

(2014) 12 BOM CK 0253

In the Bombay High Court

Case No : Cri. Rev. Appln. No. 126 of 2014

Bibhas Chandra Singh

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 24-12-2014

Acts Referred:

Citation : (2015) 3 MhLJCrI 307

Hon'ble Judges : Shukre, J.

Bench : Single Bench

Advocate : M. B. Naidu, Advocate, for the Applicant; Shyam B. Ahirkar, Special Public Prosecutor, for the Non-applicant

Final Decision : Allowed

Judgement

S. B. Shukre, J. (Oral)—Heard. Admit. Heard finally by consent.

2. This is an application filed against order dated 10-7-2014 passed by the Additional Sessions Judge, Nagpur (Special Judge under the Prevention of Corruption Act), Pandharkawda, District Yavatmal dismissing the application (Exh.107) filed by the applicant for his discharge in Special Case No. 6 of 2011.

3. The facts of the case may be stated in brief as under.:

3.1. The applicant along with four others is being prosecuted for an offence punishable under section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act and also section 120-B read with section 420 of the Indian Penal Code. The whole case of the prosecution is based upon one Memorandum of Understanding (for short, MOU) dated 16-4-1999 signed between the Directorate General of Re-settlement (for short, DGR) and Coal India Limited (for short, CIL), with the object of forming union free captive coal transport entities or companies of ex-servicemen in the coal subsidiaries so as to provide opportunities of resettlement to the ex-servicemen after their retirement or release from the Armed Forces of India. Prior to the MOU dated 16-4-1999, there was one MOU reached between the DGR and CIL on 8-4-1993 which came out with scheme of

resettlement of ex-servicemen for the first time. Its terms and conditions did not substantially differ from those in the subsequent MOU dated 16-4-1999. The only difference between these two MOUs, about which there is no dispute, is in respect of upper age limit prescribed in the eligibility criteria and the limitation of retirement or release of the ex-serviceman within ten years of the formation of the ex-servicemen Company (for short, ESM Company). In the 1993 MOU, maximum age limit was below 60 years and in the 1999 MOU, it was up to 55 years of age. In 1993 MOU, there was no restriction of the retirement within particular number of years, whereas in 1999 MOU, there is restriction that an ex-serviceman cannot be a member of ESM Company unless he has retired within ten years of formation of the ESM Company. The ESM Company upon its formation and registration under the provisions of Companies Act, as per the scheme of both MOUs, would get sponsorship of DGR so that it would become eligible to apply to CIL and its subsidiaries to get coal transport contracts. Before sponsoring the ESM Company, DGR, as per the MOU Scheme, would satisfy itself about the fulfilment of eligibility criteria and other conditions as mentioned in the MOU and the applicable notifications, if any.

3.2. In pursuance of the first MOU dated 8-4-1993, one ESM Company namely, M/s GSL Associates Private Ltd., came to be formulated on 23-5-1993 and it was governed by MOU dated 8-4-1993. This Company, hereinafter referred to as "said ESM Company", received sponsorship from the DGR and it continued to enjoy the sponsorship till the time the offences were registered in this case. As the said ESM Company had the sponsorship of DGR, it applied for award of the work of transporting of coal belonging to the subsidiary of CIL, the Western Coalfields Ltd. (WCL for short). Five work orders dated 21-5-2007, 29-7-2007, 3-8-2007, 20-1-2008 and 21-4-2008 were issued to said ESM Company by WCL. Issuance of the work orders meant that the Company had the sanction for transportation of coal belonging to the WCL within the areas specified in the work orders. The rate of transportation to the said ESM Company was higher than the one payable to civilian contractors. The applicant was then working as Sub Area Manager, Niljai Subarea, Wani Western Coalfields Ltd., District Chandrapur and had the responsibility of allotting the coal transport work to various tipper owners of the said ESM Company as per the terms and conditions of the work orders. During the course of transportation of the coal, it was noticed by the superiors of the applicant that some of the tipper owners were not eligible to be part of the said ESM Company as either they had crossed the age of 55 years or had retired earlier than within the period of 10 years from the time of formation of the said ESM Company and still, they were allowed to operate under the work orders issued to the said ESM Company. An enquiry was held and the matter was entrusted to the Central Bureau of Investigation, the respondent herein, which made detailed investigation into the irregularities apparently committed by the applicant and it reached a prima facie conclusion that the applicant, a public servant, had intentionally and knowingly allotted coal transport work to various ineligible tipper owners of the said ESM Company and paid them the rate fixed

for ESM Companies, which was higher than the civilian contractors after having entered in to a criminal conspiracy with other co-accused and thus dishonestly caused loss to the tune of ` 64,81,547/- to WCL. In the process, it was alleged, the applicant together with other co-accused, committed the offences punishable under section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 (for short the P.C. Act) and sections 120-B and 420 of the Indian Penal Code. The Central Bureau of Investigation's basis for such prima facie conclusion was that as per the MOU dated 16-4-1999, it was the responsibility of the applicant to ensure that all the terms and conditions of the MOU were followed in letter and spirit, particularly those relating to eligibility criteria and since the applicant, intentionally and knowingly, allowed violation of the eligibility criteria at the hands of various tipper owners of said ESM Company in conspiracy with the other co-accused, the applicant and others were criminally liable for the offences alleged against them. Accordingly, a charge sheet came to be filed against the applicant and other co-accused.

3.3. Sometime after filing of the charge-sheet, on 21-11-2013, an application marked as Exh.107 was filed by the applicant seeking his discharge from the case under section 227, Criminal Procedure Code contending that no prima facie case for the offences alleged against him was made out. The application was heard at length by the learned Special Judge, Pandharkawada and finding that there was no substance in the contentions of the applicant, the learned Special Judge rejected the application by his order passed on 10-7-2014. It is this order, which is under challenge in the present criminal revision application.

4. It is the contention of the learned Counsel for the applicant that although the said ESM Company had been formulated under the MOU of 8-4-1993, what has been sought to be alleged against the applicant is violation of another MOU dated 16-4-1999, which did not govern the said Company in any way. In MOU dated 8-4-1993, the upper age limit was of 60 years whereas in MOU dated 16-4-1999, it was of 55 years and since it has been specifically alleged in the charge sheet that crossing of upper age limit of 55 years by the tipper owners of said ESM Company is one of the violations not checked by the present applicant, no criminality can be attached to the applicant for the alleged acts of negligence or connivance. He submits that even if it is assumed, just for the sake of argument, that 1999 MOU was applicable to the said ESM Company, still, it cannot be said that any responsibility was cast upon the applicant to see that eligibility criteria mentioned therein were to be monitored and checked by the applicant at the time of allotment of works. He submits that since the upper age limit of 55 years as well as the limitation regarding retirement within 10 years were part of the eligibility criteria, it can be safely inferred that these criteria were applicable at the time of registration of ESM Company and once these criteria were found to be satisfied by the DGR at the time of grant of sponsorship, there would be no further responsibility on the officers of WCL to again check for these eligibility criterion in as much there was no provision in either of the MOUs that after granting sponsorship if any of its members/tipper owners had crossed the upper

age limit of 60 or 55 years as the case may be, he would cease to be member of the ESM Company. He also submits that as regards the limitation of retirement within 10 years of formation of ESM Company, the responsibility has been solely cast upon the DGR and this can be seen particularly from Clause 4 of MOU dated 16-4-1999. He also submits that sponsorship of the said ESM Company had not been withdrawn by DGR at the time the work orders were issued to it. He further submits that once it is found that none of the conditions of MOUs dated 8-4-1993 or 16-4-1999 has been violated by the ESM Company at the time of grant of sponsorship and its sponsorship had also not been later withdrawn for any violations, no criminal liability in any manner can be fastened upon the applicant and even if there was some violation of the eligibility criteria, the responsibility for checking those violations not being with the applicant as per the MOUs, it cannot be said that prima facie case is made out against the applicant for the offences alleged against him. In support of this argument, learned Counsel for the applicant has taken me through the various clauses of MOU dated 16-4-1999 and also other relevant documents filed on record.

5. Learned Special Public Prosecutor for the respondent-CBI strongly opposed this application and submitted that since MOU of 1999 categorically states that it supersedes MOU of 1993, any argument based upon some of the clauses of MOU dated 8-4-1993 would be rendered irrelevant for deciding this application. He submits that this case has been basically founded upon MOU dated 16-4-1999 and, therefore, reference to the various terms and conditions of this MOU only would be permissible in law. He further submits that in MOU dated 16-4-1999 there is specific clause providing for responsibility of the Coal Company together with the responsibility of the DGR to ensure compliance with its various terms and other conditions as laid down by the Ministry of Defence as well as Coal India Limited, from time to time. This clause, which is Clause 20(c) of the MOU, creates an onerous duty in the Officer of the Coal Subsidiary, who is in-charge of the coal transport within and without premises of the Coal Subsidiary to the effect that he must, while allotting works as per the work order for transportation of coal, ensure that each of the conditions of the eligibility criteria is complied with and this would include ensuring that the tipper owners were not above the upper age limit of 55 years and were also the persons who had retired within the period of ten years from the date of formulation of the ESM Company. He submits that there are several witnesses who have stated that it was the duty of this applicant to monitor, supervise and control the operations relating to transportation of the coal and also movements of trucks or tippers within the premises of the Coal Subsidiary and, therefore, the responsibility for ensuring compliance with the terms and conditions of MOU dated 16-4-1999 lay entirely upon the shoulders of the present applicant. He further submits that the statements of the witnesses have disclosed prima facie that the conditions were deliberately given a go by by the present applicant with a view to earn pecuniary advantage for himself by doing favours to the tipper owners of the said ESM Company in conspiracy with concerned persons of the said ESM Company

and thus, it can be said that there is sufficient material available on record, which, on the face of it, discloses that there are reasonable grounds for proceeding against the applicant for the offences alleged against him.

6. Learned Special Public Prosecutor has also taken me through the various provisions of MOU dated 16-4-1999 as well as statements of witnesses and also the query raised by investigating agency with the DGR to which a reply was given by the DGR that the DGR was only a facilitator of the contract between the Coal Subsidiary and ESM Company and was not in a position to take any action or perform its supervisory role unless and until reports as contemplated in MOU dated 16-4-1999 were submitted to it or any complaint is received by it. In support, learned Special Public Prosecutor has also referred to the following cases.

- (1) State of M. P. v. S. B. Johari and others, (2002) 2 SCC 57,
- (2) Central Bureau of Investigation v. K. M. Sharan, (2008) 4 SCC 471 and
- (3) K. L. E. Society and others v. Siddalingesh, 2008(3) Mh.L.J. (Cri.) (S.C.) 74 = (2008) 4 SCC 541.

6.1. In the case of State of M. P. v. S. B. Johari and others the principles that must be applied for deciding an application seeking discharge of the accused are stated. It has been held that it is settled law that at the stage of framing of charge, the Court has to prima facie consider whether there is sufficient ground for proceeding against the accused and that the Court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. It is also observed that if the Court prima facie finds that the case is made out for proceeding further then a charge has to be framed. The Hon'ble Apex Court has further held that the charge can be quashed if the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by defence evidence, if any, cannot show that the accused committed the particular offence.

6.2. In the case of Central Bureau of Investigation v. K. M. Sharan also the Hon'ble Apex Court has held that while exercising inherent power by the High Court to quash the charge-sheet under section 482, Criminal Procedure Code, the High Court should limit its consideration to the question whether or not allegations made in the FIR and the charge-sheet taken on their face value and accepted in their entirety would prima facie constitute an offence for making out a case against the accused and that it would not be proper for the High Court to embark upon an inquiry to ascertain whether the allegations in the FIR and the charge-sheet are reliable or not and thereupon to render definite finding about truthfulness or veracity of the allegations. Same principles of law have been stated in K. L. K. Society and others v. Siddalingesh. Although these principles have been stated in the context of the inherent power of the High Court under section 482, they are similar to those governing exercise of the power of the

Court in discharging the accused under section 227, Criminal Procedure Code and therefore, will have to be borne in mind while deciding the question of entitlement of the applicant herein to seek discharge in the light of the rival arguments.

7. The accusations made against the applicant by the respondent can be found in the summary of charge filed along with the charge-sheet by the respondent at page Nos. 128 to 131 of the paper book of this case. It would be appropriate to reproduce here this summary of the charge as it would give us proper insight in the nature of allegations against the applicant and the material which the respondent seeks to produce in support thereof. It is reproduced thus :

1) That, Shri Bibhash Chandra Singh, Sub Area Manager, Niljai Sub Area, Wani North Area, Western Coalfields Ltd. entered into criminal conspiracy during the period 2007-2009 at Niljai Sub Area with Shri S. S. Sial, Managing Director, Shri Rajeswar Prasad, Shri Amir Chakraborty, Clerk M/s J. J. Earthmovers Limited, Ghugus/Supervisor of M/s GSL Associates Pvt. Ltd. and Shri Ramesh Natar tipper owner to cheat WCL by engaging and dishonestly allowing ineligible tippers in contravention to the MOU signed between the Directorate General of Re-settlement (DGR) and Coal India Ltd. in the matter of transportation of coal and thereby caused wrongful loss of ` 64,81,547.00 to WCL in the form of excess payment to the ineligible tipper owners who dishonestly engaged their tipper through M/s GSL Associates Pvt. Ltd. and caused corresponding wrongful gain to themselves.

2) That certain eligibility criteria were stipulated in the MOU signed between the DGR and Coal India Ltd. dated 16-4-1999, in which ESMs engaging their tippers, should not have been above the age of 55 years and should have retired/released within the last 10 years.

3) M/s GSL Associates Pvt. Ltd. and ESM Company were awarded five Work Order viz.....for transportation of coal at Niljai Open Cast Mine vide various work Orders. That during the execution of the above five work Orders, it is revealed that Shri Bibhas Chandra Singh, the Sub Area Manager, Niljai Sub Area of WCL, Wani Area, entered into criminal conspiracy with officials of M/s GSL Associates Pvt. Ltd. Col. S. S. Sial, Rajeshwar Pathak and Amir Chakraborty and tipper owner Shri Ramesh Natar to cheat WCL and in furtherance of said criminal conspiracy dishonestly flouted the provisions of MOU dated 16-4-1999 signed between Coal India Ltd. and the Directorate General of Re-settlement. The ineligible Tipper owners were either above the age of 55 years or had retired before 10 years and knowing fully well that the ESM tippers were not eligible as per the MOU signed between the CIL and the DGR and those were to be treated as civilian tippers.

4) That, during the period April 2007 to March 2008, 511075.56 MT coal was transported using thirteen ineligible tippers and excess payment of ` 19,57,419/- was paid to M/s GSL Associates. During the period April 2008 to May 2008,

79804.710 MP coal was transported using eight ineligible tippers and excess payment of ` 3,05,652/- was paid to M/s GSL Associates. During the period June 2008 to April 2009, 421847.636 MT coal was transported using 11 ineligible tippers and excess payment of ` 42,18,476/- was paid to M/s GSL Associates. The rate of transportation of coal for ESM companies was always higher than the civilian contractors and these ineligible tipper owners were paid at the rate fixed for ESM Companies and thereby caused wrongful loss to the tune of ` 64,81,547.00 to WCL in the form of excess payment to the ineligible tipper owners who engaged their tipper through M/s GSL Associates Pvt. Ltd. and corresponding wrongful gain to themselves.

5) That, Shri Bibhas Chandra Singh, Sub Area Manager, Niljai Open Cast Mine by abusing his official position dishonestly allowed ineligible tipper owners to engage their tippers for the execution of work awarded to M/s GSL Associates Pvt. Ltd. under his signature vide office order Nos.

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6) That Shri S. S. Sial, the Chairman cum Managing Director of M/s GSL Associates Pvt. Ltd., in furtherance of said criminal conspiracy dishonestly and fraudulently engaged ineligible tippers for the execution of the said work order knowing fully well that those of the ex servicemen tipper engaged were ineligible as per terms of the MOU and thereby claiming excess rate under the ESM criteria cheated WCL to the tune of ` 64,81,547/- and caused wrongful gain themselves.

7) That Shri Rajeshwar Prasad, Supervisor.....

8) That Shri Amir Chakraborty, Clerk.....

9) That Shri Ramesh Natar, ineligible tipper owner...

10) That the aforesaid acts of Shri Bibhash Chandra Singh, Sub Area Manager, Shri S. S. Sial, Managing Director, Shri Rajeswar Prasad, Shri Amir Chakraborty, Supervisors of M/s GSL Associates Pvt. Ltd. And Shri Ramesh Natar, tipper owners constitute the commission of offences which are punishable u/s 120-B read with 420 of IPC and 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988.

11) The original sanction order No.CH/CIL/RC02(A)/2009NGP/926 dated 22-9-2011 issued by the Chairman-cum-Managing Director, Coal India Limited, Calcutta to prosecute Shri Bibhas Chandra Singh is enclosed with the charge

sheet.

12) It is prayed that the Hon"ble Court may be pleased to take cognizance of the offences and try the accused persons as per law in the interest of justice.

8. A careful perusal of the allegations made against the applicant and the materials on which reliance has been placed by the respondent to support these allegations would show that the entire allegations against the applicant relate to violation of two clauses of MOU dated 16-4-1999 by the said ESM Company and allotting of works to the said ESM Company by him knowing fully well that the said ESM Company had violated these terms of the MOU and thereby caused loss of ` 64,81,547/- to WCL, a coal subsidiary of the CIL in the form of excess payment. The charge of the excess payment has been made because the approved rate for transportation of coal by the said ESM Company was higher than the rate given to the civilian contractors and, therefore, a duty was placed upon the applicant to be careful while allotting works for coal transportation to the ESM Companies by ensuring that they adhered to the terms and conditions of the MOU in letter and spirit. These allegations further show that the two clauses of MOU dated 16-4-1999 that were violated in allotting of works to the said ESM Company were: the tipper owners of the ESM Company were above the age of 55 years, and were also not the persons who had retired or released from the Armed Forces within the period of ten years of the formation of the said ESM Company. In other words, there was violation of Clause 5(b)(i) and Clause 20(c) of MOU dated 16-4-1999.

9. In order to understand if the afore stated allegations made against the applicant, taken at their face value and without adding anything thereto or subtracting anything therefrom and without considering the defence of the applicant or the probability that might arise from out of the defence of the applicant, disclose any sufficient ground for proceeding further against the applicant by framing charge against him, one would have to read MOU dated 16-4-1999 as it is as the allegations in the charge-sheet refer to violations of this MOU of 1999. This 1999 MOU supersedes 1993 MOU and, therefore, as rightly submitted by Shri Ahirkar, learned Special P. P., it would make the said ESM Company to continue its present operations as per its terms and conditions, though as rightly submitted by Shri Naidu, learned Counsel for the applicant, it would not retrospectively nullify the 1993 MOU, there being no express provision inserted to that effect in 1999 MOU. This would mean upper age limit for members of the said ESM Company at the time of their becoming members was 60 years and not 55 years as the said ESM Company has been admittedly formed under the 1993 MOU and that the DGR had the duty to ensure that the sponsorship granted by it under the terms and conditions of 1993 MOU was allowed to be continued by it under the new 1999 MOU on satisfying itself about compliance by the said ESM Company of its terms and conditions. This would also mean that if the said ESM Company's sponsorship by the DGR has been continued, in the present case it has been continued without any dispute, it

implied that the ESM Company fulfilled the criteria of upper age limit and also retirement/release within 10 years of formation of the Company.

10. According to the prosecution, there was a duty imposed upon the officer of the WCL like the present applicant to ensure that said two conditions of 1999 MOU relating to upper age limit and retirement/release were fulfilled by the tipper owners before allotting coal transport work to them as per the work orders and failure of this duty was connivance and criminal neglect on the part of the applicant. This duty is being canvassed by the prosecution as a duty in addition to the duty of the DGR to satisfy itself about fulfilment of said two conditions at the time of grant or continuance of sponsorship under 1993 MOU or 1999 MOU and it must be performed by the officer of the coal subsidiary, applicant in the present case, in-charge of execution of the work orders for transportation of coal by the ESM Company. Therefore, it would be useful to consider relevant parts of the 1999 MOU.

11. A copy of MOU dated 16-4-1999 is available on record and it is from page No. 25 to 31 of the paper book of this case. The relevant clauses in this regard are reproduced as under :

Formation of Private Ltd. Co.

4. On a request being received from CIL or anyone of its subsidiaries (hereafter referred to as the coal subsidiary), the DGR will have suitable and eligible ESM selected to form a private ltd. co. (hereafter referred to as the ESM Co.) after a feasibility study by the sponsoring directors the co. will be formed and registered with the Registrar of Companies as a Pvt. Ltd. Co. under Companies Act, 1956. The Memorandum and Articles of Association will be approved by the DGR. It will be the responsibility of the DGR to ensure that all individuals forming or participating in the Pvt. Ltd. Co. are only entitled ESM/Widows/Dependents and that they are suitable and financially sound.

5. Eligibility :- Eligibility conditions as approved by the MOD from time to time will apply. These will be intimated to CIL/Coal Subsidiary before implementation. In case of any reservation by CIL/Coal Subsidiary companies, the same will be discussed before implementation. Broadly the eligibility conditions effective from the date of signature are as follows:

a) Directors :.....

b) Tipper owners/owner Drivers :

(i) ESM should not be above the age of 55 yrs. And have retired/released within the last 10 years.

15. Award of work :

a) Transport contract to be given to ESM Co. by the coal subsidiary shall be strictly confined to DGR sponsored companies only. Under no circumstances the coal subsidiary will deal with any ESM Co. not sponsored by DGR.

b) It shall be the responsibility of the DGR to inform the coal subsidiary immediately in case any of the DGR sponsored ESM Co., during the tenure of contract with the coal subsidiary, is de-sponsored by DGR so as to enable the coal subsidiary to stop business with such de-sponsored

ESM Co.

20. Compliance of MOU and termination of contract :-

a).....

b).....

c) DGR and the CIL subsidiaries will fully cooperate and constantly endeavour to devise measure to ensure compliance of various provision of MOU and other conditions laid down by MOD/CIL from time to time. Further, DGR should evolve a system to ensure compliance of MOU provisions regarding deployment of ex-servicemen their vehicles, their payments and the constitutions of board of directors in case DGR finds anything in variance with the MOU provisions on these his office will inform in the CIL and initiate suitable action.

12. On a careful reading of the above referred clauses of 1999 MOU it becomes clear that as per the eligibility criteria for formation of an ESM Company, the ex-servicemen, who are willing to form the company, should not be above the age of 55 years and should have retired or released from the Armed Forces within the last 10 years. Although it has not been clarified from which date the period of last 10 years is to be calculated, it is obvious that it is in the context of formation of an ESM Company as it is related to the conditions of eligibility to form an ESM Company. In other words, an ex-serviceman can not form his coal transport company unless and until, at the time of its formation, he is of 55 years of age or below it and had either retired or released from the service during the period of last ten years preceding the formation of ESM Company. The MOU nowhere prescribes as to what happens to an exserviceman, who after having validly become the member of the coal transport company, crosses 55 years of age.

13. Clause No.15 refers to award of transport contract by the coal subsidiary being strictly confined to only those ESM Companies which are sponsored by the DGR. This clause also casts a responsibility upon the DGR to inform the coal subsidiary immediately in case the DGR sponsored company during the subsistence of the contract with the coal subsidiary is de-sponsored by it so as to enable the coal subsidiary to stop the business with such de-sponsored ESM Company. Thus, there is a provision for sponsoring of the ESM coal transport company and its de-sponsoring as well by the DGR only and nobody else. This clause contains a mandatory provision that the coal transport contract must be awarded to the DGR sponsored companies only and also an embargo upon the coal subsidiary to not to deal with, under any circumstances, with any ESM Company not sponsored by DGR.

14. It must be noted here that in the said MOU, there is no express provision

about de-sponsoring of the ESM Company or rendering the ESM Company as ineligible to get transport contracts on its participant ex-servicemen crossing the upper age limit of 55 years. It would be thus obvious that the ESM Company cannot be de-sponsored or declared ineligible just because the participant ex-servicemen or some of them have crossed the age of 55 years of age. In fact, tenor of the clauses is such that it can be safely concluded that the MOU permits an otherwise eligible ex-serviceman to form his coal transport company and obtain sponsorship from the DGR even just one day before his completion of the age of 55 years and once he forms the company by duly registering with the Registrar of Companies under the provisions of Companies Act, 1956 and also obtains sponsorship from the DGR, such ex-serviceman can legitimately stake his claim for award of coal transport contract under the provisions of MOU dated 16-4-1999. That apart, under Clause-4, a duty has been specifically cast only upon the DGR and nobody else including any officer of the coal subsidiary like WCL to ensure that all individuals forming or participating in the ESM Company are eligible, suitable and financially sound as per the various conditions laid down in this MOU. Therefore, even for the other condition relating to the retirement/release within last ten years, it is only for the DGR to satisfy itself about its fulfilment before granting sponsorship.

15. The above referred clauses of the MOU, taken at their face value, make it amply clear that it is exclusively the duty of the DGR to ensure that at the time of formation of coal transport company of the ex-servicemen, the company meets the requirements of the MOU dated 16-4-1999 and only after satisfying itself about fulfilment of the eligibility criteria relating to upper age limit and retirement or release from armed forces within last ten years together with the other conditions that it must grant sponsorship to the ESM Company. These clauses when read and accepted as they are also indicate that once the sponsorship is given, it cannot be withdrawn by the DGR only on the ground that the age of 55 years has been crossed by the participant ex-serviceman. They also ex facie clarify that it is not the duty of the officer of the Coal Subsidiary such as Sub Area Manager that the applicant is, to once again examine the issue from the view point of fulfilling the eligibility criteria relating to age and retirement or release from the service within last 10 years and the grant of sponsorship by the DGR will be enough for reaching a conclusion that the said eligibility criteria are fulfilled in a given case. The only duty cast upon Sub Area Manager of the WCL, who is admittedly in-charge of the allotment of coal transport work as per work orders and also the work of processing proposals for award of coal transport contracts to any sponsored ESM Company under the MOU dated 16-4-1999, is to ensure together with the DGR that there is complete compliance with the provisions of MOU regarding deployment of vehicles of the ex-servicemen and payments to be made to the ex-servicemen as per the terms and conditions stated in Clause 20(c). The conditions governing deployment of vehicles of the exservicemen and payments to be made to the company of ex-servicemen are governed by Clauses 9 to 18. However, the allegations made

against the applicant do not refer to violation of any of these conditions and, therefore, it is not necessary to go into the details of the conditions laid down in all those clauses. The allegations only relate to violation of eligibility criteria and now it is clear from the discussion made earlier that the said criteria apply only at the time of formation of the coal transport company by the ex-servicemen and grant of sponsorship by the DGR and there being no corresponding duty cast upon Sub Area Manager of the coal subsidiary or for that matter any officer of the coal subsidiary to re-scrutinize and recheck fulfilment of the eligibility criteria by the ESM Company, it cannot be said that the applicant has prima facie committed any illegality much less any criminality. Any act of commission or omission could be said to be inviting liability under the criminal law only when it is prima facie shown that such act of commission or omission falls within the scope of duty of the accused. When no duty in law or under an agreement between the parties is cast upon the applicant-accused, no accusation of criminal failure to perform the duty or dishonestly conniving at the breach of duty can be made against the applicant-accused, and therefore, it has to be held that in this case there are no sufficient grounds for proceeding against the applicant-accused.

16. In the instant case, even though it was the duty of the DGR to ensure that afore stated eligibility conditions were fulfilled by the ESM Company like GSL Associates Pvt. Ltd. to whom the work orders for transportation of coal had been issued by the superior officers of the applicant and not by the applicant, no action has been sought to be taken against the concerned officials of the DGR. If at all there was any violation on the part of the ex-servicemen who participated in the said ESM Company regarding upper age limit and also the criteria of retirement/release from service within last ten years, said ESM Company should not have been given sponsorship by the DGR and if the DGR had given continued sponsorship to the said ESM Company, which it had in the present case about which there is no dispute, there was no reason for the applicant to suspect that the sponsorship so given was in violation of the said two conditions as it was neither his duty to recheck and re-scrutinize compliance with the said conditions nor was there any complaint received by the applicant in this regard. Even, if the applicant had received some information in the nature of oral complaint regarding violation of the said two conditions by the said ESM Company, the applicant need not and could not have done anything, there being no duty cast upon him in that regard and no power given to him to perform that duty. Even otherwise, it is not the case of the respondent that the applicant, in spite of receiving information in this regard, did not take any action in the nature of passing on of the information to the DGR.

17. Learned Counsel for the applicant has pointed out to me that the said ESM Company-GSL Associates Pvt. Ltd was formed under the provisions of MOU dated 8-4-1993, which did not contain any condition of eligibility regarding retirement or release from service within last ten years and it also did not prescribe upper age limit of 55 years. There is no dispute about the same. There is another significant aspect of which note must be taken. Said ESM Company formed under

the 1993 MOU and sponsored also by the DGR as per the same MOU continued to enjoy sponsorship of DGR even after coming into force of new MOU in the year 1999. After 1999 MOU, the DGR could have thought of de-sponsoring the said ESM Company, if it had deemed it fit. The fact that it did not consider it fit to de-sponsor the said ESM Company after coming into effect of 1999 MOU itself indicated that there was, in the eyes of the DGR, no violation of any of the said eligibility criterion by the said ESM Company, even as per the new MOU of the year 1999, or otherwise it would have desponsored the said ESM Company.

18. Learned Special Public Prosecutor has submitted that MOU dated 8-4- 1993 has been superseded by MOU dated 16-4-1999, which can be seen from Clause-3 of the subsequent MOU and, therefore, continuation of sponsorship of the said ESM Company could be presumed to be as per the new conditions of eligibility in the subsequent MOU, thereby binding the parties to the new conditions.

19. I have already made my conclusions earlier as to how failure of the DGR to de-sponsor the said ESM Company after coming into force of 1999 MOU can be interpreted to mean no violations by the said ESM Company of eligibility criterion even under the new MOU. That apart, it is doubtful if the subsequent MOU could bind the parties already recognised and sponsored under the provisions of 1993 MOU to the new conditions of eligibility as the subsequent MOU of 1999 is completely silent as to what will happen to the ESM companies sponsored under the previous MOU dated 8-4-1993. It is only stated in Clause-3 that it supersedes the last MOU signed on 8-4-1993. It would only mean that whatever ESM Companies that were to take birth on or after 16-4- 1999 were to be formed as per the new conditions of the eligibility and nothing more. The silence in the subsequent MOU on the aspect of continuation of sponsorship granted under the previous MOU or renewal of old sponsorship on new eligibility conditions only indicates that the rights and liabilities created under the old MOU have not been disturbed in any manner and only the rights and liabilities that were to be created on or after 16-4-1999 were to be governed by the new MOU. Therefore, the argument of the learned Special Public Prosecutor for the respondent that the said ESM Company was governed by the new eligibility conditions under MOU dated 16-4-1999 cannot be accepted. But, I must say, this is only an academic discussion because this Court has only to consider the prima facie worth of the allegations made against the applicant, which are based upon the eligibility criterion stated in 1999 MOU and not in 1993 MOU and as such any reference to the conditions of MOU dated 8-4-1993 could not really be the standard for evaluating the prima facie case of the prosecution against the applicant. This discussion has been made only to highlight the inadequacy of the investigation made in this case, and it only goes to show that there are fundamental flaws in the investigation which has not at all considered the impact of 1993 MOU on the alleged violations of eligibility criterion by the said ESM Company which were allegedly connived at by the applicant.

20. Learned Special Public Prosecutor at this stage has invited my attention to various statements recorded by the respondent and has even painstakingly taken me through them in support of his argument that there is enough material prima facie showing that the allegations made against the applicant are genuine and warrant his trial on merits. These statements only indicate that as a Subarea Manager it was the duty of the applicant to monitor and exercise control over the allotment of coal transportation work carried on within the area falling under his jurisdiction and to ensure that there was compliance with the MOU provisions while allotting works and deploying vehicles of the ex-servicemen.

21. I have already discussed at length the nature and extent of the responsibility of the applicant under the 1999 MOU with regard to ensuring compliance with the MOU provisions for deployment of vehicles, etc. and found that what is sought to be placed upon the shoulders of the applicant, on a bare reading of MOU dated 16-4-1999, cannot be seen, but what can be seen is only what falls on the shoulders of the DGR. However, the respondent did not consider it at all and only accepted the opinion of Colonel Govind Singh, Director, Directorate General of Re-settlement (DGR) that after giving sponsorship, there is no further responsibility of the DGR and that DGR only facilitates the willing ex-servicemen in forming the ESM Company and getting of coal transport work by it and that once the company is formed and sponsored by it, the DGR loses any say in the matter and then it becomes the matter only between the ESM and Coal Subsidiary. It is true that once the sponsorship is given, it would be for the coal subsidiary and the ESM Company to comply with the terms and conditions of the MOU. But, in the instant case, the alleged violations of the MOU pertained to a field connected with grant of sponsorship and not to something which was within the competence of the coal subsidiary and its officers which related to deployment of vehicles of ex-servicemen and making of payments to the ESM Company, as mentioned in Clause 20(c). But, there is no allegation of violation of the conditions lying within the said field of competence of the coal subsidiary. Therefore, I find that the allegations made against the applicant when taken at their face value and accepting as they are, do not make out prima facie case against the applicant so as to proceed further in this case and as such, I find that the applicant is entitled to be discharged from the case. All these aspects have not been properly considered by the learned Special Judge and as such the order passed by him deserves to be quashed and set aside and the application (Exh.107) filed by the applicant needs to be allowed.

22. Accordingly, the revision application is allowed.

23. The impugned order is hereby quashed and set aside.

24. Application filed under section 227 of Criminal Procedure Code (Exh. 107) is allowed and the applicant stands discharged from the case.