminal act is performed under the colour of authority but which in reality is for the public servant's own pleasure or benefit then such acts shall not be protected under the doctrine of State immunity.

“8. The protection given under Section 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 of 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 Section 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. ... This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case.

9. At this juncture, we may refer to *P. Arulswami v. State of Madras*, AIR 1967 SC 776 wherein this Court held as under: (AIR p. 778, para 6)

‘It is not therefore every offence committed by a public servant that requires sanction for prosecution under Section 197(1) of the 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. It is the quality of the act that is important and if it falls within the scope and range of his official duties the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted. An offence may be entirely unconnected with the official duty as such or it may be committed within the scope of the official duty. Where it is unconnected with the official duty there can be no protection. It is only when it is either within the scope of the official duty or in excess of it that the protection is

claimable.’

10. ... Sections 197(1) and (2) of the Code read as under:

‘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 the affairs of a State, of the State Government:

* * *

(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.’

11. Such being the nature of the provision, the question is how should the expression, ‘any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty’, be understood? What does it mean? ‘Official’ according to the dictionary, means pertaining to an office, and official act or official duty means an act or duty done by an officer in his official capacity.

In *B. Saha v. M.S. Kochar* (1979) 4SCC 177 it was held:

‘17. The words “any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty” employed in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the section will be rendered altogether sterile, for, “it is no part of an official duty to commit an offence, and never can be”. In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between these two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197(1), an act constituting an offence, *directly and reasonably* connected with his official duty will require sanction for prosecution under the said provision.’

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. It has been widened further by extending protection to even those acts or omissions which are done in purported exercise of official duty. That is under the colour of office. Official duty therefore implies that the act or omission must have been done by the public servant in course of his service and such act or omission must have been performed as part of duty which, further, must have been official in nature. The section has, thus, to be construed strictly, while determining its applicability to any act or omission in the course of service. Its operation has to be limited to those duties which are discharged in course of duty. But once any act or omission has been found to have been committed by a public servant in discharge of his duty then it must be given liberal and wide construction so far its official nature is concerned. For instance, a public servant is not entitled to indulge in criminal activities. To that extent the section has to be construed narrowly and in a restricted manner. But once it is established that that act or omission was done by the public servant while discharging his duty then the scope of its being official should be construed so as to advance the objective of the section in favour of the public servant. Otherwise the entire purpose of affording protection to a public servant without sanction shall stand frustrated. For instance, a police officer in discharge of duty may have to use force which may be an offence for the prosecution of which the sanction may be necessary. But if the same officer commits an act in course of service but not in discharge of his duty [and without any justification therefor] then the bar under Section 197 of the Code is not attracted. To what extent an act or omission performed by a public servant in discharge of his duty can be deemed to be official, was explained by this Court in *Matajog Dobey v. H.C. Bhari* (AIR p. 49, paras 17 & 19)

‘The offence alleged to have been committed [by the accused] must have something to do, or must be related in some manner, with the discharge of official duty. ... ‘

15. Thus, it is not essential to have sanction in every case under Section 197 Cr.P.C. for prosecuting a public servant because if the offence/act has not been performed in performance of the public duty/official duty, then the immunity may not be available. In the present case also, the detention of the complainant in the Police Station was neither in connection with any enquiry being conducted by the petitioner nor was the complainant summoned under Section 160 of the Evidence Act for recording his evidence. The

complainant was also not wanted in any other case. The background in which the petitioner wanted to harass the complainant cannot be acceptable as correct. In the facts and circumstance of this case, the pre-requisite of sanction under Section 197 Cr.P.C. or under Section 140 of the Delhi Police Act was not required. Thus, I do not find any infirmity, illegality or impropriety in the summoning order as also in the order dated 28.7.2004 passed by the MM concerned nor it is a case where process of court is being abused or there is any need to interfere for doing substantial justice to the parties. The petition is accordingly dismissed.

Crl.M.A.9225/2004 (Stay)

In view of the orders passed above, the application stands disposed of. Interim order, if any, stands vacated.

MOOL CHAND GARG, J.

November 30, 2009
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