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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.11.2018

CORAM:

THE HONOURABLE MR. JUSTICE N.ANAND VENKATESH

Cr1.O.P.No.20417 of 2018

Vaiko

...Petitioner/Second Accused

Vs.

The State of Tamilnadu
Represented by Inspector of Police,
D1, Triplicane Police Station,
Chennai-600 005.

...Respondent/Complainant

PRAYER: Criminal Original Petition filed under Section 482 of the Cr.P.C., to call for the records relating to the C.C.No.5516 of 2009 on the file of the XIII Metropolitan Magistrate, Egmore at Allikulam Complex, Chennai and quash the charge in so far as Section 13(2) of the Unlawful Activities (Prevention) Act, 1967 is concerned.

For Petitioner :Mr.G.Devadoss

For Respondent :Mr.A.Natarajan,
Special Public Prosecutor
Assisted by
Mr.M.Mohamed Riyaz
Additional Public Prosecutor

O R D E R

This petition has been filed seeking to quash the final report in C.C.No.5516 of 2009, on the file of the XIII Metropolitan Magistrate, Egmore.

2 The learned counsel for the petitioner would submit that the FIR was registered in Crime No.2148 of 2007 by the respondent police under Sections 13(2) of the Unlawful Activities (Prevention) Act 1967 as amended by the Unlawful Activities (Prevention) Amendment Act 2004 and 188, 143 IPC r/w 7(1)(a) CLA Act. Thereafter, the investigation was conducted and a final report has also been filed before the XIII Metropolitan Magistrate Court, Egmore and the same has been taken cognizance by the said Court for an offence under Section 188 and 143 of IPC r/w Section 7(1)(a) of the Criminal Law Amendment (CLA) Act.



3 The learned counsel for the petitioner primarily raised two grounds, challenging the final report filed by the respondent police and the Court below taking cognizance of the same. The first ground that was raised by the learned counsel for the petitioner is that the final report that has been taken cognizance for an offence under Section 188 and 143 of IPC is unsustainable in view of the judgment of this Court in Jeevanandham and others Vs. State Represented by Inspector of Police, Velayuthampalayam Police Station, Karur District and another reported in 2018 (2) LW (Cr1) 606.

4 This Court has categorically held in the said judgment that for an offence under Section 188 of I.P.C., the same cannot be taken cognizance on a police report under Section 173 (2) of Cr.P.C., and cognizance can be taken only on complaint by the concerned public servant, in the light of Section 195 of the Cr.P.C.,

5 The second ground that has been raised by the learned counsel for the petitioner is that the cognizance taken by the Court below for the offence under the Unlawful Activities (Prevention) Act, 1967 is also not sustainable, since it does not satisfy the requirement of Section 45 of the Act. The learned counsel for the petitioner would submit that an independent authority will have to review the entire evidence, gathered in the course of investigation, and then make a recommendation whether it is a fit case for prosecution. On such recommendation, the State Government or the Central government, as the case may be, shall grant sanction as it may deem fit. The learned counsel for the petitioner would submit that the final report in this case was filed only in the year 2009, whereas, the independent authority came into existence in the State of Tamil Nadu only on 25.03.2011, by virtue of G.O.Ms.No.208 dated 25.03.2011. Therefore, admittedly on the day, when the final report was filed, there was no independent authority who had reviewed the case and therefore, even if a sanction has been granted by the State Government, such a sanction does not satisfy the requirements of Section 45 of the Unlawful Activities (Prevention) Act.

6 The learned Public Prosecutor representing the respondent would submit that the State Government has granted a sanction in this case by an order dated 31.08.2009. The learned Public Prosecutor brought to the notice of this Court that the Central Government by its notification dated 21.06.2007 had already given the power to sanction for prosecution in respect



of the offence punishable under the Unlawful Activities (Prevention) Act, 1967, to the State Government. Pursuant to the said permission granted by the Central Government, the State Government has applied his mind to the materials collected during investigation and had granted sanction for the prosecution of the accused persons by the order dated 31.08.2009. Therefore, the learned Public Prosecutor would submit that the final report has passed the test of prior sanction under Section 45 of the Unlawful Activities (Prevention) Act, 1967.

7 This Court has carefully considered the submission made on either side. In so far as the first ground that has been raised by the learned counsel for the petitioner, challenging the final report filed under Section 188 and 143 of IPC is concerned, the judgment of this Court in Jeevanandham and others Vs. State Represented by Inspector of Police, Velayuthampalayam Police Station, Karur District and another reported in 2018 (2) LW (Cr1) 606 squarely covers the issue. This Court has categorically held that the Court cannot take cognizance of an offence under Section 188 IPC based on the police report under Section 173(2) of Cr.P.C and it can only be based on a complaint given by the concerned public servant in the light of Section 195 of Cr.P.C.. Section 143 of IPC is intertwined to the offence under Section 188 of IPC and therefore, it cannot independently stand and it does not satisfy the requirements of Section 141 of IPC. Therefore, the final report in so far as the offence under Sections 188 and 143 of IPC R/w Section 7(1)(a) of CLA Act is totally unsustainable and the Court below did not have the necessary jurisdiction to take cognizance of the same, pursuant to the investigation done by the police and filing of the final report under Section 173(2) of Cr.P.C.

8 In so far as the second ground raised by the learned counsel for the petitioner with regard to sanction contemplated under Section 45 of the Unlawful Activities (Prevention) Act is concerned, It is seen from the records that the State Government by letter dated 31.08.2009, by virtue of permission granted by the Central Government, has granted sanction for prosecution in respect of the offence punishable under the Unlawful Activities (Prevention) Act against the accused persons. It is to be seen whether this sanction is enough for the purpose of the Court below to proceed further with the case, based on the cognizance taken for the offence under Section 13(2) of the Unlawful Activities (Prevention) Act. In this regard, the learned counsel for the petitioner brought to the notice of this Court the judgment in Subhashree Das @ Mili Panda & others Vs. State of Orissa reported in 2011 SCC Online Orissa 61



9 The Orissa High Court had an occasion to deal with a case of similar nature and had dealt in extenso the issue with regard to cognizance of offence under Section 45 of the Unlawful Activities (Prevention) Act. The relevant portion of the judgment is extracted hereunder:-

"6. For better appreciation, Section 45 of the U.A.P. Act is quoted herein below:

45. Cognizance of offences:- (1) No Court shall take cognizance of any offence-

(1) Under Chapter III without the previous sanction of the Central Government or any officer authorized by the Central Government in this behalf;

(ii) Under Chapters IV and VI without the previous sanction of the Central Government or, as the case may be, the State Government, and where such offence is committed against the Government of a foreign country without the previous sanction of the Central Government.

(2) Sanction for prosecution under sub-section (1) shall be given within such time as may be prescribed only after considering the report of such authority appointed by the Central Government or, as the case may be, the State Government which shall make an independent review of the evidence gathered in the course of investigation and make a recommendation within such time as may be prescribed to the Central Government or, as the case may be, the State Government.

On a conjoint reading of both the Sub-Sections (1) and (2) of Section 45 of the U.A.P. Act, it is clear therefrom that the State Government is required to "appoint an officer" to act as an "authority" for conducting an "Independent review of the evidence gathered" in the course of the investigation and such officer appointed to carry out independent review, shall make a "recommendation" within the time as may be prescribed "to the appropriate Government".

7. Learned counsel for the petitioners asserted that incorporation of the requirement for appointment of an officer to conduct an "independent review", as incorporated to Sub-Section (2) of Section 45 of the Unlawful Activities (Prevention) Act, is an extremely stringent law, Parliament provided a safeguard to avoid frivolous prosecution.



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It is asserted that in the present case, the State or Orissa has not made "appointment" of any officer to carry out the "Independent review" and further, there has been "no prescription of any time limit" for making the necessary "recommendation". In the absence of the appointment of an officer to conduct the independent review or prescription of any time limit for making recommendation, it is contended that the sanction in the present case, is not a valid sanction in law.

In this aspect, learned counsel for the petitioners placed reliance upon the speech of Hon'ble Home Minister while moving the draft bills in the Rajya Sabha and in his speech, the Hon'ble Home Minister, clearly stated that the legislative intent behind Section 45(2) of the Act was for "creating an independent executive to review the entire evidence gathered in course of investigation and then to make a recommendation whether the case was a fit for prosecution or not". This was prescribed by the Hon'ble Home Minister in order to filter and buffer and such independent authority who was required to review the entire evidence would provide the very salutary safeguard. Such an authority independent from the investigators was the "biggest buffer against arbitrariness"

8. Sri Debasis Panda, learned Additional Government Advocate on behalf of the State produced a letter dated 24.02.2011, containing an extract taken from File No. PIC/1(Pro)93/2011 which contains the "review notes" of one Sri A.M. Prasad, the Special Secretary/Additional Secretary of Home Department. It is claimed that the said Sri Prasad had reviewed the evidence as required under Sub-Section(2) of Section 45 of the Act and had "recommended approval of the prosecution". He further submitted that since the Special Secretary/Additional Secretary of Home Department had considered and reviewed the evidence collected in the course of investigation and had recommended sanction for prosecution of the petitioners, no error or grievance on this score ought to be entertained.

9. In the light of the aforesaid submissions, in course of hearing, learned Additional Government Advocate for the State was asked to produce any document/order of appointment of Sri A.M. Prasad, Special Secretary, issued by the appropriate authority, appointing him as the "review authority" under Section 45(2) of the Act, 1967. To this query, learned Additional Government



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Advocate, fairly responded that, no such formal appointment order appointing the Special Secretary for the purpose of reviewing cases under Section 45 of the Act is available on record. To a further query of the Court as to whether the State have prescribed any time limit for the purpose of producing such report by the reviewing authority, learned Additional Government Advocate for the State also responded in the negative.

In view of the aforesaid response of the State, it is clear therefrom that the State have failed to produce before this Court any documentary evidence in order to establish the appointment of the Special Secretary A.M.Prasad as the authority for the purpose of carrying out an independent review as required under Section 45(2) of the Act. I am also constrained to note that the State have also failed to produce any document or order prescribing any "time limit" for furnishing of such recommendation, by the independent review authority. Apart from the aforesaid fact, this is relevant herein to take note of Speech of the Hon'ble Home Minister, copy of which has been furnished by the learned counsel appearing for the petitioner and the same is quoted herein below:

"Finally, Sir, we have incorporated a very salutary provision. To the best of our knowledge-I don't know, I may be corrected by the Law Minister or the Law Secretary later-it is the first time we are introducing this. In a prosecution under the UAPA, now, it is the executive Government which registers the case through a police officer. It is the executive Government which investigates the case through an investigating agency, namely, the police department. It is the executive Government which sanctions U/s.45. Therefore, there is a fear that a vindictive or a wrong executive Government could register a case, investigate and sanction prosecution. There is a fear. May be, it is not a fear that is entirely justified but you cannot say that it is entirely unjustified. So what are doing? The executive Government can register the case because no one else can register a case. The executive Government through its agency can investigate the case. But, before sanction is granted under 45(1) we are interposing an independent authority which will review the entire evidence, gathered in the investigation, and then make a recommendation whether this is a fit case of prosecution. So, here, we are bringing a filter, a buffer, an independent authority who has to review the entire evidence that is gathered and, then, make a recommendation to the State Government or the Central



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Government as the case may be, a fit case for sanction. I think, this is a very salutary safeguard. All sanctions of the House should welcome it. This is a biggest buffer against arbitrariness which many Members spoke about. Sir, these are the features in the Bill"

In this respect, reference needs to be made to the case of Rambhai Nathabhai Gadhvi V.State of Gujarat, AIR 1997 Supreme Court 3475, wherein it is held as follows:

"As the provisions of TADA are more rigorous and the penalty provided is more stringent and the procedure for trial prescribed is summary and compendious, the sanctioning process mentioned in Section 20-A(2) must have been adopted more seriously and exhaustively than the sanction contemplated in other penal statutes. If there was no valid sanction the Designated Court gets no jurisdiction to try a case against any person mentioned in the report as the court is forbidden from taking cognizance of the offence without such sanction. If the Designated Court has taken cognizance of the offence without a valid sanction, such action is without jurisdiction and any proceedings adopted thereunder will also be without jurisdiction."

In the case of Manoranjan Prasad Choudhary V. State of Bihar, (2005) 30 OCR (SC)-370, it is held that "It is also well settled proposition of law that where there is no sanction by the competent authority, the proceeding itself stands vitiated".

10.In view of the conclusions/finding reached herein above, this Court is of the considered view that, no cognizance could have been taken against the petitioners in the absence of any valid sanction of the prosecution and in this regard, although sanction for prosecution had been obtained, yet the same was not based upon a review by a validly appointed authority to carry out "independent review of evidence"obtained in course of investigation. Therefore, the very foundation for obtaining such sanction being not in consonance with law, the order of cognizance dated 16.7.2010 passed by the learned J.M.F.C., Banpur in G.R.Case No.16 of 2010 ought to be quashed and this Court directs accordingly.

Insofar as the other contentions as noted hereinabove are concerned, this Court is of the view that the same need not be dealt with in the present case, since the order of cognizance has been quashed and the same are left open for adjudication in any appropriate



proceeding, if the same is raised."

10 The learned counsel for the petitioner also brought to the notice of this Court the judgment of this Court in Soman @ Somasundaran V. State by the Inspector of Police, B-12, Tallakulam Police Station reported in 2017 SCC Online Mad 12222. The relevant portion of the judgment is extracted hereunder:-

"5.The petitioner has charge sheeted for the offence under Section 13(2) of the Unlawful Activities (Prevention) Act, 1967. Section 45 of the Act, specifically provides that cognizance of any offence under the Act in Chapter III shall be taken by the Court only with the previous sanction of the Central Government. Offences charged as against the petitioner is under Section 13(2) of the Act, which comes under Chapter III of the Act. Therefore, previous sanction of the Central Government is a pre-requisite condition to take cognizance of the offence. But, in this case, without prior sanction of the Government, the Judicial Magistrate took cognizance of the offence and proceeded the case in C.C.No.559 of 2005.

6.Though some of the witnesses have been examined in this case by the trial Court, the petitioner need not be put under ordeal, when the entire proceedings is against law as already stated.

7.Considering the above facts, this Court is of the view that it is a fit case to invoke the inherent jurisdiction of this Court under Section 482 of Cr.P.C."

11 A reading of the above judgment makes it clear that for the purpose of taking cognizance of an offence under the Unlawful Activities (Prevention) Act, 1967, previous sanction of the Central Government or the State Government, as the case may be, becomes a sine quo non. The conjoint reading of the Sub Section (1) and (2) of Section 45 of the Unlawful Activities (Prevention) Act clearly stipulates that there shall be an authority for conducting an independent review of evidence gathered in the course of investigation and the authority who had review the materials, shall make a recommendation to the appropriate Government. It is only based on the report placed by the authority, the State Government or the Central Government, as the case may be, shall proceed to grant sanction.

12 In this case, admittedly the committee itself has been constituted by the State Government under Section 45 (2) of the Act, only in the year 2011 by virtue of G.O.Ms.No. 208 dated 25.03.2011. In this case, the final report has been filed in the



year 2009 and admittedly there was no independent authority that was in existence on the day, the sanction was granted by the State Government by letter dated 31.08.2009 and therefore, the very sanction that was granted becomes vitiated. Even though, it is true that the Central Government has given permission for the State Government to exercise the power to grant sanction for prosecution, the State Government can proceed to grant sanction only after getting the report of the independent committee which was constituted under Section 45 (2) of the Act. This mandatory requirement has not been fulfilled in this case. Therefore, the very sanction is non est in the eye of law.

13 In view of the above, the final report filed by the respondent police for an offence under Section 13(2) of the Unlawful Activities (Prevention) Act, 1967 and the cognizance taken by the Court below is illegal and this Court has to necessarily interfere with the same in exercise of its jurisdiction under Section 482 of Cr.P.C.. The petitioner need not be put into the ordeal of facing the trial in this case, in view of the non fulfilment of the mandatory requirement that has been discussed herein above.

14 In the result, proceedings of the court below in C.C.No.5516 of 2009 is hereby quashed and accordingly, Criminal Original Petition is allowed.

s/d-
Assistant Registrar(CS VIII)

True Copy

Sub-Assistant Registrar

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To

- 1.The Inspector of Police,
Dl, Triplicane Police Station,
Chennai-600 005.
2. The XIII Metropolitan Magistrate
Egmore, Allikulam Complex, Chennai
- 3.The Public Prosecutor,
High Court, Madras.

+1 CC to Mr.G.Devadoss, Advocate sr 80236.

+1 CC to Public Prosecutor, sr 80539.

+1 CC to Mr.G.Devadoss, Advocate sr 80236.(12/12/2018)

CrI.O.P.No.20417 of 2018

SP(10/12/2018)