IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

WEDNESDAY, THE 22ND DAY OF JULY 2015/31ST ASHADHA, 1937

WA.No. 67 of 2007 (B) IN WP(C).31757/2005

AGAINST THE JUDGMENT IN WP(C) 31757/2005 DATED 05-04-2006

APPELLANT(S)/RESPONDENTS IN THE WRIT PETITION :-
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1. STATE OF KERALA
   REP. BY SECRETARY, HOME DEPARTMENT
   GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.

2. SRI.M.K.PARAMESWARAN,
   INSPECTOR OF POLICE, VACB, PALAKKAD.

BY SR.GOVERNMENT PLEADER SRI.P.I.DAVIS

RESPONDENT(S)/PETITIONER IN THE WRIT PETITION :-

N.R.SUBRAMANIAN
MANAGING DIRECTOR, TRAVANCORE COCHIN CHEMICALS LTD
UDYOGAMANDAL, ERNAKULAM.

BY ADV. SRI.B.S.KRISHNAN(SR.)
SMT.LATHA KRISHNAN
SRI.K.ANAND (A.201)

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 22-07-2015, ALONG WITH RP. 127/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

jvt

ASHOK BHUSHAN, C.J &
A.M. SHAFFIQUE, J.

W.A. No.67 of 2007
and
R.P. No.127 of 2007
in
W.A. No.2313 of 2006

Dated this the 22nd day of July 2015

J U D G M E N T

Shaffique, J

W.A. No.67 of 2007 is filed by the respondents in W.P.(C) No.31757 of 2005 challenging the judgment dated 5.4.2006 by the learned Single Judge. The writ petition was filed by the respondent herein challenging the First Information Report (FIR), which is produced as Ext.P1 and for quashing the same. In Ext.P1 FIR prepared by the Deputy Superintendent of Police, VACB, Palakkad, it is stated that as per the enquiry conducted by the Vigilance & Anti-Corruption Bureau, Palakkad, a case has been registered as VCI No.2 of 2003 under Secs.13(1)(c) & (d) r/w 13(2) of the PC Act, 1988 and Secs.409 and 120(B) of IPC. It is stated that in the preliminary enquiry conducted it was revealed that crime has been committed by the first respondent, who was formerly the Managing Director of M/s.Malabar Cements Limited, Sri.P.Hariharan, Joint Materials Manager of M/s.Malabar Cements

Limited and Sri.Balasubramaniam, Asst.General Manager of Coastal Energy (P) Limited. The allegations in the crime reflected as under :-

> "A Preliminary Enquiry was conducted as ordered by Government vide letter No.10815/B2/98//Vig. dated 19.5.99, into certain grave allegations against Managing Director and senior officials of M/s.Malabar Cements Ltd., Walayar. The enquiry was conducted by Vigilance & Anti-Corruption Bureau, Palakkad Unit. One of the allegations was regarding import of coal from South Africa through M/s.South India Corporation and M/s.Coastal Energy (P) Ltd. The enquiry revealed that a decision was taken to use imported coal rather than linkage coal which is of Indian origin, because the ash content in linkage coal was around 30%, while the same in imported coal was much lesser, between 12 to 15%.
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> In the 102nd Board Meeting held on 1.3.96 a decision was taken to import 30000 MT of coal from foreign countries. This contract was given to M/s.Coastal Energy (P) Ltd., after obtaining the sanction of the Director Board on 16.1.98. The coal from South Africa was brought to Cochin Port by the ship "M.V.MOSDEEP". The enquiry revealed that only a quantity of 26392.78 MT of coal was imported from South Africa at a price of Rs.2310.40 ps. per ton. When the samples of coal were tested it was found that the coal contained more than 15% of ash, whereas the maximum ash content was specified as 15% as per the amended

supply order dated 2.4.98. When the ash content was found to be exceeding the maximum limit of 15% the M/s.Malabar Cements Limited invoked a penalty of Rs.1,57,162/-. However the company has lost more than 1% of good quality coal from the total imported quantity. This is worked out as 263.92 MT (1% of 26392.78 MT). The value of 263.92 MT paid to M/s.Coastal Energy (P) Ltd. @ Rs.2310.40ps per MT is worked out as Rs.6,09,760/-. Against this loss the penalty levied is only Rs.1,57,162/-. Hence the Malabar Cements Limited has sustained a loss of Rs.4,52,598/-.

One Balasubramaniam, Asst. General Manager, Coastal Energy (P) Ltd., who was representing that company was also the Chief representative of M/s West Asia Trading Corporation, which was supplying coal to Malabar Cements Ltd during 1996. The decision inspite of higher price quoted by them appears to be malafide. The enquiry revealed also that the C.S.T. registration No.24127354 used by M/s Coastal Energy (P) Ltd. is not genuine, because that number has not been allotted to any firm, and the same company used another C.S.T.No.24126354 also in the returns submitted during August, 1999. A registered notice sent to the Cochin address of Coastal Energy (P) Ltd. by the Sales Tax Department was returned with the remark that such a firm is not working in Cochin. If there was irregularity in the collection of sales tax, which was 4% M/s Coastal Energy (P) Ltd. would have cheated Malabar Cements

> Limited and the Govt. of Kerala of an additional amount of Rs.21,21,979/-.
>
> Whether the actual weight of the coal imported from South Africa and unloaded at Cochin Port was correctly recorded is also doubtful. Enquiry has revealed that the ship which brought coal for Malabar Cements Limited had taken insurance for only 10000 MT. It is also revealed that ships with bulk cargo weighing more than 16000 MT could not unload cargo at Cochin Port till the year 2000 due to the insufficient depth of the channel. Hence as claimed a ship with 30,000 MT could not have docked at Cochin Port.
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> In view of the facts brought out in the enquiry so far conducted offences U/s 13(1)(c) & (d) r/w 13(2) of PC Act 1988, 409 and 120(B) IPC are revealed to have been committed by Sri.N.R.Subramaniam, formerly Managing Director, M/s Malabar Cements Limited, Sri.P.Hariharan, Joint Materials Manager, M/s Malabar Cements Limited and Sri.Balasubramaniam, Asst. General Manager, Coastal Energy (P) Limited.
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> As authorised I am registering the above as VCI No.2/2003 U/s 13(1)(c) & (d) r/w 13(2) of PC Act 1988 and Sec.409 and 120(B) IPC."

2. The petitioner contended that the FIR had been prepared with malafide intention. It is contended that the preliminary investigation was conducted by one Sri.M.K. Parameswaran and the said enquiry was tainted with malafides. It

is stated that no case was made against the petitioner. In so far as the FIR is concerned, it refers to the decision of the Board of Directors. It is alleged that the petitioner has committed offence. The petitioner submits that he was bound to implement the decision taken by the Directors and therefore, the allegations are only with reference to the decisions taken by him while implementing decision of the Board of Directors and no penalty could be imposed by him.

3. The learned Single Judge quashed the FIR by the impugned judgment on the ground that the FIR is tainted with malafides. It is also observed that no prima facie case has been made out against the petitioner and the petitioner was acting only on the decision taken by the Board of Directors of the company. In fact, the 2nd respondent in the writ petition, Sri.M.K.Parameswaran had filed a review petition against the aforesaid judgment, which came to be rejected. He again filed a writ appeal, W.A.No.2313 of 2006, which was disposed of by this Court as per judgment dated 11.1.2007 expunging the remarks against him. Paragraph 9 of the judgment in W.A.No.2313 of 2006 reads as under :-

> "9. The totality of the circumstances, therefore, require that although the final judgment is not to be upset, the remarks as against the appellant require to be expunged, albeit the judgment to a good extent rests on observations criticising the conduct of the appellant. All the adverse remarks as against the appellant incorporated in the judgment dated 05-04-2006 in W.P.(C) No.31757 of 2005 as well as appearing in the order dated 28-09-2006 in R.P.No.640 of 2006 will stand expunged, and we hold that the officer had approached the issue with all bona fides and righteousness."

4. When W.A.No.67 of 2007 came up for admission, the Division Bench observed that since the appeal filed by the 2nd appellant had been disposed of, the first appellant filed a review petition, R.P.No.127 of 2007, seeking to review the said judgment inter alia contending that the appeal filed by the 2nd appellant, Sri.M.K.Parameswaran, was only to expunge the remarks against him, which ground has been taken by the Division Bench and therefore, the appeal has to be decided on merits.

5. The first respondent had entered appearance through counsel at the initial stage. However, there is no appearance of the counsel or party today.

6. Having regard to the factual situation arising in the case, the question to be considered is whether the learned Single Judge was justified in quashing the FIR, Ext.P1. The law in this regard is well settled and as rightly held by the learned Single Judge that the FIR could be quashed only on certain circumstances as held by the Supreme Court in **State of Haryana** v. **Bhajan Lal** [AIR 1992 SC 604]. Paragraph 108 of the said judgment had been extracted by the learned Single Judge and he relied upon sub-paragraph 7, which reads as under :-

> "7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

Thereafter the learned Single Judge had observed that the said principle had been reiterated in other judgments in **Zandu Pharmaceutical Works Ltd.** v. **Md. Sharaful Haque** [AIR 2005 SC 9], in **E.S.Mills Shri Virendra Kumar** v. **Rajiv Poddar** [AIR 1985 SC 1668] and thereafter had come to the conclusion that the petitioner has acted on the basis of the decisions taken by the Board of Directors in the Board Meeting and that there was malafide intention by the investigating officer to wreak vengeance on the petitioner.

7. Sri.P.I.Davis, the learned Senior Government Pleader, while impugning the aforesaid judgment submits that there is no finding regarding any malafides in the judgment and therefore, the learned Single Judge was not justified in quashing the FIR, Ext.P1.

8. The averments in the writ petition indicates that the Government ordered vigilance enquiry, 9/2002, against the 2nd appellant, Sri.M.K.Parameswaran and that it was understood that in the report submitted, there is clear finding that prima facie malafides in conducting the investigation in the case. O.P.No.8464 of 2003 challenging Ext.P1 FIR was filed, which came to be dismissed. Against the said judgment, the petitioner preferred W.A.No.1500 of 2003. Though there was a stay in the matter, later, when the appeal came up for hearing, the same was withdrawn with liberty to file fresh writ petition. Ext.P3 is the said judgment, in which, the Division Bench permitted to withdraw the writ petition setting aside the judgment and also granted permission to file another writ petition with additional grounds.

9. The main contention urged by the petitioner is that when it has been found that the investigation itself is malafide, the vigilance enquiry, V.E.9/2002 and Ext.P1 have no legal existence. But it is relevant to note that though the learned Single Judge observed that he had verified the files and heard learned Government Pleader, the nature of the malafides exercised by the investigating officer is not specifically mentioned in the judgment. This is an instance where allegation is that certain quantity of materials were procured by giving contract to M/s.Coastal Energy Private Limited without complying with the procedural formalities. Apparently, the petitioner was the Managing Director during the relevant time. At a stage, where preliminary enquiry alone was conducted and the names of the suspected officers were mentioned, it is for the investigating officer/agency to conduct final investigation in the matter and arrive at a conclusion, whether suspected officers were actually involved in the crime. That apart, when the learned Single Judge observed that there was malafides in the investigating process it was incumbent on the learned Single Judge to have mentioned as to what are the malafides that were alleged and proved in the case. In the

absence of any such finding by the learned Single Judge, a mere mention of the malafides and presumption that the Managing Director could not be included an accused in implementing the decision of the Board of Directors cannot be a reason for quashing the FIR. The Managing Director, of course, is part of the Board of Directors and the complexity of his involvement has to found out only after final investigation is conducted by the competent authority. Under such circumstances, we are of the view that the learned Single Judge has committed error in quashing the FIR.

10. As far as the review petition is concerned, the appeal filed by the 2nd appellant was only for expunging remarks, but in the memorandum of appeal, it is seen that he sought for setting aside the judgment. The Division Bench, while disposing of the matter, did not enter into the merits of the controversy involved in the case. The Division Bench had taken into consideration the question as to whether remarks against the 2nd appellant can be expunged or not and only for that limited purpose the Division Bench observed in paragraph 9 that there is no reason to upset the final judgment of the case. The matter had not been decided on merits. Therefore, we only clarify that the said judgment will not

stand in the way of the appellant challenging the judgment of the learned Single Judge, by which, Ext.P1 has been quashed.

In the result, the following directions are issued :-

(i) W.A.No.67 of 2007 is allowed setting aside the judgment of the learned Single Judge in W.P.(C) No.31757 of 2005 dated 5.4.2006.

(ii) Review Petition No.127 of 2007 is disposed of clarifying that the appellants are entitled to challenge the findings of the learned Single Judge dehors the judgment of the Division Bench in W.A.No.2313 of 2006.

Sd/-
ASHOK BHUSHAN
CHIEF JUSTICE

Sd/-
A.M. SHAFFIQUE
JUDGE

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P.A. TO JUDGE

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