

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Miscellaneous No.28833 of 2014**

Arising Out of PS.Case No. -18 Year- 2009 Thana -C.B.I CASE District- PATNA

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Devendra Singh, son of Late Bishwanath Singh, resident of Village-Rental Flat No.207, Kankarbagh, P.S.-Kankarbagh, District-Patna.

.... Petitioner/s

Versus

1. The State of Bihar through Vigilance

.... Opposite Party/s

Appearance :

For the Petitioner/s : Mr. Ajay Kumar Thakur-Advocate
Mr. Nilesh Kumar-Advocate

For the Opposite Party/s : Mr. Ramakant Sharma-Sr. Advocate
Mr. Santosh Kumar Pandey-Advocate

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV ORDER

Date: 29-09-2016

Petitioner filed instant petition on account of rejection of his prayer to discharge by the learned Special Judge, Vigilance -1st, Patna in Vigilance P. S. Case No.18 of 2009 leading to Special Case No.12 of 2009 vide order dated 19.06.2014.

2. On account of knavish conduct taken up at the end of officials of Public Works Department (Building Division), Danapur whereunder the authorities so named therein in order to have illegal gain in connivance of certain contractors did not opt to sell Bill of Quantity relating to tender going to be effected on 12.03.2009. Raju Yadav and Ramashray Singh, contractors found themselves aggrieved thereby on account of the illegal activities of the authorities, they have not been allowed to purchase Bill of Quantity up-till 1.00 p.m. on



12.03.2009, made complain before the Chief Secretary, Vigilance whereupon an inquiry was entrusted to Engineer-in-Chief as well as Deputy Secretary, Vigilance, who immediately conducted preliminary inquiry and for that, visited the office which was found locked, two contractors were found having bulk of documents (as detailed) which were taken into possession including N.S.C. etc. and on the basis of the aforesaid inquiry report, substantial case was registered whereupon investigation commenced and concluded by way of submitting chargesheet facilitating order of cognizance. At the stage of charge, a petition has been filed on behalf of petitioner to discharge him on the grounds so enumerated thereunder and a copy thereof, has been made Annexure-14 of instant petition and after rejection of the same, present petition has been filed.

3. It is also evident from the record that during course of investigation, petitioner had asked for quashing thereof, and the same was disposed of vide order dated 10.03.2011 under Cr. Misc. No.28885 of 2009 (Annexure-1). Subsequently thereof, order of cognizance was also challenged under Cr. Misc. No.11757 of 2011, which was disposed of along with Cr. Misc. No.19966 of 2011 vide order dated 02.09.2013 (Annexure-13).

4. In support of the plea, the learned counsel for the petitioner has submitted that the order impugned happens to be



contrary to the spirit of law on account thereof, is fit to be set aside. Furthermore, it has been submitted that for the same event, petitioner was prosecuted under departmental proceeding after having been put under suspension. The departmental proceeding ultimately resulted futile having conclusive finding in favour of petitioner as, the disciplinary authority had not found the charges duly substantiated. Consequent thereupon, suspension was revoked and was reinstated. So, it has been urged that ones petitioner has been exonerated in a departmental proceeding, consequent thereupon, criminal proceeding would not survive, which the learned lower Court ought to have considered during course of adjudicating upon plea of the petitioner to discharge.

5. It has further been submitted that as petitioner had met with an accident on 06.03.2009 on account thereof, he was on leave right from 07.03.2009. As, on 12.03.2009, his leave was continuing one, hence he could not have been dragged for the misdeeds having alleged, exposed on 12.03.2009. Different Annexures have been annexed to justify aforesaid contention (application of leave, medical report etc.). It has also been submitted that Casual Leave was sanctioned and though, the same have been perceived by the Investigating officer, which he had incorporated in the case diary and on the aforesaid ground, it has been argued that petitioner would not

have been made an accused and in likewise manner, his prayer for discharge would not have been rejected.

6. It has further been submitted that preliminary inquiry happens to be motivated one and was managed by the complainant, Raju Yadav as well as Ramashray Singh, because of the fact that the Executive Engineer had already cancelled the tender dated 12.03.2009, on the same day due to unavoidable reason. As the tender was cancelled, then in that event, there was no question of providing sale of Bill of Quantity (the aforesaid official communiqué is Annexure-3). The aforesaid document has purposely been ignored during preliminary inquiry. Had there been proper consideration thereof, then the allegation having been attributed at the end of Raju Yadav as well as Ramashray Singh would not have any relevance.

7. It has further been submitted that petitioner was posted as Accounts Clerk and vide Annexure-7, petitioner has been authorized to discharge function of Cashier. It has been submitted that though petitioner was posted at the Danapur as a Senior Accounts Clerk since 2008, he has been identified as Cashier. Being a Cashier, he was not at all expected to indulge in selling bill of quantity. In likewise manner, it has also been submitted that whatever seizure has been made from Daya Shankar Upadhyay as well as Satyendra Prasad contractors and further, from a vehicle, for that petitioner could not be



held responsible. In likewise manner, it has also been submitted that because of the fact that petitioner was on leave, therefore, he happens to be unable to explain under what circumstances, office was closed during visit by the prosecution party. Therefore, in sum and substance, submission having been made on behalf of petitioner is that the learned lower Court committed error in rejecting the prayer of the petitioner and on account thereof, the order impugned is fit to be set aside. Consequent thereupon, petitioner be directed to be discharged.

8. At the other end, the learned Senior Counsel representing Vigilance has submitted that all events have visualized after visit of the prosecution party during course of conduction of preliminary inquiry. Petitioner claimed to have met with an accident on 06.03.2009, but his application happens to be ante-dated. It has further been submitted that assertion of the petitioner became doubtful on the score that he filed application for Casual Leave (C.L.) from 07.03.2009 to 14.03.2009 and the same has been shown to be allowed on 07.03.2009, but the aforesaid application was not all found on 07.03.2009 at the office as was closed. Because of the fact that office was not opened on 07.03.2009, therefore, authenticity of the document has itself fallen under doubt. In likewise manner, the office order having at the end of the Executive Engineer whereunder tender going to be opened on 12.03.2009, has been cancelled again been created



ante-dated on account of absence of those material on 12.03.2009, which ought to have been pasted on Notice Board. The aforesaid instance are not mere coincidence, because of the fact that during course of inception of the office, the same was found closed, none of the staff were present and further, seizure of documents from the contractors as detailed under the written report itself speak a lot. Not only this, the complicity of the petitioner is further found exposed from the statement of the witnesses recorded under Paras-48, 50, 51, 52, 53, 54 and found corroborated with the documentary evidence having incorporated under Para-154 as well as 168 of the case diary. Hence, order impugned has rightly been passed.

9. Plea of alibi is the matter of trial. More particularly, so far instant case is concerned, it needs in depth consideration, which would be only during course of trial.

10. So far plea of the petitioner that having exonerated under departmental proceeding, would blur the fate of the criminal prosecution, is not at all found appreciated by the Hon'ble Apex Court. In *State of (NCT of Delhi) v. Ajay Kumar Tyagi reported in (2012) 9 SCC 685* wherein after discussing the earlier judgment, it has been held:-

“24. Therefore, in our opinion, the High court quashed the prosecution on total misreading of the judgment in the case of P.S. Rajya (Supra). In fact, there are precedents, to which we have



referred to above speak eloquently a contrary view i.e. exoneration in departmental proceeding ipso facto would not lead to exoneration or acquittal in a criminal case. On principle also, this view commends us. 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 can not be rejected on the basis of the evidence in the departmental proceeding or the report of the Inquiry Officer based on those evidence.”

11. In *Sheoraj Singh Ahlawat and others v. State of Uttar Pradesh and another* reported in (2013) 11 SCC 476, it has been held:-

“12. The case at hand being a warrant case is governed by Section 239 of the Cr.P.C. for purposes of determining whether the accused or any one of them deserved to be discharged. Section 239 is as under:

“239. When accused shall be discharged.-If,



upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.”

A plain reading of the above would show that the Court trying the case can direct discharge only for reasons to be recorded by it and only if it considers the charge against the accused to be groundless.

13. *Section 240 of the Code provides for framing of a charge if, upon consideration of the police report and the documents sent therewith and making such examination, if any, of the accused as the Magistrate thinks necessary, the Magistrate is of the opinion that there is ground for presuming that the accused has committed an offence triable under Chapter XIX, which such Magistrate is competent to try and which can be adequately punished by him.*

14. *The ambit of Section 239 Cr.P.C. and the approach to be adopted by the Court while*



exercising the powers vested in it under the said provision fell for consideration of this Court in Onkar Nath Mishra and Ors. v. State (NCT of Delhi) and Anr. (2008) 2 SCC 561. That too was a case in which a complaint under Sections 498-A and 406 read with Section 34 of the I.P.C. was filed against the husband and parents-in-law of the complainant-wife. The Magistrate had in that case discharged the accused under Section 239 of the Cr.P.C, holding that the charge was groundless. The complainant questioned that order before the Revisional Court which directed the trial Court to frame charges against the accused persons. The High Court having affirmed that order, the matter was brought up to this Court.

15. *This Court partly allowed the appeal qua the parents-in-law while dismissing the same qua the husband. This Court explained the legal position and the approach to be adopted by the Court at the stage of framing of charges or directing discharge in the following words:*

“11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken



at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.” (emphasis supplied)

16. Support for the above view was drawn by this Court from earlier decisions rendered in *State of Karnataka v. L. Muniswamy* 1977 Cri.LJ 1125, *State of Maharashtra & Ors. v. Som Nath Thapa and Ors.* 1996 Cri.LJ 2448 and *State of M.P. v. Mohanlal Soni* 2000 Cri.LJ 3504. In *Som Nath's* case (*supra*) the legal position was summed up as under:

“32.....if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable



consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage.” (emphasis supplied)

17. So also in Mohanlal's case (supra) this Court referred to several previous decisions and held that the judicial opinion regarding the approach to be adopted for framing of charge is that such charges should be framed if the Court prima facie finds that there is sufficient ground for proceeding against the accused. The Court is not required to appreciate evidence as if to determine whether the material produced was sufficient to convict the accused. The following passage from the decision in Mohanlal's case (supra) is in this regard apposite:

“7. The crystallized judicial view is that at the stage of framing charge, the court has to prima facie consider whether there is sufficient

ground for proceeding against the accused. The court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused.”

18. In State of Orissa v. Debendra Nath Pandhi (2005) 1 SCC 568, this Court was considering whether the trial Court can at the time of framing of charges consider material filed by the accused. The question was answered in the negative by this Court in the following words:

“18. We are unable to accept the aforesaid contention. The reliance on Articles 14 and 21 is misplaced...Further, at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the Object of the Code. It is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea



of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police.

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23. As a result of aforesaid discussion, in our

view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material...” (emphasis supplied)

19. Even in Smt. Rumi Dhar v. State of West Bengal & Anr. (2009) 6 SCC 364, reliance whereupon was placed by counsel for the appellants the tests to be applied at the stage of discharge of the accused person under Section 239 of the Cr.P.C., were found to be no different. Far from readily encouraging discharge, the Court held that even a strong suspicion in regard to the commission of the offence would be sufficient to justify framing of charges. The Court observed:

“17...While considering an application for discharge filed in terms of Section 239 of the Code, it was for the learned Judge to go into the details of the allegations made against each of the accused persons so as to form an opinion as to whether any case at all has been made out or not as a strong suspicion in regard thereto shall subserve the requirements of law.”

20. To the same effect is the decision of this Court in Union of India v. Prafulla Kumar Samal and Anr. v. (1979) 3 SCC 4, where this Court

was examining a similar question in the context of Section 227 of the Code of Criminal Procedure. The legal position was summed up as under:

“10. Thus, on a consideration of the authorities mentioned above, the following principles emerge :

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code 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:

(2) 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.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully

within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post Office or a mouth-piece 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 appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

The aforesaid view has been reaffirmed in ***State of Tamil Nadu by Inspector of Police Vigilance and Anti-corruption v. N. Suresh Rajan and others with State represented by Deputy Superintendent of Police Vigilance and Anti-corruption vs. K. Ponmudi and others reported in (2014) 11 SCC 709.***

12. That being so, in depth exercise with regard to genuineness of the statement of the witnesses having under relevant paragraphs of the case diary as referred on behalf of learned senior counsel for the Vigilance in consonance with the plea having been taken at the end of the petitioner raising his plea of alibi, as well as in the background of

different Annexures, urging the Court to make in depth scrutiny of the materials is not at all found permissible in the eye of law. As, preparation of document in ante-dated event, requires thorough considering much less, the same are beyond consideration for the present purpose.

13. In *Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia and another with State of Maharashtra v. Dilip Nathumal reported in (1989) 1 SCC 715*, it has been observed:-

“20. We wish to add a word regarding interference by the High court against a charge framed by the Sessions Court. [Section 227](#) which confers power to discharge an accused was designed to prevent harassment to an innocent person by the arduous trial or the ordeal of prosecution. How that intention is to be achieved is reasonably clear in the section itself. The power has been entrusted to the Sessions Judge who brings to bear his knowledge and experience in criminal trials. Besides, he has the assistance of counsel for the accused and Public Prosecutor. He is required to hear both sides before framing any charge against the accused or for discharging him. If the Sessions Judge after hearing the parties frames a charge and also makes an order in support thereof, the law



must be allowed to take its own course. Self restraint on the part of the High Court should be the rule unless there is a glaring injustice stares the Court in the face. The opinion on any matter may differ depending upon the person who views it. There may be as many opinions on a particular matter as there are courts but it is no ground for the High Court to interdict the trial. It would be better for the High Court to allow the trial to proceed.”

14. Considering the submissions having been made on behalf of respective counsels on the scale of the principle having been laid down by the Hon’ble Apex Court, as referred above, it is found and held that instant petition sans merit and is accordingly, rejected.

(Aditya Kumar Trivedi, J)

Vikash/-

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