IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKHAT SRINAGAR

Reserved on: 28.06.2022
Pronounced on: 08.07.2022

CRM(M) No.337/2021

SANJAY KUMAR SRIVASTAVA & ORS. ... PETITIONER(S)

Through: - Mr. Syed Faisal Qadiri, Sr. Advocate with Ms. Iqra Khalid, Advocate.

Vs.

CENTRAL BUREAU OF INVESTIGATION …RESPONDENT(S)

Through: - Mr. T. M. Shamsi, ASGI.

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

JUDGMENT

1) The petitioners have invoked the jurisdiction of this Court under Section 482 of the Cr. P. C thereby challenging the proceedings initiated by Chief Judicial Magistrate, Srinagar, in a challan arising out of FIR No.RC1232019A0003 for offences under Section 120-B read with 420 of RPC and Sections 4-H, 5(1)(d) read with Section 5(2) of the J&K Prevention of Corruption Act (hereinafter referred to as the J&K PC Act). Challenge has also been thrown to order dated 27.11.2020 and order dated 25.09.2021 passed by Chief Judicial Magistrate, Srinagar, in the challan emanating out of the aforesaid FIR.

2) The facts leading to the filing of the instant petition are that the aforesaid FIR came to be registered by CBI/Anticorruption Bureau (ACB), Srinagar, on the basis of source information alleging therein that the petitioners, who happen to be the officers/officials of Srinagar Central Sub Division, Central Public Works Department, Srinagar, in connivance with accused Ghulam Mohi-ud-din Bhat of M/S Ghulam Mohi-ud-din Bhat & Sons (Govt. Contractor) and other unknown officials/private persons were involved in alleged irregularities i.e. use of sub-standard material resulting in poor workmanship in the construction of helibase and chain link fencing, adjoining Airbase with provision of cabin/helicopter Hangar at BSF Campus, Humhama, Srinagar, during the year 2014-2015. It was further alleged that the aforesaid accused/public servants in connivance with each other and accused contractor managed to submit fake invoices of cement and TMT steel and also used sub-standard material in the execution of aforesaid contract. It was alleged that no technical staff on behalf of the contractor was deployed and no batch mix plant was utilized in the work. It was further alleged that the payments on extra cement to the tune of Rs.28.00 lacs, in addition to the basic quantity of cement has been released by the accused public servants to the contractor thereby providing undue benefit to the said contractor and causing wrongful loss to the Government exchequer.

3) Investigation of the case was set into motion and after investigation, the allegations regarding submission of fake invoices of

steel TMT bars and cement were established. It was also established that sub-standard material was used during the execution of the contract work, batch mix plant was not used in execution of the concrete work and that no technical staff was deployed by the contractor at the site. After completion of investigation, offences under Section 4-H, 5(1)(d) r/w 5(2) of J&K PC Act and Section 120-B r/w Section 420 RPC were found established against the petitioner and the co-accused. The respondent approached the competent authority for sanction of prosecution in terms of Section 6 of the J&K PC Act against the petitioner who are public servants but the same was denied by the competent authority of CPWD. After denial of sanction for prosecution, the respondent filed the challan against the petitioners and the co-accused to the extent of commission offences under Section 120-B, 420 RPC only and dropped the offence under J&K PC Act.

4) After the charge sheet was laid before the Court of learned Chief Judicial Magistrate, Srinagar, an order came to be passed by the said Court on 27.11.2020, whereby the learned Magistrate accepted the contention of Assistant Public Prosecutor, appearing on behalf of the respondent herein that the acts alleged to have been committed by the petitioners fall beyond the scope of their official duty and, as such, no previous sanction under Section 197 of Cr. P. C is required in the case. Accordingly, the learned Magistrate took cognizance of the offences and issued process against the accused including the petitioners herein. This order came to be challenged by petitioner No.1 herein by way of a

petition under Section 482 of the Cr. P. C (CRM (M) No.135/2021) before this Court. The aforesaid petition came to be disposed of by this Court in terms of order dated 22.04.2021, leaving it open to the petitioner therein to approach the trial court by way of an application seeking his discharge on the pleas raised in the said petition. Accordingly, the petitioners filed an application for their discharge before the learned trial Magistrate. However, the learned Magistrate, after hearing the parties, passed a detailed order dated 25.09.2021, whereby application of the petitioners was dismissed and charge for offences under Section 120-B read with 420 RPC was framed against the petitioners and the co-accused. Both these orders i.e. order dated 27.11.2020 and order dated 25.09.2021 have been impugned by the petitioners by way of instant petition.

5) I have heard learned counsel for the parties and perused the grounds of petition as well as the response filed by the respondent.

6) Learned senior counsel appearing for the petitioners has raised two contentions, one that once sanction for prosecution in terms of Section 6 of the J&K PC Act was declined by the competent authority, it was not open to the respondent to file challan against the petitioners by dropping the offences under the provisions of the J&K PC Act and confining the challan only to offences under RPC. According to learned senior counsel, the offences under the J&K PC Act and the RPC are interconnected and if sanction for prosecution was declined by the competent authority, after considering the material collected by the

investigating agency, the petitioners could not have been subjected to prosecution for the offences under RPC by circumventing the order of the competent authority. In the alternative, the learned senior counsel has argued that even if it is assumed that the respondent was justified in dropping the offences under the provisions of the J&K PC Act and launching prosecution against the petitioners only in respect of the offences under RPC, still then, because the acts alleged to have been committed by the petitioners have been done by them in exercise of their official functions, therefore, without there being previous sanction for prosecution of the petitioners under Section 197 of the Cr. P. C, the learned trial Magistrate was not justified in taking cognizance of the offences and framing charge against the petitioners.

7) *Per contra,* learned ASGI, appearing for the respondent, has vehemently argued that it was open to the respondent to confine the challan against the petitioners to the offences under Section 120-B read with Section 420 RPC only, which are independent offences. He has further contended that the previous sanction of the Government for launching prosecution for offences under Section 120-B and 420 RPC is not required in this case because the acts alleged to have been committed by the petitioners do not come within the purview of their official acts/functions. Learned ASGI has submitted that fabrication of records and entering into criminal conspiracy can never be termed as acts done in discharge of official functions.

8) Before dealing with the rival contentions of the learned counsel for the parties, it would be apt to notice certain facts which have emerged from the record. The FIR, which is subject matter of the instant case, was registered in respect of offences under the J&K PC Act as well as the offences under Ranbir Panel Code. After investigation of the case, offences under both the aforesaid provisions were established against the accused including petitioners herein on the basis of same set of facts. The record further reveals that the respondent approached the competent authority for grant of sanction for prosecution against the petitioners in terms of Section 6 of the J&K PC Act because the petitioners happen to be the public servants. The matter was considered by the Central Vigilance Commission (CVC) and vide office memorandum dated 21st September, 2020, it was conveyed to the competent authority i.e. CPWD, that after examining the record of the case, sanction for prosecution against petitioners Laxman Singh Adhikari, Sanjay Kumar Srivastava, Prabhat Singh and Sharawan Kumar has been denied. The Commission further advised initiation of departmental action against petitioners Sanjay Kumar Srivastava and Sharawan Kumar.

9) Vide communication dated 29th October, 2020, CPWD informed the respondent that disciplinary authority of the CPWD has decided for denial of sanction for prosecution against the petitioners and that it has decided to initiate necessary departmental action against petitioners Sanjay Kumar Srivastava and Sharawan Kumar. Upon receipt of this

communication, the respondent decided to launch prosecution against the petitioners in respect of the offences under Section 120-B read with Section 420 RPC and omitted offences under the J&K PC Act from the challan, though the facts and the evidence have remained the same.

10) Central Vigilance Commission is a statutory authority created under Central Vigilance Act, 2003. Section 8 of the said Act deals with functions and powers of the Vigilance Commission. Sub-Section (1)(a) of the said provision is relevant to the context and the same is reproduced as under:

> *8. Functions and powers of Central Vigilance Commission. (1) The functions and powers of the Commission shall be to—*
>
> *(a) exercise superintendence over the functioning of the Delhi Special Police Establishment in so far as it relates to the investigation of offences alleged to have been committed under the Prevention of Corruption Act, 1988 or an offence with which a public servant specified in sub-section (2) may, under the Code of Criminal Procedure, 1973, be charged at the same trial;*

11) From a perusal of the aforesaid provision, it is clear that superintendence over the functioning of the Delhi Special Police Establishment Act relates to not only investigation of offences under PC Act but it also relates to any other offence which a public servant is alleged to have committed and for which he can be charged at the same trial along with the offences under the PC Act. Thus, it cannot be stated that opinion of Central Vigilance Commission where the case has been referred to in terms of Section 6 of the J&K PC Act, which is in *pari materia* with Section 19 of the PC Act of 1988, is confined only to the offences under the provisions of the PC Act. The same definitely

covers all other offences for which a public servant may be charged at the same trial along with the offences under the provisions of the PC Act.

12) A perusal of the Manual of the Central Bureau of Investigation as also the Vigilance Manual, which is applicable to Central Vigilance Commission, would show that if there is a difference of opinion between advices of Central Vigilance Commission and the concerned department as regards the grant of sanction for prosecution against a public servant, inasmuch if Central Vigilance Commission advises grant of sanction for prosecution but the concerned department proposes not to accept the said advice, the issue has to be resolved by referring the matter to the Department of Personnel and Training for a final decision. Neither the Manual of CBI nor the Vigilance Manual, 2017, provides for a situation where there is a difference between the opinion of the CBI and the advice given by the Central Vigilance Commission, as accepted by the concerned department. Thus, the only option available to CBI, in such a situation, is to make a request to the Central Vigilance Commission or the concerned department to reconsider the matter either by providing further material or otherwise. The CBI cannot conveniently ignore the advice of the Central Vigilance Commission as accepted by the concerned department and prosecute the public servants by mischievously dropping the offences under the provisions of the PC Act, thereby circumventing the protection granted to a public servant under the said legislation. Such

an approach would render the protection granted to a public servant against frivolous prosecutions in terms of Section 6 of the J&K PC Act, which is in *pari materia* with Section 19 of the PC Act of 1988, nugatory and redundant, which can never be the intention of the legislature.

13) A Division Bench of the High Court of Bombay in the case of **Atchut Mucund Alornekar and others vs. Central Bureau of Investigation/Anti Corruption Bureau, Goa,** 2012 SCC Online Bom 1256, has, in somewhat similar circumstances where the CBI, after its proposal for grant of sanction of prosecution against public servants was declined by the competent authority on the advice of the Central Vigilance Commission, filed a charge sheet against the accused public servants for offences under Section 120-B read with Section 420 of IPC, observed as under:

> *"33. Admittedly, the F.I.R was registered under **sections 120-B r/w 420 of I.P.C and sections 13(2) r/w 13(1)(d) of the P. C. Act.** All the petitioners are public servants. Under **section 19 of the P. C. Act.,** prior sanction of the appropriate authority was required to prosecute the petitioners. In the present case, the prior sanction had to be obtained from the C.V.C, New Delhi. The allegations are the same for offences under I.P.C and under P. C. Act. As already stated earlier, the C.V.C had declined sanction stating that the matter was not fit for launching of prosecution. As has been argued by the learned Senior Counsel appearing for the petitioners, the offences punishable under **sections 120-B r/w 420 of I.P.C** are inter-linked with the offences punishable under **sections 13(2) r/w 13(1)(d) of the P. C. Act.** The offences under **Section 120-B r/w 420 of I.P.C**, are not separate or independent accusations. Therefore once the sanction under **section 19 of the P. C. Act** was refused by the competent authority and the said competent authority found that the matter was not fit for launching*

> *prosecution, the respondent could not have laid charge-sheet against the petitioners under* ***Section 120-B r/w 420 of I.P.C****, by conveniently dropping* ***section 13(2) and 13(1)(d) of P. C. Act.*** *Again, the petitioners No. 15 and 16 are the public servants removable by the Central Government, though others are removable by the department. The allegation against them is that they abused their official position as public servants. The act or omission alleged to have been performed by the said petitioners is in the course of their service and as part of their duty and is official in nature. In the case of "Sheetla Sahai" (supra), the Apex Court has held that for the purpose of attracting* ***section 197 of Cr.P.C****, it is not necessary that the public servants must act in their official capacity but even where the public servants purport to act in their official capacity, the same would attract the provisions of section 197. Therefore, prior sanction under* ***section 197 of Cr.P.C*** *was required to be obtained insofar as the petitioners No. 15 and 16 are concerned.*
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> *34. In our considered opinion, this is a fit case where in order to meet the ends of justice and to prevent the miscarriage of justice, the F.I.R and the proceedings in Criminal Case No. 2.S/2012.B pending in the Court of J.M.F.C at Vasco-da-Gama as against the petitioners are liable to be quashed and set aside. No other view is possible."*

14) In **Ashoo Surendranath Tewari vs. Deputy Superintendent of police and another,** 2014 SCC Online Bom 5042, a Division Bench of the Bombay High Court was dealing with a case where the competent authority, on the basis of advice of Central Vigilance Commission, had declined sanction for prosecution against accused public servants for offences under Section 120-B of IPC read with Sections 420, 406, 467, 468 and 471 of IPC and Section 13(2) read with Section 13(1)(d) of Prevention of Corruption Act, 1988, and the Special Court discharged the accused public servants for offences under Section 13(2) read with Section 13(1)(d) of Prevention of Corruption Act, 1988 but proceeded to frame charges against them for offences under Section 120-B of IPC

read with Sections 420, 406, 467, 468 and 471 of IPC. The High Court upheld the aforesaid order of the Special Court. However, in an appeal filed against the aforesaid order of the Bombay High Court, the Supreme Court in the case of **Ashoo Surendranath Tewari vs. Deputy Superintendent of Police, EOW, CBI another,** (2020) 9 SCC 636, set aside the order of the High Court and after applying the ratio laid down by it in the case of **Radheshyam Kejriwal vs. State of West Bengal,** (2011) 3 SCC 581, observed that when the matter has been examined by the Central Vigilance Commission and its opinion has been accepted by the competent authority, chances of conviction in a criminal case involving the same facts appear to be bleak. Accordingly, the Supreme Court set aside the order of the High Court as well as that of the Special Court and discharged the petitioner/accused.

15) From the forgoing enunciation of law on the subject, it is clear that once a particular set of facts is examined by Central Vigilance Commission whereafter it reaches the conclusion that on the basis of material put up before it, no criminal offence is made out against the accused public servant and the said opinion is accepted by the competent authority, it is not open to the investigating agency to file a challan on the same set of facts against the accused public servant by dropping the offences under the provisions of Prevention of Corruption Act and confining the challan only to the offences under other penal provisions.

16) The Central Vigilance Commission, as per the provisions contained in Clauses 6.7.2, 6.7.3 and 6.7.4 of the Vigilance Manual, 2017, is required to apply its mind to the material collected by the investigating agency that has been produced before it, whereafter it has to come to a conclusion as to whether on the basis of the said material a case for grant of sanction for prosecution against the public servant is made out. Clause 6.7.4 of the Manual is relevant in this context and the same reads as under:

> *6.7.4 The guidelines issued vide Commission's Circular No. 005/VGL/11 dated 25.05.2015 are hereunder: -*
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> *(a) The prosecution must send the entire relevant record to the sanctioning authority including the FIR disclosure statements, statements of witnesses, recovery memos, draft charge-sheet and all other relevant material. The record so sent should also contain the material / document, if any, which may tilt the balance in favour of the accused and on the basis of which, the competent authority may refuse sanction.*
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> *(b) The authority itself has to do complete and conscious scrutiny of the whole record so produced by the prosecution independently applying its mind and taking into consideration all the relevant facts before grant of sanction while discharging its duty to give or withhold the sanction.*
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> *(c) The power to grant sanction is to be exercised strictly keeping in mind the public interest and the protection available to the accused against whom the sanction is sought.*
>
> *(d) The order of sanction should make it evident that the authority had been aware of all relevant facts / materials and had applied its mind to all the relevant material.*
>
> *(e) In every individual case, the prosecution has to establish and satisfy the court by leading evidence that the entire relevant facts had been placed before the sanctioning authority and the authority had applied its mind on the same and that the sanction had been granted in accordance with law.*

17) From a perusal of the aforesaid Clause, it is clear that Central Vigilance Commission has to do complete scrutiny of the record produced by the prosecution and it has to apply its independent mind to this material. The Commission has also to keep in mind the public

interest and the protection available to the accused against whom the sanction is sought. It is only thereafter that the Commission takes a decision as to whether or not sanction for prosecution against the public servant is to be granted.

18) In the instant case, the Commission has undertaken the aforesaid exercise whereafter it has come to a conclusion that sanction for prosecution against the petitioners is required to be declined, meaning thereby that the material collected by the investigating agency has not been sufficient enough to persuade the Commission to make out a case for grant of sanction for launching prosecution against the petitioners. It has to be borne in mind that the opinion rendered by the Commission in this case is relating to the same set of facts as has been made the basis for launching prosecution against the petitioners for the offences under RPC, which are definitely interlinked to the allegations so far as the same relate to the offences under the J&K PC Act.

19) The protection granted to a public servant against the prosecution under Section 6 of the J&K PC Act, which is in *pari materia* with Section 19 of the PC Act of 1988, has been provided under the statute in order to safeguard the public servants from frivolous complaints and un-necessary harassment, while they are discharging their official duties. It is to give them freedom to perform their duties without fear or favour. The power to grant or refuse sanction for prosecution in the hands of the sanctioning authority is to safeguard the honest public servants from vexatious prosecutions. Grant of sanction for prosecution

of a public servant is not an idle formality but the same is a mandatory requirement of law. This protection given to a public servant cannot be circumvented by defeating the provisions relating to grant of sanction as contained in the Prevention of Corruption Act by dropping the offences under the said Act and launching prosecution in respect of the offences under other statutes in a case where same set of facts gives rise to offences under different statutes.

20) If we have a look at the impugned orders passed by the learned Chief Judicial Magistrate, Srinagar, the aforesaid aspect of the matter has been completely overlooked by the learned Magistrate. What has weighed with the learned Magistrate while passing the impugned orders is that the offences under Section 120-B read with Section 420 RPC do not require previous sanction for prosecution as the said offences cannot be stated to have been committed by the petitioners in discharge of their official duties. The learned Magistrate, even after noticing the issue as to whether in a case where sanction for prosecution for offences under the PC Act has been declined, the prosecuting agency is justified to drop these offences and launch prosecution against the accused public servants in respect of the offences under RPC on the same set of facts, has not addressed this issue at all in the impugned orders. The learned Magistrate, it seems, has concentrated more on the issue as to whether previous sanction for prosecution under Section 197 of the Cr. P. C is required in the case, without addressing the basic issue relating to effect of denial of sanction for prosecution in terms of

Section 6 of the J&K PC Act. Thus, the impugned orders passed by the learned Magistrate have been rendered unsustainable in law.

21) For the facts emanating from the record, it is clear that it is a case where the respondent has, in order to circumvent and defeat the protection granted to the petitioners as public servants against their prosecution without sanction by the competent authority, in terms of the provisions contained in Section 6 of the J&K PC Act, launched the prosecution against them by conveniently dropping the offences under the J&K PC Act and filing the challan against them for offences under RPC only on the same set of facts.

22) The Supreme Court in the case of **Chittaranjan Das vs. State of Orissa,** (2011) 7 SCC 167, has, while dealing with a situation where the prosecuting agency had launched prosecution against the public servants after their retirement even though sanction for prosecution against them was declined while they were in service, observed as under:

> *"14. We are of the opinion that in a case in which sanction sought for is refused by the competent authority, while the public servant is in service, he cannot be prosecuted later after retirement, notwithstanding the fact that no sanction for prosecution under the Prevention of Corruption Act is necessary after the retirement of Public*

> *Servant. Any other view will render the protection illusory. Situation may be different when sanction is refused by the competent authority after the retirement of the public servant as in that case sanction is not at all necessary and any exercise in this regard would be action in futility.*

23) The analogy of the aforesaid ratio is certainly applicable to the facts of the instant case also because allowing the prosecution against the petitioners for the offences under RPC when the sanction for prosecution against them has been declined under Section 6 of the J&K PC Act on the same set of facts, will render the protection available to the petitioners illusory.

24) For the foregoing reasons, the petition is allowed and the impugned proceedings as well as the impugned orders passed by the learned Chief Judicial Magistrate, Srinagar, are quashed.

25) A copy of this order be sent to learned trial court for information.

(SANJAY DHAR)
JUDGE

Srinagar,
08.07.2022
"Bhat Altaf, PS"

Whether the order is speaking: ***Yes/No***
Whether the order is reportable: ***Yes/No***