IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 24TH DAY OF FEBRUARY 2010

BEFORE

THE HON'BLE MR.JUSTICE JAWAD RAHIM

CRL.R.P.NO.703/2009

BETWEEN:

Smt.A.C.Kamakshi
W/o M.N.Eshwara
Aged about 47 years
No.939, 'Usha Kiran'
Tonachikoppal Layout
Mysore-9. .. PETITIONER

(By M/s.G.Jairaj & Assts., Advs.)

AND:

Union of India by Inspector of
Police, CBI, ACB
Bangalore. .. RESPONDENT

(By Sri.K.Ravishankar, Adv. for
M/s.Ashok Haranahalli Assts., Advs.)

This Criminal Revision Petition is filed under Section 397 read with Section 401 of Cr.P.C. praying to set aside the order dated 3.8.2009 and quash the proceedings pending on the file of XXXII Addl.City Civil and Sessions Judge, Bangalore and Special Court for C.B.I.Cases, Bangalore in Spl.C.C.No.168/2005 etc.

This Revision Petition coming on for 'dictating orders' this day, the Court made the following:

ORDER

This petition is by second accused against the order dated 3.8.2009 passed in Spl.C.C.No.168/2005 on the file of XXXII Addl.City Civil and Sessions Judge, Bangalore City.

2. Heard learned Counsel Sri.Jairaj for the petitioner. Sri.Ravishankar and Sri.Hegde for the respondent – C.B.I.

3. Material facts on the basis of which petitioners is indicted to face trial are:

Inspector of C.B.I., ACB, Bangalore, on the basis of information received conducted investigation in the matter relating to possession of assets disproportionate to known source of M.N.Eshwar, the first accused. During investigation, he conducted raid and found assets in possession of the delinquent official – M.N.Eshwar and his wife A.C.Kamakshi valued more than the known

source of income. An inventory of property during raid was prepared evaluating the value of the property and explanation of the accused was sought. His explanation did not convince the officer that the assets owned by the delinquent official and his wife was acquired lawfully from known source of income. Therefore, it was considered as disproportionate to his known source of income to an extent of Rs.11,84,924.65 paise. Final report was filed on which cognizance has been taken by the learned Special Judge under the Act and both the accused were summoned.

4. On their appearance, the accused No.2 – Smt.A.C.Kamakshi resisted the prosecution, first on the ground that she was not a public servant and therefore, was not amenable for any action under the provisions of Prevention of Corruption Act (hereinafter referred to as 'the Act'). Secondly, that property belonging to her is her acquisition in which M.N.Eshwar had no interest and therefore, her possession and ownership of the assets cannot be linked to his possession and ownership. It is

further urged that, under the provisions and scheme of the Act, she cannot be proceeded against as an abetor for the offence punishable under Section 13(1)(e) of the Act. Lastly, it was urged that the Inspector of C.B.I., ACB, who investigated the case, had no legal competence in view of Section 17 of the Act.

5. Learned special Judge considered the grounds urged against the initiation of prosecution and by the impugned order rejected the objections, against which the second accused is in revision.

6. Sri.Jairaj contends that the petitioner is wife of M.N.Eshwar and the raiding party found the properties as belonging to her. The Investigating Officer has in his own report described the properties as belonging to her and therefore, unless it was established that it was acquired through the delinquent official, no charge could be laid.

7. The thrust of argument is that, only a public servant, can be prosecuted under the provisions of the PC

Act and as the petitioner is being not a government servant, Section 13(1)(e) of the Act has no application.

8.Regarding competence of Investigating Officer, reliance is placed on the decision of this Court in the case of *STATE OF KARNATAKA & ETC., -vs- B.NARAYANA REDDY* reported in *2002 CRI.L.J. 845,* wherein it was held placing reliance on the decision of the Apex Court reported in *AIR 1992 SC 604* that a Superintendent of Police or any Police Officer of above that rank is required to satisfy himself about the existence of ground for proceeding with investigation. Undoubtedly, a reference is made under Section 17 of the Act, which postulates,

> "notwithstanding anything contained in the Code of Criminal Procedure, no police officer below the rank (a) in the case of the Delhi Special Police Establishment, of an Inspector of Police; (b) in the metropolitan areas of Bombay, Calcutta, Madras and Ahmedabad and in any other metropolitan area notified as such under sub-section (1) of Section 8 of Cr.P.C., of an Assistant Commissioner of Police; (c) elsewhere, of a Deputy

> Superintendent of Police or a police officer of equivalent rank, shall investigate any offence punishable under this Act without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant. Provided that if a police officer not below the rank of an Inspector of Police is authorised by the State Government in this behalf by general or special order, he may also investigate any such offence without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make arrest therefor without a warrant. *Provided further that an offence referred to in clause (e) of sub-section (1) of Section 13 shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police."*

Therefore, relying on the second proviso of Section 17, it was submitted that, Inspector of Police in the instant case by name K.M.Ramesh had no legal competence to carry out the investigation.

9. Answering the said objections raised, learned Counsel for the C.B.I. Sri.Ravishankar would take me through the records and very particularly, he drew my attention to the impugned order itself, in which the learned trial Judge has noticed that K.M.Ramesh was duly authorised by the Superintendent of Police to carry out the investigation. To supplement that observation in the impugned order, the learned Counsel has produced in this petition the order itself, which reads thus:

> *"I, Biju George Joseph, Superintendent of Police,*
> *Central Bureau of Investigation, Special Police Establishment, Anti Corruption Branch, Bangalore, hereby authorise, Shri K.M.Ramesh, Inspector of Police, SPE:CBI:ACB:Bangalore, under the provisions of Section 17 of Prevention of Corruption Act 1988, to investigate the case in RC 21(A)/2004 against Shri M.N.Eshwara, Permanent Way Inspector/Section Engineer, Sagara, Mysore Division, South Western Railway, Mysore, for the offences punishable U/sec 1392) r/w 13(1)(e) of PC Act, 1988. He is further authorised to take the assistance of any other officer not below the rank of Inspector of Police of this branch for the investigation of this case."*

From the order in question, it is clear that the Superintendent of Police Sri.Biju George Joseph of Central Bureau of Investigation has, specifically by name, authorised Sri.K.M.Ramesh, Inspector of Police, C.B.I. to investigate the case relating to possession of assets disproportionate to the known source of income by M.N.Eshwara – first accused herein.

10. Learned Counsel Sri.Jairaj could not controvert any of these facts put forward by the Counsel for C.B.I. I am, therefore, convinced that the technical objection raised questioning the competence of K.M.Ramesh to investigate the case finds no support and is worth only rejection. Accordingly, the said ground is rejected.

11. The second ground urged by the C.B.I. is regarding of maintainability of this petition under Section 397 of Cr.P.C. The thrust is based on Section 19(3) of the Act. Section 19(3) reads thus:

> "***19. Previous sanction necessary for prosecution.-***
> *(1). . . .*
> *(2). . . .*

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974).-

(a). . . .
(b). . . .
(c) no Court shall stay the proceedings under this Act on any other ground and no Court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the Court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings."

12. Learned Counsel Sri.Ravishankar and Hegde would conduct that courts have consistently held that the orders passed residing the application of the accused seeking discharge is an interlocutory order, not amenable to Revision. But decision of the Apex Court in case of *SATYA NARAYAN SHARMA -vs- STATE OF RAJASTHAN* reported in *2001 CRI.L.J. 4640* dealing the provisions of Section 19(3)(c) is of the Act more appropriate. While distinguishing the scope and ambit of revision under Section 397 of Cr.P.C. and prohibition incorporated in the

provisions of Section 19(3)(c) of the Act, the Apex Court observes thus:

> *"Section 19 provides –*
>
> *(a) that no Courts should stay the proceedings under the Act on any ground and*
>
> (b) *that no Court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings. To be noted that (b) above is identical to S.397(2) of the Criminal Procedure Code which deals with revisional power of the Court. If Section 19 was only to deal with revisional powers then the portion set out in (b) above, would have been sufficient. The legislature has, therefore, by adding the words "no Court shall stay the proceedings under this Act on any other ground" clearly indicated that no stay could be granted by use of any power on any ground. This therefore would apply even where a Court is exercising inherent jurisdiction under S.482 of the Criminal Procedure Code."*

Advancing the view that even revisional power shall not be exercised, the Apex Court observes thus:

> *"Since the stays are granted by Courts without considering and/or in contravention of S.19(3)(c) of the Act has an adverse effect on combating corruption amongst public servants, the Supreme Court directed all the High Courts to list all cases in which such stay is granted*

before the Court concerned so that appropriate action can be taken by that Court in the light of this decision."

A guide could be taken from the decision that liberal exercise of revisional power under Section 397 Cr.P.C. is also discouraged in view of the restriction imposed by Section 19 of the Act particularly Section 19(3)(c) of the Act.

13. It was urged on behalf of the respondent that the orders passed seeking discharge are totally interlocutory in nature and therefore, in view of the provisions of sub-section (2) of Section 397 of Cr.P.C., the revision itself is barred. But, it cannot be said that the order passed denying the discharge of accused is purely an interlocutory order. Therefore, when such orders are questioned, the remedy of revision becomes available. However, it is urged on behalf of respondent that Section 19(3)(c) of the Act has to be used as a bar for revision under Section 397 of Cr.P.C. If that was the intention of the legislature, then such restriction would

have been incorporated by the legislature in the Act itself.

Section 22 of the Act is of relevance, which reads thus:

> *"**22. The Code of Criminal Procedure, 1973 to apply subject to certain modifications.-** The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall in their application to any proceeding in relation to an offence punishable under this Act have effect as if,-*
>
> *(a) in sub-section (1) of Section 243, for the words "The accused shall then be called upon", the words "The accused shall then be required to give in writing at once or within such time as the Court may allow, a lit of the persons (if any) whom he proposes to examine as his witnesses and of the documents (if any) on which he proposes to rely and he shall then be called upon" had been substituted;*
>
> (b) *in sub-section (2) of Section 309, after the third proviso, the following proviso had been inserted, namely:-*
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> *"Provided also that the proceeding shall not be adjourned or postponed merely on the ground that an application under Section 397 has been made by a party to the proceeding";*
>
> *(c) after sub-section (2) of Section 317, the following sub-section had been inserted, namely:-*
>
> *"(3) Notwithstanding anything contained in sub-section (1) or sub-*

section (2), the Judge may, if he thinks fit and for reasons to be recorded by him, proceed with inquiry or trial in the absence of the accused or his pleader and record the evidence of any witness subject to the right of the accused to recall the witness for cross-examination";

(d) in sub-section (1) of Section 397, before the Explanation, the following proviso had been inserted, namely:-

"Provided that where the powers under this section are exercised by a Court on an application made by a party to such proceedings, the Court shall not ordinarily call for the record of the proceedings."

Hence, it is seen that by Section 22, the provisions of the Code of Criminal Procedure have been made applicable to the proceedings under this Act subject to modification as indicated in Section 22 itself. The modification to Section 397 of Cr.P.C. incorporated in Section 22 of the Act only prevents the court from calling for the records from the trial court. That means, the provisions of Section 397 of Cr.P.C. will be applicable subject only to restriction that the records, which are otherwise permitted to be called

for in revision, is not permissible. If the intention of legislature was to restrain grant of any interim order of stay or to describe the order passed during proceedings as interlocutory in nature, the same restriction could have been found in Section 22 of the Act. Therefore, I find it difficult to accept that orders of framing charge or discharge of an accused are interlocutory in nature and barred by sub-section (2) of Section 397 of Cr.P.C. However, even if there is any restriction, we have to see whether that restriction has overriding effect on the Code of Criminal Procedure. Section 28 of the Act is of importance. Section 28 of the Act reads thus:

> *"**28. Act to be in addition to any other law.-** The provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt any public servant from any proceeding which might, apart from this Act, be instituted against him."*

Therefore, in all aspects, Section 28 is clear that the provisions of the P.C.Act are in addition to and not in derogation of any other law like the provisions of the Code of Criminal Procedure particularly the power

conferred by Section 397(1). Section 28 of the Act reads that the provisions of this Act (P.C.Act) shall not be in derogation of any other law for the time being in force. Hence, the reasonable conclusion would be that provisions of P.C.Act have to be considered as supplementary provisions and not to be considered as in derogation of the provisions of the Code of Criminal Procedure. Therefore, what is inconsistent in the provisions of Sections 19 and 22 of the Act could have been considered as being not in derogation to the general power conferred on the Courts by virtue of the provisions of the Code of Criminal Procedure. However, learned Counsel has brought to my notice that the issues similar to this did come up for consideration before the Apex Court in the case of *GUJARAT URJA VIKASH NIGAM LTD. -vs- ESSAR POWER LIMITED* reported in *AIR 2008 SC 1921* where the Apex Court noticed the conflicting provisions in the Electricity Act (36 of 2003), Sections 86(1)(f), 174, 175 and the Arbitration and Conciliation Act (26 of 1996), Section 11. Noticing the scheme of

both the Acts where the provisions were inconsistent. Analysing the scope and ambit of both the enactments, the Apex Court held that:

> *"43.. . . .(2) The second situation is a conflict where it is impossible to reconcile the two conflicting texts despite all efforts. In this situation the Vikalpa principle applies, which says that whichever law is more in consonance with reason and justice should be preferred. However, conflict should not be readily assumed and every effort should be made to reconcile conflicting texts. It is only when all efforts of reconciliation fail that the Vikalpa principle is to be resorted to.*
>
> *(3) There is a third situation of a conflict and this is where there are two conflicting irreconciliable texts but one overrides the other because of its greater force. This is called a Badha in the Mimansa system (similar to the doctrine of ultra vires). The great Mimansa scholar Sree Bhatta Sankara in his book 'Mimansa Valaprakasha' has given several illustrations of Badha as follows:*
>
> *"A Shruti of a doubtful character is barred by a Shruti which is free from doubt. A Linga which is more cogent bars that which is less cogent. Similarly a Shruti bars a Smriti. A Shruti bars Achara (custom) also. An absolute Smriti without reference to any popular reason bars one that is based upon a popular reason. An approved Achara bars an unapproved Achara. An unobjectionable Achara bars an objectionable Achara. A Smriti of the character of a Vidhi bars one of the character of an Arthavada. A Smriti of a*

doubtful character is barred by one free from doubts. That which serves a purpose immediately bars that which is of a remote service. That which is multifarious in meaning is barred by that which has a single meaning. The application of a general text is barred by a special text. A rule of procedure is barred by a mandatory rule. A manifest sense bars a sense by context. A primary sense bars a secondary sense. That which has a single indication is preferable to what has many indications. An indication of an inherent nature bars one which is not so.. . . . ."

Ultimately, the Apex Court noticing two conflicting texts in the same Act held that the word "derogation" shall not be taken as any liberal meaning. The intended purpose of the provisions needs to be understood. But as could be seen, the Apex Court was constrained to decide two conflicting provisions of the same Act to decide what derogation means?

14. It is therefore seen that, under the scheme of Electricity Act, the forum for arbitration was created and noticing that the forum was already created under the Electricity Act, the Apex Court held that the provisions of Arbitration and Conciliation Act would not apply.

15. But in the instant case, under the provisions of the P.C.Act, we notice that by virtue of Section 22 of the Act, the Code of Criminal Procedure has been made applicable subject only to certain modifications. If the intention of the legislature was to curtail the power of revision, the same restrictions would have been incorporated under Section 22 like other restrictions incorporated. In the absence of any such restrictions incorporated under Section 22, the provisions of the Code of Criminal Procedure are applicable. However, Section 19 of the PC Act has to be read which has been used as a weapon against action of this nature. The language of Section 19 by itself would indicate the fact that it was intended to avoid unnecessary intervention in the proceedings relating to trial for offence under the Act. The restriction for grant of stay and entertaining a revision is found only in sub-section (3) of Section 19 of the Act. Sub-section (3) of Section 19 reads as follows:

> "***19. Previous sanction necessary for prosecution.-*** *(1). . . . .*

(2). . . .
(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) no finding, sentence or order passed by a Special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c)no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings."

Sub-section (3) of Section 19 commences with a *non-obstante* clause, notwithstanding anything contained in the Code of Criminal Procedure, 1973 and then follows the restrictions in clauses (a), (b) and (c). Perhaps this is the reason why a view is being taken that any order

referred to in clause (c) of sub-section (3) is to be treated as barring for revision. But it is to be noted and reminded to our conscious that restrain on the powers of revision against any interlocutory order is already found in sub-section (2) of Section 397 of Cr.P.C.

16. Therefore, already there is an embargo to entertain a revision against an interlocutory order while exercising power under Section 397 of Cr.P.C. Same appears to be incorporated in clause (c) of sub-section (3) of Section 19 of the Act. If legislative intention was to bar all orders passed during proceedings from revision, that would have been found place more elaborately in clause (c) of sub-section (3) of Section 19 of the Act. But that is not so. The language of clause (c) is similar to the language of sub-section (2) of Section 397 of Cr.P.C. Besides as already referred to, if the intention of the legislature was to restrict the power of revision under Section 397 of Cr.P.C., then in Section 22 of the Act, necessary modification of the said provision would have

been done. But it has not been done. In this context, the words appearing in Section 28 of the Act that the provisions of the Act shall not be in derogation to any other law for the time being in force gains importance and hence applying under Section 28 of the P.C.Act, it could be held that in the absence of any restriction imposed under Section 22 to exercise the power of revision conferred on this court by Section 397 Cr.P.C., the revision petition filed by the petitioner questioning the impugned order refusing to discharge her is amenable to revision under Section 397, Cr.P.C. Thus it is held the revision petition is maintainable.

17. Coming to the main ground of challenge posed by the petitioner about her prosecution for the offence under Section 13(3) of the Act along with her husband-M.N.Eshwar who is a public servant, necessarily we have to take into consideration the provisions of the P.C.Act as also the Code of Criminal Procedure.

18. learned counsel for the petitioner, referring to the provisions of the P.C.Act would submit, the punishment for abetment is prescribed by Section 12 only if it is shown that the person though not a public servant has abetted commission of the offence punishable under Sections 7 or 11 of the P.C.Act. He submits, there is no other provision in the P.C.Act to proceed against a non-Government servant for abetment of the offence committed by the public servant punishable under Section 13(e) of the Act. Therefore, he submits in the instant case, as M.N.Eshwar who is a Government servant, is accused of having committed the offence under Section 13(e) of the Act, his wife-Kamakshi (petitioner herein) cannot be proceeded against in view of Section 12 of the Act which permits prosecution only if abetment pertains to offence punishable under Sections 7 or 11 of the Act.

19. In negation of such contentions, learned counsel for the respondent, Sri Ravishankar has relied on the decision of the apex court in the case of

P.NALLAMMAL, ETC., -vs- STATE REP. BY INSPECTOR OF POLICE (AIR 1999 SC 2556) wherein the apex court has held thus:

> *"Section 13 of the P.C.Act is enacted as a substitute for Ss.161 to 165-A of the Penal Code which were part of Chapter IX of that Code under the title "All offences by or relating to public servants". Those sections were deleted from the Penal Code contemporaneous with the enactment of S.31 of the P.C.Act (vide of S.31 of the P.C.Act). It is appropriate to point out here that in the original old P.C.Act there was no provision analogous to S.13(1)(e), but on the recommendation of Sanathanam Committee the said Act was amended in 1964 by incorporating S.5(1)(e) in the old P.C.Act. It is true that S.11 of P.C.Act deals with a case of abetment of offences defined under S.8 and S.9, and it is also true that S.12 of P.C.Act specifically deals with the case of abetment of offences under Sections 7, and 11. But that is no ground to hold that the P.C.Act does not contemplate abetment of any of the offences specified in S.13 of the P.C.Act."*

From the extracted verdict of the apex court, it is clear that after taking into consideration the provisions of Sections 11 and 12 of the P.C.Act ,the apex court opined there is no ground to hold that P.C.Act does not contemplate abetment of any offence specified in Section

13. Besides as we could see from Section 28 of the Act, there is a clear indication that the provisions of this Act (P.C.Act) shall be in addition to and not in derogation of any other law for the time being in force and nothing contained herein shall exempt a public servant from any procedures which might apart from this Act be instituted against him. Therefore, Section 28 also makes it clear that apart from action under the P.C.Act, a person can be proceeded against for any of the offences defined in any other law for the time being in force which undoubtedly includes the Indian Penal Code.

20. In this view, as the allegation against the petitioner-Kamakshi is being wife of M.N.Eshwar who is a Government servant, she abetted him in amassing wealth disproportionate to known sources of income, necessarily the allegation falls within the definition of 'abetment' as defined in Section 109, I.P.C. It reads thus:

> **'109.** ***Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its***

> ***punishment.-*** Whoever abets any offence, shall, if the act abetted is committed in consequence of abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.'

In the instant case, CBI has invoked Section 109, I.P.C. to rope in the petitioner as abettor for the offence committed by her husband-M.N.Eshwar. Therefore I find no legal infirmity in the prosecution launched against her. The grounds urged by her that as she is not a public servant, she cannot be proceeded against for the offence punishable under Section 13(1)(e) of the Act, is untenable because she is being proceeded against for the said offence if not as the principal offender. Consequently, all contentions urged by her against initiation of prosecution against her along with her husband-M.N.Eshwar in Spl. C.C.No.168/05 are hereby discounted.

21. In view of the discussion of the grounds urged by the petitioner in the foregoing paragraphs, I do not

wish to go into the merit of prosecution case to decide whether the charge would be tenable. In the result, the petition filed by the 2nd accused-Kamakshi in Spl.C.C.No.168/05 is dismissed. The petition is disposed of in terms of this order.

Sd/-
JUDGE

KNM/VGH