

**B.P.RAY, J.**

CRLMC NOS. 2826, 2815 OF 2008 & 317 OF 2009.

(Decided on 19.02.2010)

**SANJAY RASTOGI & ORS** .....Petitioner

. Vrs.

**STATE OF ORISSA** .....Opp parties

**CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC.482.**

For Petitioner – Mr.Ashok Parija, Sr.Advocate  
(In CRLMC.No.2826/2008)

For Petitioner – Mr.S.N.Mohapatra & Associates.  
(In CRLMC.No.2815/2008)

For Petitioner – Mr. G.Rath & Associate.  
(In CRLMC.No.317/2009)

For Opp.Party – Addl.Govt. Advocate (In all the cases).

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**B.P. RAY, J.** All these three aforesaid criminal misc. cases have been filed challenging the registration of the Cuttack Vigilance P.S. Case No. 47 of 2008 and continuance of investigation thereon pertaining to the allegation of commission of offences U/s 13(2) r/w 13(1)(d) of the Prevention of Corruption Act, 1988 and U/ss. 420, 120-B of the I.P.C. said to have been committed by the petitioners in awarding an execution of the contract work of Cuttack Development Authority for development of the plotted scheme in Sector Nos. 8, 10 and 11 of the Markat Nagar, Cuttack. The petitioners have come up with a prayer to quash the F.I.R. as well as the investigation conducted in the aforesaid Vigilance Case.

2. Common question of law and fact being involved in all these three cases, the same are being heard together and disposed of by this common order.

3. Facts relevant for disposal of these petitions U/s. 482 Cr.P.C. of these petitioners are as follows:-

Cuttack Development Authority is an authority constituted under the Orissa Development Authority Act and its activities are regulated by the Government of Orissa in Housing and Urban Development Department. The principal work of the Development Authority in question is for development of Cuttack town and also for providing housing and other amenities to the residents of Cuttack town. The authority has been transferred with the ownership of areas in the Markat Nagar within Cuttack Municipal Corporation which is popularly known as C.D.A. The authorities have divided the said area into different sectors and also delineated the land in the said sectors in different plots and after developing the same, the authorities used to transfer the same to the persons desirous of having houses and also institutions on payment of premium as fixed from time to time by the authority. For development of the plotted scheme in Sector Nos. 8, 10

and 11 in the C.D.A. area the Cuttack Development Authority invited tenders from different works contractors. As it appears, in pursuance of the said tender, floated in the year 1996, none of the tenderors except M/s. K.C. Sahoo, Contractor & Engineers Private Limited, Rourkela of which petitioner Kishore Chandra Sahoo is the owner filed their bid. The C.D.A. authorities as such awarded the contract work for negotiation to M/s. K.C. Sahoo, Contractor & Engineers Private Limited, Rourkela on escalation to the tune of 38%, so far as development of Sector No.8 is concerned and to the tune of 44% than the estimated cost so far as the development of scheme of sector 11 is concerned. During the agreement of such contract, the same was containing a clause that no escalation of cost of the project can be allowed in any circumstances and the work was executed with such stipulation. Thereafter, M/s. K.C. Sahoo, Contractor & Engineers Private Limited, Rourkela started execution of the work. As there was delayed in execution of the work due to different supervening circumstances and in the meanwhile Government revised the minimum wages for labourers, the contractor claimed escalation at the present cost on account of labour charges. It appears that the file was as such processed by the officials in charge of it including Ramesh Chandra Mohanty, petitioner in CRLMC No. 2815/2008, who was Executive Engineer of the Development Authority and the same was sanctioned by Sanjay Rastogi, the petitioner in CRLMC No 2826/2008, who was also the Vice-Chairman and accordingly payment was made. It is pertinent to mention here that the Cuttack Development Authority which is governed by a board headed by the Minister of H. & U.D. Department as its Chairman and consists of the Vice Chairman and other members also by resolution of the board approved for granting such escalation to contractors executing the said work which has occasioned on account of the enhancement of minimum work by the Government as revealed from Annexure-5. While the matter stood thus, a news item was published on 29.6.2007 in Oriya daily "The Samaja" with the caption that "C.D.A. RA DUI (2) KOTI TANKA HARILUT, MANTRI CHUP KAHINKI". Shri Pravat Ranjan Dash, an Advocate in O.J.C. No. 6721 of 1999 stating therein since the public money had been misutilised, in the interest of justice the Vigilance Department may kindly be directed to investigate into the matter and submit an interim report. The Division Bench consisting of Hon'ble Shri Justice B. P. Das and Hon'ble Shri Justice M. M. Das took cognizance of the same and directed the C.D.A. to file an affidavit. The Vice Chairman of the C.D.A. filed an affidavit denying the allegations contained in the news item. After going through the allegations and also the materials on record, this Court in the said writ petition passed the following order in OJC No.6721 of 1999:-

"Order No.236, dated 2.1.2008

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xxx

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Pursuant to the direction contained in order No. 209 dated 29.6.2007, the Vice Chairman of the C.D.A. has filed an affidavit stating in paragraphs 6 and 7 thus:

6. That it is apt to state here that the agency was given escalation due to enhancement of labour component only in order to ensure compliance of the provision of Minimum Wages Act, fair wages clauses in the agreement and various circulars issued by Government time to time. In view of the withdrawal of the escalation clause the Contractor was not entitled to get the escalation on any other reasons or ground including cost of material, POL and etc. Any apprehension contrary to the same as has been published in the newspapers

seems to have been based on mere surmises and bears no semblance of truthfulness.

7. That the agency was awarded execution of Sector 11 at a value of Rs.7,37,15,491/-. Work order was issued on 6.5.98 with completion period of 18 months. Subsequently the Contractor was asked to execute extra quantity of work in view of the conversion of the group housing areas into residential one which delayed the period of execution. The Super Cyclone also intervened for which the period was extended. But, however the agency was not paid any escalation on the materials for the extended period. Government enhanced the minimum labour wages with effect from 1.5.99. In view of the statutory provisions and the fair wages clause in the agreement as well as different circulars issued time to time the agency was extended the escalation over the labour component only for the portion of the works executed on and from the date of notification.

From the aforesaid, it transpires that the agency which was executing the developmental work entrusted by the C.D.A. was given the escalation which was due to the enhancement of the minimum labour rates by the State Govt. and the C.D.A. being the principal was liable to shoulder such escalated price and the payment has been made as per the entitlement. The affidavit of the C.D.A. is accepted.

In view of the aforesaid statements made on affidavit by the V.C., C.D.A., we find no irregularity in the same calling for any investigation. The matter is closed."

4. On the other hand, an F.I.R. was registered by the Vigilance Department on the report submitted by Sri M. Radhakrishna, D.S.P. Vigilance Cell, Cuttack to the Superintendent of Police, Vigilance Cuttack Division, Cuttack. Allegation made in the F.I.R. is that the petitioner Kishore Chandra Sahoo, who was the contractor, the petitioner Ramesh Kumar Mohanty, who was the Executive Engineer and the petitioner Sanjay Rastogi, who was the Vice Chairman and had sanctioned the payment, so also Sri Sanjeeb Kumar Ray, who was the Vice Chairman when the contract was executed along with one Fani Bhusan Rout, who was the Superintendent Engineer, C.D.A. Cuttack are said to have shown undue favour in acceptance of the sealed tender after negotiation for an escalation amount without any justifiable reason and also have made payment towards escalation of minimum wages. Though in the agreement it was stipulated that no escalation in any circumstances will be allowed to the contractor in execution of the works contract and Sri Sanjeeb Kumar Ray, Sanjay Rastogi, Ramesh Kumar Mohanty and Fani Bhusan Rout appear to have abused their official position in connivance with Kishore Chandra Sahoo and paid Rs.1.6 crores violating the condition of the agreement as well as the order of the Government. The consideration for making such payment being actuated by pecuniary advantage and the same having caused a loss of Rs.1.6 crores to the State ex-chequer, they are guilty of criminal misconduct and accordingly are punishable U/s. 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988 and under Sections 420, 120-B of I.P.C.

5. Assailing initiation of the aforesaid cases, the petitioners, who are figured as accused in the said F.I.R. along with Sanjeeb Kumar Ray and Fani Bhusan Rout, have filed these three Criminal Misc. cases basically challenging that the allegation made in the F.I.R. is contrary to the materials on record and that there being no loss to the public ex-chequer, there is no conspiracy and connivance amongst the parties and the employees of the C.D.A. have not entered in to any contract and shown any favour

to the applicants by awarding the contract on enhancement as against the estimated amount and as such the ingredient of the offence as alleged in the F.I.R. is not made out. Further more, it is submitted that when the Hon'ble Court was in seisin over the matter and after examining the affidavit filed by the Vice Chairman held that there was no irregularity in the same. Further the fact of audit objection was brought to the notice of the Hon'ble Court and this Court categorically ordered that no irregularity in the same has been committed calling for any investigation. Subsequently the initiation of the Vigilance case for investigation tantamount to over reaching the jurisdiction of the Hon'ble Court by the Vigilance Department and as such the F.I.R. and the subsequent investigation thereon is liable to be quashed.

6. In response to the counter affidavit filed, Vigilance Department while reiterating the F.I.R. allegations have also further contended that the order passed in OJC No. 6721 of 1999 is not binding since the same does not contain any direction to the Vigilance Department restraining it from conducting investigation. According to the Department, during enquiry in to the allegations it came to light that a sum Rs.1.6 crores was paid to the contractor in spite of the specific term of the agreement that no escalation is payable, the same goes without saying that the petitioners have prima-facie committed criminal misconduct U/s. 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988 and under Sections 420, 120-B of I.P.C. Hence, the F.I.R. was rightly registered against them. In such premises, according to the opposite party, for these petitioners challenging the registration of the Vigilance case along with prayer to quash the F.I.R. appears to be unsustainable.

7. Advancing his submission learned counsel appearing for the petitioners states that in this case the F.I.R. does not disclose any offence as alleged, and the Hon'ble Court being aware of the matter, have given the categorical finding that there is no irregularity in the said work calling for investigation and therefore, initiation of the Vigilance case and investigation in the matter would tantamount to abuse of the process of law over reaching the jurisdiction of the Hon'ble Court. Hence, according to them, the F.I.R. in this case deserves to be quashed consequently the proceeding there of initiated against them. However, the counsel appearing for the Vigilance Department submits that in this case the aforesaid order in the writ petition does not stand on the way of the Government to initiate a Vigilance proceeding and enquire into the matter. Since in the audit report as well as from the materials on record, a cognizable offence appears to have been committed, the same squarely attracts the ingredients of Prevention of Corruption Act. There is also nothing on record to show that the same has been lodged without any basis and being not actuated with mala fide, this Court should be loathed in interfering with the investigation.

8. Before delving into the merit of the contention advanced, it would be apposite to look into the well settled position of law with regard to quashing of F.I.R. in a Criminal Case, which has been dealt in a decision of the Hon'ble apex Court in the case of **State of Haryana and others V. Ch. Bhajan Lal and others** reported in AIR 1992 S.C. 604. The relevant paragraphs of the said judgment are quoted herein below for ready reference:-

“In following categories of cases, the High Court may in exercise of powers under Art. 226 or under S.482 of Cr.P.C. may interfere in proceedings relating to cognizable offences to prevent abuse of the process of any Court or otherwise to secure the ends of justice. However, power should be exercised sparingly and that too in the rarest of rare cases.

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

3) Where the uncontroverted allegations made in the 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 F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under S. 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 ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

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

9. Fact situation of the present case is squarely covered under the third category enunciated in the case of **Ch. Bhajan Lal and others** (supra). Extract of the order of this Court in OJC No. 6721 of 1999 quoted supra reveals that payment made by C.D.A. on account of enhancement of labour components, despite the term contained in the agreement that no escalation would be allowed, was considered by this Court vis-a-vis statutory provisions relating to minimum wages and fair wages. On such consideration it was categorically held that Government had to enhance the minimum labour wages in order to ensure compliance of statutory provisions of Minimum Wages Act as well as fair wages clauses. It is needless to say that C.D.A. and the Contractor engaged to execute the works on its behalf are required to strictly adhere to provisions relating to minimum wages and fair wages. It is pertinent to point out that no escalation was allowed on materials and escalation allowed on labour charges was duly approved by the C.D.A. in its 74<sup>th</sup> Authority meeting dated 3.1.2004. The aforesaid resolution of the Authority is quoted below for ready reference:-

“The Authority went through the agenda notes and approved the payment of differential labour rates to different agencies working in CDA. This is done in view of fair wages clause of the agreements signed and various Govt. Circulars in force.”

On consideration of materials on record, the Court has concluded that allegations relating to payment on account of escalation do not disclose any irregularity, much less commission of any offence, calling for any investigation. In other words, this Court has already held that unconverted allegations with regard to payment on account of escalation of labour component do not disclose any offence. Despite such categorical conclusion, Vigilance Department, which is a machinery of the State Government, has registered the F.I.R. When the order of the Division Bench of this Court holds good and operates in this matter, the contention of the department that the same is not binding as they are not parties to the same, appears to be fallacious inasmuch as the same was passed in presence of the Govt. as well as learned counsel for the Vigilance Department. Before concluding, it would be appropriate to point out that in course of hearing of this matter Vigilance Department produced official record dealing with enquiry preceding the lodging of the F.I.R. It appears from the record that the Vigilance Department in fact was aware that the order passed by this Court in OJC No. 6721 of 1999 construed as a bar against lodging of the F.I.R. and proceeded with investigation for which opinion was sought for from the Legal Advisor of the department. On a bare perusal of the opinion of Legal Advisor available in the departmental record, it is found that opinion does not take note of the reasons which prompted this Court to hold that no irregularity was committed in allowing escalation towards labour cost. There is absolutely no reference in the opinion to statutory provisions relating to minimum and fair wages compliance which necessitated payments towards escalation of labour cost.

10. It was faintly argued by learned Standing Counsel that there is allegation of execution of sub-standard work, apart from the unauthorized payment towards minimum wages escalation. I have gone through the records, case diary as well as other materials on record which show that the petitioners are not accused of executing or conspiring for execution of sub-standard work which was done during the period from 1998 to 2003.

11. So, for the foregoing reasons, all these Criminal Misc. cases deserve to be allowed and the registration of the F.I.R. and subsequent investigation deserve to be quashed. Hence, all the Criminal Misc. cases filed by the petitioners are allowed. Consequentially, the Vigilance case instituted against the petitioners and the investigation thereof are quashed.

Application allowed.