

IN THE HIGH COURT AT CALCUTTA
(Criminal Revisional Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Bibhas Ranjan De

C.R.R. 3864 of 2016

With

Shree Gopal Tantia @ Gopal Prasad Tantia

Vs.

The State of West Bengal & another

For the Petitioner

:Mr. Ayan Bhattacharjee, Adv.

Mr. Aditya Ratan Tiwary, Adv.

For the State

:Mr. Arijit Ganguly, Adv.

Mrs. Debjani Sahu, Adv.

Heard on

: June 08, 2023

Judgment on

: June 20 , 2023

Bibhas Ranjan De, J.

1. In this case, law was put into motion by filing an application under Section 156(3) of the Code of Criminal Procedure

1973(hereinafter referred to as CrPC) by one Tapas Kumar Biswas proprietor of M/s Vinayak Construction against Mr. Sahinul Isalm, director of B2R project Private Limited (hereinafter referred to as B2R), Rashid Ali Khan, Arif Md. Khan and Gopal Prasad Tantia , Director of G.P.T Infra Project Private Limited, alleging *inter alia* that one G.P.T Infra Project Limited (hereinafter referred to as GPT) obtained a contract for earth work in filling on Railway embankment and approaches of level-Xing, supplying and spreading of stone dust over formation and approaches of Level-Xing as blanketing materials and RCC minor bridges, retaining wall and other ancillary works in Section 'A' from Ahmedpur (excluding) to Labpur (including) km 0.00 to 15.00 in connection with Gangu conversion work of Ahmedpur – Katwa N.G. Section vide Letter of Acceptance No. CAO/Con/WT/8934 dated December 14, 2012 issued by the Chief Administrative Officer (CON), Eastern Railway, 14 Strand Road, Kolkata – 700001.

- 2.** Subsequently, B2R, a partnership firm, approached GPT for execution of part of the said contract and accordingly an agreement was executed between GPT and B2R on 26.12.2012.

- 3.** On receiving such contract, B2R engaged M/s. Vinayak Construction for execution of the work by executing an agreement on 11.01.2013. In terms of agreement Vinayak Construction completed the work within January, 2016 and accordingly measurement was taken in presence of GPT, B2R & authorized Officer of Eastern Railway.
- 4.** To complete the work Vinayak Construction appointed one Rashid Ali Khan and Arif Md. Khan for execution of work and technical administration. One Pradip Ghosh was also appointed for overall administration and audit of accounts. During functioning of work payments were made in terms of agreement dated 11.01.2013. Subsequently, said Rashid Ali Khan and Arif Khan in collusion with B2R violated the terms of agreement dated 11.01.2013. Accordingly, Vinayak Construction call off the bank transaction with Allahabad Bank by issuing a letter dated 12th February, 2015. Thereafter, on verbal discussion between B2R and M/s Vinayak Construction it was resolved that all transaction will be made through Vinayak Construction directly and no cash amount would be given to Rashid Ali Khan and Arif Md. Khan without prior written permission of M/s Vinayak Construction.

5. It was alleged that Rashid Ali Khan & Arif Md. Khan took up control of the account after preparing a forged letter heads and signature of the proprietor of Vinayak Construction and made payments to the supplier, labourers and contractors. They even prepared forged bills for obtaining payment and misappropriated the same.
6. Specific allegation was that Rashid Ali and Arif Md. Khan in collusion with B2R misappropriated the amount after 13 R/A Bill exclude in the payment made to the supplier labourers and other contractors.
7. It was alleged that in terms of agreement dated 11.01.2013 Vinayak Construction paid Rs. 42,66,469/- only as performance and bank guarantee to B2R as the said amount in turn has been deposited to GPT by B2R and amount is lying with the GPT. That apart, security deposit i.e. amount of Rs. 1, 06.66,173/- only is lying with GPT. It was again alleged that a sum of Rs. 1,61,82,642/- only was lying with GPT as performance guarantee, bank guarantee and security deposit. A some of Rs. 63,99,704/- only was lying with B2R as Sales Tax.
8. In the penaltinum paragraph complainant alleged that conspiracy was hatched up by and between GPT and B2R with

the active role of Rashid Ali Khan and Arif Md. Khan. But, in the last part of penaltium paragraphs it was alleged as follows:-

“ Sahinul Islam, Rashid Ali Khan and Arif Md. Khan are real culprits who have impersonated me in every manner and without authority misappropriate the entire amount in conspiracy with each other after procuring false documents and using the same as genuine.”

9. On receipt of the aforesaid complaint at Police Station forwarded by the Additional Chief Judicial Magistrate, Barrackpore, North 24 Parganas, a specific case being number Dumdum PS 852 dated 08.09.2016 under Section 420/406/409/467/468/471/120B of the IPC was started. After investigation charge sheet was submitted alleging *inter alia* that during investigation accused persons of B2R forged the signature of complainant and misappropriate the money.

Argument:-

10. Learned Advocate, Mr. Ayan Bhattacharjee, appearing on behalf of the petitioner has submitted that there was no agreement between the principles Contractor (GPT) with the complainant/op no. 2 (M/s Vinayak Construction). Therefore,

question of payment or misappropriation of money does not arise.

11. Mr. Bhattacharjee next submitted that after obtaining contract from Eastern Railway GPT entered into an agreement with B2R for execution of a portion of work and in turn B2R Project Private Limited entered into the agreement with M/s. Vinayak Construction for execution of the work. Accordingly, there was no privity of contract between GPT and M/s. Vinayak Construction. It has been further submitted that there was no transaction between GPT and M/s. Vinayak Construction who worked as sub agent of B2R.

12. Mr. Bhattacharjee referring to the application under Section 156(3) of the CrPC has contended that there was no specific allegation against the principle contracted i.e. GPT. Therefore, according to Mr. Bhattacharjee, question of misappropriation of money due to M/s. Vinyak Construction does not arise at all at the instance of GPT.

13. Alternatively , Mr. Bhattacharyya argued that in case of transaction of money in the name of any company, director or employee cannot be held liable in absence of any provision laid down under the statute.

14. In support of his contention, Mr. Bhattacharjee relied on the ratio of following cases:-

i) ***U. Dhar & Anr. Vs. State of Jharkhand & Anr.*** reported in ***(2003) 2 SCC 219***

ii) ***Bata India Ltd. & Ors. Vs. State of West Bengal & Ors.*** reported ***2008 Cri L. J. 164***

iii) ***Shapoor P. Mistry Vs State of West Bengal & Anr.*** reported in ***(2018) 4 CAL LT 384 (HC)***

iv) ***Asoke Basak Vs State of Maharashtra & ors.*** reported in ***(2010)10 SCC 660***

15. In opposition to that, learned advocate, Mr. Arijit Ganguli, on behalf of the State has opposed the prayer of the instant revision application and relied on few pages of the case diary in support of prima facie charge against the petitioner.

Decisions:-

16. On careful scrutiny of the application under Section 156(3) of The CrPC, I find that all allegations made against employees of the M/s Vinyak Construction /op no. 2 and B2R. Only in the penultimate paragraph the petitioner was entangled alleging that petitioner/ G.P.T entered into the conspiracy. But in the last portion of same penultimate paragraph again it was alleged that Sahinul Islam, Rashid Ali

and Arif Md. Khan were the real culprit who misappropriated the entire amount in conspiracy with each other.

17. It is undisputed that there was no privity of contract between GPT and the complainant/ M/s. Vinyak Construction and there was no transaction between these two companies. From the written complaint under Section 156(3) it appears that there was specific allegation against Rashid Ali Khan, Arif Md. Khan who forged the signature of proprietor of M/s Vinyak Construction on letter heads of the same company.

18. In ***U. Dhar*** (supra) Hon'ble Apex Court ruled as follows in terms of the facts enumerated in paragraph 3:-

“ 3. Briefly, the facts are that Bokaro Steel Plant, a unit of Steel Authority of India Limited (for short SAIL) awarded a contract to M/s Tata Iron & Steel Co. Ltd. (for short TISCO) growth shop for certain works. TISCO growth shop completed supply part of the work and erection part of the work was entrusted by it to M/s Tata Construction & Project Ltd. (for short TCPL). TCPL in turn issued tender enquiry and awarded the work to M/s Singh Construction Co., the complainant. According to the complainant, after completing the work it demanded payment of the balance amount under the contract from TCPL. The appellants herein are the Managing Director and Vice-President (Operations) of TCPL. When the complainant failed to receive the payment for the work done, they filed a complaint on 11-1-2001 under Sections 403, 406, 420 and 120-B IPC at Bokaro. The Magistrate concerned took cognizance of the alleged offences and issued summons vide order dated 19-6-2001 to the appellants. The appellants challenged the said order by filing Crl. MP No. 4780 of 2001 in the High Court of Jharkhand at

Ranchi. The impugned order was passed by the High Court dismissing the said petition on 3-5-2002.

5. *In our view, what is relevant is that the contract between TCPL and the complainant is an independent contract regarding execution of certain works and even assuming the case of the complainant to be correct, at best it is a matter of recovery of money on account of failure of TCPL to pay the amount said to be due under the contract. The complainant has alleged that TCPL has already received the money from SAIL for the work in question and it has misappropriated the same for its own use instead of paying it to the complainant and it is for this reason that the offences are alleged under Sections 403, 406 and 420 etc.*

6. *The courts below have overlooked the fact that the contract between Bokaro Steel (a unit of SAIL) and TCPL is a separate and independent contract. The contract between the complainant and TCPL is altogether a different contract. The contractual obligations under both the contracts are separate and independent of each other. The rights and obligations of the parties i.e. the complainant and TCPL are to be governed by the contract between them for which the contract between TCPL and Bokaro Steel (SAIL) has no relevance. Therefore, even if Bokaro Steel has made the payment to TCPL under its contract with the latter, it will not give rise to plea of misappropriation of money because that money is not money or movable property of the complainant.*

8. *Thus, admittedly, the two contracts are independent of each other and payment under one has no relevance qua the other. It cannot be said that there is any dishonest intention on the part of the appellants nor can it be said that TCPL or the appellants have misappropriated or converted the movable property of the complainant to their own use. Since the basic ingredients of the relevant section in the Penal Code, 1860 are not satisfied, the order taking cognizance of the offence as well as the issue of summons to the appellants is wholly uncalled for. Such an order brings about serious repercussions. So far as the appellants are concerned, when no case is made out for the alleged offences even as per the*

complaint filed by the complainant, there is no reason to permit the appellants to be subjected to trial for the alleged offences. Hence, the appeal is allowed. The impugned orders of the High Court as well as of the Chief Judicial Magistrate are hereby ordered to be quashed.”

19. Same principles were reiterated in ***Bata India Limited*** (supra) and ***Shapoor P. Mistry*** (supra).

20. In this case also there was no privity of contract in between GPT and M/s Vinayak Construction. Not only that, there was no specific allegation against GPT (Principle Contractor) in the complaint under Section 156(3) of CrPC. After consulting case diary particularly the pages referred to on behalf of the state, I do not find anything specific against GPT.

21. In ***Asoke Basak*** (supra) Hon’ble Apex Court observed as follows:-

“22. In the instant case, we are unable to gather from the complaint any averment which may suggest that Rs. 5 lakhs was entrusted to the appellant, either in his personal capacity or as the Chairman of MSEB and that he misappropriated it for his own use. The basis of the allegation is that the appellant had caused MSEB to refuse return of the money to the complainant in order to wilfully and dishonestly deprive the complainant of its use. In this regard, it would be useful to refer to the following observations in S.K. Alagh case [(2008) 5 SCC 662 : (2008) 2 SCC (Cri) 686] : (SCC p. 667, para 19)

“19. As, admittedly, drafts were drawn in the name of the Company, even if the appellant was its Managing Director, he cannot be said to have committed an offence under

Section 406 of the Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a company or an employee cannot be held to be vicariously liable for any offence committed by the company itself.”

22. *Admittedly, in the present case, the said amount was deposited by the complainant company with MSEB and there is nothing in the complaint which may even remotely suggest that the complainant had entrusted any property to the appellant or that the appellant had dominion over the said money of the complainant, which was dishonestly converted by him to his own use, so as to satisfy the ingredients of Section 405 IPC. In the absence of any such specific averment demonstrating the role of the accused in the commission of the offence, we find it difficult to hold that the complaint, even ex facie, discloses the commission of an offence by the appellant under Section 409 IPC, punishable under Section 406 IPC.*

23. From that point of view also petitioner i.e. Director of G.P.T cannot be held liable in absence of any transaction or entrustment between M/s. Vinayak Construction and G.P.T as I have already discussed hereinabove that there was no such allegation of transaction or entrustment.

24. In the aforesaid view of the matter, the impugned Criminal Proceeding against the petitioner i.e. Gopal Tantia @ Gopal Prosad Tantia, Director of GPT Infra Project Limited only is liable to be quashed and set aside.

- 25.** Accordingly, the instant criminal revision application is allowed and proceeding is quashed against the petitioner only.
- 26.** The revision application being no. CRR 3846 of 2016 stands disposed of. Any interim order, if any, stands vacated.
- 27.** Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

[BIBHAS RANJAN DE, J.]