

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

BEFORE:

The Hon'ble Justice Soumen Sen
and
The Hon'ble Justice Uday Kumar

MAT 1960 of 2023
CAN 1 of 2023
CAN 2 of 2023

Abhishek Banerjee
Vs.
Ramesh Malik & Ors.

With
MAT 1961 of 2023
CAN 1 of 2023
CAN 2 of 2023

Abhishek Banerjee
Vs.
Ramesh Malik & Ors.

For the Appellant : Mr. Abhishek Manu Singhvi, Sr. Adv.
Mr. Amit Bhandari, Adv.
Mr. Jishnu Saha, Sr. Adv.
Mr. Kishore Dutta, Sr. Adv.
Mr. Jishnu Chowdhury, Adv.
Mr. Rajarshi Datta, Adv.
Mr. Soumen Mohanty, Adv.
Mr. Ayan Poddar, Adv.
Mr. Piyush Kr. Ray, Adv.
Mr. Agnish Basu, Adv.

For the Respondent : Mr. Bikash Ranjan Bhattacharya, Sr. Adv.
/petitioner Mr. Sudipta Dasgupt, Adv.
Mr. Bikram Banerjee, Adv.
Ms. Dipa Acharyya, Adv.
Mr. Arka Nandi, Adv.

For the respondent no.13: Mr. Bikash Ranjan Bhattacharya, Sr. Adv.
 Mr. Firdous Samim, Adv.
 Ms. Gopa Biswas, Adv.
 Ms. Payel Shome, Adv.
 Ms. Sampriti Saha, Adv.
 Mr. Avijit Kar, Adv.

For the W.B.B.P.E. : Mr. Saikat Banerjee, Adv.
 Mr. Ratul Das, Adv.
 Mr. Kaushik Chowdhury, Adv.

For the DPSC, Hooghly : Mr. Biswabrata Basu Mallick, Adv.
 Mr. Biman Halder, Adv.

For the CBI : Mr. Billwadal Bhattacharyya, Ld. DSGI
 Mr. Arijit Majumdar, Adv.

For the ED : Mr. Dhiraj Trivedi, Ld. DSGI
 Mr. Billwadal Bhattacharyya, Ld. DSGI
 Mr. Samrat Goswami, Adv.

Order dated : 5th October, 2023

1. **The Court :-** Both the appeals and the applications are taken up together and disposed of by this common order.

2. The order passed by the learned Single Judge on 25th September, 2023 and 29th September, 2023 respectively are subject matter of challenge in this appeal.

3. The applicant is not a party in the writ petition. The applicant has filed an application for leave to prefer an appeal against both the orders on the ground that the learned Single Judge has assumed the role of a court of enquiry and/or a fact finding commission for the purpose of providing and/or returning

recommendation on alleged incident and/or offence which is clearly violation of the basic tenets of a court monitored investigation.

4. The grievance appears to be certain observations made in the order in relation to sensitive matters and confidential information which otherwise is not available in public domain until prosecution complaint is filed under the Prevention of Money Laundering Act, 2002. It has assumed the character of media trial by reason of live streaming of the proceeding. The information which are otherwise confidential are now made public. The learned Single Judge has proceeded on the basis of the materials filed in a sealed envelope which is likely to affect the rights of the appellant as he has not been given any opportunity before directions are given for disclosure based on the report. It is in the nature of an investigation which is not permissible in law.

5. Mr. Kishor Dutta, the learned Senior Counsel appearing on behalf of the appellant has raised objection on the aforesaid grounds.

6. Mr. Dutta has further submitted that in a court monitored investigation a court cannot assume the role of a prosecutor and interfere with the manner and mode of investigation. The learned Single Judge directed the Enforcement Directorate to call for information in relation to certain matters which is not permissible. It is only when there has been an infraction of the provision of a law that the complainant can take recourse to appropriate provisions under the Criminal Procedure Code or the law applicable to the investigation. It is submitted that the observation of the learned Single Judge that the assets disclosed by the appellant are inadequate and it calls for further

investigation is not the correct approach. It is for the investigating agency to decide and conduct the investigation.

7. Mr. Dutta submitted that courts ordinarily should stay away from the areas of investigation unless there are exceptional circumstances as investigation into crimes is the prerogative of the investigating agency. It is not the function of the court to monitor investigation process so long as such investigation does not transgress any provision of law and interference is only called for when there is an infraction of law. It must be left to the discretion of the investigating agency to decide the manner of investigation as interference at the stage of investigation is likely to prejudice if the trial is commenced against the accused. It is not the duty of the court to dictate the investigating agency the manner in which a person to be interrogated or the nature of question to be put to him. The purpose of monitoring investigation is to ensure that proper progress takes place without directing or channeling the mode or manner of investigation. It is argued that the court monitored investigation cannot be interchangeably used with the court supervised investigation as held in ***Manohar Lal Sharma v. Principal Secretary and Ors.***, reported in **2014(2) SCC 538**.

8. Mr. Dutta in reference to the said judgment has placed the observation made by the Hon'ble Supreme Court that: "Once the court supervise an investigation there is hardly anything left to the trial..... Trial becomes a farce".

9. Mr. Dutta has also referred to the decision in ***P. Chidambaram v. Director of Investigation*** reported in **2019(9) SCC 24** paragraphs 64 to 67 in aid of the aforesaid submission.

10. Mr. Dutta referred to the transcribed version of the proceedings of the court on 25th September, 2023 to show that remarks and observations have been made by the learned Single Judge in reference to the report filed by the ED in relation to the investigation made which involved confidential materials. The proceeding was live streamed. The information supposed to be confidential are now made public which is detrimental to the interest of the appellant.

11. Mr. Dutta has referred to the decision of the ***Directors Central Bureau of Investigation & Ors. v. Niyamavedi represented by its members K. Nandini, Advocate and others***, reported in **1995(3) SCC 601** to show that in the said decision the Hon'ble Supreme Court has stated that court should not disclose material content in police diaries and statements recorded during investigation.

12. It is submitted that the removal of the investigating officer recorded in the later order dated 29th September, 2023 is required to be read in the context of the observations made during hearing as it is a clear case of interference with the manner of investigation. Moreover, in view of the decision in SLP CRL NO.10029 of 2002 the court cannot direct completion of investigation within any particular period of time.

13. Mr. Dutta concludes the submission by referring to the decision in ***Shri Tapas Pal v. Biplab Kumar Chowdhury & Ors.*** reported in **2014 SCC**

OnLine Cal 19533 of this court in which on a reference Justice Nishita Mhatre as Her Ladyship then was in paragraph 39 of the said decision has distinguished the court directed or monitored investigation with court supervised investigation.

14. The appellant is not a party in the writ petition. In an earlier proceeding the appellant challenged the order of the learned Single Judge by which the application of the applicant for addition of party was rejected, *inter alia*, on the following reason:

“AB has averred in the application that he is a respected person in the society and a law abiding citizen of India. Being a Member of the Parliament the applicant ought to know that all citizens of the country are required to cooperate with any investigation conducted by the competent officers in accordance with law. It can be that the applicant, holding such high and responsible post, may be in the know of information which may be required and helpful for proceeding further with the scam case that is being investigated by the investigating officers.

The principle of adherence to natural justice thereby meaning that opportunity of hearing is to be given to a person prior to summoning him to give evidence is not the same in all branches of law. The said principle has a different connotation in a proceeding involving civil consequences but has an absolute contrary implication in a criminal proceeding. Application of the principle of natural justice in connection with PMLA and the predicate offences is practically nil.

Summoning a person for interrogation in connection with a public scam of such humungous magnitude does not ipso facto imply that coercive step will be taken against him; neither does it suggest that he is an

accused or a suspected accused. It is only when there is sufficient evidence of involvement of the said 18 person in the crime, that steps will be taken in accordance with law. But there is absolutely no requirement to hear a person prior to issuance of notice for appearing and deposing before the investigating officer. There is no application of the principle of natural justice requiring prior opportunity of hearing to be given to a person who may be required for investigating a crime.

There are enough safeguards in the Act itself where steps may be taken against the erring officers for vexatious searches. The offences under the PMLA are cognizable and non-bailable, subject to the conditions laid down. The Act has overriding effects and investigation under the Act is under exclusive jurisdiction and domain of ED. It is for the person who is charged with the offence of money laundering to disprove that he or she is not involved in the offence. Unless contrary is proved, presumption is that the accused is involved in money laundering.

Presumption of innocence is absent under the said Act. Anybody and everybody whose presence may be required by the investigating agencies are legally bound to cooperate with the investigation process. No matter how tall the person is, the law is always higher.”

15. In a Special Leave Petition being number SLP (C).11588-11589/2023 (Abhishek Banerjee v. Soumen Nandy & Ors.) preferred against the said judgment the Hon’ble Supreme Court declined to interfere with the order as would be evident from paragraphs 8 and 9 of the judgment of the Hon’ble Supreme Court dated 10th July, 2023. The said paragraphs read:

“8. Reading the order of the Single Judge in its entirety, it is evident that the Single Judge has duly applied her mind to the question whether the investigation should be stayed. The Single Judge was of

the view that such a direction could not be issued at the present stage to stultify the investigation.

9. We are inclined not to interfere with the impugned order since the consequence of doing so would be to stifle the investigation at the incipient stage. However, the petitioner is at liberty to pursue all remedies which are available in law, including under Section 482 of the Code of Criminal Procedure 1973. In the event that the petitioner takes recourse to such remedies as are available in law, the observations which are contained in the order dated 13th April, 2023 or in the impugned order dated 28th May, 2023 shall not stand in the way of the competent court dealing with such an application on its own merits.”

However, the award of cost was set aside.

16. Thereafter the investigation proceeded against many persons including the present petitioner. As it appears from record the petitioner was called as a witness and was directed to produce certain documents. Immediate cause for the appeal was the order passed by Justice Sinha following the email dated 16th September 2023 by which the applicant was directed to produce few documents by 28th September, 2023. In the mean time, on 27th September, 2023 ED issued a summon requiring the applicant to appear on 3rd October, 2023 with information/documents mentioned in Annexure ‘A’.

17. Mr. Dutta had remonstrated that whenever the appellant decides to participate in a rally a summon is slapped on his face in order to prevent him from participating in his political activity. This time also on 3rd October, 2023 the applicant was supposed to attend a program at New Delhi to the knowledge

of the ED and in order to scuttle it the Enforcement Directorate issued a notice on 27th September, 2023 requiring the appellant to be present on 3rd October, 2023. It appears from the first impugned order that the learned Single Judge was completely exasperated with the tardy progress and manner of investigation. When the court appointed an agency to investigate it has the power to monitor the said investigation and to ensure that the investigating agency conduct the investigation in a free, fair, impartial and time bound manner without any external interference (See ***Manoharlal Sharma*** (*supra*) paragraph 39).

18. The investigation was necessary in view enormity of questionable cash transactions in education recruitment scam. The magnitude of the scam is unfathomable. A fair investigation can only restore trust and faith in the system and it should be the endeavor of all to ensure that the culprits are brought to book and corrupts are punished. The entire gamut of investigation has two parts. CBI is already involved and ED is subsequently involved to find out the trail of money and the money laundering. The appellant was called as a witness. The process of investigation is continuing. The information required to be supplied in terms of the summon dated 27th September, 2023 are for the purpose of an investigation into the money trail and to bring out the truth. The truth has the ugly habit of raising its head. It is to unearth the truth a fair and speedy investigation is required. It is for that purpose the court is monitoring the investigation. We are unable to accept that the court is interfering with the investigation. Unlike an investigation which is made on the basis of a private

complaint it appears that the court on the basis of the materials on record decided to appoint ED to investigate into the money trail. The direction that was passed on 25th September, 2023 is not really interfering with the investigation but in the nature of an enquiry being made with regard to the documents that could be relevant but not called for by the ED as yet. In fact, we find prior to the order dated 25th September, 2023 on 16th September, 2023 many of the documents which form part of the first impugned order have been called for but the report was unsatisfactory might be because of unavailability of the information on the date of the report due to non-supply of the said documents. The order has referred to the memorandum of association of the company in which the appellant is the CEO. The bank account details of the company and its directors are relevant and essential to find out the trail of money. The court in monitoring the investigation of an agency appointed by it can always enquire from the investigating agency if all the information have been received as ultimately the final decision of the ED has to be based on the evidence collected. It becomes obvious that the report was inadequate with regard to essential matters. It seems that the report does not contain all the required information of the company and its directors. However, the court should not act as a prosecutor and should be cautious and careful in discussing matters forming subject matter of investigation as any observation of the court in relation to investigation might prejudice the person against whom the summon is issued and could be construed as a direction to the ED to conduct the investigation in a particular manner.

19. Dr. Singhvi, the learned Senior Counsel has referred to the transcriptions to show that the court proceeded as a prosecutor and few questions put to the officer of the ED can create a genuine apprehension in the mind of the petitioners that the purpose of investigation is to implicate him. We only say that some of the questions appearing in the transcript version were avoidable. However, we do not find any reflection of such questions in the impugned orders. The learned Single Judge perhaps was exasperated due to incomplete report and tardy progress of investigation.

20. Mr. Dhiraj Tribedi the learned DSGI has submitted that the ED is untiringly and diligently pursuing the investigation for the last nineteen months and have recovered Rs. 126 crores and large number of immovable properties have been attached and several persons have been arrested. We appreciate the anxiety expressed by Mr. Tribedi with regard to the comments made by the learned Single Judge about progress of investigation. Mr. Tribedi has submitted that one of the reasons for the delay is non disclosure of documents and information by the petitioner/appellant. The non disclosure of essential information has resulted in issuance of the summons.

21. The information and documents that are called for are essential which a high profile investigating agency like ED possibly could not have overlooked. The investigating officers entrusted should be skilled enough to decide the nature of information and documents to be called for and expected to have experience to deal with matters concerning money laundering. Failure to call for information and documents essential for the investigation could be fatal

and may create a public perception of lack of probity. ED has dedicated skilled investigators and we would expect that the investigation proceeds on a right direction. As a statutory authority it is bound by the procedure laid down in the statutes and must act with utmost probity and with the higher degree of dispassion and fairness.

22. The summons were issued only to elicit information with regard to the affairs of the company in which admittedly the applicant was the director for almost two years and presently the CEO. Huge unaccounted money has been recovered from the Chief Operating Officer of the company. He is presently in custody. The appellant is a Member of Parliament. The disclosure cannot cause any prejudice to him. It is expected that he should cooperate with the investigation. Dr. Singhvi has assured that the applicant shall furnish all information and documents within a week. We direct the applicant to disclose all document and information sought from him till date on or before 10th October, 2023. The investigation is pending for almost 19 months and any further delay would be prejudicial for all.

23. Upon receiving all the documents and information, ED shall examine it and in the event the ED is of the opinion that the presence of the applicant is necessary, shall issue summons for appearance of the applicant by giving him a notice of 48 hours in advance. It is needless to mention that ED in taking such decision shall act fairly, impartially and shall not be swayed by any observation appearing from the transcribed version claimed to be authentic

disclosed in this proceeding. The ED shall act strictly in accordance with law and in terms of the impugned orders.

24. We would expect the entire investigation to be concluded by 31st December, 2023. The appellant shall cooperate with the E.D. in all respect. However, the E.D. shall not call the applicant between 19th October, 2023 and 26th October, 2023. We expect the applicant to appear as and when his presence is required by E.D.

25. Before we conclude, we like to observe that the learned Single Judge in proceeding with the matter shall keep in mind that in monitoring the investigation, no adverse remark shall be made against any of the persons against whom the investigation is pending as it is likely to prejudice his rights in the event any proceeding is ultimately initiated upon conclusion of the investigation. The endeavour of the Court shall be to ensure a fair, speedy, impartial and time-bound investigation. It is to be remembered that any adverse observation against any of the persons summoned could be prejudicial to the interest of the said person and is likely to influence the investigation and the trial. The endeavour would be to ensure that the investigating agency gather and collate all required and relevant information and file its final report following the procedure prescribed in law with regard to the outcome of the investigation. In the instant case the learned Single Judge has not transgressed the jurisdiction. The directions with regard to disclosure of information and documents in the impugned orders has to be read in the context of the email of 16th September, 2023 and consequence of non disclosure of such documents.

The ED could not file a proper report due to insufficient materials. ED has admitted that such information are essential for a fair investigation. Even for an action to be initiated under Section 19 of the PMLA Act 2002 the authority has to form an opinion on the basis of the material gathered during investigation.

26. The appellant is also entitled to know the outcome of the investigation and can legitimately expect a quick conclusion of the investigation.

27. We hope and trust that the learned Single Judge shall ensure that the report filed or to be filed are kept confidential as it is likely to hamper the investigation and may prejudice the parties against whom the investigation is pending. The information shared and/or to be shared with the Court by the Investigating Agency are to be kept confidential.

28. The E.D. must also ensure that all materials collected and/or gathered during investigation and all documents supplied by the parties during investigation are kept confidential during the period of investigation.

29. A point of maintainability of the application for leave to appeal has been raised. Although, the decision of the learned Single Judge with regard to addition of party was upheld by the Hon'ble Supreme Court, we feel that in the pending proceeding if the appellant is aggrieved by the observations that are likely to adversely affect his participation during investigation, he may have a right to raise objection as the constitutional Court is duty-bound to ensure preservation of rights under Articles 20 and 21 of the Constitution of India. However, in the instant case there is no observation in the impugned orders that can be prejudicial to the applicant and he cannot be a person aggrieved. The

grievance is with regard to few observations found place in the transcribed version claimed to be authentic. However, no such observation has found its place in the impugned orders. The constitutional court cannot shut its eyes if there are glaring discrepancies or insufficiency of materials. The result of the investigation would be also relevant to decide the matters pending before the learned Single Judge. The investigating agency shall conduct the investigation in accordance with law.

30. With the aforesaid observations, both the appeal and the connected applications are disposed of.

31. However, there shall be no order as to costs.

32. Urgent Photostat certified copy of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Uday Kumar, J.)

(Soumen Sen, J.)