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

+ CRL.M.C. 789/2010

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Date of decision: 9th April, 2010

I B SINGH

..... Petitioner

Through Mr. Dinesh Mathur, Sr. Advocate with
Mr. Kawal Nain & Mr. P.N. Chandan,
Advocates.

versus

STATE THR. CBI

..... Respondent

Through Mr. Vikas Pahwa, Standing Counsel
for CBI & Mr. Biswajit Kr. Patra, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

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

ORDER

Heard.

1. With the consent of the parties, the matter is taken up for final disposal.
2. The petitioner is facing prosecution in case No. RC AC 1 2002 A 0001 titled ***CBI versus J.K. Singh and Others*** under Section 420 read with 120B of the Indian Penal Code. Initially the complaint was filed against M/s Mideast Integrated Steels Limited (MISL, for short) and Mr. J.K. Singh and Mr. I.B. Singh. However, by summoning order dated 7th February,

2005, cognizance was not taken against MISL but process was issued against Mr. J.K. Singh, Mr. I.B. Singh and Ms. Rita Singh.

3. Ms. Rita Singh filed a petition under Section 482 being Criminal Miscellaneous No. 810/2005. The said petition was allowed vide judgment dated 17th January, 2008, inter alia, recording that there was no evidence or material on the basis of which learned Metropolitan Magistrate should have issued summons against her.

4. A Petition filed by Mr. J.K. Singh, Criminal Miscellaneous Case No. 1164/2006, was also allowed vide judgment dated 23rd January, 2009. In this judgment, learned single Judge has examined the charge sheet and the contents thereof in paragraphs 3 to 5. For the sake of convenience, the said paragraphs are reproduced below:-

“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.”

5. A reading of the aforesaid paragraphs show that the said allegations pertain to purchase/supply of five diesel locomotives to MISL and the resultant pecuniary loss to Bharat Heavy Electricals Limited. Mr. J.K. Singh was being prosecuted as he was Chairman/Managing Director of MISL in view of the aforesaid allegations.

6. In the charge sheet filed before the learned Metropolitan Magistrate, Mr. J.K. Singh has been described as Chairman-cum-Managing Director of MISL and Mr. I.B. Singh has been described as Deputy General Manager of MISL. Name of Mr. I.B. Singh appears in paragraphs 10 and 20 of the charge sheet, which for the sake of convenience are reproduced below:-

“10. That with reference to the letter of intent (LOI) dated 29.9.94 M/s MISL on 6.12.94 issued detailed dispatch instruction under the signature of Shri I.B. Singh, Vice President of M/s MISL, whereby it was stated that 2 sets of dispatch documents alongwith the invoices and inspection certificate were to be sent to the association president of M/s MISL and another

4 sets recommending release of payment to M/s MISL Jajpur. The same dispatch instruction also stated that it would be on the basis of recommendation from Jajpur that payment shall be released to BHEL by M/s MISL. The above instructions regarding payment were contrary to the purchase order dated 29.9.94 which had clearly stipulated that the payments shall be released through a nationalized bank. However, M/s MISL with the intention of cheating BHEL, changed the mode of payment eliminating the contractual clause wherein dispatch documents were to be routed through a nationalized bank which would have ensured fool proof performance of contractual obligations by M/s MISL.

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 cheating 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 nationalized bank as per terms of contract.....”

7. There is merit in the contention of the petitioner that the reasoning and the findings given by the learned single Judge in his judgment dated 23rd January, 2009 passed in Criminal Miscellaneous Case No. 1164/2006 are equally and squarely applicable to the case of Mr. I.B. Singh. Reference in this regard can be made to paragraphs 12 to 16 of the said judgment, which for the sake of convenience are reproduced below:-

“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.*”

8. It is accepted and admitted in the reply affidavit that the respondent-CBI has not challenged the findings recorded above and has accepted the decision dated 23rd January, 2009 passed in Criminal Miscellaneous Case No. 1164/2006.

9. It is noticed that the summoning order was passed on 7th February, 2005 and the present petition has been filed on or about 6th January, 2010. It is not possible to agree with the contention of the petitioner that no limitation period has been prescribed for filing of a petition under Section 482 of the Code of Criminal Procedure, 1973 and, therefore, it is open to the petitioner to challenge and question the summoning order at any time. Even if no limitation period is prescribed for filing of a petition under Section 482, the petition should be filed within reasonable time. What is a reasonable time would depend upon facts of each case. In the present case,

I am not inclined to dismiss the present petition on the ground of delay as even Charge has not been framed and evidence has not been recorded. It is also noticed that the proceedings before the learned Metropolitan Magistrate had remained stayed after the earlier miscellaneous cases were filed before this High Court challenging the summoning order in the case of Ms. Rita Singh and Mr. J.K. Singh. No distinction has been drawn or made out by the respondent-CBI in the case of Mr. I.B. Singh and, therefore, the ratio of the decision of the learned single Judge dated 23rd January, 2009 passed in Criminal Miscellaneous Case No. 1164/2006 in the case of ***J.K. Singh versus State*** will fully apply to the facts of the present case. The petition is accordingly allowed and the summoning order against the petitioner is quashed.

SANJIV KHANNA, J.

APRIL 09, 2010
VKR