

(2016) 01 DEL CK 0231

In the Delhi High Court

Case No : Crl. M.C. 4026/2014 & Crl. M.A. 13804/2014

Irshad Ali and Others

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 06-01-2016

Acts Referred:

Arms Act, 1959 — Section 25
Criminal Procedure Code, 1973 (CrPC) — Section 173, Section 173(2), Section 226,
Section 227, Section 228, Section 482
Explosive Substances Act, 1908 — Section 4, Section 5
Penal Code, 1860 (IPC) - S

Citation : (2016) 226 DLT 681 : (2016) 1 JCC 332 : (2016) 5 RCRCriminal 375

Hon'ble Judges : Suresh Kait, J.

Bench : Single Bench

Advocate : M. Sufian Siddiqui, Rakesh Bhugra and M. Tabish Zia, Advocates, for the Appellant; Siddharth Luthra, Senior Advocate, Pramod Kr. Dubey, Smriti Sinha, Shiv Chopra, N.R. Nariman, Anupam Prasad, Vasundhara Nagrath, Amit Chadha, APP and Rahul Kumar, Inspector

Final Decision : Dismissed

Judgement

Suresh Kait, J.—CRL.M.C. No. 4026/2014

1. Vide the present petition filed under Section 482 of the Code of Criminal Procedure, 1973 ("Cr.P.C."), the petitioners seek setting aside of the order dated 04.06.2014 passed by the learned Trial Court in case bearing FIR No. 10/2006 registered at Police Station Special Cell for the offences punishable under Sections 121/121A/122/123/120-B of the Indian Penal Code ("IPC"), Sections 4/5 of the Explosive Substances Act, 1908 and Section 25 of the Arms Act, 1959.

2. Learned counsel appearing on behalf of the petitioners submitted that in essence, present case is of a person who had been working as an informer for the Intelligence Bureau ("IB") and Special Cell of the Delhi Police branch since the year 2000, which fact has been conclusively established by the Central Bureau of Investigation ("CBI") during its in-depth investigation conducted

pursuant to the directions of this Court, whereby CBI submitted the Call Detail Records (CDR's) of petitioner No. 1 being in constant touch with the senior officers of Special Cell and IB to/from landline numbers of IB/HMA. The IB officers were coercing the petitioners to join a militant camp in Jammu and Kashmir and provide information from there but their refusal to obey the orders of their masters culminated into the false implication in the present FIR alongwith recovery of the alleged contraband. Subsequently, these facts were brought to the notice of this Court by way of a petition bearing Writ Petition (Crl.) No. 501/2006, whereby vide order dated 04.08.2008 this Court was pleased to transfer the investigation to CBI while casting serious doubts on the story of the Special Cell regarding the false implication of the petitioners. The CBI after conducting in-depth investigation filed its closure report before the learned Trial Court seeking discharge of the petitioners and action against the erring police officials. However, the learned Trial Court while declining to accept the closure report of CBI being premature concluded that truthfulness of two versions of two different agencies requires thorough trial of the case and also rejected the discharge application of the petitioner No. 1.

3. Being aggrieved, the petitioners preferred a petition being Crl. M.C. No. 2418/2014 assailing the said order, wherein this Court vide order dated 20.05.2014 after hearing the parties including the learned Attorney General of India allowed the petition and remanded back the matter to the learned Trial Court with the direction to only consider the CBI closure report and hear the parties afresh without influencing with the report of the Special Cell.

4. However, the Special Cell approached the Supreme Court assailing the aforesaid judgment in Crl. A. Nos. 2040-2041 of 2012, wherein vide judgment dated 13.12.2012, the Supreme Court directed the learned Trial Court to exercise one of the three options whilst hearing the parties, viz., firstly, it may accept the application of accused for discharge, secondly, it may direct that the trial may proceed further in accordance with law and thirdly, if it is dissatisfied on any important aspect of investigation already conducted and in its considered opinion, it is just, proper and necessary in the interest of justice to direct "further investigation", it may do so.

5. Learned counsel further submitted that the learned Trial Court while passing the order dated 21.04.2014 had discussed all the three options contemplated by the Supreme Court in its judgment dated 13.12.2012, however, ignored the third option of directing "further investigation", without giving any cogent reason for the same and consequently exercised the second option to proceed with the trial. The learned Trial Court while discussing the third option, i.e., regarding "further investigation", had merely observed the closure report of CBI and gave its opinion as to why it is not convinced with the same.

6. The learned Trial Court had discussed ten points to negate the same rather than giving any observation/finding as to why the third option of directing "further investigation", cannot be ordered.

7. The aforesaid order dated 21.04.2014 passed by the learned Trial Court was assailed by the petitioners before this Court vide Crl. M.C. No. 2418/2014, which was set aside by this Court vide order dated 20.05.2014 by giving specific directions to the learned Trial Court to strictly implement the Supreme Court's directives in its true letter and spirit. Furthermore, it was observed by this Court that the stage to consider the charge sheet of Special Cell would be at the time of hearing arguments on the point of charge. However, despite the said observations of this Court, the learned Trial Court went ahead and passed an absolutely identical order dated 04.06.2014, which is under challenge in the present petition.

8. Learned counsel submitted that the learned Trial Court fell into grave error by observing that application seeking discharge of the petitioners was rejected on the sole ground that it was based on CBI's closure report being a nullity in the eyes of law. The said observation of the learned Trial Court is absolutely contrary to the Supreme Court's unambiguous directives, as stated in Para 51 of the judgment dated 13.12.2012, whereby it was stated that the Trial Court shall consider both the reports, i.e., the report of Special Cell, Delhi Police as well as the CBI's closure report.

9. While discussing the order dated 20.05.2014, this Court had categorically stated that the stage to consider the charge sheet filed by Special Cell would be at the time of hearing arguments on the point of charge. However, the learned Trial Court again passed the impugned order while directing to proceed with the trial by considering and accepting the charge sheet of Special Cell at an intermediate stage and not at the stage of hearing on charge, which is yet to take place.

10. Learned counsel for the petitioners further submitted that while passing the impugned order, the application seeking discharge of the petitioners was dismissed by the learned Trial Court by observing that since the CBI has conducted re-investigation, in the present case, which was held impermissible by the Supreme Court, thus, the CBI's closure report becomes a nullity. Whereas in para 51 of the judgment dated 13.12.2012, the Supreme Court had categorically stated that the report of the Special Cell, Delhi Police, as well as the closure report filed by the CBI have to be considered by the Trial Court. However, the learned Trial Court dismissed the aforesaid discharge application of the petitioners on the basis of the closure report filed by the CBI stating that the CBI's closure report cannot be considered being impermissible. The learned Trial Court has formed the opinion on the basis of conjectures and surmises being completely illogical and vague while negating the reasoning of closure report filed by CBI, which were neither part of the charge sheet of Special Cell nor part of their submissions. Moreover, the learned Trial Court while passing the impugned order has made certain observations, which are likely to cause grave prejudice to the petitioners as the same are akin to a judgment being passed on conviction especially when the matter is at a very nascent stage and charge has not yet

been framed against the petitioners.

11. On the other hand, learned counsel appearing on behalf of the respondent No. 1 submitted that the impugned order does not suffer from any infirmity and has been passed in accordance with law and in compliance with the directions passed by the Supreme Court in Crl. A. Nos. 2040-2041 of 2012 vide order dated 13.12.2012, as under:-

"51.....firstly, it may accept the application of accused for discharge. Secondly, it may direct that the trial may proceed further in accordance with law and thirdly, if it is dissatisfied on any important aspect of investigation already conducted and in its considered opinion, it is just, proper and necessary in the interest of justice to direct "further investigation", it may do so."

12. Learned counsel relied upon the case of Nazir Ahmed Vs. King Emperor reported as AIR 1936 PC 252, whereby the Privy Council held that when power is given to do a certain thing in a certain way, the thing must be done in that way only and all other methods of performance are necessarily forbidden.

13. Thus, by way of the present petition, the petitioners are trying to achieve quashing of order taking cognizance, which is not under challenge and has attained finality and has been upheld by the Supreme Court in its judgment dated 13.12.2012. Moreover, the petitioners are building a fresh case to challenge the impugned order only to divert the attention of this Court from the legal issue at hand, namely, the acceptance of closure report will, in fact, mean reviewing the previous order of taking cognizance which is not permissible under the Code as the learned Trial Court does not have the powers to review its own order, which has also been held in Adalat Prasad Vs. Roop Lal Jindal, , (2004) 7 SCC 338.

14. Learned counsel further submitted that the petitioners have sought their discharge thrice before the learned Trial Court and all the time, the petitioner's application seeking discharge was dismissed, i.e., vide orders dated 13.02.2009, 21.04.2014 and 04.06.2014.

15. It is further submitted that option of considering the discharge application of the petitioners was rightly rejected by the learned Trial Court as mere filing of the closure report by the CBI does not entitle the petitioners for discharge. The order of the learned Trial Court is within the stipulations of the directions of the Supreme Court's judgment dated 13.12.2012. The learned Trial Court had rightly held that in the present case the arguments on charge are yet to be heard, thus, the petitioners cannot be discharged only on the basis of the closure report.

16. Learned counsel further submitted that discharge is permissible only when there are no sufficient grounds for suing the accused. Discharge is warranted only when the absence of sufficiency of grounds is clearly established by the evidence on record.

17. Also submitted that the Supreme Court in its judgment dated 13.12.2012

held that re-investigation was not permissible and hence, the report under Section 173(2) Cr.P.C. filed by the respondent No. 1 was not set aside. Therefore, the learned Trial Court rightly held that there is sufficient material available on record to show the complicity of the petitioners in the commission of the offences stated in the report under Section 173(2) Cr.P.C. filed by the respondent No. 1.

18. I have heard the learned counsel for the parties.

19. It is not disputed that vide order dated 20.05.2014, this Court directed the learned Trial Court to pass order after complying with the directions given by the Supreme Court vide order dated 13.12.2012 as under:-

"51.....firstly, it may accept the application of accused for discharge.

Secondly, it may direct that the trial may proceed further in accordance with law and

Thirdly, if it is dissatisfied on any important aspect of investigation already conducted and in its considered opinion, it is just, proper and necessary in the interest of justice to direct "further investigation", it may do so."

20. Learned Trial Court vide order dated 04.06.2014 dismissed the application for discharge on the ground firstly, after investigation the Special Cell filed report under Section 173 Cr.P.C. / charge-sheet before the Id. CMM on 06.05.2006 as there was no stay of investigation nor process of investigation. Id. CMM on the basis of evidence / report under Section 173 Cr.P.C. took the cognizance and since offences under Sections 121/121A/122/123/120-B IPC, Sections 4 & 5 of the Explosive Substance Act and Section 25 Arms Act were exclusively triable by the Court of Sessions, accordingly, committed the chargesheet to the Court of Sessions.

21. Secondly, when the case was committed to the Court of Sessions and it was fixed for further proceedings / consideration on charge, CBI pursuant to the order of this Court dated 09.05.2006 by which "further investigation" was entrusted to CBI, filed the closure report on 11.11.2008. On the basis of closure report, an application for discharge was filed by the accused. The Hon"ble Supreme Court vide order dated 13.12.2012 has held that under the colour of "further investigation", "the reinvestigation" is not permissible to washout earlier investigation.

22. Thirdly, an accused can be discharged under Cr.P.C. after following the procedure prescribed under the Cr.P.C. The said stage will come either at the time of taking of cognizance or after hearing arguments on charge. If the Court concerned after hearing the arguments on charge finds no substance / evidence to proceed against accused on any of the offence or all of the offences, the said Court may discharge the accused of the offence in which the material is not available or all the offences to which he is charged.

23. In the present case, arguments on charge are yet to be heard and order on

charge is yet to be announced. When there are no arguments on charge or order on charge, accused cannot be discharged merely on the strength of the application filed on behalf of the accused.

24. Fourthly, accused filed an application in question for discharge on the strength of findings of the CBI in its closure report filed on 11.11.2008. It is argued by the Special Cell that this closure report is a nullity in law as on the basis of "re-investigation" only closure report can be filed and not on the basis of "further investigation". Further investigation is a supplementary investigation in continuance of the previous investigation.

25. As per Cr.P.C., after committal of the case, the first stage comes on which the prosecution is required to open its case under Section 226 Cr.P.C. Thereafter, under Section 227 Cr.P.C. accused is allowed to advance arguments on charge and after hearing submissions of both the parties, the court can discharge the accused if in its opinion no sufficient evidence exists on record. Whereas, if the offence is found to be satisfactory, the Court can frame the charge under Section 228 Cr.P.C. Therefore, it is immaterial whether accused have moved an application for discharge or not.

26. It is not in dispute that in the present case, application for discharge was moved on filing of closure report by CBI despite the fact that the arguments on charge are yet to be advanced. If the petitioners have a case based on the material on record, they may argue before the Id. Trial Court on the point of charge and if they are able to establish that no offence is made out against them, certainly they will get the benefit of discharge.

27. It is also not in dispute that the final chargesheet was filed by the Special Cell on 06.05.2006 and the cognizance by the competent authority has already been taken and the case has been committed to the Court of Sessions as per the procedure prescribed under Cr.P.C. The accused can be discharged partly or fully only after hearing arguments on charge and by consequent order thereto. Admittedly, the arguments on charge are yet to be heard by the Trial Court and order on charge is yet to be passed.

28. While dismissing the application for discharge, the learned Trial Court further recorded that the closure report filed by the CBI was after conducting the further investigation in FIR No. 10/2006. Further investigation means the continuation of earlier investigation not fresh investigation or re-investigation. Accordingly, the application filed by the petitioners for discharge was dismissed.

29. In addition, as per report of Special Cell under Section 173 Cr.P.C., the learned Trial Court has decided to proceed further on the following grounds:-

"Firstly, a police investigation culminates when report under Section 173 Cr.P.C., is filed before the Court of Id. Magistrate. At that time, the concerned Id. Magistrate is competent to accept the report or to reject the same out- rightly or may direct re-investigation or further investigation. Where the case is exclusively

triable by Court of Sessions, the Id. Magistrate after complying the mandatory provisions in the Cr.P.C. commits the same to the Court of Sessions for trial as per law. The Sessions Court after hearing arguments on charge may put accused, to stand the trial or to discharge the accused.

In the present case, the Special Cell filed the report under Section 173 Cr.P.C. before the Id. CMM on 06.05.2006 and took the cognizance of the offences under Sections 121/121A/122/123/120-B IPC and 4/5 of Explosive and Substance Act and 25 Arms Act and then committed the case for trial in the Court of Sessions. Accordingly, case was received by Id. Predecessor of this Court for further trial as per law. This shows neither the Id. Magistrate nor the concerned Sessions Court thought it fit to order for further investigation or re-investigation in the present FIR.

Secondly, once the investigation, re-investigation or further investigation has not been ordered by the Id. Magistrate or the Sessions Court, this can be done by the Hon''ble Superior Courts. The order of the Hon''ble High Court dated 09.05.2006 is very clear where Hon''ble High Court has passed order for further investigation not de-novo investigation. In this further investigation, the investigating officer of the CBI filed the closure report and with recommendations to initiate criminal action against investigating officers and other officers of the Special Cell as given the report. The order of the Hon''ble High Court is very clear that it has not set-aside the investigation conducted by the Special Cell, ultimately, in which the report by Special Cell under Section 173 Cr.P.C. was filed. When the matter was taken up by the Hon''ble Supreme Court of India, the Hon''ble Supreme Court has left all the options open for this Court and gives three options which can be exercised by this Court and this Court is of the view that on the basis of available facts and arguments advanced by the parties, option no. 2 has to be exercised and trial be further proceeded in accordance with law, i.e., as per report filed by Special Cell under Section 173 Cr.P.C.

Thirdly, the power to direct the re-investigation or de-novo investigation falls in the domain of Hon''ble Superior Courts from perusal of orders of Hon''ble Superior Courts, shows that no such order or option has been exercised rather question left over the decision for this Court.

Fourthly, by exercising option no.2, this does not mean end of road for the accused persons as accused have all the option available with them at the time of arguments on charge. At the time of framing of charge or hearing arguments on charge, accused may put any fact or argument that no charge against accused have been made out. Hence, much depends on the conclusion after hearing arguments on charge. It may be that accused may be discharged at that stage or accused may be discharged on some of the offences alleged to have committed by them or accused may be put to trial of all or some of the offences in which the charge is ordered to be framed. Arguments on charge are yet to be heard by this Court. Hence, the case is still open for the accused as well as for the prosecution.

Fifthly, in this case investigation started on the basis of information of Central Intelligence Agencies that two members of Al-Badar, the banned terrorist organization may come to Delhi. This information was recorded in DD entry made in the daily diary. As per the directions of senior officers, a team under the supervision of Mr. Sanjeev Kumar, ACP Special Cell led by Inspr. Mohan Chand Sharma was found to develop the information and identify Irshad and his whereabouts in Sultanpuri area. Secret sources were deployed. It was further came to the knowledge of Special Cell that both accused had gone to Jammu and Kashmir on the directions of their handlers to receive a consignment of arms and explosives and they may come on 09.02.2006 at about 4 pm from Jammu in JK SRTC Bus No. JK-02 Y-0299 with a consignment of explosives, arms and ammunition and will alight at Mukarba Chowk near Karnal Bypass in the evening. The information was recorded in the daily diary and discussed with senior officers. Hence, a team consisting of Insp. Sanjay Dutt and other police officials was constituted to act upon this information. They reached at the spot. After reaching the spot, police party was briefed. At about 7.35pm, both accused persons were identified by the informer when they had alighted from the bus No. JK-02 Y-0299 coming from Jammu. Both were seen carrying blue and green-red check coloured airbags each on their right shoulders. In the meantime, team posted nearby was alerted and when they were about to cross the outer Ring Road to go towards Rohini side, were apprehended. cursory search of both accused was conducted and from the right dhub of the pant worn by Mohd. Muarif Qamar @ Nawab, one Chinese Pistol star Mark 30 Calibre along with 8 live cartridges in its magazine was recovered. On checking the blue coloured bag recovered from the possession of Nawab, one white envelope containing 3 non-electronic detonators, one ABCD green coloured Timer, one AB cream coloured Timer was also recovered which was concealed beneath the layers of clothes including one light blue coloured shirt and dark gray coloured pant in the bag. From the red green coloured bag recovered from the possession of accused Irshad Ali, one Chinese Pistol star Mark-30 Calibre along with 8 live cartridges in its magazine was recovered. One white polythene containing a mixture of black and white oil based explosive material kept in a black polythene and was also concealed beneath the layers of clothes was also recovered. On weighing the explosive was found to be 2 kg.

All these recoveries at that time have to be proved during the course of trial. The CBI in the closure report had merely stated that these recoveries are planted but their investigation does not point out as to source of these materials, as to from where these materials were brought and who has planted. The investigation of CBI is totally silent on these aspects. The Closure report of CBI leads to nowhere.

Sixthly, the allegation of CBI that accused were falsely implicated and material shown to have been recovered were planted has imputed motive on the part of investigation agency but the nature of motive has not been explained in the report by the CBI. The report of CBI is silent about why these officers have falsely arrested the accused and planted the material upon them. The report of

CBI is totally silent about whereabouts of both accused persons between last week of December, 2005 and first week of February, 2006. The whereabouts of both accused have not been investigated by the CBI. This gives support to the theory of Special Cell that in between this period, accused had gone to Jammu and Kashmir for carrying out terrorist activities and came back on the time and place as revealed by the secret informer along with unlawful elements with them.

Seventhly, it is stated by the Id. APP that brother of accused Irshad Ali is a life convict. This conviction was not only in a murder case but also under the provisions of waging of war and other associates who were also convicted were also from J&K. Hence, under these circumstances, it may be safely concluded that these two persons may be having association with militant outfit. Id. APP further stated that accused Irshad Ali was using two mobile numbers 9873131845 and 9811921531 and he was in constant touch with different leaders of terrorist outfits base in Pakistan and Jammu and Kashmir including Billal Baig of JKIF who was using Pakistani number 00923008554959. This case is also registered under Section 4 & 5 Explosive Substance Act where mere possession of Explosive Substance with exploding evidence is an offence. Merely because the Special cell has not reached to the ultimate supplier, the investigation done by the Special Cell could not be thrown."

30. In view of reasons given above, the Trial Court accepted the report filed by the Special Cell, Delhi Police, under Section 173 Cr.P.C. and decided to proceed further in accordance with law.

31. It has been further held that all the recoveries had to be proved during the course of trial. The CBI in its closure report had merely stated that the recoveries are planted, but their investigation does not point out to the source of these materials, as to from where these materials were brought and who has planted. The investigation of CBI is totally silent on these aspects. Thus, the closure report of CBI leads to nowhere. The whereabouts of accused have not been investigated by the CBI. This gives support to the theory of Special Cell that in one period, the accused had gone to Jammu and Kashmir for carrying out terrorist activities and came back on the time and place as revealed by the secret informer alongwith unlawful elements. Thus, the case is also registered under Sections 4 and 5 of Explosive Substance Act, where mere possession of explosive substance with exploding device is an offence. Merely because the Special Cell has not reached to the ultimate supplier, the investigation done by the Special Cell could not be thrown out. Moreover, learned counsel for the petitioner has failed to establish any discrepancy in the impugned order on the issue noted above.

32. Regarding the third option, learned Additional Sessions Judge has rightly rejected the plea of CBI on further investigation by observing that CBI came to a conclusion that there was a report in December, 2005 about missing of accused persons, but CBI has not investigated for about two months regarding where were the accused persons. Thus, CBI on this point remained silent. Accordingly,

the story of investigation of CBI does not inspire confidence.

33. In the case of State of Orissa Vs. Debendra Nath Padhi , (2005) 1 SCC 568, the Supreme Court held that the Court of Sessions Judge at the time of considering the charge under Section 227 Cr.P.C. shall consider the material filed by the prosecution.

34. In the case in hand, a report under Section 173(2) Cr.P.C. has been filed by Special Cell, Delhi Police, in which cognizance has already been taken and as well as on the report filed by the CBI. Therefore, seeking discharge solely on the basis of CBI report is solely untenable.

35. Learned Additional Sessions Judge, vide his impugned order has decided the case as per the directions issued by the Supreme Court vide its order dated 13.12.2012 and held that there is no ground to proceed for accepting the closure report of CBI. Therefore, vide the impugned order, the learned Additional Sessions Judge held that it is neither just nor proper to direct further investigation.

36. Keeping in view the above discussion and the settled position of law, it is established that the report of CBI has already been rejected and report of the Special Cell, Delhi Police is on record. Thus, the material brought by both the agencies are on judicial file. Accordingly, the petitioners are at liberty to establish their case before the Trial Court while relying upon the material produced by CBI and by Special Cell, Delhi Police, as well. Therefore, I am of the considered opinion that there is no discrepancy and illegality in the order dated 04.06.2014 passed by the learned Additional Sessions Judge and I have no hesitation to say that the learned Additional Sessions Judge has passed the detailed order and has taken care of the directions passed by this Court and the Supreme Court as well. Therefore, at this stage, it is not proper to accept the report filed by CBI and reject the report of Special Cell, Delhi Police.

37. In view of above discussion, I find no merit in the instant petition. Accordingly, the petition is dismissed.

Crl. M.A. No. 13804/2014

Dismissed as infructuous.