

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% , Date of reserve : 25.02.2009
Date of decision : 12.03.2009

+ **Crl.REV P. No. 279/2007**

DILAWAR MIR ...PETITIONER

Through: Mr. Sanjiv.K.Jha, advocate

Versus

CBI ...RESPONDENT

Through: Vikas Pahwa, standing counsel CBI

+ **Crl.REV.P. No. 356/2007**

D.S. KANWAR ...PETITIONER

Through: Mr. D.R.Bhatia, advocate

Versus

CBI ...RESPONDENT

Through: Vikas Pahwa, standing counsel CBI

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

MOOL CHAND GARG, J.

1. This order shall dispose of both the aforesaid revision petitions which assails the order dated 06.03.2007 passed by a Learned Special Judge CBI in criminal case No. 10/2000 arising

out of R.C. No. AC-1/98-A0003/CBI/ACU-I/ND whereby charges have been framed against both the petitioners under Section 120-B/420 IPC read with Section 13(2) read with 13(1) (d) of the RC Act, 1988. The FIR, in the instant case, was registered on 30.6.1998 and the charge sheet against the accused persons was filed on 1.3.2000.

2. In short the allegations of the prosecution are that a contract was awarded by Shri D.S. Kanwar (Accused No. 1/ A1) while working as the General Manager with M/s. National Fertilizers Limited (NFL) in favour of Shri Dilawar Mir (Accused No. 2/ A2) for handling-cum-general services to National Fertilizers Limited (NFL) & transporting supplies to cooperatives and other institutional agencies in the State of Punjab and Haryana vide Agreement dated 9.9.1993 for a period of five years. The contract was signed by Accused No. 1 in his capacity as General Manager(Marketing) on behalf of NFL. As per the terms and conditions the Accused No. 2 was to be paid remuneration of Rs.65/- per metric tons of Urea manufactured by NFL and supplied to the institutional buyers. If the quantity of the fertilizers supplied exceeded 2 lacs tons, the enhanced remuneration was payable @ 100 per metric ton. In case the take-off was less than 1.5 lakh tons, the remuneration was to be reduced to Rs.50/ per metric ton. It is also the case of the prosecution that Accused No. 1 to give undue favour to Accused

No. 2, executed the contract in his favour without following the guidelines, in particular the guidelines given in letter dated 22.06.1990, wherein it was specifically mentioned that the General Manager (Marketing) though has full powers to enter into contract regarding handling of material, subject to conditions namely: (i) financial concurrence; (ii) allocation in the budget and (iii) prior approval of the Director (Finance) or Managing Director with regard to the rates and terms and conditions of contract involving the expenditure of Rs.50,000/- or above in each case. However, Accused No. 1 neither followed the guidelines nor invited tenders for the execution of this contract.

3. The Accused no. 1, in furtherance of conspiracy with Accused No. 2, also facilitated the release of ad-hoc payment of Rs.30 lacs in favour of Accused No. 2 and for that he directed staff of NFL to stay in office beyond the office hours and personally went to the office and collected the draft to be handed to Accused No. 2. The Accused No. 2 was a former Minister of Jammu & Kashmir State. The Accused No. 1 asked Sh. M. A. Sharma to release the ad-hoc payment without the same being verified by the field staff. This aspect of release of payment without verification stands established by the statement of prosecution witnesses M. A. Sharma and Anil Kumar Sharma. During the course of investigation, the CBI also recorded the statement of various witnesses who stated that no work was

performed by M/s Good Friends Agencies and was actually done by the field staff of NFL. The bills which were raised by the Accused No. 2 were false as no work was performed by them in terms of contract dated 9.9.1993. The perusal of letter dated 31.3.1995 also shows that Accused No. 1 facilitated the release of an ad-hoc payment of Rs.30 lacs against the bill of Rs.40 lacs.

4. The learned Special Judge, after hearing the parties, framed charges against both the petitioners under Section 13(2) & 13(1) (d) of the Prevention of Corruption Act, read with section.120-B/420, IPC and directed the petitioners to face trial in the aforesaid case.

5. Both the petitioners have assailed the said order and during the course of arguments have made identical submissions. Petitioner Dilawar Mir submitted that the criminal proceedings have been initiated against him on 20.2.1998 as a counter blast because the petitioner had challenged the illegal termination of the contract by way of Civil writ Petition No. 2322/1997. He has submitted that the agreement dated 9.9.1993 was entered into between National Fertilizers Limited and proprietorship concern of the petitioner namely M/s. Good Friends Agencies (GFA) on the recommendation of the then Union Ministers of state categorically. Thus it is submitted that there was no conspiracy between the petitioners and it falsifies the allegations made in the charge sheet of entering into a conspiracy by him with D. S.

Kanwar. It has been submitted that the allegations of the prosecution that the established procedure as set up by the various guidelines and rules of NFL was not followed stands falsified in the light of the fact that the contract dated 9.9.1993 was a rate contract and that the charge sheet nowhere discloses that the person finally signing the agreement was not empowered to enter into a rate contract. However the trial court in the impugned order dated 6.3.2007 in deciding that the person did not have power to enter into the contract states the rates at which the contract was to be given but fails to state that the Accused D. S. Kanwar was not entitled to enter into a rate contract.

6. It is also submitted that the liability to pay various amounts to Accused No. 2 was recognized and accepted by the Apportionment Committee which documents has been completely ignored by the trial Court. While framing of the charge. It is also submitted that there is nothing on record to show that the petitioner had any dishonest intention. It is also submitted that the Special Judge himself stated that even if it is assumed that there was no intention to cheat at the time of entering into the contract, there was definitely an intention to do so at the time of presenting the bills which it is submitted, is not correct view taken by learned Special Judge, in view of the following judgments:

AIR 2001 SC 1226

AIR 2003 SC 1069

AIR 1974 SC 301

(2006) 6 SCC 736 and

(2007) 10 SCC 110.

7. It has also stated that even otherwise no case was made out under Section 420 IPC read with Section 120-B IPC and there is every likelihood that the petitioner will stand acquitted without cross-examination of the witnesses.

8. In so far as Accused No. 1 is concerned while reiterating the submissions made by Accused No. 2 he also stated that the agreement in question was prepared by one Anil Kumar Sharma, the Deputy Manger and not by the petitioner D. S. Kanwar. The agreement went up to the higher authorities before it was finally executed. It is also stated that the Additional Manager (F & A) had given approval for payments and thus it cannot be said that the senior officials were not brought into the picture and were not aware of their entering into agreement in question. It is also submitted the Apportionment Committee nowhere states that there was any offence committed by the petitioner or that any fraud was played by him or that any act of cheating was done while entering into the agreement or while approving the payments to Mir Dilawar. It is, thus, submitted that in the facts of the case, the charges framed against the petitioner D. S. Kanwar

are required to be quashed.

9. I have heard the arguments on behalf of both the sides and have perused the written submissions.

10. From the written submissions placed on record by the Central Bureau of Investigation, it has come on record, that agreement in question though could have been executed by the General Manager, requires (i) financial concurrence; (ii) allocation in the budget and (iii) was subject to prior approval of the Director (Finance) or Managing Director which is not available in this case. For the rates and terms and conditions of contract, no tender was floated for the purpose of awarding such a contract which included huge financial liabilities. It is also submitted by the CBI that during the course of investigation they recorded statement of various witnesses. It is also the case of the prosecution that in fact no supplies were made by Accused No. 2 i.e. Dilawar Mir and he raised bogus bills.

11. Thus, on the one hand, the agreement in question was not executed by the petitioner D. S. Kanwar, in favour of second petitioner after following the norms, he also facilitated payment of huge amounts to Shri Dilawar Mir i.e. Accused No. 2 even though he had not performed the work assigned to him. Thus, prima facie, it cannot be said that no case is made out against the petitioners.

12. The defence raised by the petitioner can always be

examined by the Trial Court while recording the evidence. The facts which have been revealed by the prosecution in the challenge filed by them after investigation reveals that both the petitioners were found guilty of having committed offence under Section 420/120-B IPC read with Section 13(2) and 13(1)(d) of Prevention of Corruption Act.

13. It is well established that at the stage of framing of charges under Section 227 and 228 of CrPC, the truth, veracity and the necessary effect of the evidence, which the prosecution proposes to prove, is not required to be meticulously judged by the learned trial court. This exercise cannot be done with the standard of test, proof and judgment which is to be filed finally before finding the accused to be guilty or otherwise. The charges against the accused persons can be framed even on the basis of strong suspicion found on the material collected by the investigating agency during the course of investigation. The trial court can form a presumptive opinion regarding the existence of factual ingredients constituting the offence alleged and thus in that event, be justified in framing the charges against the accused in respect of the offences alleged to have been committed by them.

14. In this regard reference has also been made to the following judgments by the respondents, i.e.:

- i. Kanti Bhadra Shah Vs. State of West Bengal 2000(1) SCC 722;

- ii. State of Bihar Vs. RameshMir 1977(4) SCC 39;
- iii. Omwati Vs. State 2001 (4) SCC 333;
- iv. Umar Abdulla Skoor Sorathai Vs. Intelligence Officer, narcotic Control Bureau JT 1999 (5) SC 39;
- v. Sapna Ahuja Vs. State 1999 (5) AD, Delhi 407;
- vi. Radhey Shyam Vs. Kunj Bihari, 1989 Supp. (2) SCC 572;
- vii. State of M.P. Vs. S.B. Johari , 2000 SCC (Crl) 311 and;
- viii. Soma Chakravarty Vs. State, 126 (2006) DLT 289.

15. I have gone through the aforesaid judgments as well as the judgment cited on behalf of the petitioners and I have also examined the order passed by the Additional Sessions Judge framing the charges against both the petitioners.

16. A perusal of the order goes to show that the learned Special Judge has taken into consideration the material which was available on record, specifically the contract which was entered into between both the petitioners on behalf of National Fertilizers Limited without complying with the necessary formalities; the fact that no work was done in pursuance of the contract which was required to be done by M/s. Good Friends Agencies (a proprietary concern) of Dilawar Mir. Some of the observations made by the Special Judge can be incorporated for reference which shows that charge in question has been framed by the learned Special Judge after applying his judicial mind to the facts

of this case.

“ I am unable to appreciate the contention raised on behalf of the accused persons that the original contract has not been placed on record which would have shown that it had been forwarded or recommended by the Hon’ble Minister or by the Managing Director. Documents D2 is the original contract, which is signed by A.1 on behalf of NFL and accepted by A2 being proprietor of Good Friends Agencies. As per the office order dated 22.6.90(d7) the General Manager (Marketing) had full powers to enter into contract regarding handling of material subject to two conditions namely financial concurrence and allocation in the budget and subject to prior approval of Director (fin) or Mg. Director with regard to the rates and terms and conditions of contract involving expenditure of Rs.50,000/- or above in each case. The contract in question was for a period of five years w.e.f. October 1, 1993. It is mentioned in the contract that there was a gestation period of six months and the management could terminate the contract if A2 was not in a position to discharge his service obligation to the entire satisfaction of NFL. In my view, it is clear from the term of the contract that it was for a period of five years. Assuming for the sake of argument that it could be terminated after a period of six months and therefore it was for a period of six months, even then the term would show that A2 was to be paid the handling charges @ Rs.65/-PMT in respect of the Urea supplied to the institutional agencies and cooperative societies. It is part of the terms and conditions itself that A2 was entitled to enhanced remuneration @ 100 PMT if the quantity was to exceed 2lacs MT for a single crop season of six months. It was therefore apparent that even during the period of six months A2 could get a commission of more than Rs.2 Crores if the supplies were above 2 lacs MTs. A perusal of the letters dated 18.12.93 (d42), 4.1.94 (D.44), 15.2.94 (D45), 15.2.94 (D46), 10.2.94 (D47) would show that during the span of couple of months the bills @ Rs.65 PMT totaling about Rs.40 lacs were raised by A2 on NFL, **it is therefore apparent that the contract involved expenditure of more than Rs.50,000/- and therefore prior approval of Director (Fin.)/ Managing Director was required for entering the contract. There is not even a whisper in the agreement dated 9.9.93 signed by A2 and A1 that there was approval of Director (F)/MD. Thus at this stage, I am inclined to believe that the contract was entered into by**

A1 without requisite authority for the same.

I have just mentioned herein above that certain bills were submitted by A2. It has come in the statement of Shri M. A. Sharma that on 31.5.1994, A1 had asked him to stay in the office after office hours. He has further stated in his statement u/s. 161 that Anil Kumar Sharma (witness no. 34) had also come to his office and had received similar orders from A1.

When they reported to A1, they were informed that the company (NFL) had entered into a contract with M/s. Good Friends Agencies and had appointed them as handling and general service contract for the sale of Urea fertilizers to institutional agencies. He also handed over a copy of the contract and told them to release and ad-hoc payment of Rs.30 lacs which was released in favour of A2 proprietor of M/s Good Friends agencies on the instructions of D. S. Kanwar (A1) on 1.6.94. **The witness has further stated that A1 had personally collected the cheque and left the office for handing over the same to A2. He states that it was later learnt that Dilawar Mir was the Ex Minister of J & K State. The witness has stated that he had asked A1 while releasing an ad-hoc payment that the bills submitted by M/s Good Friends Agencies have not been verified by the field staff of A1 and did not care for the work and asked him to make payment. To the same effect is the statement U/s. 161 CrPC made by witness no. 34 Anil Kumar Sharma. A perusal of the various bills i.e. D.43 to D.47 on record would show that the same have been claimed @ Rs.65 PMT though as per the revised offer made by A2 vide letter dt. 31.3.95 (D52), A2 had mentioned that he may be paid @ Rs. 15PMT (instead of Rs.65 PMT) and that except for the work of liaison procurement of order and realization of payment could not be done by Good Friends Agencies. The said officer made by A2 was readily accepted by A.1. During the course of investigation the CBI has recorded the statement of number of witnesses to the effect that the work was not performed by Good Friends Agencies and that the work was in fact done by the field staff of NFL. The dishonest intention could be inferred on the part of A2 in raising the bill @ Rs. 65 PMT, when A2 was well aware that the work in terms of contract dt. 9.9.93 had not been done. If the subsequent letter dated 31.3.95 (D52) is**

accepted on the face value, asking for release of adhoc payment of Rs.30 lacs against the bill for Rs.40 lacs by A1 to his subordinate officers would lead to an inference of conspiracy between A1 and A2 for doing an illegal act. It can also be inferred from the material collected during investigation that A2 had misused his official position to cause wrongful gain to A2.

There is nothing on record to show that the contract was forwarded by the minister of State for Chemicals & Fertilizers or that the contract was recommended by the Managing Director of the NFL. Assuming that the Minister had forwarded any application made by A2 that would not mean that the established procedure has to be given a go by or that the contract has to be awarded to A2.

An apportionment committee was constituted to apportion the amount under different heads to find out as to what would be the amount payable to A2. Thus as against the payment of Rs.100 PMT, A2 was not entitled to Rs.91.90 paise plus A2 was also to pay the demurrage/wharfage if any. Moreover, as per condition 3(h) of the contract dated 9.9.93 it was the duty of the contractor to recover the payment including the interest on delayed payment at bank rate plus 1%. This amount of interest was also recoverable from the remuneration paid to M/s. Good Friends Agencies. The hurried payment without considering the recovery under these heads at the instance of A1 and collection of the cheque by A1 for handing over the same to A2 would also lead to an inference of conspiracy between A1 and A2. The statement of witness no. 2 that the contents of the contract were typed by him on dictation of A1 in September 1993 would also point out that there was no approval from the ED(F) or MD of NFL. Statement of witness No. 3 would show that there was no need of the contract like the one dated 9.9.94 as NFL had sufficient field staff to take care of the work (and in fact the major work had not been done by A2 as was stated by him in his letter for revising the terms of the contract vide D.52)."

17. The aforesaid discussion clearly holds that in this case Accused No. 1 not only mis-used his official post in executing the agreement in favour of Accused No. 2 without following the guidelines so as to benefit him out of the bill; Accused No. 2 also

tried to cheat NFL without doing the work. Thus, all the ingredients of charges framed against the petitioner were available on record. In these circumstances, the charges framed against both the petitioners are justified and as such both the petitions are dismissed. The parties may appear before the learned Special Judge on the date as fixed for further proceedings.

MOOL CHAND GARG, J.

March 12, 2009
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