THE HON'BLE SRI JUSTICE RAJA ELANGO

CRIMINAL REVISION CASE No.1863 of 2008

ORDER:

The Petitioner-Accused No.1 preferred the present Criminal Revision Case by invoking the provisions under Section 397 and 401 of the Code of Criminal Procedure, being aggrieved by judgment, dated 29.09.2008, passed in Crl.A. No.37 of 2007 by the IV-Additional Metropolitan Sessions Judge, Hyderabad, whereby the learned Sessions Judge dismissed the appeal by confirming the judgment of the XIV-Additional Chief Metropolitan Magistrate, Hyderabad, in CC No.621 of 2003 vide judgment, dated 30.12.2006, wherein the learned Magistrate found the petitioner – accused No.1 guilty of the offence under Section 168 IPC and convicted and sentenced him to pay a fine of Rs.5,000/- in default to suffer simple imprisonment for sixty days.

The case of the prosecution, in brief, is as follows:

During the course of investigation in a case in RC 7(A) of 98 CBI, Hyderabad against the petitioner, the Inspector of Police, CBI/SPE/Hyderabad, found some incriminating material against the petitioner, in his residential premises, wherein it was found that while the petitioner was working as Inspector of Police in Central Excise Department, Hyderabad, during the period 1995-98 and accused No.2, who was working as a Clerk/Shoroff in Indian Bank, Narayanaguda Branch, Hyderabad at that time, have entered into criminal conspiracy and indulged in money lending business by taking money from the third parties at lower rate of interest and used to lend the same to others at higher rate of interest. Therefore, charge sheet was filed against the petitioner and A2 for the offence under Section 168 r/w.120-B IPC.

The case was taken on file for the offence under Section 120-B r/w.168 IPC and on appearance of the accused, the charge was read over and explained to them, for which they pleaded not guilty and claimed to be tried.

During trial, the prosecution examined PWs.1 to 37 and marked Exs.P1 and P174. On behalf of the accused, no oral or documentary evidence was adduced.

The learned trial, Judge after appreciating the evidence available on record, found the accused guilty of the offence under Section 168 IPC, and accordingly, convicted and sentenced them as stated above. Challenging the same, the petitioner – A1 preferred appeal in Crl.A. No.37 of 2007 before the IV-Additional Metropolitan Sessions Judge, Hyderabad. The learned Sessions Judge dismissed the appeal by confirming the conviction and sentence recorded by the trial Court against the petitioner, for the offence under Section 168 IPC. Challenging the same, the present revision case is filed by the petitioner –accused No.1.

Heard and perused the material available on record.

Learned counsel for the petitioner submitted that the lower appellate Court erred in confirming the judgment of the trial Court and the learned Sessions Judge should have seen that the ingredients to constitute the offence under Section 168 IPC were not proved in the evidence adduced by the prosecution and even accepting the case of the prosecution as true, money lending business does not come within the meaning of trade, and therefore, he prays to allow the revision.

On the other hand, learned Additional Public Prosecutor submitted that the findings of the Courts below need not be interfered with, inasmuch as the findings are based upon proper appreciation of evidence and therefore, he prays to dismiss the revision.

The offence alleged against the petitioner is that he along with the other accused, being a public servant, used to take money from third parties at lower rate of interest and lend the said money to third parties on the higher rate of interest and thereby, he committed the offence under Section 168 IPC. The ingredients of the said section read as under:

> "168. Public Servant unlawfully engaging in trade:-- Whoever, being a public servant, and being legally bound as such public servant not to engage in trade, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both."

The word 'legally bound' in the said section, means and includes any act of the public servant concerned, if it is barred by any Act or Statute, the offence would attract. In the present case, the prosecution could not able to establish the fact that the petitioner, being a public servant, was prohibited from doing the alleged act. Further, the prosecution failed to explain properly as to whether the acts of the petitioner would amount to trading which is prohibited under Section 168 IPC.

In support of his contentions, learned counsel for the petitioner relied upon a decision of the Punjab and Haryana High Court in State of Haryana v. Prem Singh[1], wherein in paragraph Nos.6, 7 and 11, it was observed as follows in paragraph Nos.6, 7 and 11:

> 6. It is not disputed that the accused persons were acting in the capacity of public servants being the employees of Rural Artisan

[1] 1994(3) R.C.R. (Criminal) 69

Training Centre, Hansi. Now, it is to be ascertained whether they got themselves engaged illegally in the trade from which they were legally prohibited under any Act. Only those public servants who are prohibited under any Act from trading come within the purview of this section. For any breach of a departmental rule they cannot be punished under the Code. Public servants are generally not allowed to trade in order to ensure that they may not neglect their duties. Being in official position they can easily obtain unfair advantages over other traders. However, this section punishes those public servants only who were legally bound not to engage in trade. In the present case prosecution has failed to produce any enactment which could reasonably show that the accused persons being public servants were prohibited under any Act from trading. There is no evidence whatsoever, in this behalf which can be reasonably looked into, to reach the conclusion that the accused persons were specifically prohibited from trading by any enactment or any other rule of law, which could have imposed the legal prohibition required to be established under this section. It is settled law that for any breach of a departmental rule the accused persons cannot be punished under this section.

7. Indian Penal Code contains no definition of the very general word 'Trade' and no explanation of the equally wide term 'engages in Trade'. This section is in a way incomplete without the assistance of some other enactment or rule of law which imposes the legal prohibition required and the enactment containing the prohibition naturally and necessarily defines the area, which is covered by it, both as to the class of public servants to whom it applies, and the nature of the dealings in which those servants are prevented from engaging. However, several statutes have been passed from time to time prohibiting public officers from engaging in trade. Such statutes either provide the penalty to be inflicted for their breach or refer to this section of the Code.

11. In the present case in hand, it is not even alleged by the prosecution as to what profit the accused persons derived out of the transactions made by them. The element of profit which needs to be determined in view to fulfil the ingredients of definition of 'Trade' is completely missing from the case of the prosecution. This fact is not even alleged by the prosecution in its case. Once, the PWs are completely silent on this element of profit, we have no hesitation in holding that they were not engaged in a 'Trade' which was specifically prohibited by any enactment or the rule of law.

In the present case also the prosecution failed to establish the profits derived out of the alleged transactions made by the petitioner.

There is some force in the contentions raised by the learned counsel for the petitioner. Considering the above circumstances, this Court is of the view that the prosecution failed to prove its case beyond all reasonable doubts. Hence, the judgments of the Courts below are liable to be set aside and the petitioner is liable to be acquitted of the said offence.

Accordingly, the Criminal Revision Case is allowed and the conviction and sentence recorded against the petitioner – accused No.1 for the offence under Section 168 IPC, by the XIV Additional Chief Metropolitan Magistrate, Hyderabad, in CC No.621 of 2003 vide judgment, dated 30.12.2006, for the offence under Section 168 IPC, as confirmed by the IV-Additional Metropolitan Sessions Judge, Hyderabad, in Crl.A.No.37 of 2007 vide judgment, dated 29.09.2008, are set aside. Consequently, the petitioner - accused No.1 is acquitted for the said charge. The fine amount, paid if any, shall be refunded to the petitioner. Bail bonds shall stand cancelled and the sureties are discharged.

Miscellaneous applications, pending if any, shall stand closed.

RAJA ELANGO, J

August 08, 2016.
KTL