

(2023) 01 OHC CK 0047
In the Orissa High Court
Case No : CRLMC No.603 Of 2020

Shakti Ranjan Singh Samanta

APPELLANT

Vs

State Of Odisha (Vigilance)

RESPONDENT

Date of Decision : 12-01-2023

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 482

Indian Penal Code, 1860 — Section 120B, 409

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

Citation : (2023) 01 OHC CK 0047

Hon'ble Judges : R.K. Pattanaik, J

Bench : Single Bench

Advocate : D.P. Nanda, Samvit Mohanty, Niranjana Moharana

Final Decision : Dismissed

Judgement

R.K. Pattanaik, J

1. The petitioner by invoking jurisdiction under Section 482 Cr.P.C. prays for quashing of the criminal proceeding in connection with VGR Case No.8 of 2014 pending in the file of learned Special Judge (Vigilance), Keonjhar corresponding to Balasore Vigilance P.S. Case No.32 of 2014 registered under Sections 13(2) read with 13(1)(c)(d) of the Prevention of Corruption Act, 1988 (in short 'the PC Act') besides Sections 409 and 120-B IPC on the grounds inter alia that the same is not tenable in law.

2. Heard Mr. Nanda, learned Senior Advocate and Mr. Moharana, learned counsel for the Vigilance Department.

3. As per the pleading, if briefly stated, the petitioner while posted as the Junior Engineer, ITDA, Champua, Keonjhar during the period between 11th July, 2011 and 7th October, 2014 was entrusted with different works under Champua Block and Joda Block besides the construction in question related to a Permanent Crush Bond (PCB). Further pleaded that after approval of annual action plan for

the year 2012-13 by the PLC, the estimate for the said work was prepared for Rs.10 lac and was technically approved by AE, ITDA and administratively by the PA, ITDA and it was entrusted to Pani Panchayat. However, in that connection, the FIR was lodged by the DSP, Vigilance, Keonjhar with the allegation of misappropriation of Govt. fund of around Rs.2 lac through substandard work and inflated measurement of PCB with a report that a technical inspection was held on 21st April, 2014 during which excess payment of Rs.2,03,298/- was detected thereby causing loss to the Government and consequently, Balasore Vigilance P.S. Case No.32 of 2014 was registered.

4. The contention is that the investigating authority omitted to calculate the measurement of area which was piled with materials or in other words, there was defect in measurement due to lack of clearance of over burden matters which led to the erroneous estimation and that the defective measurement was never proved to be actuated with malafide and bias.

5. As per the petitioner, a departmental proceeding was initiated against him as per the OCS (CCA) Rules, 1962 which resulted in the following findings that the measurement was not properly done by the technical team; execution of earth work in the over burden soil was also not considered; the amount excess paid to the executant was unintentional due to wrong measurement which is on account of oversight hence not to be treated as a mischief or gross misconduct; and it was a loss Rs.47,971/- only due to negligence without any malafide.

6. Mr. Nanda, learned Senior Advocate, while challenging the Vigilance proceeding on the aforesaid grounds would submit that the guidelines vide Circular Order No.10 of 2004 issued by the Director-cum-Additional DG of Police, Vigilance, Orissa as per which criminal cases/open enquiries shall not be registered or held in the category of cases including where complaint/information relating to negligence results in loss caused to the Government is less than Rs.50,000/- except where there are special reasons warranting such a Vigilance enquiry/investigation. It is further submitted by Mr. Nanda that the aforesaid guideline under Clause(vi) of the Circular at Annexure-4 was not scrupulously followed before initiating the Vigilance enquiry and therefore, the proceeding before the learned court below shall have to be terminated in exercise of the Court's inherent jurisdiction. While advancing argument on other points, Mr. Nanda, learned Senior Advocate placed reliance on the decisions, such as, Shiv Kumar Vrs. Hukam Chand (1999) 7 SCC 467 and Hitendra Vishnu Thakur and others Vrs. State of Maharastra and others (1994) 4 SCC 602 with regard to fairness in criminal prosecution; Ashoo Surendranath Tiwari Vrs. Deputy Superintendent of Police (2020) 9 SCC 636 and Dr.Minaketan Pani Vrs. State of Orissa MANU/OR/0302/2022 related to exoneration in departmental proceeding and its impact vis-a-vis criminal prosecution where higher standard of proof is necessary to establish the charges; and lastly, Commissioner of Customs, Calcutta and others Vrs. Indian Oil Corporation Ltd. and others(2004) 3 SCC 488 which is regarding the binding effect of a Circular.

7. Mr. Moharana, learned counsel for the Vigilance Department on the other hand submits that during technical inspection dated 21st April, 2014, the petitioner and others were present, who signed in the TI report and Memorandum prepared without objection and as per the technical report, excess to the tune of Rs.2,03,298/- found to have been paid because of the inflated measurement. It is further submitted that during investigation, from the case record, the executant had furnished invoices in the name of a trader, who was not in existence. It is informed to the Court that the petitioner had moved the learned court below for discharge which was disallowed by order dated 4th July, 2016 and at present the trial is in progress with nearly 15 witnesses already examined. The said order of the Vigilance court as further informed by Mr. Moharana was challenged in CRLREV No.815 of 2016 but it was withdrawn on 20th March, 2017. Mr. Moharana contends that in the present case, as per the Circular i.e. Annexure-4, after investigation under the supervision of the SP. Vigilance, the matter was forwarded to the Directorate for necessary approval and sanction for prosecution after due consideration of the materials was accorded and that apart, said Circular cannot supersede the statutory provisions of the PC Act as it merely provides an in house guidelines and besides that the petitioner was not fully exonerated and even otherwise, for any such non-compliance of the guidelines, the Vigilance prosecution cannot be vitiated unless miscarriage of justice is caused thereby and in that context, he relied upon the following decisions in Vinod Kumar Garg Vrs. State (Govt. of NCT Delhi) (2020) 2 SCC 88; State of M.P. Vrs. Birendra Kumar Tripathy (2009) 43 OCR SC; and State of Karnataka Vrs. J. Jaylalita (2017) 6 SCC 363.

8. Precisely stated, according to the Vigilance Department, the petitioner abused his official position and conspired with others in the execution of a construction resulting in excess payment of Rs.2,03,298/- which was due to substandard work and accomplished through inflated measurement which has been denied by the petitioner. Mr. Nanda, learned Senior Advocate challenged the Vigilance prosecution principally on the following grounds:

- a) non-existence of a prima facie case even by considering the materials on record;
- b) exoneration of the petitioner on major charges after a departmental enquiry even considering the TI report vis-à-vis the measurement with a finding of negligence only with a loss of Rs.47,971/- instead;
- c) absence of mens rea on the part of the petitioner who may have to be alleged of negligence on account of oversight; and
- d) unjust criminal prosecution in derogation of the guideline of the State Government under Annexure-4 of the Vigilance Department dealing with registration of cases/open enquiries with reference to Clause (vi) thereof.

9. It is contended by Mr. Nanda, learned Senior Advocate that in absence of any such mens rea and gross misconduct on the part of the petitioner who may be

alleged of negligence, it would be a lame prosecution and therefore, the same should be quashed in exercise of inherent jurisdiction. It is pleaded that justice is a virtue which transcends all barriers and neither rule of procedure nor technicalities of law stand in its way. It is further pleaded that the rule stare decisis is adhered for consistency but it is not as inflexible in administrative law as in public law and the entire concept of jurisdiction under Section 482 Cr.P.C. is founded on equity and fairness and while resting upon such a pleading, Mr. Nanda, learned Senior Advocate reminds the Court of the principle *quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsa esse non protest*. It is concluded by stating that inherent jurisdiction in a given fact situation is to exercise *ex debito justitiae* and in so far as the present case is concerned, according to Mr. Nanda, such jurisdiction is needed to be invoked as the Vigilance prosecution is unwarranted and unjustified. Mr. Moharana, learned counsel for the Vigilance Department would submit that the FIR and the chargesheet disclosing the misconduct on the part of the petitioner and others does make out a *prima facie* case and the allegations are to be examined and deliberated upon during trial and rightly therefore the learned court below declined to discharge him. Regarding Annexure-4, it is submitted that such is a mere guideline for the Vigilance Department to follow and so far as the case of the petitioner is concerned, it has received sanction of the Directorate. Mr. Moharana further submits that there has been no exoneration of the charges vis-à-vis the petitioner who was found negligent and censured and an amount of Rs.47,971/- was realized from him. It is also argued that the acceptance or otherwise of the inspection report is to be pitted against the defence of the petitioner during trial and any such finding in the departmental enquiry cannot and should not be a ground for quashing of the criminal proceeding.

10. No doubt, the petitioner faced the departmental enquiry. During such enquiry, the Vigilance inspection report was referred to. An independent assessment has been made with a calculation sheet laid out with a conclusion that the excess payment stands at Rs.39,794/- only with a conclusion that there has been less measurement as the technical team left out some of the items which was detected while comparing the measurement recorded in the MB. Whether any of the items escaped the attention of the inspection team and on that basis the assessment was made is a matter to be within the domain of the trial. It is alleged that earth work excavation in the overburden area was overlooked by the technical team of the Vigilance Department. With such finding, it has been held that on recalculation, the excess payment was arrived at Rs.47,971/- and ultimately a recommendation was made for its realization from the salary of the petitioner and another accused in two installments and both were censured for the negligence. The Court believes that barely by referring to the enquiry report in disciplinary proceeding without opportunity for the Vigilance Department to respond, it would not be just and wise to discard the technical inspection report and accept the finding of the departmental enquiry. It is not known whether any clarification was ever sought for by the concerned

department from the Vigilance at any time before the departmental enquiry, if any such anomaly noticed that some items had been left out from consideration during the spot visit. So, the Court is of the view that all such aspects which are technical in nature shall have to be thrashed out during and in course of trial.

11. Referring to the decision in Ashoo Surendranath Tiwari and Dr. Minaketan Pani (supra), it is contended that since there has been exoneration of the charges of misconduct vis-à-vis the petitioner, the Vigilance prosecution shall have to be quashed. First of all, the negligence of the petitioner and another is established though the major charges failed. The charge against the petitioner is of abusing official position and conspiracy while executing the work leading to the loss of the Government exchequer. The negligence is proved in the departmental enquiry and not the grievous charges attributing any mens rea. However, the Vigilance Department alleges misconduct and the mischief and the conspiracy leading to the excess payment made to the executing agency. Such an aspect, whether, it is a case of negligence simplicitor or a misconduct with the requisite mens rea is a matter of debate and deliberation during trial. The finding of the departmental enquiry without any clarification sought for from the Vigilance Department any time prior to its commencement that some items were left out thus leading to a conclusion of negligence only is not sufficient to be relied upon and accepted to quash the prosecution against the petitioner. In the peculiar facts and circumstances of the case where on the same material an enquiry was conducted culminating in exoneration honourably can result in quashing of the criminal proceeding which is what has been held in Dr. Minaketan Pani (supra) deriving the source from the judgment of the Apex Court in Ashoo Surendranath Tiwari ibid. In the present case, it cannot be said that there has been an honourable exit of the petitioner after the departmental enquiry which independently assessed and discarded the inspection report which could have been avoided by calling for a clarification from the Vigilance Department more so when such discharge was claimed on the ground that some items had been left out from consideration.

12. Annexure-4 is a set of guidelines for the Vigilance Department to follow before registration of cases or holding enquiries. To restate, as per Clause (vi), complaint/information relating to negligence causing loss for an amount of Rs.50,000/- shall not be entertained unless weighty reasons exist subject to approval of the Directorate. In the instant case, assessment was made and loss is shown at Rs.47,971/- but then as per the Vigilance Department, it figures at more than Rs.2 lac. Such factual aspect shall have to be gone through during trial to ascertain the extent of loss as against the claim of the petitioner that some items were left out during technical inspection and confirmed in the enquiry. Furthermore, malafide is attributed by the Vigilance Department which may take away the case of the petitioner out of the purview of Annexure-4. The Court finds that malafide has been attributed and loss is assessed at more than Rs.50,000/- and that apart, before launching the prosecution, it is stated that the approval of the Directorate has been obtained which of course is not needed

where malafide is alleged. Furthermore, the decision of the Apex Court in the case of Indian Oil Corporation Ltd. (supra) is referred to contend that the Vigilance Department was bound to follow Annexure-4 and cannot go beyond it. In the said case, the Revenue Department issued a Circular but then the concerned department took a contrary stand ignoring the instructions of the Board and in that context, it was held by the Supreme Court that although a Circular is not binding on a Court or an assessee, it is not open to the Revenue to raise the contention to the contrary. Even assuming that Annexure-4 is applicable to the present case, since approval of the Directorate is said to have been obtained, it cannot be concluded that Clause (vi) thereof was not followed. However, according to the Court, Annexure-4 could be held as inapplicable considering the allegation of misconduct with mens rea thereby causing a loss of more than Rs.2 lac to the Government. A case of criminal conspiracy cannot be brought within the sweep of Annexure-4 and at this stage, the Court cannot accept the conclusion of the departmental enquiry which is to the effect that the petitioner was merely negligent without any malafide all the more when the contradictions vis-a-vis the Vigilance inspection report excluding certain items is needed to be examined and was held so without seeking a clarification in respect thereof.

13. The Court is alive to be settled position of law in the exercise of inherent jurisdiction which has been elaborately discussed and enunciated by the Apex Court in State of Haryana and Others Vrs. Ch. Bhajan Lal and Others reported in AIR 1992 SC 604. As per the aforesaid decision, if the uncontroverted allegations in the FIR do not disclose commission of any cognizable offence; or in case such allegations are so absurd and inherently improbable which no prudent person can ever reach at just conclusion; or where the criminal action is manifestly attended with malafide or instituted maliciously with ulterior motive to wreak vengeance and in such similar situations, inherent jurisdiction may be exercised to do complete and substantial justice but that does not mean, an allegation which is needed to be enquired into and investigated upon and a decision which would depend on factual and technical determination is to be nipped at the bud by exercising such jurisdiction. In the case at hand, so many factual aspects are involved for determination and the Court cannot simply accept the enquiry report and concur the view or to offer an opinion or draw a conclusion one way or the other and to close the prosecution when the allegation that the petitioner and the other accused did the mischief leading to the misconduct and loss to the Government. Having said that, the Court with due respect is not persuaded to accept the argument of Mr. Nanda, learned Senior Advocate on any such grounds so raised while challenging the impugned proceeding pending before the learned court below morefully against the background that the claim for discharge was rejected earlier and put to rest on disposal of CRLREV No.876 of 2016 being withdrawn later and that the trial has progressed to a considerable extent with the examination of majority of prosecution witnesses. Hence, the conclusion is that it is not a case where jurisdiction under Section 482 Cr.P.C. may be exercised.

14. In fact, the full import of the legal maxim *quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsa esse non protest* is that whenever anything is authorized and especially if, as a matter duty required to be done by law, it is found impossible to do that thing unless something else not authorized in express terms be also done, then that something else is supplemented by necessary intendment. *Ex debito justitiae* is inbuilt and in such exercise, the whole idea is to do real, complete and substantial justice for which the Court exists. The said aspect has been deliberated upon in *Amit Kapoor Vrs. Ramesh Chander* (2012) 9 SCC 460 and *Gian Singh Vrs. State of Punjab* (2012) 10 SCC with the same view expressed in *Dinesh Dutt Joshi Vrs. State of Rajasthan* (2001) 8 SCC 570. As held in *Gian Singh* (supra), even though the Court does have wide and expansive powers under Section 482 Cr.P.C., it has to be exercised sparingly, carefully and with circumspection and only when such exercise is justified by the tests specifically laid down in the section itself. If summed up, with the understanding of the aforesaid principles originated from the Latin maxim, it can be concluded by stating that in the given set of facts where so many points arise for decision in defending the plea of the petitioner based on enquiry report in juxtaposition to the charge of the Vigilance Department, it is really demanding for exercising jurisdiction under Section 482 Cr.P.C. and therefore, the Court is constrained and disinclined to terminate the criminal proceeding as has been prayed for.

15. Accordingly, it is ordered.

16. In the result, the CRLMC stands dismissed. However the learned Special Judge (Vigilance), Keonjhar shall dispose of the proceeding in VGR Case No.8 of 2014 without being influenced by any of the observations made hereinabove.

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