

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.15423 of 2018

Arising Out of PS. Case No.-134 Year-2009 Thana- NAGARNAUSA District- Nalanda

Shyam Kishore Prasad @ Madan Prasad S/o Late Chandeshwar Prasad, R/o Village- Khajura, Post Damodarpur (Baldha), P.S.- Nagarnausa, District-Nalanda.

... .. Petitioner/s

Versus

1. The State Of Bihar Bihar
2. Kamleshwar Prasad, S/o late Ram Bachan Ram The Area Education Officer, Noorsarai, P.S. and P.O. Noorsarai, Distt. Nalanda. resident of vill. + P.O.- Amarpura, P.S.- Naubatpur, Distt.- Patna.

... .. Opposite Party/s

Appearance :

For the Petitioner/s	:	Mr. Umesh Kumar Verma, Adv. Mr. Munna Pd. Singh, Adv.
For the Opposite Party/s	:	Mr. Kanhaiya Kishore, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV ORDER

5 01-02-2019 1. Heard learned counsel for the petitioner as well as learned A.P.P.

2. Petitioner/accused is aggrieved by an order dated 30.11.2017 passed by Sri Sunil Kumar Singh, Judicial Magistrate, 1st Class, Hilsa, Nalanda relating to Nagarnausa P.S. Case No.134/2009, G.R. No.1469/2009 whereby and whereunder prayer of the petitioner to discharge in accordance with Section 239 Cr.P.C. has been rejected.

3. In order to support the plea, it has been argued at the end of the learned counsel for the petitioner that petitioner happens to be government servant (teacher). On the same allegation he was departmentally prosecuted and was



exonerated on the ground that no misappropriation at his end has been committed. So urged that in the background of aforesaid finding, instant prosecution would not survive. In addition thereto, it has also been urged that the petitioner had furnished details of account concerning the cash received by him which has been accepted by the Department whereupon exonerated from the charge of misappropriation.

4. It has further been submitted that at the stage of 239 of the Cr.P.C. the Magistrate is not expected to act as a post office nor mouth piece of the prosecution. The court has to scrutinize the material more particularly, in the given facts and circumstances of the case, on account of exoneration of charges during departmental proceeding, would have taken a sound legal ground to discharge the petitioner and that being so, the order impugned is bad and is fit to be set aside. Learned counsel for the petitioner on that very pretext has relied upon **Ramdoss vs. K. Thangavelu** reported in (2000) 2 SCC 135, **Om Prakash Gupta vs. State of Bihar** reported in 2000(2) PLJR 238, **P.S. Rajya vs. State of Bihar** reported in (1996) 9 SCC 1, **Dr. Shiv Kumar vs. State of Bihar** reported in 2018(1) PLJR 412, **Naresh Kumar Yadav vs. The State of Bihar & Anr.** reported in 2013(4) PLJR 828.



5. On the other hand, the learned A.P.P. opposed the prayer and submitted that at the stage of framing of charge, the mode of consideration of the material happens to be weaker than prima facie case as has been held in **Amit Kapoor vs. Ramesh Chander** reported in **(2012) 9 SCC 460**. Consequent thereupon, the order impugned did not attract interference whereupon, his petition is fit to be rejected.

6. Area Education Officer, Noorsarai, as per direction of the District Superintendent of Education filed written report as, the Incharge Headmaster, Moti Prasad even on superannuation, has not handed over complete charge nor furnished account with regard to withdrawal of lacs of rupees prior to 30.09.2007. The aforesaid order contained the inquiry report submitted by the Area Education Officer wherein he had incorporated that even after superannuation of Moti Sah, the Incharge Headmaster he had not handed over full charge nor he had submitted accounts with regard to withdrawal at his end prior to 30.09.2007. It has also been disclosed that the amount has been withdrawn by Moti Prasad after having counter signature of Shyam Kishore Prasad @ Madan Prasad (petitioner) and during course thereof, huge amount has been withdrawn through cheque having in name of Shyam Kishore



Prasad and for that Shyam Kishore Prasad has also not furnished account. It has also been disclosed that in spite of account being jointly operated by the Moti Prasad and Shyam Kishore Prasad, in account register there happens to be endorsement only at the end of Moti Prasad, having signature of Moti Prasad but nothing has been at the end of Shyam Kishore Prasad with regard to withdrawal having at his end. On query, Shyam Kishore Prasad disclosed that the original register has been changed by Moti Prasad in order to misappropriate the amount. It has also been disclosed that the members of the committee namely Chandrika Lal, Kailash Prasad had withdrawn Rs.2,71,200/- but, the details of same has not been furnished. Then there also happens to be disclosure with regard to malfunctioning of midday meal programme.

7. Initially, FIR was registered only against Moti Prasad. Though presence of petitioner was in the report annexed with the written report but was not arrayed as an accused at the time of registration. However, during course of investigation he has been made an accused, charge sheeted and as is evident, after having appearance of the accused persons when the matter came up for charge, a petition has been filed at the end of the petitioner attracting for discharge whereupon, the order



impugned has been passed, subject matter of challenge under instant petition.

8. Whether at the stage of framing of charge the documents having at the end of the accused is to be considered or not has been subject to consideration in Three Judges Bench **State of Orissa vs. Debendra Nath Padhi** reported in (2005) 1 SCC 568 and the same view has been followed in **Rukmini Narvekar vs. Vijaya Satardekar & Ors.** reported in (2008) 14 SCC 1.

“22. Thus in our opinion while it is true that ordinarily defence material cannot be looked into by the Court while framing of the charge in view of D.N. Padhi's case (supra), there may be some very rare and exceptional cases where some defence material when shown to the trial court would convincingly demonstrate that the prosecution version is totally absurd or preposterous, and in such very rare cases the defence material can be looked into by the Court at the time of framing of the charges or taking cognizance. In our opinion, therefore, it cannot be said as an absolute proposition that under no circumstances can the Court look into the material produced by the defence at the time of framing of the charges, though this should be done in very rare cases, i.e. where the defence produces some material which convincingly demonstrates that the whole prosecution case is totally absurd or totally concocted. We agree with Shri Lalit that in some very rare cases the Court is justified in looking into the material produced by the defence at the time of framing of the charges, if such material convincingly establishes that the whole prosecution version is totally absurd, preposterous or concocted.



The same view has reiterated in **Harshendra Kumar D. vs. Rebatilata Koley Etc.** reported in **2011(3) PLJR 100 (SC)**. That being so, the placement of the relevant papers i.e. cash memo etc. apart from the fact that same happens to be the subject of verification, is not at all unimpeachable document and that being so, at the stage of 239 Cr.P.C., same could not be taken into consideration.

9. Examination of an accused in Departmental proceeding could be a ground to discharge the accused. A three judges bench in **State (NCT of Delhi) vs. Ajay Kumar Tyagi** reported in **(2012) 9 SCC 685** the Hon'ble Apex Court formulated the question and answered the same in following manner:

“15. Now we proceed to consider the question of law referred to us, i.e., whether the prosecution against an accused, notwithstanding his exoneration on the identical charge in the departmental proceeding could continue or not?

16. xxx xxx

17. We have given our anxious consideration to the submissions advanced and in order to decipher the true ratio of the case, we have read the judgment relied on very closely. In this case, the allegations against the delinquent employee in the departmental proceeding and criminal case were one and the same, that is, possessing assets disproportionate to the known sources of income. The Central Bureau of Investigation, the prosecutor to assess the value of the assets relied on the valuation report given later on. This Court on fact found that “the value given as basis for the charge- sheet is not value given in the report subsequently given by the valuer.” This would be evident from the following passage from paragraph 15



from the judgment:

“15.....According to the learned counsel the Central Vigilance Commission has dealt with this aspect in its report elaborately and ultimately came to a conclusion that the subsequent valuation reports on which CBI placed reliance are of doubtful nature. The same view was taken by the Union Public Service Commission. Even otherwise the value given as basis for the charge-sheet is not the value given in the report subsequently given by the valuers.”

18. Thereafter, this Court referred to its earlier decision in the case of State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335, and reproduced the illustrations laid down for exercise of extraordinary power under Article 226 of the Constitution of India or the inherent powers under Section 482 of the Code of Criminal Procedure for quashing the criminal prosecution. The categories of cases by way of illustrations, wherein power could be exercised either to prevent the abuse of the process of the court or otherwise to secure the ends of justice read as follows:

“(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under [Section 156\(1\)](#) of the Code except under an order of a Magistrate within the purview of [Section 155\(2\)](#) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any



offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under [Section 155\(2\)](#) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions [of the Code](#) or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in [the Code](#) or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

The aforesaid illustrations do not contemplate that on exoneration in the departmental proceeding, the criminal prosecution on the same charge or evidence is to be quashed. However, this Court quashed the prosecution on the peculiar facts of that case, finding that the said case can be brought under more than one head enumerated in the guidelines. This would be evident from paragraphs 21 and 22 of the judgment, which read as follows:

“21. The present case can be brought under



more than one head given above without any difficulty.

22. The above discussion is sufficient to allow this appeal on the facts of this case.”

19. Even at the cost of repetition, we hasten to add none of the heads in the case of P.S. Rajya (Supra) is in relation to the effect of exoneration in the departmental proceedings on criminal prosecution on identical charge. 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.

20. 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), this Court quashed the prosecution when the accused was exonerated in the departmental proceeding would not mean that it was quashed on that ground. This would be evident from paragraph 23 of the judgment, which reads as follows:

“23. Even though all these facts including the Report of the Central Vigilance Commission were brought to the notice of the High Court, unfortunately, the High Court took a view that the issues raised had to be gone into in the final proceedings and the Report of the Central Vigilance Commission, exonerating the appellant of the same charge in departmental proceedings would not conclude the criminal case against the appellant. 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. Therefore, we do not agree with the view taken by the High Court as stated above. These are the reasons for our order dated 27-3-1996 for allowing the appeal and quashing the impugned criminal proceedings and giving consequential reliefs.”

From the reading of the aforesaid passage of the judgment it is evident that the prosecution was



not terminated on the ground of exoneration in the departmental proceeding but, on its peculiar facts.

21. It is worth mentioning that decision in P.S. Rajya (supra) came up for consideration before a two-Judge Bench of this Court earlier, in the case of [State v. M. Krishna Mohan](#), (2007) 14 SCC 667. While answering an identical question i.e. whether a person exonerated in the departmental enquiry would be entitled to acquittal in the criminal proceeding on that ground alone, this Court came to the conclusion that exoneration in departmental proceeding ipso fact would not lead to the acquittal of the accused in the criminal trial. This Court observed emphatically that decision in P.S. Rajya (supra) was rendered on peculiar facts obtaining therein. It is apt to reproduce paragraphs 32 and 33 of the said judgment in this connection:

“32. Mr Nageswara Rao relied upon a decision of this Court in [P.S. Rajya v. State of Bihar](#) [1996 (9) SCC 1]. The fact situation obtaining therein was absolutely different. In that case, in the vigilance report, the delinquent officer was shown to be innocent. It was at that juncture, an application for quashing of the proceedings was filed before the High Court under [Section 482](#) of the Code of Criminal Procedure which was allowed relying on [State of Haryana v. Bhajan Lal](#) [1992 Supp. (1) SCC 335] holding: (P.S. Rajya case [1996 (9) SCC 1, SCC p.9, para 23])

“23. Even though all these facts including the report of the Central Vigilance Commission were brought to the notice of the High Court, unfortunately, the High Court took a view that the issues raised had to be gone into in the final proceedings and the report of the Central Vigilance Commission, exonerating the appellant of the same charge in departmental proceedings would not conclude the criminal case against the appellant. 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.” Ultimately this Court concluded as follows:

“33. The said decision was, therefore, rendered on the facts obtaining therein and cannot be said to be an authority for the proposition that exoneration in departmental proceeding ipso facto would lead to a judgment of acquittal in a criminal trial.”

22. This point also fell for consideration before this Court in the case of Supdt. of Police (C.B.I.) v. Deepak Chowdhary, (1995) 6 SCC 225, where quashing was sought for on two grounds and one of the grounds urged was that the accused having been exonerated of the charge in the departmental proceeding, the prosecution is fit to be quashed. Said submission did not find favour with this Court and it rejected the same in the following words:

“6. The second ground of departmental exoneration by the disciplinary authority is also not relevant. What is necessary and material is whether the facts collected during investigation would constitute the offence for which the sanction has been sought for.”

23. The decision of this Court in the case of [Central Bureau of Investigation v. V.K. Bhutiani](#), (2009) 10 SCC 674, also throws light on the question involved. In the said case, the accused against whom the criminal proceeding and the departmental proceeding were going on, was exonerated in the departmental proceeding by the Central Vigilance Commission. The accused challenged his prosecution before the High Court relying on the decision of this Court in the case of P.S. Rajya (supra) and the High Court quashed the prosecution. On a challenge by the Central Bureau of Investigation, the decision was reversed and after relying on the decision in the case of M. Krishna Mohan (supra), this Court came to the conclusion that the quashing of the prosecution was illegal and while doing so



observed as follows:

“6. ... In our opinion, the reliance of the High Court on the ruling of P.S. Rajya was totally uncalled for as the factual situation in that case was entirely different than the one prevalent here in this case.”

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.

25. 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.

10. In **State vs. S. Selvi** reported in **(2018) 13 SCC**

455, it has been held:



“It is well settled by this Court in catena of judgments including the cases of Union of India v. Prafulla Samal, (1979) 3 SCC 4; Dilawar Babu v. State of Maharashtra (2002) 2 SCC 135 Sajjan Kumar v. CBI (2010) 9 SCC 368; State v. A. Arun Kumar (2015) 2 SCC 417; Sonu Gupta v. Deepak Gupta (2015) 3 SCC 424; State of Orissa v. Debendra Nath Padhi (2003) 2 SCC 711; Niranjana Singh Karam Singh Punjabi etc. v. Jitendra Bhimraj Bijayya (1990) 4 SCC 76 and Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunia (1979) 4 SCC 274 that the Judge while considering the question of framing charge Under Section 227 of the Code in sessions cases (which is akin to Section 239 Code of Criminal Procedure pertaining to warrant cases) 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; where the material placed before the Court disclose grave suspicion against the Accused which has not been properly explained, the Court will be fully justified in framing the charge; by and large 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 rights to discharge the Accused. The 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 statements 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 materials as if he was conducting a trial.



11. Accordingly, instant petition sans merit and is rejected.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

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