

*Before Paramjeet Singh, J.*

**SURINDER KUMAR KAUSHAL—Petitioner**

*versus*

**STATE OF HARYANA & ANOTHER—Respondents**

**CRM No. M-31235 of 2012**

May 07, 2013

*Code of Criminal Procedure, 1973 - S. 482 - Prevention of Corruption Act, 1988 - Ss. 2(c), 7,9 - Petitioner after retirement from the post of Superintending Engineer from Public Health Department, joined as Manager Gymkhana Club Panchkula by HUDA on contract basis - FIR was registered for taking bribe - Petitioner sought quashing of FIR, Challan and order whereby charge had been framed - Report u/s 173 Cr.P.C, Order framing charge and Charge sheet quashed - Club does not fall within definition of Cooperative Society - Gymkhana club is not being controlled by government or its authorities.*

*Held*, that the club does not fall within the definition of "cooperative society" under the PCA Act. Hence, the authorities cited by the learned State counsel are not applicable in the facts of the present case.

(Para 17)

*Further held*, that In view of the discussion above, this court comes to the conclusion as under:

- (i) The Gymkhana Club, Panchkula is not created by any statutory provisions.
- (ii) The Gymkhana Club, Panchkula is a non-proprietary members' club. As per the Memorandum of Association (Annexure P-8) of the Club, it organizes on a vast scale multifarious activities providing a venue for sports and games, and facilities for recreation, entertainment and for cultural activities. The Gymkhana Club, Panchkula is not being controlled by government or its authorities, rather is controlled by the executive committee elected by the members. Even the HUDA

officials have to become members of the club on payment as per the memorandum of association.

(iii) From the evidence collected and presented before this court, at this stage this court is of the prima facie view that the employees of the Gymkhana Club are not the public servants as defined under the PC Act.

(Para 18)

*Further held,* that However, the investigating agency will be at liberty to further investigate the case to find out any evidence with regard to the performance of public duty as defined under Clause (b) of Section 2 of the PC Act to the effect that public or the community at large has an interest in the club and the club is receiving or have received any financial assistance from the Central Government or State Government or local or other public authority and thereafter may proceed in accordance with law.

(Para 19)

Baldev Singh, Senior Advocate with Deepender Singh, Advocate,  
*for the petitioner.*

Sandcep S. Mann, Sr. DAG, Haryana.

Ashit Malik, Advocate, for respondent no.2.

#### **PARAMJEET SINGH, J.**

(1) Instant petition has been filed by the petitioner under Section 482 of the Code of Criminal Procedure for quashing of FIR No.5 dated 7.7.2011, registered at Police Station State Vigilance Bureau, Panchkula, under Section 7 of the Prevention of Corruption Act (Annexure P/2), report under Section 173 of the Criminal Procedure Code (in short as Cr.P.C), order dated 7.9.2012 (Annexure P-4) whereby charge has been ordered to be framed against the petitioner and coaccused and charge-sheet dated 7.9.2012 (Annexure P-5).

(2) Brief facts of the case are that Harjit Singh, resident of House No.1, Sandhu Colony, Kaithal Road, Karnal District moved a written complaint, addressed to SHO, State Vigilance Bureau, Haryana,

Sector- 17, Panchkula. On the basis of same, the FIR in question was registered and Inspector Madan Lal constituted a raiding party and recovered bribe money from Virender Singh, cashier and arrested the petitioner. Thereafter, the challan report under Section 173 of Cr.P.C was presented in the Court of Special Judge, Panchkula. The learned Special Judge after considering the evidence on record ordered for framing of charge under Section 9 of the Prevention of Corruption Act against the petitioner and his co-accused vide order dated 7.9.2012 (Annexure P-4) and accordingly, charge was framed vide charge-sheet (Annexure P-5).

(3) The relevant facts are to the effect that the petitioner joined as Assistant Engineer in the Public Health Department, Haryana in March 1972 and ultimately retired as Superintending Engineer from the Public Health Department, Haryana on 31.1.2004. After the retirement of petitioner, he was appointed as Manager, Gymkhana Club (in short the Club), Sector-6, Panchkula by the General Secretary-cum-Estate Officer, Haryana Urban Development Authority (in short HUDA), Panchkula on contract basis, vide letter dated 20.06.2008 (Annexure P-6) and the petitioner joined his duty as such on 21.6.2008.

(4) The Club is a registered society under the Societies Registration Act, 1860 (as amended from time to time) and its area of operation is Panchkula and surrounding areas. The copies of Memorandum of Agreement and the Registration Certificate are annexed on record as Annexures P-8 and P-9. It is the case of the petitioner that as a Manager, he had been working with honesty and had not done any malpractice. The General Secretary of the Club gave advertisements in newspapers 'The Tribune' and 'Dainik Bhaskar' on 25.1.2011 vide which sealed tenders were invited from various agencies for renovation and maintenance of Swimming Pool of the Club for a period of three years w.e.f 1.4.2011 to 31.3.2014. In pursuance to the above said advertisements, complainant-Harjit Singh (respondent no.2) gave his tender in the name of M/s. Aqua Fitness Associate, Kendriya Vidyalaya, Delhi. The tender was allotted to the said M/s. Aqua Fitness w.e.f 1.4.2011 to 31.3.2014 at an annual rent of Rs.10.80 lacs plus service tax plus 10% yearly increase. The intimation regarding acceptance of the tender was also given to the above said M/s. Aqua Fitness vide letter dated 23.2.2011 (Annexure P-15) and the above said M/s. Aqua Fitness entered

into an agreement with the petitioner as Manager of the Club. It was alleged that the above said M/s. Aqua Fitness were charging more from the members and their guests and with a purpose to solve that issue, the **petitioner and his co-accused** are alleged to have accepted the amount of Rs.20,000/-. Thereafter, the case was registered, investigated and challan was presented. The learned Special Judge ordered framing of charge vide order Annexure P-4 and charge-sheet (Annexure P-5) was framed. Hence, this petition.

(5) Notice of motion was issued. In pursuance to the notice of motion, reply has been filed by respondent no.1-State of Haryana through Superintendent of Police, State Vigilance Bureau, Panchkula. The averments made in the petition have been denied. It is submitted that in the instant case, the raiding party raided the office of the petitioner where he and his co-accused Virender Singh were caught red handed on 7.7.2011 while accepting Rs.20,000/- as bribe money from respondent no.2-Harjeet Singh and the bribe money was recovered from co-accused of the petitioner which was allegedly received on behalf of the petitioner. The said recovery was effected in the presence of Mr. Narinder Kumar, Naib Tehsildar, who was Duty Magistrate at the relevant point of time. Various other details have been mentioned and some of the facts are not in dispute.

(6) The petitioner filed replication vide CM No.21152 of 2013. The same has been taken on record. Vide replication, the averments in the reply have been denied.

(7) I have heard learned counsel for the parties and perused the record.

(8) The learned counsel for the petitioner vehemently contended that the petitioner is not a public servant as defined in Section 2 (c) of the Prevention of Corruption Act, 1988 (in short the PC Act), so the petitioner cannot be prosecuted and charged under the provisions of the PC Act. The petitioner has not committed any offence under the PC Act, nor he abused his position as a public servant. Hence, the report under Section 173 Cr.P.C (Annexure P-3), order dated 7.9.2012 (Annexure P-4) and charge-sheet dated 7.9.2012 (Annexure P-5) are not sustainable in the eyes of law. The learned Special Judge has acted in an illegal and

perverse manner in framing the charge against the petitioner, therefore, the same deserves to be quashed. The learned counsel further contended that from the perusal of report under Section 173 Cr.P.C. (Annexure P-3), no offence against the petitioner under the provisions of the PC Act is made out. The Club is not a cooperative society, rather it is a nonproprietary members' club. This is the sole legal argument raised by the learned counsel for the petitioner.

(9) Per contra, the learned State counsel as well the learned counsel for the complainant vehemently opposed the contentions raised by the learned counsel for the petitioner. The learned State counsel submitted that the petitioner is a Manager of the Club which is being controlled by the Haryana Urban Development Authority (for short 'HUDA'). The management and affairs of the society are entrusted to the governing body which consists of government officials of the HUDA, legal remembrancer HUDA and in addition to it, Deputy Commissioner and Superintendent of Police, Ambala are also the members of the Club. Thus, the petitioner is a public servant, he was caught red-handed taking the bribe. Once it is proved that the payment had been obtained by incorrect and illegal means, it is not necessary that the accused should abuse his position as a public servant or that he should have obtained the money while acting as a public servant.

(10) I have considered the rival contentions of learned counsel for the parties and perused the record.

(11) The admitted facts are to the effect that the Club is a registered society under the Societies Registration Act, 1860 (as amended upto date). It is not constituted under any statute. It is a non-proprietary members' club, as per the Memorandum of Association (Annexure P-8) of the Club, it organizes on a vast scale multifarious activities providing a venue for sports and games, and facilities for recreation, entertainment and for cultural activities. Guests are also admitted, but on invitation of the members. There are specific rules with regard to the membership etc. Other details are not required to be dilated here.

(12) The question which has to be resolved is whether the petitioner is a public servant within the meaning of Section 2 (c) of the PC Act and is guilty of an offence under the PC Act.

(13) Before I deal with the contentions, it would be appropriate to reproduce Section 2 (c) of the PC, Act which 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;*

(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:*

*(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.*

*Explanation 1.-Persons falling under any of the above sub-clauses are public servants, whether appointed by the Government or not.*

*Explanation 2.-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.*

(14) From the perusal of the definition referred above, it is clear that the petitioner is not covered under any of the clauses of the above Section read with the evidence collected during the investigation. The petitioner at the material time was not a public servant as defined in

Section 2 (c) of the PC Act. While he allegedly committed the offence, he was not performing the public duties as defined under the PC Act. The learned State counsel failed to point out that any evidence has been collected by the investigating agency to the effect that the petitioner acted as a public servant and act of corruption attributed to him was in his capacity as Manager of the Club. At that point of time, he was not holding a post of the government servant in which capacity he could alone fall within the definition of public servant. There is no material evidence on record from which it could be made out that the petitioner was performing the public duty and was a government servant. The argument on behalf of the State and the complainant is that in reference to the alleged work, the accused had accepted illegal gratification, he would be liable under the provisions of the PC Act, because the liability has been made absolute and it is wholly immaterial in what capacity he had committed the offence.

(15) This is not in dispute that every benefit obtained by the public servant for himself or for any other person by abusing his position as a public servant falls within the definition of provisions of the PC Act. In the case of *State of Gujarat versus Manshankar Prabhashankar Dwivedi (1)*, the Hon'ble Supreme Court had considered the case of a lecturer of government college who was appointed as examiner by the university and allegedly committed an offence under the provisions of the PC Act. The Hon'ble Supreme Court came to the conclusion that where a lecturer of a government college appointed as examiner by the university committed an act of corruption in his capacity as examiner, Section 5 (1) (d) will not apply because he cannot be said to have abused his position as a public servant, he was not a public servant when he was acting as an examiner.

(16) The definition of public servant as defined in Section 21 of the Indian Penal Code has been considered in the case of *Ramniwas Sharma versus The State (2)*, wherein it has been held that a servant under the Soldiers Board, Ajmer is not a public servant. Similarly, in *S.K. Muttoo versus State (Delhi) (3)*, it has been held that employees of National Institute of Public Cooperation and Child Development registered under Societies Registration Act are not public servants.

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(1) AIR 1973 SC 330

(2) AIR (38) 1951 Ajmer 76 (C.N.71)

(3) 2001 (3) Chd. CC 90



(17) The learned State counsel has relied upon *Balbir Singh versus State of Punjab and others* (4) and *State of Maharashtra and another versus Prabhakar Rao and another* (5), to contend that cooperative society is covered under Section 2 (c) (ii), (viii) and (ix) and the employees of the society also fall within the definition of “public servant” under the PC Act. The contention of the learned State counsel is not sustainable, because Section 2 (c) (ii) of the PC Act refers to a person in service or pay of the “local authority”. The Club does not fall within the definition of the “local authority”. It is an association of members registered under the Societies Registration Act, 1860 and is not constituted under any statute. So far as Section 2 (c) (viii) is concerned, the case is also not covered under the same, because the petitioner does not hold any office by virtue of which he is required to perform any public duty. The “public duty” has been defined in Section 2 (b) of the Act which means a duty in discharge of which the State, the public or the community at large has an interest and the explanation added to this Section clearly explains that State includes 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. So far Section 2 (c) (ix) is concerned, that is applicable to the registered cooperative society receiving or having received any financial aid from the Central Government or State Government and the corporation established by or under a Central or State Act, or any authority or body owned or controlled or aided by the government. The Club is an association of members and there is no evidence brought on record to show that it is owned, controlled or aided by the Government or any authority or body of the State. The Memorandum of Association (Annexure P-8) clearly mentions about the aims, objectives and functions of the society and the constitution of the Club is also defined therein and its membership is opened to the residents of Panchkula in particular and others in general. The management of the Club vests in the executive committee as may be appointed and authorized. The Memorandum of Association (Annexure P-8) clearly shows that all the members are enrolled subject to payment of membership fee and selection by the executive committee. Besides this, the members are to pay monthly bill. As such, the perusal of the same clearly indicates that this is a private society registered

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(4) 2013 (1) RCR (CrI.) 66

(5) 2002(3) RCR (CrI.) 615

under the Societies Registration Act, 1860 whereas the cooperative societies as defined in the PC Act are the creation of statutes. Hence, the Club does not fall within the definition of "cooperative society" under the PC Act. Hence, the authorities cited by the learned State counsel are not applicable in the facts of the present case.

(18) In view of the discussion above, this court comes to the conclusion as under:

(i) The Gymkhana Club, Panchkula is not created by any statutory provisions.

(ii) The Gymkhana Club, Panchkula is a non-proprietary members' club. As per the Memorandum of Association (Annexure P-8) of the Club, it organizes on a vast scale multifarious activities providing a venue for sports and games, and facilities for recreation, entertainment and for cultural activities. The Gymkhana Club, Panchkula is not being controlled by government or its authorities, rather is controlled by the executive committee elected by the members. Even the HUDA officials have to become members of the club on payment as per the memorandum of association.

(iii) From the evidence collected and presented before this court, at this stage this court is of the prima facie view that the employees of the Gymkhana Club are not the public servants as defined under the PC Act.

(19) In view of the above, the report under Section 173 Cr.P.C dated 8.11.2011 (Annexure P-3), order dated 7.9.2012 (Annexure P-4) and charge-sheet dated 7.9.2012 (Annexure P-5) are hereby quashed. However, the investigating agency will be at liberty to further investigate the case to find out any evidence with regard to the performance of public duty as defined under Clause (b) of Section 2 of the PC Act to the effect that public or the community at large has an interest in the club and the club is receiving or have received any financial assistance from the Central Government or State Government or local or other public authority and thereafter may proceed in accordance with law.

Disposed of in above terms.