

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 14th January 2009
Date of decision: 23rd January 2009

CRL.M.C. No. 1164 of 2006

JITENDRA KUMAR SINGH PETITIONER
Through: Mr. Dinesh Mathur, Senior Advocate
with Mr. Kanwar Nain
and Mr. P.N.Chandan, Advocates.

versus

STATE THR. CBI RESPONDENT
Through: Mr. Ashish Kumar, Advocate.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

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| 1. | Whether Reporters of local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in Digest? | Yes |

JUDGMENT
23.01.2009

Dr. S. Muralidhar, J.

CRL.M.A. No. 7810 of 2006 (condonation of delay)

For the reasons stated in the application, the delay in filing the petition is condoned.

The application is disposed of.

CRL.M.C. No. 1164 of 2006 & CRL. M.A. No. 7808 of 2006, & CRL.M.A. No.9592 of 2008 (stay)

1. This petition under Section 482 CrPC seeks the quashing of

criminal proceedings in Case No. 12/5 titled *CBI v. J.K. Singh & Others* under Section 120B read with Section 420 IPC pending before the learned Metropolitan Magistrate ('MM'), New Delhi insofar as the petitioner is concerned.

2. The Petitioner was at the relevant time Chairman of M/s. Mideast Integrated Steels Ltd. ('MISL'), New Delhi. On 29th September 1994, Bharat Heavy Electricals Ltd. ('BHEL') obtained an order from MISL for supply of five diesel electric locomotives for MISL's steel plant at Jajpur in Orissa for a total value of Rs.342.36 lakhs. The cost of each diesel electric locomotive was Rs.62 lakhs and the time schedule for delivery required one locomotive to be supplied in April 1995, two in May 1995 and the remaining two in June 1995. The payment terms were thus following: 10% of the contract value was to be paid in advance, 5 % of the contract amount on approval of drawing 85% of contract value on proof of dispatch against irrevocable letter of credit through any nationalized bank.

3. The case of the Central Bureau of Investigation ('CBI'), which is the investigating agency in this case, is that on 6th December 1994 MISL issued a letter to BHEL under the signature of its Vice President whereby it stated that two sets of dispatch documents along with invoices and inspection certificate were to be sent to the Associate President of MISL and another four sets recommending release of payment to MISL Jajpur. It was stated that on the

recommendation being made from Jajpur payment would be released to BHEL by MISL. According to the CBI, that these instructions regarding payment were contrary to the mode of payment stipulated in the letter of intent. It is stated that had this been done, it would have been ensured that the locomotives would be dispatched to MISL only after receipt of the full payment through the nationalized bank. The specific allegation in the chargesheet is that “M/s. MISL with the intention of cheating BHEL, changed the mode of payment eliminating the contractual clause wherein dispatch hereby documents were to be routed through a nationalized bank which would have ensured fool proof performance of contractual obligations by M/s. MISL.” The allegation against the Petitioner is that he “intentionally and deliberately” changed the mode of payment.

4. The case of the CBI is that although N.K. Garg of the BHEL wrote a letter on 29th December 1994 to the MISL requesting for the name of the bank through which the documents were to be routed, as per the directions of the Petitioner the General Manager (Finance), MISL was instructed not to furnish the name of the bank to BHEL. Two locomotives were dispatched by BHEL Jhansi on 30th March 1995 to the factory of MISL Jajpur. The amount of Rs.78,98,000/- was received by Shri N.K. Garg of BHEL vide cheque Nos.672554 to 672561 dated 7th June 1995 issued by MISL. The third locomotive was dispatched to MISL on the basis of a letter dated 20th May 1995

of Shri A.K. Pandey of BHEL. A sum of Rs.15 lakhs from the MISL Delhi office was received by Shri N.K. Garg of the BHEL by two cheques No.672601 and 672602 dated 15th June 1995 for Rs. 10 lakhs and Rs.5 lakhs respectively. Shri A.K. Pandey, BHEL wrote a letter dated 22nd June 1995 to the Associate Vice President, MISL, New Delhi mentioning that payment of 10% for all the five locomotives had been received and 70% payment for the first two locomotives had also been received but that 70% payment against the dispatch of the third locomotive was outstanding. Thereafter the fourth locomotive was dispatched on 17th July 1995 and the fifth on 24th July 1995 without any decision being taken on the non-payment of the full amount on the earlier three locomotives which had already been dispatched. It was stated that out of the total price of Rs.3,46,38,056/- for the five locomotives, the BHEL received payment of only Rs.1,41,71,681. It was stated in the charge sheet filed by the CBI that “thus an amount of Rs.2,04,66,375/- is still outstanding and the same was intentionally not paid to BHEL by Shri J.K.Singh, Chairman of M/s. MISL.

5. It is stated in paras 19 and 20 of the charge sheet as under:

“19. That during the relevant period M/s. MISL had a bank balance of at least Rs.40 crores approximately, in ANZ Grindlays Bank, Connaught Circus Branch and in spite of having such a huge amount in his company’s account Shri J.K. Singh did not honour the contractual payment obligation with BHEL. This clearly indicates that

right from the beginning, when M/s. MISL unilaterally changed the mode of payment which was contrary to terms and conditions of payment and till the time when he intentionally defaulted on payment for 5 locomotives, Shri J.K. Singh was intent on cheating BHEL.

20. That the above facts disclose that Shri J.K. Singh Chairman-cum-Managing Director of M/s. MISL in conspiracy with Shri I.B.Singh Dy. General Manager of M/s. MISL, cheated BHEL to the tune of Rs.2,04,66,375/- by intentionally and deliberately changing the mode of payment which was to be routed through a nationalised bank as per terms of contract. Further, even after changing the mode of payment, they defaulted on pending payment in spite of having a huge bank balance of Rs.40 crores in ANZ Grindlays Bank Connaught Circus Branch. In this regard, Shri A.K. Mathur, the then Dy. General Manager Shri N.K. Garg, Dy. General Manager BHEL, TBD, New Delhi Shri Vijay Sharda, Addl. General Manager BHEL Bhopal and Shri A.K. Pandey Sr. Engineer, LMC, BHEL Jhansi also committed acts of commission and omission which resulted in wrongful pecuniary loss to BHEL. The aforesaid public servants were negligent in not ensuring proper performance of contract by M/s. MISL as per laid down terms and conditions.”

6. On the basis of the above charge sheet the learned MM passed the following order on 7th February 2005:

“Present: IO/Inspector Ram Singh with T.P.Singh

for DLA and B.K. Singh, P.P.

Heard, charge sheet, statement of witnesses and material on record perused.

Accused J.K. Singh is the Chairperson of M/s MISL and Rita Singh is the Managing Director of the said company. Record shows that all the cheques were issued on the instructions of J.K. Singh and also of Rita Singh. And on priority of payment were decided by both J.K. Singh and Rita. The cheque dated 23.9.96 for Rs.15 lacs in favour of BHEL was issued by Rita Singh from the account of MISL to ANZ Grindlays Bank.

On considering the material on record I am satisfied that there are sufficient grounds to proceed further under section 120B r/w 420 IPC against M/s.MISL, J.K. Singh Chairman of MISL, Mrs. Rita Singh MD and I.B. Singh, DGM. However the company cannot be prosecuted if the offence is punishable for mandatory imprisonment in view of the order of the Hon'ble High Court.

Issue process to J.K. Singh, Rita Singh & I.B. Singh for 16.3.05 through SP/IO concerned.”

7. At this stage it must be noticed that in the above order, insofar as it concerns the co-accused Rita Singh, the Managing Director of MISL, was quashed by this Court by an order dated 17th January 2008 in Crl. M.C. No. 810 of 2005. In the case on hand, by an order dated 5th August 2005, this Court stayed the operation of the impugned order dated 7th February 2005 and all further proceedings in the Case No.

12/5.

8. It is submitted by Mr. D.C.Mathur, learned Senior counsel for the Petitioner that the charge against the Petitioner is for the offence under Section 120B read with Section 420 IPC. He refers to the allegation in the charge sheet that “Shri J.K. Singh Chairman-cum-Managing Director of M/s. MISL in conspiracy with Shri I.B. Singh Dy. General Manager of M/s. MISL, cheated BHEL to the tune of Rs.2,04,66,375/- by intentionally and deliberately changing the mode of payment...” He also refers to the statement in para 20 of the charge sheet that several officials of the BHEL “also committed acts of commission and omission which resulted in wrongful pecuniary loss to BHEL. The aforesaid public servants were negligent in not ensuring proper performance of contract by M/s. MISL as per laid down terms and conditions.” According to Mr. Mathur, despite the charge being under Section 120-B IPC, the officials of the BHEL are not being prosecuted since the competent authority has declined sanction. He points out that the Petitioner cannot be said to be in conspiracy with another employee of MISL in the prosecution’s case is that the payments by way of cheques were received by the BHEL officials instead of being routed through the nationalized bank. That act could not have been committed without the participation of the BHEL officials and therefore no case of criminal conspiracy can be even prima facie made out against the petitioner in the absence of the BHEL officials being arraigned as accused.

9. It is further submitted that in the charge sheet the company MISL has not been arraigned as an accused. In the absence of the company being arraigned as an accused, the Petitioner in his capacity as Chairman cannot be so arraigned since the offence for which he is sought to be prosecuted is only under the IPC which does not contemplate any vicarious criminal liability. Reliance is placed on the judgments of the Supreme Court in *Maksud Saiyed v. State of Gujarat* 2006 (5) SCC 668, *S.K. Alagh v. State of U.P.* 2008 II SCC (Crl) 686 and *R. Kalyani v. Janak C. Mehta* 2008 XII AD (SC) 277 and the judgment of this Court in *Ashok Sikka v. State* 2008 III AD (DELHI) 145.

10. Mr. Mathur further submits that when the charge sheet is read as a whole, it only makes out a case of failure to perform a contractual obligation of making full payment for the supply of goods. In fact the specific allegation in para 19 is that the Petitioner “did not honour the contractual payment obligation with BHEL.” Clearly, therefore the issue was one of non-fulfillment of a contractual obligation for which no criminal proceedings under Section 420 IPC was maintainable. Relying on the judgments of the Supreme Court in *Anil Mahajan v. Bhore Industries Ltd.* (2005) 10 SCC 228, *Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque* (2005) 1 SCC 122 and *Central Bureau of Investigation v. Duncans Agro Industries Ltd.* JT 1996 (6) SC 227 it is submitted that instituting criminal proceedings in such circumstances was clearly bad in law.

Reliance is also placed on the judgment of the Division Bench of this Court in *Anil Kohli v. State (NCT of Delhi) 95 (2002) DLT 173* where in similar circumstances of non-fulfillment of a contractual obligation it was held that the offences under Sections 420/406 IPC were not attracted

11. On behalf of the CBI Mr. Asheish Kumar learned counsel submits that the charge sheet indicates that the payment for the two locomotives was not routed through the nationalized bank. He submitted that had it been routed through the nationalized bank then the dispatch of the locomotives would never have taken place without the BHEL receiving the full payment and therefore this was a case of cheating. He submitted that there is sufficient material to show that the Petitioner was responsible for this happening and therefore notwithstanding the fact that MISL might have not been proceeded against, that there was sufficient ground to proceed against the Petitioner. As regards the submission that this was essentially a failure to perform a contractual obligation it was submitted that this is a matter of evidence and not a ground for quashing of the criminal proceedings.

12. The first issue to be considered is whether the petitioner, in his capacity as Chairman of MISL, could be prosecuted for an IPC offence in the absence of the company MISL being prosecuted. A perusal of the order dated 7th February 2005 passed by the learned

MM shows that although the court was satisfied that there was sufficient ground to proceed under Section 120 B read with Section 420 IPC against the MISL, J.K. Singh Chairman, Ms. Rita Singh, MD and I.B.Singh DGM, process was issued only to “J.K. Singh, Rita Singh and I.B. Singh.” In other words, not only was MISL not named as an accused in the charge sheet filed by the CBI, but even process was not issued to it by the learned MM. For all purposes therefore MISL itself is not being prosecuted as an accused in the case.

13. The offence with which the Petitioner is charged is under Section 120 B read with Section 420 IPC and he has been roped in as an accused in his capacity as Chairman of MISL, without MISL itself being named as an accused. In a recent judgment in *R. Kalyani v. Janak C. Mehta 2008 XII AD (SC) 277* the Supreme Court has observed thus:

“27. If a person, thus, has to be proceeded with as being variously liable for the acts of the company, the company must be made an accused. In any event, it would be a fair thing to do so, as legal fiction is raised both against the Company as well as the person responsible for the acts of the Company.”

Earlier in *S.K. Alagh v. State of U.P. 2008 (II) SCC (Crl) 686* the Court reiterated this aspect when it held, in the context of an IPC offence, that “a Director of a Company or an employee cannot be held to be vicariously liable for any offence committed by the

Company itself.” Further in *Maksud Saiyed* it was explained that: “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.”

14. In the case on hand, it requires to be noticed that the Petitioner is sought to be roped in only in his capacity as Chairman, MISL and not even as a Director. Without going into the question whether under the Companies Act, 1956 any liability attaches to a ‘Chairman’, it requires to be noted that MISL has in any event not been arraigned as an accused. On the strength of the law explained by the Supreme Court in *Maksud Saiyed*, *S.K. Alagh* and *R. Kalyani* it is held that in the absence of MISL being itself named as an accused, and where the offences are only under the IPC, the Petitioner, in his capacity as Chairman of MISL cannot be sought to be roped in as an accused.

15. The learned Senior counsel for the petitioner is also right in his contention that in the context in which the allegation is made in the charge sheet the Petitioner cannot be said to have been in criminal conspiracy with another employee of MISL itself. The allegation is that payments were made by MISL and received by officials of BHEL directly and not through a nationalized bank. Without participation of the officials of the BHEL there is no question of any criminal conspiracy being hatched or executed or completed. When the officials of the BHEL themselves have not been proceeded

against for want of sanction, the question of proceeding against only Petitioner under Section 120B IPC is clearly not tenable in law. Moreover, the charge sheet itself only accuses of officials of BHEL in acting 'negligently' and this is inconsistent with the case of the CBI that a criminal conspiracy attracting the offences under Section 120 B read with Section 420 IPC had taken place. In ***Amrit Lal Rati Lal Mehta v. State of Gujarat 1980 SCC (Crl) 81*** it was observed that mere inadvertence and negligence would be destructive of the charge of having acted dishonestly with intent to defraud.

16. As regards the contention that what is sought to be enforced is only a contractual obligation, it requires to be noticed that once the charge of the Petitioner deliberately making payments directly to the BHEL as constituting an act of cheating goes, the only charge that remains is that of the failure on the part of MISL to make full payment to the BHEL for the five locomotives dispatched to it by the BHEL. The failure to make the full payment towards the contract cannot be by itself constitute the offence of cheating. The law in this regard is well settled in the judgments in ***Anil Mahajan, Zandu Pharmaceutical Works Ltd.*** and ***Duncans Agro Industries Ltd.***

17. For the aforementioned reasons, it is held that there was no material on the basis of which the learned MM could have issued process to the Petitioner by the impugned order dated 7th February 2005. The said order is accordingly quashed. The criminal

proceedings in Complaint Case No. 12/5 titled ***CBI v. J.K. Singh & Others*** under Section 120B read with Section 420 IPC in so far as it concerns the Petitioner will stand quashed.

18. The petition is accordingly allowed with no order as to costs.

S. MURALIDHAR, J.

JANUARY 23, 2009

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