*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.REV.P. 1021/2018

Date of decision: 03rd February, 2021

IN THE MATTER OF:

P.K. THIRWANI ..... Petitioner

Through Mr. Anuj Chauhan, Advocate

versus

CENTRAL BUREAU OF INVESTIGATION ..... Respondent

Through Mr. Anupam S Sharrma, SPP with Mr. Prakarsh Airan and Ms. Harpreet Kalsi, Advocates

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. This Revision Petition under Section 397/401 is directed against the order dated 09.10.2018, in FIR No. RC. 8(S)/06-SCB-l/DLI, Dated 14.09.2006, registered at CBI, New Delhi, passed by the learned Special Judge, CBI-III, Rohini, Delhi. The learned Special Judge has framed charges under Sections 120B, 420,467,468 & 471 IPC and Section 13(2) read with Section 13(1)(d) of Prevention of Corruption Act, 1988 against the petitioner.

2. The Uttar Bharat Government Employees CGHS Ltd, (hereinafter referred as 'The Society') is a society registered under the Delhi Co-operative Societies Act. It was registered on 18.12.1983 vide

registration No. 973, having its registered office at Room No. 216-A, Sena Bhawan, New Delhi. The members of the Society failed to respond to the notices issued by the Deputy Registrar (NGH). Since no one took interest in the affairs of the Society, the society had become defunct. Lot of discrepancies were found in the working of the Society, and the Society was wound up on 27.11.1990. After about 12 years of its being wound up an application dated 28.11.2000 was filed to the Registrar of Cooperative Societies to revive the Society. The Registrar of the Cooperative Societies summoned the Secretary of the Society along with original records and the Society was revived by an order dated 04.01.2001 passed by the then Registrar of Cooperative Societies, Mr. R.K. Shrivastava, who is also an accused.

3. A case was registered by FIR No. RC. 8(S)/06-SCB-l/DLI, Dated 14.09.2006, registered at CBI, New Delhi, under Sections 120B, 420,467,468 & 471 IPC and Section 13(2) read with Section 13(1)(d) of Prevention of Corruption Act,1988 in pursuance to the orders dated 02.05.2005 and 13.02.2006 of this court in Civil Writ petition No. 10066/2004. A preliminary enquiry being 2006/SCR-III/DLI was registered on 03.03.2006. The enquiry revealed that some of the defunct Cooperative Group Housing Societies (hereinafter referred as 'CGHS') registered during 1970-80 or thereafter were revived by Registrar, Cooperative Societies (hereinafter referred as 'The RCS') Delhi on the basis of false/forged documents and on the recommendation of the RCS. Land was allotted to these societies by the RCS. The preliminary enquiry

was registered to ascertain the genuineness of the office bearers of 5 CGHS including the Society in question. The FIR mentions that after the Society was wound because of the non-compliance of the direction as laid down by the Registrar of Cooperative Societies and after a gap of 12 years a request was made by the accused Mr. M.R. Jumle for revival of the Society to the RCS, Mr. R.K. Shrivastava and for this purpose fake letters and proceedings pertaining to the Society's matters were submitted. As a result of these fake and forged records the Society was revived on 03.01.2001. The FIR states that some of the fake and forged documents were photocopies of proceedings, receipts of share money, affidavits of promoter and members, copies of membership applications, resignations, etc.

4. It is alleged that while submitting its claim for revival of the Society, Mr. M.R. Jumle, the then Secretary of the Society, Mr. Anna Wankhede, (Ex. Dealing Assistant, DDA) and one Mr. Shrichand acted in conspiracy with the officials in the office of RCS and produced forged records pertaining to claim of revival of the Society. During the investigation it has been found *prima facie* that Mr. Srichand (A-1), Mr. Anna Wankhade (A-2), Mr. M.R Jumle (A-3) and Mr. S.P. Saxena (A-8) had forged various records of the Society for the purpose of revival of the same in conspiracy with RCS officials namely Mr. G.S. Bisht (A-4), Mr. Yogi Raj (A-5), Mr. P.K Thirwani, the petitioner herein (A-6), and Mr. R.K Shrivastava (A-7) forged and used the said documents and got the Society fraudulently revived by abuse of official position of said public

servants. Pursuant to said fraudulent revival, land was also allotted to this Society by DDA.

5. After investigation a final report was filed on 31.03.2008 before the Court. The final report states that no evidence has come on record against the petitioner regarding his involvement in the crime and hence no action is recommended against him and he may be discharged from the case.

6. Despite the report the learned Special Judge took cognizance of the offence against the petitioner and issued summons against him. The learned Special Judge, CBI-III, Rohini, Delhi by an order passed on 09.10.2018, framed charges under Sections 120B, 420,467,468 & 471 IPC and Section 13(2) read with Section 13(1)(d) of Prevention of Corruption Act, 1988 against the petitioner. It is this order which is under challenge in the instant revision petition.

7. Mr. Anuj Chauhan, learned counsel for the petitioner states that the investigating officer has stated that no evidence has been found against the petitioner and the final report as filed before this Court in Civil Writ petition No. 10066/2004 exonerates the petitioner. He contends that there is no allegation against the petitioner that he received any pecuniary advantage or monetary reward from the audit of the Society. Mr. Chauhan would contend that since the petitioner has been charged for offences under Section 13(2) read with Section 13(1)(d) of Prevention of Corruption Act, 1988 sanction under Section 19 of the Prevention of Corruption Act, 1988 was to be obtained from the competent authority and in absence of sanction the entire proceedings against the petitioner could

not continue. He would further contend that the petitioner has been charged for an alleged audit of the Society and the work even assuming but not admitting was done by him, it was done in discharge of the official duty and therefore the sanction ought to have been taken under Section 197 of the Cr.P.C. He would argue that in the absence of sanction the prosecution cannot be permitted to be continued against the petitioner.

8. He would state that a reading of the reply filed by the CBI in this court would show that the petitioner was kept in column 12 and therefore no sanction was obtained.

9. Mr. Chauhan would argue that the petitioner conducted the audit on the basis of the documents given to him by the Society and therefore, the petitioner cannot be charged with Section 120B and that there is nothing to show that there was meeting of minds between the petitioner and the other accused. The petitioner did not know that forged documents have been given to him.

10. Mr. Anupam S Sharrma, learned SPP appearing for CBI contends that the court is not bound by the opinion of the Investigating Officer. Cognizance was taken against the petitioner by an order dated 13.10.2009. He would also contend that the substantive offence for which the petitioner has been charged is 120B IPC i.e. conspiracy in relation to offences under Sections 420, 467, 468 & 471 IPC and Section 13(2) read with Section 13(1) (d) of Prevention of Corruption Act, 1988. He would contend that since the substantive offence is under Section 120B no sanction is required under Section 19 of the Prevention of Corruption Act,

1988.

11. Mr. Sharrma would further contend that in any event the petitioner is not a public servant. Mr. Sharrma would state that public servant has been defined in Section 2(c) of the Prevention of Corruption Act, 1988 and Section 21 of the Indian Penal Code. Section 2(c) of Prevention of Corruption Act, 1988 reads as under:

> *"(c) "public servant" means—*
>
> *(i) any person in the service or pay of the Government or remunerated by the Government by fees or commission for the performance of any public duty;*
> *(ii) any person in the service or pay of a local authority;*
> *(iii) any person in the service or pay of a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);*
> *(iv) any Judge, including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions;*
> *(v) any person authorised by a court of justice to perform any duty, in connection with the administration of justice, including a liquidator, receiver or commissioner appointed by such court;*
> *(vi) any arbitrator or other person to whom any cause or matter has been referred for decision or report by a court of justice or by a competent public authority;*

(vii) any person who holds an office by 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;

(viii) any person who holds an office by virtue of which he is authorised or required to perform any public duty;

(ix) any person who is the president, secretary or other office-bearer of a registered co-operative society engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the Central Government or a State Government or from any corporation established by or under a Central, Provincial or State Act, or any authority or body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);

(x) any person who is a chairman, member or employee of any Service Commission or Board, by whatever name called, or a member of any selection committee appointed by such Commission or Board for the conduct of any examination or making any selection on behalf of such Commission or Board;

(xi) any person who is a Vice-Chancellor or member of any governing body, professor, reader, lecturer or any other teacher or employee, by whatever designation called, of any University and any person whose services have been availed of by a University or any other public authority in connection with holding or conducting examinations;

(xii) any person who is an office-bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner

established, receiving or having received any financial assistance from the Central Government or any State Government, or local or other public authority"

12. Section 21 of the IPC reads as under:

*"**21**. "**Public servant**".—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 India;

Third.—Every Judge including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions

Fourth.—Every officer of a Court of Justice [(including a liquidator, receiver or commissioner)] 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 authorised by a Court of Justice to perform any of such duties;

Fifth.—Every juryman, 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 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]

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;

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 (1 of 1956)"

13. He would further contend that Section 2(*l*) of Delhi Co-operative Societies Act defines Officer in relation with the Co-operative Societies and it does not include an Auditor. Section 2(*l*) of Delhi Co-operative Societies Act, 1972 reads as under:

"The Delhi Co-Operative Societies Act, 1972

2. Definitions

(l) "officer" means the president, vice-president, chairman, vice-chairman, managing director, secretary, manager, member of committee, treasurer, liquidator, administrator and includes any other person empowered under the rules or the bye-laws to give directions in regard to the business of a co-operative society;"

Mr. Sharrma states that an Auditor appointed by the Society for its audit

will not be covered by any of these provisions and therefore no sanction is required to prosecute the petitioner.

14. Mr. Sharrma would rely on the Mohd. Hadi Raja v. State of Bihar and ANR., reported as **AIR 1998 SC 1945,** to contend that protection by way of sanction under Section 197 Cr.P.C. is not available to officers of Government companies or public undertakings.

15. Mr. Sharrma would also rely on N. K. Sharma v. Abhimanyu, reported as **AIR 2005 SC 4303,** wherein the Supreme Court held that Government servants working on deputation as Managing Director of a Co-operative Society is not a public servant in the meaning of Section 21 of the IPC. He would state that Section 21 of the IPC defines public servant and an auditor will not come within any of the clauses under Section 21.

16. Mr. Sharrma would lastly contend that even though presuming that the petitioner is a public servant then also he is not merely a post office whose duty is only to look into the documents, he has to ascertain the correctness of the documents, examine the facts, find out whether the old members had left, how many of the new members joined. He would state that the fact that audit of 16 years was done in a single day is itself sufficient to show that he does not deserve the protection of Section 197 Cr.P.C. He would also contend that Section 10 of the Evidence Act states that if there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their

common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to so conspiring, as well for the purpose of proving the existence of the conspiracy. He would state that the Society in question was a defunct Society and suddenly it was brought to life for the sole purpose of getting land at a concessional rate from DDA. Mr. Sharrma has drawn the attention of this court to the Order appointing the Auditor. Mr. Sharrma would point out that the Option-cum appointment letter for conducting statutory audit shows that it was the petitioner who gave his consent for conducting the audit for the Society and that the consent was subject to the approval of the office of the RCS. He would state that after the petitioner gave consent the Registrar, Cooperative Societies gave his approval to conduct the audit of the Society for the years 1983-84 to 1999-2000. He would further state that the petitioner was nominated by the Society to be the Auditor and therefore petitioner cannot be called as a public servant requiring the protection under Section 197 Cr.P.C.

17. In rejoinder Mr. Anuj Chauhan, learned counsel for the petitioner, would state that the petitioner was not appointed by the Society, the petitioner is an employee of the RCS. He would state that he was getting salary from the office of the RCS during the relevant period and he was asked to perform the audit as mandated under Section 53 of the Delhi Co-operative Societies Act, 1972. Mr. Chauhan would state that in fact the petitioner was working in the office of the RCS till 2004 from where he was later transferred to Directorate of Education. He would state that he

has not received any remuneration from the Society. He would further contend that since the petitioner is performing a statutory function and was engaged in the office of RCS. He is a public servant and the audit was done in the course of the performance of his duties and therefore sanction ought to have been obtained from the competent authority.

18. Heard Mr. Anuj Chauhan, learned counsel appearing for the petitioner and Mr. Anupam S Sharrma, learned SPP appearing for the CBI and perused documents.

19. The contention raised by Mr. Anuj Chauhan that there was no meeting of minds between the petitioner and other Officers of the RCS and therefore no offence under Section 120B IPC is made out cannot be gone into at this stage. This is a matter of trial and can be decided only after both sides adduce evidence. Similarly, the contention that the petitioner did not receive any consideration from the Society for conducting the audit and hence no offence under Section 120B IPC is made out also cannot be accepted. The allegation against the petitioner is that he completed the audit for 16 years in just one day which facilitated the revival of the Society and which enabled the Society to get loan at cheaper rate. The fact that the petitioner received or did not receive any remuneration from the Society is of no consequence at this stage when this court is also considering whether the Order on Charge is correct or not while exercising its jurisdiction under Section397/401 of Cr.P.C.

20. It is well settled law that Section 19 of the Prevention of Corruption Act, 1988 requires prior sanction from the appropriate authority, before

any court can take cognizance of offences, under Section 7, 11, 13 and 15 of the Act. If an offence is made out under any other section, even against a Public Servant, no prior sanction is required. In State v. Parmeshwaran Subramani, reported as **(2009) 9 SCC 729,** the Supreme Court has observed as under:

> *"**17.** Section 12 of the Act, in clear and categorical terms, speaks that whoever abets any offence punishable under Section 7 or Section 11 whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term as provided thereunder. It is thus clear that abetment of any offence punishable under Section 7 or Section 11 is itself a distinct offence. The offence punishable under Section 7 or Section 11 whether actually committed by a public servant is of no consequence. It is precisely for the said reason Section 19 of the Act specifically omits Section 12 from its purview. The courts by process of interpretation cannot read Section 12 into Section 19 as it may amount to rewriting the very Section 19 itself.*
>
> *xxxxx*
>
> ***25.** Keeping in view the aforesaid legal principles the inevitable conclusion is that the High Court fell into error in reading into Section 19 of the Act, the prohibition not to take cognizance of an offence punishable even under Section 12 of the Act without previous sanction of the Government which is not otherwise provided for. **The language employed in Section 19 of the Act is couched in mandatory form directing the courts not to take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 only, alleged to have been committed by a public servant, except with the previous sanction of the***

> ***Government.***
> ***26.*** *The legislature consciously in its wisdom omitted the offence of abetment of any offence punishable under Section 7 or Section 11 of the Act thereby making its intention clear that no previous sanction as such would be required in cases of the offence punishable under Section 12 of the Act. The High Court read something into Section 19 on its own thereby including Section 12 also into its ambit, which in our opinion is impermissible."* (emphasis supplied)

21. The petitioner has been charged for an offence under Section 120B IPC. 120B IPC is an offence in itself. The substantive charge against the petitioner is not one under Section 7, 11, 13 and 15 of the Prevention of Corruption Act, 1988. The fact that the petitioner has been accused of conspiracy for offences under Sections 420, 467, 468 & 471 IPC and Section 13(2) read with Section 13(1) (d) of Prevention of Corruption Act, 1988 no sanction is required under Section 19 of the Prevention of Corruption Act, 1988.

22. This brings us to the second question as to whether sanction was needed under Section 197 of the Cr.P.C, for the offence under Section 120B of the IPC. Section 197 Cr.P.C is attracted when a public servant is accused of committing an offence while acting or purporting to act in the discharge of his official duties.

23. In N.K. Ganguly v. CBI, reported as **(2016) 2 SCC 143,** the Supreme Court has observed as under:

> *"**35.** From a perusal of the case law referred to supra, it becomes clear that for the purpose of obtaining*

> *previous sanction from the appropriate Government under Section 197 CrPC, it is imperative that the alleged offence is committed in discharge of official duty by the accused. It is also important for the Court to examine the allegations contained in the final report against the appellants, to decide whether previous sanction is required to be obtained by the respondent from the appropriate Government before taking cognizance of the alleged offence by the learned Special Judge against the accused. In the instant case, since the allegations made against the appellants in the final report filed by the respondent that the alleged offences were committed by them in discharge of their official duty, therefore, it was essential for the learned Special Judge to correctly decide as to whether the previous sanction from the Central Government under Section 197 CrPC was required to be taken by the respondent, before taking cognizance and passing an order issuing summons to the appellants for their presence.**"**

24. A perusal of the abovementioned paragraphs would show that the public servant cannot be prosecuted without prior sanction if they are accused of wrongdoing while discharging their official duties.

25. The direction under Section 197 Cr.P.C is afforded only to those persons who cannot be removed from their office without sanction from the Government. In K. Ch. Prasad v. J. Vanalatha Devi, reported as **(1987) 2 SCC 52,** the Supreme Court has observed as under:

> *"**6.** It is very clear from this provision that this section is attracted only in cases where the public servant is such who is not removable from his office save by or with the sanction of the Government. It is not disputed*

that the appellant is not holding a post where he could not be removed from service except by or with the sanction of the government. In this view of the matter even if it is held that appellant is a public servant still provisions of Section 197 are not attracted at all.”

26. Further in S.K. Miglani v. State (NCT of Delhi), reported as **(2019) 6 SCC 111,** Supreme Court after relying on K. Ch. Prasad *(supra)* has observed as under:

*“**11.** The question as to whether a manager of nationalised bank can claim benefit of Section 197 CrPC is not res integra. This Court in K. Ch. Prasad v. J. Vanalatha Devi [K. Ch. Prasad v. J. Vanalatha Devi, (1987) 2 SCC 52 : 1987 SCC (Cri) 297] had occasion to consider the very same question in reference to one, who claimed to be a public servant working in a nationalised bank. The application filed by the appellant in the above case questioning the maintainability of the prosecution for want of sanction under Section 197 CrPC was rejected by the Metropolitan Magistrate and revision to the High Court also met the same fate. This Court while dismissing the appeal held that even though a person working in a nationalised bank is a public servant still the provisions of Section 197 are not attracted at all. In para 6 of the judgment, following has been held: (SCC p. 54)*

*“**6**. It is very clear from this provision that this section is attracted only in cases where the public servant is such who is not removable from his office save by or with the sanction of the Government. It is not disputed that the appellant is not holding a post where he could not be*

removed from service except by or with the sanction of the Government. In this view of the matter even if it is held that the appellant is a public servant still provisions of Section 197 are not attracted at all."

***12**. The High Court in its impugned judgment has not adverted to the above aspect and has only confined to the discussion as to whether the acts alleged of the appellant were in discharge of official duty. The High Court also had relied on the judgment of this Court in Parkash Singh Badal [Parkash Singh Badal v. State of Punjab, (2007) 1 SCC 1 : (2007) 1 SCC (Cri) 193] . We, having come to the conclusion that the appellant being not a public servant removable from his office save by or with the sanction of the Government, sanction under Section 197 CrPC was not applicable. The appellant cannot claim protection under Section 197 CrPC. We are of the view that examination of further question as to whether the appellant was acting or purporting to act in the discharge of his official duty was not required to be gone into, when he did not fulfil conditions for applicability of Section 197(1) CrPC.*

xxxxx

***19**. No exception can be taken to the proposition as laid down in the above case. We, having taken the view that the appellant being not removable by or save with the sanction of the Government was not covered by Section 197 CrPC. There was no necessity to consider any further as to whether the acts of the appellant complained of were in discharge of official duty or not."*

27. From the above it is clear that the protection under Section 197 of

the Cr.P.C is available to only those public servants who cannot be removed from their position without prior sanction of the government and are being proceeded against for the acts done by them in discharge of official duty.

28. Coming to the facts of the present case, it is the case of the petitioner that he is a public servant, and that therefore the Trial Court could not have taken cognizance of the offences under Section 120B against him.

29. Para 12 of the written submission submitted by Mr. Chauhan enumerates the posts held by the petitioner in the Government which reads as under:

> *a. Joined Delhi State Industrial Development Corporation (DSIDC) in 1973.*
>
> *b. In the year 1985 mines department of DSIDC was created and the petitioner was posted in mines department of DSIDC.*
>
> *c. In the year 1995 petitioner was redeployed by the chief secretary Govt of NCT and posted to Pay and Accounts office, Government of Delhi.*
>
> *d. In the year 2000 the petitioner was posted to the office of RCS and worked there till 2004.*
>
> *e. On 20.09.2004 the petitioner was transferred to the Directorate of Education.*
>
> *f. Petitioner was suspended by the chief secretary Govt. of Delhi on 09.11.2006.*

g. Petitioners suspension was revoked and the petitioner was again posted in directorate of Education on 09.02.2011.

h. Petitioner retired from Directorate of Education, Govt. of NCT on 31.07.2012.

30. The Order appointing the Auditor shows that the name of the petitioner was nominated by the Society to conduct audit of the Society and that nomination has been accepted by the RCS. The relevant portion of the order appointing the Auditor read as under:

> ***"ACCEPTANCE CERTIFICATE BY THE CA/AUDITOR***
>
> *I/We **P.K. Thirwani** do hereby give my/our consent for conducting the audit of your above mentioned society. Our consent is subject to the approval by the office of Registrar Cooperative Societies, Delhi.*
> *I/We _____ certify that my/our firm does not suffer from any disqualification mentioned in Section 226 of the Companies Act, 1956.*
>
> *Authorised Signatory*
>
> *xxxxx*
>
> ***APPROVAL OF REGISTRAR OF COOPERATIVE SOCIETIES***
>
> *NO.(Deftt-AR/Audit 2000/347) Dated 04.01.2001*
> *Option exercised by the Society has been approved for the year 1983-84 to 1999-2000 and property recorded.*
> *Dated 04.01.2001.*
>
> *Asstt. Registrar (Audit)"*

31. However, Mr. Chauhan submits that it is the statutory duty of the

RCS to conduct the audit under Section 53 of the Delhi Co-Operative Societies Act, 1972 and the Registrar had delegated the petitioner to conduct the audit. He states that the form of acceptance Certificate by CA/Auditor cannot be contrary to the language of the sanction. He states that what was done was under Section 53 of the Delhi Co-operative Societies Act, 1972. He would therefore contend that in view of the fact that no amount has been given by the Society to the petitioner to conduct the audit coupled with the fact that he was drawing salary from the office of the RCS would show that he is an employee of the RCS and has not been engaged or employed by the Society. He would state that the act was therefore done in discharge of his official duty. It is not the case of the prosecution that money has been given to the petitioner for a conduct of wrong audit.

32. In P.K. Pradhan v. The State of Sikkim, reported as **AIR 2001 SC 2547,** the Supreme Court observed as under:

> *"**5.** The legislative mandate engrafted in sub-section (1) of Section 197 debarring a court from taking cognizance of an offence except with the 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 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. Different tests have been laid down in decided cases to ascertain the scope and meaning of*

the relevant words occurring in Section 197 of the Code: "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty". The offence alleged to have been committed must have something to do, or must be related in some manner, with the discharge of official duty. No question of sanction can arise under Section 197, unless the act complained of is an offence; ***the only point for determination is whether it was committed in the discharge of official duty. There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What a court has to find out is whether the act and the official duty are so interrelated that one can postulate reasonably that it was done by the accused in the performance of official duty, though, possibly in excess of the needs and requirements of the situation.***

xxxxx

10. *In the case of Matajog Dobey v. H.C. Bhari [AIR 1956 SC 44 : 1956 Cri LJ 140 : (1955) 2 SCR 925] a Constitution Bench of this Court clearly laid down that where a power is conferred or a duty is imposed by a 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. The Court was considering in the said case the allegation that the official authorised in pursuance of a warrant issued by*

the Income Tax Investigation Commission in connection with certain pending proceedings before it, forcibly broke open the entrance door and when some resistance was put, the said officer not only entered forcibly but tied the person offering resistance with a rope and assaulted him causing injuries and for such an act, a complaint had been filed against the public officers concerned. This Court, however, held in that case that such a complaint cannot be entertained without sanction of the competent authority as provided under Section 197 of the Code. The Court had observed that before arriving at a conclusion whether the provisions of Section 197 of the Code will apply, the court must conclude that there is a reasonable connection between the act complained of and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty.

xxxxx

15. Thus, from a conspectus of the aforesaid decisions, it will be clear that for claiming protection under Section 197 of the Code, it has to be shown by the accused that there is reasonable connection between the act complained of and the discharge of official duty. An official act can be performed in the discharge of official duty as well as in dereliction of it. For invoking protection under Section 197 of the Code, the acts of the accused complained of must be such that the same cannot be separated from the discharge of official duty, but if there was no reasonable connection between them and the performance of those duties, the official status furnishes only the occasion or opportunity for the acts, then no sanction would be required. If the case as put forward by the prosecution fails or the defence

> ***establishes that the act purported to be done is in discharge of duty, the proceedings will have to be dropped. It is well settled that question of sanction under Section 197 of the Code can be raised any time after the cognizance; maybe immediately after cognizance or framing of charge or even at the time of conclusion of trial and after conviction as well. But there may be certain cases where it may not be possible to decide the question effectively without giving opportunity to the defence to establish that what he did was in discharge of official duty. In order to come to the conclusion whether claim of the accused that the act that he did was in course of the performance of his duty was a reasonable one and neither pretended nor fanciful, can be examined during the course of trial by giving opportunity to the defence to establish it. In such an eventuality, the question of sanction should be left open to be decided in the main judgment which may be delivered upon conclusion of the trial."*** (emphasis supplied)

33. From the facts of the case, as presented before this court in the instant petition, it is clear that there simply isn't enough material on record for this court to decide whether the petitioner is a public servant or whether prior sanction of the government is required to remove the petitioner from his office. This is clearly a question of fact, which is best left to the trial court.

34. In Venkateshwaran v. Singaravel Yarn Traders, reported as **(2009) 16 SCC 757,** the Supreme Court observed as under:

> ***"2.*** *When we see the complaint filed in the trial court, it is very clearly stated as under:*

> *"**6**. The second accused is guilty, as drawer of the cheque on behalf of Accused 1, as its managing partner. Accused 3 and 4 being partners of Accused 1, were in charge of and were responsible for the conduct of the business of Accused 1, and shall also be deemed to be guilty of the offence."*
>
> *Therefore, the question as to whether the present appellants, who were Accused 3 and 4, were the partners of the firm and were responsible for conduct of business, is the disputed question of fact which could not have been gone into under Section 482 CrPC. The High Court was absolutely right in not entertaining that question. It would be during the trial for the accused persons to urge that they were not in any way concerned with the said partnership firm.*"

35. In the context of matrimonial disputes, the Supreme Court in the case of Koppisetti Subbharao v. State of A.P., reported as **(2009) 12 SCC 331,** observed as under:

> ***"9.** The High Court was justified in holding that disputed questions of fact are involved and the application under Section 482 of Code has been rightly rejected. We do not find any scope for interference with the order of the High Court. However, we make it clear that we have not expressed any opinion on the merits of the case. The appeal is dismissed."*

36. The facts stated in the written submission are not borne out from the records of the case. These facts therefore cannot be looked into/taken into account at this juncture. It is the case of the petitioner that the audit was conducted by the petitioner in his official capacity as an Officer of the

RCS and was discharging a statutory duty cast on the officer of the RCS under Section 53 of the Delhi Co-operative Societies Act, 1972. Learned counsel for the petitioner further states that after his stint in the office of the RCS he was transferred to the Directorate of Education. As stated above there are no documents on record establish these facts and these facts are to be established only during the trial. Therefore, it is not possible to grant any relief to the petitioner at this stage. It is for the petitioner to establish these facts before the Trial Court to determine as to whether sanction under Section 197 Cr.P.C ought to have been taken by the prosecution or not.

37. It shall be open to the petitioner to establish before the trial court that the protection under Section 197 of the Cr.P.C is available to him which the Trial Court shall decided in accordance with law, without being influenced by this judgment.

38. The petition is accordingly dismissed along with the pending application.

SUBRAMONIUM PRASAD, J

FEBRUARY 03, 2021
rs