

(2011) 10 DEL CK 0026
In the Delhi High Court
Case No : Writ Petition (C) 3035 of 2011

Santosh Kumar Jha

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 17-10-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 77

Prevention of Corruption Act, 1988 — Section 13(1), 13(2), 19, 19(1), 19(3)

Citation : (2011) 184 DLT 438 : (2012) 1 ILR Delhi 473

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : C.B. Pandey and Mr. Ranjan Pandey, for the Appellant; R.V. Sinha with Mr. R.N. Singh and Ms. Sangita Rai for R-1 and 2, Ms. Sonia Mathur and Mr. Sushil Kumar Dubey for R-3, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—The writ petition impugns the sanction accorded, in exercise of powers u/s 19 of the Prevention of Corruption Act, 1988 (POCA), by the Minister for Railways on 14.02.2011 for the prosecution of the petitioner. The writ petition came up before this Court first on 06.05.2011 when on oral request of the petitioner, the Central Vigilance Commission (CVC) and the Central Bureau of Investigation (CBI) were impleaded as respondents. It was the contention of the petitioner on that date, that the petitioner till then had not been able to get a copy of the formal order granting sanction for his prosecution; that the previous history of the case showed that on more than one occasion, the matter was examined and it had been decided not to grant sanction to prosecute the petitioner; that the said decision was reversed under pressure from the respondent No.3 CBI. The petitioner accordingly sought interim order restraining further steps pursuant to the sanction accorded on 14.02.2011.

2. Notice of the petition was issued and the question of interim relief left to be considered on the next date of hearing. On 10.05.2011, it was directed that in

the event the respondent No.3 CBI proposed to file a charge sheet, it will first inform this Court. Thereafter on 03.06.2011, the counsel for the petitioner informed that notwithstanding the earlier order of this Court, the petitioner had been summoned by the Special Judge of CBI Court in Greater Mumbai; violation of order dated 10th May, 2011 of this Court is alleged. Vide subsequent interim orders dated 15.06.2011 and 05.07.2011, the Special Judge, CBI, Greater Mumbai was requested not to insist on the personal presence of the petitioner before that Court. Counter affidavit has been filed by the respondent No.3 CBI and to which rejoinder has been filed by the petitioner. The counsels for the parties have been heard. The counsel for the respondent No.3 CBI during the course of hearing has handed over their records as to the grant of sanction for prosecution of the petitioner. The petitioner after the conclusion of the hearing has filed an additional affidavit dated 02.09.2011 enclosing therewith the formal sanction order dated 26.04.2011 for the prosecution of the petitioner.

3. The petitioner has pleaded:

(a) that he was appointed as an Indian Railway Traffic Service (IRTS) Cadre Officer in the Railways Department on the basis of direct recruitment through Civil Services Examinations (1992) and is presently working as Deputy Chief Operations Manager (Planning), Western Railway, Mumbai;

(b) that he, in the years 2001 and 2004, had purchased immovable properties at Greater Noida and Lucknow respectively, after availing of bank loan and loans from relatives and duly intimated about the purchase of aforesaid properties to the department, in accordance with Rules;

(c) that a Departmental Vigilance Enquiry was instituted against him and the case was also given to the respondent No.3 CBI and an FIR was lodged by the respondent No.3 CBI against the petitioner of offence punishable u/s 13(2) read with Section 13(1)(d) of POCA and registered for investigation;

(d) that the respondent No.3 CBI arrived at a conclusion of the petitioner possessing assets disproportionate by 54%;

(e) that the respondent No.2 Member Traffic, Railway Board forwarded the aforesaid report of respondent No.3 CBI to General Manager, Western Railway who held that the petitioner was not found in possession of any undeclared property and the case was of violation of the Railway Services (Conduct) Rules, 1966 regarding taking prior permission before acceptance of a gift cheque and accordingly recommended to the respondent No.2 Railway Board only departmental enquiry and no prosecution against the petitioner;

(f) that the competent Disciplinary Authority on 21.02.2008 took a decision for initiation of only major penalty proceedings against the petitioner and did not recommend prosecution of the petitioner;

(g) the respondent No.4 CVC in its note dated 14.05.2008 recorded that the respondent No.3 CBI takes up cases involving more than 30% of the assets as fit

for prosecution; that in the present case as per calculation of the Railways, the percentage of disproportionate assets is only 20.65%; that the respondent No.4 CVC's own calculation of disproportionate assets was of 34.7% while that of respondent No.3 CBI, as aforesaid, was of 54%. In the circumstances, the matter was referred back to the respondent No.3 CBI to consider the views of the respondent No.2 Railway Board;

(h) the petition does not disclose the findings of the respondent No.3 CBI at this stage; however it is pleaded that on the matter being referred again to respondent No.4 CVC and thereafter again to the respondent No.2 Railway Board, the respondent No.2 Railway Board again on 06.01.2009 opined that the case did not warrant prosecution by the respondent No.3 CBI;

(i) however the respondent No.3 CBI again approached the respondent No.4 CVC and a joint meeting of respondent No.3 CBI, respondent No.4 CVC and the respondent No.2 Railway Board was held on 11.09.2009 in which it was found that respondent No.3 CBI can be said to have brought out a clear "disproportion" of 15.73% which can go upto 24.42% only if there is a strong evidence to reject the income of the wife of the petitioner and the loan;

(j) that under the influence of respondent No.3 CBI, a Committee of Experts was constituted and on the basis of report whereof respondent No.4 CVC advised prosecution of the petitioner and the Disciplinary Authority of the petitioner changed its earlier view and recommended sanction of prosecution of the petitioner.

4. The petitioner contends that the Disciplinary Authority having initially applied its mind and not sanctioned prosecution, has now, in sanctioning the prosecution acted mechanically at the behest of respondent No.3 CBI. It is contended that the earlier decision of not recommending prosecution had attained finality and could not have been reviewed in the absence of any fresh material coming on record. Reliance in this regard is placed on *Abha Tyagi v. Delhi Energy Development Agency* 2002 III AD (Del) 641 and the judgment dated 23rd July, 2004 of the Division Bench of this Court in LPA No. 542/2002 arising there from. For the same reasons the order of sanction is also averred to be arbitrary and mala fide. Various other errors in the computation of percentage of disproportionate assets of the petitioner are averred. It is also contended that the constitution of an Expert Committee was illegal. It is alleged that while in the FIR the check period was from 1993 to 2005, it has been reduced while computing the percentage of disproportionate assets to six years (1999 to 2005) only causing great prejudice to the petitioner. It is further contended that the representations of the petitioner from time to time have not been considered. With reference to *Mohd. Iqbal Ahmed Vs. State of Andhra Pradesh*, , it is contended that grant of prosecution sanction is a sacrosanct exercise and not a mere idle formality and thus the grant of sanction by the respondent No.2 Railway Board on the basis of the orders of respondent No.4 CVC is illegal; that the sanctioning authority has not applied its own mind.

5. The respondent No.3 CBI qua the argument of the petitioner of the violation of the interim order dated 10.05.2011 of this Court directing the respondent No.3 CBI to, if proposing to file the charge sheet to first inform this Court, has explained that the charge sheet in fact had been filed prior thereto on 05.05.2011 and thus there is no violation of the interim order of this Court. It is further pleaded that intimation thereof was given to the petitioner on 05.05.2011 itself and the petitioner was asked to remain present on 11.05.2011 but the petitioner stated that he will be on leave at Delhi till 15.05.2011; that the Special Judge, CBI, Greater Mumbai took cognizance on 11.05.2011.

6. The respondent No.3 CBI in its counter affidavit as also on each and every date of hearing, has been vehemently opposing the territorial jurisdiction of this Court to entertain this petition. It is pleaded that the alleged offence has been committed at Mumbai, the FIR has been registered at Mumbai and the charge sheet has also been filed before the Special Judge, CBI, Greater Mumbai; the petitioner is also posted at Mumbai and the Special Judge, CBI, Greater Mumbai has already taken cognizance of the matter and the impugned sanction order is a part of the charge sheet and is under the judicial scrutiny of the learned Special Judge. It has further been contended on each and every date that the Special Judge, CBI, Greater Mumbai being beyond the territorial jurisdiction of this Court, no order with respect to proceedings of that Court could be made by this Court. Reliance is placed on C.B.I. Anti-Corruption Branch, Mumbai Vs. Narayan Diwakar, and on Musaraf Hossain Khan Vs. Bhagheeratha Engg. Ltd. and Others, . It is contended that it would be more appropriate to challenge the order taking cognizance in the Criminal Court having jurisdiction and the issue of validity of sanction should be gone into by that Court only. Reference is also made to Bholu Ram Vs. State of Punjab and Another, . It is also the argument of the respondent No.3 CBI that efficacious alternative remedy being available as aforesaid, the discretionary writ remedy ought to be declined to the petitioner.

7. It is further the plea of the respondent No.3 CBI that the present proceedings are dilatory; that the order of sanction of prosecution has been issued in the name of the President as per the Government of India (Allocation of Business) Rules, 1961 and the same was authenticated as per Government of India Authentication (Orders and Other Instruments) Rules, 2002 and under Article 77 of the Constitution of India, the same is not to be called into question.

8. It is also pleaded by the respondent No.3 CBI on merits that at the time of first advice of respondent No.4 CVC, certain material facts were not taken into consideration by the respondent No.4 CVC and hence the facts which were not considered at the time of first advice were further highlighted and represented by respondent No.3 CBI for re-consideration of respondent No.4 CVC and upon consideration thereof on report of the Expert Committee, the respondent No.4 CVC reconsidered the matter and gave the reconsidered advice for issuance of sanction order for prosecution of the petitioner.

9. The petitioner in his rejoinder to the counter affidavit has justified the

territorial jurisdiction of this Court by pleading that the offices of the respondents are within the jurisdiction of this Court, the sanction order dated 26.04.2011 for prosecution has been issued by the Ministry of Railways from New Delhi; all the information for approval of sanction for prosecution has been gathered by the petitioner through the medium of Right to Information Act, 2005 in New Delhi only. The petitioner further avers that the petitioner till now having not been served with any summons pertaining to prosecution, has no other avenue to challenge the sanction for prosecution except by way of this writ petition. He denies having been informed of the filing of the charge sheet and states that the present petition was filed even prior to the charge sheet being filed in the Court of the Special Judge, CBI, Greater Mumbai. It is reiterated that the filing of the charge sheet is in violation of the orders of this Court. Else, the pleas in the counter affidavit regarding grant of sanction are controverted.

10. Section 19 of POCA prohibits any Court from taking cognizance of an offence punishable there under except with the previous sanction of the Central Government or the State Government as the case may be and in the case of any other person, of the authority competent to remove him from his office. A first reading thereof appears to indicate that the challenge if any to the sanction, cannot be before the Court taking cognizance of the offence inasmuch as without a valid sanction, that Court would have no jurisdiction. However, Section 19 itself in sub-section (3) thereof provides that no finding, sentence or order passed by a Special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission, irregularity in the sanction required under sub-section (1), unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby. It further provides that no Court shall stay the proceedings under the Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice. Sub-Section (4) further provides that in determining whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the Court shall have regard to the fact whether the objection could and should have been raised "at any earlier stage in the proceedings".

11. Sub-Sections (3) & (4) of Section 19 are thus indicative of objections regarding and/or challenge if any to the sanction, being maintainable before the Special Judge only and/or in any appeal and/or other proceedings in the nature of revision etc. arising from the proceedings before the Special Judge.

12. The aforesaid question assumes relevance not only to determine whether this Court would have territorial jurisdiction but also whether the petitioner has alternative remedy. If the petitioner has the option of taking the pleas as taken herein before the Special Judge, CBI, Greater Mumbai, then the rule of alternative remedy though not absolute, would bar the jurisdiction of this Court. Moreover, if the Special Judge is empowered to entertain all such pleas and the

petitioner if aggrieved from the findings of the Special Judge, CBI, Greater Mumbai has remedies there against, then such remedies would definitely be in the High Court at Mumbai under whose territorial jurisdiction the Special Judge is.

13. I find the Supreme Court in *State of Madhya Pradesh Vs. Jiyalal*, to have held that it is open to an accused to question the genuineness or validity of the sanction order before the Special Judge. Similarly, in *State of M.P. Vs. Dr Krishna Chandra Saksena*, it was held that the question whether before granting sanction all the relevant evidence had been considered or not, could be examined only at the stage of trial when the sanctioning authority comes forward as a prosecution witness to support the sanction order if challenged during the trial and before that stage and at the very inception, the sanction order cannot be quashed on the supposition that all the relevant documents were not considered by the sanctioning authority. Similarly, recently in *Chittaranjan Das Vs. State of Orissa*, also, it was observed that if disputed questions of fact are involved, it is expedient to leave the question of validity of the sanction to be decided by the trial court.

14. Once one reaches a conclusion that the challenge made as in this petition could be made by the petitioner before the Special Judge, CBI also, the question of maintainability of this petition under Article 226 of the Constitution arises. Of course, the present petition was filed before the charge sheet was filed in the Court of Special Judge, CBI, Greater Mumbai. However, the question still arises whether a person against whom sanction has been so accorded and whose prosecution is imminent can, by rushing to the Court, create a situation in which unless stay of prosecution is granted the challenge to the sanction would become irrelevant. I am of the view that if such challenge were to be held to be maintainable, the same would delay the prosecution. The purport of Section 19(3)(c), prohibiting any Court from staying the proceedings under this Act on any other ground is again to ensure expeditious decision. Though the word "Court" in Section 19(3)(c) may not cover the High Court exercising powers under Article 226 but the legislative intent appears to be to ensure expeditious trial in such cases. It has been so held in *State of Bihar and Another Vs. P.P. Sharma, IAS and Another*, also. Reference in this regard may also be made to *State of West Bengal and another Vs. Mohammed Khalid and others*, though relating to the Terrorist and Disruptive Activities (Prevention) Act, 1987 but holding that though in an extreme and rare case the High Court may be justified in invoking the power under Article 226, that power is not exercisable where the position may be debatable. It was further held that in such cases the gamut of procedure prescribed under the special Act must be followed, namely raising the objection before the Designated Court and if necessary challenging the order of the Designated Court. It was yet further held that where the High Court has to perform the labored exercise of scrutinizing the material, there is sufficient indication that the writ jurisdiction under Article 226 is not available.

15. The petitioner herein has neither shown any reason for this case to fall in the

category of "extreme and rare" nor has shown any ex facie illegality in the sanction accorded. Rather the counsel for the petitioner has argued by taking this Court through the laborious exercise of scrutinizing the material. Thus, no case for entertaining under Article 226 is made out.

16. Mention in this regard may also be made of the judgment of the Division Bench of Madras High Court in *Dr. J. Jayalalitha v. Dr. M. Channa Reddy, Governor of Tamil Nadu* (1995) II MLJ 187 where a criminal writ petition impugning the order of sanction was held to be premature for the reason of ample opportunity to raise all contentions being available. Mention may also be made to the judgment of C.K. Thakker, J. in *Durgaprasad P. Dash Vs. State Bank of Saurashtra and Another*, speaking for the Gujarat High Court, while holding that the powers under Article 226 cannot be curtailed or taken away by legislation, laying down that the High Court will not be oblivious of the fact that the petition, before cognizance is taken by the Special Court, is premature and as and when cognizance is taken it being open to the accused to take all the contentions that no sanction could have been granted or that grant of sanction is contrary to law before the Special Court. It was further held that jurisdiction under Article 226 is to be exercised in the larger interest of justice and looking to the seriousness of the allegations, interference with the sanction may not be in larger public interest. Mention may also be made of *State of Punjab and Another Vs. Mohammed Iqbal Bhatti*, where also the Supreme Court, though in a Civil Appeal and arising from a Civil Writ Petition, held that the legality and/or validity of the order granting sanction would be subject to review by the Criminal Courts.

17. The law therefore appears to be that a Civil Writ Petition would not ordinarily lie in the circumstances.

18. The Full Bench of this Court recently in judgment dated 29th July, 2011 in LPA No. 819 of 2010 titled *C.S. Agarwal v. State* had occasion to determine whether a petition under Article 226 of the Constitution of India is in the exercise of civil or criminal jurisdiction. After considering the case law in the regard, the test culled out was "whether criminal proceedings are pending or not and the petition under Article 226 of the Constitution is preferred concerning those criminal proceedings which could result in conviction and order of sentence". It was further held that when, the Writ Petition for quashing of an FIR is filed, if the FIR is not quashed, it may lead to filing of the challan by the Investigating Agency; framing of charge; and can result in conviction or order of sentence - seeking quashing of such an FIR would therefore be criminal proceedings and while dealing with such proceedings, the High Court exercises its criminal jurisdiction. Seen in this light also, the High Court which ought to exercise such criminal jurisdiction would naturally be the High Court within whose jurisdiction, but for the interference by the High Court, the Court where challan would be filed, charge framed and order resulting in conviction may be made is situated. Such High Court in the facts of this case, is not this Court but the Bombay High Court.

19. I find that in *Dhirendra Krishan Vs. BHEL* ILR (1999) I Del 538 also Criminal Writ Petition impugning the sanction to have been preferred.

20. On the aspect of territorial jurisdiction of this Court, the counsel for the respondent No.3 CBI has also referred to *Hari Dutt Sharma Vs. Union of India (UOI) and Others*, where also this Court refused to entertain the Civil Writ Petition for the reason of the cause of action having proximity to Mumbai where the FIR had been lodged and charge sheet had been filed and the trial was in progress.

21. I therefore accept the objection of the respondents as to the territorial jurisdiction of this Court and hold that this Court does not have the territorial jurisdiction to entertain this petition.

22. Alternatively, even if it were to be held that this Court has territorial jurisdiction to entertain the petition, a five Judge Bench of this Court in *Sterling Agro Industries Ltd. Vs. Union of India (UOI) and Others*, has held that this Court can refuse to entertain the petition if finds another High Court to be a more convenient Court to entertain the petition. The difficulties in this Court entertaining this petition have already been noticed above in this Court being not able to issue any directions to the Court of the Special Judge CBI, Greater Mumbai. For this reason also, this is an appropriate case for this Court to refuse to entertain the petition.

23. Though the aforesaid is sufficient for disposal of this petition but for complete adjudication it is expedient to also deal with the challenge on merits by the petitioner to the order of sanction. As aforesaid, Delhi Energy Development Agency (*supra*) forms the fulcrum of the case of the petitioner. However, the said judgment itself notices the dicta in *P.P. Sharma (supra)* and in *Parmanand Dass Vs. State of Andhra Pradesh*, laying down that sanction order is an administrative act and there is no legal bar for reconsideration or revocation of the order by the sanctioning authority; rather it was held that "we find that there could be no legal bar to the sanctioning authority revising its own opinion before the sanction order is placed before the Court". However, the Division Bench of this Court in *Delhi Energy Development Agency* further held that the sanctioning authority cannot be left free to change its orders and decisions at its will and whim though it may reconsider its order and even revise it but only when some reasonable rationale and valid basis exists therefore. It was held that such basis may arise where the order is found to be suffering from some material infirmity, irregularity or perversity or where some fresh investigation material becomes available to the authority to dictate a reversal of the first order. The Division Bench in that case however found no such fresh material and held that different interpretation on the same material was not permissible.

24. The Supreme Court also recently in *State of Himachal Pradesh Vs. Nishant Sareen*, held that it is not permissible for the sanctioning authority to review or reconsider the matter on the same material. Earlier in *Mohammed Iqbal Bhatti*

(supra) also while reiterating that the State in the matter of grant or refusal to grant sanction exercises statutory jurisdiction and the same would not mean that once exercised it cannot be exercised once again, it was held that for exercising its jurisdiction at a subsequent stage, the express power of review in the State may not be necessary as even such a power is administrative in character. It was further held that while passing an order for grant of sanction, serious application of mind on the part of the concerned authority is imperative and an order refusing to grant sanction would be subject to review by "Criminal Courts". In that case, the Supreme Court affirmed the finding of fact of the High Court that no material was placed before the competent authority and only a communication had been received from the Director, Vigilance Bureau and which was not a new material. Upon finding that no fresh material had been placed before the sanctioning authority and no case of the sanctioning authority on an earlier occasion having failed to take into consideration a relevant fact or having taken into consideration irrelevant fact having been made out, it was held that the decision ought not to have been changed.

25. A perusal of the sanction order dated 26.04.2011 shows the same to be containing detailed reasons for according the sanction. The counsels have also referred to the Allocation of Business Rules, 1961 of the Government of India, framed under Article 77 of the Constitution of India, with the counsel for the respondent No.3 CBI contending that the appointing authority of the petitioner being the President of India and thus the order granting or refusing sanction could not have been issued by anyone below the Minister of Railways and the matter having never gone in the past to the Minister and the counsel for the petitioner contending that while the competent authority for granting sanction is the Minister but the competent authority for rejecting the sanction is the respondent No.2 Railway Board. However in view of the unequivocal position in law that there is no bar to review of the order and the only test is whether there was any ground for review or not, the said questions are not relevant.

26. I may also notice that it is also the contention of the counsel for the respondent No.2 Railway Board, supporting the counsel for the respondent No.3 CBI, that the petitioner is merely relying upon the observations at various stages in the decision making process whether to grant sanction or not. There is merit in the said contention also. The Apex Court in *Sethi Auto Service Station and Another Vs. Delhi Development Authority and Others*, held that internal nothings are not meant for outside exposure and nothings in the file culminate into an executable order affecting the rights of the parties only when it reaches the final decision making authority in the department, gets his approval and the final order is communicated to the person concerned. Similarly, in *Jasbir Singh Chhabra and Others Vs. State of Punjab and Others*, , it was held that issues and policy matters which are required to be decided by the Government are dealt with by several functionaries some of whom may record nothings on the files favoring a particular person, someone may suggest a particular line of action; however, the final decision is required to be taken by the designated authority

keeping in view the larger public interest. The said views were recently approved in Union of India (UOI) and Others Vs. Vartak Labour Union, .

27. The Indian Railways Vigilance Manual 2006, copy of which has been handed over, in paras 501 to 515 thereof provides for a detailed procedure running into several stages for obtaining CVC's advice in cases relating to CBI's request for prosecution with the final decision being of the Minister, Railways. It is not the case of the petitioner also that in the present case at any earlier point of time the file was referred to the Minister.

28. All the aforesaid questions require detailed examination of documents and records. The same as noticed above is beyond the scope of writ jurisdiction. Suffice it is to state that an Expert Committee had been constituted before sanction was accorded. The benefit of the report of the said Expert Committee was not available when according to the petitioner the sanction was refused. The present is not thus a clear cut case where it can be said that no new material was available before the sanctioning authority. The counsel for the respondent No.3 CBI has referred to Dinesh Kumar Vs. Chairman, Airport Authority of India and Another, where this Court held that the question whether or not sanctioning authority applied its mind to the facts and the material collected is a mixed question of law and facts which requires evidence for determination and if at all the petitioner has any grievance against the validity of the sanction order, he obviously would get a chance to challenge its validity before the concerned Court where the charge sheet is filed. The aforesaid equally applies to the ground of challenge in the present case also. The question whether any ground for review existed or not would require going into a plethora of documents and records available before the sanctioning authority on both the occasions. The said question is thus a mixed question of law and fact which cannot be adjudicated at this stage.

29. I may also notice that the question in the present case is of, what percentage the assets of the petitioner were found disproportionate. The earlier decision relied upon by the petitioner appears to be guided by the comparatively small percentage by which the petitioner's assets were disproportionate. While exercising equity jurisdiction, this Court would not exercise the equity in favour of a person who has disproportionate assets howsoever miniscule they may be.

30. Thus there is no merit in the petition. The same is dismissed. The petitioner is also burdened with costs of `20,000/- payable to the respondent No.3 CBI before the Court of Special Judge, CBI, Greater Mumbai on the next date of hearing.