(2009) 02 DEL CK 0080

In the Delhi High Court

Case No : Criminal Revision Petition No. 67 of 2009

Kushal Kumar	APPELLANT
Vs	
Central Bureau of Investigation and Another	RESPONDENT

Date of Decision : 17-02-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 197, 397, 401
Income Tax (Certificate Proceedings) Rules, 1962 — Rule 60, 61, 62, 63, 63(2)
Penal Code, 1860 (IPC) — Section 120B
Prevention of Corruption Act, 1988 — Section 13(1), 13(2), 19(1), 7

Citation : (2009) 7 ILR Delhi 63

Hon'ble Judges : G.S. Sistani, J

Bench : Single Bench

Advocate : R.K. Kapoor and Mukesh K. Verma, for the Appellant; Pankaj Batra, for respondent No. 2/UOI, for the Respondent

Final Decision : Dismissed

Judgement

G.S. Sistani, J.—The present petition has been filed u/s 397 of the Code of Criminal Procedure, 1973 (hereinafter referred to as, "Cr.P.C."), and is directed against the Order on Charge dated 17.01.2009 passed by the learned Special Judge/CBI/PHC/New Delhi in CC No. 19/08, RC No. AC1/2004/A0003 CBI.

2. The facts of the case as culled out from the petition, are: the State Bank of India (hereinafter referred to as, "SBI") filed an original application for the recovery of debts against the borrower M/S Ajay Metals, Delhi Road, and, a Recovery Certificate was issued on 04.02.2002 according to which the Bank was entitled to recover a sum of Rs. 72,89,296.76 and the consequential relief of interest and costs.

3. The Recovery Officer-II, DRT, Chandigarh issued a demand notice dated 12.07.2002 for payment of the outstanding amount of Rs. 72, 89, 296.76, within fifteen (15) days, failing which the recovery was to be executed under the provisions of the DRT Act, 1993. When payments were not made, SBI, on

25.08.2003 filed a proposal for sale of the equitably mortgaged property. Subsequently, a proclamation of sale through an open auction was issued on 18.12.2003 and it was declared that the auction would take place on 29.01.2004. The reserved price of the property was fixed as Rs. 13 lakhs and Recovery Inspector, Sh. AK Shukla was appointed as the auctioneer. The auction notice was got published in Dainik Bhaskar on 13.01.2004 and in an English Daily also.

4. On 29.01.2004, an auction was conducted by the auctioneer Shri A.K. Shukla at the premises of M/S Ajay Metals and out of the total No. of nine (9) bidders, Dr. I.S. Yadav being the highest bidder, was declared successful with his bid of Rs. 36 lakhs. It is stated that Dr. IS Yadav deposited a demand draft of Rs. 10.65 lakhs which was more than 25% of the final bid.

5. However, on 25.02.2004, Sh. Subhash Chand Sharma, who was the Guarantor as well as the judgment debtor, filed objections to the auction sale. The petitioner herein (Recovery Officer) directed for issuance of a notice to the auction purchaser and the matter was adjourned to 05.03.2004. Learned Counsel for the petitioner submits that the notice was issued in view of the provisions of Rule 63 of the IInd Schedule to the Income Tax Act, 1961; the Income Tax (Certificate Proceedings) Rules, 1962; and, also keeping in mind the principles of natural justice. Thereafter, SBI filed its reply to the objections and prayed for dismissal of objections and confirmation of sale and the matter was adjourned to 16.03.2004. In pursuance of the notice issued to the auction purchaser (issued for delivery through the channel of SBI), the auction-purchaser appeared on 10.03.2004, in the open Court and sought time to file the reply to the objections. The auction- purchaser filed his reply to the objections on 15.03.2004. As per the petition, on 15.03.2004, the petitioner was on leave and because of the fact that the work for which he had taken leave, could not be completed on 15.03.2004, so he extended his leave to 16.03.2004. In the absence of the petitioner, the matter was adjourned to 19.03.2004, as per usual practice, by the lone office Assistant, Mr. AK Shukla, who also happened to be the auctioneer in the instant case. Learned Counsel for the petitioner submits that in the meantime, on 17.03.2004 a complaint was lodged by the auction-purchaser, against Mr. AK Shukla (Recovery Inspector), which was converted into FIR No. RCAC12004A0003, dated 17.03.2004, by the CBI. The file of the auction proceedings were then transferred to Mr. Yogesh Jain, ROI, in the Tribunal, at the request of the petitioner, in view of registration of FIR against Mr. AK Shukla (Recovery Inspector).

6. The Central Bureau of Investigation (CBI) sought sanction from the Central Government for the prosecution of the petitioner, which was granted u/s 19(1)(a) of the Prevention of Corruption Act, 1988 (hereinafter referred to as, "PC Act"). Allegations were leveled u/s 120B, Indian Penal Code, 1860 (hereinafter referred to as, "IPC") read with Section 7, 13(2), 13(1)(d) of the PC Act. The said order granting sanction was passed on 24.06.2005. Thereafter, a charge-sheet was filed by the Inspector of Police, CBI, ACU-I, New Delhi wherein a prayer was

made for taking cognizance of the offence against Sh. AK Shukla (Recovery Inspector) and Sh. Kushal Kumar (Recovery Officer, the petitioner herein) and for summoning them for trial of the offences punishable u/s 120B, IPC read with Sections 7, 13(2), 13(1)(b) of the PC Act.

7. Since the sanction was not sought/granted u/s 197 of Cr.P.C., the petitioner filed a Criminal Writ Petition No. 771/2006, which was, however, dismissed vide order dated 07.11.2008. Aggrieved by the judgment of this Court, the petitioner filed a SLP (Crl.) before the Apex Court and which is pending admission before the Apex Court. In the meantime, arguments on charge were heard by the Special Judge, Patiala House Courts and vide order dated 17.01.2009, submissions of the petitioner against the framing of charge were rejected. Vide order dated 02.02.2009, charges were framed against the petitioner. Aggrieved by the said orders, the petitioner has filed this Criminal Misc. Petition before this Court and prayed for setting aside of the order dated 17.01.2009 and dated 02.02.2009, passed by the Special Judge, CBI, New Delhi in CC. No. 19/08 (CBI v. A.K. Shukla and Kushal Kumar), RC No. AC1/2004/A0003 CBI, New Delhi.

8. Mr. Kapoor, learned Counsel for the petitioner has assailed the order primarily on three points.

(i) The FIR is against one Mr. A.K. Shukla and that the FIR does not mention the name of the petitioner. Learned Counsel has drawn the attention of this Court to the fact that the complainant therein (auction purchaser) had not prayed for any action to be initiated against the petitioner herein.

(ii) He next contends that in the Order on Charge, the learned trial court has failed to take into consideration that once the objections were filed by Sh. Subhash Chand Sharma (Guarantor), the petitioner was duty bound to issue notice to the complainant and wait for his reply and thus there was no impropriety on behalf of the petitioner. It is the case of the petitioner that he performed the judicial act within the parameters provided under the recovery proceedings as in IInd schedule appended to the Income Tax Act, 1961 and Income Tax (Certificate Proceedings) Rules, 1962. The perusal of Rules 60 to 63 shows that there is a mandatory requirement of issuance of notice, especially under the proviso to Rule 63(2). The relevant rules as relied upon by the petitioner, are reproduced below:

60. Application to set aside sale of immovable property on deposit.

(1) Where immovable property has been sold in execution of a certificate, the defaulter, or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale, on his depositing.

(a) The amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, with interest thereon at the rate of fifteen per cent per annum, calculated from the date of the proclamation of sale to the date when the deposit is made; and

(b) For payment to the purchaser, as penalty, a sum equal to five per cent of the purchase money, but not less than one rupee.

(2) Where a person makes an application under Rule 61 for setting aside the sale of his immovable property, he shall not, unless he withdraws the application, be entitled to make or prosecute an application under this rule.

61. Application to set aside sale of immovable property on ground of non-service of notice or irregularity.

Where immovable property has been sold in execution of a certificate, such Income Tax Officer as may be authorized by the Chief Commissioner or Commissioner in this behalf, the defaulter, or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale of the immovable property on the ground that notice was not served on the defaulter to pay the arrears as required by this Schedule or on the ground of a material irregularity in publishing or conducting the sale:

Provided that-

(a) No sale shall be set aside on any such ground unless the Tax Recovery Officer is satisfied that the applicant has sustained substantial injury by reason of the non-service or regularity; and

(b) An application made by the defaulter under this rule shall be disallowed unless the applicant deposits the amount recoverable from him in the execution of the certificate.

62. Setting aside sale where defaulter has no saleable interest.

At any time within thirty days of the sale, the purchaser may apply to the Tax Recovery Officer to set aside the sale on the ground that the defaulter has no saleable interest in the property sold.

63. Confirmation of sale

(1) Where no application is made for setting aside the sale under the foregoing rules or where such an application is made and disallowed by the Tax Recovery Officer, the Tax Recovery Officer shall (if the full amount of the purchase money has been paid) make an order confirming the sale, and, thereupon, the sale shall become absolute.

(2) Where such application is made and allowed, and where, in the case of an application made to set aside the sale on deposit of the amount and penalty and charges, the deposit is made within thirty days from the date of the sale, the Tax Recovery Officer shall make an order setting aside the sale.

Provided that no order shall be made unless notice of the application has been given to the persons affected thereby.

(iii) It is next contended that the learned Special Judge has observed in the order dated 17.01.2009 passed by him that, "objections were entertained from the Objector, who was a guarantor, though he had not deposited the mandatory amount.... Counsel for the petitioner submits that the observations of the learned Special Judge are misplaced inasmuch as, it was not mandatory on the part of the petitioner to deposit the amount. And in fact, the provisions in Rule 63 (supra), warranted that no order could have been passed unless notice of the application had been given to the persons affected. Furthermore, the petitioner acted in accordance with the requirements of Rule 22 of the DRT Act which provides that the tribunal shall be guided by the principles of natural justice.

9. Learned Counsel for the petitioner further submits that merely because Sh.A.K. Shukla (auctioneer) demanded the alleged bribe by abusing the name of the petitioner (Recovery Officer), a negative inference cannot be drawn against the petitioner. It is also stated that since the petitioner was acting judicially and the proceedings before him were judicial proceedings in view of Rule 82 of Schedule II to Income Tax Act, the petitioner was also entitled to protection under the Judicial Officers Protection Act, 1850.

10. Per Contra, learned Counsel for the CBI, Mr. Ashish Kumar submits that the objections raised by the petitioner herein have been duly dealt with by the learned Special Judge and thus no grounds are made out for interference in this revision petition. Learned Counsel for the CBI has drawn the attention of this Court to the chargesheet wherein specific findings have been made against the petitioner. The relevant paragraphs read as under:

11. Investigation further disclosed that Shri Kushal Kumar and Shri AK Shukla entered into a criminal conspiracy and in furtherance of the said criminal conspiracy, Shri AK Shukla, after the auction proceedings were over on 29.01.2004, demanded bribe of Rs. 35,000/- for himself and for Shri Kushal Kumar from Dr. IS Yadav....

12. Investigation disclosed that Sh. Kushal Kumar, the Recovery Officer, while acting in conspiracy with Shri AK Shukla, took up the matter on 09.02.2004 and noted in that the report of Shri AK Shukla on the auction be placed on record. He adjourned the matter to 25.02.2004. On 25.02.2004, Shri Subhash Chand Sharma, the Guarantor/one of the judgment debtors filed an objection against the auction/sale of the said property to Dr. IS Yadav. However, Shri Subhash Chand Sharma did not deposit the mandatory amount with this objection and thus did not fulfill the requisite condition and therefore, his objection was liable to be rejected, outright. Instead, Sh. Kushal Kumar entertained the matter....Sh. Kushal Kumar summoned Dr. IS Yadav on 10.03.2004, instead of 05.03.2004, when the matter was fixed for further proceedings. Further on the next date, i.e. on 05.03.2004, Sh. Kushal Kumar adjourned the matter to 16.03.2004. On 05.03.2004, the State Bank of India, Rewari also filed its reply to the objection of

Shri Subhash Chand Sharma. .

13. Thus, Sh. Kushal Kumar on 27.02.2004, instead of summoning the auction purchaser, Dr. I.S. Yadav, for his appearance on the next date of hearing i.e 05.03.04, summoned him for 10.03.2004, when no other party was summoned. Further, on 05.03.04, Sh. Kushal Kumar, instead of adjourning the matter to 10.03.2004, when Dr. I.S. Yadav had been summoned, adjourned it for 16.03.04.

14. Investigation further disclosed that on 10.03.2004, when Dr. I.S. Yadav, the auction purchaser, along with his Accountant Shri Gopal Sharma, appeared before Sh. Kushal Kumar, the latter in presence of Shri Gopal Sharma, behaved with Dr. I.S. Yadav in an unbecoming manner. When Dr. I.S. Yadav presented the notice dated 27.02.2004 issued by Sh. Kushal Kumar for appearance of Dr. I.S. Yadav on 10.03.2004, before Sh. Kushal Kumar, he threw it away and asked Dr. I.S. Yadav to come with some lawyer. Sh. Kushal Kumar also asked Dr. I.S. Yadav as to whether Sh. A.K. Shukla had told him something and, if not, he should talk to Sh. A.K. Shukla, the Recovery Inspector.

11. Learned Counsel for CBI also relies upon the Order on Charge dated 17.01.2009, to canvas his arguments that the learned Special Judge has followed the dictum of the Apex Court in the case of Union of India (UOI) Vs. Prafulla Kumar Samal and Another, . Learned Counsel submits that the Special Judge, CBI had taken into account all the objections raised by Sh. Kushal Kumar (petitioner herein) and on the basis of settled position of law with respect to the "framing of charge., rejected the contentions of the petitioner. Thus there is no infirmity in the order passed by the learned Special Judge.

12. I have heard learned Counsel for the parties, taken into account the rival contentions and minutely analysed the material on record. Section 397 read with Section 401 of Cr.P.C. vest revisionary jurisdiction in the High Court. In the case of Jagannath Choudhary and Others Vs. Ramayan Singh and Another, the Apex Court while reiterating the established principles with regard to the exercise of revisionary jurisdiction, by this Court, held:

9. Incidentally the object of the revisional jurisdiction as envisaged u/s 401 was to confer upon superior criminal courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions of (sic or) apparent harshness of treatment which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand in some undeserved hardship to individuals. (See in this context the decision of this Court in Janata Dal Vs. H.S. Chowdhary and Others,) The main question which the High Court has to consider in an application in revision is whether substantial justice has been done. If however, the same has been an appeal, the applicant would be entitled to demand an adjudication upon all questions of fact or law which he wishes to raise, but in revision the only question is whether the Court should interfere in the interests of justice. Where the court concerned does not

appear to have committed any illegality or material irregularity or impropriety in passing the impugned judgment and order, the revision cannot succeed. If the impugned order apparently is presentable, without any such infirmity which may render it completely perverse or unacceptable and when there is no failure of justice, interference cannot be had in exercise of revisional jurisdiction

10. While it is true and now well settled in a long catena of cases that exercise of power u/s 401 cannot but be ascribed to be discretionary - this discretion, however, as is popularly informed has to be a judicious exercise of discretion and not an arbitrary one. Judicial discretion cannot but be a discretion which stands "informed by tradition, methodised by analogy and disciplined by system" - resultantly only in the event of a glaring defect in the procedural aspect or there being a manifest error on a point of law and thus a flagrant miscarriage of justice, exercise of revisional jurisdiction under this statute ought not to be called for. It is not to be lightly exercised but only in exceptional situations where the justice delivery system requires interference for correction of a manifest illegality or prevention of a gross miscarriage of justice. In Nosibolla2, Logendranath Jha3 and Chinnaswamy Reddy1 as also in Thakur Das (Dead) by Lrs. Vs. State of Madhya Pradesh and Another, this Court with utmost clarity and in no uncertain terms recorded the same. It is not an appellate forum wherein scrutiny of evidence is possible; neither the revisional jurisdiction is open for being exercised simply by reason of the factum of another view being otherwise possible. It is restrictive in its application though in the event of there being a failure of justice there can be said to be no limitation as regards the applicability of the revisional power.

11. The High Court possesses a general power of superintendence over the actions of courts subordinate to it. On its administrative side, the power is known as the power of superintendence. On the judicial side, it is known as the duty of revision. The High Court can at any stage even on its own motion, if it so desires, and certainly when illegalities or irregularities resulting in injustice are brought to its notice, call for the records and examine them. This right of the High Court is as much a part of the administration of justice as its duty to hear appeals and revisions and interlocutory applications - so also its right to exercise its powers of administrative superintendence. Though however, the jurisdictional sweep of the process of the High Court, however, under the provisions of Section 401 is very much circumscribed, as noticed hereinbefore.

13. Furthermore, while dealing with a matter wherein charges framed against the accused by the Trial Court but quashed by the High Court in a revision petition before it, the Apex Court observed:

3. ...The revision power under the Code of Criminal Procedure cannot be exercised in a routine and casual manner. While exercising such powers the High Court has no authority to appreciate the evidence in the manner as the trial and the appellate courts are required to do. Revisional powers could be exercised only when it is shown that there is a legal bar against the continuance of the

criminal proceedings or the framing of charge or the facts as stated in the first information report even if they are taken at the face value and accepted in their entirety do not constitute the offence for which the accused has been charged. This Court in Kanti Bhadra Shah and Another Vs. The State of West Bengal, has held that there is no legal requirement for the trial court to write a reasoned or lengthy order for framing the charges.

4. In the instant case the learned Judge ignored the basic principles which conferred the jurisdiction upon the High Court for exercise of revisional powers. It was premature for the High Court to say that the material placed before the trial court was insufficient for framing the charge or that the statement of the prosecutrix herself was not sufficient to proceed further against the accused-respondent.

5. As the impugned order has been passed against the settled position of law, it is unsustainable and is accordingly set aside. The order of framing the charge passed by the trial court against the accused is upheld with directions to it to proceed with the trial of the case and dispose of the same on merits in accordance with law.

14. In light of the aforestated principles laid down by the Apex Court with regard to exercise of revisionary jurisdiction by the High Court, and applying them to the facts of this case, it would be relevant at this stage to note the First Information Report (FIR) which was lodged against Sh. AK Shukla, Recovery Inspector. In the FIR, it has been mentioned that Sh. AK Shukla (Recovery Inspector) had mentioned the name of Sh. Kushal Kumar (petitioner herein), as the person who was an associate of Sh. AK Shukla in demanding bribe. In fact, in the FIR, the complainant (auction purchaser) goes on to state that on 10.03.2004, he had met the petitioner in his office and showed him the notice of appearance. At this, the petitioner threw his notice of appearance and asked him to appear through a counsel. Then the petitioner asked him (auction purchaser), whether the latter had met Mr. Shukla (Recovery Inspector) and if Mr. Shukla had told him "something" and if not, then he should contact Mr. Shukla. Learned Special Judge has rightly taken this fact into consideration that the petitioner had asked the complainant (auction purchaser) whether Mr. Shukla (Recovery Inspector) had told him "something" and if not then he should go and contact him. The learned Special Judge while passing his order, had based his decision upon para 10 of Union of India (UOI) Vs. Prafulla Kumar Samal and Another, . It would be useful to reproduce the said relied portion of the judgment:

10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the judge while considering the question of framing the charges u/s 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction u/s 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post Office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

15. As per the law laid down by the Apex Court in the case of Prafulla Kumar (supra), a Court framing charges has to consider whether the material placed on record before it, discloses a grave suspicion against the accused, and whether the same has been properly explained to the court or not.

16. In my considered opinion, Sh. Kushal Kumar (petitioner) being a Recovery Officer, there was no reason for the petitioner to have asked the complainant to go and speak to Shri AK Shukla, Recovery Inspector, who had in fact no role to play, once, the matter was placed before the Recovery Officer and objections had been filed. Another factor which led to grave suspicion in the mind of the learned Special Judge is the fact that although the matter had been adjourned to 16.03.2004, the complainant (auction-purchaser) was asked to appear before the Recovery Officer (petitioner herein) on 10.03.2004. The explanation which has been given in the court is that since 31st March was fast approaching (the closing date of the year), therefore the Recovery Officer was inclined to wind up the matter expeditiously, and see that the money is credited to the account. I do not find sufficient force in this submission of learned Counsel for the petitioner on account of the fact that it was Sh. Subhash Chand Sharma, Guarantor who had filed objections, and no purpose would have been served by calling the auction-purchaser on a date, when the matter was neither listed nor the objector (Sh. Subhash Chand Sharma) had been called. The money would only have been paid by the complainant if the objections had been dismissed. Furthermore, the malafide of the Recovery Officer is also shown by the fact that he entertained the objections from Sh. Subhash Chand Sharma without him having deposited the mandatory amount. Rule 60 of Income Tax (Certificate Proceedings) Rules, 1962 explicitly lays that the deposition of the amount is a condition precedent for entertaining the objections. Rule 60 reads as under:

60. Application to set aside sale of immovable property on deposit.

(1) Where immovable property has been sold in execution of a certificate, the defaulter, or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale, on his depositing.

(a) The amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, with interest thereon at the rate of fifteen per cent per annum, calculated from the date of the proclamation of sale to the date when the deposit is made; and

(b) ....

Thus the learned Special Judge has correctly observed that this fact also points against the petitioner.

17. Having regards to the facts of this case and the reasons given by the learned Special Judge in support of his findings, I find there to be no material irregularity or impropriety that may warrant interference by this Court in the order dated 17.01.2009 passed by the learned Special Judge/CBI/PHC/New Delhi in CC No. 19/08, RC No. AC1/2004/A0003 CBI. Consequently, the petition is dismissed.

