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THE HIGH COURT OF DELHI AT NEW DELHI

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Crl.M.C.No.2150/2008

Date of Decision: 29.03.2012

Bimal Bharthwal

..... Petitioner

Through: Mr. Arvind Nayyar, Mr. Narendera
Singh Bisht and Ms. Mamta,
Advocates

Versus

State through CBI .

..... Respondent

Through: Ms. Sonia Mathur with Mr. Sushil
Kumar Dubey, Advocates for CBI
along with SI R.P. Sharma
Mr. B.S. Sharma, Advocate for R-2,
3 and 7.

AND

Crl.M.C. No.2603/2008

Sanjay Verma

..... Petitioner

Through: Mr. Arvind Nayyar, Mr. Narendera
Singh Bisht and Ms. Mamta,
Advocates.

Versus

State through CBI & Ors.

.....Respondents

Through: Ms. Sonia Mathur with Mr. Sushil Kumar Dubey Advocates for CBI along with SI R.P. Sharma
Mr. B.S. Sharma, Advocate for R-2, 3 and 7.

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

M.L. MEHTA, J.

1. The petitioners herein are aggrieved by the order of the Ld. MM dated 06.10.2007 wherein, the Ld. MM was pleased to issue summons to the petitioners as accused, whereas in the charge sheet the petitioners were cited as prosecution witnesses.

2. The brief facts necessitating the present petition are that, on the complaint of one D.R. Singh, Sr. Manager, Vigilance NR (Indian Airline Ltd. Safdurjung Airport), the CBI registered a case RC 4 (s)/ 2000- SIU-I, on 16.05.2000. Thereafter the charge sheet of the offence was submitted in the court of Ld. MM on 17.11.2000 wherein the petitioners were cited as prosecution witnesses. Thereafter, vide order dated 28.11.2000, the Ld. MM was pleased to take cognizance of the offence and issue summons to the accused persons named in column one of the charge-sheet. A supplementary charge sheet was filed by the CBI on 19.03.2002. The matter was fixed for argument on charge on 21.04.2006 vide order dated 23.01.2006. On 21.04.2006, the accused persons, namely F. George, Brijesh Kumar and Pradeep Kumar moved an application before the Ld. MM to summon the petitioners as accused in the case on the premise that as per statements of the

petitioners under Section 161 Cr.PC, their involvement was made out in the alleged conspiracy, but they had been cited as witnesses and not accused by the CBI in the chargesheet. A reply was filed by the CBI to the said application contending that the petitioners had no role to play in the alleged conspiracy. On the contrary, they were victims of the conspiracy hatched by the accused persons/ respondents no.3 to 7. Rejecting the contentions of the CBI, the Ld. MM was pleased to summon the petitioners vide impugned order dated 06.10.2007. Hence the present petition praying for quashing of the summoning order qua the petitioners.

3. The learned counsel for the petitioners submitted that the petitioners have been victims of a conspiracy hatched by the other accused persons and were not accomplices in the conspiracy. The petitioners were mentioned in column 4 of the chargesheet as witnesses. The cognizance of the offence was already taken by the LD. MM on 28.11.2000 against the accused persons and a second cognizance qua the petitioners without revelation of any new material evidence incriminating the petitioners in the offence is bad in law. It is submitted that the application to array the petitioners as accused was filed by the respondents no.3 to 7/ accused persons in the trial court and not by the CBI. On the contrary, the investigation agency has submitted a reply opposing the application of the accused persons to summon the petitioners contending that the petitioners were victims and not accomplices to the alleged conspiracy. It is further submitted that the case was already fixed for arguments on charge. The Magistrate was empowered to take recourse to section 319 CrPC and summon the petitioners only if any incriminating evidence is adduced during inquiry/trial, but cannot at this stage take

cognizance under Section 190 Cr.PC qua the petitioners. Reliance is placed on the judgment of this court in *Anirudh Sen v. State (NCT of Delhi) 2006 {3} JCC 2081*.

4. It is submitted that it is not for the accused persons to dictate as to who should be arrayed as an accused and who be made a witness. Also the charge-sheet was filed in the year 2000 and the supplementary charge-sheet in 2002, however, the application, to array the petitioners as accused was filed in 2006, i.e. 4 years after the filing of the supplementary charge-sheet and thus cannot be allowed.

5. Per Contra, the learned counsel for the respondents no. 2 to 7 submitted that incriminating evidence has been recorded against the petitioners in their own statements to the CBI. The statements of the petitioners clearly project the role played by them in the alleged conspiracy. The chargesheet also acknowledges and categorically states the specific role played by the petitioners in the conspiracy, however, instead of citing them as accused, the petitioners have been cited as witnesses in the charge-sheet. It is submitted that the handwriting of the present petitioners on the forged and fabricated documents has also been confirmed by the prosecution.

6. It is further submitted that vide order dated 23.01.2006 the Ld. MM had merely fixed the matter for argument on charge, however, an application was moved by the accused persons for impleading the petitioners as accused, as a result of which arguments on charge could not be heard. It is further submitted that, even as late as 12.03.2012, the prosecution was directed to supply deficient copies to the accused person under section 207 CrPC and the arguments on charge are yet to be heard. Order dated 12.03.2012 states

“To come up for supply of deficient copies and otherwise to file a column-wise list of witnesses along with nature of documents as well as purpose of examination on 29.05.2012.”

7. The learned counsel for the respondents contended that the relevant procedure for grant of pardon by the prosecution is provided under section 306 CrPC, wherein the prosecution is allowed to grant pardon to an accomplice for his turning into an approver, however, the CBI on its own discretion cannot allow an accomplice to be a prosecution witness.

8. Distinguishing the judgment of **Anirudh Sen** (Supra), it is submitted, that case was at the stage of framing of charge and the stage of section 207 had been crossed by the trial court. However, the present case is still at the stage of supply of deficient copies under section 207 CrPC which is prior to stage of framing of charge.

9. It is submitted that the plea of the petitioners can be considered by the trial court at the stage of charge when the trial court would be within its power to discharge the petitioners if prima facie no case is made out qua them. It is contended that the Ld. MM was within his powers to summon the petitioners at the pre-charge stage, on the basis of the evidence available on record, if he is prima facie satisfied with the role of the petitioners in the alleged conspiracy. Reliance is placed on the judgments of the Hon’ble Supreme Court in *M/s SWIL Ltd. v. State of Delhi & Ors JT 2001 (6) SC 405* and this court in *Jitender Singh v. Govt. of NCT 2003 (1) JCC 66*.

10. I have heard learned counsel for the petitioners and the learned counsel for the respondents and learned APP and perused the records.

11. A short proposition of law arises for adjudication in the present petition, being, whether the magistrate is clothed with the power to take cognizance against a person at the pre-charge stage, against whom incriminating material is available on record, although he has been cited as a witness by the prosecution.

12. A detailed perusal of the chargesheet and the statements of the petitioners as given to the CBI clearly establishes the role played by the petitioners in the alleged conspiracy. The act of the petitioners finds acknowledgment in the chargesheet and reveals the modus operandi followed by the accused persons in the alleged conspiracy. The factum of the role played by the petitioners in the alleged conspiracy cannot be ignored by the Ld. MM even though they have not been made accused in the chargesheet.

13. The law is trite that the Magistrate takes cognizance of an offence and not the offender. At the stage of cognizance the Magistrate takes into consideration the police report, the statement of witnesses and any other evidence available on record. The power of the Magistrate is unfettered and unrestricted in that it is his prerogative to appreciate the available evidence to see if, prima facie an offence is made out. The Hon'ble Apex Court has held in *SWIL India Ltd. (supra)* that it is clear that at the stage of taking cognizance of the offence, provisions of Section 190 Cr.PC would be applicable. Section 190 inter alia provides that "*The Magistrate may take cognizance of any offence upon a police report of such facts which constitute an offence*". As per this provision, Magistrate takes cognizance of an offence and not the offender. After taking cognizance of the offence, the Magistrate under Section 204 Cr.PC is empowered to issue process to the accused. At the

stage of issuing process, it is for the Magistrate to decide whether process should be issued against a particular person/ persons named in the charge-sheet and also not named therein. For that purpose, he is required to consider the FIR, the chargesheet and the statements recorded by the police officer and other documents tendered along with the charge-sheet. Further, upon receipt of police report under Section 173(2) Cr.PC, the Magistrate is entitled to take cognizance of an offence under Section 190 (1) (b) even if the police report is to the effect that no case is made out against the accused by ignoring the conclusion arrived at by the IO and independently applying his mind to the facts emerging from the investigation by taking into account the statements of the witnesses examined by the police. At this stage, there is no question of application of Section 319 Cr.PC.

13A. In ***Jitender Singh*** (supra), the Magistrate had taken cognizance on 16.2.1995 and issued summons to the accused for 7.6.1996. The said accused appeared before the Court and was granted bail. Thereafter, the case was adjourned for hearing on question of charge on few days. The Magistrate passed an order for issuance of summons to other accused named in the complaint observing that they were equally involved in commission of offence. Those persons challenged the said order on the ground that the Magistrate could not revert back to the first stage of taking cognizance to summon additional persons as accused and that the only provision under which he could have exercised the power of issuing summons to additional accused was after recording of evidence under Section 319 Cr.PC. This Court in ***Jitender Singh*** (supra) held that there was no bar in the power of

Magistrate to summon other accused persons who in his view were also involved in commission of the offence.

14. In case titled ***Raghubans Dubey v State of Bihar*** [AIR 1967 SC 1167], the Hon'ble Apex Court has held that

“In our opinion, once cognizance has been taken by the Magistrate, he takes cognizance of the offence and not the offender. Once he takes cognizance of an offence, it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceedings initiated by his taking cognizance of an offence.

15. In a Division Bench judgment of this Court titled ***Jagdish Sahai Mathur and others v State*** {1991 CrL.L.J 1069}, the scope of Section 190 Cr.PC has been discussed. \

“The language of Section 190 of the Code is loaded with significance. It talks of cognizance and that too of the “offence” and not the “offender”. The Magistrate first takes cognizance of the offence and thereafter only proceeds to find out who the offenders are. The steps though appear to be intertwined are distinct”.

16. The judgment of Anirudh Sen (supra) is clearly distinguishable from the present case on facts as well as law. The petitioner in that case had been summoned subsequently at the stage of charge, although previously his name was mentioned in Column No.2 of the Charge-sheet. Moreover, it was observed by the Court that there was no material present to link the petitioner with the alleged conspiracy. In the present case, arguments have not been heard on charge. The same could have been done only after the supply of deficient copies under Section 207 Cr.PC to the accused persons. Also the learned MM was prima facie satisfied with the role of the petitioners in the alleged conspiracy at the time of issuing summons to the petitioners.

17. In view of the law laid down by the Hon'ble Supreme Court as discussed above, there is no doubt that the magistrate was well within his powers to issue summons against the petitioners after taking note of the role of the petitioners in the alleged conspiracy. Hence, the contention of the petitioners that the cognizance taken by the Ld. MM was bad, is untenable and cannot be sustained.

18. The petitioners had further submitted that they were the victims of the conspiracy and not accomplices. This argument of the petitioners drives strength from the contentions of the CBI advanced at the time of opposing the summoning application qua the petitioners. This contention cannot be raised at the stage of summoning, however, such contentions may be raised at the stage of framing charges.

19. At the stage of summoning, all that the magistrate has to see is whether or not there is "sufficient ground for proceeding against the accused". At this stage, the Magistrate is not to weigh the evidence meticulously. The standard

to be adopted by the Magistrate in scrutinizing the evidence is not the same as the one which is to be kept in view at the later stage of framing charges.

20. Therefore, the contention of the petitioners that they were victims and accomplice cannot be looked into at the stage of summoning. At the stage of summoning the factum of the involvement or participation of the petitioners in the alleged conspiracy is sufficient enough for the Magistrate to take cognizance and summon them.

21. In view of the above observations, I find no infirmity in the order of the Ld. MM.

22. The petition is dismissed.

M.L. MEHTA, J.

MARCH 29, 2012/ud