A.F.R.

Court No. - 34

Case :- APPLICATION U/S 482 No. - 15070 of 2020

Applicant :- Om Narayan Tiwari

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Vikas Budhwar,Shrawan Kumar Ojha,Vinay Saran(Senior Adv.)

Counsel for Opposite Party :- G.A.

Hon'ble Suneet Kumar,J.

1. Heard Sri Vinay Saran, Senior Advocate, assisted by Sri Vikash Budhwar and Shrawan Kumar Ojha, learned counsel for the applicant and learned A.G.A. for the State.

2. The petition is being decided without calling for counter affidavit on consent of the parties.

3. By the instant petition filed under Section 482 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.'). the applicant seeks the following relief:

> *"It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to allow this application, and further be pleased to quash the impugned charge-sheet dated 17.12.2019 alongwith cognizance dated 05.08.2020 passed by learned Special Judge (Prevention of Corruption Act) Special Court No. 1, Varanasi in Special case No. 517 of 2020, State Vs. Om Narayan Tiwari arising out of Case Crime No. 867 of 2012, under section 13(1)(E) read with section 13(2) of Prevention of Corruption Act, 1988, Police Station Kotwali, District Ballia pending in the court of Special Judge (Prevention of Corruption Act), Special Court No. 1, Varanasi."*

4. The applicant, a senior clerk, in the office of Chief Medical Officer, District Ballia, upon enquiry was found having assets beyond his known and legal source of income. The applicant seeks quashing of the charge sheet and consequential proceedings on the ground that applicant came to

be exonerated in disciplinary proceedings on an identical charge. It is submitted that prosecution of the applicant on the charge that was the basis of the disciplinary proceedings is abuse of the process of the Court.

5. The facts giving rise to the instant petition, briefly stated, is that an F.I.R. came to be lodged on 30 November 2012 by Inspector, Vigilance Department, Gorakhpur, under Section 13(1)(e) of the Prevention of Corruption Act, 1988 (hereinafter referred to as "P.C. Act").

6. It is alleged that the Vigilance Department vide letter dated 23 November 2010, directed an open enquiry against the applicant. In the enquiry, it was found that applicant being a public servant, during the period of enquiry, had spent Rs. 16,52,742 over and above his known source of income. The applicant was, prima facie, found guilty of having acquired disproportionate assets.

7. The Investigating Officer (for short "I.O.") collected documents, including, declaration filed by the applicant; document of the Sales Tax department; income and bank statements related to the applicant and his family members; financial assitance given by the relatives of the applicant in purchasing the property and construction of the house; the documents relating to expenses incurred by the applicant and the family. The statement under Section 161 Cr.P.C. was recorded of the family members; executive engineer of the electricity department; bank official; wife of the applicant and official of the insurance company. I.O. upon investigation, prima facie, was of the opinion that the applicant had amassed assets disproportionate to his known source of income. The check period is from the date of appointment (28.04.1987) to 31 December 2012. (Parcha No. 2 at page 45 of the petition)

8. Sanction of the competent authority for prosecution was granted on 4 January 2019 which is part of the case diary. Charge sheet was filed on 17 December 2019, cognizance by the competent court was taken on 5 August 2020 summoning the applicant to face trial.

9. Earlier a complaint came to be filed against the applicant before the Lokayukta, Uttar Pradesh, on 15 September 2006 in terms of the Uttar Pradesh Lokayukta and Up-Lokayuktas Act, 1975. Applicant was subjected to notice to

show cause. Pursuant thereof, the applicant replied and recorded his statement before the Lokayukta. The report dated 20 August 2010 came to be submitted holding the applicant, prima facie, guilty of acquiring disproportionate assets, thereby, directing the Government to take necessary action against the applicant for misconduct and prosecute the applicant for the offence under the P.C. Act.

10. It appears, thereafter, on the report of the Lokayukta, applicant came to be charge sheeted (12 October 2010) in disciplinary proceedings initiated by the Disciplinary Authority. The charge against the applicant, inter-alia, was that being a clerk he had amassed property of several crores; purchased a residential plot in the name of his wife; the market value as on date was valued approximately at Rs. 50 lakh. The imputation of misconduct, thus, was that applicant being a clerk, had acquired assets beyond his known legal means. The applicant denied the allegation and submitted his reply, inter alia, contending that the parcel of land was purchased on 5 June 1992 for Rs. 95,200/- by his wife, Rs. 13,850/- was spent on Stamp and Rs. 700 towards expenses for registration i.e. total 1,09,750,00/- was incurred. Subsequently, a house was constructed thereon valued at Rs. 1,20,000/-. It was further stated that the wife of the applicant is an income tax assessee engaged in purchase and sale of agricultural products (vegetables, potatoes, grains etc.). Further, the applicant had borrowed money from his family members and other relatives. Enquiry Officer/Additional Director, Medical Health Family Welfare, Azamgarh Division, Azamgarh, on considering the evidence did not find the charge of disproportionate assets proved against the applicant. The applicant, however, was held guilty for not taking prior permission nor informing the Government before purchasing the property and building a house. Applicant came to be punished, withholding one increment temporartily.

11. It is, in this backdrop, the learned Senior counsel appearing for the applicant submits that the applicant came to be exonerated in disciplinary proceedings on the charge of disproportionate assets. The prosecution of the applicant under the P.C. Act for the same charge based on the same material is unsustainable and abuse of the process of the Court. In support of his submission, reliance has been placed on the decision rendered by the Supreme Court in **Ashoo**

Surendranath Tewari Versus The Deputy Superintendent of Police, EOW, CBI [1] (for short 'Ashoo Tewari case').

12. In rebuttal, learned Additional Government Advocate (A.G.A.) submits that exoneration of the applicant in departmental disciplinary proceeding would not mean exoneration or acquittal in the criminal case. The standard of proof in a departmental proceedings is lower than that of criminal prosecution. It is further urged that the I.O. had not accepted the explanation of the applicant that the alleged income of the wife of the applicant is bonafide/genuine, rather, a sham coverup of illegal earnings of the applicant. She was not registered with the relevant authorities for trade, including, the Sales Tax department. It is further urged that the applicant had siphoned of his ill acquired money through different channels. It is further submitted that Lokayukta on the same materials furnished by the applicant had returned a finding, prima facie, holding the applicant guilty of acquiring disproportionate assets beyond known source of income. The exoneration of the applicant in the disciplinary proceeding would not absolve him of the culpability of the offence.

13. The facts, inter se, parties are not in dispute.

14. The question that arises for determination is whether a person who is exonerated in a departmental disciplinary proceedings no criminal proceedings can be advanced or may continue against him on the same subject matter/or charge.

15. It would be apposite to consider the law on the proposition being pressed by the learned counsel for the applicant.

16. In **State of N.C.T. of Delhi Vs Ajay Kumar Tyagi**[2] (for short "NCT Delhi case"), a three Judge Bench was called upon to answer a reference referred by a two Judge Bench on having noticed conflicting views. The issue for consideration by the Larger Bench is as follows:

> *"The facts of the case are that the respondent has been accused of taking bribe and was caught in a trap case. We are not going into the merits of the dispute.*

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1. Criminal Appeal No. 575 of 2020 (arising out of SLP (Crl.), decided on 8 September 2020
2. 2012(9) SCC 685

However, it seems that there are two conflicting judgments of two Judge Benches of this Court; (I) P.S. Rajya vs. State of Bihar reported in (1996) 9 SCC 1, in which a two Judge Bench held that if a person is exonerated in a departmental proceeding, no criminal proceedings can be launched or may continue against him on the same subject matter, (ii) Kishan Singh Through Lrs. Vs. Gurpal Singh & Others 2010 (8) SCALE 205, where another two Judge Bench has taken a contrary view."

17. On having considered the decisions, including that rendered by the High Courts, the Supreme Court, answered the reference in the following terms:

> *"**We are, therefore, of the opinion that the exoneration in the departmental proceeding ipso facto would not result into the quashing of the criminal prosecution**. We hasten to add, however, that if the prosecution against an accused is solely based on a finding in a proceeding and that finding is set aside by the superior authority in the hierarchy, the very foundation goes and the prosecution may be quashed. But **that principle will not apply in the case of the departmental proceeding as the criminal trial and the departmental proceeding are held by two different entities. Further they are not in the same hierarchy.**"*

18. Upon answering the reference the order of the High Court quashing the criminal prosecution was reversed being unsustainable on misreading **P.S. Rajya** case.

19. In **P.S. Rajya v. State of Bihar[3],** (for short 'PS Rajya' case) the question before the Court was as to whether:-

> *"3. …….the respondent is justified in pursuing the prosecution against the appellant under Prevention of Corruption Act, 1947 notwithstanding the fact that on an identical charge the appellant was exonerated in the departmental proceedings in the light of a report submitted by the Central Vigilance Commission and concurred by the Union Public Service Commission."*

20. The Court clarified in para 23 of the report that *"...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..."*

21. In **NCT Delhi,** the Court, therefore, was of the opinion that the prosecution was not terminated on the ground of exoneration in the departmental proceedings but on the peculiar facts. The observation is as follows:

3. (1996) 9 SCC 1

> *"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), the Supreme Court quashed the prosecution when the accused was exonerated in the departmental proceeding would not mean that it was quashed on that ground."*

22. **P.S. Rajya** case came up for consideration before the Supreme Court in **State v. M. Krishna Mohan**[4], thereafter, in the case of **Central Bureau of Investigation v. V.K. Bhutiani's**[5], the Supreme Court held that quashing of the prosecution was illegal holding that exoneration in departmental proceedings would not lead to exoneration or acquittal in criminal case. It is well settled that the standard of proof in department proceeding is lower than that of criminal prosecution. It is equally well settled that the departmental proceeding or for that matter criminal cases have to be decided only on the basis of evidence adduced therein. Truthfulness of the evidence in the criminal case can be judged only after the evidence is adduced therein and the criminal case cannot be rejected on the basis of the evidence in the departmental proceeding or the report of the Enquiry Officer based on those evidence.

23. On having considered the law, reverting to **Ashoo Tiwari** case relied by the learned counsel for the applicant. The Supreme Court relying on **Radheyshyam Kejriwal Vs. State of West Bengal and another**[6] (for short 'Radheyshyam Kejriwal case)**,** set aside the judgment of the High Court and Special Judge and discharged the appellant from the offence under the Penal Code. The facts, therein, was that the employer SIDBI did not consider it a fit case, consequently, declined permission to prosecute the appellant. The Chief Vigilance Commission (CVC) after having gone through the arguments put forth by the CBI and SIDBI during the course of joint meeting was of the opinion that the appellant may have been negligent without any criminal culpability.

24. In **Radhey Shyam Kejriwal**, the adjudicating authority under the provisions of the Foreign Exchange Regulation Act, 1973 was not convinced with the Enforcement Directorate to impose penalty upon the appellant. In other words, if

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4. 2007 14 SCC 667
5. (2009) 10 SCC 674
6. (2011) 3 SCC 581

the departmental authorities themselves, in statutory adjudication proceedings recorded a categorical and an unambiguous finding that there is no such contravention of the provisions of the Act, it would be unjust for such departmental authorities to continue with the criminal prosecution and say that there is sufficient material. It would be unjust and an abuse of the process of the court to permit Enforcement Directorate & Foreign Exchange Regulatory Authority to continue with criminal proceedings on the very same material.

25. After referring to various decisions the Supreme Court culled out the ratio of the decisions as follows:-

> *"38. The ratio which can be culled out from these decisions can broadly be stated as follows:*
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> *(i) Adjudication proceedings and criminal prosecution can be launched simultaneously;*
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> *(ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;*
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> *(iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;*
>
> *(iv) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;*
>
> *(v) Adjudication proceedings 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 proceedings in favour of 8 the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and*
>
> *(vii)* ***In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases."***

26. The Court finally concluded:

> *"39. In our opinion, therefore, the yardstick would be to judge as to whether the allegation in the adjudication proceedings as well as the proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceedings is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court."*

27. In nutshell, to recapitulate, in **Radhey Shaym Kejriwal**, the statutory adjudicating authority did not find prima facie case to impose penalty for violation of the Act. The prosecution based on the same material was held unjustified and abuse of the process of the Court. In **Ashoo Tiwari**, CVC agreed with the competent authority of SIDBI, after hearing the CBI, that complicity and culpability of the appellant was not found. The Court relying on para 38(vii) of **Radhey Shaym Kejriwal** and having regard to the detail CVC order was of the considered opinion that the "*chances of conviction in a criminal trial involving the same facts appear to be bleak*".

28. Both the decisions were decided on the peculiar facts arising therein, the decisions do not lay down any proposition that exoneration of an employee in departmental disciplinary proceedings, the criminal prosecution on the identical charge or evidence has to be quashed automatically.

29. Even otherwise in a case were acquittal of the employee by the criminal court is concerned it does not preclude the employer from taking disciplinary action if it is otherwise permissible. The two proceedings, criminal and departmental, are entirely different. They operate in different fields and have different objectives. In service jurisprudence, the purpose of enquiry proceeding is to deal with the delinquent employee departmentally and impose penalty in accordance with the service rules. The rule relating to appreciation of evidence and proof in the two proceedings is also not similar. In criminal law burden of proof is on the prosecution to prove the guilt. "without reasonable doubt", on the other hand, penalty can be imposed on the delinquent employee on a finding recorded on the basis of "preponderance of probability" **(Refer-Avinash Sadashiv Bhosale (D) through legal heirs Vs. Union of India[7], G.M. Tank Versus State of Gujarat and others[8]; Depot Manager, A.P. State Road Transport Gorakhpur Vs. Mohd. Yusuf Miya[9]).**

30. Reverting to the facts of the case in hand, it is not in dispute that the statutory authority Lokayukta held the applicant, prima facie, guilty of disproportionate assets and misconduct, accordingly, recommended criminal

7. (2012) 13 SCC 142
8. (2006) 5 SCC 446
9. [1997 (2) SCC 699]

prosecution and disciplinary proceedings against the applicant. The Department/Employer of the applicant in compliance lodged an FIR being Crime Case No. 578 of 2010, under section 13(1)(e) of Prevention of Corruption Act, 1988.

31. At the same time the department initiated disciplinary proceedings. The charge-sheet did not contain any specific charges or imputation of misconduct. The points framed by the Lokayukta for determination of the complaint against the applicant contained in the order of the Lokayukta was taken as the charge against the applicant. The Enquiry Officer on considering the reply of the applicant and the evidence returned a finding that the charge of disproportionate assets is not proved. The Enquiry Officer further records that he is constraint to disagree with the findings recorded by the Lokayukta. The enquiry report came to be accepted by the disciplinary authority i.e. Director (Administration) Family Welfare, U.P. Lucknow, vide order dated 22 March 2017.

32. That what is writ large from the above noted facts is the manner in which the departmental authorities proceeded against the applicant departmentally to scuttle the Lokayukta report and the prosecution against the applicant. Charge was not framed; imputation of misconduct was not reduced nor detailed; disciplinary authority sat in appeal over the reasoned findings of the statutory authority– the Lokayukta. The Act confers powers of court upon the Lokayukta to summon and examine witness or records, such power is lacking in the disciplinary authority. The scope, objective and ambit of enquiry in both the proceedings is distinct and different. In the same breath the complainant/informant (Deputy Chief Medical Officer, NRHM Ballia) vide communication dated 30 December 2020 requested the I.O. not to proceed with the investigation pending disciplinary enquiry. The chain of facts clearly reflects the influence of the applicant, a clerk, upon the officials of the department. The conduct of the disciplinary authority on the face of the material brought on record tantamounts to perpetuating fraud and corruption by conspicuously attempting to shield the applicant under the garb of exoneration in disciplinary proceedings.

33. The subsequent FIR came to be lodged by the Vigilance, upon investigation, charge-sheet was filed, which is under challenge.

34. I have carefully gone through the voluminous material brought on record with the assistance of the learned counsel for the parties. I would restrain from entering into the merit of the evidence. The enquiry/investigation by the Lokayukta/I.O. is in detail, meticulous and supported by cogent evidence. It would suffice to take note of the admitted case setup by the applicant. Applicant came to be appointed on compassionate ground in 1987. He was married in 1988. Applicant and his wife do not have ancestral agricultural land. The plot of land was purchased by his wife in 1992 and the house, thereon, came to be constructed immediately thereafter. The source of income setup by the wife is trade in agricultural produce. The applicant created the asset within 5 years of his service and 4 years of marriage. The trading business of the wife is not registered with any of the statutory authorities, including, Sales Tax Department. The trade transaction is in cash. The documents/accounts pertaining sale/purchase was not maintained.

35. In this backdrop of admitted facts the applicant came to be let off in the departmental disciplinary proceedings on the ground that the wife is an income tax assessee, thus, taking her income to be lawful. On the other hand, the authorities trained in enquiry/investigation, prima facie, found the explanation furnished by the applicant a mere cover up of his unexplained income far beyond his known and legal source. The alleged business and income of the wife, prima facie, was taken to be a sham transaction – the basis for prosecution. In the given facts to contend that exoneration in disciplinary proceedings would tantamount to quashing of criminal proceedings would be travesty of justice.

36. Having regard to the law and reasons hereinabove, the petition lacks merit, accordingly, dismissed on fact and law.

37. The trial court to proceed in accordance with law without being influenced by the observations made in the order and judgment.

Order Date :- 12.10.2020
K.K. Maurya