

IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL WRIT PETITION NO.21 OF 2015.

1. The Police Inspector, Central Bureau of Investigation, Bambolim, Goa.
2. The Superintendent of Police, CBI, Bambolim, Goa. Petitioners.

Versus

1. State of Goa, Through the Public Prosecutor, High court of Bombay at Panaji, Panaji, Goa.
2. Mr. Kashinath Jairam Shetye, son of late Mr. Jairam Shetye, major, occupation, service, resident of A 102 Raj Excellency, Patto Ribandar Tiswadi, Goa.
3. Dr. Ketan Govekar, major, occupation service r/o Wadji Building, St. Inez Tiswadi, Panaji, Goa. Respondents.

Mr. J. Vaz, Special Public Prosecutor for the petitioners.
 Mr. A. N. S. Nadkarni, Advocate General with Mr. D. Lawande, Additional Public Prosecutor for the respondent no.1.
 Respondent no. 2 in person.

**Coram:-F. M. REIS,
K. L. WADANE, JJ.**

**Reserved on:-27th July, 2015.
 Pronounced on:- 16th September, 2015**

JUDGMENT (Per K. L. Wadane, J.

Heard Mr. J. Vaz, learned Special Public Prosecutor for the petitioners, Mr. A. N. S. Nadkarni, learned Advocate General for the respondent no.1 and respondent no. 2 in person.

2. Rule.

3. Heard forthwith with the consent of the learned counsel appearing for the respective parties. Mr. D. Lawande, learned Additional Public Prosecutor waives notice on behalf of the respondent no.1. Respondent no. 2, who appears in person, waives service.

4. The petitioners/original respondent nos. 1 and 2 have challenged the order dated 3.5.2014 passed by the Special Judge, CBI Court for Goa at Mapusa in Criminal Miscellaneous Application No. 2/2014, by which the learned Judge in exercised of powers under Section 156 of Cr.P.C. directed the petitioners to register an FIR against one of the accused namely Shri Caetano Silva under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act(hereinafter referred to as "the Act" for short) and other penal provisions, in case attracted, if action is not prohibited by the High Court or interim relief granted in his favour is vacated.

5. Brief facts of the case may be stated as follows:-

The respondent nos. 2 and 3 herein filed a complaint against the MLAs, MPs, other public servants and others alleging that they are holding public offices although they are foreign nationals or have lost their Indian Citizenship. It is alleged that Indian Citizenship Act, 1955, does not allow for dual citizenship, that the accused has

acquired Portuguese citizenship although they are holding high public offices like police officers, advocates and public servants. The respondent nos. 2 and 3 have lodged complaint to the police and they have alleged that police have not lodged FIR inspite of their insisting upon the same. Police have acted in connivance with politicians, Department Officials and the Police Officers to facilitate the accused in getting illegal benefits. In turn they have received directly or indirectly benefits or gratifications. The respondent nos. 2 and 3 have also lodged complaints with Central Bureau of Investigation ("CBI" for short) and National Investigation Agency(" NIA" for short) since the accused hold high posts and holding this position is a threat to the national security. They have further alleged that action of the investigating agencies is illegal, arbitrary, capricious, unreasonable and unbecoming of persons appointed to uphold the mandate of law. Political agencies have brought pressure on this investigating agencies not to register any complaint with intention to help the accused to wipe out the evidence. Two of the persons they have named are Benaulim MLA Shri Caetano and Aldona MLA Shri Glen Ticlo.

6. After the complaints were lodged to CBI, the respondent nos. 2 and 3 received a confidential letter dated 12.2.2013 from SP, CBI, informing that the matter is transferred to Director General of Police, Goa, for action. The accused have violated the provisions of the Indian Citizenship Act, 1955, Indian Passport Act and the Prevention of Corruption Act. Offences Committed by them are serious in nature and

therefore, direction should be given to the petitioner no.1 CBI or NIA to register the FIR and conduct fair and reasonable investigation in the matter. The respondent nos. 2 and 3, therefore, requested the directions to the present petitioners to register the FIR. After hearing both sides, learned Special Judge passed the order as referred above.

7. We have heard arguments of Mr. J. Vaz, learned Special Public Prosecutor for the petitioners, Mr. A. N. S. Nadkarni, learned Advocate General for the respondent no.1 and respondent no. 2 in person at length.

8. We have also gone through the written arguments submitted by the respondent no. 2.

9. During the course of arguments, Mr. Vaz, learned Special Public Prosecutor has argued that the Special Judge appointed for conducting trial of the Act investigated by CBI is not authorised/empowered to order registration of the FIR.

10. According to Mr. Vaz, CBI is established under the Delhi Special Police Establishment Act, 1946. During the course of arguments, Mr. Vaz, firstly submitted that the officer of CBI can act only upon the directions of his/her superior officer and secondly as per the directions of the High Court and Supreme Court except these authorities, no other authority has power to order CBI any inquiry or

investigation or even registration of FIR. Therefore, according to Mr. Vaz, learned Special Public Prosecutor, the Special Judge has exceeded its jurisdiction and therefore, wrongly directed the CBI to register the FIR.

11. As against these, Mr. K. Shetye, respondent no.2 in person has argued that the Special Judge is appointed by the Government of Goa to conduct trial for the offences under the Act. Therefore, it has ample power to direct the CBI to register the FIR. According to Mr. K. Shetye, respondent no.2, the learned Special Judge is appointed as Special Judge for the State of Goa as per notification dated 29.10.2013. Vide notification dated 14.3.2008, the same judge is appointed for exclusive trial of the corruption cases investigated by CBI or Anti Corruption Branch at Panaji. Therefore, CBI Judge/CBI Court is not the Court of a Magistrate as is otherwise understood. According to the respondent no. 2, the appointment of the Judge is also not a mere appointment of Special Judge under the Act but on a Special Court setup to try cases investigated by CBI.

12. Mr. Shetye, in support of his arguments, relied upon the observations of the Apex Court in following cases:-

(i) Centre for Public Interest Litigation Vs. Union of India, in Writ Petition (Civil) No. 38 of 1997.

(ii) Subramanian Swamy Vs. CBI, (2014) 8 SCC 682.

(iii) Chandra Babu @ Moses Vs. State, Criminal Appeal

No. 899/2015.

13. By referring to the observations of the above cited authorities, Mr. Shetye has argued that the Special Judge appointed for the purpose of a trial of the offences under the Act is authorised to take cognizance of the offences and to direct investigation including registration of FIR.

14. As against these, Mr. Vaz, learned Special Public Prosecutor has argued that the Special Judge appointed under the provisions of the Act has to follow the procedure of a warrant trial by the Magistrate and the Magistrate have no powers to direct CBI to register the FIR. Therefore, he has relied upon the observations in the case following cases:-

(i) Central Bureau of Investigation Vs. Devendra S. Doctor and anr., 2008(1) Bom. C. R.(Cri.) 314.

(ii) Central Bureau of Investigation Vs State of Rajasthan and another, (2001) 3 SCC 333.

(iii) Advocate Aires Rodrigues Vs. Officer incharge, Anti-Corruption Branch and others, Criminal Writ Petition No. 126 of 2014.

Mr. Vaz, relied upon the observations of Division Bench of this Court in which one of us (F. M. Reis, J) was a party while deciding the Criminal Writ Petition No. 126/2014.

15. Considering the observation of the above cases and the arguments advanced by both the sides, a following question arises for our consideration

Whether the Special Judge appointed under the provisions of the Act has power, authority or jurisdiction to direct the CBI to investigate a private complaint?

16. Considering the arguments advanced by both the sides, it is necessary to mention here that the notification dated 29.10.2013 by which the learned Special Judge has envisaged the power under the Act to conduct the cases is issued by the Department of Law and Judiciary, Law(Establishment) Division, Government of Goa which reads as follows:-

“On the recommendation of the Hon'ble High Court of Bombay and with the approval of the Government of Goa, Shri P. V. Sawaikar, District judge-I and Additional Sessions Judge, Panaji is hereby appointed and posted on deputation as Special Judge for trial of cases under Prevention of Corruption Act, 1988 investigated by the Central Bureau of Investigation in Goa.

Posting of Shri P. V. Sawaikar, Special Judge for trial of cases shall be on deputation and shall be governed by the standard terms of deputation as contained in the Office Memorandum No.13/4/74-PER

dated 12/2/1999 amended from time to time.”

17. On bare perusal of the contents of the above notification, it appears that the Special Judge (Shri P. V. Sawaikar) is appointed for trial of cases under the Act investigated by CBI in Goa. So notification is restricted the power to conduct the trial of the cases under the Act. Therefore, it cannot be said that a Special Judge has envisaged the power to direct the CBI to register the offences against the accused persons. Therefore, basically we are of the opinion that the Special Judge has travelled beyond the scope of the notification and exceeded its jurisdiction while passing the impugned order.

18. It is material to note that the respondent nos. 2 and 3 have filed private complaint against the two officers, Superintendent of Police and Police Inspector, two members of legislative Assembly, 43 Advocates, six unknown persons working in the High Court of Bombay at Goa and 500 unknown persons working/retired from the Government Department in Goa and others.

19. So apparently, it seems that some of them are public servants. Admittedly, the complainants/respondents have not obtained prior permission to prosecute them.

20. Operative order of the Special Judge reads as follows:-

“ In the above background, no case is made out for this

Court to invoke powers under Section 156 of Cr.P.C. and order registration of FIR against the accused except against Shri Caetano Silva. CBI, however, shall register FIR under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act and other penal provisions in case attracted, if action is not prohibited by the High Court or interim relief granted in his favour is vacated.”

21. So looking to the above order, it appears that only against one accused i.e Caetano Silva who is stated to be sitting MLA , has filed a Writ Petition with regard to his citizenship and the same is pending before the High Court. Further is stated that for sometime interim protection was granted to him, however subsequently it was not extended. Thus from the above facts, it is seen that the matter pertains to the dual citizenship of Shri Silva appears to be pending in the High Court for its consideration. On this background now it is necessary to deal with the question involved in the matter.

22. Looking to the almost relevant provisions of law, it appears that a Special Judge is appointed under Section 3 of the Act . It is settled position of law that such a Special Judge while trying offences has a dual powers of Sessions Judge as well as that of a Magistrate. It is also well settled that such a Special Judge is vested with all the powers under the Cr.P.C. which are vested in the Court of a original

jurisdiction save and except the ones specially prohibited/excluded by the provisions of the Act. A perusal of the Act demonstrates that the jurisdiction/power under Section 156(3) of the Cr.P.C. is not excluded. Therefore, such Special Judge enjoys the powers of the Magistrate under Section 156(3) of the Cr.P.C.

23. On the other hand, CBI is established under the Delhi Special Police Establishment Act, 1946. This Statute does not contain any provisions as to conferring any Special jurisdiction upon such Special Judge.

24. The question before the Hon'ble Supreme Court in case of ***Central Bureau of Investigation, Jaipur***(supra), and also in ***Sakiri Vasu v. State of U.P., (2008) 2 SCC 409***, was as to whether a Magistrate has power to direct the Central Bureau of Investigation (CBI) to conduct investigation into any offence. The Apex Court held that the magisterial power under Section 156(3) of Cr.P.C. cannot be stretched beyond directing 'the officer in charge of a police station' to conduct the investigation. A Magistrate, therefore, has no power to direct the CBI to conduct investigation into any offence. The Apex Court observed that Section 156 of Cr.P.C. deals with investigation into cognizable offences. If the power of a magistrate to order investigation by the CBI in non-cognizable cases cannot be traced in Section 156 of Cr.P.C., it is not possible to trace such power in any other provision of the Code. What is contained in sub-section (3) of Section 156 of Cr.P.C.

is the power to order the investigation referred to in sub-section(1) because the words “order such an investigation as above-mentioned” in sub-section (3) are unmistakably clear as referring to the other sub-section. Thus, the power is to order an “officer in charge of a police station” to conduct investigation. The Apex Court further clarified that from the definitions of “police station” and “officer-in-charge of a police station” it is clear that a place or post declared by the Government as police station, must have a police officer-in-charge of it. The primary responsibility for conducting investigation into offences in cognizable cases vests with such police officer. Section 156(3) of the Cr.P.C. empowers a Magistrate to direct such officer-in-charge of the police station to investigate any cognizable case over which such magistrate has jurisdiction. Section 36 of the Cr.P.C. authorises any other police officer, who is superior in rank to an officer in charge of a police station to exercise the same powers of the officer-in-charge of a police station. But when a Magistrate orders investigation under Section 156(3) of Cr.P.C., he can only direct an officer-in-charge of a police station to conduct such investigation and not a superior officer. Section 36 of the Cr.P.C. is not meant to substitute the magisterial power envisaged in Section 156(3) of the Cr.P.C., though it could supplement the powers of an officer-in-charge of a police station. It was further observed that what is envisaged in Sections 5 and 6 of the Delhi Special Police Establishment Act, 1946 (under which Act, CBI has been constituted) is not one of conferring power on a Magistrate to order the CBI to conduct investigation in exercise of Section 156(3) of

the Cr.P.C. Therefore, it was held that the plea that when the State Government gives consent for the CBI to investigate any offence within the area of the State, it would be permissible for the Magistrate to direct the officer of the CBI to conduct such investigation is not tenable.

25. Likewise relying upon the judgment of the Apex Court in a ***CBI, Jaipur***(supra) Vs. State of Rajasthan, in the case ***Atul Chandra Buragohain Vs. State of Assam, 2007(1) Gau LR 707(Gau)***, Gauhati High Court held that when Section 156(3) of Cr.P.C. is read, in the light of the definitions of “police station” and “officer-in-charge of a police station”, as contained under Section 2(o) and S. 2(s) of Cr.P.C., respectively, it becomes clear that the primary responsibility of conducting investigation into cognizable offences rests in the “officer-in-charge of a police station” or such other officer, who may be deemed to be officer-in-charge in terms of Section 2(o) of Cr.P.C., i.e., an officer, who performs the function of an officer-in-charge of a police station in the absence of its in-charge. Thus, when a Magistrate orders investigation, under Section 156(3) of Cr.P.C., this direction is really meant for the officer-in-charge of a police station.

26. It is pertinent to note that though an officer, superior in rank to an officer-in-charge of a police station, may conduct investigation into a case by virtue of Section 36 of Cr.P.C., the Magistrate cannot direct anyone other than the officer-in-charge of a police station to conduct

investigation in terms of Section 156(3) of Cr.P.C. Therefore, a police personnel, whether from the CBI or from any other department, who does not fall within the meaning of the officer-in-charge of a police station, cannot be directed to investigate any case under Section 156(3) of Cr.P.C.

27. A perusal of the facts and observation of the cases of ***CBI v. State of Gujarat, 2002 (2) CCR 316 (Guj)***, the order issued by the Special Judge of directing the CBI under Section 156(3) of Cr.P.C. to conduct investigation in a private complaint case under Section 13(2) read with S. 13(1)(d) of Prevention of Corruption Act, 1988, and Sections 120-B, 467, 468, 471, 471(a), 211 of IPC, was set aside by the Gujarat High Court on the ground that the Special Judge had no such power to direct CBI to investigate a case.

28. In view of the reasons mentioned above, it is not possible for the Special Judge for CBI to direct the CBI to conduct investigation in a case even though the Special Judge may have the powers under Section 156(3) of Cr.P.C., mainly because CBI is not a 'police station' and such direction can be given only to 'the officer in charge of a police station'.

29. At the same time, it is material to note here that the superior Constitutional Courts such as the High Courts and the Supreme Court have the powers to direct the CBI to conduct investigation in any case.

30. In the case of ***Sakiri Vasu***(*supra*), the Hon'ble Supreme Court held that no doubt the Magistrate cannot order investigation by CBI but the Supreme Court or the High Court has power under Article 136 or Article 226 (respectively) to order investigation by CBI. It was further held that this should however be done only in some rare and exceptional case, otherwise, CBI would be flooded with a large number of cases and would find it impossible to properly investigate all of them.

31. So looking to the above observation even such powers are to be exercised utmost care and caution has to be taken. From the order passed by the learned Special Judge, it appears that the accused Caetano Silva appears to be sitting MLA and is a public servant and the Division Bench of this Court while deciding the Criminal Writ petition No. 126/2014 in which one of us(F. M. Reis,J) was a party has observed in paragraph 11 as follows:-

“In ***Nilesh Rane vs. Ravikant Yadav and another***, decided on 31st July, 2014, another Division Bench of this Court has also followed the decision in Anil Kumar's case and has held that when the offence is punishable under the Prevention of Corruption Act, it is the Special Judge who has to deal with the application under Section 156(3) of Cr.P.C., and that in such a case, the Special Judge cannot refer the matter for investigation by the police under Section 156(3) Cr.P.C. against a public

servant without valid sanction order.”

32. In view of the observations and the fact that the order is passed to register FIR against sitting MLA, the Special Judge cannot refer the matter for investigation by the Police under Section 156(3) of Cr. P.C. against public servant without valid sanction order.

33. Thus, the conclusion is that while the Special Judge appointed under the Act cannot direct the CBI to register the FIR. Thus, the impugned order passed by the Special Judge is without jurisdiction. Therefore, the impugned order dated 3.5.2014 passed by the Special Judge, CBI Court for Goa at Mapusa in Criminal Miscellaneous Application No. 2/2014 is quashed and set aside.

34. Writ Petition is allowed. Rule made absolute in above terms with no order as to costs.

35. Petition stands disposed of.

K. L. WADANE,J.

F. M. REIS,J.

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