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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO. 323 OF 2018

Manoj Omprakash Gupta

. Applicant

vs.

CBI ACB, Mumbai & Anr.

. Respondents

Mr. Niranjan Mundargi I/b Vijay Advani for the Applicant.

Ms. S.D. Khot for the respondent No.1.

CORAM : A.S. GADKARI, J.

DATE : 25th June 2019.

P.C.:

1] By the present Revision Application, the applicant has impugned Order dated 18th May 2018 passed by the learned Special Judge (C.B.I.), Mumbai below Exh.15, rejecting the discharge application preferred by the applicant under Section 227 of Cr. P.C. from C.B.I. Special Case No.115 of 2015 for the offense punishable under Section 109 of the Indian Penal Code and under section 13(2) read with 13(1)(e) of Prevention of Corruption Act, 1988.

2] Heard the learned counsel for the applicant and the learned counsel for the respondent/CBI ACB. Perused the record annexed to the application.

3] The applicant is an accused in C.B.I. Special Case No.115 of 2015 arising of crime bearing No. RC/Mumbai/2014/A/0024 for the offense under Section 109 of the Indian Penal Code and 13(2) read with 13(1)(e) of Prevention of Corruption Act, 1988. After completion of investigation, C.B.I. A.C.B, Mumbai has submitted its final report under Section 173 (2) of the Cr. P.C. before the CBI Special Court, Mumbai.

The applicant thereafter preferred an application under Section 227 of Cr. P.C. seeking his discharge from the said C.B.I. Case. The Trial Court by the impugned Order dated 18th May 2018 has rejected the said application.

4] The learned counsel for the applicant submitted that, the applicant was in the employment of Kendriya Bhandar, Mumbai as a Manager and while performing his duty, has alleged to have been committed the act of defalcation and other acts which according to the prosecuting agency are punishable for aforesaid offences. He submitted that, however the said Kendriya Bhandar is not a Government enterprise or entity and therefore the applicant is not a public servant. He submitted that, the provisions of the Prevention of Corruption Act, 1988 cannot be applied to the present case and the

petitioner therefore deserves to be discharged from the offences punishable under the Prevention of Corruption Act.

5] The learned Special P.P for the respondent on instructions submitted that, the Government of India has 71% share holding in the said enterprise namely Kendiya Bhandar. She submitted that, it is the enterprise of the Government and therefore the provisions of the Prevention of Corruption Act are rightly applied to the present offence. She therefore prayed that, the present application has no merits and may be summarily rejected.

6] Section 2(c)(ix) of the Prevention of Corruption Act, 1988 reads as under:-

“2(c)- “public servant” means :-

(ix) any person who is the president, secretary or other office-bearer of a registered co-operative society engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the Central Government or a State Government or from any corporation established by or under a Central, Provincial or State Act, or any authority or body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956”

(underline emphasis supplied)

A plain reading of the said provision would indicate that, the words used therein are “....receiving or having received any financial aid from the Central Government or a State Government” Thus the said provision does not make any distinction with respect to ownership or independent enterprise having been run by the Government. The said provision of Section 2(c)(ix) relates to the 'public servant' working in establishment/enterprise which is a Government entity, otherwise the words “receiving or having received any financial aid from the Central Government or a State Government” would not have been incorporated in the statute by the legislature. The said terminology encompasses all activities aided by the Government. The contention of the learned counsel for the applicant therefore cannot be accepted.

7] The Supreme Court in the case of *R.S. Nayak vs. A.R. Antulay and Anr. Reported in AIR 1986 SC 2045*, while dealing with the provisions of Sections 227, 239 and 245 of Cr.P.C., in unequivocal terms in Para 44 has held as under:-

“The Code contemplates discharge of the accused by the Court of Sessions under Section 227 in a case triable by it; cases instituted upon a police report are covered by Section 239 and cases instituted otherwise than on police report are dealt with in Section 245. The three sections contain some what different

provisions in regard to discharge of the accused. Under Section 227, the trial Judge is required to discharge the accused if he 'considers that there is not sufficient ground for proceeding against the accused.' Obligation to discharge the accused under Section 239 arises when "the Magistrate considers the charge against the accused to be groundless." The power to discharge is exercisable under Section 245(1) when "the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction." It is a fact that Sections 227 and 239 provide for discharge being ordered before the recording of evidence and the consideration as to whether charge has to be framed or not is required to be made on the basis of the record of the case, including documents and oral hearing of the accused and the prosecution or the police report, the documents sent along with it and examination of the accused and after affording an opportunity to the two parties to be heard. The stage for discharge under Section 245, on the other hand, is reached only after the evidence referred to in Section 244 has been taken. Notwithstanding this difference in the position there is no scope for doubt that the stage at which the Magistrate is required to consider the question of framing of charge under Section 245(1) is a preliminary one and the test of "prima facie" case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if the trial Court is satisfied that a prima facie case is made out, charge has to be framed."

A further reliance can also usefully be placed on

the decision of the Supreme Court in the case of *State of Maharashtra Vs. Soma Nath Thapa* reported in (1996) 4 SCC 659 wherein, the Supreme Court has held that, if there is ground for presuming that the accused has committed the offence, it can be said that, a prima facie case has been made out against the accused. It has been further held that even if the Court finds that the accused might have committed an offence, it can frame charge. The Supreme Court has further clarified in the said case that at the stage of framing of charge probative value of the statements cannot be gone into.

The Supreme Court in the case of *Palvinder Singh Vs. Balwinder Singh and others* reported in (2008) 14 SCC 504 while dealing with the provisions of Section 227 of Cr.P.C., in para 13 has held that, the charges can also be framed on the basis of strong suspicion. That, marshaling and appreciation of evidence is not in the domain of the Court at that point of time.

Thus, it is clear that, the Supreme Court in its various decisions has held that while considering the application for discharge the Court has to take into the prima facie case as made out by the Complainant/prosecution.

8] Prima facie it appears from the record that, there is

sufficient material available against the applicant to proceed with to frame charge for the offences alleged against him. After taking into consideration the material available on record, this Court is of the view that the applicant does not deserve to be discharged from the aforestated CBI Case. This Court finds no illegality or irregularity either on facts or in law committed by the Trial Court in the impugned Order dated 18th May 2018.

Revision Application being devoid of merits, is accordingly rejected.

9] At this stage, the learned counsel for the applicant submitted that, the applicant intends to challenge the present Order before the Honourable Supreme Court and submitted that the interim relief granted by Order dated 25th July 2018 may be further continued for a period of 4 weeks. The learned Special P.P vehemently opposed the said prayer.

However, interim relief granted by this Court by Order dated 25th July 2019 is hereby continued for a period of two weeks from the date of uploading of the present Order on the High Court Website.

(A.S. GADKARI, J.)