

A UNION OF INDIA AND ORS.
v.
SUSHIL KUMAR MODI AND ORS.

JANUARY 24, 1997

B [J.S. VERMA, K. RAMASWAMY AND S.P. BHARUCHA, JJ.]

Constitution of India, 1950 : Article 136

C *State of Bihar—Scam—Order passed by Supreme Court—As a sequel thereto writ petitions decided by Patna High Court—Observations made by Patna High Court—Validity of.*

D *Investigation—Monitoring by Court—Continuous Mandamus—Purpose of proceedings is essentially to ensure performance of statutory duty by C.B.I. and other Government Agencies in accordance with law for proper implementation of Rule of Law.*

E *State of Bihar—Scam—Investigation—Monitoring of by Court—Role of High Court in monitoring—Difference of opinion between CBI and other Officers during investigation—Held in such a case final decision should not be taken by the Director C.B.I. or any other officer but by Attorney General on reference being to him—Personal presence of Director CBI during investigation—Held may be required only when it is essential for a purpose which cannot be served by presence of the other Officers of C.B.I.—However it is the duty of Director C.B.I. to ensure proper representation in the Court—Suggestion by High Court to Director CBI to consider desirability of not involving any Officer of Bihar Cadre in the investigation—Held such observation do not cast any aspersion on the Officers of C.B.I.—While monitoring the investigation process High Court should not enter into the merits of any of the accusations.*

F *Union of India & Ors. v. Sushil Kumar Modi & Ors., [1996] 6 SCC 500 explained.*

G *Vineet Narain & Ors. v. Union of India & Anr., [1996] 2 SCC 199; Anukul Chandra Pradhan v. Union of India & India & Ors., [1996] 6 SCC 354; R. v. Metropolitan Police Commissioner, (1968) 1 All. E.R. 763; Vineet Narain & Ors. v. Union of India & Anr., (1996) 3 Scale (SP) 15 and Abhinandan Jha v. Dinesh Mishra, AIR (1968) SC 117 = [1967] 3 SCR 668, referred*

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CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 304-305 A
of 1997.

From the Judgment and Order dated 13.11.96 and 19.12.96 of the Patna High Court in C.W.J.C. No. 1617 and 602 of 1996.

Ashok H. Desai, Attorney General of India, T.R. Andhyarujina, Solicitor General of India and P. Parmeswaran, A. Mariarputham and Pallav Shishodia for the Appellants. B

Ram Jathmalani for the Respondent No. 1.

Arun Jaitley, Ravi Shankar Prasad and Ms. Kamini Jaiswal for the Respondent No. 3. C

Basant K. Chaudhary, Prashant K. Chaudhury, Pramod Kumar, Gopal Singh and Ms. Vimla Sinha for the Respondent No. 2.

Dr. Rajeev Dhawan, P.K. Shahni, B.K. Chaudhary, Pramod Kumar, Gopal Singh and Ms. Vimla Sinha for the Respondent No. 11. D

B.B. Singh for the State of Bihar.

The following Order of the Court was delivered : E

Leave granted. This order has to be read in continuation of our order dated November 5, 1996 passed in Civil Appeal Nos. 14164-65 of 1996, *Union of India & Ors. v. Sushil Kumar Modi & Ors.*, reported in [1996] 6 SCC 500. These appeals by special leave are against some portions of the orders dated November 13, 1996 and December 19, 1996 passed by the Patna High Court in the same matter-CWJC No. 1617 of 1996 with CWJC No. 602 of 1996-as a sequel thereto. The material facts need not be reiterated as they are mentioned in our aforesaid order dated November 5, 1996. F

When the matter was taken up in the Patna High Court subsequent to our aforesaid order dated November 5, 1996, during the further proceedings after our order, the High Court has made the two orders dated November 13, 1996 and December 19, 1996. The learned Attorney General, on behalf of the appellants, has indicated certain portions of these two orders and contended that they do not match with our earlier order dated H

A November 5, 1996. It would be appropriate at this stage to quote those portions of the two orders to which grievance is made by the leaned Attorney General. These are :

In order dated November 13, 1996 :

B *Portion 'A' :*

C "The Supreme Court has not laid down the modality of making reference to the Attorney General in case of difference of opinion. What if the Director does not make the reference on his own. According to us, this can be sorted out by asking the Director, CBI, to submit the complete report(s) submitted by the Joint Director and/or other investigating officers so that in the event Court finds that there is difference of opinion, which requires resolution by the Attorney General, the same may be referred to him."

D *Portion 'B' :*

E "The aforesaid aspects of the matter as also other aspects, which were briefly mentioned during the course of hearing today, can be more properly and effectively discussed in the presence of the Director, CBI himself. He is also to be told about the import of the Supreme Court's orders. We are, therefore, of the opinion that the next hearing, of the opinion that the next hearing should taken place in his presence."

F In order dated December 19, 1996 :

Whole of para 4, particular the following :

Portion 'C' :

G "..... the present case is the only case of its kind in which investigation is being monitored by the High Court.....in the interest of proper and effective monitoring of the case we think it appropriate to direct that the final report which is submitted to the CBI Headquarters/Director be submitted in its original form The correct position, which emerges from the order of the Supreme Court, is that the report of the Joint Director is not to be submitted

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to this Court directly, the same has to be sent to the Director, CBI/Headquarters and then the same is to be filed in this Court. As indicated above, there is a very thin line of distinction between vetting and editing and if this authority to vet the report submitted to him is given to the Director, he may as well edit a part of it. The proper course, no doubt, would be to hold discussions across the table between the Director, Joint Director and others whose presence may be considered necessary so that differences, if any, between them are ironed out and a unanimous report is submitted. However, if such unanimity is not possible to arrive at, the Director must submit the original report as submitted to him along with his comments/views so that this Court may consider that too and issue appropriate directions."

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In para 5, the following :

Portion 'D' :

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"..... In those cases also the conspiracy angle does not appear to have been gone into, which is so vital for proper investigation into the crimes and in respect of which judicial finding has been recorded in the main judgment."

In para 6, the following :

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Portion 'E' :

"In this connection we would also like to impress upon the Director to consider in consultation with the Joint Director the desirability of posting/retaining officers, who do not belong to this State or the state cadre. Keeping in view the involvement of a very large number of persons of different hue and kind, chances of their influencing persons having local background cannot be ruled out.....".

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In para 8, the following :

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Portion 'F' :

".... The reports contain materials which constitute *prima facie* case against the persons concerned and it is not understandable as to why chargesheet cannot be submitted on the basis of the materials

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A referred to therein....."

The learned Attorney General submitted that the above extracts of the two orders made by the High Court, in particular, are unwarranted apart from certain other observations therein which could have been avoided. In reply

B Shri Ram Jethmalani submitted that the observations of the High Court have to be understood in the context as indicating the manner in which the Central Bureau of Investigation (CBI) is required to conduct the investigation. He submitted that a grievance of this kind by the CBI does not appear to be appropriate.

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At the outset, we would indicate that the nature of proceedings before the High Court is somewhat similar to those pending in this Court in Writ petition (Crl.) Nos. 340-343 of 1993, *Vineet Narain & Ors. v. Union of India & Ors.*, and Writ Petition (Civil) No. 640 of 1995, *Anukul Chandra*

D *Pradhan v. Union of India & Ors.*, and, therefore, the High Court is required to proceed with the matter in a similar manner. It has to be borne in mind that the purpose of these proceedings is essentially to ensure performance of the statutory duty by the CBI and the other Government agencies in accordance with law for the proper implementation of the rule law. To achieve this object a fair, honest and expeditious investigation into

E every reasonable accusation against each and every person reasonably suspected of involvement in the alleged offences has to be made strictly in accordance with law. The duty of the Court in such proceedings is, therefore, to ensure that the CBI and other Government agencies do their duty and do so strictly in conformity with law. In these proceeding, the Court is

F not required to go into the merits of the accusation or even to express any opinion thereon, which is a matter for consideration by the competent court in which the charge-sheet is filed and the accused have to face trial. It is, therefore, necessary that not even an observation relating to the merits of the accusation is made by the Court in these proceedings lest it prejudice

G as that of 'continuing mandamus' to require performance of its duty by the CBI and the other concerned Government agencies. The concerned agencies must bear in mind and, if needed, be the reminded of the caution administered by Lord Denning in this behalf in *R v. Metropolitan Police Commissioner*, (1968) 1 All. E.R. 763. Indicating the duty of the Commis-

H sioner of Police, Lord Denning stated thus :

"... I have no hesitation, however, in holding that, like every constable in the land, *he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State..... I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land.* He must take steps so to post his men that crimes may be detected; and that honest citizen may go about their affairs in peace. He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; *but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone....."*

The nature of such a proceeding in a Court of law was also indicated by Lord Denning, as under :

"A question may be raised as to the machinery by which he could be compelled to do his duty. *On Principle, it seems to me that once a duty exists, there should be a means of enforcing it. This duty can be enforced, I think, either by action at the suit of the Attorney-General : or by the prerogative order of mandamus...."*

(Page 769)
(emphasis supplied)

There can hardly be any doubt that the obligation the police in our constitutional scheme is no less.

According to the Code of Criminal Procedure, the formation of the opinion as to whether or not there is a case to place the accused for trial is that of the police officer making the investigation and the final step in the investigation is to be taken only by the police and by no other authority, (See, *Abhinandan Jha v. Dinesh Mishra*, AIR (1968) SC 117 = [1967] 3 SCR 668). This must be borne in mind as also that the scope and purpose of a proceeding like the present is to ensure a proper and faithful performance of its duty by the police officer by resort to the prerogative writ of mandamus.

A To ensure this aspect, we had directed in our earlier order dated November 5, 1996 that in case of difference of opinion at any stage during the investigation, the final decision is not to be taken by the Director, CBI or any other officer but by the Attorney General on reference being made to him of the difference of opinion between the concerned officers. This part of our earlier directions was clear in the context in which it was made and this is to be understood as a direction to the Director, CBI for compliance in the manner indicated. The High Court is only required to ensure that the Director, CBI does not close any investigation based only upon his individual opinion if there be any difference of opinion between him and the concerned officers in the CBI. Such a matter is then required to be referred by the Director to the Attorney General for his opinion, which would govern the further action to be taken therein. The above quoted portion 'A' of the order dated November 13, 1996 of the High Court requires the High Court to act in the manner herein indicated.

D So far as portion 'B', as quoted above, of the order November 13, 1996 is concerned, it is sufficient for us to observe that the High Court would take into account the fact that the personal presence of the Director, CBI in the High Court may be required only when it is essential for a purpose which cannot be served by the presence of the other officers of the CBI who normally represent the CBI at the hearings in the High Court.

E In view of the numerous cases pending in different High Courts, the Director, CBI personally may not be left with sufficient time for him official duties to appear personally at the hearings of these matters in the High Courts. However, it is the duty of the Director, CBI to ensure proper representation on his behalf in the High Court so that the High Court gets all the assistance needed at the hearings.

The observations of the High Court contained in the above quoted portion 'D' in para 5 and portion 'F' in para 8 of its order, do not appear to conform strictly to the manner of exercise of the monitoring process by the Court. It is likely that they may be construed as expression of opinion on the merits of the case. Portion 'C' in para 4 of the High Court's order appears to be unnecessary. For the purpose of properly monitoring the case in terms of the order of this Court, keeping in view the nature of this proceedings and the manner in which the exercise is to be performed to ensure performance of its duty by the CBI, guidance through the counsel for the CBI could have been given by the High Court without entering into

the merits of any of the accusations.

The only remaining portion of the High Court's order for consideration is Portion 'E' in para 6. Suffice it to say that the High Court has merely suggested to the Director, CBI to consider the desirability of not involving any officer of the Bihar cadre in the investigation but not such direction has been given. It appears that the High Court intended to impress upon the Director, CBI the need to consider avoiding any possible embarrassment to officers of the Bihar cadre in view of the suspicion of the alleged involvement of several important persons in the State administration. We do not read the observations to mean that they cast any aspersion on the officers of the Bihar cadre. The learned Attorney General also did not further press this objection since this observation has to be so construed in the context.

It appears to us necessary to reiterate that the proceeding before the High Court in the Present case being somewhat similar to the proceedings in Writ Petition (Crl.) Nos. 340-343 of 1993, *Vineet Narain & Ors. v. Union of India & Ors.*, and Writ Petition (Civil) No. 640 of 1995, *Anukul Chandra Pradhan v. Union of India & Ors.*, pending in this Court, the procedure required to be adopted by the High Court has to be on the same lines. We also consider it appropriate to draw the attention of the CBI and the High Court to the orders of this Court made in these matters indicating the manner of performance of the duty. In *Vineet Narain & Ors. v. Union of India & Anr.*, [1996] 2 SCC 199, it was said :

"In this proceeding we are not concerned with the merits of the accusations or the individuals alleged to be involved, but only with the performance of the legal duty by the government agencies to fairly, properly and fully investigate into every such accusation against every person, and to take the logical final action in accordance with law.

In case of persons against whom a *prima facie* case is made out and a charge-sheet is filed in the competent court, it is that court which will then deal with that case on merits, in accordance with law."

(Page 201)

In *Vineet Narain & Ors. v. Union of India & Anr.*, (1996) 3 Scale (SP) 15,

A it was said :

"To eliminate any impression of bias and avoid erosion of credibility of the investigation being made by the CBI and any reasonable impression of lack of fairness and objectivity therein, it is directed that the CBI would not take any instructions from report to, or furnish any particulars thereof to any authority personally interested in or likely to be affected by the outcome of the investigations into any accusations. This direction applies even in relation to any authority which exercises administrative control over the CBI by virtue of the office he holds, without any exception. We may add that this also accords with that learned Solicitor General has very fairly submitted before us about the mode of functioning of the CBI in this matter."

In *Anukul Chandra Pradhan v. Union of India & Ors.*, [1996] 6 SCC 354, it was said :

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"A note of caution may be appropriate. No occasion should arise for an impression that the publicity attaching to these matters has tended to dilute the emphasis on the essentials of a fair trial and the basic principles of jurisprudence including the presumption of innocence of the accused unless found guilty at the end of the trial. This requirement, undoubtedly has to be kept in view during the entire trial. It is reiterated, that any observation made by this Court for the purpose of the proceedings pending here has no bearing in the merits of the accusation, and is not to influence the trial in any manner. Care must be taken to ensure that the credibility of the judicial process is not undermined in any manner."

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(Pages 356-357)

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The true purpose and scope of a proceeding of this nature clearly emerges from the above quoted orders passed in the cases pending in this Court. Some of the orders are indicated above. The required guidance to the CBI and other government agencies as well as to the courts' monitoring such investigations is available from the same. The delicate task of ensuring implementation of the rule of law by requiring proper performance of its duty by the CBI and other Government agencies, while taking care to avoid the likelihood of any prejudice to the accused at the ensuing trial because of any observation made on the merits of the accusation in the present

proceedings, has to be performed with the dexterity and tact needed in the conduct of such a proceeding. We have no doubt that all concerned, including the High Court, would bear in mind this aspect to prevent any reasonable impression of erosion in the credibility of the judicial process. A

We have no doubt that the CBI and the High Court would proceed further in the matter as indicated above. There can be no grievance to the CBI or any other authority if the High Court's order and the proceedings before it are so understood and continued. We make it clear that the above orders made by the High Court are to be construed and understood in the manner indicated herein. B

These appeals are disposed of, accordingly, C

T.N.A.

Appeals are disposed of.