
(2015) 04 DEL CK 0110

In the Delhi High Court

Case No : Criminal M.C. 5144/2014 & Crl. M.A. No. 17580 of 2014

Central Bureau of Investigation

APPELLANT

Vs

Unknown Officers of Special Frontier Force and Others

RESPONDENT

Date of Decision : 17-04-2015

Acts Referred:

Constitution of India, 1950 — Article 227

Criminal Procedure Code, 1973 (CrPC) — Section 100, 100 (4), 100(4), 100(5), 151

Penal Code, 1860 (IPC) — Section 120-B, 420, 467, 468, 471

Prevention of Corruption Act, 1988 — Section 13 (2), 13(1) (d)

Citation : (2015) 3 JCC 1613

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Sonia Mathur, Sushil Kr. Dubey, Advocates, Satender Singh, IO and Party-in-Person, for the Appellant

Final Decision : Allowed

Judgement

Manmohan Singh, J.—The present petition has been filed by the petitioner under Section 482Cr.P.C. and Article 227 of Constitution of India for setting aside the order dated 28th October, 2014 and 10th November, 2014 passed by Special Judge, CBI, Patiala House Court, New Delhi.

In terms of impugned order dated 28th October, 2014, Special Judge directed the concerned Superintendent of Police, CBI and DIG, CBI to furnish written explanation and the action taken report against erring officials in terms of the law laid and procedure established, within 10 days for alleged flagrant violations of salutary provisions contained in Sub-section (4) and (8) of Section 100 Cr.P.C. as well as for non recording of appropriate statements of witnesses of search till date. In terms of order dated 10th November, 2014 the Special Judge further directed SP and DIG concerned to furnish written submission before 12th November, 2014 as to why matter be not proceeded against them in terms of law laid and procedure established for non compliance of direction in terms of order dated 21st October, 2014 and 28th October, 2014 and their wilful disobedience.

2. The brief facts of the case are as under:-

i) The Central Bureau of Investigation (CBI) Anti Corruption - 1, New Delhi registered an FIR No. RC AC 1 2014 A 0008 on 21st October, 2014 on basis of complaint dated 14th October, 2014 by Shri Ravi Mathur, Special Secretary, Cabinet Secretariat, Government of India, Bikaner House (Annexe), New Delhi.

ii) The complaint was filed against the Unknown officers of Special Frontier Force, Unknown Officers of Cabinet Secretariat, Directors of M/s. Sai Baba Builders and Consultants Private Limited and others under Section 120-B, 420, 467, 468, 471 IPC and Section 13 (2) read with 13(1) (d) of Prevention of Corruption Act, 1988 and substantive offences thereof.

iii) The allegations in brief are that in the procurement and installation of pre-fabricated "shelters in various field units of SFF in phases I and II, which were awarded to M/s. Sai Baba Builders and Consultant Pvt. Ltd. at the cost of Rs. 3.96 crore and at the cost of Rs. 13.27 crore, unknown officers involved in the process of preparation of tender, procurement, installation and commissioning indulged in criminal omission and commission to grant undue favour to M/s. Sai Baba Builders and Consultant Pvt. Ltd.

iv) It was alleged that the private vendor manipulated documents required for eligibility conditions in the said tender and also submitted forged documents to the tender committee. The public servants colluded with the vendors for manipulation of tender conditions, delivery conditions, etc to extend undue favour to the contractors leading to corresponding loss to state exchequer. The technical evaluation of the bids and inspection of stores was not done in accordance with the relevant financial rules to grant undue favour.

v) For the purpose of investigation an application dated 21st October, 2014 was moved before Special Judge, Patiala House, New Delhi for obtaining search warrants under Section 93 Cr.P.C. for conducting searches at the following 3 premises:-

i) A-36, Flat No. G-5, Kailash Colony, New Delhi residence of Sh. Shyam Sunder Bhattar, Director of M/s. Sai Baba Builders and Consultant Pvt. Ltd. and M/s. Rockside Impex Pvt. Ltd.

ii) R-122, Greater Kailash-I, New Delhi property in possession of Ms. Manjari, Director of M/s. Sai Baba Builders and Consultant Pvt. Ltd. and her husband Sh. S P Singh.

iii) 36 and 37, Round Tank Lane, Howrah, West Bengal- 711101 residence of Jai Prakash Narayan Singh, Director of M/s. Sai Baba Builders and Consultant Pvt. Ltd.

vi) The Special Judge, Patiala House Courts, New Delhi was pleased to issue search warrants for conducting searches at the above said three premises vide order dated 21st October, 2014 with instructions to submit the compliance

Report within 24 hours of the search. It was also mentioned that official conducting search shall comply with all procedures laid down under Section 100 Cr.P.C.

3. It is the case of CBI that for the purpose of witnessing the searches, as per normal practice followed, independent witnesses were arranged from different Government organizations and PSUs and searches were conducted at the above said premises on 22nd October, 2014 after duly observing all legal formalities. The search report was filed before the Court of Duty Magistrate on 23rd October, 2014 i.e. within 24 hours of the search.

The compliance report was forwarded by the Duty Magistrate Court to the Court of Special Judge, Patiala House, New Delhi on 27th October, 2014 after the Diwali Vacations. On 27th October, 2014, an application was filed in the Court of Special Judge, Patiala House, New Delhi for the retention of the document seized during searches as the same were required for the purpose of investigation.

4. The matter was heard by the Court of Special Judge, Patiala House, New Delhi on 28th October, 2014 whereby the Special Judge in terms of impugned order has directed the concerned Superintendent of Police, CBI and DIG, CBI to furnish written explanation and the action taken report against erring officials in terms of the law laid and procedure established, within 10 days for such flagrant violations of salutary provisions contained in sub-section (4) and (8) of Section 100 of Cr.P.C. as well as for non recording of appropriate statements of witnesses of search till date.

5. The matter was thereafter listed on 10th November, 2014 before the Special Judge. Since the written explanation and action taken report could not be filed, by order dated 10th November, 2014 SP and DIG concerned were directed to furnish written submission before 12th November, 2014 as to why matter be not proceeded against them in terms of law laid and procedure established for non compliance of direction in terms of order dated 21st October, 2014 and 28th October, 2014 and their wilful disobedience.

6. The main reasons for passing the impugned orders are as follows:

(a) Omission on the part of I.O. and officials conducting search to join respectable persons of locality to witness the search and recovery is flagrant violations of salutary provision contained in sub-section (4) and (8) of Section 100 of Cr.P.C.

(b) I.O. has not written all case diaries and supplementary case diaries are written by officials other than I.O.

(c) Statement of witnesses of search under Section 161 Cr.P.C. needs to be recorded in terms of law and procedures established.

(d) Loose sheets of the case diaries have been tagged in a folder and have not been maintained in a volume in terms of mandate contained under Section

172(1B) Cr.P.C.

7. Aggrieved by the aforesaid impugned orders, therefore, the petitioner has filed the present petition on various grounds for quashing of orders dated 28th October, 2014 and 10th November, 2014. The same are as follows :

i) That the Special Judge has failed to appreciate the fact that it is very difficult to call independent members of the locality or adjoining locality to join investigation as members of search team as the searches are generally conducted in early hours of morning and may take 6 to 18 hours in normal course. It is also difficult, in the interest of justice or case, to initiate action against the erring members of the locality for not joining investigation, by shifting focus from the main case whereof search is to be conducted.

ii) That the Special Judge has failed to appreciate the fact that non joining of witnesses from the locality and joining of witnesses from public sector banks is no more an irregularity, which has been upheld by the Supreme Court in *Sunder Singh Vs. State of Uttar Pradesh*, AIR 1956 SC 411 : (1956) CriLJ 801 ; *Radhakishan Vs. State of U.P.*, AIR 1963 SC 822 : (1963) 2 LLJ 667 : (1963) 1 SCR 408 Supp ; *Kamalabai Jethamal Vs. The State of Maharashtra*, AIR 1962 SC 1189 : (1962) 2 SCR 632 Supp ; *Tej Bahadur Singh vs. State of UP*, (1970) 3 SCC 779 and *State of Punjab Vs. Wassan Singh and Others*, AIR 1981 SC 697 : (1981) CriLJ 410 : (1981) 1 SCALE 146 : (1981) 2 SCC 1 : (1981) SCC(Cri) 292 : (1981) 2 SCR 615 .

iii) That the Special judge has failed to appreciate that letters were issued to various organizations (Government and Central PSUs) for deputing their officials to act as independent witnesses for the secret work to be undertaken by CBI as per practice being followed in CBI. This issuance of letters to various organizations is as per the provisions of Section 100(4) Cr.P.C. in which request is made to the concerned authorities to depute their official to act as independent witnesses for secret work. The purpose of search is not mentioned in order to maintain secrecy of the investigation. The exercise is taken only to ensure that the witnesses to search are independent and credible.

iv) That the Special Judge has failed to appreciate that Section 100 (4) Cr.PC. does not unconditionally mandate the search team to take the witnesses from the same locality. The section clearly provides that if respectable and independent witnesses are not available from the same locality then witnesses from other locality can be taken. Perusal of Section 100(4) Cr.PC. reveal that it does not prescribe that if the inhabitants of the locality are not available then they must be from the neighbouring locality only and of nowhere else. Section 100(4) Cr.PC. only says that the witnesses can be from any other locality.

v) That the Special Judge has failed to appreciate that orders under Section 100(4) Cr.P.C are required to be issued if the inhabitants are not willing to act as witnesses or in cases where the police team comes to conclusion that the inhabitants of the locality without reasonable cause are refusing or neglecting to

attend and witness a search under this section. The ground of issuance of order under the provision of Section 100(4) Cr.PC. is to force attendance of such persons who do not want to act as search witness without reasonable cause. If the Police Team is satisfied that the inhabitants of the locality have reasonable and valid reasons for not attending the searches then issuance of orders to such inhabitants under Section 100(4) is not required. The word used in Section 100(4) Cr.PC. is "may" which means it is a discretion of the team to decide whether to issue such order or not.

vi) That the Supreme Court in the matter of State of U.P. Vs. Zakauallah, AIR 1998 SC 1474 : (1998) CriLJ 863 : (1998) 1 Crimes 58 : (1997) 10 JT 54 : (1997) 7 SCALE 620 : (1998) 1 SCC 557 : (1997) 6 SCR 456 Supp : (1998) AIRSCW 276 : (1997) 10 Supreme 522 has held that "if the police in order to carry out official duties, have sought the help of any other person he would not forfeit his independent character by giving help to police action. The requirement to have independent witness to corroborate the evidence of the police is to be viewed from a realistic angle. Every citizen of Indian must be presumed to be an independent person until it is proved that he was a dependent of the police or other officials for any purpose whatsoever."

vii) That the Special Judge has failed to appreciate that whenever part investigation is entrusted to other IO, the said IO after making development in the investigation issues the supplementary case diaries. This practice is being followed in all the branches of CBI. Supplementary case diaries are never written by the Chief IO. Authorizing someone else to conduct search in the case amounts to entrusting part investigation to the said IO for which supplementary case diaries are required to be issued by them.

viii) That the Special Judge has failed to appreciate that it is nowhere mentioned in Cr.PC. that statement of witnesses will be recorded at what time. The present case is only one week old and IO can record the statement of witnesses of search at any time. As per provisions of Section 100(5) Cr.PC. the witnesses of search are not even required to attend the court unless specifically summoned by the court. It only provides that list of things seized in course of search shall be prepared by searching officer and signed by him and such witnesses. In such scenario it is not necessary on the part of the IO to record the statement of witnesses of search under Section 151 Cr.PC. unless huge cash/incriminating articles viz arms etc. are recovered from the search.

ix) That the Special Judge has failed to appreciate that the mandate of Section 172(1B) Cr.P.C prescribing that an investigating agency needs to maintain case diary in volume and duly paginated which has been complied by the petitioner. The case diary presented before the Judge were duly tagged together and were paginated.

8. It is the case of CBI that before conducting search, letters were issued to various organizations (Government and Central PSUs) for deputing their officials

to act as independent witnesses for the secret work to be undertaken by CBI as per practice being followed in CBI. These letters to various organizations were issued as per the provisions of Section 100(4) Cr.P.C. whereby request was made to the concerned authorities to depute their officials to act as independent witnesses for secret work. The exercise is taken only to ensure that the witnesses to search are independent and credible.

9. Section 100(4) Cr.P.C. does not unconditionally mandate the search team to take the witnesses from the same locality. The section provides that if respectable and independent witnesses are not available from the same locality then witnesses from other locality can be taken. Perusal of Section 100(4) Cr.P.C. reveals that it does not prescribe that if the inhabitants of the locality are not available then they must be from the neighbouring locality only and nowhere else.

10. Issuance of written order under the provision of Section 100(4) Cr.P.C. is in order to enforce attendance of such persons who do not want to act as search witness without reasonable cause and the police team comes to conclusion that the inhabitants of the locality are refusing or neglecting to attend and be witness to a search under this Section without reasonable cause. If the Police Team is satisfied that the inhabitants of the locality have reasonable and valid reasons for not attending the searches then issuance of orders to such inhabitants under Section 100(4) is not mandated. The word used in Section 100(4) Cr.P.C. is "may" which means it is a discretion of the team to decide whether to issue such order or not.

11. Non joining of witnesses from the locality and joining of other independent witnesses is no more an irregularity, which has been upheld by the Supreme Court in *Sunder Singh Vs. State of Uttar Pradesh*, AIR 1956 SC 411 : (1956) CriLJ 801 ; *Radhakishan Vs. State of U.P.*, AIR 1963 SC 822 : (1963) 2 LLJ 667 : (1963) 1 SCR 408 Supp para 5 and *State of Punjab Vs. Wassan Singh and Others*, AIR 1981 SC 697 : (1981) CriLJ 410 : (1981) 1 SCALE 146 : (1981) 2 SCC 1 : (1981) SCC(Cri) 292 : (1981) 2 SCR 615 .

12. It is settled law that a witness of search other than the one from the locality even if he has been brought by the investigating agencies along with them cannot be disbelieved only on the ground that he was not of locality where the search took place but was brought by the police along with them for purposes of search and also will not vitiate the search. Reliance is placed on the following judgments :

i) *Ronny @ Ronald James Alwaris Etc. Vs. State Of Maharashtra*, (1998) 3 AD 32 : AIR 1998 SC 1251 : (1998) CriLJ 1638 : (1998) 2 Crimes 65 : (1998) 2 JT 375 : (1998) 2 SCALE 261 : (1998) 3 SCC 625 : (1998) 2 SCR 162 : (1998) AIRSCW 1103 : (1998) 3 Supreme 378 .

ii) *Mahatam Parshad Vs. State of Delhi*, (1996) 4 AD 208 : (1996) 63 DLT 884 : (1996) 38 DRJ 591 .

iii) Narender, Usha, Satish Kumar and Navin Vs. State, (2009) CriLJ 3613 .

13. Recently in a similar case being Cri M.C. 4955/2014 titled as C.B.I. vs. State, coordinate Bench of this Court vide order dated 3rd February, 2015 has held that since the bank officers were associated during the search proceedings, therefore passing of the impugned order was unwarranted. Operating portion of the order is reproduced below :

"xxx xxx xxxx xxx

Upon hearing and perusal of the impugned order, material on record and list of witnesses so placed on record, I find that Officers of Union Bank of India, Syndicate Bank, Bank of India, Oriental Bank of Commerce and Indian Overseas Bank were the members of the search team.

The principle of audi alteram partem has been recapitulated by the Apex Court in the following words:-

"In our view, the High Court was not justified and correct in passing observations/strictures against Appellants 2 and 3 without affording an opportunity of being heard, and it is in violation of a catena of pronouncements of this Court that harsh or disparaging remarks are not to be made against the persons and authorities whose conduct comes into consideration before courts of law unless it is really necessary for the decision of the case." The State of West Bengal and Others Vs. Babu Chakraborty, AIR 2004 SC 4324 : (2004) 96 ECC 121 : (2004) 7 JT 216 : (2004) 7 SCALE 387 : (2004) 12 SCC 201 : (2004) AIRSCW 4995 : (2004) 6 Supreme 460 .

and

In State of W.B. v. Babu Chakraborty, the principle was reiterated by stating that the High Court was not justified and correct in passing observations and strictures against Appellants 2 and 3 therein without affording an opportunity of being heard. [Om Prakash Chautala Vs. Kanwar Bhan and Others, AIR 2014 SC 1220 : (2014) AIRSCW 972 : (2014) 2 JT 417 : (2014) 1 RCR(Civil) 974 : (2014) 1 SCALE 742 : (2014) 5 SCC 417 : (2014) 3 SCJ 8 : (2014) 1 SCT 759 .

During the course of hearing, it was submitted by Standing Counsel for the CBI that before passing of the impugned order, the explanation from the Investigating Officer was not sought and had it been done so, it would have been brought to the notice of the trial Court that Bank Officers were associated in the search proceedings.

Since Bank Officers were associated during the search proceedings, therefore, passing of the impugned order was unwarranted. Resultantly, this petition is allowed and the impugned order of 20th October, 2014 is hereby quashed."

14. Whenever part investigation is entrusted to other IO, the said IO after making development in the investigation issues the supplementary case diaries. This practice is being followed in all the branches of CBI. Supplementary case

diaries are never written by the Chief IO. Authorizing someone else to conduct search in the case amounts to entrusting part investigation to the said IO for which supplementary case diaries are required to be issued by them.

15. The present case was only one week old when the impugned order was passed and IO can record the statement of witnesses of search at any time. As per provisions of Section 100(5) Cr.P.C. the witnesses of search are not even required to attend the court unless specifically summoned by the court. It only provides that list of things seized in course of search shall be prepared by searching officer and signed by him and such witnesses. In such scenario it is not necessary on the part of the IO to record the statement of witnesses of search under Section 161 Cr.P.C.

16. The mandate of Section 172(1B) Cr.P.C prescribing that an investigating agency needs to maintain case diary in volume and duly paginated has been complied by the petitioner in the present case. The case diary presented before the Judge were duly tagged together and were paginated.

17. It is settled position in law that manner and method of conducting investigation are left entirely to the police and the Magistrate has no power under any provision of Cr.P.C. to interfere with the same. Reliance is placed on the following judgments:

i) Rajiv Gupta Vs. State and Others, (2000) 7 AD 1127 : (2001) 104 CompCas 26(2) : (2000) 87 DLT 411 : (2000) 56 DRJ 473

ii) The State of West Bengal and Others Vs. Babu Chakraborty, AIR 2004 SC 4324 : (2004) 96 ECC 121 : (2004) 7 JT 216 : (2004) 7 SCALE 387 : (2004) 12 SCC 201 : (2004) AIRSCW 4995 : (2004) 6 Supreme 460

iii) Om Prakash Chugh Vs. State of Haryana and Others, AIR 2000 SC 2477 : (2000) CriLJ 3486 : (2000) 3 JT 402 : (2000) 10 SCC 612 : (2000) AIRSCW 2595 : (2000) 7 Supreme 566 : (2000) 6 Supreme 571

18. Even if there is any flaw in the investigation, its impact on the case of prosecution has to be seen at stage of trial. Any observation such as made by Special Judge in impugned order would irreparably prejudice the case of prosecution at the very threshold. Thus, the trial court is always at liberty to examine the issue at the stage of trial. Therefore, I am of the view that the passing order at this stage is unwarranted.

19. The petition is accordingly allowed and the impugned order dated 28th October, 2014 and 10th November, 2014 are quashed.

20. No costs.