

* **THE HIGH COURT OF DELHI AT NEW DELHI**
+ **BAIL APPLN. 341/2012**

Date of Decision: 11.04.2012

DR.ANUP KUMAR SRIVASTAVA Petitioner

Through: Mr. Abhas Mishra with
Mr.S.Mishra, Advocates.

Versus

CBI Respondent

Through: Mr.P.K.Sharma, Standing
Counsel with Mr.Uday Prakash
Yadav, Adv.

With

+ **BAIL APPLN. 344/2012**
HEMANT GANDHI Petitioner

Through: Dr.Ashutosh, Advocate.

Versus

CBI Respondent

Through: Mr.P.K.Sharma, Standing
Counsel with Mr.Uday Prakash
Yadav, Adv.

And

+ **BAIL APPLN. 282/2012**
LALLAN OJHA Petitioner

Through: Mr.Vikas Pahwa, Sr.Advocate
with Mr.B.Badrinath,
Mr.A.K.Dubey, Advocates.

Versus

CBI Respondent

Through: Mr.P.K.Sharma, Standing
Counsel with Mr.Uday Prakash
Yadav, Adv.

CORAM:
HON'BLE MR. JUSTICE M.L. MEHTA

M.L. MEHTA, J.

1. These three bail applications under Section 439 Cr.PC read with Section 482 Cr.PC have been preferred by petitioners Dr. Anup Kumar Srivastava, Lallan Ojha and Hemant Gandhi for grant of bail in respect of criminal case registered against them under Sections 7,8,10, 12,13(2) read with Section 13(1)(d) of Prevention of Corruption Act read with Section 120B IPC in case number RC-AC 120/2A. All these bail applications are being disposed of by this common order as they are interconnected and the stand of CBI in all these applications is common.

2. Briefly stating the facts are that Hemant Gandhi was acting as a middleman for accused Dr. A.K. Srivastava and Lallan Ojha, who were respectively posted as Commissioner and Superintendent of Central Excise at the relevant time. The allegations are that they were involved in obtaining illegal gratification by corrupt and illegal means from the businessmen. Further the allegations are that they had conspired to conduct an unauthorized raid at the business premises of Dalip Aggarwal and Anand Aggarwal. It was alleged that in furtherance of the conspiracy accused Hemant Gandhi had shown the premises of Aggarwals to Lallan Ojha on the evening of 27.12.2011 and it was decided to conduct a raid on the morning of 28.12.2011. In the process a team of officials of Central Excise led by accused Lallan Ojha

conducted surprise raid at the godown premises of Dalip Aggarwal and Anand Aggarwal on 28.12.2011 under the overall supervision and control of accused Srivastava. Then they negotiated with Aggarwals for an illegal gratification for not taking any action and made an initial demand of Rs.2 crore which was ultimately finalized at Rs.60 lac. A sum of Rs.40 lac was received in cash and a cheque of Rs.20 lac was issued by Aggarwals as security for the remaining amount of bribe. Out of the said amount, a sum of Rs.3 lac was paid to Ojha as his share and the said amount was given on 2.1.2012 to his driver who kept the same in the dickey of the car parked at his office at ITO. Accused Lallan Ojha was apprehended and got recovered Rs.2,96,500/- from the dickey of his car. His driver confirmed that this money was delivered to him by an unknown person at the instance of Ojha.

3. Investigation revealed that various phone calls were made by these accused persons to each other and they were in constant touch with each other after they held a meeting on 27.12.2011. During investigation, statements of drivers of Lallan Ojha and that of Hemant Gandhi were recorded under Section 164 Cr.PC and they both confirmed that the packet containing Rs.3 lac belonged to accused Lallan Ojha and was given by the driver of accused Hemant Gandhi to the driver of Ojha. The said amount was found to be Rs.2,96,500/-. It is stated that the difference in the amount is due to shortage of currency notes in the packet. During investigation, statement of Superintendent,

Central Excise Mr. S.K. Singh, who also formed part of the raiding team, was recorded under Section 164 Cr.PC. He also stated the raid to be unauthorized and conducted by Lallan Ojha at the instance of A.K. Srivastava. He also stated having received a sum of Rs.20 lac from Anand Aggarwal on the directions of Lalaj Ojha and later on having given the same to Hemant Gandhi for delivering the same to Srivastava. Statement of one Mahender Kapur was also recorded under Section 164 Cr.PC. He admitted business relations with Hemant Gandhi and that he had lent Rs.9 lac to Hemant Gandhi as temporary loan. He stated that a sum of Rs.7.50 lac was returned by Hemant Gandhi on 30.12.2011. He had got recovered Rs.6 lac from his friend Subash Sapra to whom he had given the same out of the said amount of Rs.7.50 lac.

4. Mr. Vikas Pahwa, learned senior counsel appearing for petitioner/accused Lallan Ojha at the outset submits that there was no case made out against Lallan Ojha inasmuch as none of the ingredients of Section 7 and Section 13(i)(d) were attracted. In this regard, he relied upon *A. Subair v. State of Kerala* [(2009) 6 SCC 587] and *Subash Parbat Sonvane v. State of Gujarat* [(2002) 5 SCC 86]. He submits that there were no allegations of initial demand of bribe or at the time of trap or acceptance of money by the petitioner Lallan Ojha. There was also no motive of the petitioner Lallan Ojha to help a private party. He also submits that there is no document of raid to show that the money recovered was of a private party. He further submits that the goods found in the godown of Aggarwals were not amenable to excuse duty.

He also submits that the telephone calls between accused persons, if any, were not authentic and no reliance could be placed upon them and such taped conversation could not be used for the purpose of conviction. In this regard he relied upon *Mahabir Prasad Verma v Dr. Surinder Kaur* [(1982) 2 SCC 258].

5. Mr. Pradeep Jain, learned counsel appearing for the petitioner A.K. Srivastava adopts all the arguments of Mr. Pahwa and in addition submits that the petitioner A.K. Srivastava being a Joint Secretary, Government of India, his arrest and prosecution was barred under Section 6A(1) of Delhi Police Establishment Act. In this regard, he relies upon *Dr. R.R. Kishore v CBI 142* [(2007) DLT 702]. He also submits that the petitioner Srivastava is suffering from heart ailments and has undergone treatment and was not medically fit. He also seeks his bail on medical grounds and relies upon *Sharad Kumar vs. CBI* [184 (2011) DLT 193].

6. Dr. Ashutosh, learned counsel appearing for petitioner/ accused Hemant Gandhi also adopts all the arguments of Mr. Pahwa and contends that the petitioner Hemant Gandhi is entitled to grant of bail on the ground of parity with co-accused Dalip Aggarwal and Anand Aggarwal who have already been enlarged on bail.

7. Per contra, Mr. P.K. Sharma, learned Standing Counsel for CBI submits that pursuant to the conspiracy hatched by three accused

persons, an illegal raid was conducted by Ojha under the control and supervision of Dr. A.K. Srivastava. After the raid, a bargain was struck for Rs.60 lac by accused/ petitioner Hemant Gandhi and a sum of Rs.40 lac in cash and cheque of Rs.20 lac was also received by them from Aggarwals through Hemant Gandhi. He also submits that 96 telephone calls were made by the accused persons to each other which show not only the conspiracy and active involvement of all of them, but their *modus operandi* of receiving illegal gratification. He submits that from the statements of two drivers of petitioners Ojha and Gandhi and that of Mr. S.K.Singh, Superintendent, the factum of receipt of bribe money is also established. With regard to pleas raised by petitioner Dr. A.K. Srivastava, he submits that Section 6A (1) was not applicable since it was a trap case and thus within the ambit of sub section (2) thereof. He submits that since the petitioner Srivastava got admitted himself in the hospital immediately after arrest of other two accused persons from the spot, his arrest at a later date would be nothing but as a consequence of the trap. He submits that the medical examination of A.K. Srivastava by the medical Board of AIIMS has also reported his condition to be stable. With regard to petitioner A.K. Srivastava, he submits that he is also involved in another case of housing scam and had been charge-sheeted in that case. With regard to the plea of petitioner Hemant Gandhi of parity, he submits that Aggarwals are businessmen and they had become victims of circumstances and compulsions. Their offences were only that of abatement, whereas the offences committed by Hemant Gandhi

were of active conspiracy of accepting bribe from Aggarwals for himself and co-accused persons. He also received cash amounts and also the cheque and was the beneficiary of the bribe money. He also submits that Gandhi is involved in number of cases by CBI and in one of those cases, he has been convicted and he has been facing trial in other cases also. He submits that this was a case of trap and initial demand of bribe was not the requirement. The accused persons having agreed to accept the bribe money after negotiations was enough to bring their case within Section 7 and Section 13(1)(d) of PC Act in addition to other sections read with Section 120B IPC. With regard to the plea of telephonic conversation, he submits that though this tape recorded conversations may not be the basis of conviction, but in view of the existence of other sufficient evidence against the petitioners, the taped conversation could be relied upon as corroborative evidence.

8. I have heard learned counsel for the petitioners and also learned Standing Counsel for CBI and perused the record.

9. The essential ingredients of Section 7 are that (i) the person who accepts gratification should be a public servant, (ii) he should have accepted the gratification for himself and the gratification should be as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official function, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person.

10. Insofar as Section 13 (1) (d) of the Act is concerned, the essential ingredients are (i) he should be a public servant (ii) he should have used corrupt or illegal means or otherwise abused his position as such public servant and (iii) he should have obtained a valuable things or pecuniary advantage for himself or for any other person.

11. In Section 13(1) (d), the word used is 'obtained'. The Apex Court in the case of **C.K. Damodaran Nair v Govt. of India** [(1997) 9 SCC 477] had the occasion to consider the word 'obtained' used in Section 5 of PC Act, 1947, which is now Section 13(1)(d) of the Act of 1988. It was held in para 12 thus:

“12. The position will, however, be different so far as an offence under Section 5 (1)(d) read with Section 5(2) of the Act is concerned. For such an offence prosecution has to prove that the accused 'obtained' the valuable thing or pecuniary advantage by corrupt or illegal means or by otherwise abusing his position as a public servant and that too without the aid of the statutory presumption under Section 4(1) of the Act as it is available only in respect of offences under Section 5(1)(a) and (b) - and not under Section 5(1)(c), (d) or (e) of the Act. 'Obtain' means to secure or gain (something) as the result of request or effort (Shorter Oxford Dictionary). In case of obtainment the initiative vests in the person who receives and in that context a demand or request from him will be a primary requisite for an offence under Section 5(1) (d) of the Act unlike an offence under Section 161 IPC, which, as noticed above, can be,

established by proof of either 'acceptance' - or 'obtainment'"

12. The core question that needs to be seen is as to whether prima facie there is sufficient legal evidence on record to bring home the petitioners within the ambit of Section 7 and 13 (1) (d) read with Section 13(2) of the Act.

13. From the facts as noted above, it would be seen that there was a clear well-designed and planed conspiracy to conduct illegal raid on the business premises of Aggarwals. This conspiracy was hatched by all the accused persons/ petitioners. There is prima facie evidence on record in the shape of statements of Mr. S.K. Singh that the raid was illegal and unauthorized. Though the transcript of taped conversation cannot be used as a substantive piece of evidence, but having seen the transcript of the conversation that took place between the accused persons/ petitioners before and after the raid, it would be prima facie seen that it was all planned to extort money from Aggarwals under the fear of raid. Further it is also gathered from the information provided by Rekha Rani, PS to Srivastava that Hemant Gandhi was frequent visitor to the office of Srivastava. In her statement she stated this fact and also that she had noted down the mobile number of Hemant Gandhi on several occasions as part of her duties. Not only that the other senior officers namely Pradeep Kumar and B. Mohan, who were working under Srivastava, had

identified the voice of Srivastava in the recorded conversation, but the report of CFSL also confirmed the same.

14. The initiation of conduct of raid vests in Srivastava and Lallan Ojha. Though the demand was made by Lallan Ojha through petitioner Hemant Gandhi, but the entire raid was under the control and supervision of Srivastava. It was after raid that a payment of Rs.2 crore was made as a bribe, but after negotiation with Lallan Ojha and Srivastava through Hemant Gandhi, the amount was settled to Rs.60 lac. Not only that, there were element of 'acceptance' by the accused persons. Recovery of Rs.2,96,500/- from the driver of Ojha and receipt of Rs.20 lac by Hemant Gandhi through S.K. Singh for Srivastava prima facie establishes the acceptance of bribe money by them in pursuant to the execution of the conspiracy and thus prima facie there are ingredients of Section 7 as also Section 13(1) (d) qua the petitioners Srivastava and Ojha. There is no reason to disbelieve the statement of driver of petitioner Hemant Gandhi who had given the money to driver of Lallan Ojha at his instructions. There is also no reason to disbelieve the statement of Mr. S.K. Singh, recorded under Section 164 Cr.PC, who was a member of the raiding party and witnessed the entire incident. He was also paid Rs.20 lac by Aggarwals at the instance of Ojha and had later at his instructions delivered the said money to Hemant Gandhi for Srivastava. Similarly, there was also no reason to disbelieve the statement of Mahender Kapur under Section 164 Cr.PC

who was a friend of Hemant Gandhi and had received Rs.7.5 lac from him as towards repayment of his loan and later on got recovered Rs.6 lac of the said amount from a person to whom he had given the same.

15. With regard to petitioner A.K. Srivastava, a plea was also raised by learned counsel Mr. Jain that his prosecution was barred under Section 6 A(1) of Delhi Police Establishment Act in the absence of approval from the Central Government. In this regard, reliance was placed on the case of ***R.R Kishore (surpa)*** Section 6A of Delhi Special Police Establishment Act reads as under:

“[6A. Approval of Central Government to conduct inquiry or investigation.- (1) The Delhi Special Police Establishment shall not conduct any inquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act, 1988 (49 of 1988) except with the previous approval of the Central Government where such allegation relates to-

(a) the employees of the Central Government of the Level of Joint Secretary and above; and

(b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by that Government.

(2) Notwithstanding anything contained in subsection (1), no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any gratification other than legal remuneration referred to in clause (c) of the Explanation to

*Section 7 of the Prevention of Corruption Act,
1988 (49 of 1988).”*

16. In the case of ***R.R. Kishore (supra)***, the complainant sent a complaint dated 16.12.2004 to CBI alleging therein that he had met the petitioner/ accused on 14.12.2004 and the later informed him that four members of the appropriate authority have become corrupt and were demanding Rs.20,000/- each and, therefore, petitioner/ accused demanded a sum of Rs.80,000/- from him in two installments of Rs.40,000/- each in two/three days. It was alleged that since the complainant did not want to pay the bribe, he made a complaint against him to CBI on 16.12.2004 at 2 pm. The FIR was registered under Section 7 and the matter was entrusted to investigating officer. It was in this factual matrix that it was held that initiation and conduct of investigation on 16.12.2004 itself was in contravention of provisions of Section 6A (1). It was held that Section 6A(2) was triggered only in respect to cases involving arrest of a person on the spot on the charge of or accepting to attempting to accept any gratification other than legal remuneration referred to in clause (c) of Section 7 of the Act. Section 6A(2) would be applicable in cases involving arrest of a person on the spot on the charge of accepting or attempting to accept the bribe. In the factual matrix of the said case as there was no question of arrest of the petitioner on the spot, Section 6A(2) was held to be not applicable.

17. It would be seen that the facts in the instant case are entirely different and distinguishable from the case of R.R. Kishore (supra). The two accused persons namely Lallan Ojha and Hemant Gandhi were arrested on the spot, whereas accused Srivastava immediately got himself admitted in the hospital and thus could not be arrested. When his condition became normal, he was arrested. The arrest of Srivastava would be nothing but extension of trap arrest. Prima facie Section 6A(2) was attracted and this being a non obstante section, provisions of sub section (1) mandating approval of the Central Government were not applicable. The objectives of Section 6A(1) was to provide protection to the officers of the rank of Joint Secretary and above who is or has been a decision maker level officer. However, where the accusation of corruption was based on direct evidence and it did not require for inference to be drawn depending upon the decision making process, there was no rationale to classify them differently and giving protection. In other words, if the accusation of bribery was supported by direct evidence of acceptance of illegal gratification including trap cases, it is obvious that no other factor is relevant and the level and status of officer is irrelevant. It is for this reason that the cases of bribery including the trap cases are outside the scope and ambit of Section 6A (1).

18. The Supreme Court in the case of *Vineet Narain v Union of India* [1988 (1) SCC 226] had the occasion to deal with execution order creating the differentiation in officers. The Supreme Court had observed

that the cases of bribery including the trap cases and disproportionate assets cases are based on direct evidence and no factor pertaining to the expertise of decision maker was involved and, therefore, the said order did not include within its ambit the cases of disproportionate assets and also trap cases. With regard to the plea of petitioner Srivastava of medical ground, it was submitted by learned Standing Counsel for CBI that this petitioner was getting required medical treatment in Jail Hospital and as per medical report of AIIMS, his condition is normal. This fact could not be controverted by learned senior counsel for the petitioner. Be that as it may, there is no complaint of lack of proper medical treatment of petitioner A.K. Srivastava in jail hospital. There is also no reason to doubt that all kinds of medical treatment that may be required by petitioner A.K. Srivastava will be provided to him by jail authorities, as per rules. In the case of *Sharad Kumar* (supra) one of the grounds for grant of bail of accused Karim Morani, was on the facts of his physical condition. So far as invocation of plea of medical ground is concerned, it was all to depend upon the facts and circumstances of each case and one case cannot be a precedent for the other cases.

19. With regard to the plea of petitioner Hemant Gandhi of parity with Aggarwals, it may be noted that by any reason, role of both of them, could not be equated or taken to be similar in the commission of offence. The raid on the premises of Aggarwals was unauthorized and illegal, which they did not know and they were victims of compulsion

and circumstances. Their only fault is that they had not informed or reported about the illegal demand of petitioners to the authorities and for which they are prosecuted under Section 12 of PC Act. The plea that the goods found in the business premises of Aggarwals were not amenable to excise duty is extraneous for consideration of bail applications and that rather goes against the petitioners in having raided the premises and taken illegal gratification despite knowing that the goods were not amenable to excise duty.

20. The petitioners A.K. Srivastava and Lallan Ojha are senior officers of the Central Excise Department. Most of the witnesses who have been cited by the prosecution are officials of their department and some of the officials cited as witnesses are their juniors and subordinates. It is every likelihood that in case they are released on bail, they would be able to influence the witnesses. This is presumably because of this apprehension that the prosecution has chosen to get the statements of two drivers and one Superintendent recorded under Section 164 Cr.PC before the Magistrate. The apprehension of CBI in this regard seems to be well founded in the given facts and position of these two petitioners.

21. The pleas that the petitioners are in custody for about three months now and the charge-sheet has been filed are also no ground to

admit them on bail. This Court in **Mukesh Jain vs.CBI** [2010 (1) AD (Delhi) 443 held as under:

“9. It is true that the petitioner has been in custody for more than eight months and the chargesheet has already been filed, but considering the huge amount of public money, being retained by him, his having been in custody for eight months by itself would, in the facts and circumstances of this case, not entitle him to grant of bail at this stage. The economic offences having deep rooted conspiracies and involving huge loss of public funds whether of nationalized banks or of the State and its instrumentalities need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of our country. Therefore, the persons involved in such offences, particularly those who continue to reap the benefit of the crime committed by them, do not deserve any indulgence and any sympathy to them would not only be entirely misplaced but also against the larger interest of the society.”

22. Having regard to the entire factual matrix of the case and the legal preposition of law as noted above, I do not find it a fit case to admit the petitioners on bail at this stage. All the three bail applications are hereby dismissed.

M.L. MEHTA, J.

April 11, 2012/rd