IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 26.06.2019

DELIVERED ON: 28.06.2019

CORAM:

THE HON'BLE MR. JUSTICE P.N. PRAKASH

Crl.R.C. No.366 of 2019 and Crl.M.P. Nos.5388 & 5389 of 2019

Dr. I. Vijayakumar
CMD (Retd.)
Madras Fertilisers Ltd.
Manali
Chennai 600 068 .. Revision Petitioner/A1

vs.

State represented by
The Additional Superintendent of Police
Central Bureau of Investigation
Anti-Corruption Bureau
Chennai .. Respondent/Complainant

Criminal Revision filed under Section 397 r/w 401 Cr.P.C. seeking to call for the records in C.C. No.35 of 2017 pending on the file of the IX Additional Sessions Judge (Special Judge for CBI Cases), Chennai and set aside the order dated 28.03.2019 passed by the said Court in Crl.M.P. No.5844 of 2018 in C.C. No.35 of 2017.

For petitioner : Mr. Abudu Kumar Rajarathnam
for M/s. S.Joel
For respondent : Mr. K.Srinivasan
Special Public Prosecutor
for CBI Cases

ORDER

Based on source information, the CBI registered a case in Cr. No.RC MA 1 2015 A0038 on 26.08.2015 and after completing the investigation, has filed final report (charge sheet) in C.C. No.35 of 2017 before the IX Additional District and Sessions Judge/Special Judge for CBI Cases, Chennai, for the offences under Section 120-B read with Sections 511 and 420 IPC and under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (for brevity "the PC Act") against Dr. Vijayakumar, I.R.S. (Retd.) (A1) (for brevity "Vijayakumar"), Sundarasekaran (A2), B1-Business International Marketing and Services Pvt. Ltd. (A3) (for brevity "B1 Business International") and BOGE Compressors India Pvt. Ltd. (A4) (for brevity "BOGE Compressors").

2 On receipt of summons, Vijayakumar (A1), Chairman & Managing Director of Madras Fertilisers Ltd. (for brevity "MFL") and Sundara Sekaran (A2), General Manager-Plant, MFL appeared before the Trial Court and collected the relied upon documents under Section 207 Cr.P.C. Thereafter, Vijayakumar (A1) filed Crl. M.P. No.5844 of 2018 and Sundara Sekaran (A2) filed Crl.M.P. No.6622 of 2018 in C.C. No.35 of 2017 under Section 239 Cr.P.C. for discharging them from prosecution, which has been dismissed by the Trial Court on 28.03.2019, aggrieved by which, Vijayakumar (A1) is before this Court.

3 Heard Mr. Abudu Kumar Rajarathnam, learned counsel for Vijayakumar (A1) and Mr. K. Srinivasan , learned Special Public Prosecutor for CBI Cases.

4 Albeit the final report runs to 24 pages, the kith and kernel of the allegations is as under:

4.1 MFL is a public sector undertaking under the administrative control of the Department of Fertilisers, Ministry of Chemicals and Fertilisers, Government of India. Vijayakumar (A1) assumed charge as the Chairman and Managing Director of MFL on 11.05.2012 in the place of one Satish Chandra, I.A.S. MFL needed four screw air compressors (oil free) for running their plant, inasmuch as the then existing ones were purchased in the year 1980 and needed replacement. The approximate cost of the four screw air compressors was around Rs.6 crores. MFL decided to call for tenders for the purchase of four screw air compressors. Accordingly, sealed tenders were invited by MFL, in which, various companies partook. Everything was sailing smooth during Sathish Chandra's period. After Vijayakumar (A1) assumed office on 11.05.2012, manipulations started.

4.2 It is alleged that Vijayakumar (A1) deliberately raised untenable queries and in conspiracy with Sundarasekaran (A2) and others, cancelled the earlier tender and directed re-floating of tender on 30.04.2013 in order to accommodate B1 Business International (A3) and BOGE Compressors (A4). Accordingly, a fresh tender notice was published by MFL in the dailies on 07.06.2013, in which, B1 Business International (A3), Vertex Pneumatic Pvt. Ltd., Mangalore, Ingersoll Rand (India) Ltd., ELGI Equipments Ltd. and Kaeser Compressor Pvt. Ltd. partook and submitted their bids.

4.3 Vijayakumar (A1) and other conspirators, found fault with the offers made by Vertex Pneumatic Pvt. Ltd., Mangalore, Ingersoll Rand (India) Ltd., ELGI Equipments Ltd. and Kaeser Compressor Pvt. Ltd. for no good reason and Vijayakumar (A1) directed one Gnanasambandam (Approver) Chief Manager - Process Engineering and Projects, to submit a report recommending B1 Business International (A3) for award of contract and rejecting the tender applications of other participants. Accordingly, Gnanasambandham (Approver) submitted a report dated 11.02.2014 recommending to open the price bid of B1 Business International (A3) and to reject the bids of other firms.

4.4 On the directions of Vijayakumar (A1), Sundarasekaran (A2) also submitted a report dated 24.02.2014 agreeing with the suggestions of Gnanasambandham (Approver) and recommended opening of price bid of B1 Business International (A3) and rejection of bids of other firms. The bid of B1 Business International (A3) was opened on 28.02.2014 and on opening the same, it was found that the date of the bid was 13.02.2014. The bid showed a revised price. It may be pertinent to state here that Gnanasambandham's report is dated 11.02.2014, whereas, the bid date of B1 Business International (A3) is 13.02.2014. In other words, the recommendation made by Gnanasambandham (Approver) is prior to the date of the bid.

4.5 The issue did not stop with this. Vijayakumar (A1) directed Gnanasambandham (Approver) to demand a bribe of Rs.1 crore from B1 Business International (A3) and BOGE Compressors (A4) as reward for awarding the contract to them. Accordingly, Gnanasambandham (Approver) sent an SMS to one Ram Hariharan (Approver) of B1 Business International (A3) which read as "the game is over; now, it is your turn to honour the commitment". Ram Hariharan (Approver) met Gnanasambandham (Approver) near Hotel Saravana Bhavan at Anna Nagar, Chennai, and demanded a sum of Rs.1 crore. Ram Hariharan (Approver) agreed to pay a sum of Rs.25 lakhs initially, to which offer, Gnanasambandham (Approver) agreed. In July 2014, Ram Hariharan (Approver) accompanied by one Jayakaran of BOGE Compressors (A4) gave a sum of Rs.25 lakhs in a bag to Gnanasambandham (Approver), at a point near Anna Nagar (West) Bus Depot. Gnanasambandham (Approver) who came in a Honda car, collected the amount and handed over the same to a person sent by Vijayakumar (A1) near Anna University, Chennai, on the same day and Vijayakumar (A1) confirmed the receipt of the amount. News about the activities of the conspirators started leaking and the Vigilance Commission got wind of it.

4.6 As things stood thus, Gnanasambandham (Approver) contacted Ram Hariharan (Approver) and collected an additional sum of Rs.1 lakh in March 2015 near a tea stall and Canara Bank ATM at the junction of Park Road and MTH Road near Padi, for squaring up the Vigilance Commission enquiry and ensuring that the award is not cancelled. Soon thereafter, the CBI registered a regular FIR on 26.08.2015 against nine accused and after completing the investigation, filed final report against four accused by taking 3 accused as approvers. The three approvers are Gnanasambandham (Approver), Ram Hariharan (Approver) and Jayakaran.

5 On the directions of the Chief Metropolitan Magistrate, the XV Metropolitan Magistrate, George Town, Chennai recorded the confession statements of Gnanasambandham (Approver), Ram Hariharan (Approver) and Jayakaran under Section 164 Cr.P.C. All the three approvers were given tender of pardon under Section 306(1) Cr.P.C. by the VII Metropolitan Magistrate, George Town, Chennai. The other officials who were part of the tender process were cited as witnesses.

6 Thus, the sum and substance of the allegation in the final report is that Vijayakumar (A1) and Sundarasekaran (A2) who are public servants, had conspired with others, viz., Gnanasambandham (Approver), Ram Hariharan (Approver) and Jayakaran, to ensure that the contract is awarded to B1 Business International (A3), which is the marketing company for BOGE Compressors (A4), for which, a sum of Rs.1 crore was demanded by Vijayakumar (A1) as reward and a sum of Rs.25 lakhs was received as bribe.

7 The Supreme Court, in Onkar Nath Mishra v. State (NCT of Delhi) [(2008) 2 SCC 561], has considered exhaustively the law of discharge of an accused from criminal prosecution and has held that even a strong suspicion is enough to frame a charge. The relevant passage from the said judgment is as under:

> "11. It is trite 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."

(emphasis in original)

The aforesaid judgment has been quoted with approval by the Supreme Court in Sheoraj Singh Ahlawat v. State of U.P. [(2013) 11 SCC 476 and State of Tamil Nadu vs. Suresh Rajan [(2014) 11 SCC 709].

8 Bearing in mind the aforesaid legal proposition, this Court now proceeds to meet the arguments raised by Mr. Abudu Kumar Rajarathnam, learned counsel for Vijayakumar (A1).

(i) In the FIR, Section 7 of the PC Act has been included, but, in the final report, the said provision has been deleted and only Section 13(1)(d), ibid, has been included and therefore, the CBI themselves have given up the allegation with regard to bribe and hence, the prosecution should be quashed.

This Court’s finding:

The final report filed by the police wherein the penal provisions are stated are not the on all and end all of a criminal case. The final report is merely an opinion of the Investigating Officer. The Trial Court need not implicitly agree with the opinion of the Investigating Officer. The Trial Court, on consideration of the final report and the accompanying documents, can frame appropriate charges and can include Section 7 of the PC Act also. Even after the commencement of trial, charges can be altered under Section 216 Cr.P.C. Normally, Section 7 of the PC Act along with Section 13(1)(d), ibid, will be invoked in trap cases, where, the accused is caught red handed. In this case, none of the accused has been caught red handed like in a trap case. Therefore, the Investigating Officer did not invoke Section 7, ibid and had invoked only Section 13(1)(d), ibid, which, in the opinion of this Court, cannot be faulted. Hence, on this ground, the accused cannot be discharged from prosecution.

(ii) There is no material to show that Vijayakumar (A1) and Sundarasekaran (A2) had consipired.

This Court’s finding:

Conspiracy is hatched in secrecy and seldom will there be any direct evidence for it. In the cast at hand, we have the judicial confession statements of three approvers, viz., Gnanasambandham (Approver), Ram Hariharan (Approver) and Jayakaran. This Court carefully scanned the confession statements of the three approvers. Gnanasambandham (Approver) has clearly stated the circumstances under which he met Ram Hariharan (Approver) of B1 Business International (A3) near Hotel Saravana Bhavan at Anna Nagar and made the demand of Rs.1

crore and agreed to accept Rs.25 lakhs as initial payment. Thereafter, he has stated that in July 2004, Ram Hariharan (Approver) and Jayakaran brought Rs.25 lakhs in a bag and gave it to him near Anna Nagar (West) Bus Depot at 11.00 a.m.; he collected the money from them and on the instructions of Vijayakumar (A1), handed over the money to a person near Anna University, Chennai, on the same day. In the light of such overwhelming materials, this Court cannot conclude that there was no conspiracy amongst the accused.

(iii) In the FIR, the Tender Committee Members were also shown as accused, but, they have not been chargesheeted and therefore, there is discrimination.

This Court's finding:

The FIR in this case was registered based on source information and it is true that 9 persons were shown as accused therein, including the Tender Committee Members. However, during the course of investigation, the CBI found that the Tender Committee Members were not involved in the racket and it was only the chargesheeted accused, along with the approvers, who were involved. Just because, the names of the Tender Committee Members appear in the FIR, it is not necessary that they have to be prosecuted and for excluding them from the prosecution for valid reasons, the chargesheeted accused cannot be discharged on the ground of parity.

(iv) Charge sheet merely states that Manual on Contracting/Procurement System (MOCPS) of MFL has been violated, but, has not stated as to which clause has been violated.

This Court's finding:

Unfortunately, the prosecution is not for violation of the rules. The prosecution is simply for fixing a bribe of Rs.1 crore and accepting a bribe of Rs.25 lakhs for rejecting the tender of four other firms and accepting the tender of B1 Business International (A3) and BOGE Compressors (A4).

(v) As per the judgment of the Supreme Court in CBI vs. Ashok Kumar Aggarwal and another [(2013) 15 SCC 222], the Magistrate who granted tender of pardon should have compared the culpability of the person seeking pardon qua the other accused, which has not been done; in other words, Gnanasambandham (Approver) should not have been given tender of pardon at all.

This Court's finding:

(a) In the instant case, Vijayakumar (A1) and Sundarasekaran (A2) were found steering the tender proceedings deliberately in order to favour award of contract to B1 Business

International (A3) and BOGE Compressors (A4). The material on record shows manifestly that at every stage, Vijayakumar (A1) was putting spokes wantonly in the award of contract to four other participating firms and had specifically directed Gnanasambandham (Approver) to give a report recommending acceptance of the bid of B1 Business International (A3) and rejection of the bid of other four firms. It was at the instance of Vijayakumar (A1) that Gnanasambandham (Approver) went and negotiated the bribe of Rs. 1 crore and received Rs.25 lakhs as advance from Ram Hariharan (Approver) of B1 Business International (A3).

(b) As regards Ram Hariharan (Approver) and Jayakaran, they were employees of B1 Business International (A3) and BOGE Compressors (A4) respectively. These two persons were acting for their respective companies in organizing the bribe for getting the contract from MFL. Thus, all the three approvers viz., Gnanasambandham (Approver), Ram Hariharan (Approver) and Jayakaran are minions and in order to catch the sharks, the shrimps should have to be kept as bait. Therefore, in the opinion of this Court, there is no illegality in the grant of tender of pardon to three approvers for pinning those in the higher echelons of the establishment.

(vi) Since Vijayakumar (A1) and Sundarasekaran (A2) had retired from service on 30.10.2015 and 31.10.2014 respectively, no sanction under Section 20 of the PC Act was obtained by the prosecution; nevertheless, the prosecution should have obtained sanction under Section 197 Cr.P.C. as per the law laid down in the following judgments:

i. Judgment of the Supreme Court in N.K. Ganguly vs. CBI, New Delhi [(2016) 2 SCC 143];

ii. Judgment of the Supreme Court in State of Madhya Pradesh vs. Sheetla Sahai and Others [(2009) 8 SCC 617];

iii. Judgment of this Court in T.R. Narayanan vs. State [MANU/TN/3050/2015]; and

iv. Judgment of this Court in M.S. Jaffar Sait, DGP, Crime Branch CID, Chennai vs. The DVAC, Chennai [order dated 23.05.2019 in Crl.O.P. No.13711 of 2019].

This Court’s finding:

(a) The above specious argument requires to be rejected on the short ground that MFL where Vijayakumar (A1) was working will not fall within the domain of Section 197 Cr.P.C. As stated above, MFL is a public sector undertaking. In Mohd. Haji Raja vs. State of Bihar and another [AIR 1998 SC 1945], the Supreme Court has held as follows:

> "27. Therefore, in our considered opinion, the protection by way of sanction under Section 197 of the Code of Criminal Procedure is not applicable to the officers of government companies or the public undertakings even when such public undertakings are "State" within the meaning of Article 12 of the Constitution on account of deep and pervasive control of the Government.………"

(b) Much argument was advanced by the learned counsel for Vijayakumar (A1) by placing reliance upon the judgment of the Supreme Court in N.K.Ganguly (supra). It is pertinent to point out that the observations of the Supreme Court in N.K.Ganguly (supra) turned out on the facts of that case. In that case, the allegation was that the public servants had unauthorisedly transferred certain housing plots for a lower consideration to themselves and others. The allegation against N.K. Ganguly was that as Director General of Indian Council of Medical Research, he gave approval for transfer of plots and formation of a society. In fact, in paragraph no.17 of the said judgment, the Supreme Court has extracted the Office Note of N.K. Ganguly which is as under:

> "17 …. On 12-6-2006, N.K. Ganguly recorded a note in the file stating that "the proposal was approved provided it was under the provisions of laws and land use for which it was acquired……."

In the light of those facts, the Supreme Court held that sanction under Section 197 Cr.P.C. is required for prosecuting N.K. Ganguly, though he had retired from service. The facts of the case at hand are not akin to those in N.K. Ganguly (supra). In the instant case, the allegation is that a bribe of Rs.1 crore was demanded for rejecting the bids of three other companies and awarding the contract to one particular company and an advance of Rs.25 lakhs was received in regard thereo. At this juncture, the observation of the Constitution Bench of the Supreme Court in K.Satwant Singh vs. State of Punjab [AIR 1960 SC 266] which finds a reference in N.K. Ganguly (supra) deserves to be extracted:

> "16. It appears to us to be clear that some offences cannot by their very nature be regarded as having been committed by public servants while acting or purporting to act in the discharge of their official duty. For instance, acceptance of a

bribe, an offence punishable under Section 161 IPC, is one of them and the offence of cheating or abetment thereof is another. … where a public servant commits the offence of cheating or abets another so to cheat, the offence committed by him is not one while he is acting or purporting to act in the discharge of his official duty, as such offences have no necessary connection between them and the performance of the duties of a public servant, the official status furnishing only the occasion or opportunity for the commission of the offences…. The act of cheating or abetment thereof has no reasonable connection with the discharge of official duty. The act must bear such relation to the duty that the public servant could lay a reasonable but not a pretended or fanciful claim, that he did it in the course of the performance of his duty."

In the purported discharge of his official duties, Vijayakumar (A1), as the Chairman and Managing Director of MFL, started moving the files in such a manner that the contract is awarded to B1 Business International (A3) which is the marketing company of Boge Compressors (A4). The evidence relating to the manner in which the files were moved will be relevant under Sections 7 and 8 of the Evidence Act to prove the motive. That apart, receiving bribe is no part of one's official duty. The judgments of the Supreme Court on this aspect are a legion. Suffice it to cite the judgment in Punjab State Warehousing Corporation vs. Bhushan Chander [(2016) 13 SCC 44], wherein, it has been held as under:

"20. A survey of the precedents makes it absolutely clear that there has to be a reasonable connection between the omission or commission and the discharge of official duty or the act committed was under the colour of the office held by the official. If the act(s), omission or commission of which is totally alien to the discharge of the official duty, question of invoking Section 197 CrPC does not arise. We have already reproduced few passages from the impugned order from which it is discernible that to arrive at the said conclusion the learned Single Judge has placed reliance on the authority in B. Saha [B. Saha v. M.S. Kochar, (1979) 4 SCC 177 : 1979 SCC (Cri) 939] . The conclusion is based on the assumption that the allegation is that while being a public servant, the alleged criminal breach of trust was committed while he was in public service. Perhaps the learned Judge has kept in his mind some kind of concept relating to dereliction of duty. The issue was basically entrustment and missing of the entrusted items. There is no dispute that the prosecution had to prove the

> case. But the public servant cannot put forth a plea that he was doing the whole act as a public servant. Therefore, it is extremely difficult to appreciate the reasoning of the High Court. As is noticeable he has observed that under normal circumstances the offences under Sections 467, 468 and 471 IPC may be of such nature that obtaining of sanction under Section 197 CrPC is not necessary but when the said offences are interlinked with an offence under Section 409 IPC sanction under Section 197 for launching the prosecution for the offence under Section 409 is a condition precedent. The approach and the analysis are absolutely fallacious. We are afraid, though the High Court has referred to all the relevant decisions in the field, yet, it has erroneously applied the principle in an absolute fallacious manner. No official can put forth a claim that breach of trust is connected with his official duty……..”

As held by the Supreme Court in the Bhushan Chander (supra), no official can contend that receiving of bribe is connected with his official duty.

(vii) Vijayakumar (A1) has been exonerated in the departmental proceedings and hence, he should be discharged from the criminal prosecution.

This Court’s finding:

This argument deserves to be stated only to be rejected because the findings of the departmental enquiry can have no bearing on the criminal prosecution, where, there are three approvers, who, in their judicial confessions, have clearly implicated Vijayakumar (A1).

(viii) When Ram Hariharan (Approver) of B1 Business International (A3) and Jayakaran of BOGE Compressors (A4) have been given tender of pardon, the CBI ought not to have included B1 Business International (A3) and BOGE Compressors (A4) in the charge sheet.

This Court’s finding:

After the judgment of the Supreme Court in Assistant Commissioner, Assessment-II, Bangalore & others vs. Velliappa Textiles and another [(2003) 11 SCC 405] and Iridium India Telecom Ltd. vs. Motorola Inc. & others [(2011) 1 SCC 74], companies and corporate houses can no longer claim immunity from criminal prosecution on the ground that they are incapable of possessing the necessary mens rea for the commission of criminal offences. Had the contract been awarded, B1 Business International (A3) and BOGE Compressors (A4) would have benefitted financially. Their employees, viz., Ram Hariharan (Approver) and Jayakaran who were the conduits, have given judicial confession to the effect that a sum of Rs.25 lakhs was handed over to Gnanasambandham (Approver) on the demand of Vijayakumar (A1) for having awarded the contract. Therefore, the prosecution of the two companies is perfectly justified, though their employees were given tender of pardon for having disclosed the truth.

(ix) Gnanasambandham (Approver) is himself an accused in a trap case registered by the C.B.I. and therefore, he is a tainted witness; had the C.B.I. brought this to the notice of the Magistrate, tender of pardon would not have been given to Gnanasambandham (Approver); hence, the prosecution is liable to be quashed.

This Court’s finding:

No material has been placed before this Court by Vijayakumar (A1) to show that Gnanasambandham (Approver) is an accused in a trap case. Even assuming for a moment that he is an accused in a trap case, that cannot be a reason to hold that the Magistrate should not have given him tender of pardon. This can be looked at from yet another angle. Accepting the argument of the learned counsel for Vijayakumar (A1) that Gnanasambandham (Approver) is a dubious person, it only reinforces the prosecution case, because, Vijayakumar (A1) has rightly picked up a dubious person like Gnanasambandham (Approver) to be his conduit. Had Gnanasambandham (Approver) been a paragon of virtues, Vijayakumar (A1) would not have used him as his stooge.

(x) In the final report, A3 has been shown as B1 Business International Marketing and Services Pvt. Ltd. represented by Jose Mathew, Managing Director; this is illegal and against the provisions of Section 305 Cr.P.C. and therefore, the prosecution should be quashed.

This Court’s finding:

It is true that Section 305 Cr.P.C. states that a juristic person like a company can nominate a person to represent it. The C.B.I. has made Jose Mathew, Managing Director of B1 Business International (A3) to represent it. If B1 Business International (A3) wants “X” to represent it, it can make necessary application before the Trial Court and seek substitution which will be considered on merits by the Trial Court. Concededly, neither B1 Business International (A3) nor Boge Compressors (A4) is before this Court. This Court is unable to fathom as to in what way Vijayakumar (A1) is prejudiced if, in the final report, the C.B.I. had shown some persons as representing the two juristic entities?

In the ultimate analysis, this Court finds no merit in this criminal revision and accordingly, the same is dismissed. Vijayakumar (A1) is directed to appear before the Trial Court within a period of two weeks from the date of receipt of a copy of this order and apply for bail, in the event of he not having been released on regular bail or anticipatory bail in this case. Unfortunately, in the State of Tamil Nadu, this procedure is not adopted and suspension of sentence and bail are granted under Section 389(3) Cr.P.C. by the Trial Courts at the time of convicting the accused, ignoring the fact that the said relief can be granted only to a person who is on bail. Connected Crl.M.Ps. are closed.

Sd/-
Assistant Registrar(Insp.Cell)

//True Copy//

Sub Assistant Registrar

cad

To

1 The Additional Superintendent of Police
Central Bureau of Investigation
Anti-Corruption Bureau, Chennai

2 The IX Additional Sessions Judge
(Special Judge for CBI Cases), Chennai

3 The Public Prosecutor,
Madras High Court, Chennai.

+1 cc to Mr.S.Joel, Advocate, Sr.No. 53774

order in
Crl.R.C. No.366 of 2019

CSL/15.07.2019