IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-M-40489-2016 (O&M)
Date of decision: 15.03.2021

Jimmy Subawalla and others

... Petitioners

Vs.

Central Bureau of Investigation and another

... Respondents

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. J.S. Bedi, Sr. Advocate with
Mr. Karan Pathak, Advocate
for the petitioners.

Mr. Sumeet Goel, Advocate
for the respondent-CBI.

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<u>ARVIND SINGH SANGWAN, J.</u>

Prayer in this petition is for quashing of FIR No.RCCHG2014A0021 dated 09.12.2014 under Section 120-B of the Indian Penal Code (for short 'IPC') read with Section 420 IPC and Section 13 (2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (for short 'PC Act'), registered at ACB, CBI, Chandigarh as well as report under Section 173 Cr.P.C. dated 10.10.2016 and further proceedings pending before Special Judge, CBI, Chandigarh, being misuse of process of law.

It is worth noticing that at the stage, when the case before the trial

Court/Special Judge, CBI was fixed for framing of charge, this petition was filed in the year 2016 and on 06.12.2016, it was directed that charge be not framed. Interim order is continuing, as the arguments are not advanced on behalf of the petitioners.

The Special Judge, CBI, Chandigarh, vide request letter dated 16.02.2021, has sought permission for resuming the trial process in view of judgment of the Hon'ble Supreme Court in **Asian Resurfacing of Road Agency Pvt. Ltd. and anr. Vs. CBI, 2018 (2) RCR (Crl.) 415**, wherein it is held that the cases, which are at trial stage and proceedings are stayed by the higher Court, after a lapse of six months, said order will automatically be lapsed, unless it is extended by a speaking order and the trial Court may, on expiry of aforesaid period, resumed the proceedings.

Learned senior counsel for the petitioners has submitted that the FIR was registered after conducting a preliminary inquiry against S.K. Bansal, the then Chief Engineer, Municipal Corporation, Chandigarh (for short 'MCC'), S.R. Aggarwal, the then Superintending Engineer, MCC, Public Health, R.C. Diwan, then Executive Engineer, MCC, Public Health and M/s Selvel Media Services Pvt. Ltd. and its partners i.e. petitioners. It is further submitted that on completing of the inquiry, a report under Section 173 Cr.P.C. was submitted against six persons i.e. R.C. Diwan, Bishwadeep Dutta, G.M., M/s Selvel Media Services Pvt. Ltd., Jimmy Subawalla, Director, M/s Selvel Media Services Pvt. Ltd., Mysa Ganesh, Director, M/s Outdoor Communication Pvt. Ltd. and two firms i.e. M/s Selvel Media Services Pvt. Ltd. and M/s Outdoor Communication Pvt. Ltd. through its directors, whereas S.R. Aggarwal and S.K. Bansal were kept in column No.2, as no chargesheet was presented against them. It is further submitted that the allegations against the petitioners are that in the year 2007, two tenders for operation and maintenance of 40 toilet blocks in various complexes of Chandigarh were floated by MCC and these 40 number of toilet blocks were in two parts. Part A of the work consisted of display of advertisement on the wall of the toilet blocks and Part B was of displaying the advertisement on the connecting passage. Similarly, for 46 number of toilet blocks, tenders were floated by MCC for earning the revenue with a stipulation that the agency will quote licence fee per toilet and minimum proposed licence fee per toilet per month was Rs.500/- for each toilet in each group of toilet blocks per month for a period of five years. It was also submitted that the contractor will pay the advertisement tax in respect of the advertisement displayed on the wall of the toilet along with licence fee and other taxes leviable from time to time. Petitioners Jimmy Subawalla and Bishwadeep Dutta being the authorized representatives of M/s Selvel Media Services Pvt. Ltd. submitted their tender with MCC and demanded an amount of Rs.9800 per month per toilet. Later on, there were some negotiation between the petitioners and MCC regarding waiving off advertisement fee and the tax, however, it was specified by MCC that no remission for licence fee will be allowed, in case any advertisement space remains un-utilized. It was also provided that the contractor will comply with the byelaws and legal orders of the local body or any public authority. As per Clause 7 of the tender, the contractor was required to pay the advertisement fee to MCC along with licence fee, if offered by the agency and all incidental service charges levied from time to time. As per terms and conditions of Part 2 of the tender, MCC shall not be responsible in case advertisements are not displayed on the board and no waiver shall be given in the licence fee, as per Chandigarh Advertisement Order, 1954. It was also provided that some other stringent provisions like Clauses 17 & 19 will be adhered to by the contractor.

Learned senior counsel has next submitted that two companies M/s Selvel Media Services Pvt. Ltd. and M/s Outdoor Communication Pvt. Ltd. submitted their conditional bids and MCC was demanded payment of operation and maintenance of toilet blocks, therefore, they did not submit bid for the licence fee with reference to the connecting passage and in the bid, against this column, it was stated as Nil and even no technical bids were submitted by both the companies. Though it was specific condition of the MCC that no conditional tender will be accepted, however, both the companies submitted their conditional bids. M/s Selvel Media Services Pvt. Ltd. demanded a sum of Rs.9800 for operation and maintenance of toilet blocks and M/s Outdoor Communication Pvt. Ltd. demanded an amount of Rs.1198 for operation and maintenance of toilet blocks, but did not submit any bid regards licence fee for display of advertisement on connecting passage by quoting the licence fee as Nil, despite the fact that the contractor was expected to earn huge revenue from the display boards.

During the inquiry, it was found that R.C. Diwan, being the Executive Engineer of MCC negotiated with M/s Selvel Media Services Pvt. Ltd. and reduced the amount from Rs.9800/- to Rs.8800/- with an annual increase of 10% instead of 15%, as quoted in the original bid, which shows that both of them connived and conspired with each other, as an undue favour was shown to M/s Selvel Media Services Pvt. Ltd. and no licence fee payable for the connecting passage was offered by this company. It was also found that R.C. Diwan in order to give undue favour to M/s Selvel Media Services Pvt. Ltd. placed a supplementary agenda in a meeting of F&CC without disclosing the change in the nature of original tender floated by MCC for operation and maintenance of toilet blocks and the connivance and conspiracy was to bar MCC from recovering the revenue generated by the advertisement on the connecting passage, as in the supplementary agenda, it was offered to provide connecting passage free of costs to M/s Selvel Media Services Pvt. Ltd. Since F&CC had upper power of finance limit upto Rs.35.00 lacs but in the tender, the value more than Rs.5.00 crores was involved, therefore, F&CC did not approve the tender as per the policy decision. It was further found that while preparing the comparative statements of bids submitted by two companies, R.C. Diwan, in order to give undue benefit to M/s Selvel Media Services Pvt. Ltd., mentioned at his own that apart from licence fee and advertisement tax, M/s Selvel Media Services Pvt. Ltd. is not willing to pay any other levy to MCC. At the time of allotment of tender to M/s Selvel Media Services Pvt. Ltd., R.C. Diwan, S.R. Aggarwal and S.K. Bansal, the officials of MCC, gave undue benefit to M/s Selvel Media Services Pvt. Ltd. while allotting work for operation and maintenance of toilet blocks for a period of five years on 10.09.2007. Thereafter, within a period of three months, R.C. Diwan sent a communication to M/s Selvel Media Services Pvt. Ltd. that as per advice of Chief Auditor, MCC, advertisement tax as per Punjab Municipal Corporation

Act, shall be payable on the allotted work. Upon this, M/s Selvel Media Services Pvt. Ltd. through its officials i.e. petitioners No.1 & 2, undertook to pay the advertisement tax, however, later on, all the accused, in conspiracy with each other, did not recover/collect the advertisement fee/tax from M/s Selvel Media Services Pvt. Ltd., which resulted into loss of crores of rupees.

Learned senior counsel for the petitioners has relied upon certain communications between M/s Selvel Media Services Pvt. Ltd. and R.C. Diwan, the then Executive Engineer, MCC, to submit that as per communication, no offence under Section 120-B IPC is made out. It is argued that an offence under Section 120-B IPC can be attracted when ingredients of Section 120-A IPC are attracted, an 'Illegal Act', as defined in Section 43 IPC, says, when it appears that two or more persons, in criminal conspiracy, agree to do or caused to be done an act, same will be punishable under IPC. It is submitted that act of the petitioners, in submitting the bid, showing the inability to pay the licence fee, is neither illegal nor prohibited.

It is next argued that no offence under Section 420 IPC is made out, as there was no dishonest intention of the petitioners from the beginning, when initial bid was submitted. Even on subsequent occasions, when similar bids were allotted regarding other toilets in the markets, no licence fee was demanded by MCC. It is further submitted that no offence under Section 13(2) read with Section 13(1)(D) of PC Act is made out. There is no evidence to show that any valuable things or pecuniary advantage was given by the petitioners to co-accused, who were officers of MCC and since the petitioners are not public servants, provisions of PC Act cannot be invoked against them.

In reply, learned counsel for respondent-CBI has opposed the prayer on the ground that all the accused, in conspiracy with each other, have caused huge loss to the public exchequer. It is submitted that this petition was filed at the stage, when the charges were to be framed and for the purpose of framing of charge, the Court is required to satisfy, if a prima facie case exists for proceeding against the accused and for that limited purpose, the Court can evaluate the material or documents on record and cannot appreciate the evidence. Learned counsel has relied upon **State of Orrisa and another Vs. Saroj Kumar Sahoo, 2006 (1) RCR (Crl.) 324** to support his arguments.

Learned counsel has further submitted that present petition filed under Section 482 Cr.P.C. praying for quashing of criminal proceedings at the stage when the investigation was pending or before the charges were framed, is not maintainable, as the High Court cannot evaluate the material or documents. In this regard, reliance is placed upon **State of Madhya Pradesh Vs. Awadh Kishore Gupta and others, 2004 (1) RCR (Crl.) 233.**

It is further argued that it has been held by the Hon'ble Supreme Court in **State of Andhra Pradesh Vs. Goloconda Linga Swamy and another, 2004 (3) RCR (Crl.) 831** that while framing the charge, the material, which is in existence, collected during the investigation, if sufficient for holding the accused guilty, should be considered at the time of trial, whereas while framing the charge, the Court is to see if prima facie case is made out, showing the commission of an offence and involvement of the person charge-sheeted. It is also held that while exercising powers under Section 482 Cr.P.C., the High Court does not function as a Court of appeal or revision and the inherent jurisdiction, though wide, has to be exercised sparingly and with caution and ordinarily, the High Court should not embark upon an inquiry whether the evidence in question is reliable or not.

Learned counsel for respondent-CBI has lastly relied upon **State of Haryana and others Vs. Ch. Bhajan Lal and ors., 1991 (1) RCR (Crl.) 383** to submit that the present case do not fall within the parameters laid down by the Hon'ble Supreme Court, for exercising the jurisdiction under Section 482 Cr.P.C. for quashing of an FIR.

On merits, learned counsel for CBI has argued that the conspiracy between R.C. Diwan, the then Executive Engineer, MCC and M/s Selvel Media Services Pvt. Ltd. is apparent on record, as in order to give undue benefit, firstly he, by way of negotiation, reduced the bid from Rs.9800/- to Rs.8800/- with annual increase of 10% instead of 15%, as quoted in the original bid and then kept silent regarding licence fee payable for connecting passage, as the petitioners deliberately quoted the price as Nil in the tender. It is further submitted that the conspiracy between MCC officials and the petitioner is also apparent, as the petitioners gave a conditional bid despite the fact that it was specifically provided that no conditional bid will be accepted and thereafter, a proposal was made by R.C. Diwan for providing free of costs passage to M/s Selvel Media Services Pvt. Ltd., which was later on declined by F&CC. Even while preparing the comparative statement of two bids, in order to give undue benefit to M/s Selvel Media Services Pvt. Ltd., R.C. Diwan, in conspiracy with the petitioners, mentioned that apart from licence fee and advertisement tax, the petitioners are not willing to pay any other levy to MCC, therefore, prima facie evidence of conspiracy between all the accused, based on documentary evidence, was sufficient to submit the report under Section 173 Cr.P.C.

Learned counsel for respondent-CBI has also submitted that it is well settled principle of law that where a public servant is being tried for an offence under the provisions of PC Act, a private person, against whom, charge is under Section 120-B IPC, can also be tried together with the same.

It is further argued that M/s Selvel Media Services Pvt. Ltd. had filed CWP-4163-2014 against MCC regarding charging of advertisement fee/tax, on basis of the letters, which were written by the co-accused/officers of MCC and the same demonstrates the conspiracy between them. It is also submitted that vide order dated 18.05.2017, aforesaid writ petition filed by the petitioner(s) was disposed of, by appointing an independent Arbitrator for adjudication of the dispute.

Learned counsel further submits that CBI was not a party before the writ Court and therefore, the MCC officials connived with M/s Selvel Media Services Pvt. Ltd. for giving consent for appointment of an Arbitrator, on the basis of the communications, which is the evidence in this case to prove conspiracy. It is also submitted that in fact, the whole action of MCC officials and M/s Selvel Media Services Pvt. Ltd. and other accused in the negotiation bid and then in allotting the tender, is illegal and therefore, the MCC officials, who are accused in this case, did not brought this fact to notice of writ Court that present FIR is pending against them. Learned counsel thus submitted that it was beyond scope of the sole Arbitrator to look into the commission of offence by the accused persons and therefore, the proceedings before writ Court and

Arbitrator, if any, at back of CBI cannot be considered as a defence in these proceedings.

Learned counsel further submitted that later on, Review Application No.241 of 2019 was filed in CWP No.13565 of 2015 by a third party, which had filed an application under Order 1 Rule 10 CPC during pendency of writ petition and this application was rendered as infructuous while deciding main petition. It is further also submitted that one of the ground of review the appointment of Arbitrator was that present FIR No.RCCHG2014A0021 dated 09.12.2014 against officials of MCC and writ petition is pending and in this petition itself, stay order against framing of charge is passed on 06.12.2016. However, despite noticing this fact, the review application was dismissed with Rs.2.00 lacs as costs vide order dated 24.09.2019.

Learned counsel has referred to **Priti Saraf and another vs State of NCT of Delhi and another, passed in Criminal Appeal No.296 of 2021** decided on **10.03.2021**, wherein the Hon'ble Supreme Court has held that initiation of arbitral proceedings has no co-relation with the criminal proceedings and there is no reason for holding that the offence of cheating would elude from a commercial transaction as in many cases, offence of cheating is committed in course of a commercial transaction invoke Sections 415, 418 and 420 IPC.

Learned counsel has further referred to the case of **Trisuns Chemical Industry vs Rajesh Aggarwal, 1999(4) RCR (Criminal) 223**, wherein a similar view has been taken by the Hon'ble Supreme Court as noticed in **Priti Saraf's case (supra)**.

Learned counsel thus concluded that any award if passed by Sole Arbitrator will have no bearing on the commission of offences and the same should be decided independently by the Special Judge, CBI, Chandigarh.

After hearing learned counsel for the parties and going through the record, I find that no case for quashing of the proceedings is made out within the parameters of **State of Haryana vs Bhajan Lal, 1992 Suppl (1) SCC 335**, accordingly, finding no merit, the present petition is dismissed.

Considering the fact that proceedings before the trial Court were stayed in the year 2016, the trial Court/Special Judge, CBI, Chandigarh is directed to expeditiously conclude the trial preferably within a period of two years.

The order dated 18.05.2017 and 24.09.2019 in CWP No.13565 of 2015 and Review Application No.241 of 2019 titled as M/s Selvel Media Services Pvt. Ltd. Vs. The Municipal Corporation, Chandigarh and others or any award of Sole Arbitrator, if passed, will not be looked into evidence by the trial Court.

[ARVIND SINGH SANGWAN]
JUDGE

15.03.2021
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Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No