Vincent George Vs. Cbi

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Court : Delhi

Decided On : Dec-23-2014

Judge : V.P.Vaish

Appellant : Vincent George

Respondent : Cbi

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

25. h September, 2014 Date of Decision:

23. d December, 2014 % + CRL. M.C. 3371/2013 VINCENT GEORGE Through: .Petitioner Mr. Guru Krishan Kumar, Sr. Advocate with Mr. R. Sudhindere and Mr. Abhishek Prasad, Advocates. versus CBI Through: .Respondent Mr. Narender Mann, Special PP for CBI with Mr. Manoj Pant and Ms. Utkarsha Kohli, Advocates with IO Inspector Sushil Diwan. CORAM: HONBLE MR. JUSTICE VED PRAKASH VAISH

JUDGMENT

1 The petitioner has challenged the impugned order dated 18.07.2013 and 19.07.2013 passed by learned Special Judge, CBI-03 (PC Act), Tis Hazari Court, Delhi in CC No.01/2013 arising out of RC No.4/2001/CBI/SIU-IX (EOU-VII/ New Delhi) titled as CBI vs. Vincent George whereby the petitioner was summoned for the offence punishable under Sections 13(1)(e) of Prevention of Corruption Act,

1988 (hereinafter referred to as the Act).

2. Shorn off unnecessary details, the facts of the case are that on 14.03.2000 on the basis of source information, preliminary inquiry No.PES19/2000/E0002 was registered. During the course of preliminary inquiry it transpired that the petitioner was a public servant during the period November, 1984 to November, 1989 and December, 1989 to December, 1990. During the said period, the total income of the petitioner, his wife and his minor children namely Master Dennis George and Ms. Priyana George from known sources of income was Rs.8,84,772.99/(Rupees Eight lakhs eighty four thousand seven hundred seventy two and ninety nine paise). Prior to 1984 the petitioner and his family members were in possession of moveable assets worth Rs.1,56,722/- (Rupees One lakh fifty six thousand seven hundred twenty two). The petitioner and his family members had acquired moveable and immoveable assets during the period November, 1984 to December, 1990 to the tune of Rs.18,82,417/(Rupees Eighteen lakhs eighty two thousand four hundred seventeen only). The expenses incurred by the petitioner and his family members during the said period were Rs.1,20,286.81 (Rupees One lakh twenty thousand two hundred eighty six and eighty one paise). Thus, the preliminary inquiry revealed that disproportionate assets found in possession of the petitioner and his family members at the end of December, 1990 were Rs.9,61,308.82 (Rupees Nine lakhs sixty one thousand three hundred eight and eighty two paise). On the basis of preliminary inquiry, FIR bearing Crime No.S-19/1999 E0006dated 20.03.2001 for the offence punishable under Section 13(2) read with Section 13(1)(e) of the Act was registered.

3. The investigation was conducted and on completion of investigation a final report dated 22.05.2013 for closure of the case was filed stating that the allegations of FIR have not been substantiated.

4. Vide impugned order dated 18.07.2013 the final report was not accepted and the petitioner was summoned for the offence punishable under Section 13(2) read with Section 13(1)(e) of the Act.

5. Feeling aggrieved by the said order the petitioner has filed the present petition.

6. Learned senior counsel for the petitioner contended that the income tax returns of the wife of the petitioner and children show that they had received gifts/ foreign remittances from his sister, brother and brother-inlaw through proper banking channels during the check period which was normally treated as acquisition of assets by the petitioner. He has also pointed out that the income tax return of the wife of the petitioner contemporaneous to the check period i.e. November, 1984 to December, 1990 duly incorporated the interest earned out of the foreign remittances received from the brother and brother-in-law of the petitioner. According to him, the said income will not come within the purview of the income of the petitioner nor could it be taken as income from unknown sources. It was also submitted that once receipt of money is satisfactorily explained as belonging to them, the same cannot be clubbed with the income of the petitioner. The wife of petitioner and his children were independent account holders and were independent income tax assessees and were paying income tax on the amounts held by them, all the foreign remittances received by them were received through proper channels and were disclosed in their income tax returns.

7. It was also contended by learned senior counsel for the petitioner that there was no cash deposit or unexplained income from any source. Each foreign remittance received by the family members of the petitioner was from an identified source and through an identified bank which was duly disclosed in the wealth tax return of the family members of the petitioner. The record of payments through banking channels disclosed that income tax and wealth tax return were not in contemplation of legal proceedings. The persons who had made such remittances had been examined during investigation and they have confirmed that the said amount was remitted as gifts towards education of children of the petitioner.

8. Lastly, it was contended on behalf of petitioner that according to the prosecution, the disproportionate income of the petitioner was 1.52%, which is insignificant.

9. Per contra, learned special PP for CBI urged that the plea taken by the petitioner is a matter of trial. According to Section 13(1)(e) of the Act satisfactory explanation must be given before the Court and not before the investigating

agency.

10. I have given my thoughtful consideration to the submissions of learned senior counsel for the petitioner as well as learned special public prosecutor for CBI and have perused the material on record.

11. The scope of exercising power under Section 482 of Cr.P.C. and the categories of cases where the High Court can exercise this power relating to cognizable offences to prevent abuse of process of any Court or otherwise to secure the ends of justice were laid down by the Honble Supreme Court of India in State of Harayana vs. Bhajan Lal, 1992 Supp. (1) SCC335 A note of caution was, however, added that the power should be exercised sparingly and that too in rarest of rare cases. The illustrative cases indicated by the Apex Court are as follows: (i) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused. (ii) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code. (iii) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused. (iv) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code. (v) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused. (vi) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party. (vii) Where a criminal proceeding is manifestly attended with

malafide and/ or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

12. There are a catena of judgments of the Honble Supreme Court. However, specific reference can be made to State of U.P. vs. Golconda Linga Swamy & Anr., (2004) 6 SCC522 wherein it was held that while exercising the powers under Section 482 of Cr.P.C., the Court does not function as a Court of appeal or revision and that such a power though very wide, has to be exercised sparingly, carefully and with caution and only when such exercise is justified by tests laid down in the section itself. Section 482 of Cr.P.C. envisages three circumstances under which inherent jurisdiction may be exercised namely; (i) to give effect to an order under Cr.P.C., (ii) to prevent abuse of process of the Court, and (iii) to otherwise secure ends of justice.

13. In Golconda Linga Swamys case (supra) it was also held that it is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction in the enactment dealing with the procedure and provide with all cases that possibly arise. When the complaint is sought to be quashed it is permissible to look into material to assess what the complainant has alleged and whether any offence is made out even if the allegation are accepted in toto. Similarly, in the case of Devendra & Ors. Vs. State of Uttar Pradesh & Anr., (2009) 7 SCC495 Honble Supreme Court observed that when the allegations made in the first information report or the evidences collected during investigation do not satisfy the ingredients of an offence, the superior Court would not encourage harassment of a person in a Criminal Court for nothing.

14. In view of the settled proposition of law as noted above, there does not remain any doubt that this Court has inherent power under Section 482 Cr.P.C. and also extraordinary power under Article 226 of the Constitution of India to entertain the present petition. Since power is to be exercised sparingly due care and caution will be required to examine the allegations as set out in the FIR and also brought up from the evidence gathered during investigation.

15. As noted above the power exercised by this Court under Section 482 of Cr.P.C. are very wide and the very plenitude of the power requires a great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principle. The inherent powers should not be exercised to stifle a legitimate prosecution. Of course, no hard and fast rule can be laid down in regard to cases in which this Court will exercise its extraordinary jurisdiction of quashing the proceedings at any stage.

16. The above position was highlighted in State of Karnataka vs. M. Devendrappa, (2002) 3 SCC89 17. Again the Apex Court in R.P. Kapoor vs. State Punjab, AIR 1960 SC866 summarized some categories of cases where inherent power can and should be exercised to quash the proceedings; (i) where it manifestly appears that there is a legal bar against the institution or continuous for example want of sanction; (ii) where the allegation in the first information report or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged; (iii) where the allegation constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

18. In dealing with the case referred in clause (iii) of said judgment, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusation made and a case where there is legal evidence, which on appreciation, may or may not support the accusation. The judicial process should not be an instrument of oppression, or needless harassment. The Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly.

19. The law regarding summoning of an accused was considered by the Honble Supreme Court of India in Pepsi Foods Ltd. & Anr. vs. Special Judicial Magistrate & Ors., (1998) 5 SCC749 wherein it was held:

28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.

29. No doubt the Magistrate can discharge the accused at any stage of the trial if he considers the charge to be groundless, but that does not mean that the accused cannot approach the High Court under Section 482 of the Code or Article 227 of the Constitution to have the proceeding quashed against him when the complaint does not make out any case against him and still he must undergo the agony of a criminal trial. It was submitted before us on behalf of the State that in case we find that the High Court failed to exercise its jurisdiction the matter should be remanded back to it to consider if the complaint and the evidence on record did not make out any case against the appellants. If, however, we refer to the impugned judgment of the High Court it has come to the conclusion, though without referring to any material on record, that in the present case it cannot be said at this stage that the allegations in the complaint are so absurd and inherently improbable on the basis of which no prudent man can ever reach a just conclusion that there exists no sufficient ground for proceedings against the accused. We do not think that the High Court was correct in coming to such a conclusion and in coming to that it has also foreclosed the matter for the Magistrate as well, as the Magistrate will not give any different conclusion on an application filed under Section 245 of the Code. The High Court says that the appellants could very well appear before the court and move an application under Section 245(2) of the Code

and that the Magistrate could discharge them if he found the charge to be groundless and at the same time it has itself returned the finding that there are sufficient grounds for proceeding against the appellants. If we now refer to the facts of the case before us it is clear to us that not only that allegation against the appellants do not make out any case for an offence under Section 7 of the Act and also that there is no basis for the complainant to make such allegations. The allegations in the complaint merely show that the appellants have given their brand name to Residency Foods and Beverages Ltd.

for bottling the beverage Lehar Pepsi. The complaint does not show what is the role of the appellants in the manufacture of the beverage which is said to be adulterated. The only allegation is that the appellants are the manufacturers of bottle. There is no averment as to how the complainant could say so and also if the appellants manufactured the alleged bottle or its contents. His sole information is from A.K. Jain who is impleaded as Accused 3. The preliminary evidence on which the first respondent relied in issuing summons to the appellants also does not show as to how it could be said that the appellants are manufacturers of either the bottle or the beverage or both. There is another aspect of the matter. The Central Government in the exercise of their powers under Section 3 of the Essential Commodities Act, 1955 made the Fruit Products Order, 1955 (for short the Fruit Order). It is not disputed that the beverage in question is a fruit product within the meaning of clause (2)(b) of the Fruit Order and that for the manufacture thereof certain licence is required. The Fruit Order defines the manufacturer and also sets out as to what the manufacturer is required to do in regard to the packaging, marking and labelling of containers of fruit products. One of such requirements is that when a bottle is used in packing any fruit products, it shall be so sealed that it cannot be opened without destroying the licence number and the special identification mark of the manufacturer to be displayed on the top or neck of the bottle. The licence number of the manufacturer shall also be exhibited prominently on the side label on such bottle [clause (8)(1)(b)].. Admittedly, the name of the first appellant is not mentioned as a manufacturer on the top cap of the bottle. It is not necessary to refer in detail to other requirements of the Fruit Order and the consequences of infringement of the Order and to the penalty to which the manufacturer would be exposed under the provisions of the Essential

Commodities Act, 1955. We may, however, note that in Hamdard Dawakhana (Wakf) v. Union of India [AIR 1965 SC1167: (1965) 2 SCR192 an argument was raised that the Fruit Order was invalid because its provision indicated that it was an Order which could have been appropriately issued under the Prevention of Food Adulteration Act, 1954. This Court negatived this plea and said that the Fruit Order was validly issued under the Essential Commodities Act. What we find in the present case is that there was nothing on record to show if the appellants held the licence for the manufacture of the offending beverage and if, as noted above, the first appellant was the manufacturer thereof.

20. Before adverting to the facts of the present case, it would be appropriate to consider the relevant provisions of Section 13(1)(e) of Prevention of Corruption Act, which reads as under:

13. Criminal misconduct by a public servant - (1) A public servant is said to commit the offence of criminal misconductxxx xxx xxx (e) if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.

21. On analysis of provisions of Section 13(1)(e) of the Act, it is manifestly clear that it is not the mere acquisition of property that constitutes an offence under the provisions of the Act but it is the failure to satisfactorily account for such position that makes the position objectionable as offending the law. To substantiate a charge under Section 13(1)(e) of the Act, the prosecution must prove the essential ingredients namely (i) the prosecution must establish that accused is a public servant; (ii) the nature and extent of the pecuniary resources or property which were found in his possession; (iii) it must be proved that as to what were his known sources i.e. known to the prosecution; (iv) it must prove quite objectively that such resources or property found in possession of the accused were disproportionate to his known sources of income. Once the said ingredients are satisfactorily establish, the offence under Section 13(1)(e) of the Act is complete, unless the accused is able to account for such resources or property. The initial burden is on the prosecution to establish that the accused had acquired the

property disproportionate to his known sources of income. It is only after the prosecution has proved the requisite ingredients, the burden of satisfactorily accounting for the position of such resources or property shifts on the accused.

22. In the instant case, the check period is w.e.f. 01.11.1984 to December, 1990. As per final report filed by the CBI the total income of the petitioner during the said period was Rs.8,84,772.99 (Rupees Eight lakhs eighty four thousand seven hundred seventy two and ninety nine paise) (which includes the amount of Rs.4,94,476.50 transferred from NRE account of Mr. Zacharia P. Thomas). The expenditure incurred during the said period was Rs.1,20,286.81 (Rupees One lakhs twenty thousand two hundred eighty six and eighty one paise) and the likely saving was Rs.7,64,386.18 (Rupees Seven lakhs sixty four thousand three hundred eighty six and eighteen paise). The assets found at the beginning of November, 1984 was Rs.1,56,722/- (Rupees One lakhs fifty six thousand seven hundred twenty two) and assets found at the end of December, 1990 was Rs.18,82,417/(Rupees Eighteen lakhs eighty two thousand four hundred seventeen). Thus, the disproportionate asset found in possession of petitioner and his family members at the end of December, 1990 was Rs.9,61,308.82 (Rupees Nine lakhs sixty one thousand three hundred eight and eighty two paise).

23. During investigation it was revealed that the father of the petitioner (Mr. M.V. George) has two daughters and two sons. His eldest daughter Smt. Lizzy Zacharia is settled in U.S.A. along with her husband Mr. Zacharia P. Thomas and their two children. His second daughter Mariamma Varghese and her husband Mr. K.E. Varghese are teachers in Kerala. His youngest son John M. George, younger brother of Mr. Vincent George, is also settled with his family in U.S.A. It was also revealed that a sum of Rs.4,94,476.50 (Rupees Four lakhs ninety four thousand four hundred seventy six and fifty paise) was transferred from NRE account of Mr. Zacharia P. Thomas and money received by wife of the petitioner (Mrs. Lilly George). In addition to this, several other transfers were also made in the bank account of Mrs. Lilly George, Priyana George and Dennis George by way of remittances from close relatives including his sister, Smt. Lizzy Zacharia and his brother-in-law Mr. Zacharia P. Thomas and his younger brother Mr. John M. George, who are settled in USA. It was also revealed that as per statement of

NRE account No.17695 in SBI, Moti Nagar, New Delhi standing in the name of Mr. Zacharia P. Thomas on 07.10.1987 Rs.4,476.50 (Rupees Four thousand four hundred seventy six and fifty paise), on 08.03.1988 Rs.1,25,000/- (Rupees One lakh twenty five thousand), on 13.10.1990 Rs.1,25,000/- (Rupees One lakh twenty five thousand) and again on 13.10.1990 Rs.2,40,000/- (Rupees Two lakhs forty thousand) were transferred from this NRE account No.17695 of Mr. Zacharia P. Thomas to SB A/c No.15200 of Mrs. Lilly George maintained in the same Branch. The credit entries of all these transfers amounting to Rs.4,94,476.50 (Rupees Four lakhs ninety four thousand four hundred seventy six and fifty paise) in the account of Mrs. Lilly George have been taken as income.

24. During investigation it was also revealed that close relatives of the petitioner namely Mr. Zacharia P. Thomas and Mr. John M. George who are settled in U.S.A. helped the petitioner financially. The remittances pertain to the period from 1984 till 1990 including remittance of US$ 40000 which were transferred on 12.04.1990 which shows that this was a gift made by Mr. Zacharia P. Thomas from U.S.A. Two FDRs of Rs.3,37,957/- (Rupees Three lakhs thirty seven thousand nine hundred fifty seven) each in the name of Priyana George and Dennis George have been opened in Canara Bank, Diplomatic Enclave Branch out of the said remittances. The petitioner and his wife claimed that these foreign remittances/ gifts have been received by them through proper banking channels and the interest of these remittances/ gifts have also been mentioned in their income tax returns.

25. As per final report, the investigation revealed the moveable assets at the beginning of the check period i.e. 01.11.1984 by the petitioner and his family members was Rs.1,56,722/- (Rupees One lakh fifty six thousand and seven hundred twenty two) and moveable asset at the end of check period i.e. 31.12.1990 was Rs.13,40,407/- (Rupees Thirteen lakhs forty thousand and four hundred seven). The immoveable asset at the end of the check period was Rs.6,56,510/- (Rupees Six lakhs fifty six thousand and five hundred ten), thus, the total assets moveable and immoveable at the end of check period was Rs.19,96,917/- (Rupees Nineteen lakhs ninety six thousand and nine hundred seventeen) (Rs.13,40,407/- + Rs.6,56,510/-). The income of the petitioner and his

family members during the check period was found to be Rs.3,52,716.02 (Rupees Three lakhs fifty two thousand seven hundred sixteen and two paise). The investigation also revealed that the foreign remittances received by the family members of the petitioner during the check period was Rs.16,20,650.38 (Rupees Sixteen lakhs twenty thousand six hundred fifty and thirty eight paise) and, therefore, the total income of the petitioner and his family members during the check period was Rs.19,73,366.40 (Rupees Nineteen lakhs seventy three thousand three hundred sixty six and forty paise). The petitioner and his family members had incurred the expenditure during the check period to the tune of Rs.1,63,203.22 (Rupees One lakh sixty three thousand two hundred three and twenty two paise).

26. The total foreign remittances of Rs.16,20,650.38 (Rupees Sixteen lakhs twenty thousand six hundred fifty and thirty eight paise) as received by the family members of the petitioner was treated as income including the amount of Rs.4,94,476.50 (Rupees Four lakhs ninety four thousand four hundred seventy six and fifty paise). Thus, the total income of the petitioner and his family members was Rs.19,73,366.40 (Rupees Nineteen lakhs seventy three thousand three hundred sixty six and forty paise) against the one earlier calculated as Rs.8,47,192.52 (Rupees Eight lakhs forty seven thousand one hundred ninety two and fifty two paise) in FIR.

27. It was also revealed during the investigation that the petitioner and Ms. Lilly George and her two children were income tax assesses during the relevant period. The income tax and wealth tax returns were filed by the petitioner and his wife for the year 1985-86 to 1990-91. The petitioner paid a sum of Rs.22,327/- (Rupees Twenty two thousand three hundred twenty seven) as income tax during the check period from his salary as TDS and, therefore, the said amount cannot be taken as expenditure during the check period. Mrs. Lilly George paid a sum of Rs.14,262/- (Rupees Fourteen thousand two hundred sixty two) as income tax and Rs.1,345.65 (Rupees One thousand three hundred forty five and sixty five paise) as wealth tax during the check period. These expenditure of Rs.14,262/- (Rupees Fourteen thousand two hundred sixty two) and Rs.1,345.65 (Rupees One thousand three hundred forty five and sixty five paise) were taken into expenditure

head because these amounts were paid by Mrs. Lilly George to Income Tax Authorities and Wealth Tax Authorities during the check period. According to the CBI, the petitioner and his family members during the check period were found in possession of disproportionate assets to the tune of Rs.30,031.82 (Rupees Thirty thousand thirty one and eighty two paise) i.e. 1.52%.

28. The Apex Court in Krishnanand Agnihotri vs. State of M.P., AIR 1977 SC796 it was observed as under:

It will, therefore, be seen that as against an aggregate surplus income of Rupees 44,383.59 which was available to the appellant during the period in question, the appellant possessed total assets worth Rupees 55,732.25 the assets possessed by the appellant were thus in excess of the surplus income available to him, but since the excess is comparatively small it is less than ten per cent of the total income of Rs.1,27,715.43 we do not think it would be right to hold that the assets found in the possession of the appellant were disproportionate to this known sources of income so as to justify the raising of the presumption under sub-section (3) of Section 5. We are of the view that, on the facts of the present case the High Court as well as the Special Judge were in error in raising the presumption contained in sub-section (3) of Section 5 and convicting the appellant on the basis of such presumption.

29. The said position was also highlighted by the Apex Court in M. Krishna Reddy vs. State, Deputy Superintendent Police, Hyderabad, (1992) 4 SCC45 30. In the present case, according to the prosecution the value of disproportionate assets was Rs.30,031.82 (Rupees Thirty thousand thirty one and eighty two paise) which is 1.52% of the total income. If the factual position is considered in the background of legal principles elaborated above, in my view, the impugned order passed by the trial court whereby the petitioner was summoned is liable to be set aside.

31. As a result of the above discussion, the petition is allowed. Consequently, order dated 18.07.2013 and 19.07.2013 passed by learned Special Judge-03 (PC Act), Tis Hazari Court, Delhi in CC No.01/2013 is set aside.

32. The trial court record be sent back forthwith. Crl.M.A. 12556/2013 The application is dismissed as infructuous. (VED PRAKASH VAISH) JUDGE DECEMBER23d, 2014 hs