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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 09th January, 2015

+CRL.A.1045/2013 & CrI.M.A.12384/2013 & 16243/2013

IQBAL GAZI & ORS.

..... Appellant

Through: Mr. D.B. Goswami, Mr. Ritesh Bahri, Mr.
S. Gaurav Sasan and Mr. Randeep Kumar
Rehan, Advocates

versus

STATE

..... Respondent

Through: Mr. Varun Goswami, APP for the State
along with Mr. Shiv Anand Mishra, ACP &
Insp. Anand Sagar, PS Seelampur
Mr. Javed Khan, Advocate for R-2

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Present appeal under Section 12 of Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred as MCOCA) r/w Section 482 Cr.P.C. has been preferred challenging the order dated 29th July, 2013 passed by the learned Additional Sessions Judge whereby on the application moved by the complainant under Section 9 of the MCOCA r/w Section 319 Cr.P.C., FIR was ordered to be registered against the appellants.

2. It is submitted by the learned counsel for the appellant that Section 9 of MCOCA does not give any power to the Court to give direction to register FIR and this Section provides for taking

cognizance of an offence by the Special Court of MCOCA. Passing of the order by the learned Sessions Judge to register FIR does not amount to taking cognizance. Hence, the order passed by the learned Sessions Judge is not maintainable. Moreover, under Section 23(1)(a) of MCOCA, 1999, the information of commission of any organized crime shall not be recorded without prior approval of the police officer not below the rank of the Additional Commissioner of Police. The penal provisions has to be strictly complied with. However, in the instant case, the learned Sessions Judge committed a grave error in directing the SHO to register the FIR. Under Sub-Section (2) of Section 23 of MCOCA, the Special Judge cannot take cognizance of any offence unless sanction has been previously given by the police officer not below the rank of Additional Commissioner of Police. In such a situation, even as far as private complaint is concerned, sanction has to be obtained from the concerned police officer before cognizance is taken by the Special Judge. By placing reliance on *Jamiruddin Ansari vs. Central Bureau of Investigation & Anr.*, 2009 Cri. LJ 3961, it was submitted that the impugned order is in violation of the provisions of MCOCA and as such, deserves to be set aside.

3. Per contra, it was submitted by the learned Additional Public Prosecutor for the State that a Special Judge being court of original jurisdiction has power under Section 156(3) Cr.P.C. to order investigation and investigation cannot be done without registration of FIR. Reliance was placed on *Mohd. Yousuf vs. Afaq Jahan (Smt.) and Anr.*, (2006) 1 SCC 627. Furthermore, registration of FIR was not a mechanical exercise and it was registered only after obtaining the requisite sanction. By relying upon *R.N. Aggarwal vs. R.C. Bansal and Ors.*, JT 2014(12) SC 79 and *Dr. A.S. Narayana Rao vs. CBI*, WP (Crl.) 1626/2011, it was submitted that the impugned order does not suffer from any infirmity which calls for interference. As such, the appeal is liable to be dismissed.

4. Learned counsel for respondent No.2 besides supporting the submissions made by the learned Additional Public Prosecutor for the State further submitted that the FIR has already been registered on 14th August, 2013 after obtaining requisite permission from the competent authority. As such, there is no violation of Section 23 of the Act. The order under challenge is dated 29th July, 2013 and even after registration of FIR, no relief has been sought for quashing of FIR. Moreover, as per the grounds of appeal itself, mere registration

of FIR is not taking cognizance of the offence, hence, even otherwise Section 23 of the Act is not applicable. As such, the appeal is liable to be dismissed.

5. I have given my considerable thoughts to the respective submissions of learned counsel for the parties.

6. An application under Section 9 of MCOCA r/w Section 319 Cr.P.C. was moved by the complainant Mohd. Mobin for taking action against Iqbal Gazi, Kamalludin @ Kamal, Mohd. Umar @ Pau and Mohd. Jamal @ Ranjha while giving the details of their previous involvements. Although the application was also against Saleem @ Bobby but during the pendency of the application, he died on 15th July, 2013, as such, the complaint against him was not pressed. Vide impugned order dated 29th July, 2013, learned Special Judge observed that keeping in view the averments made in the complaint enumerating cases/involvements of the appellants, it was feasible to get investigation carried out by police, as such, SHO, Police Station Seelampur was directed to register an FIR and investigation was to be carried out by Assistant Commissioner of Police of Sub Division Seelampur in terms of Section 23(1)(b) of the Act, 1999.

7. The issue before this Court is whether the learned Special Judge is competent to give a direction to SHO for registration of FIR and to investigate thereon. The Court of Special Judge is constituted under Section 5 of MCOCA. The procedure and the powers of the Special Judge have been prescribed in Section 9 of the Act. For better appreciation, Section 9 of the Act is reproduced herein below:-

“9. Procedure and powers of Special Court

(1) A Special Court may take cognizance of any offence without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence or upon a police report of such facts.

(2) Where an offence triable by a Special Court is punishable with imprisonment for a term not exceeding three years or with fine or with both, the Special Court may, notwithstanding anything contained in sub-section (1) of section 260 or section 262 of the Code, try the offence in a summary way in accordance with the procedure prescribed in the Code and the provisions of section 263 to 265 of the Code shall, as far as may be, apply to such trial:

Provided that, where-in the course of a summary trial under this sub-section, it appears to the Special Court that the nature of the case is such that it is undesirable to try in a summary way, the Special Court shall recall any-witnesses who may have been examined and proceed to re-hear the case in the manner provided by the provisions of the Code for the trial of such offence and the said provisions shall apply to and in relation, to a Special Court as they apply to and relation, to a Magistrate:

Provided further that, in case of any conviction in a summary trial under this section, it shall be lawful for a Special Court to pass a sentence of imprisonment for a term not exceeding two years.

(3) A Special Court may, with a view to obtaining the evidence of any person, supposed to have been directly or indirectly concerned in or privy to an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof, and any pardon so tendered shall, for the

purposes of section 308 of the Code, be deemed to have been tendered under section 307 thereof.

(4) Subject to other provisions of this Act, a Special Court shall; for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of session, so far as may be, in accordance with the procedure prescribed in the Code for the trial before a Court of Session."

8. A bare reading of the provision would show that the Special Judge may take cognizance of the offence without the accused being committed to him for trial and the Court of Special Judge shall be deemed to be a Court of Session.

9. The Constitution Bench in the case of ***A.R. Antulay vs. Ramdas Srinivas Nayak & Anr.***, AIR 1984 SC 718 was of the view that the Special Judge appointed under the Prevention of Corruption Act enjoys all powers conferred on the court of original jurisdiction functioning under the High Court except those specifically conferred under the Act. The Bench observed:

"27..... While setting up a Court of a Special Judge keeping in view the fact that the high dignitaries in public life are likely to be tried by such a court, the qualification prescribed was that the person to be appointed as Special Judge has to be either a Sessions Judge, Additional Sessions Judge or Assistant Sessions Judge. These three dignitaries are above the level of a Magistrate. After prescribing the qualification, the Legislature proceeded to confer power upon a Special Judge to take cognizance of offences for the trial of which a special court with exclusive jurisdiction was being set up. If a Special Judge has to take cognizance of offences, ipso facto the procedure for trial of such offences has to be prescribed. Now the Code prescribes different procedures for trial of cases by different courts. Procedure for trial of a case before a Court of Session is

set out in Chapter XVIII; trial of warrant cases by Magistrates is set out in Chapter XIX and the provisions therein included catered to both the types of cases coming before the Magistrate, namely, upon police report or otherwise than on a police report. Chapter XX prescribes the procedure for trial of summons cases by Magistrates and Chapter XXI prescribes the procedure for summary trial. Now that a new criminal court was being set up, the Legislature took the first step of providing its comparative position in the hierarchy of courts Under Section 6 Code of Criminal Procedure by bringing it on level more or less comparable to the Court of Session, but in order to avoid any confusion arising out of comparison by level, it was made explicit in Section 8(1) itself that it is not a Court of Session because it can take cognizance of offences without commitment as contemplated by Section 193 Code of Criminal Procedure. Undoubtedly in Section 8(3) it was clearly laid down that subject to the provisions of Sub-sections (1) and (2) of Section 8, the Court of Special Judge shall be deemed to be a Court of Session trying cases without a jury or without the aid of assessors.”

10. In the case of ***Harshad S. Mehta v. State of Maharashtra***, (2001) 8 SCC 257, the Bench while dealing with the case under the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 observed that special court is a Court of exclusive jurisdiction in respect of offences Under Section 3(2) of the Act, like special court under Prevention of Corruption Act it has original criminal jurisdiction. The special court per se is not a Magistrate and also it is not a court to which the commitment of a case is made.

11. In the case of ***State of T.N. v. V. Krishnaswami Naidu***, (1979) 4 SCC 5, the Supreme Court while answering a question, as to whether the special judge under the Criminal Law (Amendment)

Act, 1952 can exercise the power conferred on a Magistrate Under Section 167 Code of Criminal Procedure to authorise the detention of the accused in the custody of police, held that a special judge is empowered to take cognizance of the offence without the accused being committed to him for trial. Their Lordship observed:

“5. It may be noted that the Special Judge is not a Sessions Judge, Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure though no person can be appointed as a Special Judge unless he is or has been either a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge. The Special Judge is empowered to take cognizance of the offences without the accused being committed to him for trial. The jurisdiction to try the offence by a Sessions Judge is only after committal to him. Further the Sessions Judge does not follow the procedure for the trial of warrant cases by Magistrates. The Special Judge is deemed to be a Court of Session only for certain purposes as mentioned in Section 8(3) of the Act while the first part of Sub-section 3 provides that except as provided in Sub-sections (1) and (2) of Section 8 the provisions of the Code of Criminal Procedure, 1898 shall, so far as they are not inconsistent with this Act, apply to the proceedings before the Special Judge.”

12. Thus, as held by their Lordship's the Special Judge has all powers under the Code, which are vested in the Court of original jurisdiction except the ones specifically prohibited. Thus since the jurisdiction under Section 156(3) Cr.P.C. is not specifically denied, the Special Judge has the jurisdiction to direct registration of FIR under Section 156(3) Cr.P.C. as a Court of original jurisdiction which the Magistrate has.

13. In *Mohd. Yousuf vs. Smt. Afaq Jahan and Anr.*, (2006) 1 SCC

627 their Lordships held that:

“10. The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complaint because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter.”

14. In view of the above, in order to carry out investigation into the allegations levelled against the appellants if the learned Special Judge had directed registration of FIR, there is no infirmity in the same because the police could investigate the matter only after registration of FIR. Even *Jamiruddin Ansari*(supra) relied upon by learned counsel for the appellant does not help the appellant. In that case, Hon’ble Supreme Court referred to the provisions incorporated in Section 9 and Section 23 of the Act and observed that the expression used in Section 9(1) indicates that the Special Court may take cognizance of any offence without the accused being committed to it

for trial, either on receiving a complaint of facts or upon a police report of such facts, which clearly indicates that the Special Court is also empowered to take cognizance of an offence under MCOCA even on a private complaint. The said power vested in the learned Special Judge is, however, controlled by the provisions of Section 23(2) of the Act, which provides that no Special Court shall take cognizance of any offence under the Act without the previous sanction of a Police Officer not below the rank of Additional Director General of Police.

15. As per the averments made in the grounds of appeal itself, mere registration of FIR did not tantamount to taking cognizance of offence. However, the State has placed on record copy of the FIR registered against the appellants to show that before registering the FIR requisite sanction under Section 23 was obtained.

16. Looking from any angle there is no infirmity in the impugned order which calls for interference. As such, the appeal is dismissed. Pending applications, if any, also stand disposed of accordingly.

(SUNITA GUPTA)
JUDGE

JANUARY 09, 2015/rs