HIGH COURT OF JAMMU AND KASHMIR AND LADAKH
ATJAMMU

Reserved on 03.02.2023
Pronounced on 09.02.2023

APPCR No. 92/2018
c/w
CRMC No. 800/2018
IA No. 1/2018

Santosh Kumar and others
.....Appellant/Petitioner(s)

Through :- Mr. Vishal Sharma, DSGI

v/s

Kuldeep Singh and another .....Respondent(s)

Through :- Mr. J. P. Gandhi, Advocate

Coram: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

APPCR No. 92/2018

This is an application for dispensing with the requirement of filing certified copy of the impugned complaint.

For the reasons stated in the application, the same is allowed and requirement of filing certified copy of the impugned complaint is dispensed with.

Application is disposed of.

CRMC No. 800/2018

1) Through the medium of this petition, the petitioners have challenged the complaint filed by respondent No. 1 against them and co-accused alleging

commission of offences under Sections 454, 392, 379/34 RPC, which is stated to be pending before the Court of District Judicial Mobile Magistrate, Doda. Challenge has also been thrown to order dated 09.08.2010 passed by the learned trial Magistrate, whereby the process has been issued against the petitioners.

2) It appears that respondent No. 1 filed a complaint through his power of attorney holder before the trial Magistrate alleging therein that on 14.10.2009, an Army Party led by petitioner No. 1 comprising about 16 persons including the other petitioners, attacked the house of the complainant/respondent No. 1 without any rhyme and reason. It was alleged that the petitioners ransacked the house of the complainant and also took away with them 22 tolas of gold, 3 silver glasses, 2 silver plates besides cash of Rs. 43,000/-. It was averred by the complainant that on 15.10.2009, father of the complainant went to the Police Station, Dessa (Doda) and lodged a complaint with the Police, but no action was taken by the concerned SHO. On 18.10.2009, village Panchayat under the Chairmanship of Sarpanch met and accused, respondent No. 2 herein was held responsible for compensating the complainant and his family for the loss suffered by them.

3) It seems that the learned trial Magistrate, after recording the statement of attorney holder of the complainant, took cognizance of the complaint and thereafter proceeded to direct the Additional Superintendent of Police, Doda to investigate the matter presumably in exercise of its power under section 202 of Code of Criminal Procedure.

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4) The Investigating Officer, after recording the statements of the witnesses and conducting the investigation, submitted his report dated 25.02.2010 before the Magistrate, in which he concluded that the allegations made in the complaint are absolutely false and concocted. As per his report, on 14.10.2009, a number of houses were searched by the Army personnel of 10 RR Camp Gali Dessa, as they had received an input with regard to presence of militants in the area and concealment of some Arms and Ammunition by them in the area. It was further reported by the Addl. S.P that like houses of many other inhabitants, the house of the complainant was also searched. According to the report, the allegations made in the complaint against the Army personnel are false.

5) After receipt of the report of the Investigating Officer, learned Magistrate recorded preliminary statements of some more witnesses of the complainant and thereafter concluded that he is not satisfied with the investigation conducted by the Additional Superintended of Police, Doda. It was observed that from the material on record, offences under sections 453, 392, 379/34 RPC are made out against the petitioners and respondent No. 2. Accordingly, process was issued against them vide the impugned order.

6) The main ground, which has been urged by the learned counsel for the petitioners/accused, is that the petitioners were discharging their lawful duties at the time of alleged incident and as such, their actions are protected by the provisions contained in Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 (for short, the AFSP Act). It is submitted that in view of the provisions contained in section 7 of the AFSP Act, it was not open to the

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learned Magistrate to entertain the complaint and take cognizance of the offences.

7) On the other hand, contention of respondent No. 1 is that protection of section 7 of the AFSP Act is not available to the petitioners because they have ransacked the house of the complainant without any rhyme and reason and have stolen the articles lying over there. It has been contended that earlier petition filed by petitioner No. 1 before this Court for a similar relief has been dismissed in terms of order dated 09.07.2018 passed in CRMC No. 350/2012. According to the learned counsel, the instant petition is, therefore, not maintainable.

8) I have heard learned counsel for the parties and perused the record including the trial court record.

9) As already noted, learned counsel for the respondent/complainant has raised a preliminary objection with regard to the maintainability of the instant petition on the ground that petitioner No. 1 had invoked jurisdiction of this under Section 561-A Cr. P.C. on an earlier occasion for the similar relief and the same was dismissed by this Court.

10) In this regard, it is to be noted that earlier petition was filed by the petitioner No. 1 only and the other petitioners did not join the petitioner in the said petition. The other petitioners have for the first time challenged the impugned complaint and the proceedings. Therefore, the instant petition cannot be held to be not maintainable. Even otherwise, the order passed by

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this Court while dismissing the earlier petition filed by petitioner No. 1 is not on merits but the same was dismissed for the reason of non-prosecution.

11) The Supreme Court in the case of **Madan Lal Kapoor vs. Rajiv Thapar and others, 2007 (7) SCC 623** has held that criminal matters cannot be dismissed for default and that it must be decided on merits because such matter relates to the administration of criminal justice. In the same judgment, the Supreme Court has categorically held that criminal revision petition cannot be dismissed for non-prosecution. While dealing with a petition under Section 561-A Cr.PC (J&K) or under Section 482 Cr.P.C the High Court exercises its supervisory jurisdiction. Therefore, the petition under Section 482 Cr. PC is required to be decided on merits and the order dismissing the petition under Section 482 Cr. P.C. for non prosecution is a nullity in the eyes of law. On the basis of such an order, a petitioner cannot be debarred from invoking the jurisdiction of this Court under Section 482 Cr. P.C. In view of this, the objection with regard to the maintainability raised by the respondent/complainant is without any substance.

12) Before testing the merits of the other contentions raised by the parties, it would be apt to refer to the relevant provisions contained in Section 7 of AFSP Act. It reads as under:

> "7. **Protection of persons acting in good faith under this Act**.— No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act."

13) From a perusal of the aforesaid provision, it is clear that no prosecution or other legal proceedings can be instituted without the previous sanction of the Central Government against any person in respect of anything done or purported to be done in exercise of the powers conferred by the Act.

14) Section 3 of the AFSP Act gives powers to the Governor of the State of Jammu and Kashmir or the Central Government to declare the whole or any part of the State as disturbed area. It is not in dispute that area in question was declared as disturbed area at the relevant time. Section 4 of the AFSP Act gives special powers to the Armed Forces. Clause (d) of the said section empowers the Armed Forces to enter and search, without warrant, any premises to make any such arrest or to recover any person believed to be wrongfully restrained or confined or to recover any arms, ammunition or explosive substances believed to be unlawfully kept in such premises and for this purpose, the Armed Forces are authorised to use such force as may be necessary and seize such property arms, ammunition and explosive substances.

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15) Thus, the actions taken by a member of the Armed forces in an area which has been declared as disturbed area under section 3 of the AFSP Act, for the purpose of recovery of arms, ammunition or explosive etc. from the premises, is protected from prosecution or any other legal proceeding in terms of the Section 7 of the AFSP Act.

16) The Supreme Court in the case of **General Officer Commanding, Rashtriya Rifles vs. Central Bureau of Investigation, (2012) 6 SCC 228,** while interpreting the provisions of Section 7 of the AFSP Act and comparing

the same with the provisions contained in Section 197 of the Code of Criminal Procedure and Section 19 of the Prevention of Corruption Act, 1988, has observed as under:

> "…Thus, it is evident from the aforesaid comparative chart that under the provisions of Cr.P.C. and Prevention of Corruption Act, it is the court which is restrained to take cognizance without previous sanction of the competent authority. Under the Act 1990, the investigating agency/complainant/person aggrieved is restrained to institute the criminal proceedings; suit or other legal proceedings. Thus, there is a marked distinction in the statutory provisions under the Act 1990, which are of much wider magnitude and are required to be enforced strictly.
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> 82. Thus, in view of the above, the law on the issue of sanction can be summarised to the effect that the question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duty. In order that the public servant may not be unnecessarily harassed on a complaint of an unscrupulous person, it is obligatory on the part of the executive authority to protect him. However, there must be a discernible connection between the act complained of and the powers and duties of the public servant. The act complained of may fall within the description of the action purported to have been done in performing the official duty. Therefore, if the alleged act or omission of the public servant can be shown to have reasonable connection inter-relationship or inseparably connected with discharge of his duty, he becomes entitled for protection of sanction.
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> 83. If the law requires sanction, and the court proceeds against a public servant without sanction, the public servant has a right to raise the issue of jurisdiction as the entire action may be rendered void ab-initio for want of sanction. Sanction can be obtained even during the course of trial depending upon the facts of an individual case and particularly at what stage of proceedings, requirement of sanction has surfaced. The question as to whether the act complained of, is done in performance of duty or in purported performance of duty, is to be determined by the competent authority and not by the court. The Legislature has conferred "absolute power" on the statutory authority to accord sanction or withhold the same and the court has no role in this subject. In such a situation the court would not proceed without sanction of the competent statutory authority.

<u>17)</u> From the foregoing analysis of the law by the Supreme Court, it is clear that the question whether an act complained of is done in performance of duty or in purported performance of duty, is to be determined by the Competent Authority and not by the Court. If the Competent Authority comes to a

conclusion that act has not been done in performance of duty or in purported performance of duty, sanction for prosecution has to be granted or else the same is to be refused. Without the sanction of the Central Government, the Court concerned cannot entertain the complaint or challan and take cognizance of the offences. In the cases to which section 7 of the AFSP Act is attracted, the court cannot even entertain a legal proceeding without the sanction of the Central Government.

18) Coming to the facts of the instant case, there is sufficient material on record to show that the petitioners, who are members of the Armed Force had raided the house of the complainant as also of other villagers on the fateful day because there were inputs that certain militants were present in the locality and they had concealed arms and ammunition in the village. The petitioners were, therefore, within their jurisdiction and power to enter the houses of the villagers including that of the complainant to look out for the militants and arms and ammunition. To that extent, they were performing their lawful duties.

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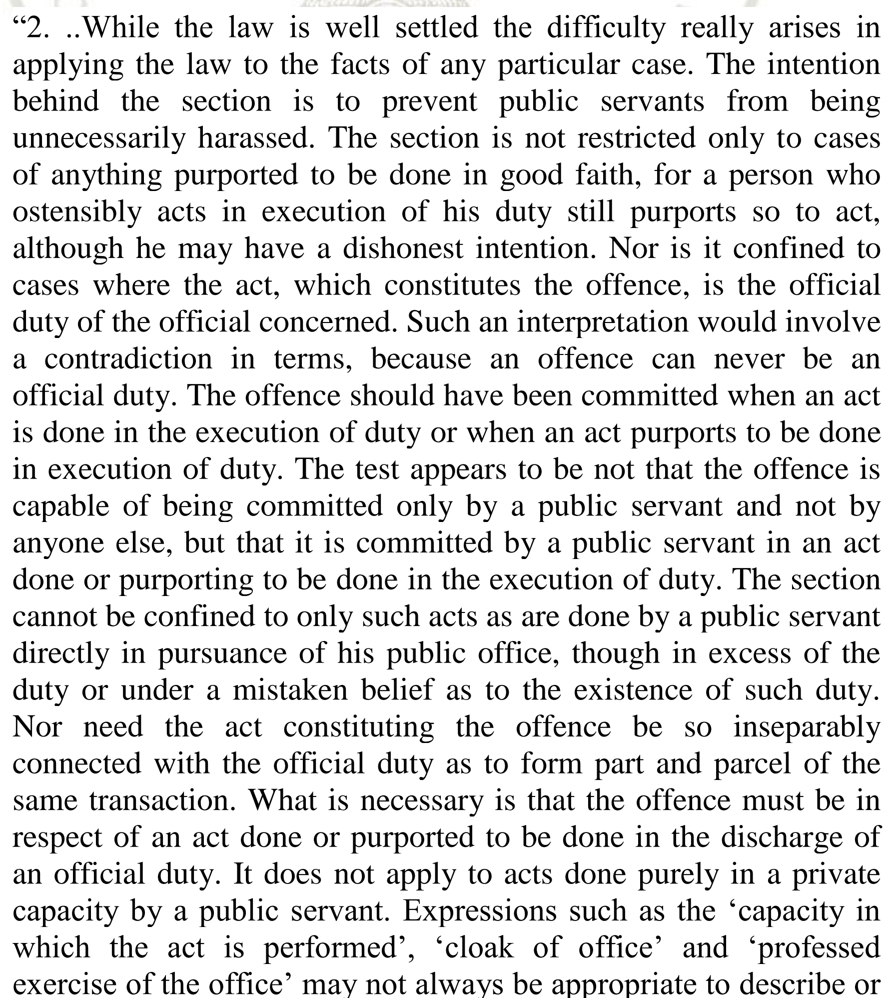
19) Learned counsel for the respondent No. 1 has argued that ransacking the house or stealing articles there from cannot be termed as lawful duty, therefore, such an act of the petitioners is not saved and protected by the Section 7 of the AFSP Act.

20) Per contra, learned counsel for the petitioners has contended that even if the allegations made in the complaint are assumed to be correct, still then what the petitioners have done is that they have exceeded their lawful duties, which would be covered by the expression "anything done or purported to be

done in exercise of the powers conferred by the Act" as has been used in Section 7 of the AFSP Act.

21) The merits of rival contentions raised by the parties can be determined after understanding the purport of the afore-noted expression used in Section 7 of the AFSP Act. Similar expressions have been used in the provisions contained in section 197 of Code of Criminal Procedure and Section 19 of the Prevention of Corruption Act, 1988. This expression has been subject matter of discussion in a number of judgments of the Supreme Court delivered from time to time. It would be apt to refer to some of these judgments.

22) In **Pukhraj vs. State of Rajasthan and Anr. (1973) 2 SCC 701,** the Supreme Court while decoding this aspect of the matter, has observed as under:



> "2. ..While the law is well settled the difficulty really arises in applying the law to the facts of any particular case. The intention behind the section is to prevent public servants from being unnecessarily harassed. The section is not restricted only to cases of anything purported to be done in good faith, for a person who ostensibly acts in execution of his duty still purports so to act, although he may have a dishonest intention. Nor is it confined to cases where the act, which constitutes the offence, is the official duty of the official concerned. Such an interpretation would involve a contradiction in terms, because an offence can never be an official duty. The offence should have been committed when an act is done in the execution of duty or when an act purports to be done in execution of duty. The test appears to be not that the offence is capable of being committed only by a public servant and not by anyone else, but that it is committed by a public servant in an act done or purporting to be done in the execution of duty. The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor need the act constituting the offence be so inseparably connected with the official duty as to form part and parcel of the same transaction. What is necessary is that the offence must be in respect of an act done or purported to be done in the discharge of an official duty. It does not apply to acts done purely in a private capacity by a public servant. Expressions such as the 'capacity in which the act is performed', 'cloak of office' and 'professed exercise of the office' may not always be appropriate to describe or

> delimit the scope of section. An act merely because it was done negligently does not cease to be one done or purporting to be done in execution of a duty..."

23) Again, in **In State of Orissa vs. Ganesh Chandra Jew**, **(2004) 8 SCC 40**, the Supreme Court has held as under:

> "7. The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty." (emphasis supplied).

24) In **Virupaxappa Veerappa Kadampur vs. State of Mysore, AIR 1963 SC 849,** the Supreme Court has interpreted that the words " under colour of duty" mean acts done under the cloak of duty, even though not by virtue of duty. While explaining it, the Supreme Court has said that when a police officer prepared a false punchnama or false report, he is clearly using the existence of his legal duty as a cloak for his corrupt action or as a veil to

his falsehood. According to the Supreme Court, the acts thus done in dereliction of his duty must be held to have been done "under the colour of duty".

25) In **Sankaran Moitra vs. Sadhna Dass and Another (2006) 4 SCC 584,** the Supreme Court has held as under:

> "25. The High Court has stated that killing of a person by use of excessive force could never be performance of duty. It may be correct so far as it goes. But the question is whether that act was done in the performance of duty or in purported performance of duty. If it was done in performance of duty or purported performance of duty, Section 197(1) of the Code cannot be bypassed by reasoning that killing a man could never be done in an official capacity and consequently Section 197(1) of the Code could not be attracted. Such a reasoning would be against the ratio of the decisions of this Court referred to earlier. The other reason given by the High Court that if the High Court were to interfere on the ground of want of sanction, people will lose faith in the judicial process, cannot also be a ground to dispense with a statutory requirement or protection. Public trust in the institution can be maintained by entertaining causes coming within its jurisdiction, by performing the duties entrusted to it diligently, in accordance with law and the established procedure and without delay. Dispensing with of jurisdictional or statutory requirements which may ultimately affect the adjudication itself, will itself result in people losing faith in the system. So, the reason in that behalf given by the High Court cannot be sufficient to enable it to get over the jurisdictional requirement of a sanction under Section 197(1) of the Code of Criminal Procedure. We are therefore satisfied that the High Court was in error in holding that sanction under Section 197(1) was not needed in this case. We hold that such sanction was necessary and for want of sanction the prosecution must be quashed at this stage. It is not for us now to answer the submission of learned counsel for the complainant that this is an eminently fit case for grant of such sanction."

26) In **D. T. Virupakshappa vs. C. Subash, (2015) 12 SCC 231,** the Supreme Court held that the allegation of police excess in connection with the investigation of the criminal case was reasonably connected with the performance of the official duty of the police. Therefore, cognizance could not have been taken by the Magistrate without previous sanction of the State Government.

27) Recently, the supreme Court in the case of **D. Devaraja vs. Owais Sabeer Hussain, 2020 (7) SCC 695,** while discussing the law relating to the requirement of sanction to entertain or to take cognizance of an offence committed by a police officer under section 197 Cr. P.C. has observed as under:

> "68. Sanction of the Government, to prosecute a police officer, for any act related to the discharge of an official duty, is imperative to protect the police officer from facing harassive, retaliatory, revengeful and frivolous proceedings. The requirement of sanction from the government, to prosecute would give an upright police officer the confidence to discharge his official duties efficiently, without fear of vindictive retaliation by initiation of criminal action, from which he would be protected under Section 197 of the Code of Criminal Procedure, read with Section 170 of the Karnataka Police Act. At the same time, if the policeman has committed a wrong, which constitutes a criminal offence and renders him liable for prosecution, he can be prosecuted with sanction from the appropriate government.
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> 69. Every offence committed by a police officer does not attract Section 197 of the Code of Criminal Procedure read with Section 170 of the Karnataka Police Act. The protection given under Section 197 of the Criminal Procedure Code read with Section 170 of the Karnataka Police Act has its limitations. The protection is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and official duty is not merely a cloak for the objectionable act.
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> 70. An offence committed entirely outside the scope of the duty of the police officer, would certainly not require sanction. To cite an example, a police man assaulting a domestic help or indulging in domestic violence would certainly not be entitled to protection. However if an act is connected to the discharge of official duty of investigation of a recorded criminal case, the act is certainly under colour of duty, no matter how illegal the act may be.
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> 71. If in doing an official duty a policeman has acted in excess of duty, but there is a reasonable connection between the act and the performance of the official duty, the fact that the act alleged is in excess of duty will not be ground enough to deprive the policeman of the protection of government sanction for initiation of criminal action against him.
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> 72. The language and tenor of Section 197 of the Code of Criminal Procedure and Section 170 of the Karnataka Police Act makes it absolutely clear that sanction is required not only for acts done in discharge of official duty, it is also required for an act purported to

> be done in discharge of official duty and/or act done under colour of or in excess of such duty or authority.
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> 73. To decide whether sanction is necessary, the test is whether the act is totally unconnected with official duty or whether there is a reasonable connection with the official duty. In the case of an act of a policeman or any other public servant unconnected with the official duty there can be no question of sanction. However, if the act alleged against a policeman is reasonably connected with discharge of his official duty, it does not matter if the policeman has exceeded the scope of his powers and/or acted beyond the four corners of law.
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> 74. If the act alleged in a complaint purported to be filed against the policeman is reasonably connected to discharge of some official duty, cognizance thereof cannot be taken unless requisite sanction of the appropriate government is obtained under Section 197 of the Code of Criminal Procedure and/or Section 170 of the Karnataka Police Act.
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> 75. On the question of the stage at which the Trial Court has to examine whether sanction has been obtained and if not whether the criminal proceedings should be nipped in the bud, there are diverse decisions of this Court."

28) From the forgoing analysis of law on the subject, it is clear that if an act is connected with the discharge of official duty of an accused, the said act is certainly under the colour of his duty, no matter how illegal the act may be, but if the offence is committed entirely outside the scope of the duty of police officer/official, there is no requirement of previous sanction. In short, in order to attract the provisions of Section 7 of AFSP Act, it has to be shown that there is a reasonable connection between the act and performance of duty in execution of powers under the Act.

29) Coming to the facts of the instant case, the petitioners were certainly under a legal duty to conduct search operation in the village, in which the complainant was residing so as to track down and apprehend the militants as also to recover the arms and ammunition, regarding which they had credible inputs. In doing so, the petitioners may have exceeded their powers, inasmuch

as, they may have ransacked the articles lying in the house of the complainant by breaking open the locks of doors, boxes and other receptacles so as to look for hidden militants, arms and ammunition, but in no case, it can be stated that these acts of the petitioners fell outside the scope of their duties. What the petitioners are alleged to have done is that they have exceeded their powers by committing the aforesaid alleged acts. Thus, their acts definitely come within the scope of acts purported to be done in exercise of the powers conferred by the Act. Such acts are protected by the Section 7 of the AFSP Act.

30) Even otherwise the question whether the acts alleged to have been committed by the petitioners were in exercise of their duties or purported exercise of their duty or the same fell outside the scope of their duty, had to be determined by the Competent Authority i.e. by the Central Government and not by the learned trial Magistrate. In fact, in terms of the Section 7 of the AFSP Act, the learned Magistrate could not have entertained the complaint without the sanction of the Central Government. Therefore, there was no question of taking cognizance of the offences and issuing the process against the petitioners. The whole exercise undertaken by the learned Magistrate is, therefore, without any jurisdiction and as such, liable to be quashed.

31) For the foregoing reasons, the petition is allowed and the proceedings initiated against the petitioners on the basis of the impugned complaint are quashed. It shall, however, be open for the Central Government to consider the material on record collected during investigation conducted by the Additional Superintendent of Police, Doda and that collected by the learned

Magistrate, and thereafter take a decision as to whether or not the petitioners are required to be prosecuted.

32) Disposed of.

33) Copy of this order be sent to the learned trial Magistrate.

(SANJAY DHAR)
JUDGE

JAMMU
09.02.2023
Karam Chand/Secy.

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No