

GAHC020001762018



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/74/2018

AMIT SARKAR
S/O LATE ARUN SARKAR
RESIDENT OF WALFORD BURMA CAMP ROAD
KOHIMA

NEILIE KOZA SARKAR
W/O AMIT SARKAR
R/O WALFORD BURMA CAMP ROAD

VERSUS

THE STATE OF NAGALAND AND 4 ORS.
KOHIMA

2:VIGILANCE COMMISSION NAGALAND
DIRECTORATE OF VIGILANCE AND ANTI CORRUPTION POLICE
KOHIMA

3:) THE DIRECTOR AND DIG OF POLICE
VIGILANCE AND ANTI CORRUPTION
KOHIMA

4:ADDL.SUPERINTENDENT OF POLICE
VIGILANCE AND ANTI CORRUPTION POLICE
KOHIMA

5:OFFICE THE LOKAYUKTA
KOHIMA
NAGALAND
NEW SECRETARIAT AREA
OLD VIGILANCE COMMISSIONER BUILDING
KOHIMA
NAGALAN

Advocate for the Petitioner : S. S. DEY, SR. ADV

Advocate for the Respondent : GOVT ADV NL

Linked Case : WP(C)/60/2018

M/S KODONYI ENTERPRISES
KOHIMA

2: KODOTSOLO VENUH
S/O LT. ANYI CHAKHESANG
MANAGER M/S KODONYI ENTERPRISE
BURMA CAMP ROAD WALFORD
DIMAPUR
VERSUS

THE STATE OF NAGALAND AND 4 ORS.
KOHIMA

2:VIGILANCE COMMISSION NAGALAND
DIRECTORATE OF VIGILANCE AND ANTI CORRUPTION POLICE
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3:THE DIRECTOR AND DIG OF POLICE
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NEW SECRETARIAT AREA

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KOHIMA
NAGALAND

Advocate for : S.S DEY
SR.ADV.

Advocate for : GOVT ADV NL appearing for THE STATE OF NAGALAND
AND 4 ORS.

Linked Case : AB/32/2018

AMIT SARKAR
S/O LATE ARUN SARKAR
RESIDENT OF WALFORD BURMA CAMP ROAD
KOHIMA

2: NEILIE KOZA SARKAR
W/O AMIT SARKAR
R/O WALFORD BURMA CAMP ROAD

VERSUS

THE STATE OF NAGALAND
KOHIMA

Advocate for : S. S. DEY
SR. ADV
Advocate for : appearing for THE STATE OF NAGALAND

Date of Hearing & Judgment : **26.02.2024**

BEFORE
HON'BLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT & ORDER (ORAL)

Heard Mr. S.S. Dey, learned senior counsel assisted by Mr. Pfosekho Pfofte, learned counsel for the appearing for the petitioners and Mr. Imti Imsong, learned Additional A.G., Nagaland, appearing for the respondent State and Mr. T.B. Jamir, learned counsel appearing for respondent No. 5.

- 2.** All the 3 (three) proceedings are taken up together for disposal taking into account similarity of the facts and issues involved.
- 3.** From the materials on record it reveals that an FIR was filed by the Deputy Inspector General of Police, Vigilance & Anti-Corruption, Nagaland on 21.08.2017 alleging *inter alia* that from a preliminary investigation conducted by Shri B. Phongtau Phom, Dy. S.P., it was seen that there was an involvement of private

individuals as well as Government officials in the commission of offence. It is further seen from the said FIR that on the basis of a preliminary investigation prima facie evidence have been established that a total amount of Rs. 16,23,00,000/- (rupees sixteen crores twenty three lakhs) were released under the Forward Linkage Scheme by setting up of MRI Unit at NHAK, Rs. 15,49,40,000/- (rupees fifteen crore forty-nine lakh and forty thousand) was paid to M/S Kodonyi Enterprises (for short 'the enterprise in question') in two installments, i.e. on 22.03.2013 and on 03.10.2013 and the remaining amount of Rs. 73,60,000/- (rupees seventy three lakh sixty thousand) was paid to the Assistant Commissioner of Tax, Kohima, being the VAT on 22.03.2013. It has been further mentioned that the Budgetary Quote from SIEMENS for the machine with 22 supporting accessories, local accessories and installation was Rs. 5,00,00,000/- (rupees five crores) whereas the bill submitted by the enterprise in question for the cost of the MRI machine including transportation and installation charges, its accessories including installation charges, Civil Works including transportation and installation charges, Office furniture including transportation and installation charges and Silent Diesel Generator including transportation, civil works and installation charges was Rs. 16,23,00,000/- (rupees sixteen crores and twenty three thousand) inclusive of Rs. 73,60,000/- (seventy three lakhs sixty thousand) VAT. It further reveals from the preliminary investigation that the total numbers of the equipment alongwith the accessories and installations would have been Rs. 4,68,00,000/- (rupees four crores sixty eight lakhs) which includes the cost of transportation from China to Mumbai. However, the enterprise submitted a bill of Rs. 7,60,00,000/- (rupees seven crores sixty lakhs) for the cost of MRI machine including transportation and installation, Rs. 1,50,00,000/- (rupees one crore fifty lakhs) for the optional/non-optional SIEMENS items including transportation and installation charges. It is further mentioned in the said FIR that an amount of Rs. 4,42,00,000/- (rupees four crore forty two lakhs) was claimed by the enterprise in excess of the total amount. Further to that, the total cost of Civil Works including transportation and installation charges was Rs. 1,61,40,000/- (rupees one crore sixty one lakh and forty thousand) which

required physical verification of the Technical Wing and the cost of comprehensive warranty of the machine for a period of 5 years @Rs. 82,00,000/- (rupees eighty two lakh) per year i.e Rs. 4,10,00,0000/- (rupees four crore ten lakhs) required proper clarification from the contractor.

3. On the basis of the said FIR, a case was registered under Section 120B read with 409/420/465/477A of the IPC and Section 8/9/13(1)(c)(d)&(2) of the Prevention of Corruption Act, 1988 (for short, the Act of 1988) and the same was endorsed to the Additional S.P., Vigilance & Anti-Corruption for investigation. This initiation of investigation by the Nagaland State Vigilance Commission had been challenged in the instant proceedings on the ground that the State Vigilance Commission would have no jurisdiction to carry out any enquiry or investigation against the petitioners.

4. It is specific case of the petitioners that the resolution dated 09.04.1976 on the basis of which the State Vigilance Commission was set up enumerates at Clause (2) the jurisdiction of the State Vigilance Commission and the powers in respect of all matters enumerated therein. Referring to sub-clause (a)(b)&(c) of Clause (2), it was the case of the petitioners that the State Vigilance Commission could undertake any enquiry into any transaction or cause an enquiry or investigation or enquiry into complaints of corruption, misconducts, lack of integrity or others against all malpractice or misdemeanors only when it is related to public servants. It is, therefore, the specific case of the petitioners that as on perusal of the FIR, it would reveal that the allegation primarily is that the petitioners herein had supplied machine and installed the same at a price higher than what the petitioners could have done so, the State Vigilance Commission could not have investigated, caused an enquiry or investigation on the basis of the said allegation. Accordingly, the said proceedings which was initiated, being registered as Case No. RC-10/2017 and the Orders passed therein were challenged in WP(C)/60/2018 and WP(C)/74/2018.

5. This writ petition, being WP(C)/74/2018, was filed by 2 (two) writ petitioners who claim to be owner/proprietor of the enterprise in question. Prior to that, the writ petition being registered as WP(C)/60/2018 was filed by the

enterprise as the petitioner No. 1 and its Manager, who was the petitioner No. 2 claiming the same reliefs.

6. Before further proceeding, this Court finds it relevant to take note of that pursuant to the resolution dated 09.04.1976 whereby the Nagaland State Vigilance Commission was constituted vide a Notification dated 15.06.1976 the Governor of Nagaland declared the Office of the Director of Vigilance as the Police Station with effect from the date of issue of the said Notification. It is further apposite to take note of another Notification dated 21.08.1999 whereby the Chief Secretary, Governor of Nagaland in exercise of the powers conferred under Section 2(o) of the Code of Criminal Procedure, 1973, declared that the Director of Vigilance & Anti-Corruption, Nagaland, be the Officer-in-Charge of the Vigilance Police Station for the whole State of Nagaland with its Headquarters at Kohima. Further, it was also stipulated that the Director and the Officers of the Directorate of Vigilance & Anti-Corruption shall be deemed to be Police Officers of the Vigilance Police Station and have jurisdiction and power to investigate into offences being punishable under the various Sections which would include:-

- (1) all offences under the Prevention of Corruption Act, 1988;
- (2) Section 406 to 409, IPC and 417 to 420, IPC;
- (3) Section 471 to 477A,IPC;
- (4) all offences under Official Secrets Act, 1923;
- (5) all offences under the Assam maintenance of Public Order Act, 1974;
- (6) attempts, abetments of offences in item 4 to 5 above, by whosoever committed.
- (7) any other particular offence or offences that may be specified by the State Government.

7. Subsequent thereto, vide another Notification dated 23.03.2007, the Chief Secretary to the Government of Nagaland, in exercise of the powers under Section 3(i) of the Act of 1988 read with Rule 15(b) of the Rules for Administration of Justice & Police in Nagaland, 1937 and the Notification dated 19.06.1975 issued by the Government of Nagaland under the proviso to sub-section 2 of the Code of Criminal Procedure, 1973 appointed the Tribunal for

disciplinary proceedings in Vigilance Commission, Nagaland, as a Special Judge within the jurisdiction of the Police Station of the Vigilance Commission. In terms with the said Notification, the said Tribunal could exercise jurisdiction in respect to Clause (a) any offences punishable under the Act of 1988 and (b) any conspiracy to commit or any attempt to commit or abetment of any of the offences as specified in clause (a). From the tenure of the said FIR dated 21.08.2017, it is the opinion of this Court that Nagaland State Vigilance Commission could have investigated and thereupon brought to the logical conclusion the said allegations contained in the said FIR.

8. Be that as it may, in the meantime there had been certain statutory developments in as much as the Nagaland *Lokayukta* Act, 2017 which is the Act 1 of 2018 was enacted (for short, Act of 2018). In terms with Section 36 of the Act of 2018, the resolution of the Nagaland Legislative Assembly constituting the State Vigilance Commission stood repealed from the date of an appointment of *Lokayukta*. In terms with sub-section (2) of Section 36 of the Act of 2018, it was stipulated that notwithstanding such repeal, any act or thing done under the said resolution shall be made to have been done under the Act of 2018. Sub-section (3) of Section 36 has a vital significance for which the same is reproduced herein under:-

"(3) All inquiries and investigations and other disciplinary proceedings pending before the Nagaland State Vigilance Commission and which have not been disposed of, shall stand transferred to and be continued by Lokayukta as if they were commenced before him under this Act."

9. From a perusal of the above quoted sub-section (3) of Section 36 of the Act of 2018, it would reveal that all inquiries and investigation and other disciplinary proceedings pending before the Nagaland State Vigilance Commission and which has not been disposed of, shall stand transferred to and be continued by the *Lokayukta* as if they were commenced before him in the Act of 2018. In view of the above, the investigation being RC-10/2017 which was initiated under the aegis of the Nagaland State Vigilance Commission, which was pending investigation at that relevant point of time stood transferred to be continued by

the *Lokayukta* as if they were commenced before him under the provisions of the Act of 2018. The consequential effect of transferring the said investigation within the fold of the *Lokayukta*, that too under the provisions of the Act of 2018 is that the said investigation has to be carried out in terms with the Act of 2018 and any further steps which were required to be taken had to be taken in accordance with the Act of 2018.

10. At this stage, this Court finds it relevant to take note of Section 15, 16 & 25 of the Act of 2018 which would show as to what the *Lokayukta* or the *Upa-Lokayukta* can do in terms with the Act of 2018. A perusal of Section 15 of the Act of 2018 would show that the *Lokayukta* or the *Upa-Lokayukta* being prima facie satisfied during the course of inquiry or investigation that allegations or grievances against any action is likely to be substantiated either wholly or partly may a report in writing, recommend to the public functionary concerned to stay the implementation or enforcement of the decision or action complained against or to take such mandatory or preventive actions on such terms and conditions, as may be specified in his report. Section 16 stipulates that the *Lokayukta* or *Upa-Lokayukta* as the case may forward an interim report to the competent authority recommending grant of interim relief to the complainant if the *Lokayukta* or the *Upa-lokyukta* as the case may be is satisfied at any state of preliminary inquiry or investigation that the complainant had sustained injustice or undue hardship in consequence of any decision or action of a public functionary and that the grievance complained thereof should be redressed expeditiously. Further to that the *Lokayukta* or *Upa-Lokayukta* may, at any stage of the inquiry or investigation has the power to forward the interim report to the competent authority recommending to take such action as may be considered necessary by him against the public functionary, pending inquiry or investigation. It is relevant that the three sub-clauses to sub-section 2 of Section 16 stipulates as to when such interim report is required to be submitted to the competent authority, those are:-

- (i) to safeguard wastage or damage to public property or public revenue by administrative acts of the public functionary;
- (ii) to prevent further acts of misconduct of public functionary and

(iii)to prevent public functionary from secreting the assets earned by him allegedly by corrupt means.

11. It is, however, very pertinent to take note of Section 25 of the Act of 2018 in as much as the said provision stipulates as regards the reports of the Lokayukta or the Upa-Lokayukta and how and what actions are required to be taken by public functionaries/competent authority on the basis of such report. The said Section 25 alongwith sub-clause are quoted herein below:-

"Section 25 : Reports of Lokayukta or Upa-Lokayukta.

(1)(a) If, after investigation of any action involving a grievance, the Lokayukta or Upa-Lokayukta, as the case may be, is satisfied that such action has resulted in injustice or undue hardship to the complainant or any other person, the Lokayukta or Upa-Lokayukta shall, by a report in writing, recommend to the competent authority concerned that such injustice or hardship shall be remedied or redressed in such manner and within such time as may be specified in the report, including:-

(i) That any practice on which a decision, recommendation, act or omission was based should be altered or reviewed, or

(ii) That any law on which a decision, recommendation, act or omission was based should be altered or modified; or

(iii) That reasons should be given for any decision, recommendation, act or omission; or

(iv) That any other steps as is legally permissible may be taken.

(2) The competent authority to whom a report is sent under sub-section (1) shall, within one month of the expiry of the period specified in the report, intimate or cause to be intimated to the Lokayukta or Upa-Lokayukta, as the case may be , the action taken on the report.

(3) If, after investigation of any action involving an allegation, the Lokayukta or Upa-Lokayukta, as the case may be, is satisfied that such allegation is substantiated either wholly or partly, he shall by a report in writing communicate his findings and recommendations along with the relevant documents, materials and other evidence to the competent authority concerned.

(4) (a) The Competent authority in the case of a public functionary other than the Chief Minister, or a Member of the State Legislature, shall examine the report forwarded to it under sub-section (3) and without any further inquiry, take action on the basis of the recommendation and within ninety days from the date of receipt of the report, intimate or

cause to be intimated to the Lokayukta or Upa-Lokayukta, as the case may be, the action taken or proposed to be taken on the basis of the report.

(b) The Lokayukta shall send his report in respect of a complaint against the Chief Minister or the Member of State Legislature with his recommendation to the Governor who shall take such action as he may deem fit or expedient on the report.

(c) That the report of the Lokayukta and the order passed by the Governor shall be laid on the table of the Legislative Assembly.

(5) If the Lokayukta or Upa-Lokayukta, as the case may be, is satisfied with the action taken or proposed to be taken on his recommendation referred to in sub-section (1) or sub-section (3), he shall close the case under information to the complainant if any, the public functionary and the competent authority concerned, but where he is not so satisfied and if he considers that the case so deserves, he may make a special report upon the case to the Governor and also inform the competent authority concerned and the complainant, if any,

(6) The Lokayukta shall present annually a consolidated report on the administration of this Act to the Governor,

(7) On the receipt of a special report under sub-section (5) or the Annual Report under sub-section (6), the Governor shall cause a copy thereof together with an explanatory memorandum to be laid before the State Legislature within four months from the date of the receipt of the report by the Governor or till the Legislature meets next, whichever is later.

(8) If the Annual Report is not laid in the State Legislature within the time provided in sub-section (7), the Lokayukta shall be free to make the Report public in the manner he may choose.

(9) The Lokayukta or Upa-Lokayukta, as the case may be, may at his discretion, make available, from time to time, the substance of cases closed or otherwise disposed of by him, which may appear to him to be a general, public, academic or professional interest in such manner and to such persons as he may deem appropriate."

12. From a perusal of the above quoted Section 25 and more particularly sub-section (1)&(3) would categorically show that the report to be submitted by the Lokayukta or the Upa-Lokayukta after an investigation are recommendatory in nature and it is on the basis of the said report the competent authority shall examine the said report and without any further inquiry take action on the basis of the recommendation and within 90 (ninety) days from the date of receipt of

the report intimate or cause to be intimate to the *Lokayukta* or the *Upa-Lokayukta* as the case may be, the actions taken or to be taken on the basis of the report. Sub-clause (b)&(c) of sub-clause (4) of sub-Section 25 is not relevant for the purpose of the proceedings in as much as the matter does not relate to the Chief Minister or the Member of the State Legislature, Sub-section (5) of Section 25 empowers the *Lokayukta* or the *Upa-Lokayukta* as the case may be to close the case if satisfied with the action taken or proposed to be taken on the recommendation made, by the public functionary and the competent authority concerned, however, if the *Lokayukta* or the *Upa-Lokayukta* as the case may be is not so satisfied and considers that the case deserves further actions, the *Lokayukta* or the *Upa-Lokayukta* may make a special report of the case to the Governor and also inform the competent authority concerned and the complainant. It is however relevant to take note of that the provisions of the Act of 2018 do not show that the *Lokayukta* or the *Upa-Lokayukta* in terms with the Act of 2018 has the power to act as the Police Station or the Officer-in-Charge of the Police Station. The powers which has been conferred are purely recommendatory in nature on the basis of the said recommendation(s), obligation(s) are cast upon the public functionary or the competent authority to take appropriate actions.

13. In the instant proceedings it would be seen, more so, from the IA(Civil)/149/2023 that the SP & IO of RC-10/2017 had submitted chargesheet and on the basis thereof, the proceedings being RC-10/2017 is pending trial before the Court of Special Judge, PC Act, Nagaland *Lokayukta* at Kohima. The records however do not reveal that any report was submitted by the *Lokayukta* or the *Upa-Lokayukta* in terms with the Act of 2018 recommending actions to be taken in terms with Section 26 of the Act of 2018 and in pursuance thereto, the charge-sheet was filed.

14. Mr. T.B. Jamir, learned counsel appearing on behalf of respondent No. 5, i.e. the Office of the *Lokayukta*, Nagaland, submits that as per his instructions no report was submitted, save and except, the chargesheet being filed in RC-10/2017 by the S.P. & IO.

15. A question, therefore, arises as to whether under the Act of 2018 the Office of the *Lokayukta* or its functionaries can submit the chargesheet, more so, when the Act of 2018 is clearly silent and the power which has been conferred upon the *Lokayukta/Upa-Lokayukta* is purely recommendatory in nature and further to seek compliance of the recommendations.

16. In the opinion of this Court, if there is no report submitted by the learned *Upa-Lokayukta*, Government of Nagaland, in respect to RC-10/2017 and without the said report the Office of the *Lokayukta*, Nagaland, had submitted the chargesheet the same on the face of it would be without jurisdiction and authority. This Court, having taken note of Section 25 of the Act of 2018 is of the opinion that till the *Lokayukta* or the *Upa-Lokayukta* of the Government of Nagaland submits a recommendation and on the basis of the said recommendation steps are taken by the competent authority or the public functionaries the Office of the *Lokayukta* or the *Upa-Lokayukta*, the Government of Nagaland, as the case may be, retains the jurisdiction over the subject matter, i.e. RC-10/2017. The above analysis, therefore, deals with issues caused in the 2 (two) writ petitions before this Court.

17. Let this Court now deal with the anticipatory bail application, being AB/32/2018. In the opinion of this Court in view of the above observations and the analysis and further taking into account that the Vigilance & Anti-Corruption Police Station, Kohima, do not exist, nothing survives to be decided in the said bail application.

18. This Court further finds it relevant to take note of that the Act of 2018 does not empower the *Lokayukta* or the *Upa-Lokayukta* to arrest. As already opined that the power is only limited to submitting reports, making recommendations. Under such circumstances, taking into account that the Nagaland State Vigilance Commission is no longer in existence, the question of arresting the petitioners in AB/32/2018 does not arise in a proceeding under the Act of 2018. Under the circumstance the said AB/32/2018 had become redundant and infructuous.

19. Accordingly, this Court, therefore, disposes the instant 2 (two) writ

petitions as well as the bail application with the following observations and directions:-

- (i) The record does not show that there has been any report submitted by the learned *Upa-Lokayukta* of the Government of Nagaland in respect to RC-10/2017. Under such circumstances, the learned *Upa-Lokayukta*, Government of Nagaland, still retains its jurisdiction over the said proceedings, being RC-10/2017 and the said authority would be at liberty to make recommendation, by submitting reports as deemed fit in respect to the proceedings, being RC-10/2017.
- (ii) The chargesheet so submitted on 19.07.2021 by the S.P.&IO of RC-10/2017 is not clear as to under what authority the said official had submitted the said chargesheet in RC-10/2017, more so taking into consideration that nothing is available on the records that there has been a report submitted by the learned *Upa-Lokayukta* of the Government of Nagaland. Therefore, the initiation of proceedings on the basis of the said chargesheet before the learned Special Judge, PC Act, Nagaland *Lokayukta* is *nonest* and requires to be interfered with. Be that as it may, this Court finds it relevant to observe that the learned *Upa-Lokayukta* of the Government of Nagaland would be at liberty to submit recommendations before the competent authority as defined under Section 2(1) (e) of the Act of 2018 and on the basis of the said recommendation, the competent authority would be under an obligation to take action under sub-clause (4) of the Section 25 of the Act of 2018 and submit a compliance report before the Office of the learned *Upa-Lokayukta*, Government of Nagaland, within a period of 90 (ninety) days as mandated. With the above observations and directions the writ petitions stands disposed of.
- (iii) The anticipatory bail application in view of the aforesaid reasons, had becomes redundant and infructuous, for which the same stands closed.
- (iv) This Court observe for better clarity that this Court had not interfered with the investigation. This Court has only observed that upon an investigation carried out by the Office of the *Lokayukta*, Government of Nagaland, the power conferred under the Act of 2018 is recommendatory in nature and the reports submitted by the said learned *Upa-Lokayukta*, Government of Assam on basis of

an investigation carried out can only be brought to the logical conclusion by the competent authority/public functionary as per the provisions of law.

Sd/-
JUDGE

Comparing Assistant