

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.09.2017

PRONOUNCED ON : 13.09.2017

CORAM:

THE HONOURABLE DR.JUSTICE **G.JAYACHANDRAN**

Criminal Revision Case No.1663 of 2016 and
Crl.M.P.No.13785 of 2016

Ramesh Gelli

..

Petitioner

Vs

The Inspector of Police,
Central Bureau of Investigation,
Bank Securities & Fraud Cell,
Bangalore.

.. Respondent

Prayer:- Criminal Revision filed under Sections 397 and 401 of Criminal Procedure Code to set aside the order passed in Crl.M.P.No.5944 of 2016 in C.C.No.3 of 2009 pending on the file of the learned XI Additional Special Court at Chennai and direct the trial Court to return back the charge sheet filed by the respondent in lieu of the dictum laid down by the Hon'ble Supreme Court in **N.K.Ganguly v. Central Bureau of Investigation** reported in 2016 (2) SCC 143.

For Petitioner : Mr.Abudukumar Rajarathinam,
for Mr.S.Ashok Kumar

For Respondent : Mr.K.Srinivasan,
Special Public Prosecutor (CBI cases)

ORDER

This Criminal Revision Case is filed by the petitioner seeking to set aside the order passed in CrI.M.P.No.5944 of 2016 in C.C.No.3 of 2009 pending on the file of the learned XI Additional Special Court at Chennai and direct the trial Court to return back the charge sheet filed by the respondent in lieu of the dictum laid down by the Hon'ble Supreme Court in **N.K.Ganguly v. Central Bureau of Investigation** reported in 2016 (2) SCC 143.

2.The contention of the learned counsel appearing for the revision petitioner is that the petitioner was former Chairman-cum-Managing Director of Global Trust Bank which later got merged with Oriental Bank of Commerce. Based on the complaint of the year 2004, an F.I.R. was registered on 26.03.2007 by the respondent police which entrusted with specific task of investigation of bank securities and fraud cases. The main contention of the revision petitioner is that he being a servant of private bank, cannot be considered as public servant to be prosecuted under the Prevention of Corruption Act. However this contention, in a different case, was negatived by the Hon'ble Supreme Court to the extent that under Section 46-A of the Banking Regulation Act, for offence under Chapter IX of IPC, the employees of the bank covered

under the Banking Regulation Act will be treated as public servants. Later, provisions in Chapter IX of IPC namely, Sections 161 to 165-A was omitted in IPC and incorporated in the Prevention of Corruption Act, 1988. The corresponding amendment was not brought into the Banking Regulation Act. However, the Hon'ble Supreme Court has held that it is a causes omissus. As far as substitution of Sections 161 to 165-A under Chapter IX of IPC by Prevention of Corruption Act, it is strenuously contended by the learned counsel for the petitioner that the Sections analogous to old Sections 161 to 165-A of IPC are only Sections 7 to 12 of the Prevention of Corruption Act and not Section 13 of the Prevention of Corruption Act. For that effect, a clarification has also been given by the Hon'ble Supreme Court in the earlier case filed by the present revision petitioner. Therefore, even if a private Bank employee is a public servant as per Section 46-A of the Banking Regulation Act, 1949, the said deeming clause shall apply only to Sections 7 to 12 of the Prevention of Corruption Act and not for Section 13 of the Prevention of Corruption Act.

3. In the light of the above factual background, the petitioner has filed an application before the trial Court to return back the charge sheet. Since, the prosecution has not applied necessary sanction

under Section 197 Cr.P.C., as per the dictum laid down by the Hon'ble Supreme Court in **N.K.Ganguly v. Central Bureau of Investigation** reported in 2016 (2) SCC 143, whenever there is an allegation against the accused in discharge of official duty, it is mandatory that while prosecuting the accused under the I.P.C., offence, sanction under Section 197 Cr.P.C., is necessary. In the absence of sanction, charge sheet has to be returned.

4.The trial Court, after considering the submission made by the learned counsel for both parties, has dismissed the case as devoid of merits. Challenging the same, the present Criminal Revision has been filed on the ground that the Hon'ble Supreme Court has held that the petitioner is a public servant by virtue of the provision of Section 46A of Banking Regulation Act, 1949, in **CBI v. Ramesh Gelli** (the petitioner herein) (2016(3) SCC 788), the Hon'ble Supreme Court had also further clarified that the Chairman/Managing Director/Executive Director for Private Banking shall be deemed to be public servant for the offence committed under Sections 7 to 12 I.P.C., alone. Therefore, the Hon'ble Supreme Court has widen the scope of 'public servant' for prosecuting a public servant under I.P.C., Offences, sanction has to be obtained under Section 197 I.P.C. Whenever there is a nexus with the alleged offence and the discharge of their official duty irrespective of sanction granted under Section 19 of Prevention

of Corruption Act. Since, the prosecution has not obtained sanction under Section 197 Cr.P.C., to prosecute the petitioner, a deemed public servant, as per the Hon'ble Supreme Court interpretation, the charge sheet in C.C.No.3 of 2009 has to be returned back, in view of the dictum laid down by the Hon'ble Supreme Court in **N.K.Ganguly v. Central Bureau of Investigation** (cited supra).

5.The learned Special Public Prosecutor (CBI cases) appearing for the respondent contended that the present Criminal Revision is ill-conceived and misdirected. The Hon'ble Supreme Court in **CBI v. Ramesh Gelli** (cited supra), where the present petitioner was the respondent has categorically held that the Banking Regulation Act, 1949 which came into force prior to the Prevention of Corruption Act, 1988 had a provision under Section 46A of Banking Regulation Act, which reads as under:-

"46A. Chairman, Director, etc., to be public servants for the purposes of Chapter IX to the Indian Penal Code

Every Chairman who is appointed on a whole-time basis, Managing Director, Director, Auditor, Liquidator, Manager and any other employee of a banking company shall be deemed to be a public servant for the purposes of Chapter IX of the Indian Penal

Code (45 of 1860)."

6.This provision was inserted in the Banking Regulation Act, 1949 with effect from 14.01.1991 wherein, the Chairman, Managing Director, etc., of Banking shall be deemed to be a public servant for the purpose of Chapter IX of I.P.C. This provision was further amended in the year 1994 with effect from 31.01.1994 wherein, the words "appointed on whole time basis" were deleted as such every Chairman, Managing Director, Director, Auditor, Liquidator, Manager any any other employee of Banking shall be deemed to be a 'public servant'.

7.Since, Chapter IX of I.P.C., was deleted from the Code in the year 1988, after the enactment of Prevention of Corruption Act, 1988, the express, corresponding amendment ought to have been made to under Section 46A of Banking Regulation Act, however, such amendment has not been carried out. Such omission is not a conscious omission but only a causes omissus, as per the direction of the Hon'ble Supreme Court and therefore, the petitioner herein who is deemed to be a 'public servant' as per the interpretation of Section 46A of the Banking Regulation Act, and the interpretation given to the said provision by the Hon'ble Supreme Court in his own case reported in **CBI v. Ramesh Gelli** (cited supra), the petitioner has no reason to dispute about his 'public servant' status.

8. So far as the plea of sanction under Section 197 Cr.P.C., is concerned, in the very same judgment, the Hon'ble Supreme Court has categorically held that the public servant as defined in Section 2(C) of the Prevention of Corruption Act, as a wider meaning than the general definition of 'public servant' given under Section 21 I.P.C., and therefore, a public servant under the Prevention of Corruption Act, need not necessarily be a 'public servant' under Section 21 of I.P.C.

9. Sanction under Section 197 Cr.P.C., is mandatory if the person satisfies two conditions. First, the 'public servant' should be a person appointed by the Government and secondly, the offence alleged to have been committed ought to have been committed while acting or purporting to act, in discharge of his official duty.

10. In so far as the petitioner is concerned, he is neither the 'public servant' appointed by the Government nor, the alleged offence is committed while acting or purporting to act in discharge of his official duty. Therefore, the learned Special Public prosecutor (CBI cases) submitted that the judgment rendered by the Hon'ble Supreme Court in **Mohd. Hadi Raja v. State of Bihar** (1998 (5) SCC 91) squarely applies to the facts of the case and there is no

ground to entertain the Criminal Revision Case.

11.As a counter submission, the learned counsel for the petitioner submitted that after the judgment in **Mohd. Hadi Raja v. State of Bihar** (cited supra), much water has flown under the bridge regarding the interpretation of application of Section 197 Cr.P.C. The march of law as it now stands is reflected in **N.K.Ganguly v. Central Bureau of Investigation** (cited supra) rendered on 19.11.2015 by the Hon'ble Supreme Court.

12.The point for consideration is that, "Whether the petitioner who is now declared as a 'public servant' by the Hon'ble Supreme Court in the judgment in **CBI v. Ramesh Gelli** (cited supra), for the purpose of Prevention of Corruption Act, is also a 'public servant' for the purpose of I.P.C., offence ?" and "Whether sanction under Section 197 of Cr.P.C., is a prerequisite to prosecute him ?"

13.Section 197 Cr.P.C, is a protection given to the officers of Government companies or public undertaking from needless and vexatious prosecution. However, such a protection is available for the 'public servant' only for the other conditions indicated in the sections are fulfilled. In **N.K.Ganguly v. Central Bureau of Investigation** (cited supra), the judgment relied by the learned counsel for the petitioner, several judgments of the Hon'ble Supreme Court including

two Constitutional Bench judgments in **K.Swatwant Singh v. State of Punjab** (AIR 1960 SC 266); **B.Saha v. M.S.Kochar** (1979 (4) SCC 177) and three judges Bench of the Hon'ble Supreme Court in **Shreekantiah Ramaya Munipalli v. State of Bombay** (AIR 1955 SC 287 and few more cases including the judgment in **Praksh Singh Badal v. Union of India** (2007 (1) SCC 1) and has concluded as follows:-

"From a perusal of the case law referred to supra, it becomes clear that for the purpose of obtaining previous sanction from the appropriate government under Section 197 of CrPC, it is imperative that the alleged offence is committed in discharge of official duty by the accused. It is also important for the Court to examine the allegations contained in the final report against the Appellants, to decide whether previous sanction is required to be obtained by the respondent from the appropriate government before taking cognizance of the alleged offence by the learned Special Judge against the accused. In the instant case, since the allegations made against the Appellants in the final report filed by the respondent that the alleged offences were committed by them in discharge of their official duty, therefore, it was essential for the learned Special Judge to

correctly decide as to whether the previous sanction from the Central Government under Section 197 of CrPC was required to be taken by the respondent, before taking cognizance and passing an order issuing summons to the appellants for their presence.”

14. Whether the offence alleged to have committed is on discharge of official duty of the accused is a litmus test to ascertain whether sanction under Section 197 Cr.P.C., is required or not. For the said purpose, **Mohd. Hadi Raja v. State of Bihar** case, provides the yardstick to find out what act could be alleged to be committed by the public servant while acting or purporting to act in discharge of his official duty.

“Although the instrumentality or agency with a corporate veil, for all intents and purposes may be held to be a third arm of the government and such instrumentality discharges the duties and functions which the State intends to do as indicated in *Ajay Hasia's case* (1981 (1) SCC 712), such instrumentality or agency is none the less juridical person having a separate legal entity. Therefore, such instrumentality must be held to have an independent status distinct from the State and cannot be treated as a government department for all purposes.

Therefore, even if an officer of such instrumentality or agency takes or receives, keeps or expends any property or executes any contract, such acts even though in ultimate analysis may be held to have been done in the interest of the State, Such action cannot be construed, as of rule, an action of the government by its employees or by an authority empowered by the government. It may be indicated here that it is not necessary that persons falling under any of the descriptions given in various clauses under [Section 21](#) of IPC need to be appointed by the government. If such person falls under any of the descriptions as contained in various clauses of [Section 21](#) of the Indian penal code, such person must be held to be a public servant. [Explanation 1](#) of [Section 21](#) indicates that persons falling under any of the above descriptions are public servants whether appointed by the government or not [Explanation 2](#) indicates that wherever the words 'public servant' occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to held that situation. Sub clause (b) of clause twelve of [section 21](#) expressly makes the officers of local authority and corporation established by or under a Central, Provincial or [State Act](#) or a government owned company

as defined in [Section 617](#) of the Companies Act 1956, public servants. But protection under [section 197](#) Cr. P.C. is not available to a public servant unless other condition indicated in that Section are fulfilled.

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

15.In **Mohd. Hadi Raja v. State of Bihar** (cited supra), the Hon'ble Supreme Court after referring catena of judgment has interpreted the phrase, 'offence committed' while discharging official duties. To set the issue rest, those judgments are also extracted below.

(i) In three Judges Bench in **P.K.Pradhan v. The State of Sikkim rep. By the C.B.of I** (JT 2001 (5) SC 610), it has been held

as follows:-

"Thus, from a conspectus of the aforesaid decisions, it will be clear that for claiming protection under [Section 197](#) of the Code, it has to be shown by the accused that there is reasonable connection between the act complained of and the discharge of official duty. An official act can be performed in the discharge of official duty as well as in dereliction of it. For invoking protection under [Section 197](#) of the Code, the acts of the accused complained of must be such that the same cannot be separated from the discharge of official duty, but if there was no reasonable connection between them and the performance of those duties, the official status furnishes only the occasion or opportunity for the acts, then no sanction would be required. If the case as put forward by the prosecution fails or the defence establishes that the act purported to be done is in discharge of duty, the proceedings will have to be dropped. It is well settled that question of sanction under [Section 197](#) of the Code can be raised any time after the cognizance; may be immediately after cognizance or framing of charge or even at the time of conclusion of trial and after conviction as well. But there may be certain cases where it may not be possible to decide

the question effectively without giving opportunity to the defence to establish that what he did was in discharge of official duty. In order to come to the conclusion whether claim of the accused, that the act that he did was in course of the performance of his duty was reasonable one and neither pretended nor fanciful, can be examined during the course of trial by giving opportunity to the defence to establish it. In such an eventuality, the question of sanction should be left open to be decided in the main judgment which may be delivered upon conclusion of the trial."

(ii).In **S.K.Zutshi v. Biman Debnath** (2004 (8) SCC 31) it has been held as follows:-

"8.....the question is how should the expression, 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty', be understood? What does it mean? 'Official' according to dictionary, means pertaining to an office, and official act or official duty means an act or duty done by an officer in his official capacity. In **B. Saha and Ors. v. M. S. Kochar** (1979 (4) SCC 177), it was held : (SCC pp. 184-85, para 17) "The words 'any offence alleged to have been committed by

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

Use of the expression, 'official duty' implies that the act or omission must have been done by the public in the course of his service and that it should have been in discharge of his duty. The Section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those

acts or omissions which are done by a public servant in discharge of official duty. 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 and without any justification therefor then the bar under Section 197 of the Code is not attracted....."

This judgment has brought out the difference between the act or omission committed in the course of service and the act committed in discharge of official duty.

(Emphasis applied)

16. From the final report, it could be seen that the petitioner has committed misconduct in the course of his duty exercising his power as Chairman cum Managing Director but the act committed by him is not in discharge of his official duty. Therefore, the protection given to a 'public servant' under Section 197 Cr.P.C., is not available to this petitioner. The other contention to seek protection under Section 197 Cr.P.C., is that the 'public servant' should be an officer not removable from his office save by or with the sanction of the Government.

(Emphasis applied)

17. Admittedly, the petitioner is not a Government servant but only a 'public servant'. It is submitted by the learned counsel for the petitioner that the Deputy Governor of Reserve Bank of India is the competent authority to remove the Chairman cum Managing Director of a Bank.

18. Even that is so, it is not the Government who has appointed him and it is not the competent authority to remove him from office. Therefore, banking sector, being governed by the Reserve Bank of India and considered as limb of the State under Article 12 of the Act and by virtue of Section 46A of Banking Regulation Act, the petitioner is deemed to be a 'public servant' for the purpose of provisions under the Prevention of Corruption Act. It cannot be extended to I.P.C.

19. Even for the sake of argument, if the petitioner should be considered as a 'public servant' for I.P.C. offences also, the protection available under Section 197 I.P.C., is not available for the petitioner herein since, the conditions in-built in Section 197 Cr.P.C., which say a person removable from office save or by sanction to Government and the act committed or purported to committed in discharge of official duty, does not attracts to the facts of the present case.

20. At this juncture, it is appropriate to extract the observation of the privy council in **H.H.B Gill and Another v. The King** (AIR 1948 Privy Council 128), where the privy council has said, thus:-

"A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a Judge neither acts nor purports to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act: nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office."

Therefore, for the above said reasons, this Court holds that there is no merit in this Criminal Revision Case and accordingly, the same is liable to be dismissed.

21.In the result, the Criminal Revision is dismissed and the judgment passed by the trial Court is confirmed. Consequently, connected miscellaneous petition is closed.

13.09.2017

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Index: Yes

Speaking Order/non speaking order

To

1.The XI Additional Special Court,
Chennai.

2.The Inspector of Police,
Central Bureau of Investigation,
Bank Securities & Fraud Cell,
Bangalore.

3.The Special Public Prosecutor (CBI cases),
High Court, Madras.

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Pre Delivery Order made in
Crl.R.C.No.1663 of 2016

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