

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.1688 of 2020

Subrat Das.

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Petitioner

M/s. Ramakanta Mohanty, Sr. Advocate,
S.R. Patnaik, Imrean Khan, P.K. Mohanty,
S. Mohanty, M. Kar, Advocates

-versus-

State of Odisha (Vigilance).

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Opposite Parties

Mr. Niranjan Moharana
(A.S.C., Vigilance) – For O.P.-State

**CORAM:
JUSTICE S. PUJAHARI**

**ORDER
05.08.2022**

**Order
No.**

12. **1.** The petitioner who is charge-sheeted as a co-accused in Vigilance Case No.5 of 2007 corresponding to T.R. No.1 of 2013 in the court of the Special Judge (Vigilance), Bhubaneswar, has filed this application under Section 482 of Cr.P.C. seeking for quashing of the said criminal proceeding.
- 2.** Heard the learned counsel for the petitioner and the learned counsel appearing for the Vigilance

Department, and perused the relevant papers on record vis-à-vis the contentions raised by the rival sides.

3. At the relevant time the petitioner was working as Asst. Engineer (Civil) in the erstwhile department of Irrigation and Power under the Chief Engineer, Potteru Irrigation Project, and the Vigilance police drew up / registered FIR vide Bhubaneswar Vigilance P.S. Case No.5 of 2007 against the petitioner and other co-accused persons, alleging, inter-alia, that in connection with the irrigation repairing work during the year 2003 under the Food for work programme at Pratap Ramchandrapur Irrigation Section although 319.7733 MT of rice was shown to have been received and handed over to the contractors for being distributed to the labourers, and though distribution was shown to have been made vide Utilisation Certificate, on verification of records, due procedure was found to have not been adopted in the process of tender, maintenance of record, allotment of work,

execution of agreement, distribution of rice etc. It is alleged that the officials including the petitioner in connivance with the contractors misappropriated public money to the tune of Rs.33,41,630.90 paise.

4. After investigation, charge-sheet was submitted on 29.08.2012 against the petitioner and the co-accused under Sections 13(2), 13(1)(c)(d) of the Prevention of Corruption Act and Sections 409, 408, 471, 420 and 120-B of IPC with specific allegation that there was criminal misappropriation of rice to the tune of 198.7733 MT worth Rs.20,77,180.98 paise by forging the account register, indent forms and work file. The learned Special Court, Vigilance took cognizance of the said offences on 21.01.2013, and charge has also been framed against the petitioner and the co-accused persons by the trial Court as per the order dated 04.05.2018. The petition filed by the present petitioner for discharge was rejected by the trial Court on 11.04.2018.

5. It may also be stated here that on 01.09.2012, i.e., in the aftermath of submission of the charge-sheet by the Vigilance Department, a common proceeding was initiated on administrative side by the Water Resources Department against the accused-officers including the petitioner under the Services Rules, on the same set of charges, and on the basis of the findings rendered by the Enquiring Officer and report submitted, the State Government exonerated the petitioner alone from the charges levelled against him.

6. It further appears that since the petitioner was not given promotion, he approached the Odisha Administrative Tribunal and thereafter this Court in W.P.(C) No.25713 of 2019, and in pursuance of the order passed by the said Tribunal in O.A. No.116 of 2018 and this Court in the writ petition referred to above, the State Government have given promotion to the petitioner on adhoc basis to the rank of SE (C),

Level-I as per the Notification dated 11.06.2020 of the Department of Water Resources.

7. In the factual scenario as above, the learned counsel for the petitioner submits that since the petitioner has already been exonerated from the same set of charges, in the Disciplinary Proceeding on the finding that there was no loss to the Government by any act of the petitioner, continuance of the criminal proceeding against him will be a clear abuse of the process of the Court, inasmuch as the standard of proof required to establish the guilt in a criminal case is far higher than the standard of proof required to establish the guilt in the departmental proceedings. According to him, there is bleak chance of conviction of the petitioner in the Vigilance cases where acquittal is a mere fait accompli. In support of his contention, the learned counsel for the petitioner has placed reliance on the decision of a Single Bench of this Court in CRLMC No.658 of 2018, and also on the decision of the Apex Court in **Ashoo Surendranath**

Tiwari vrs. The Deputy Superintendent of Police, EOW, CBI and another, reported in (2020) 9 SCC 636.

8. Per contra, it is the submission of the learned counsel appearing for the Vigilance Department that the trial Court having already framed charge against the petitioner and the co-accused persons on forming an opinion regarding existence of prima-facie case against them to proceed with the trial, and the said opinion being on the basis of the materials produced by the prosecution on record, the finding rendered in the Disciplinary proceeding in the aftermath of the completion of the investigation by the statutory agency or the consequence of the said proceeding can not come in the way of continuance of the criminal proceeding against the accused-petitioner, especially after framing of charge against him by the trial Court. Relying on ***M.E. Shivalinga Murthy vrs. C.B.I., Bengaluru***, reported in (2020) 2 SCC 768, he submits that at the stage of framing of charge the

accused can not rely on any external materials by way of defence to persuade the Court to discharge him. The learned counsel further submits that although the Departmental proceeding was initiated for the same set of allegations, in course of the enquiry all the incriminating materials collected during investigation have not been taken into consideration. The contention of the Vigilance Department vide paragraph-10 of the objection affidavit dated 25.06.2021 is extracted here below for ready reference:-

“10. Xxxxxx The Marshalling Officer could be not able to produce Tender files, Tender opening register to justify the drawal of agreements in respect of the alleged work. The Enquiry Officer also inferred that the agreement register has been manufactured at a later date and planted in place of original one, and attributed the said act to the Executive Engineer. The opinion/observations of the Enquiry Officer, cannot be accepted to the effect that “he has put all the blames on the head of the Executive Engineer and stated that the petitioner is a sub-ordinate Officer in the rank of Asst. Engineer who works directly under the nose of the Divisional Officer, and treated him innocent”. The Enquiry Officer has exonerated the accused-petitioner along with

other delinquent officers (i.e., other accused persons) relying on the statements drawn during Enquiry of the said accused persons citing them as witnesses. On the other hand the Vigilance investigation shows the illegalities as pointed out in Para-9 above to the effect that the accused persons have conspired with each other, abused their official position, created forged documents, manipulated the records, cheated the Govt. and misappropriated the rice without executing the works, and caused loss of Rs.20,77,181/- in terms of rice by not executing the agreement as well as the alleged works. However, the Enquiry Officer conducted enquiry after completion of investigation and treated the same as the procedural irregularities and opined that work has been executed, which is contrary to the findings of the Vigilance investigation. The Departmental Enquiry, though admitted the forgery, manipulation of documents / registers and active participation of the petitioner in the alleged act, however treated the said illegalities and conspiracy as irregularities by drawing self inferences or assumptions or presumptions etc. The alleged offences can be well proved or disproved on proper appreciation of evidences during trial. Furthermore, the Enquiry Officer exonerated the petitioner from the alleged crime, who has played a key role in joint conspiracy with the other accused persons, taking various technical pleas like presumptions and assumptions. In this backdrop it cannot be said that the petitioner has been exonerated on merit.xxxxxx”

9. The learned counsel for the Vigilance Department further submits that the judgment of the

Apex Court in the case of **Ashoo Surendranath Tewari (supra)** as cited by the petitioner is per incuriam, inasmuch as it has not taken note of the decision in the case of a three Judge Bench of the Apex Court in **State (NCT Delhi) vrs. Ajay Kumar Tyagi**, reported in (2012) 9 SCC 685. He has placed emphasis on the paragraph nos.24 and 25 of the said judgment which are quoted here below:-

“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. I have considered the rival contentions of the parties keeping in mind the facts involved in the case at hand as well as the principles settled. Admittedly, the Departmental proceeding was initiated against the petitioner and other officers involved, and the enquiry conducted in the aftermath of completion of the investigation by the Vigilance police, a statutory investigating agency, and the enquiry report in the said departmental proceeding was submitted by the enquiring officer subsequent to the order of cognizance was passed by the Special Judge (Vigilance) on finding a prima-facie case on the basis of the materials produced before him, to proceed against the petitioner and the co-accused for the offences alleged. Hence, it cannot be said that the Departmental proceeding that was started against the petitioner was parallel to the initiation of vigilance

case / investigation. That apart, a perusal of the enquiry report vide Annexure-4/A would reveal, inter-alia, that during the Departmental enquiry the Tender opening Register, Work registers etc. were not produced before the enquiry officer, and the Agreement register produced before him was found to be a manufactured one. The Enquiring Officer appears to have formed his opinion on many important aspects, on the mere basis of his assumption or presumption in absence of evidence. That apart, while affirming procedural irregularities and while attributing the same to the then Executive Engineer (co-accused), he gave a clean chit to the petitioner who was working then as the Asst. Engineer. In view of the above depiction, this Court finds merit in the contention of the learned counsel for the Vigilance Department that the exoneration of the petitioner in the Departmental proceeding was not on merit.

11. From the aforesaid two decisions, there appears to be division of opinion. Prior to the case of **Ashoo Surendranath Tewari (supra)**, a decision was also rendered by the Apex Court in the case of **Radheshyam Kejriwal vrs. State of West Bengal and another**, reported in (2011) 3 SCC 581 wherein in paragraph-38 it has been held as follows;

“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.”

Placing reliance on the decision of **Radheshyam Kejriwal (supra)** the Apex Court reiterated the case of **Ashoo Surendranath Tewari (supra)**. But, in the decision cited by the learned counsel for the Vigilance Department, the law laid down in the case of **Radheshyam Kejriwal (supra)** has not been taken note of.

12. Learned counsel for the Vigilance Department would submit that in the case of **Radheshyam Kejriwal (supra)** the decision rendered being a decision of two Judge Bench, inasmuch as one of the Judge, dissented, the law laid down in the case of **Ajay Kumar Tyagi (supra)** can be said to be holding the field, even if the same has not taken note of the case of **Radheshyam Kejriwal (supra)**. In view of the law laid down in the case of **Ajay Kumar Tyagi (supra)**, the subsequent decision also is of no

assistance to the petitioner as the same has a precedence value being a decision rendered earlier.

13. However, the Apex Court in the case of ***Central Board of Dawoodi Bohra Community and another vrs. State of Maharashtra and another***, reported in AIR 2005 S.C. 752, have held as follows:-

“Having carefully considered the submissions made by the learned senior counsel for the parties and having examined the law laid down by the Constitution Benches in the above said decisions, we would like to sum up the legal position in the following terms :-

(1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength.

(2) A Bench of lesser quorum cannot doubt the correctness of the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of co- equal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of co- equal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

(3) The above rules are subject to two exceptions : (i) The abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be

placed for hearing before any particular Bench of any strength; and

(ii) In spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of Chief Justice constituting the Bench and such listing. Such was the situation in *Raghubir Singh & Ors.* and *Hansoli Devi & Ors.*(supra).”

14. Therefore, a decision rendered by a Coordinate Bench earlier has the precedence value than a decision rendered by a later Bench. But, here in this case, the only question that has arisen is, whether the decision rendered in the case of ***Radheshyam Kejriwal (supra)*** can be said to be a decision of a strength of a co-equal Bench. No doubt, there was division of opinion by the Judges, but for all purposes the same can be a decision rendered by a Bench of three Judges. So, it was a decision of a co-equal Bench earlier to the decision rendered in the case of ***Ajay Kumar Tyagi (supra)***. Therefore, the same has also binding effect. If the subsequent decision

disputes such decision, even if the same is a decision on majority, it has no alternative but to refer the same to a larger Bench. Neither the same appears to have been done nor the case of **Radheshyam Kejriwal (supra)** has been taken note of in the case of **Ajay Kumar Tyagi (supra)**. Therefore, the decision rendered in the case of **Radheshyam Kejriwal (supra)** still holds the field, notwithstanding the same being a decision on majority, and subsequently the Bench of co-equal strength in an Unity has taken a different view. Hence, the decision rendered in the case of **Ashoo Surendranath Tewari (supra)** which has relied upon the case of **Radheshyam Kejriwal (supra)** can not be said to be per-incuriam for having not taken note of **Ajay Kumar Tyagi (supra)**. The Apex Court also while dealing with the question of precedence in the case of **Union of India through C.B.I. v. Nirala Yadav @ Raja Ram Yadav @ Deepak Yadav**, reported in (2014) 9 SCC 457 have taken the aforesaid view. This Court also in the case of **Pandia Gouda vrs. State of Orissa**, reported in (2019) 75 OCR

349, placing reliance on the decision in the case of **Nirala Yadav @ Raja Ram Yadav (supra)** held the same.

15. Reverting back to the case at hand, while not accepting the submission of the learned counsel for the Vigilance Department that the law laid down in the case of **Ashoo Surendranath Tewari (supra)** is per-incuriam, this Court is of the view that in this case the exoneration of the petitioner in the departmental proceeding being not on merit, notwithstanding the fact that the law laid down in the case of **Ashoo Surendranath Tewari (supra)** reiterating the principle settled in the case of **Radheshyam Kejriwal (supra)** reiterated holding is the field, this Court is not inclined to quash the criminal proceeding against the petitioner in view of his exoneration in the departmental proceeding, inasmuch as it has been held in the case of **Radheshyam Kejriwal (supra)** that the finding in the adjudication proceeding in favour of a person facing trial for identical violation will depend upon the

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

16. In the facts and circumstances of the case, and for the discussion made hereinabove, this Court finds no merit in the application of the petitioner. Hence, the CRLMC stands dismissed.

*(S.Pujahari)
Judge*

MRS

