

(2008) 02 DEL CK 0112

In the Delhi High Court

Case No : Criminal M.C. 2504 of 2006

Nemichand Jain alias Chandra Swami

APPELLANT

Vs

Enforcement Directorate

RESPONDENT

Date of Decision : 04-02-2008

Acts Referred:

Citation : (2008) 02 DEL CK 0112

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : K.K. Sud and Anish Shrestha, for the Appellant; A.K. Vali, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J.

Background Facts

1. The Petitioner Shri Nemi Chand Jain @ Shri Chandra Swami filed a suit for defamation in London against Shri Lakhu Bhai Pathak in the Court of the Queens Bench Division, London. By an order dated 13th January, 1986 the Court in London directed Shri Chandra Swami to deposit a sum of 6,000 Pounds in the Court as security towards the cost of the defendant in the said suit No. 6353 of 1984. On account of the plaintiff's failure to comply with the orders of the Court in London, the suit was dismissed. By an order dated 1st March 1988 that Court ordered that the said amount together with the accrued interest should be paid to the defendant's solicitors in partial satisfaction of the costs. Consequently a sum of 6638.29 pounds was paid to the defendant's solicitors on 16th March 1988.

2. The information regarding this payment was given to the Deputy Director (Enforcement), Directorate of Revenue Intelligence by the Central Bureau of Investigation (CBI) in August 1988. The CBI also forwarded the statement of one Mr. David Charles Crank a Solicitor representing Lakhu Bhai Pathak to the effect

that as per the intimation received by him from M/s. Oswald Hickson Collier and Company, the Solicitors for Shri Chandra Swami, the said amount was deposited in the Court in London. In relation to the above deposit for and on behalf of Shri Chandra Swami without prior permission of the Reserve Bank of India (RBI) in contravention of Section 8(1) of the Foreign Exchange Regulation Act, 1973 (FERA) one Shri K. N. Aggarwal, Secretary of the Petitioner was questioned. He made a statement in which it was claimed that the said amount was deposited without the knowledge of Shri Chandra Swami by his devotees.

3. A complaint was filed on 31st May 1996 by the Enforcement Directorate against the petitioner u/s 56 FERA in the court of learned Additional Chief Metropolitan Magistrate (ACMM), New Delhi. After the pre-charge evidence was recorded, summons was issued to the petitioner on 5th October 1996 for the offence u/s 8(1) FERA. Application for recording of defense evidence through video conferencing

4. On 27th October 2004, an application was filed by the petitioner seeking permission to file the statement of Shri Adnan M. Khashoggi on affidavit. This application was accompanied by the sworn affidavit of Adnan Khashoggi. On 19th March 2005, in a complete turnaround, the counsel for the petitioner informed the learned ACMM that he did not press his application dated 27.10.2004 for seeking permission to file the statement of Adnan Khashoggi by way of affidavit. The said application was accordingly dismissed by the learned ACMM as withdrawn.

5. Simultaneously on 19th March 2005, the petitioner filed another application for recording the statement of Adnan Khashoggi by videoconferencing and for summoning the Additional Director of the Enforcement Directorate as a witness. The case was adjourned to 28th May 2005 for reply of the prosecution to the said application. Between 28th May 2005 and 20th February 2006, there were 7 adjournments before the application for recording the statement of Adnan Khashoggi through videoconference could be heard and disposed of by the learned ACMM.

Impugned order of Learned ACMM

6. By the impugned order dated 20th Feb 2006, the learned ACMM dismissed the application recording inter alias the fact that there was no bilateral treaty arrangement between India and Saudi Arabia where the witness Adnan M. Khashoggi resided. Therefore, in terms of the judgment of the Supreme Court in The State of Maharashtra and P.C. Singh Vs. Dr. Praful B. Desai and Another, no recording of evidence through video conferencing was possible. Also, the learned ACMM held that the application was with a view to delaying the completion of the trial and Therefore deserved to be rejected. Submissions of Counsel

7. Mr. K.K. Sud, learned Senior Counsel for the petitioner, at the outset submitted that he was not pressing the prayer made in the application u/s 243 CrPC for summoning the Additional Director of the Directorate of Enforcement as

a witness. He submitted that the petitioner was prepared to undertake the expenses for the recording of the evidence of Adnan Khashoggi through video conferencing.

8. Referring to the judgment in *State of Maharashtra v. Praful B. Desai* Mr. Sud contends that the mere absence of a bilateral treaty between Saudi Arabia and India cannot be a ground to refuse the application of the Petitioner for recording of the defense evidence through videoconferencing. Alternatively it was submitted that the witness Adnan Khashoggi travels frequently to London, New York, Paris and Spain and since India had bilateral arrangements with regard to the corresponding countries, his evidence could be recorded when he might be present in any of the said places. Finally, Mr. Sud submitted that even if the petition for videoconferencing was not entertained, this Court could pass an appropriate order to permit the petitioner to tender the affidavit of Adnan Khashoggi by way of evidence before the trial court, notwithstanding the fact that earlier the petitioner had withdrawn the application seeking such relief.

9. According to Mr. Sud, the learned ACMM could reject the application u/s 243 CrPC only on the grounds mentioned therein i.e., the application was delayed or that it was vexatious, or granting it would defeat the ends of justice. The impugned order mentions only the first ground and not the other two. Even the ground of delay in the completion of the trial could not be attributed to the petitioner at all. It is pointed out that the adjudication proceedings have ended in the exoneration of the Petitioner and Therefore these criminal proceedings are likely to be quashed on that basis. In the circumstances, the ends of justice would not be defeated if the application of the petitioner was allowed. On the other hand its denial would seriously prejudice his rights.

10. In reply, Mr. A.K. Vali, learned Counsel for the Enforcement Directorate referred to the bulky case record and order sheets to show that numerous adjournments had been granted by the court of the learned ACMM at the instance of the Petitioner. It is obvious that the present application was only an abuse of process of Court and to delay the proceedings. Mr. Vali posed a question that if the Petitioner could travel to New York, Spain, London or Paris, there was no reason why he could not visit India to depose as a witness at the trial. He further clarified that the order exonerating the petitioner in the adjudication proceedings was under challenge by the Enforcement Directorate in this Court. Delay at the instance of the Petitioner

11. The grounds on which an application filed by the defense u/s 243(2) CrPC for summoning witnesses can be refused are that it is made for the purpose of vexation or delay or for defeating the ends of justice. The provision mandates that such reasons for refusal must be recorded in writing. At this juncture it is important to note that the grounds on which the application can be refused are in the alternative. In other words, the existence of any one, and not all, of the grounds is sufficient for justifying the refusal of an application u/s 243(2) CrPC.

12. A perusal of the case record shows that on 12th August 2000 the charge was framed. On 21st January 2003, after the statement of the accused u/s 313 CrPC was recorded, the following order was passed:

Present: Sh. A.K. Vali along with Sh. Naveen Matta.

Accused with counsel.

S/A recorded. Now to come up for DE on 21/2/2003.

Sd/-

ACMM

13. Thereafter numerous adjournments were granted at the instance of the petitioner. To be precise adjournments were granted on 21st February 2003, 4th April 2003, 21st May 2003, 15th July 2003, 19th August 2003, 22nd September 2003, 5th November 2003 and 12th December 2003 at the instance of the petitioner. Thereafter, an order was passed on 7th February 2004 which is self-explanatory and reads as under:

Present: Sh. A.K. Vali Advocate along with Sh. Navin Matta, SPP.

Accused with Sh. K.K. Manan advocate.

The application of complainant for closing defense evidence is pending. Id. defense counsel has orally opposed the application of the complainant stating that the complainant had also taken several adjournments for completing its evidence and that the accused wants to summon Adnan M. Khashoggi as this witness is from Gulf countries and Therefore, he has requested for three months adjournment for his production in the court. The Id. defense counsel has also submitted that he is a material witness in this case and his testimony is of utmost importance for the adjudication of this case.

In view of the request made, I am inclined to grant one more opportunity to accused for leading his defense evidence. Since the defense counsel has requested for three months time for production of this witness, his request is allowed and the case is adjourned to 17.05.2004 for D.E. It shall be responsibility of the accused to bring this witness. The summons be given duly which may be got executed either by courier etc. or any other manner of prescribed under law.

Sd/-

ACMM/New Delhi.

07.02.2004

14. On 17th May 2004 the petitioner did not present the witness Adnan Khashoggi. The case was adjourned by 3 more months till 25th August 2004 On that date the accused was again absent and exempted on an application moved

by his counsel. When the case came up for hearing 2 months later on 27th October 2004, an application was filed by the accused seeking permission to file the statement of Adnan Khashoggi on affidavit. This application was accompanied by the sworn affidavit of Adnan Khashoggi. The case was then adjourned to 2nd December 2004 for the reply of the prosecution. On 8th February 2005 the case had to be adjourned at the instance of the counsel of the accused. The application was then argued in part on 9th and 23rd February 2005 but adjourned again on 5th March 2005. As already noticed, there were seven more adjournments at the instance of the petitioner before the application came to be dismissed by the impugned order dated 20th February 2006.

15. The record of proceedings speaks for itself. The delay in the progress of the trial during the last eight years is largely attributable to the petitioner. He was granted numerous adjournments at his request for his earlier application for tendering the evidence of Adnan Khashoggi by way of affidavit. While that application was being heard in part, he did a turnaround and withdrew it only to file the present application for recording of the evidence through videoconferencing. This application has gone on for almost a year before the learned ACMM and thereafter in this Court for nearly two years. The application is not only a perfect example of a delaying tactic but also ought to be refused on the ground that it is made for the purpose of vexation.

Is the application made for defeating the ends of justice

16. Much argument was advanced by the learned Senior counsel for the petitioner that no opinion had been formed by the learned ACMM that the application should be refused on the ground that it had been made for defeating the ends of justice and Therefore the application ought not to have been refused. For the limited purpose of examining the tenability of this submission, this Court has examined the nature of the evidence sought to be produced by the defense in the context of the offence u/s 8(1) FERA. For the purposes of Section 8(1) FERA, it appears to this Court that the source of acquisition of the foreign exchange by the petitioner otherwise than by way of purchase is really not relevant. The offence stands attracted in terms of Section 8(1) read with Section 56 FERA if it is shown that a person has acquired foreign exchange otherwise than by way of purchase without the previous general or special permission of the RBI.

17. In the present case, the fact is that the deposit of 6000 pounds was made in the suit filed by the petitioner in London. Also, clearly it was for the benefit of and on behalf of the petitioner. The affidavit of Adnan Khashoggi which was earlier sought to be tendered and then withdrawn, and which is again asked to be taken on record, confirms the fact of deposit but only seeks to explain that it was made by the devotees of the petitioner without his knowledge. Such a statement does not appear to be relevant for avoiding the criminal liability u/s 8(1) FERA. In this background, allowing the application of the Petitioner for permission to tender such affidavit in evidence by way of defense or to have the

deposition of the witness recorded by way of video conferencing, would only defeat the ends of justice since no useful purpose is going to be served thereby. Conversely no prejudice can be said to be caused to the accused by refusal of such application. Also, there can be no doubt that it will further delay the completion of the trial.

18. In view of the above conclusions, it is not necessary to examine if the existence of a bilateral treaty between Saudi Arabia and India was critical for deciding if the application of the petitioner u/s 243(2) CrPC could be entertained in view of the decision in a State of Maharashtra v. Praful B. Desai. In other words, even if such treaty exists, it would make no difference to the conclusion that the application filed by the petitioner u/s 243(2) CrPC was rightly refused by the learned ACMM for the reasons explained hereinabove.

Conclusions and Directions

19. For the above reasons, the impugned order dated 20th February 2006 passed by the learned ACMM does not call for any interference. It is clarified that any observation in this order on the nature of the evidence sought to be tendered by the petitioner in his defense is only for the purposes of considering the merits of the application filed by the petitioner u/s 243(2) CrPC and is not intended to influence the ultimate verdict of the trial court which will be based on the independent assessment by the trial court of the evidence on record.

20. The petition is dismissed.

21. The Court is informed that the next date of hearing before the trial court is 12th February 2008. The trial court record be sent back immediately through a Special Messenger along with a certified copy of this order. The trial court will hereafter proceed in the matter as expeditiously as possible in accordance with law.