IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1044 OF 2005

Gunaji s/o Sadashiv Savant
and Anr. ..Applicants

Vs.

The State of Maharashtra
and Ors. ..Respondents

....
Mr.C.P.Sengaonkar, Advocate for Applicants
Mr.D.P.Adsule, A.P.P. for State
....

CORAM: SMT. V.K. TAHILRAMANI, J.

DATE OF RESERVING THE ORDER : 13.07.2005
DATE OF PRONOUNCING THE ORDER : 29.07.2005

P.C.

1. The applicants i.e. original accused in Special Case No. 80 of 2003 have prayed for quashing of process issued against them by the learned Special Judge, Gr.Bombay by order dated 21.11.2003. The process was issued under Sections 7, 12, 13(1)(d) r.w. 13(2) of the Prevention of Corruption Act, 1988 r.w. Section 109 of IPC. The

said case is pending before the Special Court (P.C.A.Cases for Gr.Bombay).

2. The applicant no.1 is a Police-Sub-Inspector and applicant no.2 is a Police Constable. It is the case of the complainant that the accused person had demanded an amount of Rs.1,50,000/- from him and if the said amount was given to them, the complainant would not be arrested. They took Rs.3000/- which was on the person of the complainant and Rs.10,000/- which was in his house and asked the complainant to make arrangement for the remaining amount which was settled. The complainant filed his complaint with ACB. The said complaint came to be registered as C.R.No. 49 of 2000 by ACB (B.M.U.) Mumbai. In the said case, the police preferred an application dated 17.3.2003 before the Special Court for granting ‘A’ summary in the said matter. The ground for seeking ‘A’ summary was that no sanction was granted by the sanctioning authority.

3. It may be stated here that sanction was sought only in respect of applicant no.2 Sambhaji Chavan

and the Joint Commissioner (L.& O.) vide his letter dated 28.11.2002 informed that sanction to prosecute Shri.Sambhaji Chavan only cannot be given. Thus, it is seen that it is not as if sanctioning authority totally refused to grant sanction but looking to the fact that there were two accused and their role, it was observed that sanction only in respect of Sambhaji Chavan could not be granted.

4. By order dated 19.4.2003 the learned Special Judge rejected the application for 'A' summary. In the order dated 19.4.2003 the learned Special Judge directed that the matter be put up before the Director General of ACB (B.M.U.) and before the Commissioner of Police for reconsideration of the issue. This order of the learned Special Judge has also been impugned in the present application.

5. The learned advocate for the applicants has submitted that no sanction has been granted in the present matter and hence, cognizance cannot be taken. He has submitted that hence the process issued against the applicants deserves to be

quashed and set aside. Thus, the contention of the learned advocate for the applicants is that the applicants being public servants, sanction under Section 197 of Cr.P.C. was necessary and as no sanction has been obtained in the present case, the prosecution ought to be quashed.

6. I do not find much merit in the above contention. In the State of H.P. Vs. M.P.Gupta, the Supreme Court has observed thus:-

> . "This Court has stated the legal position in Shreekantiah Ramayya Munipalli case and also Amrik Singh case that it is not every offence committed by a public servant which requires sanction for prosecution under Section 197 of the Code, nor even every act done by him while he is actually engaged in the performance of his official duties. Following the above legal position, it was held in Harihar Prasad Vs. State of Bihar as follows (SCC Page 115 para 66):
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> . "As far as the offence of criminal conspiracy punishable under Section 120-B read with Section 409 of the Indian Penal Code is concerned and also Section 5(2) of the Prevention of Corruption Act are concerned, they cannot be said to be of the nature mentioned in Section 197 of the Code of Criminal Procedure. To put it shortly, it is no part of the duty of

> a public servant, while discharging his official duties, to enter into a criminal conspiracy or to indulge in criminal misconduct. Want of sanction under Section 197 of the Code of Criminal Procedure is, therefore, no bar.
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> . Above views are reiterated in State of Kerala Vs. Padmanabhan Nair. Both Amrik Singh and Shreekantiah were noted in that case. Sections 467, 468 and 471 IPC relate to forgery of valuable security, Will etc. forgery for the purpose of cheating and using as a genuine a forged document respectively. It is no part of the duty of a public servant while discharging his official duties to commit forgery of the type covered by the aforesaid offences. Want of sanction under Section 197 of the Code is, therefore, no bar."

7. Useful reference may also be made to the decision of the Supreme Court in the case of **S.K. Zutshi and Anr. Vs. Bimal Debnath and Anr. reported in AIR 2004 SC 4174.** In the said case, it is observed that when an offence by a public servant is not in discharge of his official duty, in such case sanction to prosecute would not be necessary. Learned A.P.P. has submitted that question whether the accused has acted in his official course of duty or not and whether,

therefore, sanction would be necessary or not, should be left open to be decided in the main judgment which may be delivered upon conclusion of trial. Reliance was placed on the decision of the Supreme Court in the case of **Raj Kishor Roy Vs.Kamleshwar Pande & Anr. reported in AIR 2002 SC 2861** wherein these very observations have been made in paragraphs 11 and 12.

8. From the decision in the case of State of H.P. Vs. M.P.Gupta (supra), it is clear that the sanction to prosecute would not be necessary in the cases under Sections 467, 468, 409 of IPC and section 5(2) of the Prevention of Corruption Act. The offences which the applicants are facing, are of similar nature. In view of the observations in the above cited judgments, sanction to prosecute may not be necessary. However, even assuming that sanction is necessary, the question whether the applicants have acted in official course of duty or not and whether, therefore, sanction is necessary or not, in my view in the light of the observations of the Supreme Court in the case of Rajkishor Roy Vs. Kamleshwar Pandey (supra), should be left open

to be decided during the trial.

9. The second contention raised by the learned advocate for the applicants is that there are only three options open to the Court when the police files report stating that no offence appears to have been committed viz.;- (1) Court may accept the report and drop the proceedings, (2) Court may disagree with the report and taking the view that there is sufficient ground for proceeding further, takes cognizance of the offence and issues process or (3) Court may direct further investigation to be made by the police under Section 156(3) of Cr.P.C. The learned advocate for the applicants has submitted that these are the only three options open to the Court and it would not be open to the Court to direct the sanctioning authority to reconsider the matter. In support of his contention, he has placed reliance on the decision of the Supreme court in the case of **Bhagwant Singh Vs. Commissioner of Police and another reported in AIR 1985 Supreme Court 1285.** I have perused the said decision. The main issue in the said case was when a Magistrate decides not to take cognizance of

an offence or drops the proceedings against some persons mentioned in the F.I.R. then in that case, the Magistrate must give notice to the first informant and hear him first before taking the decision to drop the proceedings. That was the main issue before the Supreme Court in the case of Bhagwant Singh (supra) and the said decision has been rendered in the light of the issue which was before the Supreme Court. The issue whether the Court could pass such an order directing the sanctioning authority to reconsider the matter was not being considered by the Supreme Court in the case of Bhagwant Singh. Hence, in my view, this decision would be of no help to the applicants.

10. The learned Advocate for the applicants has also placed reliance on the decision of the Single Judge of the Delhi High Court in the case of **State (C.B.I.) Vs. R.S.Mathur 1994 Cri.L.J. 794.** He has placed reliance on the observations in the said judgment that directions by the Special Judge to obtain sanction for submitting final report is an incorrect order and hence, the said order came to be set aside. However, these observations have

been made in the context that previous sanction is not necessary for the purposes of filing of final report under Section 173 of Cr.P.C. It was in view of the above opinion of the Supreme Court that the order of the Special Court directing the police to obtain sanction even for submitting the final report was set aside. The same is not the situation in the present case and hence, the said decision also would not come to the aid of the applicants.

11. Reliance was also placed by the learned advocate for the applicants on the decision of the Supreme Court in the case of **Mansukhlal Vithaldas Chauhan Vs. State of Gujrat reported in 1997 Cri.L.J.4059**. In the said decision, it has been held that "the order of sanctioning authority mechanically in obedience of mandamus issued by the High Court is not a valid sanction. This decision is also distinguishable on facts because in the present case, the Special Judge has not directed the sanctioning authority to grant the sanction but Court has only asked the sanctioning authority to reconsider the issue. Sending the matter back to

the sanctioning authority for reconsideration of the issue cannot be equated with directing the sanctioning authority to grant sanction.

12. In the case of Mansukhlal Chauhan (supra), the High Court directed the State Government to grant sanction for prosecution. The Supreme Court held that sanction being granted on the directions of the High Court was invalid because there was no independent application of mind by the authority. The Supreme Court observed that the High Court's directions directing the State Govt. to grant sanction had taken away the discretion of the authority not to grant sanction and it was left with no choice but mechanically accord sanction in obedience of the mandamus issued by the High Court. In such case, the Supreme Court observed that sanction was invalid. It is clear that the Court cannot direct the sanctioning authority to grant sanction. It is pertinent to note that in the said decision the Supreme Court has not observed that Court could not have sent back the matter for reconsideration on the issue of grant of sanction. From the observations in the case of Mansukhlal

Chavan, it is clear that the Court cannot direct sanctioning authority to grant sanction but the Court can direct the sanctioning authority to reconsider the matter, because in such case, all the alternatives would be open to the sanctioning authority i.e. whether to grant sanction or not to grant sanction. In the present case also, the Special Court has not directed the sanctioning authority to grant sanction but has only asked the sanctioning authority to reconsider the matter. In view of the decision of the Supreme Court in the case of Mansukhlal Chauhan, it appears that such an order can be passed and thus, in my view, such an option is also open to the Court when the report is submitted by the police.

13. In this view of the matter, I find no merit in any of the contentions raised on behalf of the applicant, hence, application is rejected.

[V.K.TAHILRAMANI,J.]