Chandra Sekhar Pathak Vs Jogesh Chandra Dey and others
 Amulya Chandra Bhattacharjee Vs State of West Bengal and others

Civil Rule No''s. 2210 and 2239 (W) of 1966

Court: Calcutta High Court

Date of Decision: April 20, 1970

Acts Referred:
Constitution of India, 1950 â€" Article 226, 226(1)#West Bengal Criminal Law Amendment (Special Courts) Act, 1949 â€" Section 6

Citation: 74 CWN 816

Hon'ble Judges: Anil Kumar Sen, J

Bench: Single Bench

Advocate: N.C. Banerjee and T.C. Roy, for the Appellant;P.K. Sen Gupta and S. Banerjee, for the Respondent

Judgement

Mr. Anil Kumar Sen, J.
These two Rules, issued on two applications under Article 226(1) of the Constitution, arise out of a criminal case,

being Case No. 5 of 1965, now pending in the Additional Special Court, Calcutta. Civil Rule No. 2210 (W) of 1966 had been obtained on

August 19, 1966 by Chandrasekhar Pathak who is accused No. 4 in the trial. Civil Rule No. 2239 (W) of 1966 by Amulya Chandra

Bhattacharjee, accused No. 5 in the trial. As the two rules involve a common question as to the maintainability of the prosecution on the ground of

invalidity of the sanction they were directed to be heard analogously.

2. In order to decide the point raised it is necessary to refer to the facts leading to the aforesaid prosecution. Government of West Bengal framed a

scheme for distribution of Chemical Fertilizer and execution thereof was left in charge of the Department of Agriculture. Under this scheme, various

distributors were to place their indents for fertilizer with the department, on receipt whereof the Government was to issue directions to the suppliers

for booking the required stock of fertilizer to the destination stations mentioned by the distributors. Such consignments, however, were to be

booked in the name of the Deputy Secretary of the Department as consignee and their relative Railway Receipts were to be sent to the Deputy

Secretary. On receipt of the Railway Receipts, the distributors concerned were called upon to pay the price in advance to the department and on

receipt thereof the Deputy Secretary was to endorse the Railway Receipts in favour of the distributors. It appears that a system was invoked -

there being some doubt as to whether there was proper sanction therefore or not - to receive the payment of price by cheques. The procedure

followed was that on receipt of the price by cheques, challans for the deposit thereof in the Reserve Bank were to be prepared and forwarded to

the deputy Secretary by the Accountant of the Fertiliser Section through the Assistant Secretary; on receipt thereof the Deputy Secretary was to

endorse the Railway Receipts in favour of the distributor and send back the cheque and the challan to the Accountant for deposit with the Reserve

Bank. Up to March 1962 such deposits were made through the cashier but thereafter directly by the Accountant of the Fertiliser Section.

3. It appears that while the Railway Receipts were made over to the distributors after endorsement by the Deputy Secretary on the date the

cheque was made over or immediately thereafter; there gradually occurred unconscionable delay in presenting the cheques to the Reserve Bank for

encashment. This threw open the door to unscrupulous distributors to cheat the Government in respect of the price of fertilizer already taken

delivery of by them taking advantage of this inordinate delay in the presentation of cheques. In many cases after the goods were taken delivery of

when the cheques were presented for encashment they were dishonoured and the Government suffered heavy loss from a number of distributors

who subsequently failed to pay up those dues in entirety. In some cases, a particular distributor was allowed to receive subsequent consignments

on the relative Railway Receipts being endorsed in its favour on the recommendation of the Assistant Secretary even at a time when his cheque for

the previous consignment had been returned uncashed being dishonoured on presentation by the Reserve Bank.

4. The Petitioner Amulya Chandra Bhattacharjee was the Assistant Secretary of the Department of Agriculture. He was put on suspension on

November 15, 1962 and a departmental proceeding was started against him on January 8, 1963. The charge was gross neglect of his duties and

utter lack of supervision which led to the loss of Rs. 3,79,760 in respect of six distributors. The statement of allegations annexed to the aforesaid

charge-sheet clearly indicated that the charge covered certain deals by the six distributors set out in the charge-sheet on different occasions and for

fertilizer of different values, but all the transactions covered a period of the first six months of the year 1962. That on the aforesaid charge a

departmental enquiry was held by Shri Malinath Mukherjee, the Inquiring Officer, appointed by the State Government. On his findings the

Assistant Secretary, that is, the Petitioner Amulya Chandra Bhattacharjee, cannot be totally absolved from the charge of negligence and lack of

proper supervision of the work of the Accountant; though, according to the Inquiring Officer, the greater part of the responsibility should have been

placed upon the Deputy Secretary. Upon the finding of the Inquiring Officer the Assistant Secretary, in the departmental procedure followed, had

to deal with the cheques and the challans prior to the same being placed before the Deputy Secretary for endorsement of the Railway Receipts on

the basis of the recommendation of the Assistant Secretary and again if and when such cheques were returned by the Reserve Bank dishonoured.

But, according to the Inquiring Officer, the Assistant Secretary had no connection with the sending of the cheques by the Directorate Cashier or

the Accountant to the Reserve Bank for encashment. What happened on the basis of the aforesaid findings does not appear from the records of

the present case, though the learned Advocate appearing for Amulya Chandra Bhattacharjee has conceded from the bar that some penalty was

imposed on the basis of the aforesaid findings, but then the same is subjudice in some other proceedings in this Court. Nothing, however, turns on

the result of the said disciplinary proceedings so far as the present dispute is concerned.

5. In the meantime it appears that on an information lodged with the police by the Secretary of the Department of Agriculture, the police carried on

certain investigation over certain acts with reference to such fertilizer deals suspected to constitute criminal offences under the law. According to

the present prosecution this investigation revealed that there was a criminal conspiracy between some of the public servants including the Petitioner,

Amulya Chadnra Bhattacharjee and some outsider to commit criminal breach of trust in respect of a few Railway Receipts and for the cheques

representing the price thereof. The Government accorded its sanction to prosecute on September, 29, 1964 and allotted the case on January 21,

1965 for trial to the Additional Special Court u/s 4(2) of the West Bengal Criminal Law (Special Courts) Act, 1949.

6. The subject matter of the charge in this criminal case is a deal where y three Railway Receipts bearing Nos. 852687, 573342 and 573346 all

dated September 17, 1961 were endorsed in favour of M/s. Shaw Miller and Company against payment of Rs. 65,568 by a cheque No.

A786127 dated September 20, 1961 which cheque, however, was never entered in the relevant registers and were not even presented for

encashment. The charge was u/s 120(B) read with Section 409 and 409/34.

7. The Special Court took cognizance of the offence on the allotment as also on a petition of complaint lodged by the Director of the Public

Prosecution against eight persons including present two Petitioners. In or about April 1965 most of the accused persons including the present

Petitioners appeared before the Special Court and immediately thereafter the Petitioner, Chandrasekhar Pathak moved this Court on May 3, 1965

with an application u/s 435 and 439 of the Code of Criminal Procedure praying that the proceedings as against him should be quashed and one of

the grounds taken was that in the sanction accorded by the State Government his name did not appears as one of the persons involved in the

conspiracy.

8. When the aforesaid Rule came up for hearing before A.K. Das, J. the following order was recorded on the concession of the learned Advocate

appearing for the Petitioner. ""Mr. Banerjee appearing for the Petitioner states that this application will not be pressed as he has advised client to

raise this point before the Judge, Additional Special Court. The Rule is accordingly discharged. Let the records be sent down immediately"".

9. Though reference to the aforesaid proceedings and the result thereof has been made in the affidavit-in-opposition filed on behalf of the

Respondents I had at the hearing called for the original record of this Court in the aforesaid Rule and taken into consideration the records of the

proceedings in this Court.

10. When the matter went back, on May 30, 1966 the Petitioner, Chandrasekhar Pathak, field an application in the Additional Special Court

taking an objection that as he was not named in the sanction as one of the persons involved in the conspiracy, the case cannot proceed as against

him and he should be discharged. It is, however, not disputed by the Respondents that the name of Chandrasekhar Pathak do not appear as one

of the parties to the conspiracy in the sanction accorded but, according to the Respondents, there are ample materials on records including the

police papers to show that Chandrasekhar Pathak was one of the parties to the conspiracy. It is also not disputed that Chandrasekhar Pathak is

not a public servant who by himself can ask for any protection u/s 197 of the Code of Criminal Procedure.

11. On July 30, 1966 another application was filed by the Petitioner Chandrasekhar Pathak proposing to take certain additional grounds with

which we are now no longer concerned in this rule inasmuch as those grounds are not pressed before me in this Rule.

12. The learned Judge of the Special Court overruled these two objections raised by Chadnrasekhar Pathak by an order dated August 13, 1966.

On the objection as to maintainability of prosecution as against Chandrasekhar in the absence of a sanction wherein his name appears as a part to

the conspiracy, the learned Judge took the view that sanction is accorded to the prosecution of a public servant for an act amounting to an offence

and in the present case such act was the act of conspiracy to commit breach of trust in respect of the three Railway Receipts dated September 17,

1961; when Petitioner''s name appeared as one of the members to such a conspiracy from the records a mere omission of his name in the sanction

itself would not invalidate the prosecution.

13. Immediately after the aforesaid order the Petitioner Chandrasekhar Pathak instead of moving this Court in the appropriate jurisdiction u/s 435

and 439 of the Code of Criminal Procedure, moved the above application under Article 226(1) of the Constitution praying for a writ of mandamus

for quashing the Criminal Case No. 5 of 1965 and for a writ of prohibiting the Respondents, the State authorities, from proceeding any further with

Criminal Case No. 5 of 1965. This Court in issuing the Rule recorded a reservation to the effect ""it is directed that the question of maintainability of

the petition under Article 226 of the Constitution will be decided first after the other party appears"". This Court however refused to grant any stay

of further proceedings while issuing the Rule on the application of Chandrasekhar Pathak (being Civil Rule 2210 (W) of 1966).

14. Immediately thereafter on August 24, 1966 the Petitioner Amulya Ch. Bhattacharjee who had not so long raised any objection as to the

maintainability of the prosecution or validity of the sanction moved a similar application under Article 226(1) of the Constitution with similar prayer.

This Court issued the Rule and directed that the said rule be heard along wit the Rule obtained by Chandrasekhar Pathak. On this application this

Court, however, granted an interim stay of further proceedings of the Criminal Case.

15. In both the Rules it appears that nearly same set of grounds had been taken and at the hearing only ground that has been pressed is that the

prosecution should be quashed and a writ of prohibition should be issued as the prosecution does not rest upon a valid sanction.

16. The Respondents have appeared in both the Rules. On their behalf, an affidavit has been filed by one Asoke Kumar Roy Chowdhury, an

Inspector of Police, who had investigated the case.

17. Mr. Banerjee and Mr. Roy appearing on behalf of the Petitioners in support of these two Rules have raised three points in support of their

contention that the sanction accorded was not in accordance with law and as such is invalid - (a) that the facts disclosed in the sanction do not

make out any case of criminal breach of trust and as such this only betrays that the sanction was accorded mechanically and without any

application of mind by the sanctioning authority, (b) the sanction was not accorded on consideration of all relevant materials and as such the

sanction is not a valid sanction in law and (c) as the sanction was accorded without affording any opportunity to the public servant concerned to

show cause why such sanction should or should not be granted, the sanction so granted, in violation of principles of natural justice, cannot afford a

foundation for a valid prosecution.

18. Mr. Sengupta appearing along with Mr. Banerjee for the Respondents has contested each of the aforesaid points. Mr. Sengupta has further

contended that validity or invalidity of the sanction is really an issue involved in the trial to be decided on evidence and as such the challenge thrown

by the Petitioner to the said sanction in an application under Article 226 (1) of the Constitution at this stage is not well conceived.

19. In support of the first point the learned Advocate for the Petitioner relies on the text of the sanction, which has been annexed to both the

petitions, to contend that the facts set out therein do not make out any case of criminal breach of trust whatsoever. Mr. Sengupta, however,

without conceding the objection, has contended that such an objection is premature because even if the facts set out in the sanction do not make

out the offence the prosecution can still at the trial lead evidence to prove that the sanctioning authority had before it all the necessary facts to

constitute an offence for which the sanction to prosecute was accorded.

20. On the second point raised, the learned Advocate for the Petitioner relies on an assertion made in paragraph 7 of the application of Amulya

Chandra Bhattacharjee to the effect that the sanctioning authority never took into consideration the findings arrived at by Shri Malinath Mukherjee

in the departmental proceedings although that was a very relevant material which should have been taken into consideration in according the

sanction. The objection in this form had not been taken by the other Petitioner, Chandrasekhar Pathak, in his application to this Court in this

application before the tribunal below. According to the learned Advocate for the Petitioners Shri Malinath Mukherjee had in the departmental

proceedings come to definite findings as to the procedure followed in the department and the Assistant Secretary''s involvement therein. These,

according to the learned Advocate, are very material in deciding as to whether such an Assistant Secretary could have committed the offence for

which he is being charged. The learned Advocate also relies on an alleged admission made by the Respondents in paragraphs 4(f), 7 and 9 of the

affidavit-in-opposition wherein the Respondents claimed that findings in the departmental proceedings were not relevant for the purpose of the case

and as such not considered. According to this affidavit-in-opposition again, all the relevant papers and documents were taken into consideration in

according the sanction.

21. The learned Advocate for the Petitioner has strongly relied on the observation of the Supreme Court in the case of (1) Rohtas Industries Vs.

S.D. Agarwal and Others, where their Lordships of the Supreme Court were approving the view taken by Lord Hodson and Lord Upjohn that

even in exercising full and unfettered discretion conferred by a statute the authority is bound ""to exercise it lawfully namely, not to misdirect himself

in law, nor to take into account irrelevant matters, nor to omit relevant matters from consideration"". Similarly, reliance was placed on a decision of

the Supreme Court in the case of (2) Western M.P. Electric Power and Supply Company Ltd. Vs. State of U.P. and Another, ; in this case it was

held that where exercise of powers is dependent on satisfaction limited by certain conditions laid down by the statute, the satisfaction is not wholly

excluded form judicial review and when challenged the authority must show that the exercise of the power was within the conditions laid down by

the statute.

22. According to Mr. Sengupta, however, Section 197 of the Code of Criminal Procedure, unlike the statutory provisions under consideration by

the Supreme Court in the aforesaid two cases, does not specify any condition nor provides any limitation in the matter of according sanction to

prosecution. According to Mr. Sengupta, Section 197 as aforesaid only contemplates that when the offender is a public servant contemplated by

the section and is accused of any offence alleged to have been committed while acting as such he should not be prosecuted unless the State or the

Central Government as the case may be accords a previous sanction to such prosecution. It is a protection against any possible frivolous or

harassing prosecution of a public servant for acts done in the discharge of his official duty. Judicial decisions have only laid down that in

appropriately discharging this obligation as to whether sanction should or should not be granted the sanctioning authority must know the facts of the

case. What have to be taken into consideration are the facts constituting the offence for which the public servant would be prosecuted: (3)

Gokulchand v. King 75 I.A 30. The sanctioning authority is not required to go into the question of or decide the truth or otherwise of the facts or

the allegations nor to take into consideration materials relevant for such a decision. According to Mr. Sengupta, the findings of the Inquiring Officer

and/or the procedure under which the Petitioner, Amulya Chandra Bhattacharjee was acting as the Assistant Secretary may be relevant for

deciding as to whether he could have indulged in any wrongful act for which he is being prosecuted and as such relevant to the issue of truth or

otherwise of the charge but non-consideration thereof by the sanctioning authority will not invalidate the sanction. He relies on the decision of the

Supreme Court in the case of (4) Indu Bhusan Chatterjee v. State of West Bengal, 1958 SCR 999.

23. In the present case, according to Mr. Sengupta, all the facts not only appear from the sanction itself but can be proved from the materials

which were taken into consideration by the sanctioning authority. Mr. Sengupta, on facts also, strongly disputes the contention of Mr. Banerjee that

the findings of the Inquiring Officer in the departmental proceedings - the subject matter of enquiry wherein was totally different from the subject-

matter of the present prosecution - was at all relevant or a necessary consideration for according the sanction. Mr. Sengupta has drawn my

attention to a part of the findings of the Inquiring Officer to show that the said Inquiring Officer himself refused to go into the question of propriety

or otherwise of the conduct of the Assistant Secretary in respect of some of the deals on the ground that those were not the subject-matter of the

charge in the disciplinary proceedings. According to Mr. Sengupta, the charges in the disciplinary proceedings related to the deals effected in the

first six months of the year 1962 whereas in the present criminal case the charge relates to an earlier transaction of September 1961. On this point

also Mr. Sengupta without conceding the objection raised on behalf of the Petitioner has again contended that whether the sanction had been

granted taking into consideration all the relevant facts constituting the offence or not and what are the materials relevant thereto, are the issues

involved in the trial to be decided on evidence and cannot be prejudged at this stage.

24. In support of the third point raised on behalf of the Petitioner, the learned Advocate for the Petitioner has relied on the principles laid down by

the Supreme Court that even in case of administrative orders which lead to civil consequences, it is but necessary that the authority making the

order must give an opportunity to show cause to the person likely to be affected by the order. He has relied on the decisions in the case of (5)

State of Orissa Vs. Dr. (Miss) Binapani Dei and Others, , (6) Union of India (UOI) and Others Vs. Indo-Afghan Agencies Ltd., and the

unreported decision of the Supreme Court in the case of (7) A.K. Kraipak v. Union of India, dated 29.4.69 (writ petitions No. 173 to 175 of

1967) as also on the decision of the Supreme Court of United States in the case of (8) Roderick v. John Jullien, AIR 1970 S.C. 32. According to

the learned Advocate for the Petitioner, the grant of sanction leads to taking away the immunity from prosecution for the official acts of the public

servant and as such before an order could be passed granting such sanction it is but necessary that the public servant concerned should be given an

opportunity to show cause. And when it has not been so done the resulting sanction must necessarily be held to be invalid.

25. Mr. Sengupta however has strongly contested this point. He has in the first place drawn my attention to the fact that the necessary averment on

facts to substantiate such a contention is not in the pleadings. According to Mr. Sengupta there is nothing in the pleadings in either of the two cases

to show that the sanction was accorded without affording any opportunity to show cause. Secondly, Mr. Sengupta has contended assuming that it

has been so done even then it does not invalidate the sanction. Mr. Sengupta relied on the decision in the case of (9) In the matter of Kalagava

Bapiah (1903) ILR 27 Mad 54.

26. All the three points raised and strongly contended for on behalf of the Petitioner relate, in my opinion, to but one issue namely whether the

sanction which constitutes the basis of the prosecution as against the public servant had or had not been validly granted. Such issue has to be gone

into only for the purpose of deciding whether the prosecution can lie on such a sanction. In my view this would necessarily also involve a further

question as to whether any sanction is at all necessary for prosecution of the public servant on the charge leveled against him. This is so because

invalidity of the sanction even if assumed - will not lead to failure of the prosecution unless the charge be such that there can be no prosecution

thereon without previous sanction. It has since been laid down that immunity from prosecution without a previous sanction is limited to acts which

have reasonable connection with the discharge of official duty; (10) Matajog Dobey Vs. H.C. Bhari, . It may be recalled that the Supreme Court

has held that for instituting prosecution against a public servant on charges of conspiracy and of criminal breach of trust, sanction may not normally

be necessary. (11) Ronald v. State of West Bengal, AIR 1954 SC 455 and (12) Om Prakash Gupta Vs. State of U.P., .

27. In my view the two issues viz. as to whether the sanction accorded is a valid sanction or not and whether any sanction is at all necessary or not,

are the issues involved in the trial itself; it is always open to an accused to raise such an issue either as a preliminary issue or as an issue at the final

hearing. If and when raised the parties are entitled to adduce evidence and the trial Court is to decide it on evidence. Section 197 of the Code of

Criminal Procedure lays down no limitation or condition to the grant of the sanction except as laid down by judicial decisions to the effect that the

sanctioning authority must apply its mind to the facts of the case and that the sanction is given in respect of the facts constituting the offence

charged. Now it is also well settled that if such facts do not appear on the face of the sanction even then it can be proved by extraneous evidence

that those facts were placed before the sanctioning authority. That was the decision of the Privy Council in the case of (3) Gokul Chand v. King,

75 IA 30 subsequently approved by the Supreme Court. In the present case it appears that the public servant concerned has not at all raised any

such issue in the trial and the other accused had not raised the issue in the manner now urged before me; the trial itself has not yet proceeded and

no evidence has yet been taken. In such circumstances I do not think that it would be proper exercise of the extraordinary jurisdiction of this Court

to withdraw to this Court - so to say one of the issues involved in the trial on an application under Article 226(1) of the Constitution and decide it

for itself. That would be usurping a part of the jurisdiction of the tribunal below. After all not only has the law empowered the tribunal below to

decide the issue but also provided an alternative normal way of challenging such decision of the tribunal in this very Court either in the revisional

jurisdiction or on an appeal against the final order. That is exactly the effect of the provisions of Section 6 of the West Bengal Criminal Law

Amendment (Special Courts) Act 1949.

28. In this view I would refrain from expressing myself on the objections raised before me lest I would thereby embarrass the tribunal below or

prejudice the parties on an issue as to validity of the sanction which in my view should not be prejudged by this Court on an application under

Article 226 (1) of the constitution at the present stage of the trial. Supreme Court also under similar circumstances refused to go into such an

objection in the case of (13) M.K. Gopalan and Another Vs. The State of Madhya Pradesh, . In my view the above decision and the decisions in

the cases of (14) C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, and (15) Sales Tax Officer, Jodhpur

and Another Vs. Shiv Ratan G. Mohatta, substantially support the view taken by me.

29. Apart from this, in my opinion, the applications and particularly the application of Amulya Chandra Bhattacharjee cannot at all be considered

to be bona fide. It is clear from the facts set out hereinbefore that the sanction according to his prosecution was so done as early as on September

29, 1964. He appeared in the proceedings early in the year 1965. Although one of his co-accused was prosecuting a proceeding u/s 435 read

with 439 of the Code of Criminal Procedure in this Court in none too bona fide manner only not to press this application after having stayed the

proceedings for a year on such an application, the public servant concerned, who is more directly interested in the objection as to the validity of the

sanction, raises no objection whatsoever. Then when the matter goes back, again an objection is raised by the co-accused but the public servant

concerned does not choose to raise any issue over the validity of the sanction. He allows the proceedings to continue until August 19, 1966 when

the objection of the co-accused is over-ruled. The co-accused moves this Court, obtains a Rule and it is only at that stage that he comes before

this Court with an application under Article 226(1) of the Constitution to raise a dispute as to validity of the sanction. In my opinion, if the public

servant concerned had any legitimate and bona fide grievance as to validity of the sanction he should have raised such an issue much too earlier if

he really intended to get any relief from the writ jurisdiction of this Court. There is no explanation for this extraordinary delay. I am satisfied that

recourse had been taken to the writ jurisdiction only to delay the prosecution and as such the application is not at all bona fide.

30. On the findings as above the applications must fail and I discharge the Rules. I direct that the Petitioner do pay costs to the contesting

Respondents, hearing fee being assessed to five gold mohurs in each of the two cases.