

**A.F.R.**

**Court No. - 2**

**Case :- APPLICATION U/S 482 No. - 13226 of 2020**

**Applicant :- S.K. Srivastava, Irs (Retd.)**

**Opposite Party :- Central Bureau Of Investigation And 4 Ors.**

**Counsel for Applicant :- Shashi Dhar Shukla**

**Counsel for Opposite Party :- A.S.G.I.,Ravi Prakash,Sanjay**

**Kumar Yadav,Sanjeev Kumar Pandey**

**Hon'ble Suneet Kumar,J.**

**Order on Application Nos. Nil of 2020 filed under Chapter XXII Rule 1 of High Court Rules**

During the course of argument the said applications has not been pressed by learned counsel for the applicant, accordingly, the applications are dismissed as not pressed.

**Order on Application under Section 482 Cr.P.C.**

1. On the matter being taken up, Shri Ravi Prakash, learned counsel appearing for Central Bureau of Investigation (for short 'C.B.I.')

submits that baseless and derogatory allegations have been made in the petition, as well as, in the rejoinder affidavit filed by the applicant against several persons including him.

2. It is urged that the allegations taken on face value are scandalous and contemptuous. It is submitted that contempt proceedings be initiated against the applicant.

3. On specific query, learned counsel submits that no application for drawing contempt proceedings against the applicant has been filed, but submits that the Court *suo moto* take notice of the scandalous pleadings.

4. Be that as it may, the Court is not inclined to enter into the controversy without there being a formal application to that effect. However, disposal of the instant petition would not preclude the learned counsel for the C.B.I. or any other aggrieved person from raising the issue and seeking remedy in an appropriate proceedings in accordance with law. The matter is kept open.

5. By the instant application filed under Section 482 of Code of Criminal Procedure (for short 'Cr.P.C.'), the applicant seeks the following reliefs:

*“i. To set aside & quash the order dated 14.2.2020 of learned Special Judge, Anti Corruption, CBII, Ghaziabad by which the cognizance has been taken by the Court in the matter of CBI RC 1202019A0004 dated 4.7.2019 filed by the CBI.*

*ii. To also set aside & quash the Chargesheet dated 14.2.2020 under Section 120B & 420 IPC, 1860 r.w. Section 7 of the Prevention of Corruption Act, 1988 & which has been forwarded by I.O., ACB, CBI, Ghaziabad in CBI RC1202019A0004 dated 4.7.2019.*

*iii. To grant Ad-interim ex-parte stay of proceedings in CBI RC No. 1202019A0004 dated 4.7.2019 u/s 120B & 420 IPC, 1860 & Section 7 of P.C. Act, 1988 & to further grant Ad-interim Ex-parte stay on all the consequential proceedings initiated or bring initiated based upon CBI RC No. 1202019A0004 dated 4.7.2019 & Chargesheet.*

*iv. To summon the records of the Trial Court of the present case.”*

6. The applicant/accused is challenging the charge-sheet, cognizance order and the consequential proceedings arising therefrom.

7. The facts, for the purposes of the case, briefly stated, is that the C.B.I. registered a regular case on the written complaint of Director General of Income Tax (Vigilance) on directions of the Commissioner, Central Vigilance Commission, New Delhi, dated 1 July 2019. The allegation against the applicant, a (compulsory) retired official while posted as Commissioner Income Tax (Appeals) (for short 'CIT(A)-I'), with additional charge of CIT(A)-II Noida, during December 2018 to 11 June 2019, indulged in acts of omission and commission adverse to the interest of revenue. It is further alleged that the orders passed by the applicant in the capacity of an appellate authority were antedated i.e. after his retirement on 11 June 2019. The orders were uploaded on the ITBA system after demitting office. The investigation further reveals falsification of records; it is further alleged that during this period 13 appeals was decided by the applicant in conspiracy with co-accused Anil Kumar (Chartered Accountant), which were beyond the jurisdiction of CIT(A) Noida. These appeals fall within the jurisdiction of CIT(A) Ghaziabad. It is alleged that the appellate orders were procured orders for extraneous consideration. The applicant never held the charge of CIT(A) Ghaziabad during the period September 2018 to 11 June 2019.

8. Learned counsel appearing for the applicant submits that applicant being a quasi judicial authority, exercising appellate jurisdiction, under the statutory provisions was competent to decide the appeals, both on the subject matter and jurisdiction; there is no evidence on record to show that the orders passed in the appeals were procured for extraneous considerations; proper notice was given to the assesseees in all the appeals, the

notices have been brought on record; the appeals were decided on merit after due notice to the concerned official of the department. The learned counsel has drawn the attention of the Court to various orders and circulars of the department in particular circulars dated 30 December 2019 and 31 December 2019 to submit that applicant had jurisdiction to hear and decide the alleged appeals. It is further urged that allegation of calling for records and deciding the appeals is not borne out from the material or any evidence. The appeals were filed through the e-filing system.

9. It is further urged by learned counsel for the applicant that it is a case of malicious prosecution to harass the applicant; taking the allegations and evidence on face value, the ingredients of the offence against the applicant is not made out. He submits that the proceeding is liable to be quashed being abuse of the process of the Court.

10. In rebuttal, learned counsel appearing for the CBI submits that the ingredients of the offence of cheating, criminal conspiracy and under Section 7 of the Prevention of Corruption Act, 1988, is made out; he further submits that exercise of inherent power of the Court under Section 482 Cr.P.C. is limited, the Court would not enter into the merit or consider the defence being raised by the applicant; it is urged that only a, prima facie, case linking the applicant to the offence has to be examined at the stage of framing of charge.

11. I have heard Shri V.P. Srivastava, learned Senior Counsel, assisted by Shri Shashi Dhar Shukla, learned counsel for the

applicant and Shri Ravi Prakash, learned counsel appearing for the C.B.I. and perused the record.

12. In nutshell, allegation against the applicant is that by virtue of his position as appellate authority he dishonestly and fraudulently adjudicated 13 appeals outside his jurisdiction conspiring with the co-accused, thereby, causing wrongful loss at Rs. 7.26 crores to the revenue. The assessment orders in all the appeals was passed by the concerned Income Tax Officer of Ghaziabad. The aggrieved assesseees were required to file the appeals within the jurisdiction of CIT(A) Ghaziabad, however, co-accused Anil Kumar (Chartered Accountant) though being fully aware of this fact filed the appeals at CIT Noida. It is alleged that co-accused Anil Kumar entered into criminal conspiracy during the relevant period with the applicant to get the appeals decided, including his and his wife's appeal, thereby, causing loss to the revenue and corresponding wrongful gain to the accused persons.

13. It is further alleged that the dishonest intention is reflected from the evidence in support of the charge that the order-sheet and other records pertaining to the appeals were not maintained, the date of submission of the appeals, the date of last hearing and date of final order and the nature of order passed thereon was not indicated. It is further asserted on the strength of evidence that applicant with dishonest intention did not sent the mandatory notice/intimation to the concerned Assessing Officer in the prescribed form (ITNS-51) enclosing the appeal memo. Without receipt of ITNS-51 duly filled by the concerned Assessing Officer and returned to the CIT appeals,

the appeals could not have been heard, neither date could have been fixed for hearing. It is further alleged that the applicant in capacity of appellate authority did not requisition the assessment records from the Assessing Officer.

14. It is further alleged that the applicant framed/manufactured false/incorrect records with an intent to cheat the department to give an impression that hearing had taken place in at least 6 out of 13 appeals. In some of the appeals (viz. assessee Sanjay Mittal), the notice for hearing was sent by speed post on 30 January 2018 fixing 7 January 2019 for hearing. The record of the post office Moradnagar shows that the speed post was served on 3 January 2019. However, the orders on the said appeal came to be passed on 31 December 2018. It is alleged that acknowledgement slip was not sent with the notice. The appeal of the assessee Sanjay Mittal came to be allowed and disposed of in his favour which was done dishonestly by the applicant. Tax liability at Rs. 67,82,836/- was allowed in favour of the assessee and against the revenue.

15. Further, it is alleged that the circulars of the Central Board of Direct Taxes, New Delhi, was not complied by the applicant by not issuing the appellate orders within 15 days of the order by registered post or through service/circulation without requiring the assessee/appellant to file an application in that regard. The date of hearing was deliberately not mentioned in the order-sheets of any of the 13 appeals, thereby, giving an opportunity to the applicant to antedate such orders, which were uploaded after demitting office. It is

alleged that in the 13 appeals applicant caused wrongful loss at Rs. 7.26 crores to the revenue and commensurate wrongful gain to the assessee, co-accused and himself.

16. The record further reveals that during course of investigation on search of the residential premises of the applicant on 5 July 2019 Indian currency at Rs. 16,44,970/- was found from the possession of the applicant which is alleged to be part of the undue financial gain obtained by the accused.

17. The allegations and the material/evidence placed on record, taken on face value, prima facie, make out the ingredients of the offence of criminal conspiracy, cheating and abuse of his position as public servant obtaining undue advantage for wrongful gains and causing wrongful loss to the revenue.

18. The investigation further reveals the circumstances and chain of events pointing towards the dishonest conspiracy. In respect of all 13 appeals no assessment records or miscellaneous records for the assessment year 2015-16 and earlier years were ever called by the applicant at any stage of hearing. It is further revealed during investigation that the appellate orders were typed by a private typist Shri Amar Kumar Das and his wife Smt. Nalni Parva Das who are not employees of the department. Further, one of the typist is class 9<sup>th</sup> pass and having no knowledge of English language nor of computer, laptop/desktop. The bills raised by the typist were processed on the directions of the applicant.

19. In nutshell, the acts of commission and omission on the part of the applicant in respect of the appeals is that the applicant in connivance with co-accused Anil Kumar, (Chartered Accountant)/assessee entertained and adjudicated the appeals without having jurisdiction; no order-sheet and other records indicating the date of submission of appeal, date of hearings, date of final order and nature of final order in respect of appeals was prepared; the applicant without mandatory intimation to the Assessing Officer and without receipt of ITNS-51, duly filled by the Assessing Officer, the appeals were heard; the assessment records pertaining to the appeals was not summoned from the concerned Assessing Officers; false and manufactured records was created in respect of the appeals to indicate the hearing and disposal of the appeal of the assessee noted therein; some of the appeals has been shown to have been allowed and disposed of in favour of the assessee when it was not at the hearing stage; appellate orders are antedated having passed after the applicant demitting office.

20. In **Anil Mahajan vs. Bhor Industries Ltd. And others 2005 (10) SCC 228**, the Supreme Court observed as under:

*“The substance of the complaint is to be seen. Mere use of the expression “cheating” in the complaint is of no consequence.”*

21. The evidence and the material brought on record, prima facie, establishes that applicant abusing his position as Commissioner (Appeals) entered into criminal conspiracy with co-accused Anil Kumar (Chartered Accountant) as a public servant, obtained undue advantage for extraneous considerations, committed acts of commission and omission with mala fide intentions thereby causing wrongful loss to the



department and wrongful gain to the assessee and himself. The evidence and the surrounding circumstances taken on face value constitute commission of the offence under Section 120B, 420 IPC and Section 7 of Prevention of Corruption Act, 1988, against the applicant and co-accused.

22. Section 120B I.P.C. deals with the punishment for criminal conspiracy. The offence of “criminal conspiracy” is defined under Section 120A I.P.C. The most important ingredient of the offence “criminal conspiracy” is the agreement between two or more persons to do an illegal act or an act not illegal by illegal means. (Refer: **Kehar Singh Vs. State (Delhi Administration), (1988) 3 SCC 609**). The offence of conspiracy is complete when two or more conspirators have agreed to do or cause to be done an act which is itself an offence, in which case no overt act need be established. In **Noor Mohammad Mohd. Yusuf Momin Vs. State of Maharashtra, 1971 AIR 885**, the Supreme Court considered and laid down the distinction between Section 34, Section 109 and Section 120B I.P.C. Section 34 embodies the joint liability in doing a criminal act, the essence of the act being the existence of common intention, participation in the commission of the offence in furtherance of the common intention invites its application. On the other hand Section 109 may be attracted even if the abettor is not present when the offence abetted is committed provided that he has instigated the commission of the offence or has engaged one or more persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or illegal omission takes place or has

intentionally aided the commission of an offence by an act or illegal omission.

23. Turning to charge under Section 120B I.P.C., criminal conspiracy postulates an agreement between two or more persons to do or cause to be done an illegal act or an act which is not illegal, by illegal means. It differs from the other offences in that mere agreement is made an offence even if no step is taken to carry out the agreement. A conspiracy from its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming. But like other offences criminal conspiracy can be proved by circumstantial evidence. In deed, in most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts, surrounding circumstances and antecedent and subsequent conduct, amongst other factors, constituting relevant material. The agreement of understanding may be proved by necessary implication to do an unlawful act by unlawful means.

24. It is settled principle of law that at the stage of framing of charge, in proceedings under Section 482 Cr.P.C., it is not open for the Court to enter into the sufficiency of the evidence in order to appreciate the documents and the statements in support of the charge. (**Vide Mohd. Akbar Dar vs. State of Jammu & Kashmir, AIR 1981 SC 1548 & Radhey Shyam vs. Kunj Behari & others AIR 1990 SC 121**)

25. It is not a case where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused. Further, the

criminal proceedings is not manifestly attended with mala fide and/or the proceedings maliciously instituted with an ulterior motive against the applicant merely performing appellate power in the backdrop of the allegations and evidences.

26. It is well established proposition of law that a criminal prosecution, if otherwise justifiable and based upon adequate evidence does not suffer on account of mala fide or vendetta of the complainant. (Refer: **State of Haryana and others vs. Ch. Bhajan Lal and others 1992 AIR 604**)

27. Having regard to the facts and circumstances and the material placed on record, I am of the opinion that there is prima facie evidence in support of the charges. The submission of the learned counsel for the applicant that the criminal prosecution does not constitute the ingredients of the offence against the applicant, lacks substance.

28. Learned counsel for the applicant failed to point out any illegality, infirmity or jurisdictional error in the impugned order.

29. The petition being devoid of merit is, accordingly, dismissed.

30. Learned trial court to proceed in accordance with law without being influenced by any observations made in the order.

**Order Date :- 4.11.2020**

S.Prakash

(Suneet Kumar,J.)