

(2015) 09 DEL CK 0443
In the Delhi High Court
Case No : WP(CrI) No. 446/2015

Rajnish B. Bhatia

APPELLANT

Vs

CBI and Others

RESPONDENT

Date of Decision : 09-09-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 218, 219, 220, 221
Penal Code, 1860 (IPC) — Section 120B, 379, 411, 414, 420
Prevention of Corruption Act, 1988 — Section 13(1)(d), 13(2)

Citation : (2015) 09 DEL CK 0443

Hon'ble Judges : Ashutosh Kumar, J.

Bench : Single Bench

Advocate : Vikas Pahwa, Sr. Advocate and B. Badrinath, Advocate, for the Appellant; Sonia Mathur and Meghna Rohtagi, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Ashutosh Kumar, J.—The petitioner challenges the order dated 12.2.2015 passed by learned Special Judge, CBI-05, Patiala House Courts, New Delhi in CC No. 56/2012 and CC No. 2/2013 whereby joint trial of the aforesaid two separate cases have been ordered by taking resort to Section 219 of the Code of Criminal Procedure. By the same order, the Court below has directed the recording of prosecution witnesses of CC No. 2/2013 in CC No. 56/2012.

2. On 20.4.2012, CBI registered an FIR vide RC No. 221/2012/E006 alleging leakage of the technical General Paper CPLT/ATPLT (Paper-I) of Pilot License Examination, January-2012, which was conducted at various examination centres throughout the country on 15th March, 2012. It was alleged in the aforesaid FIR, that before commencement of examination, the Chief Examination Officer (hereinafter "CEO" for short) received a telephonic information that the technical general question paper has been leaked. On being asked to name and disclose the identity, the Secret Informer told that he had received such question paper through an email on 14.3.2012 in the night. The aforesaid informer was asked to

forward the email along with the question paper on the email address of the CEO. Eleven pages of the question paper were forwarded to the CEO.

3. The procedure which is followed is that before the question papers are dispatched to various examination centres, they are vetted by the technical experts of Directorate General of Civil Aviation (hereinafter "DGCA" for short) in the office of CEO at R.K. Puram. After vetting, the question paper is taken out from the system and is sent to the examination centres in a sealed envelope through special messengers. The question papers of the aforesaid examination were vetted on the first day upto question serial number 41 and 59 questions were vetted on the next day. The document which was forwarded through the email contained corrected questions till item No. 41 and 59 questions which were vetted on the next day were found missing in such forwarded e-mail. On receipt of such leaked out question paper through email, the statement of officers of DGCA was recorded. R.V. Zamir, Assistant Director, CEO who was present during the vetting stated that Captain H.S. Malhotra of DGCA, Headquarters was associated with the vetting on the first day i.e. on 6.3.2012 when 41 questions were checked. Aforesaid Mr. Zamir had to leave the office for some urgent work and in the meantime Captain Malhotra was left alone for about 10 minutes in the office. On further enquiry of the result of the examination it was found that 41 candidates had scored 90% marks who in the earlier papers had not even scored 60% marks.

4. A re-examination was conducted on 10.4.2012 on the same centres and the result disclosed that out of 48 candidates who had scored 88% marks, only 10 candidates had cleared the re-examination. 10 candidates who had scored more than 90% marks in the previous examination remained absent in the re-examination and 20 candidates who had secured above 90% marks, failed in the re-examination. In the meantime an anonymous complaint also was received by the vigilance department wherein it was alleged that one Shailender Pal Singh who worked with Air India was the main person involved in the leakage of question papers. The facts stated above revealed commission of offence punishable under Section 120B read with Section 420 of IPC and Section 13(2) read with Section 13(1)(d) of the P.C. Act, 1988 against Shailender Pal Singh, an employee of Air India and a resident of Uttar Pradesh.

5. After investigation, chargesheet was submitted (CC No. 56/12) against Lalit Jain, H.S. Malhotra and Siddharth Choudhary out of whom H.S. Malhotra was a public servant whereas the other two were private persons. After the filing of the chargesheet cognizance was taken and charges were framed against the aforesaid three persons under Section 120B IPC read with Section 13(2) read with Section 13(1)(d) of the P.C. Act, 1988. No charge was framed under Section 420 of the IPC.

6. A supplementary chargesheet was filed against one Rahul Kheriwal. Against him also charges were framed under the same sections.

7. Thereafter another chargesheet vide chargesheet No. 2/13 was filed on 28.2.2012 against Lalit Jain, H.S. Malhotra, Rahul Kheriwal and the petitioner (Rajnish B. Bhatia).

8. The aforesaid chargesheet namely chargesheet No. 2/13 disclosed that there was leakage of question paper in the examination which was held in August, 2011. In that examination (2011), also, H.S. Malhotra was assigned the task of setting and vetting the question papers. It was alleged that he, in conspiracy with other accused persons, including the petitioner got the question papers leaked for monetary considerations. The 2011 examination process was completed in normal course.

9. It would be noteworthy to repeat that the examination of 2012 which was scheduled on 15th March, 2012 was cancelled and a re-examination was held. No action was taken so far as 2011 examination was concerned.

10. After the filing of the chargesheet No. 2/13, charges were framed against all the persons including the petitioner except Rahul Kheriwal who was discharged and a separate trial proceeded.

11. The trial in both the cases proceeded for some time whereafter a prayer was made by CBI that since many of the prosecution witnesses are common in both the cases, therefore, it would be expedient to try both the cases together.

12. The petitioner expressed his reservation on the ground that a joint trial with other accused persons who were charge-sheeted in CC No. 56/12 would prejudice his case as he was only charged for the offence which was discerned in CC No. 2/13 which related to leakage of question paper of the examination held in the year 2011. The further objection of the petitioner was that the transaction as well as the facts of both the cases were not similar, and, therefore, the case of the petitioner could not be clubbed along with the accused persons of the other case (CC No. 56/2012) in terms of Section 219 of the Code of Criminal Procedure. The petitioner had apprehension that the statement under Section 161 of the Code of Criminal Procedure recorded in CC No. 56/12 would be used against him as well.

13. The Trial Court after analysing the provision of Section 219 of the Code of Criminal Procedure and the facts of both the cases concluded that the offences in both the cases were with respect to the same transaction and similar offence was committed within a span of 12 months i.e. from August, 2011 to March, 2012. The Trial Court also noted the fact that in both the cases all the accused persons were same except the petitioner who was only charge-sheeted in CC No. 2/13 and his role was limited to the leakage of question paper for the examination conducted in the year 2011. It was noted by the Trial Court that despite a separate chargesheet (CC No. 2/13) having been filed, it was only in the nature of a supplementary chargesheet to the main R.C. case as no separate case was registered. The Trial Court, therefore, clubbed both the cases for a joint trial by taking resort to Section 219 of the Code of Criminal Procedure, specifying that

the petitioner would not be prejudiced as his role is confined to the leakage of 2011 question paper. By the same order, it was directed that CC No. 56/13 would be tried as the main case and the deposition of prosecution witnesses in CC No. 2/13 would be recorded in CC No. 56/13.

14. In order to appreciate the contention of the petitioner, it is first necessary to refer to the provisions of Sections 218 to 223 of the Code of Criminal Procedure.

15. Section 218 of Cr.P.C. provides that for every distinct offence, there would be a separate charge and every such charge shall be tried separately unless the accused persons, by an application in writing so desire and the Magistrate is of the opinion that such person is not likely to be prejudiced thereby, and in that event, the Magistrate may try together all or any number of charges framed against such persons.

16. To such rule of separate charge and a separate trial for each distinct offence, certain exceptions have been laid down in Sections 219 to 223 of the Cr.P.C. and which exceptions are based on rational principles. In Section 219 of the Cr.P.C., joint trial for offences of the same kind not exceeding three in number and committed within a period of 12 months is permitted for avoidance of multiplicity of proceedings. Section 220 of the Cr.P.C. permits of one trial even if many offences are committed, if such offences form part of the same transaction; the rationale for such an exception being that in such circumstances, separate trials may lead to conflicting judgments. In case of any doubt about what offence has been committed, Section 221 of the Cr.P.C. permits of framing of any number of charges which could be tried together, provided the offences are connected and the accused could also be convicted for an offence with which he is not expressly charged but might have been charged. Section 223 of the Cr.P.C. permits of a joint trial of several persons in specified cases, where various offences committed by them are connected with each other. Section 219 and Section 223 of the Cr.P.C. are quoted below:

"Section 219 . Three offences of same kind within year may be charged together.

(1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with, and tried at one trial for, any number of them not exceeding three.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code (45 of 1860) or of any special or local law:

Provided that, for the purposes of this section, an offence punishable under section 379 of the Indian Penal Code (45 of 1860) shall be deemed to be an offence of the same kind as an offence punishable under section 380 of the said Code, and that an offence punishable under any section of the said Code, or of any special or local law, shall be deemed to be an offence of the same kind as an

attempt to commit such offence, when such an attempt is an offence.

Section 223 . What persons may be charged jointly. The following persons may be charged and tried together, namely:--

- (a) persons accused of the same offence committed in the course of the same transaction;
- (b) person accused of an offence and persons accused of abetment of, or attempt to commit, such offence;
- (c) person accused of more than one offence of the same kind, within the meaning of section 219 committed by them jointly within the period of twelve months;
- (d) persons accused of different offences committed in the course of the same transaction;
- (e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first named persons, or of abetment of or attempting to commit any such last- named offence;
- (f) persons accused of offences under sections 411 and 414 of the Indian Penal Code (45 of 1860) or either of those sections in respect of stolen property the possession of which has been transferred by one offence;
- (g) persons accused of any offence under Chapter XII of the Indian Penal Code (45 of 1860) relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence; and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges:

Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in this section, the [Magistrate or Court of Session] may, if such persons by an application in writing, so desire, and [if he or it is satisfied] that such persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons together."

17. In the case at hand, though there has been leakage of question paper for the examination conducted in 2012, for which a main case (RC No. 221/2012-E-006) was instituted but the petitioner has been charge-sheeted with respect to leakage of question paper of 2011 examination. It has been noted by the Court below that though a separate chargesheet was filed and not a supplementary chargesheet vide chargesheet No. 2/13 but such chargesheet was submitted without any registration of a separate case. In such an event, the chargesheet No. 2/13 is to be accepted as a supplementary chargesheet in the main case. The transaction is same namely leakage of question papers in Pilots"

examination of 2011 and 2012. The accused persons in CC No. 56/12 are private and public officials who have also been made accused in CC No. 2/13, except for the petitioner who has only been charge-sheeted in CC No. 2/13. Thus the transaction and the facts of the two instances when question papers were leaked, are same.

18. It has been argued on behalf of respondent No. 3, H.S. Malhotra, who was arraigned as an accused in the first chargesheet that any separate trial would on the other hand cause prejudice to him and others who are common in both the cases as the evidence recorded in one trial would become known to the witnesses in the other trial and the prosecution could very well block the chinks or latent wedges in its" case in the other trial.

19. In *State of Andhra Pradesh Vs. Cheemalapati Ganeswara Rao and Another*, , the Supreme Court dealt with the same provision but under the Code of 1898. The Supreme Court held that what had to be ascertained was whether offences arise out of acts so connected together so as to form the same transaction for the same to be clubbed together. The Supreme Court observed as hereunder:--

"What is meant by "same transaction" is not defined anywhere in the Code. Indeed, it would always be difficult to define precisely what the expression means. Whether a transaction can be regarded as the same would necessarily depend upon the particular facts of each case and it seems to us to be a difficult task to undertake a definition of that which the Legislature has deliberately left undefined. We have not come across a single decision of any Court which has embarked upon the difficult task of defining the expression. But it is generally thought that where there is proximity of time or place or unity of purpose and design or continuity of action in respect of a series of acts, it may be possible to infer that they form part of the same transaction. It is, however, not necessary that every one of these elements should co-exist for a transaction to be regarded as the same. But if several acts committed by a person show a unity of purpose or design that would be a strong circumstance to indicate that those acts form part of the same transaction. The connection between a series of acts seems to us to be an essential ingredient for those acts to constitute the same transaction and therefore, the mere absence of the words "so connected together as to form" in cls. (a), (c) (sic) and (d) of S. 239 would make little difference."

20. In *Mohan Baitha and Others Vs. State of Bihar and Another*, , the Supreme Court interpreted Section 220 of the Code and observed as hereunder:--

"It may be noticed that under Section 220 of the Code of Criminal Procedure, offences more than one committed by the same persons could be tried at one trial, if they can be held to be in one series of acts, so as to form the same transaction. The expression "same transaction" from its very nature is incapable of an exact definition. It is not intended to be interpreted in any artificial or technical sense. Common sense and the ordinary use of language must decide whether on the facts of a particular case, it can be held to be in one transaction.

It is not possible to enunciate any comprehensive formula of universal application for the purpose of determining whether two or more acts constitute the same transaction. But the circumstances of a given case indicating proximity of time, unity or proximity of place, continuity of action and community of purpose or design are the factors for deciding whether certain acts form parts of the same transaction or not. Therefore, a series of acts whether are so connected together as to form the same transaction is purely a question of fact to be decided on the aforesaid criteria".

21. The broad test, therefore, for ascertaining whether offences charged form part of the same transaction are: the same modus operandi for committing several offences; offences committed are of same nature, involving similar system or persons; proximity of time of the commission of offences, suggesting continuity of action; series of acts which may be closely connected affecting and impacting similar type of persons etc. If the substratum of the series of acts is common, then those acts do constitute same transaction.

22. The very fact that all the accused persons are common in both the cases (CC No. 56/12 and CC No. 2/13) except the petitioner and the allegation, in both the cases, is of getting the question papers of a particular examination leaked, is definitely indicative of the offences in both the cases being committed in the same transaction, and within a period of one year.

23. The clubbing of the two cases, therefore, is justified on a joint reading of Sections 219 and 223 sub-Clause (d) of the Code of Criminal Procedure.

24. It has been submitted on behalf of the CBI that no prejudice would be caused to the petitioner; rather prejudice would be caused to the other accused persons if joint trial is not held. It was submitted that many prosecution witnesses have now been examined and the entire trial would be vitiated if the same set of evidence is recorded in the other case, if it is tried separately. The apprehension of the petitioner that the statement under Section 161 recorded in CC No. 56/12 would be used against him if he is tried along with the accused persons in the same trial, is unfounded. The role of the petitioner is limited to the leakage of question papers for 2011 examination and he has nothing to do with the leakage of question papers of 2012 examination.

25. Thus seen in totality it would only be in the interest of the accused persons and the petitioner as well if same trial is conducted.

26. The case of the petitioner is squarely covered by clause (d) of Section 223 of the Cr.P.C. which provides for charging and trying together persons accused of different offences committed in the course of same transaction. The proviso to Section 223 of the Cr.P.C. specifically states that even if number of persons are charged with separate offences and such persons do not fall in any one of the categories specified in the Section, the Magistrate or the Court of Session may on an application in writing by such persons and on his being satisfied that anyone would not be prejudicially affected thereby, try all such persons together, taking

into account the expediency for joint trial.

27. True it is that the petitioner has not consented for joint trial, but other accused persons are desirous of one trial. Keeping the expediency in mind and taking into account the fact that no prejudice is caused to the petitioner; rather prejudice would be caused to others, if two trials are held, the order dated 12.02.2015, clubbing, the two case together, has been passed.

28. This Court sees no reason to interfere with the order impugned, more so, when some of the prosecution witnesses have already been examined at the trial.

29. The petition is dismissed.

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30. In view of the petition having been dismissed, no orders are required to be passed in the instant application.

31. Dismissed as having become infructuous.