

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

OWP No. 171/2010

**Reserved on 14.09.2022
Pronounced on 22.9.2022.**

Prem Nath and others

..... petitioner (s)

Through :- Mr. M.K.Bhardwaj Sr. Advocate
with Mr. Gagan Kohli &
Mr. C.S.Azad Advocates

V/s

State of J&K and another

.....Respondent(s)

Through :- Mr. Raman Sharma AAG

Coram: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGEMENT

1 The petitioners have filed the instant writ petition challenging FIR No. 5 of 2010 for offences under Sections 120B, 167-a, 420-RPC read with Section 5(1)(d) and 5(2) of Jammu and Kashmir P.C. Act registered with Police Station, Vigilance Organization, Jammu.

2 As per contents of the impugned FIR, a Joint Surprise Check (JSC) was conducted by the Vigilance Organization into the allegations of construction of substandard overhead tank at Dok Paloura, Jammu during the period 2006 to 2009 which is stated to have collapsed in the month of June, 2009. According to the impugned FIR, during the Joint Surprise Check, it was found that the Chief Engineer, PHE Department, Jammu had allotted the work of construction of overhead tank at Dok Paloura, Jammu to Sh. Janak Raj Gupta contractor in the year 2004 at the estimated costs of 15.49 lacs. The work was started in the year 2006 and completed in the year 2009. The overhead tank in the process of its commissioning in the month of June, 2009

collapsed. It is alleged that the substandard material was used in the construction of overhead tank and the work was not executed as per the specifications mentioned in the allotment order which resulted into collapsing of the overhead tank. According to the impugned FIR, a part payment of Rs.10.85 lacs was found to have been released in favour of the contractor. The impugned FIR goes on to allege that petitioner No.1, the then Executive Engineer, in league with petitioner No.2, the then Assistant Executive Engineer, petitioner No.3, the then Jr. Engineer PHE Sub Division No.1, petitioner No. 4, the then Assistant Executive Engineer, Jammu and Contractor Janak Raj Gupta, under a well-knit conspiracy by abusing their official positions, had authorized payment in respect of the contract for execution of work that was not carried out in accordance with the contract thereby causing huge loss to the State exchequer. The FIR further goes on to allege that, *prima facie*, the petitioners and the contractor Janak Raj Gupta have committed offences punishable under Sections 120B, 167A, 420A RPC read with Sections 5(1)(d) and 5(2) of the J&K P.C Act.

3 The petitioners have challenged the impugned FIR on the ground that a Departmental Enquiry was conducted into the same allegations in which the petitioners have been exonerated and no culpability on their part was found. It has been contended that the contract was awarded to the co-accused Janak Raj Gupta on turn-key basis and the project was not handed over by the contractor to the Department at the time when the mishap took place. As such, the petitioners cannot be roped in as co-accused for no fault of theirs, when the whole fault lies upon the shoulders of the contractor. It has been further contended that the petitioners have authorized payment of only Rs.9.25 lacs in favour of the contractor against a bill of Rs.10.85 lacs and Rs.1.60 lacs have been withheld. Thus, according to the petitioners, there has been no loss to the

State exchequer, particularly when the contractor, as per the terms of the contract, was to reconstruct the overhead tank because the mishap took place during the warranty period. It has also been contended that before registering the impugned FIR, the Vigilance Organization has not conducted any preliminary verification into the allegations and without undertaking such an exercise, it was not open to the Vigilance Organization to register the impugned FIR. It is further contended that the impugned FIR has been lodged after a delay of eight and a half months and there is no explanation on the part of the Vigilance Organization for this delay.

4 The petition has been contested by the respondents by filing reply thereto. In their reply, the respondents besides reiterating the facts narrated in the impugned FIR, have contended that the impugned FIR has been registered on the basis of the result of Joint Surprise Check conducted by the Vigilance Organization. It has been further contended that the petitioners have remained associated with the execution, construction, monitoring and commissioning of the project and, as such, they were responsible for maintaining the quality of the work including the material being used and to ensure that the work is done as per the specified terms and conditions of the contract. According to the respondents, the petitioners failed to discharge their responsibilities and, in fact, authorized payment of bills in favour of the contractor which shows that they were in league with the contractor. It has been contended that the report of the Enquiry Committee is not binding upon the Investigating agency and that scope of departmental enquiry and criminal proceedings is distinct and different from each other.

5 I have heard learned counsel for the parties and perused the record.

6 The first ground that has been raised by learned Senior Counsel appearing for the petitioners is that the subject matter of impugned FIR was also subject matter of departmental enquiry conducted by the Enquiry Committee that was constituted by the Government in terms of G.O No. 166-PW (Hyd) of 2009 dated 04.06.2009. According to the petitioners, they were exonerated of the charges after holding a detailed enquiry, whereafter they were reinstated. On this ground, it is urged that the criminal proceedings against the petitioners cannot go on because the standard of proof in criminal proceedings is higher than the standard of proof in departmental enquiry. It is contended that if the charges could not be proved on the touchstone of preponderance of probability, there is no chance of proof of the said charges in a proceeding, where the same are required to be proved beyond reasonable doubt. Reliance in this regard has been placed upon the judgment of the Supreme Court in the case of **P.S.Rajya vs. State of Bihar, (1996) 9 SCC 1** as also the judgment passed by the Supreme Court in the case titled **Ashoo Surendra Nath Tiwari vs. The Deputy Superintendent of Police, EOW, CBI and another, 2020 SCC Online SC 739.**

7 In order to test the merits of contentions raised by learned Senior Counsel appearing for the petitioners, it is necessary to have a look at the case law on this issue.

8 While in P.S. Rajya's case (supra), the Supreme Court has observed that the standard of proof required to establish the guilt in a criminal case is far higher than the standard of proof required to establish the guilt in the departmental proceedings and, as such, once a person is exonerated in departmental proceedings, the prosecution against him cannot sustain on the same charges, in **Krishan Singh vs. Gural Singh and others, (2010) 8 SCC 775,** the Supreme Court took a contrary view and observed that there is neither

statutory, nor any legal principle that findings recorded by the Court, either in civil or criminal proceedings shall be binding between the parties while dealing with the same subject matter and both the cases have to be decided on the basis of evidence adduced therein.

9 The aforesaid two contrary views taken by the Supreme Court came up for consideration before a three Judge Bench of the Supreme Court in the case of **State (NCT of Delhi) vs. Ajay Kumar Tyagi, (2012) 9 SCC 685**. The Court, after noticing its observations in P.S. Rajya's case (supra), concluded as under:

“Even at the cost of repetition, we hasten to add none of the heads in the case of P.S. Rajya (Supra) is in relation to the effect of exoneration in the departmental proceedings on criminal prosecution on identical charge. The decision in the case of P.S. Rajya (Supra), therefore does not lay down any proposition that on exoneration of an employee in the departmental proceeding, the criminal prosecution on the identical charge or the evidence has to be quashed. It is well settled that the decision is an authority for what it actually decides and not what flows from it. Mere fact that in P.S. Rajya (Supra), this Court quashed the prosecution when the accused was exonerated in the departmental proceeding would not mean that it was quashed on that ground. This would be evident from paragraph 23 of the judgment, which reads as follows:

“23. Even though all these facts including the Report of the Central Vigilance Commission were brought to the notice of the High Court, unfortunately, the High Court took a view that the issues raised had to be gone into in the final proceedings and the Report of the Central Vigilance Commission, exonerating the appellant of the same charge in departmental proceedings would not conclude the criminal case against the appellant. We have already held that for the reasons given, on the peculiar facts of this case, the criminal proceedings initiated against the appellant cannot be pursued. Therefore, we do not agree with the view taken by the High Court as stated above. These are the reasons for our order dated 27-3-1996 for allowing the appeal and quashing the impugned criminal proceedings and giving consequential reliefs.”

From the reading of the aforesaid passage of the judgment it is evident that the prosecution was not terminated on the ground of exoneration in the departmental proceeding but, on its peculiar facts.

10 In a recent case of **Ashoo Surendra Nath Tiwari** (supra), the Supreme Court culled out the following principles:

- (i)Adjudication proceeding and criminal prosecution can be launched simultaneously;*
- (ii)Decision in adjudication proceeding is not necessary before initiating criminal prosecution;*
- (iii)Adjudication proceeding and criminal proceeding are independent in nature to each other;*
- (iv)The finding against the person facing prosecution in the adjudication proceeding is not binding on the proceeding for criminal prosecution;*
- (v) Adjudication proceeding by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of [Article 20 \(2\)](#) of the Constitution or [Section 300](#) of the Code of Criminal Procedure;*
- (vi) The finding in the adjudication proceeding in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceeding is on technical ground and not on merit, prosecution may continue; and*
- (vii) In case of exoneration, however, on merits where allegation is found to be not sustainable at all and person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue underlying principle being the higher standard of proof in criminal cases."*

11 From the foregoing analysis of law on the subject, it is clear that when the allegations in the departmental proceedings as well as in Criminal proceedings are identical and a person has been exonerated in the departmental proceedings on merits, the trial of the person in the criminal case would be an abuse of process of Court. However, it has to be kept in mind that the result of the departmental proceedings should have been accepted by the competent

authority and the same should have acquired finality before determining whether the criminal proceedings can be quashed.

12 This Court, in the case of **Sarwan Singh vs. State** (CRMM No.265/2019, date of decision: 17.12.2020) while reconciling the ratio laid down by the Supreme Court in the cases of Ashoo Surendra Nath Tiwari (supra) and Ajay Kumar Tiyagi (supra) has observed as under:

“18. In Ashoo Surendranath Tiwari's case (supra), the competent authority had refused sanction for prosecution against the accused on the ground that no offence under the [Prevention of Corruption Act](#) was made out, but in spite of this, the Special Court had, while discharging the accused for offences under [Prevention of Corruption Act](#), refused to do so to the extent of offences under [IPC](#). It is to be borne in mind that at the time of grant or refusal of sanction for prosecution, the whole material collected by the investigating agency during investigation of the case is to be placed before the Competent Authority. The action of refusal to accord sanction for prosecution by the competent authority was concurred and confirmed by the Central Vigilance Commission by giving detailed reasons therefor. Thus, the question of grant/refusal of sanction to prosecute the accused in that case had acquired finality. It is in those circumstances that the Supreme Court held that on similar allegations, the criminal proceedings cannot go on. In Ajay Kumar Tyagi's case, (supra) although the enquiry officer had exonerated the accused of the charges which were identical to the charges in the criminal case, yet no action was taken on the report of the enquiry officer and the disciplinary proceedings had not acquired finality. In those circumstances, the Supreme Court observed that the High Court had fallen into error in quashing the criminal proceedings on the premise that the accused had been exonerated in the departmental proceedings, the same being premature keeping in view the fact the Disciplinary Authority was not bound to accept the report of the enquiry officer. The Supreme Court further proceeded to answer the question of law referred to it, i.e. whether the prosecution against an accused, notwithstanding his exoneration on the identical charge in the departmental proceedings could continue or not? While answering this question in affirmative, the Court analysed the two conflicting views expressed in P.S Rajya's case and Krishan Singh's Rajya's case and Krishan Singh's case (supra) as has been discussed hereinbefore”.

13 From the foregoing discussion, it is clear that before applying the principle, that exoneration in a department proceedings would lead to quashing of criminal charges relating to the same allegations, the facts and circumstances of each case have to be taken into consideration.

14 Adverting to the facts of the instant case, if we have a look at the enquiry report, that has been annexed by the respondents to their reply, it is revealed that it is not a case of clear cut exoneration of petitioners on merits. In the inquiry report, it has been observed by the Committee that no cube tests at each stage of concreting were got conducted by the Department. It has also been observed that overall workmanship of the contractor was found below satisfaction and poor quality of cement was used by the contractor that was not conforming to the relevant Indian standards. The Committee has further observed that the bill amounting to Rs.10.85 lacs has been passed by petitioner No.1 and that the role of the field staff, who remained associated with the construction of the work, which includes the petitioners herein, cannot be overlooked in terms of their duties and responsibilities to maintain the quality of the work. The Committee went on to observe that the field staff has failed to impose their authority, as a result of which, the contractor conducted himself in a manner which was not in conformity with the conditions laid down in the contract and agreed by the contractor as per the agreement drawn between the contractor and department for execution of the allotted work. The committee has concluded that the field staff cannot be absolved of their responsibilities. According to the Committee, the duties and responsibilities of field staff are to be judged in the light of Govt. Order No. AC 656 WIP of 1967 dated 15.11.1967 which fixes the responsibility of Executive Engineer as 15/% for test check on the works executed, 100% for Assistant Executive Engineer and Junior Engineer and Works Supervisor are stated to be responsible for

complete supervision and maintaining the quality of the work. The Committee has, while concluding its report, observed that the field staff cannot be fully absolved of their duties and responsibilities.

15 From the above, it is clear that the petitioners, who were associated with the project, have not been given a clean chit, but their roles have come under scanner. The question, as to whether they have connived with the contractor, is a matter that can be ascertained only after investigation of the case. Therefore, merely because the petitioners have been reinstated pursuant to the departmental enquiry, does not mean that they can not be prosecuted for criminal offences keeping in view the aforesaid observations contained in the report of enquiry. Therefore, it is not a case of clean chit to the petitioners. Thus, even as per the ratio laid down by the Supreme Court in Ashoo Surendra Nath Tiwari's case (supra), the criminal proceedings against the petitioners cannot be quashed.

16 It has been contended by learned Senior Counsel, appearing for the petitioners that there has been no loss to the State exchequer, inasmuch as, part of the payment due to the contractor was withheld by the petitioners. The argument advanced by learned Senior Counsel appearing for the petitioners is specious because, admittedly, the petitioners have released a payment of Rs.9.25 lacs against the work done which ultimately has come to a naught with the collapsing of the overhead tank. As per report of the Enquiry Committee, sub-standard material including cement and steel has been used in the construction of tank and there has been no proper supervision on the part of the petitioners during execution of the work. In spite of all this, payments have been released in favour of the contractor. Therefore, it cannot be stated that there has been no loss to the State exchequer.

17 Learned Senior Counsel appearing for the petitioners has contended that there has been no preliminary verification before registering the impugned FIR and that there has been a delay of more than eight months in registering the FIR. In the instant case, the impugned FIR has been lodged on the basis of a Joint Surprise Check conducted by the Vigilance Organization as is clear from the very first sentence of the impugned FIR. The record of the respondents which has been produced during the hearing of the case, reveals that a complaint was received by the Vigilance Organization on 11.06.2009 in which it was alleged that on account of collapsing of overhead tank at Paloura Jammu, a loss to the tune of Rs.38 lacs has been caused to the State exchequer. It was further alleged that the contractor along with the officers and officials of PHE Department are required to be investigated and arrested. It appears that, upon receipt of the said complaint, a Joint Surprise Check was conducted by the Vigilance Organization.

18 Chapter 3 of the Vigilance Manual, 2008 relates to the complaints. Clause 3.7 of the said Chapter provides the procedure for verification of complaints. One of the methods for verification of complaints as provided in the said clause is Joint Surprise Check by the State Vigilance Organization. Clause 3.10 of the Manual relates to Joint Surprise Check. It provides that, vide Government Order No. GAD-12 dated 26.05.2003, the State Vigilance Organization has been authorized to conduct surprise check in association with a representative of the Government Department where check is to be conducted. So, it is not that in every case, preliminary enquiry has to be conducted by the Vigilance Organization before registering an FIR. It is up to the Vigilance Organization to choose the mode and method of verification of the compliant. It can be by secret verification or by open verification or joint surprise check or preliminary enquiry. Even FIR can be registered by the

Vigilance Organization without adopting any of the above methods. So, no fault can be found with the action of the respondent-Vigilance Organization in conducting Joint Surprise Check and registering the FIR based on the findings of the JSC. The course that has been adopted by the respondent-Vigilance Organization in this case is perfectly legal.

19 That takes us to the contention of the petitioners that there has been a delay in registering the FIR. The same appears to be without any merit. As already noted, the complaint was received by the Vigilance Organization on 11.06.2009, whereafter a Joint Surprise Check was conducted and on 18.02.2010, the impugned FIR came to be registered. In the cases relating to corruption by the public servants, before registering an FIR, the concerned authority has to examine the record available in the relevant Department and for the said purpose, record is needed to be collected from different offices. So by very nature of the exercise, which is required to be undertaken in such cases, some amount of time is likely to be consumed.

20. The record produced by the respondent-Vigilance Organization reveals that the report of Joint Surprise Check was prepared only on 31.12.2009, whereafter it was examined at various levels of the respondent-Vigilance Organization before taking a decision regarding registration of the impugned FIR. An FIR against a public servant cannot be registered in a routine manner as soon as a complaint is received against him. Undertaking a preliminary enquiry or Joint Surprise Check is absolutely necessary to ascertain the veracity of the allegations made in the complaint, otherwise, the public servant would be susceptible to reckless prosecution and no public servant would be able to take decisions in a free and fair manner. It is for this reason that before registration of an FIR against a public servant in matters relating to corruption, the case is examined at various levels and this is what

has happened in the instant case which has led to registration of the impugned FIR after more than eight months of receipt of the complaint. Therefore, it cannot be stated that the delay in lodging the FIR has remained unexplained in this case. The argument of learned senior counsel for the petitioner in this regard, therefore, deserves to be rejected.

21 From the foregoing discussion, it is clear that the question, whether petitioners have connived with the contractor, as a result of which, overhead tank collapsed on the day of its commissioning and the question, as to what role the petitioners had in the whole episode, is a matter which can be gone into by the investigating agency during investigation of the case, but one thing is clear that the material on record, *prima facie*, does disclose commission of cognizable offences by the petitioners. It is the statutory duty of the respondent-Vigilance Organization to undertake investigation into the allegations made in the impugned FIR and this Court, in exercise of its writ jurisdiction, cannot restrain the respondent-Vigilance Organization from performing its statutory duty.

22 For all the foregoing reasons, I do not find any reason to interfere with the investigation of the case at this stage. The petition is, therefore, dismissed. Interim order shall stand vacated. Anything said herein shall not be taken as an observation on merits of the case and the investigating agency shall be free to take an independent decision on the basis of the material that may be collected by it during investigation of the case.

(SANJAY DHAR)
JUDGE

JAMMU
22 .09.2022
Sanjeev

Whether order is speaking: Yes
Whether order is reportable: Yes