

GAHC040000942023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
(ITANAGAR BENCH)

Case No. : Crl.Rev.P. 2/2023

1:Pradeep Gairola and 2 Ors.
a Permanent Resident of Dehradun, Uttarakhand and presently serving as General
Manager (P), PMU Basar, NHIDCL

2: Shiva Om Shukla
A Permanent Resident of Sahajahanpur
Uttar Pradesh and presently serving as Graduate Engineer
PMU Basar
NHIDCL

3: Sunil Kumar
a Permanent Resident of Noida
and Presently serving as Executive Director (P)
RO Itanagar
NHIDC

VERSUS

1:THE STATE OF AP and 2 Ors.
Represented by the Learned Public Prosecutor.

2:The Divisional Forest Officer Aalo Forest Division
West Siang District Arunachal Pradesh.

3:The Range Forest Officer Mechuka Forest Division
Shi Yomi District Arunachal Pradesh

Advocate for the Petitioner : Ninnong Ratan
Advocate for the Respondent : P P of AP

**BEFORE
HONBLE MR. JUSTICE NANI TAGIA**

ORDER

Date : 25.01.2023

Heard Mr. Ninnong Ratan, learned counsel for the petitioners. Also heard Mr. Token Ete, learned Addl. P.P., appearing on behalf of Respondent No. 1; and Mr. Yomi Riram, learned Government Advocate, appearing on behalf of Respondents No. 2 & 3.

The petitioners, altogether 3(three) in nos., stating to be working as General Manager(Project), PMU-Basar, National Highways Infrastructure Development Corporation Ltd.(NHIDCL); Graduate Engineer, PMU-Basar, NHIDCL; and Executive Director (Projects), Regional Office, Itanagar, NHIDCL; have filed this criminal revision petition under Section 397 of the Code of Criminal Procedure, 1973, read with under Article 227 of the Constitution of India, challenging the order, dated 02.11.2021, passed by the Court of the learned Chief Judicial Magistrate, West Siang District, Aalo, in Complaint Case No. 10/2021 u/ss. 2(ii)(iii)(iv), 3A, 3B(1)(a)(b), 3B(2) of the Forest Conservation Act, 1980; and Sections 33, 34 & 35 of the Assam Forest Regulation Act, 1891, whereby cognizance of Complaint Case No. 10/2021 has been taken against them and they were issued with the summons fixing the next date of appearance on 12.04.2022.

The impugned order, dated 02.11.2021, passed by the Court of the learned Chief Judicial Magistrate, West Siang District, Aalo, in Complaint Case No. 10/2021, has been challenged by the petitioners primarily on the ground that since they are the officials of the National Highways Infrastructure Development Corporation Ltd. (NHIDCL), which is a Government of India undertaking, therefore, the petitioners are the public servants within the meaning of Section 21 of the Indian Penal Code and accordingly, the Chief Judicial Magistrate, West Siang District, Aalo, could not have taken cognizance of the Complaint Case No. 10/2021 without prosecution sanction

having been granted by the competent authority in terms of Section 197 of the Code of Criminal Procedure, 1973.

Mr. Ete, learned Addl. P.P., on the other hand, has contended that the employees of the Public Sector Corporations are not the public servants within the meaning of Section 21 of the Indian Penal Code so as to entitle protection granted under Section 197 of the Code of Criminal Procedure, 1973. In support of his contention, Mr. Ete, learned Addl. P.P., Arunachal Pradesh, has relied on 2(two) decisions of the Hon'ble Apex Court, reported in **(1998) 5 SCC 91(Mohd. Hadi Raja v. State of Bihar)**; and **(2019) 16 SCC 63(Bharat Sanchar Nigam Ltd. v. Pramod v. Sawant & anr.)**.

In **Mohd. Hadi Raja**(supra), in Paragraphs No. 19 to 27, thereof; it has been held by the Hon'ble Apex Court as under:

“19. 'Public Servant' has not been defined in the Code of Criminal Procedure but Section 2 [Y] of the Code of Criminal Procedure provides that the words used in the Criminal procedure Code but not defined in the Criminal Procedure Code but defined in the Indian Penal Code shall be deemed to have the same meaning attributed to them in the Indian Penal Code. Section 21 of the Indian Penal Code defines 'public servant' and therefore, the expression 'public servant' will have the same meaning in the Criminal procedure Code. It will be appropriate to refer to clauses 9 and 12 of Section 21 IPC.

“21. Ninth - Every officer whose duty it is as such officer to take, receive, keep or expend any property on behalf of the Government or to make any survey, assessment or contract on behalf of the government or to execute any revenue process or to investigate or to report on any matter affecting the pecuniary interests of the government or to make, authenticate or keep any document relating to the pecuniary interests of the government or to prevent the infraction of any law for the protection of the pecuniary interests of the government.

*

*

*

Twelfth. - Every person-

(a) in the service or pay of the government or remunerated by fees or commission for the performance of any public duty by the government;

(b) in the service or pay of a local authority, a corporation established by or under a Central, provincial or State Act or a Government company as defined in Section 617 of the Companies Act, 1956(1 of 1956).

20. Although the instrumentality or agency with a corporate veil, for all intents and purposes may be held to be a third arm of the government and such instrumentality discharges the duties and functions which the State intends to do as indicated in Ajay Hasia case such instrumentality or agency is nonetheless juridical person having a separate legal entity. Therefore, such instrumentality must be held to have an independent status distinct from the State and cannot be treated as a government department for all purposes. Therefore, even if an officer of such instrumentality or agency takes or receives, keeps or expends any property or executes any contract, such acts even though in ultimate analysis may be held to have been done in the interest of the State, such action cannot be construed, as of rule, an action of the government by its employees or by an authority empowered by the government. It may be indicated here that it is not necessary that persons falling under any of the descriptions given in various clauses under Section 21 of IPC

need to be appointed by the government. If such person falls under any of the descriptions as contained in various clauses of Section 21 of the Indian Penal Code, such person must be held to be a public servant. Explanation 1 of Section 21 indicates that persons falling under any of the above descriptions are public servants whether appointed by the government or not. Explanation 2 indicates that wherever the words 'public servant' occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation. Sub clause (b) of clause twelve of section 21 expressly makes the officers of local authority and corporation established by or under a Central, Provincial or State Act or a government owned company as defined in Section 617 of the Companies Act 1956, public servants. But protection under section 197 Cr. P.C. is not available to a public servant unless other conditions indicated in that Section are fulfilled.

21. It is be noted that though through the contrivance or mechanism of corporate structure, some of the public under takings are performing the functions which are intended to be performed by the State, ex facie, such instrumentality or agency being a juridical person has an independent status and the action taken by them, however important the same may be in the interest of the State cannot be held to be an action taken by or on behalf of the government as such within the meaning of Section 197 Cr. P.C.

22. For the purpose of enforcing the fundamental rights, the public undertakings which, on account of deep and pervasive control can be held to be a state within the meaning of Article 12 has been treated at par with the government department but in all its facets, public undertaking has not been equated with the department run directly by the government. It was on this account that the Surgeon appointed in Hindustan Steel Works Ltd. has not been equated with the government servant for the purpose of applicability of Article 311 of the Constitution. In Praga Tools case, even though Praga Tools was held to be an instrumentality or agency of the State, it has been indicated by this Court that Praga Tools Corporation had a separate legal existence and being a juridical person cannot be held to be a government concern run by or under the authority of the government. Similar view was taken by the Patna High Court in Sindhri Fertilizers case by indicating that even though the said concern was completely owned by the President of India who could also issue directions and the Directors were to be appointed by the President of India, in the eye of law, the company was a separate legal entity and had a separate legal existence. Such decision of Patna High Court has been approved by this Court. In Dhonoa case an IAS officer, when on deputation to a public undertaking having deep and pervasive control of the State, was not held to be a government officer entitled to protection under Section 197 of the Code of Criminal Procedure, even though such officer did not cease to be a government servant and had a lien in government service while on deputation. The protection which a government department was entitled to has also not been given to the Hindustan Steel Works Ltd. in K. Jaymohan case.

23. The importance of the public undertaking should not minimised. The government's concern for the smooth functioning of such instrumentality or agency can be well appreciated but on the plain language of Section 197 of the Code of Criminal Procedure, the protection by way of sanction is not available to the officers of the public undertaking because being a juridical person and distinct legal entity, such instrumentality stands on a different footing than the government departments.

24. It is also to be indicated here that in 1973, the concept of instrumentality or agency of state was quite distinct. The interest of the State in such instrumentality or agency was well known. Even then, the legislature, in its wisdom, did not think it necessary to expressly include the officers of such instrumentality or the government company for affording protection by way of sanction under Section 197 CrPC.

25. It will be appropriate to notice that whenever there was a felt need to include other functionaries within the definition of 'public servant', they have been declared to be 'public servants' under several special and local acts. If the legislature had intended to include officers of an instrumentality or agency for bringing such officers under the protective umbrella of Section 197 CrPC, it would have done so expressly.

26. Therefore, it will not be just and proper to bring such persons within the ambit of Section 197 by liberally construing the provisions of Section 197. Such exercise of liberal construction will not be confined to the permissible limit of interpretation of a statute by a court of law but will amount to legislation by Court.

27. Therefore, in our considered opinion, the protection by way of sanction under Section 197 of the Code of Criminal procedure is not applicable to the officers of Government Companies or the public undertakings even when such public undertakings are "State" within the meaning of Article 12 of the Constitution on account of deep and pervasive control of the government....."

Similarly, in **Bharat Sanchar Nigam Ltd. v. Pramod v. Sawant & anr.**(supra), the Hon'ble Apex Court in Paragraphs No. 6, 7 and 8, has held as under:

"6. The appeal raises a short and pure question of law for consideration with regard to the protection under Section 197 CrPC available to employees of public sector corporation claiming the status of a "public servant". The relevant extract of Section 197 CrPC reads as follows:

"197. Prosecution of Judges and public servants-

(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."

7. The term "public servant" has been defined in Section 21 of the Penal Code, 1860, the relevant portion for the present case reads as follows:

"21. "Public servant".—The words "public servant" denote a person falling under any of the descriptions hereinafter following; namely: —

* * *

Twelfth —Every person—

(a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government;

(b) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in section 617 of the Companies Act, 1956(1 of 1956)."

8. At the very outset, we are of the opinion that the question for grant of sanction for prosecution under Section 197 CrPC on the ground of being a "public servant" is not available to Appellants 3 and 4 on account of their ceasing to be employees of the Indian Telecommunication Service after their absorption in the appellant Corporation on 01.10.2000, prior to the complaint. The fact that their past service may count for purposes of pension in case of removal or dismissal by the Corporation or that administrative approval of the Ministry concerned may be formally required before any punitive action will not confer on them the status of "public servant" under the CrPC."

Thus, the Hon'ble Apex Court in the 2(two) decisions referred to hereinabove; has authoritatively held that employees of public sector corporations are not entitled to protection u/s. 197 of the Code of Criminal Procedure, 1973, on the ground of being public servants.

In view of the above, since there is no dispute that the petitioners are the employees of the Corporation called the National Highways Infrastructure

Development Corporation Ltd. (NHIDCL), a Government of India undertaking; they would not be entitled to protection under Section 197 of the Code of Criminal Procedure, 1973, on the ground of being public servants, as contended by Mr. Ratan, learned counsel for the petitioners.

Accordingly, I do not find any error in the impugned order, dated 02.11.2021, passed by the Court of learned Chief Judicial Magistrate, West Siang District, Aalo, in Complaint Case No. 10/2021 and accordingly, no interference is called for to the impugned order, dated 02.11.2021, referred to above.

The criminal revision petition, therefore, being devoid of merit; stands dismissed.

JUDGE

Comparing Assistant