(2012) 09 CAL CK 0015

Calcutta High Court

Case No: C.R.R. No. 2755 of 2011

Kunal Saha (Dr.)		APPELLANT
	Vs	
Mr. Gora Chand Dey Justice (Retired) and Another		RESPONDENT

Date of Decision: Sept. 21, 2012

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 197, 357, 359, 468, 468(2)(c)
- Judges (inquiry) Act, 1968 - Section 2, 3, 3(1), 3(2)
- Judges (Protection) Act, 1985 - Section 3, 3(1)
- Penal Code, 1860 (IPC) - Section 143, 147, 304A, 323, 324

Citation: (2013) 1 CALLT 41

Hon'ble Judges: Aniruddha Bose, J

Bench: Single Bench

Advocate: Kunal Saha, In Person, for the Appellant; Debasish Roy, Public Prosecutor and Mr. S. Ganguly for the Respondent No. 2, for the Respondent

Final Decision: Dismissed

Judgement

Aniruddha Bose, J.

The petitioner is the husband of Anuradha Saha, who breathed her last on 28 May 1988, after having fallen ill while on a social visit to India. The petitioner is a medical practitioner settled in the United States of America, doing research in HIV/AIDS. The deceased wife of the petitioner had developed fever with skin rash on or about 25 April 1988 while in Kolkata on a social visit to this country. For this purpose, Dr. Sukumar Mukherjee, a medical practitioner was consulted. Her condition did not improve, and had in fact deteriorated, and other doctors had also been consulted in Kolkata, where she was being treated in a private hospital. Eventually she was shifted to a hospital in Mumbai on further deterioration of her condition, where she passed away. The petitioner had instituted an action alleging medical negligence

under the Consumer Protection Act, 1986 before the National Consumers Disputes Redressal Commission, (the Commission) claiming compensation of Rs. 77,76,73,500/- with interest, impleading as respondents in the proceeding the three medical practitioners who treated her, as well as the hospital where she was treated in Kolkata. A criminal complaint was also instituted against the three medical practitioners in the Court of the learned Chief Judicial Magistrate. Alipore by one Malay Kumar Ganguly, who it appears is a relative of the petitioner. The said criminal complaint was tried on evidence and the learned Chief Judicial Magistrate found two of the three medical practitioners arraigned as accused before him guilty of commission of offence u/s 304-A of the Indian Penal Code, 1860. The third medical practitioner was acquitted. The convicted doctors were sentenced to undergo simple imprisonment for three months and to pay a fine of Rs. 3000/-, in default of which the convicted persons were directed to undergo a simple imprisonment for a further period of 15 days.

2. The doctors who were held guilty appealed against the judgment of conviction before the learned Sessions Judge at Alipore and the complainant filed a criminal revisional application for enhancement of punishment imposed on the two doctors held guilty. Another appeal questioning legality of the judgment of acquittal of one of the three doctors was filed before this Court by the complainant. The appeals against the judgment of conviction which were filed before the learned Sessions Judge were eventually heard by a learned Single Judge of this Court upon withdrawing the same from the Court of the learned Sessions Judge, and these appeals were heard along with the other proceedings.

3. In a judgment and order passed on 19 March 2004, the appeals preferred by the two doctors were allowed and the revisional applications as also the appeal against acquittal filed by the complainant were dismissed by the respondent No. 1, who at that point of time was a Judge of this Court. The complainant appealed against this judgment and order before the Supreme Court of India. The Commission also had dismissed the complaint of the petitioner by a judgment and order dated 1 June 2006. The petitioner preferred an appeal against this order of dismissal passed by the Commission also before the Supreme Court.

4. The Hon''ble Supreme Court, in a common judgment delivered on 7 August, 2009 [(i) Malay Kumar Ganguly Vs. Dr. Sukumar Mukherjee and Others, 1, dismissed the criminal appeals, and thus the judgment of this Court acquitting the doctors of the criminal charges was sustained. As regards the claim of the petitioner before the Commission, the Supreme Court found the opinion of the Commission that there was no negligence on the part of the hospital or the doctors to be wrong. The matter was remitted to the Commission for the purpose of determining the quantum of compensation.

5. In the judgment delivered on 19 March 2004, the Hon''ble Single Judge of this Court had made certain comments and observations concerning conduct of the

petitioner himself, in relation to the treatment of his deceased wife, as well as certain motives were attributed in bringing the actions. Such comments and observations have been recorded in the judgment of the Supreme Court and found to be "not borne out by the records" and "otherwise highly undesirable". In the proceeding, out of which this revisional application arises, the petitioner had alleged that such comments in the judgment are defamatory. According to the petitioner, such comments were widely published in the news media, and such negative publicity denigrated the petitioner''s image and lowered his prestige before the public and had brought endless pain and anguish for him. The petitioner, being aggrieved by such comments had filed a complaint alleging offence u/s 500 of the IPC in the Court of the learned Chief Metropolitan Magistrate, Kolkata which was registered as Case No. C/9938 of 2011, against the Hon''ble Judge, who had retired by then. Prayer of the petitioner in this petition was:-

It is therefore most humbly prayed that this Learned Court may gracious be pleased to take cognizance of the offence alleged and issue process against the accused u/s 500 of the Indian Penal Code and in the event of appearance of the accused; try, convict and sentence the accused as per law and justice and further be pleased to pass further orders of adequate compensation u/s 357 and of Costs of the litigation u/s 359 of the Code of Criminal Procedure against the accused and in favour of the petitioner and further be pleased to pass such other order or orders that Your Honour may think fit and proper in the interest of justice. And for this act of kindness your petitioner, as in duty bound, shall ever pray.

6. The observations and comments made in the judgment delivered by the respondent No. 1, which the petitioner alleges to be defamatory, were to the effect that the wife of the petitioner had died because of interference of the petitioner only. There were also observations to the effect that the petitioner had filed the proceedings against the doctors in Kolkata with the sinister motive to make financial gain by bringing in the American medical insurance system to India. The petitioner''s complaint was heard by the learned 8th Metropolitan Magistrate. Before the leaned Magistrate, the petitioner himself was examined at the initial stage along with two other witnesses, being Mihir Banerjee and Ratna Ghosh. The petitioner in his initial deposition before the learned Magistrate stated that after the delivery of the said judgment of this Court, his prestige was lowered before the society. Mihir Banerjee stated an oath that before 2004 he had good impression regarding the petitioner but after going through the judgment of the Hon''ble High Court at Calcutta passed on 19 March 2004, image of Dr. Kunal Saha was lowered in his eyes. He further stated in his initial deposition that in the year 2006 while he was traveling in train in an AC two tier compartment, he had met the Hon''ble Judge who had delivered the judgment. After talking about various matters he had asked about Dr. Saha and the Hon''ble Judge told him that Anuradha Saha had expired due to wrong treatment of her husband Dr. Saha, who obstructed smooth running of administration in hospital. He also deposed that the respondent No. 1 had told him that Dr. Kunal

Saha was trying to open the gate for foreign insurance companies business in India. The evidence of Ratna Ghosh at the initial stage was to the effect that she read the judgment of the High Court in the month of March 2004 in which it was stated that Dr. Kunal Saha was responsible for the death of his wife. After reading the judgment, she stated in her initial deposition that she and other people were shocked and prestige and respect of Dr. Kunal Saha was lowered down in their eyes. Both these witnesses however stated in their initial deposition that after meeting Dr. Saha later, they became respectful of him again.

7. The learned Court below dismissed the petition by an order passed on 10 August 2012, finding that there was no ingredient of section 500 of the Indian Penal code in the said case. It was also observed in the order of dismissal that a Judge of a High Court had privilege to make certain remarks at the time of passing the judgment while discharging his public duty as a Judge and the remarks passed in the judgment of 19 March 2004 were merely observations while passing a judgment without any malafide intention. In the order impugned, it was recorded that the learned Court below found it difficult to accept that the Hon''ble Judge had passed such remarks in the order to hamper reputation of the complainant.

8. There were two other grounds on which the petition of complaint was dismissed. The first ground was on the law of limitation based u/s 468(2)(c) of the Code of Criminal Procedure (1973 Code). The other ground for rejection was that the complaint was filed without obtaining sanction u/s 197 of the Code. The petitioner made an application for review of this order by a petition filed on 12 August 2011. This application was filed mainly on the aspect of rejection of the petition on the ground of lack of sanction u/s 197 of the Code. A judgment of the Supreme Court in the case of Mohd. Akram Ansari Vs. Chief Election Officer and Others, was referred to in support of the review petition. Primarily, the review petition was based on another judgment on the same point in the case of Anjani Kumar Vs. State of Bihar and Another, In this judgment, it has been observed that to obtain protection conferred by section 197 of the 1973 Code, there must be reasonable nexus between discharge of public duty and the acts complained against. This review petition was rejected on 16 August 2011 mainly on the ground that the learned magistrate did not have inherent power to review his own order.

9. In the judgment reported in Malay Kumar Ganguly Vs. Dr. Sukumar Mukherjee and Others, , the Supreme Court observed:

190. We must express our agony in placing on record that the Calcutta High Court in its judgment had made certain observations which apart from being not borne out from the records, are also otherwise highly undesirable. Some of the conclusions arrived at by the High Court are not based on the findings emerging from the records.

191. These conclusions are as produced as under:

On 24-5-1998, it was noted wounds were healing well, epidermal islands have appeared over palms, soles and trunk.... no obvious Pseudomonas Colony like before. All these noting in the record of Breach Candy Hospital indicate that her skin had started healing and undoubtedly, such healing was the outcome of effective treatment. This betterment of skin lesion in the instant case could have been due to timely and effective treatment, undoubtedly with steroids. This may indicate the benefit of the treatment at Calcutta....

It was furthermore stated:

32. In this connection it is also to be mentioned that the death certificate alone cannot rule out the possibility of accidental, suicidal or homicidal cause of the death. A post-mortem examination alone could rule out the possibility of these three kinds of death.... On the other hand, the improvement of Anuradha as noticed before 25.5.1998 indirectly supports the argument that the treatment at Calcutta was at best not wrongly directed.

119. ...But in the present case, it indicates that there was no fixed treatment and no faith was reposed on any of the accused doctors and overzealousness of the patient party practically brought the untimely death of a young lady.

192. The High Court observed that Anuradha died because of interference of Kunal. Such an observation was made on the basis of some representations although his named did not appear in the records of AMRI. It was stated:

124. At the close, it is to be pointed out that Dr. Kunal Saha did not repose faith on any institution as can be ascertained from his conduct discussed hereinabove in detail. He also failed to take the investigating agency of this country into confidence and in Para 25 of the complaint, it was noted, ''that the accused persons are highly influential and are likely to interfere with the investigation and as such, the complainant would be left with no other alternative than to institute the complaint before the highest Magistracy of the Sessions Division of 24 Parganas (South)''. It is rightly contended by the learned counsel appearing on behalf of the accused doctors that such an action may lead to two conclusions:

(i) The complainant has no confidence on the police investigation of this country, or

(ii) The police investigation could unveil some untold facts or circumstances leading to the untimely death of Anuradha.

Be that as it may, by filing a complaint for the purpose of proving the rash and negligent act against the three specialized doctors, the complainant party intentionally took upon themselves a heavy burden of proving the case which they actually failed to discharge. So it was claimed to be an uneven battle, which was declared by the complainant party without being aware of the law on the subject and the consequences. It is needless to mention that now-a-days there is an attempt amongst the patient party to lodge complaint against the attending doctors for the

purpose of their punishment. On several occasions the patient party also ransacked the hospitals or chambers of the doctors and mishandled them on the plea of negligence to duty. In this way the doctors have been suffering from fear psychosis."

193, We must also express our great dissatisfaction when the Calcutta High Court stated:

121. But it is sufficiently clear that a man of the medical field now residing at United States with family after acquiring citizenship of that country has challenged the conduct and integrity of the three Professors. In this connection, I deem it proper to quote a remark of Lord Denning, M.R. in Whitehouse v. Jordan.

... Take heed of what has happened in the United States. "Medical malpractice'' cases there are very worrying, especially as they are tried by juries who have sympathy for the patient and none for the doctor, who is insured. The damages are colossal. The doctors, insure but the premiums become very high; and these have to be passed on in fees to the patients. Experienced practitioners are known to have refused to treat patients for fear of being accused of negligence. Young men are even deterred from entering the profession because of the risks involved. In the interests of all, we must avoid such consequences in England. Not only must we avoid excessive damages. We must say, and say firmly that in a professional man an error of judgment is not negligent.

194. Further, the statement made by the High Court that the transfer certificate was forged by the patient party is absolutely erroneous, as Dr. Anil Kumar Gupta deposed before the trial court that he saw the transfer certificate at AMRI''s office and the words "for better treatment" were written by Dr. Balaram Prasad in his presence and these words written by Dr. Prasad, who told it would be easier for them to transport the patient. In a case of this nature, Kunal would have expected sympathy and not a spate of irresponsible accusations from the High Court.

10. The petitioner had instituted the complaint case before the learned Court below in the month of August, 2011. To the petition was annexed the text of a news item published in the Bengali daily, Ananda Bazar Patrika of 20 March 2004. In this news report, the printout of which appears to have been obtained after downloading it from the archive website of that newspaper, the said observations made in the judgment have been substantially reproduced.

11. Dr. Saha, appearing in person assailed the impugned order arguing that the petition ought not to have been rejected at the threshold and the grounds on which the petition was dismissed by the learned Court below were erroneous. According to him, the complaint should have been tried in regular course as a Judge of the higher judiciary in India does not have absolute privilege or immunity for all actions taken in discharge of judicial duty. On the aspect of dismissal of the petition for lack of sanction in terms of section 197 of the 1973 Code, he has referred to a judgment of

the Constitution Bench of the Supreme Court in the case of K. Veeraswami Vs. Union of India (UOI) and Others, . Relying on this judgment, he has argued that after retirement of a Judge, the fetters placed against prosecution under the aforesaid provision does not continue. Touching upon merit of the case, he has submitted that the aforesaid comments or observations were made without any basis in the judgment of the respondent No. 1. According to him, there was no material on record which would have justified any reference to introduction of foreign medical insurance companies. On the comment that he was responsible for the death of his wife, his submission is that he had been making every possible effort to treat her wife and save her life, and civil liability of the aforesaid medical practitioners in causing death of his wife stood established before the Supreme Court.

12. Addressing me on the aspect of obtaining sanction u/s 197 of the 1973 Code, Dr. Saha has argued that sanction of the government is not necessary in terms of the said section for the purpose of taking cognizance of an offence alleged to have been committed by a Judge if the act complained against is not in discharge of official duty or has no reasonable nexus with discharge of such duty. On this point, judgments of the Supreme Court in the cases of B.S. Sambhu Vs. T.S. Krishnaswamy, Romesh Lal Jain Vs. Naginder Singh Rana and Others, and Raj Kishor Roy Vs. Kamleshwar Pandey and Another,) have been referred to. On the allegation against the respondent no. 1, submission of Dr. Saha is that the comments made in the judgment, in respect of which he had instituted the complaint, was outside his course of official duty and had no reasonable nexus with discharge of such duty. None of these comments, on the basis of which he had founded the action, according to Dr. Saha, was based on records. There was no material on record to suggest that the petitioner was responsible for death of his wife. There was no material on record to suggest that he had brought the medical negligence action before the Commission as well as in the Court of the learned Magistrate for the purpose of introducing or facilitating foreign insurance business. It was wholly unnecessary, argued Dr. Saha, to suggest that action, the nature of which was brought by him, would encourage patient parties to ransack hospital or chambers of the doctors. In substance, argument of Dr. Saha on this point is that he had made out a prima facie case that the aforesaid observations were made by the Hon''ble Judge in his judgment going beyond the records of the case and hence could not be treated to be ex-facie in discharge of his judicial or official duties. Citing the judgments of the Supreme Court in the cases of Dr. Subramanian Swamy Vs. Dr. Manmohan Singh and Another,) M.A. Rumugam Vs. Kittu @ Krishnamoorthy,), he submitted that ordinarily, it would be premature to quash a criminal complaint in exercise of jurisdiction u/s 482 of the 1973 Code. As a corollary, his contention is that the complaint of the petitioner before the learned magistrate should not have been rejected at the threshold.

13. The relevant provisions of section 197 of the Code of Criminal Procedure, 1973, to which my attention was drawn by Dr. Saha stipulates:-

Prosecution of Judges and public servants. (1) When any person who is or was a Judge or Magistrate of 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:"

14. The implication of the said provision was examined by the Supreme Court in the judgment of B.S. Sambhu v. T.S. Krishnaswamy (supra) which has been relied upon by Dr. Saha. In that case, in connection with an application for transfer of a suit from one court to another before the District Judge, the District Judge had called for remarks from the Judge concerned regarding certain allegations that were made in the transfer petition. In response to such query, the learned Judge in writing had informed the District Judge that the character of the Advocate who applied for transfer was not good and he had misbehaved in open Court making "nonsense allegations. He had also referred to the Advocate as a big gambler and a rowdy. This letter was read out by the District Judge in open Court and the Advocate concerned had filed a complaint before the learned Magistrate alleging that content of the said letter amounted to defamation u/s 500 of the IPC. Before the magistrate, question was raised as to whether the Court could take cognizance of the offence without sanction as contemplated in section 197 of the 1973 Code. This was negatived by the learned Magistrate and the magistrate''s view was assailed before the High Court u/s 482 unsuccessfully. The applicant, who was an additional munsiff and judicial magistrate, first class at the relevant point of time preferred an appeal before the Supreme Court. It was argued on his behalf that the aforesaid comments were made while acting or purporting to act in discharge of his official duty and sanction was necessary under the aforesaid provision of the Code under those circumstances. The Supreme Court however rejected this argument and held:-
It is not possible to accept this contention for in our view there is no reasonable nexus between the act complained of and the discharge of duty by the appellant. Calling the respondent as ''Rowdy'' ''a big gambler'' and ''a mischievous element'' cannot even remotely be said to be connected with the discharge of official duty which was to offer his remarks regarding the allegations made in the transfer petition.

15. In this judgment the Supreme Court had reiterated the Court''s earlier view taken in the case of Matajog Dobey Vs. H.C. Bhari, in which it was held:-

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

16. A similar issue was also examined by the Supreme Court in the case of Raj Kishor Roy (supra). In this case, dealing with the defence of a police officer resisting initiation of proceeding against him under sections 323/ 324 /504 of the IPC on the ground that he was acting in discharge of his official duty in relation to the acts complained against, the Supreme Court held:--

In this case, as indicated above, the complaint was that the 1st respondent had falsely implicated the appellant and his brother in order to teach them a lesson for not paying anything to him. The complaint was that the 1st respondent had brought an illegal weapon and cartridges and falsely shown them to have been recovered from the appellant and his brother. The High Court was not right in saying that even if these facts are true then also the case would come within the purview of section 197 Cr.P.C. The question whether these acts were committed and/or whether the 1st respondent acted in discharge of his duties could not have been decided in this summary fashion. This is the type of case where the prosecution must be given an opportunity to establish its case by evidence and an opportunity given to the defence to establish that he had been acting in the official course of his duty. The question whether the 1st respondent acted in the course of performance of duties and/or whether the defence is pretended or fanciful can only be examined during the course of trial. In our view, in this case the question of sanction should be left open to be decided in the main judgment which may be delivered upon conclusion of trial.

17. In this proceeding, notice was issued upon the respondent No. 1, but he has not appeared. Learned Public Prosecutor appeared in this matter on behalf of the State. At the initial stage, Dr. Saha took objection against appearance of the learned Public Prosecutor in defence of respondent No. 1. But State is also a party to this proceeding, and the learned Public Prosecutor apprised this Court that he would confine his submission on legal issues only, and not support the stand of any of the parties to this proceeding. He specifically submitted that he was not representing the respondent No. 1. On such submission being made, I permitted him to make his submissions in this matter.

18. The aforesaid judgments of the Supreme Court establish that in a case involving allegations against a Judge or a public servant of commission of criminal act while discharging his official duty, a complaint need not always be kept suspended for obtaining sanction from the competent authority in terms of section 197 of the 1973

Code. The question as to whether a particular act was committed in discharge of official duty or not in the light of provisions of section 197 of the 1973 Code has to be examined in the facts of a given case. In the case of B.S. Sambhu (supra), the complaint against the munsiff was on the charge of defamation. Though the comments were not made in that case in a judgment, they were made in response to a query of the District Judge. The movement of the events in that proceeding was also through the official channel. On the point of obtaining prior sanction in terms of section 197 of the 1973 Code, the Supreme Court found use of the denigrating expressions in respect of the complainant in that case could not be said to be connected with discharge of official duty. The principle of law, which in my opinion emerges from the ratio of these judgments of the Supreme Court, is that if ingredients of an offence is established, and prima-facie no nexus can be found between discharge of official duty and commission of an act constituting prima facie as offence, then a petition of complaint ought not to be rejected straightway, at the threshold in such circumstances. It should be left for the Judge or the public servant to justify such act at a later stage of the proceeding that such act was committed in discharge of official duty. In the event the Court declines to take cognizance of a complaint alleging criminal charge against a Judge or a public servant, then there ought to be prima-facie application of mind to ascertain if the act complained against was in discharge of official duty or not. In a case of this nature, where initial deposition revealed that there was lowering of prestige of the complainant in the eyes of general public, and part of the initial deposition revealed that the act complained against was done outside official discharge of duty, if tested solely on the basis of provisions of section 197 of the 1973 Code, I would have had held such rejection at the threshold to be improper. The rejection of petition of complaint on this ground in my opinion would have been improper, as the order of rejection does not reveal any application of mind on the part of the learned Court below in reaching at a finding that those comments, which were found by the Supreme Court to be irresponsible accusations, could be said to have been made in discharge of official duty. The learned Public Prosecutor did not address me much on applicability of section 197 in connection with the petition of complaint out of which this proceeding arises, but, referred to several authorities which lay down that discharge of official duty by committing acts in excess to what would be normal in the circumstances of a given case would not constitute an offence. I do not consider it necessary to refer to all these authorities as they restate an established principle of law. But on this point again, it is not possible for me to presume that it was on this ground the petition of complaint was rejected. The order of rejection does not reveal so. Under ordinary circumstances, that could have been a preliminary defence, if the learned magistrate had taken cognizance and issued process, and without any application of mind on the part of the learned magistrate on this specific point, it would not be possible for me in exercise of revisional jurisdiction to come to a specific finding that such comments were in excess of what would have been ordinarily required in discharge of official duty, and not beyond discharge of

official duty.

19. I also do not think the learned Court below ought to have rejected the petition on the ground that a Judge of a superior Court enjoys privilege in the nature of absolute immunity against criminal proceeding for acts done while discharging official duty. In the decision of the Constitution Bench of the Supreme Court, in the case of K. Veeraswami (supra), it has been held that the Judges enjoy no special protection from criminal proceedings, except in regard to the offence of corruption when sanction for criminal prosecution is required. In the event a judicial act is motivated by certain external factors which may eventually result in commission of an offence, then such immunity would erode. But this allegation is not there in the petition of complaint, and I do not consider it necessary to deal with such issue in this judgment.

20. The learned Court below in the order by which the petition of complaint was rejected, held that the Judge of a High Court has privilege to make remarks at the time of passing a judgment in discharge of his official duty as a Judge. But in the order, source of such privilege has not been spelt out. I do not find any source of such privilege in common law, as applicable to this country. The statutes under which special immunity has been granted I shall discuss in this judgment. Privilege of this nature could be traced to section 77 of the IPC, so far accusation is under criminal law which stipulates:--

Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

21. Dr. Saha on this point has argued that the aforesaid comments in the judgment could not be made in good faith as the highest Court of the land has found these comments to be irresponsible accusations. His further submission is that in the event the respondent no. 1 wanted to defend his action on the ground of having made the said comments in good faith, he ought to have had taken the defence himself and good faith could not have been presumed to be the motivating factor behind such comments, particularly since the Supreme Court had found such comments to have been made unsupported by any material on record. In support of this submission he has relied on the judgment of the Supreme Court in the case of In Re: K. Sundaram reported in AIR 2001 SC 2374. In this decision, the Supreme Court quoted a passage from an earlier judgment, being the case of Harbhajan Singh Vs. State of Punjab, In this judgment, it has been held:--

There is no doubt that the mere plea that the accused believed that what he stated was true by itself, will not sustain his case of good faith under the Ninth Exception. Simple belief or actual belief by itself is not enough. The appellant must show that the belief in his impugned statement had a rational basis and was not just a blind simple belief. That is where the element of due care and attention plays an important role. If it appears that before making the statement the accused did not

show due care and attention that would defeat his plea of good faith.

22. In the order impugned, the learned Court below has not specifically held that the petition of complaint was being rejected as the comments complaint against which were made, were in good faith. But there is suggestion to that effect in the order, as the learned Court below has observed that it is "very difficult to swallow that Hon''ble Judge passed such remarks in order to hamper the reputation of the complainant." By implication, the learned Court below attributed good faith as motive behind such comments. On this point also I accept the submission of the petitioner that it was not proper for the learned Court below to construe the act to have been done in good faith. The defence of good faith in this case, if the defence of the respondent No, 1 was founded on this principle, was required to be taken by the respondent No. 1 if he chose to do so after cognizance was taken in the event the petition of complaint was otherwise maintainable. The principle of law enunciated by the Supreme Court in the case of M.A. Rumugam v. Kittu @ Krishnamoorthy (supra) that those who plead exception must prove it ought to be extended and applied in a case of this nature at the time of taking cognizance, unless of course a clear-cut case of good faith can be ascertained ex facie from the available materials on record.

23. Dr. Saha next drew my attention to the initial statements of Mihir Banerjee made on oath. In the earlier part of this judgment, I have referred to the substance of his initial deposition. Perusal of the judgment delivered on 19 March 2004 was not the sole factor which had shocked him. He had stated in his initial deposition that he was shocked for the second time when he met the Hon''ble Judge while travelling in an AC two tier compartment in a train in the year 2006. In course of conversation with the Hon''ble Judge who had retired by then, he had asked him about the case of Dr. Saha and he was told by the Hon''ble Judge that Anuradha Saha had expired due to wrong treatment of her husband and said Dr. Saha had obstructed the smooth running of administration in hospital. Relying on this part of the deposition, Dr. Saha had argued that this submission was made after the Hon''ble Judge had retired from his service and this statement could not be said to have been made in discharge of official duty and hence the learned magistrate should have taken cognizance and issued process on the basis of this part of the deposition. According to Dr. Saha the learned Court below had ignored this part of the initial deposition altogether and for this reason alone the impugned order ought to be set aside and proceeding against the respondent No. 1 should have been started, upon taking cognizance of complaint of the petitioner.

24. Learned Public Prosecutor has submitted that if this was the basis of Dr. Saha''s complaint, then the order of rejection of the petition of complaint at the threshold ought not to have been passed. But this was not the foundation of his complaint. Though at the time of deciding on the question of taking cognizance, the Court has to consider both the content of the petition as well as the statements made in initial

deposition, if the initial deposition contains statements totally at variance with or foreign to the allegations contained in the petition of complaint, then the court would have to consider the statements made in the petition of complaint only. In the petition of complaint, there is no reference at all in relation to the conversation Mihir Banerjee claims to have had with the respondent No. 1 on the train. I accordingly find no error in the approach of the learned Court below on this count.

25. The next point I shall examine is rejection of the petition on the ground of delay. Section 468 of the 1973 Code stipulates:--

Bar to taking cognizance after lapse of the period of limitation.-(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."

26. The offence of defamation can carry punishment of simple imprisonment of upto two years. Thus, the limitation period in such a case would be three years, in terms of section 468(2)(c) of the 1973 Code. The judgment, which according to the petitioner contains defamatory statements, was delivered on 19 March in the year 2004. Even if I take into account the initial deposition of Mihir Banerjee relating to his conversation with the respondent No. 1 in the train, then the alleged defamatory statements were made in the year 2006. The petition of complaint was filed in the year 2011, well beyond the three year limitation period specified in sub-clause 2(c) of section. 468 of the 1973 Code. In the petition of complaint, there is no reason given explaining the delay, on the strength of which jurisdiction of the Court to condone delay could have been invoked. Dr. Saha, argued that it was only after the judgment of the Supreme Court was delivered on 7 August 2009. he became certain that the comments made in the said judgment were defamatory and the defamatory nature of the comments was confirmed and within two years from the date of delivery of the said judgment the petition of complaint was instituted.

27. Offence of defamation occurs when the offending statements are published containing imputation concerning any person harming or intending to harm his reputation. In this case, the offending comments were published and circulated by the print and electronic media immediately after the judgment was delivered, as pleaded in the petition of complaint. The newspaper report which has been annexed to the petition of complaint is dated 20 March 2004. In his initial deposition the petitioner has stated:-

After judgment dt. 19.3.04 of Hon''ble High Court Calcutta, my prestige was lowered down before the society.

So I filed this defamation case against Retired Justice Gorachand Dey. I filed all documents including newspaper reporting and Judgment of Hon''ble Supreme Court where the judgment of Hon''ble High Court Calcutta was set aside.

I pray for process.

28. The deposition of Mihir Banerjee also discloses that after perusing the verdict of the High Court dated 19 March 2004 the image of Dr. Saha was lowered in his eyes. Then he referred to the alleged conversation in the train with the Hon''ble Judge himself in the year 2006 and stated on oath that he was shocked for the second time after his conversation with the Hon''ble Judge. Similarly the initial statements of Ratna Ghosh also disclose that after reading the judgment she wondered how a doctor like Kunal Saha could kill his wife in such a manner.

29. The petitioner wants to compute the period of limitation from the date of delivery of the Supreme Court judgment. The observations of the Supreme Court regarding the comments made in the judgment of the respondent No. 1 do not constitute the foundation of the case of the petitioner, "though the opinion and observations of the Supreme Court may have the impact of strengthening the case of the petitioner. The basic ingredient of the offence of defamation is statements made in writing or orally which would have harming effect on reputation and prestige of the complainant in public eye. The aforesaid observations in the judgment of the Supreme Court cannot be construed to have extended the period within which the action was required to be brought. The observations made by the Supreme Court in paragraphs 190 to 194 of the report, at best can be said to have confirmed the stand of the petitioner that those comments ought not to have been made in the judgment delivered by the respondent No. 1, But the judgment of the Supreme Court cannot be construed to have further lowered the reputation or aggravated the impact of the comments made in the judgment delivered 19 March 2004. The initial deposition of the two witnesses as well as that of Dr. Saha himself are to the effect that the delivery of the judgment on 19 March 2004 and its subsequent media coverage had lowered and harmed reputation of the latter. In the petition there is no explanation for delay. Otherwise also I do not find sufficient reason for condoning the delay, in the absence of any explanation disclosed to that

effect in the petition of complaint. Nor can any explanation be inferred from the petition of complaint, a copy of which has been annexed to the revisional application, I agree with the finding of the learned Court below that the petition of complaint out of which the present proceeding arises was barred by limitation. On this ground, the present revisional application should fail.

30. NOW I shall deal with the provisions of the Judges (Protection) Act. 1985. Since I have already held that the petition ought to fail as there was no error on the part of the learned Court below in holding that the petition of complaint was barred on the ground of limitation, it might not have been necessary for me to deal with the provisions of this statute. Learned Public Prosecutor had brought to the notice of this Court the provisions of the said Act, An additional affidavit has been filed by the petitioner on this issue, affirmed on 13 March 2012. Elaborate argument was also advanced before me dealing with application of the said Act in relation to comments made in a judgment of the High Court. Considering the sensitivity as well as the importance of the issue involved, I am dealing with this question also in my judgment, as in my opinion it would not be impermissible for a revisional Court to take cognizance of a statute having direct bearing on issues raised in the petition even though such an issue may not have been raised by the parties and not considered by the Court of first instance. 32. Section 3 of the Judges Protection Act 1985 stipulates:-

3. Additional protection to Judges.- (1) Notwithstanding anything contained in any other law for the time being in force and subject to the provisions of sub-section (2), no Court shall entertain or continue any civil or criminal proceeding against any person who is or was a Judge for any act, thing or word committed done or spoken by him when, or in the course of, acting or purporting to act in the discharge of his official or judicial duty or function.

(2) Nothing in sub-section (1) shall debar or affect in any manner the power of the Central Government or the State Government or the Supreme Court of India or any High Court or any other authority under any law for the time being in force to take such action (whether by way of civil, criminal, or departmental proceedings or otherwise) against any person who is or was a Judge.

31. Argument of Dr. Saha is that the provisions of the said statute does not confer absolute privilege or immunity to the action of a Judge in respect of all acts done in discharge of official or judicial duty or function and subsection (2) of the said provision contemplates that the Court or authority before whom a proceeding against a Judge is brought ought to examine first whether the act complained against was in discharge of official duty or not before entertaining or rejecting such an action.

32. He wants this Court to construe the provisions of section 3 of the 1985 Act in the same manner the Hon''ble Supreme Court has interpreted the provisions of section

197 of the Code in the case of B. Sambhu (supra). His submission is that in order to become entitled to the protection contemplated under the 1985 Act, comments made in a judgment ought to undergo the scrutiny first as to whether such comments were made in a context having reasonable nexus with discharge of judicial duty. The mere fact that such comments are contained in a judgment would not confer absolute immunity to the learned Judge who is the author of the judgment if such comments otherwise warrant criminal action, in this case being action for defamation. The immunity contemplated in subsection (1) of section 3 of the 1985 Act, contended Dr. Saha, is only a qualified immunity, curbed by the provisions of sub-section (2) of the Act. He also referred to two decisions of the Supreme Court of the United States of America to sustain his claim that the Judge of a superior Court is not immune from a criminal action. The first judgment referred to is Bracy v. Gramley reported in 519 US 1074 : 117 S.Ct. 726 (1997) . The other one is the decision of the same Court in the case ofUS v. Will reported in 449 US 200, 66 Led 2d 392, 101 S. Ct 471 . Two Indian authorities were also referred by him, being a decision of the Bombay High Court in the case of Deelip Bhikaji Sonawane Vs. The State of Maharashtra and Others, and a judgment of the Rajasthan High Court in the case of Ravi Shankar Srivastava Vs. State of Raj. and Others, The two judgments of the United States of America deal with rights and obligations of judges under the statutory provisions of that country. These statutory provisions do not have application in the context of this country. Neither of these two judgments deals with any common law principle of immunity of the Judges. In the case of Bracy v. Gramley (supra), there is reference to corruption in judiciary in the United States of America, but the judgment was not delivered on that issue. The Constitution Bench judgment of the Supreme Court in the case of K. Veeraswamy (supra) is the leading authority of this country on the point of immunity of Judges. Hence I do not consider it necessary to deal with the decisions of the Supreme Court of the United States of America in this judgment. Dr. Saha had also referred to certain articles dealing with punishment of judges on corruption charges in different jurisdictions. While these articles have substantial informative value, for adjudication of this proceeding they are not required to be considered.

33. In addition, Dr. Saha has argued that judiciary is an organ of the State and has to act within the same constitutional limitations the two other organs of the State operate. In support of his submission he has relied on the judgments of the Supreme Court in the cases of Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, and E.P. Royappa Vs. State of Tamil Nadu and Another, as well as the judgment of the Supreme Court in the case of Sub-Committee of Judicial Accountability Vs. Union of India and others, . Referring to these judgments, he submitted that it is the constitutional duty of the Court to protect Fundamental Rights of the citizens, and the offending comments made in the judgment of the respondent No. 1 violate his right to reputation. The 1985 Act cannot provide protection to respondent No. 1

against criminal consequence for making irresponsible accusations against the petitioner, he argued, as such protection would violate Fundamental Rights of the petitioner. The petitioner however has not challenged the constitutional validity of the 1985 Act in this proceeding. Following the dictum of presumed constitutionality of a legislative Act, I shall proceed to test the legality of the petitioner''s complaint upon considering the provisions of the 1985 Act.

34. In the case of Deelip Bhikaji Sonawane, the accused was an assistant commissioner of police who had been appointed as executive Magistrate by the Government of Maharashtra. In connection with several disputes having criminal overtone under the provisions of sections 143, 147 and 506 of the IPC an interim bond was executed by one of the individuals involved in the criminal case, but this was cancelled on the ground that he was in breach of the conditions of the said bond. He was called upon to furnish fresh bond with two sureties, one of whom was to be a Government servant not belonging to Class IV and another a respectable businessman, for a sum of Rs. 3000/- each. The said individual could not execute the bond at the police station and he was taken into custody. He was released only when the two sureties were arranged. It was found by the Bombay High Court that interim bond could not have been demanded or asked to be furnished by a person unless and until such person was habitual offender or was so desperate and dangerous as to render his being at large without security hazardous to the community. No such case was made out in the show cause notice in which the said individual was asked to execute the interim bond.

35. The individual who was detained thereafter had filed a private complaint in the Court alleging offence u/s 342 of the IPC of wrongful and illegal confinement by the said executive magistrate. It was dismissed for want of sanction u/s 197 of the Code by the Court of first instance. The said order of dismissal was challenged in the Sessions Court unsuccessfully and thereafter the victim applied before the High Court. Protection was claimed by the executive magistrate under the 1985 Act. The Bombay High Court held and directed:-

10. So far as the respondent No. 2 is concerned, he is claiming protection under the provisions of the Judges (Protection) Act, 1985. The said Act is applicable to the Judges which includes a person who is empowered by law to give a judgment in any legal proceedings. u/s 3(1) of the said Act it is provided that no Court can entertain a civil or criminal proceeding against any person who is or was a Judge for any act, thing or word committed, done or spoken by him when, or in the course of acting or purporting to act in the discharge of his official or judicial duty or function. However, sub-section (2) of section 3 empowers the respective Government or the Supreme Court of the High Court or any other authority to take such action whether by way of civil, criminal, or departmental proceedings or otherwise against any person who is or was a Judge. As per the finding of the Sessions Court the petitioner was wrongfully and illegally confined for five days in Chapter Case No. 43 of 1994 which

amounted to an offence u/s 342 of the IPC. The respondent No. 2 was party to the said proceedings in the sessions Court and was represented by his own Advocate. The said observations were never challenged by him before the higher forum. We are also of the view that the Respondent No. 2 was acted illegally without following the procedure under the provisions of Cr.P.C. before confining the petitioner to jail. In the circumstances, we direct the State Government to take appropriate action against the Respondent no. 2 for his wrongful and illegal act.

11. In the circumstances, the petitioner may pursue his remedy for claiming damage or compensation for deprivation of his personal liberty as may be open; to him under law. He may also, if he chooses, apply to the appropriate authority for obtaining sanction to prosecute the respondent No. 2.

12. In the result, we direct the State Government to take appropriate action against Respondent No. 2 for illegally detaining the Petitioner in custody without following the procedure established by law. It is open for the Petitioner to apply for sanction of prosecution of the Respondent No. 2 to appropriate authority and also to claim damages or compensation for his illegal detention. Rule is disposed of accordingly.

36. In the case of Ravi Shankar Srivastava (supra) the petitioner was a member Board of Revenue, who sought quashing of First Information Report registered against him before the Anti-Corruption Bureau, Jaipur. The allegation against him was obtaining illegal benefit for passing an order in a revenue matter. One of the grounds taken for seeking quashing of the proceeding was immunity of an act done in discharge of judicial duty under the provisions of section 3 of the 1985 Act. The Rajasthan High Court rejected such argument and the writ petition was dismissed. In this judgment it was held:--

76. Now so far as the additional protection of Judges is concerned, learned counsel for both the parties referred section 3 of the Judges Protection Act 1985. It is no doubt that sub-clause (2) of section 3 empowers the State Government to take action against any person, who is or was a Judge.

77. Applying to the facts and the circumstances of the case, the petitioner is working as Member of Board of Revenue and admittedly he is discharging judicial functions. Upon perusal of the source report and contents of the FIR it reveals that he has accepted the gratification prior to decide the case in their favour. In view of the judicial propriety if anybody, who is acting as a Judge out of the Court i.e. Board of Revenue sitting in Jaipur accepting the bribe and which is corroborated by the evidences, in such circumstances an enquiry can be initiated against a Judge also as per section 3 Sub-clause (2) of Judge Protection Act. No illegality whatsoever has been committed by the respondents regarding lodging of FIR and filing challan:

37. Section 2 of the Judges (Protection) Act, 1985 provides:--

In this Act, "Judge" means not only every person who is officially designated as Judge, but also every person-

(a) who is empowered by law to give in any legal proceeding a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority would be definitive; or

(b) who is one of a body of persons which body of persons is empowered by law to give such a judgment as is referred to in Clause (a).

38. It would be apparent from this definition that the said Act seeks to confer protection not only upon a person who is holding the post of a High Court Judge, but other authorities as well discharging judicial duty, like the Assistant Police Commissioner in the case of Deelip Bhikaji Sonawane (supra), and the member of Board of Revenue in the case of Ravi Kumar Srivastava (supra). Sub-section (1) of the aforesaid provision prescribes an embargo on a Court in entertaining or continuing any civil or criminal proceeding against any person who is or was a Judge for any act or word committed, done or spoken by him in the course of discharge of his official or judicial duty or function. This Act thus protects a retired Judge as well for any act done in discharge of his official or judicial duty against being arraigned in a Court as a defendant or an accused in any civil or criminal proceeding. The respondent no. 1 in this proceeding thus is covered by the said statute in spite of having retired from the post of a High Court Judge. Now question arises as to whether the petitioner could take recourse to sub-section (2) of section 3 of the said Act, and could have required the magistrate to undertake a preliminary enquiry to ascertain as to whether the offending comments were made in the judgment in discharge of judicial duty of the respondent No. 1. The aforesaid Subsection empowers the Central Government, State Government, Supreme Court of India, any High Court or any other authority under any law for the time being in force to take such action against any person who is or was a Judge. The expression "action" has been clarified in the said provision as civil, criminal, departmental or otherwise.

39. In my understanding, as I have already observed, the ratio of the decisions of the Supreme Court to which Dr. Saha has placed reliance on for construing the provisions of section 197 of the 1973 Code reflect that while dealing with such an issue, unless it is apparent that certain acts having criminal overtone have been committed in actual discharge of official duty, a petition against a public servant or a Judge in relation to such acts ought not to be rejected at the threshold for lack of sanction. The concerned public servant or Judge in such circumstances would be entitled to resist the proceeding on the ground of lack of sanction at a later stage. Section 197 of the said Code does not bar proceeding altogether against a public servant or a Judge on the allegation of commission of an offence in discharge of official duty. To prosecute such person, however prior sanction is necessary. Section 3 of the Judges Protection Act however places an embargo upon a Court from entertaining or continuing any civil or criminal proceeding against a Judge, for any

act, thing or word committed, done or spoken by him in the discharge of his official or judicial duty or function. The degree of protection afforded under the 1985 Act is greater, which is reflected in the heading of the section which is indicative of the object of the section. Preamble to the statute explains the object of the said legislation. "An act for securing additional protection for Judges and others acting Judicially and for matters connected therewith.". The heading of the section is additional protection of Judges. Use of the expression "additional protection" obviously implies protection over and above that granted by other laws, which would include section 197 of the 1973 Code and section 77 of the IPC and such protection extends to civil proceedings as well.

40. Dr. Saha had argued that in view of the provisions of section 3(2) of the 1985 Act, defamation action was permissible in respect of offensive words contained in a judgment as it was permissible to bring a criminal proceeding in view of the aforesaid provisions. His case on this point is that the learned magistrate is an "authority" within the meaning of the said Sub-section to entertain the said petition, as taking cognizance and issuing process in such a situation would constitute taking criminal action within the provisions of sub-section (2). According to Dr. Saha, the observations of the Supreme Court in the case of Malay Kumar Ganguly (supra) established that the comments which were made against him in the judgment delivered on 19 March 2004 were defamatory and under such circumstances cognizance should have been taken and process ought to have been issued. In the event the respondent No. 1 wanted to invoke protection granted under the said statute, it could be tested whether such comments are made in discharge of his judicial duty or function or not at that stage.

41. In my opinion, comments forming part of a judgment per se would constitute "words spoken" or "act committed" in discharge of judicial duty. There is no allegation in the subject complaint that such comments were prompted or motivated by any external factor, as was in the case of Ravi Shankar Srivastava (supra). Sub-section (1) of section 3 of the 1985 would thus prohibit any Court from entertaining any criminal or civil action for use of any expression used in a judgment. So far as the provision of sub-section (2) of section 3 of the 1985 Act are concerned, the power to institute civil criminal or departmental proceeding has been preserved for the Central Government, State Government, the Supreme Court of India, any High Court or any other authority. The provisions of sub-section (2) of section 3 of the Act, constitute exception to the provisions of subsection (1) of section 3. The embargo under sub-section (1) of section 3 of the 1985 Act is on a Court in entertaining any proceeding against a Judge made in discharge of his official or judicial duty. But sub-section (2) thereof permits specified constitutional or statutory authorities to bring such action, if permitted under the law. In such a proceeding, whether the acts complained against had reasonable nexus with discharge of judicial or official duty or function or not could be examined. But a private person is not authorized under the said provision to initiate action against a

Judge by instituting civil or criminal proceeding in relation to any action taken in discharge of judicial duty. As I have already observed, comments made in a judgment would ex facie constitute acts done or words spoken in discharge of judicial duty. The judgment of the respondent No. 1 itself has been sustained by the Hon''ble Supreme Court. In the event the construction contemplated by Dr. Saha on the aforesaid provision is accepted, such construction would render the provisions of Sub-section (1) of section 3 of the 1985 Act otiose as the protection given therein in such a situation would only be illusory. In view of the provisions of sub-section (1) of section 3 of the Act in respect of a complaint instituted by a private individual u/s 500 of the IPC containing allegation that comments made in a judgment constitutes offence under the aforesaid provision, a learned Magistrate would have no jurisdiction to entertain the same.

42. In the case of Deelip Bhikaji Sonawane (supra), the Court on its own did not pass any direction, but order was issued upon the State government to take appropriate action against respondent No. 2 therein for certain acts committed by him which was found to be illegal and wrong. Leave was also given to the petitioner therein to apply to appropriate authority for obtaining sanction to prosecute the respondent No. 2 therein. Thus the Court exercised its power to direct the State Government to take steps for punishing an offender but did not assume such jurisdiction itself. In the case of Ravi Shankar Srivastava (supra), the first information report was filed before a statutory authority. Institution of a suit or a criminal proceeding in a Court by a private person was not in issue in that proceeding. In that case there was additional allegation of external factors prompting a judicial decision. In neither of these two decisions, the Court had entertained a civil or criminal proceeding at the instance of a private person. In this proceeding, the words contained in the judgment of the respondent No. 1 is intricately linked with discharge of judicial duty, and hence the respondent No. 1 is protected u/s 3(1) of the 1985 Act.

43. So far as the present proceeding is concerned, the anguish and anxiety of the petitioner over the comments made in the judgment has been found to be justified by the Hon''ble Supreme Court. There is no scope on my part for reassessing the justification of such comment. The Hon''ble Supreme Court found such comments to be unwarranted. On that count, there is no controversy. But grievance of the petitioner cannot be redressed in the manner he sought to, by instituting a defamation action. The reason for this I have discussed in the earlier part of this judgment.

44. As regards the order of the learned magistrate passed in review, I do not find any error in that judgment. In the absence of specific power or jurisdiction to review its own decision, a Court cannot exercise such power. The judgment on the basis of which the petitioner wanted reconsideration of the order of rejection lays down principles in the same line as has been held in the judgment in the case of B.S. Sambhu (supra).No substantive argument relating to rejection of review petition

was also made before me on this point in course of hearing. The instant petition is accordingly dismissed, but without any order as to costs.