

## Section 197 CrPC vis-a-vis Public Servant under Section 21(Twelfth)(b) IPC

Section 197 CrPC vis-à-vis "Public Servant" under Section 21(Twelfth)(b) IPC

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Cite as: (2010) PL August S-8 The moot question under discussion is that whether the protection given under Section 197 of the Criminal Procedure Code, 1973 (called "CrPC") could be made applicable in respect of employees of government companies who are not removable from office save by or with the sanction of the Government, provided other implied conditions are fulfilled. Flowing from a plain reading of the section, sub-section (1) of Section 197 uses the term "public servant" thereby meaning the person who is employed....in connection with the "affairs of the Union, of the Central Government/State Government" under sub-clauses (a) and (b) of sub-section (1) of Section 197 CrPC. Within the meaning of the term "affairs of the Union, of the Central Government/State Government" as set out in Section 197, brings within its fold the government companies as the instrumentalities of the Government through the corporate veil, having separate juridical identity.

Different courts ruled differently in the matter of definition of "public servant" under Section 21(Twelfth)(b) IPC. In *S.P. Das v. State of Bihar*<sup>1</sup> it has been held that the Senior Divisional Manager and the Assistant Manager of the Insurance Company are "public servants" as defined under Section 21 IPC for entitling sanction under Section 197 CrPC. However, it has been held by the Allahabad High Court that no sanction is required for prosecuting an employee or officer of a nationalised bank (*Bhagwan Prasad Saxena v. State of U.P.*<sup>2</sup>). However, in *State of Maharashtra v. L.D. Kanchan*<sup>3</sup> it has been held that an employee of a nationalised bank is a public servant. Although, in a different context, the recent judgment of the Supreme Court in *National Small Industries Corpn. Ltd. v. State (NCT of Delhi)*<sup>4</sup> while dwelling on the definition of "public servant", it has been held that a government company is not a "public servant", employee of the company is a "public servant".

Contrarily, the SC judgment in *Mohd. Hadi Raja v. State of Bihar*<sup>5</sup> held that the employees of government companies cannot come within the ambit of the term "public servant" for getting the protective cover as envisaged in Section 197 of the Criminal Procedure Code, 1973 as they cannot be treated on a par with the government servants based on the following supportive and rival contentions.

**Supportive contentions** (a) The officials of the public sector undertakings and the government companies which are "State" within the meaning of Article 12 of the Constitution will enjoy the same protection as available to a public servant under Section 197 CrPC, although the officials of the public sector undertakings and the government companies are not directly employed by the State Government or the Central Government but they being employees of the instrumentalities of the Government through the corporate veil, are to be treated on a par with the government servant for the purpose of protection by way of requirement of sanction under Section 197 CrPC. (Para 6 of SC judgment in *Mohd. Hadi Raja v. State of Bihar*<sup>5</sup>.)

(b) In reality, the Government acts through the instrumentality or agency of the corporation. Where the corporation is an instrumentality or agency of the Government, it must be subjected to the same limitation in the field of constitutional law as the Government itself, though in the eye of the law, it would be a distinct and independent legal identity.

(c) The officers of the instrumentalities of the State having deep and pervasive control of the State and discharging the duties and functions intended to be performed by the Government through the contrivance of corporate veil, cannot but be entitled to the desired protection under Section 197 CrPC, on satisfying the other implied requirements.

**Rival contentions** That the employees of nationalised banks cannot be treated on a par with government servants on the sly that banks are covered under the Shops and Commercial Establishments Act. Similarly, the Assistant Surgeon of Hindustan Steel Ltd. cannot be treated on a par with government servant since Article 311 of the Constitution is not applicable to him. Rival contention has also been advanced stating that a government company has separate legal existence because being registered under the Companies Act, it has a separate juridical identity and as such could not be regarded as equivalent to a government department in *Praga Tools Corpn. v. C.A.*<sup>6</sup>, and *Subodh Ranjan Ghosh v. Sindri Fertilisers and Chemicals Ltd.*<sup>7</sup>

The judgment (*Mohd. Hadi Raja v. State of Bihar*) The Hon<sup>ble</sup> Judge gave verdict that: (SCC p. 102, para 27)

27. Therefore, in our considered opinion, the protection by way of sanction under Section 197 of the Code of Criminal Procedure is not applicable to the officers of government companies or the public undertakings even when such public undertakings are "State" within the meaning of Article 12 of the Constitution on account of deep and pervasive control of the Government.

Briefly on the following considerations: (a) the public undertakings and government companies performing the functions which are intended to be performed by the State, ex facie, such instrumentality or agency being a juridical person has an independent status and the action taken by them, however important, the same may be in the interest of

the State, cannot be held to be an action taken by or on behalf of the Government as such within the meaning of Section 197 CrPC, and (b) the functional acts of the employees of government companies and public undertakings in the discharge of public duties through the corporate veil, cannot be construed, as of rule, an action of the Government, it will not be just and proper to bring such persons (in service of government companies) within the ambit of Section 197 by liberally construing the provisions of Section 197 and such an exercise of liberal construction will not be confined to the permissible limit of interpretation of a statute by a court of law but will amount to legislation by Court.

Without contempt The Hon<sup>ble</sup> Judge has been driven by the point that employees, who are in direct employment with the State/Central Government (by way of "government servant" coming with Article 311 of the Constitution) only can claim the benefit of protection under Section 197 CrPC. If that was the legislative intention, the words "public servant" would not have been used in Section 197 within the meaning of Section 2(y) CrPC, instead, the words "government servant" would have been inserted in Section 197 CrPC. It is not necessary that persons falling under any of the descriptions given in various clauses under Section 21 IPC need to be appointed by the Government only. The Explanations given under Section 21 IPC are *res ipsa loquitur*. Explanation 1 of Section 21 IPC amply clarifies that persons falling under any of these descriptions in Section 21 IPC are public servants whether appointed by the Government or not. Explanation 2 indicates that wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation. Sub-<sup>o</sup>clause (b) of clause (Twelfth) of Section 21 expressly makes the officers of local authority and corporation established by or under a Central, Provincial or State Act or a government owned company as defined in Section 617 of the Companies Act, 1956. Despite the above, the puisne Judge gave a go-by to the *ex facie*/explicit legislative intent writ large in the definition of "public servant" in Section 21(Twelfth)(b) IPC for providing the benefit of intended protection under Section 197 CrPC.

The logicity of the separate "juridical identity" of the government company vis-<sup>À</sup>-vis the constitutionality of the Government [swayed by the wording "public servant not removable from his office save by or with the sanction of the Government" in Section 197(1) CrPC] as discussed in the judgment *ibid* is not proximate to the core issue i.e. whether the employee of the government company under the corporate veil coming within the definition of "public servant" under Section 21(Twelfth)(b) IPC will come within the purview of Section 197 CrPC. The term "public servant" used in Section 197 CrPC cannot be regarded to be disjunctive to the definition given under Section 21(Twelfth)(b) together with the Explanatory notes. The "juridical identity" of the government company/public undertaking, as separate from the Government within the meaning of Article 12 of the Constitution, cannot, by any rationale, efface the intended legislative intention ascribed to the definition of "public servant"; the words "public servant" have been consciously employed in Section 197 CrPC to meet the ends of justice. The puisne Judge did not even dwell or ponder as to whether it is a case of *casus omissus* in the matter.

It is a surrogate thinking that only government servants (within the meaning of Article 311 of the Constitution) only are eligible to secure the protection under Section 197 CrPC and not others in the government corporate sector, say, like Reserve Bank of India (set up under a separate Act of Parliament) discharging the governmental functions like the Currency and Monetary Authority in the country. The concept of separate juridical identity as enjoyed by RBI could in any way, abrogate the legislative intents given in Section 197 CrPC vis-<sup>À</sup>-vis Section 21(Twelfth)(b) IPC? It could never be.

The definition of "public authority" in Section 2(h) of the Right to Information Act, 2005 also includes any body owned, controlled or substantially financed and non-government organisation substantially financed directly or indirectly by the appropriate Government. Similarly, Sections 4 to 7 of the UK Act (Right to Information) defined among others that publicly-owned companies also fall within the meaning of "public authorities" if they are wholly owned by the Crown.

The words "public servant not removable from his office save by or with the sanction of the Government" used in Section 197 CrPC is obsolete and obnoxious and it has outlived its utility, with the gradual passage of government functions performed by the public sector undertaking and government companies under the corporate veil or otherwise. Perhaps, the Law Commission of India needs to focus its attention to examine the issue in greater perspective and depth to see that the legislative intention of Section 197 CrPC is well-served.

The employees in the government companies (not removable from service save by the Government), discharging public functions similar to that of the Government, under the corporate veil cannot be discriminated against, for getting the protective cover under Section 197 CrPC, in contrast to the government servant in the Government, in the context of Article 14 of the Constitution of India by way of equal protection of laws. Strange are the ways of judicial wisdom. May be, the government servant is born twice in the eye of the law, in the context of Section 197 CrPC vis-<sup>À</sup>-vis Section 21(Twelfth)(b) IPC!

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- (1990) 1 Crimes 344 (Pat).
- (1989) 1 Crimes 518 (All).
- 1989 Cri LJ 697 (Bom).

- (2009) 1 SCC 407 : (2009) 1 SCC (Cri) 513.
- (1998) 5 SCC 91 : 1998 SCC (Cri) 1265.
- (1969) 1 SCC 585.
- AIR 1957 Pat 10.