

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.11 OF 2020

Union of India through
Central Bureau of Investigation-ACB,
Mumbai.

Applicant

versus

1. Ajoy Kumar Singh (A/1), Kolkatta.
2. The State of Maharashtra

Respondents

Ms.Ameeta Kuttikrishnan, Special P.P. for Applicant-CBI.

Mr.DineshTiwari with Mr.Mikhail Dey, Mr.Sumit Khanna i/by
Mr.Rajeev N. Kumar, Advocate for Respondent no.1.

Mr.A.R.Patil, APP, for Respondent no.2-State.

CORAM : PRAKASH D. NAIK, J.

DATE : 28th June 2022

PC :

1. The applicant/Union of India/CBI is aggrieved by order dated 6th December 2018 passed by Special Judge (CBI) in CBI Special Case No.100 of 2009 allowing application (Exhibit-213), directing CBI to provide documents to respondent no.1.

2. The FIR was registered by CBI vide RC 08(A)/2007-Mum on 22nd February 2007 against respondent no.1 u/s.109 of Indian Penal Code read with Section 13(2) r/w 13(1)(e) of Prevention of Corruption Act, 1988. In the FIR it was alleged that during the period from 16th December 1987 to 31st March 2005 the accused-respondent no.1 amassed disproportionate assets to the tune of Rs.95,32,424/- in his name and in the name of his wife and relatives.

During the course of investigation it was revealed that accused no.1 being public servant had acquired movable and immovable assets to the tune of Rs.3,07,97,136/- in his name and in the name of others during the period from 16th December 1987 to 23rd February 2007 against his likely savings of Rs.6,64,441/-. The wife of accused no.1 and his relatives aided and abetted accused no.1 in acquiring the assets. On completing investigation charge sheet was filed.

3. Respondent no.1 filed an application before Trial Court u/s.91 of Cr.PC seeking directions to CBI to provide documents. Learned Special Judge (CBI) allowed the said application vide order dated 6th December 2018 and directed CBI to provide following documents to accused :

a) Copy of report filed by CBI whilst initiating the procedure for sanction which is at page nos.125 to 339c, which was forwarded by DIG, CBI, ACB on 8-9-2009 to DG Vigilance-cum-CVO CBDDT, New Delhi;

b) Copy of the Forwarding Letter issued by SP, CBI, ACB, Mumbai dated 15-10-2009 (at pages 351-352c);

c) Draft Sanction Order forwarded by SP, CBI, ACB on 15-10-2009 to DGIT (V) & CVO, CBDDT (at pages 359-371/c);

d) Report of DGIT (V) & CVO, CBDDT, upon the CBI report (at pages 17-26/N);

(e) UO Note, dated 4-11-2009 (at pages 408-424/c);

(f) Letter/OM No.009/ITX/086/6409 dated 24-11-2009 issued by CVC (at page 432/C);

(g) DGIT (V), NZ/SUSP/01/07 and DGIT (V), WZ/CBI/04/07 given to CBI by the CVO CBDDT.

The applicant has challenged the said order before this Court.

4. Learned advocate for applicant submitted that order dated 6th December 2018 passed by Special Judge is contrary to law. The documents sought by the accused were not part of charge sheet. The application u/s.91 of Cr.P.C seeking documents was not maintainable in law. The Trial Court ought not to have been entertained such application at the stage of framing charge. The documents sought were not part of documents relied upon by prosecution in accordance with Section 207 of Cr.P.C. Such documents which are not part of charge sheet cannot be supplied. The prayer for supply of documents by prosecution at the stage of framing of charge was erroneous. The Trial Court has misconstrued Section 91 of Cr.P.C. The Trial Court has erroneously relied upon the decision in the case of Nitya Dharmananda @ Lenin and another Vs. Gopal Sheelum Reddy also known as Nithya Bhaktananda and another¹. The accused was seeking correspondence made by CBI with sanctioning authority which are not relied upon by CBI during trial.

5. Learned advocate for applicant has relied upon decision of Supreme Court in the case of **State of Orissa Vs. Debendra Nath Padhi**².

6. Learned advocate for respondent no.1 submitted that there is no infirmity in the order passed by Trial Court directing CBI to hand over documents to respondent no.1. Accused is entitled for such documents. Learned Trial Court has rightly allowed the application preferred by respondent no.1. The documents are in custody of CBI.

1 (2018)2-SCC-93

2 (2005)1-SCC-568

These documents were not deliberately included in the charge sheet. The copy of report filed by CBI while initiating the procedure for sanction were forwarded by DIG, CBI, ACB to DG-Vigilance cum CVO CBDT, New Delhi. Other documents viz forwarding letter issued by SP, CBI, ACB, Mumbai dated 15-10-2009, draft Sanction Order forwarded by SP, CBI, ACB dtd. 15-10-2009 to DGIT (V) & CVO, CBDT, report of DGIT (V) & CVO, CBDT, upon the CBI report, UO Note, dated 4-11-2009, Letter/OM No.009/ITX/086/6409 dated 24-11-2009 issued by CVC, DGIT (V), NZ/SUSP/01/07 and DGIT (V), WZ/CBI/ 04/07 given to CBI by the CCVO CBDT, are crucial before framing charge against accused. There was no legal bar to provide these documents to the accused. In the event documents are not furnished to the accused, it would affect his right to defend himself. The Trial Court has assigned reasons for allowing application. The ratio laid down by Supreme Court in the case of Nitya Dharmananda @ K. Lenin and another (supra) is squarely applicable in this case and the said decision has been taken into consideration by the Special Judge (CBI) while allowing the application. The respondent no.1 was entitled to call for such documents by invoking Section 91 of Cr.PC. Respondent no.1 cannot be deprived of these documents at the stage of discharge. The impugned order is an interlocutory order and the revision application challenging such order is not maintainable. In the revision application the CBI has not stated that documents are not vital and important. Hence revision application may be rejected.

7. Application u/s.91 of Cr.PC was preferred by respondent no.1 before Trial Court before framing of charge on the ground that documents enumerated therein are crucial before framing of charge

against accused. The application was opposed by prosecution by filing reply and contending that copies of all documents submitted along with charge sheet which are relied upon by prosecution, were provided to the accused. The accused are not entitled to get copy of each and every correspondence made during investigation and not relied upon by prosecution to prove the charges against accused. At the stage of charge accused cannot ask for production of any document for the purpose of proving his innocence. Only material produced before the Court u/s.173 of Cr.PC has to be looked into by the Court at this stage.

8. Learned Special Judge (CBI) relied upon the decision as stated hereinabove and allowed the application preferred by respondent no.1 directing CBI to provide documents to accused/respondent no.1. The documents are in the nature of correspondence exchanged by authorities more particularly during the process of sanction.

9. On completing investigation the investigating agency filed report/charge sheet before competent Court in accordance with Section 173 of Cr.PC. In the present case report/charge sheet was filed before competent Court. Provision of discharge in respect to the sessions triable case is enumerated u/s.227 of Cr.PC. Section 207 of Cr.PC mandates supply to the accused of copy of police report and other documents. The documents as contemplated u/s.207 were provided to the accused in the present case. Section 91 of Cr.PC relates to summons to produce documents or other things. The charge is yet to be framed. The accused had preferred application seeking documents on the ground that these are crucial at the stage of framing of charge.

10. In the case of State of Orissa Vs. Debendra Nath Padhi (supra), the Supreme Court has dealt with the scope of Section 91 of CrPC. It is observed in the said decision that any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is 'necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code'. The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the Court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. Insofar as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it, whether police or accused. If under Section 227 what is necessary and relevant is only the record produced in terms of Section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by court and under written order an officer

in charge of a police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof. Insofar as Section 91 is concerned, it was rightly held that the width of the powers of that section was unlimited but there were inbuilt, inherent limitations as to the stage or point of time of its exercise, commensurate with the nature of proceedings as also the compulsions of necessity and desirability, to fulfill the task or achieve the object. Before the trial court the stage was to find out whether there was sufficient ground for proceeding to the next stage against the accused. The Court is required to see the context of purpose of preferring application u/s.91 of Cr.PC. It would have to be borne in mind that law does not permit roving or fishing inquiry.

11. Applying aforesaid principles in the present case, it is evident that application preferred by respondent no.1 before Trial Court u/s.91 of Cr.PC at the stage of discharge should not have been entertained by the Trial Court.

12. Learned Special Judge while allowing the application has relied upon decision of Supreme Court in the case of Nitya Dharmananda @ K.Lenin and another (supra). The factual matrix of the said decision is that accused was charge sheeted for the offence u/s.376 of IPC. He approached High Court with a prayer that entire material available with investigator which was not made part of the charge sheet ought to be summoned u/s.91 of Cr.PC. The High Court reversed the order of Trial Court and allowed the application.

The said order was challenged before Supreme Court. The contention raised on behalf of appellant before Supreme Court was that decision of High Court was contrary to the law laid down in case of State of Orissa Vs. Debendra Nath Padhi (supra). The defence could not be considered at the stage of framing of charge. The contention of defence was that if the investigator is not fair and the material of sterling quality, though seized during investigation and available with him is deliberately left out from the charge sheet, there is no bar for the Court to summon the said material. The Supreme Court observed that it is settled law that at the stage of framing of charge, the accused cannot ordinarily invoke Section 91. However, the Court being under the obligation to impart justice and to uphold the law, is not debarred from exercising its power, if the interest of justice in a given case so require, even if the accused may have no right to invoke Section 91. To exercise this power the Court is to be satisfied that the material available with the investigator not made part of the charge sheet, has crucial bearing on the issue of framing of charge. The Supreme Court referred to decision in the case of Debendra Nath Padhi (supra). In paragraph 8 of the decision it was observed that while ordinarily the Court has to proceed on the basis of material produced with the charge sheet for dealing with the issue of charge but if the Court is satisfied that there is material of sterling quality which has been withheld by the investigator/prosecutor, the Court is not debarred from summoning or relying upon the same even if such document is not a part of the charge sheet. It does not mean that the defence has a right to invoke Section 91 of Cr.PC de hors the satisfaction of the Court, at the stage of charge. It is pertinent to note that Supreme Court in the said decision has set aside the order of High Court and directed the Trial

Court to proceed to deal with the issue of framing charge and proceed with the matter expeditiously. Thus, the order of High Court allowing application u/s.91 of Cr.PC was set aside by Supreme Court.

13. In the present case Trial Court has observed that it is desirable that accused be permitted to rely upon such documents to establish his innocence even at the stage of hearing of discharge application. The documents which are sought to be relied upon by the respondent n1o.1 are in the nature of correspondence. They do not form part of charge sheet. Even applying the ratio laid down in the case of Nitya Dharmananda @ K. Lenin and another (supra), the demand made by accused no.1 do not satisfy the requirement contemplated in the said decision. The decision delivered in the case of State of Orissa Vs. Deberndra Nath Padhi (supra) by three Judge Bench clearly indicate that jurisdiction u/s.91 of Cr.PC when invoked by accused, the necessity and desirability would have to be seen by the Court in the context of purpose and investigation, inquiry, trial or other proceedings under the Court. The impugned order cannot be termed as interlocutory order.

14. Considering the aforesaid aspects and law laid down in the decisions referred to hereinabove, impugned order is not tenable in law and deserves to be quashed and set aside.

ORDER

- (i) Criminal Revision Application No.11 of 2020 is allowed and disposed of accordingly;
- (ii) The impugned order dated 6thDecember 2018 passed by Special Judge (CBI), Court Room No.53, Greater Bombay under

Exhibit-213 directing CBI to provide documents to respondent no.1/
original accused no.1 in Special Case No.100 of 2009 is set aside.

(PRAKASH D. NAIK, J.)

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