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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 3939 OF 2015

1. Smt. Jaitoon Fateh Khatri & anr. .. Petitioners

Versus

1. The State of Maharashtra and ors. .. Respondents

WITH
CRIMINAL WRIT PETITION NO. 4108 OF 2015

Rukhsana Nisar Fateh Khatri w/o
Nisar Fateh Mohd. Khatri .. Petitioner

Versus

1. The State of Maharashtra and ors. .. Respondents

WITH
CRIMINAL WRIT PETITION NO. 4115 OF 2015

1. Sakina Abid Khatri w/o
Abid Fateh Mohd. Khatri and anr. .. Petitioners

Versus

1. The State of Maharashtra and ors. .. Respondents

Mr. Subhash Jha a/w Mr. Samir Vaidya a/w Ms. Rushita Jain i/by Law Global for petitioners.

Mr. P. D. Gharat, Spl. P. P. a/w Mrs. M. M. Deshmukh, APP for State.

CORAM: NARESH H. PATIL &
PRAKASH D. NAIK, JJ.

RESERVED ON : JUNE 21, 2016

PRONOUNCED ON : JULY 15, 2016

ORDER [Per Naresh H. Patil, J.] :

1. The petitioners pray for direction to quash and set aside the impugned FIR No. 57 of 2015 (Exhibit “G” to the petition) registered by Anti Corruption Bureau, Mumbai (for short ACB, Mumbai). As the petitioners raised identical issues, these petitions are decided by a common order.

2. In short, the petitioners' contention is that the State Government by an order dated 12/12/2014 directed to hold an open enquiry to be conducted by ACB in respect of irregularities done in the matter of awarding contracts for construction of dams in the State of Maharashtra. ACB, Thane commenced open enquiry in connection with Balganga Dam at Pen.

3. At the instance of ACB, Thane, Kopri Police Station registered a crime on 25/8/2015, being FIR No. I-123/15 for offences punishable

under Sections 420, 467, 468, 471, 120-B, 109 of the Indian Penal Code read with Section 13(1)(c) and 13(1)(d) read with Section 13 (2) of the Prevention of Corruption Act. The names of 11 accused persons are mentioned in para 3(iii) of Criminal Writ Petition No. 3939 of 2015.

4. In the said FIR, it was alleged that the petitioners / partners, who participated in Balganga dam/irrigation project tender used forged / fabricated documents and in collusion and connivance with public servants, who have been named in the FIR, raised inflated bills and in the process caused loss to the exchequer to the tune of Rs.92,63,42,110/- (Rupees Ninety-Two Crores Sixty-Three Lakhs Forty-Two Thousand One Hundred Ten only).

5. Certain arrests took place after registration of the crime. The premises occupied by some of the accused persons were also raided. A public servant – Anilkumar Balriam Gaikwad, Executive Engineer, Public Works Department and other unknown persons have been named in the impugned FIR.

6. The petitioners alleged that another FIR being FIR No. 57 of 2015, dated 23/9/2015, which is impugned in this petition, was registered

by ACB, Mumbai alleging that Class 1-A registration certificate was obtained by M/s. F. A. Enterprises in the year 2007 from Public Works Department (PWD), Mantralaya, Mumbai on the basis of fictitious documents.

7. Learned counsel appearing for the petitioners submitted that the FIR No. I-123 of 2015 registered on 25/8/2015 by ACB, Thane is a exhaustive and detailed one. It refers to alleged role played by partners of M/s. F. A. Enterprises / F. A. Construction in participating in tender floated for construction of the Balganga Irrigation Dam amounting to Rs.512.75 crores. The second FIR, which came to be registered on 23/9/2015, according to the learned counsel, arises out of the same transaction and is closely connected with the said tender process. In view of the nature of allegations and transactions, as alleged by the ACB, Thane, in the first FIR, the second FIR registered by ACB, Mumbai deserves to be quashed and set aside. Learned counsel submitted that as the alleged offences form part of the same transaction, this court would quash and set side the second FIR. The co-relation in respect of series of acts shall be considered as an essential ingredient while appreciating the present case. It was submitted that Class 1 – A certificate was obtained by the petitioners, which was an

essential requirement for participating in the tenders process. In case the prosecution alleges that Class 1-A certificate was fraudulently obtained in Mumbai, then registration of second FIR was not at all required. A statement of the complainant Hanumant Appa Vetal was recorded as per Section 161 of Cr. P.C. Learned counsel submitted that law is well settled on the principles of registration of second FIR. Learned counsel placed reliance on the following judgments :-

(a) S. Swamirathnam vs. State of Madras [AIR 1957 SC 340].

(b) State of Andhra Pradesh vs. Cheemalapati Ganeswara Rao and anr. [AIR 1963 SC 1850].

(c) Srichand K. Khetwani vs. State of Maharashtra [AIR 1967 SC 450].

(d) Mohan Baitha & Ors. vs. State of Bihar and anr. [(2001) 4 SCC 350].

(e) Mahesh Parsram Matta vs. State of Goa [2015 SCC online Bom 555].

(f) Mallu and ors. vs. The State of Karnataka [CDJ 2015 Kar HC 212]

(g) Dhurvasalu Naidu vs. State [1980 Cri. L. J. 911]

(h) C. Muniappan & ors. vs. State of Tamil Nadu [(2010) 9 SCC 567].

(i) T. T. Antony vs. State of Kerala & ors. [(2001) 6 SCC 181].

(j) Amitbhai Anilchandra Shah vs. Central Bureau of Investigation [(2013) 6 SCC 348].

(k) Babubahi vs. State of Gujarat and ors. [(2010) 12 SCC 254].

(l) Surender Kaushik and ors. vs. State of Uttar Pradesh and ors. [(2013) 5 SCC 148].

We refer to some of the observations relied upon by the learned counsel for the petitioners in the aforesaid judgments, which are reproduced herein below:

(A) Para 25 of the judgment in the case of State of **Andhra Pradesh vs. Cheemalapati Ganeswara Rao and anr**. (Supra):

"25. …...........The series of acts which constitute a transaction must of necessity be connected with one another and if some of them stand out independently they would not form part of the same transaction but would constitute a different transaction or transactions.........."

(B) Para 20 of the judgment in the case of **T. T. Antony vs. State of Kerala and ors**. (Supra) :

"20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 of Cr. P.C. only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 Cr.P.C. Thus, there can be no second FIR and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 Cr.P.C.

(C) Paras 46, 59 and 60 of the judgment in the case of **Amitbhai Anilchandra Shah vs. Central Bureau of Investigation** (Supra):

“46. In Cheemalapati Ganeswara Rao while considering the scope of Section 239 of Cr. P. C. 1898 (Section 220 in Cr.PC, 1973), this Cort held :

> “30. …....Where, however, several offences are alleged tohave been committed by several accused persons it may be more reasonable to follow the normal

rule of separate trials. But here, again, if those offences are alleged not to be wholly unconnected but as forming part of the same transaction the only consideration that will justify separate trials would be the embarrassment or difficulty caused to the accused persons in defending themselves. We entirely agree with the High Court that joint trial should be founded on some `principle'.

59. In the light of the specific stand taken by CBI before this Court in the earlier proceedings by way of assertion in the form of counter-affidavit, status reports, etc. we are of the view that filing of the second FIR and fresh charge-sheet is violative of fundamental rights under Articles 14, 20 and 21 of the Constitution since the same relate to alleged offence in respect of which an FIR had already been filed and the court has taken cognizance. This Court categorically accepted CBI's plea that killing of Tulsiram Prajapati is a part of the same series of cognizable offence forming part of the first FIR and in spite of the fact that this Court directed CBI to “take over” the investigation and did not grant the relief as prayed, namely, registration of fresh FIR, the present action of CBI filing fresh FIR is contrary to various judicial pronouncements which is demonstrated in the earlier part of our judgment.

> 60. In view of the above discussion and conclusion, the second FIR dated 29-4-2011 being RC No. 3(S)/2011/Mumbai filed by CBI is contrary to the directions issued in judgment and order dated 8-4-2011 by this Court in Narmada Bai vs. State of Gujarat and accordingly the same is quashed. As a consequence, the charge-sheet filed on 4-9-2012, in pursuance of the second FIR, be treated as a supplementary charge-sheet in the first FIR. It is made clear that we have not gone into the merits of the claim of both the parties and it is for the trial court to decide the same in accordance with law. Consequently, Writ Petition (Cri) No. 149 of 2012 is allowed. Since the said relief is applicable to all the persons arrayed as accused in the second FIR, no further direction is required in Writ Petition (Cri.) No. 5 of 2013."

(D) Para 21 of the judgment in the case of **Babubhai vs. State of Gujarart & ors**. (Supra):

"21. In such a case the court has to examine the facts and circumstances giving rise to both the FIRs and the test of sameness is to be applied to find out whether both the FIRs relate to the same incident in respect of the same occurrence or are in regard to the incidents which are two or more parts of the same transaction. If the answer is in the affirmative, the

> second FIR is liable to be quashed. However, in case, the contrary is proved, where the version in the second FIR is different and they are in respect of the two different incidents / crimes, the second FIR is permissible. In case in respect of the same incident the accused in the first FIR comes forward with a different version or counterclaim, investigation on both the FIRs has to be concluded."

8. Learned Spl. P. P. Mr. Gharat submitted that in both the cases registered under different FIRs several serious issues calling for thorough investigation are raised. In the first FIR, issue of Class 1-A certificate was not at all an issue. It was alleged in the first FIR i.e. FIR No. I-123 of 2015, that five contractors were shown as dummy contractors. Bogus and false documents were also produced during participation in the tender process. The role attributed to M/s. F. A. Enterprises and F.A. Construction is highlighted in detail in the first FIR. These companies / firms participated in the tender process.

9. Learned Spl. P. P. submitted that the second FIR bearing No. 57 of 2015 is based on a complaint filed in respect of obtaining of Class 1-A certificate from Mantralaya, Mumbai in connivance with public servants by the accused persons. While obtaining the Class 1-A certificate, bogus

documents, deeds were relied upon by the accused persons. Class 1-A certificate was obtained in the year 2007, whereas the tender process was initiated in the year 2009. Learned Spl. P. P. submitted that merely because the Class 1-A certificate was utilized by accused persons while participating in the tender process in the year 2009 would not make the transaction same or similar in nature. Sameness of transactions is required to be appreciated on its own merits and each case needs to be considered accordingly. He further submitted that the investigation is progressing in both the cases and considering the seriousness of the offences committed by the accused, it would not be in the interest of public and interest of justice to quash and set aside the second FIR on the grounds raised by the petitioners herein.

10. We have perused the material placed on record. We have considered the submissions advanced by the learned counsel for the parties. We have also perused the judgments cited above. The provisions of Chapter XVII of Cr. P. C. refers to "The Charge". Section 220 refers to trial for more than one offence. Section 223 refers to persons who could be charged jointly. Section 223(d) reads as under :-

223. What persons may be charged jointly. - The following persons may be charged and tried together, namely :-

(a) …..

(b) …..

(c) …..

(d) persons accused of different offences committed in the course of the same transaction;

11. The principles regarding registration of second FIR in respect of the same transaction are well settled by now. The series of acts, which constitute transaction, must necessarily connect with each other. But if some of them stand out independently, they would not form part of same transaction, but would constitute a different transaction or transactions. It has been held that the meaning of "same transaction" is not defined anywhere in the Code and it will always be difficult to define precisely what the expression means. It depends on particular facts of each case.

12. The legal principle further states that whether two or more acts constitute same transaction or not are to be gathered from the conspectus of the entire gamut of the case which is investigated by the officer concerned. The circumstances indicating proximity of time, unity

or proximity of place, continuation of action, commonality of purpose or design play very dominant role in considering whether the subsequent FIR needs to be rejected.

13. The intrinsic nature of the allegation made in the first FIR is required to be viewed with care and caution. In the first FIR registered on 25/8/2015 by the Investigating Officer – Hanumant Vetal, ACB, Thane, it was stated that for getting tender of Balganga Irrigation Dam, members of one family, who were shareholders of M/s. F.A. Enterprises and F.A. Construction, committed illegal acts, which were supported by the public servants. Authorized body gave sanction for Rs.512.75 crores on 24/2/2009 for construction of the dam. Ten applicants purchased the tender form, out of which seven participated. For purchasing forms for four applicants, one representative had come. The details of how the financial viability was tried to be projected, bank guarantees were obtained by adopting fraudulent means and method for participating in the tender process were highlighted in the complaint. Obtaining of stamp papers, preparation of deeds, recording of statement of lawyer were also highlighted in the complaint. Reference to the bank guarantee issued by Bombay Mercantile Bank, withdrawal of some of the members of the F.A.

Construction and F. A. Enterprises, re-continuation of the partnership firm was described in the first complaint. It was alleged that cartel was formed and a farce was made out of participation of tender process. It was alleged that there was criminal misconduct committed by the accused persons.

14. The complaint refers to a meeting headed by then Hon'ble Minister for Irrigation, where 25 officers were present. The minutes of the meeting held on 28/1/2009, which was referred in a Circular dated 4/2/2009 issued by State Government has been mentioned in the complaint. The first complaint narrates that F. A. Enterprises showed that they had a turn over of more than 125 crores but did not file any document in support of the same. Statement of Chartered Accountant – Mr. Ramesh Joshi was also referred. In the end, it was submitted that fraudulently bogus documents were created and by misleading, petitioners participated in the tender process.

15. We have minutely perused both the FIRs. In the second FIR the complainant states that F.A. Construction formed a new firm namely F. A. Enterprises on 26/7/2006. For obtaining Class 1-A certificate, an application was made on 5/8/2006 addressed to Executive Engineer,

Presidency Division, P.W.D., Mumbai. The PWD granted Class 1 – A certificate for 2007-2008 on 12/4/2007 and based on the said certificate, the F.A. Enterprises participated in the Balganga Irrigation Tender process in the year 2009. It was alleged that bogus documents were created for getting Class 1-A certificate. Reference was made to Deed of Partnership dated 1/7/2006 and Deed of Retirement-cum-continuation of Partnership. Reference was made in the second FIR to Government Resolution dated 11/2/2002, which prescribed a procedure to be followed for examining, processing and sanctioning such application for getting the said certificate. On 3/10/2006, a report was submitted in respect of the application made by the petitioners. A further report was submitted by Anil Gaikwad, the then Executive Engineer, PWD, Mumbai. Inquiry conducted in this respect refers to the correspondence made by Executive Engineer – Anil Gaikwad in violation of the Government Resolution dated 11/2/2002. It is alleged that the public servant connived with five partners of F. A. Construction.

16. The second FIR strictly, independently refers to obtaining of Class 1 – A certificate from PWD, Mantralaya, Mumbai by F. A. Enterprises. In the inquiry it was revealed that the relevant file maintained by the PWD, Mantralaya, Mumbai, was preserved, but it was revealed that

the said file is not available. It is alleged that the public servants, who were responsible to preserve the file, are answerable. An offence was accordingly registered against them under Section 201 read with Section 120-B of IPC. Incident of obtaining Class 1-A certificate took place in the Secretariat, Mantralaya, Mumbai and, therefore, ACB registered an offence at Mumbai.

17. There is no doubt that seriousness of the offence alleged to have been committed by the accused persons named in the FIR requires thorough investigation, which is going on. We find that distinct and different feature of allegations are made in respect of both the FIRs/complaints. Taking into consideration the subject matter of both the FIRs, we are of the view that it cannot be termed to be arising out of same transaction. Class 1-A certificate was obtained in the year 2006, whereas the accused participated in the tender process in the year 2009. It cannot be said that there was connection between series of acts to constitute same transaction. We have examined the facts and circumstances giving rise to both the FIRs. The version in the second FIR is different and both the FIRs are in respect of two different incidents. Therefore, the second FIR in the case is permissible. Even otherwise, we do not find that any

prejudice would be caused if the two FIRs are independently investigated, taking into consideration the provisions incorporated under Chapter XVII of the Cr. P. C.

18. For the reasons stated above, we are not inclined to interfere in these petitions. The Petitions are dismissed.

(PRAKASH D. NAIK, J.) (NARESH H. PATIL,J.)