(2013) 01 JH CK 0142

In the Jharkhand High Court

Case No : Criminal Miscellaneous No. 1582 of 2009

Sanjiv Paul — APPELLANT

Vs

Central Bureau of Investigation — RESPONDENT

Date of Decision : 31-01-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 120(B), 156(3), 200, 420
Penal Code, 1860 (IPC) — Section 120(B), 406, 420
Prevention of Corruption Act, 1988 — Section 13(1)(d), 13(2)

Citation : (2013) 2 AJR 301 : (2013) 1 JLJR 455

Hon'ble Judges : Rakesh Ranjan Prasad, J

Bench : Single Bench

Advocate : U.U. Lalit, I. Sinha and D. Banerjee, for the Appellant; M. Khan, for the Respondent

Final Decision : Allowed

Judgement

R.R. Prasad, J.—This application has been filed for quashing of the entire criminal Proceeding of R.C. No. 4(A) of 2006(R) including the order dated 18.7.2009 passed by the Special Judge, C.B.I., Ranchi whereby and whereunder cognizance of the offences punishable u/s 420 read with Section 120(B) of the Indian Penal Code and also u/s 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act has been taken against the petitioner and others. The case of the prosecution is that notice inviting tender (NIT) was floated on 5.12.2003 by A.K. Khan, the then Professor I/C Civil Work, Civil Engineering Department for appointment of Architect-cum-Consultant for Civil and Electrical Works to be undertaken at NIT, Jamshedpur. 12 bidders including M/s. TPE, Tata Steel responded to the said notice. The committee headed by A.K. Khan selected L-6 to L-9 including M/s. TPE to be called for negotiation. After holding negotiations, the committee recommended M/s. TPE for awarding consultancy. In that process, the committee never invited L-1 for negotiation and thereby they contravened the norms of the CPWD and CVC. The said recommendation having been approved by Building Works Committee, M/s. TPE was awarded with the consultancy on 30.12.2003 by Professor A.K. Khan. On such appointment as consultant, M/s. TPE prepared estimate, design and drawing and architectural map relating to the Civil and Electrical Works. Thereupon M/s. TPE on being authorized to invite receive and analyse tender issued NIT dated 16/18.1.2004 for appointment of contractor for doing Civil and Electrical Works for an estimated cost of Rs. 541 lacs. Last date of purchase of tender documents was fixed as 23.1.2004. Subsequently, that date was extended to 28.1.2004. Pursuant to that notice, when three parties responded, tender documents were issued to them. M/s. JUSCO, Jamshedpur the 4th bidder was also issued with the tender documents but those documents were issued to him after expiry of last date and that too against the demand draft of Rs. 20,000/- dated 29.1.2004 which document was quite invalid. That apart, M/s. JUSCO was not having requisite Income Tax Clearance Certificate at the time of purchase of tender document nor it was registered with Sales Tax and Central Tax authorities and at the same time, experience certificate as stipulated under NIT was not submitted. In spite of that, M/s. JUSCO was awarded contract ignoring the claim of L-1, as a result of which, NIT, Jamshedpur suffered a loss of Rs. 162.68 lacs as the rate quoted by M/s. JUSCO was Rs. 700.48 lacs whereas L-1 had quoted its rate as Rs. 537.80 lacs.

2. Thus, it has been alleged that Mr. K.N. Jha heading Town, Planning and Engineering (M/s. TPE) an unit of Town Division of M/s. Tata Steel in conspiracy with the officials of M/s. JUSCO awarded contract to M/s. JUSCO, an unit of Tata Steel and thereby put the NIT to a great loss.

3. On such allegation, a case was registered as R.C. No. 4(A) of 2006(R) u/s 420 read with Section 120(B) of the Indian Penal Code and also u/s 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act.

4. The matter was taken for investigation and during investigation, it was found that Professor A.K. Khan being Chairman of the Building Advisory Committee firstly in conspiracy with the official of M/s. TPE dishonestly and fraudulently recommended for appointment of M/s. TPE as Architect-cum-Consultant ignoring the claim of L-1 to L-8 and thereby NIT suffered a loss of Rs. 4,86,000/-. Further it was found that M/s. TPE headed by Mr. K.N. Jha subsequently appointed M/s. JUSCO as contractor for undertaking Civil and Electrical Works again ignoring the claim of L-1, M/s. Adisons Constructions Limited, though M/s. JUSCO was never eligible in terms of NIT to be appointed as consultant and thereby NIT was put to loss of Rs. 54,46,257/-.

5. As per charge sheet following are the reasons for taking M/s. JUSCO to be ineligible to participate in the bid.

(a) According to one of the clauses of NIT tendering of Income Tax Clearance Certificate was a precondition for purchase of tender document but M/s. JUSCO had applied for PAN card on 21.1.2004 which was issued on 16.2.2004, i.e. after the award of the work.

(b) Last date for purchasing tender papers was fixed as 28.1.2004 whereas M/s. JUSCO was given tender papers on 29.1.2004 against a draft of Rs. 20,000/- issued on 29.1.2004.

(c) M/s. JUSCO did not have separate Provident Fund Code.

(d) M/s. JUSCO did not have a certificate of commencing of business on the date of tendering.

(e) It did not have requisite credential for having executed work worth Rs. 10 crores in a year in a single work.

(f) It was not having contract labour licence on the date of submission of the tender document

(g) M/s. JUSCO had applied for Central Sales Tax and Jharkhand Sales Tax Certificate on 30.4.2004 after it was awarded the work.

6. Further during investigation, it was found that during negotiation against a rebate of 2.5% of the total offer M/s. JUSCO was given interest-free mobilization advance of Rs. 70 lacs by the aforesaid tender committee.

7. In this manner, it was found by the Investigating Officer that M/s. TPE as well as M/s. JUSCO, both sister concern of Tata Steel having favoured by Professor Khan, Chairman of the Building Advisory Committee in appointing M/s. TPE as consultant and then Mr. K.N. Jha, Chairman of M/s. TPE favour M/s. JUSCO in appointing him consultant by ignoring all the norms prescribed under CPWD and also ignoring the fact that M/s. JUSCO was not eligible in terms of NIT to be appointed as contractor.

8. The C.B.I. submitted charge sheet against 8 accused persons including M/s. JUSCO represented by Sanjiv Paul as well as also against Sanjiv Paul in his personal capacity.

9. On submission of the charge sheet, cognizance of the offences punishable u/s 420 read with Section 120(B) of the Indian Penal Code and also u/s 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act was taken against the petitioner and others, vide order dated 18.7.2009 which is under challenge.

10. Mr. U.U. Lalit, learned Sr. counsel appearing for the petitioner submitted that as per the case of the prosecution, criminalities were allegedly involved at two levels. Firstly, the manner in which Mr. A.K. Khan in the capacity of Chairman, Building Advisory Committee appointed M/s. TPE as Architect-cum-Consultant and at other level, when Mr. K.N. Jha, Chairman of M/s. TPE selected M/s. JUSCO, to which petitioner is Managing Director, for awarding contract for undertaking Civil and Electrical Works at NIT by ignoring the claim of L-1 but so far as the petitioner, Managing Director of M/s. JUSCO is concerned, he is no more involved with the first part of criminality. So far second leg of the criminality is concerned, there has also been no criminality on the part of this petitioner in individual capacity, still he has been arrayed as accused and thereby

prosecution cannot be maintained against him.

11. In this regard, it was submitted that unless there happens to be any overt act on the part of the accused, he cannot be prosecuted. In case of the petitioner, there has been absolutely no allegation against him in its individual capacity either in the FIR or in the charge sheet showing commission of the offence alleged and that if there has been any criminality on the part of the Company, namely, M/s. JUSCO, the petitioner being Managing Director cannot be prosecuted on the assumption of being responsible for omission and commission on the part of the Company vicariously as it has been held categorically in a case of Maksud Saiyed Vs. State of Gujarat and Others, that the penal code does not contain any provision for attracting vicarious liability on the part of the Managing Director or the Director of the Company when the accused is the Company.

12. It has been further held that in cases of body corporates, vicarious liability on the part of the Managing Director and other Directors would arise only if a provision exists on that behalf in the statute itself.

13. Learned counsel in this respect has also referred to cases of S.K. Alagh Vs. State of U.P. and Others, , K.K. Ahuja Vs. V.K. Vora and Another, , S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, .

14. Thus, it was submitted that any prosecution of the petitioner on the assumption of the petitioner being vicariously liable on account of omission and commission by the Company would certainly be vitiated.

15. Learned counsel further submitted that the Company M/s. JUSCO as well as this petitioner being Director of M/s. JUSCO is being prosecuted simply for the reason that contract was awarded to M/s. JUSCO, who never happens to be L-1 but that cannot be a ground for criminal prosecution as lowest bidder has no enforceable right in law to be awarded the contract. More so, when the NIT does stipulate that NIT/consultant (M/s. TPE) reserves the right to reject any of the tender without assigning any reason.

16. In such situation, any prosecution of the petitioner would amount to abuse of the process of law particularly, when there has been no allegation that the petitioner did again anything in his personal capacity upon contract being awarded to M/s. JUSCO.

17. Learned counsel would go to submit that the prosecution has come forward with the specific charges against the Company represented by the petitioner and also against the petitioner individually which are the same wherein it has been charged that M/s. JUSCO illegally purchased the tender document on 29.1.2004 after expiry of date for sale of tender papers and that M/s. JUSCO was illegally awarded Civil and Electrical contract work by other accused persons, though it was ineligible firm in terms of the NIT which was within the knowledge of the petitioner. By making these two allegations C.B.I. is seeking prosecution of this petitioner in individual capacity on the assumption of being responsible

vicariously for the misconduct of the Company but in absence of any allegation that M/s. JUSCO was awarded contract at the behest of this petitioner, the petitioner cannot be prosecuted individually.

18. Under the circumstances, the order taking cognizance is fit to be quashed so far this petitioner is concerned.

19. As against this, Mr. Khan, learned counsel appearing for the C.B.I. submitted that it is the case of the prosecution that last date for selling tender paper was 28.1.2004. Pursuant to that, three bidders purchased the papers in time and submitted tender papers whereas M/s. JUSCO was supplied tender papers after expiry of the date on 29.1.2004, that too against the demand draft of Rs. 20,000/- issued on 29.1.2004 and thereby M/s. JUSCO was shown favour by the Chairman of M/s. TPE, sister concern of TISCO. Not only that M/s. JUSCO was also not eligible in terms of NIT to be appointed as contractor as he did have several disqualifications which have been put in the charge sheet. In spite of the fact that M/s. JUSCO was not eligible on account of the fact stated in the charge sheet, still it participated in the process of bid, though this petitioner was fully knowing that M/s. JUSCO is not eligible to participate in the process of tender and further in spite of being ineligible on several counts, M/s. JUSCO was awarded contract though he never happened to be L-1 and thereby NIT was put to heavy loss and all these circumstances unerringly points towards culpability on the part of the Company and also on the part of the petitioner individually, who in conspiracy with other accused persons secured the contract and gained for itself and thereby the court has rightly taken cognizance of the offences against the Company as well as the petitioner which never warrants to be quashed.

20. Having heard learned counsel appearing for the parties gravamen of the charges appears to be that M/s. JUSCO who was ineligible on account of non-fulfilling of the criterias laid down under NIT was allowed to participate in the bid even after expiry of the date for submission of the tender papers. In spite of that Mr. K.N. Jha, Chairman of M/s. TPE awarded the contract of Civil and Electrical Works to M/s. JUSCO, L-2, an unit of Tata Steel ignoring the claim of L-1 and thereby M/s. JUSCO has been shown favour by Mr. K.N. Jha.

21. According to the case of the prosecution, ineligibility on the part of M/s. JUSCO was on several counts which have already been narrated wherein it has been noted that M/s. JUSCO had had no Income Tax Clearance Certificate; it did not have separate Provident Fund Code as well as certificate of commencing of business on the date of tendering, requisite credential of the contract labour licence etc. Upon these charges, charge sheet was submitted not only against M/s. JUSCO represented by the petitioner and others but also against the petitioner in personal capacity, though it is the case of the prosecution that it was M/s. JUSCO who was awarded contract and was the beneficiary of the said award. Thus, this petitioner, being Managing Director of M/s. JUSCO is being sought to be prosecuted on account of being liable to be prosecuted vicariously and at the same time, he is being prosecuted in his personal capacity.

22. Thus, the question does arise as to whether under the circumstances, the petitioner can be prosecuted on the principle of vicarious liability for the commission of offence allegedly committed by the Company.

23. To answer this question, I need not to go too far away as the issue has already been decided by the Hon''ble Supreme Court.

24. In this regard I may refer to a decision rendered in a case of S.K. Alagh vs. State of U.P. and others (supra) wherein it has been held as under:

As, admittedly, drafts were drawn in the name of the Company, even if the appellant was its Managing Director, he cannot be said to have committed an offence u/s 406 of the Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a company or an employee cannot be held to be vicariously liable for any offence committed by the Company itself.

25. Further one may take notice of a decision rendered in a case of Maksud Saiyed vs. State of Gujarat and others (supra) it has been observed as follows:

Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and the Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.

26. Thus, it has categorically been held that the Managing Director or the Director can be held vicariously liable for commission of the offence committed by the Company under any statute if that statute provides for that. Even in that case where statute contemplates prosecution of the Managing Director or the Director on account of principle of vicarious liability, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.

27. It be noted that Penal Code save and except some provision specifically providing thereof does not contemplate vicarious liability on the part of the party, if is not charged directly for commission of an offence.

28. Now keeping in view the charges which the C.B.I. has come forward to bring

on the record the petitioner cannot be held to be vicariously liable for the commission of the offence of the Company as it has already been noted that ineligibility on the counts mentioned above were there on the part of the Company itself and still the Company was awarded with award by showing favour to it. That apart, it is the Company who is said to have been benefited by the award. Thus, any prosecution of the petitioner on account of vicarious liability is bad.

29. Going further in the matter, it be stated that the petitioner is being sought to be prosecuted also on personal capacity as Managing Director, M/s. JUSCO on the charges which reads as follows:

(a) As Managing Director, M/s. JUSCO, Sh. Sanjiv Paul has illegally purchased the tender document on 29.1.2004, i.e. after expiry of the date for sale of tender papers.

(b) Sh. Sanjiv Paul representing M/s. JUSCO has illegally participated in the tender for the award of Civil and Electrical Construction Work, although it was a non-eligible firm in the terms of its eligibility document which was within his knowledge.

(c) Loss to the NIT as award was not given to L-1 who had quoted rate below than M/s. JUSCO.

30. Almost similar is the charges which have been put in against M/s. JUSCO represented by this petitioner as Managing Director which read as hereunder:

(a) M/s. JUSCO has illegally purchased the tender document on 29.1.2004, i.e. after expiry of the date for sale of tender paper.

(b) M/s. JUSCO had illegally awarded Civil and Electrical Construction Work by other accused persons, although it was a non-eligible firm in the terms of its eligibility documents.

31. Thus, virtually on the same charges M/s. JUSCO as well as this petitioner in his personal capacity is being prosecuted.

32. It be recorded that during hearing when it was put to the counsel as to whether there has been any overt act on the part of this petitioner in securing award in favour of M/s. JUSCO, it was stated by the counsel appearing for the C.B.I. by referring the charges as made out in the charge sheet that the petitioner had purchased the tender document and that he had participated in the process of the bid. Upon which counsel for the C.B.I. was directed to file supplementary counter affidavit, vide its order dated 20.12.2012 putting forth the materials on the basis of which those charges had been levelled but it was never done.

33. Under the circumstances, one can easily say that the charges relating to the petitioner in the personal capacity are bald statements never based on any material.

34. In this regard, it is pertinent to note that the statement made by the witnesses as is appearing in the charge sheet wherein at paragraph 24(c) it has been stated that Mr. K.N. Jha, issued the tender document to M/s. JUSCO without any application money. Further, it has been stated that P.W. Sri Nurul Islam has proved that the tender documents were issued without any fee for the same.

35. Thus, it appears that whatever allegations are there for securing award in favour of the Company, in spite of being ineligible to participate in the bid, it was upon the Company. Further it is the Company who is said to have gained benefit from the award. This petitioner has never been alleged to have gained any benefit out of the award or any allegation is there to the effect that at the behest of this petitioner M/s. JUSCO was awarded with contract.

36. In such situation, one is at loss to comprehend as to how offence is made out u/s 420 even with the aid of Section 120(B) of the Indian Penal Code and also u/s 13(1)(d) of the Prevention of Corruption Act against the petitioner in his personal capacity.

37. Thus, I am constrained to hold that no offence is made out against the petitioner who is prosecuted in his personal capacity under which cognizance of the offence has been taken and thereby the order taking cognizance is hereby quashed so far the petitioner is concerned. In the result, this application stands allowed.

