

1 SCOB [2015] HCD 87**HIGH COURT DIVISION**

(Criminal Revisional Jurisdiction)

Criminal Revision No.329 of 2006
with
Criminal Revision No.334 of 2006
with
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Criminal Revision No.336 of 2006
with
Criminal Revision No.337 of 2006

Zakir Hossain Sarkar, son of late Abdul Hakim Sarkar, of Village Durgapur, Post Office Shatibari, Upazilla Mithapukur, District Rangpur.

... Petitioner in all the revisions

-Versus-

1. **The State,**

2. **Shah Md. Solaiman Alam** M.P, son of late Gaisuddin Shah Fakir, former Chairman, Mithapukur UCCA Ltd., of Village Chithali Uttarpara, Mithapukur, Rangpur.

...Opposite parties in all the revisions

Mr. Sk. Baharul Islam, Advocate
... for the petitioner

Mr. S.M. Abul Hossain, Advocate
... for opposite party 2

Mr. Mansurul Haque Chowdhury, Advocate
... for the co-accused-applicant

Judgment on 24.04.2014

Bench:

Mr. Justice Muhammad Abdul Hafiz
and
Mr. Justice Md. Ruhul Quddus

Section 21 of the Penal Code and section 2 of the Prevention of Corruption Act, 1947:

A Member of Parliament is not a 'public servant' within the meaning of section 21 of the Penal Code or section 2 of the Act II of 1947. We, therefore, accept the submission advanced by the learned Advocate for the petitioner only to the extent that in order to prosecute opposite party 2, no sanction from the Government was required. ... (Para 25)

Judgment**Md. Ruhul Quddus, J:**

1. All the five Rules involving common questions of law and facts have been heard together and are disposed of by this judgment.

2. The Rule in Criminal Revision No. 329 of 2006 was issued calling in question the order dated 18.04.2004 passed by the Special Judge, Rangpur in Special Case No. 9 of 2003 arising out of Mithapukur Police Station Case No. 20 (4) 01 under sections 418, 420, 409 and 109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 (Act II of 1947). In this case allegation of misappropriation of Taka 40,000/- on account of a power tiller leased out to Mst. Rabeya Begum, a Member of Mithapukur Upazila Central Co-operative Association Ltd. (in brief UCCA Ltd.) was brought.

3. The Rule in Criminal Revision No. 334 of 2006 was issued against similar order passed on 18.04.2004 in Special Case No. 8 of 2003 arising out of Mithapukur Police Station Case No. 27 (3) 2001 under the same penal sections. In this case allegation of misappropriation of Taka 29,000/- on account of a power tiller leased out to Md. Abdul Awal, another Member of UCCA Ltd. was brought.

4. The Rule in Criminal Revision No. 335 of 2006 was issued against similar order passed on the same date in Special Case No. 6 of 2003 arising out of Mithapukur Police Station Case No. 28 (4) 2001 under the same

penal sections. In this case allegation of misappropriation of Taka 28,000/- on account of a power tiller leased out to Md. Saju Miah, another Member of UCCA Ltd. was brought.

5. The Rule in Criminal Revision No. 336 of 2006 was issued against similar order passed on the same date in Special Case No. 5 of 2003 arising out of Mithapukur Police Station Case No. 26 (4) 2001 under the same penal sections. In this case allegation of misappropriation of Taka 24,000/- on account of a power tiller leased out to Md. Nurun Nabi, another Member of UCCA Ltd. was brought.

6. The Rule in Criminal Revision No. 337 of 2006 was issued against similar order passed on the same date in Special Case No. 7 of 2003 arising out of Mithapukur Police Station Case No. 8 (4) 2001 under the same penal sections. In this case allegation of misappropriation of Taka 32,000/- on account of a power tiller leased out to Md. Yousuf Uddin, another Member of UCCA Ltd. was brought. In all the cases the respective lessees of the power tillers and opposite party 2 with some others were made accused.

7. Informant Jatan Kumar Roy, District Anti-corruption Officer of the then Bureau of Anti-Corruption lodged all the said cases with Mithapukur police station on different dates in 2001. The Informant himself investigated the cases and submitted charge sheets all dated 25.03.2003 under sections 418, 420, 409, 109 of the Penal Code read with section 5 (2) of the Act II of 1947 against the accused excluding opposite party 2 on the ground that the money allegedly appropriated was already paid and that being Chairman of UCCA Ltd., he was an ornamental head, not the chief executive. The Special Judge, however, did not accept the charge sheet as it is, and took cognizance of offence against him as well, but subsequently discharged him by the impugned orders all dated 18.04.2004 as no sanction to prosecute him was accorded from the office of the Hon'ble Prime Minister, which according to him was a requirement of law. Challenging the said orders the petitioner, a witness of the cases moved in this Court and obtained the Rules with ad-interim orders of stay.

8. During pendency of the Rules, one of the co-accused Md. Ali Haider Prodhan filed applications for addition of party in all the criminal revisions, which were kept with the records for disposal at the time of hearing of the Rules.

9. Mr. Sk. Baharul Islam, learned Advocate for the petitioner submits that there are clear allegations of misappropriation of public money against the accused-opposite party 2. The Upazila Central Co-operative Association Ltd., Mithapukur is an association of co-operative societies, which works with the assistance of Bangladesh Rural Development Board, and the Government of Bangladesh has no financial or administrative involvement with UCCA Ltd. Opposite party 2 as its Chairman does not fall within the meaning of a public servant and his identity as a Member of Parliament is not relevant in the instant cases. More so, a Member of Parliament does not fall within the definition of public servant and as such no sanction from the office of the Hon'ble Prime Minister was required to be accorded. The exclusion of opposite party 2 from the cases on the plea of Government sanction is, therefore, illegal.

10. Mr. Abul Hossain, learned Advocate appearing for the opposite party 2 submits that the petitioner is a stranger in the cases and has brought these criminal revisions out of local enmity just to humiliate and harass his opponent i.e. present opposite party 2. Mr. Hossain further submits that in view of clause 12 of section 21 of the Penal Code a Member of Parliament being remunerated by the Government falls under the definition of public servant and the trial Court rightly exonerated him for want of Government sanction.

11. In reply thereto Mr. Islam submits that the petitioner is a witness of the cases and being a member as well as a former Chairman of UCCA Ltd. has got interest in the same. So, he is not a stranger in the cases and the criminal revisions are maintainable.

12. Mr. Md. Mansurul Haque Chowdhury, learned Advocate appearing for the co-accused-applicant in the application for addition of party submits that because of the stay orders passed in the instant criminal revisions, the original cases are still pending and causing endless harassment to the applicant. He has come forward only for early disposal of the Rules and would not make any submissions touching the merit of the cases.

13. Since the Rules are being disposed of, Mr. Chowdhury would have no more grievances with the stay orders passed therein. The purpose of filing these applications having been fulfilled, it is needless either to allow or reject them.

14. However, we have gone through the record and considered the submissions of the learned Advocates for the contesting parties. Whether a Member of Parliament is a public servant and sanction from Government was

required to prosecute opposite party 2 is a question of law to be looked into in these criminal revisions. The words 'public servant' have been defined in sections 21 of the Penal Code, 2 of the Act II of 1947 and 2(b) of the Criminal Law Amendment Act, 1958 which are quoted below:

15. Section 21 of the Penal Code:

"21. The words 'public servant' denote a person falling under any of the descriptions hereinafter following, namely:-

Second.- Every Commissioned officer in the Military [Naval or Air] Forces of [Bangladesh];

[Third.-Every Judge including any person empowered by any law to perform, whether by himself or as a member of any body of persons, any adjudicatory function;]

Fourth.- Every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any Property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court; and every person specially authorized by a Court of justice to perform any of such duties;

Fifth.- Every jurymen, assessor, or member of a panchayat assisting a Court of justice or public servant;

Sixth.- Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority;

Seventh.- Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

Eighth.- Every officer of [the Government] whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

Ninth.- 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 an 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];

Tenth.- Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district;

Eleventh.- Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election;

A Municipal Commissioner is a public servant.

[Twelfth.- Every person-

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

(b) in the service or pay of a local authority or of a corporation, body or authority established by or under any law or of a firm or company in which any part of the interest or share capital is held by, or vested in, the Government.]

16. Section 2 (b) of the Criminal Law Amendment Act, 1958:

"2(b) "Public servant" means a public servant as defined in section 21 of the Penal Code and includes a Chairman, Director, Trustee, Member, Commissioner, Officer or other employee of any local authority, statutory corporation or body corporate or of any other body or organization constituted or established under any law;"

17. Section 2 of the Prevention of Corruption Act, 1947:

"2. Interpretation.- For the purposes of this Act, "Public Servant" means a Public servant as defined in section 21 of the Penal Code and includes an employee of any corporation or other body or organization set by the Government and includes a Chairman, Vice-Chairman, Member, Officer or other employee of a local authority, or a Chairman, Director, Managing Director, Trustee, Member, Officer or other employee of any corporation, or other body or organization constituted or established under any law."

18. In all the above definitions so many persons under different categories including the Municipal Commissioners, Members of *Panchayat* and Local Authority are described as public servants. But a Member of Parliament, who is the People's representative in the Legislature to make laws being directly elected by the People, is not included anywhere. This exclusion is not meaningless. It was not the intention of the Legislature to include them in public servants.

19. 'Public servant' has also been defined in the case of *Ramesh Balkrishna Kulkarni Vs. State of Maharashtra*, (1985) 3 SCC 606 as "...an authority who must be appointed by the Government or a semi-governmental body and should be in the pay or salary of the same. Secondly a 'public servant' is to discharge his duties in accordance with the rules and regulations made by the Government."

20. The question as to whether a Member of Legislative Assembly (MLA) is a public servant as defined in the Penal Code as well as in the Act II of 1947 was raised in the Case of *R S Nayak Vs. A R Antuly*, (1984) 2 SCC 183 = AIR 1984 SC 684. It was strenuously argued that an MLA was a public servant as he fell within the meaning of the expression in section 21, clause 12 (a) of the Penal Code and also within the contemplation of clauses 3 and 7 thereof. The Supreme Court of India upon thorough analysis referring to the entire history and evolution of the concept of 'public servant' held that an MLA was not a public servant within the meaning of section 21, clauses 12 (a), 7 and 3 of the Penal Code.

21. In our jurisdiction, the Appellate Division in the case of *Sheikh Abdus Sabur vs. Returning Officer and others*, 41 DLR (AD) 30 held the Member of Parliament not to be a public servant unlike the Member of a Union Parishad. The Appellate Division distinguishing the functions of Legislature and that of Union Parishad held that "... Above all, members of a Union Parishad are 'public servants' within the meaning of S.21 of the Penal Code. The term 'Public Servants' denotes some executive control over them and they are subject to disciplinary rules which are applicable to regular government servants. In view of these differences in respect of functions and duties the Legislature thought it proper and expedient to treat them as separate class of people's representatives...."(para 40)

22. In an unreported decision passed in Writ Petition No. 9905 of 2007 (*Mohammad Shahidul Islam vs. National Board of Revenue and others*) Justice Mohammad Abdur Rashid with reference to the principles expounded in the above cases observed and held:

"...We do not find any difficulty to say that a Member of Parliament is not a public servant within the meaning of section 2 of the Prevention of Corruption Act, 1947 and section 21 of the Penal Code."

23. It should be borne in mind that our Constitution has accepted the well defined doctrine of separation of powers between legislature, executive and judiciary. Function of the Legislature mainly is to make laws and thus the duty of the Members of Parliament is to participate in the law making process where the executive or Government has nothing to do but to implement the laws passed by the Legislature. In a democracy, a Member of Parliament has a distinct position and status especially in relation to the exercise of his freedom of expression, opinion and conscience for the People. He is so free that he cannot only criticize the Government but also can call for change of the Constitution criticizing its provisions if he feels necessary. It also reflects from the oath of his office as prescribed in the third schedule of the Constitution. Unlike the President, Prime Minister, Ministers and other constitutional functionaries, he does not have to swear (or affirm) to preserve, protect and defend the Constitution.

24. A Member of Parliament represents the people, the owners of the country and their authority moves with him. He is neither appointed by the Government nor is he in the pay of the executive Government. He discharges his constitutional duties of law making in accordance with the laws made by them not by rules and regulations made by the executive. It will frustrate the very purpose of separation of powers if a Member of Parliament is treated a public servant.

25. In view of the above, this Court is of the firm opinion that a Member of Parliament is not a 'public servant' within the meaning of section 21 of the Penal Code or section 2 of the Act II of 1947. We, therefore, accept the submission advanced by the learned Advocate for the petitioner only to the extent that in order to prosecute opposite party 2, no sanction from the Government was required.

26. So far the merit of the case is concerned we find that in all the police reports it was found that the money allegedly misappropriated was paid and as such the opposite party 2 was not sent up. The delayed payment of lease money to a private association cannot be construed as 'criminal misconduct' within the meaning of section 5 (1) of the Act II of 1947. Besides, opposite party 2 being Chairman of UCCA Ltd. was an ornamental head, not the chief executive and he had only recommended the co-accused-lessees of the power tillers on their applications for lease. The allegation of misappropriation was mainly directed against the lessees and opposite party 2 was made an accused for abatement. Realization of lease money is actually a routine work of the association, for non-performance of which opposite party 2 being an ornamental head of the association should not be held liable. We do not think that the allegation of misappropriation of public money at all lies against him. There is nothing wrong in the ultimate decisions of the Special Judge in exonerating him from the charge.

27. In the result, all the Rules are discharged. The applications for addition of party are accordingly disposed of. The orders of stay passed earlier at the time of issuance of the Rules stand vacated.