

ORISSA HIGH COURT: CUTTACK

CRLMC NO. 3329 OF 2010

In the matter of an application under section 482 of the Code of Criminal Procedure.

Birabar Sethi @ Birendra Sethi Petitioner

-Versus-

State of Orissa Opp. Party

For petitioner: M/s. D.P.Dhal, K.Dash,
P.K. Roputray, B.S. Dasparida,
A.K. Mishra & S.Mishra.

For opp. party : Mr.P.K. Pani,
Standing Counsel (Vigilance).

Date of Judgment: 27.06.2012.

P R E S E N T:

THE HONOURABLE SHRI JUSTICE M.M.DAS

M.M. DAS, J. The petitioner in this application under Section 482 Cr.P.C. has challenged the order dated 28.06.2010 taking cognizance of the offence under Sections 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act, 1988 and under Sections 418/420/120 -B IPC passed by the learned Special Judge, Vigilance, Balasore in T.R. No.22 of 2010 and has sought for quashing of the proceedings in the said T.R. No.22 of 2010.

2. On receiving information with regard to the allegation of misappropriation of Government funds, while executing a project, i.e.,

construction of cement concrete road of Morsuan village under Balibandha Grama Panchayat in Jhumpura Block of Keonjhar district, an enquiry was conducted by the Vigilance Police. The prosecution alleges that during the enquiry, it was revealed that in 2004 – 05, the above concrete road was constructed at a cost of Rs. 2,50,000/-. To construct the said road, one Sri Bairagi Nayak of the said village was selected as Village Level Leader (VLL) in the Palli Sabha. As per the request of the Sarpanch, the Junior Engineer of Jhumpura Block prepared the estimate on 02.10.2004 for Rs.2,50,000/- as cost of construction of the said road. The estimate was sanctioned by Sri Ashis Kumar Banerjee, Assistant Engineer of the said Block. The then Sarpanch, Sri D. Majhi, accorded approval of the estimate and issued the work order dated 28.11.2004 in favour of the said Bairagi Nayak, who executed the work under the supervision of the Junior Engineer Sri Birabara Sethi. During the course of execution of the work, food-grains to the tune of 98 quintals and 500 bags of cement were issued on different dates to Shri Nayak. The Junior Engineer measured the work done recorded the measurement on 20.03.2005 in M.B. No.6, which was check-measured by Sri Ashis Kumar Banerjee, Assistant Engineer on the same day. The first Running Account (RA) bill for Rs.1,71,574/- was passed by the Sarpanch and a net amount of Rs.43,274/- was paid to the executant of the work after deduction of the cost of the cement and food-grains supplied to him. The executant

completed the work and the Junior Engineer Sri Sethi measured the work on 27.05.2005 in M.B. No.6, which was also check -measured by the Assistant Engineer, Sri Banerjee, on the same date. The second Running Account (RA) and final bill amounting to Rs.78,426/- was passed for payment by the Sarpanch on 06.06.2005 and a net amount of Rs.60,334/- was paid to the executant Sri Nayak after due deduction. The length of the cement concrete road executed is 175 meters. It is further alleged that even though it was shown that the road was constructed completely, but during the year 2005 – 06, the same work of Marsuan Naik Sahi village was again proposed to be executed under the name “Completion of Marsuan Naik Sahi village cement concrete road”. For this, the Junior Engineer Sri Sethi prepared the estimate amounting to Rs.3,40,000/- on 02.09.2005, which was technically sanctioned by Sri Banerjee, Assistant Engineer and administratively approved by the Sarpanch. As per the recommendation of the Palli Sabha, the work was again entrusted to Bairagi Nayak, VLL on 30.03.2006. He executed the work under the supervision of the Junior Engineer Sri Sethi. During execution, 200 bags of cement and 90 quintals of rice were issued on different dates. After completion of the said work, Sri Sethi recorded measurement in M.B. No.8, which was check-measured by Sri Banerjee, Assistant Engineer. Thereafter, the first Running Account bill and the final bill of Rs.3,40,000/- was passed by the Sarpanch and the net amount of

Rs.2,43,870/- was paid to the executant after due deduction. The length of the road executed was 596' 0". The work was technically inspected by Sri A.K. Mishra, Assistant Engineer, R & B, Barbil in presence of S.Os. The Assistant Engineer Sri Mishra has opined that there has been excess payment of Rs.21,202/- for the work executed during the year 2004 – 05 and Rs.33,728/- for the work executed during the year 2005 – 06. Thus, a total sum of Rs.54,930/- has been paid in excess due to inflated measurement. On the basis of the said enquiry report, the Inspector of Vigilance, Keonjhar Unit lodged an F.I.R. on 30.06.2008 mentioning therein that the above excess payment proves that the Junior Engineer Sri Sethi and the Assistant Engineer Sri A. K. Banerjee entered into a criminal conspiracy and recorded inflated measurement resulting in excess payment of the above amount to the executant Sri Bairagi Nayak and thereby committing misappropriation and causing loss to the State exchequer.

3. The F.I.R. was registered as Balasore Vigilance P.S. Case No.21 of 2008 under Sections 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act and Sections 418/420/120-B IPC and the matter was investigated. After completion of the investigation, final form has been submitted against Sri Birabara Sethi, Junior Engineer, who is the petitioner in this case and Sri Bairagi Nayak, VLL, who executed the work. Upon receipt of the said charge sheet (final form), the learned Special Judge, Vigilance, Balasore passed an order dated

28.06.2010 taking cognizance of the above offences in the aforementioned case, which is impugned in this present criminal Misc. Case petition.

4. Mr. Dhal, learned counsel for the petitioner urged that it is evident from the case diary that during the investigation, both the petitioner and the Assistant Engineer Sri Banerjee were examined by the Investigating Officer, who stated that the works have been done in a proper way and since the measurement subsequently done during the enquiry after receipt of the allegation, was in the year 2008, i.e., after around a gap of three years from the date of execution of the work, Sri A.K. Mishra, Assistant Engineer, who measured the work in 2008, has reached at a wrong conclusion with regard to excess payment. It was further submitted that materials collected by the I.O. with regard to the petitioner as well as Sri Banerjee, were placed before the sanctioning authorities, namely, The Engineer-in-Chief, Water Resources, Odisha and General Administration Department respectively. While on the self-same material, the sanction was given by the Engineer-in-Chief to prosecute the petitioner, the General Administration Department, on the contrary, refused to give sanction against Sri Banerjee, though he stands on the same footing as per the F.I.R. He further submitted that whatever measurement was done by the petitioner was check-measured by the Assistant Engineer Sri Banerjee, in respect of whom, sanction has been refused by the

General Administration Department and, therefore, he has not been shown as an accused in the charge sheet. Mr. Dhal, learned counsel contended that since Sri Mishra measured the thickness of the road in 2008 after a long gap, there is bound to be difference in measurement due to erosion of the road by user as well as weathering. Mr. Dhal, therefore, submitted that this Court, by exercising the power under Section 482 Cr. P.C., in the facts of the present case, should quash the order of cognizance as well as the proceeding against the petitioner inasmuch as Sri Banerjee, against whom, the sanction was refused to be accorded by the General Administration Department, has categorically stated before the Investigating Officer in his statement recorded under Section 161 Cr. P.C. that a work has been done in the proper way and the same has been measured and check-measured duly. The statements recorded under section 161 Cr. P.C. during the investigation of the petitioner and Sri A.K. Mishra are available in the case diary, which were perused by this Court.

5. Mr. Pani, learned counsel for the Vigilance Department produced before this Court the technical inspection report, which was prepared by Sri A.K. Mishra, Assistant Engineer, R & B, Barbil on 29.04.2008. He brought to the notice of this Court, the observations of Hon'ble Justice A.K. Ganguly, in the case of **Dr. Subrmanyam Swamy v. Dr. Manmohan Singh and another**, (2012)51 OCR (SC) 682, wherein His Lordship taking note of the increase in corruption in the

country, has observed that corruption in our Country not only poses a grave danger to the concept of the constitutional governance, but also threatens the very foundation of the Indian democracy and the rule of law. The magnitude of corruption in our public life is incompatible with the concept of a socialist, secular, democratic republic. The Supreme Court also observed that it cannot be disputed that where corruption begins, all rights end. Corruption devalues human rights, chokes development and undermines justice, liberty, equality, fraternity, which are the core values in our Preambular vision and, therefore, the duty of the Court is that any anti-corruption law has to be interpreted and worked out in such a fashion as to strengthen the fight against corruption. That is to say in a situation where two constructions are eminently reasonable, the Court has to accept the one that seeks to eradicate corruption to the one, which seeks to perpetuate it.

6. There is absolutely no quarrel on the above proposition with regard to the consequences of corruption. But, however, in a given case, if the allegations, prima facie, do not show that the action on the part of the accused would amount to corruption, the proceeding for such an offence cannot be sustained.

7. Further, in the instant case, the F.I.R., which was filed by the Inspector of Vigilance, Keonjhar Unit, on the basis of which the case was registered, categorically states as follows :-

“Therefore, it is requested that a case against Sri Asish Kumar Bannerjee, Ex-Assistant Engineer, Jhumpura Block, Sri Birabara Sethi, Ex-Junior Engineer, Jhumpura

Block and Sri Bairagi Nayak executed under Section 13 (2) read with Section 13 (1) (d) of the P.C. Act and Sections 418/420/120 – B IPC may please be registered and ordered to be investigated into.”

8. During the investigation, it is, prima facie, revealed that statements of both the above Engineers against whom, similar allegation was made, gave their statements, which were recorded under Section 161 Cr. P.C. by the Investigating Officer stating that there has been no irregularity in conducting measurement of the work executed by Sri Bairagi Nayak. Admittedly, Sri Mishra, Assistant Engineer measured the cement concrete road constructed by Sri Nayak in the year 2008, on the basis of which allegation of excess payment rests.
9. Judicial notice can very well be taken of the fact that the concrete road used by the villagers constructed over four years back, cannot have the same measurement and quality as it had on the date, when it was constructed. Further, it being admitted by the then Assistant Engineer Sri Banerjee that the measurement done by the petitioner was check-measured by him and was found to be correct and the Assistant Engineer, Shri Banerjee having not been arrayed as an accused, who was the higher authority over the petitioner and checked the measurement done by the petitioner and found the same to be correct, it is seen that no prima facie case for the offences of which cognizance has been taken, is made out and this Court further finds that for the above reasons, if the criminal case is allowed to

continue, there can be no doubt that the same will end in acquittal of the petitioner.

10. With regard to exercise of jurisdiction under Section 482 Cr. P.C., it would be profitable to refer to the decision of the Supreme Court in the case of ***Dr. Raghubir Swain v. State of Bihar***, AIR 1964 SC 1. In the said case, the Supreme Court, though was dealing with the power of the High Court under Section 561 – A of the old Code, which is similar to Section 482 Cr.P.C. of the new Code, spoke about the inherent power of this Court in a general way when it observed that the inherent powers of the High Court of a State means the power, which must, by reason of being of highest Court in the State having general jurisdiction over civil and criminal courts in the State, inhere in that Court. The powers in a sense are in an inalienable attribute of a position, it holds with respect to the courts subordinate to it. Such powers are partly administrative and partly judicial. They are necessarily judicial when they are exercisable with respect to a judicial order and for securing the ends of justice. Thus observing, the Supreme Court held as follows :- .

“When we speak of the inherent powers of the High Court of a State we mean the powers which must, by reason of its being the highest Court in the State having general jurisdiction over civil and criminal Courts in the State, inhere in that Court. The powers in a sense are in an inalienable attribute of the position it holds with respect to the Courts subordinate to it. These powers are partly administrative and partly judicial. They are necessarily judicial when they are exercisable with respect to a judicial order and for securing the ends

of justice. When we speak of ends of justice we do not use the expression to comprise within it any vague or nebulous concept of justice, nor even justice in the philosophical sense but justice according to law, the statute law and the common law. Again, this power is not exercisable every time the High Court finds that there has been a miscarriage of justice. Inherent powers are in the nature of extraordinary powers available only where no express power is available to the High Court to do a particular thing and where its express powers do not negative the existence of such inherent power. The further condition for its exercise, in so far as cases arising out of the exercise by the subordinate Courts of their criminal jurisdiction are concerned is that it must be necessary to resort to it for giving effect to an order under the Code of Criminal Procedure or for preventing an abuse of the process of the Court or for otherwise securing the ends of justice”.

11. Considering the facts of the present case in the above background, this Court is of the view that continuance of criminal proceeding in T.R. No. 22 of 2010 against the petitioner as well as the other accused persons would clearly amount to an abuse of the process of the Court and the proceeding should be quashed to secure ends of justice.
12. In the result, therefore, the order dated 28.06.2010 taking cognizance of the offence under Section Sections 13 (2) read with Section 13 (1) (d) of the P.C. Act and under Sections 418/420/120 – B IPC against the accused persons in T.R. No.22 of 2010 is set aside and the proceeding, i.e., T.R. No.22 of 2010 pending before the learned Special Judge, Vigilance, Balasore stands quashed in its entirety.
13. The CRLMC is accordingly allowed.

.....
M.M. Das, J.

Orissa High Court, Cuttack.
June 27th,2012/Biswal.