

Case No. 3207/2020

PS Moti Nagar

Hitesh Bhatia Vs. Mr. Kumar Vivekanand

U/s 156(3) Cr.P.C.

01.07.2021

Proceedings are being conducted through video conferencing via CISCO WEBEX MEETINGS in view of circular of the Hon'ble High Court of Delhi bearing no.256/RG/DHC/2021 dated 08.04.2021.

O R D E R

Present: None.

Vide this order, this Court shall dispose of an application u/s 156(3) Cr.P.C., on behalf of the complainant who has prayed to this Court for giving directions to the police for registration of FIR and commencement of investigation, into the offences alleged by the complainant, to have been committed by the accused. The complainant states to have already approached the SHO and DCP concerned, but no action was allegedly taken by the police. The complainant states that he is employed with one SMC group as a Quantitative Researcher, wherein his job portfolio requires him to trade in alternative international markets, and lead a new desk with developing strategies in future and options. The complainant states that he also deals in sale and purchase of bitcoins, that he always takes a proof of identity before entering into any trade transactions, and that he also pays taxes on the gains that he makes in such trade. The complainant further states that on multiple occasions, the accused purchased bitcoins from the complainant. It is stated that the accused used to transfer funds to the bank account of the complainant, in return of which, the complainant used to transfer bitcoin into the accused's virtual wallet/ address on the online transaction portal "Binance". The complainant further states that on

05.07.2020, he was informed that his bank accounts have been frozen, and his transaction in bitcoins were marked as illegal transactions. The complainant states that he thereupon confronted the accused regarding that source/ legality of money paid by the accused against the bitcoins, upon which the accused admitted that these payments were a 'scam', and that the accused also refused to return the bitcoins transferred to him by the complainant. The complainant alleges that he has been cheated by the accused, and has sought the intervention of this Court for directions to police for registration of a criminal case and thorough investigation in the matter.

This Court had sought an Action taken report from the police. The investigation officer has submitted that the complainant has received the amounts from different accounts, and has been a beneficiary in the said transactions. It is further stated that out of the total sum of money paid by the accused to the complainant, against purchase of bitcoins, Rs. 6 Lakhs were credited from the account of a person residing at Nagpur, and she has got an FIR registered u/s 66 C and 67 of the Information & Technology Act, 2000 at PS Sitabardi, Nagpur, Maharashtra, for alleged commission of cyber offences/ cyber fraud. Similarly, out of the total sum, Rs. 3,00,000/- were credited into the account of the complainant, from the account of a person residing at Telangana, who has similarly got an FIR registered for commission of cyber fraud at PS Cyber Crime, Cyberabad Commissionerate, Telangana. Remaining amount was transferred prima facie from the account of the accused himself. The investigation officer has stated that investigation in the above two FIRs is underway, and no cause of action has been made out for initiation of investigation in Delhi.

This Court has already heard in detail, the submissions of Mr. Bharat Chugh, Id. counsel for the complainant through video conferencing mode.

Ld. counsel has stated that since the complainant and his office are situated at Moti Nagar, Delhi from where all those transactions have been made, therefore, this Court has jurisdiction to entertain the present

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complaint u/s 200 Cr.P.C. alongwith the present application u/s 156(3) Cr.P.C. Ld. counsel has further stated that as per the legal position as on today, dealing in bitcoins and other crypto currency is absolutely legal, and therefore, the complainant was carrying out a legitimate trade and profession, in the exercise of his fundamental right under Article 19(1)(g) of the Constitution of India, in course of which, he has been cheated by the accused, as he did not disclose to the complainant that the money transferred into his account did not belong to him, or came from dubious sources, and thereby induced the complainant to part with his bitcoins, in return of transfer of money into the accounts of the complainant, which ultimately got freezed, thereby ultimately depriving the complainant of his bitcoins, as well as his hard earned money. Ld. counsel has relied upon the Judgment of Hon'ble Supreme Court in ***Internet and Mobile Association Vs. U.O. I (dated 04.03.2020) and Lalita Devi Vs. State of U.P. [(2007) 6 SCC 171]*** in support of his contentions. Ld. counsel has also stressed upon the fact that the complainant always took payment for sale of bitcoins through recorded medium i.e. RTGS/IMPS, and misappropriation of proceeds of crime was never his intention, and the most which can be attributed to him, can be lack of due diligence. Ld. counsel has also stated that the cryptocurrency, not being a Fiat currency, does not come within the purview of RBI regulations.

Ld. counsel has also stated that in the absence of “Banning of Cryptocurrency and Regulation of Official Digital Currency Bill, 2019” being passed, there is no restriction on dealing in cryptocurrency, and the complainant himself, has not been at fault, and had a legitimate expectation of enjoying the fruits of a legitimate profession being carried out by him, as a reward for the business risk taken by him.

Case record perused.

On the basis of the facts mentioned in the complaint and the supporting documents, this Court is of the opinion that its jurisdiction is made out in view of the provisions of Section 179, 180 and 182 of Cr.P.C., and due to the absence of any material filed by the police to suggest to the contrary. Now, it

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becomes necessary to prima facie consider whether the complainant himself was carrying out a lawful activity, and whether he himself has come to this court with clean hands. In a circular dated 06.04.2018, titled RBI/2017-18/154 DBR No.BP.BC.104/08.13.102/2017-18, the RBI, while referring to its public notices dated 24.12.2013,01.02.2017 and 05.12.2017 cautioning users, holders and traders of virtual currencies, had directed the banks and financial institutions regulated by it, not to deal in virtual currencies and not to provide services eg.maintaining accounts, registering, trading, settling, clearing, giving loans and accepting VCs as collaterals, opening accounts of exchanges dealing with them etc., for facilitating any person or entity in dealing with virtual currencies. These directions were stated to have been issued by the RBI in exercise of its powers under the relevant provisions of the Banking regulation Act,1949, Reserve bank of India Act,1934, and Payment and Settlement Systems Act,2007. This prohibitory circular was set aside as unconstitutional by the Hon'ble Supreme Court in the case titled as ***Internet and Mobile Association versus Union of India (04.03.2020)***. ***Thereafter, on 31.05.2021***, RBI has issued circular RBI/2021-22/45 DOR AML REC 18/14.01.001/2021-22 titled as 'Customer Due diligence for transactions in virtual currencies', advising the banks and financial institutions not to rely upon the circular 06.04.2018, while cautioning their customers, as it has been set aside by the Hon'ble Supreme court. But, at the same time, it has directed all entities regulated by it to carry out customer due diligence process in line with regulations governing standards for KYC, AML and CFT, and obligations of regulated entities under PMLA,2002, in addition to ensuring compliance with relevant provisions under FEMA,1999 for overseas remittances.

It is pertinent to note that Hon'ble Supreme Court in ***Internet and Mobile Association Vs. Union of India (04.03.2020)*** has not adjudicated upon the legality of the virtual currency, and there is no specific legislation too, as on date, specifically dealing with the legality and regulation of cryptocurrency. While setting aside the RBI circular dated 06.04.2018, the Hon'ble Supreme

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Court has acknowledged the fact that many institutions are accepting virtual currency as valid payment for the purchase of goods and services, and therefore, there is no escape from the conclusion that the users and traders of VCs carry on an activity that falls squarely within the purview of RBI. It has also been observed by Hon'ble Supreme Court that cryptocurrency has the potential of creating a parallel monetary system, which is perceived as a threat to the existence of a central authority- regulated monetary system, and therefore RBI has the power to regulate such activities. The power of RBI to frame policies on such matters, and to issue instructions to the banks who are "system participants" under the Payments and Settlements Systems Act, 2007 has also been recognised by the Hon'ble Supreme Court. At the same time, Hon'ble Apex court stated that access to banking is the equivalent of supply of oxygen in any modern economy, and the total denial of such access to the persons who carry on a trade, that is not prohibited by law, cannot be said to be a reasonable restriction, and is extremely disproportionate. Therefore, the RBI circular dated 06.04.2018 has been set aside by the Hon'ble Supreme Court only upon the ground of unreasonableness of restrictions imported upon the exercise of freedom guaranteed under Article 19 (i)(g) of the Constitution of India.

Therefore, transactions in cryptocurrency still have to comply with the general law in force in India including PMLA, IPC, FERA, NDPS Act, Tax laws, and with the RBI regulations regarding KYC (know your customer), CFT (Combating of funding of terrorism) and AML (Anti-money laundering requirements). The traceability of bitcoin transactions on the transaction portal "BINANCE" may even be managed through the Blockchain Analysis, but establishing their connection with the malicious actors is a complex issue, in case the transaction intermediary is not adhering to the KYC norms. It does not suffice as alleged, that the complainant was insisting upon the picture of Aadhar Card of the accused to be sent on his whatsapp number, before entering into the transactions . KYC is the responsibility of the intermediary, and cannot be left to the individuals, be it institutional transfer or person to person trade, with the

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intermediary shying away from the responsibility to ensure legitimacy of the source and destination of money, and establishment of the real identity of the parties. Apart from this, it is the responsibility of such an intermediary as “BINANCE” to ensure adequate safeguards against activities such as 'mixing', and other random cryptocurrency exchanges, which change the identity of bitcoins being held by a virtual wallet, making tracing of any illegal proceeds and any bitcoins, purchased through it, extremely difficult. Even in the absence of any specific law regulating or banning, or monopolising cryptocurrency, only legitimate trade in the same, through legitimate intermediaries, may aspire for protection of Article 19 (i)(g) of the Constitution of India. Opportunistic activities, aimed at exploiting the lack of legal regulation, with utter disregard to the identity of parties, sources and destination of funds, and illegal purposes e.g. terrorism, narcotics, illegal arms, cross-border illegal transactions for which it may be used, still do not enjoy any route for legal and regulatory escape. Therefore, the aforementioned aspects have to be investigated in detail, and any negligence or complicity of the online VC transaction portal “BINANCE” in perpetration of hiding the proceeds of crime, and in the funding of any illegal activities through cryptocurrency has to be inquired into.

Coming to the culpability of the accused, the screenshots of the conversation with the accused on Whatsapp, annexed by the complainant in his complaint, prima facie imply knowledge of the accused regarding the source of money. The accused in the present case, is also the accused in the two cybercrime FIRs registered at Telangana and Nagpur, as discussed above. In such a situation, it is quite possible that apart from being involved in the aforesaid cyber offences, the accused may have hid the factum of illegality of money from the complainant, thereby inducing him to deliver bitcoins in exchange of money, while being aware of the fact that it may, sooner or later come under the radar of the banking system, and so it is better to get rid of the same, purchase bitcoins and multiply/ mix transactions to hide its source, and to encash it from 'safe haven' countries, where there is absence or lack of

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regulations. There is a possibility that the complainant was unaware of these designs of the accused, and fell into his trap, thereby suffering wrongful loss.

At the same time, it seems that the complainant has not disclosed the complete facts before this Court, and therefore, the possibility of his consent/connivance in the entire gamut of activities, cannot be ruled out at this stage. The complainant went ahead in accepting money from different accounts, which may not have been a mere lack of caution or due diligence. In one of the whatsapp conversations annexed alongwith the complainant, the accused is seen advising the complainant to clear his bank accounts immediately on receipt of any consideration against sole of bitcoins, and the complainant fails to be alarmed, thanks the accused for such advice, and admits that he immediately converts any such consideration back to cryptocurrency. Moreover, the complainant has nowhere stated in the complaint as to how, or through whom the accused got the whatsapp number of the complainant, , and contacted him. It cannot be therefore said with certainty that the complainant did not know the accused prior to that, and that he did not have any previous dealings with him. However, as submitted by Id. counsel for the complainant, the complainant has approached this Court with awareness of all legal consequences which may ensue, and this is a ground for giving of directions for investigation to find out the real offender, and this court is in agreement with the submissions of Id. counsel.

Therefore, upon a consideration of the complaint u/s 200 Cr.P.C., the application u/s 156(3) Cr.P.C., the other material on record, and the action taken report of the police, this Court is of the opinion that cognizable offences u/s **403/411/420 of Indian Penal Code** have been prima facie committed, and the real culprits need to be identified. The possibility of the complainant, accused and the online intermediary, being hand in glove cannot be denied too, whereby the accused may have been involved in hacking/cyber-crimes against unsuspecting persons, and transferring the same immediately to the complainant against bitcoins, who,in turn, may have been mixing/ transferring the same in exchange for more bitcoins, thus creating a chain of transactions difficult to follow

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up, till the amount is invested in any illegal activity, or is withdrawn in a 'safe haven' jurisdiction. The exchange intermediary may either be involved, or may just be keeping its eyes shut to all such activities carried out through it.

At the same time, it is also possible that any of these persons/ intermediaries may come out to be innocent, or just negligent. This highlights the need for investigation by the police, more so, as the investigation may be extremely technical, and true facts have to be necessarily brought before this Court. Needless to state, registration of FIR does not mean that the accused is to be automatically arrested, and the concerned provisions of Cr.P.C., and directions of Hon'ble Supreme Court and Hon'ble High Court of Delhi have to be adhered to in this regard. In case, apart from the aforesaid offences under the Indian Penal Code, the offences under the Prevention of Money Laundering Act, 2002 or under the Foreign Exchange Management Act, 1999 are found to be made out, the police is at liberty to inform the concerned specialized agencies. PS Moti Nagar is therefore, directed to immediately lodge an FIR under the appropriate provisions of Indian Penal Code as discussed aforesaid, and to send compliance report to this Court, within 2 days from today.

Put up for report regarding the status of investigation on 06.08.2021.

Copy of this order be sent to Id. counsel for the complainant by way of whatsapp/ e-mail, and also be uploaded on the website of Delhi District Courts.

(ABHINAV PANDEY)
MM-04:West:THC:Delhi
01.07.2021