(2007) 10 GAU CK 0006

In the Gauhati High Court

M.L. Sharma and Others — APPELLANT

Vs

Central Bureau of Investigation and Others — RESPONDENT

Date of Decision : 03-10-2007

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 120, 223, 235, 482
Penal Code, 1860 (IPC) — Section 120, 420, 477
Prevention of Corruption Act, 1988 — Section 13

Citation : (2008) CriLJ 1725

Hon'ble Judges : I.A. Ansari, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

I.A. Ansari, J.—By this order, I propose to dispose of all the criminal petitions enlisted above, which have arisen out of the applications made under Article 227 of the Constitution of India read with Section 482, Cr.P.C. against the orders, dated 13-4-2007 passed, in Special Case Nos. 5/2006 to 20/2006, whereby the learned Special Judge, CBI, Guwahati, Assam, has rejected the prayer made by the present petitioners, who are accused in the cases aforementioned, to amalgamate and try all the cases together as one case.

2. Broadly speaking, the facts leading to the impugned order are that during the year 1995-98, the Telecom Department, which is, now, known as BSNL, awarded contracts to various contractors for the purpose of trenching of various parts of Imphal-Moreh route and Imphal-Chandrapur route, on National High Way No. 37, in the State of Manipur, and laying of optical fibre cables oh the routes aforementioned, which were divided into several sub-sections. Following the execution of the contract works, so awarded, and payment of the bills made, in this regard, several First Information Reports came to be registered against various contractors, who had been awarded the contract works, and also some officers and employees of the Telecom Department, on accusations of commission of the offences of criminal conspiracy, cheating and

misappropriation. On completion of investigation, charge-sheets were laid by the Central Bureau of Investigation (in short, ''the CBI''). The present petitioners, who are accused in the said cases, applied, in the Court of the learned Special Judge, C.B.I., Guwahati, for amalgamation of all the cases so that there could be one trial in respect of all the cases. By the order, dated 13-4-2007, as the learned Court below has rejected the prayer, so made, the petitioners have, now, come to this Court with the present applications made under Article 227 of the Constitution of India read with Section 482, Cr.P.C.

3. I have heard Mr. D.S. Choudhury and Mr. A. Hussain, learned Counsel for the accused-petitioners. I have also heard Mr. D.K. Das, learned senior Counsel, appearing on behalf of the CBI, Mr. S. Muktar, and Mr. A.C. Dey, learned Counsel, appearing on behalf of the accused-respondents.

4. Appearing on behalf of the petitioners, Mr. Choudhry, learned Counsel, submits that under the provisions of Section 223(d), Cr. P.C, persons, who are accused of having committed different offences in the course of the same transactions, may be charged and tried together. Mr. Choudhury also submits that in view of the fact that in the case at hand, all the contracts, In question, are of the same nature and though the contract works stood divided into several parts, the same involved the same High Way, that is, the National High Way No. 37, the petitioners were wholly justified in seeking appropriate order from the learned Court below directing a joint trial of all the accused involved in all the cases aforementioned. Referring to the case of Mohan Baitha and Others Vs. State of Bihar and Another, , Mr. Choudhury submits that the expression ''same transaction'', which appears in Section 223(d), cannot be equated with one transaction and that even a series of transactions may, in a given case, be treated as forming part of the same transaction.

5. In the case at hand, the learned trial Court, according to Mr. Choudhury, has seriously fallen into error in omitting to take note of the fact that the cases, which the CBI has investigated according to its own convenience, essentially involved same type of contract works forming broadly speaking, part of the same transaction and, hence, in such circumstances, the learned Court below ought to have amalgamated all the cases into one case so as to avoid delay and also possibility of prejudice, which such delay may cause to all the accused.

6. Contraverting the submissions made on behalf of the accused-petitioners, Mr.D.K. Das, learned Senior Counsel, submits that in the present case, each of the contracts awarded is distinct and separate. Mr. Das also submits that though the nature of the works may be same, but the contractors awarded are different in each case and, similarly, the amounts involved, in various transactions, are not one and the same nor are the terms and conditions of all the contracts entirely same. In such circumstances and, particularly, when some of the accused had also raised objection to the prayer of amalgamation, the learned Court below was fully justified in not acceding to the prayer of the present accused-petitioners.

7. Referring to and relying upon, The State of Andhra Pradesh Vs. Cheemalapati Ganeswara Rao and Another, , Lalu Prasad @ Lalu Prasad Yadav Vs. State through C.B.I. (A.H.D.) Ranchi, Jharkhand, and Mohan Baitha (supra), Mr. Das has submitted that though a transaction may consist of several isolated parts or a series of acts and may be regarded, in a given case, as forming part of the same transaction, the fact remains that if some of such acts stand out independent of the other, then, all such acts would not be treated to have formed part of the same transaction.

In fact, even in Mohan Baitha and Others Vs. State of Bihar and Another, the Apex Court has held,".... The expression "same transaction" from its very nature is incapable of an exact definition. It is not intended to be interpreted in any artificial or technical sense. Common sense and the ordinary use of language must decide whether on the facts of a particular case, it can be held to be in one transaction. It is not possible to enunciate any comprehensive formula as of universal application for the purpose of determining whether two or more acts constitute the same transaction. But the circumstances of a given case indicating proximity of time, unit or proximity of place, continuity of action and community of purpose or design are the factors for deciding whether certain acts form parts of the same transaction or not. Therefore a series of acts whether are so connected together as to form the same transaction is purely a question of fact to be decided on the aforesaid criteria". A bare reading of what has been observed in Mohan Baitha (supra), shows that these observations are in tune with what were laid down in Cheemalapati Ganeswara Rao 1963 2 Cri LJ 671(supra).

8. Before I enter into the merit of the submissions made, on behalf of the parties concerned, the facts of each of the cases, which the CBI has registered and the accused are being prosecuted for, need to be noted. The learned trial Court has, I find, succinctly described, in a nutshell, the facts of each of these cases. I. therefore, reproduce, here in below, what the learned trial Court has described as the facts of each of these cases.

However, in RC Case No. 9(A)/2001-SIL, it has been alleged in the charge sheet that during 1995-98. accused Sh. M.L. Sarma, Sh. Nabendra Kumar, Sh. Pijush Kanti Bagchi, Sh. A.S. Debm, Sh. Ram Prasad, Sh. Raja Sikaria and S.R. Das (now deceased) entered into criminal conspiracy and such conspiracy was to cheat BSNL by submitting false bills and on the basis of those false bills, they fraudulently claimed Rs. 11,28,329/- thereby causing the department loss to the tune of amount, aforesaid and corresponding gain to all the accused persons, above. The work, in respect of which false bills were submitted relates to trenching on the routes and laying of optical fiber cable in Sub-sections (10) and (11) of Imphal-Moreh route and on the basis of aforesaid allegations, above accused persons were charge sheeted with having committed offences u/s 120, 420, I.P.C. and Section 13(2) r/w. 13(1)(d), P.C. Act, 88.

In R.C. Case No. 12(A)/2002-SIL, it has been alleged in the charge sheet that during 1995-96, accused Sh. Ram Prasad, Sh. M.N. Khan and Sh. Babul Kalita entered into criminal conspiracy to cheat BSNL by submitting false bills causing huge loss to the BSNL to the tune of Rs. 15,36,130/- and corresponding gain to above accused persons. The work, in respect of which false bills were submitted, relates to trenching on the routes and laying of optical fibre cable in Sub-sections 17 of Imphal-Moreh route and on the basis of aforesaid allegations, above accused persons were charge sheeted with having committed offences u/s 120B, 420, I.P.C. and Section 13(2) r/w. 13(1)(d), P.C. Act, 88.

In R.C. Case No. 9(A)/2002-SIL, it has been alleged in the charge sheet that during 1995-96, accused Sh. P.K. Bagchi, Sh. A.S. Deb, Sh. Ram Prasad and Sh. H. Brojendra Singh entered into criminal conspiracy to cheat BSNL by submitting false bills causing huge loss to the BSNL to the tune of Rs. 8,52,537/- and corresponding gain to above accused persons. The work, in respect of which false bills were submitted, relates to trenching on the, routes and laying of optical fibre cable in Sub-sections 14 of the Imphal-Moreh route and on the basis of aforesaid allegations, above accused persons were charge sheeted with having committed offences u/s 120B, 420, I.P.C. and Section 13(2) r/w. 13(1)(d), P.C. Act, 88.

In R.C. Case No. 7(A)/2001-SIL, it has been alleged in the charge sheet that during 1995-97, accused Sh. M.L. Sarma. Sh. Nabendra Kumar, Sh. P.K. Bagchi, Sh. A.S. Deb and Sh. S.K. Borah entered into criminal conspiracy to cheat BSNL by submitting false bills causing huge loss to the BSNL to the tune of Rs. 5,13,752/- and corresponding gain to above accused persons. The work, in respect of which false bills were submitted, relates to trenching on the routes and laying of optical fiber cable in Sub-sections (14) of the Imphal-Moreh route and on the basis of aforesaid allegations, above accused persons were charge sheeted with having committed offences u/s 120B, 420, 477A, I.P.C. and Section 13(2) r/w. 13(1)(d), P.C. Act, 88.

In R.C. Case No. 5(A)/2002-SIL, it has been alleged in the charge sheet that during 1996-97, accused Sh. M.L. Sharma, Sh. Nabendra Kumar, Sh. P.K. Bagchi and Sh. Abed Hussain entered into criminal conspiracy to cheat BSNL by submitting false bills causing huge loss to the BSNL to the tune of Rs. 17,50,198/- and corresponding gain to above accused persons. The work, in respect of which false bills were submitted, relates to trenching on the routes and laying of optical fiber cable in Sub-sections 22 & 25 of the Imphal-Moreh route and on the basis of aforesaid allegations, above accused persons were charge sheeted with having committed offences u/s 120B, 420, I.P.C. and Section 13(2) r/w. 13(1)(d), P.C. Act, 88.

In R.C. Case No. 13(A)/2001-SIL, it has been alleged in the charge sheet that during 1996-97, accused Sh. Nabendra Kumar, Sh, P.K. Bagchi and Sh. Bhabesh Baruah entered into criminal conspiracy to cheat BSNL by submitting false bills causing huge loss to the BSNL to the tune of Rs. 2,68,540/- and corresponding gain to above accused persons. The work, in respect of which false bills were submitted, relates to trenching on the routes and laying of optical fiber cable in Sub-sections 18 of the Imphal-Moreh route and on the basis of aforesaid allegations, above accused persons were charge sheeted with having committed offences u/s 120B, 420, I.P.C. and Section 13(2) r/w. 13(D)(d), P.C. Act, 88.

In R.C. Case No. 10(A)/2001-SIL, it has been alleged in the charge sheet that during 1995-98, accused Sh. Nabendra Kumar, Sh. D. Sundarmurthy, Sh. S. Kumar Singh, Sh. Sjit Chandra and Sh. M.S. Deol entered into criminal conspiracy to cheat BSNL by submitting false bills causing huge loss to the BSNLto the tune of Rs. 4,27,464/- and corresponding gain to above accused persons. The work, in respect of which false bills were submitted, relates to trenching on the routes and laying of optical fiber cable in Sub-section 20 of the Imphal-Moreh route and on the basis of aforesaid allegations, above accused persons were charge-sheeted with having committed offences u/s 120B, 420, 477A, I.P.C. and Section 13(2) r/w. 13(1)(d), P.C. Act, 88.

In R.C. Case No. 10(A)/2002-SIL, it has been alleged in the charge-sheet that during 1996-97. accused Sh. P.K. Bagchi, Sh. Ram Prasad, Sh. M.N. Khan and Sh. S. Rabha entered into criminal conspiracy to cheat BSNL by submitting false bills causing huge loss to the BSNL to the tune of Rs. 7,56,077/- and corresponding gain to above accused persons. The work, in respect of which false bills were submitted, relates to trenching on the routes and laying of optical fiber cable in Sub-section 15 of the Imphal-Moreh route and on the basis of aforesaid allegations, above accused persons were charge-sheeted with having committed offences under Sections 120B, 420, I.P.C. and Section 13(2) r/w. 13(1)(d), P.C. Act, 88.

In R.C. Case No. 14(A)/2002-SIL, it has been alleged in the charge-sheet that during 1995-96, accused Sh. Nabendra Kumar, Sh. P.K. Bagchi, Sh. D. Sundarmurthy, Sh. Section Kumar Singh and Sh. M.S. entered into criminal conspiracy to cheat BSNL by submitting false bills causing huge loss to the BSNL to the tune of Rs. 19,40,417/- and corresponding gain to above accused persons. The work, in respect of which false bills were submitted, relates to trenching on the routes and laying of optical fiber cable in Sub-sections 19, 21, 24, 26 and 27 of the Imphal-Moreh route and on the basis of aforesaid allegations, above accused persons were charge-sheeted with having committed offences under Sections 120B, 420, I.P.C. and Section 13(2) r/w. 13(1)(d), P.C. Act, 88.

In R.C. Case No. 8(A)/2001-SIL, it has been alleged in the charge-sheet that during 1996-98, accused Sh. M.L. Sharma, Sh. P.K. Bagchi, Sh. A.S. Deb and Sh. Raj Kumar Das entered into criminal conspiracy to cheat BSNL by submitting false bills causing huge loss to the BSNL to the tune of Rs. 2,61,429/- and corresponding gain to above accused persons. The work, in respect of which false bills were submitted, relates to trenching on the routes and laying of optical fiber cable in Sub-sections 3A of the Imphal-Moreh route and on the basis of aforesaid allegations, above accused persons were charge-sheeted with having committed offences under Sections 120B, 420, 477A, I.P.C. and Section 13(2) r/w. 13(1)(d), P.C. Act, 88.

In R.C. Case No. 1l(A)/2002-SIL, it has been alleged in the charge-sheet that during 1996-97, accused P.K. Bagchi, Sh. Ram Prasad, Sh. M.N. Khan and Sh. Tarun Das entered into criminal conspiracy to cheat BSNL by submitting false bills causing huge loss to the BSNL to the tune of Rs. 11,84,935/- and corresponding gain to above accused persons. The work, in respect of which false bills were submitted, relates to trenching on the routes and laying of optical fiber cable in Sub-sections 16 of the Imphal-Moreh route and on the basis of aforesaid allegations, above accused persons were charge-sheeted with having committed offences under Sections 120B, 420, I.P.C. and Section 13(2) r/w. 13(1)(d), P.C. Act, 88.

In R.C. Case No. 8(A)/2002-SIL, it has been alleged in the charge-sheet that during 1996-97, accused Sh. Nabendra Kumar and Sh. D. Sundarmurthy entered into criminal conspiracy to cheat BSNL by submitting false bills causing huge loss to the BSNL to the tune of Rs. 12,99,811/- and corresponding gain to above accused persons. The work, in respect of which false bills were submitted, relates to trenching on the routes and laying of optical fiber cable in Sub-sections 13 of the Imphal-Moreh route and on the basis of aforesaid allegations, above accused persons were charge sheeted with having committed offences under Sections 120B, 420, I.P.C. and Section 13(2) r./w. 13(1)(d), P.C. Act, 88.

However, in R.C. Case No. 6(A)/2002-SIL, it has been alleged in the charge sheet that during 1996-97, accused Sh. Pijush Kanti Bagchi. Sh. A.S. Deb, Sh. Ram Prasad and Sh. M.N. Khan entered into criminal conspiracy to cheat BSNL by submitting false bills causing huge loss to the BSNL to the tune of Rs. 12,50,416/- and corresponding gain to above accused persons. The work, in respect of which false bills were submitted, relates to trenching on the routes and laying of optical fiber cable in Sub-sections 13 and 14 of the Imphal-Moreh route and on the basis of aforesaid allegations, above accused persons were charge sheeted with having committed offences under Sections 120, 420, I.P.C. and Section 13(2) r./w. 13(1)(d), P.C. Act, 88.

Again in R.C. Case No. 18{A)/2002-SIL, it has been alleged in the charge sheet that during 1996-97, accused Sh. Nabendra Kumar, Sh. The Rajendra Singh, Sh. D. Sundaramurthy and Sh. Abed Hussain entered into criminal conspiracy to cheat BSNL by submitting false bills causing huge loss to the BSNL to the tune of Rs. 1, 15,361.85/- and corresponding gain to above accused persons.

9. From the facts as narrated above, what can be safely gathered is that according to the prosecution, the accused involved, in all the cases, are not one and the same. Most importantly, what cannot be ignored is that in each case, the offences of cheating and misappropriation were preceded, according to the prosecution, by a criminal conspiracy. The conspirators, in each of these cases, are not one and the same. When an offence is alleged to have taken place as a result of a criminal conspiracy entered into by a set of accused, such accused

cannot be tried along with those accused, who might have entered into another conspiracy for commission of another, though similar, offence. The fact that some of the conspirators, in some of the cases, are same would not make all the conspiracies as conspiracies forming part of the same transaction. This apart, and as has been correctly noted by the learned trial Court, though various contractors were entrusted to do the work of trenching in different parts of the same route and laying of optical fibre cables, the., fact remains that there are as many as 12 independent contractors to whom the work has been allotted and it is not the case of the prosecution that all these contractors conspired with each other. For from this, the, contractors are alleged to have entered into different conspiracies with the officers and employees of the Department concerned. In such circumstances, all the acts, alleged to have been done, cannot be said to be have formed part of the same transaction.

10. Section 223, which provides for joint trial, deals with various circumstances, where under a joint trial of more than one accused is possible. While Clause (a) of Section 223 permits persons, who are accused of having committed the same offence in the course of same transaction, to be charged and tried together. Clause (d) of Section 223 permits persons, who are accused of having committed different offences, but during the course of same transaction, to be charged with and tried together. It is, according to Mr. Choudhury, Clause (d) of Section 223 which stands attracted to the facts of the present case. There can be no doubt that even if different offences are committed by different persons in the course of the same transaction, they can be charged and tried together. The expression ''same transaction'' has, however, no general or universal meaning.

11. In fact, in Cheemalapati Ganeswara Rao 1963 (2) Cri LJ 671 (supra), the Apex Court has held thus, "It is generally thought that where there is proximity of time or place or unity of purpose and design or continuity of action in respect of a series of acts, it may be possible to infer that they form part of the same transaction. It is, however, not necessary that every one of these elements should co-exit for a transaction to be regarded as the same. But if several acts committed by a person show a unity of purpose of design that would be a strong circumstance to indicate that those acts form part of the same transaction.

Now, a transaction may consist of an isolated act or may consist of series of acts. The series of acts which constitute a transaction must of necessity be connected with one another and if some of them stand out independently they would not form part of the same transaction but would constitute a different transaction or transactions.

Therefore, even if the expression ''same transaction'' alone had been used in Section 235(1) it would have meant a transaction consisting either of a single act or of a series of connected acts.

12. From what has been observed and laid down in Cheemalapati Ganeswara Rao 1963 (2) Cri L J 671 (supra), which has been consistently followed as judicial

precedent, is that when there is proximity of time and place and when there is unity of purpose and design or continuity of action in respect of a series of acts, it may be possible to infer that they form part of the same transaction. Thus, when several acts committed by a person show a unity of purpose or design, it may be an indication that all these acts form part of the same transaction. However, when a transaction consists of isolated acts or consists of a series of acts and if one of such acts stand out independent of the other, then, all such acts would not be treated as acts forming part of the same transaction, but would constitute different transactions.

13. In the backdrop of the position of law discussed above, when I revert to the facts of the present case, what becomes clear is that though some of the acts are common in some cases, neither all the accused nor all the acts appear, in all the cases, to be same. This apart, in each of the cases, as already pointed out above, the offence of cheating and/or the offence of misappropriation is preceded by a conspiracy and this conspiracy, in each case, is distinct and different and involve different persons as conspirators. When the conspiracies are distinct and different, the offences, committed pursuant to such criminal conspiracies, cannot be held to be forming part of the same transaction.

14. Considered thus, it is clear that in the facts and circumstances of the present case, all the cases could not have been amalgamated into one case and tried together. Such a course would have, if adopted, been contrary to the scheme of the Code of Criminal Procedure, which envisages a fair trial of every accused person. Merely because of the fact that the contracts allotted arose out of the similar nature of work on a given stretch of a highway, all such cases could not have been tried together, particularly, when the persons involved in the conspiracy, for the allotment of work, execution thereof and in making payment of the bills raised by the contractors are not one and the same in all the contracts, i.e., in all the transactions.

15. It has been contended, during the course of the hearing, by Mr. Choudhury. learned Counsel, that the project of laying of optical fiber cable was executed by many contractors, but the entire route, under the CPWD works manual, is treated as one work and, hence, the learned Special Judge ought to have held that all the contract formed part of the same transaction. The submission, so made, has no force. The CPWD works manual may have described a given series of works as one work, but if the people, who are involved in the execution of these works, are not one and the same and when execution of each such work is preceded by criminal conspiracy entered into by different persons, there cannot be Joint trial of all such persons.

16. It is also alleged by Mr. Choudhury, learned Counsel, that it was in order to achieve a given target of the Silchar Branch of the CBI, that the CBI has spilt up one case into several cases. This submission has also no substance, when it is not in dispute that the conspiracy alleged to have been committed, in each of the cases aforementioned, is distinct and separate and the persons involved are not

same in all the cases in such circumstances, all the cases cannot be treated to have formed part of one and the same transaction.

17. What logically follows from the above discussion is that the impugned order rejecting the petitioners'' prayer for amalgamation of all the cases into one case is not incorrect, illegal or unjustified. I see, therefore, no reason to interfere with the impugned order. In the result and for the reasons discussed above, all these criminal petitions fail, the same are not admitted and shall, accordingly stand dismissed.

