THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL REVISION CASE NO.1572 OF 2017

ORDER:

This criminal revision case is filed under Sections 397 & 401 Cr.P.C, questioning the propriety, legality of the order in Crl.M.P.No.9 of 2016 in C.C.No.53 of 2014 in Cr.No.4/ACB-HR/2011 dated28.04.2017 passed by the First Additional Special Judge for SPE & ACB Cases-cum-V Additional Chief Judge, City Civil Court, Hyderabad, dismissing the petition filed under Sections 239 & 245 Cr.P.C.

The petitioner is the accused the respondent filed charge sheet against the petitioner for the offences punishable under Sections 7 and 13(1)(d) r/w Section 13(2) of Prevention of Corruption Act, 1988 (for short 'Act'), for possessing disproportionate assets to his known source of income worth Rs.76,75,784/-.

The main contentions raised before the Court below in the petition are that the respondent without conducting proper investigation and without collecting any material in a casual manner, filed charge sheet before the Court below. However, documents were made available to the respondent/complainant by the petitioner/accused to prove that the accused did not possess disproportionate assets to his known source of income, the petitioner contented that the material collected during investigation, including seizure of documents revealed that he petitioner acquired assets in the shape of immovable property and deposits in the bank in the name of his three wives, children and family members. It is contended that, there is no iota of truth in the allegations and they are not supported by any material. The allegation that possessing immovable properties in the name of Smt. P. Sujata and Smt. Y. Anitha Reddy who are the government servants, as benamis, is without any evidence and contrary to the observations of the Court below and the value of the assets assessed by the Investigating Agency is not proper and if the calculations were made properly, the petitioner did possess no assets in excess of the known source of income. It is also contended that though Smt. Sujatha locked the doors and waited for the officials for conducting search and after arrival of the officials, she opened the lock and entered into the house, the Investigating Officials wantonly and purposefully implicated the petitioner, who is no way concerned with the offence and the proposed charge sheets are groundless. Apart from that, no *prima facie* material to proceed against the petitioner is available for the offence punishable under Sections 7 and 13(1)(d) r/w Section 13(2) of the Act.

The learned Public Prosecutor filed counter, denying material allegations, while contending that the petition is not maintainable for the reasons that Sections 239 & 240 Cr.P.C have no application. During investigation, the Investigating Officials collected recorded information during search and obtained valuation of imovable properties held in the names of petitioner's family members and obtained assets other than the known source of income and the petitioner failed to account for the property satisfactorily and there is substantial evidence on record collected during investigation by the Investigating Agency to support the charges and the contentions urged in the grounds for discharge of the petitioner cannot be decided at pre-trial stage and the Court can arrive at a conclusion only after completion of trial. Therefore, it is alleged in the allegation that the proposed charges are groundless is not tenable and prayed for dismissal of the petition

Upon hearing argument of both the counsel, the Court below dismissed Crl.M.P.No.9 of 2016, observing that the contentions and grounds urged in the petition in support of those grounds, cannot be decided at the pre-trial stage, since it is the question of fact to be decided. Aggrieved by the order passed by the Court below in Crl.M.P.No.9 of 2016, the present criminal revision case is preferred, mainly on the ground that the allegation that Smt. P. Sujata and Smt. Y. Anitha Reddy are the benamidars of the petitioner are baseless and they are also government servants, having independent source of income. Therefore, the question of possessing assets in excess of known source of income is an error on the face of record and the proposed charges are groundless and prayed to discharge the petitioner, allowing this criminal revision case by setting aside the order passed by the Court below in Crl.M.P.No.9 of 2016.

During hearing, learned counsel for the petitioner reiterated the contentions raised in the grounds of revision and requested this Court to pass appropriate order by exercising power under Sections 397 & 401 Cr.P.C. Whereas, the learned Special Public Prosecutor for A.C.B. supported the order passed by the Court below in all respects and prayed to dismiss the criminal revision case.

Crl.M.P.No.9 of 2016 was filed before the Court below under Sections 239 & 245 Cr.P.C, raising various contentions referred in earlier paragraphs.

Section 239 Cr.P.C deals when accused shall be discharged and it stipulates that if, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.

Section 245 Cr.P.C deals with when accused shall be discharged.-

(1) If, upon taking all the evidence referred to in section 244 the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

Thus, the question of invoking jurisdiction under Section 245 Cr.P.C would not arise and it can be decided only aafter recording evidence, but not at this stage. Consequently, Section 245 Cr.P.C has no application to the present facts of the case.

Considering rival contentions and perusing material available on record, the point that arises for consideration is as follows:

"Whether material available on record is sufficient to proceed against the accused for the offence punishable under Sections 7 and 13(1)(d) r/w Section 13(2) of Prevention of Corruption Act, 1988.?"

P O I N T:

The present petition is filed under Section 397 and 401 of Cr.P.C. Jurisdiction of this Court under Section 397 and 401 of Cr.P.C. is limited and the High Court may exercise such power only when the Court found that there is a manifest perversity in the order or the finding recorded by the Court is without any evidence or material, though section 401 of Cr.P.C. confers a kind of paternal and supervisory jurisdiction on the High Court over all other criminal Courts established in the State in order to correct miscarriage of justice arising from a misconception of law, irregularity or procedure, neglect or proper precautions or apparent harshness of treatment which has on the one hand resulted in some injury to the due maintenance of law and order or, on the other hand, in some underserved hardship to individuals. The revisional power conferred on the High Court by Section 401 of Cr.P.C. is discretionary power, has to be exercised in the aid of justice. Whether or not the High Court will exercise its revisional jurisdiction in a given case, must depend upon facts and circumstances of each case. The discretion conferred on the High Court by Section 401 of Cr.P.C. has to be exercised judicially, on judicial principles and not arbitrarily. Therefore, keeping in mind the scope of revision, I would like to decide the present issue before this Court.

According to sections 238 and 239 of Cr.P.C. if the Court is of the opinion upon considering the police report and documents sent with it under Section 173 and making such examination, if any, of the accused as the Magistrate or Sessions Judge thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate or Sessions Judge considers the charge against the accused to be groundless, he shall discharge the accused and record his reasons for so doing.

The documents referred to in Section 207 of Cr.P.C. also must relate to such documents which can be subsequently transferred into evidence at the time of the trial. Hearing of the prosecution and the accused under this section does not mean the hearing of arguments only, it includes the hearing of the evidence if needed. The word “groundless” would mean the absence of reasonable ground to expect a conviction. “Groundless” is equivalent to saying that there is no ground for framing the charges, which depends on the facts and circumstances of each case. Therefore, only when the Magistrate or Sessions Judge comes to conclusion that there are no grounds to frame a charge for specific offence, the Court can discharge the accused for such offence. Even the scope of Section 238 and 239 Cr.P.C. is limited, such power has to be exercised only when the Magistrate or Sessions Judge came to conclusion that it is groundless, based on charge sheet and documents filed under Section 173 of Cr.P.C.

Consideration of records and documents at the stage of framing charge is for the limited purpose of ascertaining whether or not there is sufficient ground to proceed against the accused. Whether the material at the hands of the prosecution is sufficient and whether the trial will end in conviction or acquittal are not relevant considerations at the stage of framing of charge as held by the Apex Court in "***P.Vijayan v. State of Kerala***[1]"

In view of the law declared by the Apex Court in the judgment referred supra, an accused can be discharged only when the Court finds that the charge is groundless or when there is no *prima facie* material to proceed further by framing charges against him. Here, in this case, the petitioner mostly questioned the calculations filed along with the charge sheet by way of annexures. The calculation arrived by the respondent is the main ground to conclude that this petitioner possessed assets in excess of the income from known sources. But, this Court, at this stage, cannot decide whether value of the property possessed by the petitioner is in accordance with law or not and the variation pointed out by the petitioner cannot be assessed and the income cannot be decided at this stage. As seen from the material on record, the income of the petitioner and the probable expenditure during the check period of the petitioner and his three wives and their children respectively, the petitioner possessed assets more than the known source of

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[1] AIR 2010 SC 663

income and this Court while deciding the petition under Sections 397 & 401 Cr.P.C cannot undertake the calculations to conclude that the petitioner did not possess assets in excess to the known source of income. Whether the three wives allegedly are married to the petitioner and they purchased the property in their name, their children and the petitioner's mother, the question has to decided at the end of the trial and at this stage, it is difficult to arrive at such conclusion and to discharge the petitioner for various offences stated above.

It is also contended that the charge levelled against the petitioner is groundless and the material collected during investigation does not disclose *prima facie* material to proceed against the petitioner for the above offences. Curiously, no material is produced by the petitioner before this Court, except the charge sheet and the explanation of the petitioner. The Investigating Agency considered the explanation submitted by the petitioner, but not satisfied with the explanation offered by the petitioner filed charge sheet. The Trial Court also considered the explanation offered by the petitioner, but concluded that such facts have to be proved by the evidence and at this stage, the petitioner cannot be discharged for various offences mentioned supra. In any view of the matter, in view of the limited jurisdiction of this Court, it is difficult to undertake calculations and valuation of the properties at this stage. Though, the petitioner filed this petition on various grounds, more particularly purchase of the properties in the name of individuals i.e. benami transactions, such ground cannot be decided at this stage.

The word benami transaction is defined under Section 2(a) of Benami Transactions (Prohibition) Act, 1988, which is as under:

> ***Benami transaction' means any transaction in which property is transferred to one person for a consideration paid or provided by another person.***

To treat whether a transaction is benami transaction, the prime consideration is payment of sale consideration by the petitioner and obtaining document in the name of his wife, children and mother. Several tests are laid down by various High Courts to find out whether a transaction is a benami transaction or not. In **Rama Rao v. Srikrishna Murti**[2], this Court laid down the following tests to decide whether a document is benami or not:

1. Motive for taking the sale deed in the name of another,
2. Custody of the sale deed the connected vouchers,
3. Passing of consideration; and
4. Possession of the property.

The Supreme Court in **Kedarnath v. Prahalad Rai**[3]**,** held that to decide whether a particular transaction is benami or not, the source of money always will be a very valuable test.

In Binapani Paul Vs. Pratima Ghosh and Ors.[4], the Supreme Court had an occasion to discuss whether transaction in question was a Benami transaction and held that, Court has to gather the intention of the concerned parties on the basis of the circumstances surrounding the transaction. Intention have to gathered from the totality of the circumstances both preceding and

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[2] AIR 1962 AP 226
[3] AIR 1960 SC 213
[4] AIR 2008 SC 543

subsequent to the transaction in question and if the intention of the person providing for the fund for purchasing the property has a major role to play, determination of mode is significant. It is well-settled that intention of the parties was the essence of the Benami transaction and the money must have been provided by the party invoking the doctrine of Benami and the evidence clearly shows that the original Plaintiff did not have any justification for purchasing the property. The Ratio Decidendi laid down by the Apex Court in the said case is to determine transaction as Benami the Court has to gather the intention of the concerned parties from the totality of the circumstances surrounding the transaction. The Apex Court further held that reliance cannot be placed on an Act, which did not exist at the time of transaction of a property to determine issues related to property.

In a Constitutional Bench decision in **Kanakarathanammal v. V.S. Loganatha Mudaliar**[5], the Apex Court had an occasion to deal with the question of providing money to the wife, the purpose for purchase of the property *vis-a-vis* a transaction which was benami in nature. For the purpose of inferring acknowledgement and/ or admission by husband that the property was purchased by his wife, this Court, upon taking into consideration the provisions of Mysore Hindu Law Women's Rights Act (10 of 1933), opined as follows:

> "12. We have carefully considered the arguments thus presented to us by the respective parties and we are satisfied that it would be straining the language of Section 10(2)(b) to hold that the property purchased in the name of the wife with the money gifted to her by her husband

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[5] [1964] 6 SCR 1

> should be taken to amount to a property gifted under Section 10(2)(b). The argument about the substance of the transaction is of no assistance in the present case, because the requirement of Section 10(2)(b) is that the property which is the subject-matter of devolution must itself be a gift from the husband to the wife. Can we say that the property purchased under the sale deed was such a gift from the husband to his wife? The answer to this question must clearly be in the negative. With what funds the property is purchased by the female is irrelevant for the purpose of Section 10(2)(d); so too the source the title to the fund with which the said property was purchased. All that is relevant to enquire is: has the property been purchased by the female, or has it been gifted to her by her husband? Now, it seems clear that in deciding under which class of properties specified by Clauses (b) &(d) of Section 10(2) the present property falls, it would not be possible to entertain the argument that we must treat the gift of the money and the purchase of the property as one transaction and hold on that basis that the property itself has been gifted by the husband to his wife. The obvious question to ask in this connection is, has the property been gifted by the husband to his wife, and quite clearly a gift of immovable property worth more than Rs 100 can be made only by registered deed. The enquiry as to whether the property was purchased with the money given by the husband to the wife would in that sense be foreign to Section 10 (2)(d) gift of money which would fall under Section 10(2)(b) if converted into another kind of property would not help to take the property under the same clause, because the converted property assumes a different character and falls under Section 10(2)(d). Take a case where the husband gifts a house to his wife, and later, the wife sells the house and purchases land with the proceeds realised from the said sale. It is, we think, difficult to accede to the argument that the land purchased with the sale-proceeds of the house should, like the house itself, be treated as a gift from the husband to the wife; but that is exactly what the appellants argument; will inevitably mean. The gift that is contemplated by Section 10(2)(b) must be a gift of the very property in specie made by the husband or other relations therein mentioned. Therefore, we are satisfied that the trial court was right in coming to the conclusion that even if the property belonged to the appellants mother, her failure to implead her brothers who would inherit the property along with her makes the suit incompetent. It is true that this question had not been considered by the High Court, but since it is a pure point of law depending upon the construction of Section 10 of the Act, we do not think it necessary to remand the case for that purpose to the High Court."

In **Thakur Bhim Singh (Dead) By LRs and Anr. v. Thakur Kan Singh**[6] it has been held that the true character of a transaction is governed by the intention of the person who contributed the purchase money and the question as to what his

[6] [1980] 2 SCR 628

intention was, has to decided by:

(a) Surrounding circumstances
(b) Relationship of the parties
(c) Motives governing their action in bringing about the transaction and
(d) Their subsequent conduct.

This aspect of the matter has been considered by the Apex Court in **Jaydayal Poddar (Deceased) Through L.Rs. and Anr. v. Mst. Bibi Hazira and Ors[7]**, wherein this Court held:

> ...The essence of a benami is the intention of the party or parties concerned; and not unoften, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation, and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. Though the question, whether a particular sale is benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid test, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the Courts are usually guided by these circumstances: (1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour; (4) the position of the parties and the relationship, it any, between the claimant and the alleged benamidar; (5) the custody of the title-deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale.

Source of money had never been the sole consideration. It is merely one of the relevant considerations but not determinative in character. [See **Thulasi Ammal v. Official Receiver, Coimbatore[8]**].

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[7] [1974] 2 SCR 90
[8] AIR 1934 Mad 671

In **Protimarani Debi and Anr. v. Patitpaban Mukherjee and Ors[9]**, the Calcutta High Court observed:

> The correct proposition was stated in Official Assignee of Madras v. Natesha Gramani [AIR1927Mad194] . There is no presumption that when a property stands in the name of a female the Court will immediately jump to the conclusion without any proof that it really belongs to the husband of the female. Before such a presumption is raised or attracted it is necessary for the person who wants to make out that the property is not the property of the female, in whose name the document stands, to establish the fact that the consideration money for the purpose had come from the husband.

In view of the law declared by the Apex Court and various Courts the question of benami transaction can be decided only after trial, but not at this stage. Therefore, on this ground, it is difficult to accept the contention of the learned counsel for the petitioner.

To decide a petition under Section 239 Cr.P.C, the important requirement is to consider the material produced along with the charge sheet under Section 173 Cr.P.C, verify, scrutinise and find out whether there is any *prima facie* case made out against the petitioner. But, unfortunately, the petitioner who produced no document along with the report, except filing copy of the charge sheet and annexures thereto and submitted an explanation to the department before filing charge sheet. Therefore, this Court is unable to verify the material produced before the Court below along with the charge sheet filed under Section 173 Cr.P.C. When the petitioner and the respondent did not produce any document filed along with the charge sheet before the Court below, this Court

[9] 60 CWN 886

has no other option, except to concur with the findings recorded by the Court below.

It appears from the record that before the Court below, the petitioner did not produce any other material except the material produced before this Court, thereby disabling both the Courts to verify whether there is any *prima facie* material to proceed against the petitioner from the proposed charges are groundless. In such case, the order passed by the Court below cannot be faulted on any of the grounds raised in the criminal revision petition. Hence, I find no illegality in the order passed by the Court below, since the grounds urged shall be answered only at the end of the trial and at this stage, this Court cannot decide such grounds at pre-trial stage. Hence, the criminal revision case is liable to be dismissed.

In the result, the criminal revision case is dismissed.

Consequently, miscellaneous applications pending if any, shall stand dismissed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date:

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