

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of Decision: 3rd July, 2017**

+ **1. CRL.M.C. 2193/2015 & CrI. M.As. 7760-7761/2015**

M.S. BADHAN

..... Petitioner

Through: Mr.M.P.Sahay and Ms.Purnima
Raj, Advocates.

versus

CENTRAL BUREAU OF INVESTIGATION Respondent

Through: Ms.Rajdipa Behura, Spl. P.P
for CBI with Mr.Philomon
Kani Handa,Adv.

Mr.Ajay Digpaul, CGSC for
UOI

+ **2. CRL.REV.P. 346/2015 & CRL.M.A.8691/2015**

SIBNATH

..... Petitioner

Through: Mr.Bansuri Swaraj, Adv. with
Mr.Siddhesh Kotwal, Adv.

versus

CENTRAL BUREAU OF INVESTIGATION Respondent

Through: Ms.Rajdipa Behura, Spl. PP for
CBI with Mr.Philomon Kani
Handa, Adv.

Mr.Ajay Digpaul, CGSC for
UOI.

+ **3. CRL.REV.P. 347/2015 & CRL.M.A.8693/2015**

RAJESH SARDA

..... Petitioner

Through: Mr.Bansuri Swaraj, Adv. with
Mr.Siddhesh Kotwal, Adv.

versus

CENTRAL BUREAU OF INVESTIGATION

..... Respondent

Through: Ms.Rajdipa Behura, Spl. PP for
CBI with Mr.Philomon Kani
Handa, Adv.
Mr.Ajay Digpaul, CGSC for UOI.

CORAM:

HON'BLE MR. JUSTICE I.S.MEHTA

JUDGMENT

I.S. MEHTA, J.

1. By virtue of the present petitions filed under Section 482 Cr.P.C. the petitioners, i.e. M.S. Badhan, Sibnath Mal and Rajesh Sarda, seeks to quash and set aside the impugned summoning order dated 23.04.2015 passed by the learned Special Judge (PC Act) (CBI)-6, Patiala House Court, New Delhi in CR No. 06A/14 and RC No. 01(A)/2013/ACU-VIII in AC-III/CBI/ND under Sections 7/12/13(2) read with Section 13(1)(d) of PC Act titled *CBI vs. N.K. Rai etc.*

2. The brief facts stated are that a case was registered on the basis of source information that Nand Kishore Rai, Superintendent of Customs, Custom House, Strand Road, Kolkata in criminal conspiracy with Surendra Singh Bisht, Superintendent of Customs, Kolkata Port Commissionerate; P. Vijay Kumar, Deputy Director, Directorate of Revenue Intelligence(DRI), Mumbai; Pydi Rama Prasad, Deputy Commissioner, Directorate General of Central Excise Intelligence(DGCEI), Kolkata; Baljeet Singh, Customs Appraiser, New Customs House, New Delhi and other unknown officers of Customs Department were demanding and accepting pecuniary favours and illegal gratification for processing import/export related work of one Rajesh Sarda(*petitioner herein*) of M/s Universal Agency.
3. During the investigation it was revealed that the proposal of M/s Universal Agency, Kolkata was initiated for transportation of cargo from Kolkata port by railway to Nepal through Nautanwa/Jogbani Land Customs Station(LCS) by rail. In this regard permission from the Central Board of Excise and Customs(CBEC), New Delhi was required. The said proposal of the petitioner-Rajesh Sarda was processed and recommended by N.K. Rai, Superintendent of Customs and was forwarded to CBEC, New Delhi through Kolkata Port Commissionerate for approval and N.K. Rai and other officers of the Customs Department pursued the matter with regard to expeditious processing of the said proposal.
4. It was further revealed in the investigation that the aforementioned officers of Customs along with the petitioner- M.S.

Badhan the then Member, Central Board of Excise and Customs(CBEC) were involved in getting the final clearance to the application of M/s Universal Agency dated 23.07.2012 for transportation of bulk cargo, including fertilizer by rail through Jogbani and Nautanwa Land Customs Station. The accused persons and other officers of the Customs were in contact with one another for the purpose of processing the file of M/s Universal Agency and also there has been demand and acceptance of bribe and conversations recorded for transportation of bribe money.

5. The conversation of the calls between various persons involved in the case recorded through telephone of the accused persons were collected from Special Unit, CBI, Kolkata and further the specimens of voices of the accused persons namely- Rajesh Sarda(*petitioner herein*), P. Rama Prasad, Baljit Singh and Surender Singh Bisht were sent to CFSL, CBI, New Delhi for scientific examination and the specimen of voice of the petitioner- M.S. Badhan was also sent for scientific examination. The CFSL expert had given positive opinion with respect to the voice specimens of the accused persons.
6. The investigation further revealed that the approval of the file was granted by the petitioner- M.S. Badhan on 14.12.2012. The chain of the movement of the bribe money started from Rajesh Sarda(*petitioner herein*) who was seeking permission for transportation of his cargo to Nepal by rail and this amount was handed over to N.K. Rai through accused Shib Nath Mal(*petitioner herein*) and the amount was given to accused Surendra Singh Bisht

who delivered it to accused Pydi Rama Prasad. Thereafter, the accused Pydi Rama Prasad bought the amount of Rs. 5 lakhs in Delhi and delivered it to the petitioner- M.S. Badhan at his residence. This chain and movement of the bribe money was established through the telephonic conversation.

7. Thereafter, the charge-sheet/closure report dated 28.05.2014 was submitted by the respondent/CBI before the Court of the learned Special Judge (PC Act) (CBI)-06, Patiala House Court, New Delhi wherein it specified the role played by each of the accused towards the commission of the offence and the conclusion arrived at by the investigating officer.
8. Consequently, the learned Special Judge (PC Act) (CBI)-06, Patiala House Court, New Delhi took cognizance against the petitioner-Rajesh Sarda (A6) and the petitioner-Sibnath Mal (A-7) for the offences punishable under Section 120B IPC and under Section 12 of PC Act, 1988 and against the petitioner-M.S. Badhan for the offence under Section 120B IPC and under Sections 7, 13(2) read with Section 13(1)(d) of PC Act, 1988 and vide impugned order dated 23.04.2015 summoned the present petitioners.

Hence the present petitions.

9. The learned counsel for the petitioners has submitted that the trial Court was not correct in appreciating the evidence in the closure report and the trial Court wrongly took the cognizance and summoned the petitioners for the offence without taking or giving directions to the respondent/CBI under Section 173(8) Cr.P.C. for

further investigation and the trial Court has fallen into grave errors of law and has misdirected itself on the issues involved therefore, the impugned order dated 23.04.2015 be set aside.

10. The learned SPP for the respondent/CBI has submitted that the respondent/CBI has filed a closure report qua against the petitioners-M.S. Badhan, Shiv Nath Mal and Rajesh Sarda and the respondent/CBI stands on the closure report. However, the lower Court has taken the cognizance to which the respondent/CBI will abide.
11. The whole question hinges around whether the learned Special Judge could take cognizance of the offence qua the present petitioners when there is no evidence found by the investigating agency/CBI?
12. In the instant petition, the learned Special Judge (PC Act) (CBI)-6, Patiala House Courts, New Delhi took cognizance qua the petitioners on 23.04.2015 on the basis of material evidence placed on record along with the charge-sheet filed under Section 173 Cr.P.C. In the present charge-sheet the petitioners were not charge-sheeted.

Meaning thereby, that, during the course of investigation, no evidence was found qua the present petitioners by the investigating officer/agency.

13. The learned Special Judge (PC Act) (CBI)-6, Patiala House Courts, New Delhi took cognizance against the present petitioners for the offences punishable under Sections 120-B IPC and Sections

12/7/13(2) read with Section 13(1) (d) of the Prevention of Corruption Act, 1988 on the basis of the existing evidence qua the other accused persons.

14. Cognizance is always taken of an offence and not of an offender. In the instant case, the closure report of the respondent CBI qua the present petitioners is to be taken under Section 169 Cr.P.C. which is reproduced hereunder:-

“169. Release of accused when evidence deficient.- If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial.”

15. If the learned Trial Court finds that there is no sufficient evidence qua the present petitioners then the learned Trial Court has the option to exercise its judicious mind under Section 173(8) Cr.P.C. for further investigation and collecting material evidence qua the present petitioners. Sub-section (8) of Section 173 Cr.P.C. is reproduced hereunder:-

“(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub- section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the

police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).”

16. In the instant case the learned Trial Court instead of issuing directions for further investigation to the respondent CBI in order to fetch material evidence under Section 173(8) Cr.P.C. finds sufficient material evidence for taking cognizance qua present petitioners when the respondent CBI itself says that there is no evidence found against the petitioners herein.
17. The Hon’ble Supreme Court in the judgment reported as ***Pepsi Foods Ltd.and Anr. vs. Special Judicial Magistrate and Ors., 1998 5 SCC 749***, while dealing with the summoning of an offence in a criminal case has observed that summoning of an accused in a criminal case is a serious matter. The criminal law cannot be set into motion as a matter of course. The relevant paragraph of the judgment is reproduced as under:-

"28. Summoning of an accused in a criminal cases is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the

evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put question to the complainant and his witnesses to elicit answers to out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

18. In the present petition, the allegations against the present petitioners only comes into picture at point 15(Result of laboratory analysis) of the charge-sheet wherein positive opinion was given by the CFSL expert with regard to the voice specimen of the petitioners-M.S. Badhan and Rajesh Sarda, and further at point 16(Brief facts of the case) of the charge-sheet wherein the role of the petitioners were discussed along with the other accused persons which is reproduced as under:-

"Role of Shri MS Badhan

Investigation discloses that Shri MS Badhan was the authority to grant approval for permission of transportation of cargo of M/s Universal Agency through rail route. The bribe amount received from Shri Rajesh Sarda was meant to be finally delivered to him. From recorded conversation, it appears that he received a bribe of Rs. 5 lakh from Shri P. Ram Prasad in New Delhi. There was no express demand from his side for the work. The analysis of the telephonic conversation shows that he was very guarded about the whole transaction. On telephone he scolded Shri P. Vijay Kumar for conducting the whole transaction without taking

precaution. He visited Kolkata on 26.10.2012 where Shri P. Vijay Kumar discussed with him the permission to the proposal of M/s Universal Agency.

Role of Shri Rajesh Sarda

Shri Rajesh Sarda was instrumental in submitting application of M/s Universal Agency for transportation of goods to Nepal through Jogbani and Nautanwa by rail. He arranged bribe money for accused officers and paid them. He had knowledge of the work and payment of bribe. He pursued the matter till grant of permission.

Role of Shri Shib Nath Mal

Shri Shib Nath Mal is an employee of M/s Universal Agency, working assistant of Shri Rajesh Sarda. The application for permission on behalf of M/s Universal Agency for transportation of cargo through rail route was signed by him."

19. During the course of investigation carried out by the respondent/CBI on the material point of investigation the conclusion drawn is reproduced as under:-

"Conclusion

As revealed from foregoing paras, it appears that offence has been committed. however, following weaknesses have been found in the case during investigation:

- a) There is no recovery of the bribe amount.*
- b) There is no clear demand of bribe on the part of Shri MS Badhan.*
- c) The key persons like Shri MS Badhan made conversations in very guarded language and they were taking precaution that their conversations did not reveal any criminality.*
- d) The evidence of telephonic conversation at best is corroborative in nature.*

e) There is no gross irregularity in the processing of the file and granting approval. Though there is departure from the previous pattern of approval given to M/s Universal Agency. there is no written procedure defining the process of granting approval for transportation of the cargo on rail route.

In view of abovementioned weaknesses in the case, allegations cannot be proved beyond reasonable doubt and chargesheet has not been filed..."

(underlining supplied)

20. As per the prosecuting agency/CBI no case is made out against the petitioners. There is no occasion for the trial Court to look into additional evidences to give direction under Section 173(8) Cr.P.C. since there is no additional evidence filed on record and the prosecuting agency/CBI takes stand on their investigation and the closure report qua against the petitioners therefore, the cognizance taken against the present petitioners is bad.

21. Even if the prosecution case taken to be gospel truth still do not constitute *prima facie* case qua the present petitioners in absence of any evidence against the petitioners in the charge-sheet filed by the respondent CBI. Reliance is placed on the judgment of the Apex Court in the case ***State of Haryana & Ors. v. Ch. Bhajan Lal & Ors., AIR (1992) SC 604***, which has laid down certain category for quashing of the proceedings, the relevant portion is reproduced hereunder:-

“(a) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused;”

22. In the light of aforesaid discussions, the cognizance taken qua the present petitioners without taking recourse under Section 173(8) Cr.P.C. for further investigation is hereby set aside.
23. In these circumstance, I set aside the impugned orders dated 23.04.2015 passed by the learned Special Judge (PC Act)(CBI)-06, Patiala House Courts, New Delhi and quash the summoning order dated 23.04.2015 against the petitioners.
24. Consequently, the present petitions are allowed. One copy of this judgment be placed on the files of CRL.REV.P. 346/2015 and CRL.REV.P. 347/2015.
25. Let one copy of this judgment be sent to the concerned Court(s). All the pending applications (if any) are disposed of accordingly
No order as to costs.

I.S.MEHTA, J

JULY 03, 2017