IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.10.2021

CORAM

THE HON'BLE Mr. JUSTICE C.V.KARTHIKEYAN

Crl.A.No. 45 of 2010

The State by CBI
Rep. by its Deputy Superintendent
of Police, CBI/ACB,
Chennai.

... Appellant/Complainant

Vs.

1. M.Kalaivanan
2. Dhikpathy
3. Muthu Srinivasan
4. V.S.Ranganathan
5. K.C.Raman
6. S.B.Rao
7. M/s. X-Press Container Lines
   C/o. M/s. Patvolk, No.19,
   J.N. Herediya Marg, Ballard Estate,
   Mumbai -1.

... Respondents/ Accused 1 to 7

Prayer: Criminal Appeal filed under Section 378 (2) Cr.P.C., against the order of the Principal Judge CBI Cases, Chennai, in C.C.No. 16 of 1999 dated 09.09.2009 acquitting the accused under Section 120-B of IPC read with 420 IPC read with 13(2) read with 13(1)(d) of the Prevention of Corruption Act 1988 and specific offences under Section 420 IPC and under Section 13(2) read with 13(1)(d) of P.C.Act 1988.

For appellant : Mr. Ashok Kumar Gowtham
Special Public Prosecutor
for CBI Cases

For R-1 : Mr. L.Rajasekar

For R-2 to R-4 : Mr. V.Krishnakumar
For R-5 to R-7 : G.Ravikumar

ORDER

The prosecution is on appeal questioning the acquittal of all the accused by Judgment dated 09.09.2009 by the Principal Special Judge for CBI Cases at Chennai in C.C.No. 16 of 1999 which Calendar Case had been taken cognizance pursuant to investigation in First Information Report in R.C.No. 15(A)/1996 which had been registered on information received on 21.03.1996 under Sections 120-B read with Section 420 IPC and also under Section 13(2) read with 13(1)(d) of P.C. Act 1988. After investigation, as stated final report had been laid against the seven accused.

2. A-1 was the Chairman of Madras Port Trust. A-2 was the traffic Manager, A-3 was FA & CAO and A-4, Additional Chief Accounts Officer. A-5 to A-7 are private individuals. I am in formed that A-4 V.S.Ranganathan has unfortunately expired during the pendency of the criminal appeal. At any rate, since he had been acquitted of all charges by the learned trial Judge, nothing needs to be adjudicated with respect to him.

3. It had been alleged that A-2 had initiated a proposal to A-1 to permit container shipping lines to take advantage of 200 mtrs berth length under private participation scheme for the purpose of berthing licensee vessels for the purpose of loading and unloading of containers. This was approved by A-1 in his capacity as Chairman of Madras Port Trust.

4. It is also claimed that necessary approval had been obtained from the Madras Port Trust Board. Thereafter, an advertisement had been issued which had been marked as Ex.P-5 inviting participants to avail the said 200 mtrs at berth length under private participation scheme.

5. The allegation of the prosecution is that this advertisement had been issued without obtaining prior permission of the Central Government as necessitated under Section 42(3) of the Major Port Trust Act. It is also claimed that A-1 to A-4 had wilfully granted the contract to A-5 to A-7 and had omitted to grant the contract to another participant in the tender, who would have provided more profit to the Madras Port Trust. However, without going into any further discussion, I must point out that there has been a specific finding by the learned trial Judge that the said loss was only hypothetical in nature and it was also stated that there has been no actual loss by the Madras Port Trust.

6. Claiming that there has been violation of procedure in not obtaining prior sanction from the Central Government in issuing such advertisement, namely, Ex.P-5, the First Information Report had been registered on source information and subsequently, after investigation, the final report had been laid before the competent Court which had taken cognizance of the same as C.C.No. 16 of 1999. Summons had been directed to the accused, who entered appearance and thereafter copies under Section 207 Cr.P.C., had been furnished to all the accused. Charges had also been framed.

7. The first charge was a comprehensive charge under Section 120-B IPC read with Section 420 IPC read with 13(2) read with 13(1)(d) of P.C. Act, 1988 as against A-1 to A-7. The second charge was against A-1, A-2, A-5, A-6 and A-7 for offence punishable under Section 420 IPC. The third charge was against A-1 for offence punishable under Section 13(2) read with 13(1)(d) of P.C. Act, 1988. The fourth charge was against A-2 for offence punishable under Section 13(2) read with 13(1)(d) of P.C. Act, 1988. The fifth charge was against A-3 for offence punishable under Section 13(2) read with 13(1)(d) of P.C. Act, 1988. The sixth charge was against A-4 for offence punishable under Section 13(2) read with 13(1)(d) of P.C. Act, 1988.

8. The accused when questioned abjurred the charges and therefore, the learned trial Judge invited the prosecution to prove the charges. Accordingly, the prosecution examined PW-1 to PW-22 as witnesses. On the side of the accused, witnesses were not examined. Prosecution also marked Exs. P-1 to P-71. On the side of the accused, Ex.D-1 was marked. The learned Judge, after examination of the prosecution witnesses also questioned the accused under Section 313 Cr.P.C., with respect to the incriminating evidence adduced as against them and their explanations were noted. Finally, by Judgment dated 09.09.2009 on appreciation of the documentary and oral evidence adduced, the learned Judge had thought it fit to acquit the accused of all the charges. As stated, the prosecution is now in appeal as against such acquittal.

9. Heard Mr. Ashok Kumar Gowtham, learned Special Public Prosecutor, for CBI Cases, Mr. L.Rajasekar, learned counsel for the first respondent, Mr.V.Krishnakumar, learned counsel for the second to fourth respondents and Mr.G.Ravikumar, learned counsel for the fifth to seventh respondents. As pointed out earlier, A-4 had unfortunately died during the pendency of the present Criminal Appeal.

10. The entire charge of the prosecution surrounds issuance of the advertisement for allotment of 200 mtrs of berth for private participation to to permit to dock the vessels in order to load and unload containers by berthing the vessels in the said area / quay, license fee and rent could be collected which would only add to the profits of the Madras Port Trust.

11. In this connection, Section 42 of the Major Port Trust Act will make quite relevant:-

> "42. Performance of services by Board or other person.—
>
> (1) A Board shall have power to undertake the following services:—
>
> (a) landing, shipping or transshipping passengers and goods between vessels in the port and the wharves, piers, quays or docks belonging to or in the possession of the Board;
>
> (b) receiving, removing, shifting, transporting, storing or delivering goods brought within the Board's premises;
>
> (c) carrying passengers by rail or by other means within the limits of the port or port approaches, subject to such restrictions and conditions as the Central Government may think fit to impose;
>
> (d) receiving and delivering, transporting and booking and despatching goods originating in the vessels in the port and intended for carriage by the neighbouring railways, or vice versa, as a railway administration under the Indian Railways Act, 1890 (9 of 1890);
>
> (e) piloting, hauling, mooring, remooring, hooking, or measuring of vessels or any other service in respect of vessels;]
>
> (f) developing and providing, subject to the previous approval of the Central Government, infrastructure facilities for ports.]
>
> (2) A Board may, if so requested by the owner, take charge of the goods for the purpose of performing the service or services and shall

give a receipt in such form as the Board may specify.

(3) Notwithstanding anything contained in this section, the Board may, with the previous sanction of the Central Government, authorise any person to perform any of the services mentioned in sub-section (1) on such terms and conditions as may be agreed upon.

(3A) Without prejudice to the provisions of sub-section (3), a Board may, with the previous approval of the Central Government, enter into any agreement or other arrangement (whether by way of partnership, joint venture or in any other manner) with, any body corporate or any other person to perform any of the services and functions assigned to the Board under this Act on such terms and conditions as may be agreed upon.]

(4) No person authorised under sub-section (3) shall charge or recover for such service any sum in excess of the amount 5 [specified by the Authority, by notification in the Official Gazette].

(5) Any such person shall, if so required by the owner, perform in respect of goods any of the said services and for that purpose take charge of the goods and give a receipt in such form as the Board may specify.

(6) The responsibility of any such person for the loss, destruction or deterioration of goods of which he has taken charge shall, subject to the other provisions of this Act, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872 (9 of 1872).

(7) After any goods have been taken charge of and a receipt given for them under this section, no liability for any loss or damage which may occur to them shall attach to any person to whom a receipt has been given or to the master or owner of the vessel from which the goods have been landed or transhipped."

12. Sub-Section (1) of the said provision enumerates the list of activities which can be carried out by the Port Trust and Sub-Section (3) also states that some of the activities listed above under Sub-Section (1) can be carried out with the permission of previous sanction or permission by the Central Government.

13. Much emphasis had been made by Mr. Ashok Kumar Gowtham, learned Special Public Prosecutor for CBI Cases, with respect to the issuance of advertisement. It is claimed that such advertisement, namely, Ex.P-5 had been issued without prior sanction of the Central Government. It had been stated that therefore, there had been violation of a statutory provision and necessarily the accused should be held answerable and punishable for such an act and it is therefore urged that this Court should revisit the Judgment acquitting them all of the charges.

14. Heard also arguments advanced by the learned counsels on behalf of the accused.

15. I have given careful thought to the arguments advanced.

16. I hold that the Court should give a broader construction with respect to he interpretation of Section 42 of the Major Port Trust. Section 42(1) deals with the list of activities which the Port Trust shall undertake and the nature of activities have been enumerated. Sub-Section (3) however begins with a non obstante clause, "notwithstanding" and therefore would mean that dehors whatever has been stated in Sub-Section (1) or in Sub-Section 2 under Section 42, the Board may "with the previous sanction of the Central Government do any of the activities as stated in Sub-Section (1) of Section 42".

17. Naturally, this revolves around interpretation of the said provision. Sub-section (1) grants the Port Trust authorities to do any of the activities mentioned therein and the word used is "shall" and further clarified under Sub-section (3) wherein the mandate was laid to get previous sanction of the Central Government.

18. A question has now come up for consideration particularly because an omnibus charge has been framed as against the A-1 to A-4, namely, that not only did they issue the advertisement Ex.P-5 without the previous sanction of the Central Government but they had also entered into an agreement with A-5, A-6 and A-7 to the detriment of the Madras Port Trust. Therefore both acts complained had been combined into one particular charge. The learned Judge had combined both the

allegations but as is evident, the words under Section 42 Sub-clause 3, namely that the Port Trust “may.....perform” any of the acts under Sub-clause (1) would only indicate entering into an agreement with the successful tenderer.

19. This would actually mean committing and binding the Port Trust into a contractual relationship with the successful tenderer. Issuing an advertisement does not bring about any commitment on the part of the Port Trust. They may receive applications and later, there is always a window for the Port Trust or for that matter any organisation which issues an advertisement to walk away from what had been stated in the advertisement.

20. An advertisement is only an invitation seeking offers. Such an invitation can always be withdrawn. Issuing of an advertisement in its strict sense does not require any previous sanction of any authority. In the instant case, it is pointed out that the Port Trust particularly the Trustees of the Madras Port Trust had taken a decision to issue such an advertisement calling for participants with respect to licensing 200 mts of berth place for vessels to be utilised for unloading and loading the containers.

21. The second act after issuing the advertisement is on receipt of the various bids by the participants and after centralising around one particular tenderer to be awarded the contract, actually entering into such a contract. This creates a binding contractual relationship between the Port Trust and the particular individual with whom such a contract is entered into. This has to be contrasted with the act of issuing an advertisement which does not create any binding contractual relationship with any one of the participants, who answers to such a publication. Therefore, the contention of the learned Special Public Prosecutor that Ex.P-5 had been issued in violation of Section 42(3) cannot be countenanced by this Court.

22. The second aspect of entering into the agreement as seen from the records has been done after following due procedure. While entering into any agreement, there is always an application of mind and subjective satisfaction of the authority, who enters into such a contract.

23. Here, A-5, A-6 and A-7 been granted the contract. As had already been pointed out, there has been no tangible loss suffered by the Port Trust. The final report only projected loss on the basis that if any other tenderer had been chosen then the returns of the Port Trust would have been higher. But there again, a question mark remains. This assertion is a little

too hypothetical and too far fetched to enable a conclusion to be reached that the other tenderer would have performed the obligation under the contract without causing any further loss or frustration to the contract during the period of contract. Therefore I hold that the said argument again cannot be accepted. What then remains is whether the contract entered into with the A-5, A-6 and A-7 was executed after obtaining necessary permission and after following due procedure.

24. In this regard, it is not the case of the prosecution that such procedure were not followed. The tenders received had passed through a Special Committee nominated for that particular purpose. It had finally been approved by the Trustees of the Madras Port Trust. Neither the Special Committee members nor the Trustees of the Madras Port Trust had been arranged as accused in this case. They had actually approved the tender granted to A-5 to A-7. In the course of the Judgement, there has been a discussion by the learned trial Judge with respect to applicability of Section 319 Cr.P.C., and the learned Judge had thereafter come to a conclusion that they cannot be arrayed as accused on the basis of the evidence available.

25. The above discussion points out to only narrow facts, namely, the advertisement issued, the tenders received, the processing through the vetting by a Sub Committee and approval by the Trustees of the Madras Port Trust.

26. The role of A-1 or even A-2 was that they had initialised this particular advertisement. A-2, particularly had been instrumental in suggesting the particular project. A-1 is said to have approved of the project. A-1 is said to have caused publication to be issued. Thereafter, the process went through its normal course. The final approval was by the Trustees of the Madras Port Trust. The loss is only hypothetical and was a projected loss and it is not the case of the prosecution that actual monetary loss was suffered by the Madras Port Trust.

27. To interfere with a Judgment of an order of acquittal, prosecution will have to rely on evidence which has not been considered by the learned Judge or on evidence which have been perversely interpreted by the learned Judge. These are not points put forth during the course of arguments. What has been repeatedly stated is the fact of issuing of advertisement primarily and not even about the award of contract. As pointed out above, issuing the advertisement does not create, by any stretch of imagination, a contractual relationship by the Port Trust with any one of the participants or with those who answer to the advertisement. It is only an invitation. It is not a binding contract in itself.

28. In Bhagwan Singh and others Vs. State of Madhya Pradesh, (2002) 4 SCC 85, the Hon'ble Supreme Court held as follows:-

> "the golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favorable to the accused should be adopted."

29. In view of these reasons even though I am not entering into a complete discussion on the evidence adduced which I hold is actually not required in the present case, I would dismiss the present Criminal Appeal.

30. Accordingly, the Criminal Appeal is dismissed.

Sd/-
Assistant Registrar(CS V)
//True Copy//

Sub Assistant Registrar

vsg

To
1. The Deputy Superintendent of Police,
CBI/ACB,
Chennai.

2. The Principal Special Judge
for CBI cases,
Chennai

3. The Public Prosecutor,
High Court, Madras

+1CC to Mr.K.Srinivasan, Advocate, Sr.No.53710
+2CCs to Mr.L.Rajasekar, Advocate, Sr.No.53781
+2CCs to Mr.G.Ravikumar, Advocate, Sr.No.53750

Crl.A.No.45 of 2010

KV (CO)
K.RK. (02.11.2021)