

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: October 16, 2014

Decided on: November 11, 2014

CRL.A. No. 610 of 2008

MADHAVSINH SOLANKI

..... Appellant

Through: Mr. Hamid Kureshi, Ms. Sima Gulati, Ms. Shikha Pandey, Ms. Pallavi Sharma, Ms. Aakanksha Nehra and Mr. Aritra Roy, Advocates.

versus

STATE THR. CBI

..... Respondent

Through: Mr. Sanjay Jain, ASG with Mr. Naveen Mata, Ms. Rajul Jain and Mr. Akash Nagar, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

11.11.2014

Introduction

1. This appeal under Section 341 of the Code of Criminal Procedure Code, 1973 (Cr PC) against an order dated 7th July 2008 passed by the learned Special Judge (CBI), Delhi in RC No. 1(A)/90/CBI/ACU-IV whereby a direction was issued that a complaint be filed against the Appellant under Section 193 IPC before the Court of competent jurisdiction.

2. The Appellant was a Minister of External Affairs in the Government of India. On 1st February 1992 during his visit to Davos, Switzerland to

attend the annual World Economic Forum, the Appellant sought an appointment with the Swiss Foreign Minister Mr. Rene Felber. At that meeting with Mr. Felber, the Appellant handed over an envelope containing an unsigned typed 'Memorandum'. The said Memorandum referred to a request presented by the Government of India to the Government of Switzerland on 23rd January 1990 for mutual assistance in connection with the Bofors case. It purported to advise that since the validity of the above request for legal assistance was challenged in the Courts in India, "until a final decision is issued by Indian courts on that issue, no further steps should be taken in Switzerland in this matter".

The background events

3. The events leading up to the aforementioned request was that on 22nd January 1990 the CBI registered a case against Mr. Martin Ardbo, former President of M/s. AB Bofors, Sweden and its other concerned Directors and employees, W.N. Chadha @ Win Chadha, President of M/s. Anatron General Corporation and its other concerned Directors and employees, the Directors, employees and direct or indirect beneficiaries of M/s. Svenska Inc., Panama and M/s. Pitco/Moresco/Moineao, Geneva and various other entities and certain public servants of Government of India under Sections 120-B IPC read with Sections 161, 162, 163, 164 & 165-A IPC read with Sections 5 (2) read with Sections 5 (1) (d) and 5 (2) read with Section 5 (1) (c) of the Prevention of Corruption Act, 1947 read with Sections 409, 420, 468 and 471 IPC. Accordingly the information received by the CBI revealed that between 1982 and 1987 certain public servants of the Government of India entered into a criminal conspiracy with W.N.Chadha, Martin Ardbo,

G.P. Hinduja and others in India and abroad and pursuant thereto committed offences of criminal conspiracy, bribery, criminal misconduct by public servant, cheating, criminal breach of trust, forgery for the purpose of cheating and using the same as genuine in respect of the contract dated 24th March 1986 entered into between the Government of India and M/s. AB Bofors of Sweden ('Bofors') for a value of Swedish Kroners 8410.66 million (Rs.1437.72 crores or Rs.14377.2 million) for the supply of four hundred and ten 155 mm FH 77-B guns, towed vehicles and ammunition, etc. by Bofors.

4. In order to ascertain the recipients of commissions/bribe, a Letters Rogatory ('LR') was issued by the Court of Special Judge, New Delhi on 7th February 1990 to the Competent Judicial Authorities in the Confederation of Switzerland. The Swiss judicial authorities were, through this LR, requested to collect and pass on documents from Swiss Bank Corporation, Geneva, Switzerland, Nordfinanz Bank, Zurich, Switzerland and others with full details of the accounts holders as well as the persons who were the authorised signatories or beneficiaries for receipt of illegal remittance by Bofors. The Swiss authorities were also requested to record the statements of the relevant witnesses including officials of the concerned banks and a number of persons whose involvement had come to notice during the investigation.

5. The Investigating Judge (Examining Magistrate) of Geneva after perusing the LR passed an order on 26th March 1990 admitting the request for assistance and ordering commencement of investigation. In the two appeals filed against the said order, the Cantonal Court of

Geneva by an order on 3rd July 1990 annulled the order of the Examining Magistrate. The Cantonal Court asked for certain clarifications regarding the LR which was forwarded to it by the Court of Special Judge, Delhi on 22nd August 1990. Pursuant to the LR, certain documents relating to M/s. AE Services Ltd. and Colbar Investment Inc. showing remittances by Bofors into their accounts were received by the CBI in December 1990. This was only in part execution of the LR. Further investigation in pursuance of the LR was awaited. By an order dated 23rd January 1991, the Cantonal Court suspended the examination of the LR till Indian judicial authorities decided on the petitions questioning the legality of the LR. As on that date, a criminal miscellaneous petition has been filed in this Court by WN Chadha for quashing the arrest warrants issued against him.

6. This Court by an order dated 19th December 1990 dismissed the petition of H.S. Chaudhary and others and had *suo moto* issued notice to the CBI as to why proceedings initiated on the filing of the FIR in the case pending in the Court of Special Judge should not be quashed. The said order dated 19th December 1990 was challenged by the Union of India before the Supreme Court of India. By an order dated 27th August 1991, the Supreme Court directed that all proceedings pursuant to the FIR dated 22nd January 1990 would proceed in accordance with law. A copy of the above judgment was forwarded by the CBI to the Indian Embassy in Switzerland on 12th September 1991 to be further submitted to the Swiss authorities. It was clarified to the Swiss Authorities that since the validity of the FIR and LR had been upheld by the Supreme Court, the pendency of WN Chadha's petition in the Delhi High Court

should have no influence on the ongoing investigations in the Swiss Courts.

The Memorandum and the events that followed

7. It was in the above background that the Appellant met the Swiss Minister Mr. Felber on 1st February 1992 at Davos in Switzerland. At that meeting the Appellant handed over to Mr. Felber an envelope containing an unsigned typed 'Memorandum' relating to the matter of execution of the LR. Since the said Memorandum forms the subject matter of the present proceedings the following relevant portions are reproduced:

“The Indian Government has presented a request for mutual assistance to Switzerland on 23rd January, 1990, in the “Bofors” matter.

This request is based on allegations of bribes in the Bofors transaction.

Although an enquiry took place in India, such allegations could not be proven and it has been said that the request for mutual assistance was based on political reasons. These allegations caused the fall of Mr. Gandhi's government, although nothing could be established. In Sweden both the government and Bofors have closed the case.

The enquiry opened in India led to several proceedings in India, where the validity and legality of the request for mutual assistance has been challenged before the Indian courts.

This matter is still not resolved in India and one party, Mr. Chadha has filed a petition before the Delhi High Court, which will have to decide whether the Indian request for mutual assistance is valid or not under Indian law.

Until a final decision is issued by Indian courts on that issue, no further steps should be taken in Switzerland in this matter.

It has to be noted that in Sweden both Bofors and the Government have closed the case.

It is one of the conditions of the Mutual Assistance between India and Switzerland that before any assistance is provided the condition of dual criminality must be satisfied. It, therefore, flows that question whether a criminal offence has been committed or not in a particular given case has to be established before an Indian Court as well as before the Swiss judicial authority. The issuance of Letter of Rogatory by the Special Judge has been challenged in the petition under Article 26 of the Constitution of India by one of the persons named in the FIR of the case and the High Court being a superior court of the special Judge it cannot be assumed by the Swiss Court that the first pre-requisite of criminality in India has been established and that they were free to proceed in the matter without pronouncement on merits the results of the High Court litigation. In case the Swiss authorities overlook this aspect of the matter, it will be in gross violation of the Mutual Assistance in criminal matters. As a matter of fact, every accused has a right to exhaust his all remedies in India before the Rogatory can be acted upon in an outside country (Switzerland).”

8. The meeting was reported in the Indian press and led to questions being raised in the Parliament. On 30th March 1992, the Appellant made the following statement in the Lok Sabha explaining what had transpired:

“I have read the report which has appeared in newspaper today, I wish to make a brief statement clarifying my position.

Neither the Ministry of External Affairs nor I deal with the

Bofors investigation. I am not aware of the details of the pending proceeding. Hence there was no occasion for me to make any request to the authorities in Switzerland in respect of the cases before the Swiss Courts, and I categorically state that I have not done so.

However, it is true that when I was in Davos, I made a courtesy call on Mr. Felber, Federal Councillor for Foreign Affairs. **At the ends of our conversation, while taking his leave, I handed over a note to Mr. Felber. This note on the status of the court cases pending in India had been given to me by a lawyer.** I now regret that I handed over this note which has caused embarrassment to me and avoidable misunderstanding.

The Government of India's position has been made amply clear by the letters written by the CBI to the Swiss authorities. On these aspects, I understand that a statement will be made on behalf of the Government in due course."

9. By a letter dated 15th July 2002, the Secretary, Ministry of External Affairs forwarded to the DIG of the CBI a copy of the aforementioned Memorandum.

10. It appears that the Government of India sought the opinion of the Solicitor General of India ('SGI') on whether the proposal of the CBI for prosecuting the Appellant "is a fit case for grant of sanction for his prosecution." The SGI rendered written opinion on 19th January 1997 that "apart from S.193 there does not appear to be a case for prosecuting Shri Solanki. If CBI has any other offences in mind it should have specified them rather than stating vaguely that the case comes under any other offence punishable under law."

11. In the meanwhile, it appears that the CBI recorded statement of K.Mangalmurti, the former Ambassador of India to Switzerland, on 21st April 1997. He *inter alia* stated that he was present throughout the visit of the Appellant and that the Appellant had requested for an appointment with Mr. Felber. He then stated as under:

“We had requested for a small room for a meeting between Mr. Solanki and Mr. Felber. I had sought the meeting as required by Mr. Solanki. The meeting was fixed in advance. I accompanied Mr. Solanki to the meeting venue. I remember that the PA to Mr. Solanki was also available during his visit. However, I do not recall whether he accompanied Mr. Solanki till the entrance of the room or not. But I am very clear that nobody else was available near the room nor entrance and that inside the room along with Mr. Solanki and myself nobody from India was available. From the Swiss side Mr. Felber was assisted by Mr. Simonin, who was earlier Ambassador looking after the Asian matters. Therefore, we were only 4 persons in the meeting Simonin also acted as the translator. After discussing for about 10 minutes on bilateral matters, I moved out along with Mr. Simonin. Mr. Solanki and Mr. Felber were left themselves. This tete-a-tete was called for by Mr. Solanki. For such dignitaries one-to-one meeting is not uncommon. However, Mr. Felber was very poor in English, as his mother tongue was French, and he knew German also. No interpreter was available during the tete-a-tete and, therefore, I do not know how well they would have communicated with each other. I also do not know what transpired between the two ministers. It appears that Mr. Solanki had handed over some paper to Mr. Felber. I do not recollect as to how Mr. Solanki carried the paper, as to whether he was carrying it in his briefcase or not. The tete-a-tete lasted only for a few minutes. I was waiting outside. Thereafter, we went away together.

On being asked about the presence of any advocate or any other unknown Indian in the venue of the meeting or at the entrance of the room, I am to state that there was nobody.

The PA did come there but had gone away when we entered the room. As mentioned above, only four of us were present in the meeting and there was nobody at the entrance or outside waiting for Mr. Solanki. We went in together and therefore I was with Mr. Solanki throughout.

Mr. Solanki did not discuss with me as to what happened during the meeting with Mr. Felber. He held this matter very close to his chest. Obviously, he had handed over a note to Mr. Felber, but Mr. Felber may or may not have understood as to what is to be done with that note. It appears that the note was handed over by Mr. Felber to the Legal Department attached with the Foreign office of Switzerland and from there it got leaked out to the press. It created so much embarrassment for the Government of India. Thereafter, contradictory views started coming out as to whether it was an official document or not. After Mr. Solanki gave a speech in the Parliament it was made known to us that the piece of paper handed over by him was not official and I was asked to communicate the same to the Swiss authorities. Accordingly, I contacted Mr. Simonin and communicated the same to him. I also contacted him and requested him for a copy of the note. Mr. Simonin had provided me a copy of the note. This note shows that it was an unsigned note running into 4/5 pages typed out on a plain sheet of paper. There was no letterhead nor forwarding note nor any signature. I had gone through the contents of the note and faxed it to MEA. It should be available with MEA files. I had addressed it to Mr. Srinivasan, the then Secretary looking after Europe. I had gone through the contents of the note and found it to be a legal advice quoting several case laws. Apparently it looked to me as a note prepared by a competent lawyer. The contents of the note was that the proceedings in the Swiss Courts should be held in abeyance till the matter relating to the validity of the FIR is decided by the Indian Courts and that the validity of the FIR has already been challenged in the Indian Courts. The note looked like a proper legal advice meant to be communicated to the concerned. A copy of the same should be available in the

file of the Indian Embassy in Switzerland.

This note has created a lot of confusion and the Swiss were wondering what we really wanted. They got to know that our government was confused. However, I later confirmed to them that our Parliament had decided that his note was not an official document and therefore, it should not be considered.”

12. A further opinion was sought from the Attorney General (AG) on whether the facts and circumstances of the case warranted grant of sanction for prosecution of the Appellant "in connection with Bofors case". In his opinion dated 8th June 1998, the AG referred to the statement made by the Appellant to the CBI on 25th March 1997 to the following effect:

“I told Mr. Felber that an Indian lawyer outside had given this note to him which relates to Bofors case which are going on in India and Switzerland and that according to him it will be better if the Swiss cases are taken up after the Indian Courts decided on it.”

13. The AG’s opinion was that the case under Section 193 rests on stronger ground than Section 201 but advised that care must be taken to plead the requisite ingredients of Section 192 read with Section 193 of the IPC regarding fabrication of false evidence for the purpose of being used in any stage of a judicial proceeding.”

The second LR issued by the Special Judge

14. On 8th December 1998, a second LR was issued by the Special Judge in which, after referring to the Memorandum, *inter alia* it was stated as under:

“3.22 The facts mentioned in the aforesaid false memorandum handed over by Shri Solanki to Mr. Felber, were false and fabricated in as much as the case was still under investigation in India at that time and that it was falsely mentioned that the allegations were neither proved nor established.

3.23 The acts of Shri Solanki in handing over of this memorandum with a view to entertain an erroneous opinion and which can be used at any stage of judicial proceedings amounts to an offence under Section 193 of the Indian Penal Code (‘IPC’). It is, therefore, very essential to have the original memorandum handed over by Shri Solanki to Mr. Felber and to know the details in this regard. An extract of the aforesaid section of law is annexed and marked as Annexure-H.”

15. By the LR, the judicial authorities in Switzerland were requested to render assistance for collection of documents and for recording statements of the concerned persons in Geneva including Mr. Felber and Mr. Simonin, former Ambassador in Switzerland looking after Asian matters.

The sanction order

16. On 5th May 1999, the Joint Secretary in the Ministry of Home Affairs (‘MHA’) issued an order whereby the Central Government accorded sanction under Sections 188 and 197 Cr PC for "the trial and prosecution" of the Appellant for the offence under Section 193 IPC.

The relevant portions of the sanction order read as under:

“9. And whereas, the aforesaid fabricated memorandum contained certain false statements and facts to the effect that

“This request is based on allegations of briberies in

the Bofors transaction. Although an enquiry took place in India, such allegations could not be proven and it has been said that the request for mutual assistance was based on political reasons. These allegations caused the fall of Mr. Gandhi's government, although nothing could be established."

10. And whereas, the facts mentioned in the aforesaid memorandum handed over by Mr. Solanki to Mr. Felber, were false and fabricated in as much as the case was still under investigation in India at that time and that it was falsely mentioned that the allegations were neither proved nor established.

11. And whereas, by the aforesaid acts Shri Solanki fabricated a false document and gave the same to Mr. Felber in order to cause the Swiss Authorities to come to an erroneous opinion regarding the Letters Rogatory aforesaid, pending before the Swiss Authorities:

12. And whereas, the aforesaid acts of Shri Solanki constitute an offence under Section 193 IPC committed in Switzerland.

13. And whereas, Shri Madhavsingh Solanki acted or purported to act in his official capacity as the Minister for External Affairs of the Government of India, New Delhi.

14. And whereas, the accused Shri Madhavsingh Solanki is a citizen of India, and he committed the alleged offence in Switzerland:

15. And whereas, according to Section 188 of the Code of Criminal Procedure, 1973, the offence alleged to have been committed by the said Shri Madhavsingh Solanki as aforesaid can be legally tried in India with the previous sanction of the Central Govt.: but cannot be inquired into without previous sanction.

16. And whereas, the Central Government, after thoroughly and carefully examining the materials before it in regard to the said allegations and the circumstances of the case, considers that the

said Shri Madhavsinh Solanki, the then Minister of External Affairs, Government of India should be prosecuted in the competent Court of Law in India for the offence u/s 193 of the Indian Penal Code.”

Statements of Mr. Simonin and Mr. Felber

17. Pursuant to the above request, the office of the Examining Magistrate at Bern issued summons inter alia to Mr. Felber as well as Mr. Simonin. The relevant portion of Mr. Simonin’s answers to the questions posed to him reads as under:

“Question: What arrangements were made after the aforesaid memorandum had been received from Shri Solanki?

Answer: I can no longer remember exactly how the memorandum came to me. I imagine that it must have come from the State Secretary or via the Secretariat of the Head of the Department. As I have already indicated, the memorandum was passed on to the International Law Directorate. No other measures were taken. However, there were certain reactions. The Indian ambassador at the time, Mr. Mangalmurti, requested a meeting with meeting on 7th April 1992 and explained Mr. Solanki’s memorandum should be regarded as null and void.”

18. The statement of Mr. Felber, recorded on 10th April 2000, reads as under:

“Question: Under what circumstances and at whose instigation did the meeting come about on 1st February 1992 between yourself and the then Foreign Minister of India?

Answer: I was in Davos on 1st February 1992 in my capacity as Federal President. I gave a speech to the participants at Davos. In Davos, I had a whole series of meetings with ministers and foreign ministers of foreign state. These meetings all took place in a special room at the Posh Hotel in Davos where I was staying. However, no meeting was arranged with Mr. Solanki.

On 1st February 1992, I went to the Davos Forum to give my speech. While I was in the lobby, someone came up to me and said that Mr. Solanki would like to speak to me for a few minutes. Mr. Solanki requested that there would be no witnesses. I already knew Mr. Solanki. I had met him in October 1991 on a visit to India. A room was quickly found in Davos and I was able to meet Mr. Solanki with just the two of us present. Mr. Solanki had a large envelop with him. He told me that he had new information about the Bofors case and that it was important for me to communicate this to the Swiss government. I repeated to Mr. Solanki what I had already told him in Delhi, namely that I was not responsible for justice matters. I went on to explain to him that I could take the document and pass it on to the Federal Office of Justice. That was the end of the meeting with Mr. Solanki. The meeting lasted about five minutes. I then left him and went back to my staff. I gave the envelope I had received from Mr. Solanki unopened to one of my staff, probably my personal assistant. Georges Martin handed the envelope over unopened to my personal assistant. I should like to note that there was an Indian journalist in the lobby of the Davos forum where my staff were waiting. She is accredited to the UN in Geneva. I had already seen her on my visit to India. She had asked me some questions. Then in Davos, she asked me why I had met Mr. Solanki. I told her that I could not make any comment, as this was a legal matter.

Question: I am holding up the memorandum produced by the Federal Department of Foreign affairs and filed with the case papers. Is this the document which was given to you.

Answer: I never saw the document in the envelope. I cannot say whether this is the document which was handed over in Davos. I simply received a very large envelope. The envelope was considerably bigger than the A4 sheet which has been shown to me. As far as I can remember, the envelope was almost square. It was probably made of thin cardboard and was being shown to me here. Perhaps the notes were written by Ambassador Simonin. To be sure, it would be necessary to check with the secretariat of the Federal Department for Foreign Affairs, Mr. Simonin was also in Davos. It could be that I gave the envelope to Mr. Simonin [sic].

Question: Who was present when this memorandum was handed over?

Answer: Mr. Solanki and I were alone in this special room in Davos....”

19. On 4th April 2003, an application was filed in the Court of the learned Special Judge by the CBI praying for filing of a complaint against Appellant under Section 340 Cr PC. *Inter alia* it was stated in the application that by handing over the above false information to the Swiss authorities, the Appellant had acted intentionally “with the purpose to scuttle investigation being conducted by the Swiss authorities” in terms of the LR issued by the Court. It was further stated that:

“The aforesaid false and fabricated memorandum was given by Shri Solanki to the Swiss Foreign Minister so that the Swiss authorities in-charge of the mutual assistance acting on its contents form an erroneous impression and drop further investigation into this case. The aforesaid acts committed by Shri Madhavsinh Solanki constitute an offence punishable under Section 193 IPC.”

20. It was further stated in paras 15 to 17 of the said application as under:

“15. It appears that the clear intention of Shri Solanki was to pass the note on through the Swiss Foreign Minister to the Swiss Judicial authorities dealing with the Bofors case and cause them to form an erroneous opinion touching a point material of the result of the proceedings in the Bofors case, namely, the legality and propriety of the Letters Rogatory and India’s request for mutual assistance. It is further submitted that in view of the nature and serious implications of mis-statements in the memorandum the Swiss authorities would have discontinued further investigation and closed the case.

16. That as per the provisions of Section 195(1)(b)(i) Cr PC, no Court shall take cognizance of any offence punishable under Section 193 IPC when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court except on the complaint in writing of that Court or of some other Court to which the Court is subordinate. It is submitted that in view of the foregoing submissions, it appears that Shri Solanki by introducing the aforesaid false/fabricated memorandum had committed an offence under Section 193 IPC before this Hon'ble Court concerning the execution of the aforesaid Letters Rogatory/Letter of Request. It is further submitted that it is expedient in the interest of justice that an enquiry should be made in this regard.

17. Thus, there is a case to this Hon'ble Court to record a finding that Shri Solanki had committed an offence under Section 193 IPC and make a complaint to a competent Magistrate having jurisdiction. It is submitted that along with this petition copies of relevant documents and statements are enclosed.”

Proceedings in this Court

21. On 9th June 2003, notice was issued to the Appellant in the aforementioned application. That order was challenged by the Appellant in this court by filing Criminal Misc. (M) No. 3324 of 2003. It was inter alia submitted before this Court on behalf of the Appellant since the original of the Memorandum handed over by the Appellant to Mr. Felber had not been produced by the CBI, its petition before the Special Judge was not maintainable. On merits it was submitted that the note produced by the CBI was not a document containing any false statement and, therefore, the notice issued by the Special Judge to the Appellant should be quashed by the High Court in exercise of its powers under Section 482 Cr PC.

22. By a judgment dated 20th August 2007, this Court dismissed the aforementioned petition on the ground that it was premature. The Court was of the view that “in a matter like this, it would be proper that in the first instance Trial Court considers the submissions of the petitioner on the basis of which petitioner argues that no case of proceeding against him under Section 193 IPC and Section 195 Cr PC is made out.”

Order of the Special Judge

23. In the impugned order dated 7th July 2008, the learned Special Judge recorded a finding that the prosecution of the Appellant for the offence punishable under Section 193 IPC was expedient and, therefore, a complaint should be filed against him before the Court of competent jurisdiction. In the said order, the learned Special Judge came, *inter alia*, to the following conclusions:

- (i) The investigation carried out by the Swiss authorities pursuant to the LR issued by the Court was part of ‘judicial proceeding’ for the purposes of Section 193 IPC.
- (ii) When the Appellant handed over the Memorandum to Mr. Felber he knew about its contents. Therefore, it did not matter whether the Memorandum was undated, not on the official letterhead and did not indicate to whom it was addressed. Although the Appellant “was not the author of the said memorandum”, yet he “took the responsibility of handing it over to Mr. Felber for onward transmission to Justice Department of Switzerland, having full knowledge as to its contents and its

implications.”

(iii) The statement in the Memorandum that “although an enquiry took place in India such allegation could not be proven” was misleading since the JPC report “was not relevant for the purposes of investigation of an offence.”

(iv) The assertion in the Memorandum that the request for a mutual assistance was based on ‘political reasons’ was false to the knowledge of the Appellant.

(v) Although the writ petition filed by Mr. Chadha was pending in the High Court “it was not in the fitness of things to assert that propriety as well as legality of the FIR has not stood the test of legal decision.” Further when the Court was seized of the matter and an LR had been issued it was not incumbent upon the Appellant to tender a legal opinion to the Swiss authorities “with a view to dissuade them from collection of facts on the request of the Court.”

(vi) The last limbs of the Memorandum made it clear that the Appellant wanted the Swiss authorities not to proceed with the request sent by the Court. The Appellant “caused such circumstances to exist, which ought have reflected in evidence/material to be collected by the Swiss authorities touching the material point in the issue so that they ought have formed an opinion upon that issue and it would have reached the

evidence so collected. It is evident that respondent fabricated false evidence in the course of judicial proceedings.”

(vii) Though the Appellant claimed in his reply that the sanction accorded under Sections 188 and 197 IPC was not valid, "yet during the course of arguments he opted not to challenge the sanction accorded in the case.” In any event the sanction order suffered from “no illegality and invalidity.”

24. The learned Special Judge in the impugned order dated 7th July 2008 concluded that since the Appellant committed an offence punishable under Section 193 IPC on 1st February 1992 at Davos, Switzerland, his prosecution for the said offence was “expedient in the interest of justice” and that it was desirable to file a complaint against him under Section 193 IPC before the Court of competent jurisdiction.

Submissions of learned Counsel for the Appellant

25. Mr. Hamid Kureshi, learned counsel appearing for the Appellant, made the following submissions:

(i) It was erroneous on the part of the trial Court to observe that the Appellant during the course of argument opted not to challenge the validity of the sanction accorded in the case. The written submissions filed by the Appellant before the learned Special Judge clearly raise such a challenge.

(ii) The sanction for prosecution of the Appellant accorded by the order dated 5th May 1999 was vitiated in law since the entire

material gathered by the CBI was not before the sanctioning authority. For instance, the original of the Memorandum handed over by the Appellant to Mr. Felber was not received by the time the order according sanction was passed.

(iii) The Memorandum which forms the subject matter of the case did not contain any condition, order, request or direction; did not contain any false statement; would not lead any person or authority to entertain any erroneous opinion in any respect; was merely a note and in fact the word 'Memorandum' used to describe it was a misnomer.

(iv) The Memorandum could not be construed as fabrication of false evidence within the meaning of Section 192 IPC. In fact even the CBI described it as only a fabrication of "false document". The Memorandum in any event was not fabricated by the Appellant. It was given to him by a lawyer and passed on to Mr. Felber. Therefore the essential ingredients of the offence under Section 193 IPC were not made out.

(v) The Memorandum being inadmissible in evidence could not possibly have been taken note of by any Court or authority and could not have caused such Court or authority to make any erroneous decision.

(vi) The Memorandum was not tendered or submitted in any Court in any judicial proceedings since it was only passed to Mr.

Felber who was neither a Court nor an Investigating Officer. The question of anyone entertaining an erroneous opinion on the basis of the Memorandum did not arise. Since the note only referred to a stay order and not to any final order, it had nothing to do with the results of the proceedings. Since none of the ingredients of Section 192 IPC were satisfied no case under Section 193 IPC was even *prima facie* maintainable against the Appellant.

(vii) In terms of the proviso to Section 188 Cr PC, the previous sanction of the central government is required, in respect of the offence committed outside India both for the enquiry and the trial in respect of such offence. The sanction order referred to both Sections 188 and 197 Cr PC but in effect it was only for “trial and prosecution” of the Appellant and not for enquiry into the offence. Insofar as there was no sanction for the enquiry, the entire investigation into the offence stood vitiated.

(viii) The incident was of 1992 and with little progress made in the past twenty-two years, no useful purpose would be served in continuing these vexatious proceedings, in the interests of justice.

Submissions of the learned ASG

26. Mr. Sanjay Jain, learned Additional Solicitor General (ASG) appearing for the CBI, brought to the Court the original files which affirmed that a copy of the Memorandum handed over by the Appellant to Mr. Felber was available with the CBI as early as 15th July 1992. Mr. Jain also referred to the letter dated 12th May 1997 addressed by the CBI

to the central government requesting for sanction to prosecute the Appellant. The notings on the file revealed that the Prime Minister himself signed the concerned note.

27. On the interpretation of what constitutes fabrication of false evidence it is stressed on the expression “whoever causes any circumstance to exist” occurring in the opening portion of Section 192 IPC as well as on the words “intending that such circumstance, may appear in evidence in a judicial proceeding,”. Mr. Jain submitted that at that stage of granting sanction it is sufficient that the sanctioning authority was satisfied that a *prima facie* case existed for the purpose of proceeding against the Appellant under Section 193 IPC. Mr. Jain pointed out that as per the Explanation 2 under Section 193 IPC, an investigation preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding though investigation may not take place before a Court of Justice. According to him, the proceeding before the concerned judicial authority at Geneva pursuant to the LR sent to the Government of Switzerland would also, therefore, come under as ‘judicial proceeding’ which is incidental to the proceeding before the learned Special Judge (CBI) for the purpose of Section 192 IPC.

28. Mr. Jain stressed that the Appellant himself should be deemed to be the author of the document. Being the Cabinet Minister of the Government of India, when he carried the note and handed it over to Mr. Felber, a Minister in the Government of Switzerland. He held out to the Minister that the note he was handing over had the imprimatur of the Government of India. The Appellant being a Cabinet Minister caused a

circumstance to exist with an intention to scuttle further processing of the LR sent to the Government of Switzerland. According to Mr. Jain from the point of view of Mr. Felber the Appellant was the maker of the document. Further, in terms of Explanation 3 under Section 193 IPC an investigation conducted under the authority of a Court of Justice would be a proceeding that would ultimately impact the judicial proceeding that would adjudicate the crime in question. He pointed out that the decision, if any, of the Swiss authority not to send documents would also be a part of the evidence that would be led in the judicial proceedings before the Special Judge.

29. Mr. Jain pointed out that the sanction order need not be a detailed one. The scope of judicial review of such order was limited to the extent of ensuring that there was no arbitrariness vitiating the sanction order.

Decision of the Court

30. From the statement of Mr. K.Mangalmurti, recorded in 1997, it is apparent that a copy of the Memorandum was available with the Government of India even as early as on 15th July 1992. The relevant portion of the statement of Mr. Mangalmurti reads thus:

“After Mr. Solanki gave a speech in the Parliament it was made known to us that the piece of paper handed over by him was not official and I was asked to communicate the same to the Swiss authorities. Accordingly, I contacted Mr. Simonin and communicated the same to him. I also contacted him and requested him for a copy of the note. Mr. Simonin had provided me a copy of the note. This note shows that it was an unsigned note running into 4/5 pages typed out on a plain sheet of paper. There was no letterhead nor forwarding note nor any signature. **I had gone through**

the contents of the note and faxed it to MEA. It should be available with MEA files. I had addressed it to Mr. Srinivasan, the then Secretary looking after Europe. I had gone through the contents of the note and found it to be a legal advice quoting several case laws. Apparently it looked to me as a note prepared by a competent lawyer. The contents of the note was that the proceedings in the Swiss Courts should be held in abeyance till the matter relating to the validity of the FIR is decided by the Indian Courts and that the validity of the FIR has already been challenged in the Indian Courts. The note looked like a proper legal advice meant to be communicated to the concerned. A copy of the same should be available in the file of the Indian Embassy in Switzerland.” (emphasis supplied)

31. For the purposes of the satisfaction to be arrived at by the sanctioning authority for the grant of sanction, it was sufficient that a copy of the above Memorandum, which in any event was not denied by the Appellant, was available.

32. That the Appellant was not the author of the Memorandum is not in dispute even from the point of view of the CBI. The CBI proceeded on the statement made by the Appellant in Parliament that he did hand over a note to Mr. Felber when he was in Davos and that the said note was handed over to him by a lawyer. The statement of the Appellant in Parliament also shows that he was aware what the document contained. He has stated that “this note on the Status of the Court cases pending in India had been given to me by a lawyer.” In his statement to the CBI made in March 1997, the Appellant disclosed that he had told Mr. Felber that “an Indian lawyer outside had given this note to him which relates to Bofors case which are going on in India and Switzerland and

that according to him it will be better if the Swiss cases are taken up after the Indian Courts decide on it.”

33. Mr. Felber confirmed that “Mr. Solanki had a large envelope with him. He told me that he had new information about the Bofors case and that it was important for me to communicate this to the Swiss government.” What is interesting is that Mr. Felber refers to a previous meeting with the Appellant. Mr. Felber stated that he repeated to Mr. Solanki “what I had already told him in Delhi, namely, that I was not responsible for justice matters. I went on to explain to him that I could take the document and pass it on to the Federal Office of Justice.” Clearly, the meeting held between the Appellant and Mr. Felber was for a second time. Even at the earlier meeting in Delhi the Appellant had broached the same topic. Also the Appellant was aware, from the contents of the Memorandum, that Mr. Felber would have to pass it on to the Federal Office of Justice.

34. As it turned out the envelope did reach Mr. Simonin. In response to the specific question regarding the Memorandum and what the Appellant wanted when he handed it over to Mr. Felber, Mr Simonin answered as under:

“It can be seen from the memorandum that what was wanted was for the request for international mutual assistance in the Bofors case to be stopped. I do not know anything more about the wishes or intentions of Mr. Solanki.”

35. Prima facie, it appears that the Appellant was not merely a courier of the Memorandum. He was aware of what it contained and what was

intended to be achieved by it being handing over.

36. What was available to the sanctioning authority at the time of passing of the sanction order was not only the copy of the Memorandum and the statement made by the Appellant in Parliament but also the other materials which included the opinion of the SGI and the AG.

37. Since extensive arguments were advanced on the interpretation of Sections 192 and 193 IPC, the Court next turns to that issue. Section 192 is a definition of the expression ‘fabricating false evidence’. The provision reads as under:

"192. **Fabricating false evidence** – Whoever causes any circumstance to exist or [makes any false entry in any book or record, or electronic record or makes any document or electronic record containing a false statement], intending that such circumstance, false entry or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry or false statement, so appearing in evidence, may cause any person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said “to fabricate false evidence.”

38. Section 193 IPC prescribes the punishment for this offence. This is in two parts. When the offence is committed in relation to judicial proceedings the punishment is of imprisonment for a term which may extend to seven years and also fine. Section 193 reads as under:

“193. **Punishment for false evidence** – Whoever

intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine,

And whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.”

39. It was explained by the Supreme Court in ***Babu Lal v. State of Uttar Pradesh AIR 1964 SC 725*** that “the important ingredient which constitutes fabrication of false evidence within the meaning of Section 192 Indian Penal Code beside causing a circumstance to exist or making a false document – to use a compendious expression – is the intention that the circumstance so caused to exist or the false document made may appear in evidence in a judicial proceeding, or before a public servant or before an arbitrator, and lead to the forming of an erroneous opinion touching any point material to the result of the proceeding.” In ***Ahmed Ali v. Emperor AIR 1926 Cal 224***, the High Court held that “the purpose with which a document might have been prepared is a matter of inference.” If the intention is that the document should be used in a judicial proceeding, the fact that it may not be ultimately used is not of much consequence. The expression 'causes a circumstance to exist' is itself a part of the definition of 'to fabricate false evidence'. It is, therefore, not limited to actual fabrication of the evidence by the Appellant himself. The term 'judicial proceedings' in terms of Explanation 2 to Section 193 includes "an investigation directed by law

preliminary to a proceeding before a Court of Justice." Therefore, it is possible to construe the handing over of the Memorandum as creating a circumstance bringing about evidence that might lead to the formation of an erroneous opinion in the judicial proceedings in connection with the LR.

40. At the stage of granting of sanction to prosecute the Appellant, the authority has to be satisfied there was material to form a *prima facie* view that the Appellant had caused circumstances to exist with the intention that a false statement might appear in evidence in the judicial proceeding. The circumstance brought into existence was the handing over of the Memorandum by the Appellant, as a Cabinet Minister of the Government of India, to the Minister in the Government of Switzerland with a view to stopping the Government of Switzerland from further proceeding with the request made by way of the LR. The offence under Section 192 IPC stood attracted when with an intention to bring about the result of causing the Government of Switzerland to form an erroneous opinion regarding the request made by the LR, the Memorandum was handed over to Mr. Felber by the Appellant. The sanction order thus viewed cannot be said to be error in opining that the Appellant "fabricated a false document".

41. The sanction order refers to Section 188 IPC. The Court is not satisfied that the omission to separately mention the sanction for an inquiry vitiates the sanction order. The Court is also satisfied that there was sufficient material before the sanctioning authority for forming a *prima facie* opinion as to the need for grant of sanction.

42. The Court has consciously avoided commenting on the submissions made by the Appellant on the aspect of the truthfulness or otherwise of the statements contained in the Memorandum. Suffice it to observe that it was not necessary for the sanctioning authority, at the stage of granting of sanction, to form a definitive opinion in that regard.

43. Mr. Mangalmurti told the Swiss authorities that the Memorandum was not an official document and therefore, “should not be considered.” He also affirmed that “this note has created a lot of confusion and the Swiss were wondering what we really wanted.” It *prima facie* appears that the intention behind handing over that Memorandum was to dissuade the Swiss authorities from further processing the LR. It appears that the said outcome was a distinct possibility had the Government of India not immediately advised the Swiss authorities not to take any serious action on the Memorandum handed over to Mr. Felber.

44. The incident is of 1992. However, *prima facie* the attempt by the Appellant, as a Union Cabinet Minister of the Government of India in handing over the Memorandum intending to stall the processing of the LR forwarded to the Swiss authorities was a grave matter. The Appellant, having himself initiated several rounds of litigation, cannot be permitted to plead delay as a legitimate reason for the further proceedings against him to be dropped.

45. The Court clarifies that the sanction order, the order of the learned

Special Judge and the present order have expressed only a *prima facie* view. They are not intended to influence the final decision of the Court trying the offence against the Appellant under Section 193 IPC.

46. The appeal is dismissed. The stay of the impugned order stands vacated. The trial Court record be returned forthwith.

S. MURALIDHAR, J.

NOVEMBER 11, 2014

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