(2016) 08 PAT CK 0098

PATNA HIGH COURT

Case No: Criminal Miscellaneous No.10414 of 2016 (Arising Out of PS.Case No. -24 Year-2008 Thana -C.B.I Case District Patna).

Dr. Panchanand Prasad (Son of Late Shri Mahadeo Lal Das, Resident of Village Ramanakabad, P.S. Haveli Kharagpur, District Munger) - Petitioner @HASH The State of Bihar Through Vigilance - Opposite Party	Vs	APPELLANT RESPONDENT

Date of Decision: Aug. 3, 2016

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 197

Citation: (2016) 3 BBCJ 204 : (2016) 4 BLJud 96 : (2016) CriLJ 4749 : (2016) 4 PLJR 616

Hon'ble Judges: Aditya Kumar Trivedi, J.

Bench: Single Bench

Advocate: Mr. Bindhya Kesri Kumar, Sr. Advocate and Mr. Arun Kumar, Advocate, for the Petitioners; Mr. Ramakant Sharma (L.O.I/C Vig.) Mr. Kedar Singh, Advocate, for the Opposite Party''s

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Mr. Aditya Kumar Trivedi, J. - Heard learned Senior Counsel for the petitioner as well as learned Senior Counsel of the Vigilance.

2. At an earlier occasion while the petitioner/accused had approached the Hon''ble Apex Court under SLP (Criminal) No. 9300/2012, the same was dismissed on 24.02.2015, however, the question with regard to sanction was directed to be

remained open and under the guise of aforesaid latitude, petitioner has prayed for discharge before the learned lower court advancing his plea that the Law Department, which had issued the sanction, is not at all competent one, no material was available before the concerned authority which could have justified the process of sanction and further, the Law Department neither happens to be Appointing Authority nor Dismissing Authority. Therefore, sanction is defective one whereupon no prosecution could survive as proper sanction is sine qua non for pro valid prosecution. To substantiate such plea, the learned counsel for the petitioner also relied upon principle laid down by this Court under Cr. Misc. No. 44151/2008 as well as Cr. Misc. No.18584/2010, though the orders of aforesaid Cr. Miscellaneous neither being annexed with brief nor have been placed during course of argument.

3. Learned Senior Counsel for the petitioner, during course of argument has also placed short notes which substantiates his plea whatever been advanced during course of his argument. It has also been pleaded as is evident from the notes of argument that the defect so pointed out at an earlier occasion could be rectified and followed with issuance of fresh sanction and on account thereof, subsequent prosecution is permissible. However, till subsistence of aforesaid defect, further proceeding is forbidden which ultimately should be directed to conclude by way of discharge of the accused.

4. At the other end, learned senior counsel representing Vigilance while controverting the submissions made on behalf of petitioner, has submitted that from the sanction order, it is apparent that the same was accorded after perusal of the File No. 9/AA-03-03-2008 belonging the Health Department which contains the relevant materials and that being so, it could not be said that the State Government was not at all versed with the materials with regard to the facts and circumstances of the case. That being so, the Sanctioning Authority had an opportunity to go through the relevant materials whereupon found justified in granting sanction. Furthermore, it has also been submitted that Sanctioning Authority is the State Government and not the Secretary, Law Department which is itself evident from the sanction order (Annexure 7). The Secretary, Law Department was only entrusted to issue the same in obedience to the order of the State Government which he issued and so, it could not be said that the Secretary, Law Department happens to be the Sanctioning Authority and further would question his propriety as being Sanctioning Authority.

5. It has further been submitted that though, the law speaks with regard to the obligation on the aforesaid score to be raised at an earliest but, that does not mean that on that very score, the petitioner should be discharged rather, the objection is to be seen in the background of the evidence having been adduced during course of trial and so, before conduction of the trial it will be premature to adjudicate the same. As such, it had been submitted that the petition under reference sans merit whereupon, is fit to be dismissed.

6. In **CBI v. Ashok Kumar Aggarwal reported in 2014 Cr.L.J. 930**, the aforesaid issue along with other issues were raised before the Hon''ble Apex Court while challenging the validity of the prosecution and so far present controversy is concerned, after discussing the relevant judicial pronouncements as well as taking into account the relevant provisions of law under para-47, it had been held:-

"Undoubtedly, the stage of examining the validity of sanction is during the trial and we do not propose to say that the validity should be examined during the stage of enquiry or at pretrial stage".

7. In **State of Bihar v. Rajmangal Ram reported in 2014 Cr.L.J 2300**, where under also sanction order was issued by the Law Department and further, on the basis thereof, this Court had quashed the order of learned lower court. While setting aside the same, it had been held by the Hon''ble Apex Court as follows:-

10. In the instant cases the High Court had interdicted the criminal proceedings on the ground that the Law Department was not the competent authority to accord sanction for the prosecution of the respondents. Even assuming that the Law Department was not competent, it was still necessary for the High Court to reach the conclusion that a failure of justice had been occasioned. Such a finding is conspicuously absent rendering it difficult to sustain the impugned orders of the High Court.

11. The High Court in both the cases had also come to the conclusion that the sanction orders in question were passed mechanically and without consideration of the relevant facts and records. This was treated as an additional ground for interference with the criminal proceedings registered against the respondents. Having perused the relevant part of the orders under challenge we do not think that the High Court was justified in coming to the said findings at the stage when the same were recorded. A more appropriate stage for reaching the said conclusion would have been only after evidence in the cases had been led on the issue in question.

8. In **Nanjappa v. State of Karnataka reported in 2015 Cr.L.J. 4012**, again the issue had been dealt with after considering the relevant provisions as well as earlier judicial pronouncements and concluded in following way:-

15. The legal position regarding the importance of sanction under Section 19 of the Prevention of Corruption is thus much too clear to admit equivocation. The statute forbids taking of cognisance by the Court against a public servant except with the previous sanction of an authority competent to grant such sanction in terms of clauses (a), (b) and (c) to Section 19(1). The question regarding validity of such sanction can be raised at any stage of the proceedings. The competence of the court trying the accused so much depends upon the existence of a valid sanction. In case the sanction is found to be invalid the court can discharge the accused relegating the parties to a stage where the competent authority may grant a fresh sanction for

prosecution in accordance with law. If the trial Court proceeds, despite the invalidity attached to the sanction order, the same shall be deemed to be non-est in the eyes of law and shall not forbid a second trial for the same offences, upon grant of a valid sanction for such prosecution.

16. Having said that there are two aspects which we must immediately advert to. The first relates to the effect of sub-section (3) to Section 19, which starts with a non-obstante clause. Also relevant to the same aspect would be Section 465 of the Cr.P.C. which we have extracted earlier. It was argued on behalf of the State with considerable tenacity worthy of a better cause, that in terms of Section 19(3), any error, omission or irregularity in the order sanctioning prosecution of an accused was of no consequence so long as there was no failure of justice resulting from such error, omission or irregularity. It was contended that in terms of explanation to Section 4, "error includes competence of the authority to grant sanction". The argument is on the face of it attractive but does not, in our opinion, stand closer scrutiny. A careful reading of sub-section (3) to Section 19 would show that the same interdicts reversal or alteration of any finding, sentence or order passed by a Special Judge, on the ground that the sanction order suffers from an error, omission or irregularity, unless of course the court before whom such finding, sentence or order is challenged in appeal or revision is of the opinion that a failure of justice has occurred by reason of such error, omission or irregularity. Sub-section (3), in other words, simply forbids interference with an order passed by Special Judge in appeal, confirmation or re-visional proceedings on the ground that the sanction is bad save and except, in cases where the appellate or re-visional court finds that failure of justice has occurred by such invalidity. What is noteworthy is that sub-section(3) has no application to proceedings before the Special Judge, who is free to pass an order discharging the accused, if he is of the opinion that a valid order sanctioning prosecution of the accused had not been produced as required under Section 19(1). Sub-section (3), in our opinion, postulates a prohibition against a higher court reversing an order passed by the Special Judge on the ground of any defect, omission or irregularity in the order of sanction. It does not forbid a Special Judge from passing an order at whatever stage of the proceedings holding that the prosecution is not maintainable for want of a valid order sanctioning the same. The language employed in sub-section (3) is, in our opinion, clear and unambiguous. This is, in our opinion, sufficiently evident even from the language employed in sub-section (4) according to which the appellate or the re-visional Court shall, while examining whether the error, omission or irregularity in the sanction had occasioned in any failure of justice, have regard to the fact whether the objection could and should have been raised at an early stage. Suffice it to say, that a conjoint reading of sub-sections 19(3) and (4) leaves no manner of doubt that the said provisions envisage a challenge to the validity of the order of sanction or the validity of the proceedings including finding, sentence or order passed by the Special Judge in appeal or revision before a higher Court and not before the Special Judge trying

the accused. The rationale underlying the provision obviously is that if the trial has proceeded to conclusion and resulted in a finding or sentence, the same should not be lightly interfered with by the appellate or the re-visional court simply because there was some omission, error or irregularity in the order sanctioning prosecution under Section 19(1). Failure of justice is, what the appellate or re-visional Court would in such cases look for. And while examining whether any such failure had indeed taken place, the Court concerned would also keep in mind whether the objection touching the error, omission or irregularity in the sanction could or should have been raised at an earlier stage of the proceedings meaning thereby whether the same could and should have been raised at the trial stage instead of being urged in appeal or revision.

However, **CBI v. Ashok Kumar Aggarwal, 2014 Cri LJ 930** (supra) as well as **State of Bihar v. Rajmangal Ram, 2014 Cri LJ 2300** (supra) were neither referred nor considered.

9. The Hon''ble Apex Court in **P.V. Narasimha Rao v. State (CBI/SPE) as reported in (1998) 4 SCC 626** had held under the following para:-

With due respect we find it difficult to agree with these observations. In taking this view the learned Judge has construed Section 6 of the 1947 Act, which like Section 193 and 105 to 197 Cr. P.C. was a limitation on the power of the Court to take cognisance and thereby assume jurisdiction over a matter, as a right conferred on a public servant to mean "no public servant shall be prosecuted without previous sanction". This aspect had been considered by this Court in **S.A. Venkataraman v. The State, (1985) SCR 1037**. In that case the appellant, who was a public servant, had been dismissed after departmental enquiry and thereafter he was charged with having committed the offence of criminal misconduct under Section 5(1) of the 1947 Act and he was convicted. No sanction under Section 6 was produced before the trial court. It was contended before this Court that the court could not take cognisance of the offence without there being a proper sanction to prosecute. The said contention was rejected on the view that sanction was not necessary for the prosecution of the appellant as he was not a public servant at the time of taking cognisance of the offence. After referring to the provisions contained in Section 190 Cr. P.C. which confers a general power on a criminal court to take cognisance of offences and, after holding that Section 6 is in the nature of a limitation on the said power, it was observed :-

"In our opinion, if a general power to take cognisance of an offence is vested in a court, any prohibition to the exercise of that power, by any provision of law, must be confined to the terms of the prohibition. In enacting a law prohibiting the taking of a cognisance of an offence by a court, unless certain conditions were complied with, the legislature did not purport to condone the offence. It was primarily concerned to see that prosecution for offences in cases covered by the prohibition shall not commence without complying with the conditions contained therein, such as a

previous sanction of a competent authority in the case of a public servant, and in other cases with the consent of the authority or the party interested in the prosecution or aggrieved by the offence." (pp. 1043, 1044)

* * *

"When the provisions of Section 6 of the Act are examined it is manifest that two conditions must be fulfilled before its provisions become applicable. One is that the offences mentioned therein must be committed by a public servant and the other is that person is employed in connection with the affairs of the Union or a State and is not removable from his office save by or with the sanction of the Central Government or the State Government or is a public servant who is removable from his office by any other competent authority. Both these conditions must be present to prevent a court from taking cognisance of an offence mentioned in the section without the previous sanction of the Central Government or the State Government or the authority competent to remove the public servant from his office. If either of these conditions is lacking, the essential requirements of the section are wanting and the provisions of the section do not stand in the way of a court taking cognisance without previous sanction." (p. 1045)

This means that when there is an authority competent to remove a public servant and to grant sanction for his prosecution under Section 19(1) of the 1988 Act the requirement of sanction preludes a court form taking cognisance of the offences mentioned in Section 19(1) against him in the absence of such sanction, but if there is no authority competent to remove a public servant and to grant sanction for his prosecution under Section 19(1) there is no limitation on the power of the court to take cognisance under Section 190 Cr. P.C. of the offences mentioned in Section 19(1) of the 1988 Act. The requirement of sanction under Section 19(1) is intended as a safeguard against criminal prosecution of a public servant on the basis of malicious or frivolous allegations by interested persons. The object underlying the said requirement is not to condone the commission of an offence by a public servant. The inapplicability of the provisions of Section 19(1) to a public servant would only mean that the intended safeguard was not intended to be made available to him. The rigour of the prohibition contained in sub-section (1) is now reduced by sub-section (3) of Section 19 because under clause (a) of sub-section (3) it is provided that no finding, sentence or order passed by a special Judge shall be reversed or altered by a in appeal, confirmation or revision on the ground to absence of, or any error, omission or irregularity in the sanction required under sub-section (1), occasioned thereby. This would show that the requirement of sanction under sub-section (1) of Section 19 is a matter relating to the procedure and the absence of the sanction does not go to the root of the jurisdiction of the court. It must, therefore, be held that merely because there is no authority which is competent to remove a public servant and to grant sanction for his prosecution under Section 19(1) it cannot be said that Member of Parliament in outside the

Purview of the 1988 Act.

10. Apart from this in State of **Madhya Pradesh v. Dr. Krishna Chandra Saksena reported in (1996) 11 SCC 439**, **Parkash Singh Badal v. State of Punjab reported in (2007)1 SCC 1**, **Dinesh Kumar v. Chairman, Airport Authority of India reported in (2012) 1 SCC 532**, The **Director, Central Bureau of Investigation v. Ashok Kumar Aswal reported in (2015) 7 Scale 131**, the aforesaid view had been reiterated and further, it had been held that sanction order should not be indicted at the threshold and at best it should be left to be determined in course of trial on the ground that it is found based upon subjected satisfaction.

11. Furthermore, the learned counsel for the petitioner failed to substantiate his plea that there was no authority vested to the Secretary, Law Department to issue the sanction order of the State Government so directed and so, it requires some sort of detailed material to expose the authority which could be possible only during course of trial by way of examining/cross-examining the witnesses as well as exhibit of relevant documents.

12. That being so, the order impugned does not attract any kind of interference at the present stage, whereupon, the instant petition is found premature and is, accordingly, rejected.