

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P. (CRL) No. 1372/2011**

% Reserved on: 18th February, 2013
Decided on: 3rd May, 2013

A P PATHAK

..... Petitioner

Through: Mr. Amrender Sharan, Sr. Adv. with
Mr. Pramod Kr. Dubey, Mr. Amit
Singh, Mr. Someshvar Jha, Advs.

versus

CBI

..... Respondent

Through: Mr. P.K. Sharma, SC with Mr. Anil
Kr. Singh, Adv.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By this petition the Petitioner seeks quashing of RC No. DAI-2011-A-0013 dated 31.08.2011 under Section 13(1)(e) read with Section 13(2) of the Prevention of Corruption Act, 1988 (PC Act) and proceedings pursuant thereto including the investigation, in view of the non-compliance of mandatory provision of Section 6A of the Delhi Special Police Establishment Act (in short the DSPE Act).

2. Learned counsel for the Petitioner contends that since the Petitioner was a Joint Secretary level officer it was mandatory on the part of the CBI to have taken the prior approval of the Central Government under Section 6(A)(2) of the DSPE Act before proceeding with the investigation as no trap was to be laid immediately. The approval taken subsequently is of no avail as held by the Supreme Court in *State of Kerala Vs. M.S. Mani and Ors.* (2001) 8 SCC 82. The CBI failed to act in accordance with its manual on the source information which is statutory in nature. The CBI was required to

register a preliminary enquiry. In the counter affidavit it is admitted that no preliminary enquiry was registered, thus there was gross violation of guideline 9.1 of the CBI manual. Reliance is placed on *P. Sirajuddin Vs. State AIR 1971 SC 520*, *State of Haryana & Ors. Vs. Ch. Bhajan Lal and Ors. AIR 1992 SC 604* and *Ripun Bora Vs. State (2012) ILR IDelhi 412*. The law is well-settled. An illegally collected evidence pursuant to a legally registered FIR can be used as evidence, however if the FIR itself is registered illegally then the entire evidence collected pursuant thereto has to be struck down and cannot be acted upon. Section 6(A) of the DSPE Act raises a complete bar on proceeding against a Joint Secretary level and above officer without the prior approval of the Central Government. The word used in the provision is “shall” showing its mandatory nature. Relying upon *Emperor vs. Khwaja Nazir Ahmed, AIR 32 (1945) PC 18*, *Hukam Chand Shyam Lal Vs. Union of India & Ors. (1976) 2 SCC 128*, *Captain Sube Singh and Ors. Vs. Lt. Governor of Delhi and Ors. (2004) 6 SCC 440* and *J& K Housing Board & Anr. Vs. Kunwar Sanjay Krishan Kaul & Ors. (2011) 10 SCC 714* it is contended that if the Statute requires a thing to be done in a particular manner then the same has to be done in that particular manner and not otherwise.

3. Learned counsel for the CBI on the other hand contends that in the present case the complaint was sent by the Chief Vigilance Officer of the Petitioner’s Department to the Central Vigilance Commission (CVC) which directed the CBI to take proper action on 8th February, 2011. In cases referred by the CVC, the CBI may or may not register the FIR. Guidelines 9.1 and 9.2 of the CBI manual itself state that in a case of misconduct only and not criminal misconduct, the matter should be sent back to the concerned

Department. After the receipt of the complaint on 8th February, 2011 the income-tax details of the Petitioner were collected. The Petitioner also made communications wherein he referred himself as Director and never informed that he was a Joint Secretary level officer. Further the official website of the Petitioner's Department was checked where also the Petitioner was not shown to be an officer of the Joint Secretary level and above. Since the CBI was not aware of the position of the Petitioner, the abovementioned FIR was registered on 31st August, 2011 and investigation started thereon. The moment it came to the notice of the investigating officer that the Petitioner was a Joint Secretary level officer, approval from the concerned Department was taken and further investigation was carried thereafter. Reliance is placed on *State of Andhra Pradesh Vs. P.V. Narayana (1971) 1 SCC 483* and *Dr. M.C. Sulkunte Vs. State of Mysore (1970) 3 SCC 513* to contend that even in case where there is non-compliance of mandatory provision the trial is not vitiated, except when there is grave miscarriage of justice. In the entire petition or the arguments made before this Court, there is no averment that there has been grave miscarriage of justice. Further in view of *K. Veeraswami Vs. Union of India and Ors. (1991) 3 SCC 655* the aims and objects of the Legislation should be considered while deciding the issue whether the investigation is vitiated or not.

4. In the rejoinder learned counsel for the Petitioner contends that the decisions relied upon by the learned counsel for the Respondent/ CBI are not applicable to the facts of the case as in the said case the trial had completed and thus in view of Section 465 Cr.P.C. it was held that error in grant of sanction does not vitiate the trial unless the accused has suffered grave miscarriage of justice.

5. I have heard learned counsel for the parties. Briefly the facts of the case are that a complaint was forwarded by the CVC to CBI on 8th February 2011 regarding acquisition of disproportionate assets by the Petitioner. On receipt of the complaint discreet verifications including calling of the income-tax details were made resulting in the registration of the abovementioned FIR on 31st August, 2011. As per the stand of the CBI during verification it was not revealed that status of the Petitioner was an officer of a Joint Secretary level as the list of Joint Secretary level empanelled officers on the DOPT website did not include the name of the Petitioner. After the registration of the FIR searches were conducted at the residential premises/ properties of the Petitioner on 2nd September, 2011 on the strength of the search warrants issued by the learned Special Judge, CBI, Patiala House Courts. During the search the Petitioner claimed himself to be an officer of the level of Joint Secretary. Thus a letter was sent to the Joint Secretary and Chief Vigilance officer of the Ministry of Road Transport and Highways on 28th September, 2011 and in the reply dated 29th September, 2011 it was clarified that the Petitioner was granted proforma promotion to the post of Chief Engineer (Civil) and thus was holding the post equivalent to Joint Secretary in the Govt. of India. Further investigation was kept in abeyance and on 20th October, 2011 CBI sought post-facto approval of the Government under Section 6(A) of the DSPE Act which was conveyed to the CBI vide letter of the Joint Secretary and Chief Vigilance officer of the Ministry dated 9th November, 2011.

6. In the present case the issues are whether the investigation in violation of Section 6(A) DSPE Act would be illegal and liable to be set aside and whether the ex post-facto approval would ratify the earlier investigation

carried out. Before proceeding further it would be appropriate to reproduce Section 6(A) of the DSPE Act which reads as under:

“6A. Approval of Central Government to conduct inquiry or investigation

(1) The Delhi Special Police Establishment shall not conduct any enquiry 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 sub-section (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.)”

7. A perusal of the decisions relied upon by the learned counsel for the Respondent would show that they were the cases wherein the legality of investigation was being considered after the trial was concluded and the accused therein had been convicted for the offences under the Prevention of Corruption Act (in short the PC Act). In the light of Section 19(3)(a) PC Act it was held that the illegality in the investigation did not vitiate the trial unless prejudice is caused. The same would have no application when the

accused agitates the illegality at the first available opportunity. In the case in hand the complaint was received by the CBI on 8th February, 2011 and the FIR was registered on 31st August, 2011. During this period, enquiries were conducted including collection of income tax details, however except checking the website, no efforts were made by the enquiry officer to find out the status of the Petitioner which was improper. In introducing Section 6(A) to the DSPE Act, the policy of the Legislature is to afford adequate protection to public servants and to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause.

8. In *Ms. Mayawati Vs. Union of India and Anr. (2012) 8 SCC 106* the issue of Section 6 of the DSPE Act came up for consideration before the Hon'ble Supreme Court and it was held that it was obligatory to obtain the consent of the State concerned to confer jurisdiction on the CBI to investigate any case arising within the jurisdiction of the State. The Hon'ble Supreme Court noted:

“30. As rightly pointed out that in the absence of any direction by this Court to lodge an FIR into the matter of alleged disproportionate assets against the petitioner, the investigating officer could not take resort to Section 157 of the Code of Criminal Procedure, 1973 (in short “the Code”) wherein the officer in charge of a police station is empowered under Section 156 of the Code to investigate on information received or otherwise. Section 6 of the DSPE Act prohibits CBI from exercising its powers and jurisdiction without the consent of the Government of the State. It is pointed out on the side of the petitioner that, in the present case, no such consent was obtained by CBI and submitted that the second FIR against the petitioner is contrary to Section 157 of the Code and Section 6 of the DSPE Act. It is not in dispute that the consent was

declined by the Governor of the State and in such circumstance also the second FIR No. RC 0062003A0019 dated 5-10-2003 is not sustainable.

37. It is also brought to our notice that merely because various orders of this Court including the order dated 18-9-2003 [(2003) 8 SCC 696] have been communicated to various authorities in terms of the provisions of the Rules of this Court, CBI is not justified in putting the Assistant Registrar of this Court as the informant/complainant. Further, as rightly pointed out by Mr Salve, the complainant/Assistant Registrar would not and cannot be a witness in the case to corroborate the statements made in FIR No. RC 0062003A0019 dated 5-10-2003. As rightly pointed out, proceeding further, as if the said Assistant Registrar of this Court made a complaint cannot be sustained.

38. We have already pointed out after reading various orders of this Court which show that Taj Corridor was the subject-matter of reference before the Special Bench. Various directions issued in the order dated 18-9-2003 [(2003) 8 SCC 696] have to be read in the light of the previous orders dated 16-7-2003 [(2003) 8 SCC 706] , 21-8-2003 [*M.C. Mehta v. Union of India*, (2003) 8 SCC 711] and 11-9-2003 [*M.C. Mehta v. Union of India*, (2012) 8 SCC 132] as well as subsequent orders dated 25-10-2004 [*M.C. Mehta v. Union of India*, (2007) 1 SCC 137 : (2007) 1 SCC (Cri) 292] and 7-8-2006 [*M.C. Mehta v. Union of India*, (2012) 8 SCC 137] wherein this Court has clarified that it was not monitoring the disproportionate assets case. We are satisfied that a reading of all the orders of this Court clearly shows that the direction to lodge FIR was issued only with respect to Taj Corridor matter, more particularly, irregularities therein. In fact, the direction was confined to find out as to who cleared the project of Taj Corridor and for what purpose it was cleared and whether there was any illegality or irregularity committed by officers and other persons concerned in the State. We have already noted all those orders which clearly state that CBI is free to interrogate and verify the assets of the

officers/persons relating to release of Rs 17 crores in connection with Taj Corridor matter.

44. In the light of the above discussion, we hold that in the absence of any specific direction from this Court in the order dated 18-9-2003 [(2003) 8 SCC 696] or any subsequent orders, CBI has exceeded its jurisdiction in lodging FIR No. RC 0062003A0019 dated 5-10-2003. The impugned FIR is without jurisdiction and any investigation pursuant thereto is illegal and liable to be quashed, and is accordingly quashed. The writ petition is allowed.”

9. In *Mayawati* (supra) the Hon’ble Supreme Court was dealing with a case of ‘consent’ from the State Government for the registration of FIR and to investigate the matter, in the absence of which the CBI had no jurisdiction to register the FIR and investigate the matter.

10. There is an obvious distinction between ‘approval’, ‘consent’ and ‘sanction’. An ‘approval’ or ‘consent’ implies mere concurrence or agreement whereas ‘sanction’ confers authority on the person in whose favour power to grant sanction is conferred. The difference between ‘approval’, ‘consent’ and ‘sanction’ is that of degree. In *State of Maharashtra vs. Janardan Ramchandra Nawankar*, 1987 Cri. L.J. 811 the Bombay High Court while dealing with the distinction between ‘consent’ and ‘sanction’ held as under:

“54. Besides, it must be remembered that Under Section 20 of the Prevention of Food Adulteration Act only consent of the Commissioner is necessary and not sanction. There is obvious difference between ‘consent’ and ‘sanction’. ‘Consent’ implies mere concurrence or agreement whereas ‘sanction’ confers authority on the person in whose favour sanction is granted. Therefore, the considerations applicable in the case of ‘sanction’

would, in my opinion, not be applicable to a case where mere consent is required.”

11. It is thus evident that unlike ‘sanction’ which is mandatory in nature and has to be obtained prior to taking cognizance, an ‘approval’ can be taken ex-post facto as well. There is yet another aspect which needs consideration in the present case. Though initial searches were conducted without the approval, however thereafter on receipt of the intimation from the Petitioner that he was Joint Secretary level officer, the investigation was kept on hold and approval was taken. Thus, if this Court quashes the earlier investigation prior to the approval, the same would be an incorrect procedure of law as investigation cannot be accepted or quashed piecemeal. Investigation has been defined by the Supreme Court in *H.N. Rishbud Vs. State of Delhi* (2007) 15 SCC 699 as:

5. To determine the first question it is necessary to consider carefully both the language and scope of the section and the policy underlying it. As has been pointed out by Lord Campbell in *Liverpool Borough Bank v. Turner* [(1861) 30 LJ Ch 379] , “there is no universal rule to aid in determining whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of the Court to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed”. (See *Craies on Statute Law*, p. 242, Fifth Edn.) The Code of Criminal Procedure provides not merely for judicial enquiry into or trial of alleged offences but also for prior investigation thereof. Section 5 of the Code shows that all offences “shall be investigated, inquired into, tried and otherwise dealt with in accordance with the Code” (except in so far as any special enactment may provide otherwise). For the purposes of investigation offences are divided into two

categories “cognizable” and “non-cognizable”. When information of the commission of a cognizable offence is received or such commission is suspected, the appropriate police officer has the authority to enter on the investigation of the same (unless it appears to him that there is no sufficient ground). But where the information relates to a non-cognizable offence, he shall not investigate it without the order of a competent Magistrate. Thus it may be seen that according to the scheme of the Code, investigation is a normal preliminary to an accused being put up for trial for a cognizable offence (except when the Magistrate takes cognizance otherwise than on a police report in which case he has the power under Section 202 of the Code to order investigation if he thinks fit). Therefore, it is clear that when the Legislature made the offences in the Act cognizable, prior investigation by the appropriate police officer was contemplated as the normal preliminary to the trial in respect of such offences under the Act. In order to ascertain the scope of and the reason for requiring such investigation to be conducted by an officer of high rank (except when otherwise permitted by a Magistrate), it is useful to consider what “investigation” under the Code comprises. Investigation usually starts on information relating to the commission of an offence given to an officer in charge of a police station and recorded under Section 154 of the Code. If from information so received or otherwise, the officer in charge of the police station has reason to suspect the commission of an offence, he or some other subordinate officer deputed by him, has to proceed to the spot to investigate the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of the offender. Thus investigation primarily consists in the ascertainment of the facts and circumstances of the case. By definition, it includes “all the proceedings under the Code for the collection of evidence conducted by a police officer”. For the above purposes, the investigating officer is given the power to require before himself the attendance of any person appearing to be acquainted with the circumstances of the case. He has also the authority to examine such person orally either by himself or by a duly authorised deputy. The officer

examining any person in the course of investigation may reduce his statement into writing and such writing is available, in the trial that may follow, for use in the manner provided in this behalf in Section 162. Under Section 155 the officer in charge of a police station has the power of making a search in any place for the seizure of anything believed to be necessary for the purpose of the investigation. The search has to be conducted by such officer in person. A subordinate officer may be deputed by him for the purpose only for reasons to be recorded in writing if he is unable to conduct the search in person and there is no other competent officer available. The investigating officer has also the power to arrest the person or persons suspected of the commission of the offence under Section 54 of the Code. A police officer making an investigation is enjoined to enter his proceedings in a diary from day-to-day. Where such investigation cannot be completed within the period of 24 hours and the accused is in custody he is enjoined also to send a copy of the entries in the diary to the Magistrate concerned. It is important to notice that where the investigation is conducted not by the officer in charge of the police station but by a subordinate officer (by virtue of one or other of the provisions enabling him to depute such subordinate officer for any of the steps in the investigation) such subordinate officer is to report the result of the investigation to the officer in charge of the police station. If, upon the completion of the investigation it appears to the officer in charge of the police station that there is no sufficient evidence or reasonable ground, he may decide to release the suspected accused, if in custody, on his executing a bond. If, however, it appears to him that there is sufficient evidence or reasonable ground, to place the accused on trial, he is to take the necessary steps therefore under Section 170 of the Code. In either case, on the completion of the investigation he has to submit a report to the Magistrate under Section 173 of the Code in the prescribed form furnishing various details. Thus, under the Code investigation consists generally of the following steps: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence

relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under Section 173. The scheme of the Code also shows that while it is permissible for an officer in charge of a police station to depute some subordinate officer to conduct some of these steps in the investigation, the responsibility for every one of these steps is that of the person in the situation of the officer in charge of the police station, it having been clearly provided in Section 168 that when a subordinate officer makes an investigation he should report the result to the officer in charge of the police station. It is also clear that the final step in the investigation, viz. the formation of the opinion as to whether or not there is a case to place the accused on trial is to be that of the officer in charge of the police station. There is no provision permitting delegation thereof but only a provision entitling superior officers to supervise or participate under Section 551.

12. In *Dr. R.R. Kishore Vs. CBI 142 (2007) DLT 702* this Court quashed the investigation and permitted re-investigation after obtaining approval for the reason that no approval was taken at all. It was held:

“28. After examining the aforesaid decisions of the Privy Council as well as of the Supreme Court, the following principles emerge:

1. If cognizance is taken on the basis of such an illegal investigation and no objection is taken at the initial stages and the trial proceeds to its conclusion and results in conviction then the same can be set aside only if it has resulted in a miscarriage of justice.

2. However, if the illegal investigation is brought to the notice of the Trial Court at the initial stages then the court ought not to proceed with the trial and be a mute spectator to the illegality and contravention of a mandatory provision but should direct reinvestigation so that the defect in investigation is cured.”

13. Reliance of learned counsel for the Appellant on *State of Kerala Vs. M.S. Mani & Ors.* (supra) is misconceived and has no application to the facts of the present case. In the said case the Hon’ble Supreme Court observed that the contempt petition was filed on 17th May, 1999 and the consent of the Attorney General was obtained on 11th May, 2000 and that a subsequent consent would not convert the incompetent motion into a maintainable petition.

14. In the present case had the approval not been taken at all and the investigation completed, the same would have been illegal. Further an investigation cannot be set at naught piecemeal. Thus in view of the fact that the CBI had taken the approval after it became aware of the status of the Petitioner the illegality committed at the inception of investigation gets cured and the same would not permit this Court to quash the earlier investigation. In view of the aforesaid discussion the petition is dismissed.

(MUKTA GUPTA)

MAY 03, 2013

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