

(2021) 04 J&K CK 0005
In the Jammu And Kashmir High Court
Case No : Civil Revision No. 13 Of 2017

Ghulam Hassan Sofi And Anr

APPELLANT

Vs

State Of Jk

RESPONDENT

Date of Decision : 02-04-2021

Acts Referred:

Prevention Of Corruption Act, 1988 — Section 5(2)
Code Of Criminal Procedure, 1973 — Section 2(h), 156, 156(1), 156(3), 173(8)
Jammu And Kashmir Agrarian Reforms Act, 1976 — Section 4, 8
Constitution Of India, 1950 — Article 21

Citation : (2021) 04 J&K CK 0005

Hon'ble Judges : Rajnesh Oswal, J

Bench : Single Bench

Advocate : Altaf Haqani, Shakir Haqani, B. A. Dar, Saba Gulzar

Final Decision : Dismissed

Judgement

1. The order dated 10th April 2017 (hereinafter referred to as the 'order impugned') passed by the learned court of Special Judge Anti-Corruption Srinagar (hereinafter referred to as trial court) has been impugned by the petitioner through the medium of present petition by virtue of which the learned trial court has directed the SSP VOK Srinagar (now ACB) to conduct or get conducted further investigation on the aspects stated in the order.

2. The petitioner has challenged the order impugned on the following grounds: -

(i) That once the court had taken a cognizance of offence under section 5 (2) PC Act, power to order further investigation could not have been invoked by the learned trial court, as the learned trial court was not competent to switch back to the pre-cognizance stage.

(ii) That the order impugned is liable to be quashed as the learned trial court had no power to order further investigation on its own, without any motion or application on the part of the investigating / prosecuting agency. The trial court

has infact passed the order impugned so as to enable the prosecution to fill up the lacunas in their case and the order impugned amounts to ordering reinvestigation.

(iii) That the learned trial court had not heard the petitioner for the purposes of passing orders on the issue of further investigation as the trial court had simply heard the arguments on charge/discharge of the accused.

3. Before examining the issues raised by the petitioner, it is necessary to have the brief resume of the allegations leveled against the petitioner.

4. The charge sheet for commission of offence under section 5 (2) PC Act read with 109 RPC was filed against the petitioner and the other accused on the ground that the petitioner is in possession of disproportionate assets to the extent of Rs.67,88,189/-. It is further stated in the charge sheet that the petitioner was appointed as a Patwari in the year 1974 and was posted in Rakhs and Farms Department and served there for about a decade and later on was transferred to the Revenue Department District Budgam. The check period in the case of the petitioner has been fixed from 1986 to 2006. During this whole period, the total income of the petitioner was Rs.13,72,324/- and expenditure during check period has been considered as Rs. 5,96,921/-whereas the income at the beginning of the check period of the petitioner was Rs. 3,53,816/-. The prosecution has determined the total value of the assets acquired by the petitioner during the check period as Rs. 79,17,408/-.

5. The prosecution has alleged the petitioner to have acquired following immovable assets through various deeds/mutations either in his name or in the names of his relatives. Details of the same are reproduced as under:-

S. No.

Details of properties

Situated at

Mode of acquisition

Declared value

Cost assessed.

On the name of

1

Three storied house double storeyannexe and six shops have been constructed on 2.5 kanals

Krimshore

Gift

23,19,455/-

Gh. Mohd. Bhat

2

Residential house at Gulberg Colony Hyderpora

Gulbery Colony, Huderpora

19,81,799/-

Self

3

03 & 02 marlas

Krimshore

Gift

Two Sons

4

01 kanal 14marlas

Krimshore

Gift

Total consideration for 1 K.19- M. 1.57 lacs

Gh. Mohd Bhat

5

6 marlas

Krimshore

Gift

90,000/-

Gh. Mohd. Bhat

6

01 kanal 03 marlas

Krimshore

Gift

3.00 lacs

Son

7

07 kanals and 14 marlas

Parnewa

Gift

3.50 lacs

Two sons

8

04 kanals and 12 marlas

Parnewa

Gift

4.50 lacs

Mst. Saja Begum

9

12 ½marlas

Burgoo

Mutated u/s 4 &8 AR Act

75,000/-

Self

10

01 kanal 09 marlas

Burgoo

Gift

80,000/-

Self

11

05 kanals

Burgoo

Mutated u/s 4 & 8 A.R. Act

10.00 lacs

Self

12

02 kanals 19 marlas

Burgoo

34,000/-

Self

13

01 kanals 2 marlas

Burgoo

10,000/-

Self

14

03 kanals& 06 marlas

Burgoo

Gift

30,000/-

Self

15

02 kanals

Burgoo

Sale

25,000/-

Two Sons

16

02 kanals

Burgoo

Gift

1.50 lacs

Brothers

174

01 kanal& 13 marlas

Burgoo

U/s 4 & 8 A.R. Act.

Self

18

01 kanals& 09 marlas

Burgoo

U/s 4 & 8 A.R. Act

15,000/-

Self

19

02 kanals

Burgoo

Sale

30,000/-

Firdous Ahmad

20

02 kanals& 12 ½ marlas

Burgoo

Gift

87,000/-

Self & brothers

21

08 kanals& 05 marlas

Burgoo

Gift

3.00 lacs

Gh. Mohd. Mir

22

01 kanal

Gulberg Colony, Hyderpora

Sale

5.50 lacs

Ab. Rashid Beigh

6. Besides these, the petitioner has also acquired the following movable assets:-

23

Car bearing registration No. JK04A-0843

Self

24

Gold ornaments

115 grms

60,000/-

Self

25

House hold goods

Joinery items

1,07,535/-

26

Electronic gadgets

86,310/

27

Furnishings

57,000/-

7. The matter was heard by the learned trial court for charge and discharge and the learned trial court vide order dated 10th April 2017 passed the order impugned and directed for further investigation on the aspects as narrated in the order.

8. Mr. Haqani, learned senior counsel has vehemently argued that the order of further investigation can be passed only when the new facts are brought to the notice of the trial court after the filing of charge-sheet. He further contended that the learned Magistrate had only three options when the challan was filed, i.e. (1) accept the report and take cognizance of the offences and issue process, (2) may

disagree with the report and drop the proceedings or (3) may direct further investigation under section 156 (3) and require the police to make a further report. So, he contended that once the court had issued a process, direction for further investigation could not have been issued by the learned trial court.

9. Per contra, Mr B.A. Dar, learned Sr. AAG has vehemently argued that the learned Magistrate has powers to order further investigation under section 156 Cr.P.C even at post-cognizance stage. He has placed reliance upon the judgment of the Apex Court reported in (2019) 17 SCC 1.

10. Heard and perused the record.

11. Apex Court in the case titled Vinubhai Haribhai Malviya v. State of Gujarat reported in (2019) 17 SCC 1 has held as under:

42. There is no good reason given by the Court in these decisions as to why a Magistrate's powers to order further investigation would suddenly cease upon process being issued, and an accused appearing before the Magistrate, while concomitantly, the power of the police to further investigate the offence continues right till the stage the trial commences. Such a view would not accord with the earlier judgments of this Court, in particular, Sakiri [Sakiri Vasu v. State of U.P., (2008) 2 SCC 409 : (2008) 1 SCC (Cri) 440] , Samaj Parivartan Samudaya [Samaj Parivartan Samudaya v. State of Karnataka, (2012) 7 SCC 407 : (2012) 3 SCC (Cri) 365] , Vinay Tyagi [Vinay Tyagi v. Irshad Ali, (2013) 5 SCC 762 : (2013) 4 SCC (Cri) 557] , and Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] ; Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] having clearly held that a criminal trial does not begin after cognizance is taken, but only after charges are framed. What is not given any importance at all in the recent judgments of this Court is Article 21 of the Constitution and the fact that the Article demands no less than a fair and just investigation. To say that a fair and just investigation would lead to the conclusion that the police retain the power, subject, of course, to the Magistrate's nod under Section 173(8) to further investigate an offence till charges are framed, but that the supervisory jurisdiction of the Magistrate suddenly ceases midway through the pre-trial proceedings, would amount to a travesty of justice, as certain cases may cry out for further investigation so that an innocent person is not wrongly arraigned as an accused or that a prima facie guilty person is not so left out. There is no warrant for such a narrow and restrictive view of the powers of the Magistrate, particularly when such powers are traceable to Section 156(3) read with Section 156(1), Section 2(h) and Section 173(8) CrPC, as has been noticed hereinabove, and would be available at all stages of the progress of a criminal case before the trial actually commences. It would also be in the interest of justice that this power be exercised suo motu by the Magistrate himself, depending on the facts of each case. Whether further investigation should or should not be ordered is within the discretion of the learned Magistrate who will exercise such discretion on the facts of each case and in accordance with law. If, for example, fresh facts

come to light which would lead to inculcating or exculpating certain persons, arriving at the truth and doing substantial justice in a criminal case are more important than avoiding further delay being caused in concluding the criminal proceeding, as was held in *Hasanbhai Valibhai Qureshi* [*Hasanbhai Valibhai Qureshi v. State of Gujarat*, (2004) 5 SCC 347 : 2004 SCC (Cri) 1603] . Therefore, to the extent that the judgments in *Amrutbhai Shambhubhai Patel* [*Amrutbhai Shambhubhai Patel v. Sumanbhai Kantibhai Patel*, (2017) 4 SCC 177 : (2017) 2 SCC (Cri) 331] , *Athul Rao* [*Athul Rao v. State of Karnataka*, (2018) 14 SCC 298 : (2019) 1 SCC (Cri) 594] and *Bikash Ranjan Rout* [*Bikash Ranjan Rout v. State (NCT of Delhi)*, (2019) 5 SCC 542 : (2019) 2 SCC (Cri) 613] have held to the contrary, they stand overruled. Needless to add, *Randhir Singh Rana v. State (Delhi Admn.)* [*Randhir Singh Rana v. State (Delhi Admn.)*, (1997) 1 SCC 361] and *Reeta Nag v. State of W.B.* [*Reeta Nag v. State of W.B.*, (2009) 9 SCC 129 : (2009) 3 SCC (Cri) 1051] also stand overruled.

12. Thus, it is evident from the decision of the Apex Court that further investigation can be ordered suo-motu by the Magistrate himself depending upon the facts of each case. Whether further investigation should or should not be ordered is within the discretion of the learned Magistrate who can exercise such discretion on the facts of each case and in accordance with law. As such the first contention of the petitioner that once the process has been issued, the court had no jurisdiction to order further investigation is bereft of any merit and as such the same is rejected.

13. The second contention raised by the petitioner that no application was made by the prosecution agency also deserves to be rejected in view of the law laid down by the Apex Court in the judgment (*supra*).

14. The third contention raised by the petitioner is that the further investigation can be ordered only on the discovery of new facts and not on the basis of the facts already placed before the learned Magistrate. In *H.N.Rishbud v. State of Delhi* reported as AIR 1955 SC 196, Hon'ble the Apex Court has held that that it does not follow that the invalidity of the investigation is to be completely ignored by the court during trial. When the breach of such mandatory provision is brought to the knowledge of the court at a sufficiently early stage, the court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such re-investigation as the circumstances of an individual case may call for.

15. The Hon'ble Apex Court while relying upon the judgment in case mentioned above as *H.N.Rishbud v. State of Delhi*, in *Vinubhai Haribhai Malaviya v. State of Gujarat* has held that this decision is a clear authority for the view that further investigation is not altogether ruled out merely because cognizance of the case has been taken by the court, defective investigation coming to the light during the course of a trial may be cured by a further investigation, if the circumstances permit it (para 29). Thus, in view of this, it is not at all necessary that the court can order further investigation only on the basis of the subsequent facts brought

to its notice, the further investigation can be ordered by the court even when the defective investigation comes into light, may be even before framing of charge. So, this contention too deserves to be rejected. The last contention raised by the petitioner is that the petitioner was heard on the issue of charge as well as discharge only and not on the issue of further investigation. The perusal of the order reveals that the learned trial court while ordering further investigation has pointed out the following aspects those are required to be considered for the purpose of further investigation:-

(1) The investigating officer should have gone further to check the authenticity of these mutations from the attesting officers as well as marginal witnesses cited therein, as the donors have unequivocally stated that as a matter of fact, they sold their respective properties to accused for consideration and were not aware of those mutations.

(2) Whether the posting of the accused during the relevant time had anything to do with the same before reaching to any conclusions. The investigating officer was required to make an effort to check the authenticity of the mutations attested under Section 4 and 8 of the Agrarian Reforms Act, whereas erstwhile owners had categorically deposed that they in fact sold these pieces of land to the accused against the consideration. The investigating officer should have checked from the records as to whether the accused was bona fide tiller of the land duly recorded in Kharif 1971 before arriving at any conclusion. Investigating officer was required to collect evidence before concluding that the two residential/commercial properties at Krimshore and residential house at Hyderpora were in fact raised by the accused and he was holding possession thereof as Benami properties. The investigating officer had not conducted any investigation as to whether any permission had been taken by the accused being a public-servant from the Government or the competent authority for the acquisition of these properties.

16. The learned trial court has given the cogent reasons while ordering the further investigation and from the perusal of the order impugned, it is revealed that the petitioner had raised these issues during the course of his arguments on charge and discharge. So, there is no substance that the petitioner was not heard on the said issue once the petitioner has raised the issue, those pointed towards the defective investigation conducted by the investigating officer, the trial court was well within the power to order further investigation.

17. In view of what has been discussed above, there is no merit in the present petition, as such, the same is dismissed.

18. The SSP VOK Srinagar (now ACB) is directed to complete the further investigation of the case within a period as prescribed by the trial court in its order dated 10th April 2017. Record be returned to the officer concerned.