IN THE HIGH COURT OF MADHYA PRADESH AT INDORE

BEFORE

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

ON THE 5th OF FEBRUARY, 2024

MISC. CRIMINAL CASE No. 4449 of 2024

BETWEEN:-

BRIJESH SINGH TOMAR S/O LATE SHRI H.S. TOMAR, AGED ABOUT 60 YEARS, OCCUPATION: SERVICE 20/2, SILVER LINE, MANORAMAGANJ, INDORE (MADHYA PRADESH)

.....PETITIONER

(BY SHRI S. K. VYAS, SENIOR ADVOCAT WITH MS. NEHA YADAV, ADVOCATE FOR THE PETITIONER)

AND

THE STATE OF MADHYA PRADESH STATION HOUSE OFFICER THROUGH POLICE STATION HATHPIPLIYA DISTRICT DEWAS (MADHYA PRADESH)

.....RESPONDENT

(BY MS. HARSHLATA SONI, P.L./G.A.)

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This application coming on for admission this day, the court passed the following:

ORDER

Heard finally with the consent of the parties.

2] This petition has been filed by the petitioner under Section 482 of the Cr.P.C., for quashing the order dated 11.01.2024, passed by the II Additional Sessions Judge, Bagli, District Dewas passed in S.T. No.71/2015 whereby, the learned Judge of the Trial Court has taken

cognizance against the petitioner on an application filed by the respondent under Section 319 of the Cr.P.C., under Sections 420 and 409 of the IPC.

3] In brief, the facts of the case are that the FIR in the present case was filed on 06.04.2014 under Sections 406, 409 and 420 of the IPC against one Krishnadas Vaishnav, who was posted as Office Assistant Grade-II, Karnawat Centre of Madhya Pradesh Paschim Kshetra Vidyut Vitaran Company Ltd and against the aforesaid accused person, certain embezzlement of Rs.42,89,218/- was alleged. The FIR was made on the basis of a written complaint of the Executive Engineer along with the present petitioner. Thus, the petitioner was initially one of the complainants in the said case.

4] In the aforesaid case 14 witnesses have already been examined and the present petitioner has been examined as PW-12 and, after the examination of the present petitioner was completed, an application under Section 319 of the Cr.P.C. has been filed by the prosecution contending that the petitioner PW-12 Brijesh Singh Tomar and other witnesses have admitted that on many documents the petitioner has also appended his signatures and the responsibility to deposit the amount of electricity bills was also of the petitioner either by himself or through him and thus, the petitioner is also hand in gloves with the main accused Krishnadas and he has also committed the offence of embezzlement of the tune of Rs.42,89,218/-. The aforesaid application has been allowed by the learned Judge of the Trial Court wherein, the Court has referred to various paragraphs of the petitioner’s deposition in the Court to hold that the petitioner has

admitted his signatures on various documents. The aforesaid order is under challenge before this Court.

5] Shri S. K. Vyas, learned senior counsel assisted by Ms. Neha Yadav, counsel for the petitioner has stressed upon the applicability of Section 132 of the Evidence Act and Section 164 of Cr.P.C. in the present case. It is submitted that even though the petitioner has answered the questions put to him during his cross-examination, the same cannot be used to prosecute him except where the prosecution is for giving false evidence by such answers, as is provided under the proviso to Section 132 of the Evidence Act, 1872.

6] Shri Vyas has also drawn the attention of this Court to S.164(2) of Cr.P.C. which provides that a Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily, whereas, the petitioner was never apprised that the evidence may be used against him. Thus, it is submitted that the non-compliance of the provisions of S.164(2) of Cr.P.C. has rendered the impugned order bad in law. Counsel has also submitted that trial has commenced in the year 2015 andtill date 14 witnesses have been examined and in such circumstances, it was not expedient to allow the application u/s.319 of Cr.P.C. In support of his submissions, Shri Vyas has also relied upon the decision rendered by the Supreme Court in the case of ***Michael Machado And Another vs. Central Bureau of Investigation and Another,*** reported in ***2000 (2) Crimes 23 (SC).***

7] Counsel has also submitted that otherwise also, the petitioner is a public servant as has already been held by this Court vide order

dated ***12.12.2014,*** in ***M.Cr.C. No.9730/2014*** in the case of ***Ashokshri Hukumchand Gite Vs The State of M.P.*** wherein, this Court has held that an employee of MPPKVVCL is a public servant and the matter has been remanded back to the Trial Court with the direction to decide whether the bar created by Section 197 of Cr.P.C. would be applicable in the aforesaid case or not.

8] On the other hand, counsel appearing for the respondent/State, has opposed the prayer and it is submitted that no case for interference is made out.

9] Heard counsel for the parties and perused the record.

10] Before proceeding to deal with the facts of the case, it would be relevant to refer to the relevant provisions on which the learned senior counsel for the petitioner has made special emphasis.

11] The relevant excerpts of Section 164 of Cr.P.C. reads as under:-

> **"164. Recording of confessions and statements.**—(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:
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> [Provided that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence:
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> Provided further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.]
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> (2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.
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> (3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

> (4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:—
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> "I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.
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> (Signed) A. B.
> Magistrate."
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> *(Emphasis Supplied)*

Section 132 of the Evidence Act, 1872 reads as under:-

> "**132. Witness not excused from answering on ground that answer will criminate**. — A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:
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> **Proviso.** — Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."
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> *(Emphasis Supplied)*

12] At this juncture, it would also be relevant to refer to the decision rendered by the Supreme Court in the case of ***R. Dineshkumar v. State,*** reported as ***(2015) 7 SCC 497*** *which is a good read for any student of law.* In the aforesaid case also, a similar question arose before the Supreme Court, *i.e.,* whether the evidence recorded in the trial Court by a witness can be used against him to prosecute him, holding it to be incriminating. It has been very elaborately, answered by the Supreme Court in the following manner:

“**29.** The High Court on an elaborate consideration of the various authorities and the legal position came to the conclusion: (*R. Dineshkumar case* [*R. Dineshkumar* v. *State*, 2014 SCC OnLine Mad 9656 : (2014) 6 CTC 484] , SCC OnLine Mad para 63)

> “*63*. In view of all the above discussions, I hold that the evidence of the second respondent, as a prosecution witness before the trial court, and the incriminating answers given by him *amount to compelled testimony falling* within the sweep of Section 132 of the Evidence Act and thus, he is protected by the proviso to Section 132 of the Evidence Act.”
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> (emphasis supplied)

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36. The scope of Section 132 of the Evidence Act fell for consideration of this Court in *Laxmipat Choraria* v. *State of Maharashtra* [AIR 1968 SC 938 : 1968 Cri LJ 1124 : (1968) 2 SCR 624] . Three appellants (brothers) were convicted for the offence under Section 120-B of the Penal Code and Section 167(81) of the Sea Customs Act, 1878. Briefly stated the facts are that the three appellants before this Court were part of an international gold smuggling organisation. The kingpin of the organisation was a Chinese citizen living in Hong Kong. One Ethyl Wong, an Air Hostess of Air India was also a member of the abovementioned organisation and carried gold on “*several occasions*”. She was examined as a prosecution witness in the case. “*She gave a graphic account of the conspiracy and the parts played by the accused and her own share in the transaction. Her testimony was clearly that of an accomplice.*”

37. Before this Court, the main argument was that: (*Choraria case* [AIR 1968 SC 938 : 1968 Cri LJ 1124 : (1968) 2 SCR 624] , AIR p. 941, para 2)

> “2. … Ethyl Wong could not be examined as a witness because (*a*) no oath could be administered to her as she was an accused person since Section 5 of the Oaths Act bars such a course and (*b*) it was the duty of the prosecution and/or the Magistrate to have tried Ethyl Wong jointly with the appellants. The breach of the last obligation … vitiated the trial and the action was discriminatory. In the alternative … even if the trial was not vitiated as a whole, Ethyl Wong's testimony must be excluded from consideration and the appeal reheard on facts here, or in the High Court.”

38. Dealing with the question whether Ethyl Wong should have been prosecuted along with other accused, this Court opined: (*Choraria

case [AIR 1968 SC 938 : 1968 Cri LJ 1124 : (1968) 2 SCR 624] , AIR p. 943, para 11)

> "*11.* … The prosecution was not bound to prosecute her, if they thought that her evidence was necessary to break a smugglers' ring. Ethyl Wong was protected by Section 132 proviso of the Evidence Act even if she gave evidence incriminating herself. She was a competent witness…."

39. Dealing with the immunity conferred under Section 132 proviso of the EA, 1872, this Court held thus: (*Choraria case* [AIR 1968 SC 938 : 1968 Cri LJ 1124 : (1968) 2 SCR 624] , AIR p. 942, para 7)

> "*7.* Now there can be no doubt that Ethyl Wong was a competent witness. Under Section 118 of the Evidence Act all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them for reasons indicated in that section. *Under Section 132 a witness shall not be excused from answering any question* as to any matter relevant to the matter in issue in any criminal proceeding (among others) upon the ground that the answer to such question will incriminate or may tend directly or indirectly to expose him to a penalty or forfeiture of any kind. The safeguard *to this compulsion* is that no such answer which the witness is compelled to give exposes him to any arrest or prosecution or can it be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer. In other words, if the customs authorities treated Ethyl Wong as a witness and produced her in court, *Ethyl Wong was bound to answer all questions and could not be prosecuted for her answers*. Mr Jethmalani's argument that the Magistrate should have promptly put her in the dock because of her incriminating answers overlooks Section 132 proviso. *In India the privilege of refusing to answer has been removed so that temptation to tell a lie may be avoided but it was necessary to give this protection.* The protection is further fortified by Article 20(3) of the Constitution which says that no person accused of any offence shall be compelled to be a witness against himself. This article protects a person who is accused of an offence and not those questioned as witnesses. *A person who voluntarily answers questions from the witness box waives the privilege which is against being compelled to be a witness against himself because he is then not a witness against himself but against others. Section 132 of the Evidence Act sufficiently protects him since his testimony does not go against himself*. In this respect the witness is in

no worse position than the accused who volunteers to give evidence on his own behalf or on behalf of a co-accused. There too the accused waives the privilege conferred on him by the article since he is subjected to cross-examination and may be asked questions incriminating him."

(emphasis supplied)

40. In substance, this Court in *Choraria case* [AIR 1968 SC 938 : 1968 Cri LJ 1124 : (1968) 2 SCR 624] held that once the prosecution chose to examine Ethyl Wong as a witness *she was bound to answer every question put to her*. In the process, if the answers given by Ethyl Wong are self-incriminatory apart from being evidence of the guilt of the others she could not be prosecuted on the basis of her deposition in view of the proviso to Section 132 of the Evidence Act. This Court's conclusions that "in India the privilege of refusing to answer has been removed …" and that "the safeguard to this compulsion" in our opinion, are clearly in tune with the dissenting opinion expressed by Ayyar, J. in *Gopal Doss case* [ILR (1881) 3 Mad 271] . This Court opined that the proviso to Section 132 of the Evidence Act is a necessary corollary to the principle enshrined under Article 20(3) of the Constitution of India which confers a fundamental right that "*no person accused of any offence shall be compelled to be a witness against himself*". Though such a fundamental right is available only to a person who is accused of an offence, the proviso to Section 132 of the Evidence Act creates a statutory immunity in favour of a witness who in the process of giving evidence in any suit or in any civil or criminal proceeding makes a statement which criminates himself. Without such an immunity, a witness who is giving evidence before a court to enable the court to reach a just conclusion (and thus assisting the process of law) would be in a worse position than an accused in a criminal case.

41. The sweep of Article 20 fell for consideration of this Court in *Nandini Satpathy* v. *P.L. Dani* [(1978) 2 SCC 424 : 1978 SCC (Cri) 236] . V.R. Krishna Iyer, J. spoke for the Bench.

(*i*) It was a case where a crime under the Prevention of Corruption Act and certain other offences under the Penal Code came to be registered against Nandini Satpathy, former Chief Minister of Orissa.

(*ii*) This Court examined the scheme of Article 20(3) and Section 161(2) and opined that: (*Nandini Satpathy case* [(1978) 2 SCC 424 : 1978 SCC (Cri) 236] , SCC p. 434, para 21)

"*21.* … we are inclined to the view, terminological expansion apart, Section 161(2) CrPC is a parliamentary gloss on the constitutional clause."

This Court also recognised that protection afforded by Section 161(2) is wider than the protection afforded by Article 20(3) in some respects.

"*21.* … The learned Advocate General, influenced by American decisions rightly agreed that in expression Section 161(2) of the Code might cover not merely accusations already registered in police stations but those which are likely to be the basis for exposing a person to a criminal charge. Indeed, this wider construction, if applicable to Article 20(3), approximates the constitutional clause to the explicit statement of the prohibition in Section 161(2). This latter provision meaningfully uses the expression 'expose himself to a criminal charge'. Obviously, these words mean, not only cases where the person is already exposed to a criminal charge but also instances which will imminently expose him to criminal charges. In Article 20(3), the expression 'accused of any offence' must mean formally accused in praesenti not in futuro—not even imminently as decisions now stand." (SCC pp. 434-35, para 21)

(*iii*) This Court in *Nandini Satpathy case* [(1978) 2 SCC 424 : 1978 SCC (Cri) 236] opined that there is a "*cluster of rules*" commonly grouped under the term "*privilege against self-incrimination*". The origins of such privilege against self-incrimination are traceable to a sharp reaction to the practice of the Court of Star Chamber which readily convicted persons on the basis of self-incrimination. Such a rule of the common law is embodied in Article 20(3) of the Constitution of India.

(*iv*) This Court opined that the protection of Article 20(3) is available not only to a person who is facing trial for an offence before a court of law but even to a person embryonically accused by being brought into police diary. In other words, "suspects" but "not formally charged" are also entitled for the protection of Article 20(3).

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43. Section 132 existed on the statute book from 1872 i.e. for 78 years prior to the advent of the guarantee under Article 20 of the Constitution of India. As pointed out by Muttusami Ayyar, J. in *Gopal Doss* [ILR (1881) 3 Mad 271] , the policy under Section 132 appears to be to secure the evidence from whatever sources it is available for doing justice in a case brought before the court. In the process of securing such evidence, if a witness who is under obligation to state the truth because of the oath taken by him makes any statement which will criminate or tend to expose such a witness

> to a "*penalty or forfeiture of any kind, etc.*", the proviso grants immunity to such a witness by declaring that "*no such answer given by the witness shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding*". We are in complete agreement with the view of Ayyar, J. on the interpretation of Section 132 of the Evidence Act.
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> **44.** The proviso to Section 132 of the Evidence Act is a facet of the rule against self-incrimination and the same is a statutory immunity against self-incrimination which deserves the most liberal construction. Therefore, no prosecution can be launched against the maker of a statement falling within the sweep of Section 132 of the Evidence Act on the basis of the "*answer*" given by a person while deposing as a "*witness*" before a court.
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> **45.** In the light of our above discussion, we are of the opinion that the High Court rightly refused to summon PW 64 as an accused to be tried along with the appellant and others."
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> *(Emphasis Supplied)*

13] When the facts of the present case are tested on the anvil of the aforesaid decision of the Supreme Court, it leaves no manner of doubt that the case of the petitioner, who is made an accused on an application filed by the prosecution u/s.319 of Cr.P.C. on the basis of his deposition as a prosecution witness Pw/12, is squarely covered by the aforesaid authoritative pronouncement of the Supreme Court wherein, it has been clearly held that the deposition made by a witness cannot be used against him to arraign him as an accused under Section 319 of Cr.P.C. Thus, the impugned order is apparently cannot be sustained in the eyes of law.

14] On the other hand, also considering the fact that the application u/s.319 of Cr.P.C. has been allowed when 14 witnesses were already examined in around 9 years' time, the learned judge of the Trial Court ought to have used his discretion u/s.319 0f Cr.P.C. with great caution. The Supreme Court in the case of ***Michael Machado (Supra)*** has held as under:-

> **14.** The court while deciding whether to invoke the power under Section 319 of the Code, must address itself about the other constraints imposed by the first limb of sub-section (4), that proceedings in respect of newly-added persons shall be commenced afresh and the witnesses re-examined. The whole proceedings must be recommenced from the beginning of the trial, summon the witnesses once again and examine them and cross-examine them in order to reach the stage where it had reached earlier. If the witnesses already examined are quite large in number the court must seriously consider whether the objects sought to be achieved by such exercise are worth wasting the whole labour already undertaken. Unless the court is hopeful that there is a reasonable prospect of the case as against the newly-brought accused ending in being convicted of the offence concerned we would say that the court should refrain from adopting such a course of action."

15] In view of the aforesaid discussion, the impugned order dated 11.01.2024, being contrary to law, is liable to be, and is hereby set aside.

16] With the aforesaid, the petition stands ***allowed*** and ***disposed of***.

(SUBODH ABHYANKAR)
JUDGE

Bahar