

(2018) 07 J&K CK 0100

In the Jammu And Kashmir High Court

Case No : Criminal Miscellaneous Case No..301 Of 2011, Ia No. 335 Of 2011

Bhim Parkash Rao And Ors. @APPELLANT@Hash State Of Jammu & Kashmir

Date of Decision : 27-07-2018

Acts Referred:

Code of Criminal Procedure 1973, — Section 4(1)(c), 161, 251, 561A
Jammu and Kashmir State Ranbir Penal Code, 1989 — Section 409, 411

Citation : (2018) 07 J&K CK 0100

Hon'ble Judges : Sanjay Kumar Gupta, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. In the instant petition filed under Section 561-A of Criminal Procedure Code, the petitioners seek quashment of the order dated 25th October, 2011

passed by the Sessions Judge, Reasi, by which the Court has accepted the revision and set aside the order passed by the Sub-Judge (JMJC), Katra

dated 05th May, 2011, by which the petitioners were discharged in case FIR No.245/2010 under Sections 409/411 RPC of Police Station, Katra.

2. The factual matrix of the case is that the petitioner No.1, namely, Bhim Parkash Rao, who is working as Junior Engineer in GREF is the Incharge

of Road Construction for the road of Katra, Reasi under GREF.Â Petitioner No. 2, namely, Om Parkash is the owner of land, which was taken by

the petitioner No.1 for his labour and they are using the land and the petitioner No.1 is paying the rent to petitioner No.2 for the same.Â On the land,

petitioner No. 2 has also constructed some rooms, but there were no windows and doors and the petitioner No. 3, namely, Daya Ram is the mate of

the labour. It is alleged in the instant petition that a false and frivolous case has been registered against the petitioners and FIR No. 245/2011 under

Section 409/411 RPC. The allegations against the petitioners are that on 20th November, 2011 at 11:30 A.M, Sh. Ramesh Choudhary (SI) from

Police Station, Katra has learnt from the reliable sources that the petitioners have embezzled the Government store comprising 70 Cement Bags

(Ambuja) marked as not for retail sale and on these allegations, the case was registered against the petitioners under aforesaid Sections. The

investigation was conducted and the prosecution has seized 64 bags of cement instead of 70 bags. The prosecution has recorded the statement of

the witnesses under Section 161 Cr.P.C and after investigation, the Challan was presented in the Court of learned Sub-Judge (JMJC), Katra against

the petitioners for offence of Section 409/411 RPC.

3. It is also alleged in the petition that the Judicial Magistrate 1st Class (Sub-Judge), Katra after appreciating the material on record of

prosecution case and the statement of the witnesses recorded under Section 161 Cr.P.C, discharged the petitioners from the charges vide order dated

05th May, 2011 (Annexure-A). The Trial Court has specifically mentioned that the police have implicated the accused persons on mere suspicion

without prima-facie material against them. The criminal breach of trust on the part of the accused persons has not been prima-facie proved by the

prosecution, as the evidence collected and forming part of the Challan is not sufficient material to proceed against the accused person for trial. The

Trial Court has also mentioned that the alleged cement properly accounted was meant for the construction of the Reasi road at Aghar Jitto, which was

kept in the shop of accused No. 3 without any dishonest intention. Moreover, the departmental enquiry, which was initiated against the accused

person Nos. 1 and 2 has also exonerated the accused persons from the charges leveled against them.

4. It is further alleged that the State has filed the revision petition before the Sessions Judge, Reasi against the order dated 05th May, 2011 passed by

the Judicial Magistrate 1st Class (Sub-Judge), Katra, by which the Trial Court has discharged the petitioners in FIR No. 245/2011 under Sections

409/411 RPC. The prosecution has challenged the order on the ground that the Trial Court has passed the order in a haste manner without

considering the material and also mentioned that the Trial Court has not appreciated the evidence regarding embezzlement. The case was listed

before the Session Judge, Reasi on 25th October, 2011 and the Sessions Judge, Reasi allowed the revision petition and set aside the same on the

ground that there is a sufficient material in the present case to proceed against the accused persons.Â Â

5. In the instant petition, the petitioners have assailed the order dated 25th October, 2011Â on theÂ grounds that the order is against law and facts.Â

So the same is not sustainable and is liable to be quashed; that as per the allegations leveled against the petitioners that on the basis of information

learnt from the reliable sources, Ramesh Chander (SI) has addressed a docket to Police Station, Katra on the allegation that the accused persons

(petitioners) have embezzled the government Store comprising 70 Bags Cement (Ambuja) marked as not for retail sale and thereafter, only 64 bags of

cement were seized.Â The cement was seized from the land, which was used by the labour of GREF, who was engaged for construction of road.Â

It is the record that the cement was kept in the premises because of the rain and nobody has misappropriated the cement. The Revisional Court

without appreciating the prosecution case, statement of witness and other material on record allowed the revision petition and have also not

appreciated whether from the material and the statement witnesses recorded any offence under Section 409 RPC has been made out or not.Â

So the order is not sustainable and is liable to be quashed.Â

6. Objections have been filed on behalf of respondent-State.Â The stand taken by the respondent in the objections is that on 20th November, 2010 at

about 11:30 A.M, Shri Ramesh Choudhary (SI) from P/S Katra while on patrolling duty along with other constables in the area of Agar Jitto received

information from reliable source that one employee of GREF Department, namely, Bhim Parkash Rao Grade 2nd-Accused No. 1 is incharge for

construction of Katra-Reasi Road in connivance with GREF mate, namely, Daya Ram-accused No. 3 has embezzled 70 bags of government cement

and sold to one person, namely, Om Parkash-accused No. 2, which is still in possession of the said Om Parkash.Â On receiving said information, SI-

Ramesh Choudhary sent a docket to P/S Katra through Ct. Ashok Kumar No. 599/RSI.Â An FIR No. 245/2010 under Sections 409/411 RPC stands

registered against the accused persons.Â Investigation of the case was handed over to ASI-Sam Paul Gill, who visited the spot prepared site plan,

recorded statements and seized 64 bags of Ambuja cement marked as 'not for retail sale' and 6 bags of Ambuja Cement from the shop of

accused No. 2, namely, Om Parkash.

Thereafter, the accused persons were arrested and after the culmination of the investigation, challan was produced before the learned Sub-Judge

(JMJC), Katra against the accused persons for trial.

7. It is also stated in the objections that the Sub-Judge (JMJC), Katra has passed an order dated 05th May, 2011 in FIR No. 245/2010 u/s 409 RPC,

whereby the Sub-Judge (JMJC), Katra has discharged all the accused persons. A revision against the order of Sub-Judge (JMJC), Katra dated 05th

May, 2011 was filed before the Sessions Judge, Reasi, whereby all the accused persons were discharged and the Sessions Judge, Reasi was pleased

to allow the revision against the order passed by the Sub-Judge (JMJC) Katra vide order dated 25th October, 2011 with the observations that there is

sufficient material in the present case to proceed against the accused persons. Consequently, the revision petition was allowed and the impugned

order being afflicted with legal malady was quashed. It is also stated that the alleged cement, which was meant for the construction of the Reasi road

at Agar Jitto, which was kept in the shop of accused No. 3 with dishonest intention. Moreover, the departmental inquiry, which was initiated against

the accused Nos. 1 and 2 and exonerated the accused persons from the charges leveled against them has no effect on the criminal proceedings

initiated against the accused.

8. It is further stated in the objections that the instant petition is misconceived inasmuch as the same is not maintainable and that no legal, fundamental

and/or statutory rights of the petitioners have been violated. On these counts, the instant petition deserves to be dismissed outright.

9. I have considered the rival contentions. Petitioners have relied on 2015 ACR 43 case titled Binod Kumar v. S2015 ACR 43 case titled Binod

Kumar v. state of Bihar and 2007 (1) JKJ 1(HC) Kamaljeet Singh v State.

10. I have also gone through the law on the subject. Petitioners have been asked to be charge sheeted under Sections 409/411 RPC, which are

warrant trial.

11. Procedure for warrant trial has been provided in Section 251 Cr.P.C. It is

relevant part reads as under:-

251 A. Procedure to be adopted in cases instituted on police report.

(i) when, in any case instituted on a police report, the accused appears or is brought before a Magistrate at the commencement of a trial, such

Magistrate shall satisfy himself that the documents referred to in Section 173 have been furnished to the accused, and if he finds that the accused

has not been furnished with such documents or any of them, he shall cause them to be so furnished.

(2) If, upon consideration of all the documents referred to in 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 him.

(3) If, upon such documents being considered, such examination, if any being made and the prosecution and the accused being given an opportunity of

being heard, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter,

which such Magistrate is competent to try, and which in his opinion, could be adequately punished by him, he shall frame in writing a charge against

the accused.

(4) The charge shall then be read and explained to the accused and he shall be asked whether he is guilty or claims to be tried.

(5) If the accused pleads guilty, the Magistrate shall record the plea and may, in his discretion, convict him thereon.

(6) If the accused refuses to plead, or does not plead, or claims to be tried, the Magistrate shall fix a date for the examination of witnesses.

12. From bare perusal of this section, it is evident that if after examination and hearing, the Magistrate finds the charge as groundless, the Court shall

discharge the accused and in case Magistrate is of the opinion that there is ground for presumption that the accused has committed an offence triable

by him and in his opinion he or she could be adequately punished, the court shall frame a charge against the accused in writing.

13. For the purpose of framing of charge, therefore, the Judge has to consider judicially whether on consideration of the materials on record, it can be

said that the accused has been reasonably connected with the offence alleged to have been committed and that on the basis of the said materials there

is a reasonable probability of chance of accused being found guilty of the offence alleged. If the answer is in the affirmative, the judge will be at

liberty to presume that the accused has committed an offence. Charge is first notice to the accused of an accusation made against him. It should

conveyed to him in sufficient clearness and certainty what the prosecution intends to prove and which case the accused is to meet.

14. Section 4(1)(c) of Code of Criminal Procedure defines a "charge" includes any head of charge when the charge contains more heads than

one. As per Law a charge may be precise formulation of a specific accusation made against a person of offence alleged to have been committed by

him. The main purpose of framing charge is to give intimation to the accused of clear, unambiguous and precise notice of the nature of accusation that

the accused is called upon to meet in the course of trial. At the time of framing charges, the Court has to prima facie consider whether there is

sufficient ground to proceed against the accused and Court is not required to appreciate whether the material produced is sufficient or not for

convicting the accused.

15. Now coming to present case, perusal of order of JMIC it reveals that, while discharging the accused, he has appreciated the materials on file as he

was deciding the case finally. This was not proper on part of JMIC. He was only to form opinion as to whether there was sufficient material of

accusations leveled in FIR. JMIC has written in order that cements kept for construction of Reasi road at Agarjitto was kept in shop of accused no.3

without any dishonest intention; this finding of JMIC has been based upon departmental enquiry wherein accused no.1 and 2 were exonerated. But

there is no such evidence in file with regard to exoneration of accused 1 and 2 in departmental enquiry.

16. Further law is settled that exoneration in departmental proceeding ipso facto would not lead to exoneration or discharge in a criminal case.

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 cannot be rejected on the basis of the evidence in the departmental proceeding or the report of the Inquiry Officer based on those evidence. So exoneration in the departmental proceeding ipso facto would not result into the quashing of the criminal prosecution.Â Â

17. The order of Session Judge Reasi dated 25.10.2011 passed in revisionÂ thereby setting aside order of discharge passed by JMIC Reasi is, thus, correct and does not suffer from any infirmity of law. I have carefully gone through the authorities cited by counsel for petitioners; there is no dispute with regard to these laws. But firstly facts are to be seen then law is to be applied. Facts of those cases are quite different than that of present case.Â The order of Sessions Judge, Reasi is upheld and this petition is dismissed.