

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON : 26.11.2019
PRONOUNCED ON : 28.11.2019
CORAM
THE HONOURABLE Mr.JUSTICE P.N.PRAKASH
CRL.O.P.No.29375 of 2019

S.C.B.Mohan,
S/o.S.C.Bangaru Samy,
A2, Arjith Villa,
7th Cross, Thillai Nagar,
Trichy 620 018.
(formerly working as Executive Engineer,
P.W.D. Yanam)

.. Petitioner

Vs

The State
Rep. by the Inspector of Police
CBI/ACB/Chennai
Central Bureau of Investigation
Anti-corruption Branch
Shashtri Bhavan, 3rd Floor
Haddows Road, Chennai-34

.. Respondent

Criminal Original Petition filed under Section 482 Cr.P.C.,
to call for the records in Special Calendar Case No.2 of 2010
before the Hon'ble Special Judge under P.C. Act, 1988 Puducherry
and quash the charge with two more heads (altered charge under
Section 216 Cr.P.C.) dated 27.08.2019 on the file of the Special
Judge (under P.C. Act 1988) Puducherry in Special Calendar Case
No.2 of 2010.

For Petitioner : Mr.V.S.Venkatesh

For Respondent : Mr.K.Srinivasan,
Spl. Public Prosecutor (CBI cases)

O R D E R

The issue in dispute, as distilled from the facts, is
crystallised as under :

Mohan (petitioner/A1), Executive Engineer, P.W.D.,
Puducherry and Sathyanarayana Raju (A2), contractor, are facing
a prosecution in Spl.C.C.No.2 of 2010 before the Special Judge
for P.C. Act cases, Puducherry (for brevity "the trial Court")
for the offences under Section 120-B read with Sections 420,

468, 471 IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (for brevity "the P.C. Act").

2.1.The P.W.D., Puducherry called for an open tender from contractors, for the work of construction of a ring bund around island No.3 in Yanam. Mohan (A1) was the Executive Engineer involved in this project and eventually, Sathyanarayana Raju (A2), contractor, was the successful bidder.

2.2.There are basically two allegations in the final report viz. Mohan (A1) and Sathyanarayana Raju (A2), conspired to :

- i. alter the figure in the tender document of M/s.Maytas Infra (P) Ltd., a competitor of Sathyanarayana Raju (A2), by altering the numerals from Rs.70 per m³ of earth work to Rs.270/-, on account of which, M/s.Maytas, who would have bagged the contract, lost in the race ;
- ii.at the instance of Mohan (A1), Sathyanarayana Raju (A2) executed ring bund work at a different site viz. bridge upstream site for 3371.20 m³ and bridge downstream site for 2705.45 m³, which was not mentioned in the tender notice and for which, Sathyanarayana Raju (A2) claimed payment.

2.3.However, the trial Court framed charges on 19.04.2013, only in respect of the first allegation and did not frame charge for the second allegation, though the police statements of Nageswara Rao, Junior Engineer, P.W.D., Jyothi Raju, Junior Engineer, P.W.D., measurement book and bill book in support of the allegation were available.

2.4.When the accused were questioned on the charges so framed on 19.04.2013, they pleaded "not guilty".

2.5.The prosecution examined their witnesses and completed their side, after which, the accused were questioned under Section 313 Cr.P.C. on 01.07.2019.

2.6.During the course of arguments, the Special Public Prosecutor, brought to the notice of the trial Court the fact that no charge was framed for the second allegation and prayed orally for altering the charge. Arguments and counter arguments were heard by the Special Judge, during which, the accused filed their memo of objections on 06.08.2019 against altering the charge.

2.7.After hearing either side, the trial Court framed an additional charge (4th charge) on 27.08.2019, which reads as follows :

"Fourthly, during the above period and also during

the said course of transaction and in pursuance of such conspiracy, you A1 and A2 had cheated the Public Works Department, Yanam, Puducherry in regard to the work against item No.6 of the schedule of works "Code No.2.3.1(-) 2.4.:Supplying and filling with good earth (excluding rock) in layers not exceeding 20 cm in depth, breaking clods, watering, rolling each layer with ½ tonne roller or wooden or steel rammers, and rolling every 3rd and top-most layer with power roller of minimum 8 tonnes capacity including all leads and lift (payment will be made based on level measurement), deduct for not rolling with power roller or minimum 8 tonnes for banking excavated earth in layers not exceeding 20 cms in depth", as the work according to the M Book has been executed at a different site, which is not within the purview of the schedule of work, for which payment has already been made for executed portion of 6076.65 M3 to the tune of Rs.9,11,497.50 citing this schedule of work, thereby A1 and A2 had deviated from the original scope of work at the "T" bridge to the said sum and thereby you A1 and A2 had committed the offence of cheating punishable u/s 420 IPC r/w 120-B IPC and within my cognizance."

3.Heard Mr.V.S.Venkatesh, learned counsel for the petitioner and Mr.K.Srinivasan, Special Public Prosecutor (CBI cases).

4.Mr.Venkatesh fairly conceded that, the trial Court has the power to alter the charge under Section 216 Cr.P.C. at any time before the judgment is delivered, but, contended that, there was no credible material available before the trial Court to frame the 4th charge in this case. He further contended that there is no shred of evidence to show that the accused had executed a work in a site, other than the one prescribed in the tender notice.

5.Refuting the above contentions, Mr.Srinivasan, Special Public Prosecutor for CBI cases drew the attention of this Court to the Section 161(3) Cr.P.C. statements of Jyothi Raju (P.W.7) and Nageswara Rao (P.W.6) and submitted that both of them have stated that the accused had executed works at the bridge upstream site for 3371.20 m³ and at the bridge downstream site for 2705.45 m³ and had submitted bills for that work also. He contended that, just because, the trial Court had failed to include this allegation in the charges that were framed on 19.04.2013, the realisation of this mistake by the Special Judge and the rectification of it, by framing a charge for this

allegation, cannot be said to be illegal or improper, in the light of the overarching powers under Section 216 Cr.P.C.

6.In reply, Mr.Venkatesh contended that both Nageswara Rao and Jyothi Raju, who were examined as P.W.6 and P.W.7 respectively, have not stated a word about this allegation and in fact, they were declared hostile by the trial Court.

7.Mr.Venkatesh took this Court through the measurement book (Ex.P23) and contended that, even in that, there is no material to support the allegation that the accused had executed the work at a different site not specified in the tender notice.

8.This Court gave its anxious consideration to the rival submissions.

9.It is trite that the trial Court has wide powers under Section 216 Cr.P.C. to alter or add a charge at any time before the delivery of the final verdict. Section 217 Cr.P.C. provides certain safeguards for the accused, when a charge is altered under Section 216 Cr.P.C.

10.It is true that, in the police statements of Jyothi Raju (P.W.7) and Nageswara Rao (P.W.6), they have spoken vividly by referring to the measurement book that was maintained by them about the works executed by Sathyanarayana Raju (A2) at a different site viz. bridge upstream site for 3371.20 m³ and bridge downstream site for 2705.45 m³ and have further stated that these works were executed by Sathyanarayana Raju (A2) on the oral directions of Mohan (A1).

11.As contended by Mr.Srinivasan, the trial Court should have framed a charge for this allegation, at the inception on 19.04.2013. Even though no charge was framed for this allegation, the prosecution went about examining the said Nageswara Rao as P.W.6 and Jyothi Raju as P.W.7, and the measurement book was marked as Ex.P23 and the bill book was marked as Ex.P24. However, these two witnesses, supported the prosecution case with regard to certain other facts, but, refused to say that the extra work was executed by Sathyanarayana Raju (A2) on the oral instructions of Mohan (A1). On this score, they were declared hostile. However, Jyothi Raju (P.W.7) has stated as follows in his chief examination on 10.04.2017 :

"As per Ex.P23 the contractor has carried out for the work ring bund around island No.3 the work carried out as per page No.3 was 3,371.20 cum. As per page No.8, 2705.45 cum. This work was carried out on the

upstream side of the bridge and down stream side of the bridge."

Mr.Venkatesh wanted to demonstrate to this Court that the measurement book did not support the prosecution case qua the 4th charge. In the opinion of this Court, whether the measurement book supports the prosecution theory or not, is a question which falls within the domain of appreciation of evidence and that can be done only by the trial Court and not by this Court in this criminal original petition, because, the scope of this criminal original petition is, not on the quality of the evidence available to sustain the charge, but, to find out, if there was any illegality or impropriety in the framing of the additional charge by the trial Court.

12.Even if the trial Court disbelieves the evidence of Nageswara Rao (P.W.6) and Jyothi Raju (P.W.7), on the aspect of the work allegedly done by Sathyanarayana Raju (A2), at the instance of Mohan (A1) beyond the tender notice, then, a finding is required to be given by the trial Court, for which, the existence of a charge on that head is essential. In other words, the process of a criminal trial in our system is such that, charges will be framed based on the police report and accompanying documents, evidence would be adduced to prove the charges and finally, a finding will be given by the trial Court qua each charge.

13.In this case, the accused were not caught by surprise by the newly added 4th charge, inasmuch as, the reference to the allegations in the 4th charge find place in paragraph No.10 and 11 of the final report and is supported by the police statements of Nageswara Rao (P.W.6), Jyothi Raju (P.W.7), the measurement book and the bill book, the relevant pages of which, were furnished to the accused under Section 207 Cr.P.C., even before the charges were framed at the first instance on 19.04.2013.

14.Therefore, this is not a case, in which, the accused were kept in the dark throughout and were suddenly caught unawares by the trial Court, while framing the 4th charge on 27.08.2019 relating to the execution of a work at a different site. In fact, after the addition of the 4th charge on 27.08.2019, the trial Court has permitted the accused to recall P.W.1, the sanctioning officer, for further cross-examination. The trial Court has also recalled Jyothi Raju (P.W.7) for further cross-examination and in the meantime, the accused has filed the present petition in this Court, on account of which, further proceedings in the trial Court has halted.

15.As alluded to above, this Court cannot give any finding with regard to the evidence of Nageswara Rao (P.W.6) and Jyothi Raju (P.W.7) nor on the evidentiary value of the measurement book (Ex.P23) and bill book (Ex.P24). Suffice it to say that albeit Jyothi Raju (P.W.7) being declared hostile, his statement in chief-examination extracted in paragraph 11 above read with the measurement book (Ex.P23) and bill book (Ex.P24) can be construed as prima facie materials to frame the 4th charge. Hence, the framing of the additional charge (4th charge) by the trial Court cannot be said to be either perverse or illegal.

16.At this juncture, Mr.Venkatesh, learned counsel for the accused submitted that the prosecution had only supplied a few pages of the measurement book (Ex.P23) and the bill book (Ex.P24) and prayed for a direction to the trial Court to furnish a photocopy of the entire measurement book and bill book. On verification with the Special Public Prosecutor, this Court understands that these two books are not very voluminous.

17.Since charge is being altered in this case, this Court is of the view that interests of justice will be served, if the trial Court is directed to take a photocopy of the entire measurement book (Ex.P23) and bill book (Ex.P24) and furnish a copy each to Mohan (A1) and Sathyanarayana Raju (A2) within one week from the date of receipt of a copy of this order and thereafter, proceed with the case.

With the above direction, this criminal original petition stands dismissed.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

gya

To

1.The Special Judge,
Special Court under P.C. Act
Puducherry.

2.The Inspector of Police
CBI/ACB/Chennai
Central Bureau of Investigation
Anti-corruption Branch
Shashtri Bhavan, 3rd Floor
Haddows Road, Chennai-34

3.The Public Prosecutor
High Court, Madras

+3cc to Mr.V.S.Venkatesh, Advocate sr.99106

CRL.OP.No.29375 of 2019

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nr 08/01/2020