IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.322 OF 2013

N.R. Saraiya & Anr. .... Petitioners

Vs.

Union of India & Anr. .... Respondents

Mr. Kumar Abhishek i/by Mr. M.D. Nagle, Advocate for the Petitioners.
Mr. Rebecca Gonsalvez, Advocate for Respondent no.1.
Mr. V.V. Gangurde, A.P.P. for the respondent- State.

Coram : Smt. R.P. SondurBaldota, J.
Date : 15th February, 2017.

P.C.

1 The petition is directed against the order dtd. 18th September, 2012 passed by the Special Judge, C.B.I. for Greater Mumbai dismissing the petitioners application for discharge in Special Case No. 60 of 2012. It is taken up for final hearing at the stage of admission in accordance with the order dtd. 4th July, 2016.

2 Petitioner no.1 is the Senior Vice President of Shipping Corporation of India Limited ("SCI" for short), the Government of India Undertaking. He was also In-charge of

Outports Accounts w.e.f. 1st February, 2005. Petitioner no.2 is the General Manager of SCI. Since 2003 she was working as Deputy General Manager of the Outports Accounts Department. The Vigilance Department of SCI had submitted a note alleging (1) non reconciliation of Accounts. (2) claiming of bogus or inflated expenses by the agents of SCI and (3) claiming of expenses by the agents which are not allowable in accordance with the Agency Agreement. Therefore, SCI engaged services of M/s S.B. Bilimoria & Co. as Auditor to look into the allegations. The Auditor submitted it's first report dtd. 1st July, 2006 pointing out discrepancies in Port Trust Deposit Accounts and expenses made by the agent M/s. J. M. Baxi & Co., which were not in accordance with the agency agreement. Then SCI asked the concerned departments i.e. Financial Accounts Division (F.& A.), Liner & Passenger Services (L & PS) Division and Bulk & Tanker (B&T) Division to provide preliminary observations. The concerned departments pointed out anomalies in the report of the Auditor. Therefore, the Chairman and the Managing Director of SCI appointed an Internally Constituted Committee of persons from various departments i.e. from Financial Accounts, Liner & Passenger Services, Bulk Carrier & Tanker Division, Purchase & Services Division, Fleet Personnel Division for their detailed scrutiny. Later the Auditor, M/s S.B. Billimoria submitted it's revised report dtd. 6th August, 2007. When the matter was placed before the Board Meeting held on 12th February, 2007, it was decided that Rs.17.8 Lacs be recovered from the agent together with penalty of 100% of the amount disallowed. Since the Ministry had desired that the matter be put up in the Audit committee, the matter was deliberated by Audit Committee in it's meeting. After deliberations it accepted the basis adopted by the Internally Constituted Committee and confirmed the revised report of the Auditor. The matter was approved by the Board of SCI in the meeting held on 8th September, 2007 with recommendation for additional recovery of Rs.53,366/- alongwith 100% penalty for the amount disallowed. Pursuant to the decision taken in the Board Meeting, amount of Rs.17.8 Lacs together with penalty of 100% of the amount disallowed was recovered by the petitioner on 22nd May, 2007 from the agent M/s J.M. Baxi & Co. The further recommendation of recovery of Rs.53,366/- alongwith 100% penalty on the amount disallowed was also implemented and the amount recovered from the Agent of 13th November 2007.

3 Despite the corrective measures taken by the SCI, respondent no.1 initiated preliminary enquiry on 18th July, 2007. In reply to the same, SCI provided all the information in detail including the report as well as the revised report submitted by M/s. S. B. Billimoria and Co. It also pointed out that SCI has recovered the amount from the agent M/s. J. M. Baxi and Co. Respondent no.1 however proceeded to lodge a complaint on 31st February, 2009 against the petitioners and the

other officials alleging that during a period April-1999 to 2008 the accused persons named in the complaint and other unknown officials entered into criminal conspiracy with private persons i.e. the partners of M/s. J. M. Baxi and Co. for causing wrongful loss to SCI. The complaint alleges that M/s. J. M. Baxi and Co. was appointed as an agent of SCI without following the guidelines and was paid it's "unsupported, disallowable unreasonable claims" without verifying and settling the same. According to the complaint, payment of unsettled claim to M/s. J. M. Baxi and Co. was in violation of the guidelines of SCI. It is further alleged that the agreement signed by original accused no.1 and original accused no. 7 was by abusing their official position. Further the report of the Auditor, M/s. S.B. Billimoria and Co., and the report of the Internal Assessment Committee reveal excess payment made by way of unsupported and unreasonable expenses claimed by the agent. Respondent no.1 had appointed M/s. R. B. Jain and Association, Chartered Accountant and Auditor for verifying the allegations mentions in the FIR. In it's report dated 9th September, 2009 the Auditor observed that the above situation had arisen due to the outdated and obsolete computer accounting system prevailing in the SCI and suitable corrective measures have already been initiated by SCI. The Auditor of CBI had nothing further to add. Thus the Auditor appointed by respondent no.1 did not attribute any lapse on the part of the petitioners. Despite the report, charge-sheet came to be filed before the Special Judge, Greater Mumbai in CBI case No.RC 10(A)/2009-MUM on 7th July, 2010 against the petitioners and two more persons culminating into Special Case No. 60 of 2010. The charge-sheet alleges that, the petitioners, after taking charge of the Accounts Department and Outports Accounts respectively having ensured that the condition of order dated 20th April, 1999 with M/s. J. M. Baxi and Co. had not complied by them. They did not scrutinise the bills submitted by the agent of M/s. J. M. Baxi and Co. and soft copies of the bills were uploaded in the system of SCI. On certain occasions the uploading was delayed. As per the charge-sheet, the above facts on the part of the petitioners reveal the commission of the offences punishable under Section 120B, 420, 465, 467, 468 471 of Indian Penal Code and Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988.

4 In the charge-sheet, respondent no.1 had stated that it had sought sanction from the Competent Authority for SCI for prosecuting the petitioners and the same was awaited. The Sessions Registrar, for examining the documents annexed to the charge-sheet, submitted the report dated 13th July, 2010 stating that sanction of the Competent Authority is necessary for launching prosecution against the petitioners and that the same was yet to be obtained. Therefore the petitioners on 15th April, 2011 filed the application at Ex.58 praying that prosecution should not frame charges against the petitioners till receipt of

the sanction. Respondent no.1 in it's reply sought deferment of prosecution till sanction was received from the Competent Authority. The learned Special Judge by his order dated 6th May, 2011 rejected the application of the petitioners and allowed the request for deferment of respondent no.1. In the circumstance, the petitioners filed application dated 20th May, 2011 under the Right to Information Act to SCI for information as to whether sanction for prosecution of the petitioners had been granted to respondent no.1. SCI by it's letter dated 23rd May, 2011 informed that the Competent Authority i.e. Chairman and Managing Director of SCI had already denied sanction for prosecution to CBI as far back as 18th September, 2010. The petitioners then on 10th June, 2011 filed the application at Exh.66 praying that respondent no.1 be directed to produce sanction for prosecution of the petitioners. Respondent no.1 filed reply admitting in terms, that sanction for prosecution of the petitioners was rejected by SCI vide it's letter dated 18th September, 2010, but claimed that the matter had been taken up before the Central Vigilance Committee (CVC). CVC in it's office memorandum noted that it had received from the respondent allegation-wise rebuttal on the comments of SCI. It noticed that there was differences of opinion between the respondent and SCI and in order to resolve the issue it had decided to hold joint meeting between SCI and CBI at the Additional Secretary Level. Accordingly the meeting was held after which the commission took it's decision by office memorandum dated 19th October, 2011. In that it observed that accommodations granted to M/s. J. M. Baxi & Co. were apparently on account of system failure. It was established that the SCI had in place faulty system which allowed M/s. J. M. Baxi & Co. to take undue advantage. There was no evidence of personal complicity of the petitioners with regard to abuse of authority by granting undue accommodation. It further opined that the petitioners as the persons in charge their respective branches should have ensured that the loopholes in the system were plugged and should have brought, the deficiencies and lacuna in the system in the open so that remedial measures could be taken. However with regard to the processing, upholding of scrutiny of bills the responsibility was vicarious as the work has actually done by one Mr. Kamath. Moreover, the faulty system adopted by SCI was continuing, as a matter of fact, since even before the petitioners replaced their Predecessors. Therefore the facts indicated a strong case for prosecuting M/s. J. N. Baxi & Co. and other accused persons, but not the petitioners. For these reasons CVC had refused to grant sanction for prosecution of the petitioners. But at the same time it asked SCI to initiate departmental proceedings against the petitioners.

5 The petitioners thereafter filed an application for discharge dated 9th March, 2012 (Ex.87) praying that in view of the observations of CVC, the petitioners deserve to be

discharged from the proceedings. Respondent no.1 opposed the application by filing reply dated 30th September, 2012. The learned Special Judge then by his order dated 18th September, 2012 rejected the application for discharge. In his short order the reasons for rejection of the application are stated at paras 8 to 10 of which paras 8 and 9 are devoted to stating the background. The 10th para of the order is the only para wherein the Special Court has stated it's reasons for rejecting the application of the petitioners. The same read as under :

> "It has already been pointed out above that accused had moved applications Exh.58 and 68 contending about want of sanction for prosecution and those applications have been finally rejected by this Court. Obviously there being no provision for review of orders in the Code of Criminal Procedure, the contentions made by the accused in the present application regarding want of sanction the accused are entitled for discharge and further that as has already been pointed out earlier charge sheet refers to the alleged acts which are based on the evidence collected by Chartered Accountant against the accused for irregularities in the accounts maintained by the accused. Moreover the circumstances as regards irregularities of the accounts have not been disputed by the accused at this stage and further that offences of conspiracy and cheating requires that circumstances should be proved by evidence. It cannot be said that charge against the accused in groundless as contemplated by the provisions of Code of Criminal Procedure and on the basis of submissions and principles laid down in case relied upon by the learned counsel of accused cannot be accepted. Hence, the points are answered in the

Negative."

6 Mr. Abhishek Kumar, the learned advocate for the petitioners submits that the learned Special Judge failed to appreciate the aspect of want of sanction to prosecute the petitioners in proper perspective. He could not have brushed aside the contention in the manner as done. He submits that the entire case made out by respondent no.1 in the charge-sheet was on the basis of improper understanding of the facts and circumstance and there was no evidence whether oral and documentary to support the allegations. Further SCI had already provided suitable clarification vide its letter datd 6/7th May, 2009 and the circumstances prevailing in SCI. It had not attributed the payment to M/s. J. M. Baxi & Co. to any lapse on the part of the petitioners. In any case, Mr. Abhishek Kumar submits that in view of the observations of CVC of failure on the part of the petitioners in ensuring that the loopholes in the system are plugged, SCI had initiated departmental enquiry against the petitioners in which they have been completely exonerated. He also submits that it is strange that despite refusal by CVC to grant sanction for prosecution, CBI desires to continue with the prosecution which is not tenable in law.

7 Ms. Gonsalvez, the learned advocate for CBI submits in reply that the sanction to prosecute for the offences punishable under Prevention of Corruption Act cannot be

relevant to the offences punishable under Indian Penal Code. In this connection, she relies upon decision of Single Judge of our High Court in ***Ashoo Surendranath Tewari vs. The Deputy Superintendent of Police Economic Offences Wing, CBI in Criminal Writ Petition No. 3024 of 2012 dated 11th July, 2014*** that refusal to accord sanction for prosecution under the provisions of Prevention of Corruption Act cannot be held relevant to discharge an accused of the offence punishable under Indian Penal Code and that the prosecution needs to be given an opportunity to lead evidence to establish the guilt of the accused. Mr. Abhishek Kumar on the other hand relies upon decision of Division Bench of our High Court in ***Atchut Alornekar vs. Central Bureau of Investigation in Criminal Application Main No. 78 of 2012 dated 29th August, 2012*** in this regard**.** The facts of the decision cited are similar to the facts of the present case. The FIR in that case was registered under Section 120-B read with Section 420 Indian Penal Code and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act. All the petitioners therein were public servants. Under Section 19 of the Prevention of Corruption Act, prior sanction of the appropriate authority to prosecute the petitioners was required to be obtained. The CVC had declined sanction stating that the matter was not fit for launching prosecution. The Division Bench found, in the facts of that case, that the offences punishable under Section 120-B read with Section 420 Indian

Penal Code were interlinked with the offences punishable under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act. The offences under Section 120-B read with Section 420 Indian Penal Code were not separate or independent accusations. Therefore, once the sanction under Section 19 of the Prevention of Corruption Act was refused by CVC and the CVC found that the matter was not fit for launching prosecution, there could be no chargesheet filed against the petitioners only under Section 120-B read with Section 420 Indian Penal Code by conveniently dropping Section 13(2) and 13(1)(d) of the Prevention of Corruption Act. It had therefore held that, it was a fit case where the FIR and the proceedings were required to be dropped.

8 In the facts of the present case, CBI has not left any stone unturned for seeking sanction of CVC to prosecute the petitioners for the offences alleged against them under the Prevention of Corruption Act. The CVC has, however, for extensively detailed reasons refused to grant sanction. The relevant portion of the official Memorandum of CVC reads as under :-

> "It is apparent that undue accommodation has been granted to M/s. J. M. Baxi & Co., however, this seems to be on account of systemic failure. While it is established that the SCI had in place a faulty system

which allowed M/s. J. M. Baxi & Co. to take undue advantage, personal complicity with regard to abuse of authority for granting undue accommodation, on part of Shri NR Saraiya and Smt. Ladi, with regard to their complicity is not fully established. Shri. Saraiya and Smt. Ladi as incharges of their respective Branches should have ensured that loopholes in the system were plugged and should also have brought in the open the deficiencies and lacunae in the system so that remedial measures could be undertaken. Thus, there is a strong case for RDA major penalt/against both of them. However, with regard to the processing, uploading the scrutiny of bills, the responsibility was vicarious as the work was actually to be done by Shri. Kamath. Moreover, the faulty system adopted by the SCI was continuing from much earlier period, as a matter of fact even before the time Shri. Saraiya replaced his predecessor and took over as incharge. It appears therefore that though there is strong case for prosecuting M/s. J. M. Baxi & Co. and other accused persons, malafide does not seem apparent in case of Shri. N. R. Saraiya and Smt. Ladi. However, both Shri. Saraiya, then Vice President, SCI and Smt. Vaishali Ladi, then DGM, SCI, have committed serious lapses by not discharging their assigned duties fully.”

Perusal of the office Memorandum of CVC and the above quoted para in particular, makes it clear that, CVC has not accepted the allegations of corruption against the petitioners. Its indictment of the petitioners is only for not being efficient in discharge of their duties by ensuring that there is a proper accounting system in place. This observation at the highest can lead to departmental action against the petitioner. As already noted hereinabove, the petitioners have been completely exonerated in the departmental enquiry conducted against them. Unfortunately, these aspects of the matter were completely lost sight off by the learned Special Judge. The other decision cited by Mr. Abhishek Kumar on this aspect is of the Apex Court in ***Mohd. Iqbal Ahmed vs. State of Andhra Pradesh reported in (1979) 4 Supreme Court Cases 172.*** In the similar facts of the case the Apex Court held that the prosecution had been launched without any valid sanction and therefore the cognizance taken by the Special Judge is completely without jurisdiction.

9 In the case on hand, there can be no dispute that the facts constituting the offences alleged under the provisions of Indian Penal Code and those under the provisions of Prevention of Corruption Act are same. There are no separate and independent allegations for the two sets of offences. Consequently, once it is found by CVC that the material is not sufficient to grant sanction for prosecution for the offences

punishable under the provisions of the Prevention of Corruption Act, the same material cannot held to be fit for prosecution for the offences punishable under Indian Penal Code. The respondent, as an independent investigating agency, ought to have accepted this legal position and the opinion of CV and dropped the proceedings against the petitioners. Hence, the petition is allowed in terms of prayer clause (a).

(Smt. R.P. SondurBaldota, J.)