REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE/ORIGINAL JURISDICTION

CRIMINAL APPEAL NO. 1273 OF 2015
[ARISING OUT OF SLP (CRIMINAL) NO.2978 OF 2014)

ESSAR TELEHOLDINGS LTD. … APPELLANT

VERSUS

CENTRAL BUREAU OF INVESTIGATION … RESPONDENT

WITH

WRIT PETITION (CRIMINAL) NO.36 OF 2014

WRIT PETITION (CRIMINAL) NO.39 OF 2014

J U D G M E N T

R.F. Nariman, J.

1. Leave granted in SLP (Crl.) No.2978 of 2014.

2. These matters arise as a sequel to the judgment delivered by this Court on 1.7.2013 by which three writ petitions filed by Essar Teleholdings Limited, Loop Telecom Limited and Vikash Saraf were dismissed by a Division Bench of this Court.

3. The brief facts necessary to appreciate how the controversy arose before this Court are as follows.

4. CBI registered an FIR RC No.DAI 2009 A 0045 dated 21.10.2009 alleging offences under the Prevention of Corruption Act, 1988 and criminal conspiracy in respect of the grant of 122 UAS licenses in the year 2008 against various unknown Government officials, persons and companies. The gist of the offence was set out in the penultimate paragraph of the said FIR, which is set out as follows:

> "Thus, the concerned officials of Department of Telecommunications in criminal conspiracy with private persons/companies by abusing their official position granted Unified Access Service Licenses to a few selected companies at nominal rate by rejecting the applications of others without any valid reason thereby causing wrongful loss to the Government of India and a corresponding wrongful loss to private persons/companies estimated to be more than Rs.22,000 Crores.
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> The aforesaid facts disclose commission of offence under sections 120-B IPC, r/w section 13(2) r/w 13 (1) (d) of PC Act, 1988 against certain unknown officials of Department of Telecommunications, Government of India, unknown private persons/companies and others"

5. On 16.12.2010, this Court passed an order reported in **Centre for Public Interest Litigation** v. **Union of India,** (2011) 1

SCC 560, directing the CBI to investigate the said FIR. On 10.2.2011, while monitoring the CBI investigation, this Court passed an order directing that no other Court shall pass any order which may in any manner impede the investigation being carried out by the CBI and Directorate of Enforcement. On 2.4.2011, and 25.4.2011, CBI filed a chargesheet and a first supplementary chargesheet against 12 accused persons for offences committed both under the Indian Penal Code and the Prevention of Corruption Act. It is common ground that none of the petitioners before us were named or mentioned in these two chargesheets.

6. The present case arises out of a second supplementary chargesheet dated 12.12.2011 naming 8 persons as accused, alleging offences under Section 120B read with Section 420 IPC. It is relevant to mention that this second supplementary chargesheet which implicated the petitioners before us did not contain any offences under the Prevention of Corruption Act. The CBI mentioned in the said chargesheet that separate offences came to their notice during the investigation of FIR RC No.DAI 2009 A 0045, as a result of which the second supplementary chargesheet was being filed. They further went on to state that these charges are triable by a Magistrate of the First Class but may be endorsed to any appropriate court as deemed fit after

which process may be issued to the accused persons for their appearance and to face trial as per law.

7. On 21.12.2011, the Special Judge took cognizance of this second supplementary chargesheet dated 12.12.2011 and stated that he was satisfied that there is enough incriminating material on record to proceed against the accused persons.

8. Meanwhile, pursuant to an observation made in this Court's order dated 10.2.2011, two important things happened. First, the Delhi High Court passed an administrative order dated 15.3.2011 appointing Shri O.P. Saini as Special Judge to undertake trial of cases in relation to all matters pertaining to the 2G Scam, and the Government of NCT of Delhi also promulgated a notification dated 28.3.2011 under the Prevention of Corruption Act nominating the self-same Shri O.P. Saini a Special Judge to undertake trial of cases in relation to all matters pertaining to the 2G Scam. Three writ petitions were filed as has been stated above, challenging *inter alia* the order dated 21.12.2011 passed by the Special Judge, CBI taking cognizance of the matters stated in the second supplementary chargesheet against the petitioners before us. The prayers contained in these writ petitions are set out hereunder:

a) a Writ of Certiorari or an order or direction in the nature of certiorari quashing the Administrative Order dated 15.03.2011 issued by the Respondent No. 1 in so far as it seeks to confer upon the Ld. Special Judge Shri O.P. Saini jurisdiction to inquire into and try all cases arising out of 2G Spectrum scam, which are otherwise exclusively inquired into and triable by a Magistrate under the relevant statutes and to quash all consequential actions/orders passed thereupon;

b) a Writ of Certiorari or any other order or direction in the nature of certiorari quashing the Notification bearing No. 6/05/2011-Judl. dated 28.03.2011 in so far as it seeks to confer upon the Ld. Special Judge Shri O.P. Saini jurisdiction to inquire into and try all cases arising out of the 2G Spectrum scam, including those which are not within the scope of his jurisdiction under the relevant statutes read with the Constitution of India and to quash all consequential actions/orders thereupon;

c) a writ to quash and set aside order dated 21.12.2011 passed by the Ld. Special Judge Shri O.P. Saini taking cognizance in CC No. 1(B) of 2011 titled 'CBI v Ravikant Ruia & Ors' and all proceedings emanating therefrom;

d) Pass such other further orders, which may be required in the interest of justice equity and good conscience.

9. It will thus be seen that prayers (a) and (b) concern themselves with quashing the administrative order dated 15.3.2011 of the High Court and the notification dated 28.3.2011 of the Government of NCT of Delhi, both appointing and conferring jurisdiction on the Special Judge to enquire into and try all cases arising out of the 2G Scam. Prayer (c) was devoted to setting aside the order dated 21.12.2011 passed by the learned Special

Judge taking cognizance.

10. In a detailed judgment, this Court set out the arguments of the petitioners as follows:

> "The learned counsel for the petitioner(s) assailed the impugned Administrative Order passed by the Delhi High Court dated 15-3-2011 and the Notification dated 28-3-2011 issued by the Government of NCT of Delhi on the following grounds:
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> 14.1. The impugned notification travels beyond the provisions of CrPC. CrPC mandates that offences under IPC ought to be tried as per its provisions.
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> 14.2. It has been held by this Hon'ble Court in *CBI* v. *Keshub Mahindra* [(2011) 6 SCC 216 : (2011) 2 SCC (Cri) 863] that: (SCC p. 219, para 11)
>
> > "*11. No decision by any court, this Court not excluded, can be read in a manner as to nullify the express provisions of an Act or the Code*…."
> >
> > (emphasis in original)
>
> Thus, the Administrative Order and the notification are contrary to the well-settled provisions of law and ought to be set aside insofar as they confer jurisdiction on a Special Judge to take cognizance and hold trial of matters not pertaining to the PC Act offences.
>
> 14.3. If the offence of Section 420 IPC, which ought to be tried by a Magistrate, is to be tried by a Court of Session, a variety of valuable rights of the petitioner would be jeopardised. This would be contrary to the decision of the Constitution Bench of the Hon'ble Supreme Court in *A.R. Antulay* v. *R.S. Nayak* [(1988) 2 SCC 602 : 1988 SCC (Cri) 372] , wherein it was acknowledged that the right to appeal is a valuable right and the loss of such a right is violative of Article

14 of the Constitution of India." [at para 14]

11. After setting out Sections 194, 26, 220 and 223 of the Code of Criminal Procedure Code (in short "CrPC") and Sections 3 and 4 of the Prevention of Corruption Act, this Court stated:

> "From the aforesaid second charge-sheet it is clear that the offence alleged to have been committed by the petitioners in the course of 2G Scam cases. For the said reason they have been made accused in the 2G Scam case.
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> Admittedly, the co-accused of 2G Scam case charged under the provisions of the Prevention of Corruption Act can be tried only by the Special Judge. The petitioners are co-accused in the said 2G Scam case. In this background Section 220 CrPC will apply and the petitioners though accused of different offences i.e. under Sections 420/120-B IPC, which alleged to have been committed in the course of 2G Spectrum transactions, under Section 223 CrPC they may be charged and can be tried together with the other co-accused of 2G Scam cases." [at paras 24 and 25]

12. This Court went on to consider some of the earlier judgments of this Court with reference to the validity of the administrative order dated 15.3.2011 and the notification dated 28.3.2011 and then held:

> "On the question of validity of the Notification dated 28-3-2011 issued by the NCT of Delhi and Administrative Order dated 15-3-2011 passed by the Delhi High Court, we hold as follows:
>
> 30.1. Under sub-section (1) of Section 3 of the PC Act

the State Government may, by notification in the Official Gazette, appoint as many Special Judges as may be necessary for such area or areas or for such case or group of cases as may be specified in the notification to try any offence punishable under the PC Act. In the present case, as admittedly, co-accused have been charged under the provisions of the PC Act, and such offence punishable under the PC Act, the NCT of Delhi is well within its jurisdiction to issue notification(s) appointing Special Judge(s) to try the 2G Scam case(s).

30.2. Articles 233 and 234 of the Constitution are attracted in cases where appointments of persons to be Special Judges or their postings to a particular Special Court are involved. The control of the High Court is comprehensive, exclusive and effective and it is to subserve a basic feature of the Constitution i.e. independence of judiciary. (See *High Court of Judicature for Rajasthan* v. *Ramesh Chand Paliwal* [(1998) 3 SCC 72 : 1998 SCC (L&S) 786] and *High Court of Orissa* v. *Sisir Kanta Satapathy* [(1999) 7 SCC 725 : 1999 SCC (L&S) 1373] .) The power to appoint or promote or post a District Judge of a State is vested with the Governor of the State under Article 233 of the Constitution which can be exercised only in consultation with the High Court. Therefore, it is well within the jurisdiction of the High Court to nominate officer(s) of the rank of the District Judge for appointment and posting as Special Judge(s) under sub-section (1) of Section 3 of the PC Act.

30.3. In the present case, the petitioners have not challenged the nomination made by the High Court of Delhi to the NCT of Delhi. They have challenged the letter dated 15-3-2011 written by the Registrar General, High Court of Delhi, New Delhi to the District Judge-I-cum-Sessions Judge, Tis Hazari Courts, Delhi and the District Judge-IV-cum-Additional Sessions Judge, I/C, New Delhi District, Patiala House Courts, New Delhi whereby the High Court intimated the officers about nomination of Mr O.P. Saini, an officer of Delhi Higher Judicial Service for his appointment as Special Judge for 2G Scam cases." [at para 30]

13. In the last paragraph, namely, paragraph 35, this Court dismissed the writ petitions in the following terms:

> "We find no merit in these writ petitions, they are accordingly dismissed. The Special Court is expected to proceed with the trial on day-to-day basis to ensure early disposal of the trial. There shall be no order as to costs." [at para 35]

14. Close upon the heels of the judgment of this Court, Essar Teleholdings Ltd., one of the petitioners before us, by an application dated 29.7.2013, sought for a joint trial, by praying as follows:-

> a) Pass an order to give effect to the judgment of the Hon'ble Supreme Court dated 01.07.2013 passed in Writ Petition (Civil) No. 57 of 2012, treating the Accused in CC No. 1B of 2011 as 'Co-accused' with the Accused in CC No.1 of 2011 and to pass all other consequential orders, in this regard; and/or
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> b) Consider the matter afresh from the stage of the receipt of the report under Section 173(8) CrPC, and frame fresh charges and also issue appropriate directions upon the Applicants joining the Trial in C.C. No.1 of 2011, and/or
>
> c) Issue appropriate directions to ensure that the proceedings i.e. CC No 1 of 2011 and CC No 1B of 2011 are assimilated into one Trial and for this purpose issue appropriate directions to rectify the situation as to the past, and for further proceedings, direct that the Trial being C.C. No. 1 of 2011 is conducted in conformity with Section 220 with 223 CrPC;and/or
>
> Pass any other order(s) as this Hon'ble Court may

deem fit and proper in the interest of justice.

15. The other two writ petitioners, whose petitions had been dismissed by this Court by the judgment dated 1.7.2013, namely, M/s Loop Telecom Limited and Mr. Vikash Saraf, both filed review petitions against the judgment dated 1.7.2013, in which they raised the self-same grounds that were argued before this Court. These review petitions were dismissed by this Court on 24.9.2013. It can be seen from this narration of facts that the judgment dated 1.7.2013 has become final between all the parties to the *lis*.

16. The immediate cause for filing of the present appeals is a judgment dated 2.9.2013 by which the Special Judge dismissed the application filed by Essar Teleholdings Ltd. asking for a joint trial.

17. Shri Harish Salve, learned senior counsel appearing for all the petitioners, submitted that as a lot of water had already flowed and a large number of witnesses have already been examined, the correct course of action in the present case should be to send the second supplementary chargesheet filed by the CBI to a Magistrate of the First Class to try the offences under Section 120B read with Section 420 of the Penal Code. His argument was

that this Court, in the judgment dated 1.7.2013, had held that since the present petitioners were co-accused in the on-going trial, it must follow that either there be a joint trial, in which case the entire proceeding has to start *de novo,* or as was suggested by him, the second supplementary chargesheet should be sent for trial separately to a Magistrate of the First Class. According to learned counsel, it is clear that under the Prevention of Corruption Act, the Special Judge can only try offences that arise under the said Act and not offences that arise under the Penal Code. It is only Section 4(3) of the said Act that permits, in the circumstances mentioned therein, the trial of Penal Code offences which are that when trying any case, the Special Judge may also try an offence other than the offence specified in Section 3 of the Prevention of Corruption Act provided that this can only be at the same trial. He stressed the words "same trial" and said that it is clear that short of a Penal Code offence being linked to a Prevention of Corruption Act offence and provided they are tried together, no offence under the Penal Code can be tried by the Special Judge set up under the Prevention of Corruption Act.

18. These submissions were countered by Shri Anand Grover, learned senior advocate appearing on behalf of the respondents. According to learned counsel, this Court in the judgment dated

1.7.2013 did not direct that there be a joint trial but only observed in passing that the special Judge "may" try the present case along with the main case. He further argued that ultimately, since this Court dismissed the writ petitions filed by these very petitioners, and stated that the Special Court is expected to proceed with the trial on a day to day basis to ensure early disposal, it is clear that ultimately no joint trial was, in fact, to take place under any alleged direction of this Court. He further went on to submit that in any case the provisions of Sections 220 and 223 of the CrPC vest a discretion in the Court, which discretion has been appropriately exercised by the learned Special Judge on the facts of the present case. He went on to argue that if there were to be a joint trial, all the accused would necessarily have to give their consent which is not the case here. He also went on to submit, by citing **Harjinder Singh** v. **State of Punjab,** (1985) 1 SCC 422, that the expression "same trial" occurring in section 4(3) of the Prevention of Corruption Act could also mean that the present case may be tried immediately after the trial in the main case is over.

19. Having heard learned counsel for both the parties, we are of the view that the learned senior advocate for the petitioners is attempting to raise submissions which have already been rejected by this Court by its judgment dated 1.7.2013. His main submission,

that in the fitness of things, the second supplementary chargesheet should be tried by a Magistrate of the First Class would be directly contrary to the finding of this Court that the said second supplementary chargesheet be tried only by the learned Special Judge. Quite apart from this, his submission is also beyond the prayer made in the application filed before the Special Judge. We have already extracted the said prayer in paragraph 13 above. It is clear that on a reading of the prayers in the said application, only a joint trial was asked for in pursuance of the judgment of this Court dated 1.7.2013. In fact, on a reading of the application and the arguments made before the learned Special Judge, the petitioners' main argument was that this Court, in the order dated 1.7.2013, had in fact mandated a joint trial. This was correctly turned down by the learned Special Judge, regard being had to the fact that this Court, in paragraph 25 of the judgment dated 1.7.2013, only stated that a discretion was vested with the Special Judge which he may well exercise given the facts of the case.

20. Read in the backdrop of Sections 220 and 223, it is clear that a discretion is vested with the Court to order a joint trial. In fact, in **Chandra Bhal** v. **State of U.P.**, (1971) 3 SCC 983, this Court stated:

> "Turning to the provisions of the Code, Section 233 embodies the general mandatory rule providing for a separate charge for every distinct offence and for separate trial for every such charge. The broad object underlying the general rule seems to be to give to the accused a notice of the precise accusation and to save him from being embarrassed in his defence by the confusion which is likely to result from lumping together in a single charge distinct offences and from combining several charges at one trial. There are, however, exceptions to this general rule and they are found in Sections 234, 235, 236 and 239. These exceptions embrace cases in which one trial for more than one offence is not considered likely to embarrass or prejudice the accused in his defence. The matter of joinder of charges is, however, in the general discretion of the court and the principle consideration controlling the judicial exercise of this discretion should be to avoid embarrassment to the defence by joinder of charges. On the appellant's argument the only provision requiring consideration is Section 235(1) which lays down that if in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person then he may be charged with and tried at one trial for every such offence. This exception like the other exceptions merely permits a joint trial of more offences than one. It neither renders a joint trial imperative nor does it bar or prohibit separate trials. Sub-section (2) of Section 403 of the Code also provides that a person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under Section 235(1). No legal objection to the appellant's separate trial is sustainable and his counsel has advisedly not seriously pressed any before us." [at para 5]

21. The other contention of learned senior counsel for the petitioners before us has already been answered by this Court by upholding both the administrative order dated 15.3.2011 and the

NCT notification dated 28.3.2011. This Court having held that the administrative order dated 15.3.2011 of the High court was valid, it is clear that even a Penal Code offence by itself – that is, such offence which is not to be tried with a Prevention of Corruption Act offence - would be within the Special Judge's jurisdiction inasmuch as the administrative order of the High Court gives power to the Special Court to decide all offences pertaining to the 2G Scam. In fact, once this order is upheld, the learned senior advocate's argument based on Section 4(3) of the Prevention of Corruption Act pales into insignificance. This is for the reason that independent of Section 4(3) of the Prevention of Corruption Act and of the notification dated 28.3.2011, the Special Judge has been vested with the jurisdiction to undertake the trial of all cases in relation to all matters pertaining to the 2G Scam exclusively, which would include Penal Code offences by themselves, so long as they pertain to the 2G Scam. Shri Salve cited **State (through CBI, New Delhi)** v. **Jitender Kumar Singh**, (2014) 11 SCC 724, and paragraph 38 in particular to submit that a Special Judge appointed to try Prevention of Corruption Act cases, cannot try non Prevention of Corruption Act cases unless there is a causal link between such cases and the Prevention of Corruption Act cases, in which case they must be tried together. As has been held by us,

once the challenge to the administrative order dated 15.3.2011, is specifically rejected, the offences arising out of the second supplementary chargesheet, being offences under the Penal Code relatable to the 2G scam, can be tried separately only by the Special Judge.

22. We find that the Special Judge, vide the order dated 2.9.2013, has given cogent reasons for not exercising his discretion to order a joint trial. He stated that the evidence in the main case has almost reached the end and as many as 146 witnesses in the main case and 71 witnesses in the second supplementary chargesheet have already been examined, clubbing the two cases together would result in the wastage of the effort already gone into and would lead to a failure of justice. The learned Judge concluded as follows:-

> 47) In the end I may add that it is not obligatory on the Court to hold a joint trial and provisions of these sections are only enabling provisions. An accused cannot insist with ulterior purpose or otherwise that he be tried as co-accused with other accused, that too in a different case. It is only a discretionary power and Court may allow it in a particular case if the interest of justice so demands to prevent miscarriage of justice. In the instant case, neither the facts and allegations are common, nor evidence is common nor the accused were acting with a commonality of purpose and, as such, there is no ground for holding a joint trial. I may also add that holding a joint trial at this stage may lead to miscarriage of justice.
> 48) In my humble view, a Court may not deem it

desirable to conduct a joint trial, even if conditions of these Sections are satisfied, though not satisfied in the instant case, that is:

a) when joint trial would prolong the trial;

b) cause unnecessary wastage of judicial time; and

c) confuse or cause prejudice to the accused, who had taken part only in some minor offence.

23. We find no infirmity in the impugned judgment. As a result, the appeal and the writ petitions are, therefore, dismissed.

……CJI.
(H.L. Dattu)

……J.
(A.K. Sikri)

……J.
(R.F. Nariman)

New Delhi;
September 29, 2015.