IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR

Reserved on: 13.04.2022
Pronounced on:20.04.2022

CRMC No.122/2018

NAZIR AHMAD GANAIE ... PETITIONER(S)

Through: - Mr. Mir Manzoor, Advocate.

Vs.

STATE OF J&K …RESPONDENT(S)

Through: - Ms. Asifa Padroo, AAG

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner has challenged order dated 16.06.2012 passed by Additional Special Judge, Anticorruption, Kashmir, Srinagar, whereby the learned Special Judge has, after holding trial of the case, directed the respondent to place the record before the competent authority for considering accord of sanction for prosecution against the petitioner in terms of Section 6 of the J&K Prevention of Corruption Act. A further observation has been made vide the impugned order to the effect that the respondent can probe certain aspects as mentioned in the impugned order in terms of Section 173(8) of Cr. P. C

2) Before coming to the grounds of challenge, it would be apt to notice the facts leading to filing of the instant petition. It appears that FIR No.04/1991 for offence under Section 5(2) of J&K Prevention of

Corruption Act came to be registered with Vigilance Organization, Kashmir. After investigation of the case, the charge sheet came to be filed by the investigating agency against Dr. Gh. Hassan Khan, the then Block Medical Officer, Bandipora and the petitioner was cited as a prosecution witness in the said challan. As per the charge sheet, an amount of Rs.30,000/ on account of payment of incentive charges under family planning programme, was stated to have been drawn from Bandipora Treasury by the aforesaid officer in the month of February, 1990 and the said amount was not accounted for. It was alleged in the charge sheet that the aforesaid amount has been fraudulently and dishonestly misappropriated by the officer and the officials connected with its drawl and that there were also mutilations/tampering in the drawl register and cash book pertaining to the aforesaid amount.

3) After framing of charges against accused Dr. Gh. Hassan Khan, trial of the case commenced. When all the prosecution witnesses were examined and the case was set down for recording of statement of accused Dr. Gh. Hassan Khan under Section 342 of Cr. P. C, the learned Special Judge observed that the evidence on record, prima facie, discloses the involvement of PW-9, Cashier Nazir Ahmad Ganai, the petitioner herein. It is in these circumstances that the impugned order came to be passed by the learned Special Judge.

4) The impugned order has been challenged by the petitioner on the grounds that there is no provision in the Code of Criminal Procedure or in any other law in existence to array a person as an accused in the pending

trial, particularly when the investigating agency, after investigation of the case, had not found any material against the petitioner; that there was no material before the learned Special Judge to seek impleadment of the petitioner as an accused; that it is not open to a court to direct the competent authority to accord sanction for prosecution and that once the trial of a case has been completed, it is not open to the court to direct further investigation of the case.

5) I have heard learned counsel for the parties and perused the record of the case.

6) So far as the contention of learned counsel for the petitioner that there was no material before the trial court to observe that the petitioner is, prima facie, involved in the alleged crime, is concerned, the same is without any substance. The learned Special Judge has very elaborately and in a lucid manner dealt with this aspect of the matter and has noted that there is evidence on record that the petitioner and the original accused were responsible for tearing the page of Contingent Register on which bill for Rs.3000/ was entered and instead of it, at the instance of the original accused, the petitioner had prepared the bill for Rs.30,000/. The learned Special Judge has also noted that there is material on record to show that the drawl register, contingent register and cash book used to be in the custody of the petitioner herein. So, there was enough evidence on record before the learned Special Judge to observe that there is, prima facie, involvement of the petitioner who was Cashier at the relevant time.

7) Section 351 of the J&K Cr. P. C, which is somewhat akin to the provisions contained in Section 319 of the Code of Criminal Procedure, 1973, empowers a Court to take cognizance of the offence against a person who is in attendance, if there is evidence before the Court that the person is, prima facie, guilty of the said offence. A person attending a Criminal Court, although not under arrest, can be detained by the Sessions Court for the purpose of inquiry or trial of any offence of which such court takes cognizance. The commission of the offence should appear from the evidence. Even a Magistrate, on taking cognizance of the offence which in his opinion has been committed by a person who is not before him and there is sufficient ground for proceeding against him, is empowered to issue process for summoning of such person under Section 204 of Cr. P. C. Section 190(1)(b) of the Cr. P. C does not restrict power of a Magistrate to proceed against an offender merely because in the police report his name is not sent up as an accused. A Magistrate is empowered to take cognizance of the offence and thereby summon any other person as an additional accused who may also appear to have committed the offence from the facts stated in the charge sheet of the police. I am supported in my aforesaid view by the judgment of this Court rendered in the case of **T. R. Kalra vs. State,** 2003 (II) SLJ 631.

8) Similarly, a Sessions Judge can add any person as an accused before it and direct him to be tried with other accused if such person appears to be involved in the commission of offence on the basis of evidence recorded during the trial and not on the basis of the evidence collected by

the investigating agency. This has been clearly laid down by this Court in the case of **Tariq Mehmood v. State,** 1997 KLJ 72.

9) A Constitution Bench of the Supreme Court in the case of **Hardeep Singh v. State of Punjab,** (2014) 3 SCC 92, has, while answering the question as to the degree of satisfaction required for impleading an additional accused, observed as under:

> ***"106.*** *Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused."*

10) In the same case, the Supreme Court explained the nature of satisfaction required to invoke the power to arraign an accused in the following words:

> ***"117.5.*** *Though under Section 319(4)(b) CrPC the accused subsequently impleaded is to be treated as if he had been an accused when the court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 CrPC would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused*

> *and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different."*

11) From the foregoing enunciation of law, it is clear that for arraigning an additional accused, there has to be much stronger evidence against the said accused than mere probability of his involvement in the crime.

12) In the instant case, keeping in view the nature of evidence that had come on record during the trial of the case as has been discussed hereinbefore, the learned Special Judge was well within his jurisdiction to initiate the process for arraying the petitioner as an accused. So, no fault can be found in the satisfaction recorded by the learned Special Judge in this regard.

13) The other ground urged by the learned counsel for the petitioner is that it was not open to the learned Special Judge to direct the competent authority to accord sanction for prosecution against the petitioner. In this regard, the learned counsel has relied upon the judgments of the Supreme Court in the cases of **Mansukhlal Vithaldas Chauhan v. State of Gujarat,** 1997 (7) SCC 622 and **Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke & Ors,** (2015) 3 SCC 123.

14) There can be no quarrel with the proposition that a Special Judge cannot direct the competent authority to grant sanction against a potential accused but then in the instant case, the learned Special Judge, by virtue of the impugned order, has not directed the competent authority to grant

sanction for prosecution against the petitioner. The learned Special Judge has only directed the Commissioner, Vigilance Organization, to place all the relevant record and the statements of the prosecution witnesses recorded in the case as well Case Diary before the competent authority for considering accord of sanction for prosecution against the petitioner. So, no direction has been extended by the learned Special Judge to the competent authority to grant sanction. The direction is only to place the relevant material before the competent authority, which has been left free to apply its own mind to the material and to take a decision as to whether or not sanction for prosecution against the petitioner is to be accorded.

15) The petitioner has placed on record a copy of the Government order dated 12.11.2013 whereby sanction for his prosecution has been accorded by the competent authority. Having gone through the said order, this Court does not find anything in its contents that would even remotely suggest that the competent authority has accorded sanction to prosecute the petitioner under the influence or under the directions of the learned Special Judge. Therefore, the argument raised by the learned counsel for the petitioner in this regard is bound to fail. The order of sanction clearly reflects independent application of mind by the competent authority to the material before it.

16) Lastly, it has been argued that the learned Special Judge has erred while directing further investigation in the case as at the stage of conclusion of the trial, a Magistrate/Court is not empowered to do so. In

support of his argument, learned counsel for the petitioner has placed reliance on the following judgments:

1. ***Amrutbhai Shambhubhai Patel vs. Sumanbhai Kantibhai Patel & Ors, 2017 (4) SCC 177;***
2. ***Reeta Nagv. State of West Bengal & Ors, 2009(9) SCC 129; and***
3. ***Bikash Ranjan Rout v. State through the Secretary, (2019) 5 SCC 542;***

17) In a recent case titled **Vinubhai Haribhai Malaviya and ors. Vs. The State of Gujarat and ors, (2019) 17 SCC 1,** the Supreme has in clear terms laid down that an order of further investigation can be made after a report was received by a Magistrate under Section 173(2) of Cr. P. C and this power to direct further investigation would continue to enure in such Magistrate at all stages of the criminal proceedings until the trial itself commences, meaning thereby that after trial of the case commences, a Magistrate cannot direct further investigation of the case.

18) The question arises as to whether in the instant case, the learned Special Judge has actually directed the investigating agency to undertake further investigation. If it is shown that such a direction has been issued by the learned Special Judge, then the impugned order to that extent cannot be sustained. However, the situation is not such. A perusal of the impugned order reveals that the learned Special Judge has carefully worded his order and while noting that investigation in the case is silent on certain aspects, he has left it free to the investigating agency to probe these aspects in terms of Section 173(8) of Cr. P. C. The learned Special Judge has only observed that the investigating agency at this stage as well

can probe these aspects. There is no direction to the investigating agency to undertake further probe. The investigating agency has only been made aware about its jurisdiction to undertake further investigation of the case in terms of Section 173(8) of Cr. P. C, which, even in the absence of any such observation of the learned Special Judge, the investigating agency could have undertaken. Therefore, the argument of the learned counsel for the petitioner on this count also fails.

19) For the forgoing reasons, I do not find any infirmity or illegality in the impugned order passed by the learned Special Judge. The said order is well reasoned and lucid, as such, the same does not call for any interference by this Court. Thus, there is no merit in this petition. The same is, accordingly, dismissed. The learned Special Judge is directed to proceed further in the matter in accordance with law.

20) A copy of this order be sent to the learned Special Judge for information and compliance

(SANJAY DHAR)
JUDGE

Srinagar,
20.04.2022
"Bhat Altaf, PS"

Whether the order is speaking: ***Yes/No***
Whether the order is reportable: ***Yes/No***