

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO.303 OF 2022

Chetan Jagdish Kadav .. Applicant
Versus
The State of Maharashtra .. Respondent

WITH
CRIMINAL REVISION APPLICATION NO.304 OF 2022

Sanjay Shivgonda Khot .. Applicant
Versus
The State of Maharashtra .. Respondent

WITH
CRIMINAL REVISION APPLICATION NO.306 OF 2022

Siddharth Sakharam Gaikwad .. Applicant
Versus
The State of Maharashtra .. Respondent

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Mr.A.V.Chatuphale for the Applicants in all the Revision Applications.

Mr.S.S.Hulke, A.P.P. for the State/Respondent.

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CORAM: BHARATI DANGRE, J.
DATED : 04TH SEPTEMBER, 2023

P.C:-

1. The three Revision Applications are filed by the three Applicants, who are charged for the offences punishable under Sections 420, 464, 471, 109, 120-B of the Indian Penal Code (for short, **“The IPC”**) and Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (for short, **“The P.C.Act”**) in C.R.No.I-29 of 2011, which came to be registered against eight accused persons. Upon completion of investigation, A.C.B. submitted charge-sheet on 08/08/2017 before the Special Court, Kalyan and pursuant to which Special Case ACB No.16 of 2017 is registered.

In the said case, the Applicants preferred applications for discharge and the same are rejected by the impugned orders. Since the accusations faced by the three Applicants are in a common C.R. and common charge-sheet is filed, I had deemed it appropriate to list the Applications together.

2. Heard the learned counsel Mr.Chatuphale for the Applicants, who are arraigned as Accused Nos.4, 5 and 6 in the charge-sheet and the learned A.P.P. Mr.Hulke for the State/A.C.B.

3. Before I deal with the legal submissions advanced on behalf of the Applicants, it is necessary to refer to the factual background in which the legal question arises.

One Anil Waghu Banote filed a complaint on 04/09/2010 to the Police Superintendent, A.C.B., Thane inter alia

complaining about theft of a well, as he alleged that the well which is shown to be constructed on record, was never constructed on the land bearing Gat No.1 of village Shil, Tal. Ambernath owned by one Smt.Barkubai Parsu Rone (the beneficiary) and as such a sum of Rs.70,000/- payable towards its construction, was misappropriated.

4. Upon the complaint being filed, apart from the beneficiaries i.e. Accused Nos.1 and 2, the Deputy Engineer, Siddharth Sakharam Gaikwad (Applicant in REVN/306/22), Sanjay Shivgonda Khot, the then Sectional Engineer (Applicant in REVN/304/22) and Chetan Jagdish Kadav, Gramsevak, Group Grampanchayat, Karav (Applicant in REVN/303/22) as well as Sou. Vithabai Sitaram Kadav, then Sarpanch as well as Madan Rambhau Kadav, Upsarpanch of village were arraigned as accused. The present Applicants were arraigned as accused in their official capacities as the employees of Small Irrigation Department.

5. During the course of investigation, it is revealed that Accused No.1-Barkubai is the beneficiary of "Jawahar Well Scheme" and she was permitted to construct a well in Gat No.1. Her son, Accused No.2, submitted the documents to the Chief Executive Officer ("CEO"), Zilla Parishad through BDO, Panchayat Samitee, Ambernath and the papers were submitted to Small Irrigation, Zilla Parishad and on 28/03/2008, technical sanction was granted. The CEO passed an order advancing benefit of the scheme in favour of Accused

No.1. Accordingly the Deputy Engineer, Panchayat Samitee, Ambernath was under an obligation to visit the site and submit a layout plan for the well, but instead of doing so, he sanctioned an advance of Rs.4,200/-. After this stage, the Branch Engineer Sanjay Khot (Applicant/Accused No.5) and Deputy Engineer Siddharth Gaikwad (Applicant/Accused No.4) were under obligation to visit the site of construction, but without inspecting the site, they submitted a report of construction of well and on the basis of their report dated 31/03/2009, an amount of Rs.35,800/- was disbursed in favour of the beneficiary by a cheque, handed over to Accused No.2. Accused Nos.4 and 5 were thereafter expected to carry out a site visit and give a report of completion, but without visiting the site, they prepared the report of completion of work of digging well and, therefore, in February 2010, the balance amount was disbursed in favour of the beneficiary.

Her son, Subhash Rone obtained illegal documents of construction of well in Gat No.1 from Sarpanch and from the Deputy Engineer of Panchayat Samitee. Thus, without a well being dug, false report has been prepared about completion of construction of well and a panchnama was prepared, which was drawn by Chetan Kadav (Applicant/Accused No.6), the former Gramsevak and it is on his report, an amount of Rs.30,000/- was paid to the beneficiary.

All the accused persons being instrumental at different stages, aided the beneficiary by illegally indicating that the well was constructed and they forged the documents for conferring the benefit under the Jawahar Well Scheme.

6. The Applicants before me are the public servants. The subject C.R. invoke offence under the IPC as well as the offence punishable under Section 13(1)(d) read with 13(2) of the P.C. Act.

Before prosecuting the Applicants, the Investigating Officer filed proposal before the C.E.O., Zilla Parishad for sanction, but no sanction is granted against the Applicants under Section 19(3) of the P.C. Act.

The refusal of sanction was pressed as one of the prime ground for discharge before the Special Judge, as it was sought to be canvassed that the Accused are not only facing charge for the offence under Section 13 of the P.C.Act, but also under the IPC. It is also sought to be argued that the act was done in discharge of the duty and, therefore, in absence of sanction under Section 197 of Cr.P.C., the Applicants/Accused who are the public servants, cannot be tried even for the offences under the IPC.

Per contra, A.C.B. opposed the applications on the ground that admittedly no sanction is accorded for prosecuting the Applicants for the offences under the IPC, as nothing of the act done by the accused is in discharge of their duty and, hence, no sanction under Section 197 of Cr.P.C. is required and though the Applicants/Accused who are the public servants, cannot be prosecuted for the offences under the P.C.Act in absence of sanction, the trial against them for the offences under the IPC shall continue, as no sanction is required.

This argument did not find favour with the special Judge, who categorically recorded that it is a well settled principle that if a public servant is found to have been committed an act in discharge of his duty or if there is reasonable connection or it is intrinsically connected and related to performance of duty, sanction under Section 197 of Cr.P.C. is necessary, but if it is not so, in that case, there is no requirement of sanction. Concluding that the function discharged by the Applicants is not intrinsically related to public duty, the Additional Sessions Judge, Kalyan, by the impugned order dated 25/04/2022, recorded that no sanction is necessary.

7. The question, therefore, arises before me for consideration is whether the Applicants are entitled for protection under Section 197 of Cr.P.C., which contemplated the prosecution of public servant. Sub-section (1) of Section 197 clearly contemplate that no Court shall take cognizance of offence alleged to have been committed by a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government, of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty.

The requirement of sanction under Section 197, therefore, arises in case of a public servant, who is acting or purporting to “act” in discharge of his official duty. The sanction contemplated under Section 197 is, therefore, intrinsically connected with discharge of official duty. For prosecuting a public servant for the offences punishable under the IPC, if the alleged act is done or purported to be done in

discharge of his official duty, then sanction is must. If he is prosecuted without such sanction, the entire action initiated against him may be rendered *void ab initio* for want of sanction. Though obtaining of sanction may not be a prerequisite, as sanction can be obtained even during the course of trial, depending upon the facts of the particular case and, particularly, at what stage of proceeding, requirement of sanction surfaces. The question as to whether the act complained of, is done in performance of duty or in purported performance of duty, is to be determined by the competent authority and not by the Court.

8. In the three Applications, A.C.B. applied for sanction to the CEO, Zilla Parishad and when the communication dated 04/06/2013 addressed to the CEO, seeking sanction as regards the four accused persons, the employees of Zilla Parishad, Thane is perused, it is evident that the sanctioning authority was informed about the invocation of offences against the public servant under the Prevention of Corruption Act as well as under the provisions of the Indian Penal Code and it contemplated that since the sanction is necessary before prosecuting them from the authority, who is competent to remove them, and, since, the CEO was the competent authority, the sanction was specifically sought under Section 19(1)(c).

The respondent/ACB has placed before me the communication dated 04/06/2013 by which the sanction to prosecute the accused was sought under the P.C.Act.

The CEO, Zilla Parishad raised certain queries with the ACB by his communication dated 20/12/2013, by raising the point that there are no clear instructions about the implementation of the scheme and even the beneficiary was under an impression that the well was constructed in her field, but only after the complaint was filed, it came to the notice that the well was constructed in some other portion of land. Ultimately, on 06/06/2015, the CEO refused the sanction under Section 19(3) by referring to the resolution of the State Government (Planning Department) with a specific reasoning that there are administrative lapses on part of the Accused/officials, but they are not criminal in nature.

9. In the wake of the aforesaid communication, it is the argument of Mr.Chatuphale that there is no sanction granted for prosecuting the Applicants under the offences punishable under the IPC and without such sanction, the prosecution against them cannot continue and the learned Judge has committed a grave error in recording that no sanction is required for prosecuting the Accused under the IPC provisions.

10. The law on the said point is well settled.

The protection conferred upon a public servant under Section 197 is to protect the responsible public servant against institution of vexatious criminal proceedings for the offences alleged to have been committed by them while they are acting or purporting to act as public servants. The intention behind the said provision is to offer adequate protection to public

servant to ensure that they are not prosecuted for the acts done by them in discharge of their official duties, without reasonable cause and when sanction is granted, to confer on the Government, complete control of the prosecution.

The protection is, however, available to a public servant in a limited arena, it is available only when the alleged act done by the public servant is reasonably connected with discharge of his official duty and not merely a cloak for doing the objectionable act. If in discharge of his official duty, he act in excess of his duty, but still there is reasonable connection between the act committed and the discharge of his official duty, excess exercise of his power may not deprive him of the protection, but if the alleged act has no connect with the official act, in that case, the protection may not be available to him. For example, killing of a person by use of excessive force would never be an act performed in discharge of his duty.

In *Shambhoo Nath Mishra Vs. State of U.P.*¹, the Hon'ble Apex Court considered the question, when the public servant is alleged to have committed the offence of fabrication of false record or misappropriation of public funds etc., can be said to have acted in discharge of official duties, since it was not a part of his duty to fabricate false record and misappropriate the funds. The Apex Court concluded that the performance of official duty under the colour of public authority cannot be camouflaged to commit crime, as public duty may provide him an opportunity to commit the crime. The following observations of the Apex Court are very pertinent :-

¹ (1997) 5 SCC 326

“34. In *Shambhoo Nath Misra v. State of U.P.*, this Court considered the question when the public servant is alleged to have committed the offence of fabrication of false record or misappropriation of public funds, etc. can he be said to have acted in discharge of official duties? Since it was not the duty of the public servant to fabricate the false records, it was held that the official capacity only enabled him to fabricate the records and misappropriate the public funds hence, it was not connected with the course of same transaction. This Court has also observed that performance of official duty under the colour of public authority cannot be camouflaged to commit crime. Public duty may provide him an opportunity to commit crime. The court during trial or inquiry has to apply its mind and record a finding on the issue that crime and official duty are integrally connected or not.”

11. In *State of Maharashtra Vs. Dr. Budhikota Subbarao*², the Hon'ble Apex Court pertinently observed as under :-

“Use of the expression, 'official duty' implies that the act or omission must have been done by the public servant in 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. In *P. Arulswami v. State of Madras* this Court after reviewing the authorities right from the days of Federal Court and Privy Council held:

“... 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

² (1993) 3 SCC 339

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."

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 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 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 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 Dubey v. H.C. Bhari* thus:

"[T]he 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... there must be a reasonable connection between the act and the discharge of official duty; *the act must bear such relation to the duty that the accused could lay a reasonable (claim) but not a pretended or fanciful claim, that he did it in the course of the performance of his duty.*"

(emphasis supplied)

If on facts, therefore, it is prima facie found that the act or omission for which the accused was charged had reasonable

connection with discharge of his duty then it must be held to be official to which applicability of Section 197 of the Code cannot be disputed.”

12. In *Devinder Singh & Ors. Vs. State of Punjab through CBI³*, the principles on the issue of requirement of sanction has been once again reiterated by categorically concluding that once act or omission has been found to have been committed by the public servant in discharge of his duty, it must be given liberal and wide construction so far its official nature is concerned. Public servant is not entitled to indulge in criminal activities and to that extent Section 197 shall be construed narrowly and in a restricted manner. In paragraph No.39, the principles emerging from various authoritative pronouncements came to be crystallized to the following effect :-

“39.1 Protection of sanction is an assurance to an honest and sincere officer to perform his duty honestly and to the best of his ability to further public duty. However, authority cannot be camouflaged to commit crime.

39.2. Once act or omission has been found to have been committed by public servant in discharging his duty it must be given liberal and wide construction so far its official nature is concerned. Public servant is not entitled to indulge in criminal activities. To that extent Section 197 CrPC has to be construed narrowly and in a restricted manner.

39.3 Even in facts of a case when public servant has exceeded in his duty, if there is reasonable connection it will not deprive him of protection under Section 197 CrPC. There cannot be a universal rule to determine whether there is reasonable nexus between the act done and official duty nor is it possible to lay down such rule.

39.4 In case the assault made is intrinsically connected with or related to performance of official duties sanction would be necessary under Section 197 CrPC, but such relation to duty should not be pretended or fanciful claim. The offence

³ (2016) 12 SCC 87

must be directly and reasonably connected with official duty to require sanction. It is no part of official duty to commit offence. In case offence was incomplete without proving, the official act, ordinarily the provisions of Section 197 CrPC would apply.”

13. In the latest decision in *Indra Devi Vs. State of Rajasthan & Anr.*⁴, the position as regards Section 197 of Cr.P.C. and about availability of protection is once again reiterated in the following words :-

“10. We have given our thought to the submissions of the learned counsel for the parties. Section 197 CrPC seeks to protect an officer from unnecessary harassment, who is accused of an offence committed while acting or purporting to act in the discharge of his official duties and, thus, prohibits the court from taking cognizance of such offence except with the previous sanction of the competent authority. Public servants have been treated as a special category in order to protect them from malicious or vexatious prosecution. At the same time, the shield cannot protect corrupt officers and the provisions must be construed in such a manner as to advance the cause of honesty, justice and good governance. (*See Subramanian Swamy Vs. Manmohan Singh*). The alleged indulgence of the officers in cheating, fabrication of records or misappropriation cannot be said to be in discharge of their official duty. However, such sanction is necessary if the offence alleged against the public servant is committed by him “while acting or purporting to act in the discharge of his official duty” and in order to find out whether the alleged offence is committed “while acting or purporting to act in the discharge of his official duty”, the yardstick to be followed is to form a prima facie view whether the act of omission for which the accused was charged had a reasonable connection with the discharge of his duties. (*See State of Maharashtra Vs. Dr. Budhikota Subbarao*). The real question, therefore, is whether the act committed is directly concerned with the official duty.”

14. The latest decision of the Hon’ble Apex Court on which Mr.Chatuphale has relied is in the case of *A. Sreenivasa Reddy*

⁴ (2021) 8 SCC 768

Vs. Rakesh Sharma & Anr.⁵, where a distinction is drawn in the sanction to be awarded under Section 19 of the P.C. Act and under Section 197 of Cr.P.C. in prosecuting the offences under the IPC.. The thin line of distinction has been drawn between the sanction under the two statutes, which must be taken note of.

“59. From the aforesaid, it can be said that there can be no thumb rule that in a prosecution before the court of Special Judge, the previous sanction under Section 19 of the PC Act, 1988 would invariably be the only pre-requisite. If the offences on the charge of which, the public servant is expected to be put on trial include the offences other than those punishable under the PC Act, 1988 that is to say under the general law (i.e. IPC), the court is bound to examine, at the time of cognizance and also, if necessary, at subsequent stages (as the case progresses) as to whether there is a necessity of sanction under Section 197 of the CrPC. There is a material difference between the statutory requirements of Section 19 of the PC Act, 1988 on one hand, and Section 197 of the CrPC, on the other. In the prosecution for the offences exclusively under the PC Act, 1988, sanction is mandatory qua the public servant. In cases under the general penal law against the public servant, the necessity (or otherwise) of sanction under Section 197 of the CrPC depends on the factual aspects. The test in the latter case is of the "nexus" between the act of commission or omission and the official duty of the public servant. To commit an offence punishable under law can never be a part of the official duty of a public servant. It is too simplistic an approach to adopt and to reject the necessity of sanction under Section 197 of the CrPC on such reasoning. The "safe and sure test", is to ascertain if the omission or neglect to commit the act complained of would have made the public servant answerable for the charge of dereliction of his official duty. He may have acted "in excess of his duty", but if there is a "reasonable connection" between the impugned act and the performance of the official duty, the protective umbrella of Section 197 of the CrPC cannot be denied, so long as the discharge of official duty is not used as a cloak for illicit acts.”

5 Cri.Appeal No.2339 of 2023 dtd. 08/08/23

15. The well settled position of law that emerges from the above authoritative pronouncement is clear; the principle of immunity protect all acts, which the public servant is duty bound to perform in exercise of his public duty. The purpose for which they discharge their duties protect them from criminal prosecution with an exception that when an criminal act is performed or purported to be discharged under the colour of authority, but which is real sense, is beyond his official duty, so as to derive any benefit for himself and by obliterating the discharge of his official function, then he shall not be entitled for any protection. A public servant while discharging his official duties enters into a criminal conspiracy or indulgence in criminal misconduct, such misdemeanor on his part shall never be construed as a part of his official duty and the protection under Section 197 cannot be availed by him. An official act can be performed in discharge of the official duties as well as in dereliction of duty. For claiming protection under Section 197, the act of the accused complained of must be such that the same cannot be separated from his official duty, but if there was no reasonable connection between the act performed and the duty discharged, in that case, no sanction would be required.

16. Applying the aforesaid test to the present case, it is evident that all the Applicants face charge under Sections 120-B, 420, 464, 471, 109 read with Section 34 of the IPC and since the material in the charge-sheet is indicative of committing cheating as well as committing an offence of forgery for the purpose of cheating by procuring documents

establishing that the well was constructed by the beneficiaries in Gat No.1 and assisting the beneficiaries in availing the benefit of Jawaharlal Well Scheme, they definitely must subject themselves for trial, as the prosecution has collected sufficient material to prove the charges against them.

Since the offence committed by them is not in discharge of their official duty, by applying the aforesaid test, I do not think that absence of sanction under Section 197 of the Cr.P.C. is an impediment in prosecuting them, for the offences punishable under the IPC. Since the sanction has been refused by the CEO, Zilla Parishad for prosecuting them under the P.C. Act, they deserve discharge from Section 13(2) read with Section 13(1)(d) of the P.C. Act. In fact, the ACB consciously has not sought sanction from the CEO before prosecuting the accused for the offences punishable under the IPC and the sanction was only limited to the offences under the P.C. Act.

17. The Additional Sessions Judge, Kalyan has committed no error in recording that there is a *prima facie* case to try the Accused for the offences punishable under the IPC, and since, the alleged act of the Accused does not take colour from their public duty, no sanction is necessary.

Upholding the aforesaid order, the Revision Applications are dismissed.

(SMT. BHARATI DANGRE, J.)