IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 03.12.2019

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THE HONOURABLE MR.JUSTICE M.DHANDAPANI

CRL. R.C. NOS. 1322,1324 & 1328 OF 2019
AND
CRL. M.P. NOS. 17852,17856,17858,17859, 17863 & 17864 OF 2019

M. Balasubramanian .. Petitioner in all revision petitions

Vs.

State rep. by
Deputy Superintendent of Police
CBI: ACB: Chennai. ... Respondent in all revision petitions

Criminal Original Petitions have been filed under Section 397 r/w 401 of Cr.P.C to call for the records in Crl.M.P.Nos.1095 and 1427 of 2014 and 1811 of 2013 in CC Nos.14,15 & 16 of 2012 pending on the file of XI Additional Special Judge for CBI Cases, Chennai and set aside the order dated 05.11.2019.

For Petitioner : Mr. Sunder Mohan Senior Counsel
For M/s.Norton & Grant

For Respondent : Mr. K.Srinivasan, Spl. PP (CBI Cases)

COMMON ORDER

These revision petitions are preferred against the order dismissing the discharge petition filed by the petitioner u/s 239 Cr.P.C. in Crl. M.P. Nos.1095 and 1427 of 2014 and 1811 of 2013 in C.C. Nos.14, 15 & 16 of 2012, pending on the file of XI Additional Special Judge for CBI Cases, Chennai, dated 05.11.2019.

2. It is the case of the petitioner that while working as Senior Branch Manager in Syndicate Bank, he was deputed as Managing Director in REPCO Bank during the year 1987 and the service of the petitioner was extended periodically every 3 years. REPCO Bank extended its service base by starting REPCO Home in which 7 persons were appointed and the petitioner was appointed as Managing Director, while the other persons were appointed as Directors. The remuneration of the petitioner was fixed as per the Board Resolution. The petitioner, while at the time of retiring from the service of the bank, was receiving an annual remuneration of Rs.20,00,000/- from REPCO Home and

Rs.7,41,000/- as annual remuneration from REPCO Bank. Three months after his retirement, the respondent, based on certain information, filed three cases before the XI Additional Judge, City Civil Court, Chennai in C.C.Nos. 14, 15 and 16 of 2002 against the petitioner alleging misuse of his official position while granting loans unauthorizedly and, thereby, misappropriated a sum of Rs.89,69,000/-(Rupees Eighty Nine Lakhs and sixty nine thousand only) and caused huge loss to the Bank. After investigation, Hence, the respondent filed charge sheet against the petitioner u/s 120 (B) r/w 420 IPC and Sec 13 (2) r/w 13(1)(d) of the Prevention of Corruption Act, 1988. Since, the petitions filed by the petitioner before the trial court for his discharge proved unsuccessful, the present petitions have been filed assailing the said order.

3. Learned counsel appearing for the petitioner submitted that the petitioner, being a public servant was not removed from service till he retired from the services of the bank. It is the further submission of the learned counsel for the petitioner that there were 7 persons, who were Members of the Board and Directors, including the petitioner. Therefore, for waiver of any loan, the consent of all the members of the Board was necessary. However, the petitioner along with three other persons alone have been mulcted with the conspiracy, which shows the lacunae in the prosecution. It is the further submission of the learned counsel for the petitioner that the petitioner having held the post of Managing Director, for prosecuting him, sanction as contemplated u/s 197 Cr.P.C. is mandatory. The acts of the petitioner having been performed in the discharge of his official duty, he cannot be fastened with criminal liability alleging that he acted with mala fide intention. It is the submission of the learned counsel for the petitioner that the act of the petitioner being part of the discharge of his official duties, prior sanction is essential and in the absence of sanction, the prosecution cannot be proceeded with. In support of the said contention, reliance was placed on the decision in Balakrishnan Pillai Vs. State of Kerala & Anr. (1996 (1) SCC 478), wherein the Apex Court considered the scope and application of Section 197 Cr.P.C and held as under :-

> "6. The next question is whether the offence alleged against the appellant can be said to have been committed by him while acting or purporting to act in the discharge of official duty. It was contended by the learned counsel for the state that the charge of conspiracy would not attract Section 197 of the Code for the simple reason that it is no part of the duty of a minister while discharging his official duties to enter into a criminal conspiracy. In support of his contention, he placed strong reliance on the decision of this Court in Harihar Prasad Vs State of bihar. He drew our attention to the observations 74 of the Judgment where the Court,

while considering the question whether the acts complained of were directly concerned with the official duties of the public servants concerned and hence want of sanction under Section 197 of the code was no bar to the prosecution. The question whether the acts complained of had a direct nexus of relation with the discharge of official duties by the public servant concerned would depend on the facts of each case. There can be no general proposition that whenever there is a charge of criminal conspiracy levelled against a public servant in or out of office of the bar of Section 197(1) of the code would have no application. Such a view would render Section 197 (1) of the code would have no application. Such a view would render Section 197(1) of the Code specious. Therefore, the question would have to the examined the facts of each case. The observations were made by the Court in the special facts of that case which clearly indicated that the criminal conspiracy entered into by the three delinquent public servants had no relation whatsoever with their official duties and, therefore, the bar of Section 197(1) was not attracted. It must also be remembered that the said decision was rendered keeping in view Section 197(1), as it then stood, but we do not base our decision on that distinction. Our attention was next invited to a three Judge decision in B. Saha Vs. M.S. Kochar. The relevant observations relied upon are to be found in paragraph 17 of the Judgment. It is pointed out that the word. "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty."employed Section 197(1) of the code, are capable of both a narrow and a wide interpretation but their lordships pointed out that if they were construed too narrowly, the section will be rendered altogether sterile, for, "it is no part of an official duty to commit an offence, and never can be."At the same time, if they were too widely construed they will take under their umbrella every act constituting an offence committed in the course of the same transaction in which the official duty is performed or is purported to be performed. The right approach, it was pointed out, was to see that the meaning of this expression lies between these two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection. Only on act constituting an offence directly or reasonable connected with his official duty with his official duty will require sanction for prosecution. To put it briefly, it is the quality of the act that is important, and if it falls within the scope of the aforequoted words, the protection of Section 197 will have to be extended to the public servant concerned. This decision, therefore, points out what approach the Court should adopt while construing Section 197 (1) of the code and its application to the facts of the case on hand.

7. In the present case, the appellant is charged with having entered into a criminal conspiracy with the co-accused while functioning as a Minister. The criminal conspiracy alleged is that he sold electricity to an industry in the state of Karnataka "without the consent of the Government of Kerala which is an illegal act""without the consent of the Government of Kerala which is an illegal act"without the consent of the Government of Kerala which is an illegal act"under the provisions of the Electricity (supply) Act, 1948 and the Kerala Electricity Board rules framed thereunder. The allegation is that he in pursuance of the said alleged conspiracy abused his official position and illegally sold certain units to the private industry in Bangalore (Karnataka) which profited the private industry to the tune of Rs.19,58,630.40 or more and it is therefore, obvious functioning as the Minister for Electricity he without the consent of the Government of Kerala supplied certain units of electricity to a private industry in Karnataka. Obiviously, he did this in the discharge of his duties as a Minister. The Government of Kerala was not obtained before this Arrangement was entered into and the supply was effected. For that reason, it is said that he had committed an illegality and hence he was liable to be punished for criminal conspiracy under Section 120-B, IPC."It is, therefore, clear from the charge that the act alleged is directly and reasonable connected with his official duty as a minister and would ,therefore, attract the protection of Section 197(1) of the Act.

8. For the above reasons, we are unable to accept the view taken by the High Court of Kerala in so far as the requirement of sanction under Section 197(1) of the Code is concerned, in relation to the charge of criminal conspiracy. We, therefore, allow this appeal, set aside the

> decision of the High Court in so far as that charge is concerned and hold that sanction under Section 197(1) of the code was sine qua non. As pointed out earlier so far as the second charge under Section 5(2) read with Section 5(1)(d) of the Prevention of Corruption Act is concerned, the view of the High Court remains undisturbed. The appeal is allowed accordingly and will stand so disposed of.”

4. It is therefore submitted by the learned counsel appearing for the petitioner that no prior sanction as mandated u/s 197 Cr.P.C. having been obtained from the competent authority and the act of the petitioner being in discharge of his official duties, immunity is granted to him from the prosecution and, therefore, the prosecution itself has to fail, which aspect has not been properly appreciated by the court below and, therefore, the order passed by the court below deserves to be set aside and the petitioner be discharged from the charge.

5. Per contra the learned Additional Public Prosecutor appearing for the respondent submits that the allegation against the petitioner is that he was involved in a conspiracy for waiving the loans that were sanctioned to certain industries without concurrence of the Board. It is the duty of the petitioner, as the head of the institution to and authorised to handle the funds of the public with care and caution, but, in the performance of his official duties, he aided certain industries in waiver of the loans at his discretion, which having come to the knowledge of the respondent subsequent to the retirement of the petitioner, prosecution was launched against him. The petitioner having retired from the services of the bank, no prior sanction of the competent authority is necessary and, therefore, the trial court has considered all the relevant materials placed before it and has arrived at a just and fair conclusion and, therefore, no interference is called for with the order of the trial court. Therefore, Therefore, discharging the petitioner at this stage would be very much detrimental to the prosecution and, therefore, pleaded for dismissal of the revision petitions.

6. Heard the learned counsel appearing for the petitioner and the learned Special Public Prosecutor appearing for the respondent and perused the materials available on record to which this Court's attention was drawn.

7. Time and again, it has been laid down by the Courts that the trial court, at the initial stage should not make a roving enquiry and the courts ought to discern a strong suspicion over the existence of facts constituting the offence as against the accused and that at that stage, evidentiary value need not be gone into at all by the court. Therefore, where there exists

some material, which gives rise to a likelihood of involvement of the accused in the fraudulent transaction the courts should be circumspect in allowing the discharge petition.

8. Before proceeding to analyse the issue on hand, it would be apposite to have a look at Section 197 of Cr.P.C., which speaks about the prosecution of public servants. For better clarity, the same is extracted hereunder:-

> Prosecution of Judges and public servants.-
> (1) When any person who is or was a Judge or Magistrate or 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 save as otherwise provided in Lokpal and Lokayuktas Act, 2013-
>
> (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:
>
> (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, of the state Government:
>
> Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a proclamation issued under clause (1) of Article 356 of the constitution was in force in a state, clause 9b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government"were substituted."

9. In this regard, useful reference can be had to the decision of the Constitution Bench in K. Satwant Singh - Vs - State of Punjab (AIR 1960 SC 266), wherein the Constitution Bench had occasion to examine the scope of Section 197 Cr.P.C. and in that context held as under :-

> "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 IPC, is one of them and the offence of cheating or abatement 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."

10. In State of Maharashtra - Vs - Dr.Budhikota Subbarao (1993 (3) SCC 339), the Supreme court had occasion to consider the meaning of 'Official Act' and in that context held as under :-

"This Court has considered the meaning of the 'official act' thus : "6. Such being the nature of the provision the question is how should the expression, 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty', be understood? What does it mean? 'Official' according to dictionary, means pertaining to an office. And official act or official duty means an act or duty done by an officer in his official capacity. In S.B.Saha v. M.S.Kochar 1979 4 SCC 177, it was held:

"The words 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty' employed in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the section will be rendered altogether sterile, for, 'it is no part of an official duty to commit an offence, and never can be'. In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between these two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197(1), an act constituting an offence, directly and reasonably connected

> with his official duty will require sanction for prosecution under the said provision." Use of the expression, 'official duty' implies that the act or omission must have been done by the public servant in course of his service and that it should have been in discharge of his duty. The section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty.

In P.Arulswami v. State of Madras (1967) 1 SCR 201 this Court after reviewing the authorities right from the days of Federal Court and Privy Council held:

> "… It is not therefore every offence committed by a public servant that requires sanction for prosecution under Section 197(1) of the Criminal Procedure Code; 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. It is the quality of the act that is important and if it falls within the scope and range of his official duties the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted. An offence may be entirely unconnected with the official duty as such or it may be committed within the scope of the official duty. Where it is unconnected with the official duty there can be no protection. It is only when it is either within the scope of the official duty or in excess of it that the protection is claimable." 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. 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) If on facts, therefore, it is prima facie found that the act or omission for which the accused was charged had reasonable connection with discharge of his duty then it must be held to be official to which applicability of Section 197 of the Code cannot be disputed."

11. From the above, it is evident that any duty, which is intrinsically intertwined with the discharge of the official work and in the course of the official work is to be termed official duty unless and until the 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.

12. A close perusal of above the decisions above, unequivocally holds that the bar u/s 197 of Cr.P.C is restricted only for an act constituting an offence directly or reasonably connected with the official duty and the ultimate justification for the protection conferred by Section 197 of Cr.P.C. is for the purpose of safeguarding persons, who act in good faith and in public interest and, thereby protects them from vexatious prosecutions.

13. A careful reading of Section 197 Cr.P.C. coupled with the act of the petitioner squarely leads this Court to the irrefutable conclusion that the act of the petitioner could in no way be termed to be an act in the discharge of his official duties. The act of sanctioning loan could be termed to be an act, which the petitioner could do individually or collectively, but where waiver of loans is concerned, which is connected with the financial health of the organisation, the petitioner, as Managing Director, could at best be considered to be the head of the Board and could not unilaterally take any decision for waiver of the loans. It is the allegation of the respondent that the petitioner, in connivance with certain other members had taken the decision to waive the loan, which affects the health of the financial institution and there was no Board resolution to the effect accepting the waiver. That being the case, the act of the petitioner could not be brought within the meaning of 'official act' as meant by the Supreme Court in Budhikota Subbarao's case (supra) and, therefore, as held by the Constitution Bench in Satwant Singh's case (supra), the bar u/s 197 Cr.P.C. does not stand attracted to the facts of the present case. Though it is the vociferous contention of the learned counsel for the petitioner that in the absence of prior sanction for prosecution, no prosecution can be initiated against the petitioner as the act of the petitioner is one performed in the course of his official duties, however, it has to be pointed out that first of all the act of the petitioner in waiving the loans without the approval of the Board could not be construed as an official act, as noted above and, secondly, the petitioner having retired from service on the date when prosecution was launched against him, he not being an officer on the rolls of the employer, prior sanction for prosecution does not arise. The decisions relied on by the learned counsel for the petitioner would not in any way come to the aid of the petitioner to advance his case.

14. In the case on hand, a perusal of records reveals that the petitioner herein as well as several other accused, who have been charge sheeted, have diverted the funds and used for purposes other than those for which it has been given. Further, it is not the case of the petitioner that he had not involved himself in any of the activities alleged by the respondent, but

that the said activities are official acts, which have been done in the course of discharging his official duties. Such being the stand of the petitioner, this Court is of the considered view that the petitioner has to face the trial and establish through evidence that the acts done by him are acts that were performed in the course of discharging his official duties and it is not open to the petitioner, at this stage, to seek for discharge, when there are prima facie materials, which reveal some fraudulent acts having been done in violation of rule of law. From a perusal of the order passed by the learned Magistrate, it is evident that detailed reasons have been spelt out by the learned Magistrate indicating that sufficient materials are available on record to dismiss the discharge petition.

15. Further, it appears that the trial court has give more than sufficient and adequate reasons for subjecting the petitioner to trial. In any event, it is always open to the petitioner to come out unscathed after facing the trial and it is certainly not open to the petitioner to escape from the clutches of law at the very threshold by seeking his discharge from the charges. The petitioner herein, having conspired with other persons to defraud the bank, cannot absolve himself of complete responsibility in the fraud detected by the respondent and, therefore, if he has a strong case of his innocence, it is always open to him to prove his innocence in the trial.

16. In a case of revision, this Court has to keep in mind the scope and ambit within which this Court can interfere with the order of the court below. At this stage, this Court has to consider whether any prima facie has been made out to proceed against the accused, from the materials made available before this Court. This Court is of the opinion that prima facie case has been made out against the petitioner and it is up to the petitioner to raise all points that are in his favour before the trial court to prove his innocence. Therefore, this court is of the opinion that the trial court is right in dismissing the discharge petition filed u/s 239 of Cr.P.C. The issue raised by the petitioner cannot be decided in the present revision filed u/s 397 r/w 401 of Cr.P.C.

17. On a careful analysis of the entire factual matrix as also the order passed by the court below, this Court finds that the order passed by the court below is a well considered order founded on material reasons and evidence and the same does not suffer from any infirmity at all. Once the conclusion reached by the Magistrate is on the basis of facts on the materials presented, unless such finding of fact is perverse and wholly unacceptable, the same does not call for any interference from this Court. In this case, it appears that the Magistrate has given cogent, sound and convincing reasons and also adverted to the principles laid down consistently by the Courts for coming to the conclusion, which is perfectly in order and does not call

for any interference.

18. Therefore, this Court is of the considered view that no prejudice would be caused to the petitioner if he is subjected to due trial as sufficient opportunity would be given to the petitioner to put forth his defence. The petitioner cannot be let off by discharging him from the charges as that would completely undermine the alleged fraud of several conspirators, which is the subject matter of criminal trial pending against them.

19. For the reasons aforesaid, this Court finds no ground or scope for interfering with the order passed by the Court below and, hence, these petitions, being devoid of merits, are dismissed. Consequently, connected miscellaneous petitions are also dismissed.

Sd/-
Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

smn/GLN

To

1.XI Additional Special Judge for CBI Cases,
Chennai.

2.The Deputy Superintendent of Police,
CBI : ACB
Chennai.

+3cc to Mr.Norton & grant, Advocate, S.R.No. 100828, 100827, 100826

CRL. R.C. NOS. 1322, 1324
& 1328 OF 2019

AP(CO)
GN(28/01/2020)