

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.06.2017

Delivered on : 18.07.2017

CORAM

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

Crl.R.C. No.1007 of 2016

and

Crl.MP.No.8093 of 2016

M/s. Mahindra Consulting Engineers Ltd.,
No.17/18, Mahindra Towers
Pattullous Road,
Chennai - 600 002
Rep.by H. Janarthanam

.. Petitioner/Petitioner

vs.

SPE/CBI/ACS,
Rep.by Inspector of Police
Central Bureau of Investigation
Nungambakkam, Chennai -6

.. Respondent/Respondent

Revision Case filed under Section 397 (1) r/w 401 of Cr.P.C against the order dated 09.06.2016 passed in Crl.M.P.No.101 of 2016 in C.C.No.14 of 2014 on the file of the CJM, Pondicherry and thereby dismissing the petition filed by the petitioner under Section 239 of Cr.P.C.

For petitioner : Mr.V.Raghavachari

For respondent : Mr.K.Srinivasan
Special Public Prosecutor

ORDER

By way of the present petition under Section 397 read with 401 of the Code of Criminal Procedure, the petitioner has challenged the order dated 09.06.2016 passed by learned Chief Judicial Magistrate, Puducherry, in and by which the petition filed by the petitioner seeking to discharge him from the

offence charged under Section 120B IPC read with Section 420 of IPC and Section 13(2) r/w Section 13(1)(d) of the Prevention of Corruption Act, 1988, was dismissed.

2. The factual matrix of the case are that based on the information collected, the respondent police has registered FIR under Section 120-B, read with 420 IPC and Section 13 (2) read with 13 (1) (d) of the Prevention of Corruption Act, 1988 against Ragesh Chandra (A1), Mohan (A2) and the Contractor M/s. IVRCL. The allegation is that during the period between 2004 and 2007, A1 to A3 along with unknown public servants and unknown private persons entered into criminal conspiracy to cheat Government of Pondicherry and the Government of India in the project construction of houses affected by Tsunami wherein M/s. IVRCL was issued a order to construct houses. After investigation, both A1 and A2 were dropped and M/s. IVRCL and the petitioner company was introduced as A1 and A2. It is the case of the prosecution that the present petitioner was allotted contract for construction of Tsunami for the houses by the Government of Pondicherry. The project implementation agency (PIA) also approved the appointment of the present petitioner, Mahindra Consulting Engineers Limited, Chennai, as the project Management to construct and supervise the construction activities at Kalapet project on behalf of PIA and to check whether the quality of construction conform to all National Standards specified in the request for proposal. Further, the petitioner was awarded contract as Consulting agency and paid a sum of Rs.1,42,89,945/- by the PIA for his consultancy services exclusively for Kalapet Project for construction of houses by the accused No.1, IVRCL. It is further alleged by the prosecution that based on the recommendation by the present petitioner, payments were made to IVRCL, Hyderabad. Thereafter, super check proceedings were conducted by a team of experts in the presence of eye witnesses and PIA officials and accused for the period from 23.01.2012 to 03.12.2012 and samples were collected and sent to the laboratories after obtaining permission from the Court and the same would disclose that there was violation in the construction. Therefore, it is the case of the prosecution that both the accused conspired together and cheated the Government of Pondicherry and Government of India and hence, they have been prosecuted for the offences stated above.

3. The learned Judicial Magistrate, Pondicherry has taken cognizance of the matter against the accused and framed charges. Pending trial, the petitioner herein, who was arrayed

as A2, has filed the instant petition for discharge. The Trial Court dismissed the said petition.

4. Feeling aggrieved by the said order, the petitioner has preferred the present petition.

5. The learned counsel for the petitioner urged that there is no material on record to show the involvement of petitioner. According to the learned counsel, the petitioner is in no way connected with the construction of the building and, in fact, he was only appointed as a consultancy agency to advise the PIA, which consists of top Government officials. It is contended that the entire construction was made only by the 1st accused. It is the further contention of the learned counsel that 1400 houses have been built and handed over to the Government by the 1st accused. To implement the project, the petitioner's advise has been utilised by the PIA and except that he has no role in the construction of houses in question. The instant case has been filed by the prosecution only on the basis of some source information and no complaint, whatsoever, either from the PIA or from the Government of Pondicherry. Hence, according to the learned counsel, the entire prosecution has been motivated and, in fact, in the charge sheet, the public servants, who were in charge of the PIA and who were already arrayed as accused in the FIR, were conveniently dropped and the present petitioner, who has not even been arrayed as accused in the FIR, has been introduced in order to make him as a scapegoat.

6. It is the contention of the learned counsel that though the entire contract and work orders have been approved by the PIA, no action, whatsoever has been taken against them. According to the learned counsel, the petitioner has been unnecessarily dragged into the present proceedings. It is submitted that PIA, which consists of several officials including the Engineers, have verified the bills forwarded by the revision petitioner and thereafter only bills have been passed. It is further submitted that 1400 houses were also constructed by 1st accused and handed over to the Government and that the same has been acknowledged by the PIA. Now, the CBI, on the basis of some alleged source information said to have been given with regard to deviation in 13 houses, has lodged the present case, which is in no way connected with the work of the revision petitioner. Hence, it is submitted that, absolutely, there is no prima facie materials available as against the present petitioner to frame the alleged charges. The Trial Court, has not considered the agreement entered into between the revision petitioner and the PIA as well as the

statement of the main witnesses, who were in charge of the project, and simply dismissed the petition filed by the petitioner.

7. Per contra, learned Special Public Prosecutor for CBI contended that the petitioner entered into a conspiracy along with other accused persons and thereby cheated the Government. It is submitted that the revision petitioner failed to supervise the construction activities of 1st accused. It is further submitted that there is a specific contract between this petitioner and the PIA to the effect that the revision petitioner should support the PIA to ensure that housing assistance policy formulated by the Government is implemented satisfactorily and also to ensure that the PIA housing construction component is implemented according to the operational guidelines laid down in the CPWD Manual Vol.II as per NBC Codes. It is also the contention of the learned Special Public Prosecutor that during super check proceedings conducted by a team of experts, they found some deviation in 13 houses with regard to dimension measurement. According to the Special Public Prosecutor, the Dimension of the foundation as per the poof checking is below the measurement given and the same would clearly show that the revision petitioner has not properly supervise the project and thereby caused loss to the Government. It is further submitted that the bills were sanctioned only on the basis of the recommendation of the revision petitioner. It is also submitted that the statement of L.Ws.7, 9, 10, 12 and 35 and document Nos.10, 25, 87 and 88 and other documents would go to show that there are prima facie materials to proceed as against the accused and the same would also establish conspiracy between the petitioner and the other co-accused. Hence, the learned Special Public Prosecutor prayed for dismissal of the revision.

8. I have heard the learned counsel for the petitioner and the learned Special Public Prosecutor. I have also perused the entire materials available on record.

9. The only points that arise for consideration in this revision petition are:

(1) Whether the order passed by the Trial Court in dismissing the application filed by the petitioner for discharge suffers any illegality or irregularity?

(2) Whether there is no prima facie materials to frame charges as against the accused?

10. On a careful perusal of the entire materials and charges relied upon by the prosecution, it is seen that the Government of Pondicherry with the help of Central Government took a decision for reconstruction of houses to various Tsunami affected people. It is not in dispute that one such contract was allotted to the 1st accused herein to construct 1400 houses, vide work order dated 03.7.2008 by the PIA, Government of Puducherry, and the present revision petitioner was appointed as a consultancy to advise the said PIA, which has over all control over the construction of the building and payment of money to the contractor. As per the work order, some of the major tasks assigned to the Project Management Consultancy(PMC) are:

"... ..
* Assistance towards General policy,
* Assistance towards Project Management,
Programme Coordination and contract Management,
* Assistance towards Social Monitoring and
Management,
* Technical Review and Assistance towards
quality monitoring,
* Physical Progress Monitoring
* Assistance towards Social and Environmental
Safeguards Implementation..."

Apart from the above tasks, the PIA also engaged the PMC for any other tasks it may require to meet the overall program management objectives. Based on the aforesaid work order, a contract was also signed by the revision petitioner on 10.7.2008 and handed over the same to PIA.

11. That Apart, in appendix "A" of the contract, it is specifically agreed as follows:

Assistant towards General Policy and Strategic Oversight

- Support the Project Implementation Agency to ensure that the housing assistance policy formulated by the Government is implemented satisfactorily.
- Support Project Implementation Agency to ensure that the housing reconstruction component is implemented according to the operational guidelines laid down in the CPWD Manual Vol.II and as per NBC codes.
- Help Project Implementation Agency updates the project operational manual on a periodic

basis, and advice on periodic revision required in the operational manual from time to time.

Assistance towards Project Management, Programme Coordination and Contract Management:

- Co-ordinate the Project implementation Agency to ensure smooth operation and implementation of the Project
- Assist the Project implementation Agency in Contract packaging award of contract, contract management
- Examine the bid documents prepared by the PIAs and check as to whether they are in acceptable format as prescribed by the Government of India and suggest corrections if found necessary.
- Support the Project Implementation Agency to ensure that the contract management quality and performance are satisfactory;
- Coordinate with the PIAs on any likely dispute with the contractor(s) find the reasons for the dispute and assist the PIAs in the dispute resolution procedure and take suitable action so that the works are continued smoothly.

Assistant towards Social Monitoring and Management

- Ensure that the third party consultations, community, participation, capacity building and grievance redressal mechanisms proposed in the project are implemented satisfactorily
- Collecting and analysing and social monitoring data received from various civil society organisations engaged by the respective District Collectors and producing quarterly social monitoring reports;
- Support of the Project Implementation Agency on social development issues involved in reconstruction and rehabilitation, resettlement, land acquisition, NGO coordination; and oversee the implementation of community awareness and participation and

capacity building components of the
programme; and
.. .. .
.. .. .
.. .. .

On a careful perusal of the above agreement, except one of the condition, i.e., to support the Project Implementation Agency to ensure the housing construction component is implemented according to the operational guidelines laid down in CPWD manual and NCB codes, the contract does not show any direct involvement of the revision petitioner in carrying out the construction work.

12. It is also not in dispute that the PIA comprises of the member in the rank of IAS officer and PIA is a fully functional organisation and the same could be seen by the statement given by L.W.1. The statement of L.W.1, in fact, discloses the fact that the Governing Body of PIA comprises of 8 top level Government officials, in which the Chief Secretary is the Chairman, The Relief and Rehabilitation Commission is the Vice Chairman, Secretaries of Finance and Environment, Fisheries, Revenue, Housing and Town Planning, Chief Engineer, PWD and the Project Director, Project Implementing Agency, Pondicherry are the Members. These facts are not disputed. It is also not in dispute that the entire bills in respect of the construction were made only by the PIA and the bills were also certified by the revision petitioner. Neither the PIA nor the Government of Pondicherry or the allottee of the Building raised any complaint or whatsoever against the revision petitioner. But the fact remains that the CBI registered the FIR only on the basis of some source information and carried out the investigation. Though initially they laid FIR as against one G.Ragesh Chandra, Mohan and the Contractor of IVRCL, finally charge sheet has been filed against the petitioner herein and contractor (1st accused).

13. It is the admitted fact that the revision petitioner herein has not been made as accused at the relevant time when the FIR was filed. It is the contention of the learned counsel for the revision petitioner that no prima facie materials are available as against this petitioner to frame the alleged charges and only few witnesses have spoken about the consultancy agency, i.e. the petitioner herein. In this regard, when the statement of L.W.1, the first Project Director of PIA, is analysed, it is seen that he has stated about the selection of the petitioner as consultancy services and also about the issuance of work order towards construction of 1431 houses to IVRCL, the 1st accused. L.W.2, one Vincent Rayar, in his

statement, has not stated anything about this petitioner. Similarly, L.W.4, who assisted the Project Director at the relevant time, has not stated about this revision petitioner. L.W.5 has stated that 4th meeting of the Governing body approved the evaluation and short list of five Firms for issuance of RPFs with regard to provision of EPC services for construction of houses at Kalapet. Except that he has not stated anything about the revision petitioner. L.W.6 has also spoken about the selection of the revision petitioner towards consultancy services. Apart from that he has not stated anything with regard to the nature of role played by the petitioner.

14. LW.7, who was given additional charge as Assistant Engineer (I/C), confirmed about the appearance of the 1st accused and also about the recommendation made by the revision petitioner for payment. His evidence would go to show that the bills along with necessary documents and mandatory test result of various materials were scrutinised properly by the PIA and finally the bills were cleared. He has also stated that project has been completed in all respect on 18.5.2011. He has not stated anything about the faulty construction or direct involvement of the 2nd accused, the petitioner herein. Similarly, L.W.9, who was working as Executive Engineer in the Project Implementation Agency at the relevant time, in his statement, has stated that based on the recommendation made by the revision petitioner company along with necessary supporting documents filed by him, bills were prepared and after getting note file order from the Project Director of PIA, the bills were cleared and payments were made. L.W.10 in his statement also reiterated the statement made by L.W.9.

15. L.W.11, in his statement, has stated about the contract entered into between the contractor and PIA and also about the defect liability period. His evidence would further go to show that the contract was awarded to the main accused i.e IVRCL with definite specification and codes to be used for construction of building. His entire statement does not implicate the revision petitioner in any manner.

16. At this juncture, it is useful to extract the statement made by L.W.12, which reads as follows:

"... M/s. IVRCL will submit their bills time to time to the Technical Wing of PIA. In turn, the Executive Engineer of PIA will forward the said bills to M/s. Mahindra Consultancy who was engaged as Project Management Consultant for verification of works and

certification. Further, the M/s. Mahindra Consultancy will certify the work and certificate along with bill will be forwarded to Technical Wing of PIA for payment. Then based on the certification issued by the PMC (petitioner), the Technical Wing (JE/AE/EE) will be endorsement in the M-Book and prepare a "Running Account Bill-C" as per Chapter VII of the PW Account Code. Then the same will be forwarded to Project Director of PIA along with M-Book for sanction. After according approval by Project Director the said bill will be sent to Director Planning & Finance of PIA for making payment. In turn, the account section of PIA will prepare the payment bill and making payment to the party with the expenditure sanction of Project Director, PIA."

The above statement of L.W.12 would clearly show that the bills were directly submitted by the 1st accused to the Technical Wing of PIA, which consists of Junior Engineer, Assistant Engineer and Executive Engineer, who, in turn, forwarded the bills to the revision petitioner and after certification by the revision petitioner, the bills were again sent to the PIA for approval. The statement would clearly show that all the payments were made only after getting signature of the Technical Wing of the PIA, which consists of JE/AE/EE.

17. More so, the statement made by L.W.34 would show the nature of the contract between the 1st accused and PIA for construction of the houses. L.W.35, Principal Engineer of the revision petitioner, in his evidence, has stated that the revision petitioner was appointed only to give advise to the PIA and entire construction was done by the 1st accused.

18. It is to be noted that in fact the bills submitted by the contractor to the Technical Wing of the PIA was forwarded to the revision petitioner and after certified by him, again the bill was sent to the Technical Wing of PIA, Who are all Engineers, and after obtaining their signature, the bill was processed after getting note from the PIA.

19. All the above oral and documentary materials would go to show that the revision petitioner had simply certified the bills submitted by the contractor, viz., IVRCL and that the same has been approved only by the Technical Wing of PIA. Therefore, the contention of the prosecution that this petitioner entered into a conspiracy with the original contractor and constructed

the buildings with deviation cannot be countenanced for the simple reason that the order of construction was with the 1st accused, as per the agreement entered into between the PIA and the 1st accused. Merely because, agreement has been entered into between the revision petitioner and the PIA to ensure that housing construction component is implemented according to the operational guidelines laid down by the PIA, the petitioner cannot be fastened with the criminal liability for the act of deviation done by the contractor in the buildings in question. At the most, the act of the petitioner would amount to breach of contract and it would not amount to criminal offence as alleged by the prosecution.

20. Admittedly, during super check proceedings conducted by a team of experts, some deviation was found in 13 houses. Whereas the PIA itself has admitted that the construction of other buildings is in order. It is also admitted that the entire construction was over and the buildings were handed over to the Government, which, in turn, also handed over the same to the beneficiaries. Neither the Project implementing agency nor the Government of Pondicherry raised any complaint as against the revision petitioner. Therefore, this Court is of the view that even if the petitioner had committed breach of any one of the conditions made in consultancy agreement, criminal liability cannot be fastened against the petitioner. Even the statement of experts, who conducted super check, that there are deviation in the construction is taken into consideration, the same will go against the 1st accused and for which the revision petitioner cannot be proceeded for criminal conspiracy. Of course, for the charge of conspiracy there need not be any direct evidence available on record. But the fact remains that the recommendation made by the revision petitioner has been subjected to scrutiny by the Technical Wing of the PIA. Therefore, this Court is of the view that for mere breach of agreement is not sufficient to frame charge under Section 120-B of IPC as against this petitioner.

21. Similarly, to bring home guilty for the charge under Section 420 of IPC there must be evidence to show that there was a deception by the revision petitioner from the very inception. It is not the case of the beneficiary nor the Government that there was deception by the revision petitioner. Hence, in the absence of any oral and documentary evidence by the prosecution, this Court is of the view that no prima facie materials available on record as against the revision petitioner to frame the charges under Section 420 IPC. Of course, even mere suspicion is sufficient to frame the charges as against the

accused. But at the same time, on a perusal of the entire statement and documents relied on by the prosecution, it is clear that except the statement made by super check team that there are deviation in respect of 13 houses, there is no materials to show that there was faulty construction by the 1st accused. As discussed supra, there is no prima facie materials available on record to proceed as against this petitioner for the alleged offences, since he was only adviser to Project Implementing Agency. Therefore, this Court is inclined to allow this revision.

In the result, the petition is allowed and the order dated 09.06.2016 passed by the learned Chief Judicial Magistrate, Puducherry, is set aside and the petitioner herein (2nd accused) is discharged from the charges framed in C.C.No.14 of 2014 on the file of Chief Judicial Magistrate, Puducherry.

Sd/-
Asst.Registrar (CS VI)

/true copy/

Sub Asst. Registrar

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To

1. The Inspector of Police
SPE/CBI/ACS,
Central Bureau of Investigation
Nungambakkam, Chennai -6
Central Bureau of Investigation
Nungambakkam, Chennai -6

2. The Chief Judicial Magistrate
Puducherry

3. The Special Public Prosecutor,
High Court, Madras.

+1cc to Mr.V.Raghavachari, Advocate Sr. 50062

pre delivery order in
Crl.R.C. No.1007 of 2016

SJ(CO)
VR(09/08/2017)