

(1998) 12 BOM CK 0097

In the Bombay High Court

Case No : Criminal Revision Application No. 254 with Cri. Rev. Application 257 of 1996 and Criminal Application No. 2616 of 1997

Essar Constructions Ltd. and others

APPELLANT

Vs

Central Bureau of Investigation and others

RESPONDENT

Date of Decision : 24-12-1998

Acts Referred:

Constitution of India, 1950 — Article 12
Criminal Procedure Code, 1973 (CrPC) — Section 197
Oil and Natural Gas Commission Act, 1959 — Section 27
Penal Code, 1860 (IPC) — Section 120, 21
Prevention of Corruption Act, 1988 — Section 13(1), 13(2), 5(2)
Special Courts Act, 1979 — Section 6

Citation : (1999) 2 BomCR 685 : (1999) CriLJ 1861 : (1999) 2 MhLj 148

Hon'ble Judges : D.G. Deshpande, J

Bench : Single Bench

Advocate : S.P. Chinoy, instructed by Mulla and Mulla and C.B.C., Smt. Usha Kejariwal, app, M.K. Patwardhan, N.M. Patwardhan, Laxman P. Kanal, Mahesh Jethmalani and Miss P.R. Mala, for the Appellant;

Judgement

D.G. Deshpande, J.—Heard Mr. Patwardhan for C.B.I, petitioner in Criminal Application No. 2616 of 1997 and for respondent in other applications and Mr. Chinoy for the petitioner in Criminal Revision Application Nos. 254 of 1996 and 257 of 1996 and for respondent in other application. Mr. Mahesh Jethmalani for respondent No. 1 in Criminal Application No. 2616 of 1997, and learned A.P.P. for the State.

2. Out of these three applications, Criminal Application No. 2616 of 1997 and Criminal Revision Application No. 254 of 1996 have been filed by C.B.I, and Essar Constructions Ltd. respectively against the order of Special Judge (A.S. Aguiar) dated 12-8-1996 discharging applicant-accused No. 1 in Misc. Application No. 641/1996 and applicants -accused Nos. 2 and 3 in Misc. Applications Nos. 681 and 682 of 1996 respectively for the offences u/s 120-B r/w section 420 of the Indian Penal Code. Similarly application No. 257 has been filed by petitioner

Ravikant Nandkishore Ruia against the order of Special Judge (R.S. Dalvi) dated 23-9-1996.

3. It appears from the record that Special Case No. 9 of 1996 was started by C.B.I, against certain accused for the offences u/s 120-B r/w section 420 of the Indian Penal Code, u/s 5(2) r/w section 5(1)(d) of the Prevention of Corruption Act 1988 corresponding to section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988. It is the case of C.B.I, that all the accused entered into criminal conspiracy in the year 1985-86 to cheat O.N.G.C. fraudulently and dishonestly to the tune of Rs. 39/- crores and odd in accepting tenders of accused No. 3 i.e. Essar Constructions Ltd. in the matter of W.I.P.P.M. Project when accused No. 3 had no experience and was not competent to undertake the project. At the relevant time, accused S.P. Wahi, the retired Col. was the Chairman of O.N.G.C. and he entered into a conspiracy with other accused for the aforesaid purpose.

4. In the said Special Case No. 9 of the 1996 pending before the Special Judge, Bombay, the Essar Constructions Ltd. filed an application for discharge on 23-7-1996 vide Misc. Application No. 682 of 1996. Similarly such application for discharge came to be filed by accused Col. (Retd) S.P. Wahi vide Misc. Applications No. 641 of 1996. Exhibit E to the Criminal Application No. 2616 of 1997. Third application came to be filed by Ravikant N. Ruia for discharge vide Misc. Application No. 681 of 1996, Exhibit F to the Criminal Application No. 2616 of 1997. All these three applications were decided by Special Judge A.S. Aguiar by order dated 12-8-1996. It appears from the record that after the aforesaid order was passed by the Special Judge on 12-8-1996, Essar Constructions Ltd. filed an application vide Application No. 871 of 1996 and accused Ravikant Ruia filed an application vide Misc. Application No. 870 of 1996 for discharge. These two applications came to be rejected by the Special Judge, Smt. R.S. Dalvi by her order dated 23-9-1996 and hence these petitions arise from the impugned orders i.e. dated 23-9-1996 and 12-8-996.

5. So far as Col. (Retd) S.P. Wahi, who was the Chairman of O.N.G.C. is concerned, it was his contention before the Special Court as well as this Court that sanction for prosecution was not obtained by the C.B.I, in prosecuting him under the provisions of Prevention of Corruption Act, he being a public servant. This contention was upheld by the Special Judge in his order dated 12-8-1996 as per paragraph No. 6 wherein the Special Judge has held that offence of criminal conspiracy alleged against the accused is based on the acts of applicant which were performed in the discharge of his official duties in his capacity as Chairman of O.N.G.C. and therefore, the S.C. observations in the case of Balkrishna Pillai apply to the facts alleged in the instance case and sanction u/s 197 Cr. P.C. would be required. The Special Judge has also observed that offence of cheat u/s 420 of the Indian Penal Code was also covered by the Supreme Court in the case of Balkrishna Pillai and hence prosecution of the applicant Retired Col. S.P. Wahi u/s 420, Indian Penal Code would also require sanction u/s 197 of the Criminal

Procedure Code. However, in paragraph No. 9, the Special Judge has also observed that accused No. 1 Retired Col. S.P. Wahi, ceased to be a public servant at the time of filing of the charge sheet and consequently so at the time of the Court taking cognizance of the offence and therefore, no sanction of the competent Authority to prosecute the applicant accused No. 1 under the Prevention of Corruption Act was required. The Special Judge, further, held that other accused No. 2 and 3 who were charged under sections 120-B r/w section 420 of the Indian Penal Code alongwith provisions of Prevention of Corruption Act could not be so charged because of the bar u/s 197 of the Criminal Procedure Code against taking cognizance quo, the public servant, and therefore, accused Nos. 2 and 3 before the Special Court were required to be discharged under sections 120-B r/w section 420 of the Criminal Procedure Code.

6. Four questions would arise in these petitions. Firstly, whether the sanction u/s 197 of the Criminal Procedure Code was necessary for prosecuting the accused Col. (Retd) S.P. Wahi under Prevention of Corruption Act, secondly, whether the order of discharge of other accused is proper, thirdly, whether pendency of arbitration proceedings can operate as a bar to the present prosecution and fourthly, whether the Special Judge Smt. S.S. Dalvi was justified in asserting that the Special Judge being a Sessions Judge does not lack of jurisdiction to try the accused for any other offence under Indian Penal Code at the same trial.

7. So far as first point of sanction is concerned Mr. Patwardhan relied upon a judgment of the Supreme Court reported in Mohd. Hadi Raja Vs. State of Bihar and Another, , wherein the Supreme Court has held that though the public sector undertakings and Government companies are held as State within the meaning of Article 12 of the Constitution of India, no sanction is necessary u/s 197 of the Criminal Procedure Code to prosecute a person belonging to such undertakings or Government companies, because those undertakings and Government companies, being a juridical person and a distinct legal entity, stand on a different footing than a Government department. Since this is most recent judgment of the Supreme Court directly covering the facts of the present case, same has to be accepted. Admittedly, the O.N.G.C. is a Government company constituted under the O.N.G.C. Act, 1959 having Chairman as a Head of the Commission. However, it was contended by Mr. Jethmalani supported by Mr. Chinoy that section 27 of the O.N.G.C. Act, makes all members and employees of the Commissions public servant within the meaning of section 21 of the Indian Penal Code and therefore, sanction u/s 197 was required to prosecute accused Col. (Retd.) S.P. Wahi who was the Chairman of the O.N.G.C. The aforesaid judgment of the Supreme Court reveals that while considering the question involved, the Supreme Court has taken into consideration the definition of word Public Servant as given u/s 21 of the Indian Penal Code. The Supreme Court has further observed in paragraph No. 26 of the judgment as under:-

"It will be appropriate to notice that whenever there was felt need to include other functionaries within the definition of public servant", they have been

declared to be public servant under several special and local acts. If the legislature had intended to include officers of instrumentality or agency for bringing such officers under the protective umbrella of section 197 Cr. P.C., it would have done so expressly."

Therefore, the criteria that is laid down by the Supreme Court in this regard is that, firstly, the officers of the public undertakings or Government companies are not public servant and even if they are so unless they are included in section 197 Cr. P.C. protection of obtaining sanction or requirements of obtaining sanction would not be applicable to them. In view of these facts, even if as argued by the Counsel for the accused, section 27 of the O.N.G.C. makes all members and employees of the Commission, (Members including Chairman) as public servant within the meaning of section 21 of the Indian Penal Code, they cannot claim protection u/s 197 Cr. P.C. because they have not been included in section 197 Cr. P.C. Consequently, the submissions made by Mr. Patwardhan are required to be accepted and the objections raised by the Counsel for the accused and particularly for accused Col. (Retd.) S.P. Wahi are required to be rejected. It appears that this judgment of the Supreme Court in Mohd. Hadi Raja v. State of Bihar and another referred to above could not be cited before the Special Judge when he considered the application of accused Col. (Retd.) S.P. Wahi for discharge. The order of the Special Judge discharging the accused Col. (Retd.) S.P. Wahi on the ground of want of sanction is, therefore, required to be set aside. Question whether on the date of launching the prosecution accused Col. (Retd.) S.P. Wahi retired from the service and whether sanction is required for retired personnel does not arise.

8. Second point is regarding discharge of accused from the offences u/s 120-B read with section 420 of the Indian Penal Code. The Special Judge discharged other accused from the offences u/s 120-B r/w section 420 of the I.P.C. because he came to the conclusion that accused Col. (Retd.) S.P. Wahi was the public servant and he could not be prosecuted for the offence under Prevention of Corruption Act for want of sanction, then there could not be no charge against other accused u/s 120-B r/w section 420 of the I.P.C. It is, therefore, clear that the order of discharging other accused u/s 120-B r/w section 420 is the consequence of discharge of accused Col. (Retd.) S.P. Wahi on the aforesaid ground of want of sanction. Since the said order of discharge is liable to be quashed on the basis of Supreme Court's judgment referred to above, then the charge u/s 120-B r/w section 420 against the accused is also required to be quashed. The observations and findings of the Special Judge that taking of cognizance of criminal conspiracy u/s 120-B r/w 420 of the I.P.C. quo accused Nos. 2 and 3, appears to be erroneous because of the bar u/s 197 Cr. P.C. against accused Col. (Retd.) S.P. Wahi are also required to be quashed for the same reasons as stated above.

9. Mr. Chinoy cited judgment of Punjab & Haryana High Court wherein it is held that if the arbitration award is passed in respect of dispute between the parties,

there cannot be any criminal prosecution in respect of the same matter. Mr. Chinoy contended that the matter in dispute between Essar Constructions Ltd. and O.N.G.C. has been referred to Arbitrator and award was likely to be passed in January, and therefore, in view of the aforesaid judgment of Punjab & Haryana High Court, Essar Constructions Ltd. could not be made an accused. He also contended that section 420 of the I.P.C. being compulsory to imprisonment which may extend to seven years, and section 420 could not be made applicable to Essar Constructions Ltd.

10. As against this, it was contended by Mr. Patwardhan that firstly, these grounds were never raised before the Special Court and secondly, the judgment of the Punjab & Haryana High Court was not binding on this Court and thirdly, according to him, in that matter an award was passed where as in the instant case award has not been passed and so far as point of arbitration is concerned, facts necessary to constitute defence were not raised in the petition.

11. So far as prosecution of Essar Constructions Ltd. u/s 420 I.P.C. is concerned, I find that the argument of Mr. Chinoy is well founded because section 420 provides that accused shall be punished with imprisonment of either description for a term which may extend to seven years. The word shall be punished makes it compulsory on the Court to impose punishment with imprisonment if accused is found guilty. Admittedly, Essar Constructions Ltd. is a juristic person. Punishment of imprisonment cannot be awarded. Hence prosecution of Essar Constructions Ltd. u/s 420 I.P.C. does not appear to be legal, permissible and justified.

12. However, objection of Mr. Chinoy regarding pendency of arbitration proceedings that operating as bar for prosecuting other accused in the instant case cannot be accepted, because in the judgment of Punjab & Haryana High Court award was finally passed between the parties which ultimately decided civil rights and liabilities. Secondly, this ground was not raised before the Special Court nor it has been raised in the Revision Petition, and therefore, this cannot be permitted to be raised.

13. The last point that requires consideration is whether the Special Judge Smt. R.S. Dalvi was justified in observing that the Special Court does not cease to be a Sessions Court and hence there is no lack of jurisdiction to try the accused for any other offence under the I.P.C. at the same trial. This is not accepted position of law. The Special Court are constituted under Special laws and those courts have power to deal with the offences under those laws and, or other offences under other laws if they are connected offences under the Special Laws. But it is wrong to assume that the Special Court can act as a Sessions Court and is not lacking in jurisdiction as a Sessions Court. For all these reasons I pass the following order:-

ORDER

Criminal Application No. 2616 of 1997 is allowed and made absolute. The

impugned order of the Special Court dated 12-8-1998 is quashed and set aside and application of the accused for discharge is rejected.

Criminal Revision Application No. 257 of 1996 is dismissed. Rule discharged. Stay, if any, vacated.

Criminal Revision Application No. 254 of 1996 filed by Essar Constructions Ltd. is partly allowed and proceedings against applicant Essar Constructions Ltd. u/s 420 of Indian Penal Code are quashed.

Parties to appear before Special Judge on 1-2-1999.