

CRIMINAL WRIT PETITION NO.31/2001

Shri Vijay Nanalal Shet
Resident of A/114, Zalawad Nagar,
C.D. Burfiwalla Marg,
Juhi Lane, Andheri (West),
Mumbai - 400 058.

.... Petitioner.

V/s.

State of Goa
Suptd. of Police - CBI ACB,
Panaji, Goa.

..... Respondents.

Mr. V.N. Shingnapurkar and Mr. Umesh D. Rao, Advocates
for the petitioner.

Mr. V.P. Thali, Sr. Central Govt. Standing Counsel for
the respondent.

CORAM : A.S. AGUIAR, J.

Date of reserving the
Judgment : 17.1.2002.

Date of pronouncing the
Judgment : 21/02/2002.

J U D G M E N T :

Rule. Shri Thali waives service on behalf of the
respondent. By consent of the learned Advocates taken up
for hearing forthwith.

2. The petitioner seeks quashing of the order
dated 6.6.2001 of the learned Addl. Sessions Judge in
Revision Petition No.66/2000 arising out of the order
dated 3.11.2000 passed by learned Judicial Magistrate,
First Class, at Panaji on Application Exhibit 26 in cases
No. 56 and 57/1997. The application Exhibit 26 was

filed by the petitioner under Section 319 Code of Criminal Procedure (Cr.P.C.) for adding Shri Madhusudhan Bhangui as accused in the said cases. By order dated 3.11.2000, the learned JMFC dismissed the said application under Section 319 Cr.P.C.

3. Briefly, a F.I.R. was registered under Sections 120-B, 420, 468, 471 I.P.C. and 5(1) (d), read with 5(2) of Prevention of Corruption Act, 1947 against one Shri M.S. Bhangui and one Vijay Nanalal, the petitioner herein. After investigation, two charge sheets were filed in the Court of the Judicial Magistrate, F.C. Panaji, being Criminal Case No.56/97/B under Sections 420, 467, 468, 471 of I.P.C. and Criminal Case No.57/97/B also under Sections Sections 420, 467, 468 and 471 of I.P.C., against the petitioner. After evidence was recorded by the JMFC and at the stage of recording the statement of the accused under Section 313 Cr.P.C., an application was moved by the petitioner herein under Section 319 Cr.P.C. to add the said Shri Madhusudhan Bhangui, the then Branch Manager of Bank of India, Campal Branch, Panaji, as an accused. The said application having been rejected, the petitioner moved the Court of Addl. Sessions Judge, Panaji in Criminal Revision Application No.88/2000. After hearing the arguments on both sides, the learned Addl. Sessions Judge dismissed the revision application holding that the

learned Magistrate had not committed any illegality in dismissing the application under Section 319 Cr.P.C. since the evidence on record did not show that Madhusudhan Bhangui had committed any offence under Prevention of Corruption Act or under the Indian Penal Code.

4. It is pertinent to note that in passing the impugned order, the learned Addl. Sessions Judge has gone through the order of the learned JMFC and found that the learned Magistrate after discussing the evidence on record, had come to the conclusion that Shri Madhusudhan Bhangui could not be added as an accused in the said offences on the basis of the evidence that had come on record, as the evidence on record did not show that the said Shri Bhangui had acted in criminal conspiracy with the petitioner and caused loss to the Bank.

5. The petitioner herein has challenged the orders of the Courts below on the ground that the Courts below have erred in rejecting the application as having been filed at a belated stage; that the learned Magistrate has failed to appreciate that Exhibit PW.14/A has been fully corroborated by the evidence which has come on record and in the facts and circumstances of the case that only the Court of the Special Judge had jurisdiction to entertain the charge sheet under Section

173(2) of the Cr.P.C. after the completion of the investigation by the Investigating Officer.

6. The facts of the case, as per the FIR Exhibit PW.14/A, are as under :

A reliable information was received that Shri Madhusudhan Bhangui (A.1) while working as the Branch Manager, Bank of India, Campal Branch, Panaji during the period from 1984 to 1986 had entered into a criminal conspiracy with the petitioner herein, namely Vijay Nanalal Shet, proprietor of M/s. Aurobindo Profile Industries with the objective to cheat Bank of India to the tune of Rs.4,67,000/- and to favour Shri Vijay Nanalal Shet with this amount and also with an additional wrongful gain of Rs.4,00,000/-. It was learnt that Shri Vijay Nanalal Shet (A.2) had got a small scale industrial unit sanctioned by Economic Development Corporation under the name "M/s. Aurobindo Profile Industries" at Sancoale Industrial Estate and had opened a Current Account in the Bank of India, Campal Branch, Panaji in the name of his said firm. Before the EDC released his loan in March, 1984, Shri Vijay Nanalal Shet (A.2) had submitted an application to the Bank of India, Campal Branch, Panaji to grant him bridge loan of Rs.5,00,000/- for the purpose of acquiring machinery for his new factory unit. Accordingly, upon recommendation of Shri Madhusudhan

Bhangui, loan of Rs.4,00,000/- was sanctioned by the Regional Office. The said bridge loan was to be directly disbursed to the supplier of the machinery. Shri Vijay Nanalal Shet in connivance with Shri Bhangui utilised fake purchase bill of M/s. Meera International and got the money released. Though this money was subsequently paid by the EDC to the Bank on behalf of Shri Vijay Nanalal Shet, in actuality, Shri Vijay Nanalal got undue gain as a result of his connivance with the Manager. Further Shri Vijay Nanalal applied/ requested the Bank of India, Campal Branch for grant of (1) Cash Credit (Hypo of Raw Material) Advance of Rs.95,000/- and (2) Cash Credit (Hypo of Book debts) Advance of Rs.3,25,000/- on the basis of fake documents. The application for the above advance was recommended by Shri Bhangui. The advance was disbursed to M/s. Aurobindo Profile Industries and has almost fully been recovered. Shri Bhangui (A.2) the Branch Manager also purchased post-dated cheques issued in favour of M/s. Aurobindo Profile Industries for a sum of Rs.57,000/- from Shri Vijay Shet (A.2). The cheque issued by M/s. Weldon Engineering, M/s. Meera International and M/s. Ambika Steel & Allied Industries bounced causing loss to the Bank. In dealing with Vijay Shet, Shri Bhangui had abused his official position as a public servant and as such, a wrongful loss of Rs.4,67,000/- was caused to the Bank of India, Campal Branch, and corresponding gain is

caused to accused.

7. It is pointed out that prima facie the facts disclose commission of cognizable offences punishable under Sections 120-B, 420, 468, 471 I.P.C. and 5(1) (d) read with 5(2) of Prevention of Corruption Act, 1947, against the accused Shri Madhusudhan Bhangui and Shri Vijay Nanalal Shet. Hence a regular case was registered and further investigation was entrusted to Shri Omprakash Kudtarkar. The investigation was supervised by Shri Dilip Kumar, I.P.S. who has been examined as P.W.14. The FIR is marked as Exhibit 14/A. It is pointed out that Dy.S.P. Shri Dilip Kumar also forwarded the FIR to the Special Judge, District and Sessions Court, Panaji as per letter Exhibit 14/B. After completing the investigation, the I.O. filed two charge sheets in the Court of JMFC, Panaji on 30.5.1997. Case No.56/97/B was filed on the basis of Charge Sheet wherein the petitioner herein was charged for the offences punishable under Sections 420, 467, 468, 471 of I.P.C. for cheating the Bank by using fraudulent documents, etc.. Case No.57/97/B was filed against the petitioner herein on the basis of the charge sheet wherein he was charged under Section 420, 467 and 471 of I.P.C. for cheating and forgery. In both the charge sheets, the I.O. made the following note :

"(a) Additional evidence, if any, will be adduced.

(b) FIR was registered against Shri Vijay Shet & Shri M.S. Bhangu. As there is no sufficient evidence to prosecute Shri Bhangu, he has not been cited as an accused.

(c) Shri M.S. Bhangu is cited as witness in this case."

It may be noted here that although the FIR was filed before the Special Judge, no closure report was filed before the Special Judge to indicate that the proceedings before the Special Judge had come to a close.

8. According to the petitioner, after recording of the evidence of the witnesses, it was found that sufficient evidence had come on record against the Branch Manager Shri Bhangu, who had been dropped by the I.O. Kudtarkar. Hence an application under Section 319 Cr.P.C. 1973 was filed on 23.10.2000 in the Court of the JMFC for adding Shri Madhusudhan Bhangu as an accused. In the said application, the relevant evidence of all the witnesses that had come on record of the case against Shri M.S. Bhangu as stated in the FIR Exhibit

PW.14/A, is reproduced. Some relevant evidence brought on record, is as follows :

The prosecution witness No.13 Shri Gangadhar Usgaonkar the then Regional Manager of the Bank of India, had stated that they had received the proposal through the Bank, Campal Branch from Aurobindo Profile Industries requesting for grant of credit facility against stock of Rs.85,000/- and further grant of cash credit to the extent of Rs.2,80,000/- for purchase of machinery. Pw.13 has stated that he had received the replies to the queries from the Branch Manager, but the said reply of the Branch Manager was not produced before the trial Court inspite of the application Exhibit-D being made to the trial Court, calling upon the prosecution to produce the reply and other documents. It is the contention of the petitioner that the said documents have deliberately been not produced and have, in fact, been suppressed by the prosecution as production of such documents would go against the prosecution case and also against the Bank Manager. The explanation offered by the prosecution as also by the I.O. was not satisfactory. Hence, it is contended that an adverse inference under Section 114(G) of the Evidence Act ought to have been drawn by the learned JMFC which he had failed to do.

9. A perusal of the order of the JMFC shows that the Magistrate has considered the evidence that had been brought on record and only thereafter, come to the conclusion that no evidence had been brought on record implicating the Branch Manager, Shri Bhangui in an offence of criminal conspiracy showing that the said Shri Bhangui had dishonest intention to cheat the Bank and cause wrongful gain to the petitioner, Shri Vijay Nanalal Shet. Further, it has been observed by the learned Magistrate that Mr. Bhangui himself has been examined as a witness in both the cases and he had been extensively cross examined on behalf of the accused, in which said Shri Bhangui had admitted that if the Bank had exercised some diligence in cross checking with the three companies, namely M/s. Chowgule, M/s. Salgaonkar and M/s. Sesa Goa, the Bank could have saved itself from the losses. However, the learned Magistrate rejected this admission as implicating the accused Shri Bhangui on the ground that no suggestion was put to the said Bhangui that he had been in conspiracy with the Shri Vijay Nanalal Shet. Referring to the evidence of Dy.S.P. Dilip Kumar who had filed the FIR, and the evidence of Omprakash Kudtarkar, who had carried out further investigation, the learned JMFC found nothing to suggest that said Bhangui had acted with dishonest intention while functioning as Branch Manager vis-a-vis the credit facilities granted to the accused Vijay Shet.

However, the learned trial Judge has observed that Shri Dilip KUMar had admitted that the FIR was registered for the offence of conspiracy under Section 120-B IPC. He had explained that at the time of registering the FIR, the same was done only on the basis of prima facie information and not a conclusive fact. It was an allegation and not a charge. Learned JMFC further noted that Shri Dilip Kumar had also admitted that the Bank Manager had not verified the existence of M/s. Meera International while recommending the loan, but overlooked the same, since the evidence of Douglas Lobo shows that the Bank had verified about M/s. Meera International with Canara Bank, Sion Branch, at Mumbai. Further, the Magistrate observed that from the deposition of Mr. Omprakash Kudtarkar, it appears that there were lapses on the part of the Branch Manager in not verifying the local address and the Bombay address of M/s. Arobindo Profile Industries which was the firm of the accused Vijay Shet and in not verifying the genuineness of the traders and the genuineness of M/s. Meera Intentional.

10. Despite the above evidence having been brought on record, the learned Magistrate observed that the question remains whether there is evidence to show that the accused Madhusudhan Bhangui had entered into the criminal conspiracy with Vijay Shet to cheat the

Bank and that since it was impossible to adduce direct evidence of conspiracy (Shiva Narayan v. State of Maharashtra, A.I.R. 1980 SC 439), the same could only be proved from an inference drawn from the acts of illegal omissions entered by conspirators in pursuance of the conspiracy. The learned Magistrate further held that since there is no evidence to suggest that Madhusudhan Bhangui had conspired with Vijay Shet in pursuance of a common design, there is also no evidence of what was the common design and in what way Madhusudhan Bhangui was the beneficiary of the said design.

11. From the order of the Addl. Sessions Judge in Criminal Rev. Appln. No.88/2000, it is seen that the learned Addl. Sessions Judge has held that the learned JMFC was justified in drawing the conclusion that the said Mr.Bhangui could not be added in the offence as there was no evidence against him to show that he had acted in criminal conspiracy with the petitioner and caused loss to the Bank. The learned Addl. Sessions Judge has rejected the application of the petitioner also on the ground that the application under Section 319 Cr.P.C. was filed belatedly and that the application ought to have been taken up by the applicant as soon as the charge-sheet was filed in the Court of the JMFC and not at the stage when the evidence

was recorded and the case was fixed for recording statement of the accused under Section 313 Cr.P.C.

12. It is the case of the petitioner that the order dated 3.11.2000 passed by the JMFC is illegal and improper as the learned Magistrate failed to exercise the jurisdiction in the matter by holding that the charge sheet should have been filed in the Court of the Special Judge Goa under Section 173 (2) Cr.P.C. 1973 since the FIR was submitted to the Special Judge under Section 157 of Cr.P.C. 1973 as the charges were also under Section 5 of the Prevention of Corruption Act, 1947. The learned Magistrate failed to appreciate that the FIR Exhibit PW.14/A finds corroboration in the evidence which has come on record and that only Court of Special Judge has jurisdiction to entertain the charge sheet under Section 173(2) Cr.P.C. after the completion of the investigation by the I.O. Further the Magistrate should have not entertained the two separate charge-sheets filed by the I.O. on 30.5.1997 and should have returned the charge-sheet to the I.O. directing him to file the same in the Court of Special Judge under Section 5 of the Prevention of Corruption Act, 1988. That by doing so, the learned Magistrate has usurped the power of the Special Judge under the provisions of the Prevention of Corruption Act, 1988 to deal with the case after filing the charge-sheet under Section 173(2) of

the Cr.P.C. It is submitted that the learned Magistrate had erred in entertaining and issuing process and holding the trial in two cases.

13. The learned Addl. Sessions Judge has taken the view that the I.O. was justified in filing the charge sheets before the JMFC and that there was no question of the I.O. sending any summary to the Special Judge informing him that he had dropped the said Shri Bhangui from the charge sheets as the I.O. while investigating the case found out that there was no evidence against said Madhusudhan Bhangui. The learned Sessions Judge has observed that at the time of filing of the F.I.R. under Section 157(1) of the Cr.P.C., the police officer was required to have reason to suspect only with regard to commission of an offence which he is empowered under Section 156 to investigate, but not with regard to involvement of an accused in a crime. That the investigating officer while dealing with investigation found out that there was no evidence against Mr Bhangui and therefore, he was not made accused in the charge-sheet and in fact, cited him as a witness and since no offence under the Act could be attributed to the said Mr. Bhangui, the charge sheet confined itself to only offence under the I.P.C. and that too only against the applicant (petitioner herein) and in view thereof since the FIR which was registered

and thereafter investigated and subsequently, a charge sheet was filed, there was no question of the I.O. sending summary to the Special Judge or informing him that he had dropped said Madhusudhan Bhanguai from the charge sheet.

14. These observations of the learned Addl. Sessions Judge are without merit. The Investigating Officer cannot, on his own, choose the forum for prosecuting the accused in the FIR. Even if the I.O. genuinely felt that there was no case against said Madhusudhan Bhanguai, the FIR having been lodged with the Special Judge for offence under Section 120-B, read with the offences under the I.P.C. as well as the Prevention of Corruption Act, the closure report under Section 173 ought out have been filed before the Special Judge, clearly indicating that the investigation for the offence under Section 120-B and the offence under the Prevention of Corruption Act against the Branch Manager Shri Bhanguai were proposed to be dropped. It was for the Special Judge to have accepted or rejected the report. The I.O. on his own, could not have chosen to file the charge-sheet only against the petitioner by simple device of dropping the Branch Manager Shri Bhanguai, thereby depriving the Special Judge of jurisdiction to try the matter. It must not be forgotten that the FIR was lodged for offence under

Section 120-B and other Sections of the I.P.C. as well as offence under the Prevention of Corruption Act and the case would, in normal circumstances, have been filed before the Special Judge as Mr. Bhangui being the Branch Manager of a Nationalised Bank is allegedly involved in the offences. The I.O. could not have taken upon himself to discharge Shri Bhangui, without having filed the closure report before the Special Judge and obtained his consent thereof. In the case of Sampat Singh and others v. State of Haryana and others, reported in (1993) SCCs.561, the Apex Court held that when a case is registered under Sections 161 and 165 i.P.C. and Section 5(2) of Prevention of Corruption Act, which offences can only be tried by a Special Court and police submitted cancellation report under Section 173 Cr.P.C. before the Magistrate, the Magistrate had no power to pass an order discharging the accused on the basis of that report and the Magistrate should have instead forwarded the report to the Special Judge. Hence, the Magistrate's Order was set aside directing him to transmit all the papers along with cancellation report to the Special Judge having jurisdiction.

15. In the present case, it is seen that the I.O. has not filed the report under Section 173 before the Special Judge, but has, in fact, filed charge sheets against the petitioner alone dropping the Branch

Manager, Shri Bhangui and citing him as a witness, thereby usurping the power of the Special Judge.

16. So far as the present application under Section 319 Cr.P.C. is concerned, it is seen that the same has been rejected by the trial Magistrate on the ground that there was no evidence on record implicating Mr. Bhangui in the crime and the learned Sessions Judge, in revision, has upheld the findings of the learned Magistrate in holding that there was no evidence on record against the Branch Manager. The learned Addl. Sessions Judge has further rejected the revision application on the ground that the application under Section 319 Cr.P. was belatedly filed as the same should have been filed immediately after the filing of the charge sheet when the petitioner was aware that Mr. Bhangui was being dropped from the proceedings and he was being cited as a witness.

17. So far as the delay in concerned, it is well settled that such an application can be filed at any stage of the proceedings. Section 319 Cr.P.C. specifically permits such an application being filed at any stage of the trial. Section 319 Cr.P.C., reads as follows :

" 319. Power to proceed against other

persons appearing to be guilty of offence
-(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1) then-

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

18. The Apex Court in the case of Michael Machado and anr. v. Central Bureau of Investigation and another, reported in 2000 Cri.L.J. 1708 has set out the parameters for entertaining an application under Section 319 Cr.P.C., especially when the same is filed at belated stage as in the present case. It observed as under :

"11. The basic requirements for invoking the above section is that it should appear to the Court from the evidence collected during trial or in the inquiry that some other person, who is not arraigned as an accused in that case, had committed an offence for which that person could be tried together with the accused already arraigned. It is not enough that the Court entertained some doubt from the evidence about the involvement of another person in the offence. In other words,

the Court must have reasonable satisfaction from the evidence already collected regarding two aspects. First is that the other person has committed an offence. Second is that for such offence that other person could as well be tried along with the already arraigned accused.

12. But even then what is conferred on the Court is only a discretion as could be discerned from the words "the Court may proceed against such person". The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the Court should turn against another person whenever it comes across evidence connecting that another person also with the offence. A judicial exercise is called for keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the Court had spent for collecting such evidence. It must be remembered that there is no compelling duty on the Court to proceed against other

persons."

In the said case, the Apex Court has quoted with approval its earlier observations in the case of Municipal Corporation of Delhi v. Ram Kishan Rohtagi, (1983) 1 SCC 1: (AIR 1983 SC 67: 1983 Cri. L.J. 159), wherein the learned Judge cautioned as follows:

" But we would hasten to add that this is really an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken."

The Apex Court further held :

" 14. The Court while deciding whether to invoke the power under Section 319 of the Code, must address itself about the other constraints imposed by the first limb of sub-section (4), that proceedings in respect of newly added persons shall be commenced afresh and the witnesses re-examined. The whole proceedings must be

recommenced from the beginning of the trial, summon the witnesses once again and examine them and cross-examine them in order to reach the stage where it had reached earlier. If the witnesses already examined are quite a large in number, the Court must seriously consider whether the objects sought to be achieved by such exercise is worth wasting the whole labour already undertaken. Unless the Court is hopeful that there is reasonable prospect of the case as against the newly brought accused ending in conviction of the offence concerned we would say that the Court should refrain from adopting such a course of action.

(15) ...

(16) But suspicion is not sufficient to hold that there is reasonable prospect of convicting the appellants of the offence of criminal conspiracy...."

19. It is seen from the record that the recording of evidence in Criminal Case No.56/97/B, is complete, 15 prosecution witnesses have been examined

and the prosecution has closed its evidence on 30.9.2000. Similarly, in Criminal Case No.57/97/B, 23 prosecution witnesses have been examined and the prosecution has closed its evidence on 30.9.2000. This application has been filed on 12.12.2000 i.e. much after the prosecution closed its evidence and, in fact, when the statement of the accused under Section 313 Cr.P.C. was being recorded. So far as the nature of the evidence that has come on record, it must be stated that no evidence has been brought on record conclusively implicating the Branch Manager Shri Bhangu in any case of conspiracy as alleged by the petitioner. The only evidence brought on record which may be said to be legal evidence, is evidence in the nature of an adverse inference to be drawn in view of the failure on the part of the prosecution to produce the reply of the Branch Manager to the queries Exhibit D. From the nature of the evidence collected during the trial, it, therefore, cannot be said that there is reasonable prospect of the case as against the Branch Manager, Mr. Bhangu ending in his conviction of the offence of conspiracy.

20. Further more, allowing the application will necessarily mean setting aside the trial and directing the police to file the charge sheet before the Special Judge for which sanction of the competent

authority for prosecuting the Branch Manager who is a public official and a Government Servant, would be required. This again would involve considerable delay. It also cannot be said that such a sanction would be obtained as a matter of course and, in fact, there is the possibility of application for sanction being rejected. Further more, filing the application under Section 319 Cr.P.C. at such a belated stage, that is, after completion of recording of evidence and at the stage of recording of 313 Cr.P.C. statement, calls into question the motive of petitioner in filing the application, namely to further delay the trial and the possible conviction of the petitioner. Besides there are no compelling reasons for taking cognizance against the said Shri Madhusudhan Bhangu, then Branch Manager.

21. In view of the above, the petition is rejected. Interim relief vacated and disposed of accordingly.

A.S. AGUIAR, J.

ssm.