IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 4646 OF 2014

Mr.Dhananjay Kumar,
Aged 43 years, Occupation Service,
Resident of Flat No. 123-A, R- Block,
Railway Officers Colony, Badhwar Park,
Colaba, Mumbai- 400 005 ...Petitioner

Versus

1. The Central Bureau of Investigation,
(Through its Inspector of Police,
CBI, ACB, Tanna House, Colaba,
Mumbai 400 005.

2. The State of Maharashtra ...Respondents

…...

Mr. Aabad Ponda i/b. Mr.A.S.Sayyed for the Petitioner.
Mr. H.S.Venegaokar for Respondent No.1/CBI.
Advocate General a/w. Mr. A.R.Patil, APP for Respondent No.2/State.

…...

CORAM : MRS.MRIDULA BHATKAR, J.
DATED : 12 DECEMBER, 2018

<u>P.C.</u>

1. Rule. Rule made returnable forthwith. By consent of the parties, the Petition is heard finally and disposed of at the stage of admission.

2. This Petition is directed against the order dated 1st August, 2014 passed by the learned Special Judge, CBI, ACB, Greater Bombay, thereby rejecting the application for discharge below exhibit 19 in CBI Special Case No. 82 of 2010.

3. The petitioner is a public servant working in Income Tax Department as Deputy Registrar (INV), Unit IV, Mumbai. At that time, he conspired with Ashok Suri, Deputy Director (INV), Unit-IV, Mumbai, Rajesh Shah, Chartered Accountant and one Nitin Vyas, who is a private party, with an object to obtain an illegal gratification. In the raid conducted by Income Tax Department on 4th October, 2006 on a diamond merchant, they found 18 packets of diamonds, which were withheld under the prohibitory order. A demand of bribe of Rs. 50,000/- per packet was made through Rajesh Shah by the petitioner to M/s. Somabhai Ramdas Angadia on 7th October, 2006. On source information, the offence was registered under section 120 B of the Indian Penal Code ("the I.P.C.") read with sections 7 and 12 of the Prevention of Corruption Act,1988 ("the said Act") against the petitioner. The investigating agency forwarded the papers for sanction to prosecute the petitioner under section 120B of the I.P.C. read with sections 7 and

12 of the said act. They placed the papers for sanction being the offence punishable under the said Act. The Authority- Central Board of Direct Taxes refused to issue sanction order under section 19 (1) (a) of the said Act for prosecution of the petitioner and also for Akash Suri, who is a co-accused. The matter was referred to Central Vigilance Commission, New Delhi. However, Central Vigilance Commission also disagreed for issuance of sanction order against both the accused, who are the public servants.

4. The investigating agency filed chargesheet against the petitioner for the offence punishable under section 120B of the I.P.C read with section 12 of the said Act.

5. The petitioner moved an application for discharge on the ground that as the offence under section 7 of the said Act is not made out, no prosecution can be initiated under section 12 of the said Act.

6. Mr. Ponda, the learned counsel for the petitioner while arguing the matter, has submitted that none of the parties is branded as a principal conspirator for want of sanction under

section 19 of the said Act. Therefore, the petitioner cannot be charged as an abettor under section 12 of the said Act where sanction is not required. He has further argued that section 12 of the said Act is an independent offence and it cannot be treated as the offence of lesser degree. The petitioner is entitled to discharge. In support of his submissions, he has relied on the order of this Court passed in ***Criminal Application No. 1009 of 2013 dated 29th September, 2014*** wherein co-accused Ashok Suri, Deputy Registrar of Income Tax was discharged.

7. Mr. Venegaokar, the learned counsel for respondent No.1-CBI while defending the order passed by the learned Special Judge, CBI, ACB, has argued that under the said Act, there is no concept like principal offence in criminal jurisprudence. He has submitted that the petitioner was earlier prosecuted separately under section 7 of the said Act and also separately under section 12 of the said Act. Therefore, refusal of sanction under section 19 of the said Act will not affect the prosecution under section 12 of the said Act against the petitioner. He has argued that section 12 of the said Act covers all the persons i.e., public as well as private and no sanction is required to prosecute even the public servant

under section 12 of the said Act. In support of his submission, he has relied on the judgment of the Supreme Court in the case of ***State Through Central Bureau of Investigation Versus Parmeshwaran Subramani and another*** reported in ***(2009) 9 SCC 729.*** He has also relied on the judgment of the Supreme Court in the case of ***State Through Central Bureau of Investigation, New Delhi Versus Jitender Kumar Singh*** reported in ***(2014) 11 SCC 724.***

8. In the case of ***Parmeshwaran Subramani and another*** *(supra),* the High Court has taken a view that so long as a sanction is required for punishment of the principal offence under section 7 or 11 of the said Act, sanction would equally be necessary in regard to punishment for abetment of those offences i.e., under section 12 of the said Act.

In the said case, a question raised before the Supreme Court was whether any previous sanction is necessary for taking cognizance of an offence punishable under section 12 of the Prevention of Corruption Act? While answering it, the Supreme Court has taken following view :

> *"The offence punishable under Section 7 or Section 11 whether actually committed by a public servant is of no consequence. It is precisely for the said reason Section 19 of the Act specifically omits Section 12 from its purview".*

The Supreme Court has set aside the order of the High Court.

9. In the present Petition, the issue is different. There is no dispute that for prosecution under section 12 of the said Act, sanction is not required.

10. Section 109 i.e., the penal clause for abetment is a distinct offence though it is punishable in the context of the other (principal) offence. The offence of abetment for which a person is charged with, is normally linked with the proved offence. So, the said act has to be committed either prior to or at the time of commission of the offence. The word 'act abetted' used in section 109 addresses a specific offence abetted. Section 107 defines 'abetment', i.e., instigation, intentionally aiding by an act or illegal omission so also engaging with one or more other persons in the conspiracy is abetment.

11. In the present case, as per the case of the prosecution, the petitioner who is an Income Tax Officer has handed over a piece of paper to Nitin Vyas directing him to contact the said person for further instruction and this has taken place in the presence of an officer by name Ashok Suri, who is discharged by order dated 19th September, 2014 passed in Criminal Application No.1009 of 2013. Total 19 sachets of diamonds were found in the raid conducted by Income Tax Department. There are intercepted conversations between one Ashok Suri and the applicant/accused about confirmation of delivery of the material i.e., diamond packets. There was also conversation between Rajesh Shah, accused No.3 and accused No.1, wherein Rajesh informed the applicant that he had told the Angadiya about the rate of ‘half kilo’ per packet and half kilo is a code word for Rs.50,000/-. So, it is the case that the applicant/accused had referred to the partners of Angadiya to Rajesh for conveying the demand of illegal gratification in return of release of 18 packets of diamonds which had been kept under the prohibitory orders.

12. If one or two persons conspire, then, some of them can be prosecuted for abetment. For instance, if A, B and C conspire to

eliminate Z, by poisoning and C informs the plan to D, without mentioning the name of A and B, and procures poison from D, which is administered by A to Z and Z dies, then, though A, B and C are charged for the offence of murder, D who was having knowledge who has aided in procuring poison, can be prosecuted for abetment. Similarly, A provokes B to assault C and B assaults C, then, A who has instigated, is an abettor. However, in the case of demand of illegal gratification, the roles are different. So also, the shade of abetment changes. In such case, when there is a demand of bribe, then under the Prevention of Corruption Act, the demand and acceptance of illegal gratification is the offence. Demand of bribe in some cases is made directly by a public servant who is the principal offender. In some cases, the demand of bribe is not made directly by the public servant for the sake of convenience and due to fear of getting caught. So, the demand is made through somebody, may be either a subordinate to the public servant or a colleague or a private person. Thus, the public servant who abuses his public office, demands bribe, is a principal offender. He cannot be said to be an abettor when he demands money either through other public servant or private person. The principal offender may invent different ways to obtain illegal gratification. Thus, though the actual demand even though is communicated by a private person or by other public servant, the Court has to go back and find out at whose instance, the demand is made and who is going to be actually benefited by those illegal gratification. However, in the present case under the Prevention of Corruption Act, though it has actually demanded bribe at the instance of A; B may not be treated as a principal offender. He is an abettor and the person who has asked to demand money, is the principal offender because under sections 7 and 13 of the said Act, the demand itself is an offence. A is going to be benefitted by bribe. So, from whom the demand is made or is generated, is the principal offender which is going to be the beneficiary. Occasionally public servant who actually demands money at the instance of his colleague may not be treated an abettor but a principal offender. Thus, the equation of abettor and the principal offender changes as per the nature of the offence under the said Act.

13. In the present case though there is a material on record against the petitioner/accused to frame charge under section 7 of the said Act, the authority has not granted sanction. Therefore, for

want of sanction, prosecution fails under section 7 of the said Act. Under such peculiar circumstances, the petitioner/accused cannot be charged for an abetment. Hence, the petitioner/accused is discharged under section 12 of the said Act.

14. Writ Petition is allowed.

(MRIDULA BHATKAR, J.)