

(2001) 03 OHC CK 0047
In the Orissa High Court
Case No : O.J.C. No. 12753 of 1999

Habibullah Khan

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 22-03-2001

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 170, 173, 173(8), 190(1)
Prevention of Corruption Act, 1988 — Section 13(1), 13(2)

Citation : (2001) 92 CLT 285 : (2001) 21 OCR 79 : (2001) 1 OLR 520

Hon'ble Judges : R.K. Patra, J;Ch. P.K. Misra, J

Bench : Division Bench

Advocate : M/s A.K. Ray, S. Ray, S.P. Das and R.K. Rath, for the Appellant; Shri J.K. Mishra, for the Respondent

Final Decision : Allowed

Judgement

R.K. Patra, J.—Order dated 20-9-1999 of the Special Judge (Vigilance), Bhubaneswar framing charge against the petitioner in T. R. No. 3 of 1991 is the subject matter of challenge in the writ petition (O.J.C. No. 12753/99) and in the petition filed u/s 482, Cr. P.C. (Crl. Misc. Case No. 5021 of 1999). Both the cases being analogous, they were heard together with the consent of the counsel for parties and are disposed of by this common order.

2. Cuttack Vigilance P. S. Case No. 62 of 1990 was instituted in the Court of the Chief Judicial Magistrate, Cuttack against the petitioner on the basis of the F.I.R. lodged by the Deputy Superintendent of Police, Vigilance, Special Squad, Cuttack dated 29-9-1990 alleging that he during the period from June, 1980 to December, 1989 being a public servant functioning as Minister in the State of Orissa acquired and had been in possession of assets of more than Rs. 14 lakhs which were disproportionate to his known source of income and, as such, committed an offence punishable u/s 13(2) read with section 13(1)(e) of the Prevention of Corruption Act, 1988. After investigation, the Vigilance Police filed

charge-sheet in the court of the Chief Judicial Magistrate, Cuttack on 28-3-1991 to the effect that he was in possession of assets to the tune of Rs. 13,64,802.89 disproportionate to his known source of income. Subsequently, the records were submitted to the court of the Special Judge, Bhubaneswar who by order dated 27-3-1991 took cognizance and issued summons.

3. According to the petitioner, while submitting charge-sheet, the Investigating Officer took his agricultural income at Rs. 1,98,000/- deliberately suppressing and ignoring material document like paddy sale khata, statements of witnesses, namely, K. S. Prakash Rao, A. Jagadish Rao, Chandra Sekhar Pattanaik R. S. Pattnaik, Surya Narayan, Damodar Sethia and Kalimulla Khan who were examined during the course of investigation and not examining many material witnesses. When the matter was pending consideration of framing charge, the prosecution filed an application on 24-7-1998 seeking permission for re-investigation in terms of section 173(8), Cr. P. C. in the court of the Special Judge, By order dated 11-8-1998 the learned Special Judge allowed the application and permitted re-investigation. In course of re-investigation, the Investigating Officer examined the Tahasildar, Nowrangpur, Revenue Inspector, Nowrangpur Tahasil and some rice mill owners including K.V.N. Rao, Mohammed Yunush, A. Rama Rao, K. Chandra Sekhar Rao and the Secretary of the Regulated Market Committee. He also seized the paddy sale khata from the residence of the petitioner. After completing investigation, he submitted final report stating therein that there is no material to prove the charge of acquisition of disproportionate asset by the petitioner during the period in question. In the aforesaid final report, the Investigating Officer has stated as follows ;

"During scrutiny of the case diaries, it is found that the previous Investigating Officer (I.O.) of this case mentioned that he verified from the office of R.M.C., Nowrangpur and ascertained that Shri Habibullah Khan has never pledged paddy to R.M.C., Nowrangpur. On the face of the information furnished by the Secretary, R.M.C., Nowrangpur it is proved that the previous I.O. had deliberately written false things in the records. From the scrutiny of the records it is found that one paddy sale note book was seized from Taragaon house of Sri Habibullah Khan wherein detail particulars of sale proceeds of paddy twice in every year is incorporated in it. Shri Khan has mentioned in this Note Book about sale of paddy during 1980 to 1990 amounting to Rs. 13,15,000/-."

The Investigating Officer inter alia further opined as follows :

(1) That the claims of Mr. Habibullah Khan as incorporated in the paddy sale Note Book which was seized during the house search of Taragaon house, P.S. Nowrangpur from his steel almirah amounting to Rs. 13.15 lakhs was not accepted on a flimsy ground that it was written after 2-1-1990 by one person.

(2) During examination Mr. Khan claimed that he was incorporating the informations about sale of paddy by him in every year on the loose papers as and when paddy were sold. During the year 1990 i.e. in the month of January,

1991 he found the said loose sheets were about to be damaged. So the said informations were reflected in a Note Book for the purpose of keeping proper account about the sale of the paddy which was seized by vigilance during his house search.

(3) During investigation it is ascertained that the previous Tahasildar had furnished wrong informations vide his letter No. 5795 dated 17-11-90 about the land possessed by Mr, Khan and his family members, although Mr. Khan was possessing 56.12 acres of cultivable land during the check period out of which 46.75 decimals land are irrigated land as reported by present Tahsildar.

(4) The previous I.O. has falsely incorporated in the records that the cultivable land possessed by Mr. Khan are un-irrigated land, even though the Tahasildar, Nowrangpur had furnished information vide his letter No. 5795 dated 17-11-90 enclosing detail particulars of the land possessed by Mr. H. Khan and his family members are making payment of water tax paid towards the irrigation facilities enjoyed by them in 23.4 acres of irrigated land.

(5) During investigation it is ascertained that Mr. H. Khan used to raise two paddy crops in his irrigated land but the previous I.O. has computed income from agriculture of Mr. H. Khan on the basis of single crop on the ground that the land are un-irrigated.

(6) It is ascertained that Mr. Habibullah Khan is pledging paddy with Regulated Market Committee, Nowrangpur since 1988-89 but previous I. O. has falsely noted in the record that Mr. Khan is not pledging paddy with E. M. C, Nowrangpur.

The concluding portion of the report is as follows:

"From the above re-investigation it is found that Mr. Habibullah Khan has acquired total assets during the check period of Rs. 15,43,863.84 as per Annexure-I, incurred expenditure during the check period of Rs. 4,67, 213.27 as per Annexure-II and his total income during the check period comes to Rs. 19,69,057.22 as per Annexure-III. So the total disproportionate assets acquired by Mr. Khan is computed to Rs. 47,029.89 which is 2.38% of his total income.

From the above facts it is ascertained that there is no material to prove the charge of acquisition of disproportionate assets by Sri Habibullah Khan during the Check period and as such this case is submitted to the court with a prayer to accept it as Final Report True insufficient evidence u/s. 13(2) r/w 13(1)(e) P. C. Act, 1988."

In view of such findings in the report, the petitioner claims, no case u/s 13(1)(e) has been made out.

4. As it appears from the lower court records, the Investigating Officer on 2-12-1998 submitted his final report on reinvestigation before the Special Judge who posted the case from time to time for consideration of framing charge. Ultimately by the impugned order dated 20-9-1999, he framed charge u/s 13(1)

(e) of the Prevention of Corruption Act, 1988 punishable u/s 13(2) of the said Act.

5. Learned counsel for the petitioner contended that in view of section 173(8), Cr. P. C. which empowers the police to make further investigation and in the present case re-investigation having been made pursuant to an order passed by the learned Special Judge, the final report should have been accepted and no charge should have been framed. Learned counsel appearing for the State contended that notwithstanding the final report, the court is not precluded from framing the charge.

6. Law is now settled that the investigation ending ultimately with the formation of opinion by the police as to whether on the materials collected a case is made out to place the accused before the Magistrate for trial is dependant on the nature of opinion so formed. The formation of the said opinion by the police is a final step in the investigation and that final decision is to be taken by the police and by no other authority. If the Magistrate agrees with the report that no case is made out to issue process against the accused, he might close the matter. If he comes to the conclusion that further investigation is necessary, he might make an order to that effect u/s 156(3), Cr. P. C. and ultimately if he is of the opinion that the facts set out in the report submitted by the police constitute an offence, he can take cognizance of the offence u/s 190(1)(b) Cr. P. C. notwithstanding a contrary opinion of the police expressed in the report (see *Abhinandan Jha and Others Vs. Dinesh Mishra*, and *India Carat Pvt. Ltd. Vs. State of Karnataka and Another*,

7. Learned Special Judge, however, without passing any order on the final report submitted by the police, framed charge by the impugned order by ascribing two grounds :

(i) the court is not competent to direct the police for re-investigation to change its opinion; and

(ii) re-investigation was made after a decade of the "happening".

8. Let us now proceed to consider the validity of the aforesaid two grounds.

In support of the first ground, the learned Special Judge seems to have relied on certain observations of the Supreme Court in *Abhinandan Jha v. Dinesh Mishra*, (supra). In that case, the question arose as to whether a Magistrate can direct the police to submit a charge-sheet when after investigation it submitted final report u/s 173, Cr. P. C., While deciding that question, in paragraphs 19 and 20 of the judgment, the Court observed as follows:

"19. The question can also be considered from another point of view. Supposing the police sends a report, viz,, a charge-sheet, u/s 170 of the Code. As we have already pointed out, the Magistrate is not bound to accept that report when he considers the matter judicially. But can he differ from the police and call upon them to submit a final report, u/s 369? In our opinion, the Magistrate has no such power. If he has no such power, in law, it also follows that the Magistrate

has no power to direct the police to submit a charge-sheet, when the police have submitted a final report that no case is made out for sending the accused for trial. The functions of the Magistracy and the police are entirely different, and though, in the circumstances mentioned earlier, the Magistrate may or may not accept the report, and take suitable action, according to law, he cannot certainly infringe (sic. impinge ?) upon the jurisdiction of the police, by compelling them to change their opinion, so as to accord with his view.

20. Therefore, to conclude, there is no power, expressly or impliedly conferred, under the Code, on a Magistrate to call upon the police to submit a charge-sheet, when they have sent a report u/s 169 of the Code, that there is no case made out for sending up an accused for trial."

On due consideration, we are of the opinion that the learned Special Judge erroneously relied on the aforesaid ratio. In the case at hand, by the previous order the learned Special Judge simply permitted the police to conduct further investigation. He never directed the police to change their opinion and submit final report. In the circumstances, the order for re-investigation should not have been construed by the learned Special Judge as an order requiring the Investigating Agency to change its earlier opinion and submit report in favour of the petitioner. Incidentally the out-come of the re-investigation has ended in the final report and for this no fault can be found with the investigating agency. Learned Special Judge seems to have also doubted the competence of the police to cause further investigation. Entertainment of such doubt is without any legal foundation. Section 173(8) Cr. P. C. recognises the power of the police to make further investigation. The Supreme Court recently in *Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwandadha Maharaj Vs. State of Andhra Pradesh and Others*, has held as follows :

"Power of the police to conduct further investigation after laying final report is recognised u/s 173(8) of the Code of Criminal Procedure, Even after the Court took cognizance of any offence on the strength of the police report first submitted, it is open to the police to conduct further investigation. This has been so stated by this Court in *Ram Lal Narang Vs. State (Delhi Administration)*, The only rider provided by the aforesaid decision is that it would be desirable that the police should inform the Court and seek formal permission to make further investigation."

The aforesaid being the legal position, the first ground given by the learned Special Judge is not tenable in law.

9. Now coming to the second ground, the learned Special Judge observed as follows :

".....It insults common sense of existence of any matter to base a re-investigation about a decade after the happening."

The learned Special Judge seems to have doubted the out-come of re-

investigation as it was done much after the alleged acquisition of asset; It is not disputed that re-investigation was conducted by the police after taking due permission from the court on 11-8-1998. The Investigating Officer after completing re-investigation submitted his report to the Court on 2-12-1998 within a short time. The re-investigation which was made pursuant to the order of the court being within jurisdiction, whether it related to offence alleged to have been committed a decade ago has no bearing at all. Therefore, the second reason made out by the learned Special Judge to frame charge is not valid in law.

10. For the aforesaid reasons, the impugned order of the learned Special Judge dated 20-9-1999 cannot be supported which is hereby quashed. In view of the final report submitted by the police stating that there is no material to prove the charge of acquisition of disproportionate assets by the petitioner, the charge-sheet on the basis of which cognizance was taken has lost its force. Therefore, the order taking cognizance has become non est.

11. In the result, both the petitions are allowed.

Ch. P. K. Misra, J.

12. I agree.

13. Petitions allowed.