

E. Sivakumar vs Union Of India on 18 May, 2018

Equivalent citations: AIR 2018 SUPREME COURT 2486, 2018 CRI LJ 3064, (2018) 188 ALLINDCAS 45 (SC), (2018) 104 ALLCRIC 619, (2018) 188 ALLINDCAS 45, (2018) 3 CRIMES 37, (2018) 3 CURCRIR 76, (2018) 3 RECCRIR 111, 2018 (3) SCC (CRI) 49, (2018) 4 ALLCRILR 73, (2018) 4 BOM CR 436, (2018) 5 ANDHLD 97, (2018) 71 OCR 893, (2018) 7 SCALE 656, 2018 (7) SCC 365, (2019) 127 CUT LT 135, (2019) 1 ALD(CRL) 1001, (2019) 2 CALLT 85, AIR 2018 SC(CRI) 785

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Bench: D.Y. Chandrachud, A.M. Khanwilkar, Dipak Misra

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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2018
(Diary No.17180/2018)

E. SIVAKUMARPetitioner(s)

:Versus:

UNION OF INDIA AND ORS.Respondent(s)

ORDER

A.M. Khanwilkar, J.

1. This special leave petition takes exception to the judgment and order of the High Court of Judicature at Madras dated 26th April, 2018 in Writ Petition No.19335 of 2017, whereby the High Court has issued a writ of mandamus to transfer the investigation of a criminal case concerning the illegal manufacture and sale of Gutkha and Pan Masala, Date: 2018.05.18 16:16:03 IST Reason:

containing Tobacco and/or Nicotine, to the Central Bureau of Investigation (“CBI”).

2. The petitioner has been named as an accused in the FIR because of his alleged involvement in the crime under investigation. The petitioner at the relevant time was posted on deputation as Food Safety Officer in the Food Safety and Drug Administration Department, Ministry of Health. The stated crime was being investigated by the State Vigilance Commission, constituted by the State of Tamil Nadu, headed by a Vigilance Commissioner. The gravamen of the challenge to the impugned judgment is on four counts:

(i) First, that the prayer for transfer of investigation of the crime in question to the CBI has already been considered and negated by the Coordinate Bench of the same High Court in Writ Petition No.1846 of 2017 vide judgment dated 27th January, 2017 and again in Writ Petition No.12482 of 2017 vide judgment dated 28th July, 2017. These decisions have been completely disregarded in the impugned judgment.

(ii) Second, the petitioner though named as an accused in the FIR was not given an opportunity of hearing nor was made a party in the public interest litigation in which the impugned judgment has been passed. Resultantly, the judgment under appeal is a nullity and liable to be set aside only on this score.

(iii) Third, no special circumstances have been noted by the High Court in the impugned judgment for transferring the investigation to CBI. The High Court has not even bothered to examine the efficacy of the status report regarding the investigation done by the Vigilance Commission. In other words, there was no tangible ground for directing investigation of the crime in question by the CBI.

(iv) Lastly, it is contended that the writ petition filed as public interest litigation was politically motivated having been filed by a member of the Legislative Assembly in the State of Tamil Nadu.

3. To buttress the above-mentioned grounds of challenge, reliance is placed on the decision of this Court in the case of State of Punjab Vs. Davinder Pal Singh Bhullar and Ors.¹ (2011) 14 SCC 770

4. The admission of this special leave petition is opposed by respondent No.14 (writ petitioner). It is urged on behalf of respondent No.14 that the High Court has considered all aspects of the matter and being satisfied about the imperativeness of a fair investigation of the crime in question involving high ranking officials and the tentacles of the conspiracy in commission of the crime transcending beyond the State of Tamil Nadu and into different States, it deemed it appropriate to issue a writ of mandamus to transfer the investigation to CBI. It is contended that there is no merit in the objections raised on behalf of the petitioner.

5. We have heard Mr. Mukul Rohatgi, learned senior counsel appearing on behalf of the petitioner and Mr. P. Wilson, learned senior counsel appearing on behalf of respondent No.14.

6. On a careful consideration of the impugned judgment, we agree with respondent No.14 (writ petitioner) that the High Court has cogitated over all the issues exhaustively and being fully satisfied

about the necessity to ensure fair investigation of the crime in question, justly issued a writ of mandamus to transfer the investigation to CBI. As regards the first point raised by the petitioner, we find that the High Court was alive to the fact that the Coordinate Bench of the same High Court had occasion to decide Writ Petition No.1846 of 2017 and Writ Petition No.12482 of 2017, as can be discerned from the discussion in paragraphs 107 to 122 of the impugned judgment. As regards Writ Petition No.1846 of 2017, that was filed by one P. Wilson, a lawyer by profession. Indeed, it was filed as public interest litigation to initiate an inquiry/investigation into the allegation of corruption, investigate, prosecute and ferret out the truth regarding the connivance of senior police officers as noted by the Commissioner of Police, Chennai City, in his letter dated 22nd December, 2016 addressed to the Principal Secretary, Home Department, Government of Tamil Nadu. The Court, however, found that the said petition lacked specific ground and material and, more so, the Court doubted the bona fides of the petitioner therein and thus summarily rejected the petition vide judgment dated 27th January, 2017. As regards Writ Petition No.12482 of 2017, filed by one K. Kathiresan, a lawyer by profession, as public interest litigation, the relief claimed was primarily to quash an order dated 30th June, 2017 granting extension of service to respondent No.5 therein and further, to direct registration of a case in reference to the communication sent by the Commissioner of Police, Chennai, in respect of sale of banned substances, namely, Gutkha and Pan Masala in the State of Tamil Nadu and to constitute a Special Investigation Team to investigate the case under the direct monitoring of the High Court. Thus, the primary concern in the said writ petition was about the appointment of respondent No.5 therein as Director General of Police on account of his name being referred to in the incriminating documents seized by the Income Tax Department from the partners of a gutkha manufacturing concern. In the analysis of the case, the Coordinate Bench vide its judgment dated 28th July, 2017 noted the prayer of the said writ petitioner to direct the CBI to take over the investigation by constituting a Special Investigating Team. The Court did advert to the question of entrusting the investigation to CBI in paragraphs 25A to 25D of the said judgment. However, after perusal of the case diary of the Director of Vigilance and Anti Corruption, the Court opined that the investigation of the crime was in progress. Therefore, it only issued directions to strengthen the investigation by Vigilance Commissioner in paragraph 30 of the said judgment. In that context the Court noted that it was not necessary to transfer the inquiry/investigation to CBI. That is the thrust of the analysis of the previous judgments, if read in proper perspective. These aspects have been duly taken note of in the impugned judgment in paragraphs 107 onwards, including the legal position on the doctrine of res judicata and finally answered in paragraphs 141 to 144 of the impugned judgment in the following words:

“141. As observed by K.K. Sasidharan and G.R. Swaminathan, JJ. in K. Kathiresan, supra, the Vigilance Commission headed by the Vigilance Commissioner has extensive powers to curb corruption and initiate action against government servants and servants of public sector undertakings for acceptance of illegal gratification and matters incidental thereto. The State Vigilance Commission might enquire into allegations of corruption against officials of the State Government. The State Vigilance Commission might also conduct a detailed enquiry to fix the responsibility for the loss of the file containing incriminating materials handed over to the then Chief Secretary by the Principal Director of Income Tax (Investigation) on 12.8.2016 and ensure that the guilty are brought to book and appropriate action taken in

accordance with law. However, investigation by the Vigilance department is from the angle of vigilance. The aim is to detect corruption. The power of the Vigilance Commission to investigate would not extend to an enquiry into the modus operandi of the gutkha mafia, the mode and manner of import from other States, distribution and sale of gutkha and other chewable forms of tobacco, and detection of the sources of supply. Enquiry by the Vigilance Department would not unearth secret storage and manufacturing units. Nor would such investigation be able to detect incidents of illegal import, supply and sale or nab those actually manufacturing, supplying, importing, selling or otherwise dealing with prohibited food items containing tobacco and nicotine such as gutkha.

142. Investigation by a centralized agency like the CBI would be more comprehensive and cover all aspects of the illegal manufacture, import, supply, distribution and sale of banned chewable tobacco items, including the detection of all those involved in such illegal import, manufacture, supply, distribution and sale, as also the detection of corruption and complicity of public servants and/or government servants in this regard. As observed above, there is no conflict between CBI investigation and investigation by the State machinery. Investigation can be carried out more effectively with the CBI and the Vigilance Department working in cooperation.

143. The underground gutkha business is a crime against society which needs to be curbed. We, therefore, deem it appropriate to direct the CBI to investigate into all aspects of the offence of illegal manufacture, import, supply, distribution and sale of gutkha and other forms of chewable tobacco which are banned in the State of Tamil Nadu and the Union Territory of Puducherry, including detection of and action against those involved in the offence as aforesaid, whether directly or indirectly, by aiding abetting the offence or interfering with attempts to curb the offence.

144. This order is, in our view, not only imperative to stop the menace of the surreptitious sale of gutkha and chewable forms of tobacco which pose a health hazard to people in general and in particular the youth and to punish the guilty, but also to instill faith of the people in the fairness and impartiality of the investigation. We see no reason for the State to view the entrustment of investigation to the CBI as an affront to the efficiency or efficacy of its own investigation system and we make it absolutely clear that this direction is not to be construed as any definite finding of this Court of the complicity of any constitutional functionary or of any specific official of the State Government.”

7. The view so taken by the High Court in the facts of the present case, in our opinion, being a possible view, the ground under consideration is devoid of merit. Suffice it to observe that it is not a case of disregarding the binding decision or precedent of the Coordinate Bench of the same High Court. We say so because, in the impugned judgment the decision of the Coordinate Bench has been distinguished. Besides, the question regarding the necessity to ensure a fair and impartial investigation of the crime, whose tentacles were not limited to the State of Tamil Nadu but

transcended beyond to other States and may be overseas besides involving high ranking officials of the State as well as the Central Government, has now been directly answered. For instilling confidence in the minds of the victims as well as public at large, the High Court predicated that it was but necessary to entrust the investigation of such a crime to CBI. Viewed thus, there is no infirmity in the conclusion reached by the High Court in the impugned judgment, for having entrusted the investigation to CBI.

8. As regards the second ground urged by the petitioner, we find that even this aspect has been duly considered in the impugned judgment. In paragraph 129 of the impugned judgment, reliance has been placed on Dinubhai Boghabhai Solanki Vs. State of Gujarat and Ors.², wherein it has been held that in a writ petition seeking impartial investigation, the accused was not entitled to opportunity of hearing as a matter of course. Reliance has also been placed in the case of Narender G. Goel Vs. State of Maharashtra and Anr.³, in particular, paragraph 11 of the reported decision wherein the Court observed that it is well settled that the accused has no right to be heard at the stage of investigation. By entrusting the investigation to CBI which, as aforesaid, was imperative in the peculiar facts of the present case, the fact that the petitioner was not impleaded as a party in the writ petition or for that matter, was not heard, in our opinion, will be of no (2014) 4 SCC 626 (2009) 6 SCC 65 avail. That per se cannot be the basis to label the impugned judgment as a nullity.

9. Our attention was invited to the observations made in paragraph 73 in the State of Punjab (supra), which in turn adverts to the exposition in D. Venkatasubramaniam & Ors. Vs. M.K. Mohan Krishnamachari & Anr.,⁴ wherein it has been held that an order passed behind the back of a party is a nullity and liable to be set aside only on this score. That may be so, if the order to be passed behind the back of the party was to entail in some civil consequence to that party. But a person who is named as an accused in the FIR, who otherwise has no right to be heard at the stage of investigation or to have an opportunity of hearing as a matter of course, cannot be heard to say that the direction issued to transfer the investigation to CBI is a nullity. This ground, in our opinion, is an argument of desperation and deserves to be rejected.

10. The third contention urged by the petitioner, that neither special reasons have been recorded nor the status report of (2009) 10 SCC 488 the investigation already done by the Vigilance Commission has been considered, also does not commend us. As noted earlier, the High Court in the impugned judgment has exhaustively analysed all aspects of the matter as can be discerned from paragraphs 84 to 87, 91 to 97, 100 to 107; and again in paragraphs 141-144 which have been extracted hitherto. In our opinion, in the peculiar facts of the present case, the High Court has justly transferred the investigation to CBI after due consideration of all the relevant aspects, which approach is consistent with the settled legal position expounded in the decisions adverted to in the impugned judgment, including the decision in Subrata Chatteraj Vs. Union of India and Ors.,⁵ which predicates that transfer of investigation to CBI does not depend on the inadequacy of inquiry/investigation carried out by the State police. We agree with the High Court that the facts of the present case and the nature of crime being investigated warrants CBI investigation. (2014) 8 SCC 768

11. In the case of Dharam Pal Vs. State of Haryana and Ors.,⁶ this Court has underscored the imperativeness of ensuring a fair and impartial investigation against any person accused of

commission of cognizable offence as the primary emphasis is on instilling faith in public at large and the investigating agency. The dictum in paragraph 24 and 25 of this reported decision is quite instructive which read thus:

“24. Be it noted here that the constitutional courts can direct for further investigation or investigation by some other investigating agency. The purpose is, there has to be a fair investigation and a fair trial. The fair trial may be quite difficult unless there is a fair investigation. We are absolutely conscious that direction for further investigation by another agency has to be very sparingly issued but the facts depicted in this case compel us to exercise the said power. We are disposed to think that purpose of justice commands that the cause of the victim, the husband of the deceased, deserves to be answered so that miscarriage of justice is avoided. Therefore, in this case the stage of the case cannot be the governing factor.

25. We may further elucidate. The power to order fresh, de novo or reinvestigation being vested with the constitutional courts, the commencement of a trial and examination of some witnesses cannot be an absolute impediment for exercising the said constitutional power which is meant to ensure a fair and just investigation. It can never be forgotten that as the great ocean has only one test, the test of salt, so does justice has one flavour, the flavour of answering to the distress of the people without any discrimination. We may hasten to add that the democratic set-up has the potentiality (2016) 4 SCC 160 of ruination if a citizen feels, the truth uttered by a poor man is seldom listened to. Not for nothing it has been said that sun rises and sun sets, light and darkness, winter and spring come and go, even the course of time is playful but truth remains and sparkles when justice is done. It is the bounden duty of a court of law to uphold the truth and truth means absence of deceit, absence of fraud and in a criminal investigation a real and fair investigation, not an investigation that reveals itself as a sham one. It is not acceptable. It has to be kept uppermost in mind that impartial and truthful investigation is imperative. If there is indentation or concavity in the investigation, can the “faith” in investigation be regarded as the gospel truth? Will it have the sanctity or the purity of a genuine investigation? If a grave suspicion arises with regard to the investigation, should a constitutional court close its hands and accept the proposition that as the trial has commenced, the matter is beyond it? That is the “tour de force” of the prosecution and if we allow ourselves to say so it has become “idée fixe” but in our view the imperium of the constitutional courts cannot be stifled or smothered by bon mot or polemic. Of course, the suspicion must have some sort of base and foundation and not a figment of one’s wild imagination. One may think an impartial investigation would be a nostrum but not doing so would be like playing possum. As has been stated earlier, facts are self-evident and the grieved protagonist, a person belonging to the lower strata. He should not harbour the feeling that he is an “orphan under law”.

12. Suffice it to observe that we do not intend to deviate from the conclusion reached by the High Court that in the peculiar facts and circumstances of the case, it is but appropriate that investigation

of the crime in question must be entrusted to CBI.

13. Reverting to the last contention that the High Court should have been loath to entertain a public interest litigation at the instance of respondent No.14, who happens to be a member of the Legislative Assembly in the State of Tamil Nadu or that he had pro-actively participated in raising the issue in the Assembly, has also been answered in the impugned judgment. The Court, while entertaining public interest litigation at the instance of respondent No.14, has relied upon the dictum in K. Anbazhagan Vs. Superintendent of Police and Ors.,⁷ wherein it is observed that the political opponents play an important role both inside and outside the House and are the watchdogs of the Government in power. They are the mouthpiece to ventilate the grievances of the public at large, if genuinely and unbiasedly projected. Referring to this decision, the Court noted in paragraph 70 of the impugned judgment that a petition filed by such persons (such as respondent No.14) cannot be brushed aside on the allegation of political vendetta, if otherwise, it is genuine and raises a reasonable apprehension of likelihood of bias in the dispensation of (2004) 3 SCC 767 criminal justice system. Accordingly, the ground of challenge under consideration, in our opinion, is devoid of merits.

14. While parting, we may restate the observations made by the High Court in paragraph 144 of the impugned judgment to clarify that the transfer of investigation of the crime in question to CBI is no reflection on the efficiency or efficacy of the investigation done by the State Vigilance Commission. We reiterate that position.

15. As a result, this special leave petition is dismissed.

.....CJI.

(Dipak Misra)J. (A.M. Khanwilkar)J. (Dr. D.Y. Chandrachud) New Delhi;

May 18, 2018.