

CENTRAL BUREAU OF INVESTIGATION AND ANR.

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v

ASHOK KUMAR AGGARWAL AND ORS.

MARCH 15, 2007

[DR. AR. LAKSHMANAN AND ALTAMAS KABIR, JJ.]

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Code of Criminal Procedure, 1973:

s.482—Petition before High Court challenging prosecution of petitioner—Direction by Supreme Court to decide maintainability of petition—High Court directing Department of Revenue to allow inspection of confidential files pertaining to sanction granted for prosecution and notings of Finance Minister prior to the prosecution leading evidence in trial court—Held, High Court has failed to comply with specific direction given by the Court—Impugned order set aside—High Court would take up both the issues of maintainability and validity of sanction for prosecution simultaneously and decide the same on merits—Respondent will have no right to inspection till entire file is perused by High Court and orders issued thereupon—Interlocutory orders.

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In a criminal writ petition, the High Court passed an interlocutory order directing inspection of records of the files relating to grant of sanction for prosecution of respondent no. 1 prior to the prosecution leading evidence in the trial court. Similarly, the High Court allowed the inspection to be made of the notings of the Finance Minister, to the accused owing to the fact that the same had been adverted to in the affidavit filed on behalf of the Central Bureau of Investigation. Aggrieved, the CBI filed the two appeals.

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It was contended for the appellant that despite the specific directions of the Supreme Court to hear the matter on maintainability, the High Court erred in hearing the matter on merits and directing the Department of Revenue to allow inspection of confidential files pertaining to sanction granted for prosecution of respondent no. 1.

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Disposing of the appeals, the Court

HELD: 1.1 It is not in dispute that challenges to sanction for prosecution and maintainability of the writ petition are pending consideration before the

A High Court. While disposing of Criminal Appeal no. 1308 of 2006, this Court requested the High Court to consider the question of maintainability of the writ petition on the same date itself and also reserved liberty to both the parties to approach the Division Bench for other reliefs as well and dispose of the criminal appeal accordingly. The High Court has failed to comply with specific direction given by this Court. The order of the High Court, which has been passed contrary to the direction of this Court, is set aside. [Paras 10 and 11]

B [1097-C-E]

C 1.2. This Court perused the file and in particular, the observations made by the Hon'ble Minister of Finance. Since the writ petition is pending, the High Court would peruse these notings and the observations made by the Hon'ble Finance Minister and thereafter issue appropriate directions to the parties. Since the challenge is pending consideration, the High Court would take up both the issues of maintainability and the validity of sanction for prosecution simultaneously and decide the same on merits and in accordance with law and after affording opportunity to the parties. The CBI is directed to place the notings and the relevant observations made by the Hon'ble Finance Minister in a sealed cover before the Judges of the High Court who hear the writ petition. Respondent no.1 will have no right of inspection till the entire file is perused by the High Court and orders issued thereupon.

[Para 12] [1097-F-G; 1098-A-B]

E *Additional District Magistrate, Jabalpur v. Shivakant Shukla etc.*, [1976] 2 SCC 521¹ and *S.P. Gupta v. Union of India & Anr.*, [1981] Supp SCC 87², cited.

F CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 353 of 2007.

From the Final Judgment and Order dated 21.02.2007 of the High Court of Delhi at New Delhi in W.P. (Crl.) No. 1401 of 2002.

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G Criminal Appeal No. 354 of 2007.

Gopal Subramaniam, ASG., Dayan Krishnan, Nikhil Nayyar, Gautam Narayan and Ankit Singhal for the Appellants.

¹ [1976] Supp. SCR 172.

H ² [1982] 2 SCR 365.

P.N. Puri for the Respondents.

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The Judgment of the Court was delivered by

DR. AR. LAKSHMANAN, J. *Crl. A. No. 353 of 2007 @ S.L.P.(Crl.) No. 1307 of 2007.*

1. Leave granted.

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2. The above appeal was filed by the Central Bureau of Investigation, New Delhi and the Director, C.B.I., New Delhi against the interlocutory judgment and order dated 21.2.2007 passed by the High Court of Delhi at New Delhi in W.P. (Crl.) No. 1401 of 2002 whereby the High Court directed inspection of records of the files relating to the grant of sanction for prosecution of respondent No.1 (Ashok Kumar Aggarwal) prior to the prosecution leading evidence in the trial Court.

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Crl.A. No. 354 of 2007 @ S.L.P.(Crl.) No. 1326 of 2007

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3. Leave granted.

4. This appeal was filed by the Union of India against the interlocutory judgment and order dated 21.2.2007 passed by the High Court of Delhi at New Delhi in W.P.(Crl.) No. 1401/2002 whereby the High Court granted inspection of the notings of the Finance Minister to the accused owing to the fact that the same had been adverted to in the affidavit filed by the appellant.

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5. By consent of the parties, both the appeals were taken up for hearing together.

6. We heard Mr. Gopal Subramaniam, learned Additional Solicitor General, appearing for the appellants and Mr. Ram Jethmalani, learned senior counsel, appearing for respondent No.1.

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7. Mr. Gopal Subramaniam, learned ASG, invited our attention to the various proceedings and the orders passed thereon and also the impugned judgment dated 21.2.2007. He invited our attention to the earlier order passed by this Court on October 11, 2006 in Criminal Appeal No. 1038 of 2006 filed by the Central Bureau of Investigation against the very same first respondent. The said order reads thus:

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“Leave granted.

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A Heard Mr. Gopal Subramaniam, learned Additional Solicitor General for the appellant and Mr. Ram Jethmalani, learned senior counsel appearing for the contesting respondent No.1, Mr. Ashok Kumar Aggarwal.

B The appellants have filed the above appeal against the interlocutory order dated 25.4.2006 passed by the High Court of Delhi in CrI.Misc. No. 1653 of 2006 in W.P.(CrI.) No. 1401 of 2002. The impugned order reads thus:

“W.P.(CrI.)No. 1401/2002.

C Rule.

Learned counsel Mr. Dayan Krishnan for respondents 1 and 2 submits that the admission of petition should not come in his way to object to the maintainability of the petition.

D Mr. Jethmalani has no objection to that.

List the petition for hearing on 21st August, 2006.

Sd/-

Manomohan Sarin, Judge

E J.M. Malik, Judge

April 25, 2006.”

F The matter was argued herein by both the learned senior counsel for some time. Later, both the learned senior counsel agreed that the High Court itself may be requested to dispose of the preliminary issued in regard to the maintainability of the writ petition as expeditiously as possible since the matter is pending before one forum or the other for a long time.

G It is represented that Writ Petition (CrI.) No. 1401/2002 is listed for hearing before the High Court on 30.10.2006. We, therefore, request the Hon'ble Acting Chief Justice of the High Court to place this matter before a Division Bench to consider the question of maintainability of the writ petition on the same date itself. Liberty is reserved to both parties to approach the Division Bench for other

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reliefs as well.

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The Criminal Appeal stands disposed of accordingly. The Registry is directed to send a copy of this order to the Registrar General of the High Court of Delhi today itself.

Sd/-

(Dr. AR. Lakshmanan)

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Sd/-

(Altamas Kabir)

New Delhi,

October 11,2006."

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8. The grievance of learned Additional Solicitor General is that the High Court heard the matter on merits and directed the Department of Revenue to give inspection of confidential files pertaining to sanction granted for prosecution of respondent No.1 in spite of the specific direction of this Court to hear the matter on maintainability. He further submitted that the High Court erred in not appreciating that while exercising jurisdiction under Section 482 Cr.P.C. the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it the accusation would be sustained as this is the function of the trial Court. It was further submitted that the appellant perused all the relevant documents and applied its mind in accordance with law while granting sanction dated 21.6.2002 and that the said fact is mentioned on the face of the order of sanction and the application of mind was with reference to the documents mentioned at S.Nos. 1-42 along with the report of the Superintendent of Police forwarded by the Central Bureau of Investigation. It was also argued that the documents received from the Federal Department of Justice and Appeals (Switzerland) dated 11.7.2001 along with the letter Rogatory dated 29.1.2001 were also perused by the sanctioning authority before the grant of sanction. It was further submitted that respondent No.1 herein had represented to the Government that relevant documents and more particularly the reply to the letter Rogatory received from Swiss authorities had not been perused by the sanctioning authority and that the said representations were considered at the highest level that is, at the level of the Hon'ble Minister of Finance on 18.6.2005, 27.12.2005 and more recently on 15.1.2007 and after detailed consideration of the case, the Hon'ble Minister of Finance has come to the *prima facie* conclusion that all relevant documents,

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A including the reply to the letter Rogatory were perused by the sanctioning authority before granting sanction on 21.6.2002. It was further submitted that the plea raised by the respondent/writ petitioner that the sanctioning authority had not applied its mind to all the documents and the reply to the letter Rogatory had not been shown to the sanctioning authority cannot be countenanced. It was also submitted that the documents are confidential in nature.

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C 9. *Per contra*, Mr. Ram Jethmalani, learned senior counsel, appearing for respondent No.1 submitted that the High Court should first go into the question of validity of sanction and also submitted that the High Court had rightly permitted the respondent herein to inspect all the three notings and, therefore, the direction issued by the High Court is not liable to be interfered with. He further submitted the reasons as to why the inspection of these documents must be given to respondent No.1 herein. The reasons are as follows:

- D 1. Having been disclosed and relied upon in paragraph 5 of the Affidavit dated 12th February, 2007, they have become a part of the affidavit on the principle of incorporation. Respondent No. 1 is entitled to inspect them and have the copies thereof and the Court has no discretion in the matter.
- E 2. In the said paragraph of the affidavit, the respondent has purported to give a description of the contents of these documents. The description is secondary evidence of the contents of the documents. The primary evidence is documents themselves. They cannot be withheld from inspection.
- F 3. This is an accord with the principle of Order XI Rule 15 of the Code of Civil Procedure.
- G 4. The appellants have now offered to show these documents to this Court and requested this Court to decide whether they should be given to respondent No.1 for his inspection. This procedure is not proper. Reference was made on paragraph 415 of the judgment of this Court in *Additional District Magistrate, Jabalpur v. Shivakant Shukla etc.*, [1976] 2 SCC 521.
- H 5. There is only one exception to this principle explained hereafter - *when a party asks for a document in the possession of another party and the latter claims privilege* under Sections 123 and 124

of the Evidence Act, for the purpose of deciding whether the privilege should be allowed, the Court can inspect the documents and come to its own conclusion. Whether the document relates to affairs of the State or whether public interest would suffer by the disclosure are the issues which the Court decides on inspection. Reference was made to judgment of this Court in *S.P. Gupta v. Union of India & Anr.* [1981] Supp SCC 87 at pages 272 to 303. No party can claim privilege for documents which it has voluntarily disclosed.

10. We have carefully considered the rival submissions made by both the parties. It is not in dispute that challenges to sanction for prosecution and maintainability of the writ petition are pending consideration before the High Court in Writ Petition No. 1401 of 2002. While disposing of Criminal Appeal No. 1308 of 2006, this Court requested the High Court to consider the question of maintainability of the writ petition on the same date itself and also reserved liberty to both parties to approach the Division Bench for other reliefs as well and dispose of the criminal appeal accordingly.

11. We are sorry to say that in spite of our specific direction, the High Court has failed to comply with our specific direction. We, therefore, have no hesitation to set aside the order which has been passed contrary to the direction of this Court. Accordingly, the order of the High Court dated 21.2.2007 in W.P.(Crl.)No. 1401 of 2002 is set aside.

12. When the matter was heard on 12.3.2007, we requested the learned Additional Solicitor General to place before us the notings made on the file on 18.6.2005, 27.12.2005 and 15.1.2007 for our perusal and for issuing further directions. Accordingly, the relevant file was placed before us. We perused the file and in particular, the observations made on 18.6.2005 (page 55 of the file), 27.12.2005 (page 57 of the file) and 15.1.2007 (page 59-64 of the file) by the Hon'ble Minister of Finance. Since the writ petition is pending, we request the High Court to peruse these notings and the observations made by the Hon'ble Finance Minister and thereafter issue appropriate directions to the parties to the action. Since the challenge is pending consideration before the High Court, we request the High Court to take up both the issues of maintainability and the validity of sanction for prosecution simultaneously and decide the same on merits and in accordance with law and after affording opportunity to the parties to the action.

A 13. Today, we return the file to Mr. Gopal Subramaniam after perusal. We direct the CBI to place the notings and observations made by the Hon'ble Finance Minister made on these dates referred to above in a sealed cover before the learned Judges of the High Court who hear the writ petition.

B 14. Respondent No.1 will have no right of inspection till the entire file is perused by the High Court and orders issued thereupon.

15. With the above directions, the appeals stand disposed of.

R.P.

Appeals disposed of.