

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 13TH DAY OF SEPTEMBER 2017

BEFORE

THE HON'BLE MRS.JUSTICE RATHNAKALA

CRIMINAL REVISION PETITION NO.1040/2014

BETWEEN:

H. NAGINCHAND KINCHA
S/O LATE HUKUMI CHAND KINCHA
AGED 61 YEARS
RESIDING AT NO.24, II CROSS
SHANKARAPURAM
BENGALURU - 560 004.

...PETITIONER

(BY SRI KIRAN S.JAVALI AND
SRI CHANDRASHEKARA K., ADVS.)

AND:

SUPERINTENDENT OF POLICE
CENTRAL BUREAU OF INVESTIGATION
BELLARY ROAD
BANGALORE.

...RESPONDENT

(BY SRI P.PRASANNA KUMAR, SPL.PP.)

THIS CRL.R.P. IS FILED U/S.397 R/W 401 CR.P.C.,
PRAYING TO SET ASIDE THE ORDER DATED 27.11.2014 IN
SPL.C.C.NO.130/2013 ON THE FILE OF THE XLVIII-ADDITIONAL
CITY CIVIL AND SESSIONS JUDGE AND SPECIAL JUDGE FOR CBI,
BANGALORE AND DISCHARGE THE PETITIONER.

THIS CRIMINAL REVISION PETITION HAVING BEEN
RESERVED ON 30.08.2017 AND COMING ON FOR
PRONOUNCEMENT OF ORDERS THIS DAY, THE COURT MADE THE
FOLLOWING:

ORDER

The revision petitioner (A-2) is aggrieved by the order of the Special Court in rejecting his application filed under Section 227 of Cr.P.C. seeking to discharge him of the offences under sections 7 and 8 r/w Section 13(d) of the Prevention of Corruption Act (hereinafter referred to as 'the Act') and Section 120-B of IPC pursuant to a trap, claimed to have been set up by the respondent-CBI, purportedly to trap accused No.1 in an act of accepting bribe for showing official favour by agreeing to reduce the tax on income of the original complainant.

Heard both.

2. The allegation in the complaint is to the effect that, the complainant being an income tax assessee filed a complaint on 7.9.2012 alleging that he is submitting his income tax returns in Bangalore from 2006 onwards; He had shown immovable property at Cochin in returns for the year 2008 and the same was disclosed in his income tax

returns, but in July 2011 the 1st accused/the assessing officer had issued a notice that his income tax declared for the assessment of the year 2008-2009 has escaped the assessment within the meaning of Section 147 of the Income Tax Act and it was proposed to reassess the income declared by him. He was informed that the capital gain to an extent of 3,28,65,711/- stood in his name. A similar notice was received by him in respect of the assessment years 2009-2010. In the last week of August 2012 on the direction of the 1st accused, he met him in his office at Bangalore; The 1st accused informed him that there are lot of anomalies in his returns and the tax would come around Rs.80 lakhs and if the complainant pays Rs.20 lakhs as bribe, case will be closed by imposing tax on Rs.30 lakhs, for which the complainant was not agreeable. The 1st accused warned that he will impose heavy tax of Rs.1 crore. On 1.9.2012 and 6.9.2012 he received call over his mobile phone from the 1st accused demanding bribe and was directed to hand over the same to him at Bangalore and was also informed that assessment order has been handed

over to 2nd respondent. The complainant since was not willing to pay bribe, lodged complaint with CBI/ACB. He had produced C.D. of conversation between himself and the accused for the period 1.9.2012 to 6.9.2012.

3. Learned counsel Sri. Kiran S. Javali for the petitioner submits that the assessment order in respect of which the gratification is alleged to have been demanded by the 1st accused had already been passed and no work was pending on the date of the complaint. There was no material to show about the demand of gratification by the 1st accused. As per the complaint allegations, on the Income Tax Department serving a notice under Section 148 of the Income Tax Act that substantial income has escaped assessment, the complainant met the petitioner voluntarily who is a Chartered Accountant at Bangalore and sought for his advise. He never sought for any help from the petitioner to appear before the Assessing Authority. The complainant had approached him seeking help to draft the objection statement to the notices served on him pertaining to two

assessment years served on him. On that occasion he had paid Rs.25,000/- and a receipt was passed on to him. The complainant appeared on his own before the Assessing Authority without the assistance of the 2nd accused. Since the complainant was not allowing the Assessing Authority to discharge his duties peacefully, he was informed by the said Authority to collect the order copy from this petitioner and pass on the acknowledgement. The Assessing Authority had informed that if he does not pay tax within six months, it would attract the penalty of Rs.30 lakhs. The complainant was not willing to give cheques and offered to pay Rs.5 lakhs cash and he wanted the petitioner to pay the 1st instalment of tax and had stated that he will not commit default if permitted to pay in installments. When the complainant placed the trap money on his table towards payment of tax, the petitioner pushed back the amount by his hands and refused to accept the same. As per the recitals of the trap mahazar, the trap money was lying on the table. The complainant had replaced the money in a cover and then signaled the trap team. His hands were not

subjected for sodium carbonate hand test. The 1st accused had not even touched the said money.

4. Learned counsel further submits that the petitioner is not a public servant and does not fall within the purview of sections 7 or 8 or within the purview of section 13 of the Prevention of Corruption Act. Neither Section 7 nor Section 8 contemplate gratification as a consideration for any official act. The assessment order is passed on 6.9.2012. Complaint is filed on 7.9.2012 and the trap was held on 8.9.2012. Hence, the allegation that the 1st accused demanded bribe on 7.9.2012 is false. Once an order is passed, the Assessing Authority concerned becomes "***functus officio***" as per the judgment of this court reported in **2013(6) KLJ 419 in the case of Smt.K.Chandrika Vs. State By CBI**. No body complained that the assessment order is illegal nor the reopening of the assessment was bad in law. In the absence of any material to the effect that accused 1 and 2 had agreed to hatch a

criminal conspiracy, charge under section 120-B was untenable.

5. As per the judgment of this court reported in **2013(6) KLJ 419** referred above, mere finding of the trap money on the table of the accused cannot be acceptance of bribe.

6. Learned counsel further placing reliance on the decisions reported in the case of **Keshub Mahindra Vs. Madhya Pradesh reported in 1996 (6) 522 para.14 and Niranjan Singh Karan Singh Punjab Vs. Jitendra Bhimraj Bijja (AIR 1990 SC 1962)** submits that it is the duty of the court to evaluate the documents and materials on record with a view to finding out the facts emerging therefrom taken at their face value disclose the existence of the ingredients constituting the alleged offence.

7. As per the judgment of this Court reported in **ILR 1998(3) Kar 1754 in the case of State of Karnataka Vs Khawali @ Babujan**, the material collected and placed by

the investigating agency should create an very grave, strong and serious suspicion about the complicity and in this case no such material is placed. Hence, the petitioner is liable to be discharged by the Sessions court.

8. Sri P. Prasanna Kumar, learned Special Public Prosecutor for the respondent in reply submits that the trap was held at the chamber of this petitioner and the 1st accused was present at the time the sodium carbonate test of his fingers resulted positively evincing that he had touched the tainted currency notes. Section 8 of the P.C.Act applies to private persons and on further verification it was found that the Assessing Authority has not made entry about passing the order on 6.9.2012. The Assessing Authority had projected that if the bribe amount is not paid as demanded by him, the complainant will be imposed higher penalty.

9. Learned Spl.P.P. continues to submit that the Special Judge has gone in detail to the material on records and finds that the explanation now offered by the petitioner

about pushing the tainted currency notes was not there in the written explanation submitted by him during the trap mahazar. As per the statement of the complainant, this petitioner gestured the complainant to give money, on the complainant handing over the tainted money kept in the cover, this petitioner took the currency notes, counted the same and kept back in the plastic cover and the above statement of the complainant cannot be brushed aside. The assessment order pertaining to 2009-2010 dated 6.9.2012 was seized from the chambers of this petitioner along with the tainted amount of Rs.5 lakhs, in which the balance tax payable is shown as Rs.31,86,487. From the order sheet maintained in respect of the proceedings seized from the office of the 1st accused, there is no mention about the assessment order of 6.9.2012. It is the case of the prosecution that for imposing the tax liability for Rs.30 lakhs, the 1st accused had demanded bribe of Rs.20 lakhs. The colleague of this petitioner had stated to the effect that on 7.9.2012 she was instructed by A-2 that Mr. A.K.Halim/complainant will come around 6 p.m. to collect

the assessment order and she was instructed to collect Rs.20 lakhs from him to give the assessment order. The complainant went to the chamber. On the instruction of this petitioner, she had contacted the complainant over phone on 8.9.2012 and called upon him to come to the office of A-2 by 12 noon and she also informed that A-1 will be available in the office of A2. The above statement of the witness supports the case of the prosecution. On a detailed analysis of the prosecution papers, learned Special Judge has disagreed with the contention of this petitioner and has opined that prima facie case is disclosed to suspect that this petitioner has committed the offence under Section 120-B of IPC and Section 8 of the P.C. Act. It is a well reasoned order and the authorities relied by the learned counsel for the petitioner pertains to final judgment passed after trial. At this stage they are not applicable and the revision is liable to be dismissed.

10. In the backdrop of the above, now the concern is about the legal contentions raised on behalf of the

petitioner. Firstly, he is disputing that **no work was pending for demand of illegal gratification.** Of course the Assessing Order which was seized from the chambers of this petitioner is shown to have been passed on 6.9.2012. But the Investigating Officer has collected material that there is no proof from the official record that such an order was passed on the said date. Section 7 of the Act does not contemplate specifically that the work must be pending on the date of registration of the case. It is sufficient to make out an offence under Section 7 of the Act that he accepts or obtains or agrees to accept or admits to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act. It is also possible that a public person having negotiated for the bribe amount and in anticipation of receiving bribe money despite passing the order waits for the compliance of illegal demand without disclosing that the order is already passed. The materials on record clearly show that even after passing

the Assessment Order, it is not recorded in the proceedings book and not sent to tappal section.

11. Regarding the contention that there was no recovery from the 1st accused - The special court has considered this aspect of the matter and observed that the 1st accused himself had carried the office order to the office of the petitioner on a holiday. His voice sample is collected as per the standard procedure. The Trial Court in the body of its order has discussed this aspect of the matter filament wise. The petitioner himself had given his explanation stating that the complainant had approached him in respect of income tax matter and the order passed by the 1st accused had to be acknowledged by the complainant and the amount of Rs.5 lakhs was to be given to accused No.1 and his office premises (chamber of A-2) is used for the purpose. Thus, the seized amount of Rs.5 lakhs was the amount to be given to A-1 and he had not offered any reason as to why his office was used for receiving the bribe amount of Rs.5 lakhs. As per the recovery mahazar, very

same currency notes mentioned in the entrustment mahazar are seized.

12. Petitioner contends that the complainant had placed the trap money on the table towards payment of tax and he had used his hands to push back the trap money refusing to accept the same. Learned Special Judge records that at the stage of framing the charge, such contentions by him in his written argument was not found in the explanation given by him before the Investigating Officer. The statements of the complainant witnesses and the explanation of the accused is incorporated in the recovery mahazar. Learned Special Judge observes that the averments made in the entrustment mahazar that accused No.2 asked and received the bribe amount from the complainant on behalf of A-1 cannot be brushed aside. The petitioner's finger test has shown presence of phenolphthalein. Whether this phenolphthalein was due to pushing away of the tainted notes or due to counting the

same by using his fingers being a question of fact can only be answered only after trial.

13. The third fold of argument that the **accused No.2 is not a public servant and is beyond the contemplation of the statute.** The words occurring at Section 8 of the Act "*Whoever accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gratification.....*" covers the persons other than the public servants contemplated by definition clause (c) of section 2 of the Act and that does not require much elaboration. Regarding the contention that section 7 of the P.C.Act cannot be invoked against accused No.1 is not within the competency of the petitioner to urge before this court. Even otherwise the charge sheet material contains voice recording of the accused Nos.1 and 2 and the complainant and also there is material that this petitioner made demand for bribe on behalf of the 1st accused. For framing the charge under Section 228 of the Cr.P.C. if the Judge is not required to

record detailed reasons as to why such charge is framed. On perusal of the record and hearing the parties at the stage of discharge under Section 227 of Cr.P.C., if the Judge is of the opinion that there is ground for presuming that the accused has committed an offence, he is competent to frame charge for such offence even if not mentioned in the charge sheet. That was the observation of the Apex Court in the case of ***Dinesh Tiwari Vs State of Uttar Pradesh (Crl. Appeal No.1365/2014 arising out of SLP (Crl.) No.3051 of 2008)***.

14. The court below has dealt in detail each and every fabric of charge sheet material to come to the conclusion that there are grounds to frame the charge against the accused No.1 for the offences under Section 120-B of IPC and sections 7 and 13 (1)(d) r/w Section 13(2) of the P.C. Act and against accused No.2 for the offences under Section 120-B of IPC and Section 8 of the P.C. Act r/w Section 120 of IPC. The offence under section 120-B of IPC i.e. conspiracy cannot be expected to be proved by

direct evidence. Generally, as a matter of prudence, it can only be construed on the basis of the circumstantial evidence and in connection with the allegation attributed against each of the accused. The order of the court below is well reasoned, not warranting revisional jurisdiction of this court.

Hence, the revision petition is dismissed.

Dvr:

**Sd/-
JUDGE**