(2000) 06 AP CK 0034

In the Andhra Pradesh High Court

Case No : Criminal Petition No. 457 of 2000

M. Kishan Rao and Others APPELLANT

Vs

Mrs. P. Santha Reddy and Another (No. 2) RESPONDENT

Date of Decision : 07-06-2000

Acts Referred:

Companies Act, 1956 — Section 299, 300, 624A, 627, 629A
Constitution of India, 1950 — Article 20(3)
Criminal Procedure Code, 1973 (CrPC) — Section 4, 4(2), 5, 93, 93(1)
Penal Code, 1860 (IPC) — Section 409, 411

Citation : (2002) 111 CompCas 373

Hon'ble Judges : Vaman Rao, J

Bench : Single Bench

Advocate : B. Adinarayana Rao, for the Appellant; C. Padmanabha Reddy, for C. Praveen Kumar and S. Ravi and Public Prosecutor, for the Respondent

Judgement

Vaman Rao, J.—The petition u/s 482 of Criminal Procedure Code, 1973, seeks quashing of the order dated January 28, 2000, passed by the Special Judge for Economic Offences in Crl. M. P. No. 139 of 2000 in C. C. No. 3 of 2000 under which the learned judge directed the issue of search warrant for searching the premises of registered office of accused No. 4--Spectrum Power Generation Ltd. for seizing the documents mentioned in the petition. Respondent No. 1 herein is the complainant in the said CC, which was taken on file by the learned special judge for the offences u/s 409 of the Indian Penal Code, 1860 and Sections 299, 300 and 629A of the Companies Act, 1956,

2. The parties shall be referred to as arrayed in the complaint.

3. The complaint in support of his petition for issuance of the search warrant has filed his affidavit. It is stated that the complainant filed a complaint against A-1 to A-4 for the offences under Sections 409 and 411 of the Indian Penal Code and also for the offences of contravention of Sections 297, 299 and 300 of the Companies Act and the same was taken cognizance of and summons was issued

to the accused. It is stated in the affidavit that in order to prove the said offence of contravention of offences under Sections 299 and 300 of the Companies Act, it is necessary to show that there was no resolution as required under the Companies Act, 1956, which constitute an offence. For this purpose, the minutes books of accused No. 4-company for the period November, 1992, to December, 1996, are necessary. Similarly, it is stated that the cash book of A-4-company for the period November 1, 1992, to March, 1996, along with the correspondence, vouchers and bank statements were also necessary to prove the offences under Sections 409 and 411 of the Indian Penal Code. It is stated that cash book of Kris Engineers together with correspondence, vouchers and bank statements are also necessary to prove the offence against the accused in the above case. It is stated that these documents are in the custody of the accused and they may not produce the same without altering or tampering with the said documents even if summons is issued to produce the same. It is stated that a general search warrant is necessary to search the premises of the registered office of A-4-company situated at the address given in the affidavit. It is stated that in the same premises, the office of Kris Engineers, registered partnership firm was also located.

4. On these allegations, the search warrant has been issued by the learned special judge for causing production of the minutes book of Spectrum Power Generation Limited from 1992 till date.

5. Before taking up the contentions on either side, it may be briefly mentioned as to the nature of the complaint in which the search warrant has been ordered.

6. Respondent No. 1 herein is the complainant, who is a shareholder of accused No. 4-company and petitioners Nos. 1 to 4 herein are accused Nos. 1 to 4 respectively. The sum and substance of the complaint is that A1 to A3 are the directors of accused No. 4-company and they entered into a sham contract with Kris Engineers, a partnership firm of which A2 and A3 are the only partners and that the alleged contract with Kris Engineers was entered into in violation of various provisions of the Companies Act punishable under the relative provision and Section 629A of the Companies Act and this contract itself was a mere device for transferring the funds of accused No. 4-company to Kris Engineers of which A2 and A3 are the partners who in turn have transferred the said amount to the account of accused No. 1. Thus, the allegation is that various provisions of the Companies Act have been contravened which constitute offences and that a sum of Rs. 50 lakhs has been misappropriated by the accused. It may be stated that the search warrant was issued ex parte before appearance of the accused in the case. This order issuing the search warrant is challenged on various grounds.

7. It is firstly stated that the first accused being the complainant in another C. C. No. 24 of 1-994 on the file of the Special Judge for Economic Offences for Economic Offences, Hyderabad, attended the court along with his counsel and during his presence the application for search warrant filed by the complainant was called. Accused No. 1 having come to know about the case against him, his

counsel represented to the court that notice may be ordered to the accused and they may be permitted to file a counter and may be heard. It is stated that the court passed over the matter to hear counsel for the complainant. The first accused''s counsel waited till 3 p. m. but the matter was not called and neither the complainant nor her counsel was present. As the learned judge was in his chambers, the first accused''s counsel left the premises and on January 29, 2000, when the first accused''s counsel verified the court diary, it came to light that the petition to appoint a Commissioner was allowed but no details have been mentioned in the said diary. On that day, the first accused''s counsel filed a petition for certified copies and on verification of the said copies, it came to light the issuance of search warrant in respect of the documents mentioned therein. This grievance about the order of search warrant having been issued without hearing the petitioner does not assume any significance inasmuch as notice was not ordered in the petition and the order in question was passed ex parte. Mere chance presence of the petitioner''s counsel in the court and his having mentioned the matter to the judge of which there is no record does not in itself lead to any infirmity in the order passed.

8. The order issuing the search warrant is now challenged mainly on the ground that the learned special judge in the facts and circumstances of the case had no jurisdiction to issue the search warrant and that at any rate the search warrant issued is contrary to the relevant provisions in the Criminal Procedure Code.

9. It is urged that in view of the provision in Section 627 of the Companies Act, it is adjudge of the High Court who can pass orders for search and inspection of records or for production of the relevant records from the custody of a company in a case where an officer of a company is alleged to have committed an offence in connection with the management of the company''s affairs. Section 627 of the Companies Act is extracted below :

"627. (1) If, on an application made to a judge of a High Court in chambers by the Public Prosecutor of the State or by the Central Government, or by a company prosecutor appointed u/s 624A, it is shown that there is reasonable cause to believe that any person has, while he was an officer of a company, committed an offence in connection with the management of the company''s affairs, and that evidence of the commission of the offence is to be found in any books or papers of or under the control of the company, an order may be made-

(i) authorizing any person named therein to inspect the said books or papers or any of them for the purpose of investigation, and obtaining evidence of the commission of, the offence ; or

(ii) requiring the managing agent, secretaries and treasurers or manager of the company or such other officer thereof as may be named in the order, to produce the said books or papers or any of them to a person, and at a place and time, named in the order.

(2) Sub-section (1) shall apply also in relation to any books or papers of a person

carrying on the business of banking so far as they relate to the company''s affairs, as it applies to any books or papers of or under the control of the company, except that no such order as is referred to in Clause (ii) thereof shall be made by virtue of this sub-section.

(3) No appeal shall lie from the decision of a judge of the High Court under this section."

10. On the basis of this provision, it is contended by Sri B. Audinarayana Rao, learned counsel for the petitioner that inasmuch as the accused in this case are sought to be prosecuted for various offences of contravention of the provisions of the Companies Act and for misappropriation of company funds, which are offences in connection with the management of the company''s affairs, an order in the nature of search and seizure for production of records could only be passed u/s 627 of the Companies Act and that Section 94 of Criminal Procedure Code cannot be pressed into service in such circumstances.

11. Learned counsel for the respondents Sri C. Padmanabha Reddy on the other hand contends that there is nothing in the language of Section 627 of the Companies Act to show that it abrogates the provisions in Section 94 of the Criminal Procedure Code and that a judge of the High Court is vested with exclusively jurisdiction to issue warrant in the nature of search and seizure and production of records from the office of the company where an officer of a company is sought to be prosecuted for the offences relating to the management of a company. It is pointed out that Section 627 of the Companies Act does not start with a non obstante clause which according to learned counsel is significant inasmuch as certain provisions in the same Part 13 of the Act, where the Legislature wanted to exclude the operation of the other provisions, there is a non obstante clause. Attention is invited to Sections 624, 624A and 624B of the Companies Act in this regard.

12. The absence of a non obstante clause may not always be conclusive to determine the question but is a relevant circumstance in interpreting the provision.

13. Here, a reading of Section 627 of Companies Act would make it clear that under this provision, an application can be made to a judge of a High Court only by public prosecutor of the State or by the Central Government or by a company prosecutor appointed u/s 624A of the Companies Act. Access to file an application before a judge is obviously not available to a shareholder who seeks to prosecute an officer of the company for an offence committed in connection with the management of the company. It is, therefore, obvious that the provisions in Section 627 of the Companies Act do not apply to the facts of the case inasmuch as in this case a shareholder is seeking to prosecute the directors of the company. It may be mentioned that even assuming that Section 627 of the Companies Act has created a special jurisdiction or conferred a special power or provided for any special form of procedure for making an application before a

judge of the High Court for issuing order in the nature of search and seizure or production of the records within the meaning of Section 5 of the Criminal Procedure Code, it merely implies that such a special jurisdiction, special power or special procedure can validly be enforced without infringing the provisions of Section 5 of the Criminal Procedure Code inasmuch as there is no specific provision which can be said to affect the said special jurisdiction etc. But the provisions in Section 627 of the Companies Act cannot have the effect of abrogating the provision in Section 94 of the Criminal Procedure Code inasmuch as Section 627 of the Companies Act can be invoked only when conditions prescribed therein are satisfied and Section 627 of the Companies Act does not permit a shareholder to make an application to a judge of High Court in chambers. The powers and procedure relating to investigation, enquiry or trial of offences under the Indian Penal Code shall be in accordance with the provisions of the Criminal Procedure Code as contemplated under Sub-section (1) of Section 4 of the Criminal Procedure Code. Inasmuch as Section 627 of the Companies Act cannot be construed as a provision enacted for regulating the manner or place of investigation, enquiring into, trying or otherwise dealing with the offences under the Companies Act, the provision under Sub-section (2) of Section 4 of the Criminal Procedure Code will come into play and all provisions in the Criminal Procedure Code in respect of investigation, enquiry or trial etc. shall be applicable. Issuing a search warrant is undoubtedly one of the modes of investigation or enquiry into an offence. Section 627 of the Companies Act enables special access to public prosecutor of a State, Central Government and company prosecutor to make an application to a judge of High Court for an order for production of records from the specified officers of the company. It excludes a shareholder from such a privilege.

14. In the result, I have no hesitation in holding that Section 627 of the Companies Act is not a substitute for issuing a search warrant and cannot have the effect of annulment of Section 94 of the Criminal Procedure Code in respect of investigation, enquiry or trial of offences committed by the officers of the company in connection with the management of the company.

15. It is further contended by Sri B. Audinarayana Rao, learned counsel for the petitioner that the order issuing the search warrant is without jurisdiction for another reason and amounts to an abuse of the process of the court. It is contended that u/s 91 of the Criminal Procedure Code whenever any court or any officer-in-charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceedings under this Code by or before such court or officer, such court may issue a summons, and such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order. It is contended that such summons could not be issued in respect of documents in the custody of an accused as held by the Supreme Court. The contention is where summons could

not be issued u/s 91 of the Criminal Procedure Code, a search warrant u/s 93(1)(a) of the Criminal Procedure Code cannot be issued on the ground that summonses or orders issued u/s 91 of Criminal Procedure Code were not likely to be complied with.

16. The impugned order passed by the learned special judge would show that it is purported to have been issued on the finding that the learned judge had reason to believe that the persons against whom search warrant was to be issued were not likely to produce the documents mentioned in the petition if a summons u/s 91 of the Criminal Procedure Code for production of records was issued. This observation obviously entails that the search warrant has been issued u/s 93(1)(a) of the Criminal Procedure Code which reads as follows :

"93. When search-warrant may be issued.--(1) (a) Where any court has reason to believe that a person to whom a summons or order u/s 91 or a requisition under Sub-section (1) of Section 92, has been, or might be, addressed will not or would not produce the document or thing as required by such summons or requisition, or"

17. Section 91 of the Criminal Procedure Code empowers any court or police officer or officer-in-charge of a police station, when it is considered that the production of any document or other thing is necessary or desirable for the purposes of any investigation, enquiry, trial or other proceedings under the Criminal Procedure Code by or before such court or officer, to issue a summons or a written order to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it at the time and place stated in the summons or the order.

18. The contention is that the search warrant issued u/s 93(1)(a) of the Criminal Procedure Code is illegal inasmuch as summons or an order u/s 91 of the Criminal Procedure Code could not have been issued against the petitioners who are the accused as it violates Article 20(3) of the Constitution of India. This contention is supported by the judgment of the Supreme Court in the case of State of Gujarat v. Shyamlal Mohanlal, AIR 1965 SC 1251. It has been clearly held in this case that Section 94 of the Criminal Procedure Code, 1898, the equivalent of which is Section 91 of the Criminal Procedure Code, 1973, does not apply to an accused.

19. However, after the impugned order was passed, it is relevant to note that along with this petition for quashing the said order under which the learned special judge ordered the search warrant, another criminal petition, i.e., Crl. P. No. 874 of 2000 has been filed in this court for quashing the proceedings in the relative C. C. No. 3 of 2000 on the file of the special judge for economic offences, Hyderabad, which has been separately disposed of. It has been held in the said criminal petition seeking quashing of the criminal proceedings against the petitioners that as far as Spectrum Power Generation Ltd., which has been arrayed as accused No. 4 is concerned, there is no material to proceed against

the said company for the offences alleged in the complaint and the criminal proceedings in respect of that company A4 have been quashed.

20. Thus, as of now, when this question has come up for consideration, it has to be proceeded on the assumption that the company A4 is no longer an accused in the relative criminal proceedings.

21. It has therefore become necessary to examine the validity of the order of the learned Magistrate issuing the search warrant in the light of the fact that it is directed against the company which was arrayed as accused No. 4 which can no longer be deemed to be an accused in that case. The affidavit filed on behalf of the petitioner in support of issuance of the search warrant specifically prays the court to issue a search warrant for causing production of the documents mentioned therein "by searching the premises of the registered office of Spectrum Power Generation Limited". Thus, in substance the search warrant was sought against the said company for searching its premises. Inasmuch as it has been held that there is no material to proceed against the company which is arrayed as accused No. 4 in respect of the alleged offences, the lack of power u/s 91 of the Criminal Procedure Code for issuance of summons or order for production of documents in question as against the said company (A4) cannot be pleaded as a ground for invalidating the search warrant issued.

22. It is pertinent to mention here that documents relating to the said company--SPGL sought to be produced by search are the minutes book for the period from 1992 till date and cash book of the said company from November, 1992, to March, 1996, together with corresponding vouchers. Petitioners Nos. 1 to 3 (accused Nos. 1 to 3) who are said to be the managing director and directors of the company cannot be said to have personal custody of these documents nor is there any such allegation in the affidavit filed on behalf of the petitioner. Thus, the contents of the affidavit of the petitioner and the circumstance relating to the custody of documents of an incorporated company would show that the search warrant was in fact sought to be directed against the company as such and not accused Nos. 1 to 3 and inasmuch as the said company is not an accused in view of the quashing of the proceedings against the said company, the search warrant must be deemed to have been issued against the company for production of the documents in its custody and not against A1 to A3. The order of the learned special judge specifically directs the search of the premises of the company (accused No. 4) as seen" from the following in para. 2 :

"Sri M. Jagadish Kumar, advocate is appointed as Commissioner to search the premises of the registered office of Spectrum Power Generation Ltd. (A4) situated at premises Nos. 6-28 and 6-29, near LB Nagar Municipal Office, Saroornagar, Hyderabad . . ."

23. This makes it abundantly clear that the search warrant was in fact directed against the company for search of the premises of its registered office. The learned special judge has recorded his finding of satisfaction for existence of

grounds for issuing search warrant in the following words :

"The material on record discloses that this court has reason to believe that the persons against whom search warrant to be issued are not likely to produce the documents mentioned in the petition which are in their possession by invoking the provisions of Section 91 of the Criminal Procedure Code. I am satisfied that the issue of search warrant is necessary and the requirement of the law for the issue of warrant are present. Hence issue search warrant as required."

24. In the light of what has been mentioned above as to the contents in the affidavit filed on behalf of the petitioner and the order passed by the learned judge as seen from the paras quoted above, the recording of the reasons by the learned judge to believe that the persons against whom search warrant has been issued were not likely to produce the documents mentioned in the petition had summons been issued must be deemed to refer to the SPGL, then arrayed as accused No. 4, inasmuch as the warrant itself was directed against the said company.

25. It is true that when the impugned order was passed by the learned special judge, the said company was very much arrayed as accused No. 4 before him and in that view of the matter, it is possible to contend that the order passed by the learned special judge was illegal as it could be said to have been issued on the basis that summons could have been issued u/s 91 of the Criminal Procedure Code against accused No. 4 also which in the light of the judgment of the Supreme Court cited above could not have been done as it violates Article 20(3) of the Constitution of India. But, this distinction loses its significance in view of very clear conceding on the part of learned counsel for both the parties during the hearing of the two connected criminal petitions that there was no material to proceed against accused No. 4 and that cognizance of the offence as against accused No. 4 was unwarranted and in view of the quashing of proceedings by this court against accused No. 4.

26. The validity of the order has to be examined in the light of the findings arrived at by this court and not necessarily on the facts as erroneously assumed by the trial court. Thus, it has to be held that search warrant was issued in accordance with law.

27. Learned counsel for the respondents Sri S. Ravi, further, urges that though the learned special judge is purported to have issued search warrant u/s 93(1)(a) of Criminal Procedure Code inasmuch as the grounds cited in support of the order is that if summons u/s 91 of the Criminal Procedure Code were to be issued, it was likely that they would not be complied with, but on the facts it is urged that the impugned order can be sustained in the light of the provisions u/s 93(1)(c) of the Criminal Procedure Code also.

28. The contention is that the affidavit filed by the petitioner in support of the petition specifically mentions in para. 7 that a general search warrant is necessary to search the premises of the registered office of accused No. 4-

company. Thus, the petitioner prayed for issuance of a search warrant u/s 93(1)(c) of the Criminal Procedure Code also. u/s 93(1)(c) of the Criminal Procedure Code, the court may issue a search warrant when it considers that the purpose of enquiry, trial or other proceedings under the Code will be served by general search or inspection to search, seize and produce the documents mentioned by the petitioner.

29. It has been held by the Supreme Court in the case of V.S. Kuttan Pillai Vs. Ramakrishnan and Another, , that when such a general search warrant was issued, in execution of it, the premises even in possession of the accused can be searched and the documents can be seized irrespective of the fact that the documents may contain some statements made by the accused upon personal knowledge, which when proved may have the tendency to incriminate the accused. Thus, the legal position is that such a search and seizure pursuant to search warrant issued u/s 93(1)(c) of the Criminal Procedure Code cannot be considered as subjecting the accused to compulsion to incriminate himself. Such a seizure and search obviously is not directed against the accused with a view to compel him to do anything like producing a document or making a statement. In fact, he is expected to do nothing. He can be a mere spectator of search proceedings. In fact, he is free to leave the place and be absent during the proceedings of search. The mere fact that the accused is in occupation of the premises which is subjected to search and even if such search resulted in the seizure of documents which may be attributable to the personal knowledge of the accused which may have the tendency to incriminate him, such search cannot be held to violate the constitutional guarantee against self-incrimination available to the accused under Article 20(3) of the Constitution of India.

30. The facts in the case of V.S. Kuttan Pillai Vs. Ramakrishnan and Another, , are that a search warrant was issued for searching the premises used as an office by an institution. The Supreme Court observed that the place will be in the possession of an institution. The office-bearers of the institution which was a "Sabha" were accused of an offence and the documents and the books of account were required for the purpose of trial against the office-bearers of the institution. It was observed that the office premises could not be said to be in the possession of the individual accused but stricto sensu would be in the possession of the institution. Books of account and other documents of the institution could not be said to be in the personal custody of the office-bearers of the institution but must be held to be in the possession of the institution and lying in the office of the institution. It has been held that search of an institution under the authority of a general search warrant can easily be sustained u/s 93(1)(c) of the Criminal Procedure Code.

31. The description of the premises of the nature of the institution referred to by the Supreme Court in the above case is equally applicable to a corporate office. It may be mentioned that the corporate offices are run in sprawling premises. There is nothing to show that A1 to A3 were having personal custody of the

documents sought to be seized during search. The petitioner has not furnished any information as to the specific place in the vast premises of the corporate office where those documents were lying. Under these circumstances, though the learned special judge has purportedly issued a search warrant u/s 93(1)(a) of the Criminal Procedure Code, the facts and circumstances of the case appear to justify the issuance of the general search warrant u/s 93(1)(c) of the Criminal Procedure Code also.

32. The important allegations as stated in the complaint against accused Nos. 1 to 3 are that they have contravened certain provisions of the Companies Act which is punishable under the relative provisions and Section 629A of the said Act. It is obvious that information about such contravention which includes absence of a resolution authorising the accused to enter into a contract, omission on the part of the accused to inform their personal interest in the contract, etc., could be secured from the records maintained by the company like minutes books and the account books. The crucial allegations against petitioners-accused Nos. 1 to 3 are that they entered into a sham contract with Kris Engineers and used it as a device for siphoning off the funds of the SPGL company to Kris Engineers and ultimately to A1 to A3. The account books of the company are relevant material which would furnish evidence in respect of this allegation. These documents would obviously be available in the registered office of the company.

33. Considering these circumstances, the test of probable cause both as to making out an offence and as to the availability of the documents sought to be seized by search must be held to have been made out. As to the requirement of particularity and specificity, under Sub-section (1)(a) of Section 93 of the Criminal Procedure Code, a search warrant can be issued when requirement of Section 91 of the Criminal Procedure Code would not have been complied with and a warrant could be issued to search a specific place belonging to the person to whom summons could have been issued. Whereas u/s 93(1)(b) of the Criminal Procedure Code, a search warrant could be issued where the required document or thing is not known to the court to be in the possession of any person but obviously when the place is known, the search warrant which could be issued u/s 93(1)(c) is apparently an exception to the requirement of particularity or specificity inasmuch as a general search warrant could be issued without specifying the particular place or the name of the person in whose custody the document is said to be lying. The circumstances of the case as noted above would show that there was a justification for issuing a general search warrant also as contemplated u/s 93(1)(c) of the Criminal Procedure Code.

34. Taking any view of the matter, the impugned order issuing the search warrant must be held to be in accordance with law.

35. It may, however, be noted that the above findings must be held to be only for the purpose of record inasmuch as the order issuing the search warrant is specifically challenged. It is necessary to mention here that after this petition

was filed, this court passed an interim order staying the execution of the search warrant. Under the interim orders; the respondents were directed to produce the relevant records into this court. In fact, that order has been complied with and the relevant records which were sought to be collected by the impugned search operation have been produced before the court and are lying in the custody of the Registrar (Judicial) of this court. Under the circumstances, the question of execution of the search warrant issued by the learned special judge which has been stayed under the interim orders of this court does not arise.

36. Under these circumstances, it is directed that the records produced in pursuance of the interim orders dated January 31, 2000, in Crl. M. P. No. 387 of 2000 which are now lying in the custody of the Registrar (Judicial) shall be transmitted under a sealed packet to the Court of the Special Judge for Economic Offences, Hyderabad and the learned special judge shall retain the documents as part of the record in the case and it shall be open to the parties to seek the use of these documents in such a manner as is permissible under law during the trial of the case.

37. With this direction, this petition is closed.