

(2005) 01 DEL CK 0029

In the Delhi High Court

Case No : Writ Petition (Criminal) 1543 of 2004 and and CRLM 10166-10167

Mr. Tuncay Alankus

APPELLANT

Vs

The Central Bureau of Investigation

RESPONDENT

Date of Decision : 31-01-2005

Acts Referred:

Citation : (2005) 01 DEL CK 0029

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Herjinder Singh, for the Appellant; Sanjay Jain and Monica Sharma, for the Respondent

Judgement

S. Ravindra Bhat, J.—The present petition under Articles 226 and 227 of the Constitution of India, assail three orders passed by the Special Judge, New Delhi, (dated 11.10.2004, 17.11.2004 and 6.12.2004) hereafter called the ""first order"", ""second order"" and ""third order"" respectively.

2. At the outset of the proceedings, arguments were heard on the maintainability of the petition, in view of the fact that remedies exist under the Code of Criminal Procedure, 1973 (""the Code"") in relation to the three impugned orders.

3. The petitioner is an accused facing trial before a Special Judge, Delhi, for offences under Sections 120-B, 409 and 420 of the Indian Penal Code (IPC). The petitioner, and one Cihan Karanci, were extradited to India, to stand trial for the offences mentioned, in case RC No. 3(A)/96-ACU I titled ""Central Bureau of Investigation v. C.K. Ramakrishnan and others"".

4. The brief facts necessary for the purposes of these proceedings are that according to the prosecution, Karsan Danismanlik Turizm Sanayi Ticaret Ltd, a company incorporated under the laws of Turkey (hereafter called KARSANS) had entered into a contract with National Fertilizers Ltd, (NFL) on 9th November, 1995, for supply of 2,00,000 Metric tones of urea to the former. An amount of US\$ 3,80,000 was remitted to Pamuk, as per Karsan's instruction for payment of

insurance premium. That amount was not accepted by the bank. An amount of US\$ 37.62 million towards the balance consideration was remitted to KARSANS" account by the State Bank of India, at the instruction of NFL, on 29-11-1995. The allegation is that KARSANS dishonestly induced NFL to pay the amount, and committed the offences.

5. The petitioner, who is chairman of KARSANS was extradited to India, from Switzerland, on 3rd October 1997, to face trial in the proceedings. A charge sheet was filed, and thereafter, the Special Judge framed charges on 1st December 1998. The petitioner was enlarged on bail, by an order dated 7th June 2003.

6. By the first order, the Special Judge permitted examination of seven defense witnesses out of a list of 63 proposed by the petitioner. The Special judge also recorded that the witnesses permitted to be examined, on behalf of the accused, were foreigner , beyond the reach of the court. The accused petitioner was, Therefore, permitted to produce them at his own expense, or alternatively, examine them through video conferencing. By the second order, the Special Judge dealt with and disposed off an application on behalf of the petitioner that the witnesses permitted on his behalf be examined on commission. In the course of this order, the Special Judge noted that Section 243(3) of the Code enabled him to pass the order requiring the accused to deposit reasonable expenses incurred by defense witnesses for attending to the proceedings. The contention that the direction to examine witnesses through video conferencing, and the expenses of such a procedure were to be borne by the petitioner was arbitrary, and id not amount to a fair procedure, was raised and dealt with by the Special Judge. The third order declined extension of time in regard to examination of witnesses, beyond the time granted.

7. Mr. Harjinder Singh, learned counsel for the petitioner urged that the three orders of the Special Judge require to be interfered with under Article 227 of the Constitution of India. According to him, the curtailment of number of witnesses from 63 to t e seven permitted, would result in violation of the accused right to a fair trial, guaranteed under Article 21 of the Constitution of India. He submits that the condition imposed upon the petitioner, of having to bear the expenses for examination of defense witnesses by video conferencing, similarly is vocative of the right to a fair trial. The proper order, according to him, ought to have been the issuance of a commission for examination of witnesses residing abroad, at the expense of the State. He relied upon Section 484 of the Code, for the purpose. Strong reliance has been placed by learned counsel upon the decision of the Supreme Court in Ratilal Bhanji Mithani Vs. State of Maharashtra and Others, to the effect that in every criminal trial the accused is entitled to have the witnesses examined in his presence and if a departure is made and witnesses cannot be brought to Court for one reason or the other (whether due to the action of the accused or the inaction or want of diligence on the part of the prosecution), and they have to be examined on commission beyond the frontiers

of this country, it is incumbent upon the prosecution and the Court to afford to the accused the same facilities for employment of a lawyer, the payment of his to and fro air fare to the place where the Commission will examine witnesses and his daily expenses.

8. According to counsel, every person has a right to be dealt with in accordance with established procedure, no less, and any departure from such a requirement would derogate from the right to fair procedure under Article 21. He has relied upon the decision of the Supreme Court in *A.R. Antulay Vs. R.S. Nayak and Another*, for the purpose. Reliance has been placed on the decision of the Supreme Court in *Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others*, to support the maintainability of the petition under Article 226/227 of the Constitution of India. According to Mr. Harjinder Singh, the existence of revisional remedies under the code, or the inherent power does not fetter exercise of the power under Articles 226/227, where the court sees manifest and obvious failure of justice.

9. Counsel for the petitioner also submitted that the two orders, disallowing witnesses, as well as the direction to examine the ones permitted, by the Special Judge, through video conferencing, is contrary to the notes/ communications addressed by the Swiss Government, to the Government of India, inter alia, expressing concern regarding progress of the penal procedure. It is further submitted that the impugned orders would amount to breach of the guarantees held out by the Indian Government, while seeking extradition of the petitioner.

10. It has been lastly urged that the impugned orders abridge Article 6 of the European Convention for Protection of Human Rights and Fundamental Freedoms, in that they do not ensure sufficient time, and fair opportunity to examine witnesses on behalf of the defense. Likewise, Article 3 has been cited; it requires that an accused has the right to examine his witness in the same manner, and subject to the same conditions, as the witnesses against him. Counsel urged that Article 14 of the International Covenant on Civil and Political Rights, too has been violated. That provision is similar to Article 6 of the Covenant for Protection of Human Rights and Fundamental Freedoms. According to counsel for the petitioner, all these rights would fall within the rubric of fair procedure, guaranteed under Articles 14 and 21 of the Constitution of India. He submits that these conditions, since they are not inconsistent with any municipal law, stand assimilated as part of those guarantees. For that purpose, he relies upon the decision of the Supreme Court in *Vishaka and others Vs. State of Rajasthan and Others*, .

11. Opposing any interference under Article 226/227, Shri Sanjay Jain, appearing on advance notice, for the Central Bureau of Investigation (the prosecuting agency) submits that there is nothing to warrant the exercise of extra-ordinary jurisdiction. It is submitted by learned counsel that in respect of each of the three orders, ample remedies are available under the Code itself either by way of revision u/s 397 or by invocation of Section 482. These remedies, according to

the learned counsel for the respondent are wide enough to permit scrutiny of errors of fact and jurisdiction and are, Therefore, adequate for correction of the grievances raised by the petitioner.

12. Shri. Jain has relied upon the decision of the Supreme Court in at page 580 Union of India (UOI) and Others Vs. Vidya Bagaria, to emphasize that there are inherent limitations evolved through judicial dicta, in relation to the exercise of discretion under Articles 226 and 227 of the Constitution of India. Reliance has also been placed upon the decision of the Supreme Court in Vadivelu Thevar Vs. The State of Madras, in support of the submission that it is the quality of evidence, rather than the number of witnesses, which would be determinative while examining a complaint of prejudice. The context for the submission is the first impugned order, which restricts the number of witnesses of the defense.

13. Before embarking upon the relative merits of the contentions about legality of the orders impugned, the scope of the present proceedings, in an ongoing criminal trial, have to be noticed. In Hari Vishnu Kamath's case (supra) a seven judge Constitution Bench of the Supreme Court, after reviewing all existing authorities on the issues, indicated the broad parameters that govern exercise of discretion under Articles 226 and 227 of the Constitution of India. They are:

- (1) Certiorari will be issued for correcting errors of jurisdiction;
- (2) Certiorari will also be issued when the court or tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice;
- (3) The court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the court will not review findings of fact reached by the inferior court or tribunal, even if they be erroneous;
- (4) An error in the decision or determination itself may also be amenable to a writ of certiorari if it is a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by certiorari but not a mere wrong decision.

14. In relation to criminal trials, the court's power under Article 226/227 has been examined on numerous occasions by the Supreme Court and this Court. In State, through Special Cell, New Delhi Vs. Navjot Sandhu @ Afshan Guru and Others, :

""the law is that Article 227 of the Constitution of India gives the High Court the power of superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. This jurisdiction cannot be limited or featured by any Act of the State Legislature. The supervisory jurisdiction extends to keeping the subordinate tribunals within the limits of their authority and to seeing that they obey the law. The powers under Article 227 are wide and can be

used, to meet the ends of justice. They can be used to interfere even with an interlocutory order. However the power under Article 227 is a discretionary power and it is difficult to attribute to an order of the High Court, such a source of power, when the High Court itself does not in terms purport to exercise any such discretionary power. It is settled law that this power of judicial superintendence, under Article 227, must be exercised sparingly and only to keep subordinate courts and tribunals within the bounds of their authority and not to correct mere errors." In an earlier decision, *Ouseph Mathai and Others Vs. M. Abdul Khadir*, the power under Articles 226 and 227 had been discussed, albeit in a somewhat different context. The same principles had been emphasized, in the following terms:

"the powers conferred upon the High Court under Articles 226 and 227 of the Constitution are extraordinary and discretionary powers as distinguished from ordinary statutory powers. No doubt Article 227 confers a right of superintendence over all courts and tribunals throughout the territories in relation to which it exercises the jurisdiction but no corresponding right is conferred upon a litigant to invoke the jurisdiction under the said article as a matter of right. In fact power under this article casts a duty upon the High Court to keep the inferior courts and tribunals within the limits of their authority and that they do not cross the limits, ensuring the performance of duties by such courts and tribunals in accordance with law conferring powers within the ambit of the enactments creating such courts and tribunals. Only wrong decisions may not be a ground for the exercise of jurisdiction under this article unless the wrong is referable to grave dereliction of duty and flagrant abuse of power by the subordinate courts and tribunals resulting in grave injustice to any party".

15. It is Therefore apparent that the power of the Court, though untrammelled, is hedged with the condition that it is used sparingly, in order to correct orders of inferior courts or tribunals, which amount to grave dereliction of duty and flagrant abuse of power. The power does not comprehend correction of mere erroneous views of such inferior courts or tribunals.

16. The question which arises, in the light of the above discussion is whether the features presented in the present case call for exercise of the powers under Articles 226 and 227 of the Constitution of India. It is not denied that the impugned orders can be called into question under other provisions of the Code; the petitioner can also invoke the inherent and residuary provisions u/s 482. The contention, however is that such remedies are not efficacious or appropriate.

17. As far as the first order, limiting the number of witnesses, is concerned, it has been passed in exercise of the discretion of the criminal court. Whether the said order, excluding a large number of witnesses, cited on behalf of the defense, would result in such prejudice as to amount to negation of a fair trial, is a matter requiring deeper scrutiny. For the purpose of this discussion, it would suffice to notice that the Special Judge had the discretion, and exercised it. Such exercise of discretion as been commended in certain decisions, such as *Arivazhagan Vs.*

State, Represented by Inspector of Police, . The remedy for a grievance in respect of such orders, is an appropriate petition u/s 397, or Section 482, where the court would examine the entire record, and circumstances. In such proceeding, the relative merits of the order curtailing the witnesses, the likelihood of a lengthy trial, as opposed to the allegation of prejudice arising from an abbreviated trial, would be gone into. The exercise of jurisdiction under Articles 226 and 227, in such cases would be inappropriate.

18. The second order, affirming the direction to examine defense witnesses through video conferencing, and rejecting the request to examine them by commission, has been assailed on the ground that it is contrary to law. Strong reliance has been placed up to Section 284 of the Code, and the decision in Ratilal Bhanji's case (supra) to the effect that the Code permits examination of defense witnesses outside jurisdiction of the Indian courts, only upon issuance of commissions, and that the expenses of such witnesses have to be borne by the State.

19. The question here is whether the direction is so erroneous or out of bounds vis-a-vis the powers of the Special Judge, as to amount to a dereliction of duty, or as to amount to a negation of the concept of fair trial, in which case it is a duty of the court to exercise its extraordinary jurisdiction. Each of the contentions raised with regard to the correctness of the order directing recording of deposition through video conferencing, as well as the prejudice stated to be caused by the order requiring deposit of expenses, are again prima facie, referable to powers under the Code. The power to direct bearing expenses is found in Section 243(3) read with Section 312. Hence, the case is not one where the prejudice is writ large on the face of the order. The petitioner may well be able to establish impropriety of an order of such nature, or illegality, in appropriate proceedings under the Code.

20. In *The State of Maharashtra and P.C. Singh Vs. Dr. Praful B. Desai and Another*, , the Supreme Court held that the Code is an ongoing statute, and applying the principles of interpreting an ongoing statute held that it is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law. Applying that interpretation, the court held that recording of evidence by video-conferencing is permissible under the Code. The necessary corollary is that the law is deemed to assimilate changes in technology, and progress in society, so as to be in tune with reality of the times. The Constitution and existing laws have to be looked into for discerning challenges thrown up due to emerging technological innovations; they have to be interpreted keeping this dynamic in mind. Therefore, the decision in *Ratilal Bhanji* cannot be read in isolation. That was rendered in an era where technological advances such as video conferencing were unheard of.

21. The petitioners' general grievance is with regard to prejudice being caused by the orders, resulting in his violation of right to fair trial as well as violation of rights under the European Convention for Protection of Human Rights and Fundamental Freedoms, and under the International Covenant on Civil and Political Rights. Here it has to be noticed that the right to a speedy and fair trial are indisputable and non-derogable values assured under our Constitutional scheme. However, every complaint of violation of such rights by itself would not necessitate interference under Articles 226 and 227 of the Constitution, particularly when other remedies [like in the present case] assuring a closer look at the trial process, are available. The test of prudence, Therefore, in such a case is not universal, it would depend upon the facts in each case.

22. In view of the foregoing discussion, I am of the opinion that the present case does not warrant exercise of jurisdiction under Articles 226 and 227 of the Constitution of India. It is expressly recorded that nothing stated in the course of the judgment is an expression of the merits of the case; the discussion if any, on the facts of the case is only confined to the merits of whether to exercise writ jurisdiction. All contentions and remedies of the petitioner are kept open.

23. In respect of the third order, the grievance of the petitioner is that the request for extension of time was not granted. As per that order, the time to take steps to examine the defense witnesses living abroad was to expire in the end of January, 2000. Having regard to the fact that the present petition was filed, heard, and has been decided by the present judgment, I feel that it would be in the interests of justice that the petitioner makes a fresh application for the purpose, (without prejudice to his liberty reserved in para 22) to the Special Judge, who shall grant a reasonable extension in that regard. This order would be necessary, since all the defense witnesses are foreign nationals, and denial of such an extension would necessarily result in irreparable prejudice to the petitioner.

24. The writ petition is disposed off in the above terms, granting the liberty mentioned in paras 22 and 23 above, with no orders as to costs.

25. All interlocutory applications are rendered infructuous in view of this judgment, and are disposed off in its terms.