

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

WEDNESDAY, THE 20TH DAY OF MAY 2015/30TH VAISAKHA, 1937

CRL.A.No. 844 of 2000 (A)

AGAINST THE JUDGMENT IN C.C.NO. 19/1998 of ENQUIRY COMMISSIONER AND
SPECIAL JUDGE, THRISSUR DATED 19-12-2000

APPELLANT(S)/PETITIONER:

V.V.GEORGE, FORMER U.D.CLERK, EMPLOYMENT EXCHANGE,
PALAI AND RESIDENT OF VAZHAPLAKKAL HOUSE,
MARIANGANAM, PALAI.

BY ADVS.SRI.BENOY THOMAS
SRI.PAULSON THOMAS

RESPONDENT(S)/RESPONDENT:

STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM

BY PUBLIC PROSECUTOR SHRI K.K.RAJEEV

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 19.03.2015, THE
COURT ON 20-05-2015 DELIVERED THE FOLLOWING:

“C.R.”

A.HARIPRASAD, J.

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Crl.Appeal No.844 of 2000
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Dated this the 20th day of May, 2015.

JUDGMENT

Multiple important legal questions arise in this appeal. Conviction and sentence imposed by the Court of Enquiry Commissioner and Special Judge, Thrissur on the appellant under Sections 13(1)(c) read with Section 13(2) of the Prevention of Corruption Act, 1988 (in short, “the Act”) and also under Sections 409, 465, 471 and 477A of the Indian Penal Code (in short, “IPC”) are assailed in this appeal.

2. Shorn of unnecessary details, the prosecution case is that the accused while working as Upper Division Clerk (UDC) at Town Employment Exchange, Pala on 23.10.1990 and 15.01.1991 misappropriated ₹1,440/- and ₹2,640/- (a total sum of ₹4,080/-) by committing criminal breach of trust, using forged documents and by falsifying accounts. The accused thereby committed criminal misconduct by fraudulent and dishonest misappropriation of money.

3. Heard Shri Binoy Thomas, learned counsel for the accused/appellant and Shri K.K.Rajeev, learned Public Prosecutor. I have carefully gone through the detailed notes of arguments submitted by both

sides.

4. Apart from the factual questions, touching upon the sustainability of conviction and sentence, the learned counsel for the appellant urged following legal questions for consideration:

- I. Whether the entire prosecution is barred by limitation?
- II. Whether the prosecution is bad for not obtaining proper sanction under Section 19 of the Act?
- III. Whether the prosecution should fail for want of sanction under Section 197 Cr.P.C.?
- IV. Whether, due to inordinate delay in the investigation and rigmarole of the trial, the appellant's fundamental right under Article 21 of the Constitution of India to get a fair trial is violated?

5. Since each one of the questions of law raised in this case is important and capable of creating an impact on the decision of the case, I shall examine the legal questions before dealing with the factual issues. It is to be noted here that the aforementioned legal questions will have to be further subdivided appropriately for appreciating the issues involved.

Point No.I - Limitation.

6. For appreciating this point, the following dates are relevant. It is the allegation that the appellant committed misappropriation of money and falsification of records on 23.10.1990 and 15.01.1991. It is come out in evidence that PW1 reported about commission of the offence to PW26,

Sub Inspector of Police, on 12.08.1991. There is no dispute that all the offences allegedly committed by the appellant were cognizable in nature. Ext.P65 is the first information report (FIR) registered in connection with the crime. It is dated 22.04.1994. Learned counsel for the appellant contended that there is unexplained delay of three years elapsed from the date of alleged commission of offence to the date of registration of crime. The appellant further contended that despite the statutory mandate in Section 173(1) Cr.P.C. that every investigation under Chapter XII of the Cr.P.C. shall be completed without unnecessary delay, the final report in this case was submitted by the investigating officer only on 18.12.1998, ie., after an inordinate delay of seven years and eleven months since the date of commission of offence. Further, it was filed after expiry of seven years and four months from the date of registration of Ext.P65 FIR. Still further, there is a delay of four years and seven months in submitting the final report under Section 173(2) Cr.P.C. if counted from the date of Ext.P65 FIR. Ext.P64 is the order of sanction given by PW20 under Section 19(1) (c) of the Act. It is also come out in evidence that PW20 got the request for sanction only on 06.04.1998 from the Director of Vigilance and it was granted on 13.07.1998. Even if we exclude the time for obtaining sanction for prosecution as required under Section 470(3) Cr.P.C. (three months and seven days in this case), the appellant contends that there is inexcusable and unexplained delay of more than seven years in filing the charge sheet

before the court, reckoning from the last date of the alleged offence. It is further contended that systemic delay due to a long drawn trial is for about 14 years. However, the period spent on trial cannot be taken into account for appreciating the contention of limitation.

7. Section 468 Cr.P.C. deals with the bar in taking cognizance after lapse of the period of limitation. It reads as follows:

“ (1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.

(2) The period of limitation shall be-

(a) six months, if the offence is punishable with fine only;

(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

(3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment”

On a careful reading of the provision, it is discernible that except as otherwise provided elsewhere in the Cr.P.C., no court shall take cognizance

of offence of the category specified in Sub-section (2) of the Section after expiry of the period of limitation. Admittedly, this provision is applicable to all the offences charged under the IPC. In this case, the appellant is called up to answer charges under Section 409, 465, 471 and 477A IPC. If we look into Sub-section (2) of Section 468 Cr.P.C., it can be seen that the period of limitation prescribed in the Cr.P.C. is on the basis of the nature and quantum of punishment prescribed for the offence. Section 465 IPC deals with forgery. The punishment prescribed therefor by the IPC is imprisonment for two years or fine or both. Likewise, Section 471 IPC also prescribes the same punishment for using a forged document as genuine, which is known to the accused to be a forged one. It is, therefore, evident that these two offences will fall within the category of offences prescribed under Section 468(2)(c) Cr.P.C. Sub-section (3) of Section 468 Cr.P.C. makes it amply clear that for the purpose of the Section, the period of limitation shall be determined in relation to offences which may be tried together, with reference to the offence which is punishable with the more severe punishment or the most severe punishment, as the case may be. The catchwords employed in the Sub-section are 'for the purpose of this Section' (underline supplied). It can be seen that this Section applies only to offences for which a period of limitation is prescribed in Section 468(2) Cr.P.C. The provision prescribes a period of limitation for offences punishable with fine only and for offences punishable with imprisonment of

different durations. Clause (b) of Sub-section (2) of Section 468 Cr.P.C. prescribes the period of limitation for an offence punishable with imprisonment for a term not exceeding one year and Clause (c) of the same Sub-section prescribes period of limitation for offences punishable with imprisonment exceeding one year, but not exceeding three years. It can also be seen that no limitation is prescribed for offences punishable with imprisonment exceeding three years. Another condition required to satisfy the mandate of Section 468(3) Cr.P.C. is that the offences mentioned in various limbs of Section 468(2) Cr.P.C. must be triable together. This provision was introduced by Act 45 of 1978. It is noteworthy that under the earlier Code of 1898, no period of limitation was prescribed for launching a criminal prosecution. So much so, the court could not have thrown out a private complaint or a police report solely on the ground of delay, though the delay might be a good ground for doubting the prosecution story. The object, which the statute seeks to subserve, is clearly in consonance with the concept of fairness of trial as enshrined in Article 21 of the Constitution of India. It is therefore of utmost importance that any prosecution, whether by the State or by a private party, must abide by the letter of law or else it has to take the risk of failing on the ground of limitation.

8. As mentioned above, Sub-section (3) of Section 468 Cr.P.C. operates only for the purpose of computing the period of limitation for

offences falling within Section 468 (2) Cr.P.C. For example, if one offence charged against the accused is punishable with fine only (falling within Section 468(2)(a) Cr.P.C. category) and another offence, which is sought to be tried together with the earlier offence, falls within the category of offence mentioned under Section 468(2)(b) Cr.P.C., then the period of limitation shall be determined with reference to the offence punishable with more severe punishment. Likewise, if multifarious offences triable together are alleged against an accused falling within Section 468(2) Cr.P.C., then the period of limitation shall be determined with reference to the offence punishable with the most severe punishment. If the offence alleged against the accused is punishable with imprisonment exceeding three years, there is no period of limitation for prosecution. This is the sum and substance of the mandate of Section 468 Cr.P.C.

9. A Constitution Bench of the Apex Court in **Sarah Mathew v. Institute of Cardio Vascular Diseases by its Director Dr.K.M.Chерian and others ((2014) 2 SCC 62)** resolved the controversy regarding the date relevant for computation of the period of limitation. In paragraph 51, the Supreme Court succinctly stated the following principles:

“In view of the above, we hold that for the purpose of computing the period of limitation under Section 468 CrPC the relevant date is the date of filing of the complaint or the date of

institution of prosecution and not the date on which the Magistrate takes cognizance. We further hold that Bharat Kale (Bharat Damodar Kale v. State of A.P. (2003) 8 SCC 559:2004 SCC (Cri) 39) which is followed in Japani Sahoo (Japani Sahoo v. Chandra Sekhar Mohanty (2007) 3 SCC (Cri) 388) lays down the correct law. Krishna Pillai (Krishna Pillai v. T.A.Rajendran, 1990 Supp SCC 121:1990 SCC (Cri) 646) will have to be restricted to its own facts and it is not the authority for deciding the question as to what is the relevant date for the purpose of computing the period of limitation under Section 468 CrPC.”

Hence, the date relevant for computing the period of limitation is the date of final report (18.12.1998 in this case) is a fact no more questionable. Learned counsel for the appellant contended that the trial court without regarding the question of limitation took cognizance of all the offences shown in the final report and thereby caused a substantial prejudice and injury to the accused/appellant. The appellant has another contention that the trial court, after illegally taking cognizance of time barred offences along with other offences, proceeded with the trial whereby the whole trial is vitiated. The accused would contend that evidence adduced conjointly in the case is in respect of offences barred by limitation and other offences. The nature of offences alleged against the appellant is such that they are so intrinsically intertwined and therefore the evidence cannot be separated

or segregated. For that reason also, the conviction is not sustainable, contended the learned counsel. I shall deal with this contention separately in the succeeding paragraphs. However, I have to find that the offences under Sections 465 and 471 IPC were barred at the time of taking cognizance of the offences. To this extent, the contention of the appellant is to be upheld. The consequence thereof can be considered in the succeeding paragraphs.

10. Prosecution alleged that the appellant committed criminal breach of trust and he, being a public servant, is liable to be proceeded under Section 409 IPC. Section 405 IPC defines criminal breach of trust. The essential ingredients of the offence of criminal breach of trust are (i) dishonest misappropriation or conversion of property and (ii) by a person to whom it was entrusted or having domain over the same. In other words, one of the essential requirements is dishonest misappropriation of property, entrusted to the accused, for his own use or in violation of any direction or law. Section 409 IPC is an aggravated form of criminal breach of trust and gets attracted when it is committed by a public servant, banker, etc. It goes without saying that all the legal requirements to attract an offence of criminal breach of trust should be satisfied in order to attract an offence under Section 409 IPC as well.

11. Section 465 IPC prescribes the punishment for 'forgery', the term defined in Section 463 IPC. In order to commit an offence of forgery

as defined under Section 463 IPC, the accused must be guilty of making any false document or false electronic record, etc. with an intent to cause damage or injury to the public or to any person or to support any claim or title or to cause any person to part with property, etc. It must also be established that the said act was done with an intent to commit fraud or fraud might be committed thereby. Here also a mental element of dishonesty is required.

12. Section 471 IPC is a penal provision for using a forged document as genuine one. In that Section also, we find expressions like fraudulently or dishonestly employed to describe the nature of the offence. Section 24 IPC defines the term 'dishonestly' in the following words:

“Dishonestly.- Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing “dishonestly”.”

Section 25 IPC defines the term 'fraudulently' as follows:

“Fraudulently.- A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.”

It is, therefore, clear that for roping an accused in Section 471 IPC, an allegation that he fraudulently or dishonestly used a document as genuine is to be made out and further it must be alleged that he knew or had reason to believe that the document was a forged one.

13. Section 477A IPC is pertaining to falsification of accounts. If one carefully goes through this Section, it can be seen that who ever being a clerk, officer or servant, willfully and with intent to defraud, destroys, alters, etc. any book, etc. in the possession of his employer or willfully and with intent to defraud, makes or abets the making of any false entry in or omits or alters or abets the omission or alteration of any material particular from or in, any such book, is said to have falsified the accounts and liable to be punished with imprisonment or fine or with both. What is common to all these offences is the manifestation of dishonest and fraudulent intention for making an unlawful gain. Section 13(1)(c) of the Act is relevant for our purpose. Shorn of unnecessary details, the relevant portion of the Section reads as follows:

“13. Criminal misconduct by a public servant.-(1) A public servant is said to commit the offence of criminal misconduct,-

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(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do.

xxxxxx”

On a close scrutiny of the above provision, it can be seen that dishonest or fraudulent misappropriation is the pivotal point to be established for

attracting the criminal misconduct enumerated in the Section. From the above discussion, it is discernible that the prosecution has to specifically allege and prove the dishonest and fraudulent intention of the appellant in order to attract all the offences involved in this case. In otherwords, without alleging and proving the dishonest or fraudulent intention of the appellant, the prosecution cannot succeed in this case. In this backdrop, the learned counsel for the appellant submitted that without condoning delay in filing the final report by invoking power under Section 473 Cr.P.C., the trial court wrongly took cognizance of all the offences, including those under Sections 465 and 471 IPC, and evidence was allowed to be let in, causing substantial prejudice to the appellant. It is forcefully submitted by the learned counsel that if the accused is tried for offences barred by limitation along with other offences which are not so barred, then the whole trial will be vitiated. Further, it is argued that without charging the accused and proving his guilt under Sections 465 and 471 IPC, the alleged dishonest or fraudulent intention of the appellant, which is a concomitant for finding him guilty under Sections 409 and 477A IPC and Section 13(1)(c) read with Section 13(2) of the Act cannot be proved by the prosecution. Learned counsel for the appellant further contended that the offences under Sections 409 and 477A IPC and Section 13(1)(c) read with Section 13(2) of the Act are not cognate offences of Sections 465 and 471 IPC. According to the learned counsel, without taking cognizance of the offences under

Sections 465 and 471 IPC, it is not possible to maintain a charge and prove other offences, viz., those under Sections 409 and 477A IPC and Section 13(1)(c) read with Section 13(2) of the Act. It is pertinent to note that either dishonesty or fraud is an essential ingredient in each of the offence charged on the appellant. Same set of evidence touching upon dishonesty and/or fraud adduced in this case was used to convict the appellant for all the offences, including the time barred ones under Sections 465 and 471 IPC. It is true that evidence in this case relating to all the offences is so mixed up that it cannot be separated. Stated differently, the evidence adduced by the prosecution cannot be put in definite compartments so as to apply one set of it to the offences barred by limitation and the other to the offences not so barred. Hence the composite trial of the accused for offences barred and not barred by limitation certainly had caused prejudice to the accused. All the more, it goes to the root of the legality of the trial. Hence I find that the contention of the appellant that he suffered prejudice on conviction on account of adduction of evidence against him, even in respect of time barred offences, is sustainable.

14. Learned counsel for the appellant contended that the court below did not exercise its powers under Section 473 Cr.P.C., which reads as follows:

“Extension of period of limitation in certain cases.-Notwithstanding anything contained in the

foregoing provisions of this Chapter, any Court may make cognizance of an offence after the expiry of the period of limitations, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice.”

This Section gives wide powers to criminal courts to take cognizance of an offence even after expiry of the period of limitation. What is required is that the court must be satisfied on the facts and in the circumstances of the case that delay has been properly explained or that it is necessary to do so in the interests of justice. Placement of this Section at the bottom of Chapter XXXVI dealing with limitation for taking cognizance of certain offences is relevant. Sections preceding this Section deal with bar for taking cognizance after the period of limitation, commencement of the period of limitation, exclusion of time in certain cases, exclusion of date on which court is closed and absence of limitation in case of continuing offences. Thereafter, it is mentioned in Section 473 Cr.P.C. that the court has power to extend the period of limitation in certain cases, considering the facts and circumstances of the case and also on noticing that in a given case delay has been properly explained or if the court finds that it is necessary so to do in the interests of justice. It is clear that this Section gives wider discretion to the courts than that is provided by Section 5 of the Limitation Act, 1963.

15. A question may arise whether the exercise of power under Section 473 Cr.P.C. must precede the act of taking cognizance under Section 190(1)(b) Cr.P.C. On a reading of Section 473 Cr.P.C. it is evident that it confers power on the court for taking cognizance of an offence, even after expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that is necessary so to do in the interests of justice. The Supreme Court in **State of H.P. v. Tara Dutt and another (AIR 2000 SC 297)** considered the scope and ambit of the power of the court to take cognizance of an offence after expiry of the period of limitation. It is evident from the above Section itself that the court is bestowed with a wide discretion; of course, it must be exercised with great care and circumspection to meet the ends of justice. The Supreme Court in the above decision held that it must be exercised by a speaking order. Following quotation from the decision will be useful for our purpose:

“Section 473 confers power on the Court taking cognizance after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained and that it is necessary so to do in the interest of justice. Obviously, therefore in respect of the offences for which a period of limitation has been provided in S. 468, the power has been conferred on the Court taking cognizance to extend

the said period of limitation where a proper and satisfactory explanation of the delay is available and where the Court taking cognizance finds that it would be in the interest of justice. This discretion conferred on the Court has to be exercised judicially and on well recognised principles. This being a discretion conferred on the Court taking cognizance, wherever the Court exercises this discretion, the same must be by a speaking order, indicating the satisfaction of the Court that the delay was satisfactorily explained and condonation of the same was in the interest of justice. In the absence of a positive order to that effect it may not be permissible for a superior Court to come to the conclusion that the Court must be deemed to have taken cognizance by condoning the delay whenever the cognizance was barred and yet the Court took cognizance and proceeded with the trial of the offence.”

16. If one reads Section 473 Cr.P.C. carefully, it can be seen that condonation of delay by the court should precede the taking of cognizance. In other words, after taking cognizance of an offence, which is barred under Section 468 Cr.P.C., the court cannot retrace its steps and condone the delay at a post cognizance stage. In the instant case, there is no dispute that there was no speaking order by the trial Judge under Section 473 Cr.P.C. condoning delay in taking cognizance for offences under Sections 465 and 471 IPC. As mentioned earlier, the trial Judge is not

legally competent to condone the delay in taking cognizance in respect of offences under Sections 465 and 471 IPC after taking cognizance of all the offences, including the above mentioned offences. The learned trial Judge before taking cognizance must have applied his mind as required under Section 473 Cr.P.C. and should have condoned the delay in respect of offences under Sections 465 and 471 IPC. It is also indisputable that there should have been a speaking order for condoning delay before taking cognizance. Non-compliance of the mandatory requirements certainly makes the cognizance bad in law. An option available for the trial Judge was to leave alone the offences under Sections 465 and 471 IPC and take cognizance for other offences which were not barred by the provisions of Section 468(2) Cr.P.C. But that will surely affect the strength of the prosecution case in view of the fact situation in this case. As stated above, the learned trial Judge without any application of judicial mind took cognizance of all the offences, including the time barred ones, and permitted the prosecution to adduce evidence on all the charges, causing serious prejudice to the appellant, because the essential ingredients for attracting the barred offences and other offences are identical.

17. Now the question for determination is whether non-exercise of power under Section 473 Cr.P.C. vitiates the process of taking cognizance under Section 190(1)(b) Cr.P.C. Learned counsel for the appellant contended that non-exercise of power by the court under Section 473

Cr.P.C. vitiates the entire trial rendering the same non est, notwithstanding that no limitation is prescribed for some of the charged offences. In order to support this contention, a decision of the Andhra Pradesh High Court in **Ch.Narender Reddy v. State of A.P. (2000 Cri.L.J. 4068)** is relied on. The facts in that case are different from those in this case. It is true that the pre-requisites for attracting offences under Sections 465 and 471 IPC are similar to those offences for which no period of limitation is prescribed by law. But, non-exercise of power under Section 473 Cr.P.C. by the learned trial Judge coupled with the absence of a speaking order condoning the delay before taking cognizance seriously affected the substratum of the prosecution case. Considering the facts in this case, I am of the view that the evidence adduced, especially relating to the dishonest or fraudulent intention of the appellant, are common to all the offences. The contention raised by the appellant that he was put to prejudice by allowing the prosecution to lead evidence in respect of time barred offences in the same trial with other offences and the same was used against him even in respect of other offences, thereby causing prejudice to him is to be accepted. Therefore, I am of the view that the prosecution case is not legally sustainable in view of the bar of limitation in taking cognizance of some of the offences and also for the reason that the trial court did not exercise its power under Section 473 Cr.P.C. before taking cognizance.

Point Nos.II and III: Validity of sanction under Section 19 of the

Act and effect of non-obtainment of sanction under Section 197

Cr.P.C.

18. For clarity, relevant portions of Section 19 of the Act and Section 197 Cr.P.C. are excerpted hereunder:

“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 the 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.

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(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a court in appeal, confirmation or revision on the

ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;

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(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.

Explanation.-For the purposes of this section, -

(a) error includes competency of the authority to grant sanction;

(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature.”

(As Sub-section (2) and other clauses in Sub-section (3) of Section 19 of the Act are not relevant for our purpose, they are omitted.) Relevant part of Section 197 Cr.P.C. Reads thus:

“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) xxxxxx

(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.

xxxxxx”

19. Learned counsel for the appellant submitted that apart from the material defect in the order of sanction under Section 19 of the Act, non-obtaining sanction under Section 197 Cr.P.C. is a serious flaw in the prosecution case. Ext.P64 order of sanction under Section 19 of the Act was issued by the Director of Employment, Directorate of Employment, Thiruvananthapuram. The officer who issued the order of sanction was examined as PW20. According to the learned counsel for the appellant, he was not the person authorised by law to issue an order of sanction to prosecute the appellant. The definition of 'public servant' in Section 2(c) of the Act is wider in scope than the same expression occurring in Section 197 Cr.P.C.. Section 2(y) Cr.P.C. says that the words and expressions used in the Code and not defined, but defined in the IPC, have the

meanings respectively assigned to them in the Penal Code. Section 21 IPC defines the term 'public servant'. On a reading of Section 21 IPC, it can be seen that the words 'public servant' is not synonymous with the expression 'Government servant', because the definition of 'public servant' in Section 21 IPC takes in persons in authority whether appointed by the Government or not. On a close examination of Section 19 of the Act and Section 197 Cr.P.C. it can be seen that the scope and amplitude of the former Section is much wider than the latter. Section 19(1)(a) of the Act takes in all the Central Government employees and Section 19(1)(b) of the Act takes in all the State Government employees. Section 19(1)(c) of the Act deals with other employees working under various authorities like public sector undertakings of State and Central Governments. Actually persons classified under Section 19(1)(c) of the Act are not Government servants, though they are treated as public servants as per Section 2(c) of the Act. It is also to be noted that such non-Governmental public servants covered by Section 19(1)(c) of the Act will not come within the purview of Section 197 Cr.P.C. The Apex Court in **Mohd. Hadi Raja v. State of Bihar and another ((1998) 5 SCC 91)** held that the protection by way of sanction under Section 197 Cr.P.C. 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 of India on

account of deep and pervasive control of the Government. It was also noticed in the said decision that by virtue of Section 2(y) Cr.P.C., the definition of public servant in Section 21 IPC has been incorporated in the Cr.P.C, and the protection under Section 197 Cr.P.C. is not available to a public servant unless other conditions indicated in the Section are fulfilled. So, it is evident that the considerations and parameters for determining whether an accused is entitled to claim protection under Section 19 of the Act and Section 197 Cr.P.C. are different.

20. Learned Prosecutor argued that the appellant shall not be heard to contend that sanction under Section 19 of the Act is either defective or invalid and he is precluded from challenging the prosecution for want of sanction under Section 197 Cr.P.C. Learned Prosecutor submitted that immediately after taking cognizance of the matter by the trial court, the appellant approached this Court with O.P.No.10181 of 1999 seeking quashment of the first information report. Learned Single Judge of this Court considered the matter and dismissed the original petition finding that the challenge raised by the appellant against Ext.P64 order of sanction was not maintainable. This Court found that the Government is not the appointing authority of appellant, but the Director of Employment. As such, the appellant was liable to be removed by the same Officer under the Civil Services (Classification, Control and Appeal) Rules. This Court found that the appellant was not removable from his office only by or with the

sanction of the Government and, therefore, he would not come under the protective cover of Section 197 Cr.P.C. or Section 19(1)(b) of the Act. The finding of the learned Single Judge was challenged by the appellant in W.A.No.925 of 2000 (**George v. State of Kerala - 2004 (2) KLT 369**). By the judgment in the writ appeal, delivered by a Division Bench, the finding of the learned Single Judge was confirmed. Learned Prosecutor, therefore, contended that the appellant cannot rake up a challenge against the validity of the order of sanction in a second round, that too, after the trial of the case. This contention of the prosecution is strongly opposed by the learned counsel for the appellant on the following reasons. Firstly, it was contended that the principle of res judicata or constructive res judicata has no application to a criminal proceeding. It is true that the concept of res judicata is founded on public policy. It is a bar in trying any suit or issue by a court in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or those who are litigating under the same title. It is also a settled proposition that res judicata is a rule of estoppel. It applies only in a civil litigation. Either res judicata or constructive res judicata is alien to criminal proceedings. The Supreme Court in **Lallubhai Jogibhai Patel v. Union of India and others (AIR 1981 SC 728)** considered the application of the doctrine of constructive res judicata in a writ of habeas corpus in relation to

illegal detention and found that the principles are totally inapplicable. The ratio reads as follows:

“The position that emerges from a survey of the above decisions is that the application of the doctrine of constructive res judicata is confined to civil actions and civil proceedings. This principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for a writ of habeas corpus under Article 32 of the Constitution on fresh grounds, which were not taken in the earlier petition for the same relief.”

21. Based on the decision of the Supreme Court in **Ashok Layland Ltd. v. State of T.N. and another (AIR 2004 SC 2836)**, the learned counsel for the appellant contended that a jurisdictional question, if wrongly decided would not attract the principle of res judicata. According to the learned counsel for the appellant, the decisions rendered by the learned Single Judge and the Division Bench rejecting the contention of the appellant that he could not be prosecuted without sanction under the relevant statutes are not only legally incorrect, but also against the constitutional provisions and binding precedents. Therefore, the order passed in the writ petition and also in the writ appeal mentioned above are without jurisdiction. So much so, they become a nullity. When an order is a nullity, it is axiomatic that it cannot be supported by invoking procedural principles like estoppel, waiver or res judicata. To reinforce this

submission, following passage from **Ashok Layland Ltd.**'s case is relied on:

“The principle of res judicata is a procedural provision. A jurisdictional question if wrongly decided would not attract the principle of res judicata. When an order is passed without jurisdiction, the same becomes a nullity. When an order is a nullity, it cannot be supported by invoking the procedural principles like, estoppel, waiver or res judicata.”

It is also contended that there cannot be any estoppel, waiver or acquiescence against the fundamental rights or a right conferred by a statute. According to the learned counsel, the appellant has a right to get protection envisaged under Section 19 of the Act and Section 197 Cr.P.C. He cannot be prosecuted without obtaining required sanction. Appellant further contended that the order of sanction issued in this case as per Ext.P64 is invalid in law. Hence, it can only be treated as no sanction. Reliance is placed on **Saurabh Jain v. State of Kerala (2011 (1) KLT 888 (FB))** to contend a proposition that estoppel is not a defence available to the State when its action is challenged on the ground of violation of any fundamental right or the provisions of the Constitution. This proposition of law has been stated earlier by the Apex Court in two Constitution Bench decisions in **Basheshar Nath v. Commissioner of Income-tax, Delhi and**

Rajasthan and another (AIR 1959 SC 149) and Olga Tellis and others v. Bombay Municipal Corporation and others (AIR 1986 SC 180).

Referring to the decision of the Supreme Court in **Behram Khurshid Pesikaka v. State of Bombay (AIR 1955 SC 123)** the Constitution Bench in **Basheshar Nath's** case (supra) held that it is not open to a citizen to waive his fundamental rights conferred by Part III of the Constitution. If it is a non-negotiable right available to a citizen, no one can contend that the right of a citizen is lost by waiver, estoppel or acquiescence. In **Olga Tellis's** case (supra), the same principle has been reiterated. It was also held that the Constitution is not only the paramount law of the land, but it is the source and sustenance of all the laws. The doctrine of estoppel is based on the principle that consistency in word and action imparts certainty and honesty to human affairs. The Supreme Court held that this principle can have no application to the enforcement of fundamental rights.

22. Learned counsel argued, as the appellant is charged with offences under the Act and IPC, that separate sanctions required under the Act and Cr.P.C. should have been procured before the court took cognizance of the case. To buttress this contention, learned counsel placed reliance on **R.Balakrishna Pillai v. State of Kerala and another (AIR 1996 SC 901)**. Two questions were raised before the Court in that case, viz., (i) whether sanction under Section 197(1) Cr.P.C. was required

for the prosecution under the P.C. Act of 1947 and (ii) whether sanction under Section 6 of the P.C. Act of 1947 was a prerequisite for the prosecution of accused even when he ceased to be a public servant on the date of taking cognizance by the Special Judge. Answering the first question, the Apex Court held that for trying an accused for a charge of criminal conspiracy under Section 120B IPC, sanction under Section 197 (1) Cr.P.C. is required. In that case the Supreme Court permitted the prosecution to proceed for offences under the Act, if it was otherwise sustainable on its own. Learned counsel for the appellant submitted that admittedly in this case there is complete absence of sanction under Section 197(1) Cr.P.C. It is therefore argued that sans the sanction under the above provision in the Cr.P.C., the prosecution could not have legally proceeded with the case implicating the appellant under sections 409, 465, 471 and 477A IPC. If trial in respect of those offences are barred under law and therefore, incompetent, in the special facts and circumstances of this case, the foundation of the trial under the Act too becomes shaky, contended the learned counsel for the appellant. I find some force in the argument.

23. The kernel of the prosecution case is that the appellant committed misappropriation, breach of trust, etc. by using forged documents and also by falsifying accounts. If the prosecution is legally precluded from proceeding with the trial of the appellant in respect of those

IPC offences and the evidence collected for proving those offences are so intrinsically connected with the allegations under the Act, then certainly without sanction under Section 197(1) Cr.P.C. the prosecution cannot be heard to say that the accused is guilty of any offence.

24. Learned counsel contended that the appellant has not suffered any set back by the decision in **George v. State of Kerala (2004(2) KLT 369)**, which was rendered at an earlier point of time in the same prosecution. According to the learned counsel, this decision is legally incorrect in view of the binding pronouncements of the Apex Court. On the basis of the aforementioned decisions, it was rightly contended that the principle of res judicata cannot be extended to criminal cases. That apart, right of an accused to get a fair trial cannot be negated in view of a finding in the same proceeding before the start of the trial. The principle of finality of judgments is only a facet of the principle of res judicata/constructive res judicata which is applicable only in civil cases. According to the learned counsel for the appellant, the law laid down in **George's** case is per incuriam/sub silentio and therefore, not a binding precedent. The constitutional provisions, viz., Article 154(1) read with 166(3) and Article 154(2)(b) read with Section 3 of the Kerala Public Services Act and Rule 9 of the Kerala Civil Services (Classification, Control and Appeal) Rules have not been considered in that decision. Further, Section 2(60) of the General

Clauses Act, 1897 was also omitted. Article 154 of the Constitution deals with the executive power of the State. It opens with a statement of law that the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Article 154(2)(b) says that nothing in this Article shall prevent the Parliament or the Legislature of the State from conferring by the law, functions on any authority subordinate to the Governor. Article 166(1) says that all executive action of the Government of a State shall be expressed to be taken in the name of the Governor. Clause (3) of Article 166 says that the Governor shall make rules for the more convenient transaction of business of the Government of the State and for the allocation among Ministers of the said business insofar as it is not business with respect to which the Governor is by or under the Constitution required to act in his discretion. Learned counsel placed reliance on Section 3 of the Kerala Public Services Act, 1968 wherein it is stated that all rules made under the proviso to Article 309 of the Constitution of India regulating the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the State of Kerala and in force immediately before 17.09.1968 shall be deemed to have been made under this Act. Rule 9 of the Kerala Civil Services (Classification, Control and Appeal) Rules, 1960 falling in Part III deals with appointing authorities. It clearly says that all

appointments to State and subordinate services shall be made by the Government. According to the learned counsel, the principles laid down in **George's** case is in total disregard of the above provisions. The core question, according to the learned counsel, is whether the word "Government" used in Section 197(1) Cr.P.C takes in delegates as per Article 154(2)(b) of the Constitution read with Section 3 of the Kerala Public Services Act and Rule 9 of the Kerala Civil Services (Classification, Control and Appeal) Rules. It is submitted that the question is no longer res integra and answered by a Constitution Bench of the Apex Court reported in **Gullapalli Nageswara Rao and others v. A.P. State Road Transport Corporation and another (AIR 1959 SC 308)**. Strong reliance is placed on paragraphs 25, 26, 27 and 28. The Constitution Bench in the said decision held that the State Government is an impersonal body and it can only function through the machinery and in the manner prescribed by law. Clause (60) of Section 2 of the General Clauses Act, 1897 defines "State Government" as respects anything done or to be done after the commencement of the Constitution (VII) Amendment Act, 1956 to mean, in a State, the Governor and in a Union Territory, the Central Government. Under Article 154(1) of the Constitution, the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the

Constitution. Referring to other provisions of the Constitution, the Supreme Court held that the concept of quasi judicial act implies that the act is not wholly judicial; it describes only a duty cast on the executive body or authority to conform to the norms of judicial procedure in performing some acts in exercise of its executive power. The procedural rules made by the Governor for the convenient transaction of business of the State Government apply also to quasi judicial acts; provided those rules conform to the principles of judicial procedure. It is therefore clear that the words "State Government" does not mean the Governor himself, but includes his delegates either under a valid law or under Article 154(1) read with 166(3) of the Constitution of India. Learned counsel therefore contended that as per the ratio in the above decision, a Government employee removable by the Governor or his delegates as per the above said provisions will come within the definition of the Government servant removable by the Government for the purpose of Section 197(1) Cr.P.C. The contention raised by the counsel is legally sound and therefore I am inclined to accept it. In the instant case, the appellant is a Government servant. His appointing authority as per the delegation made under Rule 9 of the Kerala Civil Services (Classification, Control and Appeal) Rules falling under Section 3 of the Public Services Act, which in turn is subservient to Article 309 of the Constitution of India, is the Director of Employment. Going by Article 311(1) of the Constitution, the appellant shall not be removed by an

authority subordinate to that by which he was appointed. Therefore, the appellant is removable by the Director himself. This does not take the employee (appellant) out of the purview of a Government employee who is removable by the Government as per the interpretation given to the Government by the above mentioned Constitution Bench decision. It is true that the Government has the power to decide on the sanctioning authority by delegating the power to another. It is submitted by the learned counsel that the power under Section 197(1)(b) Cr.P.C. was delegated to the Secretary, Vigilance Department by the State Government/Governor under Article 166 of the Constitution. Therefore, PW20 was not authorised to grant sanction under Section 197 Cr.P.C. as a delegate of the Governor as on the date of Ext.P64 sanction order. It is further contended that in the absence of sanction under Section 197 Cr.P.C. the very taking cognizance of the offences under Sections 409 and 477A IPC will fall to ground and the offences for which defective sanction was procured by the prosecution under Section 19(1)(c) of the Act, the offences under the Act also will not stand alone in the facts of this case.

25. The Division Bench in this appellant's case (George v. State of Kerala) in the earlier round of litigation held as follows:

“The authority to impose the penalty of removal on him as per statutory rules governing conditions of service is not Government, but the Director of

Employment. That means he could directly be removed or dismissed from service without any orders from Government, but upon an order by the Director. In such circumstances, merely because the Government is also having ultimate power to dismiss him being a superior authority, it could not be contended that sanction under S.197 of Cr.P.C. is required to prosecute him. If this contention is accepted, everyone employed in the Government Service can be prosecuted only with sanction from the Government as ultimately Government has also the power to remove him from service. This is not what is intended by S.197. Had it been so it would have been made clear in simple words that no Government servant shall be prosecuted in any case except with the sanction of the Government.”

Challenging the observation by the Division Bench that if the contention of the appellant was accepted, everyone in the Government service can be prosecuted only with the sanction from the Government, learned counsel placing reliance on **Nand Ran Agarwala v. H.C.Bhari and others (AIR 1956 SC 44(1))** [a Constitution Bench decision] contended that the Division Bench went wrong in making such an observation. The Constitution Bench observed that public servants have to be protected from harassment in the discharge of official duties while ordinary citizens not so engaged do not require this safeguard. The observations in the judgment would show that

if the Government gives sanction against one public servant but declines to do so against another, then the Government servant against whom sanction is given may possibly complain of discrimination. It is therefore contended that merely because the appellant happened to be an Upper Division Clerk, he cannot be deprived of a valuable right provided by the Code. I am certain that no classification on the basis of the rank of Government employees can be made to find out whether sanction is required or not. But the question is whether the act complained of fell within his official duty and also other attending facts. Therefore, from the above discussion, I am of the view that non obtaining sanction under Section 197 Cr.P.C. and defective obtaining of sanction under Section 19 of the Act are serious legal flaws in the prosecution case and each one is sufficient to vitiate the trial.

26. With great respect, I am of the view that the quotation mentioned above from the Division Bench decision is in direct conflict with the aforementioned provisions in the Constitution, the Statutes, Rules and also contrary to the principles in the decision of the Supreme Court in **Gullapalli Nageswara Rao's** case. Learned counsel relying on **Municipal Corporation of Delhi v. Gurnam Kaur ((1989) 1 SCC 101, State of U.P. v. Synthetics and Chemicals Ltd. ((1991) 4 SCC 139)** and **Govt. of A.P. v. B.Satyanarayana Rao((2000) 4 SCC 262)** contended that the rule of

per incuriam can be applied where a court omitted to consider the binding precedent of the same court or the Supreme Court rendered on the same issue or where a court omitted to consider any statute while deciding the issue. Hence, I am of the considered view that the Division Bench decision referred to above in this case cannot deter the appellant from challenging correctness of the order of sanction in this case.

27. Learned counsel contended that Ext.P65 first information report cannot be countenanced as PW1 himself has admitted that he filed a complaint earlier to Ext.P65, which was not produced. Relying on **Antony Cardoza v. State of Kerala (2011 (1) KLT 946)** it was contended that suppression of earlier statement or information given by the complainant will affect the substratum of the prosecution case. Therefore, I conclude this point by finding that the prosecution is bad for not obtaining proper sanction under Section 19 of the Act and the prosecution should fall for want of sanction under Section 197 Cr.P.C. These points are decided in favour of the appellant.

Point No.IV - Delay affecting the constitutional rights of the appellant.

28. Learned counsel for the appellant vehemently contended that the inordinate delay in the investigation and rigmarole of the trial have adversely affected the guaranteed constitutional right under Article 21 of

the Constitution for a fair trial. It is submitted by the counsel that it took three years to register a case and further four years to file a charge sheet. Besides the officers who conducted investigation are not competent under Section 17 of the Act. Section 17(c), which is applicable to this case, says that a Deputy Superintendent of Police or a Police Officer of equivalent rank shall investigate any offence punishable under the Act. The proviso says that if a Police Officer not below the rank of an Inspector of Police is authorised by the State Government in this behalf by general or special order, he may also investigate any such offence without the order of a Magistrate. In this case, there is no material produced to show that a Circle Inspector of Police was authorised by the Government to investigate the case, contended the learned counsel. In the absence of any general or special order as mentioned in Section 17 of the Act, the investigation by PWs 27 and 28, both officers in the rank of Inspectors cannot be said to be in compliance of the spirit of the statute. Long drawn investigation with unjustifiable delay certainly has affected the right of the appellant to get a fair trial. Therefore, this point is also decided in favour of the appellant.

29. Now coming to the evidence in this case also, it has to be seen that the oral and documentary evidence do not establish the guilt of the appellant. There is no definite evidence in this case that the appellant was the only person engaged in the distribution of the dole. Basic allegation against the appellant is that while the appellant was in charge of

distribution of unemployment assistance (dole) at the Town Employment Exchange, Pala, he abused his official position by falsifying accounts and forging documents and thereby he misappropriated certain amounts. According to the learned Public Prosecutor, on 31.08.1991 the surprise check conducted at Employment Exchange, Pala revealed the irregularities. On 27.04.1992, detailed enquiry order was made on the basis of the surprise check. On 30.03.1994, sanction was obtained to register the case and the first information report was registered on 22.04.1994. On 24.04.1994, the investigation started and on 25.04.1994, the appellant was suspended from service. Only on 13.07.1998 the sanction for prosecution under the Act was obtained. Still there was no sanction obtained under Section 197 Cr.P.C. It is an admitted case that on 31.03.1999, the appellant retired from service on superannuation and before that on 18.12.1998, a charge sheet was filed. Learned Prosecutor contended that oral evidence adduced by the prosecution witnesses will point a finger to the guilt of the appellant. After having gone through the oral evidence, I am of the definite view that the evidence tendered by the material prosecution witnesses would only show that the distribution of unemployment allowance was handled by the officers in the Employment Exchange, Pala including the appellant in a completely disorganized manner. The evidence, if analysed correctly, would show that the appellant cannot be blamed singly for the shortage of cash found out on inspection.

Therefore, I am of the view that the evidence in this case also do not support the prosecution case.

In the result, the appeal is allowed. Conviction and sentence imposed on the appellant under Sections 13(1)(c) read with Section 13(2) of the Prevention of Corruption Act, 1988 and also under Sections 409, 465, 471 and 477A of the Indian Penal Code is hereby set aside. He shall be set free forthwith, if not wanted in any other case.

All pending interlocutory applications will stand dismissed.

A. HARIPRASAD, JUDGE.

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A.HARIPRASAD, J.

Crl.Appeal No.844 of 2000

JUDGMENT

20th May, 2015