

(1983) 04 DEL CK 0025

In the Delhi High Court

Case No : Criminal Revision No. 30 of 1983 (Against order of Jaswant Singh, Metropolitan Magistrate, New Delhi. D/- 4-12-1982)

People Patriotic Front, New Delhi

APPELLANT

Vs

K.K. Birla and others

RESPONDENT

Date of Decision : 18-04-1983

Acts Referred:

Citation : (1984) CriLJ 545 : (1983) 23 DLT 499 : (1983) RLR 554

Hon'ble Judges : M.L. Jain, J

Bench : Single Bench

Judgement

1. The Peoples" Patriotic Front New Delhi acting through its Executive Chairman, Smt. Nirmala Prasad (since then dead) filed a complaint under Sections 109, 120-B, 161, 165A, 409 and 420, IPC in the court of the Metropolitan Magistrate, New Delhi, on 3-8-1982 against the following persons : (1) Shri K. K. Birla, Chairman. Hindustan Times Ltd., (2) Shri Kamal Nath M.P., (3) Shri Harish Jain, Director. Hindustan Monark (P) Ltd., (4) Hindustan Monark (P) Ltd., (5) Directors of Hindustan Monark (P) Ltd., (6) M/s Kuo Oil, Hong Kong, (7) Directors of M/s Kuo Oil, Hong Kong, and (8) Shri P. C. Sethi, the then Union Minister for Petroleum and Chemicals. Smt. Nirmala Parsad was examined on oath on 3-9-1982 and the case was adjourned for remaining evidence. She died on 13-10-1982. On 27-11-1982 Shri Jaya Narain moved two applications, one that he be substituted in her place, and two the concerned file of the Department of Petroleum be summoned. The learned Magistrate was of the view that there was no provision in the Code of Criminal Procedure, 1973 which permitted any substitution. The court was, however, competent to continue with the complaint. But he found that no prima facie case was made out, rather, there was no substance in the complaint. He dismissed the complaint and the two applications. Hence, the present revision petition praying that the said order of the Magistrate be set aside and he be directed to proceed further with the inquiry. At the time of arguments, it was further urged that apart from the offences stated in the complaint, offences under Sections 167, 425, 426, 463, 465, 477 and 511 IPC

and breaches of the Foreign Exchange Regulation Act, 1973 were also made out against the accused.

2. The petitioner also made an application on 24-2-1983 that the Union of India was a necessary party and notice be issued to the Secretary, Petroleum and Chemicals, Government of India. Even otherwise, in such type of petitions, the State is almost always made a party because the court whose order is under challenge, is not made a party and only the public prosecutor can assist the court in an impartial manner. A notice, Therefore, was issued to the Union in the first instance and Shri Wadhwa appeared on their behalf.

3. The complaint is mainly based upon the Forty seventh Report of the Parliamentary Committee on Public Undertakings (herein the Committee) and a series of articles written by Shri Arun Shourie in the Indian Express in the month of June, 1982 and subsequent debates in the parliament. The articles appearing in the Indian Express show how the relevant file was not traceable for a long time. But nothing turns upon it as it was made available to the Committee before it made its report.

4. It appears that on 18-1-1980 the Indian Oil Corporation (I.O.C.) had floated a tender for the supply of 500,000 tonnes of HSD to be delivered during March, 1980 to December, 1980. Fourteen offers were received. Only four out of 14 parties offered supplies on fixed prices. They also showed the quantities that they could offer. On 15-2-1980, the Union Minister Shri Sethi noted that there was a great urgency for the purchase of the articles and the Government had to act with speed to meet the shortage. He also was of the view that the price quotations with escalation clauses created an indeterminate liability but the Department pointed out that in the present situation, a fixed price for a long term delivery does not appear to be in our interest. The matter was discussed at various levels. The Minister was further of the view that the price of HSD having dropped by \$ 60 per MT was again on the climb and had already done so by \$ 4 to \$ 16, and that Saudi Arabia had already announced a cut-back in crude oil production which would affect by-products like diesel and kerosene and in the given situation it was in the best interest of the country to make purchases on firm price basis. The contract should be concluded with lowest priced firm offer on record. Only two fixed price offers fell within the range of such consideration. These were :-

(i) an offer of 30,000 tonnes of HSD from SITCO. London at US \$ 350 per MT C&F Bombay : and

(ii) an offer of 400/500,000 tonnes of HSD from Kuo Oil, Hong Kong, at US \$ 355 per MT C&F Bombay. This party had originally offered 400/500.000 tonnes of HSD on a variable basis, subsequently indicated on 18-2-1980 to offer supply at the fixed price of US \$ 355 per MT and during the course of the day on 22-2-1980 submitted a revised offer through their local representative (Hindustan Monark) reducing the fixed price to US \$ 353.50 per MT.

On 22-2-1980, the IOC was directed to issue acceptance letters to both the parties. Doubts arose in the Committee about the contract given to Kuo Oil. The department of petroleum explained to the Committee that the decision to make the aforesaid purchases was based on an analysis of the pros and cons of the alternative courses and was a considered judgment and that there were precedents for making similar contracts. But the Committee was of the view that the purchase of 412.155 tonnes of HSD on a long term basis from Kuo Oil through Hindustan Monark at US \$ 350.65 per MT on fixed price basis for the whole year resulted in a "notional" loss to the extent of US \$ 9.84 million, and that it was not prudent to have gone in for this purchase. The Committee also objected why the normal procedure of processing the purchase proposals through the Empowered Committee was not followed in this case. It wanted a further enquiry or an Explanation in this regard. They also suggested a future course of action in such cases.

5. The Indian Express articles pointed out that Platt's Oil gram and petroleum Intelligence Weekly had reported that Singapore Spot Prices for HSD began to fall from \$ 388.42 on 28-12-1979 to \$ 333.16 on 20-2-1980. But the Minister upon pressure from someone behind the curtains decided upon a fixed price contract. The complaint named the men behind this deal. They were Shri Kamal Nath, M.P., and Shri Harish Jain, one time close friends of late Shri Sanjay Gandhi.

6. On 28-7-1982, the new Minister for Petroleum made a statement in the Parliament that the outlook for oil in 1980 looked extremely worrying. The production of crude oil in Assam and the operations of the refineries had declined rapidly in December 1979 and by early January had virtually stopped. The problem of meeting the demand of HSD had assumed alarming proportion and special steps had to be taken by the Government to cover an enormous deficit in supply. The prices had hit the bottom but were again on the climb and the oil producing countries would do everything possible to reverse the then easy market conditions. On 20-2-1980 the Financial Express and on 21-2-1980 the Economic Times had published reports which assailed purchase on a variable price basis with escalation formulae linked to the movement of spot prices. It was, Therefore, considered prudent to strike the bargain at the lowest possible firm price without any variation. The Minister observed that it was possible to question the commercial judgments of this kind on hindsight. Losses or profits in such transactions could only be notional and in retrospect errors of judgments of this nature could not be ruled out. The matter was then debated, some members bitterly critical of and the others stoutly defending the deal.

7. Basing upon this material, the learned counsel for the complainant submitted that this error of judgment was not an innocuous one, but smacked of a shady deal. It revealed a conspiracy amongst the accused to defraud and cheat the public exchequer. To be precise, the allegations are that, influenced by an M.P., the Minister cutting across all established practice, procedure and norms,

directed the IOC to give a contract for purchase of huge quantity of HSD at a higher price while the international market was showing a downward trend, to a firm with little capital through an Indian agent of little consequence, and of no experience in the field, upon a commission payable to it by the foreign supplier in foreign exchange. In order to justify the deal the accused got a report planted in the Hindustan Times that variable price basis will be injurious to the public interest. The terms of the tender were allowed to be altered and negotiated without notice to the other tenderers. The Minister overruled his officers, bypassed the Empowered Committee and saw to it that the contract was bagged by Kuo Oil. It benefited the Hindustan Monark by Rs. 9 crores and more which was a loss to the people of India. Harish Jain received only \$ 6000 and a paid holiday to Singapore. Rest of the money went to private parties, and consideration had passed to accused Nos. 2 and 8. Therefore, the petitioner attacked the order of the learned Magistrate that it was not only illegal but perverse. The case was fixed for decision of the applications and further evidence, but he proceeded to dismiss the complaint itself and prevented the complainants in their attempt to expose and prove the criminal fraud committed against the people of India. They maintain that if allowed to lead evidence, they will prove the charges that they have leveled against the accused. They urge that they need do no more than show the concerned file to the court and lead the new Minister for Petroleum, the officers of the Government, IOC and the Hindustan Times and other knowledgeable persons to the witness box. They are critical of the stand adopted by the Union counsel that a citizen had no locus standi and the Union was not a necessary party to a question of such a public importance. They also urged that the matter is of such great importance that the High Court should make the Government produce all relevant records and even itself try the complaint under S. 474 Cr.P.C.

8. I have heard both the sides at considerable length. I have said earlier how Union is a party. I have further no doubt that any person can set the criminal law into motion. Yet, on the one hand the court has to see that crime is inquired into on the other, it has to see that the court is not called upon to enter into the matters which do not fall within its jurisdiction or to take upon itself the role of an enquiry commission. Before I deal with the objections of Shri Wadhwa. I want to dispose of one short matter. That is that upon the death of Smt. Prasad, the learned Magistrate could and should have permitted Shri Jaya Narain to prosecute the complaint u/s 302 Cr.P.C. read with Ashwin Nanubhai Vyas Vs. State of Maharashtra and Another, . I will also not hesitate to make appropriate orders if I were satisfied that the court can and should proceed in the matter.

9. The Standing Counsel for the Union has pointed out and rightly, that the Minister being a public servant no cognizance can be taken against Shri Sethi for any offence unless an appropriate sanction u/s 197 Cr.P.C. and Section 6 of the Prevention of Corruption Act, 1947 is obtained against him. He further pointed out that offences under Sections 161 and 165A IPC and a conspiracy in relation to them are triable only by a Special Judge and he alone can take

cognizance and, Therefore, complaint filed in the court of the Magistrate is not maintainable, vide Sections 6 and 7 of the Criminal Law (Amendment) Act 1952. Similarly, there was a bar of sanction u/s 61 of the Foreign Exchange Regulation Act, 1973 for prosecution of offences, if any under that Act. Mr. Wadhwa also pointed out that the entire complaint was exploratory in nature and based upon hearsay. Neither Smt. Prasad then, nor Shri Jaya Narain now, had any personal knowledge of the facts and circumstances of the case. Mere saying that the deal was shady or suspicious is not sufficient. It was also contended by him that offences under Sections 409 and 420 IPC cannot go together. Sensing the weight of these insurmountable objections, Shri Trikha pointed out that the facts of the case were also covered under Sections 167, 425, 426, 463, 465, 477 and 511 IPC. They have already requested the Government to give requisite sanction and if need be the High Court should direct the Government to issue sanction. At any rate the complaint can proceed against the accused other than the Minister for the offences which required no sanction.

10. I do not consider it at all necessary to call for the concerned file because it will disclose nothing which has not been disclosed by the report of the Committee by the investigative journalism and the vigilant members of the Parliament. But the legal hurdles cannot be overcome in this matter. If a sanction for prosecution is required, or the forum chosen is wrong, then no relief can be given in the present proceedings. I, Therefore, hold that the court below lacked the necessary jurisdiction to proceed with the case.

11. No doubt, Section 26 Cr.P.C. empowers the High Court to try any offence under the Indian Penal Code. But under the 1973 Code of Criminal Procedure, it has no more any original criminal jurisdiction and has only an extraordinary original criminal jurisdiction vide Section 374(1) Cr.P.C. To ask for a transfer of the complaint to its file u/s 407(1) Cr.P.C. an application should have been made in this behalf making out a suitable case for trial by the High Court. By making general observations, the High Court cannot be moved to do the job which in the ordinary course should be undertaken by a Magistrate.

12. Now, let us examine whether the objection that the complaint has no merit or substance is correct, that is whether the alleged offences are made out on the facts narrated above.

Sections 161 & 165-A :

13. To give a contract on rates higher than the prevailing rates will certainly result in extra payment by the Government, but it does not per se constitute offences under Sections 161 and 165A IPC unless it is shown that the public servant has received any gratification as a motive or reward for showing favor to the accused firm. There is no definite allegation in this regard. Extravagance or overpayment out of public funds is not equal to graft. It is not enough to merely suggest that the profits earned by the Kuo Oil or the Hindustan Monark must have been shared by someone at some level. It should be shown at what cost or

price the product was acquired by the foreign supplier so that it could be said that Kuo Oil made some ascertained amount of profit in its sales to the Government of India. One does not even know what amount of profit was in fact bagged by the Indian agent in the bargain and whether it was more than due. It was not a mere speculative transaction but was an actual delivery contract. The articles imported must have been sold to the consumers and the price should have eventually passed on to the purchasers. It is even doubtful if the public exchequer was ultimately in the loss. It should have at its worst resulted in avoidable reduction in foreign exchange accumulation. A serious charge under these sections could not Therefore be sustained on sheer surmises or vague allegations.

Section 167 :

14. This section is attracted when a public servant is charged with the duty of preparation of a document and he frames an incorrect document. The learned counsel urged that the notes recorded by the Minister were known to him and he did believe that they were incorrect. I do not think that the reasons recorded by the Minister for giving the directions to the IOC can be classified as preparation of an incorrect document. He was not even bound to record any reasons.

Section 426 :

15. This is an offence of mischief by destruction of any property. I am unable to find how the accused has destroyed and what property even if we were to hold that his action caused an avoidable loss of money to the public in general.

Section 465 :

16. This section relates to the commission of forgery. Forgery means making of a false document with an intent to cause damage or injury to the public or to any person. False document is said to have been made when a person dishonestly or fraudulently makes a document with intention of causing it to be believed that such document was made by some other. It was urged that the news item planted in the Financial Express and the Economic Times by the accused Nos. 1 and 2 were such documents. Granting that these news were planted, it cannot be said that this was done in order to make the Minister to enter into a contract. This at its best was done to justify the impugned contract. I am, Therefore, unable to see that an offence under that section was committed by the accused.

Section 477 :

17. This section is attracted when a person with intent to cause damage or injury to the public secrets any document. Now the non-traceability of the file for a pretty long time, as alleged, was not due to any action on the part of any of the accused, in particular of Shri Sethi who had long before been shifted from Petroleum to Railways.

Section 409 :

18. This was much talked of in the course of arguments. It applies when a person in his capacity of a public servant is in any manner entrusted with property, or entrusted with any dominion over property and dishonestly misappropriates or converts to his own use that property or uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or in violation of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do. I inquired how the accused was entrusted with any property or with any dominion over property which he put to his own use or disposed of that property in violation of any direction of law; other ingredients do not seem to be attracted to the facts stated in the complaint. In reply, the learned counsel referred to several Articles of the Constitution to show how the Ministry is placed in-charge of funds by the Parliament. Art. 110 defines what a Money Bill is and how it shall be piloted through the Parliament. Art. 112 deals with the budget. It shows, inter alia the sums required to meet expenditure of the Government of India. Under Art. 113 the budget is submitted to the House of the People in the form of demands for grants for its assent. Art. 114 provides for appropriation. Art. 283 provides that withdrawal of money from public fund shall be regulated by an Act or by rules made by the President. No attempt was made to show how any money was allotted to the Department of Petroleum and how it was used in contravention of any law made by Parliament or rules made by the President. Not even a circular was produced. Indeed, to oversee proper appropriation is the function which pertains to the Comptroller and Auditor General under Article 149 and unless he finds that the money has not been properly appropriated and has been misspent, it cannot be said that an offence of criminal breach of trust is made out. One may not forget that policy decisions are amenable to change as and when the situation demands. After a consideration of the matter. I am inclined to think that the matter of allotment of funds out of the Consolidated Fund of India or Public Account and their appropriation properly belongs to the sphere exclusively assigned to the audit to examine and to the Parliament to consider. If the Committee appointed by it is awaiting further report and has not given a final verdict in the matter and the audit has not yet looked into it, here is hardly any sound basis to lay a charge of any breach of trust.

Section 420 :

19. This has to be examined because Section 409 has been ruled out. This section ropes in a person who practices deception, fraud or dishonesty and thereby, inter alia induces any person to deliver any property or induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived. No doubt, dishonest concealment of fact is deception within the meaning of this section, but who has been deceived here and by whom ? Indeed, the case of the IOC is that whatever they did was done upon the direction of the Ministry. Everything was done with open eyes and no cheating can be said to have taken place.

Sections 109. 120-B and 511 :

20. Offences under these sections go with the aforesaid offences. If the aforesaid offences are not made out the question of abetment, conspiracy or attempt in relation to them does not arise.

Foreign Exchange Regulation Act :

21. There are absolutely no facts to show as to what contraventions of that Act have taken place.

22. It was vehemently urged that Kuo Oil was a company with very little capital and the Indian agent Hindustan Monark was only a cycle repairer at best having two insignificant factories, one at Ghaziabad and the other at Hyderabad, and such company should not have been given the contract. I think that argument is no more available at this stage because the Kuo Oil and their agents seem to have performed their obligations under the contracts. The Hindustan Monark offered to arrange the supply of 500,000 tonnes of HSD, while the other offers were of quantities far short of requirement or of higher value. They were selected after further negotiations as to price, may be on account of political association, but unless it is shown that they gave money for the favor, they cannot be accused of any criminal liability even if the contract is given to them in violation of any rule or policy. The learned counsel for the Union is, Therefore, correct in his submission that Mrs. Prasad or for that matter Shri Jaya Narain had no personal knowledge and the complaint is based upon hearsay and newspaper reports. It will not be sufficient to condemn the deal as a shady deal. A good case of means read on ascertained facts has to be made out if the public men who have to use their discretion in a given situation time and again are to be hauled up in a court of law. It is too much to expect that the exercise of such discretion in commercial matters must never result in losses actual or notional. The Union counsel has further pointed out that the complaint has been dismissed under Sections 203 and 245(2) Cr.P.C. and the learned Magistrate, if he finds no ground to proceed, can do so and need not await the examination of any more witnesses. As one reads through the complaint, it appears that it is more of a political criticism of the action of the Minister and seeks only at a fishing or roving enquiry into the matter. At any rate, no case for interference by this court is made out in the case. I agree with the contention of Shri Wadhwa and considering all the aspects, I find that the impugned order suffers from no incorrectness, illegality or impropriety so as to call for an intervention u/s 397 Cr.P.C. Indeed, for the reasons stated above, there was want of jurisdiction too. The provisions of the Penal Code are a strait-jacket and unless the case fits into it tightly and beyond any manner of doubt, the field for fight is not at the court room but at the polling booths.

23. I, Therefore, dismiss this petition.

24. Revision dismissed.