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Vivek Garg vs.state

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Court : Delhi

Decided On : Oct-25-2016

Appellant : Vivek Garg

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.M.C. No.2713/2016 Date of Decision:

25. h October, 2016 VIVEK GARG Through Mr.Puneet Goyal, Adv. .....

... Petitioner
STATE versus Through Nemo. CORAM: HON'BLE MR. JUSTICE P.S.TEJI P.S.TEJI, J ..... Respondent 1. The present petition under Article 226 & 227 read with Section 482 of the Code of Criminal Procedure, has been filed by the petitioner for setting aside the order dated 29th April, 2016, passed by the learned Special Judge-05, Anti-Corruption, Tis Hazari, Delhi in case titled as Vivek Garg Vs. Akhilesh Pati Tripathi, MLA & Others. vide Complaint Case No.14/2015.

2. A thumbnail sketch of the facts of the case is that Mr.Akhilesh Pati Tripathi, (respondent no.1 before the Trial Court) contested 2013 & 2015 Delhi Legislative Assembly Elections from Aam Aadmi Party and became a Member of Legislative Assembly (MLA) from Model Town constituency Elections 2013 both times Crl.M.C. No.2713/2016 Page 1 of 13 while the unnamed officials of Government of

NCT of Delhi and Election Commission of India (respondent nos.2 & 3 before the Trial Court). It is alleged that Mr.Akhilesh Pati Tripathi became an MLA in collusion with the unnamed officials of Election Commission of India and the officials of the Chief Electoral Office, DC North Office of Government of NCT of Delhi, by undervaluing a number of items used in the election campaign and thereby manipulated the accounts of expenditure incurred in Delhi Legislative Assembly Election 2013. It is further alleged that the crime was finally completed in January, 2014 when he submitted the final forged & fabricated accounts of election expenditure when the respondent no.1submitted the forged/fabricated accounts of election expenditure.

3. Learned counsel for the petitioner has contended that Section 78 of the Representation of People Act, 1951 provides that every candidate has to furnish true account of his election expenses maintained under Section 77 of the Act with the District Election Officer within 30 days from the date of declaration of the result of election. It is stated that maximum expenditure limit for Delhi Legislative Assembly Elections, 2013 was Rs.14,00,000/-. It is further stated that Mr.Akhilesh Pati Tripathi was served with a notice on 9th January, 2014 by the concerned Returning Officer Crl.M.C. No.2713/2016 Page 2 of 13 regarding the mal practice in the election expenditure and that in the said notice, two primary issues were raised, first on the procedural aspects of furnishing the accounts and the second on the manipulation of election expenditure. It is alleged that the inspection schedule notified by DEO (North) prescribing the dates on which the contesting candidates were to make available their day to day accounts in the prescribed manner, was not complied with by the respondent no.1. It is alleged that on the first date of inspection of election expenditure i.e. 23rd November, 2013, the expenditure register was produced for inspection but the same was not signed either by the candidate or by his election agent. It is contended that on the second date of inspection i.e. 28th November, 2013, the remarks of the expenditure observer are evident of mala fide intention. Learned counsel for the petitioner has alleged that on the second date of inspection i.e. 2nd December, 2013, the candidate failed to furnish the register for inspection as a result of which notice was issued by the Returning Officer pursuant whereto reply was filed by Mr.Akhilesh Pati Tripathi in which he did not submit that the accounts were

maintained on day to day basis; the reason for not furnishing the expenditure register in the prescribed manner and the reason for not furnishing the register on day to day basis. The petitioner has further pointed out the anomalies like Crl.M.C. No.2713/2016 Page 3 of 13 difference between the total expenditure shown by the respondent no.1 in the expenditure register and the abstract of the expenses shown by him; pages of the register not signed on the first date of inspection and the computerized account sheets being pasted one over the other.

4. The petitioner has further alleged the quantum of the election expenditure to the effect that in the notice dated 9th January, 2014, the accused has incurred expenditure of Rs.8,93,650/- over and above the expenditure shown in his expenditure register. It was further alleged that the candidate mentioned the rates of various items on lower side. It was further alleged that despite having knowledge of the offence committed by the candidate, no action against him was taken by the election officials.

5. The arguments advanced by counsel for the petitioner is that sufficient material was placed before the trial court but the same was ignored and complaint was dismissed. It was wrongly observed by the Trial Court that the accused was only a contesting candidate so the Prevention of Corruption Act did not apply on him. It was also wrongly observed that FIR against the accused persons cannot be registered without prior sanction. The officials of the concerned departments were corruptly managed by the MLA by abusing his official position. No sanction under the PC Act or Crl.M.C. No.2713/2016 Page 4 of 13 under the Cr.P.C. was required as the offences committed were not the part of official duties of the accused persons.

6. In support of above submissions, pronouncements in the case of Punjab State Warehousing Corp. Vs. Bhushan Chander & Anr. (Criminal Appeal No.159 of 2016 decided by Honble the Apex Court on 29th June, 2016); Maneesh E. Vs. State of Kerala & Ors. (Crl.M.C. No.7331/2015 decided by High Court of Kerala on 14th December, 2015); Lallan Chaudhary & Ors. Vs. State of Bihar & Anr. AIR 2006 SC3376 Suraj Mandal & Ors. Vs. CBI (State) 1997 JCC167& Lalita Kumari Vs. Govt. Of U.P. & Ors. AIR 2008 SC68have been relied upon.

7. I have heard learned counsel for the parties at length. I have also carefully gone through each and every allegation levelled by the petitioner in his petition against the respondents and perused the available records and judgment.

8. In so far as the allegations against the candidate are concerned, perusal of the record shows that it was alleged that he incurred expenditure more than the prescribed limits of Rs.14,00,000/-. Whether any such expenditure was made by the candidate or not is not a question to be decided by the Court but the remedy lies specifically in Rule 89 of the Election Rules. As per Rule 89 of the Election Rules, if the Election Commission after Crl.M.C. No.2713/2016 Page 5 of 13 conducting an enquiry finds the accounts of election expenses submitted by a candidate to be incorrect or untrue, it may disqualify the said candidate.

9. So far as the allegation against the unnamed officials of Election Commission of India & Govt. Of NCT of Delhi, deputed with Returning Office 18, is concerned, no specific allegation against any such officials was made in the complaint. No instance of showing any favour or disfavour by any of the officials of the Election Commission or Govt. of NCT of Delhi was alleged in the complaint. If for the sake of arguments, it is presumed that the officials did not scrutinize the final account of expenditure submitted by the candidate and did not take any action against him, the same does not fall within the meaning of criminal intent and there does not lie any criminal action against them. Since the allegations against the officials are alleged to have been committed during the discharge of their official duty, the submission of the petitioner that no sanction for lodging prosecution against such officials was required holds no basis.

10. So far the applicability of Section 156(3) Cr.P.C. is concerned, as per Section 190 of Cr.PC, when a complaint is received, the Magistrate is empowered to take cognizance of the offence disclosed in the complaint. After taking cognizance, the Crl.M.C. No.2713/2016 Page 6 of 13 Magistrate can adopt two methods. Firstly, the Magistrate may forward the complaint to the police under Section 156(3) Cr.PC, without taking cognizance, to investigate and file a report. Secondly, the Magistrate may take the cognizance of the offence disclosed in the complaint and conduct proceedings under Section 202 of Cr.P.C.

11. In the present case, the Trial Court rejected the complaint under Section 200 Cr.P.C. as well as application of the petitioner under Section 156(3) of Cr.PC. In the complaint, the petitioner made a prayer for issuance of direction to the police to investigate the matter. In the considered view of this Court, a complainant has no right or privilege to demand from the Magistrate to refer the case to the police. It is the discretion of the Magistrate, either he can forward the complaint to the police for investigation or he himself can take cognizance and proceed under Section 202 of Cr.P.C. or dismiss the same being without merit. In the present case, the Trial Court did not find any substance in the complaint filed by the petitioner and dismissed the same.

12. In the judgment CBI Vs. R.K. Yadav passed in WP (Crl.) No.903/2013 decided on 23rd December, 2015 & connected matter being CBI Vs. Dr.A.S. Narayana Rao in WP (Crl.) No.1540/2014, this Court observed that no personnel whether from CBI or any Crl.M.C. No.2713/2016 Page 7 of 13 other department, who does not fall within the meaning of the office-in-charge of a police station can be directed to investigate any case by the Special Judge, CBI. It was further observed in this judgment that the Special Judge has all powers under the Code, which are vested in the Court of original jurisdiction except the one specifically prohibited. Thus since the jurisdiction under Section 156(3) Cr.P.C. is not specifically denied, the Special Judge has the jurisdiction to direct registration of FIR under Section 156(3) Cr.P.C. as a Court of original jurisdiction which the Magistrate has.

13. However, the moot question in view of the decision of CBI v. State of Rajasthan (2001) 3 SCC333is whether the Special Judge can direct registration of FIR to CBI and whether the officer of CBI would be an officer in-charge of Police Station within the territorial jurisdiction of the Special Judge concerned. Their Lordships in CBI Vs. State of Rajasthan (supra) held that a Magistrate under Section 156(3) Cr.P.C. has no jurisdiction to order CBI to register FIR and investigate thereon. This was the predicament before the Learned Special Judge. According to him, since CBI was not a Police Station within its jurisdiction it could not direct registration of FIR under Section 156(3) Cr.P.C. in view of the decision of the Hon'ble Supreme Court in CBI Vs. State of Crl.M.C. No.2713/2016 Page 8 of 13 Rajasthan (supra).

14. It was further held by Punjab & Haryana High Court in Central Bureau of Investigation vs. Harsimranjit Singh & Ors. CRM-M-6758-2015 decided on 16.09.2015 as under:-

""In view of clear enunciation of law by Hon'ble Supreme Court, judgment of the single bench of Delhi High Court in A.S.Narayana Rao's case (supra) can be of no help to the petitioner. CBI Manual lays down elaborate procedure conducting the investigation. this court, Special Court is created only to conduct trial of cases which have already been investigated by CBI in cases of corruption as well as in special crime.... In considered view of for 15. In CBI through the SP v. State of Gujarat 2007 (6) SCC156 it was observed that : The only point for consideration in this revision is, whether a Special Judge could have directed the CBI to investigation under sec. 156(3) of the Code of Criminal the Procedure and report to him about offences mentioned in the complaint. It is undisputed that a private complaint was filed by the respondent no.2 against the accused. Action was taken by the Special Judge under sec. 156(3) of the Code and he directed the CBI to investigate the matter. The Apex Court in Central Bureau of Investigation, Jaipur v. State of Rajasthan 2001 AIR SCW305examined conflicting decisions of the Delhi and Rajasthan High Court on one hand & Gujarat and Karnataka High Court on the other hand and found that the view taken by the High Court of Delhi Rajasthan and Delhi in latest pronouncement Crl.M.C. No.2713/2016 Page 9 of 13 to conduct Decisions of cannot be substantiated. Rajasthan and Delhi High Court were overruled by the Apex Court. It was held by the Apex Court that the magisterial power under sec. 156(3) cannot be stretched beyond directing the officer incharge of a police station to conduct the investigation. A Magistrate, therefore, has no power to direct the Central Bureau of Investigation, CBI, investigation into any offence. It was, further, laid down that sec. 156 of the Code deals with investigation in the cognizable offence. If the power of a Magistrate to order investigation by the CBI in non-cognizable cases cannot be traced in sec. 156, it is not possible to trace such power in any other provision of the Code. What is contained in sub-section (3) of sec. 156 is the power to order the investigation referred to in sub-section (1), because the words order such an investigation as above- mentioned are unmistakably clear as referring to the other sub-section. Thus, the power is to order an officer to conduct investigation. From the definition

of police station and officer incharge of a police station, it is clear that a place or post declared by the Government as police station must have a police officer incharge of The primary responsibility for conducting investigation into offences in cognizable cases vests with such police officer. Sec. 156(3) of the Code empowers a Magistrate to direct such officer incharge of the any cognizable case over which such Magistrate has this judgment, the Apex Court concluded that we, therefore, reiterate that he magisterial power cannot be stretched under the said sub-section beyond directing the officere incharge of a police station to conduct the incharge of a police station In para-15 of jurisdiction. police station to investigate it. in sub-section (3) Crl.M.C. No.2713/2016 Page 10 of 13 investigation. 16. In S.P., CBI v. Satish 2015 LawSuit (Bom) 1273, it was observed that: that the failed Special After having considered the relevant provisions of the Code, we have no doubt in our mind Judge, Aurangabad exceeded his jurisdiction in directing investigation under Section 156(3) of the Code by CBI by the impugned order. learned Special The in Judge appreciating that CBI is an independent establishment created under the provisions of Delhi Special Police Establishment Act and in view of the provisions of Section 5 and 6 of the said Act, he was not empowered to direct investigation by it. The learned Special Judge further did not appreciate that CBI is not a local police station within his jurisdiction so as to invoke section 156(3) of the Code in directing investigation by it. The impugned order is, therefore, liable to be set aside and the same is accordingly set aside. However, original complainant, i.e. respondent No.1 in the present petition, is at liberty to move again to the Special Court, if he so desires, for appropriate orders for investigation of the offences alleged by him in the said complaint against Respondent Nos.2 to 6 in the present petition. Rule is made absolute in above terms. 17. In the case of State of West Bengal and Ors. v. Committee for Protection of Democratic Rights, West Bengal and Ors. AIR 2010 SC1476 it was observed that : Before parting with the case, we deem it Crl.M.C. No.2713/2016 Page 11 of 13 necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self- imposed limitations on the exercise of these Constitutional powers. The very plenitude of the power under the said Articles requires great caution in its exercise. In so far as the question of issuing a

direction to the CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because some allegations against the local police. This extra-ordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise the CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and unsatisfactory purpose investigations. levelled with a party has 18. In view of the law laid down in the judgments cited above, this Court is of the considered opinion that the Special Judge had no power to direct the CBI to conduct investigation under Section 156(3) of the Cr.P.C. about the offences mentioned in the complaint. It is undisputed that a private complaint was filed by Crl.M.C. No.2713/2016 Page 12 of 13 the petitioner. The magisterial power under Section 156(3) Cr.P.C. cannot be exercised directing the officer incharge of a police station to conduct the investigation. A Special Judge, therefore, has no power to direct the CBI to conduct investigation into any offence.

19. In view of the above discussion, this Court does not find any infirmity, illegality, impropriety or incorrectness in the impugned order dated 29th April, 2016 passed by the learned Special Judge- 05, Anti-Corruption, Tis Hazari, Delhi.

20. Consequently, this Court does not find any substance in the present petition. There is no merit in the present petition. The same is, accordingly, dismissed. OCTOBER25h, 2016 aa/dd (P.S.TEJI) JUDGE Crl.M.C. No.2713/2016 Page 13 of 13

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