
(1973) 01 CAL CK 0025
In the Calcutta High Court

K.L. Srivastava

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 25-01-1973

Acts Referred:

Penal Code, 1860 (IPC) — Section 120B, 420

Citation : (1974) CriLJ 518 : 78 CWN 462

Hon'ble Judges : N.C. Talukdar, J

Bench : Single Bench

Judgement

N.C. Talukdar, J.—These two Rules, which involve the same point for consideration and are taken up together for disposal, were directed to be heard together. The Rules are at the instance of the accused petitioner, K, L. Srivastava, as to why G. R. Case No. 887 of 1969, pending against him and several co-accused under Sections 120-B/420 and 420, Indian Penal Code in the court of Shri P. C. Chakraborty, Presidency Magistrate, 4th Court, Calcutta should not be amalgamated and tried together with G. R. Case No. 17 of 1969 pending against him and some others under Sections 120-B/420 and 420, Indian Penal Code in the court of Shri S. B. Putatunda, Presidency Magistrate, 10th Court, Calcutta.

2. For a correct appreciation of the short point involved in the two Rules the background of facts is briefly given. On the 25th April, 1967 Shri N. K. Thandani, Deputy Director-General, D.G.S. & D., New Delhi, filed a complaint before the C.B.I./SPE/CIA-1 District New Delhi, that was recorded as F.I.R. No. R.C./3/67/CIA-I, against ten accused persons including the petitioner, namely, K. L. Srivastava, S. M. Wahi, R. M. Wahi, B. C. Guha, B. Bhaskar Rao, R. C. Malhotra, Siben Sen Gupta, Nirmal Bhusan Pakrash, Bhoj Raj Jash and Debi Prasad Chakraborty. The allegations, inter alia, are that in January, 1962 the D.G.S. & D. New Delhi received a requisition for the supply of. 25 soil-stabilizer units (road working machinery) to the consignees in West Bengal and Bihar and on such requisition invited tender for supply of these soil-stabilizers. The quotation of M/

s. U.P.C.C. (P.) Ltd. were accepted on 4-9-62 on terms as referred to in the agreement. It is alleged that the accused persons who belong to the U.P.C.C. (P.) Ltd. between July 1963 and June 1964 entered into a criminal conspiracy at Calcutta to commit the offence of cheating the Central Government, viz., the Pay & Accounts Officer, Calcutta of the Office of the D.G.S. & D. New Delhi by dishonestly and fraudulently obtaining payment to the extent of 80 per cent, for 17 units of soil-stabilizers to be supplied to the various consignees against A.T. issued by D.G.S. & D., on the basis of false and fictitious Railway Receipts Nos, quoted in the said bills as proof of despatch to the consignees and in pursuance thereof had obtained 80 per cent, payment of their bills when no such store in fact was despatched on the date when the said bills were passed for payment by Pay & Accounts Officer, Calcutta and collection was made by the Bank of Tokyo and the American Express Co. The said complaint was treated as P.I.R. The police after investigation submitted a charge-sheet on 12-7-69 against the ten accused persons under Sections 120-B read with Section 420 and 420, Indian Penal Code before the learned Chief Presidency Magistrate, Calcutta who took cognizance of the case and issued processes against them. The case which was registered as G. R. Case No. 887/69 has been pending for disposal in the court of the Presidency Magistrate, 4th Court, Calcutta, Papers and documents u/s 173(4) of the Code of Criminal Procedure were supplied to the accused persons and 11-2-68 was fixed for the supply of further papers.

3. The other case which was registered as G. R. Case No. 17 of 1969 is based on a complaint filed on 19-5-68 by Shri N. K. Thandani, Deputy Director-General, D.G.S. & D., New Delhi u/s 120-B/420 and Section 420, Indian Penal Code against nine accused persons including the petitioner, viz., S. M. Wahi, R. M. Wahi, Krishna Mohan Wahi, B. Bhaskar Rao, R. C. Malhotra, "Siben Sen Gupta and S. R. Bhalla. All these accused excepting Krishna Mohan Wahi and S. R. Bhalla are also accused in the other case, viz., G. R. Case No. 887 of 1969. The allegations in the complaint, inter alia, are that M/s. U.P.C.C. (P.) Ltd. was registered with D.G.S. & D. on 1-5-61 for supply of tractors, shovels and other items including imported road-rollers manufactured by U.S.A. and West Germany. An indent for supply of 4 drag line buckets and 4 extension pieces was received by D.G.S. & D. and tender was issued for supply of those articles. The tender submitted by M/s. U.P.C.C. (P.) Ltd. was accepted on usual terms of A.T. 80% payment after initial inspection of the stores and on proof of despatch and 20% after receipt of the stores in good condition and on acceptance by the consignee on final inspection and tests after erection at site. The U.P.C.C. (P.) Ltd. was granted import trade licence and on the basis thereof imported goods. It is alleged that the accused persons entered into a criminal conspiracy sometime in February, 1964 to cheat the Central Government, viz., the Pay & Accounts Office, Calcutta and the Office of the D.G.S. & D. by dishonestly and fraudulently obtaining 80% payment of the cost of the stores namely 4 drag line buckets and 4 extension pieces against the A.T. in question issued by the D.G.S. "& D. on the basis of the fictitious Railway Receipts quoted in the bill as proof of despatch of

stores to the consignee whereas no such stores were despatched to the consignee and bills were passed for payment by the Pay & Accounts Officer, Calcutta. This complaint was treated as F.I.R. Police after investigation submitted charge-sheet on 3-1-69 before the learned Chief Presidency Magistrate, Calcutta in G. R. Case No. 17 of 1959 and by his order dated 3-1-69 cognizance was taken by the learned Chief Presidency Magistrate, Calcutta and summons was issued against the accused persons. Copies of papers and documents thereafter were supplied to the accused persons u/s 173(4), Criminal Procedure Code and the case is now pending in the court of the learned Presidency Magistrate, 10th Court, Calcutta. The date of hearing was fixed on 20-2-70.

4. At that stage the two revisional applications were moved and two Rules were issued by this Court on 16-2-70 with the direction that the Rules are to be heard together.

5. Mr. Prasun Chandra Ghosh, Advocate (with Mr. Jahar Lal Roy, Advocate) appearing in support of the two Rules, fairly submitted that the use of the term amalgamation forming the subject-matter of the prayer in the two Rules has not been very happy in view of the uniform decisions on the point and accordingly modified his prayer, to the effect that there being one conspiracy in both the cases, there should be one trial with a charge of conspiracy with two counts consisting of the two overt acts, Mr. Ghosh made also an alternative contention that even if that be held to be not possible, the two cases may be directed to be heard one after the other as otherwise the accused persons would be greatly handicapped in their defence and prejudiced ultimately. Mr. Balai Chandra Roy, Advocate appearing on behalf of the State of West Bengal in both the cases joined issue. Mr. Roy contended in the first instance that the expression "amalgamation" is unknown to law and the Rules having been issued on that basis should be discharged. As to the modified submission of Mr. Ghosh, praying for one trial under one conspiracy with two counts of charges consisting off the two different overt acts, all coming under the same conspiracy, is unwarranted and untenable because in fact there are two different conspiracies. Mr. Roy contended further that the other dimension of Mr. Ghosh's contention is also unwarranted and untenable inasmuch as the two cases are proceeding before two different Presidency Magistrates u/s 251-A, Criminal Procedure Code whereunder on charge being framed, the examination-in-chief will take place, followed by cross-examination immediately. The procedure that applies therefore raised a practical difficulty in the way of implementing Mr. Ghosh's prayer, based on the assumption of allotments having been already made to the special courts. Mr. Roy further submitted that in the event of an allotment being made to two different special courts, difficulties again would crop up. Mr. Kishore Mukherjee, appearing on behalf of the accused-opposite party No. 8, Nirmal Bhusan Pakrashi, in Criminal Revision Case No. 113 of 1970, submitted that the cases come clearly within the ambit of Section 233, Criminal Procedure Code and, therefore, the proposed joinder would amount to a mis-joinder. The second branch of Mr. Mukherjee's contention is that one trial as prayed for by one of the

co-accused, would merely cause prejudice to his client, who is one of the several accused in G. R. Case No. 887 of 1969 only and not in the other case. In the event of a joint trial, a considerable body of evidence, having no connection with his client will be let in; clouding the issues thereby and ultimately prejudicing his client. Mr. Mukherjee therefore strongly objected to the two cases being grouped together in one joint trial under, one conspiracy with two counts of charges relating to the two overt acts. A reference was made to several cases by the learned Advocates on behalf of the respective parties and the same would be considered in the proper context.

6. There is no cloud in law on the point of amalgamation because of the imprimatur of judicial decisions. Without multiplying the number of cases, a reference may be made in the first instance to the case of *Osman Mistry v. Atul Krishna Ghosh* reported in AIR 1949 Cal 632 : 51 Cri LJ 97. S. K, Sen, J. observed therein that there is no provision in the Criminal Procedure Code for amalgamating, cases and that the relevant sections relating to joinder of charges and the joinder of persons nowhere permit a magistrate to amalgamate two cases started separately and such trial, would only be illegal. A reference may also be made to a later decision, viz., the case of *Satish Chandra Chakrabarty Vs. Subrata Majumdar*, wherein Amaresh Roy, J. relied on the observations made in *Osman Mistry's* case referred to above and held that there is no provision in the Code authorising amalgamation of cases beyond the ambit of Section 234, Criminal Procedure Code. He ultimately observed that such amalgamation was illegal and without jurisdiction. A reference again may be made to the case of *Birichh Bhuian and Others Vs. State of Bihar*, Subba Rao, J. (as his Lordship then was) observed therein that a charge is not an accusation in abstract but accusation of offence against a person; that misjoinder is joinder in contravention of Sections 234 to 239, Criminal Procedure Code; and that the same is not an irregularity but an illegality as the trial was held in a manner prohibited by law. There is there-fore not much difficulty in holding that amalgamation is a concept unknown to the Code and Mr. Prasun Ghosh himself did not ultimately press the point in that form. It is therefore necessary to turn to the other branches of his submission for disposing of the two Rules.

7. The pith and substance of Mr. Ghosh's contention is that there is one conspiracy comprising both the cases and it is therefore just and fair, in order to rule out prejudice to the accused persons, that these should be one trial under one conspiracy containing two counts of charges relating to the two overt acts forming the subject-matter of the two different complaints in G. R. Cases Nos. 887/69 and 17/69. Mr. Balai Chandra Roy, Advocate appearing on behalf of the State of West Bengal, however, objected to the same, contending, that the facts involved in the two different cases stare one in the face and clearly make out two conspiracies. It is undoubtedly true that if there be one conspiracy the two overt acts can reasonably come together in one trial under two counts of charges thereunder forming different overt acts in pursuance of the same conspiracy. The point for consideration therefore is whether there is one conspiracy. It is

accordingly necessary to consider the facts forming the subject-matter of the two different charge-sheets. It cannot be overlooked that "every question of law arises out of a fact or situation, and if there be no state of facts, there can be no question of law". The point of law, therefore, raised by Mr, Prasun Chandra Ghosh cannot remain suspended in the air but must have a firm basis on the ground of facts. In this context Mr. Roy catalogued several points of difference ruling out one conspiracy. In support of his contention he submitted that (a) the two tenders are different inasmuch as (i) one was invited on 10-3-62 and the other one on 18-4-63; (ii) the first tender being submitted on 31-6-62 whereas the other one was submitted on 6-2-63; (iii) the tenders were accepted on different dates, viz., 4-9-62 and 18-9-63 respectively; (iv) the first tender related to supply of 25 soil-stabilizer units (road working machinery) and the other one related to the supply of 4 drag line buckets and 4 extension pieces; (v) and that the second tender was not even in existence when the conspiracy was hatched in respect of the first tender invited; (b) that the systems of payment are also different as paragraphs 4 and 6 respectively of the different charge-sheets would make it clear, viz., that (i) in G. R. Case No. 887/ 69, full C.F. price of the stores was to be paid as per the terms of the A.T. in foreign currency to the Principals M/s. Howard Rotavator Ltd., West Hardon, Essex, U. K. by the Director, India Supply Mission, Washington after shipment of the stores and the balance amount (i.e. the F.O.R. price minus the net C and F value) was to be paid in rupee payment as under 80% on proof of despatch from India Port after initial inspection and 20% after receipt at destination, etc.; (ii) in G. R. Case No. 17 of 1969 para. 6 lays down that it would be as per terms of 80% payment made after initial inspection of the stores and on proof of despatch and balance 20% after receipt of the stores in good condition and the terms of delivery were F.O.R. Bombay; (c) the terms of the contract varied as borne out by paragraphs 6 and 8 of the two different charge-sheets and consequently the execution is different thereof : (d) that the facts averred are also different; (e) that the objects are clearly separate; and (f) that the accused persons are also different ten being in G. R. Case No. 887 of 1969 including the petitioner. Apart from different conspiracies Mr. Roy submitted that the evidence to be led both oral and documentary would also be different, and Mr. Roy next submitted that the accused has no vested right in procedure and apprehended grounds of prejudice cannot confer on them a right in choosing the procedure. I have given my anxious consideration to the submissions made by the learned Advocates appearing on behalf of the respective parties in the light of the materials on record and I am unable to agree with Mr. Ghosh's contention that there is one conspiracy. This being so, his contentions for trying the two cases together by framing two counts of charges under one conspiracy in one trial cannot be upheld.

8. I may now turn to the decisions cited by Mr. Ghosh to lend assurance to his contentions viz. the cases of AIR 1938 130 (Privy Council); S. Swamirathnam Vs. State of Madras, ; Srichand K. Khetwani Vs. State of Maharashtra, and Mohd. Husain Umar Kochra etc. Vs. K.S. Dalipsinghji and Another etc., . On a

consideration of the said cases I find that the basis thereof is essentially different from, that obtaining in the present case. The principle laid down in AIR 1938 130 (Privy Council) is that if several persons conspire to commit offences and commit overt acts in pursuance of the conspiracy, these acts are committed in the course of the same transaction which, embraces the conspiracy and the acts done under it. Lord Wright delivering the judgment made it clear that the common concert and agreement which constitute the conspiracy serve to unify the acts done in pursuance of it. In the present case, however, common concert is ruled out by the impact of the facts. In *S. Swamirathnam Vs. State of Madras*, . Imam J. who delivered the judgment, made it quite clear that where the charge framed, discloses one single conspiracy, although spread over several years, where there is only one object of the conspiracy, and that is to cheat members of the public, the fact that in the course of years others joined the conspiracy or that several incidents of cheating took place in pursuance of the conspiracy does not change the conspiracy and does not split up a single conspiracy into several conspiracies. I respectfully agree but the facts in the instant proceedings are quite different. The question involved is not so much of splitting up a single conspiracy but a question of several conspiracies being rolled up into one. The third case on the point is *Srichand K. Khetwani Vs. State of Maharashtra*, . Raghubar Dayal, J. who delivered the judgment, held that the mere fact that licences were issued in the names of eight different persons could not make out a case of eight different conspiracies each with respect to licences issued to one particular fictitious company. I respectfully agree but in this case the facts do not disclose the issuing of different licences in the name of the same company or of different companies and thereby purportedly making out different conspiracies but bring to light different conspiracies being hatched up and pursuant thereto different modus operandi being adopted. The last case cited on the point is that of *Mohd. Husain Umar Kochra etc. Vs. K.S. Dalipsinghji and Another etc.*, . The observations of Bachawat J. are clear enough that the agreement is the gist of the offence and in order to constitute a single general conspiracy there must be a common design and a common intention of all, to work in furtherance of the common design. The triple test as laid down therein is not satisfied in the two cases forming the subject-matter of the present Rules, As a matter of fact when the conspiracy is alleged to be hatched with regard to the first tender, the second tender was not even in existence. The golden thread running through the aforesaid cases decided by the Supreme Court is the same viz., that of one conspiracy. On an anxious consideration of the facts of the present cases, I am unable to find one conspiracy and this being so, Mr. Ghosh's ultimate prayer is ruled out. To give effect to Mr. Ghosh's prayer would be to roll up two conspiracies in one charge in non-conformance to the procedure established by law and contrary to the principles laid down in the decisions referred to above. This dimension of Mr. Ghosh's arguments accordingly fails.

9. The alternative branch of Mr. Ghosh's submission now remains to be considered. The procedure to be followed at this stage is one u/s 251-A, Criminal

Procedure Code. It can-not be overlooked that up-till now there has not been any allotment to the Special Court. This being so, the hearing of the two cases one after the other would not rule out the prejudice complained of by Mr. Ghosh. After the examination-in-chief cross-examination will take place immediately. The two learned magistrates are also different. In these circumstances the alternative branch of Mr. Ghosh's arguments also fails.

10. I will now proceed to consider the objection raised by Mr. Kishore Mukherjee, providing another difficulty standing in the way of implementing Mr. Ghosh's prayers. Appearing on behalf of the accused-opposite party No. 8 in Criminal Revision Case No. 113 of 1970 arising out of G. R. Case No. 887 of 1969, Mr. Mukherjee submitted that his client does not only not support the Rule but strongly objects to being made a party in one joint trial, wherein a considerable body of evidence though not directly connecting him, would nonetheless be let in, clouding the points at issue and prejudicing his interests. The proper provision to be considered in this context, according to Mr. Mukherjee, is Section 233, Criminal Procedure Code and the proposed joinder would merely be a misjoinder. Mr. Mukherjee further adopted the submission made by Mr. Roy objecting to a joint trial. In this context I find that the persons involved in the two different cases are not the same. Out of the ten accused persons in G. R. Case No, 887 of 1969 four do not figure in G. R. Case No. 17 of 1969. This is not all. Two other accused persons not in the first case, figure again in the second case, viz., Krishna Manaji Wahi and S. R, Bhalla. The accused persons, therefore, are not the same and the evidence to be adduced in the two different cases cannot be exactly the same. The question of prejudice therefore as raised by Mr. Mukherjee on behalf of a co-accused in one case only cannot be wholly overlooked. The balance of convenience would otherwise turn into an imbalance prejudicing the accused persons who do not figure in both the cases forming the two different heads of charge in the same trial. The contentions raised by Mr. Ghosh for holding one joint trial or two trials one after the other accordingly fail.

11. I make it quite clear however that I make no observations as to the merits of the respective cases, which are left open for being decided by the courts below in accordance with law.

12. In the result, I discharge the two Rules; and I direct that the records are to go down as early as possible.