

(2007) 04 PAT CK 0008

In the Patna High Court

Case No : Criminal Miscellaneous No. 48396 of 2006

Anupam Kumar Tiwari and Others

APPELLANT

Vs

The State of Bihar and Another

RESPONDENT

Date of Decision : 11-04-2007

Acts Referred:

Arms Act, 1959 — Section 19(f)
Constitution of India, 1950 — Article 20(2)
Criminal Procedure Code, 1973 (CrPC) — Section 10, 11, 13, 13(1)(d), 15
General Clauses Act, 1897 — Section 26
Insurance Act, 1938 — Section 107
Penal Code, 1860 (IPC) — Section 120B, 13(1)(d), 13(2), 405, 409
Prevention of Corruption Act, 1988 — Section 13(1)(a), 13(1)(c), 13(1)(d), 13(2), 4

Citation : (2007) PLJR 671

Hon'ble Judges : Ramesh Kumar Datta, J

Bench : Single Bench

Advocate : N.K. Agrawal and Beni Madhaw Tiwary, Y.V. Giri and Rajendra Kumar Giri, for the Appellant;

Final Decision : Dismissed

Judgement

Ramesh Kumar Datta, J.—The petitioners have filed this application for quashing the prosecution against them in Special Case No. 14 of 2006 arising out of Vigilance P.S. Case No. 16 of 2006 for the offences under Sections 420, 467, 468, 471, 120B of the Indian Penal Code and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act. The facts leading up to the present matter are that at the instance of the Finance Department, Gandhi Maidan P.S. Case No. 147/2003 was registered under Sections 420 and 409 of the Indian Penal Code against petitioner No. 1, Anupam Kumar Tiwari. The allegation was that he was sanctioned a loan of Rs. 2,00,000/-for construction of house on his land and Rs. 1,50,000/- was paid to him as first installment. Subsequently, he is stated to have obtained the second installment by committing forgery regarding the progress of work of construction of the house. With similar allegation Gardanibagh P.S. Case No. 181/2003 and Vaishali P.S. Case No. 281/2003 were

instituted respectively against petitioner No. 2 Rudra Narayan Pandey and petitioner No. 3, Ramashish Ram. In all the three cases charge sheets have already been submitted.

2. On the same allegations a second FIR was instituted against the petitioners being Vigilance P.S. Case No. 16 of 2006 out of which Special Case No. 16/2006 is pending in the court of the Special Judge, Vigilance, South Bihar, Patna.

3. Learned counsel for the petitioners submits that precisely on the same allegations two cases have been filed with the only difference that in the Vigilance Cases the offences u/s 13(2) read with Section 13(1)(d) have been added apart from the other Sections of the Indian Penal Code. It is submitted that the petitioners are being subjected to double prosecution with respect to the same occurrence.

4. The main thrust of the argument of the learned counsel for the petitioners, however, is that the filing of the second FIR with respect to the same set of facts is not permissible under the provisions of the Code of Criminal Procedure as laid down by the Apex Court and this Court. In this regard learned counsel for the petitioners relies upon a decision of the Supreme Court in the case of T.T. Antony Vs. State of Kerala and Others, and a judgment of this Court in the case of Lalit Kumar Singh and Others Vs. The State of Bihar and Another . In the said case the Supreme Court has held that there can be no second FIR and no fresh investigation on receipt of subsequent information in respect of the same cognizable offence or same occurrence giving rise to one or more cognizable offences and only the information about commission of a cognizable offence which is first entered in station house diary by the officer-in-charge of the police station can be regarded as FIR u/s 154 and subsequent informations shall be covered by the provisions of Section 162 of the Code of Criminal Procedure. It has also been laid down in the said decision that after the FIR has been filed, it will be the duty of the Officer-in-charge to investigate not merely the cognizable offence reported therein but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 and even after conclusion of the investigation and submission of report u/s 173(2) if the officer-in-charge comes across any further information pertaining to the same incident, he can make further investigation and forward the further evidence, if any collected, with further report or reports u/s 173(8) of the Code of Criminal Procedure. The said proposition has been followed by this Court in Lalit Kumar Singh's case.

5. Learned counsel for the Vigilance, on the other hand, submitted that there can be no bar to the investigation of the offences under the Prevention of Corruption Act by filing a separate FIR in view of the offences under the Prevention of Corruption Act having been repeatedly held by the Courts to be distinct offences under special law for which fresh trial and conviction is also permissible, even though the entire trial had been conducted on the same set of facts under the provisions of the Indian Penal Code. It is submitted that the law laid down by the

Apex Court in several decisions in this regard is that what is to be seen for the purpose of bar of fresh trial with respect to other offences is that there should not be identity of the offences between the offence for which the trial had earlier been held and a conviction or acquittal recorded and the trial for the subsequent offence. If the ingredients of the offences for the two are distinct and not identical then in such circumstances, it is permissible to have a fresh trial and conviction in separate proceedings under the Code of Criminal Procedure.

6. In support of the said propositions, learned counsel for the Vigilance has referred to various provisions of the Prevention of Corruption Act, Code of Criminal Procedure and the General Clauses Act. Section 4 of the Prevention of Corruption Act provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any other law for the time being in force, the offence specified in Sub-section (1) of Section 3, i.e., any offence punishable under that Act and any conspiracy/attempt/abetment to commit them, shall be tried by Special Judges only. Sub-section (2) of Section 4 provides that the punishment specified under the Act shall be tried by the Special Judge for the area within which it was committed. Sub-section (3) of Section 4 confers power upon the Special Judge to also try any offence other than an offence specified in Section 3, with which the accused may, under the Code of Criminal Procedure 1973 be charged at the same trial. Section 13(1)(d) of the Act provides that a public servant is said to commit the offence of criminal misconduct when by corrupt or illegal means, he obtains for himself or for any other person any valuable thing or pecuniary advantage. Sub-section (2) of the said Section makes an offence of criminal misconduct punishable with imprisonment for a term of not less than one year but which may extend to seven years with further liability to fine. u/s 17 of the Act an offence punishable under the Act shall not be investigated by any Police Officer below the rank of a Deputy Superintendent of Police. u/s 19 of the Act in case of an offence punishable under Sections 7, 10, 11, 13 and 15 of the Act alleged to have been committed by a public servant, no Court shall take cognizance without the previous sanction of the appropriate Government. Section 28 of the Act lays down that the provisions of the Act shall be in addition to and not in derogation of any other law for the time being in force and nothing contained therein shall exempt any public servant from any proceeding which might, apart from this Act, be instituted against him.

7. Referring to the aforesaid provisions of the Act, learned counsel submits that the Prevention of Corruption Act lays down distinct and different offences particularly that of an offence of criminal misconduct which is not to be found in any provisions of the Indian Penal Code and moreover it lays down special forum for trial as well as investigation, not merely by an Officer-in-charge of Police Station as provided by the Code of Criminal Procedure, but by a Senior Police Officer of the rank of Deputy Superintendent of Police and above. Learned counsel also refers to Section 4(2) of the Code of Criminal Procedure which lays down that all offences under any other law apart from the Indian Penal Code shall be investigated, inquired into and otherwise dealt with according to the

provisions of the Code of Criminal Procedure but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, or trying or otherwise dealt with in respect of such offences, Learned counsel also relies upon Section 26 of the General Clauses Act which lays down that where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be "punished twice for same offence. Lastly learned counsel for the Vigilance relies upon Section 300(4) of the Code of Criminal Procedure which provides that a person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged. He also relies upon Sub-section (2) of that Section which provides that a person acquitted or convicted for any offence may be afterwards tried with the consent of the State Government for any distinct offence for which a separate charge might have been made against him at the former trial under Sub-Section (1) or (2).

8. In support of the aforesaid propositions, learned counsel for the Vigilance relies upon a decision of the Constitution Bench of the Supreme Court in the case of *The State of Bombay Vs. S.L. Apte and Another*, ; in para 13 of the said judgment it has been laid down as follows:

"To operate as a bar the second prosecution and the consequential punishment there under, must be for "the same offence. "The crucial requirement, therefore for attracting the Article is that the offences are the same, i.e. they should be identical. If, however, the two offences are distinct, then notwithstanding that the allegations of facts in the two complaints might be substantially similar, the benefit of the ban cannot be invoked."

9. In the said case the issue was whether conviction and sentence u/s 409 IPC would bar a further prosecution u/s 107 of the Indian Insurance Act. After analysing the two provisions it was held by the Apex Court that the two provisions do not constitute the same offence thus, even though the allegations of facts with respect to the two prosecutions are the same, the second prosecution with respect to offences under the Insurance Act was maintainable.

10. Learned counsel also relies upon a decision of the Supreme Court in the case of *A.A. Mulla and others Vs. State of Maharashtra and another*, of which it has been held as follows:--

"After giving our careful consideration to the facts and circumstances of the case and the submissions made by the learned counsel for the respective parties, it appears to us that the ingredients of the offences for which the appellants were charged in the first trial are entirely different. The second trial with which we are concerned in this appeal, envisages a different fact-situation and the enquiry for

finding out facts constituting offences under the Customs Act and the Gold (Control) Act in the second trial is of a different nature. It may be indicated here that the second trial has been initiated after obtaining necessary sanction for prosecuting the appellants. The principle of double jeopardy and bar of second trial as enunciated by this Court in V.K. Agarwal Case and P.V. Mohd. Case is applicable in the facts of this case. Not only the ingredients of offences in the previous and the second trial are different, the factual foundation of the first trial and such foundation for the second trial is also not indented (sic.) Accordingly, the second trial was not barred u/s 403 Cr. P.C. of 1898 as alleged by the appellants."

11. Reliance is also placed upon a decision of the Supreme Court in the case of Bhagwan Swarup Lal Biswan & Ors. vs. State of Maharastra: AIR 1965 SC 682 in para 11 of which it has been laid down as follows:--

"This decision (The State of Bombay Vs. S.L. Apte and Another,) lays down that the test to ascertain whether two offences are the same is not the identity of the allegations but the identity of the ingredients of the offences."

12. Learned counsel also relies upon a decision of this Court in the case of Ishodanand Biswas and Others Vs. The State, in which it has been held that the second trial with respect to the offences committed u/s 19(f) of the Arms Act is permissible even though with respect to the same transaction the accused persons have been already convicted under other Sections of the Indian Penal Code and this Court did not find any substance in the argument on behalf of the petitioners that it is unjust that the petitioners should be harassed in a second trial on the same set of facts for which they were tried before on another charge.

13. Learned counsel for the Vigilance lastly relied upon a Constitution Bench decision of the Supreme Court in the case of Om Prakash Gupta Vs. State of U.P., . In the said decision the Apex Court had compared the various provisions of the Prevention of Corruption Act, 1947 as amended by Act 2 of 1952 with Sections 405 and 409 of the Penal Code and had come to the clear conclusion that Section 5(1)(c) of the Prevention of Corruption Act, 1947 (which corresponds with Section 13(1)(c) of the Prevention of Corruption Act, 1988) creates a new offence called criminal misconduct and cannot by implication displace the offence u/s 405 of the Penal Code. It was further held that there are a number of elements which can be proved in an inquiry or trial u/s 5(1)(c) that cannot be let in by the prosecution when a person is charged for an offence u/s 405 Penal Code and thus, the Apex Court held that two offences are distinct and separate.

14. Learned counsel for the Vigilance further contended that the reliance upon the decision of this Court in the case of Lalit Kumar Singh (supra) and of the Supreme Court in the case of T.T. Antony (supra) by the petitioners is of no avail since the facts and law involved in those cases do not arise in the present case nor the issues that are involved in the instant case were in contemplation of the

Courts. It is submitted that in those cases the issue of the offence being distinct and separate and that there was no identity of the ingredients of the offences, was neither raised nor decided by the Court and thus no benefit can be derived by the petitioner by placing reliance upon those cases.

15. It is further submitted by the learned counsel that from the consideration of the law laid down in the aforesaid cases by the Supreme Court and by this Court it is evident that proceedings for distinct and separate offences in which there is no identity of ingredients of the offences are maintainable although they may arise out of the same set of facts and for the said reasons the FIR of the present case under the provisions of the Prevention of Corruption Act ought not to be quashed and the proceedings initiated with respect to the same must be permitted to continue.

16. Learned counsel for the petitioners faced with the aforesaid situation sought to argue that the judgment of the Supreme Court in the case of Om Prakash Gupta (supra), as a matter of fact, speaks about his contention that there must be allegation regarding the conduct of the petitioner being a regular phenomena and in this regard he seeks to find support from paras 11 and 12 of the said judgment. The said submission has no force in view of the fact that those observations of the Supreme Court were made in the context of Sub-Section (1) (a) and (b) of Section 5 of the 1947 Act corresponding to Sections 13(1)(a) and (b) of the 1988 Act and no such general proposition as submitted by learned counsel for the petitioners has been laid down apart from what is mentioned with respect to criminal misconduct applicable to those two sub-sections.

17. Learned counsel for the petitioners further submits that it is evident from the FIR filed in the present matter in the Vigilance Case that the present case has been instituted only against eight persons including these petitioners, whereas, in para 1 internal page 5 of the FIR it has been mentioned that similar cases have been filed in the Gardanibagh Police Station with respect to several other police officials. It is submitted that by acting under the Prevention of Corruption Act only against some persons like these petitioners and leaving out others, the Vigilance Bureau clearly showed its malice and mala fide in the present matter and they have not come with clean hands. The said submission of the learned counsel for the petitioner is countered by the learned counsel for the Vigilance by stating that the FIR itself while naming 8 specific accused persons states that it has also been registered against others and since the matter is now at the stage of investigation many persons who may not have been specifically named in the FIR are likely to be included in the course of the investigation. Thus, it is submitted that there is no attempt to act maliciously only against the petitioners and few others and leave out other persons involved.

18. In this regard it is pointed out that the present proceeding had been initiated by the Vigilance on the request of the Home (Police) Department which was communicated through memo No. 4846 dated 5.4.2003 upon which the Vigilance conducted a preliminary enquiry and thereafter the formal FIR was instituted

before the Vigilance being Vigilance P.S. Case No. 16/2006 dated 23.3.2006. It is further submitted that legal opinion were sought from the Senior Special P.P. Vigilance who gave his opinion in favour of amalgamation of all the police cases with the Vigilance Case and accordingly steps were taken in this regard within the Department and ultimately on the directions of the Additional DIG, Vigilance by letter No. 992 dated 15.2.2006 Investigating Officer of this Case was directed to make prayer before the Court to amalgamate the general police case with the Vigilance Case and also to properly inform the learned Special Judge, Vigilance about such steps. It is further submitted that accordingly prayers had been made in this regard before the learned Chief Judicial Magistrates, Vaishali and Patna to pass necessary orders facilitating the amalgamation of the police case with the Vigilance Case and the learned Special Judge, Vigilance was also intimated about these steps taken for amalgamation.

19. On a consideration of the entire facts and circumstances of this case and the law laid down by the Apex Court in this regard, this Court is of the opinion that the FIR at least with respect to the offences under the Prevention of Corruption Act cannot be quashed. In the various decisions of the Apex Court cited on behalf of the Vigilance, it has been clearly laid down that whether there can be two trials with respect to the same set of facts depends upon the fact whether the offences in the two trials relate to two separate and distinct offences or not and what is laid down in this regard is whether there is identity of the ingredients of offences in respect to two trials. If the ingredients of the offence in the two trials are separate and distinct then in such situation, the trial would not be hit by the doctrine of double jeopardy as laid down in Article 20(2) of the Constitution or its more expanded version as contained in Section 300(2) of the Code of Criminal Procedure. It has also been clearly laid down in the said decisions cited above that the offences of criminal misconduct introduced by the Prevention of Corruption Act is distinct from any similar offence that may be found in the Indian Penal Code.

20. So far as the reliance by the learned counsel for the petitioners on a decision of the Apex Court in the case of T.T. Antony (supra) and by a learned single judge Bench of this Court in the case of Lalit Kumar Singh (supra) is concerned, in the case before the Supreme Court no such issue arose regarding the second matter relating to distinct and separate offence. So far as the Lalit Kumar Singh's case, the issue that has been raised in this matter was not at all argued nor the decisions of the Supreme Court including that of two its Constitution Benches which have been cited above, were placed before this Court.

21. That being the position of law this Court must, however, observe that the State authorities have not acted in this regard in a manner which would have been in the best interest of all concerned including that of the accused persons of this case. Once the matter was referred to them by the Home (Police) Department, then immediately on learning about the earlier filing of the cases in the regular police stations steps ought to have been taken by the State

Government for the transfer of investigation of those cases to the Vigilance Department itself. If the same had been done, then the problems that have now arisen would not have come up and the entire matter would have been investigated by the Vigilance authority themselves and final reports submitted accordingly. By not resorting to the same, the position has been created where the petitioners have been charge-sheeted in one case and they will have to face trial before the regular Courts of law whereas with respect to the charges under the Prevention of Corruption Act in the present Vigilance case they will have to face trial on similar facts before the Special Judge, Vigilance.

22. Considering the entire facts and circumstances of this case, this Court therefore, directs that the Gandhi Maidan P.S. Case No. 147/2003, Gardanibagh P.S. Case No. Case No. 81/2003 and Vaishali P.S. Case No. 281/2003 shall stand transferred to the Vigilance Police Station and stand amalgamated with Vigilance P.S. Case No. 16/2006. Similarly the cases pending before the Courts of the Chief Judicial Magistrates, Patna and Vaishali arising out of the said Police Stations cases shall also stand transferred to the Court of the Special Judge, Vigilance, South Bihar, Patna and be amalgamated with Special Case No. 16/2006. The charge-sheets already filed in these matters shall also form part of the records and it will be open to the Vigilance to file supplementary charge-sheets in this, regard. In the result, the present application is dismissed but subject to the aforesaid observations and directions.