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

Date of Decision: 30th July, 2015

+ (i) **CRL.M.C. 2055/2015 & Crl.M.A.Nos.7312/2015 & Crl.M.A.No.8431/15**

S P GUPTA

..... Petitioner

Through: Mr. Sudhir Nandrajog, Senior Advocate, with Ms. Kanika Singh, Advocate

versus

STATE

..... Respondent

Through: Mr.P.K. Mishra, Additional Public Prosecutor for respondent-State with Mr. Aman Lekhi and Mr. Mohit Mathur, Senior Advocates, with Mr. Harish Pandey and Mr. Ashok Kumar Sharma, Advocates for complainant/first informant

+ (ii) **CRL.M.C. 2054/2015 & Crl.M.A.No.7310/2015**

S P GUPTA

..... Petitioner

Through: Mr. Tarun Chandiok, Advocate

versus

STATE

..... Respondent

Through: Mr.Karan Singh, Additional Public Prosecutor for respondent-State Mr. Aman Lekhi and Mr. Mohit Mathur, Senior Advocates, with

Mr. Harish Pandey and Mr. Ashok
Kumar Sharma, Advocates for
complainant/first informant

+ (iii) **CRL.M.C. 2053/2015 & Crl.M.A.No.7307/2015**

S P GUPTA Petitioner
Through: Mr. Tarun Chandiok, Advocate

versus

STATE Respondent
Through: Mr. Karan Singh, Additional Public
Prosecutor for respondent-State
Mr. Aman Lekhi and Mr. Mohit
Mathur, Senior Advocates, with
Mr. Harish Pandey and Mr. Ashok
Kumar Sharma, Advocates for
complainant/first informant

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

JUDGMENT

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Whether an application for withdrawal from prosecution can be withdrawn at any time at the sweet will of Public Prosecutor, is the question raised in the above-captioned three petitions.

Petitioner is an accused in three FIRs i.e. FIR No.90/2000; FIR No.99/2002 and FIR No.148/2002, registered for the offences of cheating, etc., in which the State through the Public Prosecutor had filed applications under Section 321 of Cr.P.C. for withdrawal from the prosecution. These applications were filed on 24th November, 2011 and

then abruptly withdrawn on 16th December, 2011 by moving another application but under which provision of law, is not disclosed. Trial court vide common impugned order of 7th January, 2012 has permitted the Public Prosecutor to withdraw the applications under Section 321 of Cr.P.C.. The aforesaid order was challenged by way of three separate revision petitions by petitioner which stand dismissed vide common impugned order of 15th November, 2014.

Since the subject matter of these three petitions is identical and the grounds on which quashing of the common impugned order is sought, are also on the same lines, therefore, these three petitions were heard together and by this common judgment, they are being disposed of.

The question which came up for consideration before the revisional court was whether Public Prosecutor had acted independently while filing application under Section 321 of Cr.P.C. and the subsequent application seeking withdrawal of the earlier application under Section 321 of Cr.P.C..

The learned Revisional Court in the impugned order has relied upon a decision of 14th June, 2012 of a Coordinate Bench of this Court in W.P.(C) No. 3470/2012 *Vipul Gupta Vs. State & ors.* wherein the challenge to the legality of order of 15th December, 2011 of the Lieutenant Governor of Delhi , agreeing with the proposal of Director of Prosecution not to press application for withdrawal of the case against the petitioner was considered and repelled. However, it was made clear in the aforesaid order that the right of independent consideration as to the legality of the withdrawal of the application was left open by observing as

under:-

“31. It is not disputed by the petitioners that, in the meantime, the learned M.M. has permitted the withdrawal of the application under Section 321 Cr.P.C. vide order dated 07.01.2012. It is not disputed by the petitioners that they opposed the withdrawal of the said applications under Section 321 Cr. P.C. and that they were heard by the Leaned M.M. on the said applications. It is also not in dispute that the petitioners have already preferred the remedy available to them in respect of the orders passed by the Ld. M.M., permitting the withdrawal of the applications under Section 321 Cr.P.C. Therefore, the petitioners have not only had the occasion to raise all the issues raised before this court, before the Ld. M.M., but still have the right to pursue the matter further and to raise all the issues available to them in appropriate proceedings.”

At the hearing, learned senior counsel for petitioner assailed the impugned orders on the ground that there is no provision under which application under Section 321 of the Cr.P.C. can be withdrawn. To submit so, reliance was placed upon Apex Court’s decisions in *Patel Narshi Thakershi & ors. Vs. Pradyuman Singh ji Arjun Singh ji* AIR 1970 SC 1273; *R.R. Verma & ors. Vs. Union of India & ors.* (1980) 3 SCC 402 & *Subhash Chander Vs. State (Chandigarh Administration) & ors.* AIR 1980 SC 423, wherein it has been declared that when quasi judicial power is exercised, then power of review must be conferred by a

statute either specifically or by necessary implication.

It was vehemently submitted that without any change of circumstances, application for withdrawal from prosecution was extraneously withdrawn by the public prosecutor and the courts below have erred in permitting withdrawal of the application without any application of mind. It was further submitted that both the courts below have gravely erred in misinterpreting the dictum of the Apex Court in *Sheonandan Paswan Vs. State of Bihar & ors.* AIR 1983 SC 194. Reliance was also placed upon decisions in *Cr. Rev. P. No. 1115/2012 Mohanlal Rao & ors. Vs. State of Rajasthan*, rendered on 19th March, 2012 & *M. Ramappa Vs. The State* ILR (1963) AP 126 to submit on behalf of petitioner that both the applications ought to have been considered and decided on their own merits and simplicitor withdrawal of application under Section 321 of the Cr.P.C. by a cryptic order is impermissible in law. Learned senior counsel for petitioner also submitted that courts below have hastily allowed the prosecution to withdraw the application under Section 321 of the Cr.P.C. and a cryptic dismissal of petitioner's application under Section 91 of the Cr.P.C. to summon the relevant documents to show that the application for withdrawal of application under Section 321 of the Cr.P.C. was wholly unjustified.

On behalf of respondent-State as well as complainant of this FIR, it was contended that the impugned orders do not suffer from any illegality, as it is the prerogative of the State whether to withdraw the prosecution or not and the ultimate decision to withdraw the prosecution or not, is of

the Public Prosecutor and the application for withdrawal of the application under Section 321 of the Cr.P.C. was duly supported by the consent of the Government and so, the decisions relied upon by petitioner are of no avail and there is no substance in these petitions, which ought to be dismissed out-rightly, as there is no requirement of passing reasoned orders while dealing with such applications.

In addition, it was submitted on behalf of the respondent-complainant that the application under Section 321 of the Cr.P.C. by the learned Public Prosecutor was fraudulent and not maintainable on facts and in law. Thus, dismissal of these petitions is sought.

The submissions advanced by both the sides have been duly considered in the light of the decisions cited and the impugned orders have been scrutinized. No doubt the withdrawal from prosecution is an executive and non-judicial act but there is a wide discretion with the court, which ought to be exercised judicially on well established principles. That is to say, the court has to be satisfied that the executive function of the Public Prosecutor has not been improperly exercised or that it is not an attempt to interfere with the course of justice for illegitimate purposes. It is within these parameters, the judicial discretion is to be exercised. It is so mandated by the Apex Court in *State of Bihar Vs. Ram Naresh Pandey* AIR 1957 SC 389. In *Ouseph Yakob Vs. Jose & ors.* 1959 CrL.L.J. 1170, it has been ruled that the reason for withdrawal must satisfy the judicial conscience of the court. It cannot be lightly given merely because Public Prosecutor has asked for it. It stands reiterated in *Anees Mohinuddin @ Ameer @ Abu Ayub Ansari Vs. The*

State of Andhra Pradesh 2008 CrL.L.J. 1476 that the exercise of power of the court is judicial to the extent that the court, in according or refusing consent, has to see (i) whether the grounds of withdrawal are valid and (ii) whether the application is *bona fide* or is collusive. It must be remembered that the same yardstick is to be followed when application for withdrawal of application under Section 321 of the Cr.P.C. is filed. Particularly when, it was not brought to the notice of this Court during the course of hearing that there was any change of circumstances which led to filing of application seeking withdrawal of the application under Section 321 of the Cr.P.C.

The true purport of dictum of Apex Court in *Sheonandan Paswan (supra)* is that it has to see whether the Public Prosecutor has applied his/her mind as a free agent uninfluenced by irrelevant and extraneous considerations. A bare perusal of trial court's order reveals that it had shirked the bounden responsibility of looking into *bona fides* of the Public Prosecutor in abruptly withdrawing the application under Section 321 of the Cr.P.C. after a few days, particularly when in the application under Section 321 of the Cr.P.C., Public Prosecutor has averred in no uncertain terms that a commercial transaction in between the parties is sought to be given a criminal colour and there is no likelihood of conviction on the basis of charge-sheet filed for the offence of criminal misappropriation etc. Strangely, in the second application seeking withdrawal of the first application under Section 321 of the Cr.P.C., the same very Public Prosecutor after a few days has averred that after a thorough examination of the case file and the evidence on record, he

found sufficient evidence against the accused persons. The contrast stand taken by the same very Public Prosecutor within a span of a few days certainly calls for examining the *bona fides* of the second application. Trial court has ducked the real issue by observing that the need to examine the *bona fides* of the Public Prosecutor stands obliterated in the event of prosecution seeking withdrawal of the application under Section 321 of Cr.P.C. and petitioner's application under Section 91 of Cr.P.C. has been summarily dismissed by observing that it is unwarranted. Not a word has been said by trial court in its order as to how it is unwarranted.

Surprisingly, the learned Revisional Court has gone much ahead of trial court in not only justifying the withdrawal of the application under Section 321 of the Cr.P.C. by observing that the change in mind of Public Prosecutor on the dictates or under the influence of another by itself does not justify the consideration of application under Section 321 of the Cr.P.C.

By relying upon observations made by a Coordinate Bench of this Court in *Vipul Gupta (supra)*, the courts below have disclosed utter non-application of mind, as in *Vipul Gupta (supra)*, it has been categorically held as under:-

“29. XXXXX

The facts of the present case, however, show that definite instructions were issued to the APP for withdrawal from prosecution, and it was not left by the respondents to the Learned APP to decide whether, or not, he should withdraw from prosecution.”

The afore-noted factual position runs contrary to the mandate of Section 321 of the Cr.P.C. which requires that Public Prosecutor must independently apply his mind as to whether or not, to withdraw prosecution. In *Sheonandan Paswan (supra)*, it has been categorically declared as under:-

“The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to someone else.”

The afore-noted dictum holds the field today as well. Thus, indisputably it is the Public Prosecutor who has to take the call and not the Government or the Lieutenant Governor. So, dismissal of writ petition against grant of consent by Lieutenant Governor to the withdrawal of application under Section 321 of Cr.P.C. has been erroneously relied upon by the courts below, particularly when right to pursue remedies before the criminal courts was preserved while deciding the writ petition. The legal position, as highlighted in *Ouseph Yakob (supra)* and in *M. Ramappa (supra)*, as reiterated in *Anees Mohinuddin (supra)*, has been totally ignored by both the courts below thereby rendering the impugned orders perverse.

Consequently, impugned orders are quashed with direction to the trial court to decide within four weeks the second application of 16th December, 2011 (*Annexure P-13*) i.e. the one for withdrawal of application under Section 321 of the Cr.P.C. in the light of the legal position as highlighted above and after taking it into consideration, the document(s) filed by petitioner along with application under Section 91

of Cr.P.C.

With aforesaid directions, the above captioned three petitions and applications are disposed of.

(SUNIL GAUR)
JUDGE

JULY 30, 2015

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