PETITIONER:
ABDUL WAHAB ANSARI

Vs.

RESPONDENT:
STATE OF BIHAR & ANR.

DATE OF JUDGMENT: 17/10/2000

BENCH:
G.B.Pattanaik, M.B.Shah, S.N.Phukan

JUDGMENT:

PATTANAIK,J.
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Leave Granted.

The appellant is a public servant and on 26.4.1993, the Sub Divisional Magistrate asked for an explanation from him as to why the encroachment in question is not being removed notwithstanding the direction of the High Court. The said Sub Divisional Magistrate by order dated 25th of June, 1993, appointed the appellant as a Duty Magistrate and one Shri Vinod Pal Singh as Senior In-charge Magistrate of the Police Force, who were required to remove the encroachment in question. The said appellant visited the encroachment site and requested the encroachers for removal of encroachment and on 16.7.1993 was able to remove the encroachment partially and reported the said fact to his senior officer, but on 17.7.1993, when the appellant along with armed force, reached the encroachment site, several miscreants armed with weapons, started hurling stone and as the situation became out of control, after giving due warning, the appellant was compelled to give order for opening fire and dispersed the mob. On account of such firing, one of the persons died and two others were injured and the appellant then sent a report to his senior officer about the incident. The son of the deceased, who is respondent No. 2, filed a complaint before the Chief Judicial Magistrate, alleging commission of offence by the appellant under Sections 302, 307, 380, 427, 504, 147, 148 and 149 IPC as well as Section 27 of the Arms Act. The Chief Judicial Magistrate by his order dated 24.11.1995, came to the conclusion that there is sufficient evidence available to establish that prima facie case under Sections 302, 307, 147, 148, 149 and 380 is made out against the accused and, therefore, he directed issuance of non-bailable warrants against the appellant and other accused persons. The Chief Judicial Magistrate was also of the opinion that the provisions of Section 197 of the Code of Criminal Procedure will have no application to the facts of the case. The appellant then moved the High Court under Section 482 of the Code of Criminal Procedure, praying inter alia that no cognizance could be taken without a sanction of the appropriate Government, as required under sub-section (2) of Section 197 of the Code of Criminal Procedure, when the

appellant was discharging his official duty pursuant to an order of the Competent Authority. The High Court, however without going into the merits of the matter and being of the opinion that all the questions may be raised at the time of framing of charge, disposed of the application filed by the appellant and hence the present appeal in this Court. It may be stated that there was a dispute between two sets of Mohammedan residents, one set complaining against the other about the encroachment of the property belonging to the mosque and the appellant as the Circle Inspector, on the basis of the said complaint had inquired into the matter and on the basis of a detailed inquiry, a finding had been arrived at, that the situation at the site was volatile for which on 27th of March, 1991, order under Section 144 Cr.P.C. had been promulgated. Thereafter the appellant had made several requests to the encroachers for removal of the encroachment and ultimately the Sub Divisional Magistrate, Aurangabad by his order dated 25th of June, 1993, appointed the appellant as Duty Magistrate for use of Police Force to remove encroachment in question. When the present appeal had been listed before us, a judgment of this Court in the case of Birendra K. Singh vs. State of Bihar, reported in JT 2000(8) SC 248, had been placed before us and it was contended that the question of applicability of the provisions of Section 197 Cr.P.C. can be raised at the stage of framing of charge and, therefore, the impugned order of the High Court does not require any interference by this Court. The aforesaid decision no doubt supports the contention of the learned counsel, appearing for the respondent to a great extent but as we doubted the correctness of the aforesaid ennunciation of law, the matter had been referred to a Three Judge Bench and that is how we are in session of the matter.

The learned counsel appearing for the appellant contended before us that on the plain language of Section 197 of the Code of Criminal Procedure, when the Court is debarred from taking cognizance of the offence except with the previous sanction of the competent authority, if it is established that the offence alleged had been committed by him while acting or purporting to act in discharge of his official duty, there is no justification for the accused to wait till the stage of framing of charge is reached and the High Court, therefore was in error in not exercising the jurisdiction vested in law. On the facts of the case, the learned counsel submitted that the appellant being present at the place of occurrence pursuant to an order of the Magistrate with the Police Force and was required to remove the encroachment in question and he ordered for firing when the situation went out of control, while discharging the duty of removal of encroachment and pursuant to such firing, a person died and two persons were injured, the irresistible conclusion is that the use of police force related to the performance of the official duty of the accused appellant, within the meaning of Section 197 of the Code of Criminal Procedure and consequently, without prior sanction of the competent authority, the Court could not have taken cognizance of the offence on the basis of a private complaint.

Mr. S.K. Sinha, the learned counsel appearing for the complainant-respondent as well as Mr. B.B.Singh, the learned counsel appearing for the State of Bihar, fairly stated that the judgment of this Court in Birendra K. Singhs case has been too widely stated and there is no

requirement for the accused to wait till the stage of framing of the charge is reached for raising the contention with regard to the applicability of Section 197 of the Code of Criminal Procedure. So far as the applicability of the provisions of Section 197 of the Code of Criminal Procedure is concerned, in the facts and circumstances of the present case, though Mr. B.B. Singh, appearing for the State of Bihar submitted that the gravamen of the allegation made in the complaint unequivocally indicate that the appellant was discharging his official duty when he directed for opening of fire to control the mob and, therefore, the provisions of Section 197 of the Code of Criminal Procedure would apply. Mr. Sinha, the learned counsel appearing for the complainant-respondent on the other hand contended that the act complained of cannot be held to be in discharge of official duty of the appellant and, therefore the provisions of Section 197 of the Code of Criminal Procedure will have no application.

In view of the rival submissions at the Bar, two questions arise for our consideration: 1. Assuming the provisions of Section 197 of the Code of Criminal Procedure applies, at what stage the accused can take such plea? Is it immediately after the cognizance is taken and process is issued or it is only when the Court reaches the stage of framing of charge as held by this Court in Birendra K. Singhs case. ? 2. Whether in the facts and circumstances of the present case, is it possible for the Court to come to a conclusion that the appellant was discharging his official duty and in course of such discharge of duty, ordered for opening of fire to control the mob in consequence of which a person died and two persons were injured and in which event, the provisions of Section 197 of the Code of Criminal Procedure can be held to be attracted?

So far as the first question is concerned, on a plain reading of the provisions of Section 197 makes it crystal clear that the Court is prohibited from taking cognizance of the offence except with the previous sanction of the competent authority. For a better appreciation of the point in issue, Section 197(1) is quoted herein- below in extenso:

Section 197(1). When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government 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, no Court shall take cognizance of such offence except with the previous sanction- (a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government; (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government.

Previous sanction of the competent authority being a pre- condition for the Court in taking cognizance of the offence if the offence alleged to have been committed by the accused can be said to be an act in discharge of his official duty, the question touches the jurisdiction of the Magistrate in the matter of taking cognizance and, therefore, there is no requirement that an accused should

wait for taking such plea till the charges are framed. In Suresh Kumar Bhikamchand Jain vs. Pandey Ajay Bhushan and Ors., 1998(1) SCC, 205, a similar contention had been advanced by Mr. Sibbal, the learned senior counsel appearing for the appellants in that case. In that case, the High Court had held on the application of the accused that the provisions of Section 197 gets attracted. Rejecting the contention, this court had observed:

The legislative mandate engrafted in sub-section (1) of Section 197 debarring a court from taking cognizance of an offence except with a previous sanction of the Government concerned in a case where the acts complained of are alleged to have been committed by a public servant in discharge of his official duty or purporting to be in the discharge of his official duty and such public servant is not removable from his office save by or with the sanction of the Government touches the jurisdiction of the court itself. It is a prohibition imposed by the statute from taking cognizance, the accused after appearing before the Court on process being issued, by an application indicating that Section 197(1) is attracted merely assists the court to rectify its error where jurisdiction has been exercised which it does not possess. In such a case there should not be any bar for the accused producing the relevant documents and materials which will be ipso facto admissible, for adjudication of the question as to whether in fact Section 197 has any application in the case in hand. It is no longer in dispute and has been indicated by this Court in several cases that the question of sanction can be considered at any stage of the proceedings."

The Court had further observed:

The question of applicability of Section 197 of the Code and the consequential ouster of jurisdiction of the court to take cognizance without a valid sanction is genetically different from the plea of the accused that the averments in the complaint do not make out an offence and as such the order of cognizance and/or the criminal proceedings be quashed. In the aforesaid premises we are of the considered opinion that an accused is not debarred from producing the relevant documentary materials which can be legally looked into without any formal proof, in support of the stand that the acts complained of were committed in exercise of his jurisdiction or purported jurisdiction as a public servant in discharge of his official duty thereby requiring sanction of the appropriate authority.

In the case of Ashok Sahu vs. Gokul Saikia and Anr. 1990 (Supp.) SCC 41, this court had said that want of sanction under Section 197 of the Code is a prohibition against institution of the proceedings, and the applicability of the Section must be judged at the earliest stage of the proceedings and in that case, the Court directed the Magistrate to consider the question of sanction before framing a charge. In yet another case, in the case of P. Saha and ors. Vs. M.S.Kochar, 1979(4) SCC 177, a three Judge Bench of this Court had held that the question of sanction under Section 197 Cr.P.C. can be raised and considered at any stage of the proceedings and further in considering the question whether or not sanction for prosecution was required, it is not necessary for the Court to confine itself to the allegations in the complaint, and it can take into account all the material on the record at

the time when the question is raised and falls for consideration. This being the position, we are of the considered opinion that the decision of this Court in Birendra K. Singhs case JT 2000 (8) SC 248, does not lay down the correct law by directing that the objection on the question of sanction can be raised at the stage of framing of charge and not at any prior point of time.

Coming to the second question, it is now well settled by the Constitution Bench decision of this Court in Matajog Dobey vs. H.C. Bhari, 1955 (2) SCR 925, that in the matter of grant of sanction under Section 197 of the Code of Criminal Procedure the offence alleged to have been committed by the accused must have something to do, or must be related in some manner, with the discharge of official duty. In other words, there must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable claim, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty. In the said case it had been further held that where a power is conferred or a duty imposed by statute or otherwise, and there is nothing said expressly inhibiting the exercise of the power or the performance of the duty by any limitations or restrictions, it is reasonable to hold that it carries with it the power of doing all such acts or employing such means as are reasonably necessary for such execution, because it is a rule that when the law commands a thing to be done, it authorises the performance of whatever may be necessary for executing its command. This decision was followed by this Court in Suresh Kumar Bhikamchand Jains case, 1998(1) SCC 205, and in a recent judgment of this Court in the case of Gauri Shankar Prasad vs. State of Bihar and Anr., 2000 (5) SCC 15. The aforesaid case has full force even to the facts of the present case inasmuch as in the said case, the Court had observed:

It is manifest that the appellant was present at the place of occurrence in his official capacity as Sub-Divisional Magistrate for the purpose of removal of encroachment from government land and in exercise of such duty, he is alleged to have committed the acts which form the gravamen of the allegations contained in the complaint lodged by the respondent. In such circumstances, it cannot but be held that the acts complained of by the respondent against the appellant have a reasonable nexus with the official duty of the appellant. It follows, therefore, that the appellant is entitled to the immunity from criminal proceedings without sanction provided under Section 197 Cr.P.C.

It is not necessary for us to multiply authorities on this point and bearing in mind the ratio of the aforesaid cases and applying the same to the facts of the present case as indicated in the complaint itself, we have no hesitation to come to the conclusion that the appellant had been directed by the Sub-Divisional Magistrate to be present with police force and remove the encroachment in question and in course of discharge of his duty to control the mob, when he had directed for opening of fire, it must be held that the order of opening of fire was in exercise of the power conferred upon him and the duty imposed upon him under the orders of the Magistrate and in that view of the matter the provisions of Section 197(1) applies to the facts of the present case. Admittedly, there being no sanction, the

cognizance taken by the Magistrate is bad in law and unless the same is quashed qua the appellant, it will be an abuse of the process of Court. Accordingly, we allow this appeal and quash the criminal proceeding, so far as the appellant is concerned.

JUDIS