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Dhirendra Krishan Vs. Bharat Heavy Electricals Ltd. and Others

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Court : Delhi

Decided On : May-26-1999

Reported in : 1999IVAD(Delhi)455; 1999CriLJ3405; 1999(50)DRJ607; ILR1999Delhi538

Judge : Anil Dev Singh and; S.N. Kapoor, JJ.

Acts : Constitution of India - Article 226; Code of Criminal Procedure (CrPC) , 1973 - Sections 197; Indian Penal Code (IPC), 1860 - Sections 13(1) (2), 120-B and 420; Prevention of Corruption Act, 1988

Appeal No. : Criminal Writ No. 655 of 1998

Appellant : Dhirendra Krishan

Respondent : Bharat Heavy Electricals Ltd. and Others

Advocate for Def. : Arun Jaitley, Senior Advocate and ; Mr. J.C. Seth, Adv.

Advocate for Pet/Ap. : Mr. L.P. Dhir, Adv

Judgement :
ORDER

Anil Dev Singh, J.

1. Rule D. B.

2. This order will dispose of two writ petitions, being Criminal Writ Petition No. 655/98 (Dhirendra Krishna v. Bharat Heavy Electricals Ltd. and others) and Criminal Writ Petition No. 751/98 (V. P. Kulshrestha v. Bharat Heavy Electricals Ltd. and others). By these writ petitions, the petitioners inter-alia question the sanction accorded by the third respondent under section 19(1)(c) of the Prevention of Corruption Act, 1988, for the prosecution of the petitioners for commission of the offences punishable under Sections 120B & 420 IPC and 13(2) r/w Section 13(1)(d) of the Prevention of Corruption Act, 1988 and for any other offence punishable under other provisions of law in respect of the acts enumerated in the sanction order.

3. First, we will deal with Criminal Writ Petition No. 655/98 filed by Dhirendra Krishan. Briefly stated the facts giving rise to this writ petition are as under:-

4. The petitioner who was the General Manager (Finance) of the first respondent Bharat HEavy Electricals Ltd. (for short 'BHEL'), is alleged to have entered into conspiracy with the various officers of BHEL, namely, Mr. V.P. Kulshrestha, Sr. Manager (Finance), Mr. P.S. Gupta, former Chairman & Managing Director, Mr. R.N. Mahendru, Executive Director, Mr. R.L. Verma, General Manager, Mr. Harish Chandra, Dy. General Manager (Finance) & Mr. J.L. Jain, Dy. General Manager (Purchase) (hereinafter called the accused officers of BHEL) and Mr. B. Walter Smachtin of M/s Smachtin Machine Tools. Germany and Mr. J.M. Sharma, Vice President, M/s. Empire Machine Tools, New Delhi to obtain pecuniary advantage for themselves by causing corresponding pecuniary loss to BHEL. The petitioner, who was working as General Manager (Finance), at the relevant time was a member of a technical team, headed by Executive Director, visited West Germany in July 1989 for the purpose of ascertaining the suitability of a second-hand Forge Press of capacity 7500/9000 MT belonging to Smachtin Machine Tools, Germany. The said Forge Press was offered for sale by M/s Smachtain Machine Tools to BHEL through the Indian agent, M/s. Empire Machine Tools. The team visited West Germany from 18th to 23rd July, 1989. By its report dated 17th August, 1989 it recommended the purchase of the above said second-hand Forge Press from M/s. Smachtin Machine Tools. As per the report, the Forging Press having a capacity of 9000T was in good condition and could be utilized for the manufacture

of heavy forgings etc. At this stage, it would be convenient to refer to para 5 of the report which states as follows:-

5.1 The team feels that, this Forging Press, capacity 9000T is in good condition and can be utilised for the manufacture of heavy forgings like Rotors for 200/500MW and higher rating sets and industrial turbines, Turbine/Generator shafts and Thrust bearing discs for Hydro Sets, Tube Sheets, Reactor Vessel Rings and Propeller shafts for Indian Navy etc.

5.2 This forging press can subsequently meet the requirement of entire heavy forgings like LP Rotors and TG Rotors for 500 MW and higher rating sets also on augmentation of steel making facilities to cater to an ingot of about 225 MT pc. wt.

5.3 This is an opportunity which, if availed, can make BHEL self-sufficient for its requirement of heavy forgings and provide a stand-by arrangement for meeting the requirement of forgings for Power generation, defense, Nuclear, Space, Steel and a host of other sectors.

5.4 It is felt, that, since this forging press has been working till recently, it may take around 15-18 months from the date of finalisation to it it from West Germany and install it at BHEL, Hardwar.

5.5 The provision of this press will result in cutting down the imports of BHEL by about Rs. 15 crores on a recurring basis and also make foreign exchange savings on other heavy forg ings to the tune of about Rs. 6 crores, which continue to be imported year after year. This will be the highest capacity press in the country and bring INDIA in the list of 'SELECT FEW' who have these facilities in the world.

5. After the receipt of the report, a Draft Board Memorandum dated 19th gust, 1989 on the basis of feasibility report prepared by C. F. F. P. rdwar was circulated to all the functional directors for perusal and pproval. The Draft Board Memorandum was approved by the then CMD Mr. R.S. Gupta on 23rd August, 1989. On a query, the Director (F), Mr. R.K.D. Shah, who at the relevant time was the Executive Director (Planning & Development), BHEL on 25th/28th August, 1989, made the following observations in his note:-

'There are very few presses of this capacity and range in the world and getting offers for second hand presses of this type is not so frequent. CFFP is thereforee, trying to encash the opportuity available on account of this offer.'

6. On approval of the Competent Authority for purchase of 9000 MT Forge ess along with the accessories and Manipulator from M/s. Smachtin Machine ools, West Germany. Mr. J. L. Jain, Dy. General Manager (Purchase), BHEL Ranipur Hardwar on 19th January, 1990 placed a purchase order No. 9031 on M/s. Smachtin Machine Tools for supply of Forge Press of 9000 MT alongwith, Manipulator and accessories for a sum of DM 6.37 million. Thereafter another purchase order No. 9032 for DM .60 million was placed on M/s. Smachtin Machine Tools on the same date viz. 19th January, 1990 for erection and ommissioning of the equipment at BHEL. Hardwar. On 22nd January, 1990 BHEL opened Letter of Credit at State Bank of India, Frankfurt in favor of M/s. Smachtin for DM 6779175 in respect of purchase orders No. 9031 and 9032 pertaining to supply of 9000 MT Forge Press & Manipulator with all accessories and for erection and commissioning thereof. M/s. Smachtin Machine Tools after supplying only one drawing and one pump to BHEL withdrew DM 6.44 million against the said LC from SBI, Frankfurt on 20th March, 1990. According to BHEL, the amount was withdrawn by producing false and forged documents. On 8th/9th July, 1991 M/s. Smachtin refused to undertake erection and commissioning of the Forged Press at BHEL, Hardwar. During the meeting of representative of Smachtin with the petitioner Dhirendra Krishna and Mr. J. M. Sharma, it also declined to supply Manipulator and the pumps of the Forge Press on account of their non-availability. As a result of refusal of M/s. Smachtin Machine Tools to supply the Manipulator, the same was bought by BHEL from another source at a price of DM 9.55 lakhs.

7. On the basis of source information, the CBI registered the FIR against the petitioner; Mr. R.N. Mahendru, Executive Director, BHEL Ranipur; Mr. Dhirendra Krishna, in charge G.M. (Finance), BHEL, New Delhi; Mr. S.K. Khazanchi, G.M. BHEL, Ranipur; MR. J.L. Jain, Dy. G.M. BHEL, Ranipur and M/s. Smachtin Machine Tools Company & others with the following allegations:-

1. The accused officers of the BHEL purchased certain equipment from the accused trader without obtaining any import license from the Competent Authority thereby violating the provisions of the Imports & Exports (Control) Act, 1947 and Foreign Exchange Regu lation Act, 1973.

2. That the accused officers of BHEL and others acted with the object of causing pecuniary gain to M/s. Smachtin Machine Tools and consequent loss to BHEL thereby committing the offence of criminal misconduct by corrupt or illegal means or otherwise by abusing their official position in the matter of purchase of second-hand equipment.

3. The accused officers of the BHEL processed the purchase of he equipment, namely, second-hand Forged Press with intensifier from M/s. Smachtin Machine Tools through its agent without any justifiable viability. Though in the record of the BHEL the capacity of the Forge Press is mentioned as 9000 MT, its actual capacity is 7500 MT & it is only the intensifier which has the capacity of 9000 MT. Even the import license was obtained for 9000 MT Foreign Press with accessories for DM 8657500, though the cost of the said Forge Press (7500 MT) with intensifier (9000 MT), with all accessories including Manipulator was DM 6.37 million.

4. The accused officers of the BHEL managed to obtain the approval of the Competent authority for purchase of 9000 MT Forge Press Along with accessories including the Manipulator and for erection and commissioning of the equipment at BHEL, Hardwar, though it was known to them that the said foreign trader had no technical capability to undertake erection/commissioning of the said equipment.

5. The accused officers of BHEL without any authority and to cause favor to the foreign trader waived all penalty Clauses from the purchase order in an illegal manner.

6. The foreign trader illegally withdrew almost the entire payment through SBI, Frankfurt, West Germany even without supply ing any equipment and even though it had refused erection & commissioning of the equipment.

7. The accused foreign trader did not supply the Manipulator, even though Manipulator was the main accessory of the Forge Press.

8. The accused officers of the BHEL by illegal and dubious means adjusted the bills of the supplier for only DM 6.21 lakhs for non-supply of Manipulator on the basis of weight, while the Manipulator of similar type was purchased by them from another firm in West Germany at a price of DM 9.55 lakhs causing pecuni ary loss to the BHEL.

9. The accused foreign trader offered two second-hand equipments, namely, Crane Girder (DM 1.80 lakhs) and Quality Improvement Equipment valuing DM 13.50 lakhs to Mr. R. N. Mahindru on 14th January, 1991 and the petitioner took extra ordinary initia tive to purchase the equipment without any feasibility report and without approval of Board of Directors of BHEl.

10. Mr. R. N. Mahindru and the petitioner by abusing their official positions, put up a proposal for purchase of the equipment mentioned at item 9 above to CMD, BHEL and the same was approved by the CMD at a price of DM 15.30 lakhs.

11. Mr. J. L. Jain issued purchase order in regard to Crane Girder and Quality Improvement Equipment on 5th February, 1991, though no import license was obtained for the import of Quality Improvement Equipment by BHEL.

8. On 6th May, 1998 the CBI sought sanction of the Chairman, BHEL to rosecute the petitioner and others. On 22nd MAy, 1998 Mr. R. K. D. Shah, who had been promoted as the Chairman and Managing Director of BHEL, ac-corded the sanction. After the receipt of the sanction, the CBI filed charge sheet under sections 120 IPC and 13(2) r/w section 13(1)(d) of Prevention of Corruption Act, 1988 and section 5 of Import & Exports (Control) Act, 1947 and section 19(1)(a) r/w section 56 of Foreign Exchange Regulation Act, 1973 against the accused including the petitioner before the Special court, Delhi. The Special Judge taking cognizance of the offence, has issued notice to the petitioner and others.

9. Consequent to the launching of the prosecution, the petitioner was suspended by the first respondent BHEL. Aggrieved by the action of the third respondent in

according sanction to prosecute him, the petitioner has moved the instant petition for its quashing and for setting aside of the suspension order.

10. We have heard learned counsel for the parties. Mr. Dhir, leaned counsel for the petitioner submitted that the third respondent has accorded sanction to the prosecution of the petitioner without applying his mind. It was also pointed out that the sanction does not bear any date on which it as accorded. It was submitted that the grant of sanction is not an idle formality and the sanctioning authority should apply its own independent mind before granting sanction. Mr. Dhir also urged that the third respondent granted sanction under compulsion as he wanted to buy immunity for himself from being prosecuted. According to Mr. Dhir, the third respondent acted as a judge in his own cause by granting sanction to prosecute the petitioner and other employees of the BHEL. He also canvassed that sanction accorded by the third respondent stands vitiated being afflicted by his objectionable bias towards the petitioner and other officers of the BHEL. He also pointed out that the third respondent was to lay down his office on 31st May, 1998 and the sanction was accorded on 22nd May, 1998 about 9 days before his retirement. He further submitted that the third respondent was disqualified from giving sanction for the prosecution of the petitioner as he was instrumental in clinching the deal with M/s. Smachtin achine Tools for purchase of the equipment. He referred to an extract from the note of the third respondent dated 25th/28th August, 1998 circulated to the Directors of the first respondent wherein it was stated that there were very few Presses of the capacity and range offered by M/s. Smachtin and getting offers for second-hand Press of this type is not so frequent.

11. On the other hand, learned senior counsel for the first and the third respondents, Mr. Arun Jaitley and Mr. Jayant Bhushan for the Second respondent Submitted that the sanction was a proper and valid sanction, granted by the third respondent under section 19 (1) of the Prevention of Corruption Act, 1947 after applying his mind to the material on record. It was further submitted that the third respondent while granting sanction was not under pressure from any quarter nor his decision was affected by any extraneous considerations. It was further pointed out that the sanction accorded by the third respondent is not undated in as much as sanction was accorded on 22nd May, 1998 which fact is evident from his letter

to the Deputy Inspector General of Police, Central Bureau of Investigation. It was canvassed that the note of third respondent dated 25th/28th August, 1989 was based upon the report of the Committee which had visited West Germany and had inspected the machine from 18th July, 1989 to 23rd July, 1989. It was also urged that the report of the Committee misled the third respondent into recording the note dated 25th/28th August, 1989. Besides it was submitted that the impugned decision of the third respondent was free from bias.

12. One more argument of the learned counsel for the respondents and its reply by the learned counsel for the petitioner also needs to be noticed. While the learned counsel for the respondents submitted that the Forge Press in question which was made out by the petitioner & other members of the committee to be in a good condition, was actually a junk and the purchase thereof resulted in unproductive investment, the learned counsel for the petitioner pointed out that a booklet issued by the Central Foundry Forge Plant, BHEL, Hardwar, captioned 'Forgings and Castings' shows to the contrary as is evident from the following paragraph contained therein:

'Heavy Forge Shop is symbolised by its mammoth 9000T Aero Hydraulic Open Die Forge Press,. whereas Medium Forge Shop has 2650T Forge Press. Both these presses have indicidual remote controlled manipulators.

Heat treatment facilities include electrically operated vertical shaft furnace and mist quenching equipment to ensure uniform straightness and properties.

Electro Slag Remelting Furnace of 50T capacity makes it possible to manufacture forgings with extremely low segregation and isotropic mechanical characteristics.

Light Forge Shop and 2T Open Die Hammer, 20T Counter blow Hammer and other related facilities is equipped to make small weight range of forgings including Closed Die Forgings.

With these modern facilities, CFFP has no limitations of Forging - Shafts, Rings, Discs, Forged Plates, Blocks and so on up to 80 T/pc. wt. in rough machined condition conforming to any National/International Standards.'

13. In regard to the above question whether the equipment was a junk or in good condition, we only want to say that we are not concerned with it and we will not go into the same.

14. It appears to us that the basic question which arises for consideration and determination is whether the third respondent could have considered the matter for according sanction to the prosecution of the petitioner. It cannot be disputed that at one stage the third respondent when he was the head of the Planning and Development Division of BHEL, recommended the purchase of the equipment in question. In this regard he recorded a note dated August 25/28, 1989 for the circulation to the Directors of BHEL. The note, to the extent it is relevant, reads as follows:-

'There are very few presses of this capacity and range in the world and getting offers for second hand presses of this type is not so frequent. CFFP is thereforee, trying to encash the opportunity available on account of this offer.'

15. This note was recorded in response to the objection raised by the rector (Finance) to the purchase of the said second-hand equipment. The espondents have not denied the allegation of the petitioner that even few days earlier to the note dated August 25/28, 1989 the third respondent had requested the Directors and the C. M. D. for according sanction to the purchase of the Forge Lathe in question through his note dated August 23, 1989. It seems to us that in the circumstances the third respondent was disqualified from according sanction to the prosecution of the petitioner. Since the third respondent had to decide in his discretion whether or not sanction ought to be granted for prosecution of the petitioner, in that sense, he was an adjudicator. When the adjudicator at an earlier stage had supported the purchase of the equipment from M/s. Smachtin Machine Tools, West Germany, he cannot be allowed to judge the action of his subordinates, who had advocated and recommended the purchase of the same equipment, at a latter stage at the time of granting sanction for their prosecution. The essence of a fair decision is that it should have been made by an impartial adjudicator. In case where bias is alleged the reviewing court sitting under Article 226 of the Constitution is not required to decide whether or not the decision of the

adjudicator was in fact biased, but it can certainly decide whether there was a likelihood of an objectionable bias of the adjudicator in deciding the matter. The submission of the respondents is that the third respondent as the CMD of BHEL was legitimately and legally entitled to consider the question whether or not sanction to prosecute the petitioner ought to be granted. The fact that he had recorded the note dated August 25/28, 1989 recommending the purchase of the second hand equipment in question from M/s. Smachtin Machine Tools will be of no consequence for the decision of the said question as the note was based upon the report of the Committee of which the petitioner was a member and he had no occasion to inspect the equipment before its purchase as he had not visited West Germany with the members of the committee. In other words, the submission is that if the third respondent had known the actual condition of the Lathe, he would not have recommended its purchase and he was misled by the recommendation of the Committee. In case the third respondent was misled by the petitioner and others into making a recommendation which could expose him to a possible criminal prosecution or other penal consequences leading to serious repercussions on his life and career, then this will give rise to a possibility of bias against the persons who misled him into committing the mistake. thereforee, it will be hard to reconcile with the argument that the sanction accorded by him to the prosecution of the petitioner is in order. It must not be forgotten that the third respondent had once approved the purchase of the equipment and having done so he cannot be asked to judge the action of the members of the Committee and others who had recommended its purchase. In the circumstances, it would not be a fair procedure to seek sanction from the third respondent for prosecution of the members of the Committee who held the same view as he held once.

16. Having considered the matter from the point of view of the third respondent being misled by the recommendation of the Committee, we would now like to consider, by taking a hypothetical situation, whether the sanction to prosecute the petitioner and the others would be in accordance with law if the sanctioning authority had not been misled by the ecommendations of the Committee. In case it was not misled in recording the note dated August 25/28, 1989 and it knew about the fact that the equipment was a junk and the purchase of the same would cause pecuniary loss to the BHEL but still supported the move to buy the same from M/s.

Samachtian Machine Tools, its subsequent action in sanctioning the prosecution of the members of the Committee would certainly make him a judge in his own cause.

17. Looking from any angle it appears to us that a reasonable man would entertain a serious apprehension that the decision of the third respondent may not have been free from real bias. In Rattan Lal Sharma Vs . Managing Committee, Dr. Hari Ram (Co-Education) Higher Secondary School, : (1993)IILLJ549SC , it was stated that 'the test of bias is whether a reasonably intelligent man, fully apprised of all the circumstances, would feel a serious apprehension of bias, and that the test is not whether in fact a bias has affected the judgment, the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. It is in this sense that is is often said that justice must not only be done but must also appear to be done.'

18. In The King Vs.Justices of Sunderland [1901] 2 K. B. 357, it was held that where a person at an earlier stage had supported an application or a procedure which subsequently comes to be adjudicated upon, such a person would naturally be disqualified to act as adjudicator.

19. In R. v. Gough 1993 (2) All E. R. 724, the House of Lords laid down the test for bias, applying to courts and tribunals alike (in the absence of a direct pecuniary interest), namely, whether in all the circumstances ascertained by the reviewing court, there was a real likelihood in the sense of a real possibility, of a bias on the part of a judge or member of a tribunal. In Metropolitan Properties Co. (F. G. C.) Ltd. v. Lannon and others 1969 (1) Q. B. 577, it was held that no man can be advocate for or against a party in one proceedings and at the same time sit as a judge of that party in other proceedings.

20. The principle(s) adumbrated in the above said decisions must also apply to an administrative authority who has to decide the matter in its discretion. It has to do judging impartially with an unbiased and non-partisan mind. If there is a real likelihood or possibility of the administrative authority being biased, the High Court in writ jurisdiction can intervene at the instance of the aggrieved party and grant

appropriate relief.

21. A decision by an administrative authority whether to grant or to withhold sanction to prosecute a public servant is a very serious and important decision. The grant of sanction is not an idle formality but a solemn sacrosanct act which affords protection to public servants against frivolous prosecution. The sanctioning authority has to apply its own independent mind to arrive at a decision with regard to the question whether or not prosecution is to be sanctioned. The mind of the sanctioning authority should be free from bias or pressure of any sort as the discretion to grant or to with-hold sanction, vests absolutely in the sanctioning authority. If its discretion is shown to have been affected by any extraneous consideration and is not a result of application of its independent mind, the sanction stands vitiated (See Mohd. Iqbal Ahamed Vs . State of Andhra Pradesh, : 1979 CriLJ633 , and Mansukhlal Vithaldas Chauhan v. State of Gujrat (1977) 7 SCC 622.

22. Since the grant of sanction removes the protective umbrella which shields a public servant from prosecution, thereforee, the administrative authority, who has to take a decision whether to grant or not to grant sanction for prosecution is required to be free from a possibility of bias against the public servant.

23. In view of what we have held in respect of the case of the petitioner in Criminal Writ Petition No. 655/98 applies to the petitioner in Criminal Writ Petition No. 751/98, even though he was not a member of the party which went to West Germany for adjudging the soundness of the equipment. In respect of this petitioner who was the Sr. Manager (Finance) at the relevant time, the allegation is that he had conspired with petitioner in Criminal Writ Petition No. 655/98 and some other officers in purchasing the equipment.

24. In view of the above said discussion, the writ petitions succeed and the rule is made absolute. The impugned order of sanction issued by the third respondent on May 22, 1998 is hereby quashed. It will be open to the concerned authority to consider the matter afresh and take a decision with regard to the question whether or not sanction should be granted to prosecute the petitioners.

25. Before parting with the judgment we would like to clarify that none of our observations are meant to suggest that Dr. R.K.D. Shah was part of the conspiracy in purchasing the machine.

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