

(2013) 07 JH CK 0126
In the Jharkhand High Court
Case No : Civil Review No. 33 of 2012

Raj Kumar Agarwal

APPELLANT

Vs

The Election Commission of India and Others

RESPONDENT

Date of Decision : 19-07-2013

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2014) 1 JLJR 442

Hon'ble Judges : Prakash Tatia, C.J; Aparesh Kumar Singh, J

Bench : Division Bench

Advocate : Anil Kr. Sinha and Mr. Pandey Neeraj Rai, for the Appellant;

Final Decision : Dismissed

Judgement

1. Heard counsel for the petitioner. This Civil Review has been filed to review the judgment dated 5th April 2012 passed by us in W.P.(PIL) No. 1801/12 and W.P. (C) No. 1802/12. By this order, while upholding the decision of the Election Commission of India of cancelling the biennial election of Council of States (Rajya Sabha) of the State of Jharkhand, this Court handed over investigation of one of the cases already registered by the State Police, to the Central Bureau of Investigation. The petitioner is aggrieved against the said judgment though he was not a party in the above two writ petitions.

2. It will be proper to refer the facts of the case of W.P.(PIL) No. 1801/12 and W.P.(C) No. 1802/12 and the decision of the said writ petitions by common judgment dated 5th April 2012.

3. In the process of biennial election of Council of States (Rajya Sabha) of the year 2012 in the State of Jharkhand, some informations were received by the Election Commission of India as well as by the Income Tax Department that the candidates may purchase the votes (horse trading) from some reliable sources and on the basis of which, special steps were taken in the process of the said Election of Council of States (Rajya Sabha) so that there should not be transfer

of money for votes "for notes". Because of that vigilance, some money was recovered from the vehicle which was alleged to be meant for giving to the voters of Rajya Sabha Election. The Election Commission firstly stopped the counting of votes vide notification dated 30th March 2012 and thereafter, cancelled the elections. The police also registered one criminal case, therefore, the matter was under investigation with the State Vigilance Police.

4. In the background of these facts, two writ petitions were filed, one in the name of Public Interest Litigation being W.P. (PIL) No. 1801/12 and another writ petition being W.P.(C) No. 1802/12 was filed by the President of the political party who himself was the candidate in the Rajya Sabha Election. Both the writ petitions were heard at length and decided by the judgment dated 5th April 2012 wherein gravity of the issue was thoroughly considered and it was ordered in para-34, which reads as under.

34. Since it is a grave case of involvement of money power, horse trading and influence relating to process of election of Council of States, wherein voters are Members of Legislative Assembly, we deem it proper to direct Election Commission to hand over the matter to the Central Bureau of Investigation so far as criminality of any of the persons is involved.

5. The learned Senior counsel Shri Anil Kumar Sinha assisted by Shri Pandey Neeraj Rai, Advocate vehemently submitted that this order has been passed without affording any opportunity of hearing to the review petitioner who should have been heard in view of the judgment of the Apex Court in the case of Divine Retreat Centre Vs. State of Kerala and Others, . It is also submitted that merely because the judgment dated 5th April 2012 which, according to the learned counsel for the petitioner, is not a reasoned order for handing over the matter to the CBI, the CBI arrested the petitioner and petitioner has been harassed by the CBI which is clearly proved from subsequent events which have taken place subsequently. To demonstrate the incident, learned senior counsel for the petitioner Shri Anil Kumar Sinha submitted that the petitioner was initially enlarged on bail by the order of the trial court as the offences, which were mentioned in the FIR, were bailable offences only. Thereafter, CBI added some non-bailable offences and then moved for cancellation of bail of the petitioner which was cancelled by the Trial Court. However, the High Court has set aside the said order of the Trial Court and petitioner was permitted to submit fresh bail application which was rejected by the trial court and the petitioner is now behind the bars. It is alleged that the CBI is not investigating the matter fairly and is virtually harassing the petitioner who is a political leader. It is also submitted that similar allegations are there against more accused persons, but CBI have not taken any coercive steps against those persons and they have not been arrested. Learned counsel for the petitioner further vehemently submitted that there is no allegation that the State Police is not investigating the matter properly and in such a situation, the petitioner's matter should not have been handed over to the CBI. Learned counsel for the petitioner further relied upon a judgment of the

Hon"ble Supreme Court delivered in the case of State of West Bengal and Others Vs. The Committee for Protection of Democratic Rights, West Bengal and Others, wherein it has been held that though, there is power under Article 226 of the Constitution of India vested in the Court to refer the matter to the CBI even without the consent of the State Government in spite of Section 6 of Delhi Special Police Establishment Act whereunder CBI works, but the matter can be referred to the CBI only in a rarest of rare cases and when the Court reaches the conclusion that the State Police will not be in a position to investigate the matter properly. It is submitted that since the petitioner was not given any opportunity of hearing before the impugned judgment passed in the above two writ petitions, this is also a sufficient ground for review of the order. However, Learned counsel for the petitioner submitted that by now, on 04th June 2013, charge sheet has been submitted in the court by the CBI after investigation and the petitioner is accused in that case, as has been shown in the charge sheet.

6. We have considered the submission of the learned counsel for the petitioner and perused the considered judgments relied upon by the learned counsel for the petitioner.

7. This review petition could have been dismissed for very many reasons including one of the reasons that by this time, investigation is over and no investigation is pending with the CBI. This review petition also could have been dismissed only on the ground of pressing the review petition after such a long period. The impugned judgment was delivered on 5th April 2012 and the review petition was filed as early as in nice thirteen day on 18th April 2012 however with defects and it remained with defects before the Registry in spite of grant of time and ultimately, the petition has been listed in the court after one year by order dated 9th May 2013, as the defects were not removed by the petitioner. We are ignoring the defects.

8. In such a serious matter where the criminal case was handed over to CBI by the order of this Court dated 5th April 2012, the petitioner who was made accused and was arrested in a criminal case and he had a grievance against the handing over of investigation to the CBI, did not get the case listed in the Court for more than one year in a fact situation where this Bench grants permission for listing the matter even on the same day and routinely on the next day. Be that as it may be, we are not dismissing this review petition on these grounds or on the ground of non-removal of the defects as we found there is no merit in the review petition.

9. Contention of the review petitioner that, in this matter, the Court has passed the order to refer the matter to the CBI is without assigning any reason is concerned, we have already quoted para-34 of the judgment which is concluding paragraph of the judgment dated 5th April 2012. We have already mentioned in para-34 of the impugned judgment that it is a grave case of involvement of money power, horse trading and influence relating to process of election of Council of States wherein voters are Members of Legislative Assembly. We are of

the considered opinion that these reasons themselves sufficiently indicate the reasons for referring the matter to the CBI. So far as the word "rarest of rare cases" is concerned, it is a matter of inference and inference can be drawn from the facts and circumstances and mere word "rarest of rare cases" if used in any order not supported by the reason in the order are circumstances and facts of the case, then that will not be the rarest of rare cases. What is to be found for rarest of rare cases for handing over the matter to the CBI is the totality of the facts and not mere words in the judgment. A detailed judgment is self speaking. In this impugned judgment, this Court has dismissed the writ petition which was filed by one individual in the name of public interest litigation with the cost of Rs. 1,00,000/- (Rupees one lakh). Another petition was filed by the President of the political party which is one of the national political party in the country and neither the said party nor the State President of that party nor the individual has challenged the judgment dated 5th April 2012.

10. Since the learned counsel for the petitioner has brought to the notice of this Court some new facts which occurred after the investigation is taken over by the CBI, we may take judicial notice of the subsequent important and material facts also which is the fact that in earlier biennial election of Rajya Sabha in the State of Jharkhand in the year 2010 itself where there was sting operation by the news channel alleging horse trading in Rajya Sabha Election 2010, the State Police and State Vigilance Department registered one criminal case and thereafter did not investigate the matter for almost three years. When this fact was brought to the notice of this Court, this Court not only handed over that case also to the CBI subsequent to the impugned judgment dated 5.4.2012, but also directed the CBI to investigate whether, the police officials in the Vigilance Department from top to bottom had any criminality in their action for not investigating such a high profile matter where there was allegation of use of money power, horse trading and huge influence and that too affecting the process of election of Council of States. Such things cannot be taken lightly and these are already available in our judgment dated 5th April 2012 wherein this Court found that it was a grave case of involvement of money power, horse trading and influence in a process of election of Council of States. Therefore, we are of the considered opinion that Para-34 of our judgment with reasons given in preceding paras of the impugned judgment gives complete reasons for handing over the investigation to the CBI. The subsequent event referred above of handing over not only investigation of earlier horse trading matter of 2010, in the 2013 to CBI further strengthen our view that the matter should have been handed over to CBI.

11. So far as opportunity of hearing to the petitioner is concerned, FIR was already registered by the State Vigilance Police and who are the accused, can be found only either initially at the time of lodging of the FIR, from the FIR or subsequently during the investigation and thereafter, those persons are subjected to criminal trial. In Cr. Pc, there is no provision which provides that before lodging of the FIR, accused is required to be heard.

12. So far as judgment of the Hon"ble Supreme Court in the case of Divine Retreat Centre (Supra) is concerned, fact of that case are entirely different. In that case, the matter was registered upon the order of the High Court and referred to the CBI and therefore, the Court observed that in such a situation, the opportunity of hearing should have been given to the person concerned against whom CBI enquiry has been ordered. Here in this case, it is not a case registered on the basis of the judgment of this Court dated 5th April 2012 passed in W.P.(PIL) No. 1801/12 and W.P.(C) No. 1802/12. Admittedly, Criminal case has already been registered by the State Police. Mere investigation is handed over to the CBI. We have already observed that in a criminal case, even the investigating agency may not know from the FIR that whether there are more accused who have committed offence and therefore, we are of the considered opinion that in such a situation, no opportunity of hearing can be required to be given to those unknown persons. According to the learned counsel for the petitioner, petitioner was not the main accused in the FIR. Learned counsel for the petitioner pointed out that it was known to this Court before delivery of the judgment dated 5th April 2012 that the petitioner may be accused or is accused, therefore, the petitioner could have been given an opportunity of hearing. We are of the considered opinion that neither this Court investigated into the offence, nor was in a position to hold an enquiry who can be accused. The writ petitions referred to above, were decided on the basis of the pleadings of the parties and more particularly, on the pleadings of the petitioners. Facts have not been considered for the purpose of deciding any issue with respect to any of the person. The Court was concerned with the facts of the case in which the matter was registered by the State Vigilance Department in the form of FIR. There is difference between suspect and accused. The petitioner may be suspect at that time because there was allegation against him which is a status some sort of accused than the status of accused. Suspect may not be ultimately accused and may also be exonerated in the investigation itself. We are of the considered opinion that this Court could not have open a Pandora Box inviting all the persons who were suspected only. In view of the above reasons, we are of the considered opinion that no case is made out for the review of the judgment dated 05th April 2012 and particularly when the judgment which has been relied upon by the learned counsel for the petitioner in the case of Committee for Protection of Democratic Rights, West Bengal (supra), the Apex Court has categorically held that in exercise of discretionary jurisdiction under Article 226 of the Constitution of India, High Court has ample power to refer the matter to the CBI even without consent of the State Government and therefore, the review petition is dismissed, however without imposing any cost. It goes without saying that none of the observations made by us will prejudice the petitioner in any criminal case.