

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

561-A No.17/2010

IA No.1/2010, CrIM No.801/2023

Reserved on: 14.08.2023

Pronounced on: 08.09.2023

Brij Bhushan Sharma, Age 60 years
S/o Shiv Ram R/o Sidhra, Bye-Pass, Jammu

...Petitioner(s)

Through:- Mr. A.H.Naik, Sr. Advocate with
Mr. Zia Ahmad, Advocate

V/s

1. State of J&K through Pr. Secretary Home,
New Secretariat, Srinagar.
2. Commissioner of Vigilance, J&K Govt.,
Srinagar.
3. S.H.O Vigilance Organization,
Kashmir

...Respondents(s)

Through:- Mr. Mohsin Qadri, Sr. AAG with
Mr. Maha Majeed, Advocate

4. Mohammad Shafi Dar
S/o Abdul Gani Dar
R/o Majid Bagh, Bagat-e-Barsalla,
Srinagar
5. Mohammad Ayoub Reshi
S/o Abdul Aziz Reshi
R/o Harwan, Srinagar.

...Accused-Respondent(s)

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE

JUDGMENT

Sanjeev Kumar-J

1. The instant reference arises out of order dated 02.01.2013 passed by a Single Bench of this Court [“Justice Massodi”] in 561-A No.17/2010 entitled Brij Bhushan Sharma v. State and others.
2. While hearing 561-A petition filed by Brij Bhushan Sharma, the Single Bench of Justice Massodi was confronted with a judgment dated 07.12.2009 passed by another Single Bench [“Justice Attar”] in 561-A No.84/2009, wherein a similar petition under Section 561-A Cr.P.C. filed by respondent Nos. 4 and 5 herein, namely, Mohammad Shafi Dar and Mohammad Ayoub Reshi seeking quashment of FIR No.35/2005 stood dismissed. Hon’ble Justice Massodi was, however, of the view that petition under Section 561-A Cr.P.C. filed by one of the accused Sh. Brij Bhushan Sharma, who was also respondent in 561-A No.84/2009, was liable to be allowed to the extent of quashing the charge in respect of the offences under Section 471 RPC and 5(2) of the Prevention of Corruption Act, Samvat 2006 [“the Act of 2006”]. Having proposed to take a view contrary to the one taken by Justice Attar while disposing of 561-A No.84/2009, Justice Massodi directed 561-A No.17/2010 filed by Brij Bhushan Sharma to be placed before Lord Chief Justice, so that the matter is referred to an appropriate Bench in terms of the Jammu & Kashmir High Court Rules, 1999. This is how the Lord Chief Justice has directed the matter to be placed before us.

3. Before we analyze two orders, one passed by Justice Attar dated 07.12.2009 dismissing 561-A petition filed by respondent Nos. 4 and 5 and the other dated 02.01.2013 passed by Justice Massodi proposing to allow the 561-A petition filed by Brij Bhushan Sharma to the extent of quashing the charge of the offences under Section 471 RPC and 5(2) of the Act of 2006, we deem it appropriate to set out few facts relevant to the disposal of this reference.
4. Pursuant to the intervention made by this Court in a public interest litigation alleging corruption in the Jammu and Kashmir Housing Corporation Limited, Jammu, FIR No.51/2003 came to be registered in Police Station, Crime Branch, Jammu. The investigation was later on transferred to Vigilance Organization, Kashmir under the orders of this court. Accordingly, FIR No.35/2005 was registered in the Police Station, Vigilance Organization, Kashmir with the allegation that in the year 1999, office bearers of J&K Cooperative Housing Corporation Limited, Jammu ["Housing Corporation"] and others hatched a criminal conspiracy to embezzle public money by resorting to illegal means and abusing their official position and that with a view to achieving the object and in furtherance of this conspiracy, a big chunk of land was purchased by the Housing Corporation through attorney holder instead of purchasing the same directly from the land owners. It was also alleged that huge payments were made to the attorney

holder, namely, Mohammad Yousaf Kuchay, Mohammad Shafi Dar and Mohammad Yousaf. A huge amount to be paid to the land owners was also found deposited by the suspect in the J&K State Cooperative Bank, Srinagar in Account No.949/16, opened in the name of Mohammad Yousuf Dar S/o of Sh. Gh. Rasool Dar R/o Baghat-e-Barzulla, Srinagar etc etc. Investigation was set in motion and during the course of investigation, the relevant records were seized and scrutinized. The statements of witnesses conversant with the facts of the case were recorded under Section 161 Cr.P.C.

5. The investigation conducted revealed that in and around July, 1998, Sh. Mohammad Shafi Dar, respondent No.4, who was the then Chairman, Cooperative Housing Building Society, Budgam and Shri Mohammad Yousuf Kuchay-respondent No.6 (now deleted from the array of respondents) initiated process to purchase land measuring 200 kanals at Humhama for developing a residential colony. The two approached one Sh. Sofi Mohammad Hussain R/o Bhagat-e-Barzulla, who owned a big chunk of land in the area. The land measuring 139.18 kanals was settled to be sold @ 1.87 lacs per kanal and an advance payment of Rs.12.20 lacs was made to the land owner Sh. Sofi Mohammad Hussain through cheques. It came out in the investigation that the land owner insisted for payment of total consideration in one go, however, accused-respondent No.4 and deleted respondent No.6 were not in a position to pay the entire sale consideration in one go. This led to respondent No.4 in his

capacity as the then Chairman, Cooperative House Building Society, Budgam to move a proposal before the Directors of the Society. As per the decision taken by the Board members of the Society, the proposal was put up before Brij Bhushan Sharma, the then Managing Director, J&K Cooperative Housing Corporation Limited seeking financial assistance of Rs.8.00 crores from the later for developing the housing colony. The proposal was not accepted by the Housing Corporation on the ground that the Budgam Society had failed to repay the loan already advanced to it by the Housing Corporation. However, on the persuasion of respondent No.4, namely, Mohammad Shafi Dar, the apex body of the Housing Corporation agreed to take over the project of developing of colony at Humhama. The process for acquisition was set in motion by the apex body of the Housing Corporation and respondent No.4, who was incidentally member of the Board of Directors of the Housing Corporation, was authorized to obtain revenue papers and proceed in the matter for acquiring the land. Simultaneously, the Housing Corporation led by its Managing Director-Brij Bhushan Sharma took up the matter for finance with HUDCO and succeeded in obtaining the financial assistance for developing the residential colony at Humhama.

6. The investigation further revealed that the deleted respondent No.6, Mohammad Yousuf Kuchay in connivance with respondent No.4 executed two invalid agreements to sell dated 07.11.1998 and

09.11.1998 with the Housing Corporation for sale of land measuring 81 kanals and 18 marlas and 75 kanals 15 marlas respectively. These agreements of sale were executed at a time when the deleted respondent No.6 had no locus standi to enter into any such agreement with the Housing Corporation on these dates. The land owners executed power of attorney in favour of the deleted respondent No.6 only on 23.11.1998 i.e. after the execution of agreements to sell.

7. Be that as it is, the Housing Corporation, as is alleged, was found to have subsequently purchased a total land measuring 214 kanals from the deleted respondent No.6 between December, 1998 to August, 2005 against the sale consideration of Rs.8.26 crores, which was shown to have been disbursed to the attorney holders on different dates through cheques and by cash. The investigation in respect of purchase of land mentioned above found that the accused officials of the Housing Corporation had purchased the land at exorbitant rate of Rs.4.00 lacs per kanal as against the actual sale consideration of Rs.1.87 lacs per kanal settled with and paid to the land owners. The investigation found that the accused officials of the Housing Corporation had the knowledge that the land was available for sale @ 1.87 lacs per kanal but with a view to derive wrongful gain in the transaction planted respondent No.4 as middleman and made him to obtain attorney from the land owners

so that the land is ultimately shown to have been purchased @ Rs.4.00 lac per kanal by the Housing Corporation.

8. Another aspect that the investigation revealed was that one of the cheques for an amount of Rs.50.00 lacs, which was shown to have been issued as part payment to respondent No.4 at NB, Jawahar Nagar, was later on deposited in account No.949/16, opened in the name of one Mohammad Yousuf Dar S/o Sh. Rasool Dar in the Cooperative Bank at Chanpora. The said fictitious account was found to have been opened by respondent No.5-Mohammad Ayoub Reshi, a Junior Assistant of the Cooperative Department, who was introduced as Mohammad Yousuf Dar by respondent No.4. The impersonation was done to facilitate the encashment of cheque by the officials of the Housing Corporation themselves. The absence of surname Kuchay from the cheque issued in favour of Mohammad Yousuf, attorney holder of the land owners, was exploited by opening an account in the name of Mohammad Yousuf Dar. This amount of Rs.50.00 lacs deposited in the fictitious account was found later transferred to Account No.4815/25 at Ellaquai Dehati Bank branch Hyderpora in the name of respondent No.4. Even respondent No.4 was shown to have furnished wrong parentage while opening the account at Ellaquai Dehati Bank branch Hyderpora.
9. The investigation was, thus, concluded with the finding that there was unimpeachable and incontrovertible material on record to

demonstrate that there was prior meeting of minds between the accused officials of the Housing Corporation and accused Sh. Mohammad Yousuf Kuchay and under a well-knit plan, accused Sh. Mohammad Yousuf Kuchay was, with ulterior motive, planted as broker to obtain power of attorney from the land owners instead of negotiating the deal directly with them, so that they could draw more amount from the Housing Corporation and pay less to the land owners. It was found that in the process the Housing Corporation was put to a loss of Rs.3.56 crores. The land which ought to have been purchased @ 1.87 lacs per kanal was ultimately shown to have been purchased @ 4.00 lacks per kanal.

10. The Investigating Agency, therefore, found a prima facie case for commission of offences punishable under Section 5(2) of the Act of 2006 read with Section 120-B, 419, 420, 468 and 471 RPC made out against the accused-Mohammad Shafi Dar-respondent No.4, Sh. Brij Bhushan Sharma (petitioner herein), who was then Managing Director of the Housing Corporation, Mohd. Ayoub Reshi, a Junior Assistant of the Cooperative Department-respondent No.5 and Mohammad Yousuf Kuchay (deleted respondent No.6). Sanction for prosecution in respect of in-service public servants was accorded by the competent authority vide Government Order No.42-GAD(Vig) of 2007 dated 22.05.2007. Accordingly, Vigilance Organization, Kashmir through its Senior Superintendent of Police, presented the charge-sheet before the

Special Judge Anti-Corruption, Srinagar. The Special Judge Anti-Corruption heard the prosecution as well as the accused on charge and vide its order dated 18.05.2009 charged the petitioner herein, respondent No. 4 and respondent No.5 for commission of offences punishable under Section 5(1)(c) (d) of the Act of 2006 read with Section 120-B, 419, 420, 468 and 471 RPC. However, the deleted respondent i.e. accused Mohd, Yousuf Kuchay was discharged. Respondent Nos. 4 and 5 herein challenged order of framing charge dated 18.05.2009 passed by the Special Judge Anti-Corruption, Srinagar in 561-A No.84/2009 by invoking inherent jurisdiction of this Court vested by the then Section 561-A of J&K Code of Criminal Procedure. The petition was contested by the Vigilance Organization, Kashmir. The Single Bench of Justice Muzaffar Hussain Attar considered the petition in light of the rival stand of the parties and vide its order dated 07.12.2009 dismissed the same being devoid of any merit. The learned Single Judge rejected the objections of the officials of the Housing Corporation that they were not public servants and, therefore, could not be prosecuted for offence under the Act of 2006. Referring to Section 2 of the Act of 2006, learned Single Judge concluded that Section 2 clearly provides that the expression “public servant” means public servant as defined in Section 21 of the Ranbir Penal Code and Section 21 defines “public servant” to mean a person falling under any of the descriptions mentioned in the Section, which include an officer or

servant of cooperative society or cooperative bank. The Bench also did not agree with the contention of the petitioners therein that no offence for which they had been charge-sheeted was made out on the basis of the evidence collected by the Vigilance Organization, Kashmir. The petitioners therein i.e respondent Nos.4 and 5 were, thus, made to stand trial before the Special Judge Anti-Corruption, Srinagar.

11. Notwithstanding the dismissal of quashment petition filed by respondent Nos. 4 and 5 in which the petitioner herein-Brij Bhushan Sharma was also a respondent, a separate petition under Section 561-A Cr.P.C. was filed by Brij Bhushan Sharma, the then Managing Director of the Housing Corporation, for seeking quashment of the charge against him. This petition came to be considered by another Single Bench i.e. Hon'ble Justice Hasnain Massodi. The Bench of Justice Massodi, after hearing both the sides, was of the view that the charge against Brij Bhushan Sharma for commission of offences under the Act of 2006 and Section 471 RPC was not made out. Justice Massodi, thus, proposed to quash the charge to the aforesaid extent and permit the Vigilance Organization, Kashmir to prosecute the petitioner for other offences like Section 120-B, 419, 420, and 468 RPC before the competent Court of law. Since the Bench of Justice Massodi was confronted with earlier judgment passed in respect of the same issue and same charge-sheet by Justice Muzaffar Hussain Attar on 07.12.2009, as

such, Bench of Justice Massodi referred the matter to Lord Chief Justice for constitution of appropriate Bench to resolve the conflict of two opinions.

12. We have heard learned counsel for the parties and perused the material on record.
13. From a reading of judgment dated 07.12.2009 passed by Justice Attar, one would find that the only issue conclusively determined is that the petitioner-Brij Bhushan Sharma, the then Managing Director of the Housing Corporation, was a public servant, as defined in Section 2 of the Act of 2006 read with Section 21 of the RPC. The Bench of Justice Attar did not elaborately discussed the issue as to whether on the basis of the material collected by the prosecution, charge against the accused, in particular petitioner herein, was made out. The Bench of Justice Attar mainly referred to the powers of the Criminal Court to be exercised by it for framing of charge under Section 251-A of the Code of Criminal Procedure Samvat, 1989 [“the State Cr.P.C.”] and rightly concluded that an accused charge-sheeted by the Investigating Agency can be discharged of an offence only if it is found that the charge leveled against him is groundless holding further that the charge would be groundless only, if it is not supported even by a grain of evidence or material. If prima facie evidence is available on record, then it would be sufficient for the Court to presume that the offence has been committed and that the accused is required to be put on trial.

14. While we do not dispute the proposition of law propounded by the Bench of Justice Attar on the interpretation of Section 251-A of the State Cr.P.C., we find that there is no discussion by the learned Judge in respect of the submission of the petitioners therein that even on the basis of material collected by the Vigilance Organization, no offence was made out against them. However, the Bench of Justice Massodi has gone in detail in respect of the charges framed against the petitioner-Brij Bhushan Sharma. The issue that the petitioner was not a public servant and, therefore, could not have been charged for the commission of offence under the Act of 2006 is also gone into by the Bench of Justice Massodi.
15. From a reading of the order, we find that the Bench of Justice Massodi has fully concurred with the view of Justice Attar that the officers and servant of a Cooperative Society were public servants within the meaning of Section 2 of the Act of 2006 read with Section 21 of the RPC. The Bench of Justice Massodi, however, concluded that the evidence collected by the Vigilance Organization was not sufficient to connect the petitioner-Brij Bhushan Sharma with the commission of any offence under the Act of 2006.
16. The Bench of Justice Massodi, however, opined that the charge for commission of offences punishable under Section 120-B, 419, 420, 468 RPC was clearly made out against all the accused including petitioner Brij Bhushan Sharma.

17. We have carefully gone through the record and analyzed the reasoning given by the Bench of Justice Massodi in support of discharge of the petitioner for commission of offence under Section 471 RPC and 5(2) of the Act of 2006. Insofar as, charge under Section 471 is concerned, Bench of Justice Massodi has proposed to discharge the petitioner on the ground that dishonest and fraudulent intention, which is sine qua non for commission of offence under Section, 471 RPC, is missing. The Bench opined that it is nobody's case that fictitious bank account was opened and the documents were forged to cause wrongful gain to one person or wrongful loss to another person or to defraud any person. We respectfully beg to differ with the view taken by Justice Massodi. Before we proceed, we deem it appropriate to set out Section 471 RPC herein below, which reads thus:-

“471. Using as genuine a forged document or electronic record.

Whoever fraudulently or dishonestly uses as genuine any [document or electronic record] which he knows or has reason to believe to be a forged document or electronic record, shall be punished in the same manner as if he had forged such document or electronic record.”

18. True it is that fraudulent and dishonest intention to use as genuine any document which the accused knows and has reason to believe to be a forged document is sine qua non for constituting offence punishable under Section 471 RPC. We, however, are at loss to understand as to on what basis the Bench of Justice Massodi has

concluded that such intention was missing. It has come amply on record that with a view to confer wrongful loss to the Housing Corporation and to confer wrongful benefit upon respondent No.4 along with others, a cheque of Rs.50.00 lacs which was supposed to be paid to the land owners through their attorney, was deposited by opening of an account in the look-like name of attorney by impersonation. Said amount, after its deposit, was transferred to another account opened in the name of respondent No.4. Fraudulent and dishonest intention is a matter of fact and is required to be gathered from the attending circumstances. This is matter of evidence to be led by the prosecution, once the charge proceeds in the Court. The Bench of Justice Massodi, it appears, could not appreciate this aspect of the matter and erroneously concluded that a fraudulent and dishonest intention in opening of the account by impersonation and thereafter transferring the amount so deposited in the account to another account opened in fraudulent manner.

19. We, therefore, do not agree with the Bench of Justice Massodi that the petitioner was entitled to a discharge under Section 471 RPC.
20. So far as charge under Section 5(2) of the Act of 2006 is concerned, we again find sufficient evidence on record to prima facie connect the petitioner with commission of offence under Section 5(2) of the Act of 2006. Before we proceed to deliberate on the issue, we deem it appropriate to reproduce Section 5(1)(c) & (d) of the Act of 2006, which are as under:-

“5. Criminal misconduct. — (1) **A public servant is said to commit the offence of criminal misconduct —**

(a)

(b); or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do; or

(d) if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage;”

21. From a reading of the above provisions, it clearly transpires that for constituting an offence of misconduct under Section 5(1)(d), dishonest and fraudulent intention of the accused charged with the offence is necessary ingredient. From the reading of the challan and the evidence collected by the prosecution, it clearly comes out that entire modus operandi used by the petitioner in conspiracy with other accused was to cause wrongful loss to the Housing Corporation, which had obtained huge amount to meet its needs from HUDCO, and to cause wrongful benefit to themselves. A big chunk of land which was purchased by the Housing Corporation for establishing of a residential colony in Humhama was owned and possessed by a single owner, namely Sofi Mohammad Hususain. The Housing Corporation through its Managing Director, i.e. petitioner, could have directly negotiated the deal for purchase of the land with the land owner. It has also come on record during investigation that the deal in respect of the land was settled with the

owner @ 1.87 lac per kanal. The petitioner along with other accused, acting in furtherance of criminal intention with the conspiracy put up a middleman i.e., deleted respondent No.6, who obtained power of attorney from the land owners and sold the land in pieces to the Housing Corporation @ 4.00 las per kanal.

22. Whether the attorney holder, who stands deleted from the array of respondents, was also a part of the conspiracy hatched by the petitioner and other accused is a question, we are not in a position to go into for the reason that said Power of Attorney has been discharged by the Special Judge, Anti-Corruption, Srinagar and his discharge has been upheld by the Bench of Justice Attar.
23. That apart, the deleted respondent No.6 is not before us as his name was deleted from the array of respondents by this Court vide order dated 19.03.2010.
24. Be that as it may, even in absence of the deleted respondent No.6, the petitioner can be prosecuted for the offence under the Act of 2006. The Bench of Justice Massodi has discarded the evidence collected by the Investigating Agency on its merit as if the Bench was to pronounce the final judgment on the conclusion of the trial. Sifting of evidence to come to a conclusion contrary to the one arrived at by the trial Court in framing charge is not permissible. Under Section 251-A Cr.P.C., the trial Court is required to consider all the documents referred to in the report filed under Section 173 Cr.P.C. On examination, if the Court thinks necessary, shall also

give prosecution and accused an opportunity of being heard before formulating its opinion as to whether there is ground for presuming that the accused has committed an offence.

25. From a plain reading of Section 251-A Cr.P.C., it becomes abundantly clear that an accused can be discharged for an offence only, if it is found that the charge levelled against him is groundless and the charge could be called groundless only if it is not supported by any evidence brought on record by the Investigating Agency. We do not want to deliberate deep into the powers of the trial Court in framing charge, but suffice it to say that at the time of framing of charge, the trial Court is not supposed to analyze the evidence by deep scrutiny to find out whether the evidence brought on record by the Investigating Agency is sufficient to warrant conviction. Scrutiny by the Court at the stage of framing of charge is limited to find out as to whether the charge levelled against the accused is groundless or in its opinion there is ground for presuming that accused has committed the offence. To come to a conclusion that there is ground for presuming that the accused has committed an offence, it is sufficient for the Court conclude that there is prima facie material and evidence available on record, which would require the accused to be put on trial. Scrutiny of the evidence and material collected by the prosecution in support of the charge by the High Court in exercise of its inherent jurisdiction vested under Section 561-A Cr.P.C. is by no means higher than that of the Court

framing the charge. We are, thus, of the opinion that the Bench of Justice Massodi went deep in analyzing the evidence on record and coming to the conclusion that there was no evidence demonstrating prima facie dishonest and fraudulent intention of the accused in paying the exorbitant rate of Rs.4.00 lacs per kanal instead of Rs.1.87 lacs per kanal, as was earlier settled with the land owners by one of the accused. We are aware that discharge of deleted respondent No.6 by the trial Court is likely to have adverse effect on the trial against the petitioner and other accused but that fact alone cannot be made to work to the benefit of the petitioner and other accused, who, as per the material on record, have prima facie committed the offence punishable under Section 5(2) of the Act of 2006.

26 For the forgoing reasons, we respectfully beg to differ with the view taken by Justice Massodi. We find that the conclusion arrived at by Justice Attar is correct and in consonance with the evidence and material brought on record by the Investigating Agency i.e. Vigilance Organization, Kashmir. We are told that pursuant to the reference order dated 02.01.2013 passed in 561-A No.17/2010, the Court of Special Judge Anti-Corruption, Kashmir has transferred the challan to the Court of Chief Judicial Magistrate, Srinagar without waiting for the outcome of this reference. Perhaps this has happened due to the language used by the Bench, in particular, in paragraph No.46 of the reference order, a reading whereof suggests

as if the Bench has disposed of the matter and has simultaneously referred it to the Lord Chief Justice for constitution of the appropriate Bench.

27. Be that as it may, since we have arrived at a conclusion that the quashment petition under Section 561-A Cr.P.C. filed by Brij Bhushan Sharma lacks merit and, therefore, deserves to be dismissed, we condone the lapse committed by the Special Judge Anti-Corruption, Srinagar in transferring the challan to the Court of Chief Judicial Magistrate, Srinagar.
28. For the reasons aforesaid, we concur with the view of Justice Attar and dismiss this petition. The challan, which is now pending before the Court of Chief Judicial Magistrate, Srinagar, shall be sent back to the Court of Special Judge Anti-Corruption, Srinagar, to be tried in accordance with law for the charges framed against all the accused including the writ petitioner.
29. Reference stands answered accordingly.

(Rajesh Sekhri)
Judge

(Sanjeev Kumar)
Judge

Srinagar
08.09.2023
Vinod.

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