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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 29th November, 2022
Pronounced on: 23rd December, 2022

\+ **CRL.M.C. 2364/2011**
SHO, ACB ..... **Petitioner**
Through: Mr. Suresh Tripathy, Advocate

versus

VIJAY KATARIA ..... **Respondent**
Through: Mr. Vikas Arora, Advocate

CORAM:
HON'BLE MR. JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA J.

1. The present petition under section 482 read with section 483 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'CrPC') seeks setting aside order dated 06.07.2011, passed by learned Special Judge (PC-Act) – 06, Tis Hazari Courts, Delhi, in CC No. 179/09, titled Vijay Kataria v. SHO Anti Corruption Branch, whereby upon a complaint instituted on behalf of the respondent herein under section 156(3) of CrPC, the learned Special Judge had directed the SHO, Anti-Corruption Branch to conduct an investigation and register an FIR under the relevant sections of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and the Prevention of Corruption Act, 1988 (hereinafter referred to as 'PCA') against the persons found to be guilty of the conspiracy, as alleged by the complainant, i.e, the respondent herein. The petitioner further

prays for quashing of proceedings pending before the learned Special Judge (PC Act) – 06, Tis Hazari Courts, Delhi in Case No. 020R016392009 and CC No. 179/09.

2. Briefly stated, the facts relevant for adjudication of the present petition are as under:

(a) A tender was floated by the Delhi Jal Board (hereinafter referred to as 'DJB'), inviting bids for laying clear water transmission mains from Sonia Vihar to various parts of Delhi.

(b) The said tender was awarded to M/S Larsen and Tourbo (hereinafter referred to as 'L&T') and the work was completed in 2004.

(c) On 26.09.2006, the respondent lodged a complaint before the Central Vigilance Commission (hereinafter referred to as 'CVC'), upon receipt of which the DJB conducted an enquiry and *vide* its report dated 09.10.2006, concluded that there was no substance in the allegations made in the complaint. The findings of the DJB were examined by the CVC and the complaint was closed *vide* letter dated 12.02.2008.

(d) Thereafter, on 20.04.2009, the respondent filed a complaint under Section 156(3) of CrPC before the learned trial Court alleging irregularities in the award of the aforesaid tender and illegalities committed by official of DJB and L&T. The complaint alleged that scrutiny of documents revealed fabricated and false entries and extra payments, made and withdrawn without any justification. It was further alleged that the security amount was released to the contractors without completion of the work with the motive of causing wrongful loss to the Government. It was alleged that at the time of awarding tenders, the provisions of CPWD manuals were violated, as a result of which the cost to be incurred in completion of the work was inflated and the work that would have ideally cost Rs. 47.5 crores was made to cost Rs. 170 crores. It is alleged that this resulted in excessive expenditure of the Government exchequer and unlawful gain to officials, including those of the DJB. Further technical irregularities in laying down the pipeline had also been alleged.

(e) *Vide* order dated 18.05.2009 (Annexure P3), the learned Special Judge, ACB called for a status report from the Anti-Corruption Brach of the Delhi Police, i.e., the petitioner herein. The status report filed on behalf of the petitioner in that regard on 04.09.2009 (Annexure P4), reflected that as per enquiry conducted on the complaint, the allegations made therein were not substantiated.

(f) On 01.05.2010 (Annexure P5), the learned Special Judge directed a re-investigation into the allegations and directed that the respondent shall render all and every assistance required by the investigating agency to reach to a conclusion. Pursuant to the said order, the petitioner filed another status report dated 07.09.2010 (Annexure P6), reiterating that the allegations made in the complaint were vague and not substantiated.

(g) On 16.12.2010 (Annexure P7), the learned Special Judge again directed further investigation with respect to the complaint. However, this time, the investigation was directed to be with respect to three specific points raised in the complaint, which are as under:

> "1. That 80166 mtr work had been done by the contractor while the payment had been made for 10823 mtrs.
> 2. That as per the terms of contract WCT tax @ 4% was required to be deducted while only 2% was deducted giving 2& benefit thereby causing loss to the exchequer.
> 3. Thirdly and finally the excise exemption was initially deducted and thereby refunded to the contractor which was against the contractor."

(h) In pursuance to the order dated 16.12.2010, the petitioner filed further status report dated 10.02.2011 (Annexure P8), concluding that the allegations made with respect to the aforesaid three points were also enquired into but no case was made out.

(i) On 06.07.2011, the learned Special Judge passed the impugned order and directed the SHO, ACB to register an FIR under the relevant provisions of the Indian Penal Code, 1860 and the Prevention of Corruption Act, 1988 and investigate the matter expeditiously.

3. Learned counsel appearing on behalf of the petitioner submits that the findings in the impugned order are not sustainable in law as the learned Special Judge had directed registration of FIR and investigation, nearly three years after the complaint was instituted and despite findings in various status reports to the effect that the allegations made in the complaint are baseless and no offence is made out. Learned counsel for the petitioner further submits that the impugned order has been passed without application of mind and the learned Special Judge has not recorded any reasons for disagreeing with the status reports on record for directing registration of FIR.

4. In support of his contentions, learned counsel appearing on behalf of the petitioner has placed reliance on the following judgments:

(i) Manohar s/o Manikrao Anchule v. State of Maharashtra and Anr., (2012) 13 SCC 14.

(ii) Union Public Service Commission v. Bibhu Prasad Sarangi &Anr., (2021) 4 SCC 516.

(iii) Harpal Singh Arora and Ors. V. State and Anr., W.P.(CRL.) 1009/2007.

(iv) Sarah Mathew v. Institute of Cardio Vascular Diseases By Its Director Dr. K.M. Cherian &Ors., (2014) 2 SCC 62.

(v) Abhinandan Jha & Ors. V. Dinesh Mishra, (1967) 3 SCR 668.

(vi) Emperor v. Khwaja Nazir Ahmad, AIR (32) 1945 Privy Council 18.

5. The respondent in his written submissions states as under:

(i) The respondent is now 65 years of age and has various health problems and financial issues owing to which he is unable to provide any further inputs in the present matter. He submits that nearly 12 years have elapsed since institution of the original case and the documents related to the case are not easily available anymore and in view thereof, prays that this Court pass any order as it deems fit in the facts and circumstances of the case.

(ii) The respondent opposes the authority of the SHO to approach this Court in appeal against the impugned order since there was no direction against the SHO and he was only required to execute the order passed by the learned Single Judge. In support of this contention, reliance is placed on a judgment of the Hon'ble Supreme Court in Sanjai Tiwari v. State of Uttar Pradesh 2020 SCC Online SC 1027.

(iii) That as per Section 19 of PCA, for passing an order under Section 156(3) of CrPC, prior sanction of the competent authority is required. It is submitted that the said position of law has also been laid down by the Hon'ble Supreme Court in Anil Kumar &Ors v. M.K. Aiyappa & Anr., (2013) 10 SCC 705 and by this Court as well in Ashish Kumar Aggarwal v. Vakil Ahmed, 2018 SCC On line Del 11339. In view thereof, it is submitted on behalf of the respondent that the impugned order cannot survive any longer as it has been passed without the requisite sanction.

6. Considered the submission of both the parties.

7. So far as regards the maintainability of the present petition is concerned, it may be noted that the SHO, ACB has not filed the present petition in his personal capacity. Learned counsel for the petitioner relies upon the notification bearing number F.8/380/2011/HP-II dated 04.10.2011 issued by the Hon'ble Lt. Governor, in exercise of powers conferred by section 24(3) of CrPC, which reads as under;

> "In exercise of powers conferred by sub-section (3) of section 24 of the Code of Criminal Procedure, 1973 (2 of 1974), read with the Government of India, Ministry of Home Affairs Notification No. 11011/2/74-UTL (i) dated the 20th March, 1974, the Lt. Governor of the National Capital Territory of Delhi, is pleased to appoint, Shri Suresh Chandra Tripathy, Advocate, as Special Public Prosecutor for filing appeal/conduct Criminal Case No. 179/09, Vijay Kataria Vs. SHO, Anti Corruption Branch, on behalf of State (Government

> of National Capital Territory of Delhi), in the Court of competent jurisdiction. He shall be paid a fee of Rs. 22,000/- toward each appearance, Rs. 11,000/- for drafting petition/rejoinder. Delhi Jal Board shall bear the fee of Shri Suresh Chandra Tripathy."

In view of the above, it is clear that the present petition has been filed with due authorisation from the competent authority. It is further noted that the aforesaid notification was issued after passing of the impugned order dated 06.07.2011 and therefore, it was the Govt. of NCT of Delhi who took the decision to challenge the said order through the SHO Anti-corruption Branch.

8. In the written submission, the respondent has fairly conceded that, in view of the Judgment of the Hon'ble Supreme Court in Anil Kumar & Ors. v. M.K. Aiyappa & Anr., (2013) 10 SCC 705, the impugned order dated 06.07.2011 cannot survive as there was no sanction under section 19(1) & 19(3) of the PCA. In Anil Kumar (*supra*) it has been held as under;

> "21….Once it is noticed that there was no previous sanction, as already indicated in various judgments referred to hereinabove, the Magistrate cannot order investigation against a public servant while invoking powers under Section 156(3) CrPC. The above legal position, as already indicated, has been clearly spelt out in *Paras Nath Singh* and *Subramanian Swamy* cases."

9. Even otherwise, the impugned order, in the considered opinion of this Court, should have considered the status reports filed by the petitioner before passing the directions assailed herein. The learned Special Court should have given reasons to disagree with the reports

filed by the petitioner. This Court in Harpal Singh Arora & Ors. v. State & Anr., 2008 SCC Online Del 530 has held as under;

> "16. Considering the fact that the learned MM called for the report of the CAW Cell, which is fairly detailed, the proper course of action before ordering an investigation under Section 156 (3) would have been to examine that report before deciding to issue a direction for investigation. When the police in the CAW Cell has come to conclusion that no cognizable offence is made out, the Magistrate cannot brush aside that conclusion lightly. Although that the said conclusion of the CAW Cell is not binding on the Magistrate at that stage, since his order is a judicial one he must give reasons, however brief, why he is inclined to order investigation notwithstanding the said report. Question (b) is answered accordingly."

10. Admittedly, the petitioner had filed as many as three status reports in pursuance to the directions issued by the learned Special Judge, as detailed hereinbefore. It may be pertinent to note that the learned Special Judge had even directed the scope of enquiry on certain points which were again inquired into and a status report was placed before the learned Special Judge. However, a bare perusal of the impugned order shows that the learned Special Judge chose to ignore the said status reports on record. The impugned order is, in fact, conspicuously silent about the said status reports. The power of the learned Special Judge to disagree with the status report is not in dispute, however, the same needs to be expressed in a manner which shows application of mind.

11. This Court is of the opinion that it would be a matter of propriety, that in cases where the status reports are called for by the Court concerned, before exercising power under Section 156(3) of Cr.P.C., the same should be duly considered. In the present case, the

learned Special Judge does not even record the fact that status reports were called for before passing the impugned order.

11. In view of the aforesaid, the present petition is partly allowed and the impugned order dated 06.07.2011, passed by learned Special Judge (PC-Act) – 06, Tis Hazari Courts, Delhi, in CC No. 179/09, titled Vijay Kataria v. SHO Anti Corruption Branch is set aside.

13. Be it noted that the observations made herein are not on the merits of the case.

14. The petition stands disposed of alongwith all the pending application(s), if any.

AMIT SHARMA
JUDGE

DECEMBER 23rd, 2022/*bsr*