IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO. 528 OF 2016

Mandar Mahesh Goswami,
Aged 39 yrs., Indian Inhabitant,
Residing at-1301, Brooke Ville,
Mogul Lane, Mahim,
Mumbai-400 016. .....Applicant
(Orig. Accused No.4.)

Vs.

1 The Inspector of Police,
Anti Corruption Bureau, CBI,
Tanna House, Nathalal Parekh
Marg, Mumbai.

2 The State of Maharashtra .....Respondents.

Mr. Mahesh Jethmalani, Senior Advocate with Mr. Girish Kulkarni, Mr. Gunjan Mangala I/by Kuldeep Patil for the Applicant.
Mr. Anil C. Singh, ASG with Mr. Sandesh Patil, Ms. Geettika Gandhi for the Respondent No.1-CBI.
Mr. A.R. Patil, APP for the Respondent/State.

CORAM : A. S. GADKARI, J.
DATE : 5th SEPTEMBER, 2018.

<u>JUDGMENT</u>:-

By the present Revision under Section 397 of the Code of Criminal Procedure, 1973, the Applicant has impugned Order dated 15th July, 2016 passed by the learned Special Judge for CBI, Greater

Mumbai below Exhibit-11 in CBI Special Case No. 106 of 2012 arising out of RC.15(A)/2012-MUM, registered by the Respondent No.1, rejecting the Application for discharge of the Applicant from the offences punishable under Section 120-B of the Indian Penal Code and under Sections 7, 9 and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988, (for short, *"the P.C.Act"*)

2 Heard Shri. Mahesh Jethmalani, learned Senior Counsel appearing for the Applicant and Shri. Anil Singh, the learned Additional Solicitor General of India for the Respondent No.1-CBI. Perused the entire record produced before me.

3 The Accused No.1-Jawahar K. Jagiasi is the principal accused in the present crime. The Accused No.1-J.K. Jagiasi is a Chartered Accountant by profession. The Applicant (Accused No.4) was alleged to be a Public Prosecutor appointed by the Union of India and was representing the CBI in the Sessions Court as well as in the High Court and other Courts in Mumbai.

The prosecution case in brief is that, during 2011 the Applicant, a Retainer Counsel of CBI who was a Public Servant, hatched a criminal conspiracy with Shri J.K. Jagiasi, Advocate and Tax Consultant, Shri. Kanhaiyalal Gidwani, an accused in Adarsh case, Shri. Kailash Gidwani and in furtherance thereof, Shri. Kanhaiyalal Gidwani had paid an amount of Rs. 1.25 crores to Shri J.K. Jagiasi by illegal means to influence the Public Servant i.e. CBI officials to show favour and service in connection with the pending case against Shri. Kanhaiyalal Gidwani through the Applicant, the then Retainer Counsel of CBI. The said case i.e. RC 6(A)/2011 (Adarsh case) was registered by the CBI, ACB against Shri. Kanhaiyalal Gidwani and Kailash Gidwani. Out of the said money, about Rs.21 lakhs alleged to have been delivered to the Applicant, who accepted the same by corrupt or illegal means for providing inside information about the Adarsh case such as, plan of CBI to arrest the accused persons and for influencing CBI officials. It is alleged that, the said amounts were delivered to the Applicant through the staff members/ peons/office boys of Shri J.K. Jagiasi. It is the prosecution case that, Shri. Kanhaiyalal Gidwani expired on 27th November, 2012 and therefore, the Criminal Prosecution as against him stood abated. It is the further prosecution case that, the Applicant's appointment as Retainer Counsel was terminated by the CBI and therefore, no sanction to prosecute him is necessary.

After completion of investigation, the CBI has submitted the charge-sheet.

4 The Applicant preferred an Application below Exhibit-11 for discharge under Section 227 of the Code of Criminal Procedure, 1973 predominantly on the ground that, there is no sufficient material to prosecute him and to frame charge in the matter. The Respondent No. 1 filed its reply to the said Application. The Trial Court rejected the said Application by the impugned Order on the ground that, *prima facie,* there is material to proceed with the Applicant and to frame charge in the matter.

5 Shri. Jethmalani, the learned Senior Counsel appearing for the Applicant submitted that, the Applicant was appointed as a Special Counsel/Retainer Counsel for the Union of India for a period of three years with effect from 11th July, 2017 and therefore, the extracts relied upon by the prosecution pertaining to the cash book of accused No.1 Shri. J.K. Jagiasi for the period from 21st February, 2011 to 25th April, 2011, cannot be taken into account, as at that relevant time, the Applicant was not a public servant. He further submitted that, as per the documents relied upon by the prosecution, Shri. Kanhaiyalal Gidwani made last installment to Shri. J.K. Jagiasi (co-accused) on 18th March, 2011 and therefore, the entries at Serial Nos. 8 and 9 on

page No.57 of the compilation are pertaining to some different transactions. He submitted that, the cash book seized by the prosecuting agency mentions various general entries of transactions between the Applicant and Shri. J.K. Jagiasi (co-accused) without any specific reference to substantiate the allegations against the Applicant. He further submitted that, with similar set of allegations, the prosecution had earlier filed a CBI Special Case No. 62 of 2012 against the Applicant which has been quashed by this Court, by its Order dated 17th March, 2015 passed in Criminal Revision Application No. 209 of 2013. He further submitted that, the prosecuting agency is unnecessarily grinding an axe against the Applicant for the reasons best known to them.

He submitted that, the Applicant and Shri. Kanhaiyalal Gidwani both were clients of Shri. J.K. Jagiasi (co-accused) and there is no material available on record to indicate that, the Applicant demanded bribe to favour Shri. Kanhaiyalal Gidwani and to influence the Officers of CBI as alleged. That, the Applicant did not favour anybody in discharge of his official duty or even abused his official position. He submitted that, as there is no demand of bribe by the Applicant, he cannot be prosecuted for the offences alleged against him under Sections 7 and 13 of the P.C. Act.

In support of his contention, Mr. Jethmalani, relied on the following decisions of the Hon'ble the Supreme Court:-

a) *B. Jayaraj Vs. State of Andhra Pradesh*
(2014) 13 SCC 55;

b) *P. Satyanarayana Murthy Vs. District Inspector of Police, State of Andhra Pradesh & Anr.*
(2015) 10 SCC 152;

c) *Krishan Chander Vs. State of Delhi*
2016 SCC OnLine SC 10;

d) *State Through Central Bureau of Investigation Vs. Dr. Anup Kumar Srivastava*
(2017) 15 SCC 560.

He lastly submitted that, the vital chain in prosecution case of 'demand' is missing in the present case thereby connecting the Applicant with the allegation that, the money was accepted by him for giving the inside information to the accused persons in the said Adarsh case. That, there is no material on record to show that, for abusing his official position, the Applicant has accepted the alleged amount which attracts the provisions of the P.C. Act. He therefore, prayed that, the Applicant may be discharged from the case and the impugned Order may be quashed and set aside.

6 Mr. Anil Singh, the learned Additional Solicitor General of

India, *per contra*, vehemently opposed the Application and pointed out the statements of four staff members of Shri. J.K. Jagiasi (co-accused). He submitted that, the entires in the books of accounts maintained by Shri. J.K. Jagiasi (co-accused), which has been seized by the Investigating Agency, reflects that the said Shri. J.K. Jagiasi (co-accused) had made payments to the Applicant on various occasions. He submitted that, demand is understanding between the person who demands and the one who pays or who is to pay. That, demand of illegal gratification can be gathered from the facts and circumstances and no specific words are necessary for that. In support of his contention, he relied on the decision of the learned Single Judge of this Court in the case of *Dattatraya Krishnaji Joshi Vs. State of Maharashtra* reported in 1991(2) Bom. C.R. 49=1991 Cri. L.J.2097. He submitted that, *prima facie* there is sufficient material to proceed with the Applicant by framing charge. He, therefore, prayed that the present Application may be dismissed.

7 The scrutiny of material available on record indicates that, the prosecution has relied upon statements of four office boys/staff members of Shri. J.K. Jagiasi (co-accused) namely Shri. Vikas Ramsamujh, Shri. V.Daniel, Shri. David John and Shri. Jairaj

Shervekaran. The said witnesses have stated that, in the month of November/December, 2011, the Applicant, Shri. Kanhaiyalal Gidwani and Shri. J.K. Jagiasi (co-accused) had a meeting in the office of Shri. J.K. Jagiasi (co-accused). In addition thereto, witness Shri. Jairaj Shervekaran has stated that, on one occasion he under the instructions of Shri. J.K. Jagiasi (co-accused) delivered an envelop containing cash amount to the Applicant at Fountain Circle Parking Lot. The prosecution has also relied on the cash book maintained by Shri. J.K. Jagiasi (co-accused) reflecting certain entries of payment made in favour of the Applicant.

In this backdrop, it is to be noted here that, the witness Shri. David John, in his statement has stated that, in the month of June, 2011 under the instructions of Shri. J.K. Jagiasi (co-accused), he accepted a payment of Rs. Two lakhs from the Applicant near Bombay Hospital.

8 It is, thus, clear that, there were monetary transactions *inter-se* between the Applicant and Shri. J.K. Jagiasi (co-accused). As noted earlier, Shri. J.K. Jagiasi (co-accused) was a tax consultant of the Applicant. The evidence on record is silent about the fact that, the alleged meeting which took place in the office of Shri. J.K. Jagiasi (co-

accused) between the Applicant, Shri. Kanhaiyalal Gidwani and Shri. J.K. Jagiasi (co-accused) was for a specific purpose. It is apperant from record that, Shri. Kanhaiyalal Gidwani and the Applicant both were clients of Shri. J.K. Jagiasi (co-accused) and it might be a co-incidence that on a particular day, the Applicant and Shri. Kanhaiyalal Gidwani might have come in front of each other in the office of Shri. J.K. Jagiasi (co-accused) and therefore, one solitory incident of their meeting without any other corroboration cannot be treated as a substantial piece of evidence in the chain of circumstances.

9 The Investigating Agency has charged the Applicant with Sections 7 and 13 of the P.C. Act. It is the settled position of law that, insofar as the offence punishable under Section 7 of the P.C Act is concerned, the demand of illegal gratification is *sine-qua-non* to constitute the said offence and mere recovery of currency notes cannot constitute the offence under Section 7 of the P.C. Act, unless it is proved beyond all reasonable doubt that the accused voluntary accepting the money knowing it to be a bribe. It is the further settled position of law that, mere possession and recovery of currency notes from an accused without proof of demand, would not establish an offence under Section 7 as well as Section 13(1)(d) of the P.C. Act.

The proof of demand thus, has been held to be an indispensable essentiality and of permeating mandate for an offence under Sections 7 and 13(1)(d) of the P.C. Act. That, the proof of demand of illegal gratification thus, is the gravamen of the offence under Sections 7 and 13 (1)(d) of the P.C. Act and in the absence thereof, unmistakably the charge therefor, would fail. A safe reliance can be placed on the decision of the Supreme Court in the case of *P. Satyanarayana Murthy (Supra)*.

10 In the present case, there is no material available on record even to remotely infer that the Applicant was in fact, a part of alleged conspiracy hatched by Shri. J.K. Jagiasi (co-accused) and Shri. Kanhaiyalal Gidwani for drawing inside information and providing it to Shri. J.K. Jagiasi (co-accused) pertaining to the said Adarsh case.

As noted earlier, one isolated or solitary incident of meeting between the Applicant and Shri. Kanhaiyalal Gidwani in the office of Shri. J.K. Jagiasi (co-accused) in the presence of other staff members, cannot lead to infer that, it was for a specific purpose and as noted earlier, it might be a coincidence and the benefit thereof has to be given to the Applicant. There is nothing on record even to remotely indicate that, the Applicant has demanded or attempted to demand illegal gratification from Shri. Kanhaiyalal Gidwani for himself or for influencing any other public servant.

11 The evidence of witness Shri. David John clearly indicates that, on certain occasion the Applicant, in fact had paid amount to Shri. J.K. Jagiasi (co-accused) and it is therefore, can safely be inferred that there were monetary transactions *inter-se* between the Applicant and Shri. J.K. Jagiasi (co-accused). There is no material at all on record to show that, there was meeting of minds of the Applicant and Shri. J.K. Jagiasi (co-accused) and that both of them had decided to take illegal gratification from Shri. Kanhaiyalal Gidwani (co-accused) for influencing and/or for gathering inside information from the Investigating Officer of the Adarsh case. It is the settled position of law that, charge cannot be framed on the basis of surmises and conjectures. At this stage, it is important to note that, the Trial Court while rejecting the Application for discharge of the Applicant in paragraph No. 8 of the impugned Order, has recorded a finding that there is no allegation against the Applicant that, he demanded bribe and according to this Court, the said finding is correct in view of the facts on record.

12 The material collected by the Investigating Agency is nothing more than what has been stated by this Court in the foregoing paragraphs. It clearly appears to this Court that, the case of the prosecution as against the Applicant is based on legally inadmissible evidence and proceeds on the footings of mere surmises and conjectures. The material available on record is wholly insufficient to frame charge either under Section 120-B of the Indian Penal Code or under Sections 7, 9 and 13 of the P.C. Act.

13 In view of the above, this Court is of the opinion that, the Applicant is entitled for discharge.

Hence, the following order-

a) The Order passed by Special Judge for CBI, Greater Mumbai, below Exhibit-11, in CBI Special Case No. 106 of 2012, arising out of Crime bearing RC.15(A)/2012-MUM registered by the Respondent No.1, is hereby quashed and set aside.

b) The Applicant stands discharged for the offences punishable under Sections 120-B of the Indian Penal Code and under Sections 7, 9 and 13 of the P.C. Act from CBI Special Case No. 106 of 2012, arising out of Crime bearing RC.15(A)/2012-MUM registered by the Respondent No.1.

c) The bail bonds executed by the Applicant, if any, shall stand cancelled with immediate effect.

d) The Revision Application is allowed in the aforesaid terms.

(A.S. GADKARI, J.)