

(2015) 08 AHC CK 0245

In the Allahabad High Court

Case No : Criminal Misc. Writ Petition No. 15303 of 2012

Indra Mani Pandey

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 27-08-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173(2), 197
Penal Code, 1860 (IPC) — Section 120B, 120-B, 420, 467, 468
Prevention of Corruption Act, 1988 — Section 13(1), 13(2)

Citation : (2015) 10 ADJ 167 : (2016) 1 ALJ 650

Hon'ble Judges : Amreshwar Pratap Sahi and Pramod Kumar Srivastava, JJ.

Bench : Division Bench

Advocate : M.C. Chatruvedi, Rajiv Lochan Shukla, Deepak Mishra and Diwakar Tiwari, for the Appellant

Judgement

1. Heard Sri. M.C. Chatruvedi, learned Senior Counsel for the petitioner assisted by Sri. Dwivakar Tiwari, and Sri. Ali Murtaza, A.G.A. for the respondent Nos. 1 to 4. A counter-affidavit has been filed on behalf of the respondent No. 5 to which a rejoinder-affidavit has also been filed by the petitioner. A supplementary-affidavit has also been filed bringing on record the copy of the F.I.R.

2. The matter was heard by us on 20.8.2015 and the following order was passed:

"Hon"ble Amreshwar Pratap Sahi, J.

Hon"ble Pramod Kumar Srivastava, J.

This writ petition has been listed with other writ petitions in relation to the same subject-matter of a criminal case that was registered in relation to an FIR in Case Crime No. 62328010179 of 2001 under Section 420 /467 /468 /478 /120-B IPC read with Sections 13(1) and 13(2) of the Prevention of Corruptions Act, 1988, police station Kydganj, Allahabad. The allegations appears to have been made in relation to certain work executed by the Irrigation Department at Allahabad with regard to restructuring of Saraswati Ghat at banks of River Yamuna. It is

thereafter that the matter was waiting sanction of the State Government in respect of the Government Servants involved in the case under Section 197 Cr.P.C. which sanction order was ultimately passed in relation to them on 24.7.2010.

It is at this stage a spate of writ petitions challenging the sanction orders were filed and orders were passed thereon. The said writ petitions were disposed of on 18.6.2010, 17.6.2010, 18.6.2010 and thereafter in 2012 and also in December, 2014.

The present writ petition is by a contractor who was also involved in the same case who filed this writ petition in 2012. The writ petition was entertained by a Division Bench, and upon taking notice of several orders passed in the cases relating to Government Servants, the Investigating Officer was summoned vide order dated 16.10.2012 and the order sheet in this case indicates that no interim orders were passed till 9.7.2013. To the contrary, the Division Bench which was hearing the matter then, did not extend the interim order in the other connected cases as is evident from the order sheet dated 30.10.2012.

However, on 10.7.2013 in the present case a direction was issued that no coercive steps shall be taken against the petitioner in the present case. This interim order has been extended from time to time and judgment was reserved on 3.12.2014 and the interim order was extended till delivery of the judgment. The judgment, however, was not delivered and the matter was again taken up on 20.3.2005 whereupon a direction was issued to list the case on 17.4.2015, till then interim order, if any, was extended.

It appears that with the change of roster, the matter was listed before another Division Bench on 16.7.2015 when it was directed to be listed with all connected matters. On 30.7.2015 the Bench passed an order that this writ petition should be listed before the Division Bench dealing with cases under the Prevention of Corruption Act, 1988, whereafter the writ petition was listed before the Bench of which one of us (A.P. Sahi, J) was presiding over on 6.8.2015 in the computer list. Accordingly, the Court directed that the matter should come up in the daily cause list and this is how today we have been able to catch hold of the case which is at serial No. 71 of the cause list.

On a perusal of the orders passed, it has been pointed out by the counsel for the petitioners Sri. Divakar Tiwari that the petitioner is not a Government Servant, and so far as the Government Servants are concerned, they have been extended benefits of orders which have been passed from time to time as noted above in the connected writ petitions. One such order passed in WP No. 10598 of 2010 at page 81 is extracted hereunder.

Court No. - 9

Case: CRIMINAL MISC. WRIT PETITION No. - 10598 of 2010

Petitioner Pyare Mohan Srivastava

Respondent: State of U.P. and others

Petitioner Counsel P.C. Srivastava

Respondent Counsel: Government Advocate

Hon"le Vijay Manohar Sahai, J.

Hon"ble Vikram Nath, J.

We have heard learned counsel for the petitioners and the learned AGA appearing for the State-respondents.

Learned counsel for the petitioner is permitted to make correction in the writ petition.

Considering the facts and circumstances and the allegations made in the impugned F.I.R., the Writ Petition is disposed of with the direction that till the submission of report by the police under Section 173(2) Cr.P.C. the petitioners shall not be arrested in Case Crime No. 62328010 of 1979, under Sections 420 , 467 , 468 , 471 , 120-B IPC and 13(1) R/w. 13(2) Prevention of Anti-corruption Act, 1988, P.S. Kydganj, district Allahabad and sanction order dated 27.4.2010 shall also remain stayed.

Order Date: 17.6.2010

Gaurav"

Other similar orders were passed which are at page Nos. 82, 83, 84 and 85 of the present writ petition.

It appears that on behalf of the State, a recall application has been filed in WP No. 10598 of 2010 which petition is also listed before us. We have also perused the said recall/modification application but we do not find on record any such other applications in the connected matters which have already been disposed of.

Since the petitioner is claiming parity with the orders referred to herein above and since the State has already filed a recall application in one petition, it would be appropriate that the office lists the matter again after verifying as to whether similar recall applications have been filed in the connected and decided matters or not. Learned Government Advocate is also directed to find out from his office as to whether such applications have been filed or not and to obtain proper instructions in the matter.

So far as consideration of any further relief is concerned or passing of orders otherwise in the matter, the Court will proceed after the instructions are complete by the State. The matter shall be listed in the next cause list and the office will list it at the top of the list.

Let a copy of this order be given to the learned AGA for compliance.

Order Date: 20.8.2015"

3. This petition has been filed for quashing of F.I.R. dated 9.8.2001 in Case Crime No. 62328010179, under Sections 420 /467 /468 /471 /120-B IPC, r/w. 13(1) and 13(2) of the Prevention of Corruptions Act, 1988. A further prayer is made that the respondents be directed not to arrest the petitioner in the said case. The said relief has been prayed for on the allegations in the petition that the petitioner is a contractor and he has carried out a contract work as per sanction of the appropriate authority, and any work performed pursuant to such a valid contract, was purely a matter of civil adjudication in case of any dispute that is also evident from the terms of the contract that has been filed as Annexure 3 to the writ petition.

4. Sri Chaturvedi submits that the modalities of carrying out work is clearly stipulated therein and, as such, the petitioner, being a contractor, has executed the work under the contract as well as additional work in terms of the conditions of such contract which was entered into between the petitioner and the competent authority. His contention is that the petitioner has nowhere violated or voluntarily acted in any manner so as to implicate him in a criminal case in the manner in which it has been done in the present proceedings. He has invited the attention of the Court to the recital contained in the F.I.R. wherein it is indicated that with regard to the protection of Nehru Ghat at Allahabad besides the Yamuna river, certain earth work was to be carried out, for which there was an estimated cost upon which the contract was entered, but the F.I.R. alleges that certain more work was executed by the petitioner beyond the contract which was neither in accordance with the rules nor in accordance with the terms of contract, and even otherwise if the work did exceed, it was more than 20% and was almost double of the work that had to be performed. Consequently, the petitioner was benefited by the authorities by extending him a work which he was not entitled to receive and the money also paid in response to such execution of contract was almost double the amount that was stipulated in the original contract. To be specific as against the contract, a work of Rs. 2,50,285/- was to be carried out whereas that swelled to the tune of Rs. 4,83,000/- and, therefore, such funds according to the allegations, was made available with the aid of other persons named in the F.I.R. including the Government officials so responsible.

5. Learned Counsel for the petitioner contends that even assuming for the sake of arguments that the said allegations are correct, then in that event also there is nothing indicated in the F.I.R. so as to establish that there was any overt or covert act alleged on the petitioner in having either aided or abetted the misappropriation of any amount or having caused loss to the Government Exchequer or even otherwise had done something which may amount to an offence under the Indian Penal Code.

6. Learned Counsel, therefore, submits that in this background the F.I.R. deserves to be quashed.

7. Replying to the said submissions, learned A.G.A., on the other hand contends that this incident was in relation to the work which was carried out by the

Irrigation Department of the State of U.P. for developing bathing Ghats besides the Yamuna River and while executing the said work, the same was carried out in a manner which clearly indicated the criminal involvement of all those who are concerned in the execution of the said work. The allegations are also of existence of fake documents. He, therefore, submits that the F.I.R. cannot be quashed and it had to be investigated.

8. It is further stated in the counter-affidavit that the investigation was carried out and sufficient evidence was collected indicating the complicity of the accused persons and since there were Government officials involved, therefore, sanction to prosecute them was sought to be obtained from the State Government in this regard. This sanction was granted on 27.4.2010.

9. The Counter-affidavit then further recites that these sanction orders and the F.I.R. were challenged in several writ petitions before this Court and the sanction order was stayed and some of the writ petitions were disposed of finally.

10. The said orders have been perused by us and the records of the said writ petition are also available with are listed today in the cause list. The status of the writ petitions and the orders passed thereon in brief are as follows:

11. This petition, if may be noted, has been filed on a considerable delay and in spite of that the following interim order was passed herein on 10.7.2013:

"Hon"ble Ravindra Singh, J.

Hon"ble Anil Kumar Agarwal, J.

Heard Sri. Diwakar Tiwari, learned counsel for the petitioner.

In connected writ petitioner next date 30.7.2013 is fixed.

List on 30.7.2013.

Till then no coercive steps shall be taken against the petitioner in Case Crime No. 62328010179 of 2001 under Sections 420 , 467 , 468 , 471 , 120-B IPC and Section 13(1) read with Section 13(2) of the Prevention of Corruption Act, 1988, P.S. Kydganj, Allahabad.

Order Date: 10.7.2013"

12. Sri. Ali Murtaza submits that so far as the petitioner is concerned, he is a contractor but he has been implicated with the aid of Section 120B and in such circumstances, the petitioner is also to be prosecuted simultaneously in the same case. His contention is that in such circumstances, there is no material so as to warrant quashing of the F.I.R.

13. In rejoinder, Sri. Chaturvedi submits that the case of the petitioner would be distinguishable from that of the Government servants inasmuch as their prosecution would be dependant upon a competent sanction and in the aforesaid background when the arrest of such petitioners have been stayed which is also

admitted in the counter-affidavit, the petitioner also deserves the same benefit. The petitioner in his rejoinder has also brought on record a Government Order dated 1.6.1995 to demonstrate the powers of the respective authorities.

14. It may be put on record that the counter-affidavit in paragraph No. 8 categorically states that the charge-sheet in the case of the petitioner has not yet been filed as the petitioner could not be arrested and even though sufficient evidence has been collected, but since his whereabouts were not known, distress proceedings could not be undertaken to secure the presence of the petitioner for filing the charge-sheet.

15. We have considered the submissions raised and after having noticed the aforesaid facts, it would be appropriate to mention that this writ petition has been listed with the connected petitions on account of orders passed on 16.10.2012 by a Division Bench of this Court, which is extracted hereunder:

"Hon"ble Amar Saran, J.

Hon"ble Anurag Kumar, J.

List on 30.10.2012 alongwith Civil Misc. Writ Petition No. 42984 of 2010, Civil Misc. Writ petition No. 42986 of 2010, civil Misc. Writ Petition No. 48449 of 2010, CrI. Misc. W.P. No. 13145 of 2010, CrI. Misc. W.P. No. 11174 of 2010, CrI. W.P. No. 10786 of 2010, CrI. Misc. W.P. No. 11173 of 2010, CrI. W.P. No. 10598 of 2010, CrI. W.P. No. 13146 of 2010, CrI. W.P. No. 6790 of 2011 and Civil Misc. W.P. No. 51535 of 2010.

On that date, we would like the Investigating Officer to be present before this Court and in case he has not concluded the investigation, he should submit an explanation alongwith an affidavit as to why the investigation has not been concluded so far in all these connected matters. The S.S.P. concerned will also examine the reasons for non-conclusion of the investigation, in case the same is pending and submit his report on the next listing. In the case the I.O. does not appear on the said date, the S.S.P. concerned shall appear.

Copy of this order may be given to learned A.G.A. if possible, within 24 hours for obtaining necessary instructions/filing counter-affidavit.

Order Date: 16.10.2012"

The Court then passed another order on 21.11.2012, extracted herein under:

"Hon"ble Amar Saran, J.

Hon"ble Dinesh Gupta, J.

As prayed on behalf of learned counsel for the petitioner, list in the next cause list.

Order Date: 21.11.2012"

16. The interim order was long thereafter passed on 10.7.2013, extracted herein above.

17. During the pendency of this writ petition, the State has filed a Recall Application in Writ Petition No. 10598 of 2010 that was finally disposed of on 17.6.2010 and was the first petition filed, the order whereof has been highlighted above. The reasons for moving the Recall Application disclosed in the said recall application is contained in various paragraphs but paragraph Nos. 7, 8 and 9 are relevant, which are extracted here under:

"7. That it is pertinent to mention here that in the aforesaid writ petition, this Hon"ble Court has passed an order dated 17.6.2010, whereby the sanction order dated 27.4.2010 has been stayed, the words "sanction order dated 27.4.2010 shall remain stayed" give a wrong impression that it will operate for unlimited period, which may creates the problem to prosecute the petitioner.

8. That, the abovenoted writ petition has been finally disposed of vide its order dated 17.6.2011, whereby the investigating officer is permitted to conclude the investigation and submit the report under Section 173(2) of Cr.P.C., but this Hon"ble High Court was also pleased to stay the sanction order dated 27.4.2010 indicate that the stay with regard to sanction order is for unlimited period, therefore, it is in the interest of justice to recall/modify/clarify the order dated 17.6.2010 passed by Hon"ble Mr. Justice Vijay Manohar Sahai and Hon"ble Mr. Justice Vikaram Nath in Criminal Misc. Writ Petition No. 10598 of 2010 (Pyare Mohan Srivastava v. State of U.P. and others), otherwise the applicant shall suffer irreparable loss and injury.

9. That in view of the facts and circumstances, stated above, it is expedient in the interest of justice that this Hon"ble Court may be pleased to allow the present recall application to recall/modify/clarify the order dated 17.6.2010 passed by Hon"ble Mr. Justice Vijay Manohar Sahai and Hon"ble Mr. Justice Vikram Nath in Criminal Misc. Writ petition No. 10598 of 2010 (Pyare Mohan Srivastava v. State of U.P. and others) to the extent "sanction order dated 27.4.2010 shall remain stayed" may be deleted; otherwise the applicant shall suffer irreparable loss. And/or may pass such, order or further orders, which this Hon"ble Court may deem fit and proper under the facts and circumstances of the present case, so that the justice be done."

The said recall application is still pending till date.

18. It is in the aforesaid background that we have heard the submissions raised and have perused the material on record.

19. The first contention of Sri Chaturvedi is that the dispute entirely falls within the realm of contractual liability and that no criminal liability can be fixed at least so far as the petitioner is concerned, who in good faith, has performed and executed his part of the contract on the asking and directions of the authorities concerned. He has invited the attention of the Court to clause 16 of the terms

and conditions of the contract which is on record to contend that the action of the petitioners stands clearly saved under the aforesaid terms and conditions and consequently no offence is made out against the petitioner so as to prosecute him with the other Government servants.

20. As noted above, it is an inflated estimate and inflated payment of carrying out of an alleged extra work that the F.I.R. has been lodged. These averments are categorical in the F.I.R. itself. So far as carrying out extra work is concerned, clause-16 of the contract, on which reliance has been placed, is extracted here under:

"CLAUSE 16 - The Engineer Incharge shall have power to make such alteration in or additions to the original specification, drawings, designs and instructions as may appear to him to be necessary or advisable during the progress of the work, and the contractor shall be bound to carry out the work in accordance with any instructions which may be given to him in writing signed by the Engineer Incharge and such alteration shall not invalidate the contract, and any additional work which the contractor may be so directed to do shall be carried out by the contractor on the same contractions on all respect in which he agreed to do the main work, and at the same rates as are specified in the tender for the main work. The time for the completion of the work shall be extended in the proportion that the additional work bears to the original contract work, and the certificate of the Engineer Incharge shall be conclusive as to such proportion. If the additional work includes any item for which no rate is specified here under, the contractor shall carry out the work at the rate entered in the Schedule of rates of the District but if the Schedule does not contain any rate for such work, then the contractor shall not begin such work until a rate in respect of such work, has been settled by mutual agreement between him and the Engineer Incharge with approval of the officer accepting the contract and if they are unable to agree upon a rate within two weeks from the date when the contractor received the order the Engineer Incharge may by notice in writing cancel the order for such work and carry it out in such manner as he may think best. In the event of dispute, the decision of the Superintending Engineer shall be final and binding on the contractor."

21. On a close perusal of the writ petition as well as the rejoinder-affidavit, we do not find any averment indicating as to in what manner and how clause-16 was complied with in order to enable the petitioner to either obtain the extra work which he performed or also receive payment in respect thereof. In the absence of any such material, the allegation as contained in the F.I.R. cannot be disbelieved at this stage. The Government Order dated 1.6.1995 would be of no avail to the petitioner on the facts of the present case.

22. To the contrary what we find in paragraph No. 4 of the writ petition is that the petitioner while indicating the extent of 20% variation permissible in the contract, has stated "And if the variation more, then a fresh contract ought to have been executed which was allegedly not done and for which the

departmental Officers from the Executive Engineer to the Accountant were held responsible in the F.I.R.". There are other averments relating to preparation of fake documents but suffice it to say that this justification sought to be pleaded before us for quashing of the F.I.R. in view of the said averment, is not at all available. The said averment does not deny the default but seems to shift the blame on the officials.

23. The F.I.R. impugned clearly discloses the commission of an offence that deserves to be investigated and cannot be quashed by any lawful reasoning.

24. Coming to the issue relating to the prayer for staying of arrest is concerned, the Apex Court in the case of Km. Hema Mishra Vs. State of U.P. and Others, , has clearly ruled that where the final relief of quashing the proceedings cannot be granted, then the Court cannot proceed to stay the arrest in the meantime. This issue having squarely answered by the Apex Court, the second relief prayed for by the petitioner, cannot be granted.

25. We may, however, conclude by saying that less said the better about this case keeping in view the manner in which the investigation and prosecution of this case has been kept pending to a stage that an incident of 2001 has remained un-investigated finally and the charge-sheet has not been submitted till date. We find this to be a fit case where cost deserves to be imposed. We, therefore, dismiss the writ petition with Rs. 50,000/- as costs.