Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO. 516 OF 2017

Satish Madhukar Chikhalikar & Anr ...Applicants

versus

State of Maharashtra ...Respondent

Mr. Harshwardhan Salgaonkar, for the Applicants.
Ms. R. M. Gadhvi, APP for the Respondent.

CORAM : Prakash D. Naik, J.
DATE : 21st February, 2018

P.C. :-

1. The applicants are prosecuted vide ACB Special Case No.38 of 2015 pending before the Special Court at Nashik. The applicants are aggrieved by the order dated 29th August, 2017 passed by the learned Additional Sessions Judge, Nashik, rejecting the application preferred by the Applicants for discharge below Exhibit-14.

2. The brief facts of the prosecution case are that applicant no.1 (accused no.1) was posted as Executive Engineer in Public Works Department ('PWD', for short) North Division, Nashik, with effect from 9th January,

2011. On 29th April, 2013, one Irfan Yasin Shaikh lodged the complaint with ACB that accused no.1 demanded bribe of Rs.22,000/- for issuing cheque of Rs.3,69,000/- payable to the said complainant. In pursuant to that a trap was held by ACB and one Jagdish Magan Wagh, the Section Engineer, PWD was caught accepting bribe on behalf of accused no.1. Crime was registered vide CR No.3049 of 2013 against applicant no.1 and Jagdish Magan Wagh. During the investigation of the said crime, the house of the applicants and the father of applicant no.1 was searched. During the search the police recovered cash, gold jwellery and other ornaments. It was revealed that applicant no.1 holds the property disproportionate to his known sources of income. The applicant no.2 was charged for aiding and abetting applicant no.1 in committing the alleged crime. Accordingly an offence vide CR No.3054 of 2013 was registered with Sarkarwada Police Station, for the offences punishable under Section 13(1)(e) r/w Section 13(2) of the Prevention of Corruption Act, 1988 ('the Act', for short). On completing the investigation the charge-sheet was filed before the Special Court and the case is numbered as Special Case No.38 of 2015.

3. The Applicants preferred an application for discharge before the Special Court vide Exhibit-14 under Section 227 of Criminal Procedure Code. The submission of the Applicants before the Trial Court was that there is no sufficient evidence against the applicants. The applicant no.2 is not a public servant, and she cannot be prosecuted for the alleged offences. There is no evidence to connect her in the said crime. Applicant no.2 is the wife of applicant no.1 and she was independently earning and was not depending on accused no.1. It was also submitted that the accused has not been given an opportunity to explain about the assets and income allegedly disproportionate to their known sources of income. The sanctioning authority did not issue any notice to the accused. The learned Additional Sessions Judge, Nashik, by order dated 29th August, 2017, rejected the said application and thereby refused to discharge the applicants of the said offences.

4. The Trial Court while rejecting the application was pleased to observe that, perusal of the charge-sheet shows that the earning of accused no.1 starting from 1st September, 1989 till 30th April, 2013 has been considered. The entire family history of accused no.1 is considered in paragraph 15 of the charge-sheet, has been taken into account which referred to valid income of the accused. It is also considered that accused no.2 had earned income on winning of lottery as well as from agricultural income. In para 16 of the charge-sheet, the reason for refusing to consider certain income as income from known sources is given. The said paragraph provides specific details of the property, details of income and reasons for considering the same as income from known sources of income. The Trial Court therefore observed that, it cannot be said that the accused were not given an opportunity to explain the sources of their income. The Trial Court further observed that the accused have been provided opportunity and their say and explanation have been considered. It was observed that the Court is not required to appreciate evidence to conclude whether the material produced is sufficient or not for convicting the accused. Perusal of the charge-sheet *prima faice* shows that there is sufficient evidence to make out a *prima facie* case against the accused for the offences punishable under Sections 12, 13(1)(e) and 13(2) of the Act.

5. The learned Counsel for the applicants submitted that there is no accusation in the charge-sheet that either of the accused could not satisfactorily explained the alleged disproportionate assets alleged to have been acquired by them. It is submitted that the documents relied upon by the prosecution do not indicate that the applicants were asked to explain the disproportionate assets to their known sources of income by the Investigating Officer. Even the sanctioning authority at no point of time has called upon the applicants to account and explain the properties, which are allegedly disproportionate to their income. The learned Counsel further submitted that the Trial Court has failed to consider and appreciate the law laid down in the several decisions placed before the said Court while rejecting the application. The present offence was registered in respect of another trap case lodged against applicant no.1. The ACB has investigated the subject matter of disproportionate assets within the earlier trap case. It would be incumbent upon the investigation agency to conduct thorough enquiry in the present matter, which has not been done with an application of mind on the part of the investigating machinery. It would be further necessary that the accused is afforded a reasonable opportunity to explain the factual aspects of allegations made against him. Applicant no.1 was arrested on 30th April, 2013 and was in police custody till 16th May, 2013 and thereafter in judicial custody till 30th May, 2013 in respect of the trap case lodged against him. The present FIR was registered on 28th May, 2013. It is therefore submitted that no enquiry was conducted against the applicants and that no reasonable opportunity was provided to applicant no.1 to explain any of the allegations against him prior to lodging of FIR. It is further submitted that in the absence of any opportunity being afforded to the applicants, rendering an explanation as required under the provisions of the law, no prosecution can be launched against the applicants. It is submitted that even for sanctioning authority to grant sanction, the aforesaid aspect would be the relevant factor and in the present case the sanction order is also silent in that regard. It is submitted that to initiate the prosecution under Section 13(e) of the Act, it is necessary that the public servant should fail to satisfactorily account pecuniary resources or property disproportionate to his known sources of income. The offences under the said provision are made out only in the event of failure to give explanation, which also contemplates that the opportunity must be given to such public servant to tender an explanation with regard to the known sources of income. In the absence of compliance of the said provisions the entire prosecution would stand vitiated and therefore the Trial Court ought to have discharged the applicants.

6. The learned Counsel for the Applicants relied upon the following decisions in respect of his submissions:

(i) *M. Krishna Reddy vs. State Deputy Superintendent of Police, Hyderabad* reported in *(1992) 4 Supreme Court Cases 45.*

(ii) *A.P. Pillai vs. The State reported in 2013 (3) MWN (Cr) 62, decision delivered by the Madras High Court.*

(iii) *G. Malliga vs. State, delivered in Criminal Appeal No.610 of 1997 by the High Court of judicature at Madras.*

(iv) *N. P. Lotlikar vs. CBI and another* reported in *1993 (2) Bom CR 537.*

7. The learned APP submitted that there is sufficient evidence against the applicants to frame charge. It was further submitted that the sufficient opportunity was afforded to the applicants to explain the charge levelled against them. There is failure by accused to satisfactorily account for disproportionate assets. The applicants were found in possession of the property during the course of the search carried out at their residence as well as in the bank locker and the bank accounts. The application preferred by the applicants was rightly rejected by the Sessions Court. There is sufficient evidence to proceed against the applicants. At this stage the Trial Court is not required to conduct a roaming enquiry and what is required to be seen as whether the *prima facie* evidence is there to frame the charge. It is submitted that applicant no.1 was questioned by the Investigating Officer prior to registration of the offence and a questionnaire was placed before him on 7th May, 2013 with regard to his income, property and expenditure. The questions raised therein were dealt with by the explanation tendered by applicant no.1 in his own hand writing. The Investigating Officer had also forwarded a letter dated 8th May, 2013 to applicant no.1 calling upon him to furnish the details in the Form nos.1 to 8 with regard to the property purchased and sold by him. It was further submitted that the submissions of applicant no.1 were recorded on 8th May, 2013, 7th June, 2013, 11th June, 2013 and 17th June, 2013 during the course of his interrogation, his income, expenditure and the property. Opportunity was also afforded to tender similar explanation in respect of the income, expenditure and property by applicant no.2. It is submitted that during the course of investigation the evidence was collected to show that applicant no.1 was holding the property disproportionate to the known sources of his income and that applicant no.2 has aided and abetted him in committing the said crime. The charge-sheet also indicate the reasons for not accepting the explanation tendered by the applicants. On completing the investigation, the charge-sheet is filed against the applicants and therefore the contentions of the applicants are *de void* of merits and application should be rejected. The learned APP placed reliance on the decision of Supreme Court in the case of *State of Tamil Nadu vs. N. Suresh Rajan and others* reported in *2014 (11), SCC 709.*

8. I have gone through the documents on record which includes the charge-sheet, the application preferred by the applicants and the impugned order. Perused the decisions relied upon by both parties. The prosecution case is that applicant no.1 was arrested in a trap case and during the course of investigation of the said case, it was revealed that the applicants are holding the property which is disproportionate to the known sources of their income. The primary submissions of the applicants revolves round the issue that the applicants were not given an opportunity to explain the alleged disproportionate assets and that there is no accusation in the charge-sheet that the accused could not satisfactorily explain the alleged disproportionate assets. The learned counsel for the applicants has relied upon the wordings of Section 13(1)(e), which stipulates that the public servant or any person on his behalf is in possession for which the public servant cannot satisfactorily account of pecuniary resources or property disproportionate to his known sources of income. Perusal of the charge-sheet indicate that earnings of applicant no.1 during the period from 1st September, 1989 till 30th April, 2013 has been considered. The charge-sheet also indicate that the investigating agency has taken into account the valid income of the accused, the family history of the applicant no.1 and the reasons for refusing to consider the income as income from the known sources of income. The charge-sheet refers to the specific details of the property, income and reason for not accepting the income from the known sources of income. It is also apparent that the questionnaire was submitted to applicant no.1 with regard to his property and the answers were provided by him in relation to his property as well as the property of applicant no.2 in his hand writing. By letter dated 8th May, 2013, applicant no.1 was informed that the enquiry is in progress against the applicant and the information was sought from him by forwarding Form nos.1 to 8 to him seeking the information. The statement of applicant no.1 was recorded on 8th May, 2013, which deal with all the details of his property. The statement dated 7th June, 2013 also relates to the income of applicant no.1, which also shows that an opportunity was afforded to him before filing of charge-sheet to tender the explanation. The statement dated 10th June, 2013 also refers to the detailed explanation with regard to his properties, which is also reflected in the statement dated 17th June, 2013. The statements of applicant no.2 were also recorded on 4th June, 2013, 5th June, 2013, 6th June, 2013 and 7th June, 2013. These statements also refers the explanation submitted by the accused in relation to the property in their name. The charge-sheet also reflects that the explanation of the applicants was considered and the reason for refusing to accept the explanation and considering certain income as the income through known sources of income are also reflected. Apparently, the investigating authority has conducted an exhaustive investigation and has arrived at the conclusion that the applicants have committed the alleged offences. On perusal of the documents, it is apparent that sufficient opportunity was given to the applicants. Therefore, it cannot be said that no opportunity was given to the accused as contended by the Counsel for the applicants. The learned Counsel tried to convince that after arriving at the conclusion that applicant no.1 is holding the assets which are disproportionate to his known sources of income, an opportunity ought to have been given to submit an explanation and only in such circumstances it can be said that the public servant can not satisfactorily account for pecuniary resources or property disproportionate to his known sources of income. Detailed enquiry was conducted by the investigating machinery. The statements of the applicants were recorded from time to time. There is *prima facie* evidence to show that applicant no.1 can be prosecuted for the said offence and that applicant no.2 aided and abetted him in commission of the said crime. *Prima facie* case is made out to frame the charge and the defence, if any, can be agitated during the trial. The prosecution case is that, the public servant (accused no.1) while working as a public servant had accumulated properties and pecuniary resources in his name and in the name of accused no.2 to the tune of Rs.13,91,21,589/-, which is disproportionate to their known sources of income. The charge-sheet also indicate the reason for refusing to consider certain income as income from known sources. No case made out by the applicants for grant of any relief as sought in this application.

9. The applicants have also made a grievance that the Trial Court had not taken into consideration the decisions relied upon by the applicants. The Trial Court had made reference to all the said decisions in the impugned order. Although, the impugned order does not contend any observations analysing the ratio in the said decisions, after quoting the said decisions, the Trial Court has analysed the factual aspects involved in the matter and has dealt with the submissions advanced by the applicants that there was violation of provisions of law by not affording sufficient opportunity to the applicants to satisfactorily explain the alleged disproportionate assets and for reasons stated in the order, the said contention was rejected. The Hon'ble Supreme Court in the case of *M. Krishna Reddy vs. State of Andhra Pradesh* has observed that it is not the mere acquisition of the property that constitutes an offence under the provisions of the Act, but it is the failure to satisfactorily account for such possession that makes the possession objectionable as offending the law. The prosecution must prove the required ingredients constituting the offence which includes that the accused is public servant, the nature and extent of pecuniary resources of property, which were found in his possession, not from his own sources of income and that the resources or property have been in possession of the accused were disproportionate to their own sources of income. The offence will be complete unless the accused is able to account any such resources or property. In other words, only after prosecution has proved required ingredients, the burden of satisfactorily accounting of possession of such resources or property shift to the accused. It will be pertinent to note that, the said decision delivered by the Apex Court in an Appeal challenging the order of conviction. The evidence was recorded before the Trial Court and thereby the Court came to the conclusion that the prosecution has not satisfactorily discharged the burden of proof in disproving the claim of the appellant. In the case of *A.P. Pillai* (supra), the Madras High Court has observed that there is no specific procedure contemplated under the provisions of the Prevention of Corruption Act. Normally, it is expected that the Investigating Officer, while calling for explanation from the accused, must give notice to the accused in writing along with the statement showing the disproportionate amount and sufficient reasonable time must be given for his explanation. On refusing the explanation in writing and if not given in writing on recording his oral statement, if any, and thereafter, if the Investigating Officer concludes that public servant has not satisfactorily accounted, then he may file the final report but not before that. Thus, it should be held that the pre-requisite condition has not been completed by the Investigating Officer, that is so as to satisfy himself he called public servant to satisfactorily account. In the situation, the final report filed by the Investigating Officer against the accused is invalid. On perusal of the said decision it appears that, the grievance of the accused, who was a public servant, was that the Investigating Officer did not ask for any explanation from him to satisfactorily account the possession of the assets and that no notice was given to the accused in writing seeking explanation. The law does not contemplate issuance of any notice. In the present case, it is apparent that questionnaire was to put to the public servant seeking his explanation, forms were submitted to him calling for explanation. Statements of both the applicants were recorded separately dealing with their income, expenditure and the explanation tendered by them. In another decision of the Madras High Court relied upon by the applicants, which was delivered in the case of

G Malliga (supra) it was observed that there should be no suppression of income or under estimation of the income of the accused or inflation of the expenditure or inflation of the assets of the accused. The Investigating Officer should not suppress any of the income, by way of loan or gift, while considering the income of the public servant. Similarly, after finding out that there is any disproportionate wealth in the hands of the public servant beyond his known sources of income, the accused must be given an opportunity to explain the same. Failure to give an opportunity to the accused to explain the same is fatal to the prosecution. The charge-sheet is filed in the present case which summarises the income, expenditure and the known sources of income of the applicants. It is also clear that some of the income has been considered to be valid income and the reasons are also assigned for not accepting certain income as the income from the valid sources of income. The investigating machinery after conducting the exercise of seeking an explanation and affording an opportunity to the accused has filed a charge-sheet analysing the reasons for prosecuting the applicants. In the case of *N.P. Lotalikar* (supra), this Court had an occasion to deal with the similar issue. The Court was dealing with an appeal preferred by the public servant contending that he was not given an opportunity to satisfactorily account the assets and the charge proceeds on the footing that he could not satisfactorily account for them. The Trial Court was conducted and the prosecution has examined about 25 witnesses. The accused for discharging the burden had examined as many as 32 defence witnesses and produced a large number of documents and filed a detailed written statement giving an elaborate account starting from the point of time when he joined the service. The Court, therefore, gave finding that on a total consideration the material placed before the Court it was difficult to hold that the accused has failed to satisfactorily account for the properties and the other assets that were found to be in his possession, and therefore, the conviction was set aside. It is apparent that the findings were given in the peculiar circumstances in the said case. The accused was tried before the Trial Court. The witnesses were examined and the accused have also led evidence of several defence witnesses to rebut the charge and thereafter the Court has come to the said finding.

10. The decision in the case of *State of Tamil Nadu vs. N. Suresh Rajan* sought to be relied upon by the learned APP, deals with the powers of the Court under Section 227, 228, 239 and 240 of Criminal Procedure Code. The decision relates to the issue of framing of charge/ discharge of accused/exercise of jurisdiction/power of

Court and the scope relating to the discharge of accused. The Supreme Court has reiterated the principles laid down in several decisions while observing that no mini trial is contemplated at the stage of considering the discharge application. The Court has to proceed with assumption that material brought on record by the prosecution is true. Only probative value of material has to be gone into to see if there is a *prima facie* case for prosecuting against the accused. The Court is not expected to go deep into the matter and hold that the material would not warrant the conviction. If the Court on the basis of material thinks that the accused *prima facie* might have committed offence it can frame the charge. In the light of these observations and considering the decisions put into service by the Counsel for the applicants, I do not find any illegality in the order passed by the Trial Court.

11. On the basis of the material on record, the sanction was granted to prosecute applicant no.1 for the said offences. The investigating machinery had conducted thorough enquiry, statements were recorded, information was sought from the applicants, documents were collected, analysis were undertaken and the reasons are assigned after considering the explanation of the accused, and therefore, I do not find any substance in the contentions of the applicants that they were not given opportunity to satisfactorily account for the assets. *Prima facie* case is made out against the applicants to proceed against them. In view of the above, no case is made out to grant any relief as sought in this application and the same is required to be rejected.

: Order :

(1) Criminal Revision Application No.516 of 2017 is rejected.

(2) It is clarified that, the Trial Court shall not be influenced by the observations made in this order during the trial.

(3) Criminal Revision Application stands disposed of.

[P. D. NAIK, J.]