

(2015) 04 GAU CK 0014

In the Gauhati High Court

Case No : Criminal Rev. Pet. Nos. 97 and 108 of 2013

V. Makritsu and Others

APPELLANT

Vs

Central Bureau of Investigation

RESPONDENT

Date of Decision : 30-04-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 220, 223, 307, 311, 397
Evidence Act, 1872 — Section 133
National Investigation Agency Act, 2008 — Section 21
Penal Code, 1860 (IPC) — Section 109, 120B, 307, 420, 468
Prevention of Corruption Act, 1988 — Section 13(1)(d), 13(1)(e), 13(2), 3, 4

Citation : (2015) 2 GLT 684

Hon'ble Judges : C.R. Sarma, J

Bench : Single Bench

Advocate : K.P. Pathak, Senior Advocate, B.S. Goel and A.J. Hazarika, for the Appellant; P.N. Choudhury, Sr. Retainer Counsel, Advocates for the Respondent

Final Decision : Disposed off

Judgement

C.R. Sarma, J.—By the above cited Criminal Revision Petitions, filed under Sections 482 and 397 of the Code of Criminal Procedure (for short, Cr.P.C.), the petitioners, being non public servant persons, in Special Case No. 10 of 2009, under Section 120B and 420 IPC, have prayed for quashing the said proceeding, pending before the learned Special Judge, CBI, Assam, Additional Court No. 1, Chandmari, Guwahati.

I have heard Mr. K.P. Pathak, learned Senior Counsel, assisted by Ms. B.S. Goel, learned Counsel, appearing for the petitioners and Mr. P.N. Choudhury, learned Senior Retainer Counsel, CBI.

Both learned Counsel, appearing for both the parties, have submitted their written arguments, which have perused.

As both the Criminal Revision Petitions, arising out of the same proceeding and same impugned order, involve same question of law and facts and as agreed to

by the learned Counsel, appearing for the parties, for the sake of convenience and brevity, I have taken up both the matter together for disposal by this common judgment and order.

2. The prosecution case, as may be necessary for the purpose of disposal of these petitions, may, in brief, be stated as follows.

The petitioners, who are private persons, entered into a criminal conspiracy with four Public Servants (all are Railway Employees of N.F. Railway) and some other unknown persons of Coal India Ltd., N.F. Railway and Department of Food and Civil Supplies, Nagaland and by manufacturing and forging the relevant papers, illegally diverted coal, allocated to the Government of Nagaland for distribution amongst small consumers and thus sold the coal at high price in open market in the State of Punjab.

3. On receipt of the information, the Central Bureau of Investigation (hereinafter called "the CBI") registered a case under Sections 120B, 420, 468, 471 IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereinafter called "P.C. Act"). At the close of the investigation, the Investigating Agency submitted charge- sheet against the petitioners and four Public Servants (since pardoned).

All the Public Servant accused persons filed an application under Section 307 Cr.P.C. read with Section 133 of the Evidence Act seeking pardon, with the plea that they had acted under the instruction of their superior officers and that they would cooperate with the prosecution by making full and true disclosure of the whole circumstances, within their knowledge, with regard to dispatch of the coal to Punjab, as mentioned in the FIR as well as the charge-sheet.

4. By filing written reply, the CBI conveyed no objection in respect of the petitioner's prayer for pardon and treating them as approvers. One of the non official co-accused i.e. Sh. V. Makkritsu (Petitioner in Crl. Pet. No. 108 of 2013), filed an objection against the said prayer for pardon.

5. However, after hearing the parties, the learned trial Judge, by his order, dated 13.03.2002, passed in Special Case No. 10/2009, granted pardon treating them as approvers and thus, only the petitioners, who are non public servant, remained to face the trial in the said proceeding.

6. In view of granting pardon and status of approver to all the public servant accused persons, the petitioners, being the non-official accused persons, in the said case, moved the trial Court for dropping the proceedings, pending against them, on the ground that the Special Court, constituted under the P.C. Act, has no jurisdiction to try non public servant accused persons for the offences under the Penal Code.

7. The learned Special Judge, by the impugned orders, dated 16.01.2013 and 26.02.2013, while rejecting the said prayer, framed charges under Sections 120B and 420 IPC against the petitioners, to which they pleaded not guilty and claimed

to be tried. Accordingly, the learned trial Judge posted the case for evidence.

8. Aggrieved by the said orders, the petitioners have come up with this set of Criminal Revision Petitions filed under Sections 482 and 397 Cr.P.C., with prayer for quashing the said proceeding and the judgment and orders, dated 16.01.2013 and 21.02.2013 aforesaid, on the ground of want of jurisdiction.

9. Mr. K.P. Pathak, learned Senior Counsel, appearing for the petitioners has submitted that, in view of the statutory provision, prescribed by Sections 3 and 4 of the P.C. Act, the Special Court, constituted under the P.C. Act has no jurisdiction to try case against non public servant for the offences under the Penal Code, without arraigning public servant also for the offence under the P.C. Act. Therefore, it has been argued by the learned Senior Counsel, that the learned Special Judge can't try the petitioners only for the IPC offences. The learned Senior Counsel has also contended that the learned Special Judge has committed serious jurisdictional error by deciding to try the petitioners, in violation of the statutory provision prescribed by Section 4 of the P.C. Act and that this is a fit case for interference in exercise of jurisdiction under Section 482 Cr.P.C. for preventing miscarriage of justice.

10. In support of his contention, the learned Senior Counsel for the petitioners, has relied on the following decisions:

"(1) P. Nallammal Etc. Vs. State Rep. by Inspector of Police, AIR 1999 SC 2556 : (1999) CriLJ 3967 : (1999) ECR 22 : (1999) 5 JT 410 : (1999) 4 SCALE 501 : (1999) 6 SCC 559 : (1999) 1 SCR 135 Supp : (2000) 1 SLJ 320 ;

(2) Ismail Khan Shah and Others Vs. State, (2012) CriLJ 2649 .

(3) Vivek Gupta Vs. Central Bureau of Investigation and Another, (2003) 1 JT 614 Supp : (2003) 8 SCALE 100 : (2003) 8 SCC 628 : (2003) 3 SCR 1087 Supp : (2004) 1 UJ 140 ;

(4) Anwar Hasan Khan Vs. Mohammad Shafi and Others, AIR 2001 SC 2984 : (2001) 9 JT 84 : (2001) 7 SCALE 398 : (2001) 8 SCC 540 : (2001) AIRSCW 4461 : (2001) 7 Supreme 794 ;

(5) Central Bureau of Investigation, Hyderabad v. K. Narayana Rao, reported in (2002) 9 SCC 512"

11. Refuting the said argument, advanced by the learned Senior Counsel for the petitioners, Mr. P.N. Choudhury, learned Senior Retainer Counsel, CBI, appearing for the respondent, has submitted that, in view of submission of charge-sheet against the petitioners and four public servants under Sections 120B, 420, 468 and 471 IPC and Section 13(2) read with Section 13(1)(d) of the P.C. Act, the granting of pardon and status of approver to the public servant accused persons, under Section 307 Cr.P.C., can't negate the jurisdiction of the learned Special Judge, CBI to try the case against the petitioners, under Sections 120B and 420 IPC. It is submitted that the benefit of granting pardon under Section 307 Cr.P.C.

is a conditional one and that, in the event of failure of the said approvers i.e. the public servant accused persons to disclose the truth and cooperate with the prosecuting agency, they would be liable to be tried as accused. Therefore, it has been argued that there is no bar in continuing with the trial against the petitioners.

It has been further submitted that the impugned order being an interlocutory order, the revision filed under Section 397 Cr.P.C. is not maintainable.

12. In support of his contention, the learned Senior Retainer Counsel, CBI, has placed reliance on the following decisions.

"1. P. Nallammal Etc. Vs. State Rep. by Inspector of Police, AIR 1999 SC 2556 : (1999) CriLJ 3967 : (1999) ECR 22 : (1999) 5 JT 410 : (1999) 4 SCALE 501 : (1999) 6 SCC 559 : (1999) 1 SCR 135 Supp : (2000) 1 SLJ 320 ;

2. Vivek Gupta Vs. Central Bureau of Investigation and Another, (2003) 1 JT 614 Supp : (2003) 8 SCALE 100 : (2003) 8 SCC 628 : (2003) 3 SCR 1087 Supp : (2004) 1 UJ 140 ;

3. Sethuraman Vs. Rajamanickam, (2009) CriLJ 2247 : (2009) 2 CTC 660 : (2009) 4 JT 164 : (2009) 3 SCALE 840 : (2009) 5 SCC 153 : (2009) 4 SCR 510 ;

4. Londhoni Devi and Others Vs. State, (2013) 3 GLT 249 ."

13. Having heard the learned Counsel for both the parties, it is found that the basic question, to be answered in this set of Criminal Revision Petitions, is whether, in the absence of a co-ordinate trial against public servant for the offence under the P.C. Act, the Special Judge, after granting approver status, under Section 307 of the Code of Criminal Procedure (hereinafter called the Cr.P.C.) to all the public servant accused persons, the Special Court has the jurisdiction to frame charges under Sections 120B and 420 IPC only against the non-official accused persons and to try the case against such non official accused persons i.e. the petitioners?

14. Admittedly, though the CBI has submitted charge-sheet against the petitioners and four public servants, for the offences under Sections 120B and 420 IPC and Section 13(2) read with Section 13(1)(d) of the P.C. Act, all the public servant accused persons have been made approver, after granting then-prayer for pardon, under Section 307 IPC. Consequently, the non official accused persons i.e. the present petitioners are to face the trial. There is also no dispute that the learned Special Judge, CBI, framed charge under Sections 120B and 420 IPC against the petitioners and decided to proceed with the trial, in the case, against the non public servant accused persons for the said offences.

15. Section 4 of the P.C. Act, which reads as follows, provides that the offences punishable under the Act, and for offences for conspiracy, attempt or abatement in committing the offences under the Act are to be tried by a Special Judge, appointed in accordance with Section 3 of the Act, provided such persons can be

charged at the same trial.

Section 4 of the P.C. Act, reads as follows:

"Cases triable by special Judges.-

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law for the time being in force, the offences specified in Sub-section (1) of section 3 shall be tried by special Judges only.

(2) Every offence specified in sub-section (1) of section 3 shall be tried by the special Judge for the area within which it was committed, or, as the case may be, by the special Judge appointed for the case, or, where there are more special Judges than one for such area, by such one of them as may be specified in this behalf by the Central Government.

(3) When trying any case, a special Judge may also try any offence, other than an offence specified in section 3, with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), a special Judge shall, as far as practicable, hold the trial of an offence on day- to-day basis."

16. Sub-section (3) of Section 4 clearly provides that, while trying any case for an offence specified in Section 3 of the Act, a Special Judge may also try any offence other than the offences specified in Section 3 with which the accused may under the Cr.P.C. be charged at the same trial.

The term "also" used in sub-Section 3 of Section 4 clearly indicates that, while trying a case for the offence other than the offence provided by Section 3 of the Act, the Special Judge must try, in the same trial, public servant also for the offence under the P.C. Act. This makes it clear that a non public servant also can be tried with the public servant if charges are framed for the offences under the P.C. Act as well as other Acts i.e. IPC etc. Therefore, it can be concluded that the Special Judge, appointed under Section 3 of the P.C. Act can't try a case for the offences under the I.P.C. or other Act, unless charge for offence under the P.C. Act is framed.

17. In the case of P. Nallammal (supra), the Hon''ble Supreme Court held that it was the intent of the legislature that abettors of all different offences under Section 13(1)(e) of P.C. Act should also be dealt with the public servant in the same trial, held by the Special Judge. In the said case, the Apex Court held that the Special Judge, while trying offences under the P.C. Act, has the jurisdiction to try a non public servant also, if such person is found to be a member of the conspiracy with the public servant or abettor, in committing an offence under the P.C. Act.

18. In the case of Ismail Khan Shah (supra), a learned Single Judge of the Karnataka High Court, referring to the provision of Sections 3 and 4 of the P.C.

Act observed:

"20. Therefore, it is clear from the aforesaid provisions of law that the jurisdiction to try any other offence not falling under the P.C. Act is vested with the Special Judge, provided the Special Judge is also trying the accused in respect of any offence punishable under the P.C. Act."

The learned Judge, referring to the case of Vivek Gupta (supra) observed:

"Quote para 25 of 2".

19. In the case of Ismail Khan Shah (supra), it has been held that, public servant (A1) not being put up in the trial, the Special Court could not have tried the non public servant (A 2 to A 5) under Sections 120B and 420 IPC.

20. In the case of Vivek Gupta (supra), the Hon"ble Supreme Court referring to the Section 4 of the P.C. Act and Sections 220 and 223 Cr.P.C. observed:

"13. Section 223 of the Code of Criminal Procedure has not been excluded either expressly or by necessary implication nor has the same been modified in its application to trial under the Act. The said provision therefore is applicable to the trial of an offence punishable under the Act. The various provisions of the Act which we have quoted earlier make it abundantly clear that under the provisions of the Act a Special Judge is not precluded altogether from trying any offence, other than offences specified in Section 3 thereof. A person charged of an offence under the Act may in view of sub-section (3) of Section 4 be charged at the same trial of any offence under any other law with which he may, under the Code of Criminal Procedure, be charged at the same trial. Thus a public servant who charged of an offence under the provisions of the Act may be charged by the Special Judge at the same trial of any offence under IPC if the same is committed in a manner contemplated by Section 220 of the Code.

14. The only narrow question which remains to be answered is whether any other person who is also charged of the same offence with which the co-accused is charged, but which is not an offence specified in Section 3 of the Act, can be tried with the co-accused at the same trial by the Special Judge. We are of the view that since sub-section (3) of Section 4 of the Act authorizes a Special Judge to try any offence other than an offence specified in Section 3 of the Act to which the provisions of Section 220 apply, there is no reason why the provisions of Sections 223 of the Code should not apply to such a case. Section 223 in clear terms provides that persons accused of the same offence committed in the course of the same transaction, or persons accused of different offences committed in the course of the same transaction may be charged and tried together. Applying the provisions of Section 3 and 4 of the Act and Section 220 and 223 of the Code of Criminal Procedure, it must be held that the appellant and his co-accused may be tried by the Special Judge in the same trial."

From the decision held in the said case, it can be understood that the Special Judge, while trying a public servant for the offence under the P.C. Act and also

under any other Act, may also try a non public servant for the offence under the Penal Code or any other Act, in the same trial, but he can't try the non public servant to the exclusion of the public servant.

21. In the case of Anwar Hasan Khan (supra), the Supreme Court, while laying down the principle of interpretation of statute, has explained the necessity of harmonious construction of the statutory provisions so as to ensure their consistency with the object of the statute.

22. In the case of Central Bureau of Investigation (supra), the Supreme Court has observed that the circumstances proved before and after the occurrence have to be considered to decide about complicity of accused in a case of criminal conspiracy. In the present case, this Court is not required to examine the question regarding the existence of the ingredients of conspiracy. Hence, the decision held in the above cited case will not help in this matter.

23. In the case of Sethuraman (supra), the Supreme Court has held that in view of Section 397(2) Cr.P.C. revision against interlocutory order passed, under Section 311 Cr.P.C. is not maintainable.

In the said case, the trial Court rejected the respondent/accused person's prayer, made under Sections 91 and 311 Cr.P.C. On revision, under Section 397 Cr.P.C., High Court allowed the prayer. The Supreme Court, while allowing the appeal, against the said order, passed by the High Court, held that the orders passed under Section 91 and 311 Cr.P.C. did not decide anything finally and as such revision under Section 397(2) Cr.P.C. was not maintainable.

24. In the case of Londhoni Devi (supra), a Division Bench of this Court, in deciding an appeal filed under Section 21 of the National Investigating Agency Act, 2008, observed that the order framing charge, being an interlocutory order, no appeal would lie against such order.

25. In the present case, the petition has been filed under Section 482 Cr.P.C. also, challenging the jurisdiction of the Special Judge to try the case against the petitioners. According to the petitioners, the learned Special Judge has acted in violation of the statutory provision of law and as such the proceeding, including the impugned orders, are liable to be quashed.

A case decided without jurisdiction i.e. in infringement of the statutory provision, will certainly cause miscarriage of justice resulting abuse of process. Therefore, High Court, exercising jurisdiction under Section 482 Cr.P.C., can examine the legality and propriety of continuance with the proceeding and correct the injustice caused, due to jurisdictional error.

26. As referred to above, in the case of P. Nallammal (supra), some kith and kin (non public servant) or public servant were also arraigned as co-accused along with the public servant for the offences under Sections 13(1)(e) of the P.C. Act and Section 109 I.P.C. The non public servants raised the question whether they were liable to be prosecuted along with the public servant for the offences under

Section 109 IPC read with Section 13(1)(e) P.C. Act.

Dismissing the appeal, the Supreme Court held that the abettors of all the different offences under Section 13(1)(e) of the P.C. Act should be dealt with along with public servant in the same trial by the Special Judge.

27. In the case of Vivek Gupta (supra) also, Supreme Court held that, taking the aid of Sections 220 and 223 Cr.P.C. non public servant and public servant can be tried together by the Special Judge for the offences under Sections 13(2) and Section 13(1)(d) of the P.C. Act and under Sections 120B and 420 IPC.

28. A Careful examination of the statutory provisions, prescribed by Sections 3 and 4 of the P.C. Act, makes it clear that trial of non public servant, who is found to be a member of the conspiracy or abatement in committing offence, under the P.C. Act, along with public servant, by Special Judge is not barred. Hence, there is no difficulty in understanding that the non public servant accused person is also liable to be tried along with public servant, before the Special Judge and in such trial offences under the PC. Act and the other Acts (including the I.P.C.) can be tried together.

29. From the above, there is no difficulty in understanding that a Special Judge, appointed under Section 3 of the P.C. Act, has the jurisdiction to try cases involving the offences under the P.C. Act and under any other Act, including the Penal Law in the same trial. The Special Judge, in such trial, has the jurisdiction to try non public servant also, along with the public servant for the offences under other Acts, if such persons are found to be party to the conspiracy or abatement in committing the offences under the P.C. Act by the public servant.

30. As held in the case of Vivek Gupta (supra), to proceed with the trial against non public servant, for the offences under the IPC or any other Act, the Special Judge should proceed against public servant also for committing the offences under the P.C. Act, in the same trial. In the absence of public servant, the Special Judge will cease to have jurisdiction to try only the non public servant for the offences under the Penal Code or such other Act. 1 he moment he decides not to proceed against the public servant, his jurisdiction to try private person will come to an end. His jurisdiction to try non public servant for any offence is co-related with the trial of public servant under the P.C. Act. Therefore, after granting pardon to all the public servant accused persons, the learned Special Judge could not have jurisdiction to frame charge against the petitioners, who are not public servants.

31. In the case at hand, admittedly, the trial has proceeded against non public servant. There is no charge against the public servant for the offences under P.C. Act could have been framed.

32. The CBI's plea that the pardon, granted to the public servants, treating them as approver, being a conditional one and that, in the event of their failure to support the prosecution, they would have to face the trial as accused, is a further

thing to happen. No jurisdiction can be vested on such hypothesis, which may or not come true.

33. If the said public servant accused persons support the prosecution, as per their assurance, then the trial would be against private persons for offence other than the offence covered by the P.C. Act. In that event the whole proceeding would be in violation of the statutory provision and the same would be vitiated for want of jurisdiction. Hence, I find no force in the said contention, raised on behalf of the CBI.

34. As on date, the clear position is that the Special Judge, by framing charge only against the private persons i.e. the petitioners, for the offences under Sections 120B and 420 IPC, has decided to proceed against them. No public servant has been charged for the offences under the Act.

Therefore, I have no hesitation in holding that the learned Special Judge has no jurisdiction to try the petitioners in the present form. Continuance of the proceeding will amount to abuse of process of the Court.

In such a situation, High Court, in exercise of its inherent power, under Section 482 of the Code, has to prevent the abuse of process of the Courts and secure ends of justice.

35. The offences under Section 120B and 420 IPC are triable by the Court of Judicial Magistrate First Class. The investigation in the present case, being made by the CBI, the learned Special Judge, Assam ought to have sent the case, against the present petitioners, to the Court of the Special Magistrate, Assam, Guwahati for disposal.

36. In view of the above, exercising jurisdiction under Section 482 Cr.P.C., for ends of justice, I find it to be a fit case to send the matter to the Court of the Special Magistrate, Assam, for trial.

37. Accordingly, the impugned charge, framed by the Special Judge is set aside.

38. The case be sent to the Court of the Special Magistrate, Assam, Guwahati for disposal as per law. The learned Special Magistrate, Assam, shall proceed with the case from the stage of consideration of charge. The petitioners shall appear before the learned Special Magistrate, Assam, Guwahati within 4 (four) weeks from this date.

39. With the above, this Criminal Revision Petitions are disposed of. Return the LCR.