

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DELIVERED ON: 10.02.2020

RESERVED ON: 03.02.2020

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

CRL.O.P.NO.3411 OF 2013

Abdul Kalam Azad

... Petitioner

Vs.

The State
Rep by the Deputy Superintendent
of Police, CB, CID, Ariyalur,
Perambalur District.

... Respondent

Prayer:

Petition filed under Section 482 of Cr.P.C., seeking to call for the records in C.C.No.1 of 2011 pending on the file of Hon'ble Chief Judicial Magistrate, Perambalur District and quash the charge as against the petitioner is concerned.

For Petitioner : Mr.D.Vellaiappan

For Respondent : Mr.C.Iyyapparaj
Additional Public Prosecutor

O R D E R

The petitioner has filed this petition seeking to call for the records in C.C.No.1 of 2011 pending on the file of the learned Chief Judicial Magistrate, Perambalur District and to quash the charge as against the petitioner is concerned.

2.The petitioner is the fourth accused in C.C.No.1 of 2011. The petitioner was working as Deputy Manager (Marketing), Ariyalur, from 26.07.2002 to 28.11.2003. During the said period, a special Scheme was announced for the supplies made to the Tamilnadu Water and Drainage Board (hereinafter referred to as 'TWAD Board') that based on the declaration forms furnished by the TWAD Board in the prescribed format, concessional rate of Sales Tax @ 4% and a discount of Rs.5/- per bag of cement will be paid by the Tamilnadu Cements Corporation, Ariyalur

(hereinafter referred to as 'TANCEM') to the sole selling agents/ stockists, who are getting orders from the TWAD Board.

3.It is the further case of the petitioner that one M/s.Jayalakshmi Agencies/ sole selling agent for the cement manufactured by TANCEM obtained some blank declaration forms duly signed by TWAD Board Officials and manipulated the supply details and submitted the same to the Marketing Section claiming discount.

4.It is the further case of the petitioner that the received discount forms were sent to the Accounts Division of TANCEM for processing and as they were revising the format for discount, they had returned the same to the Marketing Division. The petitioner in his note dated 24.11.2003, pointed out the corrections in the form and seal and pointed out the fraud committed by M/s.Jayalakshmi Agencies and recommended for action against the said Agency. Thereafter, the Deputy General Manager of TANCEM lodged the complaint and a case was registered in Crime No.1 of 2004 by the respondent Police.

5.It is the further case of the petitioner that in the charge sheet filed by the respondent before the learned Chief Judicial Magistrate, Perambalur District, the petitioner has been arrayed as the fourth accused. Aggrieved by the same, the petitioner has filed this criminal original petition.

6.The learned counsel appearing for the petitioner would submit that the petitioner did not commit any offence as alleged by the prosecution. He would further submit that for the very same allegation, the then Deputy Manager of TANCEM issued charge memo dated 11.04.2013 to the petitioner and the petitioner also submitted his reply on 05.03.2013. Thereafter Enquiry Officer was appointed and after conducting detailed enquiry, the Enquiry Officer filed his report holding that the charges were not proved and the same was forwarded to the Disciplinary Authority, however, till date, the Disciplinary Authority has not taken any decision. Hence, continuation of criminal case against the petitioner is un-sustainable one.

7.The learned counsel appearing for the petitioner would further submit that the requirement for prosecution is preponderance of probabilities, whereas, the prosecution case has to be proved beyond reasonable doubt. In the present case, the allegations against the petitioner has been held as 'not proved' by the Enquiry Officer. When the charges against the petitioner are held as 'not proved' during the Departmental enquiry, forcing the petitioner to face trial in a criminal case is un-sustainable.

8. In support of his contentions, the learned counsel appearing for the petitioner relied upon the decision of the Hon'ble Apex Court reported in (2011) 3 SCC 581 [Radheshyam Kejriwal Vs. State of West Bengal and another], wherein, the relevant paragraph reads as follows:

"35. Mr. Sharan contends that aforesaid principle shall apply with equal force in the prosecution under the Act as the basic principle which these judgments take note of to quash the prosecution is the higher standard of proof required in a criminal case than the adjudication proceeding and no reference at all has been made to the provisions of the Income Tax Act to come to that conclusion.

36. The decisions referred to above pertain to prosecution under the Income Tax Act and obviously had not adverted to any of the provisions of the Act, particularly Sections 50, 51 and 56 of the Act points out Mr. P. P. Malhotra, the Additional Solicitor General and therefore these decisions in his submission shall have no bearing on the facts of the present case.

37. We find substance in the submission of Mr. Sharan. They may appear to be some conflict between the views in the case of Standard Chartered Bank and L. R. Melwani holding that adjudication proceeding and criminal proceeding are two independent proceedings and both can go on simultaneously and finding in the adjudication proceeding is not binding on the criminal proceeding and the judgments of this Court in the case of Uttam Chand, G. L. Didwania and K. C. Builders wherein this Court had taken a view that when there is categorical finding in the adjudication proceeding exonerating the person which is binding and conclusive, the prosecution cannot be allowed to stand. The judgments of this Court are not to be read as statute and when viewed from that angle there does not seem any conflict between the two sets of decisions. It will not make any difference on principle that latter judgments pertain to cases under the Income Tax Act.

38.The ratio which can be culled out from these decisions can broadly be stated as follows :-

(i)Adjudication proceeding and criminal prosecution can be launched simultaneously;

(ii)Decision in adjudication proceeding is not necessary before initiating criminal prosecution;

(iii)Adjudication proceeding and criminal proceeding are independent in nature to each other;

(iv)The finding against the person facing prosecution in the adjudication proceeding is not binding on the proceeding for criminal prosecution;

(v) Adjudication proceeding 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 proceeding in favour of the person facing trial for identical violation will depend

upon the nature of finding. If the exoneration in adjudication proceeding is on technical ground and not on merit, prosecution may continue; and

(vii) In case of exoneration, however, on merits where allegation is found to be not sustainable at all and person held innocent, criminal prosecution on the same set of facts and circumstances can not be allowed to continue underlying principle being the higher standard of proof in criminal cases.""

9.The learned counsel appearing for the petitioner would further submit that since the Enquiry Officer has filed a report in favour of the petitioner, implicating the petitioner as accused and forcing the petitioner to face trial is per se unsustainable one. Accordingly, he prayed for allowing this criminal original petition.

10.Per contra, the learned Additional Public Prosecutor would submit that in similar set of facts, the Departmental proceedings and criminal proceedings may go on simultaneously. He would further submit that till date, the Disciplinary Authority has not taken a final decision and it is absolutely the discretionary power of the Disciplinary Authority either to accept or to reject the report submitted by the Enquiry Officer.

11.The learned Additional Public Prosecutor would further submit that since the petitioner has not been exonerated from the charges till date, it is not permissible to discuss all the issues before this Court in the petition filed under Section 482 of Cr.P.C. He would further submit that there is prima facie case against the petitioner/ A4 that he colluded with the co-accused to favour the individuals due to which there was loss to the Government.

12.In support of his contentions, the learned Additional Public Prosecutor relied upon the decision of the Hon'ble Apex Court reported in (2012) 9 SCC 685 [State (NCT of Delhi) Vs. Ajay Kumar Tyagi], wherein, the relevant paragraph reads as follows:

"24. Therefore, in our opinion, the High Court quashed the prosecution on total misreading of the judgment in P.S. Rajya case [(1996) 9 SCC 1 : 1996 SCC (Cri) 897] . In fact, there are precedents, to which we have referred to above, that 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 a 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 in 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.

26. For the reasons stated above, the order [Ajay Kumar Tyagi v. State, (2008) 3 DLT (Cri) 788] of the High Court is unsustainable, both on facts and law. The accused shall appear before the trial court within four weeks from today. As the criminal proceeding is pending since long, the learned Judge in seisin of the trial shall make endeavour to dispose of the same expeditiously and avoid unnecessary and uncalled for adjournments."

(emphasis supplied)

13. The learned Additional Public Prosecutor would further submit that already A1 and A2 filed petition under Section 482 of Cr.P.C. before this Court in CrI.O.P.No.1811 of 2017 and this Court vide order dated 10.04.2019 dismissed the said criminal original petition. Accordingly, he prayed for dismissal of this criminal original petition.

14. Heard the arguments advanced on either side and perused the materials placed on record.

15. The issue involved in the present case is whether the report filed by the Enquiry Officer is the conclusive verdict for exonerating the petitioner from the charges of the departmental proceedings and on that ground whether the criminal case can be quashed.

16. Admittedly, the petitioner is arrayed as the fourth accused in the case in C.C.No.1 of 2011 pending on the file of the learned Chief Judicial Magistrate, Perambalur District, for

the offence punishable under Sections 409 r/w. 109 of I.P.C. The allegation against the petitioner is that he processed the discount forms intentionally and this is a triable issue which can be decided only at the time of trial and not in the petition filed under Section 482 of Cr.P.C.

17.The issue raised in the present petition is no longer res integra. Earlier the very same issue was considered by the Hon'ble Apex Court in the decision reported in AIR 1970 SC 962 [Collector of Customs Vs. L.R.Melwani], the relevant portion of which reads as follows:

"7.Despite the finding the Assistant Collector in his complaint referred to earlier seeks to prosecute these accused persons. Hence the question is whether that prosecution is barred under Article 20(2) of the Constitution which says that no person shall be prosecuted and punished for the same offence more than once. This Article has no direct bearing on the question at issue. Evidently those accused persons want to spell out from this Article the rule of autre fois acquit embodied in S.403, Criminal Procedure Code. Assuming we can do that, still it is not possible to hold that a proceeding before the Collector of Customs is a prosecution for an offence. In order to get the benefit of Section 403, Criminal Procedure Code or Article 20 (2), it is necessary for an accused person to establish that he had been tried by a "Court of competent jurisdiction" for an offence and he is convicted or acquitted of that offence and the said conviction or acquittal is in force. If that much is established, it can be contended that he is not liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236 or for which he might have been convicted under Section 273. It has been repeatedly held by this Court that adjudication before a Collector of Customs is not a "prosecution" nor the Collector of Customs a "Court". In Maqbool Hussain v. State of Bombay, 1953 SCR 730 = (AIR 1953 SC 325), this Court held that the wording of Article 20 of the Constitution and the words used therein show that the proceedings

therein contemplated are proceedings of the nature of criminal proceedings before a Court of law or a judicial tribunal and "prosecution" in this context would mean an initiation or starting of proceedings of a criminal nature before a Court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure. This Court further held that where a person against whom proceedings had been taken by the Sea Customs authorities under Section 167 of the Sea Customs Act and an order for confiscation of goods had been passed, was subsequently prosecuted before a Criminal Court for an offence under Section 23 of the Foreign Exchange Regulation Act in respect of the same act, the proceeding before the Sea Customs authorities was not a "prosecution" and the order for confiscation was not a "punishment" inflicted by a Court of judicial tribunal within the meaning of Article 20 (2) of the Constitution and hence his subsequent prosecution was not barred. The said rule was reiterated in *thomas Dana v. State of Punjab*, 1959 Supp 1 SCR 274 = (AIR 1959 SC 375) and in several other cases."

(emphasis supplied)

18. In the case of *Collector of Customs Vs. L.R. Melwani*, the case of the prosecution was that the accused persons and some other unknown persons had entered into a conspiracy at Bombay and other places during the year 1959 for the purpose of smuggling foreign goods into India and in pursuance of that conspiracy they had smuggled several items of foreign goods in the years 1959 and 1960. In that connection, an enquiry was held by the Customs Authorities.

19. Further, in the case of *Collector of Customs Vs. L.R. Melwani*, in the enquiry held by the Collector of Customs, he gave the benefit of doubt to Accused 1 and 2. Despite the above finding, the Assistant Collector in his complaint sought to prosecute those accused persons. The Constitution Bench has considered the contention that "the finding of the Collector of Customs referred to earlier operated as an issue estoppel in the present prosecution". The conclusion of the Constitution Bench is that they are unable to hold that the proceeding before the Collector of Customs is a criminal trial. From this it follows

that the decision of the Collector does not amount to a verdict of acquittal in favour of Accused 1 and 2.

20. Further, the Hon'ble Apex Court in the decision reported in (2012) 9 SCC 685 [State (NCT of Delhi) Vs. Ajay Kumar Tyagi], has observed that the exoneration in the departmental proceeding ipso facto would not result in the quashing of the criminal prosecution, the relevant portion of which reads as under:

"25. We are, therefore, of the opinion that the exoneration in the departmental proceeding ipso facto would not result in 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.

26. For the reasons stated above, the order [Ajay Kumar Tyagi v. State, (2008) 3 DLT (Cri) 788] of the High Court is unsustainable, both on facts and law. The accused shall appear before the trial court within four weeks from today. As the criminal proceeding is pending since long, the learned Judge in seisin of the trial shall make endeavour to dispose of the same expeditiously and avoid unnecessary and uncalled for adjournments."

(emphasis supplied)

21. In the present case, though the Enquiry Officer has filed the report in favour of the petitioner, that report does not amount to giving clean sheet to the petitioner unless the Disciplinary Authority takes a final decision on the issue. It is also un-disputed fact that though the Enquiry Officer filed a report, till date, the Disciplinary Authority has not taken any decision on the Departmental Proceedings.

22. Therefore, I am not inclined to interfere with the case in C.C.No.1 of 2011 pending on the file of learned Chief Judicial Magistrate, Perambalur District at this stage.

23. This criminal original petition is accordingly dismissed. However, liberty is granted to the petitioner to raise all the issues before the Trial Court. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The Chief Judicial Magistrate,
Perambalur District.
2. The Deputy Superintendent
of Police, CB, CID, Ariyalur,
Perambalur District.
3. The Public Prosecutor,
High Court of Madras,
Chennai 600 104.

+1cc to Mr.D.Nellaiappan, Advocate, S.R.No.10228

Cr1.O.P.No.3411 of 2013

RR(CO)
CS/28/05/2020