

(2012) 02 JH CK 0044

In the Jharkhand High Court

Case No : Criminal MP. No's. 395, 562 of 2011

Dharamvir Bhadaria

APPELLANT

Vs

Union of India
 Arun Kumar Singh Vs State of
Jharkhand

RESPONDENT

Date of Decision : 28-02-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 196(2), 482

Penal Code, 1860 (IPC) — Section 120B

Prevention of Corruption Act, 1988 — Section 13, 13(1), 13(2), 3(1)

Citation : (2012) 2 JLJR 99

Hon'ble Judges : Rakesh Ranjan Prasad, J

Bench : Single Bench

Advocate : Bimal Kumar, Rajesh Lala, Anurag Kumar in 395; Mr. Krishna Murari in 532, 562, for the Appellant; M. Khan, for the Respondent

Final Decision : Dismissed

Judgement

Mr. M. Khan

1. All these three applications are directed against the order dated 4.12.2010 passed by the Special Judge, C.B.I., Ranchi in R.C. No. 20(A) of 2009 (R) whereby and whereunder cognizance of the offences has been taken u/s 120B of the Indian Penal Code and also u/s 13(2) read with Section 13(1) (d) of the Prevention of Corruption Act against the petitioners. Pursuant to the order passed by this Court in W.P.(PIL) No. 803 of 2009 directing the C.B.I. to enquire and investigate the matter relating to embezzlement of public money by the engineers, contractors and other persons towards procurement of Bitumen for the construction of the road, the matter was enquired into by the C.B.I. and found the case as that of criminal liability on the part of the Basudeo Tiwary, the then Executive Engineer, Road Construction Department, Chaibasa, M/s Nav Nirman Builders and some unknown persons and hence, lodged a case which was registered as R.C. No. 20(A) of 2009(R) on the allegation that the then Executive

Engineer during the period from 2006-07 entered into criminal conspiracy with M/s Nav Nirman Builders and others whereby he facilitated M/s Nav Nirman Builders to draw the money upon submission of false/vague invoices showing procurement of Bitumen for the execution of contractual work awarded to him.

2. It has been further alleged that contractor was required to procure Bitumen from Indian Oil Corporation, Bharat Petroleum Corporation Limited or Hindustan Petroleum Corporation Limited and was further required to submit invoices showing procurement of Bitumen and a certificate pertaining to quality of Bitumen so procured and only after verification of the quality, materials were supposed to be used. The contractor who had been given contract for construction of Seraikella-Chaibasa Road submitted 37 number of invoices showing procurement of Bitumen from the Indian Oil Corporation Limited, Tatanagar Depot but out of those, six invoices had never been issued by the Indian Oil Corporation, Tatanagar Depot, still that much quantity of Bitumen covered under six invoices was shown to have been used in execution of the work and that the then Executive Engineer dishonestly and fraudulently certified the bills of the contractor for payment facilitating the contractor to draw a sum of Rs. 89,68,966/- on the basis of false certificate.

3. The matter was taken up for investigation. In course of investigation, C.B.I. also found culpability of other persons including the petitioners, namely, Ram Bilash Sahu (petitioner in Cr. MP. No. 532 of 2011), the then Assistant Engineer, Arun Kumar Singh (petitioner in Cr. M.P. No. 562 of 2011), the then Junior Engineer and Dharamvir Bhadaria (petitioner in Cr. M.P. No. 395 of 2011), the proprietor of the said M/s Nav Nirman Builders and therefore, submitted charge-sheet against these petitioners and others with the accusation that the petitioner, Ram Bilash Sahu in conspiracy with other accused committed criminal misconduct by misusing his official position by countersigning the entries made in the relevant measurement book drawn by the petitioner, Arun Kumar Singh, the then Junior Engineer and also the bills which were never supported by the requisite invoices/challans pertaining to purchase of Bitumen, though as per the work order and even as per the Government circular, the bills which were passed were supposed to be accompanied with invoices and thus, the petitioners, Ram Bilash Sahu and Arun Kumar Singh were charged to have facilitated the petitioner Dharamvir Bhadaria proprietor of the firm M/s Nav Nirman Builders to draw the amount and thereby they committed offence punishable u/s 120B of the Indian Penal Code read with Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act.

4. Upon submission of the charge-sheet, cognizance of the offence was taken u/s 120B of the Indian Penal Code and also u/s 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, vide order dated 4.12.2010 which is under challenge in all these applications.

5. Mr. Bimal Kumar, learned Sr. Counsel appearing for the petitioners (in Cr. M.P. No. 395 of 2011) submitted that so far petitioner, Dharamvir Bhadaria is

concerned, he being a private person cannot be prosecuted for the offences under the Prevention of Corruption Act and that so far offence u/s 120B is concerned, cognizance of the offence has been taken without there being any sanction in terms of Section 196(2) of the Code of Criminal Procedure and as such, the order taking cognizance suffers from illegality and is fit to be quashed. Learned counsel In support of his submission has referred to a decision rendered in a case of Cardinal Telephore P. Toppo vs. State of Jharkhand and Another (2011(3) J.L.J.R. 282).

6. It was further submitted that initially the C.B.I. suspected six invoices out of total 37 invoices to be forged but during investigation, those six invoices have also been found to be genuine.

7. It was further pointed out that the procedure under the Government circular relating to procurement of Bitumen is so cumbersome that if the contractor would have adhered to it the construction of Road which was supposed to be completed within 21 days would not have been completed and thereby public interest would have been affected adversely. Therefore, in the interest of public, the contractor under the permission of the Executive Engineer utilized the old stock purchased from Government Undertaking Company on being certified to be satisfactory by Quality Control Department.

8. In this regard it was placed that the contractor had been awarded three works. For one of the works, he had procured Bitumen from Indian Oil Corporation Limited/Nationalized Company in excess which was utilized in the work in question and under this situation, if the Bitumen was not procured in the manner as has been prescribed under the circular, it cannot be a case of criminal misconduct, rather may be an error of judgment on the part of the Executive Engineer allowing the contractor to use the Bitumen which was lying from before in the stock of the contractor and if it is so, no case of criminal misconduct is made out, in view of the decision rendered in a case of State of Madhya Pradesh Vs. Sheetla Sahai and Others, .

9. Mr. Krishna Murari, learned counsel appearing for other petitioners submitted that so far Ram Bilash Sahu is concerned, he at the relevant point of time posted as Assistant Engineer, who as per the terms of the NIT had no role to play either in the matter of procurement of Bitumen by the contractor or in the matter of verification of the invoices, rather Bitumen after being procured was to be produced before the Executive Engineer, who was supposed to make physical verification of the same and as such, the petitioner (Ram Bilash Sahu) was not involved in any manner with the offence alleged and moreover, the petitioner has never been alleged to have gained pecuniary advantage or valuable thing in lieu of bill being passed in favour of the contractor and thereby the petitioner (Ram Bilash Sahu) cannot be prosecuted for an offence u/s 13(1)(d) of the Prevention of Corruption Act.

10. In support of his submission, a decision rendered in a case of R.

Venkatakrishnan Vs. Central Bureau of Investigation, was referred to.

11. It was further that (sic) that under terms of the NIT, the petitioners the Junior Engineer and also the Assistant Engineer were never supposed to do anything in the matter of procurement of Bitumen or with respect to certification of the quality and quantity of the Bitumen used in construction of the road, rather under Clause 39 of the P.W.D. Code, neither Assistant Engineer nor Junior Engineer has got any role to play in the matter relating to procurement of Bitumen or in the matter of payment of contractor, rather he alongwith Assistant Engineer would be responsible for maintenance of quality of the work and in that view of the matter, the petitioner, in view of the decision rendered in a case of State of Punjab Vs. Sohan Singh, cannot be held liable for the offence as alleged and that in any view of the matter, the facts as placed on behalf of other two petitioners, it can be said to be a case of simple departure from prescribed procedure but that departure was made not at the cost of the public interest or public money, rather it was in the interest of public as the work could be executed with utmost expediency.

12. It was also submitted that any misconduct coming within the mischief of clause of (i)(ii) or (iii) of Section 13(1)(d) of the Prevention of Corruption Act gets attracted in the event one gets undue pecuniary advantage/gain but here in the instant case, not a single word is there in the charge-sheet showing any pecuniary advantage/gain to the petitioners for alleged favour shown to contractor.

13. Mr. Khan, learned counsel appearing for the C.B.I. by referring to the statements made in the counter affidavit submitted that as per the work order issued by the accused Basudeo Tiwary, Executive Engineer, the contractor was required to purchase Bitumen from the Government Oil Companies for execution of the work and was also required to submit invoices/receipts showing procurement of Bitumen and those documents were required to be verified by the accused persons as to whether Bitumen was brought at the site or not but from the evidences collected in course of investigation, it has transpired that the contractor did not procure entire Bitumen as claimed by the contractor under 37 invoices from the Government Oil Companies under the order of the Executive Engineer for execution of the work, rather 27.234 M.T. claimed to have purchased under six invoices, had never been purchased from the Indian Oil Corporation Limited, Depot Tatanagar, still measurement book and bills were prepared by the Junior Engineer, Arun Kumar Singh and entries made in the measurement book were countersigned by the Assistant Engineer and thereby they facilitated the contractor to draw the amount of the bill which never accompanied the relevant invoices. Subsequently, in order to cover up the irregularities, photo-copies of the invoices, showing purchase of Bitumen which had been used in connection with other work, were submitted after passing of its bill and thereby sufficient evidences were collected showing that the Executive Engineer, Assistant Engineer and the Junior Engineer in connivance with each

other allowed the contractor to draw the amount which he was not entitled to get and thus, charge-sheet has been submitted u/s 120B of the Indian Penal Code read with u/s 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 and therefore, under this situation, where prima facie case is there against the accused persons, order taking cognizance never warrants to be quashed.

14. Having heard learned counsel appearing for the parties and on perusal of the record, what have been emerging is that on one hand it is a case of the petitioners that though under the terms of the NIT and also work order, Bitumen was to be procured from the Government Oil Companies under the requisition of the Executive Engineer and then quality of it has got to be certified by the Department of Quality Control Unit which procedure was a cumbersome which could have consumed more than 21 days whereas the petitioner in terms of the contract was to complete the job within 21 days and therefore, excess Bitumen, which had been purchased from the Government Oil Companies in connection with other work, was used in the instant case and under the situation, there may be some deviation in the procedure for procuring Bitumen but it was in the public interest and thereby it may be administrative lapses on the part of the Executive Engineer to allow the contractor to draw the bills but certainly there was no criminal intent either on the part of the Executive Engineer, Junior Engineer or the contractor.

15. On the other hand, it is a case of the prosecution that Bitumen to the extent which was covered under six invoices had never been purchased from the Indian Oil Companies, Depot Tatanagar in connection with the work in question and hence, it was never used in the construction of the work but the amount covered under six invoices were withdrawn and in order to cover up the criminality, photocopies of the invoices were placed on the record after the amount covered under the bill was drawn.

16. It is also the case that in spite of Bitumen covered under six invoices were not utilized, entry was made in the measurement book and the bill was prepared by the Junior Engineer which was countersigned by the Assistant Engineer.

17. Therefore, if the case of the prosecution gets accepted by the court, then there will be a case of misconduct. On the other hand, if the case of the petitioner is accepted, there may be an administrative lapses but there may not be misconduct.

18. Thus, both the parties have come to their respective cases which is to be decided during trial after the evidences are adduced on behalf of the parties. At this stage, this Court in exercise in power u/s 482 of the Code of Criminal Procedure would not embark upon to go into the matter as to which version whether the version of the prosecution or the version of the defence is true.

19. It has been well settled that the criminal proceeding warrants to be quashed in exercise of extraordinary power only when without adding or subtracting court

finds that allegations do not constitute any offence. In this respect, I may refer to a case of *Municipal Corporation of Delhi vs. Ram Kishan Rohtagi and Others* [(1983)1 SCC 1] wherein it has been held as under;--

It is, therefore, manifestly clear that proceedings against an accused in the Initial stages can be quashed only if on the face of the complaint or the papers accompanying the same, no offence is constituted. In other words, the test is that taking the allegations and the complaint as they are without adding or subtracting anything, if no offence is made out then the High Court will be justified in quashing the proceedings in exercise of its power u/s 482 of the present Code.

20. Here in the instant case, taking into account the case of the prosecution that Junior Engineer by making entry in the measurement book prepared bill which was countersigned by the Assistant Engineer facilitated the contractor to withdraw that amount covered under six invoices which invoices had never been procured by the contractor in connection with the work under question, it is hard to accept contention that allegations do not constitute any offence when the accused persons in connivance with each other put the contractor to pecuniary advantage and loss to Government. At this stage one may take notice of the provision of Section 13 of the Act which speaks about criminal misconduct by a public servant. Such an offence of criminal misconduct by a public servant can be said to have been committed if in terms of Section 13(1)(d)(ii)(iii), a public servant abuses its position and obtains for himself or for any other person any valuable thing or pecuniary advantage or while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest. Therefore, submission advanced on behalf of the parties that in absence of any material that the petitioners were put to pecuniary advantage no case of misconduct is made out does not appear to be tenable as it is the case of prosecution that the contractor was put to pecuniary advantage illegally.

21. Under this situation, at this stage, it cannot be said that the instant case is a case of administrative lapses. Accordingly, decisions referred to on behalf of the petitioners rendered in the case of *State of Madhya Pradesh vs. Sheetla Sahay and Others* (supra) and also *R. Venkatkrishnan vs. Central Bureau of Investigation* (supra) are not applicable.

22. So far submission that non-public servant cannot be tried under the Prevention of Corruption Act is concerned, that is without any substance as the provision as contained in Section 3(1) of the Prevention of Corruption Act does give power to the Special Judge to try the offences punishable under the Act and also any conspiracy to commit or any attempt to commit or any abetment of any of the offences of the Prevention of Corruption Act. The said provision reads as follows:--

3(1) The Central Government or the State Government may, by notification in the Official Gazette, appoint as many special Judges as may be necessary for

such area or areas or for such case or group of cases as may be specified in the notification to try the following offences, namely:--

(a) any offence punishable under this Act; and

(b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a).

23. Thus, clause (b) of the sub-section (3) embraces the offence committed in conspiracy with others or by abetment of any of the offences punishable under the Prevention of Corruption Act.

24. Keeping in view the said provision the Hon'ble Supreme Court in a case of P. Nallammal Etc. Vs. State Rep. by Inspector of Police, was pleased to hold that if such conspiracy or abetment of "any of the offences" punishable under the Act can be tried only by the Special Judge, it is unconceivable that the abettor or the conspirator can be delinked from the delinquent public servant for the purpose of trial of the offence.

25. Now coming to other submission wherein it has been put in that order taking cognizance in absence of any sanction in terms of the provision as contained in Section 196(2) of the Code of Criminal Procedure is quite bad as the said provision does stipulate that no Court shall take cognizance of the offence of any criminal conspiracy punishable u/s 120B of the Indian Penal Code, other than a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, but here in the instant case, offence punishable u/s 13(2) is never punishable with rigorous imprisonment and as such, the provision as contained in Section 196(2) of the Code of Criminal Procedure would come into play and thereby order taking cognizance get vitiated on account of want of sanction.

26. I do not find any substance in the submission advanced on behalf of the petitioners.

27. Provision of sub-section (2) of Section 196 of the Code of Criminal Procedure reads as follows:--

No Court shall take cognizance of the offence of any criminal conspiracy punishable u/s 120B of the Indian Penal Code, other than a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, unless the State Government or the District Magistrate has consented in writing to the initiation of the proceeding.

28. From perusal of the aforesaid provision, it does appear that Section 196(2) provides that no court shall take cognizance of the offence of any criminal conspiracy punishable u/s 120B of the Indian Penal Code in a case where the object of conspiracy is to commit offence not punishable with death imprisonment for life or rigorous imprisonment for a term of two years or

upwards, unless the State Government or District Magistrate has, by order in writing consented to the initiation of the proceeding.

29. Emphasis has been given by learned counsel appearing for the petitioners upon the word "rigorous".

30. It is true that u/s 13(2) punishment which has been prescribed is imprisonment for a term which shall not be less than one year but which may extend to seven years.

31. However, "Imprisonment" in terms of Section 60 may be of either description, simple or rigorous which is quite evident from the provision as contained in Section 53 which stipulates that following punishments can be inflicted under the Code:--

Firstly-death

Secondly--imprisonment for life

Thirdly--repealed

Fourthly--imprisonment which is of two descriptions:--

(i) rigorous, i.e. with hard labour and

(ii) simple

Fifthly--forfeiture of property

Sixthly-fine

32. Thus, wherever imprisonment is there, it can be either simple or rigorous, except in a case of imprisonment for life which can never be simple.

33. Thus, the point which has been raised appears to be of without substance.

34. Accordingly, I do not find any merit in all these three applications and hence, the same are dismissed. Before parting with this order, it be recorded that any finding given for the purpose of disposal of these, cases may not be prejudicial to the case of the parties.