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

…

Crl R No. 38/2022
Reserved on 18.11.2024.
Pronounced on 29.11.2024.

Dalip Thusu and another ……. Petitioner(s)

Through: Mr. Ayushman Kotwal , Advocate

Versus

Union Territory of J&K ………Respondent(s)

Through: Ms. Monika Kohli Sr. AAG

***CORAM*:HON'BLE MR JUSTICE SANJAY DHAR, JUDGE**

JUDGMENT

1 The petitioners, through the medium of present petition, have challenged order dated 27.04.2022 read with order dated 02.06.2022 passed by the learned Special Judge (Anti Corruption), Jammu ('Special Judge' for short) whereby in a case arising out of FIR No. 33/2014 for offences under Section 5(1)(c)(d) read with Section 5(2) of the Jammu and Kashmir Prevention of Corruption Act, 2006 ('P.C Act' for short) and Section 120-B of RPC registered with Police Station, Vigilance Organisation, Jammu, ('VOJ' for short), charges for offences under Section 5(1)(c)(d) read with Section 5(2) of PC Act and Section 120-B RPC have been framed against the petitioners.

2 As per the allegations made in the chargesheet, petitioner No.1, in his capacity as General Manager of J&K Projects Construction Corporation ('JKPCC' for short) made a request to the

Chief Engineer PWD (R&B) vide his letter dated 18.11.2005 for allotment of work for construction of RCC Bridge at Uttar Behani in terms of Government Order No.245-PW(R&B dated 07.07.2005, pursuant thereto, the Chief Engineer PWD (R&B) Sh. Krishan Kumar Arora authorised petitioner No.1 vide his letter No. 23407-09 dated 26.11.2005 to take up the execution of work subject to approval and finalization of GAD/Cost Offer by the Contract Committee and to ensure the completion of work within the time period.

3 As per the prosecution case, in terms of Government Order dated 07.07.2005 (supra), the works entrusted to JKPCC were subject to the technical scrutiny of the allotting Department and JKPCC was solely responsible for supervision and quality control. Thus, according to the prosecution, it was the duty of petitioner No.1 to conduct prior investigations on important aspects, like bridge foundation investigation, Hydrology, Subsoil explorations as also the investigations relating to bearing strength of soil below the foundation and silt factor. It has been alleged that that as per the records of JKPCC, no such prior investigations on any of the aforesaid aspects was conducted. It has been further alleged that, in terms of Government Order dated 23.10.1986 (supra), design of R&B hydraulic and PHE works costing Rs.30 lacs and above were to be vetted and approved by the Designs Directorate, but, in the instant case, no such requirement was followed and the design was not approved/vetted by the competent Authority before starting the construction of the bridge.

4 The allegations against petitioner No.2, who was posted as Deputy General Manager, JKPCC, Unit 4th at the relevant time, are that petitioner No.1 vide his letter UO No. 287 dated 30.11.2005 had assigned the work relating to preparation of preliminary project report and Cost Offer to petitioner No.2 who obtained Designs and Drawings from M/S High Rise Designers, Pvt. Ltd, Gandhi Nagar, Jammu. It has been averred in the chargesheet that, on the basis of these Designs and Drawings, petitioner No.2 prepared the preliminary project report and Cost Offer which was submitted to petitioner No.1. It is alleged that it was the duty of petitioner No.2 to conduct prior investigations on the aspects, like bridge foundation investigation, Hydrology, subsoil explorations as also the investigations relating to bearing strength of soil below the foundation and silt factor, but petitioner No.2 did not undertake any such exercise. .

5 On the basis of the aforesaid allegations, it was found by the Investigating Agency that a criminal conspiracy was hatched by the petitioners, in pursuance whereof, the project relating to construction of the bridge was undertaken without prior vetting of the design from the Designs Directorate and without going into deep technical aspects prior to execution of the same which led to failure of the bridge. It was also found that the exercise relating to construction of bridge was futile and the same had failed to serve its purpose thereby rendering the whole expenditure as wasteful which resulted in loss to the State Exchequer. Thus, as per the prosecution case,

offences under Section 5(1)(d) read with Section 5(2) of PC Act and Section 120-B RPC have been established against the petitioners.

6 The learned Special Judge, after analysing the material annexed with the chargesheet and, after hearing the parties, in terms of impugned order dated 27.04.2022 came to the conclusion that the charges for offences under Section 5(1)(c)(d) read with Section 5(2) of PC Act and Section 120-B RPC are made out against the petitioners and, accordingly, on 02.06.2022 memo of charges have been read over and explained to the petitioners/accused.

7 The petitioners have challenged the impugned order passed by the learned Special Judge on the ground that the charge against the petitioners is not sustainable, for the reason that there is no allegation against them that they had either obtained any valuable thing or pecuniary advantage for themselves or for anyone else. It has been contended that the ingredients of offence under Section 5(1)(d) of PC Act are not established against the petitioners even if the material annexed to the chargesheet is accepted at its face value. It has been further contended that mere loss caused to the Government Exchequer by an act or omission of a Public servant in discharge of his official functions without corresponding gain to the pubic servant or any other person, does not constitute an offence of criminal misconduct. It has also been contended that even the charge under Section 5(1)(c) of PC Act is not made out against the petitioners, because there is no allegation in the chargesheet that the petitioners have fraudulently misappropriated any property entrusted to them.

8 I have heard learned counsel for the parties and perused the material on record including the trial Court record.

9 Before determining the issue as to whether, from the material on record annexed to the chargesheet, any offence is disclosed against the petitioners, it would be apt to notice the legal position as regards the framing of charge. It is a settled law that while considering a case for charge or discharge of an accused, the Court is not required to enter into deep appreciation of the facts. The evidence and the material available before the trial Court is not to be scanned and evaluated in the manner as if the Court has to find whether the accused has committed the offence or he is innocent. At the stage of framing of charge, the Court has only to consider the material for farming opinion as to whether, **prima facie**, offence is committed which would require the accused to be put on trial. .Even a strong suspicion is enough to suggest commission of offence by an accused. The Court has merely to sift the evidence in order to find out whether or not, there are sufficient grounds for proceeding against the accused. A meticulous examination of the record, in order to find whether or not, the accused can be held guilty on the basis of the said material, is not to be undertaken. This position of law has been consistently laid down by the Supreme Court in its various judgments. Reference to some of these judgments would clarify the position.

10 In **Sajjan Kumar vs. CBI, (2010) 9 SCC 368**, the Supreme Court, while considering the scope of Sections 227 and 228 of the CrPC laid down the following principles:

"(i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.

iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal".

11 In a recent case of **Shashikant Sharma and othrs vs. State of Uttar Pradesh and another, 2023 LiveLaw (SC) 1037,** the Supreme Court has reiterated the principle that at the stage of framing of charges, the Court is not required to undertake a meticulous evaluation of evidence and even grave suspicion is sufficient to frame charge. It has been further observed that, if, upon consideration of the admitted evidence of the prosecution as reflected in the documents filed by the Investigating Officer in the report under Section 173 CrPC, the necessary ingredients of an offence are not made out, then the Court is not obligated to frame charge for such offence against the accused.

12 In the light of the aforesaid legal position, let us now analyse the facts and the material relevant to the present case. As per the prosecution case, as already narrated hereinbefore, the petitioners are alleged to have committed offences under Section 5(1)(c)(d) read with Section 5(2) of PC Act and Section 120-B RPC. For determining whether the allegations made in the chargesheet as supported by the material assembled by the Investigating Agency constitute the offence of criminal misconduct, it would be necessary to understand as to what are the ingredients of offence of criminal misconduct. In this regard, the provisions contained in Section 5 of PC Act, are required to be noticed, which read as under:

"5. **Criminal misconduct**:

(1) A public servant is said to commit the offence of criminal misconduct-

(a) ....

(b) ....

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so lo do; or

(d) if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(e) ...."

13 From a careful perusal of the aforequoted provision, it is clear that in order to constitute an offence under Section 5(1)(c), it has to be shown that the accused has dishonestly or fraudulently misappropriated or otherwise converted for his own use any property entrusted to him, or under his control as a public servant, or has allowed any other person to do so.

14 In the present case, there is no allegation in the FIR or in the chargesheet that the petitioners were entrusted with any property or that they have misappropriated the same or converted the same to their own use. In fact, even the Investigating Officer has concluded in the chargesheet that only offences under Section 5(1)(d) read with Section 5(2) of PC Act are made out against the petitioners. There is no mention of offence under Section 5(1)(c) of PC Act in the final conclusion arrived at by the Investigating Officer. The fact that the Special Judge has framed charge against the petitioners under Section

5(1)(c) of the Prevention of Corruption Act also without discussing its ingredients or referring to any supporting material, shows a complete non-application of mind on the part of the learned Special Judge. The framing of charge for offence under 5(1)(c) of PC Act against the petitioners by the Special Judge, in terms of the impugned order is, therefore, without any basis and deserves to be set aside.

15 That takes us to the charge for offence under Section 5(1)(d) of PC Act. As is clear from the language of Section 5(1)(d) of PC Act as quoted hereinbefore, a public servant can be said to have committed offence of criminal misconduct if he, by corrupt or illegal means, has abused his position as a public servant which has resulted in obtaining for himself or for any other person, any valuable thing or pecuniary advantage.

16 According to the prosecution case, which is based upon the material on record, the petitioners, who were holding the responsible positions in JKPCC at the relevant time, undertook the work of construction of RCC bridge at Uttar Behani, but while doing so, the petitioners did not conduct any prior investigation on important aspects, like bridge foundation investigation, Hydrology, Subsoil explorations as also the investigations relating to bearing strength of soil below the foundation and silt factor. Besides this, they did not get the project vetted and approved by the Designs Directorate. This omission on the part of the petitioners, according to the prosecution, led to failure of the bridge as technical aspects relating to execution of the project were not gone into by the petitioners. Due to failure of the

bridge, there was wasteful expenditure, as a result of which, loss to the State exchequer occurred. In support of these allegations, the Investigating Agency has collected the material.

17 The question, to be determined in this case is, as to whether or not, the aforesaid allegations, if taken at their face value, would constitute an offence under Section 5(1)(d) of PC Act.

18 The High Court of Kerala, in the case of **Ramesh Chennithala vs State of Kerala, (2019) 2 Crime 313,** while considering the scope and object of Section 13(1)(d) of un-amended Prevention of Corruption Act, 1988, which is in, pari materia, with Section 5(1)(d) of PC Act, observed that, for a prosecution against a public servant on the allegation of corruption or criminal misconduct as meant and defined under the P.C Act, the public servant must have either accepted illegal gratification or undue advantage for himself or any other person for anything done as part of his official functions as a public servant, or he must have dishonestly or fraudulently misappropriated money from public funds, or must have otherwise converted for his own use any property entrusted to him, or under his control as a public servant in the discharge of his official functions, or he must have enriched himself illicitly, or must have acquired pecuniary resources or property disproportionate to his known source of income. The High Court of Kerala further held that what matters is not whether the public servant has caused loss to the Government or the public exchequer, but whether there was any vicious link or nexus between him and the person benefited, and whether the public servant caused such benefit to the other person with the knowledge that his act will or may cause such benefit and cause loss to the Government or the Public Exchequer. The Court further explained that what is required for a prosecution is not simply that the Government has sustained any loss, but while proving such loss, the prosecution will have also to prove that a corresponding gain was made by the pubic servant or somebody else in whom he is interested or with whom he has vicious nexus. Just because some loss was caused to the Government, or the Public Exchequer by the discharge of functions of a public servant, he cannot be prosecuted under the PC Act.

19 A similar view has been taken by the Kerala High Court in the case of **C. Surendranath and another vs. State of Kerala, 2024 SCC Online Ker** 210. In the aforesaid case, the High Court of Kerala, after noticing the provisions contained in Section (13) (1) (d) of PC Act, held that a public servant can be prosecuted only if he has abused his position as a public servant and obtained for himself or any other person, any valuable thing, or pecuniary advantage. The Court went on to observe that the intention of the legislature is not to punish a public servant for erroneous decision, but to punish for corruption and to fall within the four corners of sub-clause (ii) of Clause (d) of Sub-section (1) of Section 13 of the PC Act, the decision/conduct of the public servant must be dishonest, amounting to corruption.

20 From the foregoing analysis of law on the subject, it is clear that unless it is shown that a public servant has obtained for himself or any other person any valuable thing or pecuniary advantage by resorting to corrupt or illegal means or by abusing his position as a public servant, the charge for offence under Section 5(1)(d) of PC Act is not made out.

21 In the present case, the allegation against the petitioners is that they have not, while executing the project relating to construction of RCC bridge at Utter Behani, conducted prior investigation on certain technical aspects and that they have not got the project vetted by Designs Directorate. This has resulted in collapsing of the bridge and consequent loss to the State exchequer. There is no whisper in the chargesheet and there is no material on record annexed to the chargesheet to even remotely suggest that the petitioners have obtained any pecuniary advantage or a valuable thing, either for themselves or for any other person. In fact, the respondents have not launched prosecution against the contractor who would have been the beneficiary of alleged misfeasance and malfeasance of the petitioners, meaning thereby that nobody has been benefited by the acts and omissions of the petitioners, though the same have caused loss to the State Exchequer. It is not the case of the prosecution that the petitioners have obtained any benefit for themselves due to their illegal acts and omissions as enumerated in the chargesheet. In the face of these circumstances, it cannot be stated that the charge for offence under Section 5(1)(d) of PC Act is made out against the

petitioners. The material on record, at best, shows that that the petitioners have not adhered to the Departmental norms and technical guidelines while executing the project.

22 The question whether violation of the rules and Departmental norms would amount to an offence under the Prevention of Corruption Act, was considered by the Supreme Court in the case of **C.K. Jaffer SHarief vs. State, (2013) 1 SCC 205.** The Supreme Court in the said case held as under:

> "*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."*

23 In the present case, the prosecution records reveal only violation of technical guidelines as also the Departmental and procedural norms on the part of the petitioners. The prosecution has failed to collect any material to show that the petitioners did so with dishonest intention with a view to obtain for themselves or any other person any valuable thing or pecuniary advantage.

24 In view of what has been discussed hereinabove, it is clear that even if the material collected by the Investigating Agency against the petitioners is taken to be correct at its face value and the allegations made in the chargesheet are also accepted as correct, still

then, the charges for offences under Section (5)(1)(c) & (d) of PC Act, or for that matter, any other charge is not made out against the petitioners. Their non-adherence to the procedures and technical guidelines can, at best, give rise to a cause for initiating a regular Departmental enquiry against them, but not a criminal prosecution.

25 The learned Special Judge, while passing the impugned order, has not gone into the aforesaid aspects of the case, thereby falling into grave error while framing charges against the petitioners. The impugned order passed by the learned Special Judge is, therefore, not sustainable in law and deserves to be quashed.

26 Accordingly, the petition is allowed and the impugned order of framing charges against the petitioners is set aside and the petitioners are discharged. Consequently, the chargesheet stands dismissed.

The record along with a copy of this judgment be sent back.

(Sanjay Dhar)
Judge

Jammu
29 .11.2024
Sanjeev

Whether order is reprotable:Yes