

(2007) 05 CAL CK 0004
In the Calcutta High Court
Case No : C.R.R. No's. 2122 and 2123 of 2004

Central Bureau of Investigation	Vs	APPELLANT
Asit Baran Banerjee and Another		RESPONDENT

Date of Decision : 18-05-2007

Acts Referred:

Constitution of India, 1950 — Article 20(2), 21
Criminal Procedure Code, 1973 (CrPC) — Section 239, 245, 300, 325, 360
Penal Code, 1860 (IPC) — Section 120B, 409, 477, 477A
Prevention of Corruption Act, 1947 — Section 5(1), 5(2)
Prevention of Corruption Act, 1988 — Section 13(1), 13(2), 26A, 3(1)
West Bengal Criminal Law Amendment (Special Courts) Act, 1949 — Section 2(2), 9(1)

Citation : (2008) 1 CHN 339

Hon'ble Judges : Ashim Kumar Roy, J

Bench : Single Bench

Advocate : Ranjan Roy, for the Appellant; Sovendu Sekhar Roy, for O.P. No. 1 and Joymalya Bagchi and Amarta Ghose for O.P. No. 2, for the Respondent

Judgement

Ashim Kumar Roy, J.—The learned First Special Court, Alipore, 24-Parganas (South) discharged the opposite parties in connection with the Special Case No.2 of 1997 arising out of R.C. No. 30 of 1989 u/s 120B / 409 / 477A of the Indian Penal Code and u/s 5(1)(c) read with Section 5(2) of the Prevention of Corruption Act, 1947, corresponding to Section 13(1)(c) read with Section 13(2) of the Prevention of Corruption Act, 1988 and the said order of discharge is under challenge in the instant criminal revision at the instance of the Central Bureau of Investigation.

2. The background of the case are as follows:

(a) The accused/opposite party No. 1 Asit Baran Banerjee, Divisional Cashier, Cash and Pay Office, Eastern Railways, Sealdah, in criminal conspiracy with the accused/opposite party No.2 Manabendra Dutt Chowdhury, a Former Junior Divisional Cashier, Eastern Railway, as superannuated on October 31, 2000 misappropriated a railway fund of Rs. 2.16 lakhs by dishonestly and fraudulently

falsifying Books of Accounts and records and by falsely showing receipt of Rs. 64,91,207.71 against actual receipt of Rs. 67,07,207.71 against an entry dated July 9, 1997.

(b) After completion of investigation the CBI submitted chargesheet u/s 120B / 409 / 477 of the Indian Penal Code and u/s 5(1)(c) read with Section 5(2) of the Prevention of Corruption Act, 1947, corresponding to Section 13(1)(c) read with Section 13(2) of the Prevention of Corruption Act, 1988, before the learned Judge, First Special Court, Alipore, against the accused/opposite parties. Whereupon, the Special Case No.4 of 1992 was registered and on September 4, 1991 the learned Court took cognizance and on August 13, 1992 charge was framed against the said accused/opposite parties.

(c) Subsequently, the accused/opposite parties filed an application for discharge and by an order dated September 15, 1994 the learned Special Judge allowed the application and discharged them from the case. The said order of discharge as passed by the learned Special Court based on the decision of this Hon''ble Court in the case of H.D. Burman v. CBI reported in 1993(2) CHN 141, and on the sole ground the learned Special Court constituted under the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 before whom the matter was pending has no jurisdiction to take cognizance of offence punishable under Prevention of Corruption Act, 1988.

The aforesaid order of discharge was never challenged before any higher forum.

(d) Subsequently, on January 1, 1997, on the self-same facts the CBI submitted another chargesheet u/s 120B / 409 / 477A of the Indian Penal Code and u/s 5(1)(c)/5(2) of the Prevention of Corruption Act, 1947, corresponding to Section 13(1)(c) / 13(2) of the Prevention of Corruption Act, 1988 before the learned Special Judge, First Court, Alipore, which gave rise to the Special Case No. 2 of 1997.

In connection with the Special Case No. 2 of 1997 the accused/opposite parties once again filed an application for discharge u/s 239 of the Code of Criminal Procedure.

By an order dated May 18, 2004 the learned Judge, First Special Court, Alipore, passed in connection with the Special Case No. 2 of 1997 allowed the said application and discharged the accused/opposite parties from the said case.

The CBI challenged the said order of discharge in the instant criminal revision.

3. The aforesaid order allowing the prayer for discharge of the accused/opposite parties based on the following grounds:

(a) The earlier order of discharge passed on September 15, 1994 in connection with the Special Case No. 4 of 1992 was never challenged and the same being still subsisting and during the subsistence of such order filing of the second chargesheet on the self-same allegation is not legally permissible.

(b) The filing of a second chargesheet on the self-same facts on which earlier chargesheet has been filed and accused has been discharged is absolutely illegal.

(c) A second prosecution on the self-same cause of action amounts to double jeopardy and is not permissible.

(d) The case is not tenable against the accused/opposite parties until and unless the order dated September 15, 1994 passed in connection with the Special Case No. 4 of 1992 is reversed.

4. Mr. Ranjan Roy, the Learned Counsel appearing on behalf of the CBI strongly criticised the impugned order of discharge and submitted as follows:

(a) The initial order of discharge was patently erroneous and illegal and once charge has been framed the question of discharging the accused does not at all arise.

(b) The offence relates to the period of 1987 while the Prevention of Corruption Act, 1947 was in operation and as such the Special Court constituted under the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 has every jurisdiction to take cognizance and hold trial in respect of the said offence, thus the initial order of discharge was wholly illegal.

(c) When a Court has no jurisdiction to take cognizance of an offence and hold trial such a Court has no jurisdiction to discharge an accused from the case.

(d) The principle laid down in the case of H.D. Burman (supra) has been wrongly applied in the facts and circumstances of the case while the Special Court passed the initial order of discharge. In the said decision it has only been held a Special Judge appointed under West Bengal Criminal Law Amendment (Special Courts) Act, 1949 has no jurisdiction to take cognizance and hold trial in respect of an offence under the Prevention of Corruption Act, 1988 not in respect of an offence under the Prevention of Corruption Act, 1947.

(e) Upon insertion of Section 26A in the Prevention of Corruption Act, 1988 by the West Bengal Criminal Law (Amendment) Act, 1994 a Special Judge appointed under West Bengal Criminal Law Amendment (Special Courts) Act, 1949 be deemed to be a Special Judge appointed under the Act of 1988 and is empowered to continue with all proceedings pending before him on the relevant date under the provisions of Act of 1988. Thereby all the difficulties created by the decision of H.D. Burman (supra) has been removed.

(f) In view of the decision of the Supreme Court in the case of State of West Bengal v. Sadan K. Bormal and Anr. reported in 2004 SCC 1739, there was no difficulty in proceeding with the case as the core area of dispute about the appointment of Special Judge under the Prevention of Corruption Act, 1947 have been clarified and they were competent to try offences under the Prevention of Corruption Act.

(g) Unless an accused has been prosecuted and punished for the self-same

offence a ban under Article 20(2) of the Constitution has no manner of application and similarly the ban contained in Section 300 of the Code of Criminal Procedure is attracted wherein a case an accused sought to be prosecuted for an offence in respect of which he was earlier tried and same has been ended in either conviction or acquittal.

Mr. Roy in support of his contentions relied upon the following decisions:

- (i) Maqbool Hussain Vs. The State of Bombay, .
- (ii) S.A. Venkataraman Vs. The Union of India (UOI) and Another,
- (iii) Mohammad Safi Vs. The State of West Bengal,
- (iv) Assistant Collector of Customs and Another Vs. L.R. Malwani and Another, .
- (v) State v. S. Bangarappa, reported in AIR 2001 SC 222.
- (vi) State of Karnataka v. C. Nagarajasivamy reported in 2006 SCC 47.
- (vii) State of West Bengal v. Sadan Kr. Bormal reported in AIR 2004 SC 2666.
- (viii) Vasant Arjunrao Bandak v. State of Karnataka reported in 2003 SCC 345.
- (ix) CBI v. Sunil Chandra Mazumdar and Anr. reported in 2006(1) C Cr. LR (Cal) 389.

Mr. Roy, therefore, prayed that the impugned order be set aside and the prosecution of the accused/opposite parties based on second chargesheet be allowed to reach its logical conclusion.

5. On the other hand, Mr. Sovendu Sekhar Roy, the learned Advocate appearing on behalf of the accused/opposite party No.1 submitted as follows:

The second chargesheet being based on the self-same allegations as that of the initial chargesheet and in view of the fact that the accused/opposite parties have been discharged in connection with the initial chargesheet and such order of discharge being still subsisting any proceeding instituted on second chargesheet was wholly illegal and thus the learned Court below very rightly discharged the accused/opposite parties from the case. The order of discharge having reached its finality there is no scope for re-opening the same by filing a second chargesheet on the self-same cause of action. There was also no sanction.

6. Mr. Joymalya Bagchi, the learned Advocate appearing on behalf of the accused/opposite party No.2 in support of the impugned order canvassed the following points:

- (a) The order of discharge passed in connection with initial chargesheet not being assailed before any Court of Law and since the same has become final, is binding by and between the parties and as such the second chargesheet containing the self-same allegations as that of earlier is illegal and not maintainable in law.

(b) The alleged incident occurred in 1987, therefore, there is no question of commission of offences punishable under Prevention of Corruption Act, 1988. Such act will be in violation of the constitutional embargo as enshrined under Article 20(2) of the Constitution of India. Thus, there is no manner of applicability of Section 26A of the Prevention of Corruption Act, 1988 to the facts and circumstances of this case because none of the accused/opposite parties can be tried and punished for any offence committed under the provision of Prevention of Corruption Act, 1988.

(c) The initial order of discharge being final the contention of the prosecution the accused persons has committed offence punishable under the Prevention of Corruption Act, 1988 is wholly misconceived.

(d) The initial order of discharge not being challenged and a fresh chargesheet being filed after three years without having obtained a fresh sanction against the accused/opposite party No. 2 although he was in employment at the material point of time is illegal.

(e) There has been an inordinate delay in conducting the prosecution in the instant case and the major part of delay was due to the lapses of the prosecution agency and thus this inordinate delay infracts the fundamental rights of an accused to speedy trial.

Mr. Bagchi finally submitted it would be completely an abuse of process of Court if the prosecution against the accused/opposite parties be permitted to continue.

Mr. Bagchi in support of his contentions relied upon the following decisions:

(i) Dilawar Singh v. Parninder Singh alias Iqbal Singh and Anr. reported in 2006(1) SCC 727.

(ii) Rameshchandra Nandlal Parikh Vs. State of Gujarat and Another, ;

(iii) S.G. Nain v. Union of India reported in 1995 SCC 889.

(iv) Moti Lal Saraf Vs. State of Jammu and Kashmir and Another, .

7. Considered the rival contentions of the parties. Perused the materials on record.

8. The relevant portion of the initial order of discharge runs as follows:

In the instant case cognizance was taken on 19.9.92 in both the cases by my Id. predecessor-in-office. Thus it is abundantly clear that the cognizance of the offence in the instant case was taken long after the new P.C. Act of 1988 came into force and long before any power was vested upon the then Judge u/s 3(1) of the new Act of 1988. Accordingly following the ratio decided in the case of H.D. Burman (supra) I must hold that any Act including taking of cognizance, taking of evidence and running of the proceeding by any Judge during the mischief period that is on and from 9. 9. 88, when the new Act of 1988 came into force till before 23.4.93 that is the date of W.B. Notification No. 661 of 1993 are all void

and bad in law. And this is why being the successor, even this Court, in our considered view, is perfectly competent not to proceed with any illegal and void proceedings. Thus we have no other alternative but to drop the proceedings of the case against the accused even in the absence of any enabling Section in the Act of 1988, for, there is no use to sit over a spoiled subject.

It is, therefore,

ORDERED

That the petition filed by the accused in this case is hereby allowed on contest and all the proceedings of the case against the accused are hereby dropped and consequently the accused Asit Baran Banerjee & Manabendra Dutt Chowdhury are hereby discharged from their bail bonds.

9. Thus the learned Judge was of the view that he is bound by the decision of H.D. Burman (supra), where this Hon"ble Court held as follows:

A Special Judge appointed under the provisions of the Criminal Law Amendment (Special Courts) Act, 1949 has no jurisdiction to take cognizance and hold trial in respect of offences punishable under the Prevention of Corruption Act, 1988, when the cognizance of offences under the Act of 1988 was taken by the Special Judge appointed under the Act of 1949 before April 23, 1993 when by a Notification No. 6614-2 all the Judges of Special Court appointed u/s 2(2) read with Section 9(1) of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 and functioning as such Judges, were appointed as Special Judges in exercise of the power conferred by Section 3(1) of the 1988 Act for taking cognizance and holding trial in respect of the offences punishable under the Prevention of Corruption Act, 1988.

However, the facts and circumstances of the case in hand is completely different. It is a case where offence was alleged to have been committed in the year 1987 when the Prevention of Corruption Act, 1947 was very much in force and as such the Special Judge appointed under the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 was empowered and possessed with the jurisdiction to take cognizance and hold the trial in respect of those offences under the Prevention of Corruption Act, 1947.

It is therefore, abundantly clear that the aforesaid initial order of discharge is based on an erroneous conclusion that the learned Special Court was lack of jurisdiction and the Court is bound by the decision of this Court in the case of H.D. Burman (supra). In any event, it is beyond comprehension when a Court come to a finding, even erroneously, that it has no jurisdiction to take cognizance of the offence alleged and to hold trial in respect thereof, how the Court passed an order of discharge in favour of the accused.

In this connection it would be quite apposite to rely on the decisions of the Hon"ble Supreme Court in the case of Mohammad Safi Vs. The State of West Bengal, , the relevant portion of the said decision is quoted below:

It is true that Mr. Ganguly could properly take cognizance of the offence and therefore, the proceedings before him were in fact not vitiated by reason of lack of jurisdiction. But we cannot close our eyes to the fact that Mr. Ganguly was himself of the opinion--and indeed he had no option in the matter because he was bound by the decisions of the High Court--that he could not take cognizance of the offence and consequently was incompetent to try the appellant. Where a Court comes to such a conclusion, albeit erroneously, it is difficult to appreciate how that Court can absolve the person arraigned before it completely of the offence alleged against him. Where a person has done something which is made punishable by law is liable to face a trial and this liability cannot come to an end merely because the Court before which he was placed for trial forms an opinion that it has no jurisdiction to try him or that it has no jurisdiction to take cognizance of the offence alleged against him. Where, therefore, a Court says, though erroneously, that it was not competent to take cognizance of the offence it has no power to acquit that person of the offence. An order of acquittal made by it is in fact a nullity.

10. In this case it is an admitted position that the initial order of discharge was passed after framing of charge. I am in full agreement with Mr. Roy that there cannot be any discharge after framing of charge in connection with a trial under Chapter XIX of the Code of Criminal Procedure. In this connection reliance may be placed in the decision of the Apex Court in the case of *Ratilal Bhatiji Mithani v. State of Maharashtra* reported in AIR 1979 SC 94, where it has been held:

Once a charge is framed, the Magistrate has no power to cancel the charge, and reverse the proceedings to the stage of Section 245 and discharge the accused. The trial in a warrant case starts with the framing of charge, prior to it, the proceedings are only an inquiry. After the framing of charge if the accused pleads not guilty, the Magistrate is required to proceed with the trial to a logical end. Once a charge is framed in a warrant case, instituted either on complaint or a police report, the Magistrate has no power under the Code to discharge the accused, and thereafter, he can either acquit or convict the accused unless he decides to proceed under Sections 325 and 360.

In view of the above, I am of the clear opinion that the aforesaid initial order of discharge is illegal and was of no effect and at best an order putting a stop to the proceedings.

11. Now the question arises for consideration whether the impugned order of discharge in connection with the second chargesheet on the ground that continuance of proceeding with the same amount to double jeopardy is legally sustainable or not?

The submissions of the Learned Counsel of the accused/opposite parties that the filing of the second chargesheet is prohibited under Article 20(2) of the Constitution as well as u/s 300 of the Code of Criminal Procedure is wholly unsound and has no force. It is beyond controversy that Article 20(2) of the

Constitution only prohibits prosecution of any person who has already been prosecuted for the self-same offence and has been punished and the provision of Section 300 of the Code of Criminal Procedure, on the other hand, contemplated, that once a person has been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, so long as such conviction and acquittal remains in force, not be liable to be tried again for such offence. However, in the instant case, the accused/opposite parties was never prosecuted and punished for the offences, nor was tried for any offence. No Court has recorded an order of conviction or acquittal after a trial and as such the ban contained under Article 20(2) of the Constitution or u/s 300 of the Code of Criminal Procedure is not attracted. The initial order of discharge which based on erroneous conclusion of lack of jurisdiction has no legal force and without any consequence.

12. The next contention of the learned Advocates of the accused/opposite parties that a long period has been elapsed since the commencement of this case and during such period the accused/opposite parties having faced great hardship and mental agony, if they again put in trial that would be violative of their fundamental rights of speedy trial granted under Article 21 of the Constitution.

It is true that the FIR was recorded in the year 1989 relates to an offence of 1987 and the CBI submitted chargesheet after completion of investigation in July, 1992 and Court took cognizance on September, 1992 and charge was framed on August, 1993 and in September, 1994 they were discharged from the case, subsequently within 2 and half years the CBI filed the second chargesheet in January, 1997 and the accused/opposite parties were once again discharged in May, 2004.

It is equally true that from the evidentiary materials collected during the investigation by the CBI, a prima facie case has been established against the accused/opposite parties for commission of offences punishable under the Prevention of Corruption Act, 1947 for their alleged involvement in misappropriating a huge sum of money amount to Rs. 2.16 lakhs and for which a charge has been framed against him. Thus, there were sufficient prima facie materials making them liable to face a trial for committing something which is made punishable by law and their such liability cannot come to an end merely because the Trial Court came to an erroneous conclusion of lack of jurisdiction to take cognizance and hold their trial.

This is a case of corruption by public servant and as regards to the same the recent view of the Supreme Court in the case of State of M.P. v. Shambhu Dayal Nagar reported in 2007(1) SCC (Cri) 1, is quoted below:

It is difficult to accept the prayer of the respondent that a lenient view be taken in this case. The corruption by public servants has become a gigantic problem. It has spread everywhere. No fact of public activity has been left unaffected by the stink of corruption. It has deep and pervasive impact on the functioning of the

entire country. Large-scale corruption retards the nation-building activities and everyone has to suffer on that count. As has been aptly observed in *Sivatantar Singh v. State of Haryana* corruption is corroding, like cancerous lymph nodes, the vital veins of the body politics, social fabric of efficiency in the public service and demoralising the honest officers. The efficiency in public service would improve only when the public servant devotes his sincere attention and does the duty diligently, truthfully, honestly and devotes himself assiduously to the performance of the duties of his post. The reputation of corrupt would gather thick and unchaseable clouds around the conduct of the officer and gain notoriety much faster than the smoke.

I am also in complete agreement with the observation of this Court in the case of *Central Bureau of Investigation v. Sunil Chandra Mazumdar* (supra), where the similar question arose for consideration of this Hon"ble High Court and our High Court observed as follows:

(27) The agony of both Shri Rudra and Shri Banerjee touching on the questions of the amount and the delay have to be understood in its realistic position. True, the proceeding in the Special Court was initiated a long time back and many years have passed in the meantime when in the midst of the trial the learned First Special Court way back in 1994 ordered the discharge of the opposite parties and the sum in the trap was Rs. 600/-. that way, the amount was a paltry sum.

(28) But, however, the fact remains that the passage of time was on account of some legal bitch for which neither the prosecution nor the deceased could be held responsible. Here, the question of application of Article 21 of the Constitution of India for speedy trial, in the most humble view of this Court, would not be applicable as there has been a halting proceeding which has been put on and off the hook by virtue of the aura of H.D. Burman's case (supra) which can no longer hold the field in view of *State of W.B. v. Sadan K. Bormal* (supra). Moreover, the question of Article 21 of the Constitution of India has to be appreciated in the light of the latest decision of the Supreme Court in *State of Rajasthan v. Ikbāl Hussain* 2004(4) AICLR (SC) 664, where the Supreme Court relying on the earlier Constitution Bench decision of *Abdul Rehman Antulay Vs. R.S. Nayak* and another etc. etc., , had outlined certain categories of delay which has to be totally ignored in giving effect to the plea of speedy trial amongst several directions in the said decision Clause C speaks of:

Delay caused by order, whether induced by the accused or not of the Court, necessitating appeals or revision or other appropriate actions or proceedings.

(29) As such by that reckoning the plea under Article 21 of the Constitution for denial of right to speedy trial under Article 21 of the Constitution of India can no longer be available in favour of the opposite party.

(30) Further, the objection of Shri Banerjee that the order dated 20.9.99 passed by the learned First Special Court rejecting the prayer of the CBI for reviving the

proceeding also having attained its finality on account of that there was no challenge thrown against the order of subsequent laying of a fresh chargesheet could attract the provisions of the Limitation Act as even the same if it is allowed to be agitated is hopelessly barred by limitation.

(31) This objection of Shri Banerjee cannot be a very sustainable ground as on the first occasion there cannot be any estoppel against the law and as seen hereinabove by virtue of the ratio of the decision of the Supreme Court in *State of W.B. v. Sadan Kr. Bormal* (supra) which took into account the West Bengal Amendment of the said Act which was not considered earlier, this question does not deserve any consideration and that apart a wrong whether perpetuated knowingly or unknowingly continues and it can be rectified at any point of time by the Court in exercise of its inherent jurisdiction and the question of limitation does not arise.

13. Moreover, in the instant case the prosecution cannot be held liable for any delay and such delay in my opinion cannot be a ground for terminating a prosecution of public servants whose prima facie involvement in the alleged offence of corruption have been prima facie established. In this connection, it would be sufficient to merely repeal what have been observed by the Hon'ble Supreme Court in the case of *State of Rajasthan v. Iqbal Hussain* reported in 2004(4) AICLR (SC) 664, wherein the Apex Court held, delay caused by orders, whether induced by the accused or not of the Court, necessitating appeals or revision or other appropriate actions or proceedings are to be ignored to be giving effect to the plea of speedy trial.

Thus, in my opinion, the plea of Article 21 of the Constitution in the instant case is not available to the accused/opposite parties.

14. Hence, I am of the final conclusions:

(a) The initial order of discharge being based on erroneous conclusion of lack of jurisdiction is wholly illegal and without any legal force and consequence. The said order is at best an order putting a stop to the proceedings.

(b) The ban contained in Article 20(2) of the Constitution and in Section 300 of the Code of Criminal Procedure, do not attract in the facts and circumstances of the instant case.

(c) The materials collected by the CBI during investigation has made out a prima facie case for commission of offence punishable under the provisions of the Prevention of Corruption Act, 1947 for their alleged involvement in misappropriation of public money amounting to Rs. 2.16 lakhs.

(d) The plea of Article 21 of the Constitution, in the facts and circumstances of the instant case, is not available to the petitioners.

(e) The foundation of the impugned order of discharge i.e. the order dated May 18, 2004 passed in connection with the Special Case No. 2 of 1997 is wholly

erroneous and not legally sustainable.

15. For the reasons stated as above, the impugned order of discharge passed on May 18, 2004, in connection with the Special Case No.2 of 1997 by the learned Judge, First Special Court, Alipore is set aside. The learned Judge is directed to proceed from the stage when the said order of discharge was passed. The Trial Court is requested to proceed with this matter with utmost expedition and to complete the trial preferably within a year from the date of communication of this order. It is expected the parties shall cooperate with the learned Court for completion of the trial as early as possible.

The office is directed to communicate this order to the Trial Court by special messenger.

Urgent xerox certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible.

Ashim Kumar Roy, J.