IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.157 OF 2020

Nitin Chimanlal Vyas, R/o.Room no.1,
23/25, 2nd Fofal Wadi, Bhuleshwar,
Mumbai-400 002. Applicant
versus
1. Central Bureau of Investigation
ACB Unit, through DSP, ACB, BKC,
Mumbai.
2. The State of Maharashtra Respondents

WITH
CRIMINAL REVISION APPLICATION NO.350 OF 2022

Rajesh Kirorilal Shah, Age 51 years,
R/o.B-2505, Oberoi Springs, New Link Road,
Andheri (W), Mumbai-400 053. Applicant
versus
1. CBI through its Director,
Lodhi Road, New Delhi.
2. The State of Maharashtra Respondents

Mr.Manan Sanghai, Advocate for Applicant in Revn.157/2020.
MrPranav Badheka with Ms.Sushmita Sherigar, Advocate for Applicant in Revn.350/2022.
Mr.H.S.Venegavkar with Mr.Aayush Kedia, Special P.P for Respondent no.2.
Mr.Y.M.Nakhwa, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 12th July 2023

PC :

1. The Applicants are facing prosecution in RC No.BAI/2007/A0017 vide Special Case No.82 of 2010 pending before Special Court (CBI), Court of Sessions, at Mumbai.

2. The prosecution case is as under :

(i) Accused no.1 Dhananjay Kumar and accused no.2 Ashok Suri were posted as Deputy Directors of Income Tax (Investigation). In September-2006 accused no.2 submitted a proposal for conducting search at the premises of M/s.Niru Impex (a firm involved in business of diamonds) and residential premises of partners thereof;

(ii) The proposal was approved. Search of the office premises of M/s.Niru Impex commenced on 4^{th} October 2006 at 03.50 hours. During search one Bhagwanbhai Ramdas Patel who was working as delivery man with M/s.Somabhai Ramdas Angadia, entered into the office premises of M/s.Niru Impex for delivering 3 packets containing diamonds belonging to M/s.Niru Impex;

(iii) Income Tax Officials detained the delivery man and he was found carrying 21 packets with him which included 3 packets which belonged to M/s.Niru Impex. The remaining packets were belonging to other merchants;

(iv) Nitin Vyas (Accused no.4) intervened. The delivery man was released in the late night of 4^{th} October 2006. All the packets were kept under prohibitory order issued u/s.132(2) of Income Tax Act on 4^{th} October 2006;

(v) On 7^{th} October 2006 employee of M/s.Somabhai Ramdas Angadia namely Rakesh Patel received phone call that Income Tax Officers had called persons from Angadia to the office of M/s.Niru Impex. Mr.Rakesh Patel informed about it to Mr.Vishnubhai Patel, one of the partners of Angadia and thereafter Vishnubhai Patel, Nitin Vyas, Rakesh Patel and Narayan Patel went to the office of Niru Impex;

(vi) Nitin Vyas and Vishnubhai Patel went into the premises and met accused nos.1 and 2. Accused no.1 asked Vishnubhai Patel to convey the owners of packets that they should appear before him along with documents pertaining to said packets, such as, account books, bills, purchase details etc;

(vii) Accused no.1 Dhananjay Kumar wrote down name of Mr.Rajesh Shah (Accused no.3), a Chartered Accountant, on a piece of paper and handed over the same to Vishnubhai Patel and Nitin Vyas directing them to contact said person for further instructions in presence of accused no.2.;

(viii) Accused no.4 contacted accused no.3 on telephone. The mobile phone number of accused no.3 had been kept under technical surveillance in connection with some other matter and the conversations were intercepted. Accused no.1 had referred the partners of Angadia to accused no.3 for conveying the demand of illegal gratification in return for release of 18 packets of diamonds that has been kept under prohibitory order. Accused no.3 made demand of Rs.50,000/- per packet. The conversations intercepted indicate that accused no.3 informed accused no.1 about having conveyed the demand to Angadia.

3. Accused no.2 Ashok Suri preferred application for discharge before Trial Court. The application was rejected by order dated 15th June 2013. Applicant in Revision Application no.350 of 2022 preferred the application for discharge. Accused no.1 Dhananjay Kumar also preferred an application for discharge. Vide common order dated 1st August 2014 passed by Trial Court, both the Applications were rejected.

4. Accused no.2 Ashok Suri preferred Criminal Application No.1099 of 2013 before this Court challenging order dated 15th June 2013 passed by Trial Court rejecting his application for discharge. Vide order dated 29th September 2014, the application was allowed and accused no.2 Ashok Suri was discharged from the proceedings.

5. Charge was framed vide order dated 5th October 2016 against Dhananjay Kumar, Rajesh Shah and Nitin Vyas.

6. Applicant in Revision Application no.157 of 2020 preferred application for discharge pursuant to the order framing charge. The said application was rejected by Trial Court vide order dated 18th February 2020.

7. Accused no.1 Dhananjay Kumar challenged the order dated 1st August 2014 passed by learned Special Judge rejecting application for discharge before this Court by preferring Writ Petition No.4646 of 2014. The said petition was allowed vide order dated 12th December 2018 and accused were discharged of offence u/s.12 of Prevention of Corruption Act (`P.C Act' for short). It was also observed that for want of sanction, prosecution fails u/s.7 of P.C.Act.

8. Learned advocate for Applicant in Revision Application No.157 of 2020 Mr.Manan Sanghai submitted that there is no evidence to prosecute the Applicant in the crime. Charge u/s.12 of P.C.Act is not tenable against Applicant. Accused nos.1 and 2 have been discharged by this Court. They were public servants. The orders rejecting applications for discharge and framing of charge are contrary to law. The interception of conversations between accused

is bad in law. It was conducted without following due process of law. Even when accused nos.1 and 3 were kept under surveillance, the statutory provisions u/s.419(A) of Indian Telegraph Act were flouted. The order of surveillance is bad in law. There was no material to frame charge against Applicant. The order framing charge is erroneous and deserves to be set aside.

9. Mr.Sanghai has relied upon following decisions :

(a) Asian Resurfacing of Road Agency Pvt.Ltd and another Vs. CBI – (2018)16-SCC-299;

(b) Priya Sharan Maharaj @ Yadavendra Parashar and others Vs. State of Maharashtra – 1995-Cri.L.J.-3683;

(c) Amit Kapoor Vs. Ramesh Chander and another – (2012)9-SCC-460.

10. Learned Advocate Mr.Pranav Badheka appearing for Applicant in Criminal Revision Application No.350 of 2022 submitted that the order rejecting application for discharge is erroneous. There is no material to prosecute the Applicant for any offence. Public servants are discharged. Applicant cannot be prosecuted for offence u/s.7 or 12 of P.C.Act. The interceptions relied upon by the prosecution is bad in law. The main accused are discharged and question of charging other accused u/s.12 for abetting the offence under P.C.Act does not arise. The case is based on alleged phone conversations between accused no.1, accused no.3 and accused no.4. Accused no.3 has no knowledge of the same. The CBI while intercepting the conversations has not complied with Rule 419(A) of Indian Telegraph Act. As per prosecution case the delivery boy entered into

the office of Niru Impex by chance. The slip containing name and phone number of accused no.3 was allegedly handed over to accused no.4 directing them to contact accused no.3. No slip as alleged has been recovered during investigation. According to prosecution the packets were seized under prohibitory order not by accused no.1 by whom the alleged demand is made through accused no.3 but by Officer In-charge. When the delivery boy entered into the premises of M/s.Niru Impex, 21 packets were not taken into possession by accused nos.1 and 2 particularly when demand is alleged to have been made by accused nos.1 and 2 through accused no.3. It is not the prosecution case that authority to return the seized diamond packets was either with accused no.1 or accused no.2. Hence question of raising demand for releasing all the packets or abetment in respect thereto does not arise. Public servants who are discharged from the case, had not seized the packets under prohibitory order nor they were authorized to release same and therefore question of showing any favour of disfavour to Angadia in discharge of their duties does not arise. The seized packets were released as per orders of Additional Director of Income Tax. Accused nos.1 and 2 have no role or part in that regard. None of the witnesses from the Income Tax Department had referred to the alleged demand and acceptance of said amount by public servants and none of them had referred to accused no.3 being subject matter of discussion between public servants and Angadia. The conversation was recorded in respect of some other incident. The prosecution case is based on suspicion and inferences. Neither offence u/s.12 of P.C Act nor u/s.120-B of IPC is made out against Applicant. The demand is *sine qua non* to constitute offence under the provisions of P.C.Act. Demand of gratification ought to be proved by reliable an cogent evidence. The competent authority refused to sanction to prosecute public servants. Once charge of conspiracy against public servants cannot stand, the charge of abetment against Applicant does not arise as the genesis of charge against accused is the charge against public servants. Once charge of conspiracy against public servants cannot stand nor can be proved, the question of charge of abetment against Applicant does not arise.

11. Mr.Badheka had relied upon following decisions :

(a) CBI Vs. V.C.Shukla – 1998-Cri.L.J.-1905;

(b) Jamuna Singh Vs. State of Bihar – AIR-1967-SC-553;

(c) Faguna Kanta Nath Vs. State of Assam – AIR-1959-SC-673;

(d) Kishore Khanchand Wadhwani and another Vs. State of Maharashtra – 2019-SCC OnLine-Bom-13130.

12. Learned Special Public Prosecutor Mr.Venegavkar appearing for Respondent-CBI submitted that charge is framed against accused vide order dated 5th October 2016. The Application for discharge could not have been entertained by Trial Court after framing of charge. There is sufficient material against accused to prosecute them. Discharge of accused nos.1 and 2 would not preclude Applicants from being tried for the offences. At the stage of charge the Court is required to see that prosecution has prima facie made out case against accused. The Court is not expected to hold money trail. There is sufficient evidence to indicate that there was demand of bribe by accused. The conversation between accused was intercepted. It does not violate provisions of any law. The documents relied upon by prosecution would clearly show that there

are strong reasons to come to the conclusion that accused are guilty of commission of offence. The order for interception of mobile numbers was granted by competent authority. The Trial Court did not find any fault with the surveillance order. The defect, if any, will have to be appreciated during trial. No case is made out to discharge the Applicants.

13. Mr.Venegavkar relied upon following decisions :

(a) Prabhu Vs. Union of India – 2003-SCC OnLine-Ker-56

(b) Balam Guab Pathan Vs. State of Maharashtra – 2017-SCC OnLine-Bom-429.

14. Accused nos.1 and 2 were public servants. From the order framing charge dated 5th October 2016, it is evident that the case of prosecution is that accused no.1 while working as Deputy Director of Income Tax being a public servant, on 7th October 2006 entered into the criminal conspiracy with accused nos.2 and 3 to commit offence punishable u/s.7 of P.C Act i.e. making attempt to obtain bribe from M/s.Somabhai Angadia for releasing packets containing diamonds and thereby committed offence punishable u/s.120-B of IPC. The accused were further charged by alleging that accused no.2 Rajesh Shah and accused no.3 Nilesh Vyas abetted commission of offence punishable u/s.7 of P.C.Act by accused no.1 who was a public servant employed as Deputy Director of Income Tax, by making attempt to obtain a bribe amount from M/s.Somabhai Ramdas Angadia for releasing 18 packets containing diamonds and thereby committed an offence u/s.12 of P.C.Act.

15. While allowing the application preferred by accused no.2

Ashok Suri challenging the order rejecting his application for discharge, it was observed by this Court that prosecution case is that accused no.1 had referred partners of M/s.Somabhai Ramdas Angadia to Rajesh Shah for conveying demand of illegal gratification in release of 18 packets of diamonds that had been kept under prohibitory order. The allegation against accused no.2 is that he had conspired with accused no.1 to make demand for illegal gratification in return for release of packets containing diamonds. Admittedly the delivery boy entered into the premises of M/s.Niru Impex and when 21 packets were taken charge from him, accused no.2 Ashok Suri and accused no.1 Dhananjay Kumar were not present in the premises. It is nobody's case that authority to return the packets containing diamonds was of Dhananjay Kumar or Ashok Suri. It is not in dispute that packets came to be released as per instructions of superior of public servants who was working as Additional Commissioner of Income Tax. The chit on which name of Rajesh Shah and telephone number was written down, was handed over to Nitin Vyas by accused no.1 Dhananjay Kumar and not by accused no.2 Ashok Suri. In spite of that Mr.Ashok Suri is sought to be involved in the alleged demand made and conveyed through Rajesh Shah on the basis that chit in question was given by Dhananjay Kumar to partner of M/s.Somabhai Ramdas Angadia in the presence of accused no.2 Ashok Suri. The transcript of the recorded conversations have been included in the charge sheet. The transcript relates to the conversation between accused Nitin Vyas and accused Rajesh Shah. In these conversation neither Nitin Vyas nor Rajesh Shah refers to Ashok Suri though there are references to accused Dhananjay Kumar. Accused no.4 Nitin Vyas is pleading with accused no.3 to explain certain things to accused no.1 Dhananjay Kumar.

This conversation does not implicate Ashok Suri in any manner. The direction to contact Rajesh Shah was given by Dhananjay Kumar. There is reference to Ashok Suri and Dhananjay Kumar only in the initial part of conversation where Nitin Vyas is saying to Rajesh Shah that he had met Ashok Suri and Dhananjay Kumar at the time of raid on M/s.Niru Impex. The prosecution case is that Nitin Vyas was referring to Ashok Suri and Dhananjay Kumar and treating the number of Rajesh Shah as if given by both of them. The case of prosecution is that telephone number of Rajesh Shah was written down and given to Angadia by Dhananjay Kumar in the presence of Ashok Suri. Even if accused no.4 perceived the number as having given by accused nos.1 and 2, it is merely his perception and cannot be accepted as fact by the Court. Even at the stage of framing charge the Court would be required to shift facts from opinion. On the basis of information nothing was suspected against accused Ashok Suri. He was implicated subsequently. There is hardly any justification for levelling accusations against him. It cannot be presumed that accused no.2 Ashok Suri had committed offence only on the basis of his presence when chit was handed over and that he sought confirmation from accused no.1 Dhananjay Kumar that packets in question were to be physically handed over to Angadia. Case was registered for offence u/s.120-B of IPC and u/s.7 and 12 of P.C.Act. Admittedly cognizance of the offence u/s.7 of P.C Act cannot be taken except without previous sanction of competent authority in view of provisions of Section 19 of P.C.Act. Admittedly sanction u/s.19 was refused by competent authority. The prosecution in respect of offence u/s.7 of P.C.Act has been dropped and the accused were sought to be prosecuted on the allegation of having committed offence punishable u/s.12 of P.C.Act which according to the prosecution does not require any sanction u/s.19 of P.C.Act. The offence punishable u/s.12 is the offence of abetting an offence punishable u/s.7 or Section 11 of P.C.Act. Even if it is accepted that sanction u/s.19 of P.C.Act would not be necessary for prosecuting an offender in respect of offence punishable u/s.12 of P.C.Act, still question would arise as to when offence u/s.12 of P.C.Act is alleged to have been committed by accused and when sanction u/s.19 of P.C.Act is refused for the prosecution of accused where accused can be prosecuted u/s.12 of the Act on the ground that sanction u/s.19 is not necessary.

16. The petition preferred by original accused no.1 Dhananjay Kumar challenging the order rejecting his application for discharge was allowed by this Court vide order dated 12th December 2018. It was observed that Section 109 of IPC is distinct offence though it is punishable in the context of other principal offence. The offence of abetment for which a person is charged with, is normally linked with the proved offence. The act has to be committed either prior to or at the time of commission of the offence. The word `act abetted' used in Section 109 addresses a specific offence abetted. Section 107 defines abetment i.e. instigation, intentionally aiding by an act or illegal omission so also engaging with one or more other persons in the conspiracy is abetment. In the present case, accused no.1 Dhananjay Kumar was the Income Tax Officer. He handed over a piece of paper to accused Nitin Vyas directing him to contact said person for further instructions and this has taken place in the presence of accused no.2 Ashok Suri, who has been discharged by order dated 19th September 2014. There are intercepted conversations between Ashok Suri and Dhananjay Kumar about

confirmation of delivery of diamond packets. There was conversation between Rajesh Shah and Dhananjay Kumar wherein Rajesh Shah had informed Dhananjay Kumar that he had told Angadia about rate Rs.50,000/- per packet and the code word is `½ kilogram'. If one or two persons conspired, then some of them can be prosecuted for abetment. When there is demand of bribe, then under P.C.Act demand and acceptance of illegal gratification is an offence. The demand of bribe in some cases is made directly by public servant who is the principal offender. In some cases the demand of bribe is not made directly by public servant for the same of convenience and due to fear of getting caught. The demand is made through somebody. Thus, the public servant who abuses his public office, demands bribe, is the principal offender. He cannot be said to be an abettor when he demands money either through other public servant or private person. The principal offender may invent different ways to obtain illegal gratification. Thus, though the actual demand even though is communicated by a private person or by other public servant, the Court has to go back and find out at whose instance the demand is made and who is going to be actually benefited by those illegal gratification. In the present case under the P.C.Act though it has actually demanded bribe at the instance of A; B may not be treated as a principal offender. He is an abettor and the person who has asked to demand money is the principal offender. `A' is going to be benefited by bribe. Hence from whom the demand is made or is generated is the principal offender which is going to be the beneficiary. Though there is material against accused no.1 Dhananjay Kumar to frame charge u/s.7 of P.C.Act, the authorities have not granted sanction. Therefore, for want of sanction prosecution fails u/s.7 of the P.C.Act, the said accused cannot be charged for abetment. He was discharged u/s.12 of P.C.Act.

17. Thus, from the factual scenario it is apparent that public servants are discharged. Sanction u/s.19 has been refused. Therefore accused cannot be prosecuted u/s.7 of P.C.Act. In the light of the fact that public servants were discharged, question whether Applicants can be prosecuted for offence u/s.12 of P.C.Act and Section 120-B IPC. Charge has been framed u/s.12 of P.C.Act and Section 120-B of IPC.

18. The entire case of prosecution falls to the ground as there was no material to charge original accused nos.1 and 2 for any offence. There was no sanction for offence u/s.7 of P.C.Act and they were discharged u/s.12 of P.C.Act. Section 12 relates to abetment. The abetment was to the principal offender. The principal offender has been discharged for want of sanction.

19. Final report was filed for offences u/s.12 of P.C.Act and 120-B of IPC. The prosecution case proceeds on the basis that Mr.Dhananjay Kumar while posted and functioning as Deputy Director of Income Tax (Investigation), Mumbai being a public servant entered into criminal conspiracy with Mr.Ashok Suri, Deputy Director of Income Tax, Mr.Rajesh Shah, Chartered Accountant and Mr.Nitin Vyas with an object to obtain an illegal gratification. In pursuance of criminal conspiracy they kept 18 packets of diamonds under prohibitory order during search conducted at M/s.Niru Impex on 4th October 2007. They demanded bribe of Rs.50,000/- per packet from Somabhai Angadia through Rajesh Shah on 7th October 2007. Section 7 relates to demand of illegal gratification. There is

no sanction and hence no charge. Accused Dhananjay Kumar and Ashok Suri are discharged for offence u/s.12 of P.C.Act. However, Petitioners can be tried and convicted for the offence of conspiracy and abetment. The conspiracy was alleged between all the accused. Accused nos.1 and 2 who are the principal conspirators were discharged. Charge of conspiracy has been framed against accused Dhananjay Kumar who has been subsequently discharged by this Court, and the applicants. The charge indicate that accused no.1 Dhananjay Kumar while working as Deputy Director of Income Tax being public servant on 7th October 2006 entered into criminal conspiracy with accused no.2 Rajesh Shah and accused no.3 Nitin Vyas to commit an offence punishable u/s.7 of P.C.Act i.e. making an attempt to obtain bribe fro M/s.Somabhai Angadia for releasing 18 packets containing diamonds and thereby committed offence punishable u/s.120-B of IPC. For lack of sanction chargesheet was not filed for offence u/s.7 of P.C.Act. Dhananjay Kumar is described as principal conspirator. In his absence charge of conspiracy is unsustainable against applicant.

20. Hon'ble Supreme Court in the case of CBI Vs. V.C.Shukla (supra) has observed that when no prima facie case was made out against one of the accused regarding the commission of offence, there will be no question of the accused having committed the offence of abetment. It is well settled that if the main offence is not made out against the accused, there will be no question of abetment of the offence. For the purposes of charges of conspiracy at least 2 parties are necessary, on acquittal of the one accused, the charges of the conspiracy will not be sustainable against the other accused. In the case of Jamuna Singh Vs. State of Bihar (supra), it was observed

that it cannot be held in law that a person cannot ever be convicted of abetting a certain offence when the person alleged to have committed that offence in consequence of the abetment has been acquitted. The question of abettor's guilt depends on the nature of act abetted and the manlier in which the abetment was made. The offence of abetment is complete when the alleged abettor has instigated another or engaged with another in a conspiracy to commit the offence. In the case of Asian Resurfacing of Road Agency Pvt.Ltd and another Vs. CBI (supra), Hon'ble Supreme Court had observed that order framing charge is clearly not an interlocutory order nor a final order. The jurisdiction of High Court is not barred irrespective of the label of a petition, be it u/s.397 or 482 of Cr.P.C or Article 227 of Constitution of India. The jurisdiction is to be exercised consistent with legislative policy to ensure expeditious disposal of trial without the same being in any manner hampered. The challenge to an order of charge should be entered in a rarest of rare case only to correct a patent error of jurisdiction and not to re-appreciate the matter. In the case of Priya Sharan Maharaj @ Yadavendra Parashar and others Vs. State of Maharashtra (supra), it was observed that as the main offence falls to the ground, there is no material whatsoever against the other accused regarding abetment or sharing common intention. Hence other accused are required to be discharged of the charges framed against them.

21. In case of Prabhu Vs. Union of India (supra), decided by Kerala High Court the accused alleged to have committed the offence u/s.12 and 14(b) of P.C.Act. It was observed that Section 12 of the Act lays down that whoever abets any offence punishable u/s.7 or u/s.11 of the Act whether or not that offence is committed in

consequence of that abetment, shall be liable to punishment. Thus, u/s.12 of the Act even if the offence abetted is not committed by the public servant, the person who abetted the offence is liable to punishment. This decision is not applicable to the present case. In the case of Balam Gulab Pathan Vs. State of Maharashtra (supra), it was observed that at the stage of framing charge the Court is required to evaluate material and documents on record with a view to finding out facts emerging therefrom, taken at their face value, reflects the existence of all the ingredients constituting the alleged offence.

22. As stated hereinabove, the peculiar facts of this case would indicate that there is no sanction to prosecute accused u/s.7 of P.C.Act and the public servants were discharged for lack of evidence for charge u/s.12 of P.C.Act. Considering the facts of this case, the Applicants cannot be charged u/s.12 of P.C.Act or u/s.120-B of IPC.

ORDER

(i) Criminal Revision Application No.157 of 2020 is allowed;

(ii) Impugned order framing charge dated 5th October 2016 passed by learned Special Judge (CBI), Greater Bombay, in Special Case No.82 of 2010 and subsequent order dated 18th February 2020 passed by Special Judge (CBI) in CBI Special Case No.82 of 2010, are quashed and set aside;

(iii) The Applicant in Criminal Revision Application No.157 of 2020 is discharged in CBI Special Case No.82 of 2010;

(iv) Criminal Revision Application No.350 of 2022 is allowed;

(v) Impugned order framing charge dated 5th October 2016 passed by learned Special Judge (CBI), Greater Bombay in special Case No.82 of 2010 is quashed and set aside;

(vi) The Applicant in Criminal Revision Application No.350 of 2020 is discharged in CBI Special Case No.82 of 2010;

(vii) Both applications stand disposed off.

(PRAKASH D. NAIK, J.)

MST