

(2021) 11 OHC CK 0108
In the Orissa High Court
Case No : CRLMC NO.477 Of 2021

Pranabandhu Behera

APPELLANT

Vs

State Of Odisha (Vigilance)

RESPONDENT

Date of Decision : 12-11-2021

Acts Referred:

Code of Criminal Procedure, 1973 — Section 161, 227, 243, 482

Indian Penal Code, 1860 — Section 120B

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

Citation : (2021) 11 OHC CK 0108

Hon'ble Judges : S.K. Panigrahi, J

Bench : Single Bench

Advocate : V. Narasingh, S. Das, S. Devi, T. Sahoo, Niranjana Moharana

Final Decision : Disposed Of

Judgement

S.K. Panigrahi, J

1. The Petitioner, who is one of the accused persons in G.R. Case No.41 of 2001 (V) arising out of Berhampur Vigilance P.S. Case No.41 of 2001, in the court of Additional Sessions Judge-Cum- Special Judge, Vigilance, Jeypore instituted by the Opposite Party/State-Complainant for alleged commission of offences punishable under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereinafter referred to as "the P.C. Act" for brevity) and Section 120B of the Indian Penal Code, 1860 (hereinafter referred to as "the Penal Code" for brevity), has made a prayer in this application under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code" for brevity) to quash the impugned order dated 09.01.2020 rejecting his applications dated 14.08.2008, 07.07.2008, 14.08.2008, 29.08.2008, 16.12.2019 and 09.01.2020 for discharge with a further prayer to quash the said proceeding.

2. The brief facts of the present case are enumerated herein below: -

(a) In the year 1994 estimate for "Balance Excavation of R.M.C. from RD 7.00 km to 84.00 km" under Upper Indrabati Right Canal Division No.II, Junagarh was prepared vide Annexure-1 by Rajkishore Mohapatra (Executive Engineer), Alekha Prasad Mohanty (Assistant Engineer) and Rangadhar Panda (Junior Engineer), based on trial pit data and the percentage of different kinds of soil therein. Accordingly, tender was published through limited competition the Contractor (Charge-sheeted Accused No.10) being the lowest bidder was issued work order on 19.01.1995.

(b) Agreement was entered into between the parties on 25.01.1995 in respect of the said work and the Contractor commenced the execution of the work.

(c) The Petitioner joined the office of Executive Engineer, Right Canal Division-II, Junagarh as Junior Engineer on 10.05.1995 i.e. immediately before payment of 3rd RA Bill. A supplementary agreement was executed on 02.09.1996 for "watering earth work".

(d) While doing measurement during 5th RA Bill, the Petitioner noticed that quantity of excavated Disintegrated rock has exceeded than the quantity mentioned in the agreement. He immediately intimated his superior authority regarding such deviation on 10.06.1996. The petitioner once again brought this fact to the notice of his higher authority on 20.01.1997.

(e) While the matter stood thus, during 12th RA Bill the Petitioner was relieved from the project under reference on 07.05.1997.

(f) Excavation for Catch Water Drain was necessitated during 13th RA Bill and the same was approved on 18.09.1997 by the Technical Team immediately after the Petitioner was relieved. Accordingly, the said work was also entrusted to the Contractor as a part of the same project.

(g) While the matter stood thus, the Petitioner came to know about the registration of the F.I.R. implicating him of dereliction of duty. Alleging deviation of work specified in the agreement, inflated measurement and execution of Catch Water Drain work beyond the agreement for "Balance Excavation of R.M.C. from RD 7.00 Km. to 84.00 Km." under Upper Indravati Right Canal Division No.II, Junagarh during the year 1995-1997 with an estimated cost of Rs.5,26,05,552/-, F.I.R. was registered by the Vigilance Department bearing Berhampur Vigilance P.S. Case No.41 of 2001 for commission of offences punishable under Section 13(2) read with Section 13(1)(d) of the P.C. Act and Section 120B of the Penal Code. As the Petitioner was the Junior Engineer in the project for the period from 10.05.1997 to 07.05.1997 relating to R.A. Bill Nos.3 to 12, he was arrayed as one of the accused persons at Sl. No.10 of the F.I.R. A Technical Team of the Vigilance Authorities visited the site and found that no substandard work and inflated measurement noticed during inspection. However, while fixing the liability solely on the Executive Engineer, in a mechanical manner, made an omnibus finding that the concerned Assistant Engineers and Junior Engineers are also responsible for violation of Codal provisions of Para-2.2.61(a) and 2.2.66(a)

of the OPWD Code Vol-1 respectively.

(h) As ill luck would have it, without proper appreciation of the technical aspects and without taking into account the relevant factors which unerringly exemplified the Petitioner's non-complicity, charge sheet was filed mechanically on 14.06.2004 for commission of offences punishable under Section 13(2) read with Section 13(1)(d) of the P.C. Act and Section 120B of the Penal Code against the Petitioner along with nine others. After filing of the charge sheet, the learned court below took cognizance of the aforesaid offences on 27.10.2006 and issued summons to all the accused persons including the Petitioner. The Petitioner as duty bound cooperated with the investigation and also appeared before the learned court below. Since he has no complicity, the Petitioner filed an application under Section 227 of the Code for discharge.

(i) The learned court below has failed to appreciate the allegations vis-à-vis the Petitioner in its proper perspective, in a mechanical manner and rejected the application for discharge by passing the impugned order dated 09.01.2020.

3. The present Petitioner has filed this CRLMC challenging the said impugned order dated 09.01.2020 with a prayer to quash the entire proceeding initiated against him in the aforesaid case. Allegations against the present Petitioner are as follows:

(i) irregularity in awarding the tender;

(ii) alleged deviation from the contract in as much as the quantity of All Kinds of Soil excavated is less than the agreement and quantity of excavated Disintegrated Rock is higher than the quantity;

(iii) the contractor was paid excess amount on account of deviation based upon inflated measurement; and

(iv) the construction of "Catch Water Drain" was not there at the time of estimate nor specified in the agreement.

4. Learned counsel for the Petitioner submitted that the tender was finalized in the year 1994 and an agreement was executed with the Contractor on 25.01.1995 much prior to the joining of the Petitioner. Hence, he has no nexus with the publication of tender and issuance of work order in favour of the Contractor. He further submitted that excavation for "Catch Water Drain" was necessitated and approved by the Technical Team on 18.09.1997. Designation for construction of such drain was confirmed by AC Quality Control as per the communication dated 18.09.1997. Admittedly, the Petitioner was relieved from the project on 07.05.1997 and as such he has absolutely no role in the alleged crime. Hence, continuance of proceeding against the present Petitioner on the allegations of irregularities in issuance of tender and award of work as well as construction of "Catch Water Drain" is ex-facie abuse of process of law.

4.1. Learned counsel for the Petitioner also contended that the Petitioner joined

as Junior Engineer in the office of Executive Engineer, Right Canal Division-II, Junagarh, Upper Indravati Irrigation Project, Khatiguda on 10.05.1995. The tender relating to construction of "Catch Water Drain" was completed in the year 1994 which is much prior to the joining of the Petitioner. However, the Petitioner has been dragged to the present controversy wherein an excess amount of Rs.1,66,41,798/- alleged to have been paid to the Contractor. Similarly, the Petitioner has absolutely no role in the variation of quantity of All Kinds of Soil and Disintegrated Rock . He further submitted that the estimation/ calculation of earth and stone to be excavated were done as per the trial pit dug as per availability of earth within the land under trial and on the basis of such estimation, agreement was executed. Thus, deviation in the quantity was beyond human control. Hence, fixing criminal liability based on such surmises and conjectures is unfounded and abuse of process of law.

4.2. He further submitted that the statement made by Sri Bichanda Charan Mishra (Executive Engineer, Vigilance) and Sri Srinibas Nayak (Assistant Engineer, Vigilance, Technical Wing) who conducted the technical inspection of the site, the deviation and inflated measurement as alleged in respect of the excavation, measurement of Disintegrated Rock and consequential excess payment to the Contractor and consequential involvement of the Petitioner vis-à-vis the allegation is out and out false. The technical inspection team has found the Executive Engineer to be solely responsible. However, the present Petitioner had been dragged into the proceeding in a mechanical manner on the allegation of violation of Codal provision of Paras -2.2.61(a) and 2.2.66(a) respectively of the OPWD Code Vol-1. The provisions of para-2.2.66(a) of the OPWD Code Vol-1 are quoted hereunder:

"2.2.66. Sectional Officers should pay particular attention to the followings among other items of duties -

a. Timely and careful field survey and investigation and preparation of plans and estimates entrusted to their charge. Any mistake in sanctioned plans and, any variation between the conditions at site and the sanctioned plan should be promptly brought to the notice of the Sub Divisional Officer or the Divisional Officer concerned with a view to get the defects remedied before actual execution of the work."

4.3. Learned counsel for the Petitioner further submitted that violation of Para-2.2.66(a) of the OPWD Code Vol.-I, qua the present Petitioner, who is a Junior Engineer, does not arise, as the Petitioner brought the factum of deviation to the notice of his higher authorities which is evident from the documents. Further, he being the Junior Engineer, measurement done by him was admittedly check measured by his higher authorities. Hence, there cannot be said to be any violation of Para-2.2.66(a) of the OPWD Code Vol.-I. 1

4.4. Learned counsel for the Petitioner finally submitted that even if the allegations culminated in the charge-sheet are accepted, a case under Section

13(2) read with Section 13(1)(d) of the P.C. Act and Section 120B of the Penal Code is not made out against the present Petitioner. Hence, interference of this Hon'ble Court in this case is required under Section 482 of the Code on the touch stone of the law laid down by the Hon'ble Apex Court in the case of State of Haryana & Ors. -vrs.- Ch. Bhajan Lal and Ors. 1992 Supp. (1) SCC 335:

5. Per contra, learned Additional Standing Counsel for the Vigilance Department submitted that after completion of investigation, charge-sheet has been submitted against the present Petitioner along with other co-accused persons, as prima facie offences under Section 13(2) read with Section 13(1)(d) of the P.C. Act and Section 120B of the Penal Code are made out. The charge-sheet was submitted on 14.06.2004 and cognizance was taken of the said offences, being a prima facie case made out against the present Petitioner based on the allegations made in the F.I.R., materials collected during investigation and sanction order. It is further submitted that one of the co-accused persons, namely, Rajendra Prasad Panda had approached this Court in CRLMC No.2189 of 2017 challenging the aforesaid proceeding and obtained a stay order for some time. But, finally, his prayer for quashing of the proceeding was disallowed vide order dated 18.04.2017. It was submitted that the present Petitioner along with other co-accused persons filed an application under Section 227 of the Code with a prayer to discharge them from the case. However, learned Special Judge (Vigilance) after hearing the parties vide the impugned order dated 09.01.2020 rejected the prayer for discharge and framed charges against them. He also brought to the notice of this Court that the present Petitioner had earlier filed another application under Section 482 of the Code bearing CRLMC No.881 of 2020 seeking quashment of the criminal proceeding as well as the order dated 09.01.2020 framing charge which was also dismissed as withdrawn vide order dated 26.02.2021 and the present Petition has been filed sequel to those petitions.

6. He further contended that the case is of the year 2001 and charge-sheet has been submitted in the year 2004. Since the case relates to corruption by public servants and has been procrastinated for last 17 years at the behest of the accused persons, the same is crying for thorough trial. It was also submitted that illegalities unearthed during investigation strongly implicates the Petitioner.

7. According to the learned Additional Standing Counsel for the Vigilance Department, the concerned public officials starting from Chief Engineer to Junior Engineers and the Contractor involved in conspiracy and abused their official positions allowing the said Contractor to work beyond the scope of agreement without fresh tender in respect of the additional work thereby facilitated the Contractor to obtain excess amount at higher rate on different terms amounting to Rs.1,66,41,798/- violating the provisions of OPWD Code and caused huge loss to the State exchequer.

7.1. He further contended that the present Petitioner had also played a vital role in measurement of the unauthorized execution of additional excavation work by

the Contractor. He had facilitated the Contractor to get the bill up to 17th RA bill at higher rate in respect of additional excavation work without fresh tender and without agreement. He also placed reliance on the provision of Para 2.2.66 of the OPWD Code Vol.I. Learned Additional Standing Counsel for the Vigilance Department further placed reliance on the provision of 3.5.31 of the OPWD Code Vol.I.

7.2. Learned Additional Standing Counsel for the Vigilance Department also contended that the Petitioner being the Field Officer was duty bound to vigilant any kind of unauthorized execution and ought to have been promptly reported regarding any kind of variation. Instead of doing so, he connived with the Contractor and caused huge loss to the State exchequer. Hence, his active connivance cannot be ruled out.

7.3. He further contended that law is well settled by the Hon'ble Supreme Court that at the time of framing of charge, the accused has no right to produce any materials. The accused can produce the same at the stage of defence under Section 243 of the Code and in the present case, the said stage has not yet reached. He also submitted that the statements of witnesses recorded under Section 161 of the Code wholly inadmissible in the evidence and a criminal proceeding should not be quashed under Section 482 of the Code on the basis of assessment of such statements. Moreover, the statement made under Section 161 of the Code by two witnesses relied by the Petitioner also have implicated the Petitioner as Junior Engineer and also attributed the responsibility in violation of the provisions of the OPWD Code which caused loss to the State exchequer. In this connection, he relied upon some authoritative pronouncements of the Hon'ble Supreme Court passed in the cases to buttress his points. The decisions resonate a settled position of law. These are State of Orissa -vrs.- Debendra Nath Padhi (2005) 30 OCR (SC) 177, Rajendra Singh vrs. State of U.P. and Anr. (2007) 7 SCC 378, Rajeev Kourav vrs. Baisahab and Ors. 4 (2020) 3 SCC 317, Dy. Superintendent of Police Vigilance and Anti Corruption, Tamil Nadu vrs. J. Doraiswamy Etc. AIR 2019 SC 1518, State of Madhya Pradesh vrs, Mohanlal Soni (2000) 6 SCC 338, State through Central Bureau of Investigation vrs. Dr. Anup Kumar Srivastava (2017) 68 OCR SC 409, Amit Kapoor vrs. Ramesh Chander and Another (2012) 9 SCC 460, M.E. Shivalingamurthy vrs. Central Bureau of Investigation, Bengaluru (2020) 2 SCC 768, State of Maharashtra etc. vrs.- Som Nath Thapa, etc. (1996) 4 SCC 659, H.N. Rishbud vrs. State of Delhi AIR 1955 SC 196, Vinod Kumar Garg vrs. State (Govt. of N.C.T. Delhi) (2020) 2 SCC 88, Kaptan Singh vrs. State of U.P. and Others (in Criminal Appeal No.787 of 2021, judgment dated 13.08.2021) and Rajeev Kourav vrs. Baisahab and Ors. (2020) 3 SCC 317

8. Heard learned counsel for the Parties. Para 2.2.66 of the OPWD Code Vol.I which envisaged the provisions is quoted below:

"Sectional Officers should pay particular attention to the followings among other items of duties -

- a. Timely and careful field survey and investigation and preparation of plans and estimates entrusted to their charge. Any mistake in sanctioned plans and, any variation between the conditions at site and the sanctioned plan should be promptly brought to the notice of the Sub Divisional Officer or the Divisional Officer concerned with a view to get the defects remedied before actual execution of the work.
- b. Timely and efficient execution of work entrusted to their charge.
- c. Proper maintenance of muster rolls and record of work charged establishment.
- d. Proper upkeep of measurement books issued. e. Record of measurements in the measurement books of all works done by contract or otherwise as well as supplies received from all sources and preparation and submission of bills in prescribed forms for payment.
- f. Proper preservation and care of tools and plant, stock and other stores kept in their charge.
- g. Timely submission of budget, accounts and prescribed returns etc. to the Sub Divisional Officers concerned."

8.1. Para 3.5.31 of the OPWD Code Vol.I which envisaged the provisions is also quoted below:

"Any increase/ decrease over/ below the schedule of quantities appended to the tender during execution should be carefully investigated into by the Divisional Officer with a view to determine the financial implication of such variations on the relative position of lowest tender. If due to wide variations during execution the relative position of the lowest tender stands changed subsequently, the work should ordinarily be closed and the balance work executed under a separate contract following the usual procedure. However, the balance of work can be continued under the same contract with the specific approval of authority higher than the officer, who accepted the tender.

Notes: Any deviation from the nature, specification, quantity and rates of items as mentioned in the agreement requires approval of the competent authority prior to payment."

9. The sole contention of the learned counsel for the Petitioner was that since the tender was finalized, an agreement was executed with the Contractor much prior to the joining of the Petitioner, the Petitioner has no nexus with the publication of tender and issuance of the work order in favour of the Contractor. It was the further submission of the learned counsel for the Petitioner that the learned trial court has failed to appreciate the fact that the petitioner has no role to play in the variation of quantity of All Kinds of Soil and Disintegrated Rock inasmuch as by no stretch of imagination, the Petitioner can be held to be responsible for the nature of soil being excavated.

10. As it appears from the impugned order, such contention having not been

raised before the trial court, the trial court looking into the materials on record appears to have framed charge against the Petitioner.

11. So far as the ratio decided by the Hon'ble Supreme Court in the case of Bhajan Lal (supra) on which the Petitioner had placed reliance is concerned, the same is not helpful to the Petitioner because of the fact that the proceeding therein was quashed since the Investigating Officer thereof in the said case had no valid legal authority to take up the investigation. In the case at hand, as it appears, the Petitioner has not challenged the investigation. Moreover, in the case of Rajeev Kourav (supra) cited by the learned Additional Standing Counsel for the Vigilance Department, the Hon'ble Supreme Court held as follows:

"6. It is no more res integra that exercise of power under Section 482 CrPC to quash a criminal proceeding is only when an allegation made in the FIR or the charge sheet constitutes the ingredients of the offence/offences alleged. Interference by the High Court under Section 482 CrPC is to prevent the abuse of process of any Court or otherwise to secure the ends of justice. It is settled law that the evidence produced by the accused in his defence cannot be looked into by the Court, except in very exceptional circumstances, at the initial stage of the criminal proceedings. It is trite law that the High Court cannot embark upon the appreciation of evidence while considering the petition filed under Section 482 CrPC for quashing criminal proceedings. It is clear from the law laid down by this Court that if a prima facie case is made out disclosing the ingredients of the offence alleged against the accused, the Court cannot quash a criminal trial.

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8. xx xx xx xx The conclusion of the High Court to quash the criminal proceedings is on the basis of its assessment of the statements recorded under Section 161 CrPC. Statements of witnesses recorded under Section 161 CrPC being wholly inadmissible in evidence cannot be taken into consideration by the Court, while adjudicating a petition filed under Section 482 CrPC."

12. In that view of the aforesaid discussion, this Court is of the considered opinion that the impugned order dated 09.01.2020 passed by the learned Additional Sessions Judge-Cum- Special Judge, Vigilance, Jeypore in G.R. Case No.41 of 2001 (V) arising out of Berhampur Vigilance P.S. Case No.41 of 2001 requires no interference. Therefore, this Court is not inclined to interfere with the impugned order.

13. However, the Petitioner is allowed to raise the aforesaid points as raised in this CRLMC before the trial court within two months hence. In such event, if the trial court finds substance in the same, in exercise of power under Section 216 of the Code, may alter the charges, if there exists ground for the same and proceed with the trial.

14. With the aforesaid order, this CRLMC stands disposed of.

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