

CASE NO.:
Writ Petition (civil) 387 of 2005

PETITIONER:
Center for Public Interest Litigation and Anr.

RESPONDENT:
Union of India and Anr.

DATE OF JUDGMENT: 06/10/2005

BENCH:
RUMA PAL,ARIJIT PASAYAT & C.K. THAKKER

JUDGMENT:
J U D G M E N T
I.A. NO. 1 IN WP (C) NO.387/2005

ARIJIT PASASYAT, J.

This writ petition is an offshoot of WP(C) No.150/1997. The main grievance in the said writ petition related to alleged irregularities and illegalities committed by respondent No.3 in the present writ petition who is respondent No.7 in the earlier writ petition. It is unnecessary to go into the maze of factual controversies involved in the earlier writ petition and the present writ petition. Challenge is essentially to the appointment of Respondent No.3-Ms Neera Yadav as Chief Secretary of Respondent No.2 i.e. State of Uttar Pradesh. Interim prayer in the I.A. is to stay functioning of Respondent No.3 in the said post.

It would suffice to note that from 10.1.1994 to 8.11.1995 respondent No.3 was the Chairman and Chief Executive Officer of New Okhla Industrial Development Authority (in short 'Noida'). The then Director of Central Bureau of Investigation (in short the 'CBI') on 6.12.1995 wrote a letter to the then Cabinet Secretary, Government of India seeking sanction for registering a preliminary inquiry into certain allegations of corruption committed by the Respondent No.3. The request was re-iterated by the then Director of CBI on 16.12.1996.

It appears that at different stages allegations were looked into by the CBI and one man Commission of Inquiry under a retired Judge of the Allahabad High Court. According to the petitioner, initially the State of U.P. took the stand that on the basis of findings of the Commission of Inquiry, prima facie case was made against respondent No.3 and disciplinary proceedings were intended to be initiated under Rule 8 of the All India Service (Discipline and Appeal) Rules, 1969 (in short the 'Rules'). On 20.1.1998 this Court directed the CBI to conduct investigation in respect of the alleged irregularities. It appears that on 8.11.2001 the respondent No.2-State of U.P. filed an affidavit stating that since the CBI inquiry was under progress into the allegations, it was decided by the State Government to keep the disciplinary proceedings in abeyance till the CBI inquiry was over. Thereafter, the CBI obtained sanction from the Central Government and filed charge sheets before the Special Judge, CBI at Ghaziabad. After the charge

sheets were filed respondent No.3 made an application for discharge under the provisions of Code of Criminal Procedure, 1973 (in short 'Code') which was rejected. The order of rejection has some significance in the present dispute. While rejecting the prayer for discharge, learned Special Judge directed framing of charges. The order rejecting the prayer for discharge is currently under challenge before the Allahabad High Court in Criminal Revision No. 2284 of 2004. It appears from the order passed by the High Court directing stay of further proceedings, that the primary question before it related to absence of sanction in terms of Section 197 of the Code. By order dated 11.1.2005 this Court appointed a Commission under Mr. Justice K.T. Thomas, a retired Judge of this Court to go into various questions relating to allotment of plots as well as into the issue as to why the disciplinary action had been dropped against several respondents in the writ petition No.150/1997 including respondent No.3 who is respondent No.7 in the said writ petition.

On 30.4.2005 respondent No.3 has been appointed as Chief Secretary of the State of U.P. This appointment is the subject matter of challenge in the writ petition. According to the petitioner, the post of Chief Secretary is a key post and in total violation of the norms fixed by the Government of India, Department of Personnel and Training, O.M. No.22011/4/91-Estt. (A) dated 14th September, 1992 the appointment of respondent No.3 was made as a Chief Secretary. Though in the writ petition, averments were made to the effect that such appointment was by way of promotion, in the additional affidavit filed it has been clarified that though it is not a promotion, yet it is a prestigious appointment and looking into the tainted reputation and doubtful integrity of respondent No.3, she should not have been appointed as a Chief Secretary, particularly when criminal cases are pending and a Commission has been appointed to look into the various aspects including the correctness of the decision to drop the disciplinary proceedings. In this background, interim prayer has been made to stay functioning of respondent No.3 as the Chief Secretary. The State of U.P. (respondent No.2) and the concerned officer, Ms. Neera Yadav (respondent No.3) have filed counter affidavits. In essence, their stand is that until a person is found guilty he should have been presumed to be innocent. The writ petition at the most raises question of morality. This is a broader issue and the decision of the Government to appoint somebody as the Chief Secretary is a policy decision which should not be interfered with. Additionally, it has been submitted that a public interest litigation cannot be entertained in relation to service matters and in any event a writ of quo warranto cannot be issued. It has been further submitted that paras 2 and 3 of the Office Memorandum on which strong reliance has been placed by the petitioner has no application as presently no prosecution for a criminal charge is pending. In fact, the charges are yet to be framed. Respondent No.3 has functioned for nearly 5 months and there is no allegation that she has in any manner attempted to interfere with the functioning of the Commission. It has been submitted that the Commission is required to give its report by 15th December, 2005 and the last date is not far off. At this juncture, it is submitted, it would not be proper and desirable to interfere with the order of appointment of respondent No.3 as the Chief Secretary. It is further submitted that the decision is not bona fide particularly

when some other persons against whom allegations have been made are functioning on high posts. It is submitted that the nature of allegations against respondent No.3 shows that this is clearly a case where oblique motives are involved.

Learned Solicitor General for the opposite party No.1 submitted that the Union does not defend the action and it is for this Court to decide whether the continuance of respondent No.3 as Chief Secretary is desirable.

It is submitted by learned counsel for the petitioner that the CBI has filed charge sheets after obtaining sanction from the Central Government. The fact that the State Government is not according sanction clearly shows that it is trying its best to protect respondent No.3 and that is why it did not pursue the departmental proceedings. That is precisely the reason why this Court has appointed the Commission under a retired Judge of this Court to find out the legality of the action.

It is submitted that Section 197 of the Code has no application to the facts of the case as the acts of corruption are not protected by the said provision.

We do not intend to deal with the merits so far as the issues in the revision petition before the Allahabad High Court are concerned. This Court has in several cases laid down parameters for application of Section 197 of the Code.

The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his

official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty, if the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case.

Use of the expression, 'official duty' implies that the act or omission must have been done by the public servant in the course of his service and that it should have been in discharge of his duty. The Section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty.

If on facts, therefore, it is prima facie found that the act or omission for which the accused was charged had reasonable connection with discharge of his duty then it must be held to official to which applicability of Section 197 of the Code cannot be disputed.

Above position was highlighted in *R. Balakrishna Pillai v. State of Kerala* (AIR 1996 SC 901), *State of M.P. v. M.P. Gupta* (2004 (2) SCC 349), *State of Orissa through Kumar Raghvendra Singh & Ors. v. Ganesh Chandra Jew* (JT 2004 (4) SC 52) and *Shri S.K. Zutshi and Anr. v. Shri Bimal Debnath and Anr.* (2004 (8) SCC 31)

We think it appropriate that considering the passage of time the matters should be decided as early as practicable. The Allahabad High Court is requested to ensure that the Criminal Revision No. 2284 of 2004 is disposed of within a period of 3 months from the date of receipt of this order.

Learned counsel for respondent No.1 shall bring this order to the notice of the High Court.

The other questions relating to legality of the action of the State Government in not proceeding with the departmental enquiries are being examined by the Commission. We, therefore, did not think it appropriate to say anything in that regard.

The basic question is whether the appointment of respondent No.3 as Chief Secretary is proper.

Learned counsel for respondent Nos. 2 and 3 have submitted that as back as on 17.4.2004 the respondent No.3 was promoted to the Chief Secretary's grade with a particular scale of pay. Since the respondent No.3 belonged to the said cadre and grade, one of the posts on which she could be appointed is the post of Chief Secretary. Therefore, there is nothing wrong in her appointment. Though the post of Chief Secretary may belong to a particular grade/cadre, it is certainly a key post. The importance of this post was noted by this Court in *E.P. Royyappa v. State of Tamil Nadu and Anr.* (AIR 1974 SC 555).

The argument presently advanced is that since respondent No.3 has been continuing in the post for five months, no orders should be passed regarding her appointment till the Commission gives its report. Had this consideration weighed with the State Government when it made the appointment there may not have been any difficulty. It could have, considering the importance of the post, awaited the report of the Commission headed by Mr. Justice K.T. Thomas. It is not the case of respondent No.2-the State of U.P. that no other officer is suitable to hold that post or that the services of respondent No.3 are so indispensable that none but she should be appointed as the Chief Secretary. This is purely a case of justifying an action. Linked with it is the question of transparency in action. It is true that the allegations against respondent No.3 have to be established. It is often said that justice should not only be done but it should appear to have been done. Lord Denning in *Metropolitan Properties Ltd. v. Lannon* (1968) 3 All E.R. 304 said "justice must be rooted in confidence, and confidence is destroyed when right minded people go away thinking "The Judge is biased". The logic is equally applicable to Governmental action and Government. The State Government could have avoided the washing of dirty linen which as contended by learned counsel for respondent Nos. 2 and 3 is the sole object of the writ petition.

We do not think it necessary to delve into the question of maintainability of the writ petition as the same, as noted at the threshold appears to be an offshoot of the earlier petition.

A time has come when the postings of officers holding sensitive posts should be done in transparent manner giving no scope for any grievance. It is true that grievances can be made or allegations can be levelled for ulterior motive or with the intention of damaging the reputation of an officer who is likely to be appointed in a sensitive post, very often at the behest of persons angling for the post. In the peculiar background facts it was really desirable for the State Government to steer clear of controversy and not to post respondent No.3 as the Chief Secretary. By doing it, it has unnecessarily created further complications and invited criticism. We, therefore, direct the State Government to transfer the respondent No.3 to some other post in the cadre/grade to which she belonged. The question of her suitability to be included in the cadre/grade, shall be examined in the writ petition itself. For the present, we do not express any opinion on that issue. The necessary steps for effectuating our order shall be taken within seven days. We make it clear that we have not expressed any opinion on the merits of the allegations as the matter is pending before the High Court and Justice Thomas Commission.

I.A. No.1 is disposed of accordingly.