
(2016) 04 JH CK 0162

In the Jharkhand High Court

Case No : Criminal Appeal(S.J.) No. 301 of 2016

Kaushal Kumar @ Kaushal Kishore Prasad

APPELLANT

Vs

State of Jharkhand through Central Bureau of Investigation

RESPONDENT

Date of Decision : 25-04-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 439

Penal Code, 1860 (IPC) — Section 120B, 409

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

Citation : (2017) 1 AIRJharR 241 : (2016) 3 ECrC 215 : (2016) 3 JBCJ 161

Hon'ble Judges : Ravi Nath Verma, J.

Bench : Single Bench

Advocate : Mr. B.M. Tripathi, Sr. Advocate and Mr. Rahul Kumar, Advocate, for the Appellant; Mr. K.P. Deo, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Ravi Nath Verma, J.—Admit.

2. It appears that the Lower Court Record has already been called for in Criminal appeal (S.J.) no. 289 of 2016.

3. Heard learned senior counsel appearing for the appellant as well as the learned counsel representing the C.B.I. on the matter of bail.

4. Before considering the prayer for grant of bail, it is necessary to give brief facts of the prosecution case: On the basis of information received through reliable source, R.C. Case no. 24(A)/1995(Pat.) was instituted at the instance of C.B.I. with the allegation that one of the accused Ram Ayodhya Sah while working as Executive Engineer, Works Division-I, REO, Ranchi entered into criminal conspiracy with this appellant along with other accused persons namely Rajiv Ranjan Prasad, Devendra Prasad Singh and Surendra Prasad-the three S.D.O.-cum-Assistant Engineers, Vivekanand Choudhary @ Viveka Nand Choudhary, Ashok Kumar, Kumar Vijay Shankar, Binod Kumar Mandal, Abhay

Kumar Sinha, Binod Prasad and Arvind Prasad-all Junior Engineers posted at different places during the year 1994 and cheated the Government of India as well as the State of Bihar to the tune of Rs.100.70 lakhs being the amount allotted under Jawahar Rojgar Yojna for the district Ranchi for execution of 17 old and 51 new schemes in proportion of 80% by Government of India and 20% by State of Bihar towards construction and repairs of different roads. The said amount of Rs.100.70 lakhs was released/allotted by the D.R.D.A. Ranchi to R.E.O. Works Division, Ranchi during the period May-June, 1994 but the said Ram Ayodhya Sah kept the said amount in a new account opened in the joint name of the designation of Executive Engineer and Divisional Accounts Officer and subsequently withdrew the amount through cheques and distributed to the Junior Engineers in the form of cash violating the rules and prescribed procedure. The Deputy Development Commissioner demanded a progress report of the Schemes, then the said Executive Engineer Ram Ayodhya Sah under the joint signature with Assistant Engineers submitted the progress report regarding 45 schemes only and huge amounts were shown to be spent by giving advances for Grade?I and Morum works besides completion of construction of wing wall, Guard wall and repair of pot holes and also on purchase of bitumen but the progress report submitted by the accused persons was found to be false. Thereafter, by order dated 28.08.1994, all the schemes were cancelled except three schemes and R.E.O., Ranchi was directed to return the money advanced to them against the cancelled schemes but only Rs.55.75 lakhs were returned to the D.R.D.A. in nine instalments.

5. Mr. Tripathi, learned senior counsel appearing for the appellant submitted that though the appellant has been convicted under Section 409 read with Section 120-B of the I.P.C. and also under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act but the charges framed by the court below were relating to retaining of the entrusted/allotted money even after cancellation of the scheme and no charge was framed for embezzlement or misappropriation of fund. The mere retaining of the amount for few days or as alleged for approximately two months, would not amount to embezzlement or misappropriation as defined under Section 409 of the I.P.C. or within the purview of Section 13(1)(d) of the Prevention of Corruption Act. As such, the conviction and finding of guilt for retaining part of money is bad in law as the said alleged misappropriated amount was returned immediately after the demand made by the authority. It was also submitted that the finding of the court below regarding the violation of financial norms or rules is misconceived and mere violation of such Rules may at best be a wrong or mere irregularity but cannot be a criminal offence. In support of his submission, learned senior counsel relied on a judgment C. Chenga Reddy and others v. State of A.P. reported in (1996) 10 SCC 193 wherein it has been held that even if the accused acted in violation of financial Code or Government circulars/instruction but dishonest intention is absent, the accused cannot be fastened with criminal liability and none of the circumstances or documents relied upon by the prosecution in the instant case

are of any conclusive nature and even the circumstances put together do not lead to the irresistible conclusion of the guilt of the appellant. It was also submitted that the conviction of the appellant is based on conjecture and surmises and also on suspicion and no clinching circumstance or conclusive evidence have been brought on record to show the involvement of the appellant in misappropriation or embezzlement of Government money or fund. Learned senior counsel seriously contended that the court below has wrongly relied on that Ext.17, 17/1 and 17/2 to show the embezzlement of fund and that the only allegation against the appellant that he retained Rs.6.90 lakhs for almost two months is liable to fail as there was no claim set up by the prosecution as to the date and time before which return of money ought to have been made by the appellant. It was contended that no case of financial gain on the part of the appellant has been made out so as to attract Section 13 (1) (d) of the Prevention of Corruption Act and admittedly out of Rs. 11 lakhs allotted to the appellant after performing the work, remaining amount of Rs.6.90 lakhs was refunded immediately after the direction given by the authority concerned, so question of misappropriation is baseless and not based on any evidence. Even P.W. 6 in his evidence clearly testified that during inspection, he found that either the work was not in progress or progress was very slow. It was also submitted that in the May-June, the work was allotted and, thereafter, the amounts were given and immediately thereafter the work order was cancelled vide order dated 28.08.1994 relying upon the report of D.D.C. dated 16.08.1994 so no proper opportunity was given to the appellant and other co-convicts to complete the work and in a hurried manner, the schemes were cancelled. It was also contended that the finding of the court below as recorded in paragraph-36 and 37 of the impugned judgment relying upon two letter nos. 429 dated 30.03.1982 and 2347 dated 31.12.1983 and the M.B. Book were never brought on record and exhibited and the finding that the soil work was not in accordance with the direction of the Government is a hypothetical finding and not based on any documentary evidence. Similarly, the very basis of the case i.e. the cancellation letter of D.D.C. dated 28.08.1994 has also not been brought on record to show that the schemes were cancelled but relying upon that cancellation letter, which is not on record, the court below held that even after cancellation of the schemes, the entrusted/allotted money to this appellant and other co-convicts were retained by them. Learned senior counsel further relying upon the case C.K. Jaffer Sharief v. State (through CBI); (2013) 1 SCC 205 submitted that the Hon?ble Supreme Court in the said case has held as follows :

"If in the process, the rules or norms applicable were violated or the decision taken shows an extravagant display of redundancy it is the conduct and action of the appellant which may have been improper or contrary to departmental norms. But to say that the same was actuated by a dishonest intention to obtain an undue pecuniary advantage will not be correct. That dishonest intention is the gist of the offence under Section 13(1)(d) is implicit in the words used i.e. corrupt or illegal means and abuse of position as a public servant."

Learned senior counsel further relying on a constitution Bench Judgment reported in 2016 (1) JLJR 121 (Union of India v. V. Sriharan @ Murugan & Ors.) submitted that in the instant case, the investigation was taken up by the C.B.I. suo-moto without the consent of the State or Central Government, which was mandatory under Section 6 of Delhi Special Police Establishment Act, 1946 and hence the investigation and subsequently the conviction and sentence based on such investigation is without authority. Lastly, it was submitted that the appellant was all along on bail during the trial but he is in custody since 16.03.2016 and the appellant has faced rigorous of trial for almost 21 years. Hence, the appellant deserves to be released on bail.

6. Contrary to the aforesaid submissions, learned counsel Mr. Deo appearing for the C.B.I. opposed the prayer and contended that there is no defect in framing of the charge and the court below after appreciating the evidence on record has rightly convicted the appellant and admittedly, the appellant retained the money even after cancellation of the schemes, which amounts to embezzlement and misappropriation of fund. Learned counsel further relying upon Ext. 17, 17/1 and 17/2 submitted that no work was done as reported by the D.D.C. but the appellant claimed to have spent rest of the money other than the refunded amount by constructing the road or keeping the morum on the roads under the scheme. Mr. Deo further relying upon different paragraphs of the deposition of PW. 2 submitted that the prosecution, at his best, brought each and every document on record upon which court below recorded its finding. Learned counsel further relying upon paragraph-20 of the case State of Maharashtra through Central Bureau of Investigation v. Mahesh G. Jain; (2013) 8 SCC 119 submitted that the hon'ble Supreme Court in corruption cases has taken a very serious note and held that minor irregularities or technicalities are not be given Everestine status. It should be borne in mind that historically corruption is a disquiet disease for healthy governance. Lastly, it was submitted that there is a gross violation of financial norms or rules and there is sufficient evidence on record to show the embezzlement or misappropriation of Government fund by the appellant and other co-convicts and in the light of a State Government's notification, the investigation of the case was taken up. So, neither the investigation nor the conviction is bad in law.

7. Before I consider the submissions of the counsels, the relevant part of the charges framed by the court below is given herein below for proper appreciation :

"(i) Later on, all the schemes of R.E.O., Ranchi except three schemes were cancelled by Sri M.S. Bhatia the then D.D.C, Ranchi. Continuous chasing by the then D.D.C. R.E.O. Ranchi, Rs.55.75 Lacs were returned to D.R.D.A. Ranchi. Most of the funds were kept in such an illegal manner for a period of more than two months despite the fact that the same was not required for any work, hence, all of you committed an offence under Section 120-B read with Section 409 of I.P.C. and Section 13(2) read with Section 13(1)(d) of P.C. Act, 1988 and within my cognizance".

(ii) That all of you during the year 1994 were entrusted with an amount of Rs.100.70 Lacs for execution of 17 old and 51 schemes under Jawahar Rojgar Yojna for constructions/repair of roads in your capacity as a public servant but an amount of Rs.55.75 Lacs were kept in such an illegal manner for a period of more than two months i.e. S/Sri (i) B.K. Mandal Rs.4.00 Lacs, (ii) K.V. Shankar-Rs.14.00 Lacs, (iii) Ashok Kumar-Rs. 10.00 Lacks, (iv) V.N. Choudhary-Rs.2.85 Lacs, (v)Arbind Prasad-Rs.4.00 Lacs, (vi)K.K. Prasad-6.90 Lacs, (vii) A.K.Sinha-Rs.7.00 Lacs and (viii) Binod Prasad-Rs.7.00 Lacs (Total Rs.55.75 Lacs) all J.Es. from REO, Ranchi despite the fact that the same was not required for any work and all of you committed a criminal breach of trust in respect of the property so entrusted thereby committed an offence under Section 409-IPC and within my cognizance."

8. Apparently from the two charges framed against the appellant and other co-convicts, it would appear that the only allegation against the appellant and others is of retaining the amount approximately for two months despite the fact that the same was not required for any work after cancellation of the schemes and besides that it appears that no charge was framed for embezzlement or misappropriation in terms of Section 409 I.P.C. and under Section 13(1)(d) of the P.C. Act. There appears to be force in submission of the learned counsel for the appellant that when the amount was returned after cancellation of the scheme, mere keeping the amount even for a period of approximately two months, though in most of the cases, amount has been returned within 21 days, will not amount to either embezzlement or misappropriation of fund. Even from the testimony of P.W.6, who had submitted a report, it appears that during inspection, he found that either the work was not in progress or progress was very slow. It has also come in evidence of P.W.1 that the allotted amount was given to the Assistant Engineers on different dates like 14.06.1994, 15.06.1994 and 17.06.1994 and the Assistant Engineers in turn gave the cash amount to this appellant, who was posted as Junior Engineer, and after cancellation of the scheme, this appellant returned Rs. 6.90 lakhs to the Assistant Engineer Rajeev Ranjan Prasad vide hand receipts dated 01.09.1994, 05.09.1994 and 06.09.1994 and similarly other Junior Engineers had also returned the amount to their respective Assistant Engineers. So only within a very short span, the Junior Engineers started the work by putting morum and other materials. It has also come in evidence that some work was done under the schemes and immediately after cancellation, rest of the amounts were returned, which were not spent. From the impugned judgment, it appears that the appellant was taken in custody on 16.03.2016 and since then he is in custody.

9. Considering the submissions of the counsels, the allegation, the charges framed by the court below, the evidences available on record, the fact that findings of the court below are based on documents which have not been brought on record or marked as exhibits, the period in custody and the fact that the appellant was all along on bail during trial and also the fact that the convicts are all Government servants and most of them have retired from their services, I am

inclined to release the appellant on bail, during pendency of this appeal, on furnishing bail bond of Rs.10,000/- with two sureties of the like amount each to the satisfaction of Special Judge, C.B.I. (other than AHD cases), Ranchi in R.C. Case no. 24A/1995(Pat.), subject to payment of fine amount as imposed by the court below.

10. Considering the nature of the case and the fact that most of the convicts have already superannuated from their services, it is desirable to direct the Office to list this case under the heading 'for hearing' in the second week of July, 2016.

11. I.A. No. 1925 of 2016 filed at the instance of the appellant for grant of bail, accordingly, stands disposed of.