IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.64 OF 2016

RAJENDRA EKNATH NERKAR)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Rajiv Patil, Senior Advocate, i/b. Mr.Vishal Kolekar, Advocate for the Applicant.

Mr.A.R.Kapadnis, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 23rd JANUARY 2017.

<u>ORAL ORDER</u> :

1 By this revision application, the applicant / accused in Crime No.29 of 2014 for the offences punishable under Sections 7, 12, 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988, is challenging the order dated 7th November 2015 passed below Exhibit 7 in Anti Corruption Bureau (ACB) Special Case N0.91 of

2014 by the learned Special Judge for Prevention of Corruption Act for Greater Bombay, thereby rejecting the application for discharge of the revisional applicant / accused from ACB Special Case No.91 of 2014.

2 Heard the learned senior counsel appearing for the revisional applicant / accused. By drawing my attention to the verification panchnama recorded by the Investigator on 11th April 2014 he argued that at the time of this verification panchnama, there was no demand by the public servant in clear terms as seen from the verification panchnama itself. By pointing out another verification panchnama recorded on 19th April 2014, the learned senior counsel argued that when there was no complaint about demand of illegal gratification on 18th April 2014, this verification panchnama shows that on 18th April 2014 itself panch witnesses were called telephonically by the Investigating Officer of the ACB. The learned senior counsel then took me through the complaint lodged by Maqsood Jainuddin Mulla on 19th April 2014 at Hotel Mina International and the resultant pre-trap panchnama as well

as post trap panchnama. By drawing my attention to the recorded conversation between the applicant / accused public servant as well as the complainant, the learned senior counsel argued that the entire conversation does not reflect any demand of illegal gratification by the revisional applicant / accused public servant. The learned senior counsel then by taking me through the memo issued to the complainant by the Flying Squad of the Regional Transport Office (RTO) argued that what was demanded was the fine amount of Rs.2,600/- and there was no demand of illegal gratification. For this purpose, the learned senior counsel relied on the document on record page no.188 showing details of traffic violation by the vehicle of the complainant as well as the memo issued to him asking him to attend the office of the RTO for composition of the offence on 15th April 2014. It is argued that in pursuance to this memo issued on 15th April 2014, the complainant infact attended the office of the RTO on 17th April 2014 and the revisional applicant / public servant had cleared his case on 17th April 2014 itself. It is further argued that the charge-sheet itself shows that all impounded papers of the vehicle were already handed over to the complainant on 17th April 2014 itself and as the work of the complainant was already over on 17th April 2014, there was no question of either demand or acceptance of the illegal gratification by the accused public servant. With this, the learned senior counsel by placing reliance on order dated 8th December 2015 passed by this court in Criminal Writ Petition No.2575 of 2015 has contended that on similar facts, this court had discharged the petitioner / accused in that case.

3 The learned APP opposed the revision application by contending that after due investigation it was found that the applicant / accused had committed the offence as alleged against him. The learned APP argued that the fine amount was paid on 19th April 2014 and it was on that day, that there was demand and acceptance of illegal gratification by the public servant through accused no.2 Jayprakash Dalvi.

4 I have carefully considered the rival submissions and perused the charge-sheet.

5 Briefly stated, it is the case of prosecution that complainant Maqsood Mulla is owner of five buses and he runs a travel agency by name Munna Travels. His buses are plied for the purpose of transporting school going children. According to the prosecution case, the revisional applicant / accused is a public servant working as an Assistant Regional Transport Officer in the office of RTO at Andheri, Mumbai. It is alleged that he demands and accepts illegal gratification from the vehicle owners who are served with memos. On 6th March 2014, Inspector Rahul Nalavade of Flying Squad of RTO issued memo to one of the drivers of the bus of the complainant. According to the complainant, at that time, the revisional petitioner had demanded illegal gratification for composition of offence of traffic violence. He lodged a complaint about demand of Rs.2,000/- by the revision petitioner. The ACB undertook verification of that demand on 11th April 2014 but came to the conclusion that there is no demand in clear words and therefore further proceedings were kept in abeyance.

6 According to the prosecution case, then again on 15th April 2014, school bus belonging to the complainant was found violating the rules and therefore again Rahul Nalavade of the Flying Squad of the RTO served the driver with a memo on 15th April 2014 mentioning the violation of rules with further directions that the owner of the vehicle should approach the office of the RTO within seven days for giving explanation. It is the case of the prosecution that on 17th April 2014 complainant Maqsood Mulla had been to the office of the RTO at Andheri and contacted the revision petitioner. At that time, there was demand of illegal gratification to him in respect of the memo dated 6th April 2014. Similarly, on that day itself, the revision petitioner / accused demanded illegal gratification to the complainant in respect of memo issued to him on 15th April 2014. Thereafter, by calling panch witnesses, formal complaint in respect of this second demand made allegedly on 17th April 2014 came to be recorded by the Investigating Officer. This complaint was recorded on 19th April 2014 by the Officer of the ACB.

7 On 19th April 2014 itself, there was verification panchnama in presence of a panch witnesses and then after undertaking necessary formalities of pre-trap panchnama, a trap was laid, in which, according to the prosecution case, the revisional applicant / accused public servant had demanded and accepted illegal gratification of Rs.1500/- through accused no.2 Jayprakash Dalvi.

8 Case of the prosecution is being examined in order to ascertain whether there is no iota of evidence against the revisional applicant / public servant in order to frame charges against him for offences punishable under Section 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act. Therefore, at this stage, it is apposite to quote definition of Sections 227 and 228 of the Code of Criminal Procedure which reads thus :

> **227. Discharge**
>
> If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the

prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

228. Framing of charge

(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of warrant- cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub- section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.

9 Bare perusal of these provisions shows that if there is no ground for presuming that accused has committed the alleged offence, then he is entitled for discharge but when the court is of the opinion that there is ground for presuming that accused has committed an offence, then the Charge can be framed against the accused. When the accused can claim for discharge is considered by the Hon'ble Supreme Court in the matter of **State of Tamil Nadu vs. N. Suresh Rajan & Ors. AIR 1982 SC (SUPP) 1982**. Relevant portion of the said report reads thus :

> "We have bestowed our consideration to the rival submissions and the submissions made by Mr.Ranjit Kumar commend us. True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouth piece of the prosecution or act as a post-office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption hat the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find

out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage. Reference in this connection can be made to a recent decision of this Court in the case of *Sheoraj Singh Ahlawat and Ors. v. State of Uttar Pradesh and Anr., AIR 2013 SC 52 : (2012 AIR SCW 6171),* in which, after analyzing various decisions on the point, this Court endorsed the following view taken in *Onkar Nath Mishra v. State (NCT of Delhi) (2008) 2 SCC 561 : (AIR 2008 SC (Supp) 204 : 2008 AIR SCW 96):*

> "11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence." ".

10 It is, thus, clear that, when the material brought on record by the prosecution does not disclose commission of any offence by the accused, then, he is certainly entitled for discharge. However, at the stage of discharge, probative value of the material has to be gone into and the court is not expected to undertake

deep scrutiny of the material brought by the prosecution in support of the charge. Conducting of mini trial at the stage of discharge is an exercise which is totally unwarranted. Keeping in mind this law on the aspect of discharge, let us examine the material produced by the prosecution in support of the Charge, in order to ascertain whether a *prima facie* case is made out against the revisional applicant / accused for the alleged offence. The Charge against the revision petitioner / accused is for offence punishable under Section 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act. These provisions read thus :

> **Section 7.**
>
> Public servant taking gratification other than legal remuneration in respect of an official act.— Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or

attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine.

Section 13(1)(d).

A public servant is said to commit the offence of criminal misconduct -

a)......

b).....

c)......

d) if he, -

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or

Section 13(2).

Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine.

11 If examined on the touchstone of the ingredients of offences punishable under Sections 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988, the complaint lodged by the complainant Maqsood Mulla on 19th April 2014 is to the effect that in respect of the memo for traffic violation received by him regarding his vehicle on 6th March 2014, on 10th April 2014 the revisional applicant / accused had demanded a bribe of Rs.2,000/-. The complainant further stated that then again on 15th April 2014, another memo alleging traffic violation was issued in respect of his another bus and therefore he again met the revisional applicant / accused on 17th April 2014 at the office of

the RTO. On that day, according to complainant Maqsood Mulla, there was demand of illegal gratification from him. Therefore, the complaint came to be lodged by him on 19th April 2014. Perusal of this complaint so also the verification panchnama goes to show that it was on 18th April 2014 that the Investigating Officer had telephonically communicated panch witnesses to attend the office of the ACB on 19th April 2014. Then, panch witnesses attended the Investigator and verification panchnama came to be recorded. Perusal of the verification panchnama shows that shadow panch Shri Narayan Ghade did not even enter inside the cabin of revisional applicant / accused but the complainant had disclosed the Investigator that initially he had met the revisonal applicant / accused and the revision petitioner / accused had directed him to deposit the fine amount of Rs.2600/-. On deposit of the said fine amount, he had again met revision petitioner / accused public servant when the revision petitioner / accused public servant, in terms, demanded illegal gratification amounting to Rs.1500/- from him and asked him to pay that amount to accused no.2 Jayprakash Dalvi.

12 It is seen from the record that pre-trap panchnama was prepared and three currency notes of Rs.500/- denomination each smeared with anthracene powder were kept in the pocket of complainant Maqsood Mulla and he was directed to give that amount only on demand by the accused public servant.

13 Trap panchnama of 19th April 2014 demonstrates that cabin of the revisional applicant / accused is situated in the office of the RTO and it is having a glass panel. Trap panchnama further shows that the revisional applicant / accused public servant had made gestures by his eyes and asked the complainant to pay the amount of Rs.1500/- to accused no.2 Jayprakash Dalvi who was sitting beside him in his cabin. As seen from the trap panchnama, the currency notes smeared with anthracene powder were recovered from the pant pocket of accused no.2 Jayprakash Dalvi by the squad of the ACB. The numbers of currency notes tallied with the numbers of currency notes recorded in the pre-trap panchnama. Those currency notes were found to be smeared with anthracene powder.

14 The trap panchnama further shows that there was conversation between the complainant and the accused public servant. That conversation though according to the learned senior counsel does not show any demand of illegal gratification, careful scrutiny of the conversation goes to show that there was demand of illegal gratification by the public servant which is not forming the the statutory dues recoverable by the RTO in respect of traffic violation. If what was paid was statutory dues, then it does not stand to reason that the complainant would pay the same to accused no.2 Jayprakash Dalvi who was sitting just beside the accused public servant / revision petitioner in the cabin of the revision petitioner. The position where the accused no.2 was sitting is seen from the sketch map filed with the charge-sheet. He was sitting beside the revision petitioner in his official cabin. Accused no.2 Jayprakash is not an employee of the RTO. It was none of his business to accept money or fees payable to the State. There was no reason with the accused no.2 Jayprakash to accept statutory dues from the complainant. This material atleast shows a strong *prima facie* case that the revision petitioner / accused

public servant must have demanded and received gratification other than legal remuneration through co-accused Jayprakash Dalvi. It is well settled that there can be a demand for illegal gratification even when no work of the complainant is pending with the accused public servant or has been done. All these aspects will have to be considered at the trial of the case and particularly on cross-examination of prosecution witnesses.

15 At the stage of framing of the charge what is required is some *prima facie* material indicating strong suspicion of commission of offence by the accused. In the case in hand, the material so placed on record with the charge-sheet is depicting strong *prima facie* case of commission of offence alleged against the accused public servant / revision petitioner.

16 In this view of the matter, I do not find any illegality or perversity in the impugned order passed by the learned trial court rejecting the application for discharge of the revision petitioner / accused from the crime in question. Therefore the order :

i) Revision Application is dismissed.

(A. M. BADAR, J.)