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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on:- 21st August, 2019

+ Crl.M.C. 1686/2016

CENTRAL BUREAU OF INVESTIGATION Petitioner

**Through: Mr. Ripu Daman Bhardwaj
with DSP Prabhat Jamwal, (IO)**

versus

SURESH KUMAR GARG & ANR. Respondents

**Through: Mr. Rajiv K. Garg, Mr. Ashish
Garg & Mr. Govind Singh,
Advs. for R-1.
Mr. Pramod Kumar, Adv. for
R-2.**

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. On the basis of report (charge-sheet) under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) submitted by the petitioner Central Bureau of Investigation upon conclusion of its investigation into first information report (FIR) – RC no. BD.1/2015/E/0009, CBI, BS & FC, New Delhi seeking prosecution of the respondents herein (accused persons), the Special Judge by his order passed on 02.02.2016, while taking cognizance for offences under Sections 13 (2) read with Section 13 (1) (c) & (d) of Prevention of Corruption Act, 1988 declined to take cognizance for other offences – under Sections 120 B read with Sections 420 and 409 of Indian

Penal Code, 1860 (IPC) “for want of mandatory sanction under Section 197 Cr.P.C.”

2. The CBI feeling aggrieved, came up to this Court by the petition at hand invoking the inherent power under Section 482 Cr.P.C. read with supervisory jurisdiction under Articles 226 and 227 of Constitution of India seeking intervention. The petition has been resisted by both the respondents. The matter has remained pending for more than three years.

3. On 07.08.2018, the following submissions were recorded:-

“The Central Bureau of Investigation (CBI) is aggrieved because the Special Judge, at the threshold, by a very detailed order recorded on 02.02.2016, while taking cognizance of the offence punishable under Section 13(2) read with 13(1)(c) & (d) of Prevention of Corruption Act, 1988, declined to take cognizance of offences punishable under Sections 120B read with Sections 420/409 IPC for the reason that there was no separate sanction for prosecution obtained under Section 197 of Code of Criminal Procedure, 1973, the prosecution having been initiated only on the basis of sanction under Section 19 of Prevention of Corruption Act, 1988. The CBI seeks to point out that this order was passed in spite of observation, inter alia, (in para 50) to the effect that the accused persons have abused their official position to cause loss to the public sector bank.

During the course of hearing, question arose as to whether the issue of charge has been considered by the trial court or not. In that context, the counsel for the first respondent submitted that, by order dated 04.04.2018, on the request of CBI time of two years for completion of further investigation has been granted, the matter now being listed (not for the consideration of charge on the basis of charge-sheet which was submitted but) for a status report to be filed.

In above light, the counsel for the petitioner requests for time to seek further instructions.

Be listed on 20th February, 2019.

4. At the hearing, it was submitted that in the wake of further investigation under Section 173 (8) Cr.P.C., the intent and power of the investigating agency in which regard was reserved in the charge-sheet dated 12.12.2015 seeking prosecution of the respondents, a supplementary charge-sheet has since been filed by which a large number of other accused persons have also been brought before the Special Judge, the question which is now plaguing the proceedings being as to whether the case against all such accused (including the respondents herein) is to proceed as one joint trial or it requires to be split up.

5. Be that as it may, the short issue which needs to be addressed by this Court on the petition at hand is as to whether, in the facts and circumstances, the Special Judge fell into error, illegality or impropriety in being decisive on the question of sanction under Section 197 Cr.P.C. at the very threshold. It was also brought out at the hearing that at the stage of consideration of the charge-sheet for taking of cognizance and issuance of process, the then prospective accused (respondents herein) were allowed to participate and make submissions through counsel. The propriety of such approach to the matter is also questioned.

6. After some hearing, the learned counsel for first respondent having taken instructions, fairly conceded that it was impermissible in law for the Special Judge to allow participation by the prospective

accused at the stage of inquiry into the material that had been placed before the Court through the police report with the request for cognizance to be taken thereupon and process to be issued against the accused. He also fairly conceded that in the facts and circumstances of the case, the question as to whether sanction under Section 197 Cr.P.C. is required is mixed question of facts and law, a definitive view not being possible to be taken without requisite evidence being gathered by the Court.

7. Both the respondents were employees of Bank of Baroda during the relevant period. The first respondent had functioned as Assistant General Manager and Branch Head while the second respondent had remained deployed as Forex Officer, Incharge of concerned branch where they are alleged to have indulged in acts of commission or omission which, in the conclusion of the investigating agency, resulted in misappropriation of funds of the bank causing wrongful loss to it to the tune of Rs. 13,75,45,819.28. The evidence which was gathered, and presented through the charge-sheet dated 12.12.2015 on a *prima facie* appraisal of which the Special Judge found, by the impugned order dated 02.02.2016, their complicity in the offences under Section 13 (2) read with Section 13 (1) (c) and (d) of Prevention of Corruption Act, 1988 has brought to light a *modus operandi* adopted by them and others leading to the alleged crimes while dealing with foreign remittances during the period August, 2014 to July, 2015, *inter alia*, by punching wrong exchange rates, wrongful debit of office accounts and giving of credit to the accounts of certain beneficiary firms who thereby gained wrongfully, non-realization of the equivalent Indian

rupee value resulting in misappropriation and debit of accounts without authority and manual deletion of debit entries to intentionally render the record unavailable/untraceable besides failure to report the questionable transactions to the treasury branch as per the settled norms. The competent authority of the Bank of Baroda had accorded Sanction for prosecution of the respondents under Section 19 of Prevention of Corruption Act, 1988. There was, however, concededly no separate sanction taken *vis-à-vis* the offences punishable under the general criminal law i.e. Indian Penal Code.

8. While accepting that the material placed before the Court indicated *prima facie* commission of offences under Section 13 (2) read with Section 13 (1) of (c) and (d) of Prevention of Corruption Act, 1988, as also under Section 120 B read with Sections 420 and 409 IPC, the Special Judge declined to take cognizance for the IPC offences on account of absence of sanction under Section 197 Cr.P.C. against the respondents though taking cognizance for offences under Prevention of Corruption Act.

9. The learned counsel for the petitioner CBI has placed reliance on *Matajog Dobey vs. H.C. Bhari*, AIR 1956 SC 44; *Ronald Wood Mathams vs. State of West Bengal*, AIR 1954 SC 455; and *State of H.P. vs. M.P. Gupta* (2004) 2 SCC 349, to argue that it was improper and incorrect on the part of Special Judge to go into the issue of requirement of sanction under Section 197 Cr.P.C. at the preliminary stage to the extent examined by the impugned order in the facts and circumstances of the case. It was submitted that misappropriation of funds by public servants is not part of their official duty and, therefore,

they cannot claim protection of prior sanction under Section 197 Cr.P.C. to escape the criminal proceedings for the offences under the general penal law particularly when sanction has been accorded for the offences under the Prevention of Corruption Act, which also stand constituted by the same set of facts and in which regard prior sanction under Section 19 has been granted. The counsel for CBI also argued that, at any rate, in the backdrop of facts which are alleged in the case, it was not correct to conclude at the threshold that sanction was requisite for such decision. In his submission, the Special Judge should have awaited the presentation of evidence showing existence of a larger criminal conspiracy in which persons other than the respondents have been party. It was the argument of the CBI that denial of summoning order on the charge of criminal conspiracy has the potency of diluting and frustrating the prosecution *vis-à-vis* not only the respondents but also other co-conspirators.

10. Exception was also taken to the participation by the prospective accused in the pre-summoning inquiry stage, reliance in that regard being placed, *inter alia*, on *Chandra Deo Singh vs. Prokash Chandra Bose @ Chabi Bose & Anr. (1964) 1 SCR 639*.

11. The consideration of the material which is presented before the court of Magistrate in the form of police report under Section 173 Cr.P.C. is an inquiry similar to the one held by the magistrate on a criminal complaint, the only difference being that in the latter, ordinarily speaking, the evidence is gathered in terms of Sections 200-202 Cr.P.C. It is well settled that the prospective accused has no *locus standi* at the pre-summoning inquiry stage. Though in the context of

such inquiry into a criminal complaint, in *Chandra Deo Singh* (supra), the Supreme Court ruled thus:-

“ Taking the first ground, it seems to us clear from the entire scheme of Chapter XVI of the Code of Criminal Procedure that an accused person does not come into the picture at all till process is issued. This does not mean that he is precluded from being present when an enquiry is held by a Magistrate. He may remain present either in person or through a counsel or agent with a view to be informed of what is going on. But since the very question for consideration being whether he should be called upon to face an accusation, he has no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so”.

(emphasis supplied)

12. In the considered opinion of this Court, the above observations would apply with equal force to an inquiry in the nature of consideration of the police report by the magistrate at the stage of taking of cognizance under Section 190 (1) (b) read with Section 204 Cr.P.C.

13. In above view, it was not correct on the part of the Special Judge to allow participation by the then prospective accused in the consideration of the charge-sheet presented by CBI leading to the impugned order being passed.

14. Be that as it may, this Court accepts and upholds the objections of the CBI that, in the facts and circumstances, it was not correct, rather it was inadvisable, to reach the conclusions on question of requirement of sanction under Section 197 Cr.P.C. *vis-à-vis* the IPC

offences. The general principles that it is not the part of the duty of a public servant, while discharging his official duties, to enter into a criminal conspiracy or indulge in criminal misconduct, rendering it unnecessary for sanction under Section 197 Cr.P.C. to be obtained should have been kept in mind. [*Harihar Prasad vs. State of Bihar*, 1972 Cr.L.J. 707 and *State of HP vs. M.P. Gupta* (supra)].

15. In *Matajog Dobey* (supra) a Constitution Bench of the Supreme Court had ruled thus:-

“17. Slightly differing tests have been laid down in the decided cases to ascertain the scope and the meaning of the relevant words occurring in Section 197 of the Code; “any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty”. But the difference is only in language and not in substance. The offence alleged to have been committed must have something to do, or must be related in some manner with the discharge of official duty. No question of sanction can arise under Section 197, unless the act complained of is an offence; the only point to determine is whether it was committed in the discharge of official duty. There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What we must find out is whether the act and the official duty are so inter-related that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation.”

16. Similar view was taken by another Constitution Bench of Supreme Court in judgment reported as *Ronald Wood Mathams* (supra).

17. In the factual matrix of the case from which the present challenge to the order of the Special Judge has arisen, it being a mixed question of facts and law, the issue whether sanction under Section 197 Cr.P.C. was required, should have been deferred for consideration as the case proceeded further on merits. The Special Judge fell into error by taking a decisive and definitive view on the subject at the threshold which was inappropriate and incorrect.

18. It is pertinent to also note here that though taking cognizance under Section 190 (1) (b) of Cr.P.C. by the impugned order, the Special Judge did not issue any direction in the nature envisaged in Section 204 Cr.P.C. The impugned order is found to be deficient in that regard.

19. For the foregoing reasons, the impugned order to the extent thereby the Special Judge declined to take cognizance for offences under Section 120-B read with Section 420, 409 IPC for want of sanction 197 Cr.P.C. is hereby set aside. The Special Judge is directed to pass fresh order on the subject of cognizance and issue of process in accordance with law bearing in mind the above observations of this Court. The question as to whether sanction under Section 197 Cr.P.C. is necessary in the case against the respondents herein is kept open to be considered and decided upon on the basis of such evidence as may be adduced on the subject.

20. The petition is disposed of in above terms.

R.K.GAUBA, J.

AUGUST 21, 2019/nk