HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

Criminal Revision Case No.2192 of 2009

ORDER:

The challenge in this Crl.R.C is the order dated 09.12.2009 in Crl.M.P.No.749 of 2009 in C.C.No.310 of 2005 passed by the learned II Additional Judicial Magistrate of First Class, Eluru, allowing the petition filed by the Inspector of Police, CID, probably under Section 319 Cr.P.C to change the nomenclature of Accused No.5 and add the petitioner herein in his individual capacity as Company Secretary of A.5—G.E Lighting India (P) Limited, Bangalore.

2) Mr.V.Raghava Rao—the *defacto* complainant who is the Proprietor of M/s.Sneha Traders filed complaint before the II Additional Judicial Magistrate of First Class at Eluru, West Godavari District against G.I Lighting India (P) Ltd, company and four others alleging that they are conniving and fraudulently using the Registration Certificate of the *defacto* complainant and thereby misusing his property and thus cheating him. The private complaint was referred to police of Penumatha PS, which was registered as case in Crime No.78/2002 for the offences under Sections 420 and 506 IPC r/w 34 IPC and investigated into and ultimately charge sheet was filed against A.1 to A.5. The charge sheet was taken into cognizance and registered as C.C.No.310/2005 and charges were framed against all the accused including A.5 which is the company. The petitioner herein who is the Company Secretary of A.5 company was not added as one of the

accused in his individual capacity. However, A.5 company was shown as G.E Lighting India (P) Ltd, Bangalore (now G.E India Industrial (P) Ltd.) represented by Dominic Viegas. Thereafter A.5 filed Criminal Petition No.5182/2007 under Section 482 Cr.P.C before the High Court seeking to quash the proceedings against it and the said petition was allowed. During the hearing of the said petition, learned Public Prosecutor brought to the notice of the Court that specific allegation was made against the Secretary of the Company i.e. Mr.Dominic Viegas as being involved in the sequence of events and the charge sheet specifically stated about the active support of such person to second accused in his intentionally recommending credit to M/s. Sneha Traders for supply of goods without advance payment through maximum exposure level new revision form to boost up sales. On such argument, in the Criminal Petition No.5182/2007, it was observed that the involvement and liability of the said Company Secretary need not be the subject of consideration and if such person is liable to be made an accused in the criminal case for the same sequence of events for which the other accused are being prosecuted, it is open to the *defacto* complainant or to the prosecuting police or to the trial Court to take any such action permitted by law in accordance with the prescribed procedure. With the above observation, the following order is passed:

> *"In the result, the criminal petition is allowed and all further proceedings in C.C.No.310 of 2005 on the file of the II Additional Judicial Magistrate of First Class at Eluru, West Godavari District against the petitioner-5th accused are quashed, while*

> *making it clear that there is no determination of any liability of Mr. Dominic Viegas, Company Secretary of the 5th accused company by this order, which is left open to be considered and decided by the trial court either at the instance of the defacto complainant or at the instance of the prosecuting police or at its own instance in a manner permitted and provided by law, if the occasion so requires."*

Thereafter the prosecution filed Crl.M.P.No.749/2009 in C.C.No.310/2005 to add the petitioner herein who is the Company Secretary of A.5 company in his individual capacity as Accused No.5. The said petition was allowed by the Trial Court.

Hence the instant Crl.R.C.

3) Heard both sides.

4) On a scrutiny of the impugned order, it must be said that the Trial Court misread the order to add the petitioner as A.5. The order of the Trial Court was prompted by its observation such as "since the Hon'ble High Court has quashed the proceedings against the Company, now the complainant intends to array the respondent who worked as Company Secretary of G.E Lighting India (P) Ltd, who according to complainant committed fraud. Therefore, in a way the adding of respondent is not a new one and it is only instead of company. Hon'ble High Court of Andhra Pradesh also observed that the complainant is at liberty to array the person who is responsible for irregularities in company". Similar such observation is "since the allegations against respondent are serious and admittedly he worked as Company

Secretary of G.E India (P) Ltd., and his adding as accused would throw light on the irregularities, there is no impediment to array the respondent as A5 instead of company". It is thus manifest that the Trial Court was under the impression that since the petitioner was earlier arraigned as Secretary of A.5 company, his impleadment now in his individual capacity is nothing new but only instead of company. The Trial Court felt that inclusion of petitioner would throw light on the irregularities and therefore, there was no impediment to array the petitioner as Accused No.5. It should be noted that Criminal Petition No.5182/2007 was filed when the trial is in the midway. Though Section of law is not mentioned, having regard to the facts, particularly the stage of the case, it is axiomatic that the petition is filed under Section 319 Cr.P.C. This Section confers power on a Court to add any person as an accused who was not already added as such, either during inquiry or trial. However, the precedential jurisprudence would exhort us that the power under this provision must be sparingly and cautiously used by the Court only when the parameters prescribed therein are satisfied.

a) In ***Michael Machado v. CBI***[1]**,** the Apex Court observed thus:

> *"**<u>Para 11</u>:** The basic requirements for invoking the above section is that it should appear to the court from the evidence collected during trial or in the inquiry that some other person, who is not arraigned as an accused in that case, has committed an offence for which that person could be tried together with the accused already arraigned. It is not enough that the court entertained*

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[1] (2000) 3 SCC 262

some doubt, from the evidence, about the involvement of another person in the offence. In other words, the court must have reasonable satisfaction from the evidence already collected regarding two aspects. First is that the other person has committed an offence. Second is that for such offence that other person could as well be tried along with the already arraigned accused.

b) In ***Palanisamy Gounder v. State***[2]**,** referring the above decision, the Apex Court observed thus:

"Para 3: x x x x … The manner in which the power under Section 319 deserves to be exercised has been laid down in Michael Machado v. Central Bureau of Investigation [(2000) 3 SCC 262 : 2000 SCC (Cri) 609] holding that unless the Court is hopeful that there is a reasonable prospect of the case against the newly added accused ending in their conviction for the offence concerned, the Court shall refrain from adding them as accused."

c) In another instance, the Apex Court in ***Lal Suraj v. State of Jharkhand***[3], has explained about the scope of Section 319 Cr.P.C thus:

"Para 11: *Section 319 of the Code is a special provision. It seeks to meet an extraordinary situation. It although confers a power of wide amplitude but is required to be exercised very sparingly. Before an order summoning an accused is passed, the trial court must form an opinion on the basis of the evidence brought before it that a case has been made out that such person could be tried together with the other accused. There is no dispute with the legal proposition that even if a person had not been charge-sheeted, he may come within the purview of the description of such a person as contained in Section 319 of the Code.*

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[2] (2005) 12 SCC 327
[3] (2009) 2 SCC 696

d) In ***S. Mohammed Ispahani v. Yogendra Chandak***[4], the Apex Court observed that power under Section 319 Cr.P.C has to be exercised only where strong and cogent evidence against a person and not in a casual and cavalier manner.

5) In the light of above precedent, when the case on hand is perused, it must be said that none of the witnesses have specifically referred the criminal role of petitioner more particularly in his individual capacity. The evidence of PWs.1 to 6 is placed before this Court.

a) PW.1 is the *defacto* complainant. He stated, earlier he applied to ACTO to cancel his RC but however in 2002 he received notice from ACTO, Tanuku calling upon him to pay Rs.1,78,000/- for doing electrical business. He gave reply stating that he applied for cancellation of RC and he was not doing electrical business. Then A.2 came to him and stated that they did business in the name of complainant's R.C and asked him to compromise the matter at Penumatha PS. They also stated that they would pay the arrears of tax. PW.1 specifically stated that he cannot identify the persons standing in the box. He further stated that A.2 took him to CTO office Tanuku stating that he would pay the arrears of tax and he was made to stay at CTO office and A.2 and others left that place. Thereafter he filed private complaint before the Court. Thus it is needless to emphasize

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[4] (2017) 16 SCC 226

that the *defacto* complainant has not spoken anything incriminating against the petitioner.

b) PW.4 is the son of PW.1 and he is an Advocate. He stated that he knows A.2 but he does not know other accused. He stated that A.2 and A.5 and himself went to Penumatha PS for settlement and the matter was not settled there and hence they all went to CTO-II. A.2, A.5 and others informed the CTO-II that they would pay the tax due. However, they did not pay the amount and escaped. His evidence is also not clear about the presence and participation of petitioner in his individual capacity.

c) The other witnesses also did not say anything about the complicity of the petitioner in the offence.

6) Thus the evidence of PWs.1 to 6 do not disclose any incriminating material against the petitioner in his individual capacity. In that view of the matter, the Trial Court grossly erred in adding the petitioner as A.5 on a wrong impression that earlier he was representing A.5 company and therefore, he could be added in his individual capacity. As already stated supra, the power under Section 319 Cr.P.C should be used sparingly when the Court forms a view that the evidence on record surfaced that the proposed accused had committed an offence for which he could be tried together with the accused already arraigned. That aspect is sorely missing in the instant case. Hence the impugned order is liable to be dismissed.

7) In the result, this Criminal Revision Case is allowed and the order dated 09.12.2009 passed in Crl.M.P.No.749 of 2009 in C.C.No.310 of 2005 by the learned II Additional Judicial Magistrate of First Class, Eluru is set aside.

As a sequel, pending miscellaneous petitions, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 13.12.2018
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