

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

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Reserved on 12.11.2024.
Pronounced on: 21 .11.2024.

**CRM(M) No.33/2021
&
CRM(M) No.31/2021**

CRM(M) No.33/2021

Pawan Singh Rathore
Son of S.D.Rathore
R/o 82 Sector D Sainik
Colony Jammu.

.....Petitioner(s)

Vs

Union Territory of J&K
and ors

..... Respondent(s)

CRM(M) No.31/2021

1 Devinder Singh Katoch
2.Shruti Bhardwaj

.... petitioners

vs

1 Satpal Sharma
2 Ishan Sharma
3.Hardev Singh

....respondents

For petitioners:

Mr. Asheesh Singh Kotwal Advocate
Mr. Adarsh Sharma Advocate.
Mr. Atul Verma Advocate.

For respondents:

Mr. P.D.Singh Dy.AG
Mr. K.S.Johal Sr. Adv with
Mr. S.S.Johal Advocate.

CORAM: HON'BLE MR JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1 By this common order, the afore-titled two petitions
challenging order dated 15.03.2019 passed by the learned Chief

Judicial Magistrate, Jammu ('CJM' for short) on the applications filed by the private respondents under Section 156(3) of Cr.P.C against the petitioners, are proposed to be disposed of.

2 The private respondents filed three separate applications before the learned CJM alleging therein that they are owners in possession of land measuring 30 marlas (10 marlas each) situated at Channi Rama near Railway Road Jammu. It was alleged by the private respondents that they raised construction over their respective portions of the land in question, but Jammu Development Authority ('JDA' for short) raised a dispute with respect to the land in question. A civil litigation was filed by the private respondents which culminated in passing of a final decree in their favour. It was also pleaded by the private respondents that when one of them approached the Jammu Municipal Corporation for grant of building permission, it was revealed that except for a strip of land measuring 4'x 6', the whole land belonged to the private respondents, whereas only the aforesaid strip of land belonged to Jammu Development Authority. It was alleged by the private respondents that on 30.09.018, the petitioners herein along with men and machinery came to their land and they forcibly demolished the buildings raised over there. It was also alleged that by this act of the petitioners, the private respondents were not only deprived of their immovable property, but even their movable belongings were destroyed. The private respondents are stated to have approached the SHO Police Station, Trikuta Nagar, Jammu for registration of an FIR, but he refused to do so which prompted them to approach the learned CJM Jammu with three

separate complaints alleging commission of offences under Sections 391/427/452/506/511 RPC read with Section 149 RPC.

3 It seems that the learned CJM, Jammu directed SHO Police Station, Bahu Fort, Jammu to verify the facts and report compliance. Upon receipt of report of the concerned SHO, impugned order dated 15.3.2019 came to be passed by the learned CJM whereby directions were issued to the SHO Police Station, Bahu Fort, Jammu to lodge an FIR against the petitioners under the relevant provisions of law and to conduct the investigation.

4 The aforesaid order was challenged by the petitioners by way of a revision petition before the learned Principal Sessions Judge, Jammu who, vide order dated 01.05.2019, set aside the order dated 15.03.2019 passed by learned CJM. It seems that the order passed by the learned CJM was challenged by one of the the private respondents, namely Sat Pal Sharma by way of a petition under Section 561-A Cr.PC bearing CRM(M) No. 259/2019. The said petition was allowed by this Court in terms of judgment dated 17.12.2020. While allowing the said petition, this Court held that an order passed by a Magistrate under Section 156(3) CrPC is not revisable in nature and, as such, it was not open to the Principal Sessions Judge, Jammu to exercise his revisional jurisdiction against the order of learned CJM. It is, in these circumstances, that the petitioners have now challenged the order of learned CJM by filing these two petitions by invoking the jurisdiction of this Court under Section 482 of CrPC.

5 It has been contended by the petitioners that they are holding high offices in the Government of Jammu and Kashmir and are members of J&K Administrative Service in the Gazetted cadre. It has been submitted that, pursuant to the directions passed by the Division Bench of this Court in PIL No. 19/2011 titled 'Prof. S.K.Bhalla vs. State of Jammu and Kashmir and others', PIL No. 19/2012 titled 'Ashish Sharma vs. State of Jammu and Kashmir and others', as also PIL No. 38/2018 titled 'Court on its own motion vs. Divisional Commissioner, Jammu and others', JDA undertook various anti-encroachment drives at different locations in the areas, falling under its jurisdiction. One such anti-encroachment drive was undertaken by the JDA on 30.09.2018 at village Channi Rama, Jammu, adjoining to the road near Jammu Tawi Railway Station. According to the petitioners, they cleared a land strip measuring 4.5 feet (wide) and 83 feet (length) from the encroachers-the private respondents who had constructed temporary structures with CGI sheets on the aforesaid strip of land. It has been contended that the private respondents had filed a writ petition bearing OWP No. 2015/2018 against the JDA seeking quashment of the decision of JDA whereby these structures were sought to be demolished on the land measuring 01 kanal, 16 marlas in khasra No. 20 at village Channi Rama, Jammu. It has been submitted that the said writ petition has been dismissed by this Court in terms of judgment dated 20.09.2024.

6 The main contention of the petitioners is that while undertaking demolition drive, they were discharging their official duties and, as such, their actions are not only protected under Section

197 of the CrPC, but even Section 46 of the J&K Development Act acts as a bar to their prosecution in respect of an act which has been done by them in good faith. It has been contended that the impugned order passed by the learned CJM suffers from non-application of mind because while passing the said order, the learned CJM has made reference to a report of the JDA which, in fact, was never received by the SHO concerned from the JDA.

7 The private respondents have not filed any reply to these writ petition.

8 I have heard learned counsel for the parties and perused record of the case including the record of learned CJM, Jammu.

9 So far as the earlier round of litigation between the parties before this Court relating to the impugned order passed by CJM is concerned, in this regard, it needs to be noted that this Court while allowing the petition filed by respondent Satpal Sharma and setting aside the order of learned Principal Sessions Judge Jammu whereby the revision petition against the impugned order passed by the CJM had been allowed, had framed two questions of law. The first question was, whether the revisional Court was within its jurisdiction to entertain the revision petition against the order passed by the CJM and the second question was, whether the provisions of Section 197 of CrPC are applicable at the stage of directing registration of an FIR on the basis of a complaint. The aforesaid petition was allowed by this Court by answering the first question and holding that the revision petition against an order directing registration of an FIR is not

maintainable as the said order is interlocutory in nature. The second question was, however, kept open and it was specifically stated that the Court is not making any observation with regard to the merits of the order passed by the CJM. So, in this round of litigation, it is open to this Court to test the legality of order passed by the CJM.

10 The primary ground, that has been urged by the learned counsels appearing for the petitioners for assailing the impugned order passed by the CJM is that the petitioners are officers who can be removed from their office only with the sanction of the Government and, therefore, they are protected under Section 197 of the CrPC, which provides that cognizance of any offence against a public servant who is removable only with the sanction of the State Government, cannot be taken without sanction of the Government, if such person 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. According to the petitioners, even if they have exceeded their powers by demolishing the structures belonging to the petitioners in the process of undertaking demolition drive pursuant to the orders of passed by the Division Bench of this Court, the provisions of Section 197 of CrPC and Section 46 of the J&K Development Act would come to their rescue. In this regard, the petitioners have placed heavy reliance upon judgment of the Supreme Court in the case of **Anil Kumar vs. M.K.Aiyappa, (2013) 10 SCC 705**

11 Learned Senior Counsel appearing for the private respondents has contended that the demolition of house belonging to a

private person without the authority of law, can, by no stretch of imagination, be an official business of a public servant and, therefore, the petitioners cannot take shelter under Section 197 of CrPC. It has been contended that the bar contained in Section 197 of CrPC is to taking of cognizance of offence and not to registration of FIR. The learned Senior Counsel has contended that the Supreme Court in the later case of **Manju Surana vs. Sunil Arora, (2018) 5 SCC 557** has expressed doubts about correctness of the ratio laid down in **Anil Kumar's** case (supra) and has referred the matter, to be settled by a Larger Bench. Therefore, the ratio laid down by the Supreme Court in **Anil Kumar's** case (supra) cannot be made applicable to the instant case. The learned Senior Counsel has also argued that, in view of the ratio laid down by the Supreme Court in the case of **HDFC Securities Ltd vs. State of Maharashtra, (2017) 1 SCC 640**, a petition under Section 482 CrPC challenging a direction for registration of an FIR is not maintainable.

12 Before testing the merits of the rival submissions made by the learned counsels appearing for the parties, it would be apt to notice the ratio laid down by the Supreme Court in the case of **Anil Kumar** (supra). In the said case, a private complaint under Section 200 CrPC came to be filed before the Special Judge under Prevention of Corruption Act alleging *mala fide* activities on the part of certain public servants and the allegations constituted the ingredients of offences under Sections 406, 409, 420, 426, 463, 465, 468, 471, 474 read with [Section 120-B IPC](#) and [Section 149 IPC](#) as also [Sections 8, 13\(1\)\(c\), 13\(1\)\(d\), 13\(1\)\(e\), 13\(2\)](#) read with [Section 12](#) of the

Prevention of Corruption Act. The learned Special Judge referred the complaint to the Deputy Superintendent of Police, Lokayukta, Bangalore under Section 153(3) of CrPC for investigation.

13 While testing the legality of the said order passed by the learned Special Judge in exercise of magisterial powers under Section 156 (3) of CrPC, the Supreme Court held that once, it is noticed that there is no previous sanction, the Magistrate cannot order investigation against a public servant while invoking powers under [Section 156\(3\) Cr.P.C.](#) While holding so, the Supreme Court relied upon the following observations made by the said Court in the case of [State of Uttar Pradesh vs. Paras Nath Singh, \(2009\) 6 SCC 372](#).

“6.And the jurisdiction of a Magistrate to take cognizance of any offence is provided by Section 190 of the Code, either on receipt of a complaint, or upon a police report or upon information received from any person other than a police officer, or upon his knowledge that such offence has been committed. So far as public servants are concerned, the cognizance of any offence, by any court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression, ‘no court shall take cognizance of such offence except with the previous sanction’. Use of the words ‘no’ and ‘shall’ makes it abundantly clear that the bar on the exercise of power of the court to take cognizance of any offence is absolute and complete. The very cognizance is barred. That is, the complaint cannot

be taken notice of. According to Black's Law Dictionary the word 'cognizance' means 'jurisdiction' or 'the exercise of jurisdiction' or 'power to try and determine causes'. In common parlance, it means taking notice of. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have been committed during discharge of his official duty.

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14 Thus, from the above, it is clear that in **Anil Kumar's** case (supra), the Supreme Court has interpreted the word 'cognizance' appearing in Section 19(1) of Prevention of Corruption Act which is in *pari materia* with Section 197 of CrPC as entertaining a complaint or taking notice of a compliant or exercising jurisdiction in respect of a complaint. Thus, as per the law laid down by the Supreme Court in the said case, even entertaining a complaint or exercising jurisdiction on a compliant against a public servant without previous sanction of the Government is barred.

15 In the later judgment in **Manju Sarana's** case (supra) on which heavy reliance has been placed by learned Senior Counsel appearing for the private respondents, a two Judge Bench of the Supreme Court has expressed doubts about the correctness of the view taken by a two Judge Bench of the same Court in **Anil Kumar's** case (supra) and has referred the matter to a Larger Bench. Admittedly, the view of the Larger Bench is still awaited.

16 The question arises as to which of the two judgments is required to be followed. In **Anil Kumar's** case (supra), a two Judge Bench of the Supreme Court has taken a final decision laying down

the law that a direction under Section 156(3) of CrPC cannot be passed by a Magistrate in a case to which Section 197 of CrPC or Section 19(1) of the P.C. Act is attracted without the previous sanction of the Government. In **Manju Surana's** case (supra), the two Judge Bench of the Supreme Court has not rendered any final opinion on the issue, but has only expressed doubts about the correctness of earlier view taken in **Anil Kumar's** case (supra). Therefore, as of now, the law laid down by the Supreme Court in **Anil Kumar's** case (supra) would hold the field till such time the same is reversed or modified by the Larger Bench to which the matter has been referred. Thus, there is no doubt in the mind of this Court that the ratio laid down by the Supreme Court in **Anil Kumar's** case (supra) has to be followed as on date.

17 The next question that is required to be determined is , as to whether the alleged acts of the petitioners would fall within the scope of their official duties so as to attract the provisions contained in Section 197 of CrPC. As to what is meant by acts or purported acts in discharge of official duties, has been a subject matter of discussion and debate before the Supreme Court in a number of cases. Reference to some of these decisions would be necessary to understand the issue.

18 In **Urmila Devi vs. Yudhvir Singh, (2013) 15 SCC 624**, the Supreme Court, in the context of the provisions contained in Section 197 of the CrPC, interpreted the expression “official duty” in the following manner:

“56. The term “official” has been defined in Black’s Law Dictionary as under:

"official.--(1) Of or relating to an office or position of trust or authority <official duties>."

The term "office" is defined in the same dictionary as under:

“office.--(1) A position of duty, trust, or authority, esp. one conferred by a governmental authority for a public purpose <the office of attorney general>."

57. Law Lexicon also gives a similar meaning to the expressions "official" and "office" as under:

"Official. ... As adjective, belonging to an officer: of a public officer; in relation to the duties of office."

"office.-- ... The word 'office' refers to the place where business is transacted...."

58. The term "duty" is defined by Black's Law Dictionary in the following words:

"duty.--(1) A legal obligation that is owed or due to another and that needs to be satisfied; an obligation for which somebody else has a corresponding right."

59. The expression “official duty” would in the absence of any statutory definition, therefore, denote a duty that arises by reason of an office or position of trust or authority held by a person. It follows that in every case where the question whether the accused was acting in discharge of his official duty or purporting to act in the discharge of such a duty arises for consideration, the court will first examine whether the accused was holding an office and, if so, what was the nature of duties cast upon him as holder of any such office. It is only when there is a direct and reasonable nexus between the nature of the duties cast upon the public servant and the act constituting an offence that the protection under [Section 197 CrPC](#) may be available and not otherwise. Just because the accused is a public servant is not enough. A reasonable connection between his duties as a public servant and the acts complained of is what will determine whether he was acting in

discharge of his official duties or purporting to do so, even if the acts were in excess of what was enjoined upon him as a public servant within the meaning of that expression under [Section 197](#) of the Code.”

19 In **Devinder Singh and others vs. State of Punjab, (2016) 12 SCC 87**, the Supreme Court, after taking note of all its previous decisions on the issue, summarised the principles emerging therefrom in paragraph (39) as under:

“39.The principles emerging from the aforesaid decisions are summarized hereunder :

39.1. Protection of sanction is an assurance to an honest and sincere officer to perform his duty honestly and to the best of his ability to further public duty. However, authority cannot be camouflaged to commit crime.

39.2. Once act or omission has been found to have been committed by public servant in discharging his duty it must be given liberal and wide construction so far its official nature is concerned. Public servant is not entitled to indulge in criminal activities. To that extent [Section 197](#) CrPC has to be construed narrowly and in a restricted manner.

39.3. Even in facts of a case when public servant has exceeded in his duty, if there is reasonable connection it will not deprive him of protection under [section 197](#) Cr.P.C. There cannot be a universal rule to determine whether there is reasonable nexus between the act done and official duty nor it is possible to lay down such rule.

39.4. In case the assault made is intrinsically connected with or related to performance of official duties sanction would be necessary under [Section 197](#) CrPC, but such relation to duty should not be pretended or fanciful claim. The offence must be directly and reasonably connected with official duty to require sanction. It is no part of official duty to commit offence. In case offence was incomplete without proving, the official act, ordinarily the provisions of [Section 197](#) CrPC would apply.

39.5. In case sanction is necessary it has to be decided by competent authority and sanction has to be issued on the

basis of sound objective assessment. The court is not to be a sanctioning authority.

39.6. Ordinarily, question of sanction should be dealt with at the stage of taking cognizance, but if the cognizance is taken erroneously and the same comes to the notice of Court at a later stage, finding to that effect is permissible and such a plea can be taken first time before appellate Court. It may arise at inception itself. There is no requirement that accused must wait till charges are framed.

39.7. Question of sanction can be raised at the time of framing of charge and it can be decided prima facie on the basis of accusation. It is open to decide it afresh in light of evidence adduced after conclusion of trial or at other appropriate stage.

39.8. Question of sanction may arise at any stage of proceedings. On a police or judicial inquiry or in course of evidence during trial. Whether sanction is necessary or not may have to be determined from stage to stage and material brought on record depending upon facts of each case. Question of sanction can be considered at any stage of the proceedings. Necessity for sanction may reveal itself in the course of the progress of the case and it would be open to accused to place material during the course of trial for showing what his duty was. Accused has the right to lead evidence in support of his case on merits.

39.9. In some case it may not be possible to decide the question effectively and finally without giving opportunity to the defence to adduce evidence. Question of good faith or bad faith may be decided on conclusion of trial”.

20

From the foregoing analysis of law on the subject, it is clear that not only the acts which have been done by a public servant in exercise of his official duty, but even the acts which a public servant has done in purported exercise of official duty, would be covered under the protective umbrella of Section 197 of CrPC. The test is whether there is a reasonable nexus between the act done by a public servant and his official duties. Even if, a public servant has exceeded his powers while discharging his official duties, Section 197

of CrPC would come into play. Thus, in a case where Deputy Superintendent of Police while escorting a prisoner to the Court, beats him up, while the prisoner tries to escape from the custody and in the process, uses excessive force, the Deputy Superintendent of Police would be entitled to protective umbrella of Section 197 of CrPC because preventing a prisoner from escaping the custody is connected with his official duties and in the process, if such police officer has exceeded his powers, he would be acting in purported exercise of his official duty. However, if we take another instance of a police officer thrashing a passerby without any rhyme or reason, in such a case, his act would neither be in the discharge of official duties, nor in the purported discharge of official duties. Thus, the police officer would not be entitled to the protective umbrella of Section 197 of CrPC in such a case.

21 Coming to the facts of the present case, it is not in dispute that the petitioners are officers of the Government who can be removed from their office only with the previous sanction of the Government. It is clear from the facts narrated in the complaint before the CJM and those narrated in the instant petitions, to which no reply has been filed by the respondents, that the petitioners were assigned the task of removing illegal encroachments of land belonging to JDA pursuant to the directions passed by this Court in the PILs, reference whereof, is given in the petitions. So, they were tasked with the job of removing illegal encroachments on JDA land. It is not in dispute that near the land which is claimed by the private respondents to be their proprietary land, there is a strip of land belonging to the JDA.

According to the petitioners, they have undertaken anti-encroachment drive and demolitions on the said strip of land belonging to JDA, whereas the private respondents vehemently disputes this and claim that the demolished structures were existing on their proprietary land. The private respondents may or may not be correct in their submissions but even if it is assumed that some of the structures, which were demolished by the officials of the JDA, were standing on the land belonging to the private respondents, still then, it would be a case of excessive use of official powers by the petitioners. The same qualify to be the acts in purported exercise of their official duties. Therefore, the protective umbrella contained in Section 197 of CrPC is available to the petitioners in the facts and circumstances of the instant case.

22 Vide the impugned order, the learned CJM has directed registration of FIR against the petitioners, while exercising his powers under Section 156(3) of CrPC without previous sanction for prosecution of the petitioners, therefore, the said order in view of the ratio laid by the Supreme Court in Anil Kumar's case (supra), is rendered unsustainable in law. In fact, the learned CJM has noted on the first page of the complaints filed by the private respondents that the petitioners are public servants and have acted in discharge of their official duties and that sanction is required for their prosecution, but in spite of noticing this, the learned CJM has, after receiving the report of the police, directed registration of FIR against the petitioners without insisting upon production of previous sanction of the Government. So, it is not a case where the learned CJM was oblivious

of the fact that the petitioners are public servants who cannot be prosecuted without previous sanction of the Government, but it is a case where despite knowing this fact, the learned CJM has ignored the same and passed the impugned order. The same is, therefore, not sustainable in law.

23 The contention of learned Senior Counsel appearing for the private respondents that in view of the law laid down by the Supreme Court in **HDFC Securities's** case (supra), the instant petition is not maintainable, is also without any merit, for the reason that, in the present case, there is an express bar on entertaining a complaint against the petitioners in view of the law laid down by the Supreme Court in **Anil Kumar's case** (supra). Thus, the very act of entertaining the complaints against the petitioners by the learned CJM without previous sanction of the Government, is illegal and contrary to law of the land. When there is a specific bar to entertaining a complaint against a proposed accused, this Court, in view of the law laid down by the Supreme Court in **State of Haryana vs. Bhajan Lal, 1999 Supp (1) SCC 335**, would be well within its jurisdiction to exercise its powers under Section 482 of CrPC to quash an order whereby directions for registration of FIR are issued.

24 In view of what has been discussed hereinbefore, the petitions are **allowed** and the impugned order passed by the learned CJM is quashed. The private respondents are, however, at liberty to seek previous sanction for prosecution of the petitioners from the

competent authority and thereafter approach CJM Jammu for revival of their complaint against the petitioners.

24 The record of the learned CJM along with a copy of this judgment be sent down.

(Sanjay Dhar)
Judge

Jammu
21.11.2024
Sanjeev

Whether order is reprobable: Yes

