THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CRIMINAL PETITION No.3330 OF 2018

ORDER:

The petitioner/Accused, apprehending his arrest in connection with Crime No.305 of 2017 of Kusumanchi P.S. registered for the offence punishable under Section 409 and 477-A of the Indian Penal Code, 1860 (for short 'I.P.C.'), filed this petition under Section 438 of the Code of Criminal procedure, 1973 (for short 'Cr.P.C') to issue a direction to the Station House Officer, Kusumanchi Police Station, to release him on bail in the event of his arrest.

The petitioner is working as Shroff in the Office of the Sub-Registrar, Kusumanchi. On 01.12.2017 the Sub-Registrar (I/c) Kusumanchi, addressed a letter to the Station House Officer against the petitioner alleging that during the course of verification of records of stamp counter of Sub-Registrar Office, Kusumanchi, by Smt.P.Yamini, Sub-Registrar, Kusumanchi, it was noticed that there was tampering of records and figures were over written by applying whitener at number of places and embezzled the stamp counter money by the petitioner herein. On noticing the irregularities the Sub-Registrar reported the matter to the Deputy Inspector General of Registration and Stamps, Warangal, consequently one Smt.M.Padma, Sub-Registrar, Market Value and Audit, Khammam Unit, has been appointed by the higher authorities as Preliminary Enquiry Officer, to enquire into the matter and to record a fact finding.

The Enquiry Officer visited the office of Sub-Registrar at Kusumanchi, and verified the stamp counter records and submitted Preliminary Enquiry Report holding that the records have tampered and the figures have been over written by applying whitener at number of places in special Adhesive Stock Register (Volume No.7) and Court Fee labels stock register (Volume No.10) on various dates. The said overwritten entries have not been attested by the then Sub-Registrar, therefore the Enquiry Officer has seized all the above records on 27.09.2017. It is further alleged that total embezzlement as per the entries find out by the enquiry is Rs.23,98,215/- and out of embezzled amount, an amount of Rs.9,47,825/- was already made good. The petitioner is still due more than 14 lakhs and the petitioner committed such offence punishable under Sections referred above. Basing on the above allegations, the police registered the crime and issued F.I.R.

The main contention of the counsel for the petitioner is that the Sub-Registrar also responsible for such embezzlement, as such he paid an amount of Rs.9,47,825/-, but not by the petitioner and the preliminary enquiry report alone cannot be taken into consideration for registering the crime, and without obtaining sanction as required under Section 197 Cr.P.C., the prosecution of the petitioner, who is public servant as defined under Section 21 I.P.C., is irregular, and therefore, he sought a direction to the Station House Officer, Kusumanchi Police Station, to release him on bail in the event of his arrest.

The Public Prosecutor (TS) opposed the petition on the ground that the investigation is not completed and prayed for dismissal of the petition.

The Preliminary Enquiry Report disclosed that the petitioner himself embezzled an amount of Rs.23,98,215/-, paid an amount of Rs.9,47,825/-, entries made for stock sold/ issued, but the stock of Court Fee Lables stock available in the counter is Rs.6,53,990/-. Therefore, as per the report, the balance of embezzled amount to be made good is Rs.7,96,400/-.

It is the case of the petitioner that he, being Shroff did not deposit an amount of Rs.9,47,825/- as shown in the report, but it was paid by the Sub-Registrar himself, who was placed under suspension, but no crime was registered against her as on today. It is not clear whether the payment of an amount of Rs.9,47,825/- was made by the Sub-Registrar or by the petitioner alone, but it was deducted from the total amount embezzled. Therefore, it is difficult to conclude at this stage that the petitioner did commit no offence, being Shroff having custody over the registers maintained in the ordinary course of business in the Sub-Registrar Office.

The main ground urged by the petitioner before this Court is that sanction is required under Section 197 Cr.P.C. must be obtained, since he is a public Servant as defined under Section 21 I.P.C.

Learned Counsel for the Petitioner in support of his contention placed reliance on the Judgment of this Court in **Ummadisetti Ratnasagar V. State, rep. by Public Prosecutor**

and Gantasala Ananda Raju[1]. In the case where an identical question came up before this Court for consideration while deciding an application under Section 482 Cr.P.C. wherein the learned Single Judge held that sanction is required to be obtained before taking cognizance of the offence against the public servant.

In view of the language used in Section 197 Cr.P.C., sanction is required to be obtained to prosecute the petitioner before taking cognizance. Taking cognizance would arise only when investigation is completed and charge sheet is filed before the competent court, but at this stage for want of sanction as required under Section 197 cr.P.C. the court cannot grant pre-arrest bail to the petitioner.

In **Matajog Dobey v. H.C. Bhari[2]** the Constitutional Bench of the Apex Court held that sanction under Section 197 Cr.P.C. can be obtained at any time before conclusion of proceedings and also held as follows:

> "*It has been widened further by extending protection to even those acts or omissions which are done in purported exercise of official duty. That is under the colour of office. Official duty therefore implies that the act or omission must have been done by the public servant in course of his service and such act or omission must have been performed as part of duty which further must have been official in nature. The Section has, thus, to be construed strictly, while determining its applicability to any act or omission in course of service. Its operation has to be limited to those duties which are discharged in course of duty. But once any act or omission has been found to have been committed by a public servant in discharge of his duty then it must be given liberal and wide construction so far its official nature is concerned. For instance a public servant is not entitled to indulge in criminal activities. To that extent the Section has to be construed narrowly and in a restricted manner. But once it is established that act or omission was done by the public servant while discharging his duty then the scope of its being official should be construed so as to advance the objective of the Section in favour of the public servant.*

[1] 2016(3) ALT (Crl.) 26 (A.P.)
[2] 1955(2) SCR 925

Otherwise the entire purpose of affording protection to a public servant without sanction shall stand frustrated. For instance a police officer in discharge of duty may have to use force which may be an offence for the prosecution of which the sanction may be necessary. But if the same officer commits an act in course of service but not in discharge of his duty then the bar Under Section 197 of the Code is not attracted. To what extent an act or omission performed by a public servant in discharge of his duty can be deemed to be official was explained by this Court in Matajog Dubey v. H.C. Bhari: AIR 1956 SC 44 thus:

[T]he offence alleged to have been committed (by the accused) must have something to do, or must be related in some manner with the discharge of official duty ... there must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable (claim) but not a pretended or fanciful claim, that he did it in the course of the performance of his duty."

(Emphasis supplied)

In **Shreekantiah Ramayya Munipalli v. The State of Bombay**[3] the Apex Court observed as follows:

"Now it is obvious that if Section 197 of the Code of Criminal Procedure is construed too narrowly it can never be applied, for of course 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. The Section has content and its language must be given meaning. What it says is -

when any public servant ..... 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......

We have therefore first to concentrate on the word 'offence'.

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. In the present case, the elements alleged against the second accused are, first, that there was an "entrustment" and/or "dominion"; second, that the entrustment and/or dominion was "in his capacity as a public servant"; third, that there was a "disposal"; and fourth, that the disposal was "dishonest". Now it is evident that the entrustment and/or dominion 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. Therefore, the act complained of, namely the disposal, could not have been done in any other way. If it was innocent, it was an official act; if dishonest, it was the

[3] 1955 (1) SCR 1177

> *dishonest doing of an official act, but in either event the act was official because the second accused could not dispose of the goods save by the doing of an official act, namely officially permitting their disposal; and that he did. He actually permitted their release and purported to do it in an official capacity, and apart from the fact that he did not pretend to act privately, there was no other way in which he could have done it. Therefore, whatever the intention or motive behind the act may have been, the physical part of it remained unaltered, so if it was official in the one case it was equally official in the other, and the only difference would lie in the intention with which it was done: in the one event, it would be done in the discharge of an official duty and in the other, in the purported discharge of it.*
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> *The act of abetment alleged against him stands on the same footing, for his part in the abetment was to permit the disposal of the goods by the doing of an official act and thus "willfully suffer" another person to use them dishonestly: Section 405 of the Indian Penal Code. In both cases, the "offence" in his case would be incomplete without proving the official act.*
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> *We therefore hold that Section 197 of the Code of Criminal Procedure applies and that sanction was necessary, and as there was none the trial is vitiated from the start. We therefore quash the proceedings against the second accused as also his conviction and sentence."*

In **K.M. Mathew v. State of Kerala and another**[4] wherein Apex Court had observed that even after issuance of process Under Section 204 of the Code, if the accused appears before the Magistrate and establishes that the allegations in the complaint petition do not make out any offence for which process has been issued then the Magistrate will be fully within his powers to drop the proceeding or rescind the process and it is in that connection the Court had observed "if the complaint on the very face of it does not disclose any offence against the accused". The aforesaid observation made in the context of a case made out by the accused either for recall of process already issued or for quashing of the proceedings may not apply fully to a case where the sanction Under Section 197(1) of the Code of Criminal Procedure is pleaded

[4] (1992) 1 SCC 217

as a bar for taking cognizance. The legislative mandate engrafted in Sub-section (1) of Section 197 debarring a court from taking cognizance of an offence except with a previous sanction of the Government concerned in a case where the acts complained of are alleged to have been committed by a public servant in discharge of his official duty or purporting to be in the discharge of his official duty and such public servant is not removable from his office save by or with the sanction of the Government touches the jurisdiction of the court itself. It is a prohibition imposed by the statute from taking 'cognizance', the accused after appearing before the court on process being issued, by an application indicating that Section 197(1) is attracted merely assists the court to rectify its error where jurisdiction has been exercised which it does not possess. In such a case there should not be any bar for the accused producing the relevant documents and materials which will be ipso facto admissible, for adjudication of the question as to whether in fact Section 197 has any application in the case in hand. It is no longer in dispute and has been indicated by this Court in several cases that the question of sanction can be considered at any stage of the proceedings.

In **Matajog** case the Constitution Bench is of the consistent view that the complaint may not disclose all the facts to decide the question of applicability of Section 197, but facts subsequently coming either on police or judicial inquiry or even in the course of prosecution evidence may establish the necessity for sanction.

In **B. Saha & others v. M.S. Kochar**[5] the Apex Court observed that instead of confining itself to the allegations in the complaint the Magistrate can take into account all the materials on the record at the time when the question is raised and falls for consideration.

In **Pukhraj v. State of Rajasthan**[6] the Apex Court observed that whether sanction is necessary or not may depend from stage to stage. In **Matajog**[12] case, the Constitution Bench had further observed that the necessity for sanction may reveal itself in the course of the progress of the case and it would be open to the accused to place the material on record during the course of trial for showing what his duty was and also the acts complained of were so interrelated with his official duty so as to attract the protection afforded by Section 197 of the Code of Criminal Procedure. This being the position it would be unreasonable to hold that the accused even though might have really acted in discharge of his official duty for which the complaints have been lodged yet he will have to wait till the stage under Sub-section (4) Section 246 of the Code is reached or at least till he will be able to bring in relevant materials while cross-examining the prosecution witnesses. On the other hand it would be logical to hold that the matter being one dealing with the jurisdiction of the court to take cognizance, the accused would be entitled to produce the relevant and material documents which can be admitted into evidence without formal proof, for the limited consideration of the court

[5] (1979) 4 SCC 177
[6] (1973) 2 SCC 701

whether the necessary ingredients to attract Section 197 of the Code have been established or not. The question of applicability of Section 197 of the Code and the consequential ouster of jurisdiction of the court to take cognizance without a valid sanction is genetically different from the plea of the accused that the averments in the complaint do not make out an offence and as such the order of cognizance and/or the criminal proceedings be quashed. In the aforesaid premise the Apex Court was of the considered opinion that an accused is not debarred from producing the relevant documentary material which can be legally looked into without any formal proof, in support of the stand that the acts complained of were committed in exercise of his jurisdiction or purported jurisdiction as a public servant in discharge of his official duty thereby requiring sanction of the appropriate authority. Further, the Supreme Court held that considering the facts and circumstances of the case, it prima facie appears that the alleged acts on the part of the Respondents were purported to be in the exercise of official duties. Therefore, a case of sanction under Section 197 Code of Criminal Procedure has been prima facie made out. Whether it was unjustified on the part of the Respondents to take recourse to the actions alleged in the complaint or the Respondents were guilty of excesses committed by them will be gone into in the trial after the required sanction is obtained on the basis of evidences adduced by the parties. At this stage, such questions are not required to be considered because the accused have not yet led evidence in support of their case on merits.

In **P.K. Pradhan v. State of Sikkim represented by the Central Bureau of Investigation**[7] the Apex Court considered the provisions contained in Section 197(1) of the Code of Criminal Procedure whether an offence committed "while acting or purporting to act in the discharge of his official duty" and laid down that the test to determine the aforesaid is that the act complained of must be an offence and must be done in discharge of official duty. In any view of the matter there must be a reasonable connection between the act and the official duty. It does not matter that the act exceeds what is strictly necessary for the discharge of the official duty, since that question would arise only later when the trial proceeds.

In large number of decisions, the Apex Court held that there must be direct nexus between the duty and commission of the offence and that "such sanction can be obtained at any time before taking cognizance of offence by the Magistrate". Therefore, while considering an application for grant of pre-arrest bail under Section 438 Cr.P.C. at pre-investigation stage, it is difficult to accept this contention and grant of bail to the petitioner.

Hence, the judgment of the Single Judge of this Court in **Ummadisetti Ratnasagar** case relied on by the counsel for the petitioner has no direct application to the present facts of the case, since Shroff is not removable by Governor of the State or President of India, and on that ground the petitioner is not entitled to claim pre-arrest bail.

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[7] 2001(6) SCC 704

Grant of pre-arrest bail is not a matter of course and it is a matter of exception. Unless the petitioner shows that there are exceptional circumstances to conclude that he did commit no offence, the Court can exercise discretionary power under Section 438 Cr.P.C. But in the present case, the offence committed by the petitioner is a serious economic offence i.e. embezzlement of more than Rs.20,00,000/- as per the preliminary report of the enquiry officer and when the petitioner committed such serious economic offence, the petitioner is not entitled to claim pre-arrest bail as held by the Apex Court in **Nimmagadda Prasad v. Central Bureau of Investigation**[8]. Hence, I find no ground to enlarge the petitioner on pre-arrest bail and the petition is liable to be dismissed.

In the result, the criminal petition is dismissed.

M. SATYANARAYANA MURTHY, J

Date: 24.04.2018
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[8] AIR 2013 SC 2821