(1998) 11 J&K CK 0026

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 168 of 1998

Syed Asgar Ali and Others — APPELLANT

Vs

State of J. and K. and Others — RESPONDENT

Date of Decision : 27-11-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 226
Criminal Procedure Code, 1973 (CrPC) — Section 155(2), 156, 197, 482
Jammu and Kashmir Government Employees (Conduct) Rules, 1971 — Rule 10(2), 9(4)
Jammu and Kashmir Prevention of Corruption (Amendment) Act, 2006 — Section 12, 5(1), 5(2), 6, 9(2)
Jammu and Kashmir Public Men and Public Servants (Declaration of Assets and Other Provisions) Act, 1983 — Section 12, 14
Jammu and Kashmir Public Servant Declaration of Assets Act, 1983 — Section 12, 14
Ranbir Penal Code, 1989 — Section 109, 120B, 200

Citation : (2000) CriLJ 306

Hon'ble Judges : O.P. Sharma, J

Bench : Single Bench

Advocate : M.H. Beg, D.C. Raina and D.S. Chauhan, for the Appellant; R. Pant, for the Respondent

Final Decision : Dismissed

Judgement

O.P. Sharma, J.—The first two petitioners are husband and wife whereas the 3rd petitioner according to the petitioners is business partner

of the 2nd petitioner. They have moved the petition for quashing FIR No. 43/ 96 registered in Police Station Vigilance, Jammu and Govt. order

dated 7-8-97 according sanction to the prosecution u/s 5(2) of Prevention of Corruption Act read with Sections 109, 120-B and 200 RPC, and

Sections 12 and 14 of J & K Public Servant Declaration of Assets Act, 1983 against the first petitioner.

2. The grounds of challenge are (i) that the petitioners were not given any

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opportunity to explain that the total assets possessed by him are not

disproportionate to the known sources of the income, (ii) that the FIR No. 43/96 does not disclose the commission of offence and (iii) that the

sanction to the prosecution has been accorded without application of mind.

3. Mr. Beigh, learned Senior Advocate appearing for the petitioners argued that the Investigating Police Officer has clubbed the income of the first

two petitioners even though petitioner is having separate income. This could have been explained by the petitioners only if an opportunity was

provided. Failure to afford opportunity according to Mr. Beigh has thus resulted in serious prejudice to the petitioner and miscarriage of justice.

Moreover, the order sanctioning prosecution it is argued suffers from application of mind because it does not indicate the basis on which the

satisfaction has been recorded. How the investigating police officer reached the conclusion that the total value of the assets of petitioner Syed

Asgar Ali was Rs. 87,30,975.00 lakhs according to Mr. Beigh is not disclosed and this vitiates the sanction order because income of the husband

and wife has been clubbed although the wife has her independent business and is not his defendant.

4. The contention of Mr. R. Pant is that the challan having already been produced in the Court of special Judge Anti-Corruption, whether any

offence is disclosed and charge against the petitioners is made out or not is question of fact which the trial Court will examine before the charge is

framed. The trial Court according to him is not precluded from considering the legality of the order sanctioning and will in fact be in a better

position to appreciate the contention as to whether any offence is disclosed and what material was produced before the sanctioning authority.

Since the prosecution of the petitioner Syed Asgar Ali is being challenged mainly on questions of fact regarding the evaluation of his assets, this

being a question of fact argued the learned counsel cannot be examined under the extra-ordinary jurisdiction.

5. The question of law involved is whether the petitioner was entitled to an opportunity of being heard before sanction to his prosecution was

accorded by the Govt. The apex Court in State of M.P. Vs. Dr Krishna Chandra Saksena, relying on an earlier judgment State of Maharashtra

and others Vs. Ishwar Piraji Kalpatri and others, and Superintendent of Police

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(C.B.I) Vs. Deepak Chowdhary and others, held that: ""it is now

well settled that at the stage of granting of sanction accused need not be heard"". However, identical argument regarding the non-compliance with

the principles of natural justice was rejected by their lordship in State of Maharashtra and others Vs. Ishwar Piraji Kalpatri and others, holding that

(at p. 1131 of Cri LJ):--

13. The main thread which runs throughout the judgment is the alleged non-compliance with the principles of natural justice in so far as applicability

of Section 5(1)(e) of the Act is concerned, which section reads as follows:

5(1)(e) if he or any person on his behalf is in possession or has, at any time during the period of his office, been in possession, for which the public

servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.

14. Interpreting this provision, the learned Judge had come to the conclusion that opportunity to satisfactorily account for must be afforded before

an offence is registered. In this connection, it was observed as follows:

Having regard to the procedure followed in relation to the investigation of corruption charges u/s 5(1)(e) of the Prevention of Corruption Act, one

needs to bear in mind that unlike in the case of offences under the IPC, substantial inquiries/investigations are carried out and completed prior to

arriving at a conclusion as to whether or not there is ground to hold that an offence has been completed. That procedure cannot be one sided in the

face of a statutory requirement which prescribes that the accused must be afforded an opportunity of being heard. Undisputedly, therefore, that

opportunity has to come prior to the stage when conclusions are reached, if at all it is to be meaningful.

15. In our opinion, there is a complete misreading of the aforesaid provisions by the High court. It is, no doubt true that a satisfactory explanation

was required to be given by the delinquent officer. But this opportunity is only to be given during the course of the trial. It is no doubt true that

evidence had to be gathered and a prima facie opinion found that the provisions of Section 5(1)(e) of the Act are attracted before a first

information report was lodged. During the course of gathering of the material, it does happen that the officer concerned or other person may be

questioned or other queries made. For the formation of a prima facie opinion that

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an officer may be guilty of criminal misconduct leading to the

filing of the first information report, there is no provision in law or otherwise which makes it obligatory of an opportunity of being heard to be given

to a person against whom the report is to be lodged. That such satisfactory account had to be rendered before a Court is also borne out from the

judgment of this Court in K. Veeraswami Vs. Union of India (UOI) and Others, where referring to Section 5(1)(e) of the Act page 713 of the said

judgment, it was observed as follows: (SCC pp 713-14 para 72)

Clause (e) creates a statutory offence which must be proved by the prosecution. It is for the prosecution to prove that the accused or any person

on his behalf, has been in possession of pecuniary resources or property disproportionate to his known sources of income. When that onus is

discharged by the prosecution, it is for the accused to account satisfactorily for the disproportionality of the properties possessed by him. The

section makes available statutory defence which must be proved by the accused. It is a restricted defence that is accorded to the accused to

account for the disproportionality of the assets over the income. But the legal burden of proof placed on the accused is not so onerous as that of

the prosecution. However, it is just not throwing some doubt on the prosecution version. The legislature has advisedly used the expression

'satisfactorily account'. The emphasis must be on the word 'satisfactorily'. That means the accused has to satisfy the Court that his explanation is

worthy of acceptance. The burden of proof placed on the accused is an evidential burden though not a persuasive burden. The accused however,

could discharge that burden of proof 'on the balance of probabilities' either from the evidence of the prosecution and/or evidence from the defence.

16. The aforesaid passage leaves no manner of doubt that the opportunity which is to be afforded to the delinquent officer u/s 5(1)(e) of the Act of

satisfactorily explaining about his assets and resources is before the Court when the trial commences and not at an earlier stage. The conclusion

arrived at by the learned single Judge that principles of natural justice had been violated, as no opportunity was given before the registration of the

case, is clearly unwarranted and contrary to the aforesaid observations of this Court in K. Veeraswami Vs. Union of India (UOI) and Others, .

This is complete answer to the main thrust of the argument of Mr. Beigh. So the

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first contention of Mr. Beigh stands negatived. It was next

contended by Mr. Beigh that the order of sanction does not disclose what material was considered by the Govt. before sanctioning the

prosecution.

Whereas, during the inyestigation, it has been found that the total income of the accused from all sources was of the order of Rs. 11,23,710.00.

Whereas after accounting for his expenditure and living expenses incurred on food, clothing, household articles, marriage of sisters and brothers

and maintenance of vehicle, telephone and education of children etc., the accused was supposed to be in debt by about Rs. 1,73,796.00.

Whereas, it is alleged that the accused has raised assets worth Rs. 85,57,179.00 and thus he is in possession of assets worth Rs. 87,30,975.00

disproportionate to known sources of income.

6. After this, sanction order refers to the report of the Commissioner of Vigilance about the charge of criminal conspiracy and thereafter the Govt..

came to the following conclusion:--

Whereas, the Govt. after considering the record and evidence in the case is satisfied that a prima facie case u/s 5(2) P.C. Act, 2006 read with

Section 109, 120-B & 201, RPC and Sections 12 and 14 of Jammu and Kashmir Public Men and Public Servants Declaration of assets and other

provisions Act, 1983 established against the accused Shri Asgar Ali, then Additional Deputy Commissioner, Kupwara;

Now, therefore, in pursuance of Section 6 of P.C. Act, 2006 sanction is hereby accorded to the prosecution of Sh. Asgar Ali the then Additional

Deputy Commissioner Kupwara for committing offences punishable u/s 5(2) P.C. Act 2006 r/w Sections 12 and 14 of J & K Public Men and

Public Servants Declaration of Assets and other Provisions Act 1983 read with Sections 109, 120-B and 201, RPC in case FIR No. 43/96 P/S

VOJ.

7. Obviously the reference to the report of the investigation means reference to the police diaries and the conclusion reached by the investigating

police officer. Reference to the record means reference to the police diaries only and therefore, it cannot be said that there was no material before

the Govt. at the time of granting sanction. It was faintly suggested by Mr. Beigh that the sanction order does not disclose as to who had personally

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scrutinized the record before subjective satisfaction was recorded. An identical argument was rejected by their Lordships of the Supreme Court in

State of Maharashtra and others Vs. Ishwar Piraji Kalpatri and others, holding that (at p. 1130 of Cri LJ):--

10. In coming to the conclusion that the order of the sanction was not valid, the High Court first held that ""in the absence of sanctioning authority

recording and holding that the accused could not satisfactorily account for disproportionate assets, no sanction could ever have been granted.

Without going into the question as to whether in the order according sanction it is necessary for such an averment being made, the record clearly

discloses that in the schedule annexed to the sanction dated 3-2-90, such a statement was made. After stating that the respondent and his family

and/or associates were found to be in possession of pecuniary resources or properties disproportionate to the extent of Rs. 5,66,604.01 it was

specifically stated that with regard to this ""the accused person failed to satisfactorily account for"". It is clear that the learned Judge had wrongly

observed that such a statement was absent.

11. Another reason as given by the High Court for quashing the sanction was that the order of sanction was signed by the Addl. Chief Secretary to

the Govt. of Maharashtra but ""there is nothing in this order to indicate as to whether the signatory or any other officer on his part was the one who

had personally scrutinized the file and arrived at a subjective satisfaction that is a legal prerequisite"". We do not find any warrant in law which

requires a statement being made, while according sanction, that the officer signing the order had personally scrutinized the file and had arrived at

the required satisfaction. In the preamble of the said order, it is categorically stated:

and whereas the Government of Maharashtra having fully examined the material before it and considering all the facts and circumstances disclosed

herein, is satisfied that there is a prima facie rase made out against the accused person and that it is necessary in the interest of justice that the

accused person should be prosecuted in the Court of competent jurisdiction for the said offence....

12. This prima facie shows that there has been an application of mind and that the material on record has been examined by the officers concerned

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before according sanction. In view of the aforesaid, there was absolutely no justification for the learned Judge to observe that any such statement,

as indicated by him, was required to be made in the order. The learned Single Judge made observations to the effect that the manner in which the

sanction order had been passed would show that a ""rather cavalier treatment"" has been meted out in the present case. We do not see any

justification for the Court making such observations in the present case because the perusal of the order of sanction does not show any legal

infirmity and such remarks by the Judge were clearly uncalled for.

8. Since the sanction order makes reference to the record and report of the Vigilance Commissioner, the record in such cases is only police diaries

and the result of the investigation, once sanction has been issued after the examination of the record and the report of the Commissioner of

Vigilance, the argument that it suffers from non-application of mind is not tenable as held in State of Bihar and Another Vs. P.P. Sharma, IAS and

Another, which reads as follows:--(Paras 27 and 28)

27. The sanction u/s 197, Cr.P.C. is not an empty formality. It is essential that the provisions therein are to be observed with complete strictness.

The object of obtaining sanction is that the authority concerned should be able to consider for itself the material before the investigating officer,

before it comes to the conclusion that the prosecution in the circumstances be sanctioned or forbidden. To comply with the provisions of Section

197 it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is desirable that the facts should be

referred to on the face of the sanction. Section 197 does not require the sanction to be in any particular form. If the facts constituting the offence

charged are not shown on the face of the sanction, it is open to the prosecution, if challenged, to prove before the Court that those facts were

placed before the sanctioning authority. It should be clear from the form of the sanction that the sanctioning authority considered the relevant

material placed before it and after a consideration of all the circumstances of the case it sanctioned the prosecution.

28. In the present case the investigation was complete on the date of sanction and police reports had been filed before the Magistrate. The

sanctioning authority has specifically mentioned in the sanction order that the

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papers and the case diary were taken into consideration before

granting the sanction. Case diary is a complete record of the police investigation. It contains total material in support or otherwise of the allegations.

The sanctioning authority having taken the cas'e diary, into consideration before the grant of sanction it cannot be said that there was non-

application of mind on the part of the sanctioning authority. It is nobody's case that the averment in the sanction order to the effect that case diary

was taken into consideration by the competent authority is incorrect. We, therefore, do not agree with the finding of the High Court and set aside

the same.

9. Last but not the least, time and again the apex Court has held that power of quashing of criminal proceedings should be exercised very sparingly.

In State of M.P. Vs. Dr Krishna Chandra Saksena, while reiterating the law laid down in R.S. Raghunath Vs. State of Karnataka and another, a

two members Bench of the apex Court speaking through Dr. A. S. Anand J. (Now his Lordship of the Supreme Court) held that:--

8. ...The extraordinary or inherent powers do not confer an arbitrary jurisdiction on the High Courts to act according to its whim or caprice. The

Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the

complaint. It has also been laid down by way of illustration as to under what circumstances the High Court can be justified in interfering with the

criminal proceedings under Article 226 of the Constitution of India or Section 482 Cr P C. Seven illustrative circumstances under which such

interference may be justified were listed as under R.S. Raghunath Vs. State of Karnataka and another,

(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 u/s 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of

the Code.

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(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 u/s 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 concerned Act (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 concerned Act,

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.

10. None of the seven illustrated circumstances exist in this case to justify interference while exercising powers of judicial review. Regarding the

challenge to the vires of provisions of Sections 9 (2) and 12 of the Act and Rule 9(4) of the J & K Employees Conduct Rules 1971 is concerned,

there is nothing arbitrary or unconstitutional in any of these provisions which are meant to ensure probity in public life and absolute integrity of

public servant. Moreover, the law is well settled that no enactment can be struck down by just saying that it is arbitrary or unreasonable. Unless it

is found that it suffers from legislative competence or violates any of the fundamental rights or any other constitutional provisions as reiterated in the

State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc., (at page 1641 para 45):--

A law made by the Parliament or the legislature can be struck down by Courts on two grounds and two grounds alone, viz., (1) lack of legislative

competence and (2) violation of any of the fundamental rights guaranteed in Part

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III of the Constitution or of any other constitutional provision....

Their lordships further held that:--

it is enough for us to say that by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds

mentioned above. In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is

violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the

fundamental rights guaranteed by Clause (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the Clauses (2) to

(6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional

infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that Court thinks it unjustified. The

Parliament and the Legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of

the people and what is good or bad for them. The Court cannot sit in judgment over their wisdom.

11. Sub-clause (2) of Section 9 of the Public Men and Public Servant Declaration of Assets and other provisions Act, 1983 only makes it

obligatory to submit annual return of assets held by a public servant and his family members in the month of January every year stating the reason

for increase if any in the assets and source thereof. There is nothing unreasonable as the classification is founded on intelligible differentia and the

differentia has a rational relation to the object sought to be achieved by the Act which is to ensure clean public life. The provision applies to all

Public Servants uniformally. Similarly, Section 12 of the Act does not suffer from the vice of discrimination because it also applies to all public

servants. It is also a reasonable restriction because prohibition against public servants to purchase property is not absolute. The only requirement is

that he should do so only after obtaining the permission from the authority prescribed under the Act. It is thus a fair and reasonable classification

because a public servant should explain the source of income before he is allowed to purchase any property. Any legislative or administrative

measure object of which is to ensure and maintain honesty and integrity in public

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life in fact only advances the constitutional mandate of

Fundamental duties enshrined in Article 51A ofthe Constitution. The object and purpose of Rule 9 (4) and Rule 10 (2) of the Jammu and Kashmir

Employees (Conduct) Rules 1971 being the same they are also intra vires the Constitution. So there is no merit in this petition which is dismissed

accordingly. However, observations made hereinabove shall not in any way influence the trial Court in case the issues raised in this case are re-

agitated before him.

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