

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.4665 of 1991

Arising Out of Complaint Case No. 256 Year-1990 District- Muzaffarpur

Sri Ram Rekha Pandey, S/o Sri Sukhdeo Pandey, resident of Village-Koeli, P.S.-
Nanpur, District-Sitamarhi

.... Petitioner

Versus

1. The State of Bihar
 2. Sri Parmeshwar Ram, S/o Late Patiram, Inspector, Custom, Muzaffarpur
- Opposite Parties

Appearance :

For the Petitioner/s : Mr. T.P. Verma, Advocate
For the Opposite Party/s : Mr. Anjani Kumar, AAG6
Mr. Jharkhandi Upadhyay, A.P.P.

CORAM: HONOURABLE THE ACTING CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH

and

**HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

CAV JUDGMENT

**(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH)**

Date: 24/06/2016

Invoking the provisions as contained in Sub-section (3)
of Section 197 of the Code of Criminal Procedure, 1973 (hereinafter
referred to as the Cr.P.C.), the Government of Bihar, by a
notification, dated 16.05.1980, published in the official gazette, has
declared that the provisions of Sub-section (2) of the said Section
shall apply to the “*Officers and men*” wherever they may be serving
the State of Bihar of the Bihar Police Force, charged with
maintenance of public order and who have been appointed by the
Inspector General of Police, Bihar, or any other Officer specially



authorized to appoint any such person of such force under the Police Act, 1961. The effect of the said notification is that no Court can take cognizance of an offence, alleged to have been committed by a member of Bihar Police Force; charged with maintenance of public order, while acting or purporting to act in discharge of his official duty except with the previous sanction of the State Government.

2. Relying on the said notification, the petitioner, who, admittedly, at the relevant point of time, was posted as Officer-in-Charge of Government Rail Police Station, at Muzaffarpur, has sought for quashing of an order, dated 01.04.1991, passed by the learned Chief Judicial Magistrate, Muzaffarpur, whereby the learned Chief Judicial Magistrate, Muzaffarpur has taken cognizance of the offences punishable under Sections 147, 323, 353, 342 and 379 of the Indian Penal Code, through present application made under Section 482 of the Code of Criminal Procedure.

3. When the matter was taken up by a learned single Judge of this Court, on 14.05.1991, in addition to the said notification, the petitioner relied on a Single Bench decision of this Court in the case of ***Ram Swarath Yadav and Anr. v. Dr Rajeshwar Prasad Sinha and Ors.*** reported in ***1990 BBCJ 765***, and a Division Bench decision of Gujarat High Court in the case of ***Bhikhaji Vaghaji v. Barot and others*** reported in ***1992 Crl.L.J. 2014***.



4. Learned single Judge of this Court expressed his inability to accept the view taken by the learned single Judge of this Court in case of **Ram Swarath Yadav** (supra) and also expressed his disagreement with Division Bench decision of Gujarat High Court in the case of **Bhikhaji Vaghaji** (supra). Learned single Judge was of the view that the said notification, dated 16.05.1980, was wholly unwarranted, illegal and beyond jurisdiction as the word 'force' occurring in Sub-section 3 of Section 197 of the Code of Criminal Procedure, should be construed to mean 'Army' when deployed in a State or States in the case of emergency including for maintenance of public order.

5. Learned single Judge, accordingly, referred the matter for consideration by a Division Bench in following terms:-

“Thus I understand that the provisions contained in sub-section (3) of section 197 of the Code lays down that the State Government may notify that the provision of sub-section (2) shall apply to such class or category of member of force, i.e., the Army charged with the maintenance of public order, as may be specified in the notification and thus in such a situation State Government will be the competent authority to accord sanction for prosecution of the class of Army as discussed above in place of Central Government as

provided under sub-section (2) of section 197 of the Code. If sub-section (3) is interpreted in this way there will be no conflict with the provisions contained in sub-section (1) of section 197 of the Code, since the Army has been treated as a different class of public servants which are not covered by sub-section (1).

For the aforesaid reasons, I am of the view that the notification relied upon by the petitioner in the case of Sri Ram Swarath Yadav (Supra) as well as in this case, issued by the State Government is unwarranted, illegal and without jurisdiction but since there are decisions on this point, which are contrary to my view, and an important question of law, having far reaching consequences, is involved in this case, therefore, this application should be heard by a Division Bench.”

6. When the matter came up for consideration before a Division Bench of this Court, the Division Bench thought it proper to refer the point for consideration to a larger Bench by an order, dated 19.03.1998, recording as follows:-

“In this case, moot question arises for consideration-whether the State Government in exercise of its power conferred by sub-section (3) of Section



197 of the Code of Criminal Procedure (in short 'the Code'), can issue a notification declaring that the provisions of sub-section (2) of the said Section shall apply to the officers and men wherever they may be serving, the State of Bihar in the Bihar Police Force charged with the maintenance of public order and who have been appointed by the Inspector General of Police, Bihar or any other officer specially authorized to appoint any person to such force under the Police Act.

2. As per sub-section (1) of Section 197 of the Code, no previous sanction is required for the class of public servants who do not fall within the category defined in that sub-section. In other words, previous sanction would only be necessary for those class of officers who are removable from service by the Central Government or the State Government as the case may be. No such distinction has been made in sub-section (2) of Section 197 of the Code. As per this provision, previous sanction of the Central Government is required before taking cognizance of any offence alleged to have been committed by any member of the armed force.

3. A learned Single Judge of this Court in the case of Sri Ram Swarath Yadav and anr. v. Dr Rajeshwar Prasad Sinha (1990 BBCJ 765), while placing reliance on a Division Bench decision of the Gujarat High Court in the case of Bhikhaji Vaghaji v. Barot and others (1982 Crl. L.J. 2014), has held that in terms of the notification issued under subsection (3) of section 197 of the Code, previous sanction would be necessary even in a case of Officer Incharge of the Police Station charged with the maintenance of public order.

4. Having regard to the aforesaid decisions, we feel inclined to refer this case to a larger Bench. Accordingly, let the records of this case be placed before the Hon'ble the Chief Justice for necessary orders."

7. This is the background in which the present matter has been placed before the full bench for consideration.

8. Submissions have been advanced at length on behalf of the petitioner and the State of Bihar justifying the correctness of the notification. However, in view of recent decision of the Supreme Court in case of ***Om Prakash vs. State of Jharkhand*** reported in

2012(12) SCC 72, we are not inclined to discuss and go into those submissions in detail since in our considered view the said decision is complete answer to the reference to the full bench.

9. For better appreciation of the issue involved, it would be apt to reproduce relevant portion of Section 197 of the Code of Criminal Procedure and the notification, in question, dated 16.05.1980. Section 197 of the Code of Criminal Procedure 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) 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:¹ Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted.

(2) No Court shall take cognizance of any



offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub- section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub- section will apply as if for the expression" Central Government" occurring therein, the expression" State Government" were substituted.

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10. The notification, dated 16.05.1980, which is at the core of controversy, issued under Sub-section (3) of Section 197 of the Code of Criminal Procedure, reads thus:-

“In exercise of the power conferred by sub-section (3) of section 197 of the Code of Criminal Procedure, 1973 (Act II of 1974), the Governor of Bihar is pleased to declare that the provision of sub-section (2) of the said section shall apply to the officers and men wherever they may be serving the State of Bihar of the Bihar Police Force charged with the maintenance of public order and who have been appointed by the Inspector General of Police, Bihar., or any other officers specially authorized to appoint any persons to such force under the Police Act (Act V of 1961).”

11. As has been noted above, the said notification, dated 16.05.1980, had come up for consideration by the Supreme Court in case of **Om Prakash** (supra). Paragraph 9 of the said decision is crucial for answering the reference, which is being extracted hereinbelow:-

“Before we deal with the rival contentions, it is necessary to state one admitted fact which leads us to conclude that the reason given by the High Court for not quashing proceedings against appellant Om Prakash and others, namely, that no notification under Section 197(3) of the Code was produced by them protecting them from prosecution in respect of any offence alleged to have been committed while acting or purporting to act in discharge of their official duties, is incorrect. We have been shown a copy of the Notification dated 16.05.1980 issued by the State of Bihar which extends the protection of force as it includes both officers and men. Mr. Gonsalves, learned Senior Counsel for the complaint has not disputed this position. It is, therefore, not necessary to dilate further on this issue.”

12. The Supreme Court, has, thus, taken note of the notification, in question, observing that the same extends protection to



all officers and men of the police force of the State of Bihar and, therefore, the said observation of Supreme Court in case of **Om Prakash** (supra), in our view, is direct answer to the reference made by the learned single Judge and the Division bench. Invoking the said notification, which requires sanction for prosecution as condition precedent for taking cognizance of offence alleged to have been committed by a Police Officer, the Supreme Court quashed the complaint cases filed against the appellants of that case, who were the Police Officers.

13. From reading of Supreme Court's decision in case of **Om Prakash** (supra), it transpires that cognizance of offence said to have been committed by the Deputy Superintendent of Police and some other Police personnel, was taken and, upon challenge, the High Court, in exercise of power under Section 482 of the Code of Criminal Procedure, set aside the cognizance order to the extent it related to the Deputy Superintendent of Police on the ground that sanction, required under Section 197 of Code of Criminal Procedure, was not obtained. The High Court of Jharkhand, however, had dismissed the petitions filed by other Police personnel as no notification, under Section 197(3) of the Code of Criminal Procedure, was produced by them to establish that they were protected against prosecution in respect of any offences alleged to have been committed by acting or purporting



to act in discharge of their official duty. The said notification, as is evident from paragraph 9 of the judgment as noted above, was produced before the Supreme Court and applying the protection granted under said notification, the Supreme Court quashed the complaint case itself. Before quashing the complaint case, the Supreme Court made following observations in paragraph 42 of its decision in case of **Om Prakash** (supra):-

“It is not the duty of the police offices to kill the accused merely because he is a dreaded criminal. Undoubtedly, the police have to arrest the accused and put them up for trial. This Court has repeatedly admonished trigger-happy police personnel, who liquidate criminals and project the incident as an encounter. Such killings must be deprecated. They are not recognized as legal by our criminal justice administration system. They amount to State-sponsored terrorism. But, one cannot be oblivious of the fact that there are cases where the police, who are performing their duty, are attacked and killed. There is a rise in such incidents and judicial notice must be taken of this fact. In such circumstances, while the police have to do their legal duty of arresting the criminals, they have also to protect themselves. The requirement of sanction to prosecute affords protection to the

policemen, who are sometimes required to take drastic action against criminals to protect life and property of the people and to protect themselves against attack. Unless unimpeachable evidence is on record to establish that their action is indefensible, mala fide and vindictive, they cannot be subjected to prosecution. Sanction must be a precondition to their prosecution. It affords necessary protection to such police personnel. The plea regarding sanction can be raised at the inception.”

14. In view of the above decision of the Supreme Court in case of **Om Prakash** (supra), we answer the reference as follows:-

- (i) The notification, dated 16.05.1980, cannot be held to be beyond the scope and/or powers conferred on the State Government under Sub-section (3) of Section 197 of the Code of Criminal Procedure, the same having been applied by Supreme Court in case of **Om Prakash vs. State of Jharkhand** (supra) and criminal prosecution having been quashed against police personnel on that ground. We are mindful of the fact that the question of jurisdiction of the State Government to issue notification, granting protection to police personnel in exercise of power under section

197(3) of the Cr.P.C., was neither raised nor decided.

- (ii) In view of the said notification, the previous sanction of the offences alleged to have been committed by the Police Officers, while acting or purporting to act in discharge of his official duty is a condition precedent. The decision of a learned single Judge of this Court in case of ***Ram Swarath Yadav and Anr. v. Dr Rajeshwar Prasad Sinha and Ors.*** (supra) lays down the correct law. Accordingly, we are in agreement with the Division Bench decision of Gujarat High Court in case of ***Bhikhaji Vaghaji v. Barot and others*** (supra).

15. After having answered the reference, we would have, normally, sent the matter back for adjudication on merits by a learned single Judge. However, after having dealt with the questions, we have considered it appropriate to dispose of the matter by the present judgment.

One Parmeshwar Ram, Inspector, Customs, Muzaffarpur lodged a complaint case, on 31.03.1990, giving rise to Complaint Case No. 256 of 1990 implicating the petitioner and five other Police personnel, who were posted in Government Rail Police Station, Muzaffarpur. The complaint case was lodged, on 31.03.1990,



for an offence said to have been committed on 29.03.1990. It is alleged, in the complaint, that when the complainant was in the process of causing search of articles possessed by one Sahid, the petitioner and other police personnel came and asked the complainant to release the said Md. Sahid. Allegedly, accused No. 2, B.K. Sharma, Sub-Inspector of Police, attempted to snatch a briefcase from Punit Das, a Constable of Customs, which was being searched. It is alleged that on the direction of the petitioner, other police personnel assaulted the complainant and his colleagues and snatched away the briefcase. It further transpires from the records that on the basis of the statement of Md. Sahid Ahmad, First Information Report, vide Government Rail Police Station Case No. 17 of 1990, was registered, on 29.03.1990, against Customs personnel asserting therein, *inter alia*, that when he reached Muzaffarpur Railway Station by a train, while he was alighting from the train, a few persons came and started searching his briefcase. It is also alleged that some of them took out money from his pocket. The occurrence, on the platform, caused a commotion, whereafter police officials are said to have come to pacify the situation.

16. It appears from the impugned order, dated 01.04.1991, passed by learned Chief Judicial Magistrate, Muzaffarpur, that plea of sanction as a pre-condition for taking

cognizance, was taken, but relying on a decision of this Court in case of ***Balram Bhagat @ Balram Prasad vs. The State of Bihar & another***, reported in ***1989 PLJR 312***, the learned Chief Judicial Magistrate did not wait for sanction and took cognizance and issued summonses to the petitioner and other accused persons.

17. upon examination of this Court's decision in case of ***Balram Bhagat*** (supra), on which learned Chief Judicial Magistrate has placed reliance while rejecting the plea of requirement of sanction before taking cognizance, it has been held that there is no requirement of sanction for prosecution as envisaged under Section 197(3) of the Code of Criminal Procedure for an Officer below the rank of Assistant Superintendent of Police. In arriving at the said conclusion, learned single Judge, in the case of ***Balram Bhagat*** (supra) placed reliance on Supreme Court's decision in case of ***Nagraj vs. State of Mysore (A.I.R. 1964 S.C. 269)*** and subsequent decision of this Court reported in case of ***Narmadeshwar Sharma vs. Sarju Charan Poddar (1964 Cr. L. J. 959)***. In the case of ***Balram Bhagat*** (supra), no notice has been taken on the government notification, dated 16.05.1980. The said decision cannot be said to be laying down a correct position of law. The order, taking cognizance and issuing summonses by the learned Chief Judicial Magistrate, is apparently contrary to the State Government's Notification, dated 16.05.1980.

18. It is apparent from the complaint that the occurrence had taken place at the Railway Station, where the petitioner was posted. In such circumstances, in our view, the learned Court below committed an error by taking cognizance without sanction as required under Section 197(3) of the Code of Criminal Procedure read with the Notification, dated 16.05.1980.

19. Considering the above and following the Supreme Court decision in case of **Om Prakash** (supra), this application stands allowed.

20. The order, taking cognizance and the order, issuing summonses, dated 01.04.1991, are, hereby, quashed.

(Chakradhari Sharan Singh, J)

I. A. Ansari, ACJ. : I agree.

(I.A. Ansari, ACJ)

Navaniti Prasad Singh, J : I agree.

(Navaniti Prasad Singh,J)

Vats/-

AFR/NAFR	NAFR
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