Dinesh Dalmia vs C.B.I on 18 September, 2007

Author: S.B. Sinha
Bench: S.B. Sinha, Harjit Singh Bedi

CASE NO.:

Appeal (crl.) 1249 of 2007

PETITIONER:

Dinesh Dalmia

RESPONDENT:

C.B.I.

DATE OF JUDGMENT: 18/09/2007

BENCH:

S.B. Sinha & Harjit Singh Bedi

JUDGMENT:

J U D G M E N T

CRIMINAL APPEAL NO. 1249 OF 2007 [Arising out of SLP (Crl.) No. 513 of 2007]

S.B. SINHA, J :

1. Leave granted.

2. Interpretation of Sub-section (2) of Section 167 of the Code of Criminal Procedure, 1973 (for short "the Code") vis-`-vis Sub-section (2) of Section 309 thereof falls for consideration of this Court in this appeal which arises out of an order dated 22.12.2006 passed by a learned Single Judge of the High Court of Judicature at Madras in Crl. R.C. No. 1173 of 2006 setting aside an order dated 25.08.2006 passed

by the 5th Additional Sessions Judge, Chennai in R.C. 4/(E)/03/BSC/FC/CBI New Delhi in Crl. R.C. No. 115 of 2006 whereby an order dated 30.05.2006 passed by the Special Court in Crl. M.P. No. 788 of 2006 in C.C. No. 19189 of 2005 was set aside.

3. Appellant was proceeded against for commission of offences under Sections 409, 420 and 120B of the Indian Penal Code.

4. The Central Bureau of Investigation (CBI) lodged a first information report against the appellant and three companies registered and incorporated under the Companies Act, 1956 on a complaint made by the Securities and Exchange Board of India. Indisputably, Appellant was named therein. He was, however, evading arrest. He had gone to the United States. The learned Magistrate by an order dated 14.02.2005, on a prayer made in that behalf by the CBI, issued a non-bailable warrant of arrest against him. Upon completion of investigation, a charge sheet was submitted before the Magistrate in terms of Sub-section (2) of Section 173 of the Code. In the said charge sheet, name of the appellant appeared in Column No. 1 along with the said three companies. Name of one of the companies named in the first information report, viz., M/s. DSQ Software Ltd., has been shown in Column No. 2. In the said charge sheet, it was stated:

"Investigation has revealed that Sh. Dinesh

Dalmia, the then Managing Director & Custodian of properties, including shares, of M/s. DSQ Software Ltd., fraudulently got dematerialized un- allotted and unlisted share of DSQ Software Ltd. In the name of three entities namely New Vision Investment Ltd., UK; Dinesh Dalmia Technology Trust and Dr. Suryanil Ghosh, Trustee Softec Corporation and thereafter these shares were sold in the market and the proceeds of sale of said shares were credited in the accounts of M/s. DSQ Holdings Ltd., M/s. Hulda Properties and Trade Ltd. and M/s. Powerflow Holding and Trading Pvt. Ltd. and thereby dishonestly misappropriated and cheated investors including existing share holders and obtained undue gain to the tune of Rs.

5,94,88,37,999/-.

Thus, Sh. Dinesh Dalmia has committed

fraudulent acts prima facie disclosing commission of offences of cheating, breach of trust,forgery and using forged documents as genuine by getting wrongful gain in the matter of partly paid shares. DSQ Software Ltd. in the name of New Vision

Investment Ltd., UK; unallotted shares in the name of Dinesh Dalmia Technology Trust and "Dr.

Suryanil Ghosh Trustee Softec Corporation". M/s. DSQ Holdings Ltd., M/s. Hulda Properties and Trades Ltd. and M/s. Powerflow Holding &

Trading Pvt Ltd have also committed offence of cheating in the matter of above mentioned shares and the above facts disclose commission of

offences punishable U/s 409, 420, 468 and 471 IPC on the part of accused Sh. Dinesh Dalmia (A- 1) and U/ 420 IPC on the part of accused

companies namely M/s DSQ Holdings Ltd (A-2)

represented by Sh. Dinesh Dalmia, Director, M/s. Hulda Properties & Trades Ltd (A-3) represented by Sh Ashok Kumar Sharma, Director & M/s

Powerflow Holding & Trading Pvt Ltd (A-4)

represented by Sh Ashok Kumar Sharma, Director.

During investigation the allegations against DSQ Software Ltd could not be substantiated and hence it is not being charge sheeted.

Accused Dinesh Dalmia is evading arrest

and has absconded to USA. He has not joined investigation. Ld. ACMM, Egmore Chennai

issued an open ended non-bailable warrant of his arrest and a Red Corner Notice (RCN) has been issued against him through INTERPOL for

locating him. His examination is necessary in this case as only he alone is aware of the end use of the funds.

Further investigation on certain vital points including end use of the funds, foreign

investigation in the matter of genuineness of New Vision Investment Ltd and as shown as its

authorized signatory, Sh. Hitendra Naik, in United Kingdom and other foreign investigation are still continuing and after completion of the remaining investigation the report of the same will be filed under section 173(8) Cr. PC in due course.

The questioned documents have been sent to

GEQD for expert opinion, it is still awaited. After being obtained, the same will be submitted with additional list of documents.

The list of witnesses and list of documents

are enclosed herewith and additional list of documents & witnesses, if necessary, will be submitted in due course.

It is, therefore, prayed that this Hon'ble

court may be pleased to take cognizance of the offences, issue the process to secure the presence of the accused and they may be tried according to law."

5. Although statements made by the witnesses under Section 161 of the Code accompanied the charge sheet, the relevant documents could not be filed as they were sent for examination before the Government Examiner of Questioned Documents (GEQD). Cognizance was taken by the Magistrate on the said charge sheet by an order dated 25.10.2005. It was specifically noted that non-bailable warrant as against the appellant was still pending.

The CBI contended that the appellant entered into India illegally as no endorsement had been made in his passport showing a valid travel undertaken by him. He was

produced before a Magistrate in Delhi for transit remand to Chennai. An order to that effect was passed. On 14.02.2006, when he was produced before the concerned Magistrate at Chennai, an order forpolice custody was prayed for and was granted till 24.02.2006. Another application was filed for further police custody for four days on 21.02.2006. An application was also filed seeking permission to conduct brain mapping, polygraph test, on the appellant which was allowed.

6. Appellant had been handed over to the police for conducting investigation till 8.03.2006. He, however, was remanded to judicial custody till 14.03.2006 by an order dated 9.03.2006. Allegedly, on the plea that further investigation was pending, the CBI prayed for and obtained order of remand to judicial custody from the learned Magistrate on 14.03.2006, 28.03.2006, 10.04.2006 and 28.04.2006. All the applications were made purported to be under Sub-section (2) of Section 167 of the Code.

7. Appellant, on expiry of 60 days from the date of his arrest, filed an application for statutory bail purported to be in terms of the proviso appended to Sub-section (2) of Section 167 of the Code on the premise that no further charge sheet in respect of the investigation under Sub-section (8) of Section 173 of the Code has been filed. When the said application was pending consideration, the CBI sought for his remand in judicial custody under Sub-section (2) of Section 309 thereof.

The said application for statutory bail was rejected by the learned Magistrate opining:

"Because, in this case, the petitioner was

arrested on the basis of Non-bailable warrant issued by this court, after taking cognizance of the offences in charge sheet. Further, the respondent side has clearly stated that before further

investigation commenced on 14.2.2006, the

petitioner was remanded to police custody, hence he was in the custody of the court since his arrest on 12.2.2006. Therefore, after expiry of the police custody, the

petitioner should be remanded to judicial custody u/s 309(2) Cr. P.C. and not u/s 167(2) Cr.P.C. However, in this case, by mistake, provision of law under which the petitioner was remanded to judicial custody was mentioned as Section 167(2) Cr.P.C. in the remand report. In fact for remanding an accused in custody against whom charge sheet has already been filed and an application for remand is not required. Hence this court is inclined to state that the petitioner was remanded to police custody u/s 167(2) Cr.P.C. and thereafter was remanded to judicial custody u/s 309 Cr.P.C."

The learned Magistrate further took note of the fact that two other cases have been registered against him by the Calcutta Police.

8. A revision application filed by the appellant herein before the learned Sessions Judge was allowed inter alia relying on or on the basis of the decision of this Court in State Through CBI v. Dawood Ibrahim Kaskar and Others [(2000) 10 SCC 438] stating:

"23. Taking into consideration of all these facts and circumstances of the case and principle of law laid down by the Hon'ble Apex Court I feel that in view of the positive conduct of the respondent in relying upon Section 167(2) Cr. P.C. in all their applications (up to the filing of the bail

application), the petitioner can also rely upon it and seek necessary orders thereunder, that the respondent is now estopped from pleading

opposite to their own previous conduct and that Section 309(2) cannot be applied to a person like the petitioner, who was arrested in the course of further investigation."

9. The CBI moved the High Court thereagainst. Its application was registered as Crl. R.C. No. 1173 of 2006. The decision of the learned Sessions Judge was over-turned by the High Court by reason of the impugned judgment stating:

"Because of this interpretation the learned

Magistrate is empowered to give "Police custody". Once police custody is completed the accused reverts back to judicial custody of post cognizance stage. Even if further investigation continues as far as such accused are concerned scope of section 167 comes to an end. "Subject to fulfillment of the requirement and the limitation of Section 167" only refers to the investigation during "police custody" especially when an accused is in remand under Section 167. When further investigation keeping him in police custody during post

cognizance stage is completed, the remand of an accused is only governed under Section 309

Cr.P.C. Under such circumstances, invoking of proviso to section 167 and demand for a

benevolent provision is inapplicable to such accused.

27. The object of enactment of such proviso in Section 167 Cr. P.C. is to have control over a lethargic, delayed investigation, especially keeping a person in custody. It is a specific direction to the police to collect material without any delay. If sufficient incriminating materials are not collected against the accused with the crime alleged. It safeguards the interest of such accused person. If materials are collected and reported to the

Magistrate within the period stipulated by filing charge sheet, then the scope of proviso to section 167 extinguishes and an accused can claim bail only on merit.

28. In the instant case most of the materials have been collected. The materials to connect the accused with the crime is already available. Final conclusion also was reached and charge sheet filed. However, custodial interrogation of the accused felt necessary. Such interrogation

entrusting him in police custody was done between 12.02.2006 and 27.02.2006 cognizance of the case was taken much earlier on 25.10.2005. Only for custodial interrogation he was entrusted under Section 167 to the CBI. Section 167 Cr.P.C. can be invoked only for such purpose in a post

cognizance case. Otherwise a remand must be made only under Section 309 Cr.P.C. If a wrong provision is quoted for further remand under section 167 Cr.P.C. instead of 309 one cannot claim the benefit of a benevolent proviso to section

167. Proviso to section 167 is available only to safeguard an innocent person or a person against whom no materials collected in spite of detaining him for 60/90 days. In the instant case abundant materials have been already collected and final report filed. Two years after the cognizance he was apprehended. He was entrusted with police custody only for custodial interrogation. Further investigation may be pending to comply with other formalities. There may be delay to receive opinion from experts and such delay cannot be taken

advantage of by invoking the proviso to section 167 Cr.P.C."

10. Appellant is, thus, before us.

11. Mr. Mukul Rohatgi, learned senior counsel appearing on behalf of the appellant, has raised two contentions before us:

(i) The charge sheet filed against the appellant and cognizance taken thereupon is illegal and invalid and by reason thereof, a valuable right of the appellant to be released on bail has been taken away. (ii) Even if the charge sheet is legal, the right of the appellant under Sub-section (2) of Section 167 of the Code continued to remain available in the facts and circumstances of the case.

Elaborating his submission, Mr. Rohatgi urged that a police report must strictly conform to the requirements laid down under Section 173 of the Code and the prescribed form for submission of the final form wherefrom it would be evident that no charge sheet can be filed upon purported completion of investigation against the appellant as he had been absconding. As the CBI kept investigation as against the appellant open, as would appear from the charge sheet itself as also the prayers made and granted by the learned Magistrate which is permissible only under Sub-section (2) of Section 167 of the Code, no chargesheet in law can be said to have been filed so far as the appellant was concerned. The CBI moreover itself proceeded on the basis that the investigation against the appellant had been pending and only in

that view of the matter applications for remand were filed under Sub-section (2) of Section 167 of the Code. It was contended that only when the appellant applied for grant of statutory bail, the CBI changed its stand and filed an application for remand under Sub- section (2) of Section 309 of the Code.

12. Mr. Amarendra Sharan, learned Additional Solicitor General appearing on behalf of the CBI, on the other hand, would submit that a charge sheet having been submitted before the Court and cognizance having been taken on the basis thereof, the only provision applicable for remand of the accused would be Sub-section (2) of Section 309 of the Code and, thus, even if a wrong provision has been mentioned by CBI in their applications for remand, the same by itself would not render the order of the Court invalid in law.

In this case the CBI took a conscious decision to file charge sheet against the appellant. His name was shown in Column No. 1 thereof although he was absconding. It was found that a case for trial has been made out. There were five accused against whom allegations were made by the complainant. One of the companies was not sent for trial as nothing was found against it. All the other accused named in the first information report had been sent for trial.

14. The learned Magistrate took cognizance of the offence. The said power can be exercised only under Section 190(1)(b) of the Code. The learned Magistrate noticed the fact, while taking cognizance of the offence, that the appellant had been absconding and a non-bailable warrant of arrest had been issued against him.

Whereas the charge sheet was submitted on 24.10.2005, the appellant was arrested only on 12.02.2006. According to Mr. Sharan, the additional documents were filed on 20.01.2006.

15. A charge sheet is a final report within the meaning of Sub-section (2) of Section 173 of the Code. It is filed so as to enable the court concerned to apply its mind as to whether cognizance of the offence thereupon should be taken or not. The report is ordinarily filed in the form prescribed therefor. One of the requirements for submission of a police report is whether any offence appears to have been committed

and, if so, by whom. In some cases, the accused having not been arrested, the investigation against him may not be complete. There may not be sufficient material for arriving at a decision that the absconding accused is also a person by whom the offence appears to have been committed. If the investigating officer finds sufficient evidence even against such an accused who had been absconding, in our opinion, law does not require that filing of the charge sheet must await the arrest of the accused.

16. Indisputably, the power of the investigating officer to make a prayer for making further investigation in terms of Sub-section (8) of Section 173 is not taken away only because a charge sheet under Sub-section (2) thereof has been filed. A further investigation is permissible even if order of cognizance of offence has been taken by the Magistrate.

17. We may notice that a Constitution Bench of this Court in K. Veeraswami v. Union of India and Others [(1991) 3 SCC 655] stated the law in the following terms :

"76As observed by this Court in Satya Narain Musadi v. State of Bihar that the statutory

requirement of the report under Section 173(2) would be complied with if the various details prescribed therein are included in the report. This report is an intimation to the magistrate that upon investigation into a cognizable offence the

investigating officer has been able to procure sufficient evidence for the Court to inquire into the offence and the necessary information is being sent to the Court. In fact, the report under Section 173(2) purports to be an opinion of the

investigating officer that as far as he is concerned he has been able to procure sufficient material for the trial of the accused by the Court. The report is complete if it is accompanied with all the

documents and statements of witnesses as required by Section 175(5). Nothing more need be stated in the report of the Investigating Officer. It is also not necessary that all the details of the offence must be stated. The details of the offence are required to

be proved to bring home the guilt to the accused at a later stage i.e. in the course of the trial of the case by adducing acceptable evidence.

18. It is true that ordinarily all documents accompany the charge sheet. But, in this case, some documents could not be filed which were not in the possession of the CBI and the same were with the GEQD. As indicated hereinbefore, the said documents are said to have been filed on 20.01.2006 whereas the appellant was arrested on 12.02.2006. Appellant does not contend that he has been prejudiced by not filing of such documents with the charge sheet. No such plea in fact had been taken. Even if all the documents had not been filed, by reason thereof submission of charge sheet itself does not become vitiated in law. The charge sheet has been acted upon as an order of cognizance had been passed on the basis thereof. Appellant has not questioned the said order taking cognizance of the offence. Validity of the said charge sheet is also not in question.

Application of Sub-section (2) of Section 173 of the Code vis-`-vis Sub-section (2) of Section 309 must be considered having regard to the aforementioned factual and legal backdrop in mind.

19. Concededly, the investigating agency is required to complete investigation within a reasonable time. The ideal period therefor would be 24 hours, but, in some cases, it may not be practically possible to do so. The Parliament, therefore, thought it fit that remand of the accused can be sought for in the event investigation is not completed within 60 or 90 days, as the case may be. But, if the same is not done with the stipulated period, the same would not be detrimental to the accused and, thus, he, on the expiry thereof would be entitled to apply for bail, subject to fulfilling the conditions prescribed therefor.

Such a right of bail although is a valuable right but the same is a conditional one; the condition precedent being pendency of the investigation. Whether an investigation in fact has remained pending and the investigating officer has submitted the charge sheet only with a view to curtail the right of the accused would essentially be a question of fact. Such a question strictly does not arise in this case inasmuch as, according to the CBI, sufficient materials are already available for prosecution of the

appellant. According to it, further investigation would be inter alia necessary on certain vital points including end use of the funds.

20. Apart from the appellant, three companies, registered and incorporated under the Companies Act, have been shown as accused in the charge sheet. It was, therefore, not necessary for the CBI to file a charge sheet so as to curtail the right of the accused to obtain bail. It is, therefore, not a case where by reason of such submission of charge sheet the appellant has been prejudiced in any manner whatsoever.

21. It is also not a case of the appellant that he had been arrested in course of further investigation. A warrant of arrest had already been issued against him. The learned Magistrate was conscious of the said fact while taking cognizance of the offence.

It is now well settled that the court takes cognizance of an offence and not the offender. [See Anil Saran v. State of Bihar and another (1995) 6 SCC 142 and Popular Muthiah v. State represented by Inspector of Police (2006) 7 SCC 296]

22. The power of a court to direct remand of an accused either in terms of Sub-section (2) of Section 167 of the Code or Sub-section (2) of Section 309 thereof will depend on the stages of the trial. Whereas Sub-section (2) of Section 167 of the Code would be attracted in a case where cognizance has not been taken, Sub-section (2) of Section 309 of the Code would be attracted only after cognizance has been taken.

23. If submission of Mr. Rohatgi is to be accepted, the Magistrate was not only required to declare the charge sheet illegal, he was also required to recall his own order of taking cognizance. Ordinarily, he could not have done so. [See Adalat Prasad v. Rooplal Jindal and Ors. (2004) 7 SCC 338, Subramanium Sethuraman v. State of Maharashtra and Anr. 2004 (8) SCALE 733 and Everest Advertising Pvt. Ltd. v. State, Govt. of NCT of Delhi and Ors. JT 2007 (5) SC529] It is also well-settled that if a thing cannot be done directly, the same cannot be permitted to be done indirectly. If the order taking cognizance exists, irrespective of the conduct of the CBI in treating the investigation to be open or filing applications for remand of the accused to police custody or judicial remand under Sub-section (2) of Section 167 of

the Code stating that the further investigation was pending, would be of no consequence if in effect and substance such orders were being passed by the Court in exercise of its power under Sub-section (2) of Section 309 of the Code.

24. We, however, have no words to deprecate the stand of the CBI. It should have taken a clear and categorical stand in the matter.

We, however, are proceeding on the basis that irrespective of the stand taken by the CBI, law will prevail. We may notice the law operating in the field in this behalf.

25. In support of the submission in regard to interpretation of Sub-section (2) of Section 167 and Sub-section (2) of Section 309 of the Code, strong reliance has been placed by Mr. Rohatgi on Central Bureau of Investigation, Special Investigation Cell I, New Delhi v. Anupam J. Kulkarni [(1992) 3 SCC 141] and Dawood Ibrahim Kaskar (supra).

In Anupam J. Kulkarni (supra), the question which inter alia arose for consideration of this Court was as to whether the period of remand ordered by an Executive Magistrate in terms of Section 57 of the Code should be computed for the purpose of Sub-section (2) of Section 167 thereof. This Court, keeping in view the provisions of Clause (2) of Article 22 of the Constitution of India, answered the question in the affirmative. It was held that a total period of remand during investigation is fifteen days. In that context, this Court observed:

"However, taking into account the difficulties which may arise in completion of the investigation of cases of serious nature the legislature added the proviso providing for further detention of the accused for a period of ninety days but in clear terms it is mentioned in the proviso that such detention could only be in the judicial custody. During this period the police are expected to complete the investigation even in serious cases. Likewise within the period of sixty days they are expected to complete the investigation in respect of other offences. The legislature however

disfavoured even the prolonged judicial custody during investigation. That is why the proviso lays down that on the expiry of ninety days or sixty days the accused shall be released on bail if he is prepared to and does furnish bail"

In regard to the question as to whether such an order of remand would be permissible in law when an accused is wanted in different cases, the answer was again rendered in affirmative. We are not faced with such a problem in the instant case.

26. In Dawood Ibrahim Kaskar (supra), this Court held:

"11. There cannot be any manner of doubt that the remand and the custody referred to in the first proviso to the above sub-section are different from detention in custody under Section 167. While remand under the former relates to a stage after cognizance and can only be to judicial custody, detention under the latter relates to the stage of investigation and can initially be either in police custody or judicial custody. Since, however, even after cognizance is taken of an offence the police has a power to investigate into it further, which can be exercised only in accordance with Chapter XII, we see no reason whatsoever why the provisions of Section 167 thereof would not apply to a person who comes to be later arrested by the police in course of such investigation. If Section 309(2) is to be interpreted - as has been interpreted by the Bombay High Court in Mansuri (supra) - to mean that after the Court takes cognizance of an offence it cannot exercise its power of detention in police custody under Section 167 of the Code, the

Investigating Agency would be deprived of an opportunity to interrogate a person arrested during further investigation, even if it can on production of sufficient materials, convince the Court that his detention in its (police) custody was essential for that purpose. We are therefore of the opinion that the words "accused if in custody" appearing in Section 309(2) refer and relate to an accused who was before the Court when cognizance was taken or when enquiry or trial was being held in respect of him and not to an accused who is subsequently arrested in course of further investigation. So far as the accused in the first category is concerned he can be remanded to judicial custody only in view of Section 309(2), but he who comes under the second category will be governed by Section 167 so long as further investigation continues. That necessarily means that in respect of the latter the Court which had taken cognizance of the offence may exercise its power to detain him in police custody, subject to the fulfilment of the

requirements and the limitation of Section 167."

27. We had noticed the dicta of the Constitution Bench judgment of this Court. At this juncture, we may notice the dicta laid down by this Court in Sanjay Dutt v. State Through C.B.I. Bombay (II)[(1994) 5 SCC 410] wherein it was held:

"53(2)(b) The 'indefeasible right' of the accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section

167(2) of the CrPC in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which enures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so

released on bail may be arrested and committed to custody according to the provisions of the CrPC. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at that stage."

28. It is a well-settled principle of interpretation of statute that it is to be read in its entirety. Construction of a statute should be made in a manner so as to give effect to all the provisions thereof. Remand of an accused is contemplated by the Parliament at two stages; pre-cognizance and post cognizance. Even in the same case depending upon the nature of charge sheet filed by the investigating officer in terms of Section 173 of the Code, a cognizance may be taken as against the person against whom an offence is said to have been made out and against whom no such offence has been made out even when investigation is pending. So long a charge sheet is not filed within the meaning of Sub-section (2) of Section 173 of the Code, investigation remains pending. It, however, does not preclude an investigating officer, as noticed

hereinbefore, to carry on further investigation despite filing of a police report, in terms of Sub-section (8) of Section 173 of the Code.

29. The statutory scheme does not lead to a conclusion in regard to an investigation leading to filing of final form under Sub-section (2) of Section 173 and further investigation contemplated under Sub-section (8) thereof. Whereas only when a charge sheet is not filed and investigation is kept pending, benefit of proviso appended to Sub-section (2) of Section 167 of the Code would be available to an offender; once, however, a charge sheet is filed, the said right ceases. Such a right does not revive only because a further investigation remains pending within the meaning of Sub-section (8) of Section 173 of the Code.

30. The High Court, in our opinion, is correct in its finding that, in the fact situation obtaining, the appellant had no statutory right to be released on bail.

31. We do not, thus, find any infirmity in the judgment of the High Court. Accordingly, the appeal is dismissed.