

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.11.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

Crl.O.P.No.24472 of 2018

And

Crl.M.P.No.13926 of 2018

V.Gurumurthy

... Petitioner

Vs.

State rep. by
The Inspector of Police,
SPE/CBI/ACB/Chennai.

... Respondent

Prayer:

Petition filed under Section 482 of Cr.P.C., seeking to call for all the records in C.C.No.3 of 2014 (RC MA1 2012 A 0025) on the file of XII Addl. Special Judge for CBI Cases at Chennai and quash the same.

For Petitioner : Mr.T.Sivananthan

For Respondent : Mr.K.Srinivasan
Special Public Prosecutor
for CBI Cases

O R D E R

The petitioner has filed this petition seeking to call for the records in C.C.No.3 of 2014 (RC.MA1.2012.A.0025) on the file of the learned XII Additional Special Judge for CBI Cases at Chennai and to quash the same.

2.The petitioner is arrayed as the first accused in FIR No.RC.MA1.2012.A.0025 for the offences punishable under Sections 120-B r/w 420 IPC r/w 477-A IPC and Sections 13(2) r/w 13(1)(d) of PC Act and substantive offences thereof. The case was registered against the accused on the allegations that during the period between April, 2008 and March, 2009, the accused entered into criminal conspiracy at Chennai and other places to cheat MMTC Limited in the matter of purchase of Gold under the Buyer's Credit Scheme and in pursuance of such conspiracy, A1 to A3 speculated in Indian Rupee-US Dollar foreign exchange fluctuation and intentionally omitted to take forward cover for

the purchases made and foreign currency loans availed under Buyer's Credit Scheme and thereby caused wrongful loss of Rs.113.38 Crores to the MMTC Limited, Chennai.

3.The specific allegation levelled against the petitioner/A1 is that the petitioner by abusing and misusing Official position, falsified the books of accounts of MMTC Limited by maintaining improper accounts by showing inflated fixed deposit amount of Rs.38,99,01,189/- and deflated loan against deposits amount of Rs.45,43,17,044/- both in the accounts of MMTC Limited kept in Union Bank of India, Main Branch at Chennai. It is also alleged that the petitioner has obtained pecuniary

consideration to the tune of Rs.41,700/- from A2 and A3 in the form of air ticket for his visit to Singapore along with his wife. Ultimately, the law enforcing agency filed final report, against which, this petition has been filed.

4.Though several grounds were raised in this petition, the learned counsel appearing for the petitioner restricted his argument and argued that proper sanction has to be obtained under Section 197 of Cr.P.C. for prosecuting the petitioner.

5.The learned counsel appearing for the petitioner would submit that the petitioner is a retired employee of MMTC Limited, Chennai, which is a Government of India undertaking. After his retirement, the investigation was carried out by the CBI without obtaining sanction from the competent Authority under Section 197 of Cr.P.C. He would further submit that sanction for prosecution is sine qua non, without obtaining sanction, no Government servant shall be prosecuted. In the present case, without obtaining sanction from the competent Authority, investigation has been done and final report has been filed.

6.In support of his contentions, the learned counsel appearing for the petitioner relied upon the following decisions of the Hon'ble Apex Court:

(i) (2006) 1 SCC 557 (Rakesh Kumar Mishra vs. State of Bihar and Others), the relevant portion of which reads as follows:

"18.Section 197(1) provides that when any person who is or was a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction (a) in the case of a person who is employed or, as the case may be, was at the time of commission of the

alleged offence employed, in connection with the affairs of the Union, of the Central Government, and (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, or the State Government."

(ii) (2008) 7 SCC 1 (S.Mohan vs. Central Bureau of Investigation), the relevant portion of which reads as follows:

"26. The appellant S. Mohan has been found guilty of offence punishable under Section 13(1)(c) and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act. This appellant was one of the Asstt. Vice-Presidents of the CANFINA dealing with CANCIGO Units. There is no allegation that he committed any illegality. The allegation against him is to the extent that he accepted the CANCIGO Units though they stood in the name of the Andhra Bank and Andhra Bank Financial Services Limited. These CANCIGO Units were worth Rs.33 crores and they were accepted with the proper authorization by the higher authorities in the CANFINA. It is highly improbable to believe that appellant S. Mohan on his own decided to accept CANCIGO Units worth Rs.33 crores without any instructions. CANFINA did not file any complaint alleging any unauthorized transaction carried out by him. Now it has been held by this Court that the entire transaction was legal and the CANFINA was entitled to the proceeds of these CANCIGO Units and not the "Custodian" under the Act. Therefore, the appellant S. Mohan is not guilty of the offence punishable under Section 13(1)(c) and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act."

(iii) (2016) 2 SCC 143 (N.K.Ganguly Vs. Central Bureau of Investigation, New Delhi), the relevant portion of which reads as follows:

"30. The learned Senior Counsel further placed reliance on the decision of a Constitution Bench of this Court in R.S Nayak v. A.R Antulay ((1984) 2 SCC 183), wherein certain observations were made with regard to Section 6 of P.C Act, 1988, as under:

"23. ... Therefore, it unquestionably follows that the sanction to prosecute can be given by an authority competent to remove the public servant from the office which he has misused or abused because that authority alone would be able to know whether there has been a misuse or abuse of the office by the public servant and not some rank outsider. By a catena of decisions, it has been held that the authority entitled to grant sanction must apply its mind to the facts of the case, evidence collected and other incidental facts before according sanction. A grant of sanction is not an idle formality but a solemn and sacrosanct act which removes the umbrella of protection of Government servants against frivolous prosecutions and the aforesaid requirements must therefore, be strictly complied with before any prosecution could be launched against public servants....The Legislative advisedly conferred power on the authority competent to remove the public servant from the office to grant sanction for the obvious reason that that authority alone would be able, when facts and evidence are placed before him to judge whether a serious offence is committed or the prosecution is either frivolous or speculative. That authority alone would be competent to judge whether on the facts alleged, there has been an abuse or misuse of office held by the public servant. That authority would be in a position to know what was the power conferred on the office which the public servant holds, how that power could be abused for corrupt motive and whether prima facie it has been so done. That competent authority alone would know the nature and functions discharged by the public servant holding the office and whether the same has been abused or misused. It is the vertical hierarchy between the authority competent to remove the public servant from that office and the nature of the office held by the public servant against whom sanction is sought which would indicate a hierarchy and which would therefore, permit interference of knowledge about the functions and duties of the office and its misuse or abuse by the public servant. That is why the legislature clearly provided that that

authority done would be competent to grant sanction which is entitled to remove the public servant against whom sanction is sought from the office." (emphasis supplied)"

34. The learned Senior Counsel also placed reliance on the three-Judge Bench decision of this Court rendered in *Shreekantiah Ramayya Munipalli*, referred to *supra*, wherein it was held as under:

"18.If Section 197 of the Code of Criminal Procedure is construed too narrowly it can never be applied, for of ofcourse it is no part of an official's duty to commit an offence and never can be. But it is not the duty we have to examine so much as the act because an official act can be performed in the discharge of official duty as well as in dereliction of it...."

19. Now an offence seldom consists of a single act. It is usually composed of several elements and as a rule a whole series of acts must be proved before it can be established.... Now it is evident that the entrustment and/ or domino here were in an official capacity and it is equally evident that there could in this case be no disposal, lawful or otherwise, save by an act done or purporting to be done in an official capacity."

7. The learned counsel appearing for the petitioner would further submit that it is for the competent Authority to decide whether the petitioner is in the course of discharging duty requiring sanction under Section 197 of Cr.P.C. or not. The matter has to be placed before the competent Authority to decide whether the petitioner's duty is official duty or non official duty and it should not be decided by the law enforcing agency. The law enforcing agency is not the competent Authority to decide whether sanction for prosecuting the petitioner is required or not and it is for the employer competent Authority to decide whether sanction for prosecuting the petitioner is required or not. Accordingly, he prayed for allowing this petition.

8. Per contra, the learned Special Public Prosecutor for CBI Cases would submit that the petitioner by abusing and misusing Official position, falsified the books of accounts of MMTC Limited by maintaining improper accounts. To that extent, he referred to the relevant portion of the final report, which reads as follows:

"In pursuance of the criminal conspiracy, A-1 maintained improper accounts and falsified the books of accounts of the MMTC Ltd., by showing inflated Fixed Deposit amount of Rs.38,99,01,189/- and deflated Loan-Against-Deposit amount of Rs.45,43,17,044/-, both in the account of the MMTC Ltd., in Union Bank of India, Chennai Main Branch, Chennai. A-1 Shri V Gurumoorthi also obtained pecuniary consideration to the tune of Rs.41,700/- offered by A-2 Shri N P Agarwal and A-3 Ganesh Agarwal in the form of air ticket for his visit to Singapore, along with his wife, during October, 2010. Thus, A-1 to A-3 committed offences punishable u/s.120-B r/w 420 IPC, 477-A IPC and Sec. 13(2) r/w 13(1) (d) of PC Act and substantive offences thereof.

That A-1 Shri V.Gurumoorthi, retired from the MMTC Ltd., Chennai, on 30th November, 2010 and hence, sanction for prosecution is not required for him."

9.The learned Special Public Prosecutor for CBI Cases would further submit that the petitioner has obtained pecuniary consideration to the tune of Rs.41,700/- from A2 and A3 in the form of air ticket for his visit to Singapore along with his wife. It is not official duty for which the prosecuting agency themselves satisfied that no sanction for prosecuting the petitioner is required. Furthermore, the petitioner is a retired employee. Hence, there is no necessity for obtaining sanction under Section 197 of Cr.P.C. from the competent Authority.

10.The learned Special Public Prosecutor for CBI Cases would further submit that the issue as to whether the allegation against the petitioner took place while the petitioner was discharging Official duty or not is a triable issue and it has to be decided only at the time of trial. Hence, giving a clean chit under Section 482 of Cr.P.C. does not arise.

11.The learned Special Public Prosecutor for CBI Cases would further submit that A2 and A3 in this case filed petition seeking discharge before the lower Court and the said petition was dismissed by the lower Court. Aggrieved by the same, they approached this Court by filing revision. This Court allowed the revision filed by A2 and A3. The same was challenged before the Hon'ble Apex Court and the issue is pending before the Hon'ble Apex Court.

12. In support of his contentions, the learned Special Public Prosecutor for CBI Cases relied upon the decision of the Hon'ble Apex

Court reported in (2016) 2 SCC 143 (N.K.Ganguly Vs. Central Bureau of Investigation, New Delhi), the relevant portion of which reads as follows:

"23. Mr. Gopal Subramaniam, the learned Senior Counsel on behalf of some of the appellants has further rightly placed reliance upon the judgement of a three judge bench of this Court in Amrik Singh v. State of Pepsu (AIR 1955 SC 309) to buttress the contention that the issue of requirement of prior sanction under Section 197 of Cr.PC can be raised at any stage of the proceedings, and not just at stage of framing of charges. The decision in Hori Ram Singh was also quoted with approval, especially the categorisation of situations in three scenarios, as under:

(a) Decision which held that sanction was necessary when the act complained of attached to the official character of the person doing it;

(b) Judgments which held that sanction was necessary in all cases in which the official character of the person gave him an opportunity for the commission of the crime; and

(c) Those which held it was necessary when the offence was committed while the accused was actually engaged in the performance of official duties.

It was further held in Amrik Singh case that:

"8. The result of the authorities may thus be summed up: it is not every offence committed by a public servant that requires sanction for prosecution u/s 197 of the Cr.PC; nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary; and that would be so, irrespective of whether it was, in fact, a proper discharge of his duties, because that would really be a matter of defence on

the merits, which would have to be invested at the trial and could not arise at the stage of grant of sanction, which must precede the institution of the prosecution." (emphasis supplied)

24. The position of law, as laid down in *Hori Ram Singh* was also approved by the Privy Council in *H.H.B. Gill v. The King* (AIR 1948 PC 128), wherein it was observed as under:

".....A public servant can only be said to act or purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty."

26. In *K. Satwant Singh v. State of Punjab* (AIR 1960 SC 266), a Constitution Bench of this Court while examining the scope of Section 197 CrPC, observed as follows:

"16. It appears to us to be clear that some offences cannot by their very nature be regarded as having been committed by public servants while acting or purporting to act in the discharge of their official duty. For instance, acceptance of a bribe, an offence punishable under Section 161 of IPC, is one of them and the offence of cheating or abetment thereof is another... where a public servant commits the offence of cheating or abets another so to cheat, the offence committed by him is not one while he is acting or purporting to act in the discharge of his official duty, as such offences have no necessary connection between them and the performance of the duties of a public servant, the official status furnishing only the occasion or opportunity for the commission of the offences.... The Act of cheating or abetment thereof has no reasonable connection with the discharge of official duty. The act must bear such relation to the duty that the public servant could lay a reasonable but not a pretended or fanciful claim, that he did it in the course of the performance of his duty."

13. The learned Special Public Prosecutor for CBI Cases would further submit that perusal of final report discloses that the

petitioner was charged for the offences under Sections 120-B r/w 420 IPC, 477-A IPC and the offences under the said Sections are not classified under the discharge of Official duty and they are outside the scope of Official duty for which sanction under Section 197 of Cr.P.C. is not required. He would further submit that whether the petitioner enjoyed the pecuniary advantage through Official duty or not is a triable issue and it has to be decided only at the time of trial. Hence, exercising the power of this Court under Section 482 of Cr.P.C. in the present case will amount to abuse of process of law. Accordingly, he prayed for dismissal of the petition.

14. Heard the arguments advanced on either side and perused the materials available on record.

15. Perusal of records discloses that the petitioner/ A1 was working as Deputy General Manager (Finance & Accounts) (Bullion Accounts) and then General Manager (Finance & Accounts), MMTC Limited, Chennai, during the period from 2008-09. He retired from service as General Manager (Finance & Accounts), MMTC Limited, Chennai, in November, 2010.

16. The allegations against the petitioner and the other accused is that during the period between April, 2008 and March, 2009, the accused entered into criminal conspiracy at Chennai and other places to cheat MMTC Limited in the matter of purchase of Gold under the Buyer's Credit Scheme and in pursuance of such conspiracy, A1 to A3 speculated in Indian Rupee-US Dollar foreign exchange fluctuation and intentionally omitted to take forward cover for the purchases made and foreign currency loans availed under Buyer's Credit Scheme and thereby caused wrongful loss of Rs.113.38 Crores to the MMTC Limited, Chennai.

17. The specific allegation levelled against the petitioner/ A1 is that the petitioner by abusing and misusing Official position, falsified the books of accounts of MMTC Limited by maintaining improper accounts by showing inflated fixed deposit amount of Rs.38,99,01,189/- and deflated loan against deposits amount of Rs.45,43,17,044/- both in the accounts of MMTC Limited kept in Union Bank of India, Main Branch at Chennai. It is also alleged that the petitioner has obtained pecuniary consideration to the tune of Rs.41,700/- from A2 and A3 in the form of air ticket for his visit to Singapore along with his wife. Accordingly, after investigation, the law enforcing agency filed the final report.

18. Though the wrongful loss occurred during the year 2008-2009, the air tickets are said to have been purchased in the year 2010. Whether the petitioner received pecuniary consideration from A2 and A3 or not, has to be decided only at

the time of trial by the Trial Court.

19.Now, the core issue raised before this Court is whether sanction for prosecuting the petitioner has to be obtained from competent Authority or not.

20.Admittedly, the petitioner retired from service as General Manager (Finance & Accounts), MMTC Limited, Chennai. After his retirement, investigation was carried out by the law enforcing agency and the law enforcing agency found that the petitioner received pecuniary consideration to the tune of Rs.41,700/- from A2 and A3 in the form of air ticket for his visit to Singapore along with his wife. That is outside the scope of employment and not during employment. Accordingly, they filed final report without obtaining sanction from the competent Authority. In the final report also it has been specifically stated that the petitioner retired from MMTC Limited, Chennai, on 30th November, 2010 and hence, sanction for prosecution is not required for him.

21.Though A2 and A3 in this case filed petition seeking discharge before the lower Court and the said petition was dismissed by the lower Court and thereafter, they approached this Court by filing revision and this Court allowed the revision filed by A2 and A3, the same was challenged before the Hon'ble Apex Court and the issue is pending before the Hon'ble Apex Court. However, mere discharge of A2 and A3 from the case by this Court does not mean that A1 is automatically entitled for the same benefit.

22.Furthermore, in the present case, this Court refrain from expressing any opinion. The issues, whether sanction under Section 197 of Cr.P.C. has to be obtained from competent Authority for prosecuting the petitioner or not, whether the petitioner received pecuniary consideration to the tune of Rs.41,700/- from A2 and A3 in the form of air ticket for his visit to Singapore along with his wife or not, whether the benefit of discharge enjoyed by A2 and A3 can also be enjoyed by the petitioner/ A1 or not, are all the issues that have to be decided only at the time of trial by the Trial Court and not by this Court while exercising its power under Section 482 of Cr.P.C.

23.In the decision of the Hon'ble Apex Court reported in (2006) 1 SCC 557 (Rakesh Kumar Mishra vs. State of Bihar and Others), relied upon by the learned counsel appearing for the petitioner the fact is that the Police personnel conducted search and seized some of the materials. Aggrieved by the same, the appellant therein filed complaint as against the Police officer therein. The same was questioned by the Court since search and seizure is in the course of Official duty and held

sanction is necessary. The other cases relied upon by the learned counsel appearing for the petitioner also does not apply to the present case as the appellant herein allegedly availed pecuniary benefit to the tune of Rs.41,700/- from A2 and A3 in the form of air ticket for his visit to Singapore along with his wife.

24.Further, in the decision reported in AIR 1955 SC 309 (Amrik Singh Vs. State of Pepsu), it has been held as follows:

"8.The result of the authorities may thus be summed up: It is not every offence committed by a public servant that requires sanction for prosecution under Section 197 CrPC; nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary; and that would be so, irrespective of whether it was, in fact, a proper discharge of his duties, because that would really be a matter of defence on the merits, which would have to be investigated at the trial, and could not arise at the stage of grant of sanction, which must precede the institution of the prosecution. (emphasis supplied)".

25.In view of the categorical decision reported in AIR 1955 SC 309 (Amrik Singh Vs. State of Pepsu), I am not inclined to allow this petition. This criminal original petition is accordingly dismissed. It is made clear that this Court has not expressed any opinion on the merits of the case. It is for the Trial Court to decide the matter independently, based on the records and in accordance with law and

without being influenced by any of the observations made in this order. The petitioner is granted liberty to raise all the grounds at the time of trial.

26.This criminal original petition is accordingly dismissed. Consequently, connected miscellaneous petition is also closed.

s/d-
Assistant Registrar (CS VI)

True Copy

Sub-Assistant Registrar

To

1.The Inspector of Police,
SPE/CBI/ACB/Chennai.

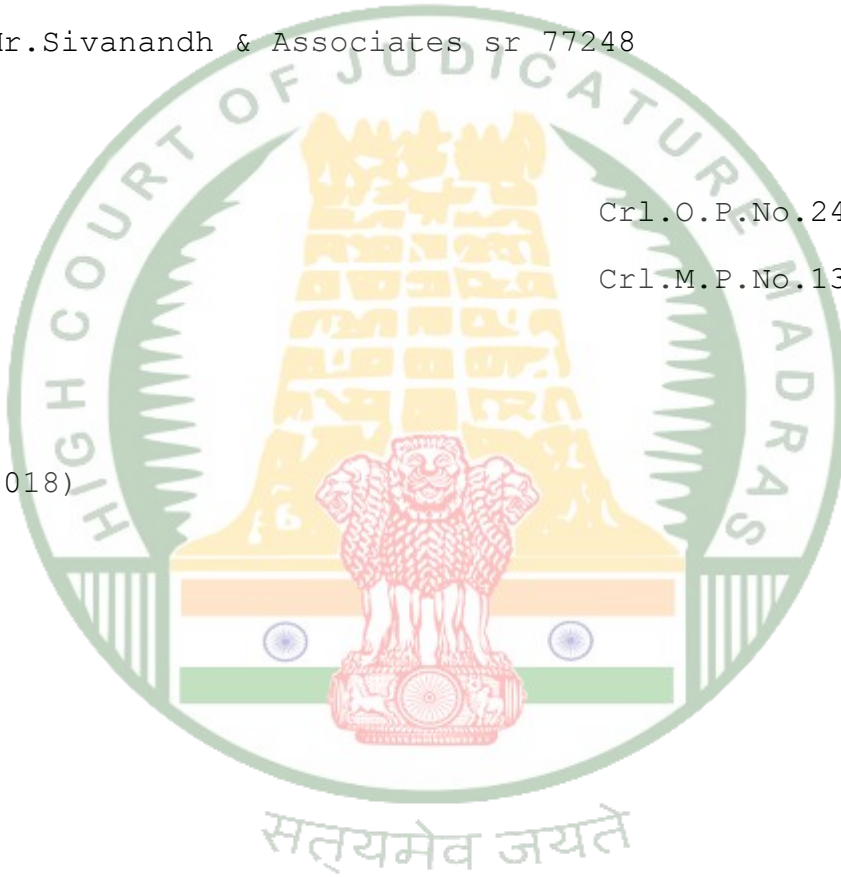
2. The XII Additional Special Judge
CBI Cases, Chennai.

3.The Public Prosecutor,
High Court of Madras,
Chennai 600 104.

+1 CC to Mr.Sivanandh & Associates sr 77248

CrI.O.P.No.24472 of 2018
And
CrI.M.P.No.13926 of 2018

BS (CO)
SP(05/12/2018)



WEB COPY