(2012) 09 JH CK 0029

In the Jharkhand High Court

Case No : Criminal M.P. No. 1376 of 2011

Satyendra Nath Tiwari @ Satyendra Tiwary APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 21-09-2012

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14A
Penal Code, 1860 (IPC) — Section 120B, 13(2), 405, 406, 420
Prevention of Corruption Act, 1988 — Section 13(1)(d)

Citation : (2013) 2 AJR 79 : (2013) 1 AJR 524 : (2013) 2 JLJR 33

Hon'ble Judges : Rakesh Ranjan Prasad, J

Bench : Single Bench

Advocate : B.P. Pandey and V.K. Sharma, for the Appellant; M. Khan, Advocate, for the C.B.I., for the Respondent

Final Decision : Allowed

Judgement

R.R. Prasad

1. This application has been filed for quashing of the entire criminal proceeding of R.C. case no. 1(A) of 2010-R including the charge sheet (Annexure 2) submitted in the case on 28.4.2011 as well as the order dated 21.5.2011 whereby and whereunder learned Special Judge. C.B.I., Ranchi took cognizance of the offences punishable u/s 120B, read with Sections 420, 468 and 471 of the Indian Penal Code and also u/s 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 against the petitioner. Pursuant to the order passed by this Court in W.P. (PIL) No. 803 of 2009, the C.B.I. made a preliminary enquiry in relation to irregularities committed by the engineers and contractors of Road Construction Department in the matter of procurement of Bitumen for construction of roads. The C.B.I. having found grave irregularities in the matter of procurement of Bitumen lodged a case was which registered as R.C. Case no. 1(A) of 2010-R on the allegation that M/s. Kalawati Construction (P) Ltd. was awarded with a contract for special repair of Balumath-Harharganj Panki Road at

an estimated amount of Rs. 1,32,83,679/-.

2. As per the agreement, Bitumen was required to be procured from the Government company on the requisitions to be made by the Executive Engineer. Accordingly, requisition was issued for lifting of 141 MT Bitumen from the Oil Companies of the Government of India by the contractor to be utilized in the execution of the work. In course of time, M/s. Kalawati Construction (P) Ltd. submitted 13 invoices claiming to have procured Bitumen under those invoices for execution of the work. But during enquiry, 11 invoices covering 224.25 M.T. Bitumen were found to be forged/fake. In spite of that, entry was made in the measurement book by the Junior Engineer which was counter signed by Assistant Engineer and then bills were allowed to be drawn by the contractor and thereby all the accused persons put the Government to loss to the extent of Rs. 55,41,979/-.

3. On such allegation, case was registered as R.C. Case No. 01(A) of 2010-R. After completion of investigation, charge sheet was submitted not only against the company but also against this petitioner, who happened to be the Director of the company and also against other Directors and also employees of the company as well as engineers of the Road Construction Department.

4. On submission of the charge sheet, cognizance of the offence was taken vide order dated 21.5.2011 which is under challenge.

5. Mr. B.P. Pandey, learned Sr. counsel appearing for the petitioner submitted that the petitioner happened to be the Director of M/s. Kalawati Construction (P) Ltd. to whom contract was awarded for repairing of Balumath-Harharganj Panki Road. During enquiry, when it has been found that payment of the amount covered under 11 fake/forged invoices has been taken by the contractor, a case was lodged not only against the company but also against this petitioner, who happened to be the Director of the company as well as against other accused persons without there being any materials to show that this petitioner being the Director of the company did any act constituting offence of cheating, forgery or misappropriation.

6. In this regard, it was further submitted that it has been the case of the parties that the contract on being awarded to the company, the company through Bijay Kumar Tiwary, one of the Directors of the company entered into an agreement whereupon work order was issued in favour of the company and the work of the company was being looked after by one Uday Shankar Tiwary on the strength of power of attorney executed in his favour by M/s. Kalawati Construction (P) Ltd. It is also come during investigation that he was also looking after the work of the procurement of Bitumen from H.P.C.L., Ranchi and in fact, it is he whose signatures are there on the 11 forged invoices and that on the basis of forged invoices, bills were drawn and the payments are said to have been made to the company. In spite of that, this petitioner has been made accused simply for the reason that he happened to be the Director of the Company, M/s. Kalawati

Construction (P) Ltd.

7. Thus, on the ground that the petitioner is vicariously liable for the commission of offence committed by the company, the petitioner is being prosecuted in absence of any allegation that the petitioner, being the Director was In-charge of or responsible to for day-to-day affairs of the company, which is quite illegal.

8. In support of his submission, learned counsel has referred to a decision rendered in a case of S.K. Alagh Vs. State of U.P. and Others, and also in a case of Maksud Saiyed Vs. State of Gujarat and Others, .

9. It was further submitted that there has been absolutely no allegation that the petitioner in any manner had obtained any benefit for himself or got the other accused benefited in any manner and thereby no offence gets attracted even u/s 13(1)(d) of the Prevention of Corruption Act.

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

11. As against this, Mr. Khan, learned counsel appearing for the C.B.I. submitted that it is true that the contract was awarded to M/s. Kalawati Construction (P) Ltd. of which this petitioner is one of the Directors, who had submitted the bid documents under his signature and had executed the power of attorney in favour of Udai Shankar Tiwary for doing day-to-day work of the company and in execution of the work, Bitumen were shown to have been procured from the Government company through 13 invoices, of them 11 invoices were found to be forged, which bear the signatures of Udai Shankar Tiwary and hence, the petitioner being the Director of the company is liable to be prosecuted when certain officers have been found to have been committed by the company or its employees whereby Government has been put to loss to the extent of Rs. 55,41,979.52 whereas the petitioner being Director of the company can be said to be the beneficiaries and thereby he is being rightly prosecuted.

12. Having heard learned counsel appearing for the parties, it appears to be the case of both the parties that contract was awarded by Road Construction Department to M/s. Kalawati Construction (P) Ltd. to which the petitioner, is one of the Directors, who had executed power of attorney in favour of Udai Shankar Tiwary to look after day-to-day affairs of the company and was also entrusted work of procuring Bitumen from HPCL, Ranchi. Said Udai Shankar Tiwary claimed to have procured bitumen under the invoices and submitted it which bear his signatures. Out of them, 11 invoices were found to be forged, on the basis of which bills were raised, amounts were drawn and the payments were made to the company. Thus, in the whole process the petitioner has figured at two places whereby it is said that the bid document has been submitted by this petitioner and that power of attorney was expected in favour of Uday Shankar Tiwary for looking after day-to-day affairs of the company but no act has been alleged to have been done by this petitioner in the matter of execution of the work or procurement of Bitumen or even taking payment on the basis of forged bills, still

this petitioner is being prosecuted for simple reason that he happened to be the Director of the company, that too in absence of any allegation that he was in-chare of or responsible to day-to-day affairs of the company presumably under the garb of the principle of vicarious liability but for simple reason that one happens to be the Director cannot beheld liable vicariously for the commission of offence of the company.

13. In this regard, I may refer to a decision rendered in a case of S.K. Alagh vs. State of Uttar Pradesh and others (supra) wherein in paragraph 21 of the said judgment it has been observed as follows:

We may, in this regard, notice that the provisions of the Essential Commodities Act, Negotiable Instruments Act, Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 etc. have created such vicariously liability. It is interesting to note that Section 14-A of the 1952 Act specifically creates an offence of criminal breach of trust in respect of the amount deducted from the employees by the company. In terms of the explanations appended to Section 405 of the Indian Penal Code, a legal fiction has been created to the effect that the employer shall be deemed to have committed an offence of criminal breach of trust Whereas a person in charge of the affairs of the company and in control thereof has been made vicariously liable for the offence committed by the company along with the company but even in a case falling u/s 406 of the Indian Penal Code vicariously liability has been held to be not extendable to the Directors or officers of the company.

14. Under the circumstances as stated above, if the petitioner is allowed to face rigor of the trial, it would certainly amount to abuse of the process of law and there would be miscarriage of justice.

15. Accordingly, entire criminal proceeding of R.C. case no. 1(A) of 2010-R including the order dated 21.5.2011 is hereby quashed. In the result, this application stands allowed.

