

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

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Reserved on: 27th April, 2015
Date of Decision: 15th May, 2015

+ CRL.M.C. No.223/2014

SANJEEV SAXENA

..... Petitioner

Through: Mr. Ajay Burman, Advocate.

versus

STATE (NCT OF DELHI)

.....Respondent

Through: Mr. Navin Sharma, APP for the
State with SI Vijender Singh,
STF/ Crime Branch.

CORAM:

HON'BLE MR. JUSTICE VED PRAKASH VAISH

JUDGMENT

1. By way of the present petition under Section 482 of Code of Criminal Procedure Code, 1973 (hereinafter referred to as 'Cr.P.C.'), the petitioner has assailed the order dated 22.11.2013 passed by learned Special Judge, (P.C. Act)-05 (ACB), Tis Hazari Courts, Delhi whereby charge under Section 12 of the Prevention of Corruption Act (for short, 'PC Act') was framed against the petitioner in case FIR No.14/2009 under Section 12 of PC Act read with Section 120B of Indian Penal Code ('IPC', for short) registered at P.S. Crime Branch, Delhi.

2. Succinctly stating the facts of the present case as per the prosecution are that on 21.07.2008, on the request of Mr. Arun Jaitely,

MP, Rajdeep Sardesai, Editor-in-Chief of CNN-IBN agreed to record evidence of 'horse trading' of MPs. Rajdeep Sardesai instructed his correspondent Siddharth Gautam to get in touch with concerned MPs and film the monetary transaction that may take place. Siddharth Gautam was instructed to contact Sudheendra Kulkarni and both met in the night of 21.07.2008 at the residence of Sudheendra Kulkarni. Mr. Sudheendra Kulkarni introduced the CNN-IBN team to three BJP MPs namely Mr. Ashok Argal, Mr. Faggan Singh Kulaste and Mr. Mahabir Singh Bhagora and also Mr. Sohail Hindustani. Mr. Sohail Hindustani told CNN-IBN team that a meeting was fixed at Hotel Le Meridien with a senior Congress leader. Mr. Faggan Kulaste and Mr. Mahabir Singh were fitted with hidden cameras and they went to the Hotel. After sometime, they returned and told the CNN team that the meeting did not materialize as the Congress leader did not turn up. In the midnight of 21/22.07.2008, the CNN-IBN team reached at 4, Feroze Shah Road, New Delhi, i.e., the residence of MP Mr. Ashok Argal, where three BJP MPs told that Samajwadi Party leader Mr. Rewati Raman Singh would arrive. Cameras were installed in the room of the said house. At about 12:30 a.m., Mr. Rewati Raman Singh came and the conversation between the three BJP MPs and Mr. Rewati Raman Singh were recorded. CNN-IBN team was told by the three BJP MPs to return next morning at 7:00 a.m. On arrival the CNN-IBN team was told by Mr. Ashok Argal that a meeting had been fixed with Mr. Amar Singh at his residence at 27, Lodhi Estate, New Delhi. CNN-IBN team reached the said address, where a Zen car bearing No.DL-5CC-7218 with tinted glasses arrived. Mr. Sohail Hindustani was sitting in the car which was being driven by Mr. Hasmat Ali. Thirty minutes later the

car came out of 27, Lodhi Estate and reached at 4, Ferozshah Road, New Delhi. BJP MPs told CNN-IBN team that Mr. Amar Singh had promised to send money through his Secretary Sanjeev Saxena (petitioner). Around 11:00 a.m., Sanjeev Saxena came along with one person wearing yellow colour shirt at the house of Mr. Ashok Argal in a white gypsy and delivered a bag containing rupees one crore to the three BJP MPs. After Sanjeev Saxena departed, the three BJP MPs got their interview recorded. On the next day the three BJP MPs placed on the table of the Parliament the said currency notes to the tune of rupees one crore when the house was debating on the motion of confidence stating that the said money was offered to them in connection with the voting. Speaker of the House, after discussion with Senior Parliamentarians, asked the said three BJP MPs to put in a written complaint. Before a formal complaint could be submitted by the MPs, a communication dated 23.07.2008 was received by the Speaker from Rajdeep Sardesai, Editor-in-Chief of CNN-IBN Network. He enclosed five video tapes along with his communication. Formal complaint dated 25.07.2008 was addressed to the Speaker, Lok Sabha by the MPs alleging that they were sought to be bribed by the leaders of Congress and Samajwadi Party to help the government by refraining from voting against confidence motion. On receiving the said complaint, a Joint Parliamentary Committee was constituted by the Speaker, Lok Sabha which conducted a detailed inquiry and tabled the report before the Parliament. In the concluding paragraph of the said report {para 141 (XIV to XVII)}, the Committee recommended further probe by investigating agency relating to roles of Mr. Sanjeev Saxena, Mr. Sohail Hindustani and Mr. Sudheendra Kulkarni. Accordingly,

investigation was conducted by Crime Branch, Delhi Police and the charge-sheet was filed against six persons namely Mr. Sanjeev Saxena (the petitioner), Mr. Sohail Hindustani, Mr. Sudheendra Kulkarni, Mr. Amar Singh, Mr. Faggan Singh Kulaste and Mr. Mahabir Singh Bhagora.

3. First supplementary charge-sheet dated 29.09.2011 was filed mentioning the efforts to trace the money trail to find the source of bribe. Mr. Ashok Argal (MP, BJP) was not charge-sheeted initially due to want of sanction against him. Once the sanction was granted for prosecution, Mr. Ashok Argal was also charge-sheeted vide second supplementary charge-sheet dated 30.10.2011. Third supplementary charge-sheet dated 24.11.2012 was filed on interrogating reporters/ correspondents of CNN-IBN team and fourth supplementary charge-sheet was filed with respect to seizure of video tapes of interviews with BJP MPs (admitted as not the part of sting operation and recorded after the sting operation was over).

4. Vide order dated 22.11.2013, learned trial court discharged all the accused in the charge-sheet except the petitioner and ordered framing of charges under Section 12 of PC Act against the petitioner. Feeling aggrieved by the said order the petitioner has filed the present petition.

5. Learned counsel for the petitioner contended that the impugned order has completely changed the basic structure of the charge-sheet on the basis of which cognizance was taken. Now a new charge-sheet has come on record, completely different from the one filed by the prosecution. Only a few lines were picked from the said charge-sheet

and the charges were framed on the reasons which may or may not have existed. Charges can be framed only on the basis of grave suspicion against an accused. However, no material has been brought on record which suggests a grave suspicion against the petitioner.

6. It was further contended by learned counsel for the petitioner that in the present case six out of seven accused have been discharged. He pointed out that 99% of the charge-sheet was dealing with discharged persons and only one per cent of the charge-sheet dealt with the present petitioner. The case of the prosecution was that the petitioner conspired with some discharged co-accused persons to deliver illegal gratification to the BJP MPs. It was not the case of the prosecution that the petitioner himself was the perpetrator of offence under Section 12 of the PC Act. When the trial court has already discharged the petitioner for an offence under Section 120B IPC, then the Court could not have framed a charge under Section 12 of PC Act. There was no evidence to show that there was offer of any bribe or illegal gratification from the petitioner's end. At the most, the only role that can be attributed to the petitioner is that of the 'postman' delivering the amount given to him and as such the petitioner had no active involvement in abetting the discharged BJP MPs for the offence under Section 7/11 of PC Act.

7. Lastly, the learned counsel for the petitioner contended that the money trail has not been traced to the petitioner. The source of money is not known till date even though the investigation is complete. The petitioner had no motive to commit the offence of abetment. He was not a Member of Parliament. The petitioner was not in the government,

ruling party or opposition party. He was not concerned with the confidence/ no confidence motion in the Parliament.

8. *Per contra*, learned APP for State urged that the petitioner was involved in commission of the offence under Section 12 of PC Act. The audio/video recordings which form a part of evidence on record show that the petitioner along with one person delivered the bag containing rupees one crore at the house of Mr. Ashok Argal. He was caught on camera and is seen placing the cash on the table before the BJP MPs. The offence of abetment is complete when a person does something with the knowledge or intention to facilitate commission of the offence. The commission of the offence by the person abetted is not necessary. Learned APP for the State further submitted that no explanation has come from the petitioner to show, why he was carrying such huge amount.

9. I have given my thoughtful consideration to the submissions made by learned counsel for the parties and have also perused the material on record.

10. Before advertng to the facts of the case, it is necessary to consider Section 12 of PC Act, which reads as under: -

“12. Punishment for abetment of offences defined in section 7 or 11. – 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 which shall be not less than six months but which may extend to five years and shall also be liable to fine.”

11. The word abetment is not defined in the P.C. Act but by virtue of Section 28 of the said Act, it is permissible to look into the definition of abetment as appearing under Section 107 of the IPC. Section 107 of IPC reads as under: -

“107. Abetment of a thing. – A person abets the doing of a thing, who-

First. – Instigates any person to do that thing; or

Secondly. – Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly. – Intentionally aids, by any act or illegal omission, the doing of concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.”

12. As per Section 107 IPC an offence of abetment takes place in one of the three ways namely (i) instigation, (ii) engaging in conspiracy for doing that thing and if an act or illegal omission takes place pursuant of that conspiracy and (iii) intentional aiding. A person is said to ‘instigate’ another to an act when he actively suggests or stimulates him to act by any means or language, direct or indirect, whether it takes the form of express solicitation, or of hints, insinuation or encouragement. The word ‘instigate’ means to goad or urge forward or to provoke, incite, encourage or urge to do an act. A mere intention or preparation to instigate is neither instigation nor abetment. The offence is complete as soon as the abettor has incited another to commit a crime, whether the latter consents or not or whether, having consented, he commits the crime or not. It depends upon the intention

of the person who abets and not upon the act which is actually done by the person whom he abets.

13. The offence of abetment is also committed by 'engaging in a conspiracy for doing of a thing' and only if act or illegal omission takes place pursuant to such a conspiracy. In order to constitute an offence of abetment by conspiracy, there must be a combination of two or more persons in the conspiracy and an act or illegal omission must take place in pursuance of that conspiracy and in order to doing of that thing. Lastly, the offence of abetment may also be committed by 'intentional aid'. A person abets by aiding when by act done either prior to, or at the time of the commission of an act he intends to facilitate and does in fact facilitate the commission thereof {explanation (2) to Section 107 IPC}. In order to constitute abetment by aiding within the meaning of Section 107 IPC, the abettor must be shown to have intentionally aided the commission of crime. Further, the aid given must be with the intention to facilitate the commission of the crime. However, mere giving of aid will not make the act of abetment an offence, if the person who gave the aid did not know that an offence was being committed or contemplated. The intention should be to aid an offence or to facilitate the commission of crime.

14. In the instant case, the material that is brought against the petitioner are the audio/video recording wherein he along with a person in yellow shirt is seen delivering a bag containing rupees one crore at the house of Mr. Ashok Argal, audio recording of conversation between the petitioner and the BJP MPs and the statements of BJP MPs recorded during their interviews. On the basis of the said material

the trial court has already discharged the petitioner from the offence under Section 120B IPC by holding that there is no evidence of meeting of minds with other person.

15. It is worthwhile to mention here that learned trial court has already discharged the three BJP MPs seen along with the petitioner on the said recording. Mr. Sohail Hindustani, Mr. Sudheendra Kulkarni and Mr. Amar Singh were also discharged by the trial court from the charges against them. The only charge framed by the trial court against the petitioner is under Section 12 of PC Act with an observation that the material brought on record was sufficient to manifest his intention or knowledge to facilitate the commission of crime. It was also observed by learned trial court that the petitioner has failed to give an explanation as to why and for what purpose the amount of rupees one crore was carried by him. However, the reasons recorded by the trial court while directing the framing of charges under Section 12 of the PC Act against the petitioner do not find favour with this Court.

16. It is an admitted case of prosecution that the trail of money is not established despite best efforts to find out its source. Trial court has also reached a conclusion in this regard that the efforts to trace money trail has failed and the principal offender who attempted to bribe BJP MPs could not be brought on record. Therefore, the only evidence against the petitioner is the audio/ video recording showing him and one person in yellow shirt delivering rupees one crore to the three BJP MPs. However, in my opinion, this evidence in itself is insufficient to fulfill the requirement of Section 107 IPC so as to establish a

prima facie case that the petitioner committed the offence of abetment as specified under Section 12 of PC Act.

17. It is not the case of the prosecution that the petitioner engaged/conspired with persons other than the co-accused to commit the offence of conspiracy. Since, the co-accused persons have already been discharged and the trial court has already held that no evidence of conspiracy is made out even against the petitioner, under such circumstances, the offence of abetment by engaging in conspiracy is not *prima facie* established against the petitioner.

18. So far as abetment by instigation or aiding is concerned, it may be mentioned that for an act to fall in either of the description, it must be done with some degree of active participation on the end of the accused. It should be a positive exercise and mere presence at the spot or the awareness of the act so committed is not sufficient to establish instigation or intentional aiding. Intention or knowledge cannot be equated to mere awareness rather some degree of affirmative act or some degree of active participation is a necessity. In the present case, what can be inferred from material on record is that the petitioner delivered the said amount to the BJP MPs and post doing that he tried talking with the person on whose instructions, he had delivered the amount. The relevant part of the audio conversation is:

(Hindi version translated into English)

“Ashok Argal: Sir, rupees one crore has been received...entire one has been received. One has been received....ok....yes...rest, later on.....right...ok...ok...correct...correct. Keep it in this...

Hello....Hello...Yes...Madam....Hello...Madam
...here. (not clear)

Sanjeev Saxena: Hello...yes sir ...yes sir....have done
that...sir...I haven't...I am just leaving....Sir....have to
talk.

Ashok Argal:

Hello...yes...yes...yes...ok..yes...take Kulaste ji.

Yes... yes.... ok... ok... one minute... will
talk... yes.....four tomorrow right...yes...yes...one
minute... ok yes.. ok...ok.. yes.. yes.. ok.. ok.. I'll talk...
one minute...

Hello... yes... tomorrow.... Yes... I am fine...
affirmative affirmative... now you send to Ashok's
place... yes... yes... sir...send to his place only...yes
sir...you can talk this with him... anyone... person
should be responsible....here... talk with Ashok ji...

Ashok Argal: Yes... Singh Sahab we will see
tomorrow... we will see.... Ok... ok...

take number at least...

Sanjeev Saxena: Yes... number has been given...

Sanjeev Saxena: Yes... Sanjeev Saxena...

Mahabir Singh Bhagora: give pen brother....

Reporter: sit.... Let's all sit and talk...

Sohail.... Sohail...

Come after closing it....

Oh... Sohail's (not clear) question....”

19. Clearly, the said part of the conversation is insufficient to indicate that the petitioner was acting on his own volition. Nowhere in the said conversation there was any indication of the purpose for which

the money was delivered. There was also no indication to suggest that the money was delivered by the petitioner at his own behalf. What can be inferred from the said recording is that the petitioner was acting on the instructions of the person on the other end of the call. He informed that person about the delivery of money and also made him talk to the BJP MPs. The only role that can be attributed to the petitioner based on this conversation is that he was merely a delivery person. This evidence in my opinion is insufficient to establish that the petitioner was actively involved in instigating the BJP MPs or in aiding them in receiving the said amount. Hence the offence of abetment by aiding or instigation, too, is not *prima facie* established from the material on record.

20. It is a settled law that at the stage of framing of charges the Court has to *prima facie* consider whether there is sufficient ground for proceeding against an accused. At that stage, the Court is not required to appreciate the evidence and to arrive at the conclusions that the materials produced are sufficient or not for convicting the accused. If the Court is satisfied that a *prima facie* case is made out or proceeding further then the charge has to be framed. The Court should not enter upon a process of evaluating the evidence by deciding its worth or credibility. The limited exercise during that stage is to find out whether the materials offered by the prosecution to be adduced as evidence are sufficient to proceed further. It follows, thus, that all that needs be shown for framing a charge is a 'ground for presuming that the accused has committed an offence' and not evidence to prove that the accused 'has' committed the offence. Discharge can be made only if no case is made out on the material before the Court, if it stands un-rebutted. If

on the basis of material on record, the Court could form an opinion that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

21. The Hon'ble Supreme Court in '**Union of India vs. Prafulla Kumar Samal & Anr.**', (1979) 3 SCC 4, has held: -

“10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a Post Office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

22. In '**Soma Chakravarty vs. State through CBI**', (2007) 5 SCC 403, the Apex Court observed as under: -

“10. It may be mentioned that the settled legal position, as mentioned in the above decisions, is that if on the basis of material on record the court could form an opinion that the accused *might* have committed offence it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused *has* committed the offence. At the time of framing of the charges the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution has to be accepted as true at that stage. Before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commitment of offence by the accused was possible. Whether, in fact, the accused committed the offence, can only be decided in the trial.”

23. The Apex Court was of the similar view in '**Niranjan Singh K.S. Punjabi vs. Jitendra Bhimraj Bijjaya**', (1990) 4 SCC 76, wherein it was held: -

“6. The next question is what is the scope and ambit of the ‘consideration’ by the trial court at that stage. Can he marshal the evidence found on the record of the case and in the documents placed before him as he would do on the conclusion of the evidence adduced by the prosecution after the charge is framed? It is obvious that since he is at the stage of deciding whether or not there exists sufficient grounds for framing the charge, his enquiry must necessarily be limited to deciding if the facts emerging from the record and documents constitute the offence with which the accused is charged. At that stage he may sift the evidence for that limited purpose but he is not required to marshal the evidence with a view to separating the grain from the chaff. All that he is called upon to consider is whether there is sufficient ground to frame the charge and for this limited purpose he must weigh the material on record as well as the documents relied on by the prosecution. In the *State of Bihar v. Ramesh Singh* [(1977) 4 SCC 39: 1977 SCC (Cri) 533: (1978) 1 SCR 257] this Court observed that at the initial stage of the framing of a charge if there is a strong suspicion-evidence which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. In *Union of India v. Prafulla Kumar Samal* [(1979) 3 SCC 4 : 1979 SCC (Cri) 609: (1979) 2 SCR 229] this Court after considering the scope of Section 227 observed that the words ‘no sufficient ground for proceeding against the accused’ clearly show that the Judge is not merely a post office to frame charge at the behest of the prosecution but he has to exercise his judicial mind to the facts of the case in order to determine that a case for trial has been made out by the prosecution. In assessing this fact it is not necessary for the court to

enter into the pros and cons of the matter or into weighing and balancing of evidence and probabilities but he may evaluate the material to find out if the facts emerging therefrom taken at their face value establish the ingredients constituting the said offence. After considering the case law on the subject, this Court deduced as under: (SCC p. 9, para 10)

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence adduced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad

probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.”

24. As can be seen from the judgments of Hon’ble Supreme Court in **Prafulla Kumar’s** case, **Soma Chakravarty’s** case and **Niranjan Singh’s** case (supra) that even though, at the time of framing of the charge the probative value of material on record cannot be gone into and the material brought on record by the prosecution has to be accepted as true at that stage, however, the Court must before framing a charge, apply the judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible. The Court cannot act merely as a post office or mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court. Undoubtedly, the Court is not expected to make a roving and fishing inquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial. However, the Court does possess the power to sift and weigh the evidence for the limited purpose of finding out whether or not a *prima facie* case against the accused has been made out.

25. It is also settled that although the test at the time of charge framing is not that of establishment of possibility and probability of accused having committed the offence and not of the proof beyond

reasonable doubt, yet while framing the evidence some material must still be available so as to appeal to the judicial conscious on which a *prima facie* case is established against the accused.

26. For the reasons recorded above, the petition is allowed and the impugned order dated 22.11.2013 passed by learned Special Judge, (P.C. Act)-05 (ACB), Tis Hazari Courts, Delhi is set aside to the extent that it directs framing of charge against the petitioner for an offence under Section 12 of the PC Act. Consequently, the petitioner is discharged for the offence under Section 12 of the PC Act in FIR No.14/2009 registered at PS. Crime Branch, Delhi.

27. Trial court record be sent back forthwith.

Crl. M.A. No.734/2014

The application is dismissed as infructuous.

**(VED PRAKASH VAISH)
JUDGE**

MAY 15th, 2015
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