

C.R.NO.51

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**Order below Ex.1 in
M.A.NO.238/04**

**IN THE COURT OF SPECIAL JUDGE(C.B.I.) FOR GREATER
BOMBAY**

ORDER BELOW EX.1
IN
MISC. APPLICATION NO.238 OF 2004
IN
SPECIAL CASE NO.83 OF 2003

State

Through the Inspector of Police
CBI BS and FC, Mumbai

.....Applicant

V/s.

Shri Anup Kumar Gond

The Then Commissioner
Seamen's Provident Fund
R/at.14/23, Triveni, Adarshnagar,
Oshiwara, Andheri(W),Mumbai:400 102.

.....Respondent

Shri.S.D. Gonsalves, Spl.P.P. for CBI.
Shri.Nitin Pradhan, Adv. for respondent.

**Coram: His Honour the Special Judge(C.B.I.)
Shri.M.V. Kulkarni.**

**Dated : 1st November, 2012.
(Court Room No.51)**

ORDER

1 This petition was filed by CBI, BS&FC, Mumbai for attachment of property of respondent/accused No.3 in Special Case No.83/03 under Criminal Law(Amendment) Ordinance 1944.

2 Roznama shows that on receiving the petition on 21/5/04, the

matter was adjourned to 8/6/04. Roznama dt.8/6/04 shows that it was adjourned to 11/6/04 for filing say by accused No.3. Roznama dt.11/6/04 shows that issue of jurisdiction was raised on behalf of accused No.3. Accused No.3 was directed to file a detailed reply on 30/6/04. A short reply appears to have been filed on 11/6/04 itself. It appears that undertaking Ex.10 was filed by accused No.3 to not to create any third party interest in respect of property mentioned in annexure-I and II of CBI application. Therefore, ad-interim attachment was not pressed.

3 Roznma dt.30/6/04, 9/7/04, 13/7/04, 16/7/04 and 23/7/04 show that the matter was simply adjourned. Roznama dt.23/7/04 shows that hearing of M.A. was adjourned to 5/8/04. It appears that further written statement came to be filed on behalf of the accused No.3 on 5/8/04. Arguments were partly heard on 12/8/04 and the matter was adjourned for further arguments to 13/8/04 and it appears that on 12/8/04 itself, accused No.3 filed M.A.378/04 raising preliminary issue of jurisdiction of the Court. It was heard alongwith M.A.No.238/04. Oral order of interim attachment then came to be passed on 16/8/04 by holding that this Court was having jurisdiction.

4 Thereafter Ex.135 was moved by accused No.3 for discharge U/s.227 of Cr.P.C. By order dt.7/7/2010, my learned predecessor rejected that application. The matter was carried to Hon'ble Bombay High Court and the order passed by this Court was set aside and the matter was remanded back to this Court to reconsider the issue. As per direction of the Hon'ble Bombay High Court, vide order dt.2/7/2012 by allowing the

application, I have discharged the applicant/accused No.3 of the offence punishable U/s.13(2) r/w. 13(1)(c)(d) of PC Act U/s.227 of Cr.P.C.

5 It appears that on 17/3/2011, the accused No.1, 3 and 12 had filed application Ex.229 for modification of attachment of order. It came to be rejected by order dt.15/4/2011. Earlier M.A.No.408/07 was also moved by accused No.3 and others to dismiss M.A.No.238/04. However, it appears that it remained unattended. Therefore, fate of interim attachment is now under consideration. It appears that the interim attachment was challenged by accused No.3 in First Appeal No.964/04 before Hon'ble Bombay High Court. However, said appeal came to be dismissed as withdrawn by order dt.30/4/2010 and ordinary copy of order of Hon'ble Bombay High Court is placed on record by accused No.3.

6 Heard Shri.Nitin Pradhan, the Ld. Counsel for the respondent/accused and Shri.Gonsalves, learned Spl.P.P. for C.B.I. Both made submissions on expected lines.

7 The thrust of arguments of Shri.Gonsalves, the learned SPP is that even though accused No.3 came to be discharged by this Court, said order is being challenged by the prosecution in Hon'ble Bombay High Court. Shri.Gonsalves has pointed out towards Section 11 of Criminal Law(Amendment) Ordinance, 1944. It provides for appeals against orders passed under Section 4 and 6 of the same Ordinance. Shri.Gonsalves has pointed out towards Section 362 of Cr.P.C. and has submitted that once the Court has signed its judgment or final order disposing of the case, it becomes functus officio. Alternatively, it is the submission of Shri.

Gonsalves that order of discharge does not amount to acquittal and it is not a final order. Shri.Gonsalves has solicited my attention to Section 300 of Cr.P.C. which prohibits the person once convicted or acquitted from being tried for the same offence. Explanation to the section reads that dismissal of a complainant, or the discharge of the accused is not an acquittal for the purposes of this section. It is therefore submission of Shri.Gonsalves that order of attachment need not be terminated.

8 Shri.Pradhan on the other hand has filed written arguments. It is submitted that the order below Ex.135 passed in Special Case No.83/03 on 2/7/2012 is judgment in rem within ambit of Section 41 of Indian Evidence Act. being delivered by competent Court which declares, defines and determines the status of the person or a thing. Reliance is placed on commentary on Evidence Act by Woodroof and Amirali, Edition-14, Vol.II, Pg.318 and Phipson on Evidence, Edition-14, para 33-17 pg.858.

9 It is submitted that CBI had alleged that accused was a public servant within meaning of Section 2(c) of PC Act. This Court was competent as Special Judge U/s.3 of PC Act and was therefore, competent to try the case for the offence under PC Act. This court being a competent, judicial forum has declared, defined and determined the status of accused No.3 as not public servant within meaning of Section 2(c) of PC Act. The legal consequence is that entire chargesheet submitted by CBI needs to be forwarded for its presentation before appropriate judicial Forum, if the CBI so desires.

10 It is submitted that the Special Judge, while trying an offence

punishable under PC Act exercises all the powers and functions exercisable by a District Judge under Section 2(3) of the Criminal Law(Amendment) Ordinance 1944. The Ordinance of 1944 is applicable to cases under PC Act in view of Section 5(6) of PC Act, 1988. Prime requirement of the application of Ordinance of 1944 in relation to the offence under Section 406, 408, 409 of IPC is the entrustment of property to the accused by Central or State Government or a Department of any such Government or a Local Authority or Corporation established by or under a Central, Provincial or State Act or an Authority or a Body owned or controlled or aided by Government. For the application of Sections 417 and 420 of IPC qua the ordinance, the prime requirement is that the person deceived is the Central or State Government or a Department of any Government, or a Local Authority or a person acting on behalf of any such Government or Department or Authority. In view of judgment passed by this Court dt.July 2, 2012, accused No.3 is not a public servant. The jurisdiction conferred by Section 5(6) of PC Act, 1988 therefore, comes to an end. This court cannot apply the provisions of Ordinance of 1944 if the accused is not a public servant and therefore cannot be tried before this Court. Corpus and contributions of SPF is wholly private and nothing has been contributed by the Central or State Government or any of its Department. The provisions of Section 406, 408 and 409 of IPC, therefore, are not applicable. Section 417 and 420 of IPC are wholly irrelevant as the prosecution has not alleged that the person cheated was Central or State Government or any Department of any local authority. SPF is a non-government Provident Fund and therefore, none of the scheduled offences are there for which the attachment and/or seizure can be validly done. The proceedings initiated

by filing M.A.No.238/2004 under Ordinance 1944, therefore, need to be quashed and set aside. All the original papers relating to the immovable and movable properties in the name of Anup Kumar Gond, Mrs.Suman Prasad and M/s.Ankismita Investment Pvt. Ltd., M/s.Serli Securities Pvt. Ltd., be directed to be returned to the respective parties. Respondent deserves to be directed to withdraw the notice of seizure of accounts and lockers of the accused and his family members.

11 My learned predecessor had passed interim order of attachment against properties detailed in annexure I and II to the Misc. Application No.238/04. Show cause notice was directed to be issued to accused No.3, 10, 11 and 12 why ad-interim order of attachment should not be made absolute. Since the ad-interim attachment is not yet set aside, it is the submission of Shri.Pradhan that the attachment is still in force. There is allegation that there was embezzlement at about Rs.92.78 Crores funds of Government of India from the account of SPF. The point of authorisation U/s.3(1) was considered. In fact, authorisation from Mr.Bhaskar Khulbe, Government of India, Cabinet Secretariat, New Delhi, dt.10th December, 2003 was annexed to this application. Accordingly, Central Government authorised investigating officer to make application before Special Judge, Mumbai for attachment of properties detailed in Annexure A below as there is reason that A.K. Gond, IRSME, Commissioner Seamen's Provident Fund committed scheduled offence of criminal misconduct under PC Act, 1988 and there is need for attachment of these properties so as to prevent their disposal/concealment or elimination during the trial. A point was also raised that civil suit was pending in Hon'ble High Court for recovery of

Rs.92.78 Crores alongwith interest. It was conceded by both the parties that provisions of C.P.C. were applicable to the proceedings.

12 Shri.Pradhan has pointed towards Section 10 of Criminal Law (Amendment) Ordinance 1944 in respect of duration of attachment. It provides that order of attachment of property under this Ordinance shall, unless it is withdrawn earlier in accordance with the provisions of this Ordinance, continue in force - a) where no Court has taken cognizance of the alleged scheduled offence at the time when the order is applied for, for one year from the date of the order under sub-section(1) of Sec.4 or sub-section(2) of Sec.6, as the case may be, unless cognizance of such offence is in the meantime so taken, or unless the District Judge on application by the agent of the State Government or as the case may be the Central Government, thinks it proper and just that the period should be extended and passes an order accordingly; or b) where a court has taken cognizance of the alleged scheduled offence whether before or after the time when the order was applied for until orders are passed by the District Judge in accordance with the provisions of this Ordinance after the termination of the criminal proceedings.

13 It is the submission of Shri.Pradhan that this Court had taken cognizance of the offence under PC Act being empowered under Section 5(1) of PC Act. Now since the accused No.3 has been discharged of the offence under PC Act, this Court is not competent to take cognizance of other offences mentioned in the chargesheet namely 120-B, 409, 420, 465, 467, 468, 477-A of IPC. Those offences are triable by the Magistrate.

14 Section 2(3) of Criminal Law(Amendment) Ordinance, 1944 provides that the functions of a District Judge under this Ordinance shall, in Presidency towns, be exercised by the Chief Judge of the Small Cause Court. Section 3 provides for application for attachment of property to be made to District Judge within the local limits of whose jurisdiction the said person ordinarily resides or carries on business etc..... Procedure for investigation of objections to attachment is given in Section 5 and the Court has to follow procedure and exercise all the powers of a Court in hearing a suit under the Code of Civil procedure. In fact, provisions are similar to provisions of attachment before judgment provided in Code of Civil Procedure.

15 The properties in annexure A are immovable properties acquired by accused No.3 between 1997-1999 which are five in numbers. In annexure B, there are amounts available in the accounts with SBI, JVPD Branch, Mumbai standing in the name of accused No.3, his wife, daughter etc.

16 Since vide order below Ex.135 dt.2/7/2012, I have held that the accused No.3 is not a public servant, he has been discharged of the offence under PC Act. Since this case was not committed to the Court of Sessions, Mumbai, as provided U/s.209 of Cr.P.C., in the capacity of Additional Sessions Judge, this Court is not competent to take cognizance of the offence under IPC i.e. Section 120-B, 409, 420, 465, 467, 468, 477-A of IPC. Consequently, in my opinion, chargesheet will have to be sent back to the Court of Chief Metropolitan Magistrate for trial for these offences as

provided under law. The attachment was effect by this Court invoking powers of District Judge U/s.5(6) of PC Act. Since this Court is not proceeding with the offence under PC Act, and as I have already discharged the accused No.3 of offence U/s.13(2) r/w. 13(1)(c)(d) of PC Act, this Court is not the competent Court to effect attachment of the properties and if at all prosecution wants to effect the attachment, in my opinion, it is required to approach Chief Judge, Small Cause Court, Bombay, for effecting attachment. Consequently, attachment has to come to an end. I, therefore, pass following order.

ORDER

1 Interim attachment effected in respect of properties mentioned in Annexure I and II in M.A.No.238/04 stands terminated.

(M.V. KULKARNI)
Special Judge (C.B.I.)
Greater Bombay.

Date :1/11/2012.

Dictated on :1/11/2012.

Transcribed on :5/11/2012.

Signed on :