A M.E. SHIVALINGAMURTHY

v.

CENTRAL BUREAU OF INVESTIGATION, BENGALURU

(Criminal Appeal No. 957 of 2017)

B JANUARY 07, 2020

[SANJAY KISHAN KAUL AND K. M. JOSEPH, JJ.]

Code of Criminal Procedure, 1973 – s. 227 – Discharge – There was a Partnership firm "AMC", first accused and second C *accused became partners of the firm in 2009 – The appellant was arrayed as the third accused – There was a reference in the charge-sheet to a conspiracy between the first accused and the second accused – The appellant was director of Mines and Geology in the State at the relevant time – It was alleged that appellant had acted in pursuance to the criminal conspiracy and abused his official* D *position with a dishonest and fraudulent intention to cheat the Government and knowingly made a false note in the file that he had discussed the matter, relating to issuance of the Mineral Dispatch Permit (MDP) to the new partners of the firm, viz., the first accused and the second accused, with the Deputy Director (legal) and directed Deputy Director to issue MDP – It was alleged in the* E *charge-sheet that the acts of the accused including the third accused (appellant) constituted criminal offences u/ss. 120B, 420, 379, 409, 447, 468, 471, 477A of IPC and ss. 13 (2), 13 (1) (c) and 13 (1) (d) of the Prevention of Corruption Act, 1988 – Applications were filed u/s. 227 of the Cr.P.C. seeking discharge – The Trial Court discharged* F *the second accused and the appellant – This order was set aside by the High Court – On appeal, held: The prosecution case largely depended upon the statement of the Deputy Director legal who took a definite stand that no opinion was sought from him by the appellant – A matter, u/r. 37 of the Rules, therefore, according to the prosecution* G *case, which ought to have gone to the State Government for prior sanction, came to be dealt with by the appellant as Director of Mines – This led to the issue of MDP – If the defence of the appellant is not to be looked into, which included the practice of obtaining in the past whenever the firm was reconstituted and also the version of the appellant that he did in fact speak with the Deputy Director* H *(legal) and acted on his advice and further that this fact would be*

established if the Deputy Director legal was questioned in his presence, they would appear to be matter which may not be available to the appellant to press before the Court considering the application u/s. 227 of the Cr.P.C. – Consequently, the appeal is dismissed – Mines and Minerals (Development and Regulation) Act, 1957 – Mineral Concession Rules, 1960 – r. 37.

Code of Criminal Procedure, 1973 – s. 227 – Contours of jurisdiction under – Held: The principle established is to take the materials produced by the prosecution, both in the form of oral statements and also documentary material, and act upon it without it been subjected to questioning through cross-examination and everything assumed in favour of the prosecution, if a scenario emerges where no offence, as alleged, is made out against the accused, it, undoubtedly, would enure to the benefit of the accused warranting the Trial Court to discharge the accused – It is not open to the accused to rely on material by way of defence and persuade the court to discharge him.

Code of Criminal Procedure, 1973 – s. 227 – Discharge – Defence of accused seeking discharge – Held: The defence of the accused is not to be looked into at the stage when the accused seeks to be discharged u/s. 227 of the Cr.PC (State of J & K v. Sudershan Chakkar and another) – The expression, "the record of the case", used in Section 227 of the Cr.PC, is to be understood as the documents and the articles, if any, produced by the prosecution – The Code does not give any right to the accused to produce any document at the stage of framing of the charge – At the stage of framing of the charge, the submission of the accused is to be confined to the material produced by the Police (State of Orissa v. Debendra Nath Padhi).

Dismissing the appeal, the Court

HELD: 1. The defence of the accused is not to be looked into at the stage when the accused seeks to be discharged under Section 227 of the Cr.PC (State of J & K v. Sudershan Chakkar and another). The expression, "*the record of the case*", used in Section 227 of the Cr.PC, is to be understood as the documents and the articles, if any, produced by the prosecution. The Code does not give any right to the accused to produce any document at the stage of framing of the charge. At the stage of framing of

A **the charge, the submission of the accused is to be confined to the material produced by the Police (State of Orissa v. Debendra Nath Padhi). [Para 15][805-D-E]**

2. It is here that again it becomes necessary to remind the contours of the jurisdiction under Section 227 of the Cr.PC. The B **principle established is to take the materials produced by the prosecution, both in the form of oral statements and also documentary material, and act upon it without it been subjected to questioning through cross-examination and everything assumed in favour of the prosecution, if a scenario emerges where** C **no offence, as alleged, is made out against the accused, it, undoubtedly, would enure to the benefit of the accused warranting the Trial Court to discharge the accused. [Para 25][810-A-B]**

3. It is not open to the accused to rely on material by way of defence and persuade the court to discharge him. [Para 26][810-C]

D

4. In this case, as already noticed, going by the statements made by the subordinates working in the Office of the appellant, on receipt of the letter from the erstwhile partners of AMC dated 26.12.2009, two of his subordinates, including the Additional Director, did recommend that the matter requires a legal opinion. E **The noting, which is undisputed in this case, made by the appellant, would appear to suggest that he had spoken to the Deputy Director (Legal). The prosecution case largely depends upon the statement of the Deputy Director (Legal) who takes a definite stand that no opinion was sought from him. A matter,** F **under Rule 37 of the Rules, therefore, according to the prosecution case, which ought to have gone to the State Government for prior sanction, came to be dealt with by the appellant as Director of Mines. This led to the issue of MDPs. It is, no doubt, true that there may not be any other material to link the appellant with various other acts and omissions which have** G **been alleged against the first accused in particular along with the fifth accused and other accused. However, the fact remains, if the defence of the appellant is not to be looked into, which included the practice obtaining in the past whenever the firm was reconstituted, and also the version of the appellant that he**

H

did in fact speak with the Deputy Director (Legal) and acted on his advice and further that this fact would be established if the Deputy Director (Legal) was questioned in his presence, they would appear to be matter which may not be available to the appellant to press before the court considering the application under Section 227 of the Cr.PC. [Para 29][810-F-H; 811-A-B]

Sree Ramakrishna Mining Company v. Commissioner of Income-Tax, Mysore **(1966) SCC Online Kar 73;** *State of J & K v. Sudershan Chakkar and another* **AIR 1995 SC 1954;** *State of Orissa v. Debendra Nath Padhi* **AIR 2005 SC 359 – referred to.**

P. Vijayan v. State of Kerala and another **(2010) 2 SCC 398 – relied on.**

Case Law Reference

(2010) 2 SCC 398	**relied on**	**Para 14**
AIR 1995 SC 1954	**referred to**	**Para 15**
AIR 2005 SC 359	**referred to**	**Para 15**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 957 of 2017.

From the Judgment and Order dated 07.11.2016 of the High Court of Karnataka at Bengaluru in Criminal Revision Petition No. 838 of 2016.

Kapil Sibal, Sr. Adv., S. Udaya Kumar Sagar, Ms. Bina Madhavan, L. M. Chidanandayya, Ms. Akanksha Mehra, Ms. Vasudha Singh, M/s. Lawyer S Knit & Co, Akshay Amritanshu, Shekhar Vyas, Arvind Kumar Sharma, Ms. Nithya Rao, Mukesh Kumar Maroria, Parmatma Singh, Mayank Jain, Madhur Jain, Ms. Aakriti Dhawan, Ms. Nishtha Singh, Advs. for the appearing parties.

The Judgment of the Court was delivered by

K. M. JOSEPH, J.

1. The appeal is directed against the Order of the High Court setting aside the Order passed by the Magistrate allowing the application filed by the appellant to discharge him.

A 2. The charge-sheet came to be filed on the basis of a FIR dated 01.10.2011. The appellant was Director of Mines and Geology in the State of Karnataka at the relevant time. There was a partnership firm by the name M/s Associated Mineral Company ('AMC', for short). The offences are alleged to revolve around the affairs of the said firm. First accused is the husband of the second accused. They became partners B of the firm (AMC) in 2009. Appellant was arrayed as the third accused. There was reference in the charge-sheet to a conspiracy between the first accused and the second accused. It is alleged, *inter alia*, that they obtained an undated letter from one Shri K.M. Vishwanath, the Ex-Partner, which is after his retirement with effect from 01.08.2009 from C the firm, which was addressed to the appellant, seeking directions to the Deputy Director of Mines and Geology, Hospet in Karnataka to issue the Mineral Dispatch Permit ('MDP' for short) to the new partners, viz., the first accused and the second accused. It is further averred that the investigation revealed that the appellant marked the said letter to the D Case Worker who put up the note seeking orders for referring the matter for legal opinion which was also approved and recommended by the Additional Director and put up to the appellant for orders. Appellant is alleged to have acted in pursuance to the criminal conspiracy and abused his official position with a dishonest and fraudulent intention to cheat the Government of Karnataka and knowingly made a false note in the file E that he had discussed this matter with the Deputy Director (Legal) and directed Deputy Director, Mines and Geology, Hospet for issue of MDPs to the new partners, viz., the first accused and the second accused by violating Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as 'the Act', for short) and Mineral Concession F Rules, 1960 (hereinafter referred to as 'the Rules', for short). There are various allegations regarding other accused. As far as appellant is concerned, it is alleged further in the charge-sheet that the acts of the accused, seven in number, including the third accused (appellant), constitutes criminal offences punishable under Sections 120B, 420, 379, 409, 447, 468, 471, 477A of the Indian Penal Code, 1860 (hereinafter G referred to as 'the IPC', for short) and Sections 13(2) and 13(1)(c) and 13(1)(d) of the Prevention of Corruption Act, 1988. No doubt, the origin of this investigation is to be traced to an Order passed by this Court dated 29.03.2011 in Special Leave Petition (Criminal) No. 7366-7367 of 2010 and connected matters ordering investigation into the illegalities into the matter of Mining Lease No. 2434 of AMC. The allegations H

include the allegation that the accused conspired to commit theft of Government property, i.e., mineral ore. They allegedly trespassed into the forest area and other areas of Bellary District: carried out illegal mining and transported it. Though, second accused (A2) to seventh accused(A7) filed applications under Section 227 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.PC', for short) seeking discharge, by Order dated 08.10.2015, the Trial Court discharged the second accused and the appellant. It is this Order which has been set aside by the High Court by the impugned Order.

APPLICATION BY THE APPELLANT SEEKING DISCHARGE

3. It is, *inter alia*, stated as follows:

Appellant is known for his honesty and dignity as a public servant. He earned his name as an excellent and honest Officer in all the places where he was posted. He was not issued a single article of charges while discharging his duties. Though, he started as a Member of the Karnataka State Civil Service, he was promoted to the Cadre of Indian Administrative Service (IAS) as he had an impeccable service record. He was posted as Director of Mines in Geology, having regard to his service record. By virtue of the delegation under Section 26(2) of the Act, the execution of the lease deed lies with the Director of Mines and Geology. AMC was granted the Mining Lease by the State way back in 1966. The firm was reconstituted several times by inducting new partners and retiring old partners. As and when there is the reconstitution of the firm, the firm intimated to the Department of Geology of the reconstitution and conducted the mining operation in the name of AMC by the newly inducted partners. Though, several reconstitutions have taken place, no application has been filed under Rule 37 of the Rules for transfer of the lease on the ground that the assets, viz., the Mining Lease belongs to the firm and not to any individual partners. Therefore, there was no requirement of making an application under Rule 37 of the Rules seeking transfer of the Mining Lease. Records produced by the official before the Court reveal that the Department has understood that reconstitution did not amount to transfer as the partnership is the owner of the asset, viz., the Mining Lease. On inducting first and second accused, the reconstituted firm made application to Deputy Director seeking MDP by intimating that two new partners were inducted. The application was sent to the Director for issuance of MDP. In addition to the application

A filed to the Deputy Director seeking MDPs, Shri K.M. Vishwanath, Ex-Partner, representing the firm, made application to the Director, placing on record that firm had been reconstituted by inducting the first and the second accused and, accordingly, intimated under Rule 62 of the Rules. It is stated further that after receiving the application by the Department, the file will have to be processed in the Mining Lease Section. There is B an elaborate procedure followed while considering applications in Department of Mines and Geology. The Section Officer initially examines the file. A detailed note on the application is prepared. The file, along with note sheet, is sent to the Superintendent of the Mining Leases Section who is a senior Officer who examines the note sheet and puts up the C same before the Additional Director. The Additional Director, who is the senior-most departmental Officer in the Department, examines the entire file and puts up the file before the Director. He passes an order considering the law applicable. If it is within the jurisdiction, he disposes the application. If an order from the State Government is required, it is so referred with comments. The Director signs the lease deed by virtue of delegation D under Section 26(2) of the Act.

4. Appellant found that the firm was constituted by Shri Jali Mahadevappa an Shri Jali Mallikarjun in the year 1966 and the lease was obtained in the name of AMC as a firm registered under the Partnership Act. The lease, as per the records, is the asset of the firm. E The firm, viz., AMC, was reconstituted on 30.06.1983 by inducting Shri L. Lingaraju as one of the partners on account of retirement of Shri J. Mallikarjun. On 13.02.1984, the firm was reconstituted again wherein Shri B. Ananda joined as a partner and Shri J. Lingaraju retired. On 13.02.1982, Smt. B. Vasanthi joined in place of Shri J. Vamadevappa F who retired from the firm. On 13.06.1986, Shri B. Vasudev entered the firm as a partner and Smt. B. Vasanthi retired from the firm. By Deed of Partnership dated 10.06.1990, Shri Mohammed Kasim joined the firm and Shri B. Ananda retired from the firm. Again, Smt. Asha Mohammad Haroon joined as partner in place of Shri B. Vasudev who retired. Again, AMC was reconstituted by inducting Shri K.M. Prabhu and Smt. G Parvathamma. There was further reconstitution by inducting Smt. Sujata Prabhu and Shri K.M. Sujan, as partners. Lastly, on 01.09.2009, the first accused and the second accused were inducted as partners. From 1981, on several occasions, the firm was, thus, reconstituted and the application under Rule 37 of the Rules was not filed before the State Government. H Partners filed Form V before the Registrar of Firms intimating

reconstitution. Never was an application made under Rule 37 as and when reconstitution was done on the ground that the firm was the owner of the mining lease. Only intimation under Rule 62 of the Rules was given. The Case Worker-CW24 has suggested to take legal opinion which was put up along with the note sheet. There was no note put up suggesting the applicability of Rule 37 of the Rules. If there was a suggestion about the applicability of such Rule, the appellant would have taken appropriate decision. The precedent available also was relied upon. The decision taken was a *bonafide* decision. The suggestion to take legal opinion was endorsed by the Additional Director which is produced before the Court as Exhibit D-765, the note sheet. During the course of the examination of the file, it was brought to the notice of the appellant that Rule 37 was not applicable. A communication was sent to the Deputy Director, Hospet that the permits will have to be issued to the AMC but not in the names of the partners. The appellant further submitted that after receipt of the file, he contacted the Deputy Director (Legal) telephonically who informed that the reconstitution of the firm had taken place by inducting new partners and permits may be issued in the name of the Company and not in the name of the partners which was denied by the said Deputy Director (Legal) at a later stage. He sought support of Section 27 of the Act which protected acts done in good faith under the Act. He pointed out that during the investigation, he gave details of various firms who have leases with the Government which have not obtained permission under Rule 37. The procedure which was consistently followed for obtaining MDPs by intimating reconstitution under Rule 62 was brought to the notice. It was contended that taking a *bonafide* administrative decision on the understanding of Rule 37 and based on previous precedents, should not be considered as cheating. Reading of the charge-sheet and allegations, according to the appellant, basically surrounded around Section 420 of the IPC.

5. The statements of CW7, CW21, CW24, CW26, CW202 and CW109 were enlisted by the prosecution in support of the charge. The appellant pointed out the statements of the witnesses and the documents produced clearly reveal there is no material much less *prima facie* material to frame the charges.

ORDER PASSED BY THE MAGISTRATE

6. The Court noted the submission of the appellant that AMC had been reconstituted on a number of occasions. No fault was found in

A accepting reconstitution. Only when the first and second accused became partners in the year 2009, the appellant was faulted. Reliance is seen placed on the judgment of the judgment of the Division Bench of the High Court in Sree Ramakrishna Mining Company v. Commissioner of Income-Tax, Mysore[1]. Thereafter, reliance is placed on decisions which were rendered under the Indian Stamp Act, 1899 for the proposition that an instrument evidencing the distribution of assets of a firm, on dissolution or retirement of a partner, would not amount to a conveyance. The principles relating to discharge under Sections 227 and 228 were discussed, and finally, it was held as follows:

> "41. In view of the above said citations, it is evident that act of A-3 in directing his subordinates to issue MOP to M/s. Associated Mining Company belonging to accused Nos.1 and 2 does not amount to fastening criminal liability of him. In the statement of CWs 7, 21, 24, 26, 109 and 202, absolutely there is no material to show that A-3 has committed criminal conspiracy to help accused Nos.1 and 2 in directing his officials to issue Mineral Dispatch Permit and as such there is considerable force in the argument of learned Counsel for accused No.3 and I am unable to accept the argument addressed by learned Special Public Prosecutor. Hence, I answer IA. No.30 deserves to be allowed. I answer."

FINDINGS OF THE HIGH COURT

7. After noting the rival contentions, the court notes that for punishing under Section 120B of the IPC, the prosecution is required to prove the conspiracy. The agreement, which is illegal, can be proved by necessary implication. It is to be largely proved from the inference of the illegal acts or omissions by the conspirators. The incriminating evidence collected by the prosecution, it is noted, is that the appellant recommended issuance of MDPs in gross violation of the Act despite the office noting to the effect that the matter required legal opinion. The stand of the appellant that he had discussed the matter with the Legal Department is seen negatived by CW21. As to his contention that many a time AMC was reconstituted and he had really discussed the matter with CW21 before directing the issue of MDPs, was found to be a matter of defence which could not be pressed at the threshold.

[1] 1966 SCC Online Kar 73 / ILR 1966 Mys. 1945

8. We notice the following findings:

"12. Applying the formulae of (some/mere suspicion – grave suspicion: as enunciated in Dilawar Balu Kurane's case (supra) and Union of India -vs- Prafulla Kumar Samai and another reported in AIR 1979 SC 366, to the evidentiary material placed before the court against respondent, then also the needle tilts more towards grove suspicion. The subject matter involved in this case is the natural resource of the country and the alleged offence is said to have caused loss to the State exchequer substantially. The respondent is a responsible officer of the State. Consciously he passed the order in violation of the statutory provisions.

13. The learned Trial Judge in the order impugned has made an omnibus observation that his action does not fasten criminal liability on him and the statement of the witnesses does not show that he committed criminal conspiracy. Though there was no direct evidence, the learned Trial Judge has lost sight of incriminating material appearing in the circumstantial evidence placed by the prosecution. Limited power vested with the Trial Court to sift and weigh the evidence is transgressed by the learned Trial Judge in the impugned order, hence requires intervention in this revision jurisdiction."

9. Accordingly, the petition was allowed setting aside the order of the Sessions Judge discharging the appellant.

10. We heard Shri Kapil Sibal, learned Senior Counsel appearing for the appellant. We also heard learned Counsel appearing for the respondent.

11. Shri Kapil Sibal, learned Senior Counsel for the appellant, submits as follows:

The lease was originally in favour of AMC in the year 1966. Thereafter, the firm was reconstituted on a large number of occasions. The procedure followed was intimation being given to the Department under Rule 62 of the Rules about the reconstitution. Rule 37 of the Rules was not invoked. This is a case where the action of the appellant was *bonafide*. Proceeding on the basis that Rule 37 applies, he further submits, this is not a case where the appellant could be prosecuted for the criminal offences. The appellant acted on the basis of the practice. He contacted the Deputy Director (Legal).

A 12. There is also case of the appellant that he had directed MDP to be issued in the name of the firm. He had also made it clear that permit be also not issued to the partners. There was no other material produced on record by the prosecution. This is not a case where there is material to establish any criminal conspiracy.

B 13. Per contra, the learned Counsel for the respondent-Central Bureau of Investigation, Bengaluru, supported the order. In particular, reliance is placed on the specific stand of the Charge Witness-CW21 to the effect that the appellant had not sought his legal opinion contrary to the stand of the appellant.

C LEGAL PRINCIPLES APPLICABLE IN REGARD TO AN APPLICATION SEEKING DISCHARGE

14. This is an area covered by a large body of case law. We refer to a recent judgment which has referred to the earlier decisions, viz., P. Vijayan v. State of Kerala and another[2] and discern the following
D principles:

i. If two views are possible and one of them gives rise to suspicion only as distinguished from grave suspicion, the Trial Judge would be empowered to discharge the accused.

ii. The Trial Judge is not a mere Post Office to frame the charge
E at the instance of the prosecution.

iii. The Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding. Evidence would consist of the statements recorded by the Police or the documents produced before the Court.

F

iv. If the evidence, which the Prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, "cannot show that the accused committed offence, then, there will be no sufficient ground for proceeding
G with the trial".

v. It is open to the accused to explain away the materials giving rise to the grave suspicion.

H [2] (2010) 2 SCC 398

vi. The court has to consider the broad probabilities, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This, however, would not entitle the court to make a roving inquiry into the pros and cons.

vii. 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.

viii. There must exist some materials for entertaining the strong suspicion which can form the basis for drawing up a charge and refusing to discharge the accused.

15. The defence of the accused is not to be looked into at the stage when the accused seeks to be discharged under Section 227 of the Cr.PC (See State of J & K v. Sudershan Chakkar and another[3]). The expression, "*the record of the case*", used in Section 227 of the Cr.PC, is to be understood as the documents and the articles, if any, produced by the prosecution. The Code does not give any right to the accused to produce any document at the stage of framing of the charge. At the stage of framing of the charge, the submission of the accused is to be confined to the material produced by the Police (See State of Orissa v. Debendra Nath Padhi[4]).

ANALYSIS OF THE CASE

16. Having set out the legal principles, as aforesaid, let us consider the facts:

Undoubtedly, the appellant came to be appointed as the Director of Mines and Geology of the State of Karnataka by virtue of Notification dated 09.06.2008. He continued in the said post till 25.10.2010. Mining Lease No.625 was executed on 02.03.1966 between the Governor and AMC, a registered firm. The Managing Partner was one Shri Jali Mahadevappa. The partners of the AMC, viz., Shri K.M. Parvatamma and Shri K.M. Vishwanath sent a letter dated 26.12.2009. It reads as follows:

[3] AIR 1995 SC 1954
[4] AIR 2005 SC 359

A "To:

The Director

Mines & Geology Mineral

Khanija Bhavan

B Race Course Road

Bangalore.

Sub: Change in Constitution of Associated Mining Company ML No.2434- Reg.

C Sir,

We undersigned are lease owner of Associated Mining Company of Guru Iron Ore Mines at Venkatagiri Village, Sandur Taluk, Bellary Dist, bearing ML No.2434 (Old 625).

D For better management we admitted as Partners Mr. G. Janardhan Reddy and Mrs. G. Lakshmi Aruna of 123/350 Veerabagouda Colony, Opp Kumaraswamy Temple Club Road, Bellary on 31st July, 2009. Subsequently on 1st August, 2009 Smt. K.M. Parvatamma and Mr. K.M. Vishwanath retired.

E Mr. G. Janardhana Reddy and Mrs. G. Lakshmi Aruna are sole Partners of the Mine. The admission and Retirement deed are enclosed herewith for your perusal. This is for your kind information.

Kindly issue permission to transport the ore from Mines to various destinations.

F Thanking you,

Yours sincerely,

sd/-

G Smt. K. Parvatamma

sd/-

Mr. K.M. Vishwanath"

17. The role, which is attributed to the appellant, begins essentially with this letter. It is the case of the prosecution that having regard to

H

Rule 37 of the Rules, it was incumbent upon the appellant, before acting upon the reconstitution of the firm, to obtain the previous sanction of the State Government. The Charge Witnesse-CW24-D. Hanumantha, undoubtedly, has given statement indicating that the letter aforesaid was marked to him to process the same. He further stated that he proposed that legal opinion may be obtained. Finally, it was submitted to the Additional Director. The Additional Director also recommended the need to obtain legal opinion. The matter came up before the appellant on 04.01.2010. On 04.01.2010, it appears that appellant has ordered:

> "… "spoken to Dy. Director (Legal), the company remains the same, whereas the partners might have been included or removed, and this they are supposed to approach the law board. In the present case, the partners are not asking for MDP (Mineral Dispatch Permits) in their names, but in the name of the company. Permits may be issued only in the name of the company viz., AMC where lease is also sanctioned to the same company only. The partners are changed, but you are not going to issue MDPs to the partners. Hence inform DD Hospet that MDPs may be issued only in the name of the Company."…"

18. The Additional Director has also spoken on similar lines.

19. The case of the prosecution, which has appealed to the High Court, is essentially based on the fact that on the one hand, the appellant in his Order dated 04.01.2010 (Draft) which was finalised on 05.01.2010, spoke about having obtained legal opinion by speaking to Deputy Director (Legal), the Deputy Director (Legal) has taken the stand that he has not given any such opinion. The statement of the Deputy Director (Legal) has been produced by the appellant along with Criminal Miscellaneous Petition No. 122009 of 2009. He has stated, *inter alia*, as follows:

> "However, no opinion was sought from me in this regard". He has further stated that since the contents of the letter dated 26.12.2009 disclosed that the entire lease holding rights were transferred in favour of the first and second accused, it is contrary to Rule 37 of the Rules. However, ignoring the provisions of Rule 37, the direction was issued to Deputy Director to issue the MDPs in the name of the Company. However, he further states that AMC is a firm not a company. He further stated that if there is no change in the rights of the lessee, then, someone else gets rights

A over the leasehold rights. The said act will attract provisions of Rule 37 of the Rules. He has also stated that though an application was filed on 29.07.1994 in view of the fact that the Mining Lease was due to expire on 01.03.1996, the lease is renewed from the year 2000 to 2010 by the Minister since the Forest Department gave permission. He goes on to state that the lease ought to have been renewed with effect from 02.03.1996 for a period of ten years.

20. It is necessary to notice Rule 37 of the Rules which were made in 1960. Rule 37 reads as follows, *inter alia*:

C "37. Transfer of lease :- (1) The lessee shall not, without the previous consent in writing of the State Government and in the case of mining lease in respect of any mineral specified in Part 'A' and Part 'B' of the First Schedule to the Act, without the previous approval of the Central Government :-

D (a) assign, sublet, mortgage, or in any other manner, transfer the mining lease, or any right, title or interest therein, or

(b) enter into or make any bonafide arrangement, contract, or understanding whereby the lessee will or may be directly or indirectly financed to a substantial extent by, or under which the lessee's operations or undertakings will or may be substantially controlled by, any person or body of persons other than the lessee:"

E

(Emphasis supplied)

21. The Trial Court has placed reliance on judgment of the Division F Bench of the Mysore High Court in Sree Ramakrishna Mining Company (supra). In fact, the Court in the said case, considered Rule 37 of the Mineral Concession Rules of 1949, which read as follows:

"37. Transfer of lease:- The lessee may with the previous sanction of the State Government and subject to conditions G specified in the first proviso to rule 35 and in rule 38, transfer his lease or any right, title, or interest therein, to a person holding a certificate of approval on payment of a fee of Rs.100 to the State Government."

(Emphasis supplied)

H

22. It is clear that the provision, as obtained prior to 1960, when the Rules were made, was different.

23. In the aforesaid case, the question came to be decided in a Reference under Section 66 of the Income Tax Act, 1922. One of the questions which fell for decision was the effect of there being no previous sanction of the Government under Rule 37 for the transfer of lease. We may notice that the Court in Sree Ramakrishna Mining Company (supra), *inter alia*, held as follows:

> "The 37th Rule, as can be seen from its language does not concern itself with the formation of a partnership such as the one before us, and, its principal purpose is to provide for the transfer of a lease granted under the provisions of the Rules. It is in the nature of an enabling provision which authorises a transfer by the lessee to a person who has a certificate of approval, and, directs that such transfer could be made with the previous sanction of the Government subject to the other conditions with which we are not concerned. There is a distinction between a statutory provision which contains an express prohibition against the performance of a certain act and one which enables its performance subject to prescribed conditions. While in the former case, there will be no difficulty in coming to the conclusion if nothing else could be said about it that the absolute prohibition against the performance of the act is what is forbidden by law, the same could not be said if the matter falls within the second category. Now the 37th rule does not, in express terms, forbid a transfer but authorises a transfer with the previous sanction of the Government and subject to other conditions."

24. The provisions of Rule 37, which would control destiny of this case, is, as it was obtained in the year 2009. Also could it not be contended that decisions rendered under the Stamp Act may not be relevant to understood the scope of Rule (37) of the Rules. No doubt, there is a case for the appellant that on a number of reconstitutions took place in regard to the firm-AMC, and on no occasion, was an issue relating to infraction of Rule 37, raised. All that the appellant did was, he acted in accordance with the practice obtaining in the Department. There is the case for the appellant that in this regard, Rule 37, as such, was not pointedly invoked by either the Additional Director or the SDA.

A 25. It is here that again it becomes necessary that we remind ourselves of the contours of the jurisdiction under Section 227 of the Cr.PC. The principle established is to take the materials produced by the prosecution, both in the form of oral statements and also documentary material, and act upon it without it been subjected to questioning through cross-examination and everything assumed in favour of the prosecution, if a scenario emerges where no offence, as alleged, is made out against the accused, it, undoubtedly, would enure to the benefit of the accused warranting the Trial Court to discharge the accused.

26. It is not open to the accused to rely on material by way of defence and persuade the court to discharge him.

C 27. However, what is the meaning of the expression "*materials on the basis of which grave suspicion is aroused in the mind of the court's*", which is not explained away? Can the accused explain away the material only with reference to the materials produced by the prosecution? Can the accused rely upon material which he chooses to produce at the stage?

28. In view of the decisions of this Court that the accused can only rely on the materials which are produced by the prosecution, it must be understood that the grave suspicion, if it is established on the materials, should be explained away only in terms of the materials made available by the prosecution. No doubt, the accused may appeal to the broad probabilities to the case to persuade the court to discharge him.

29. In this case, as already noticed, going by the statements made by the subordinates working in the Office of the appellant, on receipt of the letter from the erstwhile partners of AMC dated 26.12.2009, two of his subordinates, including the Additional Director, did recommend that the matter requires a legal opinion. The noting, which is undisputed in this case, made by the appellant, would appear to suggest that he had spoken to the Deputy Director (Legal). The prosecution case largely depends upon the statement of the Deputy Director (Legal) who takes a definite stand that no opinion was sought from him. A matter, under Rule 37 of the Rules, therefore, according to the prosecution case, which ought to have gone to the State Government for prior sanction, came to be dealt with by the appellant as Director of Mines. This led to the issue of MDPs. It is, no doubt, true that there may not be any other material to link the appellant with various other acts and omissions which have been

H

alleged against the first accused in particular along with the fifth accused and other accused. However, the fact remains, if the defence of the appellant is not to be looked into, which included the practice obtaining in the past whenever the firm was reconstituted, and also the version of the appellant that he did in fact speak with the Deputy Director (Legal) and acted on his advice and further that this fact would be established if the Deputy Director (Legal) was questioned in his presence, they would appear to be matter which may not be available to the appellant to press before the court considering the application under Section 227 of the Cr.PC.

30. This being the outcome of our discussion, the inevitable consequence is that we are not persuaded to hold that the High Court was in error in the view it has taken. Consequently, the appeal fails and it stands dismissed. We, however, make it clear that the observations made by us are for the purpose of deciding the application under Section 227 of the Cr.PC. and they are not to trammel the Court.

Ankit Gyan Appeal dismissed.