

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Revision No.560 of 2016

Arising Out of PS. Case No.-25 Year-1997 Thana- C.B.I CASE District- Patna

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Sitaram Sureka son of Late S.K. Sureka, Resident of House No. 6, Hasting Park Road, P.S.- Alipur Town & District- Kolkata

... .. Petitioner/s

Versus

1. The Central Bureau of Investigation, Patna through the Superintendent of Police
2. The Executive Engineer, Road Construction Department, Western Road Division, Bhagalpur

... .. Respondent/s

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with

Criminal Revision No. 735 of 2016

Arising Out of PS. Case No.-25 Year-1997 Thana- C.B.I CASE District- Patna

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Sanjay Sureka, son of Sitaram Surkea, Resident of House No. 6, Hasting Park Road, P.S Alipur, Town & District- Kolkata.

... .. Petitioner/s

Versus

1. The Central Bureau of Investigation , Patna through the Superintendent of Police.
2. The Executive Engineer, Road Construction Department, Western Road Division, Bhagalpur.

... .. Respondent/s

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with

Criminal Revision No. 733 of 2016

Arising Out of PS. Case No.-25 Year-1997 Thana- C.B.I CASE District- Patna

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Subrata Basu @ Subroto Basu, son of Saroj Basu, Resident of village + Post- Akara Jagarnath Nagar, P.S.- Mahesh Tala, Distt.- 24 Pargana (South), W.B.

... .. Petitioner/s

Versus

1. The Central Bureau of Investigation, Patna through the Superintendent of Police.
2. The Executive Engineer, Road Construction Department, Western Road Division, Bhagalpur.

... .. Respondent/s

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Appearance :
(In all cases)



For the Petitioner/s : Mr. Abhay Kumar Singh, Sr. Adv
Mr. Rakesh Kumar Samrendra
Mr. Manager Sah
For the C.B.I. : Mr. Sanjay Kumar, S.C. C.B.I.
: Mr. Bipin Kumar Sinha

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

JUDGMENT AND ORDER

ORAL

Date : 07 -03-2018

The above three Criminal Revision applications arise out of the common judgment and order dated 16.04.2016, passed in RC No.25A/1997 by learned Special Judicial Magistrate, C.B.I.-II, Patna, whereby she has rejected the petition filed under Section 239 of the Cr. P.C. on behalf of the petitioners for their discharge. The said RC 25A/1997 has been registered by the C.B.I. for the offences punishable under Sections 409, 420, 467, 468 and 120B of the IPC and Section 13(2) read with Section 13(1) (D) of the Prevention of Corruption Act.

2. I have heard Mr. Abhay Kumar Singh, learned Senior Counsel appearing on behalf of the petitioners and Mr. Bipin Kumar Sinha, learned counsel for the Central Bureau of Investigation (hereinafter referred to as the "C.B.I.").

3. Before I take up the ground for challenge to the impugned order, there are certain facts which are to be taken note of.



4. On an information given by the then Executive Engineer, Road Construction Department, Bhagalpur (West), a case was registered by the Sultanganj Police Station as Sultanganj P.S. Case No. 186/1996 against one Anandi Prasad Amit, Junior Engineer, alleging that he had verified the stock position of bulk bitumen on 30.08.1996 under the charge of the said Anandi Prasad Amit, located at Sultanganj Sub Divisional office campus and Kacha VATs at 3rd KM at Sahkund, Asargunj Road. Against the balance of 126.248 MT of bulk bitumen as reflected in the stock account of the said Anandi Prasad Amit, the Junior Engineer, only 45.347 MT of bulk bitumen was found available at both the places and thus 80.901 MT of bulk bitumen was detected to have been misappropriated. With the allegation that the said Aandi Prasad Amit had misappropriated 80.901 MT of bulk bitumen valued at Rs.4,08,065/-, the said Sultanganj P.S. Case No.186/1996 was registered. This is to be noticed that huge misappropriation of bitumen was unearthed at various places in the State of Bihar, commonly known as bitumen scam, and under the orders of this Court, investigations into the cases arising out of the bitumen scam were handed over to the C.B.I. for investigation. The present case was also taken over by the C.B.I. under the orders of this Court dated 20.02.1997 passed in



C.W.C.J. No. 10417 of 1996 and accordingly RC 25(A)/1997 came to be registered. In the backdrop of the ground which has been taken on behalf of the petitioners to claim discharge and assailed the impugned order, it has to be kept in mind that registration of the FIR was with the allegation of less availability of bulk bitumen than it ought to have been in the stock as per the stock account. Apparently, the allegation was of shortage of bitumen which was under the charge of the accused Anandi Prasad Amit than what ought to have been as per the supply made. Whether the supplier had supplied the bitumen or not and whether the supplier had withdrawn the amount against the supply claims to have been made were not the facts discussed in the first information report.

5. In course of investigation, it has come and which is not in dispute that M/s Reliable Transport Corporation, Kolkatta(an empanelled transporter of BPCL) was the supplier. The petitioner Sitaram Sureka of Cr. Revision No. 560 of 2016 is admittedly the proprietor of the said transporter. The petitioner Sanjay Sureka of Cr. Revision No. 735 of 2016 is the power of attorney holder of Sitaram Sureka, who held the said power of attorney to look after the transport business because of the old age of Sitaram Sureka is also not in dispute. Subrata



Basu @ Subroto Basu, the petitioner of Cr. Revision No. 733 of 2016 was the authorized representative of the transporter at Barauni which is not in dispute. Initially, the C.B.I. had submitted the charge sheet against Anandi Prasad Amit, the Junior Engineer, only on 31.03.2003 for the offences under Section 409 of the Indian Penal Code and Section 13(2) read with Section 13(1) (c) of Prevention of Corruption Act. The C.B.I. on 23.05.2006, submitted second charge sheet against these petitioners and one Dinesh Chandra Sarkar (since deceased) for the offences punishable under Sections 120B, 407, 420, 467, 468 and 471 of the Indian Penal Code. The second charge sheet was filed on the finding of investigation to the effect that the BPCL had given carriage work for delivering the bitumen at the consignee's location to M/s Reliable Transport Corporation, Koltata. The transporter had lifted 357.43 MT of bulk bitumen from the BPCL, Haldia between 28.10.1995 and 15.07.1996 in 29 consignments to be delivered to the consignee (Road Construction Department, Bhagalpur). On analysis of the movements of the tankers present at Haldia and Sultanganj used for carriage for delivering the bitumen on the same day to that bulk bitumen weighing 10.020 MT was lifted from Haldia vide POV No. 15235 dated 18.03.1996 by Tank Lorry No.



WMQ/5474, purportedly received by the said A.P. Amit on 23.03.1996 on transporter's Challan No. RTC-8553 which was in sharp contrast to the fact that the same tank lorry was taking another load on 23.03.1996 vide POV No.15685 dated 23.03.1996. The C.B.I., in course of investigation, detected that the transporter had lifted bulk bitumen on various dates from 30.01.1996 to 01.06.1996 which was never delivered to the consignee and false receipts were obtained from the consignee. The transporter also claimed transportation charge for supply of about 57.760 MT bulk bitumen which was never delivered. The C.B.I. also detected that one Dinesh Chandra Sarkar (since deceased) had falsely prepared sale documents and sale invoices against the aforesaid supply order at Barauni on the basis of 'PDNs' generated from Haldia without physical reporting of the Tanker/lorries at Barauni.

6. Apparently, thus, whereas in the F.I.R. and the first charge sheet the allegation was of shortage of bulk bitumen in the vats under the charge of the accused Anandi Prasad Amit, the second charge sheet revealed that the bitumen was, in fact, either not supplied or the supply was less in quantity than shown to have been supplied and delivered. The entire case of the petitioners for their discharge is based on the plea that once



A.P.Amit, the Junior Engineer, is held to be responsible for misappropriation of bulk bitumen which was under his charge, the allegation against the petitioners of short supply of bulk bitumen cannot sustain and their prosecution will be an abuse of the process of the court, if they are compelled to face the trial.

7. It is not evident from the record as to why framing of charge against these petitioners remained pending for all these years. A.P.Amit was, however, put on trial in the court of learned Special Judge, C.B.I.-II, Patna who has been convicted by the judgment and order dated 30.03.2012 of the charge punishable under Sections 409 of the IPC and Section 13(2) read with Section 13(1) (c) of the Prevention of Corruption Act and sentenced to imprisonment for a term of five years and fine of Rs. 10,000/-. It is the case of these petitioners that there is no finding by the trial court leading to conviction of the said A.P.Amit that there was any short supply of the bitumen by the supplier. It is being contended that once the said A.P. Amit has been held to be guilty of the offence of misappropriation of 80.901 MT of bulk bitumen and thereby commission of offence under section 409 of the IPC, these petitioners should not be put on trial on the allegation of short supply of the bulk bitumen. This is to be noticed that the petitioner Sitaram Sureka



had approached this Court seeking quashing of the order of cognizance dated 17.03.2011 by filing an application under Section 482 of the Cr.P.C which came to be disposed of by order dated 14.11.2013 with the observation that he shall have liberty to raise all the contentions at the time of framing of charge.

8. Mr. Abhay Kumar Singh, learned Senior Counsel appearing on behalf of the petitioners, has submitted that the allegations made in the two charge-sheets indicating 'shortage and 'short supply' are mutually exclusive and both cannot exist simultaneously. If there is allegation of shortage of bulk bitumen under the charge of co-accused A.P.Amit and misappropriation by him, there would be no question of short supply by the transporter. It is his plea that the allegation of short supply in the second charge sheet is not substantiated by any material. He contends that in the first charge sheet, it is the specific case of the C.B.I. that entire bulk bitumen lifted from Haldia had been delivered by the transporter to the consignee, i.e., Road Construction Department, Bhagalpur. Relying heavily on the judgment of conviction of the Junior Engineer, A.P.Amit, he has referred to the explanation given on behalf of A.P. Amit for shortage of 80.901 MT of bulk bitumen which are as follows:-

“Bitumen was kept in Kacha Vats
in open sky and the same spread up



on earth.

All pot holes on the road were repaired on the visit of the Hon'ble Chief Justice.

Pot holes were repaired at the time of Shrawani Mela.”

9. In the background of the above, he has relied on a Supreme Court decision in case of **Union of India vs. Prafulla Kumar Samal**, reported in (1979) 3 SCC page 4 and has submitted that since no *prima facie* case is made out against the petitioners giving rise to even strong suspicion against them, they have a right to be discharged. He has also relied on Supreme Court decisions in cases of **Harshendra Kumar D. vs. Rebatilata Koley**, reported in (2011) 3 SCC 351 (para 25), **Vikram Cement vs. State of M.P.**, reported in (2015) 11 SCC 711, **Prashant Bharti vs. State (NCT of Delhi)**, reported in (2013) 9 SCC 293 para 22) and **Anita Malhotra vs. Apparel Export Promotion Council**, reported in (2012) 1 SCC 520 para 20). He has argued that in view of the findings of the trial court in the trial against A.P.Amit, the principle of issue estoppel will apply in the present facts and circumstances of the case, the findings of the trial court being binding in nature arising out of the same transaction.

10. Learned counsel appearing on behalf of the C.B.I., on the



other hand, submitted that the materials collected in course of investigation by the C.B.I. leading to submission of the second charge sheet cannot be said to be groundless for applying the provision under Section 239 of the Cr. P.C. It has been argued that while considering a case for discharge the court is not required to go deep into the matter and examine the adequacy or sufficiency of the evidence for conviction of an accused. Relying on a decision of this court in case of **Subidha Devi & Ors. vs. State of Bihar**, reported in **2015 (3) CRI. L.J. 2906**, he has contended that the evidence recorded in a separate trial arising out of the same F.I.R. cannot be the record of the case and evidence recorded in separate trial, though arising out of the same F.I.R., cannot be perused while considering an application under sections 227/228 of the Cr.P.C., for the purpose of discharge. Reliance has also been placed on Supreme Court decision in case of **Sajjan Kumar vs. CBI**, reported in **(2010) 9 SCC 368** and **State of Tamil Nadu vs. N. Suresh Rajan & Ors.**, reported in **(2014) 11 SCC 709** in support of the contention that strong suspicion is enough for the trial court to frame charge.

11. The plea of issue estoppel which has been attempted to be applied in the present case on behalf of the petitioners on the



ground of conviction of A.P. Amit, in my view, is not acceptable in the facts of the present case. The principle of issue estoppel has been lucidly stated by Lord MacDermott [(1950) A.C.458] in the following words:-

“The effect of a verdict of acquittal pronounced by a competent Court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and concussive in all subsequent proceedings between the parties to the adjudication.”

12. This principle of issue estoppel regulates and controls “re-litigation of issue.....settled by a prior litigation.”(**Dixon, J.),77.C.L.R.511**. In my view, the findings in a case which are dependent upon an appeal, in no circumstance, can be allowed to govern the subsequent trial. In the present case, there is no finding in an earlier trial that there was no short supply. The trial court found the allegation of shortage of bulk bitumen to be correct beyond all reasonable doubts. Even if it is presumed that the accused in that case took the defence of utilization of bitumen for the purposes indicated or wastage because of the manner in which it was stored, that itself cannot be the basis for



these petitioners to claim discharge under Section 239 of the Cr. P.C.

13. Learned counsel for the C.B.I. is correct in his submission and has rightly relied on the decision of this Court in case of **Subidha Devi vs. State of Bihar** (supra) wherein the court specifically held relying on Supreme Court decision in case of **State of Bihar vs. Ramesh Singh (AIR 1977 SC 2018)** that the evidence recorded in a separate trial, though arising out of the same F.I.R., cannot be perused while hearing the parties under Sections 227 and 228 of the Cr. P.C. for considering the prayer of the accused to discharge him from the trial. In case of **State of Andhra Pradesh vs. Kokkiligada (AIR 1970 S.C. 771 at page 775)**, the Supreme Court held that the rule of issue estoppel cannot be extended so as to prevent evidence in the previous proceeding and it was held not sufficient to sustain the order for being used in support of a charge of an offence which the State seeks to make out.

14. There is yet another reason why the said submission made on behalf of the petitioners cannot be accepted. In the second charge sheet, there is allegation of short supply of bulk bitumen by the transporter/supplier. In the first charge sheet there is allegation of shortage of bulk bitumen. In the second



charge sheet there is allegation that the bitumen as detailed were never delivered to the consignee and false receipts were obtained from the consignee. There are two possibilities. The shortage of bitumen in the godown and Kacha VAT might have occasioned because of short supply and preparation of false receipts in support of the delivery of the consignment which is the allegation in the second charge sheet. The findings recorded by the trial court are based on the evidence adduced in the said trial including the defence of the accused. The said findings, in my view, in no case, can become a ground for holding the charge against these petitioners to be groundless for the purpose of discharge under section 239 of the Cr. P.C.

15. In case of **State of Tamil Nadu vs. N. Suresh Rajan & Ors.**(supra), the Supreme Court clearly held that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The court is not expected to go deep into the matter at that stage. In most unequivocal terms, the Supreme Court held that if the court



thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge.

16. In case of **R.S. Nayak vs. A.R. Antulay**, reported in **(1986) 2 SCC 716** considering Sections 227,239 and 245 of the Cr. P.C, the Supreme Court has held that in spite of difference in the language of three Sections, legal position is that if the trial court is satisfied that a *prima facie* case is made out, the charge has to be framed. In case of **Onkar Nath Mishra vs. State (NCT of Delhi)**, reported in **(2008) 2 SCC 561**, the Supreme Court laid down the law that what needs to be considered at the stage of framing of charge is whether there is a ground for presuming that the offence has been committed. Paragraph 11 of the said decision is relevant and is being quoted hereinbelow:-

“11. It is trite law that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is



a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.”

17. A roving inquiry is not required to be made by the court at the stage of framing of charge into the pros and cons of the matter and whether the evidence, as has been held by the Supreme Court in case of **Union of India vs. Prafulla Kumar Samal** (supra).

18. The only consideration which is required for the court at the time of framing of charges is as to whether on the basis of the material on record a *prima facie* case is made out or not.

19. The Supreme Court decision in case of **Prashant Bharti** (supra) relied on by Mr. Singh, learned Senior Counsel for the petitioners, does not support the plea for discharge.

20. In my view, it is not a fit case for interference with the impugned order rejecting the application for discharge applying



the principle laid down in paragraph 22 of the decision in case of **Prashant Bharti** (supra), on which reliance has been placed. The said judgment deals with the High Court's power under Section 482 of the Cr. P.C pertaining to quashing of the criminal proceeding. The Supreme Court in case of **Rajiv Thappar vs. Madan Lal Kapoor** reported in (2013) 3 SCC 330 made a significant observation that the power of quashing of criminal proceeding vested in the High Court under Section 482 of the Cr. P.C. would have far reaching consequences inasmuch as it would negate the prosecution/complainant's case without allowing the prosecution to lead evidence. It is desirable, therefore, that to invoke the inherent jurisdiction under section 482 of the Cr. P.C. the court has to be fully satisfied that the material produced by the accused is such that it would lead to conclusion that his defence is based on sound, reasonable and indubitable facts; the material produced is such as would rule out and displace the assertions contained in charges levelled against the accused; and the material produced is such as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant.

21. I am mindful of the fact that these applications have



been filed under the revisional jurisdiction of this Court under section 397 of the Cr. P.C. in exercise of which power the Court is required to consider the correctness and legality of the order passed by the court below. On the basis of what has been argued on behalf of the petitioners, I do not find that a case is made out for discharge of these persons under section 239 of the Cr. P.C. and there is any requirement for interference with the impugned order of the trial court.

22. I have not referred to some of the decisions which have been relied on behalf of the parties, in view of the discussions which I have made above, since they have no application for the relief in the present case.

23. These applications are accordingly dismissed.

(Chakradhari Sharan Singh, J)

HR/-

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