IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.02.2015

CORAM

THE HONOURABLE MS. JUSTICE R. MALA

CRL.R.C.No.523 of 2007

Judgment reserved on: 12.02.2015
Judgment pronounced on: 18.02.2015

1.Dalichand Jain
2.Ashwin Jain
3.Vijay Jain
4.Dhilip Kumar Jain
5.Mangal Chand Jain ..Petitioners/Accused 3 to 7

Vs

State represented by
Inspector of Police
Central Bureau of Investigation
Chennai.
(R.C.No.24/87) ..Respondent/Complainant

Prayer: Criminal Revision filed under Section 397(1) read with 401 of Cr.P.C against the judgment of conviction and sentence dated 08.01.2007 in C.A.No.10 of 1999 on the file of the II Additional Sessions Court, Puducherry, confirming the judgment of conviction and sentence dated 29.12.1998 in C.C.No.258 of 1996 on the file of the Sub-Divisional Judicial Magistrate, Pondicherry.

For Petitioners: Mr.R.Natarajan

For Respondent : Mr.K.Srinivasan
Special Public Prosecutor (CBI cases)

ORDER

This Criminal Revision Petition arises out of the judgment of conviction and sentence dated 08.01.2007 in C.A.No.10 of 1999 on the file of the II Additional Sessions Court, Puducherry, confirming the judgment of conviction and sentence dated 29.12.1998 in C.C.No.258 of 1996 on the file of the Sub-Divisional Judicial Magistrate, Pondicherry.

2.For the sake of convenience, the petitioners herein are referred to as A3 to A7.

3.The case of the prosecution is as follows:

(i) The Inspector of Police, CBI, has laid a final report against the accused persons before the trial Court alleging that A1 was working as Chief Executive Officer of M/S.Swadeshi Cotton Mills, Pondicherry from 1979 to 1986. A3 to A6 were business partners under A7 and A8 was an employee of M/S.Kumar Textile Agency (i.e.) A2. Immediately after taking over the said mill by the Government of India on 23.05.1978, A2 applied for an agency and on receipt of the application from various firms, A1 put up a note dated 29.07.1978 and requested the Chief Executive Officer/P.W.1 who was his predecessor to appoint M/S.Kumar Textile Agency/A2 as an agent of M/S.Swadeshi Cotton Mills and the same was approved by P.W.1 for three years and the appointment order was received by A3. In 1982, the Government of India took a decision to ban agency in the National Textile Corporation (N.T.C.) for the supplies made to the Government Department. On 19.09.1983, A1 prepared a document as if it is a minutes the meeting attended by Mr.B.R.Bhatia (Director of Finance), Mr.J.C.Bhandari, Chief Advisor (Marketing) in the presence of Mr.M.M.Gulati, Secretary and Mr.A.K.Sardana and himself in which it was decided to continue the agency of M/S.Kumar Textile Agency. No such meeting was convened and none of the said four persons mentioned in the minutes signed the same to show that it was discussed with them or they agreed to do it. The copy of the created minutes were kept by A1 in his personal file and a copy handed over to the Finance Department by which he made the Finance Department to believe that M/S.Kumar Textile Agency was given extension and thereby commission was paid regularly till 1987. After creating of the said bogus documents, the Mills paid a commission of about Rs.45 lakhs to M/S.Kumar Textile Agency illegally which they were not entitled for and the Mill was put to a loss of the corresponding amount. Hence all the accused persons appear to have committed the offences punishable under Sections 120B read with 420 IPC and 420 IPC.

(ii) Since A1 died during pendency of the case before the trial Court, the charge against him was recorded to be abated.

(iii)On the side of the prosecution, P.W.1 to P.W.8 were examined and Exs.P1 to P20 were marked.

(iv) The trial Court after considering the oral and documentary evidence, convicted the accused persons A2 to A8 for offences under Sections 120B read with 420 and 420 IPC and sentenced to pay a fine of Rs.5,000/- on each count in default in payment to undergo one year simple imprisonment on each count and also sentenced to undergo simple imprisonment till raising of the Court, against which, A2 to A8 preferred an appeal in C.A.No.10 of 1999 on the file of the II Additional Sessions Court, Puducherry, whereby A2 and A8 were acquitted for offences under Sections 120B read with 420 and 420 IPC and the judgment of conviction and sentence passed by the trial Court was confirmed in respect of A3 to A7, against which, this revision petition is preferred by A3 to A7.

4.Challenging the judgment of conviction and sentence passed by both the Courts below, the learned counsel for the petitioners submits that order of termination has not been communicated to A3 to A7, who are partners of A2. No meeting was convened and no evidence to show that A1 has intimated the same to A3 to A7. It is further submitted that findings of both the Courts below is only based on suspicion than on proved facts and the conviction cannot be on the basis of inference. Hence, he prayed for setting aside the judgment of conviction and sentence passed by both the Courts below. To substantiate his arguments, he relied upon the decision of the Apex Court reported in (2003) 11 SCC 207 (State (Andaman and Nicobar Admn.)) v. Shyam Raj).

5.Resisting the same, learned Special Public Prosecutor (CBI cases) submits that A3 to A7 are partners under A2/ M/S.Kumar Textile Agency, who is an agent for M/S.Swadeshi Cotton Mills, Pondicherry from 1979 to 1986. But the said mill has been taken over by the National Textile Corporation (N.T.C.), the Government of India which took decision to ban the agency of N.T.C. in the year 1982 for supplies made to the Government Department. But on 19.09.1983, A1 prepared a document styling itself as the Minutes of meeting and decided to continue the agency of A2 in which A3 to A7 were partners. A8 is working under A2 and after creating of said bogus document, the Mills paid a commission of about Rs.45 lakhs and thereby caused loss to the mill the corresponding amount. Since A1 was dead, case against A1 has been abated. Both the Courts below have rightly considered all the aspects in proper perspective and convicted and sentenced A3 to A7 as stated above. Hence, there is no reason for interference with the concurrent findings of both the Courts below. Therefore, he prayed for dismissal of the revision petition.

6.Considered the rival submissions made on both sides and perused the materials available on record.

7.The admitted facts of the case are as follows:

M/S.Kumar Textile Agency, Mumbai/A2 is an agent for M/S. Swadeshi Cotton Mills Company Limited, Pondicherry. An order/Ex.P1 has been passed in the Gazette of India on 13.04.1978, which shows that M/S.Swadeshi Cotton Mills (Pondicherry) along with other Cotton Mills have been taken over by the Government of India. The Government has authorised National Textile Corporation to take over the management of the whole of the said industrial undertakings. So M/S.Swadeshi Cotton Mills (Pondicherry) has been taken over by National Textile Corporation Limited (N.T.C.).

8.Now it is appropriate to consider the following documents marked on the side of the prosecution:

(i)Ex.P2 is a gazette notification, which was passed on 30.05.1986.

(ii)Ex.P3 is the letter dated 23.05.1978 sent by the second accused/Kumar Textile Agencies to Mr.Vedanarayanan, Swadeshi Cotton Mills in which, it was stated that they came to know from the Director of Supplies (Textile) Mumbai, the orders stated therein are still pending for execution by Swadeshi Cotton Mills.

(iii)Ex.P4 is the letter dated July 29, 1978 (i.e.) “Supply of Textile Fabrics to DGS & D”, in which, it was stated that the second accused was appointed as an agent as temporary for one year.

(iv)Ex.P5 is a letter dated 12.08.1978 sent by Swadeshi Cotton Mills (Pondicherry) to the second accused stating that they are appointed as service agents for supply of cotton textiles to DGS & D.

(v)Ex.P6 is a letter dated 21.09.1982 sent by the Chief Executive Officer, which reads as follows:

> "We have been directed by our Administrator vide letter No.MKtg/Defence/SCM/8209 dated 2.9.82 that instructions have been received from headquarters that NTC mills should not have agents for effecting supplies to DGS & D forthwith. In view of this, your agreement with us as Service Agents shall not be binding on both of us for all our future dealings with DGS & D supplies, which please note. "

From the above letter, it is clear that A2 is not an agent for Swadeshi Cotton Mills. But according to the prosecution, as per Ex.P7, on 19.09.1983, A1 has signed the Minutes as if there was a meeting convened and discussed with Director(Finance) Mr.B.R.Bhatia and further with Mr.J.C.Bhandari, Chief Adviser (Marketing) in the presence of Mr.M.M.Gulati, Secretary and Mr.A.K.Sardana. On the basis of this document, goods have been supplied and A2 to A8 received commission amount to the tune of Rs.45,00,000/-.

9.The only point now arises is whether A2 is having knowledge about the termination of agency? According to the learned counsel for the petitioner, there is no evidence to show that the original of Ex.P6/order of termination was sent to the second accused. So it is appropriate to consider the evidence of P.W.1/Vedanarayanan, who was working as Chairman cum Managing Director of NTC (Tamil Nadu and Pondicherry) during 1974 to 1978 . P.W.1 in his cross-examination stated as follows:

> " .. .. I cannot say personally, whether the original of Ex.P6 was sent to the second accused. Once in a year, internal audit would be conducted in the company. Internal audit would be conducted only after 31st March every year. Internal audit and external audit would be conducted concurrently. The annual audit referred to above is also called statutory audit. "

10.As per Ex.P6, the date of termination notice is 21.09.1982. According to the evidence of P.W.2/Daniel, who was working as Assistant Manager, Vigilance, NTC, Coimbatore during 1982, Swadeshi Cotton Mill has been taken over by NTC by virtue of notification in Ex.P1 and the same was subsequently notified in the Central Gazette in Ex.P2. During 1986-87, the first accused was the Chief Executive Officer of the said Mill and on surprise check, he noticed that the second accused company was having office inside the mill premises of Swadeshi Cotton Mills, Pondicherry and during inspection, he noticed the agency of the second accused for Swadeshi Cotton Mills were already been terminated based on the ban order issued by the Ministry of Textiles, Government of India. Ex.P9 is the note book of statement of Accounts of M/S.Kumar Textiles, Pondicherry. P.W.2 in his cross-examination, fairly conceded that at the time of seizure of document and preparation of mahazar, one Prakash Vora/A8, representing A2 company was also present and the copy of the said seizure mahazar was handed over to A8 under acknowledgment.

11.P.W.4/Thiagarajan, who is an Accounts Manager in Surval Engineering Industries Limited, Coimbatore, deposed that A2 was paid a commission to the tune of Rs.45.09 Lakhs by Swadeshi Cotton Mills during 1983-87. Ex.P8 is the extract of various amounts made to A2 company as commission during 1983-87. Ex.P9 is the similar statement of accounts. Further P.W.4 has spoken about the signatures of A1 in Exs.P4 to P7. In his cross-examination, he fairly conceded that various commissions as referred to in Exs.P8 and P9 are regarding the payment of commission to A2 company for the goods sold by them. So A2 has sold the goods as an agent and received commission.

12.P.W.5/Sundaramoorthy, who is a clerk under A2, deposed that he joined the office of A2 company on 17.08.1978 and its head office is at Mumbai. His nature of work including the preparation of various statements regarding the despatch of goods by A2 company from Swadeshi Cotton Mills, Pondicherry and even to take samples to the prospective buyers etc. Even when he joined A2 company, A2 company was functioning as agency of Swadeshi Cotton Mills. He further deposed that agency has been terminated by the Government of India during 1982. In his chief-examination, he deposed that he has no idea as to when the agency was cancelled. So his evidence is not helpful.

13.P.W.6/Solanky, who was working as Director Marketing (Holding Company), N.T.C., Delhi from 1981 to 1983, deposed that on 20.08.1982, he received a letter from the Government of India, which is a ban order and he communicated the same to P.W.3/Ananthapadmanabhan. Ex.P10 is the letter written by P.W.6 and Ex.P11 is the enclosure annexed by him to Ex.P10.

14.In Ex.P10, dated 20.08.1982, it was specifically mentioned that the Government of India has decided that henceforth no intermediaries (agents) will be engaged by N.T.C., and its subsidiaries and mills for purpose of securing orders and supplies to the Government Departments and Defence either directly or through D.G.S. & D. He is advised to report action taken by him in this respect.

15.Ex.P11 is the letter addressed by the Government of India to P.W.6 for banning the agency. After receipt of Ex.P10 letter, P.W.3 sent a communication Ex.P12 on 24.08.1982, in which it was stated as follows:

> ".. .. I believe that it will be in order in quoting for tenders to state owned as well as centrally owned public sector undertakings through the intermediaries. "

16.P.W.3 also sent Ex.P13 letter dated 02.09.1982 to P.W.6, in which, it was stated as follows:

> " .. .. In as much as I have not received this reference on behalf of Swadeshi Cotton Mills, Pondicherry I did not communicate to Swadeshi Mills. However I mentioned to Shri.J.Anandaraj, Chief Executive Officer, Swadeshi Cotton Mills about this matter over phone on the very same day. However as you have now said that this should also be communicated to Swadeshi Cotton Mills, Pondicherry. I am communicating to him. "

17.Ex.P14 is the letter dated 06.09.1982 sent by P.W.3 to P.W.6, in which, he sought for some clarifications regarding the ban order.

18.Ex.P15 is the letter dated 03.09.1982 sent by A1 to P.W.3. Ex.P16 is the letter dated 22.10.1982 sent by P.W.6 to P.W.3, in which, he has given answers to the letter dated 20.08.1982 and 02.09.1982. It was specifically mentioned that action should be taken strictly as per his letters. Ex.P17 is the bunch of letters sent by A2 requesting arrangement for payment of commission.

19.Ex.P18 is the letter dated 08.09.1982 sent by A1 to P.W.6, in which, it was stated as follows:

> "During Ananthapadmanabhan's visit to the mill we had detailed discussion on this subject and I am sure you will be receiving a communication in this matter. Taking all circumstances into account I resubmit this for your consideration and decision of the Board shall be carried out by the under signed.
>
> In the meantime, I am refraining from any quotas through agents till I hear from you finally. "

The above para shows that A1 received ban order and he will not receive any quotation through agents. Ex.P19 is the letter dated 01.03.1984 sent by A3 to A8. Ex.P20 is the F.I.R.

20.On going through the aforesaid documents, it is clear that no document was filed to show that ban order has been intimated to A2 by A1. During cross-examination of P.W.6/Solanky, a suggestion was posed to him that no ban order was issued by the Government of India as per Ex.P11, which was denied by him.

21.P.W.7/Bhandari, who worked in N.T.C. from 1982 to 1983, deposed that no meeting was convened during 1983 as mentioned in Ex.P7 and he is not the signatory of that document. It clearly shows that Ex.P7 is created only by A1 and A2 to A8 are not parties to Ex.P7.

22.Learned counsel for the petitioners culled out some portions of the judgment passed by the trial Court, which finds place in page No.8 of the typed set of papers and the same is extracted hereunder:

> ".. .. P.W.3 was sought to be cross examined to the effect that he had knowledge about the continuation of the agency in favour of A2's company even during the year 1983 itself, which was denied by him. Further the question was sought to be put to P.W.3 to the following fact.
>
> "You know very well a fraud in agency is committed by A2 company in Swadeshi Cotton Mills in connivance into A2. Are you not bound to prevent the same since Govt. money is involved"?
>
> By this question or suggestion, it has to be inferred that the accused indirectly admitted about committing of fraud in agency by A2's company and further non-taking of any deligent action on the part of P.W.3 would not exonerate the accused persons from their

criminal liability. Since P.W.3 was elaborately cross examined in relation to his not taking substantiate action for the fraudulent acts committed in relation to the agency in faovur of A2's company. "

To substantiate his arguments, he relied upon the decision of the Apex Court reported in (2003) 11 SCC 207 (State (Andaman and Nicobar Admn.)) v. Shyam Raj), in para-6, it was held as follows:

> " 6. .. .. As contended by the learned counsel for the respondent the alleged offence against the respondent has not been established by the prosecution in this case. The evidence of Pws.1,4 and 9 by themselves would not be sufficient to come to the conclusion that it is the respondent who is responsible for the rape on the victim. As urged by the learned counsel for the respondent, the judgment of the trial Court proceeds more on the basis of suspicion than on proved facts. As a matter of fact the respondent has pleaded an alibi which was supported by the evidence of defence witnesses examined by him which was not taken into consideration by the trial Court. .. .. "

As per the above decision, it is clear that no conviction can be based on suspicion circumstances. In a criminal jurisprudence, guilt of the accused to be proved by the prosecution beyond all reasonable doubt.

23.According to the case of prosecution, even the agency was banned by the Government of India, A2 to A8 conspiring with A1 created agency and received Rs.45,00,000/- as commission for agency and thereby committed the aforesaid offences.

24.Admittedly, there is no evidence to show that the ban order has been communicated to A2 company in which, A3 to A7/petitioners herein are Directors and A8, who is working under A2. Furthermore, in Ex.P7, they are not parties. In Ex.P7, it was specifically stated as "in view of this present agent M/S. Kumar Textile Agency shall continue to take charge of clearing the goods and arranging finance in immediate basis on the same terms and conditions hitherto as servicing agents" and it was signed by A1.

25.Considering the aforestated circumstances of the case, as per the evidence of P.W.1, every year internal and external audit was conducted concurrently, which is referred to as statutory audit. At that time also, they have not found any fault in respect of payment of commission to A2 company. So I am of the view, there is no evidence to show that A1 conspiring with A2 to A8 created and fabricated the document and thereby caused loss to the tune of Rs.45,00,000/- beyond reasonable doubt. It is pertinent to note that during pendency of the case in the trial Court, A1 died. The first appellate Court has acquitted A2 and A8 from the charges levelled against them. In such circumstances, both the trial Court and the first appellate Court have committed an error in convicting A3 to A7 for offences under Sections 120B read with 420 and 420 IPC. Hence, the judgment of conviction and sentence passed by both the Courts below against A3 to A7/revision petitioners herein is hereby set aside and the petitioners/A3 to A7 are acquitted from the charges levelled against them and they are set free.

26.In fine,

- The Criminal Revision Petition is allowed by setting aside the judgment of conviction and sentence passed by both the Courts below.
- The revision petitioners/accused 3 to 7 are acquitted from the charges levelled against them. The revision petitioners/accused 3 to 7 are set free.
- The fine amount is ordered to be refunded to A3 to A7/ petitioners herein.

Sd/-
Assistant Registrar

//True Copy//
Sub Assistant Registrar

kj

To
1.The Sub-Divisional Judicial Magistrate, Pondicherry.
2.II Additional Sessions Judge, Puducherry,
3.Inspector of Police
Central Bureau of Investigation, Chennai.

4.The Special Public Prosecutor (CBI Cases)
High Court, Chennai.

5.The Record Keeper
Criminal Section, High Court, Chennai.

+ 2 ccs to Mr.R. Natarajan, Advocate Sr.8682
+ 1 cc to Mr.K. Srinivasan, Special Public Prosecutor SR.8698

Crl.R.C.No.523 of 2007

SK(CO)
Eu 06.03.15