

IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM &
ARUNACHAL PRADESH)
ITANAGAR BENCH

1. Crl. Rev. Pet. 15 (AP) 2011

Sri Tomi Ete,

Son of Late Tumto Ete, resident of village Gune Bane,
PO & PS - Along, District- West Siang, Arunachal Pradesh.
Now residing at Qtr. No. 1(Type-V Complex), Vivek Vihar,
Itanagar, Arunachal Pradesh.

.....Petitioner

Advocates for the Petitioner:

Mr. Tony Pertin

Mr. A.K. Singh

Mr. K. Saxena

Mr. U. Bori

-Vs-

1. The State of Arunachal Pradesh through the Chief Secretary, Govt. of Arunachal Pradesh, Itanagar.
2. The Central Bureau of Investigation(CBI) through the Deputy Inspector General, Head of Zone, Shillong, For ACU – V, New Delhi.
3. The Secretary, Government of Arunachal Pradesh, Power Department, Arunachal Pradesh.
4. The Under Secretary, Government of Arunachal Pradesh, Power Department, Itanagar, Arunachal Pradesh.

.....Respondents.

Advocates for the Respondents:

Mr. Abhijit Bhattacharya, Spl. P.P., CBI

2. Crl. Rev. Pet. 16(AP) 2011

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BEFORE**HON'BLE MRS. JUSTICE RUMI KUMARI PHUKAN**

Date of hearing : **13.08.2015 & 11.08.2015**

Date of Judgment & Order : **11.09.2015**

JUDGMENT & ORDER (ORAL)

Heard Mr. Tony Pertin, learned counsel appearing for the petitioner. Also heard Mr. A. Bhattacharya, learned Spl. P.P., CBI, for Respondent No. 2.

2. The petitioner by filing this criminal revision petition under sections 397/401 of the Code of Criminal Procedure, 1973, *read with* section 482 of the said Code, has challenged the : (i) order dated 08.08.2011, passed by the Special Judge(P.C. Act)-cum-District & Sessions Judge, West Sessions Division, Yupia (A.P.), whereby charges has been framed against the petitioner, u/s. 120 (B) IPC *read with* sections 13(2) and 13(1)(d) of the Prevention of Corruption Act, 1988, in the C.B.I. P.C. Act Case No. 14/10(YPA) and PC Act Case No. 15/10(YPA).

3. The case of the petitioner is that on 31.05.2001, one Sri K. Riram, Under Secretary to the Govt. of Arunachal Pradesh, Power Department, Itanagar, lodged an elaborate written FIR before the appropriate authority in Central Bureau of Investigation [in short, CBI] against one Sri Darshan Singh, the then Chief Engineer(Power), Govt. of Arunachal Pradesh[in short, CE(P)] and others, requesting the CBI to make investigation into the allegation of irregularities committed by the said CE(P) and others in the Power Department. On the basis

of the said FIR, the respondent CBI initiated investigation, recorded the evidence of witnesses and seized bulk of documents and on conclusion of the investigation, submitted charge sheet u/s. 120(B) IPC r/w Sec. 13(2) r/w 13(1)(b) of PC Act, against various accused including the present petitioner. Two fold allegations was raised against the accused petitioner in the charge sheet which comprises of allegation 1(a) wherein it is alleged that the accused Darshan Singh in conspiracy with the M/s M. R. Power Project, sought undue favour from the firm in the matter of award of contract relating to supply of micro hydel sets imported from Czechoslovakia. It was alleged that the work was awarded to the firm without observing any formality and the contract was executed even when the question of the quotation of the party was not the lowest. It is alleged in the charge sheet that petitioner while working as a Superintending Engineer, released the advance money for mobilization to the firms, in violation of the Rules.

4. Allegation 1(b) against the accused petitioner is that the contract supply of 41 micro hydel sets from Germany was awarded to M/s Hydro Power Equipments, Jorhat, who was intruder and did not participate in the tender process. On the basis of the said two allegations, above referred two cases were registered against the accused petitioner. As both the cases are against the same accused petitioner, so it is taken-up together for discussion and disposal.

5. The accused petitioner accordingly made appearance before the trial Court and made a prayer for discharge u/s. 227 of the Code of Criminal Procedure, 1973, which, however, was rejected and finally, framed charge against the accused petitioner by order dated 08.08.2011. Challenging the said order, the accused petitioner has preferred the present petition.

6. As regards the allegation 1(A), it has been contended by the accused petitioner that he was the person who objected to the release of a portion of the amount against the Bank Guarantee but he finally had to release the amount, in question, upon the direction of the Chief Engineer(P) which can be affirmed from

the letter dated 14.12.1995 written by the said CE to him. It has also been submitted that the accused petitioner is nowhere involved in the decision making process as recommendation of award of work to M/s M. R. Power Project @ 7.70 crores. The investigating agency could not pin point any overt act on the part of the petitioner suggesting involvement of the accused petitioner with the offence alleged.

7. The Chief Engineer for the Works Department is the competent authority in the State of Arunachal Pradesh to issue Letter of Credit [LOC] on the requisition of Executive Engineer and on recommendation of the concerned Superintending Engineer. The accused petitioner is not a signing authority nor the Letter of Credit [LOC] has been made a part of the records and the said Letter of Credit [LOC], in question, was issued on instruction by the Chief Engineer, Civil Division, Department of Power, with intimation to the accused petitioner against the Bank Guarantee No. 57/94.

8. As regards allegation 1(B), it is the contention of the accused petitioner that merely change of nos. of Hydel Sets, as indicated in the charge-sheet, cannot bring him under the ambit of criminal conspiracy as defined u/s. 120A IPC and punishable u/s. 120B of the said Code. Neither can the respondent CBI can make the petitioner party of a conspiracy for release of Rs. 2 crores in favour of the Firm concerned as it was released under the command/instruction of the superior authority i.e. Chief Engineer(P).

9. According to the accused petitioner, the learned trial Court by its impugned order dated 08.08.2011, most mechanically followed tentatively the Charge Sheet preferred by the Investigative Agency and decided to frame Charges against the Accused, without even going through the Letter of Credit [LOC] and without trying to ascertain whether the petitioner as the Superintending Engineer is competent and authorized to release the money, in question, as alleged. Equally, rejection of prayer to discharge the accused petitioner under the petition u/s. 227 of the Code of Criminal Procedure, 1973, is

also bad in law. In the instant case, there have been dearth of materials against the petitioner and as such, in absence of any materials, the framing of charge against the petitioner is illegal. Thus, the accused petitioner is entitled to get relief within the scope and ambit of Sections 397/401 *read with* section 482 of the Cr.P.C by way of the present proceedings alone. Since the learned Court below without any support of facts or law, framed charges against the accused petitioner, therefore, the same is liable to be cancelled by this Court in exercise of powers conferred under sections 397/401 *read with* section 482 of the Code of Criminal Procedure, 1973.

10. The further contention of the accused petitioner is that while passing the impugned order dated 08.08.2011, the Court never referred to the relevant provisions of Central Public Works Department(CPWD) Manual which would clearly indicate that the petitioner was neither answerable to the type of deal made by his superior authority nor he was competent to raise any objection against anything done by his superior authority namely the Chief Engineer(P). A mere compliance of an order, lawful or otherwise, cannot constitute an offence punishable u/s. 120B IPC. It has been categorically stated by the PW-35 Er. Taru Siga, the then Executive Engineer, Bomdila, that ***"we paid Rs. 4 crore as mobilization amount to the parties as per the direction of Sh. Darshan Singh, CE, Deptt. of Power"***.

11. Hammering on the sanction order, it has been assailed that the same was obtained prior to three years of filing charge sheet while the petitioner was never a party or privy to anything done regarding supply of items to the Department concerned. So the sanction order is bad in law and the learned Court below failed to appreciate such aspect.

12. According to the petitioner, when the charge is framed against him without supportive materials, as indicated above, the order framing the charge, is perverse and a nullity in the eye of law. As an Superintending Engineer, he did nothing illegal and so, there was no prima facie case to frame charge against him under the law, even under the IPC or Prevention of Corruption Act, 1988.

13. It has been reiterated by the accused petitioner that he was the Superintending Engineer(civil) of the newly created Civil Circle, Department of Power, and he was not associated with the decision making process in the office of the Chief Engineer (Power) and the LOC, in question, was not directed to the petitioner which can be gauged from the fact that PW-35 who was the then concerned Executive Engineer had admitted that the payment was made by him and not by the petitioner and only at the instance of Chief Engineer (P). The said admission clearly shows that the said transactions were carried-out without any reference to the petitioner. Curiously enough, the person who made the payment was not made a co-accused but the petitioner who is not at all involved in making payment through LOC has been made an accused. Since the petitioner was neither a privy nor a direct partner in the decision making process, he cannot be termed a conspirator, liable to be punished under the criminal law. Hence, the framing of charge against him is a misconceived one, illegal and non-est in the eye of law. Therefore, in view of the clear irregularities committed by the learned Court below, the accused petitioner has prayed that the charge-sheet, in question, be quashed as well as the impugned order dated 08.08.2011 in order to secure the ends of justice.

14. An affidavit in opposition has been filed by the respondent Central Bureau of Investigation(CBI), wherein they have categorically submitted that Central Bureau of Investigation, New Delhi, filed a charge sheet on 24.10.2008 upon the allegation that the accused Sh. Darshan Singh, while working as the then Chief Engineer(Power) in Arunachal Pradesh, in conspiracy with M/s M.R. Power Projects showed undue favour to the Firm in the award of contract for supply of 41 imported Portable Micro Hydrel Projects imported from Germany who were an intruder and did not participate in the tender process.

15. The stand of the respondent CBI is that they have raised objection upon the maintainability of the same, on the ground that framing of charges by the trial Court is principally based upon the prima-facie allegations against the

petitioner in the charge sheet and the trial court is not required to go in details of the evidence.

16. The further stand of the respondent CBI is that the instant petition has been filed against the established statutory provisions of law i.e. section 19, sub-section 3 (c) of the prevention of Corruption Act, 1988 which postulates that "**No court shall stay the proceedings under this act on any other ground and no court shall exercise the powers of Revision in Relation to any interlocutory order passed in any inquiry, trial appeal or other proceedings**". The petitioner would be given ample opportunity for his defence during the course of trial. It is the contention of the respondent CBI that charges was framed by the trial Court after due application of mind and after perusal of evidence as produced by prosecution. According to the said respondent, it was improper on the part of the petitioner who was the then Superintending Engineer(Civil), Department of Power, in conspiracy with the then Chief Engineer(P), to release the mobilization amount of Rs. 2 crores to M/s Hydro Power Equipments on the strength of the LoC issued by the said Chief Engineer(P) while there was no administrative approval/expenditure sanction of the scheme or budget provisions for the said amount, by diversion of funds.

17. The further contention of the respondent is that in the list of documents submitted alongwith Charge-Sheet, at serial no. 14, is the said LOC No. 151 dated 22.12.1994, which indicates that it was a relied upon document by the prosecution and the learned Court below has perused the said Letter of Credit [LOC] while reaching at the conclusion of framing charges against the petitioner. Thus, the CBI never omitted to include the said LOC as a part of the documents.

18. It is also the contention of the respondent CBI that it was he, who, in fact, *suo-motu* changed the quantity of sets from 30 sets of 20 KW and 10 sets of 30 KW(total 40 sets at the cost of Rs. 7.98 crores) to 10 sets of 20 KW, 11 sets of 30 KW and 1 set of 50 KW(total 31 sets at the cost of Rs. 7.95 crores),

without placing the matter before the Work Advisory Board(WAB) and without obtaining approval of the concerned Minister.

19. It has also been categorically contended in the affidavit-in-opposition that the result of the investigation, in question, is based upon documentary and oral evidence and not prejudiced against any accused person including the petitioner and there is ample evidence, both oral and documentary, to establish the culpability of the accused as the petitioner was then SE(Civil), Dept. of Power, and in furtherance of their conspiracy with Shri Darshan Singh, Chief Engineer(P), played an active role in wrongful approval and release of fund in favour of M/s Hydro Power Equipments and thereby caused wrongful gain to the private Firm.

20. According to the respondent Central Bureau of Investigation(CBI), the learned Court below had rightly and judiciously framed the charges against the petitioner after being satisfied that there is a *prima facie* case against the petitioner and he is now trying to mislead the Court by trying to shift his responsibility towards his senior officer. The petitioner would be afforded ample opportunity to cross-examine the sanctioning authority and other witnesses during trial. As regards the accord of sanction, it is just a technical legal requirement, in which a competent authority, accord sanction order after perusal of the documents, statement and other materials collected during investigation. Considered in the light of all above, the respondent Central Bureau of Investigation(CBI) has prayed that the instant petition filed by the petitioner is devoid of merit and the same may be dismissed.

21. In support of his case, the learned counsel for respondent CBI has relied upon the case, as mentioned below:

- (i) ***AIR 2001 SC 2856 (Narayan Sharma v. State of Rajasthan)***
- (ii) ***(2000) 3 SCC 57 (G.P. Srivastava v. R. K. Raizada & ors.)***
- (iii) ***NEJ 2011 3 706 (Sushi Kumar Gupta v. Union of India)***

22. The thrust of argument of the learned counsel for the accused petitioner that there is no material on record, even a whisper, in the charge sheet, to remotely indicate that the accused petitioner has abused his position by corrupt or illegal means, obtained for himself, or any other person, in pecuniary advantage. Relying upon the case law ***State of Haryana v. Bhajan Lal & ors. 1992 suppl. (1) SCC 335***, it has been urged that as there is no materials on record, the Court can set aside and quash the First Information Report(FIR) in criminal proceeding u/s. 482 of the Code of Criminal Procedure, 1973. On the point of consideration of prima facie case, case law reported in ***State of T.N. Tr. Inspector of Police v. N. Sureshjanjan 2014 11 SCC 709***, it has been urged that the learned trial Court cannot merely act as a mouth piece of the prosecution but has to consider the broad probabilities of the case and total effect of the evidence and documents so produced before the Court. On the similar point, following case law has been relied

- 1). ***State of Orissa v. Devendra Nath Padhir (2005) 1 SCC 568***
- 2). ***CBI v. K. Narayana Rao (2012) 9 SCC 512***
- 3). ***T. Vijayan v. State of Kerala (2010) 2 SCC 398***
- 4). ***Sajjan Kumar v. CBI (2010) 9 SCC 368***

23. Further, it has been argued that the accused petitioner used no corrupt practice so as to embrace him in purview of Section 13 of the Prevention of Corruption Act, 1988. Also there is nothing to show that accused petitioner made any conspiracy as has been alleged. In that context, the case of ***K. Narayana Rao***(supra) has been relied. Over and above, the learned counsel for the petitioner has referred to so many documents which were stated to be in their possession which can reveal that the accused petitioner's conduct, whatsoever, is *bona fide*.

24. I have also considered the rival contentions of the learned counsel for the respondent Central Bureau of Investigation(CBI) who has pointed-out all the basic allegations, as has been mentioned in the charge sheet and it has also been submitted that for each and every allegation, so referred to in the charge

sheet as well as in the First Information Report(FIR), is also, there is specific documents and evidence behind, which is very much on record and the learned Court below has gone through all such matters available on records. There is prima facie material to disclose that the accused petitioner being the Superintending Engineer released the mobilization advance money of Rs. 2 crores to M/s Hydro Power Equipments knowing fully well that there is no Administrative Approval and Expenditure Sanction of the scheme or the budget provision for this amount, and it was improper to release the payment by diversion of funds. It cannot be an excuse that the accused petitioner being subordinate to the Chief Engineer, can do all the illegal things at the behest of the Chief Engineer. If at all he raised the point of irregularity, about release of advance money, but subsequently, the accused petitioner acceded to the same. Similarly, it is also found in the investigation that M/s Hydro Power Equipments vide letter dated 15.02.1995 made a proposal to install 30 KW to 50 KW micro hydel set instead of 20KW and while the said proposal was forwarded to him by the Chief Engineer, the petitioner accepted the proposal for substitution of small capacity light weight mini micro hydel units by bigger capacity with certain modifications of the agreement, without placing the matter before the Work Advisory Board(WAB) and without obtaining the approval of the concerned Minister, which is again suggestive of his involvement with the Chief Engineer while doing all such illegal acts. All materials on record is sufficient to prove the complicity of the accused petitioner with the offence alleged. I find no any substance in the contentions so raised by the petitioner, herein.

25. On the other hand, though the accused petitioner has referred about some documents in support of his contentions, but the same cannot be accepted without being tested by cross-examination which is again the subject matter of trial. In ***State of Orissa v. Devendra Nath Padhir***(supra), it has been held that the learned trial Court cannot consider the materials filed by the accused at the time of framing charge and can only consider the materials produced by the prosecution. Similarly in ***HMT Watches V. M. A. Abida & anr. Vide Crl. A. 471/2015***, decided on 09.03.2015, the Apex Court has observed that High

Courts should not express its view on the disputed question of facts. The petitioner will get ample opportunity to produce his documents and to challenge the prosecution case in the course of trial only.

26. The learned trial Court at the time of framing charge, will consider the available documents and evidence before the Court and charge can be framed on the satisfaction of existence of a prima facie case. In the *State of Maharashtra & anr. v. Som Nath Thapa & anr. 1996 4 SCC 659* it has been held that test of existence of prima facie can be made if there is ground of presuming that the accused has committed the offence. Even if the Court thinks that the accused might have committed the offence, it can frame the charges. Probative value of material on record cannot be gone into. In a case of *Bharat Parikh v. Central Bureau of Investigation(CBI) & anr. (2008) 10 SCC 109*, it has been held that at the stage of framing charge, roving and fishing enquiry is impermissible and a mini trial cannot be conducted at such stage. At the stage of framing charge, the submission of the accused has to be confined to the material produced by the investigating agency. The accused will get an opportunity to prove the documents subsequently produced by the prosecution. The case to determine a prima facie case, depends upon the facts of each case.

27. As regards the contention of the petitioner, that prayer of discharge made by the accused petitioner was rejected by the learned Court below illegally and framed the charge u/s. 228 of the Code of Criminal Procedure, 1973, is bad in law. A case law can be cited, reported in *2007 (2) KLJ 644, P. Vijayan v. State of Kerala & anr.*, it has been held that unlike 227 of the Code of Criminal Procedure, 1973, section 228 does not oblige the Court to give reasons while framing charge. Obviously, the insistence on the duty to give reasons while discharging the accused under section 227 of the Code of Criminal Procedure, 1973, because of premature termination of the proceedings by the Court. But if the Court instead of discharging the accused under Section 227 of Cr.PC, proceed under 228 of the Code of Criminal Procedure, 1973, subsequent stage of framing charge, the Court is not prematurely closing the proceedings. That

explains while no reasons need be given while framing charge. Where the materials placed before the Court displays **grave suspicion** and not some suspicion against the accused and which has not been properly explained, the Court will be fully justified in framing a charge and proceed with the trial. In the given case, it is to be noted that the learned Special Judge has fully evaluated the materials produced by the prosecution and after considering the broad probabilities of the case and various documents and the evidence of large nos. of witnesses, was satisfied about the existence of a prima facie case against the petitioners and hence, refused to discharge the accused petitioners as prayed for u/s. 227 of the Code of Criminal Procedure, 1973, and framed charges.

28. In another case reported in **(2014) 12 SCC 556, Homi Rajhans v. State of Maharashtra**, the Hon'ble Apex Court has held that there is no need to traverse all the factual details at the time of framing charge and the Court is not to scrutinize the allegations for the purpose of deciding whether such allegations are likely to upheld in the trial. In the present case, the learned Special Judge has given due consideration to all the materials produced before the Court and it cannot be expected to write each and every factual aspects in detail in such cases which is based on large nos. of documents and he has recorded in prima facie satisfaction upon scrutiny of all the documents and thereby holding that there is prima facie case to frame the charge against the accused persons.

29. On the point of conspiracy, the Apex Court in **(2007) 5 SCC 634 Suman Sood v. State of Rajasthan**, while dealing with such aspect, has categorically held that while there is no direct evidence to prove the factum of conspiracy, but, it is well settled that an inference of conspiracy can be drawn from the surrounding circumstances inasmuch as normally no direct evidence of conspiracy is available. Generally, conspiracy is hatched in a secrecy and it may be difficult to adduce direct evidence of the same. The privacy and secrecy are more characteristic of the conspiracy than of a loud discussion in an elevated place open to public view.

30. Coming to the case in hand, there are as many as 36 prosecutions with bundle of documents in support of the allegation in the charge sheet and the learned Court below has recorded his satisfaction that after going through all these documents, sufficient material is found against the accused petitioner which indicates a prima facie case for framing charge against the accused petitioner. In view of all above discussions and findings, there is no illegality in framing charge against the accused petitioner.

31. Law relating to invoking of power conferred u/s. 482 of the Code of Criminal Procedure, 1973, upon the High Court, is well settled. In landmark judgment of **Bhajan Lal**(supra), the Hon'ble Apex Court has laid down certain parameters wherein the High Court can exercise the powers conferred upon it, under Section 482 of the Code of Criminal Procedure, 1973. The above guideline is reproduced below:

(1). Where the allegations made in the First Information Report (FIR), or the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out a case against the accused.

(2). Where the allegations in the First Information Report(FIR) and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers u/s. 156(1) of the Code except under order of the Magistrate within the purview of Sec. 155(2) of the Code.

(3). Where the uncontroverted allegations made in the First Information Report(FIR) or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4). Where the allegations in the FIR do not constitute a cognizable offence but constitute a non-cognizable offence and no investigation is permitted by a police officer without an order from a Magistrate as contemplated under sec. 155 (2) of the Code.

(5). Where the allegations made in the FIR or complaint, are so absurd and inherently improbable on the basis of which no prudent person can reach such a conclusion is just conclusion that there is sufficient material for proceeding.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act to the institution and continuance of the proceeding at or where there is specific provision, the Code or Act providing efficacious redress or the grievances for the aggrieved party.

(7) Where the criminal proceeding is manifestly attended with mala fide or where the proceeding is maliciously restituted with an ulterior motive or wreaking vengeance on the accused with a view to spite him due to private and personal grudge.

32. In another case reported in **2013(10) SCC 591, Umesh Kumar v. Andhra Pradesh**, has also dealt with the scope of Section 482 of the Code of Criminal Procedure, 1973, in the following words: The scope of section 482 of the Code of Criminal Procedure, 1973 is well defined and the inherent power could be exercised to prevent abuse of process of Court and to otherwise, to secure the ends of justice. However, in exercise of such power, it is not permissible to appreciate the evidence as it can only evaluate material documents on record to the extent of prima facie satisfaction of existence of sufficient grounds for proceeding against the accused and the Court cannot look into the materials, the acceptability of which will essentially be a matter of trial. Any document filed along with the petition levelled as evidence, without being tested and proved, cannot be examined.

33. Coming to the present case, at hand, it is found that Under Secretary, Power, Sri K. Riram, lodged a detailed First Information Report(FIR) showing all the illegalities committed by the accused petitioner in conspiracy with the other accused Sri Darshan Singh thereby causing huge pecuniary loss to the State Government, which discloses a cognizable offence, against the accused persons

and as such, by invoking of jurisdiction under section 482 of the Code of Criminal Procedure, 1973, the charges against the accused persons, can not be at all set aside. Further, the Hon'ble Apex Court while deciding the case of ***HMT Watches Ltd. V. M A Abida & anr.***, decided on 19.03.2015, in Criminal Appeal 472/2015, it has been held that the High Court while exercising power under section 482 of the Code of Criminal Procedure, 1973, should not express its view on disputed matters.

34. In view of all above discussions and findings, both these petitions are hereby dismissed with a direction to the petitioners to appear before the Court and within one month from today to face the trial and the learned Court below will make endeavour to dispose the case with utmost priority preferably within 6 months because of old pendency of the matter if necessary by taking day-to-day hearing.

35. Send a copy of this order to the learned trial Court accordingly.

JUDGE

Bhask