

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 27.03.2018

Pronounced on : 11.04.2018

C O R A M

THE HONOURABLE MR. JUSTICE M.V.MURALIDARAN

**Crl.R.C.No.1119 of 2017
and
Crl.M.P.No.10560 of 2017**

S.Ganapathi

.. Petitioner

Vs

1.State Represented by
The Sub-Inspector of Police,
Central Crime Branch,
St.Thomas Mount,
Chennai.
(Crime No.1/2011)

2.C.T.Lakshmanan

.. Respondents

PRAYER: Criminal Revision filed under Section 397 r/w 401 of the Code of Criminal Procedure, to set aside the judgement passed by the learned Judicial Magistrate, Alandur in C.M.P.No.6451 of 2016 in C.C.No.38 of 2016, dated 25.07.2017.

For Petitioner : Mr.A.Navaneetha Krishnan (Senior Counsel)
for Mr.I.David Singh

For Respondents : Mrs.T.P.Savitha (for R1)
Government Advocate (Criminal Side)

Mr.R.Shanmugasundaram, (Senior Counsel)
For Mr.K.R.Ramesh Kumar (for R2)

ORDER

This Revision is filed challenging the order passed by the learned Judicial Magistrate, Alandur in CrI.M.P.No.6451 of 2016 dated 25.07.2017 in C.C.No.38 of 2016.

2.The petitioner is the sole accused in C.C.No.38 of 2016, on the file of the learned Judicial Magistrate, Alandur. The case of the Prosecution is that the complainant, the 2nd respondent herein is the Administrative Officer of a leading Multi Specialty Hospital at Pallikaranai, which was initially established as a proprietary concern and subsequently, in the year 2005, it was converted to Private Limited Company by Dr.T.G.Govindarajan. In and around May and June, 2010, the Management of the Hospital, while auditing of accounts discovered certain fraudulent finance transactions which included misappropriation / embezzlement of money to the tune of Rs.7 Crores. The entire administration including the finance

management of the Hospital was in the hands of the petitioner Mr.Ganapathy, since he was appointed as a Finance Controller of the Hospital by the Managing Director Dr.T.G.Govindarajan. The petitioner with the clear intention of misappropriating the funds of the hospital, created several forged transactions. The complaint received by the respondent was registered for the offences under Sections 408, 419, 471, 477(A) r/w 109 of Indian Penal Code and subsequently, laid final report before the trial Court for the offences under Sections 420, 408, 465 and 467 of Indian Penal Code. Thereafter, summons was issued to the petitioner copies was furnished to the petitioner and posted for questioning.

3.While so, the petitioner herein filed a petition for discharge from the said case in CrI.M.P.No.6451 of 2016 before the learned Judicial Magistrate, Alandur on the following major Points:-

- (i) A false case has been foisted against the petitioner / accused and the same is motivated and not sustainable under law.
- (ii) No prima facie materials available in the charge sheet to implicate the petitioner as accused.
- (iii) Further the brother of the petitioner / accused who is in U.S.A. made investments through RBI in the Hospital run

by the De-facto complainant. Brother of the petitioner / accused demanded shares for the investments made by him. As per the agreement the shares were not allotted to brother of the petitioner / Accused. Hence, there was a dispute between the Brother of the petitioner / Accused and the De- facto complainant. The De-facto complainant to avoid allotment of shares to the brother of the petitioner / Accused for the investments made by him, has preferred a false complaint against the petitioner / Accused. Hence, the entire proceedings are based on a false complaint without any truth.

- (iv) The alleged offences allegedly taken place when the petitioner / accused discharged his duties as an employee of Indian Overseas Bank. As per banking practice, the money transaction cannot be performed by only one official i.e. the petitioner / accused. But, the present case has been filed against the petitioner / accused only.
- (v) No sanction for prosecution is available in this case to prosecute the petitioner / accused who is / was public servant. Hence, the prosecution is not maintainable.

4.The learned Judicial Magistrate, Alandur, by order dated

25.07.2017 dismissed the said discharge petition. Challenging the same, the petitioner has filed the present revision before this Court.

5.I heard Mr.A.Navaneetha Krishnan, learned Senior Counsel for Mr.I.David Singh, learned counsel for the petitioner, Mrs.T.P.Savitha, learned Government Advocate (Criminal Side) for the 1st Respondent, Mr.R.Shanmugasundaram, learned Senior Counsel for Mr.K.R.Ramesh Kumar, learned counsel appearing for the 2nd respondent and perused the entire records on either side.

6.The learned Senior Counsel for the petitioner contended Eight major points before this Court for the discharge of the petitioner / accused which are as follows:-

- (i) No sanction has been obtained by the prosecution to take cognizance for the alleged offence from the competent authority as the petitioner was an employee of Indian Overseas Bank and the alleged act was committed while discharging the duty as a bank employee.
- (ii) A False case has been foisted against the petitioner and no prima facie material is available in charge sheet. The 1st respondent filing the charge sheet had alleged that the petitioner had committed offence U/s. 420, 408, 465 & 467 of IPC, but the learned Magistrate while taking cognizance had

inserted Section 477 in charge sheet without any averment.

(iii) A False case has been foisted against the petitioner for the reason that the brother of the petitioner / accused who is in U.S.A. made investment through RBI in the Hospital run by the De-facto complainant. Brother of the petitioner / accused demanded shares for the investments made by him. As per agreement shares were not allotted to brother of the petitioner / Accused. Hence, there was a dispute between the Brother of the petitioner / Accused and the De-facto complainant. The De-facto complainant, to avoid allotment of shares to the brother of the petitioner / Accused for the investments made by the brother of the petitioner / Accused, has preferred a false complaint against the petitioner / Accused. Hence, the entire proceedings are based on a false case without any truth.

(iv) The entire investigation in this case is contrary to Law and investigation is defective which goes to the root of the prosecution and caused prejudice to the petitioner accused and entire charge sheet is liable to be quashed Important witnesses namely Suresh, Venkataramani and Pushpalatha are not examined and hence the investigation is vitiated.

(v) No valid cognisance order has been passed and hence entire trial is vitiated.

(vi) No sufficient material to frame charges.

(vii) The entire prosecution case is not sustainable and liable to be quashed.

(viii) No fair investigation and No fair trial (Cognizance order reveals no judicial application of mind)

7.The learned Senior Counsel also relied upon the following judgments:-

(i) (2006) 7 SCC 296 (Popular Muthiah Vs State Represented by Inspector of Police)

(ii) (2008) 2 SCC 492 (S.K. Sinha, Chief Enforcement Vs Videocon International Ltd. & Ors.)

(iii) (2009) 14 SCC 541 (Musauddin Ahmed Vs State of Assam)

(iv) (2012) 9 SCC 532 (Gajoo Vs State of Uttarakhand)

(v) (2014) 2 SCC (Lalitha Kumari Vs Govt. of U.P. & Ors.)

(vi) Delhi District Court (CBI No. 1/2015) (State Through Central Bureau of Investigation, New Delhi Vs Suresh Kumar Garg & Others)

8.The learned Government Advocate (Criminal Side) appearing for the first respondent brought to the notice of this Court about the charges leveled against the petitioner and stated that the petitioner had withdrawn the amount by misusing the accounts of Dr.R.V.Jayanthi and Krishna Construction as detailed below :-

- (i) On 23rd April 2007, a sum of Rs. 27,00,000/- (Twenty Seven Lakhs) was transferred from the CC Account No. 2363 of Dr. Kamatchi Hospital Pvt. Ltd to the account No. 15161, jointly held by the accused Ganapathy and his wife Pushpalatha Ganapathy.
- (ii) On 13th April 2007, a sum of Rs. 20,00,000/- (Twenty Lakhs only) was withdrawn through cheque No. 895868 dated 13.04.2007 of Dr. Kamatchi Hospital Pvt. Ltd., and credited into the Savings Bank Account No.17000, jointly held by the accused Ganapathy and his own brother S. Venkatramani in IOB, R.K. Salai Branch.
- (iii) On 12th May 2007, an amount of Rs. 26,50,000/- (Twenty six Lakhs and fifty thousand) was falsely accounted in the book of accounts as repayment of loan made to Mr. T.G. Harikrishnan from the CC account No. 2363 of Dr. Kamatchi Hospital Pvt. Ltd.,. This amount was withdrawn through a Cheque

No.470098 of Dr.Kamatchi Hospital in Current Account No.2363, and credited into the Account No.17000, jointly held by accused Ganapathi and his own brother Venkatramanai in IOB, R.K. Salai.

- (iv) On 18th June 2007, a sum of Rs.5,90,000/- (Five Lakhs and Ninety Thousand) was withdrawn through cheque No.470877 of Dr.Kamatchi Hospital Pvt. Ltd., Current Account No.2363 and credited into the Account No.17000, jointly held by accused Ganapathi and his own brother Venkatramani in IOB, R.K.Salai. This was withdrawn for remitting fees towards ROC.
- (v) On 16th July 2007, a sum of Rs. 20,00,000/- (Twenty Lakhs only) was credited into the SB Account No.702 of Dr.R.V.Jayanthi from Krishna Constructions. Subsequently it was withdrawn in cash without the knowledge of the account holder Dr.R.V.Jayanthi.
- (vi) On 20th December 2008, a sum of Rs. 9,00,000/- (Nine Lakhs only) was withdrawn in cash from the SB Account No.702 of Dr.R.V.Jayanthi without her knowledge which was brought in from CC Account No.140, held in IOB Spencer Plaza in the name of Dr.Kamatchi Hospital Pvt. Ltd.

9.The learned Senior Counsel Mr.R.Shanmugha Sundaram appearing for the 2nd respondent had raised 2 issues, namely, once the charges were framed, the scope of discharge of the accused is very limited and the trial Court has reached its logical conclusion on relying upon the following judgments:-

- (i) 2010 (2) MWN (Cr.) 463 (K. Selvam Vs State rep. by the Inspector of Police).
- (ii) 2008(10) SCC 109 (Bharat Parikh Vs CBI)
- (iii) 1979 (2) SCC 179 (Ratilal Bhanji Mithani Vs State of Maharashtra).

10.The learned Senior Counsel for the 2nd respondent further contended that sanction is not required in the case on hand as the accused has involved in cheating and misappropriation of the Hospital fund and this is no way connected with the accused official duty. Hence, the sanction for prosecution under Section 197 Cr.P.C. does not arise. In support of his contention, he relied on judgment reported in 2016 (2) SCC 143 (N.K. Ganguly Vs CBI New Delhi).

11.The learned Senior Counsel for the 2nd respondent had submitted that the witnesses had given statement against the petitioner. Learned Counsel has also filed the written submissions.

12.This Court, heard the submissions made by the learned counsels appearing on both sides and perused the documents.

13.The first point to be considered is whether sanction is necessary under Section 197 of Cr.P.C. as a petitioner is an employee of Indian Overseas Bank. According to Section 197 of Cr.P.C., sanction is required to prosecute the Public Servant. So far as the case of the Petitioner is concerned, he is working as the Asst. Manager in the Indian Overseas Bank and it comes within the purview of Public Sector Bank. Further, while working as employee, he has allegedly undertaken the work of performing as Administrative officer in the Multi Specialty Hospital at Pallikaranai. But his original service is with the bank. Further, the transaction alleged by the respondent are relating to Bank transaction and he has alleged to have misused the power as an employee of the Indian Overseas Bank, therefore, sanction is very much required for prosecuting the petitioner as per Section 197 of Cr.P.C. Further, the judgment relied on by the 2nd respondent in 2016 (2) SCC 143 (N.K. Ganguly Vs CBI), New Delhi Speaks about the Section 197 and about obtaining sanction for prosecuting the public servant. Infact the said judgment supports the

case of the petitioner, wherein at paragraph No. 35 it reads as follows:-

"35.From a perusal of the case law referred to supra, it becomes clear that for the purpose of obtaining previous sanction from the appropriate Government Under Section 197 Cr.P.C., it is imperative that the alleged offence is committed in discharging the allegations contained in the final report against the appellants, to decide whether previous sanction is required to be obtained by the respondent from the appropriate Government before taking cognizance of the alleged offence by the learned Special Judge against the accused. In the instant case, since the allegations made against the appellants in the final report filed by the respondent that the alleged offences were committed by them is discharge of their official duty, therefore, it was essential for the learned Special Judge to correctly decide as to whether the previous sanction from the Central Government under Section 197 CrPC was required to be taken by the respondent, before taking cognizance and passing an order issuing summons to the appellants for their presence."

14. From the above judgment, it is seen that the prosecution has not obtained sanction from the competent authority, prior to taking cognizance against the petitioner. Therefore, the petitioner is entitled to get discharged from the case.

15. Insofar as the 2nd issue that once the charges are framed, the scope of discharging is very limited is concerned, in the case on hand, only the charge sheet was filed, copies were served and the case is posted for questioning the accused. Therefore, the petitioner has every right to file the discharge petition under Section 239 of Cr.P.C. and the provisions of Section 239 is very clear that the discharge petition can be filed before the commencement of trial. For better understanding, Section 239 is extracted hereunder:

Section 239:-

“When accused shall be discharged :- if, upon considering the police report and the documents sent with it under Section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against

the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.”

16. Further insofar as the judgment relied upon by the learned Senior Counsel for the 2nd respondent reported in 2010 (2) MWN (G) 463 (K. Selvam Vs State Rep. by Inspector of Police Establishment Central Bureau of Investigation Anti – Corruption Branch Chennai-600006) in concerned, in the said case, the parties have filed the discharge petition after examination of 20 witnesses, whereas, the present case is only at the stage of questioning the accused. In this case the discharge application was filed before framing charges and that discharge application was dismissed against which this revision petition was filed. Therefore, the petitioner has every right to file the discharge petition under Section 239 of Cr.P.C. Therefore, the contention of the 2nd respondent cannot be accepted. The other judgment relied upon the 2nd respondent is also not applicable to the present case.

17. So far as the contention of the petitioner that a false case has been foisted against him based on motivation is concerned, the petitioner's brother who is in U.S.A. had made investment in the

Hospital run by the 2nd respondent and invested Rs.2.5 Crores and in return, he said to have demanded share for the investment made by him as per the agreement dated 31.03.2006. In order to please the petitioner's brother, the petitioner was inducted as an administrative officer in the hospital. When the dispute arose between the petitioner's brother and the 2nd respondent that the investment was not converted into equity as promised and initiation of complaints before the RBI by the petitioner's brother, the de-facto complainant had initiated the present complaint against the petitioner, making false allegations about the transactions. Therefore, the complaint lodged by the 2nd respondent clearly establish as that to take vengeance and to escape from the payment, the above said case has been lodged. Perusal of the charge sheet, statement of witnesses and the investigation report of the Indian Overseas Bank, Central Office, clearly establishes that only to take escape from the payment, the said false case has been lodged against the petitioner.

18. In so far the 3rd issue that while filing final report the 1st respondent had stated that the petitioner is committed offence under Section 420, 408, 465 and 467 IPC and given statement to that effect. But the learned Magistrate while passing the cognizance order based

on the final report on 11.01.2016 had taken the case on file as Section 420, 408, 477, 465 and 467 IPC in which Section 477 has been introduced in the charge sheet which have no averments in the final report. Therefore, this Court feels that the learned Magistrate had exceeded his power and there was lack of application of judicial mind by the Learned Magistrate and cognizance of the charge sheet was not taken in the manner known to Law. Taking valid cognizance of the offence is the condition precedent for valid trial. But in this case the cognizance order was passed mechanically without application of judicial mind on the relevant material facts. Since the cognisance is invalid the subsequent proceedings are also invalid (2008) 2 SCC 492 (S.K.Sinha, Chief Enforcement Vs Videocon International Ltd. & Ors.)

19. The 1st respondent had conducted defective investigation goes to the root of the prosecution causing prejudice to the Petitioner/Accused. The prosecution had failed to obtain sanction from the competent authority under section 197 of Cr.P.C. before taking cognizance against the petitioner and thus, no prima facie case has been made out to frame charges against the petitioner. In this case no impartial investigation has been conducted. The materials collected by the prosecution is not sufficient to frame charge against the petitioner/accused.

19.In the result:

(a) the Criminal Revision case is allowed and the order passed by the learned Judicial Magistrate, Alandur in Crl.M.P.No.6451 of 2016 dated 25.07.2017 is set aside;

(b) the petitioner is discharged from the charges leveled against him in C.C.No.38 of 2016, on the file of the learned Judicial Magistrate, Alandur. No costs. Consequently, connected miscellaneous petition is closed.

11.04.2018

vs

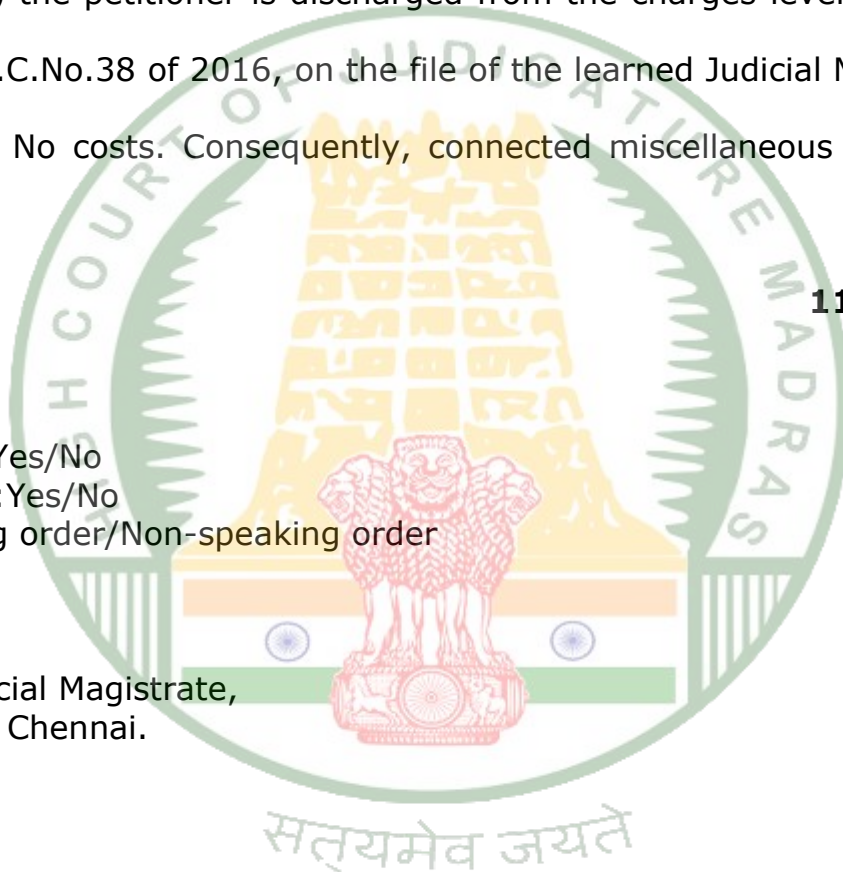
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Internet:Yes/No

Speaking order/Non-speaking order

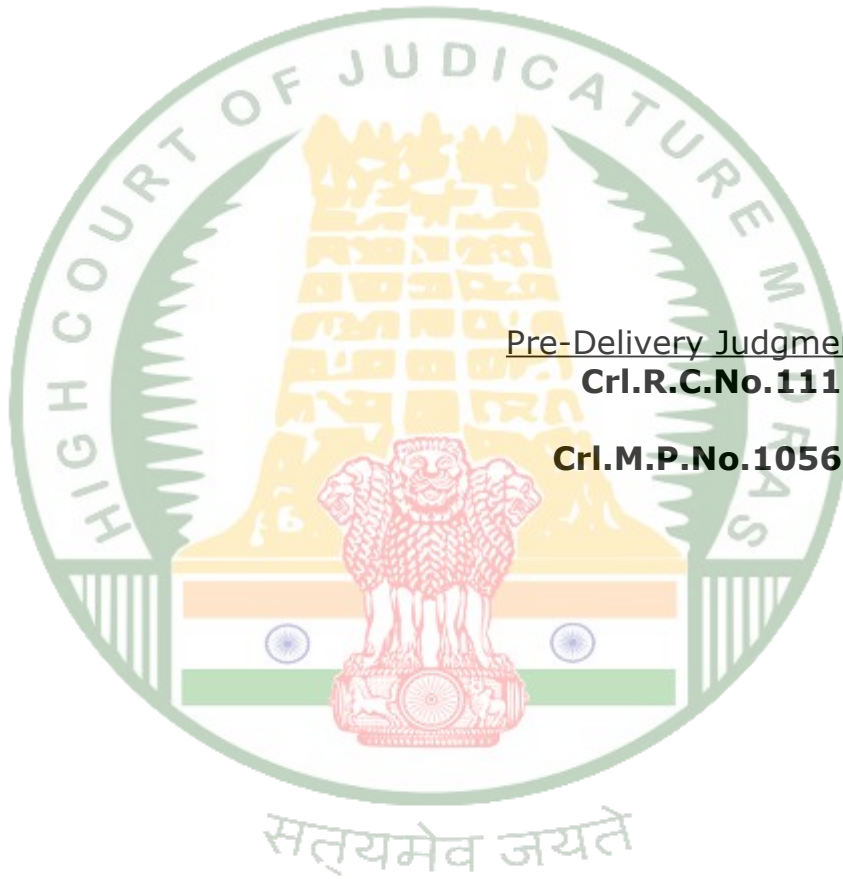
To

The Judicial Magistrate,
Alandur, Chennai.



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M.V.MURALIDARAN.J,
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Pre-Delivery Judgment made in
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