

(2007) 07 PAT CK 0009

In the Patna High Court

Case No : Criminal Miscellaneous No"s. 3284 of 2007

Om Prakash

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 23-07-2007

Acts Referred:

Penal Code, 1860 (IPC) — Section 120B, 406

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

Citation : (2007) 4 PLJR 243

Hon'ble Judges : Ramesh Kr. Datta, J

Bench : Single Bench

Advocate : Kanhaiya Prasad Singh and Mritunjay Kumar, for the Appellant; Bipin Kumar Sinha for the C.B.I. and Mr. Shailendra Kumar Singh for Opp. Party No. 2, for the Respondent

Final Decision : Dismissed

Judgement

Ramesh Kr. Datta, J.—Heard learned counsel for the parties. The petitioners seek quashing of the entire prosecution with respect to Special Case No. 4 of 2003 arising out of C.B.I./ACB P.S. Case No. RC PAT 2003A 003 dated 28.2.2003 as well as the order dated 27.10.2005 passed by the Commissioner of Customs, Patna whereby the sanction of prosecution has been granted and also the order taking cognizance dated 19.12.2005 passed by the Special Judge, C.B.I., North Bihar, Patna, by which cognizance of offence has been taken under Sections 120B, 406, 409, 467, 468, 471 and 201 of the Indian Penal Code and Section 13(1)(c) read with Section 13(2) of the Prevention of Corruption Act, 1988.

2. The allegation against these petitioners is that the petitioner, Om Prakash, the then Inspector of Customs, Farbesganj in connivance with petitioner, Anil Kumar Prasad and Swatantra Kumar, the then Assistant Commissioner and other accused persons by abusing their position as public servant during the year 1998 entered into criminal conspiracy for substituting seized high value silk cloth with low value polyester cloth fraudulently and dishonestly and which was

subsequently disposed of unauthorisedly by manufacturing false and fabricated records/documents related to seizure memos and trade opinion and thereby cheated the Customs Department causing wrongful loss at least of Rs. 3,23,840/-.

3. The prosecution case is that on 27.11.1998 Md. Abdullah the then S.D.P.O. in Bihar Police, Farbesganj seized a Tata Sumo vehicle from which 7360 meters Chinese labelled silk cloth were recovered. The said seized consignments were handed over to one Manoj Prasad, Inspector of Customs on 27.11.1998. Thereafter, on the verbal orders of co-accused Swatantra Kumar, the said Manoj Prasad handed over the seized consignments to the petitioner Om Prakash, Inspector of Customs on 28.11.1998 at Bhim Nagar in presence of Swatantra Kumar and the petitioner Anil Kumar Prasad, Inspector of Customs. Thereafter on 28.11.1998 these two accused persons alongwith another co-accused Helal Ahmad, Superintendent of Customs, gave requisition letter to Md. Abdullah, SDPO, Farbesganj requesting him to change the quality of seized consignments from silk to polyester on the basis of trade opinion obtained from two cloth traders. Md. Abdullah in connivance with accused Om Prakash changed the name of seized items in presence of these petitioners and other co-accused. During the course of investigation, it was found that the trade opinion has been obtained from fictitious persons and further there was no official requisition for obtaining trade opinion. It was further found during the course of investigation that traders are also non-existing persons.

4. Learned counsel for the petitioner has taken two points in support of the present case. Firstly, he submits that even if the allegations made in this case are taken at their face value no case is made out against these petitioners and the documents and material on the record do not disclose any such offence on which cognizance has been taken. Secondly, it is submitted by learned counsel that the sanction order dated 27.10.2005 granted by the Commissioner of Customs is invalid since earlier on three occasions, he had held that these petitioners were not liable to be proceeded against for any offence and had submitted two reports stating that no case was made out against them. Subsequently due to pressure exerted by the Chief Vigilance Commissioner and the Ministry of Finance, Government of India, he without any fresh material, changed his mind and accorded sanction.

5. With respect to the first contention, learned counsel submits that no case of misappropriation, cheating as defined in the Indian Penal Code or causing of disappearance of evidence or criminal conspiracy is made out. It is further submitted that no case of misappropriation having been made out, hence, there can be no application of the provisions of Section 13(1)(c) read with Section 13(2) of the Prevention of Corruption Act. With respect to the second contention, learned counsel has referred to various documents brought on the record to show that the sanctioning authority, namely, Commissioner of Customs was earlier of the firm view repeatedly reiterating that no offence was made out

against these petitioners and another accused, namely Swatantra Kumar, the then Assistant Commissioner of Customs. In this regard learned counsel refers to letter as contained in Annexure 4 issued by the Addl. Director (Vigilance), the letter dated 27.5.2005 issued from the Central Vigilance Commission (Annexure-10) and the letter dated 27.7.2005 issued by the Commissioner of Customs (Opposite Party No. 2) to the Chief Commissioner, Customs (Prevention), Patna Zone and the letter dated 27/28.9.2005 again issued by the Commissioner of Customs to the A.D.G., Vigilance, it is submitted on the basis of this letter that earlier, the Commissioner of Customs had repeatedly made his position clear that no case is made out against these two petitioners and he had also recommended that with regard to co-accused Swatantra Kumar also there was no case for grant of sanction for prosecution. It is submitted by learned counsel that once the Commissioner had come to the said conclusion, it was not open to him to have changed his mind without fresh materials having come to him. In fact, it is stated in the counter affidavit filed on behalf of opposite party No. 2, Commissioner of Customs that the Ministry after detailed examination of the case vis-a-vis the Commission's view on the matter did not agree with the opinion of the Commissioner conveyed vide letter dated 22.7.2005 and found it to be a fit case for prosecution and accordingly, granted sanction against the said Swatantra Kumar, Addl. Commissioner in the said case and subsequently the Commissioner after re-examination of the case in view of the Ministry's sanction of prosecution against Swatantra Kumar found it to be a fit and proper case to accord sanction for prosecution against Anil Kumar Prasad. It is, thus, stated that the Commissioner has buckled under pressure and without exercising his own independent mind merely granted sanction for prosecution against the petitioners because similar sanction has been granted with respect to Swatantra Kumar. It is submitted by learned counsel that it was not open to the Commissioner to have reviewed his earlier decision without any fresh materials on the record.

6. In support of the aforesaid contention learned counsel relies upon a Division Bench decision of the Himachal Pradesh High Court in the case of Omkar Sharma and etc. Vs. State of H.P. and Others, in paragraph Nos. 18 and 33 of which it has been held as follows:-

"18. At the risk of repetition it may be noted that admittedly there was no fresh or other material before the Respondent Board when decision Annexure P8 followed by Annexure-R2/A was taken by it. In this behalf, we may also note that the matter relating to grant of sanction/refusal is a matter which was within the domain of the appointing authority, Board in the present case. It has already taken a conscious decision as is evident from Annexure-P3. So far power to review such a decision is concerned, it could be exercised on the basis of some additional/further/new material which would have justified its action as contained in Annexures P8 and R2/A. In such a situation there is no bar to review under the Prevention of Corruption Act, 1988. It is by now well settled that the power to review is not an inherent power. It must be conferred by law either specifically

or by necessary implications."

33. What follows from the aforesaid discussion is that appropriate authority who on consideration of all the material had refused to accord sanction to prosecute a public servant, has no power on re-consideration to review such an order and thereby according sanction to prosecute on the same material. It will be a totally different situation if any additional/fresh/new material is brought before the competent authority; that admittedly is not the situation in all the three cases nor is the case of anyone of the respondents set out in their replies. Similarly, the long gap after completion of investigation and grant of sanction is an additional ground to grant relief to the petitioners in all these three cases."

7. Learned counsel also relies upon a decision of the Supreme Court in the case of *Mansukhlal Vithaldas Chauhan Vs. State of Gujarat*, , in paragraph No. 19 of which, it has been laid down as follows:-

"19. Since the validity of "Sanction" depends on the applicability of mind by the sanctioning authority to the facts of the case as also the material and evidence collected during investigation, it necessarily follows that the sanctioning authority has to apply its own independent mind for the generation of genuine satisfaction whether prosecution has to be sanctioned or not. The mind of the sanctioning authority should not be under pressure from any quarter nor should any external force be acting upon it to take a decision one way or the other. Since the discretion to grant or not to grant sanction vests absolutely in the sanctioning authority, its discretion should be shown to have not been affected by any extraneous consideration, if it is shown that the sanctioning authority was unable to apply its independent mind for any reason whatsoever or was under an obligation or compulsion or constraint to grant the sanction, the order will be bad for the reason that the discretion of the authority "not to sanction" was taken away and it was compelled to act mechanically to sanction the prosecution."

8. Learned counsel for opposite party No. 2, Commissioner of Customs, on the other hand, contends that whatever has been brought on the record by learned counsel for the petitioner is not any decision of the Commissioner of Customs, refusing to grant sanction for prosecution against these petitioners, rather those were internal correspondences that were taking place between various officials regarding the issue of granting sanction for prosecution with respect to the various officials of the Customs, including these petitioners as also Swatantra Kumar in whose case, the sanction has been granted only by the Ministry of Finance and in this connection the recommendation of the Commissioner of Customs was also sought. It is submitted that the said correspondence doesn't indicate any final conclusion being arrived by the Commissioner of Customs but only shows the particular view point held by him at that point of time while considering the materials on the record. It is further submitted that even in his letter dated 22.7.2005 in paragraph No. 5.1, the Commissioner of Customs has stated that if any substitution as alleged had been done, the same might have occurred with the conscious knowledge of seizing officer Om Prakash and Anil

Kumar Prasad; it is submitted that it cannot be said that the Commissioner of Customs had finally rejected the application for grant of sanction submitted by the C.B.I.

9. It is further submitted by learned counsel that paragraph No. 14 of the counter affidavit shows that the Ministry of Finance after examining the matter in detail and the Commissioner's view with respect to one Swatantra Kumar granted sanction for prosecution against him. Thereafter the Commissioner re-examined the entire case afresh in the light of the Ministry's sanction for prosecution against the said Swatantra Kumar and found it to be a fit and proper case for sanction of prosecution against these petitioners. It is submitted that there was never any final decision taken by the Commissioner and what was stated is merely an opinion on the particular points when the correspondences had taken place. Hence, there is no question of review of any earlier decision taken by the Commissioner and there can be no application of the cases cited in this regard on behalf of the petitioners.

10. Learned counsel for the C.B.I., on the other hand, submits that sufficient material has been disclosed in course of investigation on the basis of which chargesheet has been submitted against these petitioners and other accused persons. It is also contended by learned counsel that this being a case of alleged removal of silk cloth seized and its replacement by polyester and, therefore, it definitely comes under the provisions of Sections 406 and 409 of the Indian Penal Code as well as there being changes in the documents and disappearance of evidence under the provisions of the I.P.C. Once it is held that there is an application of the provisions of Section 409 I.P.C, the question of non-application of Section 13(1)(c) read with Section 13(2) of the Prevention of Corruption Act does not arise. Learned counsel also submits that the co-accused, Swatantra Kumar has approached this court for quashing of the entire proceedings in Cr. Misc. No. 52634 of 2006 which has been rejected by order dated 25.1.2007. He further states that another accused Md. Abdullah had also approached this court for quashing the prosecution by filing Cr. Misc. No. 2833 of 2007, which has been rejected by order dated 14.3.2007. Learned counsel also submits that the documents and materials produced by the petitioners in these applications ought not to be looked into by this court at the stage of quashing since the same is not permissible.

11. Learned counsel for the C.B.I, also relies upon a decision of three Judges Bench of the Supreme Court in the case of State of Orissa Vs. Debendra Nath Padhi, in paragraph No. 23 of which it has been held as follows:-

"As a result of the aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. Satish Mehra case holding that the trial court has powers to consider even materials which the accused may produce at the stage of Section 227 of the Code has not been correctly decided."

12. On a consideration of the facts and circumstances of the case, this court does not find any merit in the contentions raised by the petitioners. So far as the question of non-application of the various Sections on which cognizance has been taken is concerned, prima facie there appears to be materials for taking cognizance of the same. It cannot be held at this stage that no ingredients of the said offences are made out on the basis of allegations as made out in the F.I.R. followed by the charge-sheet. With respect to the invalidity of the grant of sanction, this court is of the view that the various documents brought on the record cannot be looked into for the purpose of holding that the Commissioner has not applied his own mind. In any case, those materials are only part of the correspondences that were being exchanged between the various authorities for the purpose of coming to the conclusion as to whether it is a fit case for sanction of prosecution or not. It was merely expression of view by the several authorities for the purpose of arriving at an appropriate conclusion in the matter. However, learned counsel for Opposite Party No. 2 rightly submits that the Commissioner of Customs has not given a complete chit to these petitioners in view of what he has stated in the letter dated 22.7.2005.

13. So far as the cases relied upon by learned counsel for the petitioners, that there can be no review of the earlier decision regarding sanction for prosecution are concerned, this is not a case where any decision has been taken and thus, the judgments cited by learned counsel for the petitioners do not apply to the present matter. Thus in the light of the aforesaid facts and circumstances, there is no merit in the present application and is, accordingly, dismissed. However, it would be open to the petitioners to take all pleas that are permitted to them at the time of framing of charges in accordance with law.