HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

CRMC No. 144/2015

Reserved on :28.09.2022

Pronounced on:17.10.2022.

Indra Thakur

..... petitioner (s)

Through :- Mr. Sunil Sethi Sr. Advocate with
Ms. Sonika Thakur Advocate.

V/s

State and another .....Respondent(s)

Through :- Mr. Raman Sharma AAG

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

JUDGEMENT

1 The petitioner has challenged FIR No. 16/2015 for offence under Section 5(2) of the J&K Prevention of Corruption Act, 2006 (for short 'the Act of 2006') registered with Police Station, Vigilance Organization, Jammu (Now, ACB Jammu).

2 As per the impugned FIR, a verification, on the basis of a complaint against the officers/officials of J&K PSC regarding the concealment of facts and inclusion of fake RBA/OSC/ALC certificates by most of the selected KAS candidates, was conducted by the Vigilance Organization, Jammu. During the said verification, it was revealed that RBA certificate in favour of the petitioner has been issued in violation of the provisions of J&K Reservation Act 2004 (for short "the Act of 2004"), inasmuch as, the annual income of father of the petitioner exceeded the prescribed ceiling limit and that the petitioner had not completed her entire school education from the local area. It was found that the aforesaid facts are reflected in the report of the concerned Patwari, but in spite

of this, the then Tehsildar Banihal Sh. Jitender Mishra issued RBA certificate in favour of the petitioner in contravention of the provisions contained in the Act of 2004. It was also revealed that the petitioner has, on the basis of aforesaid RBA certificate, got selected in KAS 2001 batch thereby depriving deserving candidates of their right. As per the aforesaid verification, offence under Section 5(2) of the Act of 2006 stands disclosed against the then Tehsildar Banihal Sh. Jitender Mishra and others.

3 The petitioner has laid challenged to the impugned FIR by contending that she was a law graduate and after, completing her Degree in Law, she got herself enrolled as an Advocate in terms of Notification No. 622 dated 11.02.2009 issued by the High Court of Jammu and Kashmir. It is further averred that the petitioner started her practice as an Advocate in the office of Sh. Ved Raj Wazir Advocate and was getting independent salary of Rs.2500 per month. It is averred that the moment the petitioner joined the profession as an Advocate, she ceased to be dependent upon her father for the purpose of the Act of 2004 and the Rules framed thereunder. It is contended that, though the annual income of her father exceeded the ceiling limit prescribed under Section 2(o) of the Act of 2004, yet, for the purpose of issuance of RBA certificate in favour of the petitioner, it is only her income which was to be taken into account and not that of his father, as the petitioner, at the relevant time, was gainfully employed. On this ground, it is urged that the then Tehsildar concerned, while issuing the RBA certificate in favour of the petitioner, has not violated any statute or rule. It is further submitted that the petitioner has not suppressed any facts from the relevant authorities, nor has she obtained the certificate by any deceitful means. Thus, it cannot be stated that then Tehsildar concerned, while issuing the RBA certificate in her favour, has misused or abused his official position.

4 The petition has been resisted by the respondents by filing reply thereto. In their reply, the respondent-Vigilance Organization, Jammu, has, besides narrating the allegations made in the impugned FIR, contended that the verification conducted by the Vigilance Organization has established that RBA certificate issued in favour of petitioner is in violation of norms and the rules and that the same has been issued by the then Tehsildar Banihal by abusing his official position. It has been contended that the petitioner has not received her education from the local area concerned and that the income of her father exceeded the prescribed limit, as such, she was not entitled to grant of RBA certificate. It has been submitted that the respondent-Vigilance Organization has statutory power to undertake investigating of the case once FIR has been registered and the question, whether the then Tehsildar concerned has abused his official position, while issuing the RBA certificate in favour of the petitioner, can be determined only after investigation of the case. During the course of hearing, respondents have also produced the record relating to the verification conducted by the Vigilance Organization.

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

6 The learned Senior Counsel appearing for the petitioner has, while arguing the case, reiterated the contentions raised in the petition. According to the learned Senior Counsel, the petitioner had temporarily moved out of the local area concerned with her father, who, in connection with his employment, was posted outside the local area during his service career. It has been submitted that neither the petitioner, nor her father has, at any point in time, permanently shifted their abode from the local area concerned and that their residence outside the said local area was only a temporary arrangement in connection with employment of father of the petitioner.

Therefore, according to the learned Senior Counsel, it cannot be stated that the petitioner was not the resident of the local area concerned at the time of making application for grant of RBA certificate. It has also been contended that the income of father of the petitioner for the purpose of grant of RBA certificate cannot be taken into account in the instant case because the petitioner, at the relevant time, was gainfully employed, inasmuch as, she was practicing as an Advocate. Thus, according to the learned Senior Counsel, the then Tehsildar concerned has not violated any statute or rule while issuing the RBA certificate.

7 Mr Raman Sharma, learned AAG, appearing on behalf of the respondents has contended that the question, whether the Tehsildar concerned, while issuing the certificate in question in favour of the petitioner, has abused his official position by contravening the provisions of the relevant statues and the rules, is a matter of investigation and at the initial stage, the prosecution cannot be stifled. Learned AAG has submitted that a perusal of the statutes and the rules on the subject, would, *prima facie*, reveal that the certificate in question has been issued in violation of the norms and once it is shown, the investigation in the impugned FIR has to proceed further so as to ascertain, whether the Tehsildar concerned has abused his official position. He has relied upon the judgment of this Court in the case of **Shanti Swarup Malhotra vs. State, 1973 JKLR 608** in this regard.

8 Before determining the rival contentions raised by learned counsel for the parties, it would be necessary to notice the relevant provisions contained in the J&K Reservation Act, 2004 and the J&K Reservation Rules, 2005. Section 3(1)(b) of the Act of 2004 provides for reservation in appointment by direct recruitment for socially and educationally backward

classes. Section 2(o) of the said Act defines socially and economically backward classes. It reads as under:

> *"2(0) "socially and educationally backward classes" mean—*
> *(i) persons residing in the backward area;*
> *(ii) the persons residing in the area adjoining Actual Line of Control; and*
> *(iii) weak and under-privileged classes (social castes), declared as such under notification SRO-394 dated 5-9- 1981 read with notification SRO-272 dated 3-7-1982 and notification SRO-271 dated 22-8-1988 as amended from time to time:*
>
> *Provided that the Government may, on the recommendations of the State Backward Classes Commission, make inclusions in, and exclusion from, the said category from time to time:*
>
> *Provided further that the persons specified below and their children shall be excluded from the category of socially and educationally backward classes:—*
>
> *(i) Governor (serving or retired);*
> *(ii) Chief Justice and Judges (serving or retired) of High Court or the Supreme Court of India;*
> *(iii) Chief Minister and Ex-Chief Minister;*
> *(iv) Ministers and Ex-Ministers of Cabinet rank;*
> *(v) Ministers of State and Deputy Ministers having more than one term;*
> *(vi) (vi) Chairman and members of Jammu and Kashmir Public Service Commission or the Union Public Service Commission;*
> *(vii) (vii) Members of the State Legislature (elected and nominated both) having more than one term irrespective of the period under the second term;*
> *(viii) Members of All India Services;*
> *(ix) any person whose annual income from all sources, determined in the prescribed manner, exceeds rupees three lacs or such amount as may be notified by the Government from time to time in accordance with the prescribed norms:*
> *Provided that the income ceiling shall not apply to a person who has lived and completed entire school education from an area identified as Backward or Actual Line of Control, as the case may be, and in case such schooling is not available in such area, from the nearest adjoining area;*

(x) such other persons as the Government may notify from time to time;

9 A perusal of the aforequoted provisions reveals that a person would not qualify to be belonging to a backward area in spite of residing over there if the annual income from all the sources of such person exceeds Rs.4,50,000/- or such amount as may be notified by the Government. It is pertinent to mention here that, at the relevant time, the income ceiling for the purpose of Section 2(o) of the Act was Rs.3.00 lac only.

10 Section 16 of the Reservation Act provides for issuance of certificate by the competent authority in the prescribed form. Section 17 of the said Act provides for appeals by an aggrieved person against an order passed by the competent authority under Section 16, whereas Section 18 provides for powers of revision *suo moto* or on an application made to it by the Appellate Authority in respect of orders made by the competent authority.

11 Rule 21 of J&K Reservation Rules, 2005 deals with the procedure for issuance of certificates. Relevant excerpts of the said Rule read as under:

*"21. **Procedure for issuance of certificates** - The issuance of certificates shall be governed by the procedure laid down in sections 13, 14, 15, 16, 17, 18, 20, 21 and 22 of the Act and the Competent Authority shall scrutinize the application and conduct such enquires as may be necessary for verification of the details of the application as also with regard to the eligibility of the applicant for the certificate claimed by him/her keeping in view the following guidelines, namely: -*

(i) A person claiming to be a member of Socially and Educationally Backward Classes shall be issued the requisite certificate only if he is not excluded under clause (o) of section 2 of the Act or rule 3 of these rules;

(ii) A person claiming benefit under Weak and Under privileged Class should be born in that class and on the basis of actual practicing of the occupation by his/her parents;

(iii) A person claiming benefit for being resident of Backward Area or of Area near the Line of Actual Control must establish that he/she has resided in the area for a period not less than 15 years before the date of application and is actually residing in the said area. However, a person may not be disentitled from claiming this benefit only on the ground that his/her father or person on whom he/she is dependent is living in a place which is not identified as Backward Area or area near line of Actual Control on account of his employment, business or other professional or vocational reasons;

(iv) A person claiming benefit on the grounds that he/she belongs to Scheduled Tribe community shall produce an extract of Jamanbandi in respect of members of the Tribes, who own land and extract of electoral roll or Chullhabandi or ration card in respect of landless members of the Tribes. The production of identity cards or Grazing Cards issued by Forest Department or Revenue agencies in respect of landless members of Gujjar and Bakerwal Communities shall be supplementary evidence for the said purpose:

12 Rule 22 of the aforesaid Rules provides procedure for determination of annual income. It reads as under:

*"22. **Determination of Annual Income-** The annual income of a person claiming benefit under these rules shall be determined in the following manner: -*

(i) Where a person is living with his/her parents/guardian and is dependent upon them/him, the annual income of parents/guardian from all sources shall be taken into account;

(ii) Where a person is not living with his/her parents/guardian and is not dependent upon them/him, his/her annual income from all sources including that of his/her spouse shall be taken into account:

Provided that the annual income shall be assessed by taking into account the average of the gross annual income of last three consecutive years excluding the agricultural income.

(iii) Any person appointed against any available vacancy on the basis of his being a resident of backward area or an area adjoining line of control shall be posted in such area as provided under sub-sections (2) and (3) of section 3 of the Act."

13 A bare reading of clause (iii) of Rule 21 quoted above, reveals that a person claiming benefit for being resident of backward area has to establish that he/she has resided in the year for a period not less than 15 years before the date of application and is actually residing in the said area. The Rule further provides that a person is not disentitled from claiming this benefit just because his/her father is living in a place which is not identified as backward area on account of his employment, business or other professional or vocational reasons, meaning thereby that if the children of a person who, though a resident of backward area, have to move out of the said area in connection with his employment, business or other professional or vocational reasons, are not residing in the said area, they will not be disentitled from claiming the benefit of being resident of backward area. Thus, if father of a person because of his employment moves out of backward area and carries with him his son/daughter and establishes a temporary residence outside the backward area without giving up his residence in the backward area, such son or daughter would not be disentitled from claiming a resident of backward area. This seems to be the purport of clause (iii) of Rule 21 of the Rules of 2005 from its plain reading.

14 The aforesaid interpretation of the provisions contained in clause (iii) of Rule 21 finds support from the judgments of our own High Court in the cases of **Shahnaz Bhatt vs. Divisional Commissioner, Jammu, 1994**

KLJ 470 & **Zarina Hassan and others vs. State and others, 1993 AIR (J&K) 67** Although, the aforesaid judgments are based upon the interpretation of SRO-314 of 1986 dated 09.05.1986, yet the language of the said SRO is similar to the language of Rule 21(iii) of the Rules of 2005. The relevant portion of the said SRO is quoted hereinbelow:

> *"2(b) A person claiming benefit on the grounds that he/she belongs to an identified Backward Area or an Area near the Line of Actual Control must establish that he/she or his/her father or if father is dead other member of his/her family on whom he/she is dependent, has resided in the area for a period not less than 15 years prior to the claim of benefit. The candidates must also establish that he/she or his/ her father or the person on whom he/ she is dependent is actually residing in such area where the benefit is claimed. However, a candidate shall not be disentitled from claiming this benefit only on the ground that his father or the person on whom he/she is dependent is living in a place which is not identified as Backward or Area near the Line of Actual Control, on account of his employment, business or other professional or vocational reason, provided the per capita monthly income of his family does not exceed Rs. 600/-".*

15 In the aforesaid judgments, it has been laid down that if the parents of a person belong to an area which has admittedly been declared as a backward area and they are residing out of the area on account of their Government service, such person cannot be disentitled from claiming resident of backward area. The aforesaid reasoning and interpretation given by the High Court would equally apply to the case at hand.

16 A similar question came up for consideration before the Supreme Court in the case of **Atul Khullar and others vs. State of J&K and others, 1986 SCC Supl. 225** It would be apt to refer to the relevant observations made by the Supreme Court in the said case and the same are reproduced as under:

"The second part of the contention set forth earlier is that candidates not belonging to backward areas have been selected for admission from the reserved categories. The petitioners have indicated several names in the Select List who, they say, should not have been given admission. We have gone through the entire list and carefully considered the facts pertaining to those candidates whose inclusion has been challenged by the petitioners. We find no sufficient material for sustaining the challenge made by the petitioners. With the assistance of counsel for the parties we have considered the case in respect of each of the candidates selected in the backward area categories, the Line of Actual Control Category and the B.D.S. Course and we find that in each case the candidate can be said to belong to a village listed as a backward area either in S.R.O. 272 dated July 3, 1982 as originally framed or pertaining to S.R.O. 335 dated June 14, 1983 or S.R.O. 412 dated August 27, 1984. In some cases the candidates had given an address in Jammu, and it is contended by the petitioners that such candidates could not be regarded as belonging to a backward area. The candidates who claimed the benefit have filed a Tehsildar's Certificate in the prescribed Form in support of their claim, and there is nothing on record ex facie to doubt the correctness of that Certificate. Nor is it for the Court in this proceeding to inquire into the correctness of the Certificates. Annexure II to Notification S.R.O. 272 dated July 3, 1982 makes provision for the grant of such Certificate, their prescribed Forms, the authority entrusted with the power to grant them and the conditions subject to which they can be granted. Even if this Court could be said to possess jursidiction to enter into an inquiry whether the Tehsildar's Certificates are valid and reliable documents, it appears difficult, having regard to the state of the record before us, to sustain the challenge to their validity. A specific submission has been made in regard to the selections of Meenakshi Kotwal, Inderjit Singh and certain other candidates who have been shown as residing in the City of Jammu, and it is urged that they cannot be regarded as candidates from the backward areas category even though their respective families hail from such areas. It appears to us that their residence in the City of Jammu is essentially of limited and temporary duration, and to our mind, temporary residence in an urban area cannot deny those candidates the right to admission on the basis of a reserved category if in fact they belong permanently to a village in a backward area. Appendix II of Annexure II to S.R.O. 272 dated July 3, 1982 requires that a candidate claiming to be a permanent resident in areas adjoining the Actual Line of Control or in other backward areas should establish the ground of his claim before the Tehsildar before he can be issued a certificate in that behalf.

> *The Tehsildar has granted a certificate to the different candidates whose title to consideration as members of the reserved categories has been challenged by the petitioners, and there is no satisfactory material before us to indicate that the basis underlying the certificate is entirely without substance. A candidate may belong to a village in terms of the requirement prescribed by the Anand Committee Report and because of the lack of higher educational facilities he may have to reside temporarily in a city where such education is available. It may also be that a parent of the candidate may pursuant to his employment, have taken up residence in an urban area. That in itself does not snap the bond between the candidate's family and the village, so long as the assumption of residence in the city is occasioned by temporary necessity".*

17 From the aforesaid analysis of the case law on the subject, it appears that if a person is not residing in the backward area on account of posting of his parents outside that area, who otherwise are residents of the backward area, he is not disentitled from claiming the benefit of being a resident of the backward area.

18 So far as the question of income ceiling is concerned, there can be no doubt to the fact that if the parent, on whom a person is dependent, are earning income exceeding the prescribed limit, such person is not entitled to grant of a RBA certificate. However, the situation becomes different, if a person himself is gainfully employed and is not dependent upon his/her parents. Clause (iii) of Rule 22 of the Rules of 2005 quoted hereinbefore, provides that if a person is not living with his or her parents and is not dependent upon them, his /her annual income from all sources including that of his/her spouse shall be taken into account, meaning thereby that if a person is not dependent upon his/her parents and is not living with them, for the purpose of determination of the income, it is his/her income which has to be taken into account and not that of his parents. A clarification has been issued by the Government of Jammu and Kashmir vide No.GAD (Mtg) Res-18/2003 dated

14.11.2003 in respect of SRO 126 of 1994, Rule 9 whereof is couched in the similar language as the language contained in Rule 22 of the Rules of 2005. The said clarification reads as under:

> *"Rule 9 of the Jammu and Kashmir Reservation Rules, 1994 provides that the Government servant whose income from all sources is Rs.3.00 lakhs and above cannot claim the benefit of belonging to the category of Socially and Educationally Backward Class. The format appended with the rules provides that a candidate can apply for issuance of certificate for belonging to Socially and Educationally Backward class either personally or through his father or guardian upon whom he is dependent. The son or daughter of a Government servant who is employed has to apply of his own. The salary or the income derived from his employment has to be reflected in the said format and not the income of his father. Son or daughter of the Government servant on being employed or gainfully engaged ceases to be dependent upon his father or mother as the case may be. For purposes of Reservation Rules, the income from all sources of a Government servant has to be less than Rs.3.00 lacs if he claims certificate for any of his son or daughter who are employed or gainfully engaged has to apply of his own and his income from all sources should not exceed Rs.3.00 lacs so as to exclude him from claiming the benefit of belonging to Socially and Educationally Backward Class. In short, the income of a son or daughter who is gainfully engaged cannot be added to the income of the father as certificate has to be claimed by the Government servant for his dependent* children not for those who are independent".

19. From a perusal of the aforesaid clarification, it is clear that if a son or daughter of a person is employed or gainfully engaged and he or she applies for grant of a category certificate, it is his/her income which has to be taken into account for determination of the income and not that of his/her parents.

20 From the foregoing analysis of legal position with regard to the entitlement of a person to RBA certificate, *prima facie*, it appears that a person, who, though has received education or has resided outside the backward area because of employment of his parents outside that area, is not

disentitled from claiming to be a resident of backward area once it is shown that his/her parents have not permanently shifted from the backward area. It also appears that in the case of a person, who is gainfully employed or gainfully engaged, while determining the income for the purpose of grant of RBA certificate, it is only the income of such person and not that of his parents which is to be taken into account. This is one of the possible views regarding the legal position relating to grant of RBA certificate in favour of an applicant. This view finds support from the case law referred to hereinbefore.

21 Coming to the facts of the instant case, a perusal of the verification file reveals that the Patwari has clearly reported that early education of the petitioner has taken place outside her native village because of posting of his father outside the said area. The Patwari has further reported that income of father of petitioner was Rs.3,60,000/- *per annum* which obviously is exceeding the limit prescribed at the relevant time. It has also been reported by the Patwari that Permanent Resident Certificate of the petitioner shows her residence as village Alanbas and that she also owns immovable property over there. It has also been reported that father of the petitioner does not own any immoveable property outside the said area and that they have not given up residence in that area. The verification file also contains a copy of voter list and a copy of ration card which clearly shows that the petitioner is registered as a voter in the area in question and that she is a resident of the said area. The petitioner has placed on record a copy of notification whereby she has been enrolled as an Advocate by Bar Council of Jammu and Kashmir. The notification is dated 10.02.2009, which is prior to the date of her application for grant of RBA certificate.

22 There is no dispute to the fact that the petitioner was enrolled as an Advocate at the time of grant of RBA certificate in her favour, as such, it can be inferred that she was gainfully engaged at the relevant time. Thus, as per the relevant Statutes and the Rules, it is her income only and not that of her father, that would be relevant for determining whether she is entitled to grant of RBA certificate. Thus, on the basis of the legal position discussed hereinbefore, it cannot be stated that the then Tehsildar Banihal has, while issuing the RBA certificate in favour of the petitioner, violated the norms. Therefore, there was no material before the Vigilance Organization, Jammu, that would even, *prima facie,* show that the Tehsildar concerned had abused his official position at least to the extent of granting RBA certificate in favour of the petitioner.

23 It has been contended by Mr. Raman Sharma AAG that the relevant rules and statutes can also be given an interpretation, according to which grant of RBA certificate in favour of the petitioner, in the facts and circumstances of the case, would be against the norms. He has submitted that the petitioner was residing with her father at the relevant time and, as such, income of her father cannot be excluded for determining the question, whether or not she is entitled to RBA certificate. It is being argued that once it is shown that the Tehsildar has acted in violation of the norms, the question whether or not it would be a case of criminal misconduct, is a matter of investigation.

24 Even if, the aforesaid view projected by Mr. Raman Sharma, learned AAG, is possible on the basis of the interpretation of the rules/statutes holding the field, the question would arise whether criminal prosecution for offence under Section 5(2) of the J&K PC Act can be launched against a public servant only on the basis of erroneous

interpretation of a statute/rule, particularly when neither there is any allegation in the FIR nor there is any material on record of the verification file to show that the competent authority has either adopted any corrupt means or obtained any pecuniary advantage for itself while issuing the certificate in question.. The Supreme Court has, in the case of **C.K. Jaffer Sharief vs State (Thr C.B.I.), (2013) 1 SCC 205,** while interpreting the provisions contained in Section 13(1)(d) of the Prevention of Corruption Act, 1988 which is in *pari materia* with Section 5(1)(d) of the J&K Prevention of Corruption Act, observed as under:

> *"16. A fundamental principle of criminal jurisprudence with regard to the liability of an accused which may have application to the present case is to be found in the work "Criminal Law" by K.D. Gaur. The relevant passage from the above work may be extracted below:*
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> > *"Criminal guilt would attach to a man for violations of criminal law. However, the rule is not absolute and is subject to limitations indicated in the Latin maxim, actus non facit reum, nisi mens sit rea. It signifies that their can be no crime without a guilty mind. To make a person criminally accountable it must be proved that an act, which is forbidden by law, has been caused by his conduct, and that the conduct was accompanied by a legally blameworthy attitude of mind. Thus, there are two components of every crime, a physical element and a mental element, usually called actus reus and mens rea respectively."*
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> *17. It has already been noticed that the appellant besides working as the Minister of Railways was the Head of the two Public Sector Undertakings in question at the relevant time. It also appears from the materials on record that the four persons while in London had assisted the appellant in performing certain tasks connected with the discharge of duties as a Minister. It is difficult to visualise as to how in the light of the above facts, demonstrated by the materials revealed in the course of investigation, the appellant can be construed to have adopted corrupt or illegal means or to have abused his position as a public servant to obtain any valuable thing or pecuniary advantage either for himself or for any of the aforesaid four persons. If the statements*

> *of the witnesses examined under Section 161 show that the aforesaid four persons had performed certain tasks to assist the Minister in the discharge of his public duties, however insignificant such tasks may have been, no question of obtaining any pecuniary advantage by any corrupt or illegal means or by abuse of the position of the appellant as a public servant can arise. As a Minister it was for the appellant to decide on the number and identity of the officials and supporting staff who should accompany him to London if it was anticipated that he would be required to perform his official duties while in London. If in the process, the Rules or Norms applicable were violated or the decision taken shows an extravagant display of redundance it is the conduct and action of the appellant which may have been improper or contrary to departmental norms. But to say that the same was actuated by a dishonest intention to obtain an undue pecuniary advantage will not be correct. That dishonest intention is the gist of the offence under section 13(1)(d) is implicit in the words used i.e. corrupt or illegal means and abuse of position as a public servant. A similar view has also been expressed by this Court in M. Narayanan Nambiar vs. State of Kerala while considering the provisions of section 5 of the Act of 1947".*

25 From the foregoing analysis of law on the subject, it is clear that dishonest intention is the gist of the offence under section 5(1) (d) of J&K Prevention of Corruption Act punishable under Section 5(2) of the said Act. Unless it is shown that a public servant has, by corrupt or illegal means, abused his position, it cannot be stated that he has committed the offence of criminal misconduct. In the instant case, the then Tehsildar concerned has, on the basis of a possible interpretation of the statutes and the rules, taken a view that the petitioner is entitled to grant of RBA certificate. Merely because another view relating to interpretation of these rules and statutes is possible, it cannot be stated that the then Tehsildar concerned has committed the offence of criminal misconduct while issuing the certificate in favour of the petitioner.

26 In somewhat similar circumstance, a single Bench of Kerala High Court has, in the case of **P. Sunil Kumar** vs. **State of Kerala and another**

(Crl.M.C No. 8758 of 2019, date of decision: 09.04.2021), observed as under:

> *"25. The question is, can a public servant, who acts as quasi judicial authority under a statute, be held criminally liable under the P.C.Act for passing a wrong or illegal order. Annexure-VI order was passed by the petitioner in revenue proceedings. Assuming that it was an illegal or wrong order or an example of arbitrary exercise of jurisdiction, can criminal proceedings be initiated against him for such quasi judicial adjudication?.*
>
> *26. Dishonest intention on the part of the public servant cannot be presumed for the reason that he has passed a quasi judicial order in favour of one of the parties to the proceedings. There must be some reasonable and satisfactory material to proceed against the officer. There is absolutely no allegation against the petitioner that he deliberately committed any misconduct for extraneous considerations. No material disclosing such act on his part has been unearthed during the investigation conducted for more than six years. If the petitioner has passed a wrong order, it could be corrected by the appellate or revisional authority. Criminal proceedings cannot be initiated against a public servant under the P.C.Act merely for passing a wrong order, without any material to demonstrate that such order was deliberately passed by him for extraneous considerations or on oblique motives. There shall be legally admissible materials collected during the investigation to demonstrate such oblique motives or extraneous considerations. The investigating officer has got no case that any such material has been collected during the investigation of the case.*
>
> *27. Every error committed by a quasi judicial authority, however gross it may be, should not be attributed to improper motives. The appellate and revisional forums have been provided on the pre-supposition that persons may go wrong in decision making, on facts as well as law. Even when the contest is between the Government and a private person, a quasi judicial authority entrusted with the task of decision making should feel fearless to give honest opinion while acting judicially. Even if there was possibility on a given set of facts to arrive at a different conclusion, it is no ground to indict a public servant for misconduct for taking one view. If a faulty order of a quasi judicial authority is taken as a ground for initiating criminal proceedings, the officer will be in constant fear of passing an order which is not favourable to the Government. Then he would not be able to act independently or fearlessly. Merely because the*

order is wrong, it does not warrant initiation of criminal proceedings against the public servant, unless he was actuated by extraneous considerations or oblique motives. The remedy for errors committed by a quasi judicial authority is appeal or revision to the forum or authority provided under the statute for that purpose. It is in public interest that a public servant acting as quasi judicial authority should be in a position to discharge his functions with independence and without fear of consequences. The general rule applicable in the case of the issuance of a wrong order is that it is liable to be corrected in appeal or revision. A public servant acting as quasi judicial authority may become criminally liable for obtaining personal gains. But, when he is acting judicially, even if he commits an error and passes an erroneous order, he would be protected from legal action. His accountability in respect of the orders passed by him is ensured by provisions for appeal and revision.

28. What matters is not the end result of the adjudication. What is of relevance, in attributing criminal misconduct on the part of a public servant who has acted as a quasi judicial authority, is whether he had been swayed by extraneous considerations while conducting the process. The sanctity of decision making process should not be confused with the ultimate conclusion reached by the authority. Erroneous exercise of judicial power, without anything more, would not amount to criminal misconduct. If the statutory authorities who exercise quasi judicial powers feel that they cannot honestly and fearlessly deal with matters that come before them, then it would not be conducive to the rule of law. They must be free to express their mind in the matter of appreciation of the evidence before them. Unless there are clear allegations of misconduct or extraneous influences or gratification of any kind, criminal proceedings cannot be initiated merely on the basis that a wrong order has been passed by the public servant or merely on the ground that the order is incorrect. Such decisions cannot ipso facto result in prosecution, unless the mental element of dishonesty, to cause advantage of an unwarranted variety to another is apparent.

29. If a public servant, acting as a quasi judicial authority under a statute passes an order and if such order is in favour of a person other than the Government, any pecuniary advantage obtained by such person by virtue of such order, cannot be the basis for prosecution of the public servant under the PC Act, unless there is an allegation that he was actuated by extraneous considerations or oblique motives in passing the order.

> *30. A bare perusal of Section 13(1)(d)(ii) of the P.C.Act would reveal that a public servant can be prosecuted under that provision, only if he has abused his position as public servant and obtained for himself or for any other person any valuable thing or pecuniary advantage. There is absolutely no whisper in Annexure-I F.I.R that the petitioner obtained any valuable thing or pecuniary advantage by abusing his position as public servant. As noticed earlier, by virtue of the quasi judicial order passed by a public servant, if a party to the proceedings before the public servant had obtained any pecuniary advantage, it cannot be found that it was obtained by him as result of abuse of the official position of the public servant. The legislative intent is not to punish a public servant for any erroneous decision; but to punish him for corruption. Thus, to fall within the four corners of sub-clause (ii) of clause (d) of sub-section (1) of Section 13 of the P.C Act, the decision/conduct of the public servant must be dishonest amounting to corruption. Mens rea, the intention and/or knowledge of wrong doing, is an essential condition of the offence of criminal misconduct under Section 13(1)(d)(ii) of the P.C.Act. The presumption under Section 20 of the P.C Act does not apply to the offence under Section 13(1)(d)(ii) of that Act.*
>
> *31. "Abuse" means misuse i.e. using the official position for something for which it is not intended (See M. Narayanan Nambiar v. State of Kerala: AIR 1963 SC 1116). An honest though erroneous exercise of power or an indecision is not an abuse of power (See Tarlochan Dev Sharma v. State of Punjab: AIR 2001 SC 2524)".*

27 From the foregoing analysis of the legal position, it is clear that even if, it is assumed that the certificate in question has been issued in favour of the petitioner on the basis of a erroneous interpretation of relevant rules and the statutes, still then, in the absence of any dishonest motive or intention on the part of the issuing authority and in the absence of any material to show that the petitioner had connived with the competent authority, it cannot be stated that any offence is made out against the petitioner.

28 In fact, the material on record shows that the petitioner has not concealed any relevant fact from the Competent Authority. It is not a case

where the applicant has obtained the certificate by resorting to suppression of relevant facts. The competent authority on the basis of full disclosure regarding residence and financial status of father of the petitioner, issued the certificate in favour of the petitioner by following the view which is definitely a possible view relating to interpretation of the relevant provisions of the Act and the Rules. If at all the Competent Authority has taken an erroneous view, its order is subject to correction in appeal or revision in terms of the provisions contained in Sections 17 and 18 of the Act of 2004. But this erroneous decision in the absence of any material to show dishonest intention on the part of the Competent Authority cannot be made the basis of criminal prosecution against the petitioner. It is pertinent to mention here that there is nothing on record to suggest that the certificate in question has been cancelled by the appellate or revisional authority, which goes on to show that the same has been validly issued by the Competent Authority.

29 The Supreme Court in the case of **State of Haryana and ors vs Bajan Lal and ors, 1992 AIR 604**, has clearly laid down that extraordinary power under Article 226 of the Constitution or inherent power under Section 482 of Cr.P.C can be exercised, either to prevent abuse of the process of any Court or otherwise to secure the ends of justice in a case where the allegations made in the FIR, 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. The Court further observed that even in a case where allegations in the FIR and other materials, if any, accompanying the FIR does not disclose a cognizable offence, justifying an investigation by police officer under Section 156(1) of the Code, the Court

can exercise its powers under Section 482 of Cr.P.C to quash the criminal proceedings.

30 In the instant case as already noted, the contents of the impugned FIR and the material collected during verification of the case, do not disclose commission of any cognizable offence by the petitioner, as such, continuance of criminal proceedings against the petitioner would amount to abuse of process of law.

31 For what has been discussed hereinbefore, the petition is allowed and the impugned FIR to the extent of the petitioner is quashed. It is, however, made clear that this Court has not returned any finding as regards the validity of RBA certificate issued in favour of the petitioner. The issue has been examined only from the perspective whether or not offence of criminal misconduct is made out against the petitioner.

32. The petition stands disposed of.

33 The record be returned to the learned counsel for the respondents.

(SANJAY DHAR)
JUDGE

JAMMU
17.10.2022
Sanjeev

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