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IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.562 of 2021

Chakradhara Prasad Gantayat

....

Petitioner

Mr. Debasnan Das, Advocate

-Versus-

State of Odisha(Vigilance)

....

Opposite Party

Mr. Niranjana Maharana,
ASC for the Vigilance Department

AND

CRLMC No.514 of 2021

Pitabash Sahu

....

Petitioner

Mr. Suryakanta Jena, Advocate

-Versus-

State of Odisha(Vigilance)

....

Opposite Party

Mr. Niranjana Maharana,
ASC for the Vigilance Department

CORAM:
JUSTICE R.K. PATTANAİK

DATE OF JUDGMENT:21.12.2022

1. The 1st petitioner in CRLMC No. 562 of 2021 has assailed the order dated 5th January, 2021 passed in T.R. No. 50 of 2014 by the learned Special Judge (Vigilance), Bhubaneswar corresponding to Bhubaneswar Vigilance F.I.R. No.42 of 2010, whereby, an application under Section 239 Cr.P.C. filed by him seeking discharge was rejected.

2. Whereas the 2nd petitioner in CRLMC No. 514 of 2021 questioned the correctness, legality and judicial propriety of the order of cognizance dated 13th November, 2014 passed by the court below in T.R. No. 50 of 2014.

3. Heard Mr. Debasnan Das, learned counsel for the 1st petitioner and Mr. Suryakanta Jena, learned counsel for the 2nd petitioner and Mr. Niranjana Maharana, learned counsel for the Vigilance Department.

4. The prosecution case in brief is that the petitioners as the officials of the R&B Division No.IV, Bhubaneswar allegedly abused their official position, conspired and in connivance with the contractor engaged showed him undue favour leading to misappropriation of Government money spent on execution of a work towards construction of barrier free modification in deaf and dumb school of Unit-9, Bhubaneswar. According to the Vigilance Department, the total cost of the said work was to the tune of Rs.6,84,838/-and to be completed by 8th May, 2010 but before its completion, final and check measurements were carried out falsely showing the entire work to have been over and the final bill was sanctioned by the 1st petitioner and the same was disbursed in favour of the contractor but in course of inspection of the contract work with the technical assistance of BDA, Bhubaneswar on 30th April, 2010 by the Vigilance team, it was ascertained that in respect certain items, the work was still unfinished and during surprise check, the loss was assessed at Rs.2,07,358/-. The allegation of the Vigilance Department is that the 2nd petitioner with false final and check measurements recommended the 1st petitioner who thereafter sanctioned the amount leading to its disbursement in favour of the contractor and it was accomplished with an ulterior motive of wrongful gain and thereby all of them committed the offences punishable under Sections 13(2) read with 13(1)(c)(d) of the Prevention of Corruption Act, 1988 (hereinafter referred to as 'the P.C.Act') and Sections 409,420,468,471 & 120-B IPC.

5. Mr. Das submits that the impugned order under Annexure-2 passed by the learned court below in T.R. No. 50 of 2014 is erroneous both on facts and law and in so far as the F.I.R. is concerned, the involvement of the 1st petitioner is not disclosed and CRLMC Nos.562 of 2021 & 514 of 2021

his name does not even find a mention therein. It is further submitted that the claim of the Vigilance Department about the excess payment does not receive any support from the statement of the BDA official, who had accompanied the inspection team so also the Executive Engineer did not disclose anything adverse against the 1st petitioner and in absence of any such accusation, the learned court below should have discharged him in terms of Section 239 Cr.P.C. Similarly, Mr. Jena would submit that the Vigilance Department without any substantive material could not have chargesheeted the 2nd petitioner and the learned court below fell into serious error by taking cognizance of the alleged offences vide the impugned order under Annexure-1. Furthermore, it is submitted that the guidelines prescribed in OPWD Code for check measurement of 10% of the executed work costing more than 2 lac is spread throughout the year covering all the Sub-divisions and sections of the Division which according to the Vigilance Department was not conducted by the 1st petitioner, who merely accepted the recommendation of the 2nd petitioner. It is claimed that such check measurement is randomly done and not mandatory for each and every work so undertaken in the Sub-division and sections of the Division as has been claimed. As per Mr.Das, there was no deviation and extra item has been made in respect of the construction during the project work hence no occasion had arisen for the 1st petitioner to check measure the work and moreover 85% of the cost of the said work being the supply items, there has been no violation of the OPWD Code.

6. The 1st petitioner is stated to have faced departmental proceeding on the charges of misconduct and dereliction of duty but stood exonerated and Mr. Das submits that after such exoneration, the criminal prosecution should not be allowed to remain. It is contended that the learned court below could not have framed the charges against the petitioner on the strength of the materials on record and the findings of the departmental enquiry exonerated him

from the charges and under the above circumstances, it would be a travesty of justice to keep the criminal proceeding alive and hence, the same should be interfered with and quashed in exercise of the Court's inherent jurisdiction. While advancing such an argument Mr. Das placed reliance on the following decisions, such as, **Ashoo Surendranath Tewari Vrs. Deputy Superintendent of Police, EOW, CBI & Another (2021)81 OCR(SC)920**; **Radheshyam Kejriwal Vrs. State of West Bengal 2011 AIR SCW 1479** besides this Court's decisions in **Dr.Minaketan Pani Vrs. State of Orissa(2022) 87 OCR 1** and **Satyashri @ Satyashree Mohapatra Vrs. State of Odisha(2022) 88 OCR 72** to contend that for exoneration from the levelled charges vis-à-vis the 1st petitioner on the same set of facts, the criminal prosecution should not be allowed to stand as has been held and approved in the decisions (supra). Even a judgment in respect of the petitioner of this Court in W.P. (C) No. 10919 of 2021 is placed on record to suggest that the criminal proceeding should be brought to an end as in the aforesaid decision, the case of the petitioner for promotion was directed to be considered despite the Vigilance enquiry.

7. Mr. Maharana, learned counsel for the Vigilance Department vehemently opposed the contention of Mr. Das and Mr. Jena, learned counsel for the 1st and 2nd petitioners and submitted that the materials collected by the Vigilance team during the surprise inspection prima facie reveal the illegality committed by the petitioners, one of whom said to have recommended the final check measurement and the other, as the Executive Engineer approved and sanctioned the bill even without following the provisions of the OPWD Code and the same was achieved in tacit connivance. In so far as the contention that exoneration from all the charges by one of the petitioners is concerned, Mr. Maharana would submit that such cannot be a ground to close the Vigilance prosecution against him. It is contended that the decision in departmental proceeding by itself

cannot be a ground to quash the prosecution for which the charges have already been framed. In other words, according to Mr. Maharana, a proceeding with corruption charges cannot be subdued at its threshold after exoneration in a departmental proceeding. The decisions of this Court in **Patitapaban Das Vrs. State of Odisha & Another (2022) 88 OCR 321** and **Subrat Das Vrs. State of Odisha (Vigilance)** reported in **(2022) 88 OCR 324** are referred to by Mr. Maharana to contend that merely because the departmental proceeding exonerated the 1st petitioner which was again not on merit with the examination of the entire material stated to have been collected during the Vigilance inspection, the criminal proceeding cannot be terminated. The decision of **Dr. Minaketan Pani** (supra) was sought to be distinguished by Mr. Maharana for the Vigilance Department and also contended that the decisions in **Ashoo Surendranath Tiwari** and **Radheshyam Kejriwal** (supra) which have been referred to in **Dr. Minaketan Pani** do not apply to the case.

8. Mr. Das referred to a copy of the enquiry report dated 26th June, 2020 which was submitted with a recommendation that the 1st petitioner may be exonerated from all the charges. The details of the reason with recommendation for exoneration are discussed in said report. The conclusion of the enquiry is that the claim of the Vigilance Department in respect of the items declared unexecuted worked out with a cost does not tally with the allegation of excess payment and the complaint in respect of unfinished work is rather obscure. It was held therein that rectification work was in progress at the time of Vigilance inspection and as such, no excess payment was made against any unexecuted items as claimed by the Vigilance Department to be based on false measurement which was found not possible, nor it was proved. As regards, the check measurement of at least 10 % of the work prior to payment, the finding in the enquiry was that the OPWD Code does not mandate it for each and every work. With the above conclusion, the report was submitted. Mr. Das

submits that when on the same set of facts, the charges could not be proved vis-à-vis the 1st petitioner which needs a lower standard of proof, no purpose would be served in the continuance of the criminal proceeding against him which demands a higher degree of proof.

9. In **Ashoo Surendranath Tiwari** (supra), the Apex Court while referring to the decision in **Radheshyam Kejriwal** concluded that in case of exoneration on merits where the allegation is found to be not sustainable at all, criminal prosecution on the same set of facts should not be permitted to continue. After referring to various judgments, the Apex Court in **Radheshyam Kejriwal** (supra) summarized the ratio broadly in the following terms, such as, adjudication proceeding and criminal prosecution can be launched simultaneously; decision in such proceedings is not necessary before initiating criminal action; the proceeding and criminal prosecution are independent; the finding against the person in adjudication proceeding is not binding on the Criminal court etc.; in case of exoneration on merit, the criminal proceeding on set of facts and circumstance should not be allowed to remain, the underlying principle being the higher standard of proof in criminal cases. The said decision was approved by the Apex Court in **Ashoo Surendranath Tiwari** and has been followed by this Court in **Dr. Minaketan Pani** and also in **Satyashri @ Satyashree Mohapatra** (supra). In **Dr. Minaketan Pani** and **Subrat Das**, this Court held that the decision in **State (NCT of Delhi) Vrs. Ajaya Kumar Tyagi (2012) 53 OCR (SC) 603** failed to take notice of the coordinate bench judgment in **Radheshyam Kejriwal** and the latter judgment was binding and therefore, the decision in **Ajay Kumar Tyagi** (supra) should be considered *per incuriam* as held by the Apex Court in **State of Assam Vrs. Ripa Sharma AIR 2013 (SC) 3588** and **Central Board of Dawoodi Bohra Community Vrs. State of Maharashtra AIR 2005 SC 752**. So the decision in **Radheshyam Kejriwal** governs the field which has been approved in **Ashoo Surendranath Tiwari**. However, before

applying the aforesaid decisions, it has to be confirmed that the findings in the enquiry and decision of the Disciplinary Authority on the same set of facts and circumstances is on merit and a rational conclusion.

10. In **Dr. Minaketan Pani** (supra), this Court while dealing with the case of tampering with the examination papers held and concluded that since the petitioner therein was honorably exonerated in the departmental proceeding adopting the reasoning of the decisions in **Radheshyam Kejriwal** and **Ashoo Surendranath Tiwari** set aside the order of cognizance passed by the learned court below for offences under IPC and Section 9 of the Orissa Conduct of Examinations Act. So to say, the Court held therein that since an enquiry was held vis-à-vis the nature and extent of involvement and also the responsibility of the petitioner therein which proved him to be innocent leading to an honourable exit, it was unwarranted to have the criminal prosecution to survive on the same set of facts.

11. As it is well recognized, the standard of proof required in a disciplinary enquiry is of preponderance of probabilities. The term 'preponderance of evidence' in American Jurisprudence is a term to mean 'the weight, credit and value of the aggregate evidence on either side and is usually considered to be synonymous with the term greater weight of evidence or greater weight of the credible evidence. The said phrase was borrowed from **Charles R.Cooper Vrs. FW Slade(1857-59) 6 HLC 746** and the observations made therein make it clear that preponderance of probability means more probable and rational view of the case.

12. The law is well settled that disciplinary proceedings are independent and distinct vis-a-vis the criminal prosecution as the decision in one cannot influence the other though the findings may have relevance especially that of the courts' over the departmental enquiry. Both the proceedings co-exist which are meant for different

purposes, aim and objective which is what has been the ratio in **Radheshyam Kejriwal** and followed by the Apex Court in **Ashoo Surendranath Tiwari** (supra), however, with a conclusion that a criminal prosecution should not be permitted to stay on when the enquiry by the department and exoneration from all the charges is based on a decision on merit considering all the materials brought on record. The reasoning behind quashing of the criminal proceeding on such a ground is that the person who stands exonerated from the charges levelled against him honourably should not be subjected to harassment when the decision is on the same set of facts and circumstances. That being the legal position, the next question would be, whether, the disciplinary proceeding vis-à-vis the 1st petitioner and his exoneration from the charges was really on merit? If the reply is in the affirmative, obviously then, there is escape to hold that the criminal prosecution would have to be terminated since there is a clean chit. So the termination of the Vigilance prosecution depends on the findings of the disciplinary enquiry which has to be on merit and on the same set of facts.

13. What was the material for consideration before the disciplinary proceeding vis-a-vis the 1st petitioner? On a reading of the enquiry report, it is revealed that the unfinished work was held as nothing but a rectification process and at that point of time, the Vigilance team arrived which claimed it to be the work in respect of the items not yet completed. The defence of the petitioner which was to the effect that some defect was pointed out for which rectification had been initiated since 16th April, 2001 which was to be finished on 30th April, 2010, the date on which, the Vigilance inspection was held, AS according to the enquiry report, seems to be logical. It was further concluded that the alleged unexecuted items like painting to iron works, 20mm cement plaster to the pavements with a cost of Rs.8,362/- might have been in respect of the rectification work which is quite practical. It is held therein that the work which was meant for

physically challenged students inside the campus of the institute situate at the heart of the Bhubaneswar town and visited by higher officers of various departments to monitor the progress of the work and being vigilant for overall development of the said institution, which was so claimed by the petitioner, as per the enquiry finding, could not be ignored on the ground that normally one cannot dare to manipulate or manoeuvre while getting it executed and hence excess payment in respect of alleged unexecuted items basing on false measurement is improbable and also not proved. As to what was the material on record adduced from the side of the Department and marshalled through for the charges levelled is not discernable from the enquiry report. Who were the witnesses examined and what was the evidence submitted by the Department while proceeding against the petitioner during the disciplinary enquiry does not find a mention in the report. It is made to understand that the defence of the petitioner had been recorded and finally considering the available materials such a conclusion was reached at. In a disciplinary enquiry, witnesses are examined from the side of the Department and all the incriminating materials are placed on record with an opportunity to the delinquent to submit defence and thereafter, the evidence is adduced. The delinquent is asked as to if he is inclined or proposed to cross-examine any of the witnesses of the Department through whom the evidence is led. The defence evidence is also received with an equal opportunity to the Department to scrutinize it. Only thereafter, the enquiry is concluded and then on the basis of the evidence received from both the sides, it is analyzed and each of the charges is answered with a finding and if the delinquent is found guilty of any of the charges levelled against him, punishment is proposed. In the instant case, the enquiry report does not reveal as to in what manner the evidence was received from the Department. Rather the finding is based on the written defence of the petitioner and on a bare examination of report of the Vigilance team. The inspection by the Vigilance team was in the immediate presence of

the 2nd petitioner who submitted the final check measurement. The Vigilance Department alleged that the work was inspected on 30th April, 2010 in presence of one of the petitioners and another accused besides the contractor and it was ascertained that the work had not been executed prior to 29th March, 2010, the date on which the bill was passed, rather, it actually started few hours prior to the arrival of the inspection team and all of them in presence of the witnesses and technical expert put their signatures on the surprise check report. The matter is concerning about whether the work was unfinished or it was completed and at the time of Vigilance inspection, rectification work was in progress. It is alleged that the work had not been finished and hastily commenced just before the inspection team reached. According to the 1st petitioner, some repair was to be done after the work was finished and such defence was accepted. In anyways, the Court does not find the details of the evidence on record received during enquiry since the charges were to be proved by the Department with reference to the incriminating materials collected during the Vigilance inspection. Such evidence adverse to the claim of the petitioner was needed to be confronted to him during the enquiry. But the Court finds no such confrontation to have taken place in the manner expected during a departmental enquiry. Rather the Vigilance technical report was cursorily examined with a conclusion that the defence of rectification appeared logical. Applying the principles laid down by the Apex Court in **Ashoo Surendranath Tiwari** (supra), the Court may accept the defence of the accused provided he has been honourably exonerated from all the charges. In the disciplinary enquiry, no doubt the standard of proof is preponderance of probability but then it has to be based on all the materials with a reason and rational view vis-à-vis the findings on the charges levelled. In the instant case, the departmental enquiry has not been conducted in a manner to say that there has been an honourable exit of the 1st petitioner. Merely the defence of the petitioner was pitted against the report of the Vigilance team with a

loosely worded finding that the allegation of unexecuted work could not be found favour with. The enquiry on the charges should have been threadbare. It has only been assumed that the defence of 1st petitioner is more plausible. No any clarification was also sought for from the Vigilance Department. The standard of proof is preponderance of evidence does not mean that the enquiry is to be held in a slipshod manner without weighing evidence in its proper perspective. It does not lessen the rigour of enquiry which has to be based on evidence and merit with detailed analysis. Having given anxious consideration to the defence of the petitioners and examination of the enquiry report, the Court is of the conclusion that the decision and findings on the charges cannot be held to be on merit but based on assumptions. It was conjectural to hold that the work was executed and nothing was left unfinished with a view that what was noticed by the Vigilance team was a rectification process. Such a conclusion does not meet the standard to erase the irregularities pointed out and cannot be accepted on the premise that the proof needed is of preponderance of evidence. In any case, the final decision in an enquiry has to be a rational view, not a surmise or conjecture. So the net result of the above discussion is that even though the petitioner is said to have been exonerated from the charges in a departmental enquiry since it was not on merit cannot be said to have been a case of honourable exit. As to the 2nd petitioner, it is to be held that since the materials on record do prima facie suggest his involvement as well, the Court does not find any reason or compelling ground to interfere with the order of cognizance.

14. Accordingly, it is ordered.

15. In the result, the CRLMCs stand dismissed.

(R.K. Pattanaik)
Judge