

R.C.C.No. 398/2002.

State/Pawan and other 9.

ORDER BELOW EXH.423.

The applicant third party - Nagpur District Central Co-operative Bank Ltd., Nagpur (for short, "N.D.C.C. Bank") has made this application Exh. 423 (this application previously wrongly numbered as Exh. 623). In the application the applicant has prayed that -

1. They may be permitted to have active and effective participation at the trial;
2. Permit them to cross-examine the material witnesses and
3. Permit them to lead evidence to prove that they are entitled to an amount of Rs. 30 crores frozen in the case.

2) Perused the application Exh.423 and say of learned A.P.P. at Exh.426. Heard learned advocate Shri.A.N.Deshmukh for the applicant-bank and learned A.P.P. Shri. V.S.Kulkarni for prosecution.

3) The relevant prosecution story for deciding this application is this. All ten accused have hatched a criminal conspiracy to cheat the Osmanabad District Central Cooperative Bank Ltd. Osmanabad (for short "O.D.C.C. Bank")for Rs. 30 crores. At the relevant time deceased accused No.1 was the Chairman of O.D.C.C.Bank and accused No.10 Sunil Kedar was the Chairman of applicant's N.D.C.C.Bank. There was a collusion between accused No.1 and 10 to purchase government securities through Home Trade Ltd. Washi, New Mumbai, unauthorized broker. Thereupon deceased accused No. 6, Dy. General Manager of O.D.C.C.Bank, demanded a deposit of Rs. 40 crores from N.D.C.C.Bank. Thereafter on 31/1/2002 the N.D.C.C. bank got credited their 30 crores as a deposit in the account of O.D.C.C. bank maintained with Maharashtra State Cooperative Bank Ltd. Mumbai. Then on 1/2/2002 the accused No.4, Deputy Chief Officer of O.D.C.C.Bank, at the instance of accused No.1 and 3 unauthorizedly got credited the said 30 crores in the account of said Home Trade Ltd. for purchasing government

securities. Accused No.8, Vice Chairman of Home Trade, then issued false Contract Notes of government securities worth Rs. 29,99,34,591/- to accused No.3 and on the same day the Home Trade Ltd. got credited an amount of Rs. 29,99,99,766-67 ps. in the account of N.D.C.C.Bank with the Maharashtra State Cooperative Bank Ltd. Mumbai. The Home Trade Ltd. also issued a false receipt of Rs. 29,99,34,591/- for purchasing government securities and delivered to accused No.3. It is further alleged that in the meeting dated 8/2/2002 of the Board of Directors of O.D.C.C.Bank there was no discussion on the purchase of government securities from Home Trade and even then on the proceeding register wrong entry is made to the effect that there was a resolution for purchasing government securities and the Board of Directors have unanimously resolved to purchase government securities and that proceeding was signed by accused No.1, 2 and 6. Thus it is the case of prosecution that deceased accused No.1, Chairman of O.D.C.C.Bank and accused No.2 to 6 being main officer bearers of the said bank, without having prior permission from the Commissioner, Cooperative Societies, accepted a deposit of Rs. 30 crores from N.D.C.C.Bank and in violation of R.B.I. directions paid sum of Rs. 29,99,34,591/- to Home Trade for government securities. Thus all accused in furtherance of their common intention have committed offences punishable under sections 120(B), 218, 406, 409, 420, 468, 471 r/w. 34 of I.P.C.

4) According to prosecution, during investigation it was traced out that out of 30 crores of O.D.C.C.Bank deposited in the account of Home Trade for purchasing government securities a sum of Rs. 29,99,99,766-67 got credited by Home Trade in the account of N.D.C.C.Bank. Hence, according to prosecution, the said amount is a stolen property within the meaning of Section 410 I.P.C. Therefore the Investigation Officer on 28/8/2002 issued a notice under section 102 of Cr.P.C. to N.D.C.C.Bank to freeze the said amount and also asked not to pay that amount to anybody till the decision of the Court in the case.

5) On 22/1/2003 the Investigating Officer also made an application Exh.131 before this Court contending that the misappropriated amount of Rs.29,99,34,591/-involved in the case and lying with the N.D.C.C.Bank may directed to be deposited in the Court. The O.D.C.C.Bank then made application Exh. 205 and prayed that the said amount be given to it by way of interim custody. By common order dated 09/12/2004 below Exh.131 and 205 this Court held that, the O.D.C.C.bank is entitled to recover Rs. 29,99,34,590-27 ps. being the case property from N.D.C.C. bank and to retain the same subject to final disposal of this case and N.D.C.C.Bank was directed to repay the amount of Rs. 29,99,34,590-27 ps. to O.D.C.C. Bank within one month from the date of that order, failing which the O.D.C.C.Bank is entitled to recover it with due process of law as per procedure provided for the recovery of fine. O.D.C.C.Bank is directed not to invest the same for unproductive purpose and the same must be invested in such a way that it can be recovered at any stage or at any time. O.D.C.C.Bank is also directed to execute bank guarantee in favour of this court for Rs. 40 crores etc. This order was challenged in the Hon'ble Bombay High Court by filing Criminal Writ Petition No.3/2005. However, by order dated 13/3/2013 the Hon'ble High Court pleased to dismiss the said writ petition. The N.D.C.C.Bank therefore filed Special Leave Petition. But the Hon'ble Supreme Court by order dated 11/4/2013 did not entertain the said Special Leave Petition and dismissed it. The Apex Court also directed, as requested by the Investigation Officer in his application under section 102 of Cr.P.C. that the amounts lying with the Maharashtra State Co-operative Bank,Mumbai shall remain frozen till a final decision is arrived at in the trial.

6) In this case application Exh. 423 the N.D.C.C.Bank contended that it had made investments in the government securities through various companies. It has also invested those amounts on the assurance by deceased accused No.1 and others who are connected with Home Trade Ltd. Mumbai.

That amount was to the tune of Rs. 30 crores kept with the O.D.C.C.Bank as a deposit for 180 days vide FDR No. 100265 which was to be expired on 30/07/2002. But that amount was not refunded with interest. It is further contended that the transaction between N.D.C.C. Bank and O.D.C.C. Bank is totally independent having no nexus with the business activities of O.D.C.C.Bank. Even the transaction between O.D.C.C.Bank and Home Trade was totally different. The N.D.C.C.Bank has also moved to National Consumer Forum, New Delhi for recovery of deposit amount Rs. 30 crores from O.D.C.C.Bank. The amount which N.D.C.C.Bank received from Home Trade is in respect of the transaction inter-se and it has nothing to do with O.D.C.C.Bank. According to N.D.C.C.Bank, there is identical amount paid by Home Trade to it and it was business transaction between N.D.C.C.Bank and Home Trade. The amount was received from Home Trade for the investments made by N.D.C.C.Bank and refund was made in one of the transactions. The N.D.C.C.Bank has no control over the business of Home Trade.

7) The N.D.C.C.Bank has also contended that the said bank has not been arrayed as accused in this case nor cited as a witness and thus since beginning that bank left unheard and was not given any opportunity to explain their stand in the case. The present prosecution is being continued to recover the amount of Rs. 30 crores without there being any decree either from the Co-operative Court or the Civil Court. In fact Criminal Court cannot grant any relief of recovery of the amount in favour of the O.D.C.C.Bank. Thus, according to N.D.C.C.Bank, unless and until the applicant is heard by representing effectively and actively before this Court to bring the truth on record, the punishment to the accused is of no avail, so far as Rs. 30 crores is concerned. The maturity value of deposit of Rs. 30 crores of N.D.C.C.Bank with the O.D.C.C.Bank is nothing but a public money. All these facts are required to be brought on record. There was no involvement of applicant-bank in the transaction between Home Trade and O.D.C.C.Bank.

It is thus contented that since investigation agency has attached Rs. 30 crores belonging to N.D.C.C. Bank during the investigation, the said bank is having interest in that amount and that bank goes to protect its interest by effectively cross-examination of relevant witnesses including the Investigation Officer and M/s. Y.C.Dalal or anybody appearing as a witness on the point of Rs. 30 crores. Thus it is prayed that in the interest of justice this application be allowed.

8) The learned A.P.P. has filed say at Exh. 426 and opposed this application contending, inter-alia, that there is no provision to grant such application. It is also contended that it is the duty of prosecutor appointed to conduct the matter and it is absolute right of said prosecutor to conduct the matter. It is also contended that the third party cannot dictate the Court though that party is victim or an aggrieved party. The third party cannot interfere in the work of prosecutor. At the most that party can be allowed to assist the learned A.P.P. With this it is prayed that the application may be rejected.

9) Learned advocate Shri.A.N.Deshmukh for applicant-N.D.C.C.Bank has submitted that merely because amount from the account of Home Trade was transferred to the account of N.D.C.C. Bank the amount has been frozen on the allegation that it is very misappropriated amount. In his submission, that amount, in fact, belongs to N.D.C.C.Bank and therefore reasonable opportunity to have cross-examination of the prosecution witnesses and opportunity to adduce evidence should be given to N.D.C.C.Bank. It is also submitted that unless that evidence is allowed to be adduced by the N.D.C.C.Bank the real fact would not come on record and therefore application deserves to be granted.

10) On the other hand, the learned A.P.P. Shri. V. S. Kulkarni has

vehemently submitted that the N.D.C.C.Bank has no concern with the prosecution. It is the third party. There is no provision to allow such party to cross-examine the prosecution witnesses. If at all N.D.C.C. bank wants to recover money they have remedy to file suit but they have no right to cross-examine.

11) According to prosecution, as appears from the investigation papers, that the very amount of 30 crores of O.D.C.C. Bank misappropriated under the guise of purchasing government securities have gone in the account of N.D.C.C.Bank and thus it is the stolen property within the meaning of section 410 I.P.C. and that's why the Investigation Officer issued notice dated 28/8/2002 under section 102 Cr.P.C. On the other hand, it is the case of N.D.C.C.Bank that the amount frozen was in fact received from Home Trade and it is sale proceed of the securities and thus not a stolen property.

12) The relevant provisions to be seen in this regard are Sections 301 and 302 of Criminal Procedure Code as there is no direct provision permitting a third party to have cross-examination of the prosecution witnesses and to have participation in the matter. Section 301 provides that,

“ (1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.

(2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.”

13) Thus it is very much clear and it is well settled that if in a case

which is in charge of a Public Prosecutor or Assistant Public Prosecutor a private person engages a lawyer then, notwithstanding such engagement, the Public Prosecutor or Assistant Public Prosecutor who is in charge of the case shall conduct the prosecution case and the lawyer engaged by the private party shall act therein under the supervision, guidance and direction of the Public Prosecutor or Assistant Public Prosecutor and he can submit written arguments with the permission of the Court.

The role of public prosecutor in such a case is not totally obliterated. The public prosecutor represents the State, which is the prosecuting authority for all the criminal trials, it is the exclusive prerogative of the State to conduct such prosecution through its agent i.e. the public prosecutor and, therefore, no other person much less any other advocate has any locus or any right to plead on behalf of the prosecution and to conduct the case. The prosecutor cannot left the case completely in the hands of privately engaged lawyer otherwise it would amounts to violation of Section 301 C.P.C. Please see B. Janakiramaiah Cheety V/s. A.K.Parthasarathi (2002 CRI.L.J. 4062), Shiv Kumar V/s. Hukum Chand ((1999) 7 Supreme Court Cases 467), Sama Ram V/s. State of Rajasthan (2002 CRI.L.J. 3134), In Re, Rekhan Ojha alias Rakhal Chandra Ojha (1988 CRI.L.J. 278) and Kuldip Singh V/s. State of Punjab (1996 CRI.L.J. 1619).

14) It is true that under section 302 Cr.P.C. a Magistrate may permit any other person other than police officer below the rank of Inspector, to conduct the prosecution. But this provision is not exception to the rider contained in section 301(2) Cr.P.C. as observed by the Apex Court in para 12 of reported judgment in Shiv Kumar's case (supra).

15) The Apex Court in Shiv Kumar's case also observed at para 14 that,

“It is not merely an overall supervision which the Public Prosecutor is expected to perform in such cases when a privately engaged

counsel is permitted to act on his behalf. The role which a private counsel in such a situation can play is, perhaps, comparable with that of a junior advocate conducting the case of his senior in a court. The private counsel is to act on behalf of the Public Prosecutor albeit the fact that he is engaged in the case by a private party. If the role of the Public Prosecutor is allowed to shrink to a mere supervisory role the trial would become a combat between the private party and the accused which would render the legislative mandate in Section 225 of the Code a dead letter.”

16) Thus, it appears that a Public Prosecutor cannot sit back, handing over the conduct of the case to a counsel, however, he eminent may be, briefed by the third party. It is public prosecutor who has complete control over the case.

17) In the instant case the applicant N.D.C.C.Bank does not want to conduct the prosecution and therefore Section 302 Cr.P.C. would not attract inasmuch as they merely want to prove that amount frozen is not a stolen property but absolutely owned by it. In the present case Advocate Shri. Jaysingrao Patil from Sangli Bar has been appointed as a Special Public Prosecutor by the government. But he was absent, hence the regular A.P.P. has advanced argument on this application. The learned A.P.P. opposed this application and thus at this stage not intending to give consent to the N.D.C.C.Bank to cross-examine prosecution witnesses. There cannot be full active participation of the third party in the sense of complete control over the prosecution. However, the learned A.P.P. Shri.V.S.Kulkarni has fairly submitted that if there is connection of N.D.C.C.Bank to the effect that money really belongs to it they may be come as witness. Even otherwise under section 311 Cr.P.C. the Court may at any stage of the trial summon material witnesses for examination or recall and re-examine any person if his evidence appears to be essential to the just decision of the case. Thus, applicant-N.D.C.C.Bank may pray the Court for adducing evidence under section 311 of Cr.P.C. and it may satisfy that their evidence is essential to the just decision of the case.

18) In short, it is the prosecutor in charge of the case is having complete control over the case. If applicant-N.D.C.C. Bank wants to intervene they may do so under the supervision, guidance and direction of prosecutor in charge of the case. Unless there being any permission or consent of the prosecutor the applicant cannot cross-examine the prosecution witnesses. The applicant may apply under section 311 Cr.P.C. for adducing evidence and may satisfy the Court that its evidence is essential to the just decision of the case.

With the above observations this application stands disposed of.

sd/-

Date :- 27/06/2013.

(C.P.Gaddam)
Chief Judicial Magistrate,
Osmanabad.