**K.Suresh Kumar Vs. State by Dsp**

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**SooperKanoon Citation** : sooperkanoon.com/1169821

**Court** : Chennai

**Decided On :** Jan-24-2014

**Judge** : The Honourable Ms. Justice K.B.K.Vasuki

**Appellant** : K.Suresh Kumar

**Respondent** : State by Dsp

**Judgement** :

IN THE HIGH COURT OF JUDICATURE AT MADRAS Dated: 24.01.2014 Coram THE HONOURABLE Ms.JUSTICE K.B.K.VASUKI Crl.R.C.No.325 of 2013 K.Suresh Kumar .Petitioner versus State rep.

by Deputy Superintendent of Police Organised Crime Unit, Crime Branch CID, Salem City.Respondent Prayer :- Criminal Revision is filed under Sections 397 and 401 of Cr.P.C.to set aside the order dated 25.2.2013 made in CMP.No.100/2012 in S.C.No.185/2011 on the file of the II Additional District Sessions Judge, Salem.

For Petitioner : Mr.M.Michael Bharathi and R.Prasanna Vineeth For Respondent : Mr.S.Shanmugavelayutham, PP for Mr.D.Sivaram Kumar, GA(Crl.Side)

ORDER
The 5th accused is the petitioner herein.

The petitioner is charged for the offences under Sections 449 and 302 (6 counts) r/w 120B and 109 IPC for an act of conspiracy with other accused and act of instigation to murder the entire family of one Kuppuraj, who was the retired Inspector of Police.

2.The allegations raised in the charge sheet are that one Kuppuraj, who was the retired police officer and one of the deceased, owned 6.82 acres in various survey numbers and he settled major portion of the same in favour of the minor son of one of his predeceased son and also in favour of other son, thereby neglected the remaining son Sivaguru, who is arrayed as A1 and due to which, A1 developed ill feelings against his father and other family members and sought for help of the petitioner herein/A5 and conspired with him.

In pursuance of the same, A1 executed one sale agreement in favour of one Senthilkumar on 24.5.2003 and general power of attorney on 9.8.2007 in favour of the petitioner herein/A5, thereby civil suits came to be instituted by both the groups against each other in respect of the property.

Thereafter, A1 and A5 started creating trouble to Kuppuraj and his family membeRs.in whose favour the lands were settled.

However, the general power of attorney executed in favour of A5 was cancelled on 1.7.2008 and another power of attorney came to be executed in favour of Sampath/A6 in respect of the same property on 7.7.2008 and on the strength of the same, A6 executed sale agreement in favour of Sekar/A8.

All the documents were created by A1 along with his family members arrayed as A2 to A4, in order to grab the lands from Kuppuraj, in connivance with other accused.

At last, A1 Sivaguru frustrated over his inability to obtain the original document relating to the properties from Kuppuraj, at the instigation of his family members/A2 to A4 and in connivance with A5 to A8 decided to do away entire family members of Kuppuraj and in continuance of the same, A1 along with his minor son Gokulnath armed with deadly weapons and trespassed into the house

of Kuppuraj at 8.30pm on 12.8.2010 at Dhasanaickanpatti and murdered Kuppuraj and his wife, Rathinam S/o.Kuppuraj and his wife and two daughteRs.3.The criminal law is set in motion in connection with the occurrence on the basis of the complaint lodged by the Village Administrative Officer of Nillavarpatti Group Dhasanaickanpatti and the same was registered as FIR in Mallur Police Station Crime No.222 of 2010 on 13.8.2010 and the same was investigated into and the culmination of the investigation is SC.185/2011 on the file of II Additional District Sessions Court, Salem.

The petitioner herein/A5, after duly entering appearance in SC.185/2011, filed a discharge petition in CMP.100/2012 under Section 227 Cr.P.C.on the ground that there is, except confession statement of co-accused, no material or circumstance available to prove the act of conspiracy between the parties and participation of the petitioner herein in the occurrence in any manner and as the confession statement of the co-accused cannot be independently construed to be evidence under Section 3 of the Evidence Act and failure of A1 to whisper anything in his statement about the conspiracy and abetment of A5 and in the absence of any legally permissible evidence, to arrive at finding of guilty of the petitioner/A5 for the offences as stated above, no prima facie case can be said to be made out against the petitioner.

The discharge petition was seriously opposed by the respondent/complainant.

4.The trial court disposed of the discharge petition along with similar petitions filed by other accused by a common order dated 25.2.2013, thereby dismissed all the petitions on the ground that at the time of framing charge, the court is bound to take the materials placed before it as true and if it discloses a grave suspicion against the accused, which has not been properly explained and if on the basis of the materials on record, the court can form an opinion that the accused might have committed the offence, the court can frame the charge and that, the statement of witnesses, documents and material objects produced on the side of the prosecution reveals that there was property dispute between the family of Sivaguru viz., A1 to A4 and others and the family of Kuppuraj resulting in civil and criminal proceedings and A1 and A2 unable to get an early relief, approached the

petitioner herein/A5 Suresh Kumar, who aided and abetted A3 and A4 for selling 1/3 share of the property and A5 with the help of A6 to A8 created sale agreements and power deeds to grab the property and when the deceased strongly resisted the attempts made by A5 to grab the property, A5 to A8 instigated and abetted A1 to commit the murder of the deceased with the active connivance and co-operation of A2 to A4 and all the accused conspired to eliminate the deceased with an intention to grab the property of the deceased and in pursuance of the criminal conspiracy and abetment, A1 committed the murder of all the 6 persons, as such, the materials produced by the prosecution prima facie makes out sufficient ground for framing charge against the accused.

Aggrieved against the same, A5 has come forward with this criminal revision.

5.The learned counsel for the petitioner would reiterate the same stand as stated before the trial Court for relieving the petitioner from the charges levelled against him and the same is seriously opposed by the learned Public Prosecutor.

Both the learned counsel in support of their respective contentions, cited catenna of judgments of the Hon'ble Apex court and our High court.

6.Heard the rival submissions made on both sides and perused the records.

7.The case was originally initiated against 9 accused, out of whom, A2 Gokulnath is Juvenile on the date of occurrence and the case against A2 is split up and the remaining accused are rearrayed as A1 to A8 in SC.No.185 of 2011 and the petitioner herein is arrayed as A5.

The charges framed against the petitioner herein do relate to the offence of conspiracy and abetment punishable under Sections 120B and 109 IPC.

8.For better appreciation, the definition of act of abetment and criminal conspiracy under Indian Penal Code are extracted below: 120A.

Definition of criminal conspiracy When two or more person agree to do, or cause to be done, (1) An illegal act, or (2) An act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy: Provided that no

agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation: - It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

120B.

Punishment of criminal conspiracy (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, 2[imprisonment for life].or rigorous imprisonment for a term of two years or upwards shall, where no express provision is made in this Code fro the punishment of such a conspiracy, be punished in the same abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.].107.

Abetment of a thing A person abets the doing of a thing, who- First: -Instigates any person to do that thing; or Secondly: -Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or Thirdly: -Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation1:- A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

9.As far as the present petitioner is concerned, the incriminating materials made available against him are Section 161 Cr.P.C statement of some of the witnesses and confession statement of A2, A4 and A8.

The fact that there were serious property dispute between A1/Son and his family members on one hand and deceased Kuppuraj/father and his family members including the family his other two sons, is not in dispute.

There are earlier civil and criminal proceedings initiated against each other and the civil suits are pending against each other in respect of the property in question.

As already referred to, the materials available at this stage to prove the involvement of the petitioner in the commission of the occurrence are Section 161 Cr.P.C statement of the witnesses and confession statement of other co-accused.

As far as Section 161 Cr.P.C statement of the witnesses is concerned, the witnesses who speak about the manner of involvement of A5 in the dispute of father and son are LW14 Vijayalakshmi, LW15 Uma Maheswari, LW16 Sridhar LW19 Jayanthi LW20 Rekha, LW21 Karthik LW22 Narayanan LW23 Senthil Murugan LW25 Rajini, LW26 Raja, LW28 Iyer, LW29 Palani @ Palanisamy LW35 Saravanan, LW39 C.Udhayakumar, LW40 Suresh, LW41 Ramesh @ Ramesh Kumar, LW44 Dhanapal, LW49 Nathiya, LW50 Sundaram, LW58 Sridharan, LW59 Anitha, LW60 Kalavathi, LW61 Jaishree Clara, LW62 Jakiriya Immanuel, LW80 Srinivasan, LW81 Ramesh, LW86 Madheswaran, LW87 T.R.Shanmugam LW90 S.R.Sivalingam, LW96 Balasubramanian LW97 Mani and LW98 Karikalan and LW99 Chandrasekaran LW100 Madhanlal Chawla, LW101 Murugesan and LW105 Sridhar.

Out of the above referred witnesses, except LW22 Narayanan and LW50 Sundaram others do refer to the name of the petitioner Suresh Kumar only in the context of execution of sale agreement in respect of 1/3rd share of the property and execution of general power of attorney by Sivaguru and the so called attempts made by Suresh Kumar in creating trouble into possession and enjoyment of the land in question and in causing interference of other family members of Kuppuraj who are in possession of the property in question.

All the witnesses as referred to above do only mention about the dispute between A1 and his father and his act of threatening against his father and his family membeRs.at the instigation of the petitioner/A5 and otheRs.The sale agreement

executed by A1 as referred to in the evidence of witnesses in favour of one Senthilkumar was on 24.5.2003 and general power of attorney in favour of Suresh Kumar/A5 was executed on 9.8.2007, which are much before the date of occurrence on 12.08.2010.

The power of attorney executed in favour of A5 by A1 was in force for nearly one year and the same was cancelled on 1.7.2008 and the same was executed in favour of A6 on 7.7.2008 and it is A6, who executed another sale agreement in favour of A7 Sekar.

The act of attempt to trespass into the property in question and the act of interference by the petitioner herein into the family membeRs.possession and enjoyment of the property by plucking coconut from trees was allegedly occurred during 2007.

Even then, the petitioner herein did not admittedly attempt to trespass into the property and attempt to pluck coconut, the witnesses only refer to the presence of other men, who are according to the witnesses, associates of the petitioner Suresh Kumar.

10.It is nobody's case that the petitioner Suresh Kumar, except obtaining power of attorney, had in any manner involved and participated in any other illegal act during the subsistence of and before or after the cancellation of general power of attorney.

The statement of most of the witnesses referring to the name of the petitioner Suresh Kumar as aiding and instigating A1 Sivaguru is not based on direct knowledge but based on hearsay i.e, through statement of third party and on presumption.

Even otherwise, it only refers to the civil dispute between the parties and about the occurrence allegedly taken place during 2007, in the couRs.of which, the accused allegedly sent group of men to pluck coconut from trees standing in the property in question.

As rightly argued by the learned counsel for the petitioner, the statement of the witnesses as above referred to, do not in any manner mention anything about any act of conspiracy and abetment on the part of A5 with A1 Sivaguru in committing the murder of his father and his family members during October 2010.

In this connection, the following decisions are cited on the side of the petitioner: (i)(1939) MWN page 17 (Privy Council) (Pakala Narayana Swami v.

The King Emperor) and (ii)1974 Crl.LJ1200(V80C380 (Onkar v.

State of Madhya Pradesh) Division Bench of Madhya Pradesh High Court.

11.In the fiRs.case in (1939) MWN page 17 (cited above).the Privy Council, while dealing with the admissibility of the statement under Section 32(1) of the Evidence Act, has categorically observed that the circumstances must be circumstances of the transaction; general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible.

In the second case in 1974 Crl.LJ1200(V80C380 (cited supra).the Division Bench of Madhya Pradesh under identical circumstances, observed that the expression ".circumstances of the transaction".

means only such facts or series of facts, which have a direct or organic relation to the occurrence.

The circumstances must have come proximate relation to the actual occurrence.

Circumstantial evidence of the transaction is to be distinguished from the circumstances of the transaction itself.

The statements made by the deceased long before the incident which may suggest motive for the crime, are inadmissible in evidence.

In the same judgment, the Division Bench of Madhya Pradesh High court, while dealing with the motive aspect, was of the view that motive however strong cannot form the basis of conviction and where the evidence of crime is not satisfactory,

even a strong motive cannot furnish the lacuna in such evidence.

The Division Bench of Madhya Pradesh High court while dealing with circumstantial evidence has also observed that although a suspicion about the accused's complicity in the murder arises on discovery of the incriminating articles belonging to the deceased on information furnished by the accused, it would be unsafe to draw an inference of guilt on the charge of murder in the absence of any other evidence, connecting the accused with murder.

That being the legal position, there is, as rightly pointed out by the learned counsel for the petitioner, absolutely no material to prima facie connect the petitioner with the alleged act of aiding and abetment herein in facilitating the commission of the offence by A1 in the manner as spoken by the prosecution.

12.The remaining statements of the witnesses to be looked into herein are the statements of LW22 Narayanan and LW50 Sundaram.

The statement of LW22 would proceed as if he had been to the house of the petitioner herein at 5pm during July 2010, where he found A1 Sivaguru, A2 Mala and A7 Sentilkumar and A6 Sampath and Vedikaranputhur Sekar and all of them had been talking to petitioner/A5 Suresh Kumar in the Varanda and at that time, A1 Sivaguru requested A5 to pay him Rs.10 lakhs to purchase an auto for his livelihood out of value of the land, which is the subject matter of power of attorney to which Suresh Kumar replied that he will not part with any amount and Sivaguru may not be able to obtain the original document in respect of the property in question, from his father Kuppuraj and Rathinam so long as his father is alive and A1 Sivaguru told A5 that he will go any extent to get the document and A5 promised to take care of A1.

As far as the statement of LW50 Sundaram is concerned, it proceeded as if A1, A6 and A8/who is his uncle and A7 had been to his office at 5.30pm on one Friday during July 2010 and A6 Sampath told A1 Sivaguru that as A1 did not hand over the document in respect of the land and did not repay Rs.3 lakhs Suresh Kumar was very much annoyed and at that time, A8 Sekar told A1/Sivaguru to do away with his father and brother Rathinam as advised by Suresh Kumar and the same

was affirmed by A7/ Senthil kumar and A6 Sampath and the witness warned them not to have such discussion in the office.

Though the learned Public prosecutor, by relying upon their statements, seriously argued that the statements of these witnesses are sufficient enough to prima facie make out act of conspiracy and abetment of the petitioner/A5 in instigating A1 to commit the murder of his family membeRs.this Court is not inclined to accept such argument advanced on the side of the respondent for the following reasons.

13.Before appreciating the statement of the witnesses as above referred to, it is but relevant to go into the question as to what constitutes an act of conspiracy and abetment.

In this connection, the learned counsel for the petitioner cited the following authorities: (i)(2010) 3 SCC (Cri) 801 (S.Arul Raja v.

State of Tamil Nadu) (ii)(2011) 3 SCC (Cri) 550 (John Pandian v.

State represented by Inspector of Police, Tamil Nadu) and (iii)AIR 1975 SC175(Shri Ram v.

The State of U.P.).In the fiRs.decision in (2010) 3 SCC (Cri) 801 (cited supra).the Hon'ble Apex Court has in para 20 following the earlier decision of the Hon'ble Supreme Court reported in (1999) 3 SCC54(Vijayan v.

State of Kerala) held that in order to constitute the offence under Section 120B, it is but necessary to establish that there was an agreement between the parties for doing an unlawful act.

The Hon'ble Apex Court in para 27 extracted para 583 of another decision in (1999) 5 SCC253(State v.

Nalini).wherein it is held that "....offence of criminal conspiracy is an exception to the general law where intend alone does not constitute crime.

It is intention to commit crime and joining hands with persons having the same intention.

Not only the intention but there has to be agreement to carry out the object of the intention, which is an offence.

The question for consideration in that case is did all the accused have the intention and did they agree that the crime be committed.

It would not be enough for the offence of conspiracy, when some of the accused merely entertained a wish, howsoever horrendous it may be, that offence be committed".Following the same view, it is held in para 28 that ".a meeting a minds to form a criminal conspiracy has to be proved by placing substantive evidence and the respondent has not adduced any evidence which underlines the same".14.In the second authority in (2011) 3 SCC (Cri) 550 (cited supra).it is held that ".conspiracy can be inferred even from circumstances giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence.

The circumstances in a case, when taken together on their face value, should indicate the meeting of minds between the conspirators for the intended object of committing an illegal act or an act, which is not illegal, by illegal means...".

In para 96 of the same judgment, the Hon'ble Apex court was of the view that ...merely because there are some discoveries they do not in any manner connect the accused and there is no presumption that merely because the accused has some things in his possession, which he fails to explain, ...in our opinion, this evidence would fall short to hold that he was a member of the conspiracy".It is held in para 101 therein that the established law is that every such circumstance, which is relied upon by the prosecution for establishing conspiracy, must be proved to have nexus with that conspiracy.

The Hon'ble Apex Court in para 108 of the same judgment has extracted the definition of conspiracy in Halsbury's Laws of England, as per which, the essence of the offence of conspiracy is fact of combination of minds by agreement.

The Hon'ble Supreme Court in para 110 extracted para 271 of the authority in (1988) 3 SCC609(Kehar Singh v.

State (Delhi Administration).wherein, it is observed that the gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties.

Agreement is essential.

Mere knowledge or even discussion, of the plan is not per se, enough.

In Para 113, it is held that ...there must be a meeting of minds resulting in ultimate decision taken by the conspirators regarding the commission of the offence and where the factum of conspiracy is sought to be inferred even from circumstances giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence.

The Hon'ble Apex court in para 114 referred to para 38 of the decision in (2004) 11 SCC585(Esher Singh v.

State of A.P.).wherein it is observed that ".a few bits here and a few bit there on which the prosecution relies cannot be held to be adequate for connecting the accused with the commission of the crime of criminal conspiracy.

It has to be shown that all means adopted and illegal acts done were in furtherance of the objet of conspiracy hatched.

The circumstances relied on for the purposes of drawing an inference should be prior in point of time than the actual commission of the offence in furtherence of the alleged conspiracy".It is also held in para 45 of the authority in Esher Singh case, that ...it is not necessary that each conspirator must know all the details of the Scheme nor be a participant at every stage.

It is necessary that they should agree for design or object of the conspiracy.

Conspiracy is conceived as having three elements: (1)agreement (ii) between two or more persons by whom the agreement is effected and (iii).criminal object, which may be either the ultimate aim of the agreement or may constitute the means, or one of the means by which that aim is to be accomplished.

The Hon'ble Supreme Court in para 116 referred to the authority in (2005) 12 SCC631(K.R.Purushothaman v.

State of Kerala).wherein it is reiterated that all conspirators need not take active part in the commission of each and every conspiratorial act, but mere knowledge, even discussion of the plan would not constitute conspiracy.

15.In the third case in AIR 1975 SC175(Shri Ram v.

The State of U.P.) (cited supra).the Hon'ble Apex Court held that in order to constitute abetment, the abetter must be shown to have ".intentionally".

aided the commission of the crime.

Mere proof that the crime charged could not have been committed without the interposition of the alleged abettor is not enough compliance with the requirements of Section 107.

A person may, for example, invite another casually or for a friendly purpose and that may facilitate the murder of the invitee.

But unless the invitation was extended with intent to facilitate the commission of the murder, the person inviting cannot be said to have abetted the murder.

It is not enough that an act on the part of the alleged abettor happens to facilitate the commission of the crime.

Intentional aiding and therefore active complicity is the gist of the offence of abetment under the third paragraph of Section 107.

16.As such, as rightly argued by the learned counsel for the petitioner, even assuming the statement of LW22 and LW50 to be true, the same do not make out any case against A5 for any act of conspiracy and abetment as laid down in the authorities cited above.

It is only at the stage of wish or advice and it is not the statement of the witnesses that it subsequently culminated into agreement between each other to carry out

the object of committing the unlawful act or crime.

In the absence of one such statement, the statement of above two witnesses do not raise any suspicion much less grave suspicion against the petitioner.

In this context, another authority cited on the side of the petitioner is (2009) 1 SCC (Cri) 51 (Yogesh @ Sachin Jagdish Joshi v.

State of Maharashtra).wherein, it is held that the basic ingredients of the offence of criminal conspiracy are: (i)an agreement between two or more persons; (ii)the agreement must relate to doing or causing to be done either (a)an illegal act; or (b)an act which is not illegal in itself but is done by illegal means, which is sine qua non of the criminal conspiracy, but it may not be possible to prove the agreement between them by direct proof.

Nevertheless, existence of the conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused.

But the incriminating circumstances must form a chain of events from which a conclusion about the guilt of the accused could be drawn.

It is further held therein that the test to determine a prima facie case depends upon the facts of each case and in this regard, it is neither feasible nor desirable to lay down a rule of universal application.

By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him gives rise to suspicion only as distinguished from grave suspicion, he will be fully within his right to discharge the accused.

At this stage, he is not to see as to whether the trial will end in conviction or not.

The broad test to be applied is whether the materials on record, if unrebutted, make a conviction reasonably possible.

That being the settled law, in my considered view, one such legally permissible evidence is not produced before the court and the materials made available herein

could not raise any suspicion much less rise grave suspicion.

On this score alone, the accused is entitled to be discharged.

17.Next comes the confession statement of the co-accused.

The only co-accused, who spoke about the participation of A5 are (i)A2/Mala, wife of A1/Sivaguru, (ii)A4 Rajini and (iii)A8 Sekar.

While A1 Sivaguru has in his confession statement did not refer to Suresh Kumar, A2, A4 and A8 would make similar statement like that of LW22 and LW50.

All the reasoning stated against the admissibility of such statement are applicable to the statement so made by the co-accused for want of any material to make out the agreement of minds of A5 on one hand and A1 and A2 on other hand.

In addition to the same, the confession statement of the co-accused are legally impermissible in the absence of any corroborative evidence.

The admission of the co-accused without any other material to corroborate the same, cannot form the basis to make out any case against the accused.

The learned counsel for the petitioner, in support of such contention, against sufficiency or otherwise of confession statement and post arrest statement of the accused, relied on the following authorities: (i)1964 (2) Cri.L.J.344 (Vol.69 C.N.105) (Haricharan Kurmi and another v.

State of Bihar).(ii)2012 Crl.LJ832(Pancho v.

State of Haryana) (iii)1947 MWN (Cri) 45 (Pulukuri Kottaya and others v.

the King Emperor).(iv)AIR 1966 SC119(Aghnoo Nagesia v.

State of Bihar) (v)1976 SCC (Cri) 199 (Mohmed Inayatullah v.

the State of Maharashtra) and (vi)(2011) 1 SCC (Cri) 955 (Lohit Kaushal v.

State of Haryana).In all these cases, the extent of admissibility of confession made to the police, is usefully reiterated.

As far as the post arrest statement of the accused before the police is concerned, it can be, as held by the Hon'ble Apex Court, used to limited extent under Section 27, that too not against the petitioner, but against the co-accused who made such statement.

It is held therein that the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate...Any information which serves to connect the object discovered with the offence charged is not admissible under Section 27.

No confession made to a police officer shall be proved as against a person accused of an offence.

In 1976 SCC (Cri) 199, the Hon'ble Apex Court is of the view that ...only ".so much of the information".

as relates distinctly to the fact, thereby discovered is admissible and the rest of the information has to be excluded.

In 1964 (2) Cri.LJ344(Vol.69 CN105 (Haricharan Kurmi and another v.

State of Bihar) the Constitution Bench of the Hon'ble Apex Court while dealing with similar statement against co-accused person, held that the court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence.

That being the law laid down by the Hon'ble Apex Court, the confession statement of co-accused cannot at all at any stage of the proceedings be solely independently relied on by the prosecution to make out any case against the co-accused.

Thus, for want of materials to prove the acceptance and agreement of plan initiated on the part of A1 at the instigation of the petitioner/A5 and for other legal restriction on the admissibility of statements under Section 161 Cr.P.C, and for want of any other corroborative evidence no serious reliance can be attached to confession statement of co-accused for the purpose of proof of complexity of the 5th accused in the act of conspiracy and abetment.

18.At this juncture, the learned Public Prosecutor would by citing other authorities, argue that (i)relevant considerations at the stage of framing of charge is the material on record and if on the basis of the same, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction, the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence and at the time of framing of the charges, the probative value of the material on record cannot be gone into and the material brought on record by the prosecution has to be accepted as true at that stage [(2007) 5 SCC403(Soma Chakravarty v.

State through CBI)].(ii)In order to discharge or frame charges against the accused, the court has to sift evidence on record only for limited purpose of ascertaining whether a prima facie case is made out against the accused.

At that stage, the court is not required to undertake an elaborate enquiry in sifting and weighing the material to arrive at the conclusion that it will not lead to conviction (1997) 4 SCC393(State of Maharashtra v.

Priya Sharan Maharaj and others).(iii)The materials on record must satisfy the mind of the court framing the charge that the commission of offence by the accused in question was probable (1996) 4 SCC659(State of Maharashtra and others v.

Somnath Thapa and others).(iv)The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code.

At that stage, the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction.

Strong suspicion against the accused, if the matter remains in the region of suspicion cannot take the place of proof of his guilt at the conclusion of the trial.

But at the initial stage, if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused has committed an offence, then it is not open to the court to say that there is no sufficient ground for proceeding against the accused (1977) 4 SCC39(State of Bihar v.

Ramesh Singh).and (v)At the stage of framing of charge under Section 228 or while considering discharge petition filed under section 227, it is not for Magistrate or Judge concerned to analyse all the matrials including pros and cons, reliability or acceptability thereof etc (2010) 9 SCC368(Sajjan Kumar v.

Central Bureau of Investigation).19.On the other hand, the learned counsel for the petitioner by relying on the following authorities reiterated the tests and considerations to be applied, while disposing the discharge petition: (i)AIR 1977 SC1489(State of Karnataka v.

L.Muniswamy and otheRs.(ii)1977 SCC (Cri) 533 (State of Bihar v.

Ramesh Singh) (iii)1979 SCC (Cri) 609 (Union of India v.

Prafulla Kumar Samal and another).(iv)1986 Crl LJ1922(R.S.Nayak v.

A.R.Antulay and another) (v)(2008) 1 SCC (Cri) 507 (Onkar Nath Mishra and others v.

State (NCT of Delhi) and another) (vi)(2009) 1 SCC (Cri) 51 (Yogesh @ Sachin Jagdish Joshi v.

State of Maharashtra) (vii)(2007) 1 MLJ (Crl) 100 (State rep.

by Dy.

Superintendent of Police, Vigilance and Anti Corruption, Cuddalore Detachment v.

K.Ponmudi & otheRs.(viii)(2010) 1 SCC (Cri) 1488 (P.Vijayan v.

State of Kerala and another) (ix)(2010) 3 SCC (Cri) 367 (Chitresh Kumar Chopra v.

State (Government of NCT of Delhi) (x)(2011) 3 MLJ (Crl) 317 (Jayarama Reddiar v.

Station House Officer, Gingee Police Station) and (xi)(2011) 1 MLJ (Crl) 345 (Sigamani and another v.

State represented by Deputy Superintendent of Police, CBCID, CC Wing, Coimbatore).20.The 3 Judges larger bench of the Hon'ble Apex Court in AIR 1977 SC1489held that for the purpose of determining whether there is sufficient ground for proceeding against an accused, the court possesses, comparatively wider discretion in the exercise of which it can determine the question whether the material on the record, if unrebutted, is such on the basis of which a conviction can be said reasonably to be possible.

21.The Hon'ble Supreme Court in 1979 SCC (Cri) 609 held that in exercising the jurisdiction under Section 227, the Special Judge, which under the present code is a senior and experienced court, cannot act merely as a post office or mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on....While considering the question of framing charges under this Section, he has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

22.

In (2009) 1 SCC (Cri) 51 and (2010) 1 SCC (Cri) 1488, the Hon'ble Apex Court observed that by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him gives rise to suspicion only as distinguished from grave suspicion, he will be fully within his right to discharge the accused.

23.It is held in (2008) 1 SCC (Cri) 507 that at the stage of framing of charge, the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence.

24.In (2010) 1 SCC (Cri) 1488, it is held by the Hon'ble Apex court that at the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused.

In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the document produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him.

If the Judge comes to a conclusion that there is sufficient ground to proceed, he will frame a charge under Section 228 Cr.P.C, if not, he will discharge the accused.

This provision was introduced in Cr.P.C to avoid wastage of public time, when a prima facie case was not disclosed and to save the accused from avoidable harassment and expenditure.

25.In (2010) 3 SCC (Cri) 367, it is held that at the stage of framing of charge, the court is required to evaluate material and documents on record to find out if facts emerging therefrom taken at their face value, disclose existence of all ingredients constituting the alleged offence and for this limited purpose, the court may sift the evidence and the court has to consider material only with a view to find out if there is ground for ".presuming".

that the accused has committed an offence and not for the purpose of arriving at definite conclusion.

Presume means if on the basis of materials on record, court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists.

26.Following the decisions of the Hon'ble Supreme Court, the learned brother judge of this court in (2011) 3 MLJ (Crl) 317 held that a mere suspicion is not enough at the stage of framing charge against the accused and such suspicion should be very strong suspicion founded upon materials available on record to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged.

27.The another learned brother Judge of our High Court in (2011) 1 MLJ (Crl) 345 observed that the criminal proceedings against an accused will not be sustainable in the absence of any prima facie material against him to show the knowledge or involvement of him in the commission of the offence.

28.Thus, if the facts involved in the present case and the materials available herein are evaluated in the light of the legal principles as laid down in the authorities cited above, it would disclose that there is no ground made out to presume the probable involvement of the accused in the commission of the offence to proceed to frame charges against the accused herein.

What is disclosed from the statements of the witnesses is the civil nature of the dispute between the parties and involvement of the petitioner in the civil dispute of the parties that too during 2007.

The statements of all the witnesses are only about the involvement of the petitioner/A5 on the basis of hearsay evidence and the statements of two of the witnesses i.e., LW22 and LW50 and the co-accused are not sufficient enough to make out any agreement between the parties and intention of the petitioner/A5 in aiding and abetting A1 to commit the crime charged.

As a matter of fact, the trial court has simply reproduced the evidence and arrived at a finding that prima facie case was made out and it is done so by the trial court, without duly analysing the evidence available before the same, in the light of the principles and tests for discharge, to find out as to whether any ground is made out to presume the involvement of the accused and the failure of the trial court to do so has resulted in serious irregularity and same vitiates the entire order of the trial court and the same warrants interference by this court.

29.In the result, this Criminal revision is allowed by setting aside the order dated 25.2.2013 made in CMP.No.100/2012 in SC.No.185/2011 on the file of the II Additional District Sessions Judge, Salem and by discharging the petitioner/A5 from the charges levelled against him.

rk 24.01.2014 Index:Yes/No Internet:Yes/No K.B.K.VASUKI, J.

rk To 1.The II Additional District Sessions Judge, Salem.

2.

The Deputy Superintendent of Police Organised Crime Unit, Crime Branch CID, Salem City.

3.The Public Prosecutor, High Court, Madras.104.

Crl.R.C.No.325 of 2013 24-01-2014