

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 01.08.2018
Pronounced on : 22.03.2019

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.O.P.Nos.9300 and 8530 of 2011
and
Crl.M.P.Nos.10163 & 10164 of 2018

Crl.O.P.No.9300 of 2011

1.K.M.Mohideen Kunhi ... Petitioner/Accused No.9
2.K.M.Muhammed Sherief ... Petitioner/Accused No.12
3.K.M.Ahammed Nizar ... Petitioner/Accused No.13

Vs.

State Rep. by
Deputy Superintendent of Police,
Crime Branch CID,
Vellore. ...Respondent/Complainant

Crl.O.P.No.8530 of 2011

1.T.B.Kunhi Mahin Haji ... Petitioner/Accused No.10
2.Smt.S.L.P.Kunhibi ... Petitioner/Accused No.11
3.Tmt.K.M.Tahira ... Petitioner/Accused No.14
4.Tmt.K.M.Arifa ... Petitioner/Accused No.15

Vs.

State Rep. by
Deputy Superintendent of Police,
Crime Branch CID,
Vellore. ...Respondent/Complainant

COMMON PRAYER: Criminal Original Petitions are filed under Section 482 of the Code of Criminal Procedure, to call for the records in Spl.Case No.12 of 2015 on the file of the learned Chief Judicial Magistrate, Thiruvannamalai and quash the same.

For Petitioners in
Crl.O.P.No.9300 of 2011 : Mr.R.Rajaratnam for
Mr.J.Rajaji

For Petitioners in
Crl.O.P.No.8530 of 2011 : Mr.B.Kumar, Senior Counsel
for Mr.P.Solomon Francis

For Respondent in both
Crl.O.P.Nos. : Ms.V.Saratha Devi
Govt. Advocate [Crl. Side]

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C O M M O N O R D E R

The petitioners in Crl.O.P.No.8530 of 2011 are Accused No.10, 11, 14 and 15 and the petitioners in Crl.O.P.No.9300 of 2011 are accused No.9, 12, 13 in Spl.C.C.No.8 of 2011 pending on the file of Chief Judicial Magistrate, Tiruvannamalai for the offences U/s.120(B) r/w 167, 409, 477-A, 420, 468 and 471 r/w 109 IPC and U/s.13(2) r/w 13(1)(c) and (d) of Prevention of Corruption Act and 109 IPC.

2.The respondent registered a case in Crime No.4 of 2007 against A.1 to A.9. A.1 to A.8 are officials of PWD Department and A.9 is M/s.Chandragiri Construction Company, Kasargode. After investigation, accused A.10 to A.15 were included and one K.M.Mohideen Kunhi, Partner was arrayed as A9 representing M/s.Chandragiri Construction and filed the charge sheet along with statement of witnesses, documents and M.Os. The Accused No.5 had filed Crl.O.P.No.11431 of 2015 before this Court and this Court directed the trial court to complete the trial within a period of 3 months. Hence, the case against the petitioners herein who are accused 9 to 15 against whom non-bailable warrant were pending, the case was split up and the case against them was assigned Spl.Case No.12 of 2015.

3.The petitioner in Crl.O.P.No.8530 of 2011 filed Crl.M.P.No.10164 of 2018 and petitioners in Crl.O.P.No.9300 of 2011 filed Crl.M.P.No.10163 of 2018 to amend the prayer by incorporating the Spl.Case No.12 of 2015 instead of Spl.Case No.8 of 2011. Considering the submission, the same are allowed.

4.The petitioners are referred as accused as per the rankings assigned initially when the charge sheet was filed against them in Spl.Case No.8 of 2011 for the sake of convenience and clarity.

5.The brief facts of the case is that the Government of Tamil Nadu in G.O.Ms.No.699 PW (S2) Department dated 18.10.1996 accorded administrative approval for the work of formation of a Reservoir across Kamandalar River, near Shenbagathope Village in Polur Taluk of Tiruvannamalai District. Tenders were called for, for construction of Dam. M/s.Chandragiri Construction was awarded the said contract. There were other ancillary works such as manufacture, supply, erection, testing and commissioning of 7 radial gates with hoist arrangements and deck bridges for spill way of went size 8.30 m into 4.57 m. for Shebbagathope reservoir project and the cost for this separate tender was for Rs.164 lakhs. The said project was awarded to M/s.Chandragiri Constructions a Partnership firm represented by K.M.Mohideen Kunhi (A.9) who had signed the agreement with the then SE/Special Engineer/Project circle Vellore on 16.07.2004. The tender was for Rs.1,55,32,293/-. As per the agreement between the parties, the said work was to be completed within a period of 9 months on or before 15-4-2005 and the payment term was as follows:

- a) 40% of the quoted price has to be paid to the contractor on delivery of materials at Dam site;
- b) 50% to be paid on erection for the equipments and satisfactory dry test on erection parts of complete set; and
- c) The balance of 10% was to be paid on final acceptance of the gates after satisfactory commissioning under full reservoir level conditions and after issuance of completion certificate.

6.The case of the prosecution is that between 16.07.2004 and 07.01.2005, in connection with the execution of the work of commission of 7 radial gates of Shenbagathope Project, the officials concerned with partners of M/s.Chandragiri Constructions have conspired in commission of the offence by incorrect documents, falsification of accounts, criminal breach of trust, cheating and creating false documents using the same as genuine for the purpose of cheating and misappropriation of Govt. funds thereby the accused have caused wrongful loss to the extent of Rs.1,20,80,231/- towards the execution and commissioning of radial gates. The PWD officials made a payment of Rs.1,34,23,732/- to the contractor during the period 30.07.2004 to 07.01.2005.

7.The FIR in Crime No.4 of 2007 dated 30.05.2007 was registered on the complaint given by Secretary to Government against the public servant and the contractor who were involved in Shenbagathope Project for offence U/s.120(B) 409, 477-A, 420 IPC r/w 109 IPC and U/s.13(1) (c) and (d) r/w 13(2) of Prevention of Corruption Act.

8. After completion of investigation, the charge sheet was filed. The specific case as against the petitioners who are partners of M/s.Chandragiri Constructions is that one Manickam, Executive Engineer had carried out inspection on 08.03.2006 and found that out of seven shutters to be fixed, the contractors had fixed only two shutters in an incomplete shape. On the other hand, the contractors received Rs.1,34,23,732/- as on 07.01.2005, which was not proportionate to the work done. Further, on 23.03.2006, Chief Engineer (Gl.) PWD conducted inspection of the site and found that out of the 7 gates erected, only 2 were found in position at two vents, rope drum hoist work for operating the 7 radial gates was found executed, deck bridge for operating the 7 radial gates had not been erected, and found only at 2 vents, skeleton of gliders were found to be in position, materials such as radial gate skin plates, the angles, hoist main girder channels, hoist wire rope drum and hoist gear wheel arrangements were lying at the site for fabrication and erection. For all the aforesaid works, payment for material portions were made without the required certificates of the technical personnel of Public Works Workshop and advance payment to the contractor was made to a tune of Rs.1,20,80,231/-. Thus, the active Partners of M/s.Chandragiri Constructions namely Accused Nos.9, 10, 12 and 13 sleeping partners Accused Nos.11, 14 and 15 had abetted the commission of above offence.

9. The contention of the petitioners is that the petitioners/accused No.10 is the Managing Partner, Accused Nos.9, 12 and 13 are the working Partners. Accused Nos.11, 14 and 15 are the female members/house wives. Further, as per the FIR, only the Partnership firm was shown as accused and without any specific averments, all the partners who are family members have been arrayed as accused.

10. The petitioners submit that the case was registered on 30.05.2007 based upon two reports given by Chief Engineer dated 16.02.2006 and Engineer in Chief, Water source organization and Chief Engineer(Gl.)PWD dated 27.03.2006. It is seen that the agreement of contract was entered between Special Engineer, Project, Vellore and M/s.Chandragiri Constructions represented by A.M.Mohideen Kunhi, Accused No.9. The ladies who are only sleeping partners who had not participated in any of the business transactions have been arrayed and this would show the per-functionary manner, the investigation has been carried out. The respondent had mechanically arrayed all the partners as accused. It was further stated that even prior to the registration of FIR, 7 radial gates were erected and completed by January 2005 and PWD officials was requested to conduct inspection. No officials inspected the same but on the other hand had lodged a complaint without ascertaining the true facts.

It is a fact that during October and November 2005, there was heavy torrential rains and the shutter gates got damaged, they were to be removed for repair and refix. The letter dated 07.07.2008 of the Executive Engineer, WRO, PWD Shenbagathope Reservoir Project addressed to the petitioner's firm to complete the rectification of defects in the above work on or before 18.07.2008 without fail will fortify the fact that the shutter gates earlier fixed got damaged due to torrential rain. It is an admitted fact that even prior to registration of FIR the work was completed. Hence, there is no question of cheating. The defects pointed out were only rectified later. Further, the petitioner has been informing about the progress of the work on a regular basis and was seeking time for extension for completing the project by giving the reasons for the same. The letters dated 13.04.2005, 10.02.2006, 27.12.2006 and 11.06.2007 would stand testimony to the same. Further, the letters of the Executive Engineer, WRO, PWD dated 07.07.2008, 23.07.2008, would prove the fact that the EE has asked the petitioners firm for rectification of the work on or before 18.07.2008. Despite this, the FIR was registered on 30.05.2007. Even after registration of the FIR the petitioners firm was asked to carry out the rectification work. The officials of PWD were carrying out their site inspection and instructing the petitioner's firm.

11. It is an admitted fact that though the project work has been completed, the PWD authorities are yet to release the balance due amount of nearly Rs.40 lakhs citing the pendency of the above case as the reason. It is further submitted that the firm by letter dated 11.06.2007 requested the Superintending Engineer for payment, after testing of radial gates by the General Superintendent, PWD Workshop, Chennai. It is further submitted that if at all any violation or discrepancy are seen, PWD had the powers to initiate recovery proceedings as per the tender condition and the above case was filed in haste by the officials for obvious reasons.

12. The petitioners submit that the prosecution had lost sight of the tender, and contract was for a turnkey project and the schedule of work and mode of payment have been categorically stated in the document and the concept of recording of M-Book and releasing of payment on that basis does not arise in this case. The respondent failed to look into these facts and mechanically made averments and roped in the petitioners as accused in this case.

13. The radial shutters erected by the firm are put to use and in the preceding monsoon season waters was stored and utilized by using the radial gates which stood the test of time on its quality and usage.

14.The petitioners further submitted that the case in Spl.Case No.8 of 2011 which was proceeded against PWD officials who were A.1 to A.8, ended in acquittal by Judgment dated 27.04.2016. On perusal of the same, it is found that the respondent had examined 22 witnesses, marked 65 Exhibits and M.O.1 series. On perusal of the judgment of the Chief Judicial Magistrate, Tiruvannamalai it is seen that 100 % of the work namely fabrication and erection of radial shutters have been completed and no loss have been caused to the Government. On such finding, the Magistrate acquitted all the PWD officials against which no appeal has been filed and the judgment had become final. He further submitted that since Accused A.1 to A.8, who are the public servants in this case ended in acquittal, the case for offence under Prevention of Corruption Act against the petitioners who are A.9 to A.15 cannot be proceeded with. In the absence of any specific overt act attributed against the petitioners, no case is made against them. Further, the categorical finding of the court below that there is no loss to the Government in execution of the project, case against the petitioners is liable to be quashed. Further, the petitioners relied upon the decision of the following cases:

- 1) AIR 1972 SC 1502 - BAGATHRAM VS. STATE OF RAJASTHAN
- 2) 1989(4)SCC 630 - SHIAMSUNDAR AND OTHERS VS. STATE OF HARYANA.
- 3) 2005 (1) SCC 478 - CBI VS. AKHILESH SINGH.
- 4) CDJ 2007 MHC 1753 - TAMIL MARAN VS. INSPECTOR OF POLICE, TIRUVARUR DISTRICT.
- 5) 2011(3) SCC 581 - RADESHAM KEJRIWAL VS. STATE OF WEST BENGAL.
- 6) 2011-I Law Weekly CrI. 563 - JOTHIMUTHU VS. INSPECTOR OF POLICE KAMUDHI POLICE STATION.
- 7) 2015(12) SCC 86 - VIVEKRAI AND ANOTHER VS. HIGH COURT OF JHARKHAND.

15.The respondent submits that the petitioners who are partners of M/s.Chandragiri Constructions who are beneficiaries, though they ought to have completed the work within 9 months of

the awarding of the tender i.e., on or before 15.04.2005, had failed to complete the project despite major portion of the amount was received and till 2008 the project was not completed. The Chief Engineer inspected the site. As per the inspection report dated 08.03.2006 out of the 7 shutters, only two shutters are fixed and as per the inspection dated 23.03.2006 it is found that though 7 gates were found all the gates were not properly erected and fixed as per the specification. Further, the petitioners in collusion with the officials of PWD has been seeking extension of time without proper reason, in fact, in the extension letter dated 13.04.2005, it is seen that the delay has been attributed due to non finalization of the design of civil work and also for the deck bridge. Thus right from initial stage the petitioners had no intention to complete the project within the scheduled period or within the extended period. On the other hand till the case was registered, they had not completed the project and cheated and misappropriated the funds of the Government. The case was registered on 30.05.2007. The informant in this case is none other than the Secretary of the PWD Department. After the preliminary study and scrutiny of the inspection report, the complaint was filed. Thereafter investigation was carried out, witnesses were examined, statement recorded, documents are collected charge sheet was filed against Accused Nos.1 to 15. The petitioners are arrayed as Accused Nos.9 to 15, evaded justice or not appeared before the trial court. Hence Non-bailable warrant was issued against them. In the meanwhile on the directions of this Court, the case against the public servants A.1 to A.8 were taken up. Accused No.8 passed away during trial. The trial court by Judgment dated 27.04.2016 acquitted the officials of PWD. The petitioners who were evading justice cannot now claim the benefit of the said judgment and strongly oppose the quash petition.

16.Considering the rival submissions and on perusal of the materials, it is found that on 18.10.1996 Government Order was issued for formation of reservoir near Shenbagaghope Village, Polur Taluk, Tiruvannamalai District on 26.03.2003 and technical sanction of work for formation of reservoir was granted. On 16.07.2004, contract was awarded to M/s.Chandragiri Constructions. Thereafter for the failure of the petitioners to complete the project within the stipulated time on receipt of huge sums of money, to the tune of Rs.1,34,23,732/- during the period 30.07.2004 to 07.01.2005, which were not in commensurate to the recordings found in M-Book thereby Govt.Servants had created false documents and by falsified the accounts, criminal breach of trust by public servants have been committed. The petitioners are the beneficiaries. Manickam, the Executive Engineer who has been examined as PW.14 in Spl.Case No.8 of 2011 carried out inspection on 08.03.2006 and found that all the 7 shutters have not been fixed. On the other hand the other

witnesses of PWD department have stated that all the 7 shutters were fixed at the appropriate place. PW.7 and PW.8 who are the VAOs who had visited the Dam on 09.07.2007, along with the Investigating Officer PW.21 found that all the 7 shutters were fixed and the same has been mentioned in the Observation Mahazar. PW.21 the Investigating Officer admits the same. Further, PW.9 admits that the departmental action initiated against the PWD officials has been cancelled. It is also an admitted fact that periodical extension of time was sought by contractors by giving reasons. On considering the same, the authorities had extended the time periodically to complete the work. It is also found by letter dated 11.06.2007 the work is completed and has requested for testing the radial gates. All the witnesses of the department have categorically stated that no monetary loss to the Govt. has occurred. More specifically PW.1, PW.2 and PW.9 have asserted about the same and also in Ex.P.3 dated:27-3-2006 the same is found. It is also found that since the contract is on turnkey basis, the breakup of payment particulars already decided. In view of the same, recordings in M-Book is of no significance. This fact was admitted by the officials of PWD. The prosecution has proceeded on the variation in the M-Book recordings. On analyzing of the materials, the judgment of acquittal has been rendered against the other accused in this case namely the PWD officials. The basis of conspiracy by the petitioners with the PWD officials has lost its substratum. The effect of verdict of acquittal pronounced by a competent court on a lawful charge after lawful trial cannot be lost sight of. On going through the evidence of the case of the co-accused, it is found that the evidence is inseparable and indivisible and that being so, the petitioners cannot be treated differently. In view of the same, there is no prospect of the case ending in conviction against the petitioners. Valuable time of the court would be wasted in conducting the trial only for the purpose of formally completing the procedure to pronounce the conclusion on a future date. It is almost certain that the trial would be an exercise in futility or sheer wastage of time. The case against the co-accused has ended in acquittal disbelieving the entire prosecution case and as such this Court is of the considered view that no useful purpose would be served, on the Trial against the petitioners is allowed to be continued.

17.It is also not in dispute that in a criminal liability penal provisions is to be strictly construed. In the first place there is no vicarious liability in criminal law. In the absence of any specific materials the petitioners/accused including the ladies, who are unconnected with the day to day affairs in the firm have been arrayed as Accused. There is no evidence both oral and documentary, even remotely to show that all the partners were doing the business of the firm. On the

basis of the materials, considering the position of the petitioners being the same as that of the other accused who have been acquitted, this court feels that it would be only an exercise in futility to proceed with the case.

18.Considering the special circumstances available in this case, this Court is of the view that it would be proper to quash the proceedings pending against the petitioners in Special Case No.12 of 2015 pending on the file of Chief Judicial Magistrate, Tiruvannamalai and is hereby quashed.

19.Accordingly, these Criminal Original Petition Nos.9300 and 8530 of 2011 are allowed. Consequently, the connected Miscellaneous Petitions are closed.

-s/d-

Assistant Registrar(CS-I)

True Copy

Sub-Assistant Registrar

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To

1.The Chief Judicial Magistrate,
Thiruvannamalai.

2.The Deputy Superintendent of Police,
Crime Branch CID,
Vellore.

3.The Public Prosecutor,
High Court, Madras.

+1 CC to Mr.P.Solomon Francis, Advocate sr 27853.

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CrI.O.P.Nos.9300 and 8530 of 2011
and
CrI.M.P.Nos.10163 & 10164 of 2018

AD(CO)
SP(27/03/2019)