

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

Crl. R.C Nos.650 & 652 of 2016

ORDER:

These petitions are filed under Sections 397 and 401 of Cr.P.C questioning the legality, propriety and regularity of the order in Crl.MP.No.768 of 2013 and Crl.M.P.No.770 of 2013, respectively, in C.C.No.23 of 2010 pending on the file of the Principal Special Judge for SPE & ACB Cases-cum-IV Additional Chief Judge, City Civil Court, at Hyderabad.

2. The petitioners in Crl.R.C.No.650 of 2016 are the accused Nos.1 and 2 and the petitioner in Crl.R.C.No.652 of 2016 is accused No.5 in C.C.No.23 of 2010. They will, herein after, be referred as petitioners for convenience.

3. The petitioners filed petitions under Section 239 of Cr.P.C before the Court below to discharge the petitioners for the offences punishable under Sections 408, 468, 471 & 120 (B) I.P.C r/w Sections 13 (1) (d) clause II & III of P.C.Act, 1988.

4. The petitioners are the accused Nos.1, 2 and 5 in the charge sheet laid by the respondents alleging that accused Nos.1 and 2 registered the park land measuring 600 yards showing it as house bearing Nos.1-8-450/1/A/160 and 1-8-450/1/A/159 (issued by MCH to their houses admeasuring 300 sq.yards each) in favour of R.Satya Kumar (A-6) and M.F.Peter (A-7) vide sale deeds No.1352/96 and 1351/96 dated 12.06.1996. On 16.10.1998, the petitioners have also executed a Rectification Sale Deed in Vallabhanagar Registration Office, Ranga Reddy

District in respect of the property which was earlier registered by them as houses and in rectification deeds, it is described as open plots bearing Nos.S1 & S2 by mis-using the G.O.Ms.No.522 dated 20.07.1988.

5. The petitioner in CrI.R.C.No.652 of 2016 is accused No.5 who worked as Deputy Collector, later joined in APHB as Secretary on deputation from 1995 to 1998 and later retired from service. He conspired with A1 & A2 and prepared a false note in LAQ.No.6205 describing that the land is not a vacant site reserved for park, though he was having knowledge that it was left for park place, as disclosed by the original plan available in APHB Office. Thus, accused No.5 committed the offences punishable under Section 120 (B) IPC r/w Sections 13 (1) (d) clause II & III of P.C.Act, 1988.

6. All the three petitioners raised identical grounds. Following are the few grounds identical in both the petitions.

1. The trial Court while deciding the discharge petition filed by the accused No.1 and 2 is under obligation to appreciate the prosecution in the charge sheet and to find out whether the allegations are sufficient to bring home the guilt of accused for the offences punishable under Sections 408, 468, 471 & 120 (B) I.P.C. r/w Sections 13 (1) (d) clause II & III of the Act against A1 and A2 and A5.
2. The Court below also did not consider the material on record to find out whether those allegations would constitute any of these offences i.e., criminal breach of trust, forgery, tampering of record etc.,

3. The Court below also failed to consider the evidence set up by the petitioners as to the nature of land and contrary to principle laid down in ***State of Orissa vs. Debendra Nath Padhi***¹ dismissed the petition on wrong appreciation of facts. So also in ***Ajay Kumar Parmar vs. State of Rajasthan***² wherein it was held that it is permissible to consider the defense evidence, if such material convincingly establishes that the whole prosecution version is totally absurd, preposterous or concocted. Ignoring the basic principles for deciding a petition under Section 239 Cr.P.C dismissed the petition filed by the petitioners.

7. Petitioners contend that they produced lot of material before the Court below, more particularly, averments in the writ petitions, which was dismissed, later restored and remanded by the Supreme Court in the appeal and if these documents have been considered, the court would have allowed these applications discharging the petitioners for the offences punishable under Sections 408, 468, 471 & 120 (B) I.P.C. r/w Sections 13 (1) (d) clause II & III of the Act.

8. The 2nd respondent filed counter affidavit alleging that the employees of Indian Airlines formed an association “Indian Aircraft Technicians Association” i.e., I.A.T.A which is registered. The registered Association approached the State Government for allotment of site for residential houses to its members. The State Government acquired open land admeasuring Ac.12.24 gts in Begumpet Village, Hyderabad in Sy.No.194/11part under the

¹ (2005) 1 SCC 568

² (2012) 12 SCC 406

Land Acquisition Act, 1894 on 10.06.1975 for the purpose of construction of houses for the staff of Indian Airlines. Initially 168 plots/houses were envisaged, however on technical grounds, the HUDA sanctioned 159 plots/houses i.e., Type 'A' 50 and Type 'B' 109 respectively. The HUDA, in the year 1980 sanctioned the layout by G.O.Rt.No.4 (H) M.A & U.D. dated 20.02.1986 and the State Government accorded permission to A.P.H.B to take up construction of 159 houses. Accordingly approved the layout vide L.P.No.2/85 of LPD-1/HUDA in file No.8789/PD/HUDA/84 with open space of 600 sq.yards for park and the A.P.H.B. vide Lr.No.Paigah/TCH/REGARU/81-82 dated 08.09.1994 submitted blue prints to Special Officer, MCH for permission for construction of proposed 159 houses. The accused in the above CC colluded and tampered the official records and without any authority, the accused Nos. 1 and 2 fraudulently sold the land and executed registered sale deeds in respect of the property belonging to Government admeasuring 600 sq.yards earmarked for children park in favour of accused Nos.6 and 7 who are not the beneficiaries vide registered document Nos.1351 of 1996 and 1352 of 1996, each 300 sq.yards by showing fictitious House numbers i.e., H.No.1-8-450/1/A/159 and 1-8-450/A/160 and later rectifying them into plots S1 and S2. The accused No.1 later obtained permission from MCH for construction of multistoried commercial complex in the land earmarked for the park by false representation and forgery. These illegal acts of the petitioners/A1 and A2 would constitute offences punishable under Sections 408, 468, 471 IPC, whereas the Accused No.5 colluded with other accused and committed the breach of trust,

forgery, criminal conspiracy and abuse/misuse of powers by the Government servants and thereby committed an offence punishable under Section 120 (B) I.P.C. r/w Sections 13 (1) (d) clause II & III of the Act.

9. It is also specifically contended that the averment, that plot Nos.S1 and S2 along with two unfinished houses were handed over to IATA by Engineering Department of APHB on 04.02.1991, is false, as the said open plots S1 and S2 does not exist as per the original plan and the averment of handing over open plots S1 and S2 is clear admission of the petitioner/A-5 in committing the offence.

10. Accused No.5 is an officer who manipulated the records and put up a note in LAQ No.6205 (document No.34 to 35), with regard to sale of 600 sq.yards located at the entrance of IATA colony earmarked for park, though the said land is reserved for park and putting up such note by A-5, who is holding the post of Secretary of APHB, is nothing but an abuse of exercise of power. Therefore, he committed a serious offence punishable under Section 120 (B) I.P.C. r/w Sections 13 (1) (d) clause II & III of the Act.

11. The law laid down by Apex Court in ***State of A.P. v/s. Cheemalapati Ganeswara Rao & Another³ and Vijayan v/s State of Kerala⁴*** holding that where offences have been committed in pursuance of conspiracy, it is legally permissible to charge the accused with these offence as well as with the

³ AIR 1963 SC 1850

⁴ (1999) 3 SCC 54

conspiracy to commit those offences. Conspiracy is entirely an independent offence and though other offences are committed in pursuance of conspiracy, the liability of the conspirators for the conspiracy itself cannot disappear. It is also held that to bring home the charge of conspiracy within the ambit of Section 120-B I.P.C, it is necessary to establish there was an agreement between the parties for doing unlawful act. It is no doubt true that it is difficult to establish conspiracy by direct evidence and, therefore, from the established facts an inference could be drawn but there must be some material from which it would be reasonable to establish a connection between the alleged conspiracy and the act done in pursuant to the said conspiracy.

12. Therefore, the law of the land is clearly applicable to the present facts of the case and thereby came to a conclusion that there is a prima facie case to proceed against these petitioners to constitute an offence punishable under Sections 408, 468, 471 & 120 (B) I.P.C. r/w Sections 13 (1) (d) clause II & III of the Act, requested to dismiss the petition.

13. During hearing, learned senior counsel for the petitioners, Sri Mahmood Ali, contended that the dispute with regard to sale of the property is subject matter of W.P.No.25738 of 1997 and Civil Appeal No.9583 of 2003. In fact the writ petition was dismissed for default and was restored by this Court and now it is pending. Further, when the dispute with regard to the property is the subject matter of writ petition in Civil Appeal and when W.P.Nos.12538 of 1997 and 25738 of 1997 are pending, the trial Court ought to have discharged these petitioners for the

offences punishable under Sections 408, 468, 471 & 120 (B) I.P.C. r/w Sections 13 (1) (d) clause II & III of the Act in C.C.No.23 of 2010. The Enquiry Officer, IV Additional Chief Judge-cum-Principal Session Judge for SPE and ACB cases, City Civil Court at Hyderabad appointed by this Court in writ petitions also filed a report observing that there is absolutely no material on record to show that the site in dispute is retained for park. The Hon'ble Supreme Court while disposing of Civil Appeal Nos.9582/2003 and 9583/2003 filed by these petitioners/accused 1 and 2 challenging the judgment dated 16.10.2001 passed by this Court in W.P.No.12538/1999 and W.P.No.25738/1997 remanded the matter to this Court for reconsideration of the documents brought on record before the Court. Later, the appeals were dismissed and also restored and as on today these writ petitions are pending before this Court. Even otherwise allegations made in the charge sheet on its face value would not constitute offences punishable under Sections 408, 468, 471 & 120 (B) I.P.C. r/w Sections 13 (1) (d) clause II & III of the Act. Therefore, the petitioners are liable to be discharged for the offences punishable under Sections 408, 468, 471 & 120 (B) I.P.C. r/w Sections 13 (1) (d) clause II & III of the Act. The Court below instead of discharging the petitioners based on material on record erroneously concluded that the material filed along with the report under Section 173 Cr.P.C alone shall be taken into consideration and thereby dismissed the applications erroneously.

14. Per contra, the counsel for the respondents contended that the voluminous material to establish that the properties sold by petitioners/accused 1 and 2 in favour of accused No.6 and 7 cannot be taken into account as the site is reserved for public purpose i.e., park, and the sale of the same by the petitioners would constitute an offence punishable under Sections 408, 468, 471 & 120 (B) I.P.C. r/w Sections 13 (1) (d) clause II & III of the Act. The petitioners shown the property initially as House No.1-8-450/1/A/159 and 1-8-450/1/A/160 and later executed rectification deeds and shown them as open plots bearing Nos.S1 and S2 and obtained permission from the Municipal Corporation for construction of multistoried buildings in the property. Therefore, the act of the petitioners 1 and 2 would constitute an offence punishable under Sections 408, 468, 471 of IPC and the act of accused No.5 would constitute an offence punishable under Sections 120 (B) I.P.C. r/w Sections 13 (1) (d) clause II & III of the Act, as they committed the said Act by taking advantage of their official position, and prayed to confirm the order passed by the Court below and dismiss these two revision petitions.

15. Perusing the material available on record, the points that arise for consideration are as follows:

“1. Whether the petitioners/accused Nos.1, 2 and 5 in C.C.No.23 of 2010 pending on the file of Principal Special Judge for SPE & ACB Cases-cum-IV Additional Chief Judge, City Civil Court, at Hyderabad, committed any offence, prima facie?

2. Whether the allegations made in the charge sheet would constitute the offence punishable under Sections 408, 468, 471 & 120 (B) I.P.C. r/w Sections

13 (1) (d) clause II & III of the Act. If so, are they liable to be proceeded framing charges for the various offences stated above?”

POINTS 1 & 2:

16. The petitioners, who are the accused 1, 2 and 5 in C.C.No.23 of 2010, filed CrI.M.P.Nos.768 of 2013 and 770 of 2013 under Section 239 of Cr.P.C. to discharge them for the offences punishable under Sections 408, 468, 471 & 120 (B) I.P.C. r/w Sections 13 (1) (d) clause II & III of the Act by raising various contentions. But these petitions were dismissed by the Court below by separate orders vide order dated 29.10.2015.

17. The orders are now under challenge before this Court on various grounds stated supra.

18. It is the contention of the prosecution that A1 and A2 sold 600 sq.yards of land reserved for public purpose i.e., park, in favour of A6 and A7, each 300 sq.yards, for consideration of Rs.1,80,000/-, though the market value was Rs.18 lakhs per plot i.e., 300 sq.yards. A resolution was passed in the General Body meeting of the Association and obtained permission from Municipal Corporation of Hyderabad (MCH) by filing an affidavit. The HUDA authorities inspected the site and addressed letter to MCH, while the commercial complex is under construction. In spite of information received from HUDA vide Lr.No.P7/HUDA/97, dated 07.07.1997, the MCH authorities failed to stop the illegal construction or cancel the permission granted. The accused also rectified the sale deed describing the property as S1 and S2 (vacant plots). On the basis of said facts,

the omissions of the petitioners/accused 1 and 2, a complaint was lodged by P.Venkateshwarlu, who is a member of the society and the Additional Director General of CID on the strength of the same, completed investigation and filed charge sheet.

19. The main contention before this Court is that the Court below did not take into consideration the material produced before the Court and that when the writ petitions are pending with regard to subject property of the above CC in W.P.Nos.12538 of 1997 and 25738 of 1997, any finding recorded in CC would cause prejudice to petitioners' case in writ petitions and thereby petitioners are liable to be discharged.

20. Before advertent to the contentions raised before this Court it is apposite to examine the scope of Section 397 and 401 of Cr.P.C., with reference to Section 239 Cr.P.C.

21. The present revision 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 I.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.

22. According to section 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.

23. 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.

24. 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**”⁵

25. In **Manakshi Bala Vs. Sudhir Kumar**⁶ and **Kanti Bhadr Shah And Anr. Vs The State of West Bengal**⁷, the Apex Court while deciding an appeal in a petition filed for discharge held that Magistrate at the stage of discharge petition filed under Section 239 Cr.P.C., Magistrate has to record his reasons for discharging the accused, but there is no such requirement if he forms an opinion that there is a ground for presuming the accused had committed an offence which he is competent to try. In such situation he is only required to frame a charge in writing against the accused. Even in cases instituted otherwise than on police report, the Magistrate is required to write an order showing the reasons only if he is to discharge the accused. This is clear from

⁵ AIR 2010 SC 663

⁶ [1994] INSC 308

⁷ AIR 2000 SC 522

Section 245. As per sub-section(1) of Section 245, if a Magistrate, after taking all the evidence considers that no case against the accused has been made out which if unrebutted would warrant his conviction, he shall discharge the accused. As per sub-section (2) of Section 245, the Magistrate is empowered to discharge the accused at any previous stage of the case if he considers the charge to be groundless. On both sub-sections he is obliged to record his reasons for doing so.

26. In this context, it is pertinent to point out that even in a trial before a Court of Sessions, the Judge is required to record reasons only if he decides to discharge the accused. But if he is to frame the charge he may do so without recording his reasons for showing why he framed the charge.

27. In later judgment reported in ***Sheoraj Singh Ahlawat & Ors vs. State of Uttar Pradesh & Anr***⁸ in Criminal Appeal No.1803 of 2012, the Apex Court on elaborate consideration of entire law regarding discharge, relying on ***State of M.P. v. Mohanlal Soni***⁹ and ***State of Maharashtra & Ors v. Som Nath Thapa and Ors***¹⁰ held that if on the basis of material 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

⁸ AIR 2013 SC 52

⁹ 2000 Cri.LJ 3504

¹⁰ 1996 Cri.LJ 2448

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. So also in Mohanlal's case, it is made clear that 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 and the court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused.

28. Similarly in ***State of Orissa v. Debendra Nath Pandhi***(1 supra) the Apex Court held as follows:

“18. We are unable to accept the aforesaid contention. The reliance on Articles 14 and 21 is misplaced. Further, at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. It is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision

about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police.”

29. In earlier judgment reported in ***Union of India v. Prafulla Kumar Samal and Anr***¹¹ the Apex Court laid the following principles:

- (1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out
- (2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be, fully justified in framing a charge and proceeding with the trial.
- (3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.
- (4) That in exercising his jurisdiction under section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the

¹¹ (1979) 3 SCC 4

matter and weigh the evidence as if he was conducting a trial.

30. Based on various principles laid down in the judgments referred supra, Apex Court concluded that when the allegations made against the accused are specific and having concluded that those allegations would constitute *prima facie* offence, 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. It is well settled that, at the stage of framing of charge, the defence of accused cannot be put forth. The submissions of the accused has to be confined to the material produced by the police. Clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material as held in **Onkar Nath Mishra and Ors vs. State (NCT of Delhi) and Anr¹²** and **State of Maharashtra & Ors v. Som Nath Thapa & Ors¹³** and **Mohanlal Soni's case**(8 supra) and **State of Orissa v. Debendra Nath Pandhi**(1 supra).

31. Learned counsel for the petitioner also relies on two judgments of Apex Court in **Debendra Nath** (1 supra) which I referred and in **Ajay Kumar Parmar vs. State of Rajasthan**(2

¹² (2008) 2 SCC 561

¹³ 1996 Cri.LJ 2448

supra) in paragraph 16 of the judgment, the Court held that it was not permissible for the Judicial Magistrate to take into consideration the evidence of defence produced by the appellant as it has consistently been held by this Court that at the time of framing the charge, the only documents which are required to be considered are the documents submitted by the investigating agency along with the charge sheet. Any document which the accused wants to rely upon cannot be read as evidence. If such evidence is to be considered, there would be a mini-trial at the stage of framing of charge. That would defeat the very object of the code. Even for hearing submission of accused as per Section 227 means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. Even if, in a rare case it is permissible to consider the defence evidence, if such material convincingly establishes that the whole prosecution version is totally absurd, preposterous or concocted.

32. In view of the law declared by the Apex Court in various judgments referred supra as to considering an application filed under Section 239 Cr.P.C, at the stage of framing charges, the duty of the court is only to look into allegations made in the final report and the documents annexed to it including statements of witnesses recorded and examined during investigation, and afford an opportunity to the accused to advance arguments. But said argument must be connected to the material on record i.e., allegations in charge sheet and documents filed along with report under Section 173 Cr.P.C, not more than that. The accused is

not entitled to produce any documents and adduce any evidence at the time of framing charges or at the time of disposal of petition filed under Section 239 Cr.P.C.

33. In view of the law declared by the Apex court in various judgments referred supra and scope of jurisdiction of this Court under Section 397 and 401 of Cr.P.C., it is appropriate to advert to allegations made in the charge sheet.

34. A1 is the Secretary of India Aircraft Technicians Association and A2 is the Chairman of Indian Aircraft Technicians Association, who jointly sold away 600 sq. yards earmarked for park at the entrance of the colony, after passing resolution in general body meeting of the society and executed sale deed in favour of A6 and A7 for Rs.1,80,000/- each, though the value of the property allegedly is more than Rs.18 lakhs on the date of execution, as if there were two houses in the site mentioning Door Nos.1-8-450/1/A160 and 1-8-450/1/A/159, but later executed rectification deeds rectifying the mistake describing the property as plot Nos. S1 and S2 in place of house numbers, and obtained permission of Municipality for construction of houses. These documents would suffice to conclude that the land reserved for public purpose i.e., earmarked for park as per the layout which is situated at the entrance of the colony was sold by these two persons i.e., accused Nos. 1 and 2, taking the aid of A5, who is the Secretary of APHB intentionally put up a note in LAQ No.6205 describing the property as house though it is earmarked for park. Therefore, A1, A2 and A5 conspired together and sold the land to

A6 and A7, though it belongs to the Government as it was reserved for public purpose i.e., park, which is meant for residents of colony or other public. Therefore, the sale of public property by accused No.1 and 2 by tampering records and execution of sale deeds and rectification deeds would amount to an offence. The voluminous material produced before this Court by respondent No.2 along with counter affidavit would show that petitioners taking advantage of positions as Secretary and Chairman of IATA i.e, India Aircraft Technicians Association and Indian Aircraft Technicians Association converted the public site into private site, sold to A6 and A7. The respondent -HUDA filed an affidavit in W.P.No.12538 of 1999 and W.P.No.25738 of 1997 supporting the case of the respondents. According to the allegations made in the affidavit filed by HUDA and the annexed report filed by the Enquiry Officer cum I Additional Chief Judge would disclose that no park is existing as on date of inspection but that does not mean that the site was not reserved for public purpose.

35. Accused No.1 and 2 on the request of Enquiry Officer furnished a layout by Regional Housing Engineer APHB and APHB also addressed a letter dated 07.10.1996 stating that APHB handed over unfinished work to the Society vide its letter dated 04.01.1989 but as per the letter of MCH bearing Lr.No.10/TP/CCB/96/1929, dated 17.10.1996, the accused No.1 and 2 submitted an application in the capacity of Chairman and Secretary of India Aircraft Technicians Association and Indian Aircraft Technicians Association for approval of plan in

Plot Nos.S1 and S2, earmarked for commercial purpose, in the layout plan of the housing board. The accused Nos.1 and 2 submitted an affidavit stating that S1 and S2 did not form part of open space earmarked for park and executed a bond in favour of MCH to indemnify the loss caused due to any litigation and that plan was sanctioned and finally concluded that as on the date of inspection there was no site meant for park.

36. A suit in O.S.No.151 of 1999 on the file of I Additional Chief Judge was also filed by the Vice Chairman & Housing Commissioner of APHB who was arrayed as 1st defendant in the suit filed by the 7th accused, where the HUDA contended that Chairman and Secretary of the Association have no right to execute registered sale deeds in respect of plot Nos.S1 and S2 and they are the plots earmarked as park in the approved layout. As such the said construction by the plaintiff therein are illegal and contrary to rules and regulations and bye-laws of Municipal Corporation. This assertion is suffice to conclude that even according to HUDA the property in dispute is ear marked for park. The respondent after completion of investigation filed charge sheet before the Court below for various offences.

37. The petitioners allegedly committed the offences punishable under Sections 408, 468, 471 & 120 (B) I.P.C r/w Sections 13 (1) (d) clause II & III of P.C. Act, 1988.

38. Section 408 of I.P.C deals with punishment of Criminal breach of trust by clerk or servant.

39. Criminal breach of trust is defined as follows:

“Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits “criminal breach of trust”.

40. To constitute an offence of criminal breach of trust, there must be entrustment with the property and if there is no allegation in the charge sheet that the property was entrusted, it would not constitute an offence punishable under Sections 406, 407 or 408 of I.P.C.

41. The basic requirements to bring home the accusations under Section 405 of the Code are the requirements to prove conjointly (i) entrustment and (ii) whether the accused was actuated by dishonest intention or not, misappropriated it or converted it to his own use to the detriment of the persons who entrusted it; ***Sadhupati Nageswara Rao v. State of Andhra Pradesh¹⁴***.

42. In the present case, according to the allegations made in the charge sheet and material available on record, A1 and A2 being Secretary and Chairman of the Association, who is having over all control over the affairs of the Society including the place earmarked for public purpose, got passed a resolution for sale of the property and sold the property for Rs.1,80,000/- each to A6

¹⁴ AIR 2012 SC 3242

and A7 by executing registered sale deeds, thereafter rectification deeds. When the property was entrusted to Society which is being managed by A1 and A2 and sale of the same at lower price than prevailing market value, prima facie, would constitute an offence as defined under Section 405.

43. Whether the petitioners committed breach of trust as clerk or servant is a different question. But the allegations made in the charge sheet may attract an offence punishable under Section 406 at least, prima facie.

44. The other offence allegedly committed by the accused Nos.1 and 2 is punishable under Section 406 i.e., forgery for the purpose of cheating.

45. Forgery is defined under Section 463 of I.P.C which reads as follows:

“Whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury], to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.”

46. The basic elements of forgery are:----- (1) the making of a false document or part of it and (2) such making should be with such intention as is specified in the section, viz., (a) to cause damage or infringe to (i) the public, or (ii) any person; or (b) to support any claim or title; or (c) to cause any person to part with property, or (d) to cause any person to enter into an express or implied contract; or (e) to commit

fraud or that fraud may be committed; **Sushil Suri v. Central Bureau of Investigation**¹⁵.

47. In the present case, the allegations made in the charge sheet are that the petitioners fabricated the documents and sold to A6 and A7 describing the property as houses bearing Nos. No.1-8-450/1/A/160 and 1-8-450/1/A/159 though it was a open space earmarked for public purpose i.e., for park, and later executed rectification deeds substituting plot Nos.S1 and S2 in two documents executed in favour of accused Nos.6 and 7 and obtained permission to raise multistoried shopping complex in the earmarked property at the entrance of IATA colony. The entire case would show that with a view to cheat members of the Association executed said documents and thereby caused damage to the members of the Association. Consequently, allegations made in the charge sheet would constitute an offence punishable under Section 468 IPC, prima facie.

48. Other offences allegedly committed by the petitioners are punishable under Section 471 I.P.C i.e., “Using as genuine a forged [document or electronic record].

49. According to it whoever uses as genuine a forged document or electronic record which he knows or has a reason to believe to be a forged [document or electronic record], shall be punished in the same manner as if he had forged such [document or electronic record].

¹⁵ AIR 2011 SC 1713

50. Here the record was tampered with the help of A5 by A1 and A2 and made the accused Nos.6 and 7 to believe that the property sold to them under two registered sale deeds is not the earmarked property for park and used said forged document as a genuine document and executed sale deeds thereby causing loss to them.

51. The allegations made in the charge sheet and the documents produced along with charge sheet under Section 173 of Cr.P.C prima facie constitute an offence punishable under Section 471 IPC.

52. The other offences allegedly committed by the petitioners/accused Nos.1, 2 and 5 is punishable under Section 120 (B) IPC,

53. Section 120 (B) I.P.C deals with Punishment of criminal conspiracy. But the offence under criminal conspiracy is defined under 120 (A) I.P.C.

54. According to Section 120 (A) when two or more persons agree to do, or cause to be done:

- (1) an illegal act, or
- (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy.

55. When charge sheet is filed for the offence punishable under Section 120-B I.P.C, the prosecution must satisfy the necessary ingredients. They are:

There must be an agreement to do or caused to be done an illegal act by illegal means. Therefore, the prime requirement is agreement to commit an offence.

Mere proof of such agreement is sufficient to establish criminal conspiracy; ***Sushil Suri V. Central Bureau of Investigation***¹⁶.

56. The essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both. Direct evidence to prove conspiracy is rarely available and, therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused. The offence of criminal conspiracy as defined under Section 120 A can be inferred from the circumstances and it is difficult for any one to prove such offence by direct evidence.

57. More curiously in the dispute between ***P. Venkateswarlu v. Govt. of A.P. and others***¹⁷, the Division Bench of this Court had an occasion to decide the dispute between the parties with regard to the present dispute and held that in terms of Section of 22(j) of the 1956 Act, the Housing Board notwithstanding anything contained in any other law for the time being in force, may make the provision of parks, play fields and open space, for the benefit of public, of any area comprised in the scheme or any adjoining area and the enlargement of existing parks, play-fields, open spaces and approaches. The aforementioned provision clearly goes to show that the Housing Board had no jurisdiction to carry out any other activity, than the one prescribed in the Master Plan layout earmarked as “park”. The Court while considering such a matter is not concerned with the

¹⁶ AIR 2011 SC 1713

¹⁷ 2001 (6) ALD 533 (DB)

consequences particularly where it concerns ecology. A park provides for some lung space. It is well settled that the community requires certain lung space and may also use open space for sports and other recreational activities. Parks or wetlands are also necessary for the purpose of maintaining ecological balance. The doctrine of 'public trust' applies in relation to park where for the open space is earmarked for the purpose of park, and it becomes the statutory duty of the local authorities and other statutory bodies to maintain the same. The authorities of the Board have no right to do away therewith unless the Master Plan is modified in terms of the provisions of Section 12 of the 1975 Act read with Rules 13 and 13-A of the 1977 Rules. The development Act, as noticed hereinbefore, envisages preparation of a Master Plan, which consists of various zones-the user of such zone is specified therein. Stages of development are also specified. A planned development is contemplated under the Master Plan and Zonal Development Plans. While doing so, larger public interest must be kept in view. A creature of a statute therefore cannot be permitted to violate the provisions of the Act whereunder it was created. A combined reading of the provisions of Sections 12 and 57 of the Act read with Rules 13 and 13-A of the 1977 Rules leave no manner of doubt whatsoever that even if any action is taken in derogation of the provisions of the Master Plan and Zonal Development Plan, the same would not be a lawful act.

58. In the above judgment, the dispute with regard to park layout and construction of house therein came up before this

Court more particularly with regard to 600 sq.yards abutting S.P.Raod which was earmarked for park. By G.O.Rt.No.4 (Housing) dated 20.02.1986, the Division Bench of this Court recorded the findings in paragraphs 32, 33 and 34 as stated above. Thus, in view of the law declared by Division Bench, the area in question i.e., 600 sq.yards was shown as park in the Master Plan. The layout plan can be changed or altered only in terms of the 1975 Act. The Housing Board states that it has no jurisdiction to change the layout plan. But it is contrary to law and therefore W.Ps were allowed holding as follows:

“47.In the instant case, some disturbing features have come to our notice apart from the fact that the original layout plan (Master Plan) of the Municipal Corporation had been tampered with.

48. The records show existence of four different associations, of which one is registered, in whose favour orders have been passed from time to time, although the purported acquisition was made only for the benefit of the members of one association.

49. Sale-deeds have been executed by persons, who are not authorised therefor, and in contravention of the provisions of the 1956 Act, which authorises only the Vice-Chairman to execute a Deed of Sale. We fail to understand even if the said Act provides a delegation of power as to how the same can be delegated in favour of a private individual, who is not an officer of the Housing Board. Glaring mistakes occurred in the said sale-deeds and realising the same, purported deeds of Rectification had been executed. Although in terms of the provisions of the Municipal Corporation Act and the Building Bye-laws, only a holder of a title can file an application for having a building permit, in this case vendor even after execution of the Deeds of Sale filed such an application. The

authorities of the MCH for reasons best known to them proceeded to grant permission despite the same.”

59. In view of the submissions on dispute with regard to 600 sq.yards of site earmarked for park and sale of the same by A1 and A2 with the help of A5 to A6 and A7 by execution of registered sale deeds, later rectification deeds describing it as plot Nos.S1 and S2, directly exhibits the dishonest intension. Therefore, the acts committed by petitioners A1, A2 and A5 would prima facie constitute an offence punishable under Sections 408, 468, 471 & 120 (B) I.P.C r/w Sections 13 (1) (d) clause II & III of P.C.Act, 1988.

60. It is not the contention of petitioners that charge is groundless and the allegations made in the charge sheet and material filed along with charge sheet under Section 173 Cr.P.C did not disclose any prima facie material.

61. This contention is without any basis, in view of the settlement of this issue by Division Bench decided in W.P.Nos.12538 of 1999 and 25738 of 1997. But, A1 and 2 are agitating the same issue before this Court.

62. So long as the decision of Division Bench is not set aside or reversed by any competent Court, it is binding and on the strength of the judgment, the acts done by accused Nos.1, 2 and 5 would constitute an offence punishable under 408, 468, 471 & 120 (B) I.P.C r/w Sections 13 (1) (d) clause II & III of P.C.Act, 1988.

63. The Court below by applying the principles laid down in the judgments referred in its order rightly concluded that the Court is required to go into allegations of charge sheet and the material produced in charge sheet under Section 173 Cr.P.C and on basis of such material recorded a finding that there is prima facie material to proceed against these petitioners for various offences referred supra, without going into other material produced by respondents.

64. Even on appreciation of contention of the counsel for the petitioners and respondent, I find no error in the order passed by the Court below, in view of the law laid down by the Apex Court in various judgments which I referred in earlier paras. Therefore, I find no error manifest interferes with the order passed by the Court below while exercising power under Section 397 and 401 Cr.P.C.

65. In the result, both the Criminal Revision Cases are dismissed.

M. SATYANARAYANA MURTHY, J

Date: 14.12.2017
dv