

(2011) 07 DEL CK 0344

In the Delhi High Court

Case No : Criminal Revision Petition No. 264 of 2011

Wg. Cdr. Y.S. Tomar (Retd.)

APPELLANT

Vs

Central Bureau of Investigation

RESPONDENT

Date of Decision : 05-07-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 165, 227
Official Secrets Act, 1923 — Section 13, 13(3), 3, 5

Citation : (2012) CriLJ 53

Hon'ble Judges : Suresh Kait, J

Bench : Single Bench

Advocate : Rudra Kahlon, for the Appellant; Vikas Pahwa for CBI, for the Respondent

Final Decision : Dismissed

Judgement

Suresh Kait. J.

Crl. M.A. 6632/2011 (Exemption)

Allowed subject to all just exceptions.

The application stands disposed of.

Crl. Rev. Pet. 264/2011

1. This petition is being filed against the order dated 26.03.2011 passed by the Special Judge, CBI New Delhi in CCNo. 1/2009 whereby the learned Special Judge has framed the Charges under Sections 3 & 5 of the Officials Secrets Act, 1923 against the Petitioner.

2. Facts in brief are, that the Central Government in pursuance of Section 13(3) of the Office Secrets Act, 1923 (Act No. 19 of 1923) ordered and authorized Sh. Nirbhay Kumar, Dy. S.P., CBI to lodge a complaint against the Wg.Cdr.(Retd.)Y.S. Tomar in the Court of competent jurisdiction for prosecution of the aforesaid person for the offences punishable u/s 3 and 5 of the Official Secret Act, 1923

and other offence or offences arising out of the aforesaid facts and circumstances.

3. Accordingly, the Respondent /CBI, had filed a complaint u/s 3 & 5 of the Official Secrets Act, 1993, while alleging that the instant petition is being filed on the basis of a written complaint from Wg. Cdr. M.N. Saxena, DDI(S), Air Hqs., Vayu Bhawan, New Delhi wherein he quoted a complaint from Sqn. Ldr. D.K. Sharma, in which he had reported the Anti National activities of AVM (Retd.)J.S. Kumar;Wg.Cdr.(Retd.)H.K. Nagpal; Wg.Cdr.(Retd.) Y.S.Tomar;Wg. Cdr. (Retd.) S.S. Gurtu; Flt. Ltd. (Retd.) V.K. Anwekar, S.P. Bajaj Kishan KV Bajaj; V. Subramaniam, Sudhir Oberoi; and RBS Verma (Bhagat Ram).

4. It was further alleged that Sqn. Ldr. D.K. Sharma was approached by one Air Force Sgt. K.C. Saini on behalf of AVM(Retd.) JS Kumar and requested to pass on highly sensitive information relating to Air Force after which he would be duly rewarded, Sgt. K.C. Saini was acting on behalf of the accused persons named from A-2 to A-11 in FIR. To expose the said racket, Sqn. Ldr. continued the negotiations with Sgt. K.C. Saini and in the said course Sgt. K.C. Saini introduced him to AVM J.S. Kumar who was stated to be controlling entire the operation. Further Sgt. K.C. Saini approached Sqn. Ldr. Sharma on 26.07.2001 and arranged a meeting in the evening with AVM J.S. Kumar to pass on the sensitive information.

5. That on 26-07-2001 Sqn. Ldr. D.K. Sharma received a phone call from Sgt. K.C. Saini who informed him that he had fixed a meeting with AVM J.S. Kumar at his residence, and that Sqn. Ldr. D.K. Sharma should arrange to hand over the comparative chart of VIP Executive jets to AVM J.S. Kumar in that meeting and that he would wait for Sqn. Ldr. D.K. Sharma at AIIMS bus stop at 6:00pm. Sqn. Ldr. D.K. Sharma immediately informed about the same to Wg.Cdr. M.N. Saxena who directed him to meet in his office immediately. Wg.Cdr. M.N. Saxena in turn informed his Superior officer Gp. Capt. T.K. Verma.

6. Accordingly, Gp.Capt. T.K. Verma directed Wg. Cdr. M.N. Saxena to obtain a written complaint Sqn. Ldr. D.K. Sharma and to meet him. During the course of day after the receipt of a written complaint from Sqn. Ldr. D.K. Sharma, a meeting took place in the office of ACAS(Int) AVM Malik in which Wg.Cdr. M.N. Saxena and Gp.Capt. T.K. Verma were also present. In that meeting it was decided that Wg.Cdr. M.N. Saxena would lodge a formal complaint with the CBI in this matter. The Chief of Air Staff was informed of all the developments in this case. Later in the day, Wg.Cdr. M.N. Saxena approached CBI and formally lodged complaint on the basis of which the case was registered.

7. That after the registration of the case it was decided to lay a reverse trap whereby attempt would be made to catch Sgt. K.C. Saini and AVM(Retd.) J.S. Kumar red handed while receiving the classifying information.

8. It was also decided to conduct simultaneous searches u/s 165 Code of Criminal Procedure at the residence of the other accused persons once the reverse trap materializes. Later in the evening AVM(Retd.) J.S. Kumar was

caught red-handed while accepting the classified documents from Sqn. Ldr. D.K. Sharma. A separate complaint has been filed against AVM(Retd.) J.S. Kumar and Sgt. K.C. Saini in the court of Special Judge, Delhi.

9. Immediately after the trap, search was conducted at the residence and office premises of accused persons named in the FIR. During the searches conducted at the residence of Wg.Cdr. (Retd.) Y.S. Tomar, numerous documents related to other top officials of IAF pertaining to the procurement of Defence equipments and copies of secret contract between Government of India and the then State Committee of USSR were seized in the presence of independent witnesses namely Sh. Love Kumar Chawla and Sh. Ram Singh Gautam, of the Excise Department. The documents recovered from the residence of Wg.Cdr. (Retd.) Y.S. Tomar were sent to IAF for scrutinizing and for getting an expert opinion on the classification/source of the seized documents. The opinion of the Air Force with respect to the aforesaid documents was received by CBI vide their letters bearing No. AIRHQ/S/20170/3/13/AI(S) dated 17.10.2001; 23.10.2001 and 10.12.2001.

10. The information contained in the aforesaid documents is of classified nature and permits to Hqrs./Ministry of defence and not intended to be divulged to any unauthorized person or authority. The disclosure of the information contained in the said documents, if made public or to any unauthorized person would be prejudicial to the interest of the State and would affect the security of the country.

11. Wg.Cdr.(Retd.) Y.S. Tomar obtained or collected classified information pertaining to Air Head Quarters and Ministry of Defence in respect of crash fire tenders and secret contract between President of India and the then State committee of USSR fully knowing or having reasonable grounds to believe at that time when he received these classified documents that the information were obtained in contravention to the provisions of Official Secrets Act, 1923.

12. The complaint is being filed on the order and under the authority from the Central Government as is required u/s 13 of the Official Secrets Act, 1923 vide order No. 17017/11/2003/US.IS-I dt. 22nd October, 2003 issued in this regard by the Central Government.

13. The learned Counsel for the Petitioner has raised the issue that the documents which were found in the possession of the Petitioner are not reported as classified by the Air Force Authorities and the possession of these two documents, deemed graded as "Confidential" and "Secret", do not constitute any offence under the Official Secrets Act. These two documents are quite old and are of no value to the defence/security of the nation. The information contained in these documents is freely available on the internet, therefore, these two documents were freely available in the public domain. Hence, it constitute no criminal offence as the learned Counsel has pointed out before learned Special Judge that knowledge of crash fire tenders cannot be classified as State Secret.

14. Further submits, the other document is only draft of an agreement and as such is of no value in the eyes of law as far as its sensitivity to security of State is concerned.

15. The learned Special Judge has dealt the aforesaid issues raised by the Petitioner that on perusal of the Seizure Memo dated 37.07.2001, numerous documents were recovered from the residence of the accused including file No. AIR HQ/64008/15/MT/Lgs., file in custody of DMT, and classified as "confidential" and copy No. 3 of Contract between State Committee of USSR and President of India classified as "secret" which probably originated by ADG(Mov.) Sena Bhawan, which were recovered from the possession of accused vide seizure memo dated 27.07.2001. These documents were scrutinized by CBI, an opinion of Air Force authorities was sought, in which two documents were graded as "confidential" and "secret" vide letter dated 17.10.2010,

16. Learned Counsel for the Petitioner has argued that Section 3(c) and Section 5 has been applied to nab the Petitioner whereas this Act is only applicable to the classified documents and as per the Column at Serial No. 1 and Serial No. 2, documents are unclassified documents. To justify his arguments, he has referred to page No. 65 of the instant writ petition.

17. Learned Counsel for the Petitioner further has referred to page 99, Clause 6 and Clause 7, where the words "Secret" and "Confidential" are elaborated.

18. The word "Secret" defines that the documents, information or material, the unauthorized disclosure of which would endanger national security, cause serious injury to the interest or prestige of nation or serious embarrassment to Government or would be a great advantage to a foreign Nation.

19. The word "Confidential" defines that the documents, information and material, the unauthorized disclosure of which while NOT endangering the National Security would be prejudicial to the interest of the Nation, any Government activity or individual or would cause administrative embarrassment or difficulty or be of an advantage to a foreign Nation.

20. I note that, the details of classification of the documents seized from the possession of the Petitioner given by the Air Force are "Confidential" and "Secret".

21. The Petitioner was a Senior Officer in Indian Air force, therefore, he was very much aware that the information contained in the aforesaid document is of classified nature and pertains to Hqrs./Ministry of Defence and was not intended to be divulged to any unauthorized person or authority as it would be prejudicial to the interest of State and would affect the security of the nation.

22. In respect of Crash fire tenders and Secret contract between President of India and the then State Committee of USSR, the Petitioner was fully aware or had reasonable ground to believe at the time when he received these classified documents, the information was obtained in contravention to the provisions of Official Secrets Act, 1923.

23. As pointed out by learned Standing counsel for CBI that in the first trap case, when some secret and confidential documents were seized from the possession of Sgt. K.C. Saini and pursuant to that the case was registered against him. Pursuant to this trap case, a search also took place at the residence of the Petitioner i.e. E-224 Sainik Farms, Cariappa Marg, New Delhi and numerous documents relating to defence forces including classified note sheets recorded by Chief of Air Staff and other top officials of Indian Air Force pertaining to the procurement of defence equipments and copies of contract between the President of India and the then State Committee of USSR were seized in the presence of the independent witnesses.

24. As the learned Standing Counsel for CBI has further pointed out that the charge framed against Sgt. K.C. Saini were challenged vide Crl.Rev.Petition No. 446/2009 and the same was dismissed by this Court vide order dt. 26.08.2009.

25. The Law is settled, the Judge, while framing the charge u/s 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial. The Test to determine a prima facie case would naturally depend upon the facts and circumstances of each case and it is difficult to lay down a rule of universal application. By and large, if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, it will be fully within his right to discharge the accused.

26. The Judge cannot act merely as a post office or the mouth piece of the prosecution but he has to consider the broad possibilities of the case, the total effect of the evidence and the documents produced before the Court keeping in mind the basic infirmities appearing in the case and so on. However, it does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial. These principles were settled way back in a case of Union of India (UOI) Vs. Prafulla Kumar Samal and Another, .

27. Keeping the aforesaid discussion into view, I am not inclined to interfere with the order dt. 26.03.2011 passed by learned Special Judge in CC No. 1/2009.

28. Crl.Rev. Petition No. 264/2011 is dismissed, accordingly.

29. No order as to costs.

Crl. M.A. 6631/2011

Since the Revision Petition has been decided, the instant application becomes infructuous and is dismissed as such.