

Items- 25-01-2024
38&39.

sg Ct. 8

MAT 192 of 2024
CAN 1 of 2024

Backward Classes Welfare Department
Versus
Itisha Soren & Ors.

And

MAT 193 of 2024
CAN 1 of 2024

Backward Classes Welfare Department
Versus
Itisha Soren & Ors.

Mr. Kishore Dutta, ld. AG
Mr. Biswabrata Basu Mallick, Adv.
Ms. Parna Roy Choudhury, Adv.
...for the appellants
Mr. Sirsanya Bandopadhyay, Adv.
Mr. Arka Kumar Nag, Adv.
Ms. Deboleena Ghosh, Adv.
...for the respondent no.8
Mr. Indranil Roy, Adv.
Mr. Sunit Kumar Roy, Adv.
...for the National Medical Commission
Mr. Billwadal Bhattacharyya, Ld. DSGI
Mr. Arijit Majumdar, Adv.
...for the CBI
Mr. D.N. Maiti, Adv.
Ms. A. Singh, Adv.
...for the respondent no.9
Mr. U.S. Menon, Adv.
Mr. Abhirup Chakraborty, Adv.
...for the respondent no.5
Mr. Raju Mondal, Adv.
Ms. Keya Surtodhar, Adv.
...for the respondents

1. The server copies of the impugned orders filed in Court today are taken on record.
2. The impugned orders shall be tagged with the memo of appeal subject to the undertaking that they shall give a requisition and file the certified copies within the period

of limitation.

3. By consent of the parties, both the appeals and the applications are taken up together for hearing.

In Re: **193 of 2024 with CAN 1 of 2024**

4. We have heard the learned Counsel for the parties. Yesterday (24th January, 2024) we passed a detailed order staying involvement of the CBI in relation to alleged fake tribal certificate. We have also directed the learned Registrar General to communicate to the CBI that the presence of CBI at 2:30 PM on 24th January, 2024 is not necessary.

5. Mr. Biswabrata Basu Mallick, learned Additional Government Pleader appears on behalf of the State and submits that he personally had informed the office of the learned Registrar General about the aforesaid order. However, it appears that an officer from the CBI had appeared before the learned Single Judge pursuant to the communication received from the office of the learned Registrar General being Memo No. 1096-RG dated 24th January, 2024 notwithstanding our clear direction that the impugned order shall remain stayed for two weeks subject to certain undertakings. We have been informed by the defendant concerned that appellant had filed the Memorandum of Appeal by 4.30 pm. and stay petition soon thereafter. The undertakings given by the State was duly complied with on that day itself.

6. Yesterday when we passed the order, we did not have the

opportunity to go through the impugned order since the impugned was not uploaded in the server. When the impugned direction was passed considering the urgency of the matter and that only few hours were left for the State to hand over the investigation to CBI, we exercised our jurisdiction and kept this matter today to look afresh to the order which, in fact, has been produced today during hearing.

7. In view of the fact that we have stayed the order passed during the first half of 24th January, 2024, the subsequent order passed by the learned Single Judge during the second half of the day is *void ab initio*. On the teeth of our order, the direction for handing over of the papers to the CBI could not have been passed.
8. CBI is directed to forthwith return all the documents collected from the Court by 29th January, 2024 without retaining any copy thereof to the learned Advocate-on-Record for the State and shall not proceed with the matter any further.
9. Mr. Billwadal Bhattacharyya, learned Deputy Solicitor General of India has submitted that the order passed in the first half of 24th January, 2024 has been received by them at around 9:50 PM and earlier to that, a communication was received from the office of the learned Registrar General vide Memo No. 1096-RG dated 24th January, 2024 prior to the matter being taken up by the learned Single Judge in the second half. Since our order was not communicated to the CBI in obedience to the order passed

by the learned Single Judge, the officer from the CBI was present in Court.

10. We accept the explanation offered on behalf of the CBI in proceeding with the impugned order in relation to handing over of papers and registration of FIR passed by the learned Single Judge.
11. Mr. Raju Mondal, learned Counsel appears on behalf of the writ petitioner has submitted that it has been specially brought to the notice of the learned Single Judge that the order directing presence of CBI to collect papers has been stayed by the Appellate Court.
12. However, there is no reflection of such submission in the order dated 24th January, 2024 passed in the second half of the day. The order records that the State is not represented and no one from the State has intimated to the learned Single Judge about such thing.
13. Without entering into such controversy, we feel that the State ought to have been present and brought it to the notice of the learned Single Judge about the order passed in the first half of the day. It appears that there has been a miscommunication for which the second impugned order was passed.
14. We are sure that had it been brought to the notice of the learned Single Judge that in the first half of 24th January, 2024 we have stayed operation of the order to the extent of involvement of CBI, the learned Single Judge could not have directed the papers to be handed over to the officer of CBI.

15. The order dated 24th January, 2024 passed in the second half of 24th January, 2024 and forming the subject matter of MAT 193 of 2024 is set aside. The appeal being MAT 193 of 2024 and the application being CAN 1 of 2024 are, accordingly, disposed of.
16. The FIR, if any registered, shall, accordingly, stand quashed.

In Re: **MAT 192 of 2024 with CAN 1 of 2024**

17. Today we had the benefit to consider the order dated 24th January, 2024 as the server copy has been produced at the time of hearing. Yesterday we passed a limited order after recording the submission made on behalf of the parties. It appears that the learned Single Judge has proceeded on the basis that in a writ application where a corrupt practice is apparent, without any prayer for addition of CBI or ED or for constitution of SIT the inherent power of the writ court to pass appropriate orders to unearth the scam is not affected. The order impugned records that the Advocate general handed over some documents which were counter signed by the Assistant Court Officer of the Court. The said documents were directed to be handed over to CBI keeping copy thereof in the record. The basis for directing CBI to intervene is due to an instance that had happened with one person name Sk. Sajahan, who could not be arrested by ED officials. The relevant paragraph is reproduced below:

“The police of this State have not been able to arrest one culprit Sk. Sajahan in recent Sandeshkhali raid by E.D.

who dared to touch the ED officials of this country which means that the Union of India has been touched by some miscreants. Therefore, I cannot place any faith upon such police authority, though I believe that they are efficient enough if they are allowed to work. But in several matters it come to light that police authority fails to take right steps to investigate crimes.

Therefore, this matter is to be investigated by CBI.

Before the State goes to the Hon'ble Supreme Court in connection with this order in appeal, I would expect that the State would disclose what is the total amount that has been spent by it for resisting the orders of this court in respect of CBI investigations by way of appeals and application in Supreme Court in education appointment matters. This court and also the inhabitants of this State have the right to know what is the total amount that have been spent for filing cases in Supreme Court by the State to resist the CBI investigation in those matters of illegal appointment.

Learned Advocate General has submitted that he has not been heard though he has been given sufficient opportunity of hearing and the documents those have been countersigned by the ACO of this court (and to be handed over to CBI) were taken in view of his submission. He also said that this court has not allowed him to place these documents. He has also said that these documents should come up by way of pleadings. Such documents have been accepted by this court.

However, at the very beginning of the hearing he wanted to hand over these documents without any pleadings.

I direct the Registrar General of this court to communicate to CBI officer as to appearing before this court at 2:30 p.m. today to take those papers as indicated above and to start investigation in this matter forthwith by filing FIR."

18. In our order passed on the previous day we have touched upon the issues on the basis of the oral submission made by the parties. The incident at Sandeshkhali in our considered opinion cannot have any relevance in the instant case for directing CBI to take over investigation and registered FIR. In fact, it would be evident from the impugned order that the learned Advocate General was

not even heard. Learned Advocate General submitted before us that he was not given any opportunity of hearing. The court however records that he has been given sufficient opportunity of hearing. In any event, before directing the CBI to come into the picture, the learned Single Judge ought to have arrived at a finding that in the given facts and circumstances of the case the impartiality of the State Investigating Agency is highly questionable. In the instant case, the learned Advocate General has demonstrated yesterday that steps have been taken by the State Investigating Agency much prior to filing to the writ petitioner. It does not prima facie show that the investigating agency is acting in dereliction of its duty or had failed to act impartially. In fact the learned Counsel for the writ petitioner has also submitted that the writ petitioner is not inclined to have a CBI investigation. It was on such consideration, the interim order passed by us on 24th January, 2024 shall continue for a period of four weeks or until further order whichever is earlier.

19. Even if a prayer is made for CBI investigation or investigating by impartial agency it is settled law that the court shall not grant such relief on mere asking. The extraordinary power must be exercised sparingly and cautiously and in exceptional circumstances only when it becomes necessary to provide credibility and instill confidence in investigation or where the incident may have national and international ramification or such an order may be necessary for doing complete justice and

enforcing fundamental rights. The court is required to come to a conclusion that on the basis of the material it can be safely concluded that such material does disclose a prima facie case in our view for an investigation by CBI or any other similar agency.

20. In a situation where the case involves police authorities and high police officials are involved in the alleged crime, the court may be considered in such circumstances to handover investigation to an independent agency like CBI. The Apex Court in numerous decisions has cautioned that the extraordinary power of the constitutional case under Article 32 and 226 respectively on direction to CBI to conduct investigation must be exercised with more caution which cannot be passed merely because the parties have level some allegations against some public officials. It is only in exceptional situations that the court may direct CBI or independent agency to investigate replacing the state agency where it become necessary to provide credibility and instill confidence in the investigation. The contextual and attended circumstances have to be singularly evaluated and analysed to decide necessity of further investigation or investigation by an impartial agency. In a fairly recent judgment in *Anant Thanur Karmusi vs. State of Maharashtra & Ors.*, reported in 2023 (5) SCC 820 the Hon'ble Supreme Court in paragraph 34 has held as under:

34: *In the case of Himanshu Kumar & Ors. (supra), this*

Court had occasion to consider the power of the Court to transfer investigation to any other independent agency. After taking into consideration the catena of judgments on the point, it is reiterated that investigation may be transferred to the CBI only in "rare and exceptional cases". In paragraphs 44 to 53, it is observed and held as under:

44. It is now settled law that if a citizen, who is a de facto complainant in a criminal case alleging commission of cognizable offence affecting violation of his legal or fundamental rights against high Government officials or influential persons, prays before a Court for a direction of investigation of the said alleged offence by the CBI, such prayer should not be granted on mere asking.

45. A Constitution Bench of this Court, in the case of the State of West Bengal v. Committee for Protection of Democratic Rights, West Bengal, reported in (2010) 3 SCC 571, has made the following observations pointing out the situations where the prayer for investigation by the CBI should be allowed:

70.... In so far as the question of issuing a direction to CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such powers should be exercised, but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory

investigations.

46. In the above decision, it was also pointed out that the same court in Secretary, Minor Irrigation & Rural Engineering Services, U.P. v. Sahngoo Ram Arya, (2002) 5 SCC 521, had said that an order directing an enquiry by the CBI should be passed only when the High Court, after considering the material on record, comes to the conclusion that such material does disclose a prima facie case calling for an investigation by the CBI or any other similar agency.

47. In an appropriate case when the Court feels that the investigation by the police authorities is not in a proper direction, and in order to do complete justice in the case and if high police officials are involved in the alleged crime, the Court may be justified in such circumstances to handover the investigation to an independent agency like the CBI. By now it is well-settled that even after the filing of the charge sheet the court is empowered in an appropriate case to handover the investigation to an independent agency like the CBI.

48. The extraordinary power of the Constitutional Courts Under Articles 32 and 226 respectively of the Constitution of India qua the issuance of directions to the CBI to conduct investigation must be exercised with great caution as underlined by this Court in the case of Committee for Protection of Democratic Rights, West Bengal (supra) as adverted to herein above, observing that although no inflexible guidelines can be laid down in this regard, yet it was highlighted that such an order cannot be passed as a matter of routine or merely because the parties have levelled some allegations against the local police and can be invoked in exceptional situations where it becomes necessary to provide credibility and instill confidence in the investigation or where the incident may have national or international ramifications or where such an order may be necessary for doing complete justice and for enforcing the fundamental rights.

49. We are conscious of the fact that though a satisfaction of want of proper, fair, impartial and effective

investigation eroding its credence and reliability is the precondition for a direction for further investigation or re-investigation, submission of the charge sheet ipso facto or the pendency of the trial can, by no means, be a prohibitive impediment. The contextual facts and the attendant circumstances have to be singularly evaluated and analyzed to decide the needfulness of further investigation or re-investigation to unravel the truth and mete out justice to the parties. The prime concern and the endeavour of the court of law should be to secure justice on the basis of true facts which ought to be unearthed through a committed, resolved and a competent investigating agency.

50. The above principle has been reiterated in K.V. Rajendran v. Superintendent of Police, CBCID South Zone, Chennai, (2013) 12 SCC 480. Dr. B.S. Chauhan, J. speaking for a three-Judge Bench of this Court held:

13....This Court has time and again dealt with the issue under what circumstances the investigation can be transferred from the State investigating agency to any other independent investigating agency like CBI. It has been held that the power of transferring such investigation must be in rare and exceptional cases where the court finds it necessary in order to do justice between the parties and to instil confidence in the public mind, or where investigation by the State police lacks credibility and it is necessary for having "a fair, honest and complete investigation", and particularly, when it is imperative to retain public confidence in the impartial working of the State agencies....

51. Elaborating on this principle, this Court further observed:

"17.... the Court could exercise its constitutional powers for transferring an investigation from the State investigating agency to any other independent investigating agency like CBI only in rare and exceptional cases. Such as where high officials of State authorities are involved, or the accusation itself is against the top officials of the

investigating agency thereby allowing them to influence the investigation, and further that it is so necessary to do justice and to instil confidence in the investigation or where the investigation is prima facie found to be tainted/biased."

52. *The Court reiterated that an investigation may be transferred to the CBI only in "rare and exceptional cases". One factor that courts may consider is that such transfer is "imperative" to retain "public confidence in the impartial working of the State agencies." This observation must be read with the observations made by the Constitution Bench in the case of Committee for Protection of Democratic Rights, West Bengal (supra), that mere allegations against the police do not constitute a sufficient basis to transfer the investigation.*

53. *In Romila Thapar v. Union of India, (2018) 10 SCC 753, one of us, A.M. Khanwilkar, J., speaking for a three-Judge Bench of this Court (Dr. D.Y. Chandrachud, J. dissenting) noted the dictum in a line of precedents laying down the principle that the Accused "does not have a say in the matter of appointment of investigating agency". In reiterating this principle, this Court relied upon its earlier decisions in Narmada Bai v. State of Gujarat, (2011) 5 SCC 79, Sanjiv Rajendra Bhatt v. Union of India, (2016) 1 SCC 1, E. Sivakumar v. Union of India, (2018) 7 SCC 365, and Divine Retreat Centre v. State of Kerala, (2008) 3 SCC 542. This Court observed:*

"30...the consistent view of this Court is that the Accused cannot ask for changing the investigating agency or to do investigation in a particular manner including for court-monitored investigation."

54. *It has been held by this Court in CBI v. Rajesh Gandhi, 1997 Cri. LJ 63, that no one can insist that an offence be investigated by a particular agency. We fully agree with the view in the aforesaid decision. An aggrieved person can only claim that the offence he alleges be investigated properly, but he has no right to claim that it be investigated by any particular agency of his choice.*

55. *The principle of law that emerges from the precedents*

of this Court is that the power to transfer an investigation must be used "sparingly" and only "in exceptional circumstances". In assessing the plea urged by the Petitioner that the investigation must be transferred to the CBI, we are guided by the parameters laid down by this Court for the exercise of that extraordinary power."

21. We do not find any reflection in the order as to the necessity of exercising such extraordinary power. The incident in Sandeshkhali, in our considered opinion, cannot have any relevance to the case in issue.
22. Mr. Advocate General in fact had referred to the observation of Justice Abhijit Gangopadhyay with regard to Sandeshkhali incident as one of the reasons for the CBI investigation, in the instant case which appears to be substantially correct. We perused the impugned order although the order was not available at that time when the prayer was made. However, it appears that the circumstances narrated by the learned Advocate General in aid of a prayer for stay of direction upon CBI to collect papers and register FIR appeared to be substantially correct. In fact, notwithstanding our order the learned Single Judge had directed the CBI to collect the paper and the CBI had submitted before this court that FIR has been registered pursuant to the observation made by Justice Gangopadhyay in the court. If we had hesitated to entertain such oral prayer with the undertaking in course of the day to file the Memorandum of Appeal, prejudice would have been caused to the state to conduct the enquiry and the investigation would have been shifted from the state machinery to CBI.

23. Moreover, the learned Single Judge has ignored the submission made by the learned Advocate General that both criminal and disciplinary proceedings have been initiated against the erring officials and it is still continuing.
24. Although learned Advocate General and the learned Counsel for the writ petitioner had jointly prayed to decide the writ petition itself along with the appeal, we declined to accept such request as we are of the view that the writ petition can be more appropriately dealt with by justice Gangopadhyay.
25. The office of the learned Registrar General must file a report for not communicating our order dated 24th January, 2024 to the CBI as in paragraph 8 of our order, we have specifically directed the learned Registrar General to communicate to the CBI that the presence of an officer from CBI at 2:30 PM could not be necessary in view of the stay of operation of the impugned order.
26. The learned Registrar General shall file a report indicating the circumstances under which the order of the learned Single Judge was communicated to the CBI notwithstanding stay of operation of the said order and passed on the same day before the lunch recess.
27. This report may be filed on or before 5th February, 2024 and the same may be placed in MAT 192 of 2024.
28. A copy of memorandum of appeal and a copy of the stay petition shall be served upon all the unserved respondents by 30th January, 2024.

29. The interim order passed by us on 24th January, 2024 shall continue for a period of four weeks from date or until further order whichever is earlier.
30. The learned Counsel for the writ petitioner has prayed for his admission in a suitable college.
31. We have already observed in our earlier order that the issue may be raised before the learned Single Judge as we have not stayed any other part of the order forming subject matter of the writ petition.
32. An affidavit of service shall be filed on the adjourned date.

(Uday Kumar, J.)

(Soumen Sen, J.)