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IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No. 3407 of 2010

Dr. Minaketan Pani *Petitioner*
-versus-
State of Orissa *Opposite Party*

Appeared in this case:

For the Petitioner : Mr. Debi Prasad Dhal
Senior Advocate

For the Opposite Party : Mr. S.N. Das,
Additional Standing Counsel

**CORAM:
THE CHIEF JUSTICE**

JUDGMENT
20.05.2022

सत्यमेव जयते

Dr. S. Muralidhar, CJ.

1. The present petition seeks the quashing of the order dated 15th January 2009, passed by the Sub-Divisional Judicial Magistrate (S) Cuttack, taking cognizance against the Petitioner of the offences under Sections 468/471/420/120(B)/465/466 of IPC and Section 9 of the Orissa Conduct of Examinations Act.

2. While directing notice to issue in the present petition on 9th April 2012, this Court stayed further proceedings in G.R. Case No.1057 of 2007. Thereafter, by an order dated 8th April 2022, this Court dismissed the present petition for non-prosecution.

Subsequently, by order dated 22nd April 2022 in CRLMA No.75 of 2022, the Court recalled the said order and restored the present petition to file.

3. The background facts are that one Bijay Shankar Das, son of Sri Bishnu Charan Das, appeared in the Annual High School Certificate Examination for 2007, conducted by the Board of Secondary Education, Orissa (BSE) at the Government High School, Jagatsinghpur Centre from 7th March 2007 to 16th March 2007. It was alleged that there had been a manipulation of the marks in the said examination in respect of the roll number of the said Sri Bijay Shankar Das and others at the valuation Centre of the BSE.

4. On receipt of the above information, an enquiry was conducted. During the enquiry, it was ascertained that the marks of Sri Bijay Shankar Das had been tampered, manipulated and enhanced at various leaves by officers to give undue advantage and favour to him. It was suspected that the marks of other candidates also might have been similarly tampered and manipulated. Accordingly, an FIR was registered and consequently, G.R. Case No.1057 of 2007 was registered on the board of the S.D.J.M., Sadar Cuttack.

5. In course of the investigation, it transpired that the result of the Annual High School Certificate Examination was published on 29th May 2007, in which Bijay Shankar Das was declared passed in the First Division. In the month of August 2007, one Dr. Debendra

Ch. Mishra, Ex-President, BSE received an anonymous call about the manipulation and enhancement of the marks from 39 to 89 in Oriya subject and 50 to 80 in English Paper of the abovenamed candidate. The President then sought clarification from the Secretary and Controller of Examination, BSE. However, neither officer responded to the query.

6. Thereafter, a detailed investigation was undertaken; the above officers were examined and also the documents and materials relevant to the case were gathered from different sources. The scrutiny of the statements and the documents revealed that marks of Sri Bijay Shankar Das had been illegally manipulated and enhanced by the Controller of Examination and that this was within the knowledge of the present Petitioner i.e., the Secretary, BSE. Accordingly, upon completion of the investigation the Investigating Officer (IO) submitted a charge sheet against the Petitioner and others for the aforementioned offences of which cognizance was taken by the impugned order by the S.D.J.M., Sadar Cuttack.

7. Mr. Debi Prasad Dhal, learned Senior Advocate for the Petitioner, refers to the Orissa Secondary Education Act, 1953 and in particular Chapter VI thereof which deals with the work of the Secretary. He submits that the present Petitioner, who was the Secretary, BSE had no knowledge of the acts of his superior, i.e., the Controller of Examination. The Secretary, according to him, in fact, had no role to play in regard to any examination whether it

was for admission or with regard to the publication of the result. The mark sheets and the provisional certificates were issued under the signature of the Controller of Examination. It was further submitted by Mr. Dhal that the subsequent disciplinary proceedings against the Petitioner ended in his exoneration.

8. To this effect, an additional affidavit was filed on 25th February, 2022 in which *inter alia* it was stated that in the departmental enquiry, by the Chief Secretary, and the Joint Secondary of Higher Education the following conclusion was reached:

"Without any visible evidence no one can be punished. Dr. Minaketana Pani cannot be punished basing on presumption. There is no sufficient documentary evidence or oral evidence or circumstantial evidence which prove that Dr. Minaketan Pani is involved in mark tampering activities or on the issue of back dated mark sheets and certificates.

Hence, he may be exonerated from the charges. The period suspension from 22.08.2007 to 26.10.2009 may be treated as duty."

9. However, the Enquiry Officer in an earlier enquiry dated 18th November, 2010 made the following noting on 21st June, 2011:

"The perusal of the report of the CDI and the report of the Chief Secretary reveals that no clear cut evidence against Minaketan Pani the delinquent officer is available in support of the charges framed against him. Both the Chief Secretary and CDI have agreed that the tampering and increasing of marks have not directly been done by the delinquent officer, Dr. Pani. But the delinquent officer cannot be fully absolved from

his indirect involvement in the episode as suggested by the CDI and the Chief Secretary."

10. The Petitioner was therefore 'censured' since the main charges were not proved and the period from 22nd August 2007 to 26th October 2009 was treated as duty. Aggrieved by the order (noting) dated 21st June 2011, the Petitioner preferred an appeal and after the appeal was dismissed, filed O.A. No.2001 of 2012 before the Odisha Administrative Tribunal, Bhubaneswar (OAT).

11. By an order dated 13th March 2013, the OAT disposed of the appeal. The Department of Higher Education then preferred a review against the above order dated 13th March, 2013. However, the OAT by its order dated 24th February 2014, dismissed the review petition. The Government of Odisha then preferred W.P. (C) No.2225 of 2015 in this Court. The said petition was dismissed by this Court on 19th December, 2017. Against the said order, the Government of Odisha filed SLP (Civil) No.23691 of 2018 in the Supreme Court of India. By an order dated 19th July 2019, the Supreme Court dismissed the aforementioned SLP.

12. Meanwhile, the Petitioner retired with all his back wages and regularization of his service as he had been exonerated honourably in the departmental proceedings.

13. It is in the above context that it is pleaded by Mr. Dhal that the criminal proceedings against the Petitioner cannot continue. Two decisions have been relied upon by Mr. Dhal in support of the

proposition that honourable exoneration in the departmental proceedings would justify discontinuance of the criminal proceedings on the same charges. The first is ***Radheyshyam Kejriwal v. State of West Bengal (2011) 3 SCC 581*** and the second is ***Ashoo Surendranath Tewari v. Deputy Superintendent of Police, EOW, CBI (2020) 9 SCC 636***.

14. Countering the above submissions, Mr. S.N. Das, learned Additional Standing Counsel (ASC) relies on the decision of a coordinate Bench of three learned Judges of the Supreme Court in ***State (NCT of Delhi) v. Ajay Kumar Tyagi (2012) 9 SCC 685*** which according to him came to a contrary conclusion.

15. In its order dated 22nd April 2022 in the present petition, this Court noted the conflict between the above decisions of Benches of the Supreme Court of India of the same Bench strength. Learned counsel for the parties had sought time to examine the issue further. The matter was thereafter finally heard on 13th May, 2022.

16. Mr. Dhal has submitted his written notes of argument where *inter alia* it was pointed out that several High Courts have taken the view that where there are judgments of the Supreme Court of the same Bench strength, then the later Judgment would prevail. In particular, reference has been made to the following decisions of the Full Benches of the High Courts:

(a) ***Govindanaik G. Kalaghatigi v. West Patent Press Co. Ltd. AIR 1980 Kant 92 (FB)***

(b) *Gujarat Housing Board, Ahmedabad v. Nagajibhai Laxmanbhai AIR 1986 Guj 81 (FB)*;

(c) *Jabalpur Bus Operators Association v. State of Madhya Pradesh AIR 2003 MP 81 (FB)*.

17. Of the three Judgments cited, two by Mr. Dhal for the Petitioner and one by the learned ASC, the earliest is the decision in *Radheyshyam Kejriwal v. State of West Bengal (supra)* where the following principles were laid down:

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

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

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

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

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

(v) Adjudication proceedings 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 proceedings 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 the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases.

39. In our opinion, therefore, the yardstick would be to judge as to whether the allegation in the adjudication proceedings as well as the proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceeding is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court."

18. The next in chronology is the decision in *State (NCT of Delhi) v. Ajay Kumar Tyagi* (*supra*) which is a Judgment of a Bench of three learned Judges but which took no note of the earlier decision in *Radheyshyam Kejriwal v. State of West Bengal* (*supra*). What is, however, common to both decisions is the earliest of the decisions of the Supreme Court in *P.S. Rajya v. State of Bihar* (1996) 9 SCC 1. In *P.S. Rajya v. State of Bihar* (*supra*), the allegation against the delinquent employee in the departmental proceedings and the criminal case were one and the same i.e., possessing assets disproportionate to the known sources of income. The Supreme Court was of the view that the case could be brought

under any of the categories of cases mentioned in *State of Haryana v. Bhajan Lal 1992 Supp (1) SCC 335* for quashing of the proceedings. Accordingly, the decision of the High Court declining to quash the criminal case was set aside and the criminal proceedings were quashed.

19. In *State (NCT of Delhi) v. Ajay Kumar Tyagi (supra)*, the decision in *P.S. Rajya (supra)* was sought to be distinguished by stating that it:

“19.... does not lay down any proposition that on exoneration of an employee in the departmental proceeding, the criminal prosecution on the identical charge or the evidence has to be quashed”

20. In *State (NCT of Delhi) v. Ajay Kumar Tyagi (supra)*, the Supreme Court noted that the decision in *P.S. Rajya (supra)* which was by the Bench of two Judges was distinguished in a subsequent decision in *State v. M. Krishna Mohan (2007) 14 SCC 667* which was again by a two-Judge Bench. It was accordingly held that the decision in *P.S. Rajya (supra)* was not an authority for the proposition that exoneration in departmental proceeding *ipso facto* would lead to a judgment of acquittal in a criminal trial.

21. Despite noting the aforementioned decisions, the decision in *State (NCT of Delhi) v. Ajay Kumar Tyagi (supra)* failed to take note of the coordinate Bench judgment in *Radheyshyam Kejriwal v. State of West Bengal (supra)*. The latter Judgment was binding on the coordinate Bench and therefore the Judgment in *State (NCT*

of Delhi) v. Ajay Kumar Tyagi should be considered to be 'per incuriam' as explained by the Supreme Court in *State of Assam v. Ripa Sharma AIR 2013 SC 3588* and *Central Board of Dawoodi Bohra Community v. State of Maharashtra AIR 2005 SC 752*.

22. Then we have the other three-Judge Bench Judgment, which is more recent in *Ashoo Surendranath Tewari v. Deputy Superintendent of Police, EOW, CBI (supra)* which follows *Radheyshyam Kejriwal v. State of West Bengal (supra)* but does not notice *State (NCT of Delhi) v. Ajay Kumar Tyagi (supra)*. It however takes note of *P.S. Rajya (supra)*. The conclusion reached in *Ashoo Surendranath Tewari v. Deputy Superintendent of Police, EOW, CBI (supra)* is that the exoneration in departmental proceedings would result in the quashing of the criminal case on the same charges since it entailed a higher standard of proof. In other words, if on the lower standard of proof itself the charges were not made out, they obviously would not be made out on a higher standard of proof in a criminal case. The case was held to be covered by Clause (vii) in para 38 of *Radheyshyam Kejriwal v. State of West Bengal (supra)*.

23. It must be noted here that faced with a similar dilemma, two learned single Judges of the Kerala High Court and Jammu & Kashmir High Court have come to the conclusion that it is *State (NCT of Delhi) v. Ajay Kumar Tyagi* which would apply and not *Ashoo Surendranath Tewari v. Deputy Superintendent of Police, EOW, CBI (supra)*. These are the decisions in *J. Rajesh Kumar v.*

Central Bureau of Investigation 2021 SCC OnLine Ker 3870 and the Judgment dated 17th December 2020 of the J & K High Court in ***CRM(M) No.265 of 2019*** and ***CrIM No.634 of 2019 (Sarwan Singh v. State)***.

24. However, as far as this Court is concerned, it is not persuaded to adopt the above line of reasoning of the learned Single Judges of the said two High Courts of Kerala and J&K, for the simple reason that as explained by the Full Benches of the three High Courts, i.e., the High Court of Karnataka in ***Govindanaik G. Kalaghatigi v. West Patent Press Co. Ltd.***, (*supra*), the High Court of Gujarat in ***Gujarat Housing Board, Ahmedabad v. Nagajibhai Laxmanbhai*** (*supra*) and the Madhya Pradesh High Court in ***Jabalpur Bus Operators Association v. State of Madhya Pradesh*** (*supra*), where there is a conflict between two decisions of the Supreme Court of same Bench strength, it is later of the decisions that would prevail. The last of the Judgments of the coordinate Bench of the Supreme Court of India is the decision in ***Ashoo Surendranath Tewari v. Deputy Superintendent of Police, EOW, CBI*** (*supra*) and, therefore, that would prevail.

25. A point was sought to be raised by learned ASC that the decision in ***State (NCT of Delhi) v. Ajay Kumar Tyagi*** (*supra*) was unanimous whereas the decision in ***Radheyshyam Kejriwal v. State of West Bengal*** (*supra*) was by a majority of 2:1. As observed in ***Shanti Fragrances v. Union of India (2018) 11 SCC 305***, the total strength of the Bench that decided the case is deemed

to be the Bench strength of that decision regardless of dissenting opinions.

26. For all of the aforementioned reasons, in the facts and circumstances of the present case where on the same charges on which the Petitioner is facing criminal trial he has been honourably exonerated in the departmental proceedings, the Court adopts the reasoning of the decisions in *Radheyshyam Kejriwal v. State of West Bengal* (*supra*) and *Ashoo Surendranath Tewari v. Deputy Superintendent of Police, EOW, CBI* (*supra*) and sets aside the impugned order dated 15th January 2009, passed by the Sub-Divisional Judicial Magistrate (S) Cuttack in G.R. Case No.1057 of 2007.

27. The petition is accordingly allowed but in the circumstances with no orders as to costs.

(S. Muralidhar)
Chief Justice

S. Behera