V.G.ARUN, J.

Crl.M.A.No.1 Of 2020
in Crl.M.C.No.4375 of 2020
&
W.P.C) No.20668 of 2020

Dated this the 13th day of October, 2020

ORDER

The brief facts required for considering the necessity or otherwise of issuing interim directions in Crl.M.C No.4375 of 2020 filed by the probable accused, and W.P.(C) No.20668 of 2020 filed by the named accused, in RC 5(A)/2020/CBI/ACB/Cochin registered at the Cochin Unit of the Central Bureau of Investigation are as under:

As per G.O.(P)No.41/2016/P&EAD dated 28.09.2016, the Government of Kerala had launched four programmes aimed at overall development of the State. The Livelihood, Inclusion and Financial Empowerment Mission (hereinafter "LIFE Mission") is one among the four programmes, the objective of which is to provide secure and adequate housing facilities to all landless and homeless families in the State. The project contemplates construction of housing units by utilising Government funds, sponsorships and funds of Local Self Government Institutions.

2. In early 2017, the Emirates Red Crescent, a volunteer humanitarian organisation, affiliated to the International Federation of the Red Cross and Red Crescent Societies, expressed willingness to provide financial assistance to the tune of 10,000,000 United Arab Emirates Dirhams (AED) for the construction of homes for the victims of the Kerala floods, as also a health centre. The offer fructified through a Memorandum of Understanding (MoU) entered into between the General Secretary of the UAE Red Crescent Authority and the Chief Executive Officer, LIFE Mission, Government of Kerala on 11.7.2019. The MoU provided for allocation of AED 7,000,000 for the construction

of homes for the victims of the Kerala floods, and AED 3,000,000 for construction of the health centre. The MoU also contain provisions for execution of joint projects by the parties and ensures the independence and freedom of each party to contract with a third party, except in the context of executing the joint projects.

3. Land belonging to the Wadakkanchery Municipality admeasuring 2.17 acres was made available for construction of the dwelling units and health centre. Thereafter, construction agreements were executed between the UAE Consul General, 'Unitac Builders and Developers' and 'Sane Ventures LLP' on 31.07.2019. The agreements provide for construction of apartment buildings spanning a total of 55000 sq.ft, consisting of approximately 140 apartments of 500 sq.ft each, and a mother and children health care centre with a total area of 4000 sq.ft.

4. Within the next two days, viz. 01.08.2019 and 02.08.2019, 40% of the project cost of AED 10,000,000 was transferred to the account of M/s Unitac Builders & Developers and M/s Sane Ventures LLP. Thereupon, the builders commenced construction, with the concurrence of the LIFE Mission and under its supervision.

5. On 20.09.2020, Sri. Anil Akkara, the MLA representing Wadakkancherry assembly constituency filed a complaint before the Superintendent of Police, CBI, Kochi Unit alleging that, acceptance of funds by M/s Unitac Builders & Developers and M/s Sane Ventures LLP directly from Red Crescent, a foreign agency, with the concurrence of the LIFE Mission, a Kerala Government agency, is illegal and in violation of the provisions of the Foreign Contribution (Regulation), Act, 2010 (hereinafter "FCRA"). Based on the complaint, Crime No.RC/033/2020/A0005 was registered by the CBI,

for offences under Section 120B of the Indian Penal Code, 1860 and Section 35 read with Section 3 of the FCRA against Sri.Santhosh Eappen, Managing Director of M/s. Unitac Builders & Developers, M/s. Sane Ventures LLP, unknown officials of the LIFE Mission Kerala and others.

6. Crl.M.C.No.4375 of 2020 is filed by the CEO of the LIFE Mission and W.P(C).No.20668 of 2020 is filed by Sri. Santhosh Eappen. The petitioners are in unison in their challenge against registration of the Crime.

7. Heard Sri.K.V.Viswanathan, learned Senior Counsel appearing for the petitioner in Crl.M.C.No.4375 of 2020, Sri.K.N.Abhilash, learned Counsel for the petitioner in W.P(C).No.20668 of 2020, Sri. Sasthamangalam S.Ajitkumar, learned Standing Counsel for CBI and Sri.K.B.Gangesh, learned Counsel for the complainant.

8. In elaboration of the grounds of

challenge, the learned Senior Counsel submitted that the complaint does not make out even a *prima facie* case and the hasty manner in which the crime was registered indicates a deliberate attempt to malign the State Government. Drawing attention to Sections 2(h), 2(j), 3, 4, 35, 43 and 50 of the FCRA, it was contended that a reading of the said provisions would leave no room for doubt that the allegations in the complaint, even if accepted in their entirety, are inadequate to implicate the petitioner or other officials of the LIFE Mission. Reference was also made to SRO 1492(E) dated 01.07.2011 issued by the Ministry of Home Affairs, Government of India, exempting all statutory bodies from the operation of all the provisions of the FCRA, and S.O.459(E) dated 30.01.2020, exempting all organisations (not being a political party) constituted or established by or under a Central Act or a State Act or by any administrative or executive order of the Central Government or any State Government and wholly owned by the respective Government and required to have their accounts compulsorily audited by the Comptroller and Auditor General of India or any of the agencies of the CAG, from the operation of the FCRA, in exercise of the power under Section 50 of the FCRA.

9. Reliance was placed on the decisions of the Apex Court in *State of U.P v. Mohammad Naim [AIR 1964 SC 703]* and *Divine Retreat Centre v. State of Kerala and Others [(2008)3 SCC 542]*, and that of the High Court of Bombay in *Union of India v. State of Maharashtra [2003 SCC Online Bom. 1312]* to contend that a Crl.M.C under Section 482 Cr.P.C at the instance of the State is maintainable. The decision in *Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya and Others [(1990) 4 SCC 76]* to point out the need

for restricted interpretation of special penal statutes and *Harmanpreet Singh Ahluwalia and Others v. State of Punjab and others [(2009) 7 SCC 712]* to buttress the contention of the inherent power under Section 482 Cr.P.C to prevent abuse of process and for securing ends of justice being vast and unfettered. *Indian Social Action Forum (INSAF) v. Union of India [2020 SCC online SC 310]* is cited to point out the objective of the FCRA and its different facets. The decision of this Court in *Ravindran v. CBI [1999 (3) KLT 68]* is relied on to contend that, since the Vigilance and Anti Corruption Bureau under the State has registered a crime for offences under the Prevention of Corruption Act, 1988, the CBI could not have registered another crime under the FCRA without the State's consent. The learned Senior Counsel contended that registration of cases of this nature by the CBI, transgressing into the

States' power, is a challenge to the very federal structure envisaged by our constitution and cannot be viewed as an isolated instance.

10. Sri. Abhilash supported the contentions of the learned Senior Counsel and submitted that his client has been questioned by the National Investigation Agency, the Enforcement Directorate, the CBI and the Vigilance and Anti Corruption Bureau, and that repeated questioning amounts to violation of the fundamental right guaranteed under Article 21 of the Constitution of India. The Honourable Supreme Court's decision in *Toda Ram v. State of Maharashtra [AIR 1954 SC 496]* was cited to contend that, while interpreting penal statutes, courts should lean in favour of the accused.

11. It is the contention of the learned Counsel that the construction work of the dwelling units and health centre was awarded to the

petitioner after a regular tender process by the UAE Consulate and payment received by the petitioner for that work would not fall within the definition of 'foreign contribution' and hence, the prohibition under Section 3 of the FCRA is not attracted. That, the exception under Section 4 would apply and therefore, registration of crime against the petitioner is patently illegal.

12. Sri. K.B.Gangesh, learned Counsel appearing for the complainant, submits that the provisions of the FCRA cannot be read in isolation. According to the learned Counsel, Section 3(c) takes in not only employees of any Corporation or other body controlled or owned by the Government, but Corporations and bodies controlled or owned by the Government as well, and hence prohibition under Section 3 is applicable to the LIFE Mission also. It is contended that, S.O.459(E) dated 30.01.2020, exempting all

organisations (not being a political party) constituted or established by or under a Central Act or a State Act or by any administrative or executive order of the Central Government or any State Government and wholly owned by the respective Government and required to have their accounts compulsorily audited by the Comptroller and Auditor General of India or any of the agencies of the CAG, from the operation of the Act being prospective, will not save the transactions of the LIFE Mission, which were prior to the notification. According to the learned Counsel, since the UAE Consul General was not a party to the MoU between Red Crescent and the LIFE Mission, the agreement entered between the Consul General and the builders and the payments made by the Consul General cannot be termed as payment by a foreign source. Further, the payment having been made in advance, cannot be termed as payment for goods and services rendered, as provided in Explanation 3 to Section 2(h).

13. The learned Standing Counsel for CBI agreed with the legal propositions exposited by the learned Senior Counsel, but submits that the dictum laid down by the decisions relied on by the Senior Counsel is not applicable to the facts of the instant case. Learned Standing Counsel read out the statement of Sri.Santhosh Eappen elaborately to drive home the point of a conspiracy having been hatched much before the MoU between Red Crescent and the LIFE Mission, to award the work to M/s Unitec Builders & Developers and M/s. Sane Ventures LLP, which are only name lenders, and to siphon off the foreign contribution in the guise of kick backs/commission to the officials at the UAE Consulate. It is contended that Senior Officials in the State Government, including the then Principal Secretary

to the Chief Minister, are parties to the conspiracy and further investigation is required to unravel the truth. Referring to the statement regarding payment of kick back at paragraph 5 of W.P(C).No.20668 of 2020, it is contended that the said admission and the writ petitioner's statement before the investigating officer are sufficient to prove that no tender was conducted for awarding the construction work and the actual fact is that in furtherance of criminal conspiracy, Swapna Suresh and Sarit, who were employed at the UAE Consulate, along with Sandeep and Yadhu Surendran, had conspired with the builders and high ranking officials in the State Government for siphoning off the foreign contribution for other purposes. It is pointed out that the four persons named above are hardened smugglers and cases have been registered against them by the Customs Department, the National Investigation Agency and the

Enforcement Directorate. It is suspected that the siphoned off foreign contribution may be utilised for anti national activities. Referring to section 43 of the FCRA and the S.O.No. 2446(E) dated 27.10.2011, it is contended that the CBI is the agency empowered to investigate offences under the FCRA. The consent accorded by the Government of Kerala vide S.R.O.No.318/2017 dated 13.06.2017 and the consequential Notification No. 15421/SSA5/2017/Home. dated 08.06.2017 issued by the Central Government are relied on to counter the contention of the CBI not being invested with the power to investigate offences under the FCRA.

14. Being *prima facie* convinced that the CBI is vested with the power to investigate offences under the FCRA committed within the State of Kerala, as also the *locus standi* of the State Government to challenge registration of the crime, and the larger questions being left to be decided

at the time of final hearing, this Court need only focus on whether the allegations in the complaint along with other materials made available are sufficient to attract the offences under the FCRA. The resolution of this question depends on an understanding of the relevant provisions. The objective of the FCRA as adumbrated by its preamble is twofold; (i) to regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain individuals or associations or Companies, and (ii) to prohibit acceptance and utilisation of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto. 'Foreign contribution' has been defined Under Section 2(h) as follows:

> *"2(h) "foreign contribution" means the donation, delivery or transfer made by any foreign source,—*

(i) of any article, not being an article given to a person as a gift for his personal use, if the market value, in India, of such article, on the date of such gift, is not more than such sum as may be specified from time to time, by the Central Government by the rules made by it in this behalf;

(ii) of any currency, whether Indian or foreign;

(iii) of any security as defined in clause (h) of Section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and includes any foreign security as defined in clause (o) of Section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999).

Explanation 1.—A donation, delivery or transfer of any article, currency or foreign security referred to in this clause by any person who has received it from any foreign source, either directly or through one or more persons, shall also be deemed to be foreign contribution within the meaning of this clause.

Explanation 2.—The interest accrued on the foreign contribution deposited in any bank referred to in sub-section (1) of Section 17 or any other income derived from the foreign contribution or interest thereon shall also be deemed to be foreign contribution within the meaning of this clause.

Explanation 3.—Any amount received, by any person from any foreign source in India, by way of fee (including fees charged by an educational institution in India from foreign student) or towards cost in lieu of goods or services rendered by such person in the ordinary course of his business, trade or

> *commerce whether within India or outside India or any contribution received from an agent of a foreign source towards such fee or cost shall be excluded from the definition of foreign contribution within the meaning of this clause;"*

15. Undisputedly LIFE Mission has not received any foreign contribution directly from the sponsor. The amounts received by M/s. Unitec Builders & Developers and M/s. Sane Ventures LLP, in terms of the agreement entered between them and the foreign source, being towards cost in lieu of goods or services rendered in the ordinary course of business, is exempted by virtue of Explanation 3 of Section 2(h). Section 3 of the FCRA dealing with prohibition from accepting foreign contribution reads as under:

> *"3. Prohibition to accept foreign contribution.—(1) No foreign contribution shall be accepted by any—*
>
> *(a) candidate for election;*
>
> *(b) correspondent, columnist, cartoonist, editor, owner, printer or publisher of a registered newspaper;*
>
> *(c) public servant, Judge, Government servant or employee of any corporation or*

any other body controlled or owned by the Government;]

(d) member of any Legislature;

(e) political party or office-bearer thereof;

(f) organisation of a political nature as may be specified under sub-section (1) of Section 5 by the Central Government;

(g) association or company engaged in the production or broadcast of audio news or audio visual news or current affairs programmes through any electronic mode, or any other electronic form as defined in clause (r) of sub-section (1) of Section 2 of the Information Technology Act, 2000 (21 of 2000) or any other mode of mass communication;

(h) correspondent or columnist, cartoonist, editor, owner of the association or company referred to in clause (g).

Explanation 1.—For the purpose of clause (c), "public servant" means a public servant as defined in Section 21 of the Indian Penal Code (45 of 1860).

Explanation 2.—In clause (c) and Section 6, the expression "corporation" means a corporation owned or controlled by the Government and includes a Government company as defined in clause (45) of Section 2 of the Companies Act, 2013 (18 of 2013).

(2)(a) No person, resident in India, and no citizen of India resident outside India, shall accept any foreign contribution, or acquire or agree to acquire any currency from a foreign source, on behalf of any political party, or any person referred to in sub-section (1), or both.

(b) No person, resident in India, shall deliver any currency, whether Indian or

foreign, which has been accepted from any foreign source, to any person if he knows or has reasonable cause to believe that such other person intends, or is likely, to deliver such currency to any political party or any person referred to in sub-section (1), or both.

(c) No citizen of India resident outside India shall deliver any currency, whether Indian or foreign, which has been accepted from any foreign source, to—

(i) any political party or any person referred to in sub-section (1), or both; or

(ii) any other person, if he knows or has reasonable cause to believe that such other person intends, or is likely, to deliver such currency to a political party or to any person referred to in sub-section (1), or both.

(3) No person receiving any currency, whether Indian or foreign, from a foreign source on behalf of any person or class of persons, referred to in Section 9, shall deliver such currency—

(a) to any person other than a person for which it was received, or

(b) to any other person, if he knows or has reasonable cause to believe that such other person intends, or is likely, to deliver such currency to a person other than the person for which such currency was received."

A careful perusal of the Section shows that, the prohibition against acceptance of foreign contribution therein is applicable only to the categories specified under sub-section (1) of Section 3 of the FCRA. The contention that LIFE Mission would fall under Section 3(1) (c) is liable to be rejected on a plain reading of Section and by applying the '*ejusdem generis*' rule. Hence, LIFE Mission or the builders do not fall under any of the categories enumerated in Section 3(1).

16. That takes us to the question as to whether the revelation in the writ petition, of the builders having paid kick back and facilitation charges to personnel from the UAE Consulate and others would constitute an offence. Here Section 3 (2) (b), which prohibits delivery of any currency, whether Indian or foreign, accepted from any foreign source, with the deliverer having reasonable cause to believe that such other person intends, or is likely, to deliver such currency to any political party or

any person referred to in sub-section (1), or both, assumes importance. It is to be noticed that in Section 3(2)(b) there is no reference to foreign contribution and all that is required is delivery of currency accepted from a foreign source to any person likely to deliver such currency to any political party or any person referred to in sub-section(1). The persons to whom the currency was delivered by the builders having accepted it on the assurance that it will be utilised for getting the requisite clearances and permits, the builders have to be attributed with the knowledge or possibility of such currency, or at least portion of it, being delivered to public servants or government employees. As such, registration of crime against Santhosh Eappen, the petitioner in W.P(c) No.20668 of 2020 warrants no interference at this stage.

17. The contention of the writ petitioner

that, being an agent of a foreign source in relation to a transaction made by such foreign source with the Central Government or the State Government, that the exception under Section 4(c) would apply to him is liable to be rejected. The entrustment of construction work under an agreement will not confer the status of an agent on the builder.

18. The foregoing discussion lead to the conclusion of there being no reason to interdict the investigation in RC No.05(A)/2020/CBI/ACB/Cochin. At the same time, the provisions of the FCRA and the materials on record do not justify, arraying of the petitioner in Crl.M.C.No.4375 of 2020 as an accused.

In the result, there shall be an interim stay in Crl.M.A.No.1 of 2020 in Crl.M.C No.4375 of 2020 of all further proceedings in RC No.05(A)/2020/CBI/ACB/Cochin, as against the petitioner, for a period of two months.

The prayer for interim direction in W.P.(C) No.20668 of 2020 stands rejected.

Sd/- V.G.ARUN, JUDGE

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ASSISTANT REGISTRAR

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