

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO. 3286 OF 2024**

1. Krishna Bhagwan Kotak }*Petitioner No.1*
(*Orig. Accused No.3*)

2. M/s. J.M. Baxi & Co. }...*Petitioner No.2*
(*Orig. Accused No.4*)

: *Versus* :

1. The State of Maharashtra
2. Central Bureau of Investigation,
Anti-Corruption Branch, Mumbai }*Respondents*

Mr. Kumar Abhishek Singh with Mr. Pulkit Dhawan, Ms. Sonali Mukherjee, Mr. Rohan Mathur and Mr. Shubham A. i/by. Anoma Law Group LLP, for the Petitioner.

Ms. Shilpa G. Talhar, APP for State-Respondent No.1.

Mr. Kuldeep S. Patil with Mr. Ashish Kumar Srivastava, for Respondent No.2-CBI.

CORAM : SANDEEP V. MARNE, J.
Reserved On : 22 August 2024.
Pronounced On : 29 August 2024.

JUDGMENT :

1) Petitioners have challenged the order dated 23 November 2017 passed by the learned Special Judge on application at Exhibit-116 filed in Special CBI Case No.60/2010 seeking their discharge therefrom. The learned Special Judge has held that there is sufficient material to proceed against Petitioners for framing of charge and has accordingly rejected the discharge application.

2) Petitioner No. 1 is the partner of M/s. J.M. Baxi & Co. (Petitioner No.2). Petitioners are arraigned as Accused Nos. 2 and 3 respectively in Special Case CBI No.60/2010. Petitioners at the relevant time acted as Shipping Agents of Shipping Corporation of India Ltd. (SCI) for handling port related activities. Brief prosecution story is that a criminal conspiracy was entered into by four officials of SCI viz. (i) Shri. Dhaneshchandra Punamchand Revawala-the then Deputy General Manager, SCI, (ii) Shri. Naishad Rashiklal Saraiya-the then Vice President, Outport Accounts Department, SCI, (iii) Smt. Vaishali Ladi-the then Manager (Outport Accounts), SCI and (iv) Shri. Hari Prakash Kamath-the then Deputy Manager, Finance & Accounts Division (Outport Accounts), SCI, who abused their official position and entered into a criminal conspiracy with Petitioners for granting undue benefits to Petitioner No.2, an agent of SCI. The accusation of abuse of

official position and criminal conspiracy against the four SCIL officials stem out of the following broad allegations:

(i) failing to direct Petitioners to comply with conditions laid down in the Agreement dated 12 April 1999.

(ii) dishonestly not forwarding the bills pertaining of financial years 2003-04 to 2006-07 submitted by Petitioner No.2-M/s. J.M. Baxi & Co. to the Operating Divisions/user departments for scrutiny;

(ii) not questioning Petitioners about missing and unsupported vouchers from the bills, till the internal auditor disallowed the same in their Audit Report dated 1 June 2006.

(iii) claim by Petitioners of expenses of Rs.3,21,647.50/- for the financial year 2005-06 and Rs.3,08,246/- for the financial year 2006-07 without any supporting documents as reflected from the report of M/s. R.B. Jain & Associates, Chartered Accountants appointed by the CBI.

(iv) not questioning Petitioners about absence of supporting vouchers in respect of various bills which lied unsettled and unscrutinised for a substantial period of time.

3) It appears that out of the total six accused, Shri.D.P. Revawala had retired from the services of SCI on 31 December 2005 and Shri. Hari Prakash Kamath had resigned on 6 January 2010. CBI therefore did not seek prosecution sanction against them. Since Petitioners are private persons, there was no question of seeking prosecution sanction *qua* them. So far as the other two accused-Mr. N.R. Saraiya and Smt. Vaishali Ladi are concerned, the competent sanctioning authority viz.

Chairman and Managing Director of SCI refused to grant prosecution sanction by order dated 18 September 2010.

4) On account of refusal to grant prosecution sanction, Shri. N.R. Saraiya and Smt. Vaishali Ladi sought discharge from Special Case, but their application came to be rejected on 18 September 2012. Therefore, the said two officials filed Criminal Writ Petition No.322 of 2013 challenging the order dated 18 September 2012. Their petition came to be allowed by this Court by order dated 15 February 2017 holding that since there were no separate and independent allegations against them, their prosecution was not maintainable in absence of sanction. Accordingly, Shri. N.R. Saraiya and Smt. Vaishali Ladi came to be discharged from Special Case CBI No.60/2010.

5) It appears that Shri. D.P. Revawala passed away during pendency of Special Case No.60/2010. Shri. Hari Prakash Kamath applied for his discharge before the learned Special Judge and his application was rejected by order dated 5 August 2019. Therefore, Shri. Kamath filed Criminal Writ Petition No.6407 of 2019 before this Court challenging the order dated 5 August 2019. This Court allowed Writ Petition No.6407 of 2019 filed by Shri. Hari Prakash Kamath and discharged him from CBI Special Case No.60/2010.

6) Thus out of the four SCI officials, one has passed away and three have been discharged by this Court and only

two Petitioners now remain accused in CBI Special Case No.60/2010. Petitioners also filed application at Exhibit-116 seeking their discharge. The learned Special Judge has however proceeded to reject the application by order dated 23 November 2017, which is the subject matter of challenge in the present petition. By order dated 5 December 2023, this Court has stayed the proceedings before the learned Special Judge.

7) Mr. Kumar Abhishek Singh, the learned counsel appearing for Petitioners would submit that all the allegations in the chargesheet are essentially made with reference to public servant and there is no separate or specific allegation against Petitioners. That it is an admitted position that all the subject invoices submitted by Petitioners to SCI have been disallowed. The factum of the invoices not being cleared/paid has been categorically dealt with by the Chairman and Managing Director of SCI while passing the order dated 18 September 2010 refusing to grant prosecution sanction to the chargesheeted public servants of SCI. That the chargesheet is filed under a complete misunderstanding on the part of the CBI that the invoices were cleared or paid. That the CMD has taken note of standard practice across the country and even internationally where miscellaneous and sundry expenses are genuinely expected to be incurred towards escorting customs officials and related jobs. That in this regard, the CMD has relied upon statements of the CBI's own witness, Smt. Kasturi Krishnakumar, which again seems to legitimise the expenses claimed by Petitioners on the subject invoices. According to Mr.

Singh, since the highest authority of SCI has himself categorically confirmed that no loss is caused to SCI, CBI is unnecessarily overstretching the entire issue despite noticing that none of the subject invoices are ultimately cleared. Thus, there is neither any wrongful gain to Petitioners nor any corresponding losses to SCI in the present case. Mr. Singh would rely upon orders passed by this Court discharging the three public servants particularly, the order passed in the case of Hari Prasad Kamath in support of his submission that this Court has relied upon the CMD's sanction order at length and has recorded a finding that there is no wrongful loss caused to SCI in respect of the invoices amounting to Rs.6,29,893/-. That the charge ultimately relates to only invoices relating to FY 2005-06 and FY-2006-07, totaling to Rs.6,29,893/- which is also clear from perusal of the audit report dated 9 September 2009 of CBIs auditor M/s. R.D. Jain and Associates. That the recovery of amounts towards corrective measure of Rs.17.8 lacs and Rs. 53,336/- pertain to previous bills and that there is no recovery to be made in respect of FY 2005-06 and FY 2006-07. Since the subject bills relating to the said period were not cleared, he would therefore submit that there is neither any wrong doing, much less any criminality, pertaining to the said disallowed claims/invoices. That once SCI itself asserts that there is no wrongful loss to itself, it is too far-fetched for CBI to proceed with prosecution on a wrongful assumption of any loss being caused to SCI. That in any case, all the public servants have already been discharged and therefore no ground subsists

for prosecution of Petitioners as CBI Special Court does not have jurisdiction to proceed for prosecution against private persons. He would therefore pray for discharge of the Petitioners.

8) The petition is opposed by Mr. Kuldeep Patil, the learned counsel appearing for Respondent-CBI. He would submit that the Petitioners are repeatedly found to have raised and got cleared several fictitious bills, unsupported by any vouchers and has caused wrongful loss to SCI. He would submit that the nature of transaction involved in the present case is of such nature that Petitioners, while acting as agent for SCI, used to possess funds of SCI in advance and they were raising bogus invoices for claiming various amounts out of those funds available with them. That therefore the sanctioning or clearing of bills is not entirely relevant in the facts of the present case as Petitioners had full intention of misappropriating the funds of SCI by raising fictitious bills. That there is ample documentary as well as oral evidence on record pointing out incriminating role of Petitioners. He would rely upon report of the Chartered Accountant, M/s. R.B. Jain & Associates dated 9 August 2009 in which 980 false bills of the year 2005-06 and 45 false bills of the year 2006-07 were found to have been submitted by Petitioner No.2 to SCI. That the said report clearly bears out conduct on the part of the Petitioners in claiming improper bills, which were neither supported by vouchers nor were genuine. That it is prosecution's case that

Petitioners have cheated SCI with connivance with SCI officials. That though the SCI officials are discharged for want of prosecution sanction, the offence of cheating committed by Petitioners would still survive. He would also rely upon observations made by the Central Vigilance Commission about the role played by the Petitioners. He would submit that the claim of Petitioners of non-cause of any loss to SCI is misleading. He would therefore submit that enough documentary, oral and circumstantial evidence is available on record and that therefore the prosecution must be permitted to prove the accusations against Petitioners rather than discharging them at this premature stage. He would pray for dismissal of the petitions.

9) Rival contentions of the parties now fall for my consideration.

10) In the present case, CBI initially sought to prosecute four officials of SCI alongwith Petitioners, with whom Agency Agreement dated 20 April 1999 was executed. It appears that in the Agency Agreement, certain remittances were provided to Petitioners in the Agent Disbursal Account on current basis to fulfill their continuing obligations for SCI's ship and port related activities in the concerned territory. The Agent was supposed to utilize such amounts remitted by SCI in Agent's Disbursement Account where bills and demands were received in the name of the Agent. Under Article 26 of the Agreement,

in addition to agent's fees and commission, the agent was also entitled to claim courier charges, expenses, transportation, space handling service tax etc. by producing supporting original bills, invoices of the cash memos etc.

11) It is prosecution's case that four officials of SCI, Shri. D.P. Revawala, Shri. N.R. Saraiya, Smt. Vaishali Ladi and Mr. Hari Prasad Kamath entered into criminal conspiracy with Petitioners and that they assisted Petitioners in cheating SCI by raising fake and fictitious claims through invoices unsupported by any underlying vouchers or actual transactions. The first element of charge is about the invoices pertaining to FY 2005-06 and FY 2006-07, in which the concerned four officials of SCI have not forwarded several bills submitted by Petitioners to the Operating Division/User Department for scrutiny and therefore the bills had remained unsettled/uncleared. It is CBI's allegation that even soft copies of bills were not loaded in the system of SCI and that in some cases, the uploading was delayed by more than 240 days. It is CBI's allegation that SCI officials did not even bother to question Petitioners about missing and unsupported vouchers in respect of those bills, which remained uncleared/unsettled. According to CBI, ultimately M/s. S.B. Billimoria & Co., internal auditor appointed by SCI disallowed the said bills in their audit report dated 1 June 2006. Another allegation by CBI is about failure to adhere to the stipulations of the Agency Agreement by the officials of SCI. The CBI apparently

appointed M/s. R.B. Jain & Associates, its own Auditor, and claims of Rs.3,21,647/- for FY 2005-06 and Rs.3,82,506/- during FY 2006-07 towards conveyance of custom officials and sundry/telephone/fax expenses etc were disallowed by the said Auditor.

12) Perusal of the chargesheet filed by CBI in the present case would indicate that the prosecution essentially proceeds on a footing that the four SCI officials have cheated SCI and caused wrongful loss to it. However, when proposal for grant of prosecution sanction was placed before the Chairman and Managing Director of SCI, he considered all the five heads of allegations as under:

- (A) Allegation of not forwarding bills of user department for scrutiny and finalizing the Balance Sheet leading to presumption that the accounts were settled.
- (B) Allegation of delay in uploading soft copies of accounts.
- (C) Allegation of incorrect claims made by Petitioners for Rs.3,21,647.50/- during FY 2005-06 and Rs.3,08,246/- during FY 2006-07 towards conveyance of custom officials and sundry/telephone/fax expenses etc.
- (D) Allegation of non-compliance with agreement conditions under Articles 11 and 12.
- (E) Allegation of non-compliance with other agreement conditions under Articles 15, 16, 17 and 26.

13) After considering the allegations in the above five headings, the CMD, SCI held that so far as the allegation of non-forwarding of bills of user departments for scrutiny was concerned, the concerned bills have factually not been settled and no payment has been made to the Petitioners in respect of the said bills. The relevant findings recorded by the CMD, SCI in his order dated 18 September 2010 read thus:

The aforesaid facts clearly show that the bills for the said F.Y. 2005-06 and 2006-07 have not been settled and that payments have not been made for the said bills to M/s. J.M. Baxi & Co., in view of the fact that the scrutiny and authorization of the said bills is still pending to be done by the Operating Division of the SCI. Therefore, it is submitted that the CBI is not correct to presume that the said accounts have been settled merely because of the fact that the bills were included in the accounts of the respective years, which was required to be done as a legal necessity of the accounts having to be prepared on the accrual basis.

It is germane to note that there is no financial loss, much less a wrongful loss, caused to the SCI as no payments have been made to the said agent M/s. J.M. Baxi & Co., without scrutiny and authorisation and in fact, the amount due to the said agent have been frozen as detailed above.

14) So far as the allegation of delay in uploading soft copies of the bills are concerned, it cannot be said, by any stretch of imagination, that Petitioners can have any remote role to play in that regard. The said allegation related only to SCI officials. Therefore, the findings recorded by CMD in relation to the said allegation need not be examined in the present case.

15) The third allegation of incorrect claims made by Petitioners for Rs.3,21,647.50/- during FY 2005-06,

Rs.3,08,246/- during FY 2006-07 appears to be the main allegation against Petitioners and it is claimed that no such expenditure towards conveyance of custom officials was actually incurred by Petitioners. After examining the allegations and evidence on record, CMD held that even those bills for Rs. 3,21,647.50/- and Rs.3,08,246/- were actually not settled and remained pending with Operating Division for scrutiny /authorisation. The relevant findings recorded by the CMD, SCI in this regard are as under:

Firstly, the aforesaid CBI Report as well as the report of the CBI-appointed Chartered Accountants M/s. R.B. Jain, themselves mention *merely* that M/s. J.M. Baxi & Co. had **claimed** the aforesaid amounts, however, it is nowhere mentioned in the said reports that the SCI had actually sanctioned or authorised or settled or paid the said amounts. While in all fairness, it is stated that it may be true that the General accounts submitted by M/s. J.M. Baxi & Co. had been uploaded to the computerized accounts, however, as has been mentioned in the CBI Report as well as in R.B. Jain's report [in fact, it is an allegation made by the CBI as discussed in Part "A", *supra*], these accounts for FY 2005-06 and FY 2006-07 were never settled and therefore, these bills were never authorized/sanctioned/settled by the SCI. As has already been covered elsewhere, the said bills were pending with the Operating Divisions for scrutiny/authorisation.

Therefore, when the said bills were merely **claimed** by the concerned agent M/s. J.M. Baxi & Co., and were not in fact sanctioned/ settled/ authorised by the SCI till M/s. R.B. Jain, CA, examined them, how can it be said that any officials of the SCI were responsible for that ? SCI officials can possibly be said to be responsible only if they had *wrongfully* sanctioned/ authorised the said bills and had actually paid the amounts to the said agent, however, in the absence of any such act on their part and when the said bills were yet to be sanctioned/authorised, the officials of SCI cannot be held responsible, much less for a criminal act.

16) So far as the role required to be played by an agent of Shipping Company for faster clearance related to port related activities, the CMD recorded following findings:

In the light of the above observations, it may be appreciated that escorting of Customs officers is a standard practice followed in all the ports by shipping companies. It is true that the Customs officers might have generally been provided with conveyance by their own department, however, the experience of various shipping companies has been that such conveyance is generally insufficient or is not available to all officers at all relevant times or is not available at the right time on urgent basis when the visits to the ships have to be organized. The same problem is faced practically with other authorities who have to examine/inspect a ship or have to otherwise deal with it.

In this regard, it is pertinent to point out that the work of SCI (and other shipping companies, for that matter) depends substantially on the performance and efficiency of the agent who has to deal with most of the functions related to ships, containers, cargo, passengers, port authorities, customs authorities, various types of clearances required, local support, etc. as and when a ship visits a port. Even a day's delay on the part of an agent in handling such important tasks, in respect of the visit of just a single ship, could lead to loss of thousands of dollars for the SCI due to highly competitive nature of the shipping industry, Time is of essence in this regard, and, so is the necessity to have perfection in the quality of work. A slight lapse in the quality of work can mean huge losses for the SCI.

It is in this context that the agents of various shipping companies have generally been following the practice of escorting the Customs officers or officers of other authorities in their vehicles in their anxiety to ensure that not even a single minutes is wasted unnecessarily waiting for the official vehicle of the Customs officer (or other such officers) to become available for his visits to the ship. It may be pointed out that such visits are only for a few kilometers from the office of such authorities to the point near to the place where the ship is docked. Escorting such officers saves time and the ship will not be left at the mercy of the concerned officers who could otherwise take their own time to plan/arrange the visit to the ship. Thus, by spending a small amount on escorting the officers, a shipping company is in a position to save much more in a competitive environment by saving time for which the ship has to remain docked waiting for various inspections/clearances etc.

It is in this context that the agents of the SCI might also have been following the said practice followed by various shipping companies. Since, the agent would be providing such service on behalf of SCI, it follows that expenditure on this count is to be borne by SCI. Thus, claims by the agent for such service provided are legitimate claims. However, it needs to be clarified that as a policy matter, the claims, where the agent has not provided supporting papers of the service provides are disallowable by SCI.

17) Thus, after considering the entire evidence on record, the CMD, SCI recorded an emphatic finding that even if the above practice internationally followed by shipping companies was to be momentarily ignored, ultimately the fact remains that the claims of Rs.3,08,246/- and Rs.3,21,647.57/- were never settled/authorized/sanctioned and no payments were made therefor. It further held that Petitioners had already reversed the said claims by issuing credit notes in favour of SCI. The relevant findings in this regard reads thus:

Without prejudice to what is stated above, it is reasserted that in so far as the impugned claims of Rs.3,08,246 and Rs.3,21,647.50 are concerned, the said claims were never settled/authorized/sanctioned by the SCI and no payments were made therefor. On the contrary, as mentioned earlier, on the insistence of the SCI, the aid agent M/s. J.M. Baxi & Co. has already reversed the said claim by issuing credit notes in favour of SCI. So, nothing survives for the said claims as far as SCI is concerned.

18) The CMD, SCI has also criticized CBI's report in seeking to rely upon statement of Smt. Sandhya Jadhav, Senior Tax Assistant in Customs Department wherein she denied using of conveyance facilities offered by Petitioners to custom

officials. The CMD held that there were large number of custom officials posted at Nava Sheva Port and therefore it was dangerous to rely upon a statement of a singular custom official, who could not have certified whether the other custom officials had used the conveyance facility or not. The CMD thereafter took note of statement of Smt. Kasturi Krishnakumar, who had clearly brought out the genuineness of claims made by Petitioners and that CBI had proceeded to ignore her statement. Thus, even CMD was apparently satisfied about genuineness of claims made by the Petitioners, ultimately it was found that even those genuine claims were never sanctioned by SCI and that no payment was made to Petitioners towards said claim of Rs.3,08,246 and Rs.3,21,647.50/-.

19) The CMD, SCI also did not find any basis in respect of the allegations of non-compliance with the terms and conditions of Agency Agreement on the part of the custom officials.

20) Thus, the order dated 18 September 2010 of CMD, SCI refusing prosecution sanction clearly establishes that neither the bills covered in allegation No. (A) nor the bills covered by allegation No. (C) were actually paid/cleared by SCI and that Petitioners have not received any payments from SCI towards the said bills. This Court has taken note of the order passed by CMD, SCI while discharging Mr. N.R. Saraiya and

Smt. Vaishali Ladi by order dated 15 February 2007 and Mr. Hari Prasad Kamath by order dated 14 September 2023. Today, none of the public servants who were originally accused of committing the crime are facing prosecution as each of them stand discharged. Now, the prosecution continues only against private persons being Petitioner No.2-Firm and its partner. The whole case was made out essentially against the officials of SCI under a misconception that they had connived with Petitioners in clearing false bills. However, it later transpired that none of the bills, in respect of which accusation are sought to be raised, were ultimately paid/cleared by SCI nor have the Petitioners received any payments towards the said bills.

21) So far as the report of CBI's Auditor M/s. R.B. Jain and Associates is concerned, the said report also sought to indict the accused in respect of the invoices pertaining to the years 2005-06 and 2006-07 and had exonerated the officials of SCI pertaining to the bills of earlier years reporting that suitable corrective measures were already been taken by SCI. The main accusations in the report of CBI's auditor was in respect of bills pertaining to the year 2005-06 and 2006-07 (for Rs.3,21,647.50/- and Rs.3,08,246/-). However, It is ultimately found that even those bills are not cleared by SCI. I therefore do not find that any material now remains for permitting the prosecution to take the case for trial. The material sought to be produced by CBI clearly falls short of the accusations that are sought to be pressed. From the material available on record and in the light

of discharge of the SCI officials, it cannot be stated that any grave suspicion can be raised against Petitioners. As held by the Apex Court in **Union of India Versus. Prafulla Kumar Samal and anr.**¹ if the judge is satisfied that only suspicion arises on *prima-facie* examination of evidence and not grave suspicion, the accused is entitled to discharge.

22) In absence of prosecution of public servants, it otherwise becomes questionable as to whether CBI can be permitted to carry forward prosecution against Petitioners in the light of ratio of the judgment of the Delhi High Court in **Kartongen Kemi Och Farvaltning AB and Ors. Versus. State through CBI**² holding that once charge of conspiracy against the main public servant is dropped, then the charge of abatement of conspiracy can neither be framed nor can be subjected to trial. Reference can also be made to judgment of the Supreme Court in **Yogesh alias Sachin Jagdish Joshi Versus. State of Maharashtra**³ and **Central Bureau of Investigation Versus. Akhilesh Singh**⁴ in support of the contention that once the main accused is discharged, no purpose would be served in further proceeding with the case against other accused.

23) After considering the overall conspectus of the case after sifting and weighing the evidence for the limited purpose

¹ (1979) 3 SCC 4

² 2004 (72) DRJ 693.

³ (2008) 10 SCC 394

⁴ (2005) 1 SCC 478

of finding out *prima-facie* case, I am of the view that no case of grave suspicion is made out on the basis of material available on record. Continuation of proceedings against Petitioners would therefore be a mere empty formality, with no chance of prosecution securing conviction. Continuing of prosecution in such circumstances would be abuse of process of law.

24) Accordingly, the petition succeeds. The order dated 23 November 2017 passed by the learned Special Judge is set aside and Petitioners are discharged in Special Case No.60/2010.

[SANDEEP V. MARNE, J.]

Note : Corrections are carried out in paragraph Nos. 11,12, 12(C), 15 only pursuant to speaking to minutes order dated 30 August 2024.

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