Ambadas Vs State of Maharashtra

Court: Bombay High Court (Nagpur Bench)

Date of Decision: Nov. 23, 1973

Acts Referred: Companies Act, 1956 â€" Section 617
General Clauses Act, 1897 â€" Section 8
Penal Code, 1860 (IPC) â€" Section 161, 21, 21(9)

Citation: (1974) MhLj 442

Hon'ble Judges: M.N. Chandurkar, J

Bench: Single Bench

Advocate: J.P. Pendse, for the Appellant; M.B. Mor, Asst. Govt. Pleader, for the Respondent

Judgement

M.N. Chandurkar, J.
The appellant, who was a Junior Clerk in the Government College of Education at Bhandara, has filed this appeal

challenging his conviction u/s 5 (1)(d) read with section 5 (2) of the Prevention of Corruption Act, 1947. He was originally charged for the offence

u/s 161 of the Indian Penal Code also but he has been acquitted of that charge. According to the prosecution, Hariram (P.W. 2) had passed his B.

A. Examination in 1969 and was residing in the Shukrawari Ward at Bhandara, in which Chintaman (P.W.3), a peon in the Government College of

Education where the accused was employed, was also living. It is alleged that Chintaman suggested to complainant Hariram that he should seek

admission to the College of Education, and on 31-3-1970 the complainant and Chintaman met the accused near the State Bank of India when the

complainant was introduced to the accused and the accused is alleged to have told Chintaman that he would help the complainant for getting

admitted to the college. An admission form (Ex. 11) was obtained by the complainant on 1-4-1970 from the office of the College and was

presented at the College on 13-4-1970. The prosecution alleged that on 10-4-1970 Chintaman told the complainant that the accused would help

him to get admission provided he paid Rs. 50/- to him. On 14-4-1970, i. e. the day after the form was submitted, the complainant is alleged to

have gone to the College and the accused is alleged to have taken him and Chintaman by the side of the well and demanded Rs. 50. Though the

complainant initially expressed his inability to raise such a large amount, he is said to have agreed finally, and it was then settled that the amount

would be paid in the house of Chintaman the next day at about 11 a.m. or 12 noon. The complainant then approached the Anti-Corruption

Department at 8 p.m. on the same day and narrated this complaint to P. S. I. Kothe (P.W.6) who recorded it and the complaint is Ex. 14. It was

decided that a trap would be laid the next morning. P. S. I. Kothe obtained permission of the Judicial Magistrate First Glass, for investigating this

offence. He collected two panchas-Sudhakar (P. W. 4) and one Bhayyalal who is not examined. The amount of Rs. 50 was made available by P.

S. I. Kothe himself and the currency notes were coated with phenolphthalein powder and the usual formalities which were gone through were

recorded in the first Panchanama (Ex. 15). The complainant was instructed to go to the house of Chintaman and sit in the front room and pay the

amount if it was demanded by the accused. If the amount was accepted, the agreed signal to be given was that the complainant was to cough

thrice. Behind the front room of the house of Chintaman there is another room, and according to the prosecution, P. S. I. Kothe, along with the

two panchas Sudhakar and Bhayyalal, sat in the rear room with the connecting door closed. It is alleged that the connecting door had a hole and

chinks through which the panchas and the Sub-Inspector could see what was going on in the front room. The office in which the accused and

Chintaman were employed used to work in the morning hours and admittedly Chintaman and the accused came to the house of Chintaman at

about noon time when they found the complainant in the room. The complainant is alleged to have asked the accused if he would do his work, on

which the accused is said to have assured the complainant that he was the wholesale authority in the College and he could get it confirmed from the

other Lecturers in the College, and thereafter the accused demanded the amount of Rs. 50 which was paid by the complainant. It is not in dispute

that the currency notes of Rs. 50 were placed on the thigh of the accused, and after the money was placed on the thigh by the accused after

counting the currency notes, on the agreed signal being given, the two panchas and P. S. I. Kothe appeared on the scene and the accused was

apprehended. The accused was told not to move or touch the currency notes which were on his thigh. Then the usual formalities of comparing the

numbers of the currency notes as originally noted in the first panchanama (Ex. 15) and testing the hands of the panchas, the Sub-Inspector and the

accused were gone through. It is also admitted that on the accused putting his hands in the solution of washing soda, the colour turned purple. The

part of the pyjama where the currency notes were placed was also tested by sprinkling the solution of washing soda and it turned purple. The

currency notes were seized and the second panchanama drawn up is Ex. 16. Thus, according to the prosecution the accused had accepted Rs. 50

as illegal gratification as a motive or reward for showing to the complainant the favour of getting him admitted to the College and that he had

received this bribe money by corrupt and illegal means or otherwise by abusing his position as a public servant. Accordingly charges u/s 161 of the

Indian Penal Code and section 5 (1)(d) read with section 5 (2) of the Prevention of Corruption Act were framed against the accused.

2. The prosecution story rests on the evidence of Hariram (P. W. 2), Chintaman (P. W. 3), Sudhakar (P. W. 4) and P. S. I. Kothe (P. W. 6). The

Special Judge, Bhandara, accepted the evidence of all the witnesses and came to the conclusion that the accused who was a public servant had

obtained bribe by wielding his position as a public servant and by making a representation that he was the wholesale authority in the College and

that he could help candidates who wanted admission to the College. He was, therefore, convicted of the offence u/s 5 (1)(d)read with section 5 (2)

of the Prevention of Corruption Act, But having found that the accused did not have the power to admit any candidate, the Special Judge took the

view that the bribe was not in connection with the exercise of an official function and, therefore, it was not proved that he was guilty of the offence

u/s 161 of the Indian Penal Code. He was accordingly acquitted of that offence. He was sentenced to suffer rigorous imprisonment for six months

and to pay a fine of Rs. 100, or in default, to suffer further Rigorous imprisonment for one month, for the offence u/s 5 (1)(d) read with section 5

(2) of the Prevention of Corruption Act. This appeal has now been filed by the accused challenging his conviction.

3. At the outset, Mr. Pendse, learned counsel appearing on behalf of the accused, contended that the accused could not have been convicted of

the offence u/s 5 (1)(d) read with section 5 (2) of the Prevention of Corruption Act because he cannot be said to be a ""public servant"" as

contemplated by section 2 of the said Act. The argument is that u/s 2 of the said Act, ""public servant"" is defined as meaning a public servant as

defined in section 21 of the Indian Penal Code, and since no further amendments have been made in section 2, the only person who could be

prosecuted for an offence under that Act would be a public servant as defined in section 21 of the Indian Penal Code as it stood on the date on

which the Prevention of Corruption Act, 1947, came into operation. The Prevention of Corruption Act came into operation in March 1947, and

according to Mr. Pendse, what must be found out is whether the accused could be held to be a public servant within the meaning of section 21 of

the Indian Penal Code as it stood in March 1947. The basis of this argument is the decision of the Privy Council in AIR 1931 149 (Privy Council)

in which the Privy Council observed:

Where certain provisions from an existing Act have been Incorporated into a subsequent Act, no addition to the former Act, which is not expressly

made applicable to the subsequent Act, can be deemed to be incorporated in it, at all events if it is possible for the subsequent Act to function

effectually without the addition.

Now, section 21 of the Indian Penal Code, as it originally stood, consisted of 11 clauses. Section 21 provided that the words ""public servant

denotes a person falling under any of the descriptions given in the several clauses in that section. For the purposes of the present controversy, only

the ninth and the Twelfth clauses are material. The ninth clause originally read as follows :

Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey,

assessment or contract on behalf of the Government, or to execute any revenue-process, or to investigate, or to report, on any matter affecting the

pecuniary interests of the Government, or to make authenticate or keep any document relating to the pecuniary interests of the Government) or to

prevent the infraction of any law for the protection of the pecuniary interests of the Government, and every officer in the service or pay of the

Government or remunerated by fees or commission for the performance of any public duty.

(Italics is mine).

The portion underlined, however, came to be deleted by Act 40 of 1964. But prior to that section 21 came to be amended by introduction of the

Twelfth clause which was as follows:

Every officer in the service or pay of a local authority or of a corporation engaged in any trade or industry which is established by a Central,

Provincial or State Act or of a Government company as defined in section 617 of the Companies Act, 1956.

Parliament passed Act 40 of 1964 which was known as the Anti-Corruption Laws (Amendment) Act, 1964. By this Act not only the provisions of

section 21 of the Indian Penal Code were sought to be amended but the provisions of the Criminal Law Amendment Ordinance, 1944; the Delhi

Special Police Establishment Act, 1945; the Prevention of Corruption Act, 1947, and the Criminal Law Amendment Act, 1952, were also sought

to be amended. Certain amendments were made in the third and the fourth clauses, to which it is not necessary to refer. The material amendments

were made in the ninth clause and for the existing twelfth clause, a new twelfth clause was substituted. The amendment in the ninth clause consisted

of deleting the portion underlined above. The twelfth clause which was substituted was as follows:

Twelfth.-Every person-

(a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government;

(b) in the service or pay of a local authority, a Corporation established by or under a Central, Provincial or State Act or a Government company

as defined in section 617 of the Companies Act, 1956.

The effect of the substitution of the twelfth clause was that what was deleted from the ninth clause was re-enacted as sub-clause (a) with the

modification that for the word ""officer"" the word ""person"" was substituted, and what was originally the twelfth clause was re-enacted as sub-clause

(b) of the twelth clause.

4. Now, the argument is that though it is true that the accused was a person who was covered by sub-clause (a) of clause Twelfth of section 21 of

the Indian Penal Code, this twelfth clause having come on the statute Book only in 1964, the inclusion of that clause in section 21 cannot have the

effect of that clause being read as a part of the definition of ""Public servant"" in section 2 of the Prevention of Corruption Act. Therefore, according

to the learned counsel a charge u/s 5 (1)(d) read with section 5 (2) of the said Act could not have been framed against him at all. The question

whether this addition of the twelfth clause in section 21 of the Indian Penal Code automatically becomes a part of the definition in section 2 of the

Prevention of Corruption Act has been exhaustively argued by Mr. Pendse primarily on the authority of the decision of the Privy Council referred

to earlier. It is, however, contended on behalf of the State that even assuming that the contention of the learned counsel for the appellant is

accepted, the accused would be covered squarely by the ninth clause as it stood in 1947. The latter part of the ninth clause fell for consideration

before the Supreme Court in G.A. Monterio Vs. The State of Ajmer, . That was a case in which the question was whether a Class III servant who

was employed as a metal examiner in the Railway Carriage Workshops and was working under the Works Manager who was an officer of the

Government, was an officer within the meaning of the ninth clause of section 21 of the Indian Penal Code. A contention was raised before the

Supreme Court relying on the decision of this Court in Beg v. Ramajirao Jivbaji 12 Bom. H. C. R. 1 that according to the dictum of West J., the

word ""officer"" meant some person employed to exercise to some extent and in certain circumstances a delegated function of Government who was

either himself armed with some authority or representative character or his duties were immediately auxiliary to those of some one who was so

armed. A metal examiner known as Chaser in the Railway Carriage Workshops had not delegated to him by the supreme authority some portion

of its regulating and coercive powers nor was he appointed to represent the State in its relation to individual subjects, nor was he armed with some

authority or representative character, nor were his duties immediately auxiliary to those of some one who was so armed, and since he was not

employed to exercise to some extent and in certain circumstances the delegated function of Government, he was not an ""officer"" within the meaning

of that term as used in section 21 (9) of the Indian Penal Code. The Supreme Court held that the Class III servant, since he was working under the

Works Manager who, besides being an officer of the Government, was also armed with some authority or representative character qua the

Government, was an officer in the service or pay of the Government performing as such a public duty entrusted to him by the Government and

was, therefore, a public servant within the meaning of section 21 of the Indian Penal Code. The Supreme Court laid down certain tests to

determine whether a person was an officer of the Government. These tests were:

(1) whether he is in the service or pay of the Government, and

(2) whether he is entrusted with the performance of any public duty, and it was observed that if both these requirements were satisfied it matters

not the least what was the nature of his office, whether the duties he was performing were of an exalted character or very humble indeed. The

decision in Monterio''s case, therefore, lays down that the test laid down in the decision of this Court in Beg v. Ramajirao Jivbaji (cit. supra) was a

narrow one and Wherever the two tests referred to above are satisfied, a person would be a public servant within the meaning of the term as

defined in the ninth clause of section 21. It is important to point out that a decision of the Calcutta High Court in Nazamuddin v. Queen Empress

ILR 28 Cal. 344 in which a peon attached to the office of the Superintendent of the Salt Department in the district of Mazaffarpur was held to be a

public servant within the meaning of the terms of the close portion of the ninth clause of section 21, has been cited with approval. In that case the

Calcutta High Court held that an ""officer in the service or pay of Government"" within the terms of section 21, Indian Penal Code, was one who

was appointed to some office for the performance of some public duty, and in that sense the peon was held to fall within the ninth clause of section

21. Now, even assuming, therefore, that the learned counsel for the appellant is right in his contention that for the purposes of the instant case

section 21 must be read as it stood in 1947, which meant that the latter part of the ninth clause stood as it was, it is difficult to see why the

appellant could not be a public servant within the meaning of the ninth clause. It is not disputed that the appellant was employed in the College

which was a Government College, and when he held the office of a clerk in that College, be was obviously employed for the performance of a

public duty. The two tests laid down by the Supreme Court in Monterio''s case were, therefore, satisfied.

5. Even otherwise, it is not possible to accept the contention that the twelth clause of section 21 must be left out of consideration for the purpose of

deciding the question whether the accused was a public servant or not. The process by which a part of the ninth clause was deleted and it was re-

enacted with some modification in the form of sub-clause (a) of the twelfth clause and the original twelfth clause was also deleted and was re-

enacted in the form of sub-clause (b) of the twelfth clause, was, in my view, a process to which the principle contained in section 8 of the General

Clauses Act, 1897, would clearly be attracted. Sub-section (1) of section 8 of the General Clauses Act provides:

Where this Act, or any Central Act or Regulation made alter the commencement of this Act, repeals and re-enacts, with or without modification,

any provision of a former enactment then references in any other enactment or in any instrument to the provision so repealed shall, unless a different

intention appears, be constructed as references to the provision so re-enacted.

Section 8, therefore, contemplates that the principle contained therein applies in a case not only where the whole enactment has been repealed and

re-enacted with or without modification, but also where any provision of a former enactment is repealed and is re-enacted. In Act 40 of 1964

there is no indication of an intention contrary to the principle contained in section 8 of the General Clauses Act. On the contrary, the intention

positively appears to be that the Legislature wanted the amendments to the several enactments to be carried out with a view to make adequate

provisions relating to prevention of corruption. The Act itself is styled as ""The Anti-Corruption Laws (Amendment) Act, 1964"". It could not,

therefore, have been the intention of the Legislature while enacting the Anti-Corruption Laws (Amendment) Act that when section 21 of the Indian

Penal Code was being amended by providing that every person who was in the service or pay of the Government was to be a public servant, that

amendment was not to ensure for working out the provisions of the Prevention of Corruption Act. The object appears to be to give effect to the

decision of the Supreme Court in Monterio''s case, and by substituting the word ""person"" for the word ""officer"" the law as declared by the

Supreme Court in Monterio''s case has been given effect to. It is no doubt true that in the Privy Council decision relied upon it has been held that in

case of a referential legislation any amendment made in the prior Act does not necessarily come to be incorporated in the latter Act in which for

certain purposes a reference is made to the earlier Act. The decision of the Privy Council is clearly distinguishable because that was a case in which

a question about the applicability of the principle in section 8 of the General Clauses Act was not involved. The context in which the decision of the

Privy Council was given was examined by the Supreme Court in The Collector of Customs, Madras Vs. Nathella Sampathu Chetty and Another, .

It was pointed out by the Supreme Court that the Calcutta Improvement Trust Act, 1911, referred to by their Lordships as the ""Local Act"", had, in

dealing with the acquisition of land for the purposes designated by it, made provision for the acquisition under the Land Acquisition Act and the

provisions of the Land Acquisition Act were subject to numerous modifications which were set out in the Schedule, so that in effect the ""Local Act

was held to be the enactment of a Special Law for the acquisition of land for the special purpose. The Supreme Court had also pointed out that the

observations at page 152 of the Report were made in the context of these and several other provisions which pointed to the absorption of certain

of the provisions of the Land Acquisition Act into the ""Local Act"" with vital modifications. It may be noted that in the Privy Council case an award

of the Tribunal created under the ""Local Act"" was to be final subject only to the limited right of appeal to the High Court. There was no right of

appeal to His Majesty in Council but a right of appeal was claimed by virtue of an amendment of the Land Acquisition Act which also operated

upon the ""Local Act"". By Act 19 of 1921 a new sub-section was added to the Land Acquisition Act, 1894, which gave in terms a right of appeal

to His Majesty in Council from any decree passed by the High Court on appeal from an award of the Court. The argument was that the new

section introduced by Act 19 of 1921 must be read into the ""Local Act"" with the effect that every award of the Tribunal must be deemed to be a

decree within the meaning of the CPC and, therefore, appealable to His Majesty in Council under the Letters Patent of the High Court. While

negativing this argument, the Privy Council observed :

But their Lordships think that there are other and perhaps more cogent objections to this contention of the Secretary of State, and their Lordships

are not prepared to hold that the sub-section in question, which was not enacted till 1921, can be regarded as incorporated in the local Act of

1911. It was not part of the Land Acquisition Act when the local Act was passed, nor in adopting the provisions of the Land Acquisition Act is

there anything to suggest that the Bengal Legislature intended to bind themselves to any future addition which might be made to that Act. It is at

least conceivable that new provisions might have been added to the Land Acquisition Act which would be wholly unsuitable to the local code.

Nor, again, does Act 19 of 1921 contain any provision that the amendments enacted by it are to be treated as in any way retrospective, or are to

be regarded as affecting any other enactment than the Land Acquisition Act itself. Their Lordships regard the local Act as doing nothing more than

incorporating certain provisions from an existing Act, and for convenience of drafting doing so by reference to that Act, instead of setting out for

itself at length the provisions which it was desired to adopt.

.....In this country it is accepted that where a statute is incorporated by reference into a second statute, the repeal of the first statute does not

affect the second: see the cases collected in ''Craies on Statute Low'', Edn. 3, pp. 349-50, This doctrine finds expression in a common form

section which regularly appears in the Amending and Repealing Acts which are passed from time to time in India.

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It seems to be no less logical to hold that where certain provisions from an existing Act have been incorporated into a subsequent Act, no addition

to the former Act, which is not expressly made applicable to the subsequent Act, can be deemed to be incorporated in it, at all events if it is

possible for the subsequent Act to function effectually without the addition.

It is on this last part of the observations that heavy reliance was placed before me. But so far as the present case is concerned, I have already

pointed out that the decision in the instant case turns on the applicability of the principle in section 8 of the General Clauses Act because this is not

a case where merely sub-clause (a) of the twelfth clause has been added for the first time but that that part of the clause was already there in the

ninth clause and it has only been re-enacted with slight modification as a part of the twelfth clause. There is further a clear intention on the part of

the Legislature by enacting the Anti-Corruption Laws (Amendment) Act, 1964, to provide that the definition of ""public servant"" in section 21 of the

Penal Code had to be applied as amended in section 2 of the Prevention of Corruption Act. In view of the positive enactment of the Anti-

Corruption Laws (Amendment) Act, the decision of the Privy Council can be of no assistance to the appellant.

6. There are two other decisions on which reliance is placed, in which the principle enunciated in the Privy Council decision has been given effect

to. These are Jethalal Nagji Shah Vs. Municipal Corporation for Greater Bombay, and CHHAGAN LAL RATHI Vs. Income Tax OFFICER,

DISTRICT III(I), KANPUR, AND ANOTHER., . Both these decisions were dealing with the effect of the amendment of section 46 of the

income tax Act, 1922, by adding sub-section (5A) therein. Section 46 of the income tax Act dealt with the mode of recovery of income tax and

the first four sub-sections of that section dealt with the mode of recovery through the Collector. Under sub-section (5) of section 46 it was

provided that where an assessee was in receipt of any income chargeable under the head ""Salaries"", the income tax Officer was given power to

require any person who has to pay the salary to deduct from the payment of the salary any amount which was due for arrears of income tax.

Section 21 of the Excess Profits Tax Act, 1940, specifically stated that certain sections of the income tax Act shall apply as if the provisions of

those sections were provisions of the Excess Profits Tax Act and one of the sections which was made applicable was section 46. Under the rules

framed u/s 21 of the Excess Profits Tax Act, from out of the sections of the income tax Act made applicable to the Excess Profits Tax Act, sub-

section (5) of section 46 was deleted and, therefore, the effect was that the only mode of recovery was the mode prescribed in sub-sections (1) to

(4) of section 46. In 1948 sub-section (5A) was introduced in section 46, which gave a very wide power to the income tax Officer to require any

person from whom money was due or may become due to the assessee to pay the amount so due to the income tax Officer in respect of arrears of

income tax and the sub-section further provided:

Any person making any payment in compliance with a notice under this sub-section shall be deemed to have made the payment under the authority

of the assessee and the receipt of the income tax Officer shall constitute a good and sufficient discharge of the liability of such person to the

assessee to the extent of the amount referred to in the receipt.

The question which fell for determination before the High Court was whether sub-section (5A) of section 46 which was incorporated in 1948 in

the income tax Act applied to the Excess Profits Tax Act and whether the Excess Profits Tax Officer was empowered to recover arrears of excess

profits tax by the mode provided therein. In that context it was held, relying on the decision of the Privy Council, that the Amendment Act of 1948

did not expressly apply the amendment of section 46 to the Excess Profits Tax Act and the Excess Profits Tax Act could function and did function

effectually without the addition introduced by sub-section (5A), and, therefore, sub-section (5A) of section 46 of the income tax Act did not apply

to the Excess Profits Tax Act and the Excess Profits Tax Officer had no authority to call upon the defendant in that case to pay the amount due to

the plaintiff and the payment by the defendant to the Union of India of the debt due to the plaintiff towards the liability of the plaintiff to the Union of

India for excess profits tax did not discharge the defendant from its debt due to the plaintiff under the contract. The decision in Chhaganlal Rathi''s

case also held that sub-section (5A) of section 46 of the income tax Act having been enacted only in 1948 did not become incorporated into the

Excess Profits Tax Act and, therefore, could not apply to the Excess Profits Tax Act, Now, both these decisions involve the application of the

principle laid down by the Privy Council, but as already pointed out above, the principle laid down in the Privy Council decision is of no assistance

to the appellant in the instant case and consequently the two decisions relied upon will also not be of any assistance. Therefore, the contention that

the appellant was not a ""public servant"" within the meaning of section 2 of the Prevention of Corruption Act must be negatived.