
(2010) 10 SHI CK 0072
In the High Court Of Himachal Pradesh
Case No : CWP No. 5761 of 2010

Virbhadr Singh and Another	Vs	APPELLANT
State of H.P. and Others		RESPONDENT

Date of Decision : 01-10-2010

Acts Referred:

Constitution of India, 1950 — Article 21, 226, 32
Criminal Procedure Code, 1973 (CrPC) — Section 173, 173(2), 173(8), 190, 193
Information Technology Act, 2000 — Section 66A
Penal Code, 1860 (IPC) — Section 465, 469, 471
Prevention of Corruption Act, 1988 — Section 13(1), 13(2)

Citation : (2011) 1 RCR(Criminal) 396 : (2011) 1 RCR(Criminal) 396 : (2010) 3 ShimLC 582

Hon'ble Judges : Kurian Joseph, C.J.;Deepak Gupta, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Kurian Joseph, C.J.—What is the stage at which an accused in a criminal case can seek extra-ordinary relief of change of investigating agency is the main question of law that arises for consideration in this case.

2. While attempting the answer to the above question, it is necessary to refer to the factual background of the present Writ Petition and to some extent, the facts, as available on the record, and the various guiding principles laid down by the Apex Court in the matter.

3. Thus, we may first refer to the facts in brief. FIR No. 27 of 2009 was registered by the State Vigilance and Anti Corruption Bureau, Shimla. The petitioners herein shown are the accused. The gist of the FIR registered u/s 13(1) (d)(ii) & (iii), read with Section 13(2) of the Prevention of Corruption Act, 1988, is that towards the end of the year 1989 or in the beginning of 1990, the first petitioner who was the then Chief Minister of the State of Himachal Pradesh, misused his official position with the active support and connivance of the second petitioner herein, who is his wife for collecting amounts from various

industrialists and others. A Compact Disc pertaining to the conversation on the alleged transactions in that regard released on 28.5.2007, by one Mr. Vijay Singh Mankotia, forms the basis of the FIR registered on 3.8.2009. The petitioners herein filed a Criminal Miscellaneous Petition u/s 482 of the Criminal Procedure Code/ Cr.M.M.O. No. 107 of 2009, praying for quashing the FIR with a further prayer to entrust the investigation to CBI. or any other independent agency, outside the State of Himachal Pradesh. We may extract the prayers:

(i) FIR No. 27 dated 03.08.2009 under Sections 13(1)(d)(ii) read with 13(2) of Prevention of Corruption Act, 1988 registered at Police Station Anti-Corruption, District- Shimla presently pending investigation may kindly be quashed;

(ii) It is further prayed that an interim direction be granted to stay the investigation in the said F.I.R. forthwith in the interest of justice;

(iii) It is also prayed that investigation of the matter be entrusted to Central Bureau of Investigation or any other independent agency outside the State of Himachal Pradesh, in the interest of justice.

4. Petitioners filed a miscellaneous petition, Cr.M.P. No. 575 of 2009 in the said Section 482 petition, with a prayer to stay the investigation pending decision in the main petition. On 7.9.2009, the Court in the Section 482 petition, passed the following order:

Notice. Notice on behalf of respondents No. 1 & 2 is accepted by Mr. Anshul Bansal, learned Additional Advocate General. Notice to respondent No. 3 returnable in four weeks. Reply in the same period. In the meantime, if the investigation is complete, then the State will inform this Court before filing the report u/s 173 Cr.P.C. Put up on 3.11.2009.

5. When the investigation was thus in progress, the petitioners herein filed another miscellaneous petition as Cr.M.P. No. 140 of 2010 in the main petition u/s 482 Cr.P.C. praying for impleading respondents No. 5 & 6 herein, as additional respondents. It was alleged that the whole investigation against the petitioners is on account of conspiracy between respondents No. 5 & 6 and that would be revealed from the two C Ds produced in the Court. The petitioners also filed Criminal Miscellaneous Petition No. 141 of 2010 to send the C Ds for opinion of the Central Forensic Science Laboratory, Chandigarh, for their opinion and for registering the FIR with the further prayer to investigate the said matter also alongwith the investigation in FIR No. 27 of 2009. Cr. M.P. No. 140 of 2010 was dismissed by an order dated 28th June, 2010, holding that no case is made out for impleadment of new respondents as parties in the main petition and that they are not necessary parties for deciding the main petition. It was also held therein that:

it is the material collected during the investigation and evidence led in the Court which decides the fate of the accused persons. The allegations of malafides against the informants are of no consequence and cannot form the basis for

quashing the proceedings.

In the meanwhile, the State had filed Cr.M.P. No. 431 of 2010 in the said main petition informing the Court that the investigation had been completed. Thereupon, the petitioners filed Cr.M.P. No. 432 of 2010 for a direction not to permit the State to file the report without the permission of the Court. On 4.6.2010, the Court passed an order in the main petition restraining the State from filing the report u/s 173 Cr.P.C. till the main petition is finally decided as the counsel on both sides had agreed that the matter could be finally argued on 25.6.2010. It has been observed at paragraph 6 of the order, which reads as follows:

The learned Counsel for the parties have stated that they are ready for final hearing of the petition subject to the convenience of this Court. The interim order was passed on 7.9.2009 whereby the respondents were permitted to complete the investigation and thereafter inform this Court before filing the report u/s 173 Cr.P.C.

6. The main petition u/s 482 Cr.P.C. {Cr.M.M.O No. 107 of 2009} was dismissed by order dated 3.9.2010. It is seen that prayer No. 3 for entrusting the investigation to C.B.I. alone was pressed before the Court, without conceding that the said prayer alone was pressed may not be construed in the sense that the petitioners had conceded or admitted that on the basis of the FIR No. 27, dated 3.8.2009, prima-facie case was made out against the petitioners. The submission that the petitioners reserved their right for relief No. 1 to be pursued in appropriate proceedings lateron, if need be was also noted in the order. We may extract paragraph No. 22 of the order, which deals with the above submission:

22. Mr. R.S. Cheema, Senior Advocate, learned Counsel appearing on behalf of the petitioners at the time of hearing of the petition has not pressed relief No. (i) above, he has submitted that since as per the stand of respondent No. 1 report u/s 173 Cr.P.C. has been prepared in FIR No. 27 of 2009, which is not on record, therefore, in view of this development, he is not pressing relief No. (i). But the learned Senior Advocate has submitted that it may not be construed that petitioners have conceded or admitted that on the basis of FIR No. 27 dated 3.8.2009 prima facie case is made out against petitioners. He has submitted that petitioners reserve their right for relief No. (i) in appropriate proceedings lateron, if need be. The relief No. (ii) referred above has become redundant in view of completion of investigation and preparation of final report u/s 173 Cr.P.C. In these circumstances, Mr. Cheema, has pressed only relief No. (iii) mentioned above.

(Emphasis supplied)

7. While dismissing the main petition filed u/s 482 Cr.P.C., the Court held that the prayer for change of investigating agency cannot be considered in a petition u/s 482 of the Code of Criminal Procedure. The same can be done only in

proceedings under Article 226 of the Constitution of India, mainly relying on the decision of the Supreme Court in *Divine Retreat Centre Vs. State of Kerala and Others*, It has been held thus at paragraph 49 of the order as follows:

Thus, in view of law laid down by the Supreme Court, the High Court in exercise of its inherent jurisdiction cannot change the investigating agency and appoint another investigating agency. The change of investigating agency is beyond the scope of Section 482 Cr.P.C. The High Court under Article 226 of the Constitution of India can always issue an appropriate direction at the instance of an aggrieved person in a given case for changing investigating agency after satisfying that the case is fit to be investigated by another agency in the facts and circumstances of a particular case.

8. The petition was dismissed for yet another reason also that without considering the material collected by the investigating agency till date, it cannot be said that the case is fit or not for investigation by C.B.I. It has been held at paragraph 51, as follows:

51. The case can be seen from yet another angle. The investigation papers must be before the Court upto the stage when the case is to be considered for change of investigation agency. The petitioners have raised several serious issues in the petition but in absence of material collected by investigating agency till now the issues raised by the petitioners cannot be considered on merits. The petitioners themselves had prayed a direction against respondents No. 1, 2 for not filing report u/s 173 Cr.P.C. in the Court, which was allowed by way of interim order dated 4.6.2010 as the petition was likely to be heard on merits on 25.6.2010. It is different matter that on 25.6.2010, the petition could not be heard finally. The order dated 4.6.2010 indicates that submission was made on behalf of the petitioners that in case report u/s 173 Cr.P.C. is filed in the court then their petition would become infructuous. In these circumstances, without considering the material collected by investigating agency till now, it cannot be said that the case is fit or not for CBI investigation.

9. It is in the above backdrop, that we have to consider the prayers in the Writ Petition, which read as follows:

a. Issue an appropriate Writ, Order or Direction seeking transfer of investigation of case FIR No. 27 dated 3.8.2009 u/s 13(1)(d)(ii) read with Section 13(2) of the Prevention of Corruption Act, 1988, registered at Police Station Anti Corruption, District Shimla along with entire record to the Central Bureau of Investigation;

b. Issue further prayer that further investigation, if any, by Himachal Police in the matter be stayed forthwith;

c. The respondents No. 1 & 2 may be directed to investigate the case relating to C Ds (Annexure P-13 colly) in the same manner as has been investigated with respect to C Ds produced by S.M. Katwal and Vijay Singh Mankotia and consequently, if necessary, appropriate action in accordance with law may be

directed to be taken against respondents No. 5 and 6;

d. WITH a further prayer that any other writ, order or direction deemed appropriate in the facts and circumstances of the case be also issued.

e. Costs of writ petition may be awarded in favour of the petitioners.

10. As far as prayer No (c) is concerned, it is seen from the records that the State has registered FIR No. 7 of 2010, dated 8.3.2010, u/s 465, 469 & 471 of the Indian Penal Code and u/s 66A(b) of the I.T. Act and the matter is under investigation and therefore, it is not for this Court to comment on the investigation or issue any directions in that regard in this case, since the manner or method of investigation in that case is not the core issue in this case.

11. Prayer (b) is for a direction for staying the further investigation in the matter. Further investigation is a matter coming u/s 173(8) of the Code of Criminal Procedure. It is a power to be exercised by the Magistrate, Special Judge in this case, after perusal of the report filed by the Police u/s 173(2). It is open to the investigating agency also to conduct further investigation in the matter, u/s 173(8). Still further, it is always open to the accused also to bring to the notice of the Court, the need for further investigation. That stage is only after filing the report u/s 173(2) of the Cr.P.C. and the need would depend on the report. Till date, nobody knows what the report is. The report is yet to be filed. A report by the police u/s 173(2), is only the opinion formed by the police on the basis of the information received and material collected by the police at the time of investigation. It is not automatic or mandatory that on filing the report cognizance be taken. The Magistrate has to peruse the report and be satisfied himself as to whether it is a case to be referred away/ cancelled or go for further report or to take cognizance. Whether the Court should take cognizance on the basis of the report thus filed by the police u/s 173(2), , would depend on the material collected by the police in order to form their opinion which is commonly known as police report/challan/police charge. At the risk of redundancy, we may restate the legal position that the Section 173(2), report-challan is only the opinion formed by the police and it is for the Court to decide whether to refer away the opinion or to order for further investigation in the matter or to take cognizance and proceed with the case. Thus, it all depends on the action to be taken by the Magistrate where the Section 173(2), report is filed and needless to say, after filing the report.

12. This is precisely what the Court while dismissing the Section 482 petition Cr.M.M.O. No. 107 of 2009, held at paragraph 51 that:

...without considering the material collected by the investigating agency till now, it cannot be said that the case is fit or not for CBI investigation.

13. We are also guided by the view taken as above by the decisions of the Apex Court. In State of Bihar and Another Vs. P.P. Sharma, IAS and Another, at paragraph 23, wherein it has been held as follows:

...The police report submitted by the investigating officer has to pass through the judicial scrutiny of a Magistrate at the stage of taking cognizance. Although the accused person has no right to be heard at that stage but in case the accused person has any grouse against the investigating officer or with the method of investigation he can bring to the notice of the Magistrate his grievances which can be looked into by the Magistrate....

(emphasis supplied)

14. In *M.C. Abraham and Another, A.K. Dhote and J.F. Salve and Another Vs. State of Maharashtra and Others*, at paragraph 17 & 18, it has been held as follows:

17. The principle, therefore, is well settled that it is for the investigating agency to submit a report to the Magistrate after full and complete investigation. The investigating agency may submit a report finding the allegations substantiated. It is also open to the investigating agency to submit a report finding no material to support the allegations made in the first information report. It is open to the Magistrate concerned to accept the report or to order further enquiry. But what is clear is that the Magistrate cannot direct the investigating agency to submit a report that is in accord with his views. Even in a case where a report is submitted by the investigating agency finding that no case is made out for prosecution, it is open to the Magistrate to disagree with the report and to take cognizance, but what he cannot do is to direct the investigating agency to submit a report to the effect that the allegations have been supported by the material collected during the course of investigation.

18. In the instant case the investigation is in progress. It is not necessary for us to comment on the tentative view of the investigating agency. It is the statutory duty of the investigating agency to fully investigate the matter and then submit a report to the Magistrate concerned. The Magistrate will thereafter proceed to pass appropriate order in accordance with law....

(emphasis supplied)

15. Therefore, at the stage of filing of the challan-police report u/s 173(2), of the Code of Criminal Procedure and before taking cognizance u/s 190 Cr.P.C., (in this case u/s 193 Cr.P.C., being a Court of original jurisdiction, under the provisions of Prevention of Corruption Act), the opinion formed by the police and the material collected and produced by the police alongwith the report u/s 173(2), have to undergo judicial scrutiny. That judicial scrutiny may pertain to factors like; (1) whether the report submitted is after full and complete investigation; (2) whether further investigation is necessary; (3) whether on the basis of the report cognizance is to be taken and (4) whether anything brought to the notice of the Court by the accused requires consideration, etc. It is not a mechanical exercise of receiving the report and acting forthwith as per the report either by cancelling the case or taking cognizance.

16. In the instant case, the investigation admittedly having been completed, any further step can be taken only after perusing the report, which is to be filed before the Court concerned, since thereafter there are several options to the accused.

17. In this connection, we may also deal with one submission made by learned Senior Counsel Sh. Cheema that request for change of investigating agency is permissible even after charge sheet is filed. There cannot be any quarrel with that well settled proposition. Right to fair investigation and Right to trial is a fundamental right, as held by the Hon''ble Supreme Court in Nirmal Singh Kahlon Vs. State of Punjab and Others, at paragraph 28, it has been held as follows:

28. An accused is entitled to a fair investigation. Fair investigation and fair trial are concomitant to preservation of fundamental right of an accused under Article 21 of the Constitution of India...

This position has been re-stated by the Constitution Bench in a recent decision in the State of West Bengal and Others Vs. The Committee for Protection of Democratic Rights, West Bengal and Others, At paragraph 44, it has been held as follows:

44. ...(ii) Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. The said Article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. In certain situations even a witness to the crime may seek for and shall be granted protection by the State....

18. In Rubabbuddin Sheikh Vs. State of Gujarat and Others, the Hon''ble Supreme Court considered mainly two issues; 1) Whether investigation could be transferred to CBI after charge-sheet had been submitted and trial was going on. 2) Whether the facts and circumstances of the case warranted transfer of the case to CBI because according to the accused, investigation had not been conducted properly by the State police. No doubt, it is a case where the charge-sheet had already been filed. However, it has to be noted that it is a case where the Court after seeing the materials collected by the police for forming their opinion in filing the report u/s 173(2), , took the view that the investigation by the police was not in proper direction and that in order to complete justice in the case, it was necessary to hand over the investigation to independent agency like CBI. In that context, it was held that:

...in an appropriate case, the Court is empowered to hand over investigation to an independent agency like CBI even when the charge sheet had been submitted....

19. After referring to all the earlier decisions in *Kashmeri Devi Vs. Delhi Administration and Another*, , *Inder Singh Vs. State of Punjab and Others*, , *Gudalure M.J. Cherian and Others Vs. Union of India (UOI) and Others*, , *Punjab and Haryana High Court Bar Association, Chandigarh through its Secretary Vs. State of Punjab and others*, *Vineet Narain and others Vs. Union of India and another*, , *Union of India and Others Vs. Sushil Kumar Modi and Others*, , *Rajiv Ranjan Singh "Lalan" and Another Vs. Union of India (UOI) and Others*, , *Hari Singh Vs. The State of U.P.*, , *M.C. Mehta Vs. Union of India (UOI) and Others*, etc., the Apex Court finally at paragraph 60 in *Rubabbuddin Shiekh's* case (supra), held as follows:

60. Therefore, in view of our discussions made hereinabove, it is difficult to accept the contentions of Mr. Rohatgi, learned Senior Counsel appearing for the State of Gujarat that after the charge-sheet is submitted in the court in the criminal proceeding it was not open for this Court or even for the High Court to direct investigation of the case to be handed over to CBI or to any independent agency. Therefore, it can safely be concluded that in an appropriate case when the court feels that the investigation by the police authorities is not in the proper direction and in order to do complete justice in the case and as the high police officials are involved in the said crime, it was always open to the court to hand over the investigation to the independent agency like CBI. It cannot be said that after the charge-sheet is submitted, the court is not empowered, in an appropriate case, to hand over the investigation to an independent agency like CBI.

(emphasis supplied)

20. In *State of West Bengal and Ors. v. The Committee for Protection of Democratic Rights, West Bengal and Ors.* (supra) at paragraph 46, it has been held as follows:

46. Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these Constitutional powers. The very plenitude of the power under the said Articles requires great caution in its exercise. In so far as the question of issuing a direction to the CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has leveled some allegations against the local police. This extra-ordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise the CBI would be flooded with a large number of cases and with limited resources, may find it difficult to

properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations.

21. Therefore, even after filing Section 173(2), report-challan, in an appropriate case, either the Supreme Court or the High Court under Article 226 of the Constitution of India can invoke its extraordinary jurisdiction to transfer the investigation to another agency. But, such power has to be exercised cautiously, sparingly and only in exceptional circumstances. Some of the exceptional circumstances are: 1) the Court should find it necessary to provide credibility and instill confidence in the investigation; 2) a case involving national or international ramifications; 3) a case calling for enforcement of fundamental rights. Certainly, the situations are not exhaustive. But the pre-condition for exercise of such power is the finding by the superior court that it has become necessary to invoke such a power, in the peculiar facts and circumstances of a particular case.

22. The question is, as submitted by learned Senior Counsel Sh. Satya Pal Jain, appearing for respondents No. 1 & 2, whether it is the appropriate stage and appropriate forum for the petitioners to seek the extraordinary remedy of change of investigating agency. As far as the Forum is concerned, the law is well settled by the decisions of the Hon''ble Supreme Court in *Divine Retreat Centre v. State of Kerala and Ors.* (supra) and the Constitution Bench decision in *State of West Bengal v. The Committee for Protection of Democratic Rights, W.B. and Ors.* (supra), that the Magistrate has no power under the Code of Criminal Procedure to order investigation by CBI or any other agency. The power of the Magistrate u/s 173 Cr.P.C. is only to order further investigation by the same investigating agency. The Magistrate has no power to order change of investigating agency. That power exclusively vests in the Supreme Court under Article 32 and High Court under Article 226 of the Constitution of India. In *Divine Retreat Centre* case (supra), the Hon''ble Supreme Court has also made it clear that such power of change of investigating agency is not available to the High Court in exercise of its inherent jurisdiction u/s 482 of the Code of Criminal Procedure. Still further, it has been made clear in the said decision that "neither the accused nor the complainant or informant is entitled to choose their own investigating agency to investigate a crime in which they may be interested".

23. Thus, the issue boils down mainly to two questions as far as the investigation by the CBI is concerned; 1) Whether it is an appropriate case, 2) whether it is the appropriate stage. On perusal of all the decisions referred to above and decided by the Apex Court, it is fairly clear that the answer would depend on the facts and circumstances of each case. There is no strait-jacket formula which can be applied in finding an answer to the questions.

24. As we have already discussed above, unless one sees the report u/s 173(2), of the Code of Criminal Procedure, police report- challan, it will be difficult, if not impossible, for the Court to deal with the issue. Unless, the accused-petitioners herein see the challan, it would be difficult for them to choose the further course of action since several options are available to the accused. It would all depend

on the materials collected by the police and presented before the Court, be it on authenticity or source. In this context, we may also refer to one submission made by learned Senior Counsel Sh. Satya Pal Jain, in response to the submission made by learned Senior Counsel Sh. Cheema, appearing for the accused that even according to the State, the investigation is in progress or in advanced stage that those expressions only reflect an anachronic error; the investigation according to the State had already been completed when they made the application before the Court seeking permission to file the final report, on 4.6.2010. Therefore, we may state that it is the stand of the State that as on 2.6.2010, according to the State, the investigation had already been completed. In that view of the matter, as cautioned by the Hon"ble Supreme Court in *State of Bihar v. Shri P.P. Sharma* (supra):

When the police report u/s 173 Cr. P.C. has to go through the judicial scrutiny it is not open to the High Court to find fault with the same on the ground that certain documents were not taken into consideration by the investigating officer.

25. No doubt, in *P.P. Sharma's* case (supra), non consideration of certain documents was the instance pointed out by the Apex Court. In the instant case, learned Senior Counsel Sh. Cheema, appearing for the petitioners has made an attempt to refer to several lacunae. But the position is that nobody has seen what the police report is and without seeing the police report, it is not proper for this Court in exercise of its jurisdiction under Article 226 of the Constitution of India, to decide as to whether it is an appropriate case and whether it is the appropriate stage for the Court to issue a direction for change of investigating agency in the case.

26. The only remaining aspect to be dealt with is prayer No. (c), which is for a direction to investigate the case relating to Annexure P-13, CD in the matter as has been investigated with respect to C Ds produced by S.M. Katwal and Vijay Singh Mankotia. As we have stated at paragraph 10 of the judgment, the police-CID Shimla, has already registered FIR bearing No. 7 of 2010 u/s 465, 469, 471 of the Indian Penal Code read with Section 66A(b) of the I.T. Act and the matter is under investigation. Since the investigation is thus in progress in the said case, we do not propose to make any further comment on that since for the purpose of the order that we are passing in this case, it is unnecessary for us to go into that matter, at this stage.

27. In the above circumstances, we do not find it as the appropriate stage for the petitioners to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India as an appropriate case for change of investigating agency. In that view of the matter, we do not find it necessary to issue notice to the parties. Of course, for respondents No. 1 & 2, we had the assistance of learned Senior Counsel Sh. Satya Pal Jain. Hence, the Writ Petition is dismissed as above, so also the pending application(s), if any.