

IN THE HIGH COURT OF JAMMU & KASHMIR AND  
LADAKH AT JAMMU

CRMC No. 401/2017 c/w  
CRMC No. 402/2017 &  
CRM(M) No. 140/2020

Reserved on: 08.05.2023  
Pronounced on: 24 .05.2023

**Suhas Laxman Phadke & anr  
Suprakash Kundu  
Deepak Kapoor**

**...petitioners**

*Through:* - Mr. Rahul Sharma, Adv. and Ms. Shivangi Vaid, Adv. in CRMC Nos. 401/2017 and 402/2017.

M/S. S. S. Ahmed, Rahul Raina, & Supriya Chouhan, Advocates. in CRM(M) No. 140/2020

Vs.

**State of J&K**

**...respondents**

*Through:* - Ms Monika Kohli Sr. AAG.

**CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE**

**JUDGMENT**

1 Through the medium of afore-titled three petitions filed under Section 561-A of J&K Cr.P.C (Section 482 of Central Code), the petitioners have challenged FIR No. 19/2011 for offences under Section 5(1)(d) read with Section 5(2) of J&K Prevention of Corruption Act, 2006 ('hereinafter referred to as the 'PC Act') and Section 120-B RPC registered with Police Station Vigilance Organization, Jammu as also the proceedings emanating therefrom.

2 In the impugned FIR, it has been alleged that a preliminary enquiry was conducted to enquire into the allegations regarding purchase of medicines worth crores of rupees on exorbitant rates by the Director Health Services, Jammu ignoring the codal formalities and standing instructions regarding such purchases. It was further alleged that the medicines had been procured from the firms which had been permanently de-registered/blacklisted by the Directorate General Health Services (Medical Stores Organization) R.K. Puram, New Delhi.

3 The preliminary enquiry revealed that Mission Director, NHRM had requested Director Health Services, Jammu that various drug kits were to be supplied to the health institutions of the State and, accordingly, a request was made to the Director Health Services to purchase these drug kits from the Central Public Sector Enterprises (CPSEs) as per the guidelines of Ministry of Health and Family Welfare, Government of India. After the preliminary enquiry, it was found that the Director Health Services, Jammu had issued limited NIT for purchase of medicines from CPSEs, but, most of these medicines did not fall within the ambit of 102 medicines approved for purchase from CPSEs. It was further found that, in drug kit for Asha, 4 out of 6 medicines, in drug kit for Sub Centre-A, only 1 out of 7 medicines and, in drug kit for Sub Centre-B, only 3 out of 11 medicines fell within the ambit of 102 medicines approved by the Government of India for purchase from CPSEs under Purchase Preference Policy. It was also found that the Tender Opening Committee approved rates quoted by all

the bidders despite the fact that the rates quoted by the 4 bidders in respect of all the 08 drug kits were similar and the same were far too exorbitant as compared to the rates of the previous year. It was further found that the Tender opening Committee recommended to place orders to the tune of 25% to each of the CPSEs without any negotiation and without taking into account the price fixed by the National Pharmaceutical Pricing Authority which provides for a discount up to 35% and the approved rates for the previous year. It was also found that the Tender Opening Committee did not conduct any market survey or any other mode to check the genuineness of the rates quoted by the firms.

4 During the preliminary verification, it was also found that the Verifying Committee, without taking into consideration the terms and conditions of the supply order(s) as well as the guidelines of Government of India, failed to point out that the medicines supplied had not been manufactured by the supplying firms and the said Committee also ignored good manufacturing practice certificates of the firms which supplied the medicines to CPSEs. The enquiry revealed that M/S Rajasthan Drugs and Pharmaceutical Ltd had purchased ORS powder for supply from M/S Syndicate Pharma Indore which had been permanently de-registered for ORS powder by the Director General of Health Services. The enquiry also revealed that, one Sh. Anil Lohati representative of M/S Rajasthan Drugs and Pharmaceuticals Ltd., had presented three cheques for payment and these cheques were drawn in favour of M/S Hindustan Antibiotic Limited and M/S Karnataka

Antibiotic Limited in the bank accounts of the above-named firms. It also transpired that one Sh. Kamlesh Daga of Plastic Surge Industries Private Ltd., had played the role of a middleman in the aforesaid purchases. Thus, the enquiry conducted, *prima facie*, established the allegation that the Director Health Services, Jammu had purchased the drug kits during the year 2010-11 on highly exorbitant rates in total disregard of codal formalities prescribed for purchase of drug kits thereby causing huge loss to the public exchequer.

5 In the backdrop of aforesaid allegations, the impugned FIR goes on to allege that Mr. Ashok Kumar Sharma, the then Director Health Services, Jammu, Members of Tender Opening Committee, Officers/officials of NRHM and the Members of the Verifying Committee as also others have committed offences under Section 5(1)(d) read with Section 5(2) of PC Act 52 JK PC and Section 120-B RPC.

6 Petitioner Dr. Deepak Kapoor has challenged the impugned FIR primarily on the ground that he had no role so far as procurement of drugs is concerned. According to the said petitioner, he was a member of the Verification Board and his role, as a member of the said Verification Committee, was to verify the drugs as per the terms and conditions of supply order(s) and that he had only to verify the manufacturing and expiry date of drugs along with their batch number etc. It has been submitted that the petitioner and other members of the Verification Board ensured that supply of Asha kits was as per the specifications which had been approved by the competent

Authority. It has been submitted that as per the minutes of meeting dated 13.02.2007 of the Ministry of Chemicals and Fertilizers, Government of India, a decision was taken that the medicines, that are not manufactured by the any Pharma CPSE, should be procured from other sources and, therefore, the allegation that the Verification Board failed to point out that, the medicines supplied had not been manufactured by the supplying firms, cannot be attracted to the petitioner and other members of the Verifying Board. It has been further submitted that the allegation regarding overlooking the good manufacturing practice certificates of the firms who supplied the medicines to the CPSEs are also without any merit. In this regard, the petitioner has placed on record copies of some of the good manufacturing certificates along with his petition.

7 So far as the petitions filed by Sh. Suprakash Kundu, , the then Managing Director of Bengal Chemicals and Pharmaceuticals Ltd, Sh. Suhas Laxman Phadke, the then Managing Director of Karnataka Antibiotics and Pharmaceuticals Ltd., and Sh.Sitaram Vaidya, the then Director Finance of Hindustan Antibiotics Ltd., are concerned, these petitioners have challenged the impugned FIR on the ground that the respondent/Investigating Agency has no jurisdiction to investigate the offences against the public servants of Government of India, as such, the petitioners, who were public servants of Government of India at the relevant time, cannot be subjected to investigation by respondent/Investigating Agency. It has been submitted that it is only the Investigating Agency established under the Delhi Special Police

Establishment Act 1946 which is competent to investigate offences relating to Prevention of Corruption Act against the afore-named petitioners. It has been submitted that the petitioners have never visited Jammu and Kashmir and, as such, the respondent/investigating agency is not vested with the power to investigate offences which have been allegedly committed by the petitioners while residing beyond the limits of erstwhile State of Jammu and Kashmir. It has also been contended that the respondent/Investigating Agency has not conducted any investigation against the petitioners and the Investigating Agency has, without conducting any investigation, proposed to file challan against them. It is also contended that the petitioners cannot be fastened with vicarious liability as there is no concept of vicarious liability in the criminal law. It has been submitted that, unless there is some material to show that the petitioners are personally liable, they cannot be implicated in the impugned prosecution. It has been further submitted that the petitioners, in their capacity as Managing Directors of the aforesaid Pharma CPSEs, had delegated the powers for entering into transactions with the Government of Jammu and Kashmir to different representatives and, as such, they cannot be held personally liable particularly when no pecuniary advantage has been obtained by the petitioners as the money has been paid not to the petitioners, but to the Companies, of which they happen to be the Managing Directors.

8 I have heard learned counsel for the parties and perused the record including the Case Diary produced by learned counsel for the respondent.

9 A perusal of the Case Diary reveals that during investigation of the case, the following allegations were found established against the accused:

(i) The Director Health Services, Jammu purchased various drug kits under NRHM Scheme from four CPSEs through limited tenders and all the four CPSEs quoted the same rates, whereafter it was decided to place supply order(s) to the tune of 25% from each of the CPSEs;

(ii) The rates quoted by the four CPSEs were far too in excess of the rates on which the purchases had been effected during the previous year. The Director Health Services, Jammu ignored previous years' rates and went on to award the supply order(s) in favour of four CPSEs at exorbitant rates. A detailed chart in this regard is given as under:

Name of the Drug Kit	Rate at which procured during the year 2009-10	Rate at which procured during the year 2010-11
Drug Kit of Asha	Rs.931/- per kit	Rs.1878/- per kit
Drug Kit of Sub Centre "A"	Rs.34000/- per kit	Rs.6559 per kit
Drug Kit of Sub Center "B"	Rs.1855/- per kit	Rs.4368 per kit

(iii) No market survey was conducted to ascertain the genuineness of rates quoted by the CPSEs, nor any negotiation has been undertaken with the CPSEs;

(iv) The samples of drugs kits were not obtained to verify the quality of the drugs;

(v) The NRHM kits were purchased not from the original manufacturers, but, from the suppliers at exorbitant rates;

(vi) Some of the medicines in the kits were of sub-standard quality and some of them manufactured by the private manufacturers and not by the CPSEs or by their subsidiaries.

Thus, undue benefit was bestowed on the private agencies in violation of Purchase Preference Policy;

(vii) As per the applicable guidelines issued by the Government of India, Purchase Preference Policy for CPSEs was valid only in respect of 102 medicines, but, a number of medicines mentioned in the drug kits were not figuring in the said list of 102 medicines; and,

(viii) As per the rates fixed by the National Pharmaceutical Pricing Authority, discount up to 35% was to be allowed by the suppliers and this aspect of the matter was not ascertained before issuing supply order(s) to the CPSEs.

10 In view of the fact that the aforesaid allegations were found established against the accused during investigation of the case, it cannot be stated that the allegations made in the impugned FIR are without any basis or that the same are frivolous. The aforesaid allegations clearly disclose commission of cognizable offences, therefore, it would not be open to this Court to stifle a genuine prosecution by interdicting the Investigating Agency from undertaking investigation and launching prosecution against the arraigned officials/parties.

11 Coming to the contentions raised by the petitioner Dr. Deepak Kappor, it has been established during investigation of the case that, most of the drugs, that were supplied, were not manufactured by the suppliers i.e CPSEs and these drugs were manufactured by other private drug manufacturers as was evident from the labels affixed upon these drugs. It was also found that the members of the Verification



Board including the petitioner Dr. Deepak Kapoor had certified that the procured drugs are of standard quality without actually undertaking any check in this regard. Once these allegations have been established during investigation of the case, it becomes evident that the petitioner has not discharged his legal duty of proper verification of the procured drugs. The question, whether he has actually connived with the other accused to cause loss to the State exchequer, is a matter of investigation and in these proceedings, the same cannot be gone into by this Court. But one thing is clear that the members of the Verification Board which includes Dr. Deepak Kapoor have not discharged their lawful duties.

12 That take us to the contentions raised by the petitioners/Managing Directors of CPSEs. At the outset, it has been contended by the petitioners/Managing Directors, that they do not fall within the definition of “public servant” as contained in Jammu and Kashmir Prevention of Corruption Act, as such, the respondent/Vigilance Organization, Jammu does not have jurisdiction to probe their role. The argument, it appears, is without any merit for the reason that, even if, it is assumed that the petitioners/Managing Directors of CPSEs are not public servants within the meaning of sub-Section (2) of Section 2 of J&K P.C Act, still then, it is a settled law that a person, who is not a public servant can be prosecuted for the offence of criminal conspiracy along with other public servants, who have been booked for substantive offences under the said Act.

13 Apart from this, the expression “public servant’ as per clause fifteenth of Section 21 of RPC includes every officer or servant

of a Corporation or of a Government Company. Thus, as per definition of “Public Servant” in Section 2(2) of J&K P.C Act, Managing Directors of CPSEs otherwise come within the purview of ‘public servant’. Therefore, while investigating an offence under the provisions of J&K P.C Act that has been committed within the erstwhile State of Jammu and Kashmir, if role of a person, who qualifies to be a public servant surfaces, he can be booked and prosecuted for having committed an offence under the provisions of J&K PC Act even if he resides beyond the limits of the State of J&K. So, in both the eventualities, the Managing Directors of the CPSEs cannot claim that respondent/Investigating Agency does not have jurisdiction to investigate the allegations leveled in the impugned FIR to their extent.

14 It has also been contended by the petitioners/Managing Directors of CPSEs that even after their retirement, as per the guidelines of Government of India and as per the amended Prevention of Corruption Act 1988, they are entitled to safeguard of sanction for prosecution before being subjected to prosecution. This question should not detain us because it is premature to determine, as to whether the petitioners/Managing Directors enjoy the safeguard of sanction for prosecution. The same would be determined by the Special Judge, Anti Corruption at the time of taking cognizance of alleged offences once the challan is laid before the said Court after the investigation is completed. There is no legal bar to conduct investigation of offences under PC Act. The bar comes into play only at the time of taking cognizance of offences under PC Act.

15 The other contention that has been raised by the petitioners/Managing Directors is that there is no vicarious liability in the criminal law, therefore, even if, it is assumed that the CPSEs are involved in the alleged crime, still then, the petitioners in the capacity of Managing Directors of the CPSEs, cannot be subjected to investigation and prosecution. Reliance in this regard has been placed by the petitioners on the judgment of Supreme Court in the case of **Maksud Saiyed vs. State of Gujarat, (2008) 5 SCC 668.**

16 It has been alleged by the respondent/Investigating Agency that the petitioners in their capacity as Managing Directors while entering into a criminal conspiracy, appointed representatives for entering into negotiations with the Director Health Services in respect of NIT relating to supply of drug kits and in furtherance of this conspiracy, certain private companies, who otherwise were not qualified to supply the drugs, supplied the drugs thereby gaining undue benefits from the Directorate of Health Services at the expense of State exchequer. These allegations against the petitioners/Managing Directors are in their personal capacity, so it is not a case where they are being prosecuted in respect of the acts committed by the Companies of which they happen to be the Managing Directors. The question, whether these allegations relating to conspiracy leveled against the petitioners/Managing Directors are established after investigation of the case, is a matter which can be decided only after the investigation is completed and the case is considered by the learned Special Judge for

framing of charges. At this stage and in these proceedings, this question cannot be gone into by this Court.

17 The Supreme Court in the case of **M/S Neeharika Infrastructure vs The State of Maharashtra, AIR 2021 SC 1918** has, while summarizing the scope of power of the High Court under Section 482 of Cr. PC concluded as under:

*“In view of the above and for the reasons stated above, our final conclusions on the principal/core issue, whether the High Court would be justified in passing an interim order of stay of investigation and/or “no coercive steps to be adopted”, during the pendency of the quashing petition under Section 482 Cr.P.C and/or under Article 226 of the Constitution of India and in what circumstances and whether the High Court would be justified in passing the order of not to arrest the accused or “no coercive steps to be adopted” during the investigation or till the final report/chargesheet is filed under Section 173 Cr.P.C., while dismissing/disposing of/not entertaining/not quashing the criminal proceedings/complaint/FIR in exercise of powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India, our final conclusions are as under:*

*(i) Police has the statutory right and duty under the relevant provisions of the Code of Criminal Procedure contained in Chapter XIV of the Code to investigate into a cognizable offence;*

*(ii) Courts would not thwart any investigation into the cognizable offences;*

*(iii) It is only in cases where no cognizable offence or offence of any kind is disclosed in the first information report that the Court will not permit an investigation to go on;*

*(iv) The power of quashing should be exercised sparingly with circumspection, as it has been observed, in the ‘rarest of rare cases (not to be confused with the formation in the context of death penalty);.*

(v) While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint; vi) Criminal proceedings ought not to be scuttled at the initial stage;

(vii) Quashing of a complaint/FIR should be an exception rather than an ordinary rule; viii) Ordinarily, the courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities and one ought not to tread over the other sphere; ix) The functions of the judiciary and the police are complementary, not overlapping;

(x) Save in exceptional cases where non-interference would result in miscarriage of justice, the Court and the judicial process should not interfere at the stage of investigation of offences;

(xi) Extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice;

(xii) The first information report is not an encyclopaedia which must disclose all facts and details relating to the offence reported. Therefore, when the investigation by the police is in progress, the court should not go into the merits of the allegations in the FIR. Police must be permitted to complete the investigation. It would be premature to pronounce the conclusion based on hazy facts that the complaint/FIR does not deserve to be investigated or that it amounts to abuse of process of law. After investigation, if the investigating officer finds that there is no substance in the application made by the complainant, the investigating officer may file an appropriate report/summary before the learned Magistrate which may be considered by the learned Magistrate in accordance with the known procedure;

(xiii) The power under Section 482 Cr.P.C. is very wide, but conferment of wide power requires the court to be more cautious. It casts an onerous and more diligent duty on the court;

(xiv) However, at the same time, the court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, more particularly the parameters laid down by this

*Court in the cases of R.P. Kapur (supra) and Bhajan Lal (supra), has the jurisdiction to quash the FIR/complaint;*

*(xv) When a prayer for quashing the FIR is made by the alleged accused and the court when it exercises the power under Section 482 Cr.P.C., only has to consider whether the allegations in the FIR disclose commission of a cognizable offence or not. The court is not required to consider on merits whether or not the merits of the allegations make out a cognizable offence and the court has to permit the investigating agency/police to investigate the allegations in the FIR;*

*(xvi) The aforesaid parameters would be applicable and/or the aforesaid aspects are required to be considered by the High Court while passing an interim order in a quashing petition in exercise of powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India. However, an interim order of stay of investigation during the pendency of the quashing petition can be passed with circumspection. Such an interim order should not require to be passed routinely, casually and/or mechanically. Normally, when the investigation is in progress and the facts are hazy and the entire evidence/material is not before the High Court, the High Court should restrain itself from passing the interim order of not to arrest or “no coercive steps to be adopted” and the accused should be relegated to apply for anticipatory bail under Section 438 Cr.P.C. before the competent court. The High Court shall not and as such is not justified in passing the order of not to arrest and/or “no coercive steps” either during the investigation or till the investigation is completed and/or till the final report/chargesheet is filed under Section 173 Cr.P.C., while dismissing/disposing of the quashing petition under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India.*

*( xvii) Even in a case where the High Court is prima facie of the opinion that an exceptional case is made out for grant of interim stay of further investigation, after considering the broad parameters while exercising the powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India referred to hereinabove, the High Court has to give brief reasons why such an interim order is warranted and/or is required to be passed so that it*

*can demonstrate the application of mind by the Court and the higher forum can consider what was weighed with the High Court while passing such an interim order. xviii) Whenever an interim order is passed by the High Court of “no coercive steps to be adopted” within the aforesaid parameters, the High Court must clarify what does it mean by “no coercive steps to be adopted” as the term “no coercive steps to be adopted” can be said to be too vague and/or broad which can be misunderstood and/or misapplied”.*

18 From the foregoing analysis of law on the subject, it is clear that, at the time of considering a petition for quashing of an FIR, the Court has only to consider whether the allegations made in the FIR disclose commission of a cognizable offence. It is not required to analyze the merits of the allegations and the Court has to permit the Investigating Agency to investigate the allegations in the FIR. It is further laid down that the power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court should not embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations.

19 Having regard to the aforesaid legal position, it is clear that, in the instant case, where the allegations made in the impugned FIR clearly disclose commission of cognizable offences and the material collected by the Investigating Agency during investigation of the case, *prima facie*, implicates the petitioners herein, it will not be open to this Court to quash the impugned FIR and proceedings emanating therefrom.

20 For the foregoing reasons, the petitions lack merit and are dismissed accordingly. Interim directions, if any, shall stand vacated.

The record be returned to learned counsel for the respondent.

**(Sanjay Dhar)**  
**Judge**

**Jammu**  
24.05.2023  
"Sanjeev, PS"

*Whether the order is speaking: Yes*  
*Whether the order is reportable: Yes*

