

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRI. REVISION APPLICATION NO. 284 OF 2013

Mrs. Pramila Virendrakumar Agarwal ... Applicant.
(Org.Accused No.2)
V/s.
The State of Maharashtra & Anr. ... Respondents.

**WITH
CRI. REVISION APPLICATION NO. 323 OF 2013**

Union of India ... Applicant.
(Complainant)
V/s.

Virendra Kumar Agarwal & Anr. ... Respondents.
(Org.Accused No.1)

Mr. Niteen Pradhan a/with Mr. H.G. Dharmadhikari, Ms. Lalita Phadke, Advocate for the Applicant in Revn. No. 284/2013.
Mr.Sandeep K.Shinde, Advocate for CBI in Revn.No.284/2013.

Mr.Sandeep K.Shinde, Advocate for the Applicant in Revn. No.323/2013.

Mr. Girish Kulkarni i/by Mr. D. A. Bhalerao, Advocate for Respondent in Revn. No. 323 of 2013.

Mr. A.S.Shitole, APP for the State.

CORAM : A.V. NIRGUDE, J.

DATE : 14th DECEMBER, 2015.

P.C. :

1 Both these criminal revision applications can be disposed of by a following common order.

2 Respondent No.1 in Revision Application No. 323 of 2013 and the Applicant in Revision Application No. 284 of 2015 are husband and wife. They are accused No.1 and accused no. 2 respectively in CBI, ACB Special Case No. 21 of 2010, which is pending before the Special Judge CBI (ACB), Court No. 47th, Sessions Court, Greater Mumbai. Both these accused are facing charge under section 13(1)(e) r/w. section 13(2) of the Prevention of Corruption Act, 1988. They both are accused of possessing assets which are dis-proportionate to their known source of income. They are henceforth be referred to as accused Nos.1 & 2.

3 The CBI had registered offence punishable under 13(1)(e) against accused no.1 - Virendra Kumar Agarwal some time prior to October, 2007. It was then alleged that accused no.1 accepted bribe from co-accused, who allegedly was his agent. During investigation CBI searched residence and other places belonging to the accused and took in charge various documents. From these documents, the CBI could realize that the accused possessed assets, which were disproportionate to their known source of income. The CBI on 31st December, 2007 registered offence against the accused nos.1 & 2 and started investigation. During investigation, the CBI prepared a list of the assets in possession of accused Nos.1 & 2. The documents of titles were taken in charge. The amount spent for acquiring these assets was also calculated. The CBI also

took information from employers of accused Nos.1 and 2 about the salary and other related income of these accused received during the check period between 1994 to 2007. The CBI also took into account the expenses incurred by the accused during the said check period and the CBI came to the conclusion that, on one hand, the value of the assets possessed by the accused was around Rs.33 lac but the income of the accused from the known source of income was only Rs. 27 lac approximately. The CBI came to the conclusion that the accused possessed assets disproportionate to their known source of income.

4 The investigation was complete and the charge-sheet was filed. Before the charge-sheet was filed, the CBI obtained sanction for prosecuting both these accused independently. The sanction for prosecuting the accused No.2 was obtained first and subsequently, such sanction was obtained for prosecuting accused No.1. Both these accused sought their discharge by making applications in Lower Court. Accused No.1's application was allowed. Application of accused No.2 was rejected. So, these two revisions are pending before this Court.

5 After hearing the submissions at the bar, following questions arise for my consideration :

- i. Whether the investigating officer was under obligation to record explanation offered by the accused & whether such explanation should be part of the charge-sheet ?
- ii. Whether sanctions for prosecution were defective ?

The first question was the bone of contention in many cases. The first judgment that can be referred to on this point is the judgment of the Apex Court in the case of **P. Sirajuddin, ETC. vs. State of Madras**, reported in 1970 (1) **Supreme Court Cases 595**. Relevant part of paragraph no. 17 can be quoted to hold that the investigation must be fair and reasonable. The enquiry officer must not act under any preconceived idea of guilt of the accused person. The relevant part of paragraph 17 reads as under :

“17. Before a public servant, whatever be his status, is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. If the Government had set up a Vigilance and Anti-Corruption Department as was done in the State of Madras and the said department was entrusted with enquiries of this kind, no exception can be taken to an enquiry by officers of this department but any such enquiry must proceed in a fair and reasonable manner. It is only thereafter that a charge-sheet is submitted and a full-scale enquiry is launched.”

6 The judgment of this court in the case of **N. P. Lotlikar vs. CBI and Anr.**, reported in **1993 (2) Bom. C.R. 537** too had considered this point. In this judgment, the learned Judge upheld the submission that possession of the assets is not an offence but failure to explain or account for the same would amount to an offence. The relevant portion of para- 15 of this judgment is quoted below :

“15. Since the essence of the offence is that the accused could not account for the disproportionate assets or that he failed to account therefor, this court has taken the view that such inability or failure, which is one of the basic ingredients for holding that an offence has been committed, can be said to have been established only if the accused was called upon to account for and either he did not or could not satisfactorily account for the assets in question. It was held in that decision that the sanctioning authority at the earliest point of time cannot be said to have acted correctly in law in the absence of such an opportunity being afforded to the accused, if the authority has accorded sanction for a prosecution.

In the facts and circumstances of this reported case, the learned Judge of this court came to the conclusion that before registration of offence, an opportunity ought to have been given to the accused to explain the source of fund for acquiring and possessing the assets. The learned

Judge also held that, calling explanation from the accused would have distinct advantage for investigation. Following portion of paragraph 15 of the said judgment is quoted to highlight this point :

..... To my mind, there is a distinct advantage in following this procedure because at that stage the time available is extremely short and it would certainly be difficult for the accused to involve himself in the exercise of fabricating evidence or of producing any false material. If a long period of time elapses, there is ample scope for such cover-up action. Viewed at from this point of view also, it is highly desirable, therefore, that the explanation should be called for at the earliest point of time.”

Similar view was expressed by the Madras High Court in the case of **State vs. K. Ponmudi**, reported in 2007 (1) MLJ 100.

7 To this, the learned Special Prosecutor Shri Sandeep Shinde points out that during the investigation, the accused were called and their statements were recorded. He, therefore, submitted that it is not as if an opportunity was not given at all to these accused. However, this explanation is not sufficient to counter the submissions made on behalf of both the accused. The I.O. ought to have given specific opportunity to the accused for submitting an explanation in writing and

such explanation in writing ought have been included in the charge sheet. As such the statement of the accused made to police during investigation is not admissible. The procedure adopted during investigation is found to be defective.

8 With this lapse, if sanctions for prosecution were sought, the sanctioning authority would not have an opportunity to see explanation furnished by the accused persons before taking the decision. If decision is taken without going through the explanation so offered by the accused, the sanction would be certainly defective.

9 The third question that was discussed at the bar is – whether there should be two separate cases against the accused. In view of the discussion above, I am of the view that the question posed above has lost its relevance.

10 Since I have come to the conclusion that sanction for prosecuting accused No.2 is also defective, she also deserves to be discharged. Hence, following order :-

ORDER

(A) Criminal Revision Application No.284 of 2013 is allowed as prayed for. Applicant/Original Accused No.2 stands discharged.

(B) Criminal Revision Application No. 323 of 2013
stands dismissed.

[A.V. NIRGUDE, J.]

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