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

% *Date of Decision : 22nd January, 2016*

+ **CRL.REV.P. 255/2012**

STATE Petitioner

Through: Mr.Rajesh Mahajan, ASC for the
State with Ms.Parul Joniwal.

versus

MADHURI GUPTA Respondent

Through: Mr.R.S.Malik, Advocate.

PRATIBHA RANI, J. (Oral)

1. The respondent Madhuri Gupta is facing trial in Sessions Case No.58/2010 before the learned ASJ in case FIR No.21/2010 under 3/4/5 of Official Secrets Act r/w Section 409/120-B IPC.
2. This revision petition has been filed by the State impugning the order dated 07.01.2012 whereby the respondent/accused was ordered to be charged for committing the offence punishable under second part of Section 3(1) of Official Secrets Act attracting maximum punishment upto a period of three years.
3. The grievance of the State is that on the basis of material on record, the respondent/accused should have been charged for the offence punishable under first part of Section 3(1) of Official Secrets Act attracting maximum punishment upto a period of fourteen years.
4. Vide impugned order the learned ASJ rejected the contention made on behalf of the State i.e. to charge the respondent/accused under first part of Section 3(1) of Official Secrets Act attracting maximum punishment upto a

period of fourteen years.

5. Mr.Rajesh Mahajan, ASC for the State has submitted that the impugned orders needs to be interfered with by this Court for the reason that the opinion given by Sh.R.K.Tyagi, Joint Secretary (CNV) has not been considered in right perspective by learned ASJ while framing the charge despite the fact that as per the said opinion, the information contained in the e-mail of respondent/accused related to India's security and defence. Mr.Rajesh Mahajan, learned ASC for the State has referred to Annexure-P1 whereby e-mail downloaded from the "Inbox Folder" and "Sent Folder" from the email Account of the respondent/accused were sent for opinion. The information received was to the following effect:-

'The developments covered in many of these documents relate to terrorism and Kashmir. They also cover other major developments in Pakistan internally and in its external relations and also sometimes convey assessment of classified nature.

In addition, the contents of various e-mails of Ms. Madhuri Gupta which have been recovered contain information of classified nature on security aspects of the High Commission of India, Islamabad (HCI), and on the discussions, activities and meetings of its officials. A list of such e-mails is attached as Enclosure – 1.

Besides vide her e-mail of March 27, 2010, Ms. Madhuri Gupta sent the telephone list of the High Commission of India, Islamabad. (page 255-261). Such lists are generally classified for official use only.

(ii) Yes the information contained in the documents/e-mails, if disclosed to any unauthorized person, can be prejudicial to the safety, security and interest of the State. A list of such information and inputs contained in the e-mails of Ms. Madhuri Gupta is at Enclosure – 1. In addition to them, Ms. Madhuri Gupta mentioned in her e-mail of December 22, 2009 (page 38 of smaller bunch), that DHC's wife "hates Pakistan and all

Pakistanis and expects all India-based people to have the same attitude". This assessment has the potential of endangering the safety of a family member of a senior Indian diplomat stationed abroad in a country with adversarial relations with India.

(iii) Yes, the information contained in the documents/e-mails can be directly or indirectly useful to an enemy country. Such instances have been enumerated at Enclosure – 1. Such information in e-mails of Ms. Madhuri Gupta pertaining to security aspect and views/thinking of GoI and/or senior GoI officials on key strategic issues such as Afghanistan, terrorism and terrorist organizations and individuals affecting India, Kashmir and internal developments and possible scenarios in Pakistan directly compromised the security of HCI and its personnel and also impinged adversely on pursuit of India's interests.

(iv) Yes the information contained in the documents/e-mails is connected with security and defence matters of the country both directly and indirectly. Details pertaining to security arrangements of HCI and its officials were divulged to Pakistani officials, directly putting into danger the security of HCI and its officials, including senior diplomats and Armed Forces functionaries and their family members.

E-mails of Ms. Madhuri Gupta contain information on steps being taken or contemplated by GoI, and the views and assessment of GoI or its senior officials, on sensitive and strategic issues such as terrorism, Kashmir and India's engagement in Afghanistan. These matters and the information pertaining to them in her e-mails are directly related to India's security and defence, and undermine interests of the country in these areas.

(v) The to and fro e-mail accounts which emerged in the documents/e-mails are NOT official e-mail accounts of the staff/officers posted with this Ministry or with the Indian High Commission, Islamabad.

The original documents/e-mails actually seized by the Investigating Officer, have already been perused and returned

to you.'

6. Mr.Rajesh Mahajan, learned ASC for the State has contended that vide impugned order the learned ASJ has charged the respondent/accused for committing the offence punishable under second part of Section 3(1) of Official Secrets Act attracting maximum punishment upto a period of three years. Thus, even if the evidence on record is sufficient to prove the guilt of the accused so as to attract punishment upto fourteen years, at that stage the learned Trial Court may not be in a position to convict her and award appropriate sentence for the reason that she had not been charged for the graver offence.

7. Mr.R.S.Malik, learned counsel for the respondent, on instructions from the respondent, has submitted that the respondent is facing trial and some of witnesses have already been examined. However, the respondent has no objection to face trial for the graver charge provided that on charge being amended, the State does not seek cancellation of her bail on this very ground. Mr.R.S.Malik, Advocate for the respondent has further submitted that at the time of amendment of charge, the respondent will exercise her option to recall the witnesses already examined for further cross examination.

8. Mr.Rajesh Mahajan, ASC for the State has submitted that State will not seek cancellation of bail of the respondent/accused on the ground that the charge has been amended and respondent/accused shall get fair opportunity to defend herself by recalling the witnesses for further cross examination, which she feels necessary to defend herself.

9. Penalty for spying has been provided under Section 3(1) of Official Secrets Act, which reads as under:

'3. Penalties for spying- (1) If any person for any purpose

prejudicial to the safety or interests of the State –

- (a) Approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited place; or*
- (b) makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy; or*
- (c) obtains, collects, records or publishes or communicates to any other person any secret official code or password, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy [or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States],*

He shall be punishable with imprisonment for a term which may extend, where the offence is committed in relation to any work of defence, arsenal, naval, military or air force establishment or station, mine,, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of [Government] or in relation to any secret official code, to fourteen years and in other cases to three years.'

10. In the case ***State of Maharastra Etc. Etc. Vs. Som Nath Thapa Etc. JT 1996 (4) SC 615***, one of the question of law to be examined by the Apex Court was “When can charge be framed?”. After reproducing Sec. 227, 228 in so far as session trial is concerned and Sec. 239, 240 relatable to the trial of warrant cases and section 245 (1) & (2) qua the trial of summon cases, in para 29 to 33 of the judgment it was held:-

“29. Before advertng to what was stated in Antulay's case, let the view expressed in State of Karnataka Vs. L. Muniswamy, 1977(3) SCR 113 be noted. Therein, Chandrachud, J. (as he then was) speaking fore a three Judge Bench stated at page 119 that at the stage of framing charge the Court has to apply its

mind to the question whether or not there is any ground for presuming the commission of the offence by the accused. As framing of charge affects a person's liberty substantially, need for proper consideration of material warranting such order was emphasised.

30. What was stated in this regard in Stree Alyachar Virodhi Parishad' case, which was quoted with approval in paragraph 79 of State of West Bengal Vs. Mohd. Khalid, 1995 (1) SCC 684 is that what the Court has to see, while considering the question of framing the charge, is whether the material brought on record would reasonably connect the accused with the crime. No more is required to be inquired into.

31. In Antulay's case, Bhagwati, CJ, opined, after noting the difference in the language of the three pairs of section, that despite the difference there is no scope for doubt that at the stage at which the Court is required to consider the question of framing of charge, the test of "prima facie" case has to be applied. According to Shri Jethmalani, a prima facie case can be said to have been made out when the evidence, unless rebutted, would make the accused liable to conviction. In our view, better and clearer statement of law would be that if there is ground for presuming that the accused has committed the offence, a court can justifiably say that a prima facie case against him exists, and so, frame charge against him for committing that offence.

32. Let us note the meaning of the word "presume". In Black's Law Dictionary it has been defined to mean "to believe or accept upon probable evidence". (Emphasis ours). In Shorter Oxford English Dictionary it has been mentioned that in law "presume" means "to take as proved until evidence to the contrary is forthcoming", Stroud's Legal Dictionary has quoted in this context a certain judgment according to which "A presumption is a probable consequence drawn from facts (either certain, or proved by direct testimony) as to the truth of a fact alleged." (Emphasis supplied). In Law Lexicon by P.

Ramanath Aiyer the same quotation finds place at page 1007 of 1987 edition.

33. The aforesaid shows that if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the Court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of charge probative value of the materials on record cannot be gone into, the materials brought on record by the prosecution has to be accepted as true at that stage."

11. In the case ***State of M.P. v. Mohanlal Soni (2000) 6 SCC 338*** the Hon'ble Supreme Court has held as under:

"8. The crystallized judicial view is that at the stage of framing charge, the court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused."

12. Section 222 of Code of Criminal Procedure provides :

'222. When offence proved included in offence charged –

(1) when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

(3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

(4) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions requisite for the initiation of proceedings in minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied.'

13. So, as per Section 222 Cr.P.C., though after being charged for graver offence if ultimately the graver offence is not proved, the accused can be convicted for minor offence, converse is not possible. At the stage of framing of charge, the learned Trial Court could not have examined the evidence as if he was appreciating the evidence for purpose of conviction either under first part or under second part of Section 3(1) of Official Secrets Act. The material placed by the prosecution supported with opinion Annexure P-1 was prima facie sufficient to frame charge against the respondent/accused under first part of Section 3(1) of Official Secrets Act attracting maximum punishment upto a period of fourteen years.

14. Since learned counsel for the respondent/accused has already conceded to above extent and material on record also justifies framing of charge against the respondent for the offence punishable under first part of Section 3(1) of Official Secrets Act attracting maximum punishment upto a period of fourteen years, the impugned order dated 07.01.2012 is set aside to the extent that respondent/accused has been ordered to be charged under second part of Section 3(1) of Official Secrets Act attracting maximum punishment upto a period of three years.

15. The respondent/accused shall be charged for the offence punishable under first part of Section 3(1) of Official Secrets Act attracting maximum punishment upto a period of fourteen years. After the charge is amended,

the learned Trial Court shall given due opportunity to the respondent/accused to recall the witnesses already examined for further cross examination if the respondent/accused feels the same necessary to defend herself.

16. It is made clear that learned ASC for the State has already assured the respondent/accused that after being charged for a graver offence, the State would not pray for cancellation of her bail on this ground.

17. Criminal Revision Petition No.255/2012 stands allowed in above terms.

18. A copy of this order be sent to the learned Trial Court for information and compliance.

As prayed, copy of the order be also given dasti to learned counsel for the parties.

PRATIBHA RANI, J.

JANUARY 22, 2016
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