Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO.36 OF 2024

A.V. Pavithran Advocate, about 43 years
son of Late T.V.C Nambiar
having his office at
S-3, lInd Floor, Bhanav Apt,
Next to Axis, Near Mahalaxmt Temple,
Panaji, Goa 403001 .... PETITIONER.

Versus

1. Central Bureau of Investigation
Anti-Corruption Branch
Through the Special Public Prosecutor
Bungalow No. F-1, Type VI, GMC Quarters,
NH-17, Bambolim,, Goa - 403202,
Phone: 9423884100
hobacgoa@cbi.gov.in

2. Aparna Chopdekar
Inspector of Police
CBI, ACB, Bembolim, Tiswadi, Goa. .... RESPONDENTS.

Mr Kaif Noorani, with Mr P. Kholkar, Advocates for the Petitioner.

Ms Asha Desai, Special Public Prosecutor, with Ms N. Volvoikar, Advocate for the Respondents.

CORAM : M. S. SONAK &
VALMIKI MENEZES, JJ.

DATED : 24th April 2024.

ORAL JUDGMENT : (Per *M.S. SONAK, J.)*

1. Heard Mr Kaif Noorani, who appears along with Mr P. Kholkar for the Petitioner and Ms Asha Desai, learned Special Public Prosecutor, who appears along with Ms N. Volvoikar.

2. Rule. The rule is made returnable immediately at the request of and with the consent of the learned Counsel for the parties.

3. The Petitioner is a practising Advocate of this Court. He challenges a notice dated 6/3/2024 under Section 160 of Cr.P.C., issued by the Inspector of Police, CBI, ACB, Goa, requiring him to attend the Inspector's office on 7/3/2024 at 10.30 hours for answering certain questions relating to a case registered against Shri George Vargheese under Section 13(2), r/w 13/(1) of the Prevention of Corruption Act, 1988 ((PC Act).

4. The impugned Notice dated 6/3/2024 (Annexure 'A' on page 29 of the paper book) requires the Petitioner to carry along with him the original/certified bill and Title Report along with search charges with respect to Duplex bungalow No.1, bearing House

No.839/13(1), having built up area admeasuring 150 sq. metres in Block D, in the building complex known "West Coast Residency", situated at Socorro, Bardez, Goa, for which a bill of ₹4150/- dated 1/7/2019 was generated in the name of Shri George Vargheese.

5. The Petitioner has pleaded that the impugned Notice dated 6/3/2024 was served upon him on 6/3/2024 at 12:25 p.m., and within less than 24 hours, he was directed to appear before the Police Inspector (Respondent No.2).

6. The Petitioner has pleaded, and there is no denial that he was on the panel of Lawyers for some financial institutions, including the State Bank of India (SBI). In 2019, the SBI sent him a file seeking a Title Report for the duple bungalow, which was the subject matter of the impugned notice since the said bungalow was sought to be purchased by Shri George Vargheese and Smt. Nini George.

7. The Petitioner has further pleaded, and again, this is not denied, that the Petitioner gave his Title Report along with the bill in the amount of ₹4150/- dated 1/7/2019 to the SBI in the name of Shri George Vargheese and Smt. Nini George.

8. After about four years, *i.e.* in June 2023, Shri Andrejo George, son of Shri George Vargheese and Smt. Nini George approached the Petitioner in his professional capacity in connection with the freezing

of his savings bank accounts and fixed deposit accounts. Accordingly, the Petitioner, under instructions of said Andrejo George, prepared and applied to the competent Court seeking the unfreezing of such accounts. The Petitioner has pleaded that such an application was first made to the Second Respondent, but after the same met with no success, the competent Court was moved by invoking Sections 451 and 457 of Cr.P.C. The Petitioner has pleaded that such an application is pending consideration before the Special Judge, CBI Court, at Panaji. However, Ms Desai, in the course of her arguments, submitted that this application has now been dismissed.

9. Mr Noorani submitted that the Petitioner, in the course of his arguments before the Special Judge seeking relief under the provisions of Sections 451 and 457 of Cr.P.C., may have made some submissions regarding the freezing of the accounts by the Second Respondent. Mr Noorani submitted that as a counterblast, the Second Respondent issued the impugned notice, requiring the Petitioner to attend the Police Inspector's office within less than 24 hours from the issue/receipt of such notice.

10. Mr Noorani submits that from the impugned notice, it is evident that the Petitioner had prepared a title investigation report regarding the duple bungalow and also issued a bill in the amount of ₹4150/- dated 1/7/2019 in the name of the accused, Shri George

Vargheese and his wife, Smt. Nini George. He further submitted that these facts have been pleaded in paragraphs 4.a. and 4.b. of this Petition and that these facts have not even been denied in the response filed.

11. Mr Noorani then submitted that given the above-undisputed facts, any further insistence on the part of the Second Respondent that the Petitioner remains present in her office to answer certain questions related to the case of disproportionate assets against Shri George Vargheese becomes completely redundant. He submits that the Second Respondent, in so insisting, completely ignores the fact that the Petitioner was a practising Advocate and the title investigation report and the bill were issued in his capacity as a practising Advocate. Mr Noorani submitted that Section 126 of the Evidence Act declares that whatever transpires between an advocate and his client is a privileged communication, and there can never be any forced disclosure.

12. Mr Noorani relied upon the decision of the learned Single Judge of this Court in *Anil Vishnu Anturkar vs. Chandrakumar Popatlal Baldota and ors.-* WP No.3359 of 2015 decided on 21/12/2022 and a decision of the learned Single Judge of the Madras High Court in Contempt Petition No. 818 of 2022 decided on 27/4/2022 in support of his contentions.

13. At the outset, Ms Desai, learned Special Public Prosecutor, submitted that no writ petition is maintainable to challenge a notice under Section 160 of Cr.P.C. because, by the mere issue of such a notice, no fundamental right of the Petitioner can be said to be violated. She relied on *Anubrata Mondal vs. Union of India and ors.,* 2022 LawSuit (Cal) 351 and *Nalini Chidambaram vs. Directorate of Enforcement*, 2018 LawSuit (Mad) 1375 to support the preliminary objection.

14. Ms Desai submits that even the inherent power under Section 482 of Cr.P.C. cannot be invoked to interfere with the investigation, as the Hon'ble Supreme Court held in the *State of Orissa and ors. vs. Ujjal Kumar Burdhan*, 2012 4 SCC 547.

15. Ms Desai submitted that the investigation is entirely within the domain of the police/executives, and the function of the judiciary commences after a report is filed before the competent Court. She submitted that there was no overlapping; rather, the functions of the executives and the judiciary were complementary to one another. She submitted that any interference with the impugned notice would amount to interference with the investigations. She relies on *R.P. Singh, State of Bihar vs. J A C Saldanna*, 1980 1 SCC 554.

16. Ms Desai submits that there was no legal infirmity in the issue of the impugned notice under Section 160 of Cr.P.C. because the Petitioner, even though he was an Advocate, was called upon to attend the police station and disclosed the fact that he may be acquainted. She submitted that even the exceptions under Section 160 would not apply because the investigation was under a special act, *i.e.* the Prevention of Corruption Act, as was held in *Nalini Chidambaram* (supra). She submitted that Section 160 of Cr.P.C. applies to *"any person, "* including an accused or a suspect. However, she clarified that, in this case, the Petitioner was neither an accused nor a suspect. She relied upon *Devagupthapu Hara Venkata Surya Satyanarayana Murthy vs. State of Andhra Pradesh,* 2023 CrLJ 1037 and *Nandini Satpathy vs. P L Dani*, 1978 2 SCC 424 in support of her contentions.

17. Ms Desai finally submitted that the Petitioner could not claim any privilege based on his being a practising Advocate because everyone is equal before the law. She submits that the Petitioner was not appearing for the accused persons and, therefore, there is no question of claiming any privileges. Further, she submitted that it was open to the Petitioner to remain silent, as was held in the case of *Nalini Chidambaram* (supra).

18. Based on the above submissions, Ms Desai submitted that this Petition deserves to be dismissed with exemplary costs.

19. Rival contentions now fall for our determination.

20. Regarding the preliminary objection, we must say that this Court's jurisdiction under Article 226 of the Constitution extends to protecting fundamental and statutory or other rights. Besides that, it is not the slightest intention of this Court to interfere with the investigation, which, undoubtedly, pertains to the domain of the executive, the police authorities or the investigating authorities. However, if it is found that the notice is issued to a practising Advocate to either pressurise him or to require him to act contrary to his obligations under Section 126 of the Evidence Act, then this Court must interfere rather than decline to exercise the jurisdiction based on the preliminary objection raised on behalf of the Respondents.

21. In this case, the Petitioner has nowhere disputed that in 2019, he issued the title investigation report regarding the duplex bungalow in the West Coast Residency. Along with this title report, he also issued a bill in the amount of ₹4150/- dated 1/7/2019 in the name of Shri George Vargheese (accused) and his wife, Smt. Nini George. The Petitioner has reiterated this fact in this Petition in paragraphs

4.a. and 4. b. The impugned notice also suggests that questions are sought to be asked to the Petitioner in the context of this title report and the bill for the professional services issued by the Petitioner.

22. Ms Desai, no doubt, on instructions, submitted that the Petitioner could attend the police station and confirm having prepared the title investigation report and issued the bill dated 1/7/2019. At one stage, she submitted that the Petitioner could have at least informed the Police Inspector in writing, confirming this position. After this Court pointed out that a statement to this effect was already contained in the Petition and that Mr Noorani was again prepared to reiterate such a statement based on instructions of the Petitioner, Ms Desai, on instructions from the Second Respondent, who is present in the Court, submitted that this would not be enough because the investigating officer may like to pose further questions to the Petitioner regards the documents referred to by the Petitioner in his title investigation report or about the valuation. The submission was that the Petitioner must attend the Second Respondent's office and say whatever he has to say or even remain silent in case the Petitioner felt that any replies might incriminate.

23. From the above, we must say we got an impression that the entire insistence was that the Petitioner must attend the Second Respondent's office. There was no clarity on why the Petitioner must

attend the Second Respondent's office now that the material before the investigating agencies was that the Petitioner had indeed issued the title verification report and the bill of ₹4150/-. The Petitioner also categorically admitted this position.

24. The case against Shri George Vargheese relates to disproportionate assets and, therefore, the prosecution under the provisions of Section 13 of the PC Act. The documents that may have been relied upon by the Petitioner to furnish the title report or the valuation, which is alien to the title investigation report, have *prima facie* no relevance whatsoever to such a charge. Not even any attempt was made to show or even suggest any relevance. All along, there was a singular insistence that the Petitioner must attend the police station and say what he wants to say or even remain silent. The other plea was that all this pertains to the domain of the investigation, and, therefore, the Petitioner cannot resist attending the Second Respondent's office in pursuance of the impugned notice.

25. None of the decisions relied upon by Ms Desai have really touched the issue of Section 126 of the Evidence Act. The decision in the case of *Nalini Chidambaram* (supra) was in the context of the special provisions of the PMLA. Besides, in the facts of that case, ample material was placed by the investigating agency before the Court to justify the insistence of her attending the police station for

investigations. In this case, there is no material placed on record, though the Respondent has filed a reply and urged dismissal of this Petition with "*exemplary costs*".

26. Section 126 of the Evidence Act provides that no barrister, attorney, pleader or vakil shall, at any time, be permitted, unless with the applicant's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.

27. The proviso to this section provides that nothing in this section shall protect from disclosure (i) any such communication made in furtherance of any illegal purpose and (ii) any fact observed by any barrister, pleader, attorney or vakil in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment. Section 126 clarifies that it is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client. The explanation to Section 126 provides that the obligation stated in this section continues after the employment has ceased.

28. In this case, as noted earlier, though it was indeed the SBI that had referred the matter to the Petitioner, the Petitioner has given his title investigation report and the bill in an amount of ₹4150/- dated 1/7/2019 in the name of Shri George Vargheese, who is being investigated into the commission of an offence of disproportionate assets under the PC Act and his wife, Smt. Nini George. Considering the language employed in Section 126 of the Evidence Act, we are unable to accept Ms Desai's submission that the privilege contemplated by Section 126 of the Evidence Act will not apply to this title investigation report prepared by the Petitioner, for which the Petitioner billed Shri George Vargheese.

29. There is a public purpose behind the enactment of Section 126 of the Evidence Act, and, therefore, any insistence on the part of the investigating agency that the Petitioner, who is admittedly a legal professional, acts contrary to the obligation imposed upon him by Section 126 of the Evidence Act would not be appropriate or even permissible.

30. Section 126 of the Evidence Act is based upon the principle that if communications to a legal adviser were not privileged, a person would be deterred from fully disclosing his case so as to obtain proper professional aid in a matter in which he is likely to be thrown into litigation. This section not only protects the legal adviser from

disclosing communications made to him by his client when interrogated as a witness, but he is not permitted to do so even if he is willing to give evidence unless with the express consent of his client. Section 126 is founded on the impossibility of conducting legal business without professional assistance and on the necessity of securing full and unreserved intercourse between the two in order to render that assistance effectual.

31. The Courts and Commentators have held that the privilege under Section 126 of the Evidence Act is for the protection of the client and not the lawyer. It follows from this that the client can waive the privilege but not the lawyer. The lawyer is under a professional obligation to assert the privilege until the client waives it. (*R v Central Criminal Court, ex p Francis & Francis*, (1989) 1 AC 346. Further, the provisions of Section 126, including, in particular, the explanation, indicate that the legal adviser is not to disclose the communication even when the relationship is ended or even after the client's death. The rule is "*once privileged, always privileged*". Under Section 126, an Advocate is not permitted to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment.

32. In the present case, there is not even the slightest material placed on record or even urged to bring the case within the two

explanations to Section 126 of the Evidence Act. The Petitioner, upon reference by the SBI, prepared a title investigation report for Shri George Vargheese and his wife, Smt. Nini George in 2019. The Petitioner prepared this report in his professional capacity. Therefore, neither the preparation of such a report nor the communications that may have been made for the preparation of such a report can be seriously suggested to be in furtherance of any illegal purpose in 2019.

33. Also, in the course of preparing the title investigation report, there is not even any hint or allegation that the Petitioner observed that any crime or fraud was being committed since the commencement of his employment. As noted earlier, none of the decisions, based on Ms Desai, advert to this aspect of Section 126 of the Evidence Act, possibly because this aspect was not even involved in those matters.

34. The decision of the learned Single Judge of this Court in *Anil Vishnu Anturkar* (supra) was, no doubt, not in the context of a notice under Section 160 of Cr.P.C., as was correctly pointed out by Ms Desai. But the said decision adverts to the scope of Section 126 of the Evidence Act in the context of the Court requiring an advocate to appear before it and depose to matters which the advocate was obligated not to, given the provisions of Section 126 of the Evidence Act.

35. The decision of the Madras High Court in Contempt Petition No.818/2022 was a matter where the contempt jurisdiction was invoked because the summons was issued under Sections 91 and 161 of Cr.P.C. to a Counsel, who was representing the Petitioner to appear at the police station. The learned Single Judge held that possibly the police authorities did not realise the seriousness of issuing such a summons to an Advocate who was only representing his client and took a very serious note of the attitude of the police authorities and the recklessness with which the summon had been issued to the Advocate who was representing the Petitioner in the said case.

36. The learned Single Judge of Madras High Court records that when the seriousness of the matter was brought to the notice of the learned Government Advocate (Criminal Side), the learned Government Advocate submitted that he would immediately instruct the police authorities to withdraw the summon and to personally write a letter to the Advocate representing the Petitioner regretting the mistake. The learned Single Judge then recorded his expectation that the police authorities would immediately act on the instructions given by the learned Government Advocate (Criminal Side).

37. As we observed earlier, the issuance of the impugned notice does appear to have nexus with certain submissions that may have been made on behalf of Andrejo George, son of Shri George

Vargheese and Smt. Nini George when the Petitioner appeared for only Andrejo George before the competent Court in the application under Sections 451 and 457 of Cr.P.C. seeking unfreezing of the accounts. Even before this Court, all that was submitted was that the Petitioner must appear before the Second Respondent and then claim privilege under Section 126 or even remain silent in case the Petitioner felt that any answer would incriminate him.

38. Though the Second Respondent has filed a reply, there is nothing stated in the reply supporting such insistence when the primary facts of issuing the title investigation report and the bill for an amount of ₹4150/- have been clearly admitted by the Petitioner in the Petition itself. This is an additional ground, though not by any means, the main ground why we consider that interference is necessary in a matter of this nature.

39. In a given case, the Respondents undoubtedly have the power to summon any person, including a practising Advocate, if the situation so requires. However, if the Advocates are sought to be summoned for representing their clients who are accused of offences or are going to be called upon to disclose information or even advice that they may have rendered to their own clients notwithstanding the provisions of Section 126 of the Evidence Act, then, it would not be appropriate for this Court not to interfere based on the submission

that the matter is still in the domain of investigations. Deference to the provisions of Section 126 of the Evidence Act does not amount to interference with investigations. Whilst the Respondents have the full liberty to undertake investigations, such liberty is also circumscribed by the law. Ms Desai pointed out that everyone is equal before the law. This is correct. A corollary to this is that the rule of law binds everyone, and this also includes the Respondents, whom she represents.

40. For all the above reasons, we interfere with the impugned notice, quash it, and set it aside.

41. The rule is made absolute in the above terms.

42. There shall be no order for costs even though the Second Respondent prayed for the dismissal of this petition with exemplary costs against the Petitioner, an Advocate.

VALMIKI MENEZES, J. **M. S. SONAK, J.**