

Tandle

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO. 468 OF 2019

Manohar Keshardev Mali

... Applicant.

Versus

CBI, EOW, Mumbai and Anr.

... Respondents.

.....

Mr Joseph Thattil i/b Thattil and Co. for the Applicant in
REVN/468/2019.

Ms. Ameeta Kuttikrishnan i/b Rebecca Gonsalvez for Respondent No.1-
(CBI).

Mr. R. M. Pethe, APP for the Respondent – State.

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CORAM : A. S. GADKARI, J.

DATE : 16th OCTOBER, 2019

P. C. :

1. By the present Revision under Section 397 of the Code of Criminal Procedure, the applicant/original accused No.5 has questioned the correctness, legality and propriety of the Judgment and Order dated 16th July 2019 passed below Exhibit 359 in CBI Special Case No. 135 of 2009 by the learned Special Judge (CBI), Greater Bombay, rejecting the application for discharge filed by the applicant under Section 239 of the Code of Criminal Procedure.

2. The applicant is accused No.5 in CBI Special Case No. 135 of 2009 arising out of the Crime No. RC-4/E/2005/CBI/EOW/Mumbai, dated 29th December 2009 under Section 120-B read with Section 420,

468, 471 of the Indian Penal Code and under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988.

3. Heard Mr. Joseph Thattil, learned counsel for the Applicant, Ms. Kuttikrishnan for the Respondent No.1-CBI and Mr. Pethe, learned APP for the respondent – State. Perused the charge-sheet annexed to the application.

4. It is the prosecution case that the accused Nos.1, 2 and 3 in conspiracy with other accused persons, floated various fictitious firms and by submitting forge and fake documents to the Central Excise and Customs Department, availed discounting facilities and got sanctioned the rebate claims to the tune of Rs. 3,34,00,000/- thereby causing wrongful gain to themselves and corresponding wrongful loss to the Central Excise Department, Government of India.

5. So far as the applicant/original accused No.5 is concerned, it is the allegation against him, that, he had discounted the said cheques of the accused firm M/s Mittal Overseas through the cheque discounters M/s Shree Siddivinayak Corporation and M/s Shree Arihant Corporation. That by helping the principal accused persons in the crime, the applicant has received substantial amount towards reward which is proceeds of crime. After completion of investigation, the CBI has submitted charge-sheet before the Court of Competent Jurisdiction.

The record further indicates that, the applicant, thereafter filed an application below Exhibit 359 under Section 239 of the Code of

Criminal Procedure for his discharge from the said case. The Trial Court by its Judgment and Order dated 16th July 2019 has rejected the said application.

6. The learned counsel for the applicant submitted that there is no material available on record to implead the applicant in the present crime. He submitted that, the statements of witnesses do not disclose the name of the firm opened at the instance of the applicant. That the applicant is a small time businessman, carrying on his business from Surat and has no connection with the present crime registered at Mumbai.

He further submitted that, the applicant has been falsely implicated in the present crime. He submitted that the applicant has not played any role in the crime. That the trial Court has not taken into consideration the said facts and has erroneously rejected the application preferred by the applicant. He therefore prayed that, the impugned Order may be quashed and set aside.

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 239 and 237 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."

8. 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.

9. 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.PC., 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 consideration the *prima facie* case as made out by the Complainant/prosecution.

10. The material available on record which is in the form of statements and other documents clearly indicate that, at the instance of the applicant, one of the co-accused opened an account in the Textile Co-operative Bank of Surat Limited bearing CA No.7707 in the name of "M/s Kunjabihari Synthetics". It prima facie appears that, certain cheques were issued to the other accused persons are presented before the said Bank and the applicant herein has been adequately rewarded for the same by co-accused. The statement of facts submitted by the respondent No.1-C.B.I. before the Trial Court further discloses that, the applicant had actively participated in discounting the cheques of co-accused firm namely M/s Mittal Overseas through the cheque discounters M/s Shree Siddivinayak Corporation and M/s Shree Arihant Corporation and is recipient of the amount towards reward in the present crime.

11. Prima facie, there is sufficient material available on record to show the complicity in the present crime along with other accused persons. It further prima facie, appears that, there is sufficient material available on record to proceed to frame charge against the applicant.

12. After perusing the entire material available on record, this Court is of the considered view that, there are no merits in the Revision Application.

13. Application being dehors of merits, is accordingly rejected.

(A. S. GADKARI, J.)