
Kamal Chatterjee Vs The State of West Bengal

Criminal Revisional Jurisdiction C.R.R. No. 3081 of 1997

Court: Calcutta High Court

Date of Decision: Dec. 2, 1997

Acts Referred:

Constitution of India, 1950 " Article 254(1)#Criminal Procedure Code, 1973 (CrPC) " Section 197(1)#Penal Code, 1860 (IPC) " Section 120#Prevention of Corruption Act, 1947 " Section 3A, 5, 5(1)(c), 5(4), 6#Prevention of Corruption Act, 1988 " Section 10, 11, 12, 13, 14#West Bengal Criminal Law Amendment (Special Courts) Act, 1949 " Section 10, 13, 2, 2, 2(1)#West Bengal Criminal Law Amendment (Special Courts) Amending Act, 1953 " Section 10, 13, 26, 3, 6

Citation: (1998) 2 CALLT 98 : (1998) 1 CHN 139

Hon'ble Judges: Dibyendu Bhusan Dutta, J

Bench: Single Bench

Advocate: Mr. Asimes Goswami, for the Appellant; Mr. Sudipta Mottra, for the Respondent

Judgement

D.B. Dutta. J.

1. The instant application u/s 482 of the Criminal Procedure is directed against the order dated 15.9.97 passed by the learned Judicial Magistrate.

Second Court. Sreerampore in G.R. Case No. 1336 of 1995 corresponding to Uttarpara P.S. Case No. 203 dated 5.11.95.

2. The petitioner was posted as ward master in the Uttarpara General Hospital in the year 1995. On 5.11.95, a private individual (the opposite

party No.1) lodged a complaint with the O.C. Uttarpara Police Station alleging that while he was passing along the street, he noticed the petitioner

bringing out some articles such as tin and polythene made empty gerlcan and sealed saline bottles from the campus of Uttarpara General Hospital

and that a rickshaw puller was also present there at that time. It was alleged in the complaint that the petitioner was trying to sell the said articles of

the hospital without any authority. On the basis of the said complaint. Uttarpara police case was started under sections 409, 120B IPC against the

petitioner and under sections 411, 120B IPC against another who is not a public servant.

3. After investigation, police submitted charge-sheet against the petitioner under sections 409, 120B IPC and against the co-accused under

sections 411, 120B . IPC and on 17.7.96, the learned Sub Divisional Judicial Magistrate took cognizance on the basis of that charge-sheet.

Thereafter, on 30.8.96, the learned Magistrate framed charges against the petitioner and the co-accused under sections 409, 120B IPC . The

petitioner pleaded not guilty and the learned Magistrate posted the case for evidence on 17.10.96. On 17.10.96, an application was filed on behalf

of the prosecution before the Magistrate for transfer of the case to the court of Special Judge, Hoogly, for trial on the ground that the petitioner is a

public servant. The petitioner opposed the prayer, but after hearing both parties, the learned Magistrate by his impugned order was pleased to

transfer the case from his court to the court of Special Judge, Hoogly with the direction upon the petitioner to be present in the Special Court on

30.9.97.

4. In challenging the legality of the impugned order of the learned Magistrate in the present revision, Mr. Aslmes Goswami, the learned counsel

appearing for the petitioner, contended that a case becomes triable by a Special Court only when sanction is necessary and is obtained and since in

the instant case, the alleged offence was not committed in course of discharge of the official duties of the petitioner, a public servant, sanction was

not necessary and the learned Magistrate was quite competent to take cognizance and try the case and should not have transferred the case to the

Special Court.

5. Mr. Sudlpta Moltra, the learned Additional Public Prosecutor appearing for the State, on the otherhand supported the impugned order of the

Magistrate. His contention is that the offence concerned having been committed by a public servant was exclusively triable by a Special Court

within the meaning of section 2 of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 and that for such trial no sanction would

be necessary and as such, the learned Magistrate was quite Justified in transferring the case to the Special Court. Mr. Moltra referred to the

decisions reported in 1986 CrL LJ. 1248: Superintendent and Remembrancer of Legal Affairs. W.B. v. Usha Ranjan and 1995 (1) CHN 264:

F.K. Dubcy v. Steal Authority of india Ltd.

6. In reply, Mr. Goswami contended that the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 stands vertically repealed by the

Prevention of Corruption Act, 1988. His contention is that after the Prevention of Corruption Act, 1988 come into force, the Special Judges

appointed u/s 2 of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 ceased to have jurisdiction and all Special Judges

functioning in West Bengal are functioning under the Prevention of Corruption Act, 1988. It is further contended by Mr. Goswami that since

previous sanction is necessary u/s 19 of the Act for prosecution before a Special Judge within the meaning of this Act of 1988 in respect of an

offence alleged to have been committed by a public servant and since no sanction is obtained in the instant case, the Special Judge cannot have any

Jurisdiction to try this case. It is also contended that since, according to the schedule 1 of the Criminal Procedure Code an offence u/s 409 of IPC

is triable by any Magistrate, the learned Magistrate rightly took the cognizance as well as framed charge. Mr. Goswami placed his reliance on one

decision reported in 1995 C Cr LR (Cal) 63 : H.D. Bannan v. CBI/ SPE/Calcutta, through State of West Bengal.

7. The Prevention of Corruption Act, 1947 is a central legislature enacted for more effective prevention of bribery and corruption. It created a new

offence of criminal misconduct by a public servant in section 5. Sub section (4) of section 5, however, made it clear that the provisions of section 5

shall be in addition to and not in derogation of any other law for the time being in force and that nothing contained herein shall exempt any public

servant from any proceeding which might, apart from this section, be instituted against him. Section 6 of the Act makes previous sanction necessary

for prosecution of a public servant in respect of the offence of misconduct or any attempt to commit the said offence. Section 7 makes the accused

person a competent witness for the defence. Section 7A makes the Code of Criminal Procedure 1898 applicable to any proceeding in relation to

the offences punishable under this Act. This Act, however, did not make any provision as to which court would be trying the offences under this

Act.

8. The State of West Bengal enacted the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 to provide for speedy trial and more

effective punishment of certain offences. Sub section (1) of section 2 obligates the State Government to constitute by notification in the official

gazettee one or more Special Courts and also to abolish any such court if it deems such court to be no longer necessary. Sub section (2) provides

for eligibility of a person for appointment of a Judge to preside over a Special Court. Sub section (3) of section 2 makes it clear that every Special

Court shall have jurisdiction throughout the whole of West Bengal and shall sit at such place or places as may be specified by the State

Government by notification in the official gazettee. The Act contains a schedule which specifies certain offence and item No.2 of the schedule

specifies an offence punishable u/s 409 of the 1PC committed by a public servant in respect of property, with which he is entrusted or over which

he has dominion, in his capacity as a public servant. Sub section (1) of section 4 creates or confers exclusive jurisdiction upon the Special Courts

to try the offences specified in the aforesaid schedule, notwithstanding anything contained in the Code of Criminal Procedure or in any other law.

The proviso to sub section (1) of section 4 empowers the Special Court to try any offence other than an offence specified in the schedule while

trying any case provided the accused may be charged under the Code of Criminal Procedure with such other offence at the same trial. Section 6

confers upon the High Court all the powers of appeal and revision as contemplated under the Cr. PC vis-a-vis a Special Court which is deemed to

be a court of session. Section 7 ousts the jurisdiction of any kind of any court in respect of proceedings of Special Court save as provided in

section 6. Section 10 makes the provisions of Prevention of Corruption Act, 1947 applicable to trial under this Act.

9. Subsequently, the Government of India came forward with a central legislation entitled Criminal Law Amendment Act, 1952 in order to amend

the Indian Penal Code and the Code of Criminal Procedure 1973 and also to provide for more speedy trial for certain offences. Like section 2 of

the West Bengal Act of 1949, section 6 gives the State Government powers to appoint Special Judges by notification in the official gazettee to try

the offences specified under the Prevention of Corruption Act, 1947 or the offence of conspiracy to commit or attempt to commit any abetment of

any of the said offences. Like sub section (1) of section 4 of the West Bengal Act of 1949. sub section (1) of section 7 gives exclusive jurisdiction

to the Special Judges to try the offences specified in section 6 notwithstanding anything contained in the Code of Criminal Procedure or in any

other law. Sub section (3) of section 7 contains a provision similar to that contained in the proviso to subsection (1) of section 4 of the West

Bengal Act of 1949. Section 8 prescribes the procedure and powers of Special Judge in holding the trial. Section 9 contains the provision relating

to appeal and revision. Section 10 makes a provision of transfer of all cases triable by a Special Judge u/s 7 to the Special Judge having

Jurisdiction over the cases which were pending before any Magistrate immediately before the commencement of this Act.

10. The West Bengal Criminal Law Amendment (Special Courts) Act, 1949 was amended by the West Bengal Criminal Law Amendment

(Special Courts) Amending Act, 1953 and by section 3 of that Amending Act, section 13 was inserted in the West Bengal Act of 1949 and

according to section 13, sections 6 to 10 of the Criminal Law Amendment Act of 1952 have been specifically made inapplicable to the State of

West Bengal. By the said section it has also been categorically made clear that the said sections 6 to 10 of the Act of 1952 shall be deemed never

to have applied to West Bengal. In view of section 13 of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 the said Act

could co-exist with the Central Act of 1952 and there was no repugnancy between the provisions of the said two Acts.

11. The Central Government by enacting a subsequent Central Act namely the Prevention of Corruption Act, 1988 repealed the Prevention of

Corruption Act, 1947 as well as the Criminal Law Amendment Act, 1952 (vide section 30 of the Prevention of Corruption Act, 1988). Section

2(c) of this Act considerably enlarged the scope of the term "public servant" as incorporated under the earlier Act of 1947. Sub section (1) of

section 3 empowers both the Central Government and the State Government to appoint Special Judges by notification in the official gazettee to try

any offence punishable under this Act and any conspiracy or attempt to commit such an offence or abetment of any such offence. Sub section (1)

of section 4 contains the non-obstante clause similar to that contained in sub section 4½ (1) of section 4 in the West Bengal Criminal Law

Amendment (Special Courts) Act, 1949 and makes the offences specified in sub section (1) of section 3 exclusively triable by the Special Judges

only. Sub section (3) of section 4 virtually corresponds to the proviso to sub section (1) of section 4 of West Bengal Act of 1949 and empowers a

Special Judge to try any offence other than any offence as specified in section 3 only when he tries any case under the Act and the accused may

be charged under the Criminal Procedure Code at the same trial with that other offence. Section 5 prescribes the procedure and powers of Special

Judge. Section 6 gives the Special Judge power to try summarily. The offences punishable under the Act are specified and defined in sections 7, 8,

9, -10, 11, 12, 13, 14 and 15. Like section 5 of the earlier P.C. Act of 1947, section 13 contains the corresponding provisions relating to the

offence of criminal misconduct by a public servant. Section 17 creates special investigating agencies in connection with the cases under the Act.

Like section 6 of the earlier Act of 1947, section 19 makes previous sanction necessary for prosecution of an offence under the Act alleged to

have been committed by a public servant. Section 26 provides that every Special Judge appointed under the Criminal Law Amendment Act. 1952

and holding office of the commencement of the Act to be deemed to be a Special Judge u/s 3 of the Act for that area. Like sub section (4) of

section 5 of the Prevention of Corruption Act of 1947. section 28 of the 1988 Act also provides that the provisions of this Act shall be in addition

to, and not in derogation of any other law, for the time being in force, and that nothing contained in this Act shall exempt any public servant from

any proceeding which might, apart from this Act, be instituted against him.

12. Section 409 IPC provides for the punishment of the offence of criminal breach of trust by a public servant. The offence of criminal breach of

trust is defined in section 405 of IPC . In Om Prakash Gupta Vs. State of U.P., the question arose as to whether section 409 of IPC stood

repealed by section 5(l)(c) of the Prevention of Corruption Act, 1947, which look alike, and the five Judge Bench of the Supreme Court on a clear

comparison and contrast of the different elements constituting the offence u/s 409 of the IPC and the one u/s 5(l)(c) of the Prevention of

Corruption Act, 1947 held that they are separate and distinct from one another and that these two offences can co-exist and the one cannot be

considered as overlapping the other. The Supreme Court was categorical in holding that the offence u/s 409 of the Penal Code is not impliedly

repealed by section 5(l)(c) of the Prevention of Corruption Act. 1947.

13. The offence u/s 5(1)(c) of the Prevention of Corruption Act, 1947 now corresponds to section 13(1)(c) of the Prevention of Corruption Act,

1988 and as such. In view of the Supreme Court decision in Om Parkash Gupta (supra), the question of repeal of section 409 of the IPC by

section 13(1)(c) of the Prevention of Corruption Act, 1988 cannot at all arise and it can be safely held that the offence u/s 13(1)(c) of the

Prevention of Corruption Act, 1988 and the offence u/s 409 of the IPC are quite separate and distinct from one another and cannot overlap each

other. That being so, the offence u/s 409 of the IPC cannot be construed as an offence punishable under the Prevention of Corruption Act, 1988.

14. The question of trying any offence u/s 409 of the IPC by a Special Judge under the Prevention of Corruption Act, 1988 can arise under sub

section (3) of section 4 of the Act only if the Special Judge has the occasion to try a case involving an offence punishable under the Act and the

accused may be charged under the Code of Criminal Procedure at the same trial with the offence u/s 409 of [PC. In the instant case, no offence

punishable under the, Prevention of Corruption Act, 1988 is involved in the strict sense of the term. As such, the provision of the Prevention of

Corruption Act, 1988 cannot be pressed into service in relation to the prosecution of a public servant only for an offence punishable u/s 409 of

IPC . Then again, like the provisions of section 5(4) of the earlier Prevention of Corruption Act, 1947, section 28 of the Prevention of Corruption

Act, 1988 also expressly provides that the provisions of the Act of 1988 were intended to be in addition to and not in derogation to any other law

and that nothing in this Act could exempt the public servant from any proceeding which might, apart from this Act, be instituted against him. There

is, indeed, no scope to argue that the provisions of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 have been repealed by

implication by the provisions of the Prevention of Corruption Act. 1988 particularly when there is no repugnancy or inconsistency between these

two Acts in so far as the prosecution of a public servant for an offence punishable u/s 409 of the IPC is concerned.

15. In the decision cited by Mr. Goswami (1995 C Cr LR (Cat) 63 : H.D. Barman v. CBI), the point that arose for consideration was whether the

Judges of the Special Court appointed u/s 2 of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 are competent to take

cognizance of any offence punishable under the Prevention of Corruption Act, 1988 by virtue of such appointments and a Single Bench of our High

Court held that a Judge appointed u/s 2 of the Act of 1949 cannot be treated as a Judge either u/s 26 of the Prevention of Corruption Act, 1988

or as a Judge appointed u/s 3 of that Act for taking cognizance and trying offences punishable under the 1988 Act. In the instant case, the special

Judge appointed u/s 2 of the 1949 Act is not to take cognizance or to try any offence punishable under 1988 Act. In the said decision it was also

held that in view of Article 254(1) of the Constitution, the Prevention of Corruption Act. 1988 will prevail over any existing provision of the West

Bengal Act of 1949 in the event of any repugnancy between the two even if any such provision of the West Bengal Act had also received the

assent of the President. Mr. Goswami could not place anything from the provisions of the West Bengal Act of 1949 and the Central Act of 1988 in

order to show that there is repugnancy between the provisions of section 4 of the West Bengal Act of 1949 which confers exclusive Jurisdiction

upon the Special Courts appointed u/s 2 of that Act to try the offence u/s 409 of the 1PC which is specified in the schedule of that Act and the

provisions of section 4 of the Central Act of 1988 which confer exclusive jurisdiction upon the Special Judges who are either appointed u/s 3 of

the Act or the Judges appointed under the Criminal Law Amendment Act, 1952 and treated as Special. Judges under the Act of 1988 by reason

of section 26 thereof, to try the offence punishable under the Act, in the circumstances, it is not understood how H.D. Barman's case (supra) cited

by Mr. Goswami could be of any assistance to the petitioner in the facts and circumstances of this case.

16. In the Om Prakash Gupta's case (supra), the Supreme Court held that no sanction is necessary to prosecute a public servant for an offence u/s

409 IPC as he does not normally act in his capacity as a public servant in committing criminal breach of trust. Section 197(1) of Cr. PC affords

protection to a public servant against prosecution for any offence committed by him while acting or purporting to act in discharge of his official duty

by requiring previous sanction as the condition precedent to the taking of cognizance of such offence by any court. In the instant case, on the facts

alleged, it cannot at all be said that the petitioner public servant committed the offence while acting or purporting to act in discharge of his official

duty. As such, the question of necessity of any previous sanction as contemplated u/s 197(1) Cr.PC cannot arise at all. The West Bengal Criminal

Law Amendment (Special Courts) Act, 1949 does not by itself require any previous sanction for prosecution of any public servant for an offence

punishable u/s 409 of 1PC committed by him in respect of property with which he is entrusted or over which he has dominion in his capacity as a

public servant. Section 10 of the 1949 Act, however, made the provisions of the Prevention of Corruption Act, 1947 applicable to trials under this

Act. Now cognizance is taken at the very initial stage while the trial commences on the framing of charge. Section 6 of the Prevention of

Corruption Act, 1947 did require previous sanction for prosecution of a public servant for an offence punishable under sections 161, 164, 165 of

the IPC and also the offences punishable u/s 5 of the Act. The offence involved in the instant case was not an offence specified in section 6 of the

Prevention of Corruption Act, 1947. Even though the provisions of the Prevention of Corruption Act, 1947 relating to the trial of an offence

punishable under that Act were made applicable to a trial by a Special Court appointed u/s 2 of the West Bengal Act of 1949 for an offence u/s

409 IPC as specified in the schedule of the Act by virtue of section 10 of the Act, the provisions of section 6 of the Prevention of Corruption Act,

1947 relating to cognizance of an offence specified in that section could be made applicable to the stage of taking cognizance of an offence u/s 409

IPC against a public servant by a Special Court under West Bengal Act of 1949. Similarly, the corresponding provisions of section 19 of the

Prevention of Corruption Act, 1988 regarding the necessity for sanction for prosecution of a public servant for an offence punishable under that

Act at the time of taking cognizance for that offence cannot, by implication, be made applicable to the stage of taking cognizance of an offence u/s

409 IPC by a Special Court functioning under the West Bengal Act of 1949.

17. In one of the two decisions cited by Mr. Moltra, namely the decision in the case of Superintendent and Remembrancer of Legal Affairs v.

Usha Rajan reported in 1986 Cri. LJ 1248, the Supreme Court held that the Criminal Law Amendment Act, 1952 was applicable to the State of

West Bengal except and save five sections thereof namely sections 6, 7, 8, 9 and 10 by reason of section 13 of the West Bengal Act of 1949 as

amended by section 3 of the West Bengal Criminal Law Amendment (Special Courts) Amending Act, 1953. It is evident that the provisions of

sections 6 to 10 of the 1952 Act were made inapplicable to the State of West Bengal in view of the operation of an Act of its own namely the

West Bengal Criminal Law Amendment (Special Courts) Act, 1949.

18. In the other case cited by Mr. Mollra that is to say P.K. Dubey v. Steel authority of india reported in 1995(1) CHN 264, a single Bench of our

High Court held that in view of section 4 read with clause 2 of the schedule of the West Bengal Criminal Law Amendment (Special Courts) Act,

1949, save and except the Special Courts the offence committed u/s 409 of IPC by the public servant cannot be tried by a Magistrate or by any

court.

19. A public servant may or may not commit an offence acting or purporting to act in discharge of his official duty. If he commits the offence acting

or purporting to act in discharge of his official duty, section 197(1) of the Code of Criminal Procedure would require sanction for his prosecution

and debar any court from taking cognizance of such an offence without previous sanction. If, on the otherhand, he commits the offence without

acting or purporting to act in discharge of his official duty, section 197 would not at all be applicable necessitating any sanction for prosecution. But

if the offence committed by the public servant is one specified in sub section (1) of section 6 of the Prevention of Corruption Act, 1947 such as

one punishable u/s 161 or 164 or 165 of IPC or under subsection (2) or sub section (3A) of section 5 of that Act of 1947 or is one punishable

under the Prevention of Corruption Act. 1988 such as one punishable under sections 7, 10, 11, 13 and 15 of the said Act, sanction would be

necessary and cognizance without sanction would be barred u/s 6(1) of the Prevention of Corruption Act, 1947 or u/s 19(1) of Prevention of

Corruption Act, 1988, as the case may be, no matter whether such offence is or is not committed by the public servant acting or purporting to act

in discharge of his official duty.

20. The offence involved in the instant case is one of criminal breach of trust punishable u/s 409 IPC. Normally, such an offence cannot be

committed by a public servant acting or purporting to act in discharge of his official duty, even though he may have been entrusted with the

property or may have dominion over the property in the capacity of a public servant. On the facts alleged in the instant case, it can never be said

by any stretch of imagination that the petitioner committed the offence in discharge of his official duty. It is the specific case of the petitioner as

pleaded in the revisional application that the offence was not committed in discharge of his duty. As such, the necessity of any sanction as required

u/s 197 Cr. PC is out of question here.

21. The offence concerned is also not an offence as specified either in sub section (1) of section 6 of the earlier Prevention of Corruption Act,

1947 or in sub section (1) of section 19 of the later Prevention of Corruption Act 1968 necessitating sanction under either of the said two Acts.

The offence concerned is specified in item No.2 of the Schedule of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949. Even

though the provisions of the Prevention of Corruption Act, 1947 were made applicable to trials under the 1949 Act by section 10 of that Act, the

provision of the 1947 Act relating to cognizance would not have any application here, more so when the offence is not one specified in sub

section (1) of section 6 of the 1947 Act. The 1947 Act has been repealed by the 1988 Act but since the offence is also not one specified in sub

section (1) of section 19 of the 1988 Act the question of sanction as required by section 19 of the 1988 Act will similarly not arise here.

22. By virtue of section 4(1) of the West Bengal Act of 1949 the offence u/s 409 IPC committed by a public servant is exclusively triable by

Special Judges appointed u/s 2 of the said Act. The Special Judges appointed u/s 2 of that Act cannot be said to have ceased to have Jurisdiction

to try the offence u/s 409 IPC after the commencement of Prevention of Corruption Act, 1988. The Special Judge contemplated under the Act of

1988 is either a Judge appointed u/s 3(1) of the Act or a Judge appointed under the Criminal Law Amendment Act, 1952 and holding office on

the commencement of this 1988 Act and not a Judge appointed u/s 2 of the West Bengal Act of 1949. The exclusive jurisdiction created by

section 4(1) of the West Bengal Act of 1949 for trial by Special Judges appointed u/s 2 of that Act in respect of offence u/s 409 IPC committed

by a public servant cannot be said to have been affected any way by the 1988 Act.

23. In such view of the matter, it must be held that so far as the case against the petitioner is concerned, it is exclusively triable by the Special Judge

appointed u/s 2 of the West Bengal Act of 1949 having jurisdiction over the area concerned and that the learned Magistrate had no jurisdiction to

try the case so far as it is directed against the petitioner. Accordingly, no exception can be taken to the impugned order which does not call for any

interference at the instance of the petitioner. In the result, the revisional application falls and is hereby dismissed.

24. Application dismissed