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

CRIMINAL REVISION APPLICATION NO.182 OF 2021

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Dr. Ishwar Devidas Thite

... Applicant

V/s.

The State of Maharashtra
(Through ACB, Thane Unit)

... Respondent

Mr. S.G. Deshmukh with Ms. Priya A. Patil i/by Mr.
Gautam T. Kanchanpurkar for the applicant.

Mr. R.M. Pethe, APP for the respondent/State.

CORAM : AMIT BORKAR, J.

DATED : DECEMBER 20, 2022

P.C.:

1. The applicant is challenging order dated 15th September 2021 passed by the learned Special Judge, Kalyan in Special ACB Case No.5 of 2017 rejecting application for discharge in a prosecution for offence punishable under sections 7, 12, 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988.

2. The case of the prosecution in brief is that the police inspector attached to the Anti Corruption Bureau, Thane lodged First Information Report with Kongaon Police Station stating that on 24th July 2006 the applicant joined services as Medical Officer, Class-II in Health Department of the Zilla Parishad, Thane on contract basis for a period of eleven (11) months. After completion

of eleven (11) months, the applicant was given break and thereafter appointed on contract basis for period of eleven (11) months. After giving break of two (2) days, the applicant was again appointed for a period of eleven (11) months. The last such period of eleven (11) months ended on 18th October 2015.

3. On 30th October 2015, the informant Smt. Vidya Manik Sardar lodged a complaint with the Superintendent of Police, ACB, Thane alleging that the applicant demanded amount of Rs.200/- from her and one Mr. Barku Bhoir for contribution of expenses of audit of Primary Health Center, Vangni, District Thane. It is the case of the prosecution that the applicant warned Smt. Sardar that if she did not pay the amount, the applicant shall not release her salary for the month of September 2015. She, therefore, lodged complaint with the Anti Corruption Bureau at Thane.

4. On the basis of the complaint, the Anti Corruption Bureau, Thane prepared a verification/pre-trap on 31st October 2015 in the presence of independent witnesses. According to the prosecution on 31st October 2015 the applicant accepted illegal gratification to the tune of Rs.400/- (Rupees Four Hundred Only) from Smt. Sardar and Mr. Bhoir.

5. On the basis of the said complaint, offence was registered with Kulgaon Police Station under sections 7, 12, 13(1)(d) read with section 13(2) of the Prevention of Corruption Act, 1988. The investigating officer recorded statement of witnesses and obtained digital voice record.

6. The prosecution applied for sanction of prosecution against

the applicant but the Government of Maharashtra rejected the sanction on the ground that the applicant was not in service and, therefore, there was no need of sanction. The investigating officer after completion of investigation filed charge-sheet before the learned Special Judge, Thane.

7. The applicant thereafter filed an application for discharge under section 239 of the Criminal Procedure Code, 1973. The learned Special Judge by the impugned order dated 15th September 2021 rejected the application for discharge. The applicant, therefore, has filed present revision application challenging the order of rejection of discharge.

8. Mr. Deshmukh, learned advocate for the applicant submitted that the last appointment of the applicant ended on 18th October 2015. 31st October 2015 is the date of alleged offence. He invited my attention to the communication dated 19th October 2016 issued by the State of Maharashtra in favour of Anti Corruption Bureau stating that since the applicant was not in service of the State Government, sanction for prosecution is not required. He submitted that on the date of offence the applicant was not in service and, therefore, the applicant cannot be prosecuted for offence alleged against him.

9. Per contra, Mr. Pethe, learned APP invited my attention to the communication dated 26th October 2015 recommending extension of service of the applicant to the Deputy Director, Health Services, Mumbai. The said recommendation was received by the Deputy Director, Mumbai on 27th October 2015. Therefore, it is

submitted that the offence under section 7 is made out as the applicant *ceased to be* a public servant. He submitted that since the applicant *ceased to be* public servant on the date of *sanction*, sanction under section 197 is not required.

10. Since the alleged offence took place before amendment of section 7 of the Act 16 of 2018, section 7 as stood on the date of alleged offence, i.e. in the year 2015 needs to be taken into consideration. At this stage, it would be profitable to refer to the relevant provisions of section 7 of the Prevention of Corruption Act, 1988, which reads thus:

“7. Public servant taking gratification other than legal remuneration in respect of an official act.— Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than three years but which may extend to seven years and shall also be liable to fine.”

11. On careful perusal of section 7 as is stood in the year 2015, it appears that not only the public servant but a person expected to be a public servant is covered by the language of section 7 of the PC Act. Explanation (a) to section 7 reads thus:

“Explanation.— (a) “Expecting to be a public servant”.— If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, he may be guilty of cheating, but he is not guilty of the offence defined in this section.”

12. On conjoint reading of the explanation and section 7, it appears that even if a person is expecting to be a public servant and has received gratification other than legal remuneration as a motive or reward for doing or forbearing to do any official act, such person would be covered under section 7 of the PC Act. If the person, expected to be appointed to the public office, obtains money from another, as the price of favour to be shown in exercise of his function to that office, he will surely be as corrupt as one does the same by actually in office. Of course, it needs to be proved that he gave the reason to believe to the other party that he was about to attend that office. A person may expected to be a public servant and in the hope of expectation going through, he may ask or receive a bribe, his expectation may have been well-founded though it may or may not realized that he would be appointed as the public servant.

13. In the facts of the present case, from 2006 to 2015 the applicant was appointed by giving artificial breaks. From the record, it appears that the proposal for re-appointment of the applicant was pending for active consideration with the superior authority on the date of alleged offence. Therefore, in my opinion, at this stage there is sufficient ground to proceed against the applicant for offences alleged against the applicant as the applicant

was expected to be appointed as a public servant and made demand of gratification during the period of his proposal being under active consideration.

14. The scope of judicial review in relation to discharge has been laid down by the Apex Court in **Union of India v. Prafulla Kumar Samal & Anr.** Reported in (1979) 3 SCC 4. In paragraph 10, the Apex Court has laid down the principles to be considered by the Court while considering application under section 227 of the Code, which reads thus:

“10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and

the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.”

15. On overall view of the matter, it appears that since the applicant ceased *to be* a public servant, *sanction* under section 197 was not required; and since the applicant was expecting to be in the office in view of recommendation made to the superior authorities, the learned Special Judge, ACB, Thane has rightly rejected the application for discharge. There is no perversity. There is no miscarriage of justice.

16. The criminal revision application is dismissed. No costs.

17. At this stage, learned advocate for the applicant seeks continuation of ad-interim relief which was in force from 8th October 2021. The ad-interim relief which was in force till now is extended for a period of six (6) weeks from today.

(AMIT BORKAR, J.)

Note: This order is modified as per order dated 22nd December 2022 passed on a praecipe. The corrections in paragraph 9 and 15 are shown in italicize.