

Arjun Dev Kohli Vs. State of J. and K. and anr.

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Court : Jammu and Kashmir

Decided On : Nov-27-1998

Reported in : 1999CriLJ4967

Judge : R.C. Gandhi, J.

Acts : Jammu and Kashmir Public Men and Public Servants Declaration of Assets and Other Provisions Act, 1983 - Sections 12 and 14; ;Municipal Act - Section 229; ;Jammu and Kashmir Prevention of Corruption Act, 2006 Smvt. - Sections 5, 5(2), 5A(1) and 6; ;[Indian Trusts Act, 1882](#) - Section 82; ;Ranbir Penal Code (IPC), 1989 Smvt. - Section 120B; ;Indian Penal Code (IPC) - Section 21

Appeal No. : O.W.P. No. 457 of 1998

Appellant : Arjun Dev Kohli

Respondent : State of J. and K. and anr.

Advocate for Def. : R. Pant, Govt. Adv.

Advocate for Pet/Ap. : R.P. Bakshi, Adv.

Disposition : Petition allowed

Judgement :

ORDER

R.C. Gandhi, J.

1. The petitioner has presented this petition seeking to quash Government Order No. 29-GAD(Vig.) of 1998 dated 6-5-1998, whereby respondents have granted sanction to prosecute the petitioner for having allegedly committed offences punishable under Section 5(2) of the P.C. Act, 2006 read with Section 120-B, RPC and further seeks to quash FIR No. 27 of 1997 and also Challan No. 2 of 1998 pending in the Court of learned Special Judge Anti-Corruption, Jammu to the extent it pertains to the alleged involvement of the petitioner.

2. The factual matrix of the case briefly is that an FIR No. 27 of 1997 came to be registered against Shri Hem Raj Gupta, a public servant working as Section Officer in the Office of Deputy Commissioner, Kathua upon a complaint alleging therein that he, in the course of employment, during the period from Jan., 1982 to May, 1987, indulged in corrupt practices and by abusing his official position as a public servant has obtained huge benefits by dint of which he has raised assets both movable and immovable disproportionate to his known sources of income.

3. During the investigation, the respondent No. 2 has allegedly found that the said public servant in acquiring the shopping complex at Vikas Nagar, Patoli Road, Jammu projected the petitioner, wife and daughter of the petitioner as owners of the said shopping complex, while actually, it was not raised out of their financial resources. The petitioner rendered illegal assistance to Hem Raj Gupta in illegally acquiring assets in pursuance of criminal conspiracy to save him from any possible involvement in a criminal charge.

4. The property referred to above, according to the petitioner, is his acquired property out of his own known sources of income. The respondents categorised this property as benami transaction and came to the conclusion that Hem Raj Gupta in his capacity as public servant committed offence of criminal misconduct and criminal conspiracy, punishable under Section 5(2) of the P.C. Act, 2006 read with Section 120-B, R.P.C. along with the petitioner and also committed offence under Sections 12 and 14 of Jammu and Kashmir Public Men and Public Servants Declaration of Assets and other Provisions Act, 1983 and granted sanction under Government Order No. 29-GAD (Vig.) of 1998 dated 6-5-1998 for prosecution of

Hem Raj Gupta along with the petitioner in FIR No. 27 of 1997 is uncalled for, unwarranted and illegal.

5. The petitioner has averred in the petition that the petitioner purchased 10 Marias of land along with incomplete construction of Shops at village Top Sherkhania, Vikas Nagar, Patoli Road, Jammu from Shri Gandharab Singh s/o Shri Shankar Singh, r/o Jandial vide registered sale deed executed on 13-10-1993, registered before Sub-Registrar, City Jammu on 14-10-1993 in his own name and in the name of his daughter namely Cham Gupta, w/o Ajay Kumar Gupta r/o Subash Nagar, Jammu.

6. The petitioner by profession is a contractor and his father was also renowned Contractor. He has his property in the heart of the city i.e. Purani Mandi, Jammu. The petitioner is an income-tax payee, a certificate issued on 19-11-1997 by the Income-tax Officer, New Assesses Ward, Jammu is annexed with the petition.

7. The daughter of the petitioner-Charu Gupta is married with Ajay Kumar Gupta s/o Hem Raj Gupta. Hem Raj Gupta accused in FIR No. 27 of 1997 or his son Ajay Kumar Gupta has absolutely no concern or connection with the title or ownership rights of the said property purchased by the petitioner in his name and in the name of his wife and daughter. The husband of his daughter is living separately from his father since 1989 and is having independent ration card for his unit and doing separate business. He is also an income-tax payee.

8. The property was partitioned by the petitioner and his daughter namely Charu Gupta by a memorandum of partition, which came to be executed on 23rd of April, 1994, by virtue of which two shops were given to daughter Charu Gupta by the petitioner and the rest of the property has been kept in the ownership right of the petitioner and his wife. The copies of the said deed and the memorandum of the partition are also annexed with the petition. The petitioner has also annexed the evidence of the electric connection provided by the Electricity Department and water connection provided by the P.H.E. Department in his own name. Copies of the receipts issued by the Electricity Department and Public Health Department in token of receipt of payment for installation of connections are also annexed with the petition.

9. During the construction of the building in question that is named by the prosecution 'Shopping Complex,' the Municipality, Jammu having found presence of Ajay Kumar Gupta at site on 1-2-1997, issued a notice under Section 229 of the Municipal Act to him. The said Ajay Kumar Gupta replied to the Jammu Municipality that he is not the owner of the said shopping complex and requested to withdraw the notice. Jammu Municipality did not withdraw the notice resultantly being the property of his father-in-law, filed an appeal before Jammu and Kashmir Special Tribunal for setting aside the notice and to serve it on the proper person. The Tribunal, under its order dated 6-9-1997 accepted the appeal and set aside the impugned notice with a liberty to Jammu Municipality to issue a fresh notice to the actual defaulter. The Jammu Municipality issued notice dated 9-10-1997 under Section 229 of the Municipal Act to the owners of the building i.e. petitioner, his daughter namely Gharu Gupta and his wife Smt. Romesh Kohli, who allegedly were raising construction in violation of the Municipal Act. The owners including the petitioner herein challenged the said notice by preferring an appeal before the Special Tribunal, who vide its order dated 10-12-1997 compounded the alleged violation as permissible under the Municipal law at the rate of Rs. 30 per sq. ft. and directed that compounding fee shall be paid by the petitioner before 10-2-1998 with the stipulation that in case the compounding fee is not paid, the Municipal authorities shall be at liberty to remove the unauthorised construction and the appeal shall be deemed to have been dismissed. The petitioner deposited compounding fee of Rs. 88,656/-. A receipt in token thereof is also annexed with the petition.

10. The evidence referred to above has been submitted to the respondent No. 2 by the petitioner and the respondents have without reasons, deliberately to cover up the lapses of the prosecution and to involve and prosecute Hem Raj Gupta has implicated the petitioner also. The respondents have failed to collect evidence to make out a prima facie case that the petitioner is holder of benami property. There is no factual or legal evidence for filing challan before the trial Court and despite that the petitioner has been put to trial which is sheer abuse of the process of law. The FIR, challan and the prosecution of the petitioner are required to be quashed.

11. Respondents No. 1 and 2 have filed separately the counter-affidavits. Respondent No. 1 has stated therein that since the petitioner figures as co-accused in the FIR No. 27 of 1997, as such the name of the petitioner also finds mention in the sanction order. Sanction for prosecution of Hem Raj Gupta has been granted and the petitioner being not a public servant, no sanction is required to prosecute the petitioner.

The name of the petitioner figures in the sanction to show that he is a co-accused with Hem Raj Gupta. The challenge to the sanction is misconceived. The property comprising 10 marlas of land with 4 incomplete shops is the property of Hem Raj Gupta and the sale deed referred to by the petitioner is benami transaction and the petitioner is not the owner of the property. Hem Raj Gupta and the petitioner are closely related to each other. The daughter of the petitioner is married to the son of Hem Raj Gupta and this way, Hem Raj Gupta has raised the benami assets. The benami transaction will be proved by the respondents by leading evidence before the trial Court. The petitioner in conspiracy with the accused has raised this property. Filing of an appeal by the son of the accused also makes out that the property belongs to his father and not father-in-law. It is also stated that on inspection by the prosecution agency, the name written on the front wall of the building, was found as Sudershana Building Material which also goes to show that the building belongs to Hem Raj Gupta as the name of his wife is Sudershana. Having collected such an evidence, the investigating agencies have established the conspiracy between the petitioner and Hem Raj Gupta and sanction for prosecution has been granted rightly under the provisions of P.C. Act and the prosecution of the petitioner shall not be an abuse of the process of the law.

12. Respondent No. 2 has adopted the counter-affidavit of respondent No. 1 and in para 17 of the counter has stated that 'sanction has been granted for the prosecution of Hem Raj Gupta and the name of the petitioner is mentioned in the sanction only as a co-accused.' The sanction has not been granted by the Government for the prosecution of the petitioner. The petitioner is the owner of the property is incorrect.

13. The petitioner has filed a rejoinder-affidavit controverting the pleas of the respondents with regard to the benami transaction raised in the counter-affidavit.

14. I have heard the learned counsel for the parties at length and persuade the record carefully. Record of the trial Court was also summoned which has also been examined.

15. Out of the pleadings of the parties, the following issues emerge which need consideration;

i) Whether the petitioner being not a public servant can be prosecuted by granting sanction in terms of Section 6 of the P.C. Act, for the alleged commission of offence.

ii) Whether the petitioner has conspired with Hem Raj Gupta to hide the property created by Hem Raj Gupta and is a benamidar.

iii) Whether the material on record, if unrebutted, is enough and sufficient for presuming the petitioner guilty and is of such nature on the basis of which conviction under the said sections for committing the offence of criminal conspiracy nature, can be possible.

16. While dealing with first issue, as to whether the petitioner can be prosecuted as per the sanction granted by the Government in terms of Section 6 of the P.C. Act for alleged commission of offence under Section 5(2), P.C. Act read with Section 120-B, RPC and Sections 12 and 14 of the J & K Public Men and Public Servants Declaration of Assets and Other Provisions Act, 1983 along with Hem Raj Gupta. This issue has not been contested by the respondents and need not to register and dilate upon it. The respondent No. 1, the author of the sanction for prosecution has categorically stated in para 2 of the counter-affidavit, which is extracted hereunder :

It is not disputed that the petitioner is not a public servant and the provisions of the P.C. Act and of J & K Public Men and Public Servants of Assets and Other Provisions Act, 1983 are not applicable to the petitioner for his prosecution.

17. The law is well settled beyond the pale of controversy that the provision of Sections 5 and 6 of the P.C. Act and the J & K Public Men and Public Servants Declaration of Assets and Other Provisions Act are not applicable to the person, who is not a Government servant and he cannot be prosecuted under these Acts, even if sanction for prosecution has been obtained and granted.

18. Dealing with the similar proposition on facts and law, the Supreme Court of India reiterating the view taken in *R.S. Nayak v. A.R. Antulay* AIR 1984 SC 684 : (1984 Cri LJ 613) held in case *Ramesh Balkrishna Kulkarni v. State of Maharashtra* (1985) 3 SCC 606: (1986 Cri LJ 14) that;

A 'public servant' is an authority who must be appointed by Government or a semi-Governmental body and should be in the pay or salary of the same and must discharge his duties in accordance with the rules and regulations made by the Government. A Municipal Councillor does not owe his appointment to any Governmental authority. Such a person is elected by the people and functions undeterred by the commands or edicts of a Governmental authority. The mere fact that he gets allowance by way of honorarium does not convert his status into that of a 'public servant.' Therefore, a Municipal Councillor is not a public servant within the meaning of Clause(12) of Section 21, I.P.C.

The appellant-Municipal Councillor, not being a public servant, cannot be prosecuted under the Prevention of Corruption Act - Whether or not sanction to prosecute him is obtained being wholly irrelevant to the issue.

19. The petitioner being not a public servant cannot be prosecuted under the provisions of P.C. Act, 2006 and the J & K Public Men and Public Servants Declaration of Assets and Other Provisions Act, 1983. The prosecution of the petitioner sanctioned under Government Order No. 29-GAD (Vig.) of 1998 dated 6-5-1998 deserves to be set aside, so far as it pertains to the prosecution of the petitioner.

20. So far, as the evidence collected by the respondent No. 2 for involvement of the petitioner for commission of alleged offence of criminal conspiracy is concerned, the perusal of the evidence reveals that there is nothing on record to

show that there was common object or agreement to execute the plan to hide the property. To establish and to prove the guilt of offence there should be prima facie evidence of criminal conspiracy. The evidence must be direct or circumstantial to show that there was an agreement between two or more persons to commit an offence. It envisages a meeting of minds resulting in an ultimate decision taken by the conspirators regarding the commission of the offence. Though, it is difficult to get direct evidence of conspiracy, still it can be inferred from circumstances giving rise to a conclusive or irresistible inference of an agreement between the two and more persons to commit an offence. The proof of circumstances must be such that it must exclude . any reasonable hypothesis consistent with the innocence of the accused.

21. Putting this case upon the legal test, it is required to be examined whether the following circumstantial evidence is of such a nature, to hold the petitioner-benamidar and is sufficient, if unrebutted to term the petitioner as co-conspirator and, possible to convict him;

i) On the front wall of property, Sign Board 'Sudershana Building Material Store' was found. Sudershana is the name of the wife of Hem Raj Gupta.

ii) Ajay Kumar Gupta was found on spot when the staff of the Municipality visited the site on 1-2-1997.

iii) He was served with a notice under Section 229 of the Municipal Act by the Municipality for raising the construction in violation of the Municipal laws.

iv) The name of the petitioner figures in the FIR.

Why the appeal was filed by Ajay Kumar Gupta?

vi) Why the appeal filed by Ajay Kumar Gupta was amended and the petitioner and two other owners were substituted as appellants.

22. The name of the petitioner does not figure in the FIR. The appeal has also not been amended. This itself shows the non-application of mind by the prosecution and the non-existent evidence has been taken into consideration and relied upon.

23. It is strange to see that the respondents on the basis of this evidence has termed the petitioner as benamidar. These circumstances even if proved cannot be taken as sufficient to hold the petitioner as benamidar of the property. Learned counsel Mr. Bakshi has submitted that Mr. Ajay Gupta s/o Hem Raj Gupta deals in business of Cement and Iron in the shop of his wife, got by her by a memorandum of partition, referred earlier. The Sign Board is to conduct business in the name and style 'Sudershana Cement and Iron Store.' The benami property transaction is required to be proved with some exchange of money or other relevant evidence which the prosecution misreably failed to collect. It is absurd to presume it a circumstance for categorising the property as benami, that appeal filed by Ajay Gupta was amended and the petitioner and two others referred to above were substituted as appellants. This is factually incorrect and speaks volume of non-application of mind. The petitioner filed an independent appeal against the show cause notice of the Municipality.

24. Mr. Bakshi the learned counsel, has invited the attention of the Court to bring round his point citing AIR 1977 SC 796: (1977 Cri LJ 566) (Krishnanand Agnihotri v. State of M.P.). In that case, it was contended that the amounts lying in fixed deposit in the name of Shanti Devi as an asset belonging to the appellant and that Shanti Devi was a benamidar of the appellant. The Apex Court disposed of that contention holding thus :

The burden of showing that a particular transaction is benami and the owner is not the real owner always rests on the person asserting it to be so and this burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstance unerringly and reasonably raising an inference of that fact. The essence of benami is the intention of the parties and not unoften, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of the serious onus that rests on him, nor justify the acceptance of mere conjectures or surmises as a substitute for proof. It is not enough merely to show circumstances which might create suspicion, because the Court cannot decide on the basis of suspicion. It has to act, on legal grounds established by evidence AIR 1974 SC 171, Foil, (para 26).

25. The Court while dealing further with the property described as benami transaction, observed in para 25 of the judgment that:

The next item of assets to which we must refer is the land at Varanasi which was purchased for Rs. 2,500/- in 1956. The sale deed of this land was in the name of Shanti Devi and hence it must be presumed, unless the contrary is shown by the prosecution, that the land belonged to Shanti Devi in whose name, it was purchased and it stood in the records of the Municipal authorities. The case of the appellant was that this land was purchased by the father of Shanti Devi for her benefit and the consideration for the sale was also provided by the father of Shanti Devi. Ramadhar Avasthi D.W. 22, the father of the first husband of Shanti Devi, clearly stated in his evidence that Anant Ram, the father of Shanti Devi had purchased a plot of land for Shabtu Devi for Rs. 2,500/- and this was supported by Bachhalal D.W. 11 who was one of the attesting witnesses to the sale deed. It is indeed difficult to see how this evidence led on behalf of the appellant could be brushed aside and without any evidence whatsoever led on behalf of the prosecution, it could be concluded that the purchase price of the land was paid by the appellant and that the land was purchased by the appellant in the name of Shanti Devi. We must, therefore, exclude this land in computing the total assets belonging to the appellant.

26. He has also relied upon the judgment reported as AIR 1980 SC 727 (Bhim Singh v. Kan Singh). In that case, the dispute was with regard to the sale of house by Maharaj by means of Patta, the consideration was deposited by 'B,' but the Patta was issued in the names of the plaintiffs. The Court held it that the treatment was not benami and 'B' had acquired the suit house with his money, with the intention of constituting 'A' as the absolute owner thereof. The Supreme Court rejecting the contention of the defendant with regard to the benami transaction held that:

Two kinds of benami transactions are generally recognised in India. Where a person buys a property with his own money but in the name of another person without any intention to benefit such other person, transaction is called benami. In that case, the transferee holds the property for the benefit of the person who has

contributed the purchase money and he is the real owner. The second case which is loosely termed as a benami transaction is a case where a person who is the owner of the property executes a conveyance in favour of another without the intention of transferring the title to the property thereunder. In this case, the transferor continues to be the real owner. The question whether a transaction is a benami transaction or not mainly depends upon the intention of the person who has contributed the purchase money in the former case and upon the intention of the person who has executed the conveyance in the latter case. The principle underlying the former case is also statutorily recognised in Section 82 of the [Indian Trusts Act, 1882](#) AIR 1957 SC 49, Relied on.

The principle governing the determination of the question whether a transfer is a benami transaction or not may be summed up thus : (1) The burden of showing that a transfer is a benami transaction lies on the person who asserts that it is such a transaction; (2) If it is proved that the purchase money came from a person other than the person in whose favour the property is transferred, the purchase is prima facie assumed to be for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary; (3) the true character of the transaction is governed by the intention of the person who has contributed the purchase money and (4) the question as to what his intention was has to be decided on the basis of the surrounding circumstances, the relationship of the parties, the motive governing their action in bringing about the transaction and their subsequent conduct, etc.

27. The view taken in AIR 1977 SC 796 : (1977 Cri LJ 566) (supra) (Krishnanand v. State of M.P.) has been reiterated and followed in AIR 1993 SC 313 : (1993 Cri LJ 308), M. Krishna Reddy v. State, Deputy Superintendent of Police, Hyderabad.

28. While, testing the facts of the present case in view of the evidence collected by the prosecution for involvement of the petitioner as co-conspirator and in the light of law laid down in the above judgments, the case of benami transaction with regard to the property of the petitioner, is bound to fail as there is no legal or circumstantial evidence of such a character to connect the property of the petitioner for commission of the offence.

29. There is no evidence of conspiracy hatched by the petitioner to hide the property of Hem Raj Gupta. On the contrary, in the evidence on record submitted by Hem Raj Gupta in reply to the questionnaire issued by the prosecution, in Paras C and Cl thereof, it has been specifically stated that out of the property in question, two shops have been given by the petitioner to Charu Gupta, his daughter-in-law, in April, 1994 and the petitioner is the owner of remaining building. Copy of the judgment dated 10-12-1997 of Special Tribunal is also on record, wherein the petitioner has been found defaulter in raising the construction of the property in dispute and imposed compounding fee of Rs. 88,656/- by the Tribunal. The evidences such as sale deed and memorandum of partition, referred in the judgment of the Special Tribunal is also on record of the respondent No. 2 and being such evidence in his possession, it was obligatory on the part of the respondent No. 2 to know the status of the property and collect evidence with regard to the benami transaction. No evidence to that effect has been found on record, as prima facie proof of the property is benami transaction. The ingredients of prima facie commission of offence of criminal conspiracy have not been found on perusal of evidence collected by the prosecution.

30. It has also been contended by the respondents that the nature of the benami transaction will be proved by the respondents before the trial Court and continuation of the trial and proceedings is not an abuse of the process of the Court, which should not be quashed at preliminary stage.

31. The Apex Court, while dealing with such contention of the respondents therein, in a similar proposition of facts and law, in 1994 Cri LJ 12 (Gauhati), Ananda Bezbaruah v. Union of India has pronounced that:

In this case the accused-petitioner made reliance entirely on the materials collected by the prosecution which, in my view, requires consideration from a different perspective to consider the case of the petitioner. In that view of the matter I find no support of those references as the facts and circumstances of this case warrant a different view.

From the above discussion, decision requires whether the charge framed by the Special Judge under the said sections of the Act deserve to be quashed at this

initial stage. In AIR 1988 SC 709 : 1998 Cri LJ 853 Madhvrao Jiwaji Rao Scindia v. Sambhajirao Angre the Apex Court held (para 7):

The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the Court cannot be utilised for any oblique purpose and where in the opinion of the Court chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the Court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage.

32. Mr. Pant, the learned counsel representing the respondents has cited AIR 1992 SC 604 : (1992 Cri LJ 527), State of Haryana v. Bhajan Lal to impress upon that the sanction for prosecution cannot be quashed in view of the guidelines set down by the Supreme Court in the aforementioned judgment. The Supreme Court quashed the commencement as well as the entire investigation on the ground that the SHO was not clothed with the valid legal authority to take up the investigation and proceed with the same within the meaning of Section 5-A(1) of the Prevention of Corruption Act. The case of the petitioner for quashing the FIR and proceedings is fully covered within the principles laid down therein.

33. In the present case, the prosecution has filed the challan and proceedings are sought to be quashed including sanction for prosecution of the petitioner on the grounds referred to above. Therefore, the judgment delivered in Bhajan Lal's case does not advance the cause of the respondents for defending the sanction or quashing of the proceedings.

34. To make out a case for criminal conspiracy, the evidence collected by the prosecution should be of the nature of inspiring confidence, if unrebutted, should lead to reasonably establish a prima facie case. The evidence on record even if taken on its face value is not sufficient, if, for establishing a prima facie case for

framing a charge against the petitioner.

35. The result is that the petition deserves to be allowed and is allowed. The Government Order No. 29-GAD(Vig.) of 1998 dated 6-5-1998 granting sanction for prosecution of the petitioner is quashed so far as it pertains to the petitioner.

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