

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

OWP no. 535/2006
CMP nos. 1601/2010, 686/2006 and 904/2006

Date of Decision: 04.11.2010

Ravish Trehan
v.
State and others

Coram:		
Mr. Justice Sunil Hali, Judge.		
Appearing Counsel:		
For petitioner(s)	Mr. Z. A. Shah, Sr. Advocate with Mr. Vipin Gandotra, Advocate.	
For Respondent (s)	Mr. M. I. Qadiri, Advocate General and Mr. Gagan Basotra, AAG.	
i)	Whether to be reported in Press, Journal/Media	: Yes
ii/	Whether to be reported in Digest/Journal	: Yes

Privatization of power sector is one of the priorities and objectives in this country which has embarked upon the economic liberalization.

In order to augment its vast power potential the State of Jammu and Kashmir sought participation of private entrepreneurs. The Chief Minister of the State made an open invitation to all private entrepreneurs to come forward and help the State for augmenting its power generation. The petitioner, taking queue from the policy decision of the State, is stated to have offered his services for making a dysfunctional Canal Power House at Jammu operational. His offer in this behalf was accepted by the State of Jammu and Kashmir and the Power House was handed over to him to be made functional. Before this arrangement could be made workable, the State cancelled the

contract by its decision dated 31.05.2003. Not only the decision to cancel the contract was taken but the matter was referred for criminal investigation to identify the errors, omission and illegalities in allotting this contract to the petitioner.

Cancellation of the contract became subject matter of challenge before the Writ Court. The Writ Court set aside the order of cancellation of the contract which was confirmed by the Division Bench of this Court in letters patent appeal.

On same set of facts, which necessitated the cancellation of the contract, an FIR was lodged before the Vigilance Organization and investigation initiated. The issues which were subject matter of challenge before the Writ Court are, in essence, the issues involved in the investigation for which an FIR stands lodged against the petitioner. It is under these circumstances that present writ petition has been filed before this Court, questioning the lodging of the FIR and the consequent investigation based upon it, on the ground that all these issues stood determined by the Writ Court and confirmed by the Division Bench.

The question for consideration in this writ petition is as to whether it will be in the interest of justice to allow the investigation to proceed on issues and facts regarding which there is already a judicial determination by the Writ Court.

In order to appreciate the controversy certain facts and dates are required to be noticed:-

In order to supplement the power generation and to bridge the gap between the power generation and distribution, the Chief Minister of the State announced private participation both for generation and distribution. The policy was required to be implemented by the functionaries of the government. As a first step towards such privatization, a power house located at Canal Jammu was sought to be revived through private enterprise. One M/S Shakti Hydro Electric Co. and M/S Daberson Hydro Power Ltd. Ludhiana came in touch with the government as early as in September, 2000 and submitted their proposals for renovation, modernization and up-gradation of the Canal Power House along with feasibility reports to the Government.

It seems that said proposals were considered by the Chief Engineer, Civil Investigation and Design Wing of J&K SPDC in June, 2001.

The present petitioner is also stated to have developed interest in such an enterprise and is stated to have submitted his proposal along with feasibility report, stated to have been prepared by one Ashok Kumar, who is stated to have prepared the report of M/S Shakti Hydro Ltd. Also. The said proposal is stated to have been filed on 24.07.2001. Managing Director SPDC asked the petitioner to submit a detailed project report (DPR). Consequently DPR was submitted on 18.09.2001 and the said report was sent to Central Electricity Authority for scrutiny. After receipt of the report from the said Authority, the petitioner

was asked to submit a revised project report on 17.11.2001. On submission of the revised project report, same was submitted on 21.11.2001. The DPR was cleared by the government and it conveyed the approval of the Chief Minister to the departmental proposal in anticipation of approval of the Cabinet on 29.01.2002. The department was asked to issue necessary orders for handing over the Canal Power House to M/S Trehan Industries.

The terms and conditions for the transfer were directed to be formulated/ negotiated by a Committee consisting of Chief Secretary, Financial Commissioner Planning and Development, Financial Commissioner Finance, Principal Secretary PDD and Managing Director Power Development Corporation, vide Government order No. 35-PDD of 2002 dated 30.01.2002. The power house was handed over to the petitioner after preparation of the inventory which was evaluated vide Government order No. 34-PDD of 2002 dated 30.01.2002. The said order also provided for constitution of the Committee for further finalization of the other terms and conditions. After taking over the Power House, petitioner started the work. At bureaucratic level the Committee constituted vide order dated 30.01.2002, took the following decision:-

“(i) Five kanals of land (to be verified/properly demarcated) appurtenant to the hydel project will be transferred to M/S Trehan Industries Corporation on lease of 40 years, extendable

after expiry of said period. While transferring the land on lease basis, all terms and conditions shall be clearly spelled out including the one that the land shall not be put on any other use except for power generation and other related activities. Violation will result in cancellation of the agreement and land will automatically revert back to the State Government. Other terms and condition as are applicable to industrialist-granted land on lease would be applicable in the said case & incorporated in the lease deed.

- (ii) As far as the machinery/equipment available in the said power project is concerned, the Book value would be evaluated after drawing a proper inventory and then further negotiations will be held with the entrepreneur about its transfer, which could be either by way of its outright sale or on lease basis. MD, JKPDC will have this evaluated by a competent evaluator.
- (iii) The entrepreneur will supply power to the PDD @ Rs. 3.00 per unit to start with, which will be subject to review and governed by the award of the State (Electricity) Regulatory Commission as and when constituted which is mandated to fix the tariff.

- (iv) The PDD will clear all dues on account of sale of power within a period of one month which will be backed by an L.C in case of default 1% penal interest will be payable, if the payment is not made within a period of one month.
- (v) P.P.A shall be signed between M/S Trehan Industries Corporation and Development Commissioner Power accordingly.”

The Power House was handed over to the petitioner but without signing of Memorandum of Understanding and setting the terms and conditions. The rate of Rs. 3/- per unit was accepted subject to review by the award of the State (Electricity) Regulatory Commission, as and when constituted, which is mandated to fix the tariff. The power purchase agreement was required to be executed between the petitioner and the Managing Director State Power Development Corporation.

From the aforesaid facts it is revealed that the decision to handover the Power House to the petitioner was taken on 29.01.2002. The terms and conditions as well as fixation of tariff was subject to the approval by the State (Electricity) Regulatory Commission, for which Power Purchase Agreement was to be entered between the parties.

The petitioner is stated to have effected the necessary changes on civil side on the project by spending some amount on it. The generation of the power was to wait till the MOU is executed as also the rates offered by the petitioner were finally determined. Before it could be done there was a change in the Government which resulted in review of the decision taken by the erstwhile government.

Vide Government Order No. 97-PDD of 2003 dated 21.05.2003 a Committee was constituted for determining the estimates of the work done by M/S Trehan Industries in the Canal Power House. The matter was placed before the Cabinet which deferred its decision and directed that the Power Minister should visit the spot and submit his report. After inspection by the Power Minister the Cabinet decided that the Power House be taken over by the State Power Development Corporation from M/S Trehan Industries. A Committee was also constituted, headed by Financial Commissioner (Finance) to assess the estimates of the work done by M/S Trehan Industries. The Cabinet also decided that thorough investigation be conducted by an appropriate agency about the manner in which the Canal Power House was handed over to M/S Trehan Industries without following proper procedure and Codal formalities.

Based on this decision of the Cabinet, Government Order No. 100-PDD of 2003 dated 21.05.2003 came to be issued, superseding Government order No. 34-PDD of 2002 dated

30.01.2002, with a direction for taking over the Canal Power House by the J&K Power Development Corporation.

These orders were questioned by the petitioner in OWP no. 467/2003. The writ petition was allowed and impugned Cabinet decision dated 19.05.2003 and Government Order No. 100-PDD of 2003 dated 21.05.2003 were quashed and direction was issued to give effect to Government Order No. 34-PDD of 2002 and 35-PDD of 2002 dated 30.01.2002. The said decision was questioned by the respondents before the Division Bench, which vide its judgment dated 31.05.2004 modified the order of the learned Single Judge, by directing constitution of an independent committee of experts by the Government to go into the entire gamut of the dispute. It was directed that after receipt of the report of the Committee, fresh decision shall be taken by the Government and in case of dis-agreement, it shall briefly spell out the reasons. The exercise was directed to be completed within three months.

In pursuance of the directions of the Division Bench of this Court, a Committee was constituted by the Government vide Order No. 979-GAD of 2004 dated 26.07.2004, which submitted its report to the Government with following recommendations:-

“ a)We recommend that M/S Trehan Industries be asked to pay a premium price per canal, that is 50 per cent more than the premium that is paid for the post expensive

industrial estate in the Jammu region. The 50 percent makeup is justified on the ground that the powerhouse is at a prime location in Jammu city and not in a defined industrial area. In deciding the compensation for land, the committee also deliberated upon the option charging a premium price equivalent to the last registered commercial deal in the vicinity of the powerhouse.

- b) This one time premium will be renewed when and if the lease is renewed. In case the lease is not renewed, power house will be transferred to the State Government on a “ as is where is” basis.
- c) The payment of premium will be in addition to the ground rent as per norms of the State Government.

After these conditions are met, M/S Trehan Industries should be given the following two options:-

- a) Supply power to the State Government at a fixed based price of Rs. 2.45 paise. Escalation on the price should be based on the Government of India norm for small hydel power projects.

b) In line with the industrial/ power policy, an option to avail of the exchange of power in an industrial estate for running his industrial unit. The day to day timings of the supply of power by the entrepreneur and its draw down at the industrial area for his use should be mutually decided by the client and the Chief Engineer concerned. It shall be ensured that power generated during the non peak hours does not get substituted by power consumption during peak hours.”

The recommendations of the Committee did not find favour with the Government as a result of which vide Cabinet decision dated 19th of April, 2005, recommendations of the Committee were rejected, which resulted in passing of Government order No. 131-PDD of 2005 dated 21.4.2005. Consequence of this Government order was to take over the Power Project from M/S Trehan Industries. This order became subject matter of challenge in OWP no. 248/2005. The ground for passing the impugned order, rejecting the recommendations of the Committee, reads as under:-

“1. The price per unit suggested by the Committee is on the higher side. It has serious implications and will form a

precedent for fixation of price in future for other similar projects in the private sector.

2. The recommendations of the Committee will have serious implications for investigation being conducted by the Vigilance Organization in the case. Investigation conducted so far have established prima facie dishonest intention and criminal conspiracy as regards manner and the terms and conditions of transfer of the Canal Power House to the entrepreneur.
3. Manner and method of the transfer of Canal Power House is against all the established norms and codal formalities. Such activities are required to be curbed so that in future nobody will venture to obtain, State largessee, by slip shod method.”

The following reasons are indicated in the aforesaid order:-

- a/ That rate of Rs. 3/- per unit suggested by the Committee is on higher side and the same has been fixed arbitrarily.

- b/ That the manner and method in which the transfer of Canal Power House has been done is in violation of accepted legal norms;
- c/ No norms and codal formalities have been observed while allotting the contract;
- d/ That the contract has been allotted without issuing advertisement inviting tenders.

This order became an information for the investigating agency for registering the FIR against the petitioner. On receipt of this information and registration of FIR, investigation is stated to have been initiated and according to the respondents the report has been completed.

While dealing with the aforesaid reasons for rejection/ cancellation of the contract vide order dated 19.05.2003 and 21.05.2003, the Writ Court found favour with the contention of the petitioner and the said finding stood confirmed by the Division Bench.

The finding recorded by the Writ Court and confirmed by the Division Bench, has dealt with all the issues raised in the aforesaid order. Following are the findings of the writ Court on issue no.1:-

Issue : Whether the Power House was allotted without advertisement and inviting tenders?

The contention of the State was that it was a selective decision without inviting tenders and the decision was not in public interest. The Division Bench observed as under:-

“ In the instant case too, as seen above, the then Chief Minister of the State had invited private entrepreneurs to come forward and make investments and participate in the industrialization of the State. The appeal unfortunately fell flat and outside agencies/entrepreneurs did not respond to the call presumably on account of the disturbed conditions in the State of which judicial notice can be taken. In the circumstances, the Chief Minister approached the Chamber of Commerce and on the motivation of Chamber of Commerce, the respondent made an offer to set up the project for renovation and modernization of Canal Power House, Jammu.

Though the facts of the present case are not identical to those of Kasturi Lal's case (supra), a common feature of both the cases is that contract was awarded without issuing an advertisement notice as such or inviting tenders, but after open invitation to the entrepreneurs at large in the State of Jammu and Kashmir, and, therefore, it cannot be said that it was a case of back door selection or selection on pick-and-choose basis. As a matter of fact, the appellants admitted in their affidavit that Power Development Corporation had been asked to enter into Memorandum of Understanding with the respondents and one

M/S Shakti Hydro Electric Co. for renovation and modernization of the Canal Power House, Jammu and Mohra Power Project, respectively. The respondents thus were not birds of season getting entry by back door method. In the premises, neither of the two limitations indicated in the case of Kasturi Lal (*supra*) would seem to apply.”

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Coming to the instant case, as seen above, at the instance of the authorities of the State, the respondents submitted a detailed project report and, later, in the light of the suggestions/objections by the Central Electricity Authority, a revised project report in conformity with the suggestions. The matter was processed at different levels and the project received the approval of the Chief Minister in anticipation of the Cabinet’s approval. We do not find any violation of the laid down procedure. We do not also think that the manner of consideration suffered from any apparent error. We are conscious of the fact that the writ petition arises from an order reversing the earlier decision/order and therefore, what the court primarily has to see is whether the present impugned order is arbitrary and illegal but, as noticed above, the submissions of the counsel revolved mostly around correctness of the earlier decision.”

The categorical finding of the Division Bench is that the decision does not suffer from any apparent error.

Issue:2: Whether the decision of handing over the Power House, without approval of the Cabinet and execution of Memorandum of Understanding, was proper?

The contention of the State was that the order was required to be approved by the Cabinet and not by the Chief Minister under the Business Rules.

The Division, while examining this aspect of the matter, has observed as under:-

“ In our opinion, in the instant case it is not necessary to go into larger questions as we are satisfied that the matter in hand did not require approval of the Cabinet in terms of the Business Rules. The Business Rules, as indicated above, have been framed for “more convenient transaction of the business of the Government” under Section 43 and Section 45 (2) of the Constitution of Jammu and Kashmir. Section 43 provides that Governor shall make rules for the more convenient transaction of the business of the Government of the State and for the allocation among Ministers of the said business. Section 45(2) provides that orders and other instruments made and executed in the name of the Governor or of the Government of Jammu and Kashmir shall be authenticated in such a manner as may be specified in the rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or

executed by the Governor or, as the case may be, by the Government of Jammu and Kashmir.”

It was further observed as under:-

“We find force in the submission on behalf of the respondents. As a matter of fact, strictly speaking, it is doubtful of handing over of the power house in itself constitutes alienation etc. of any immovable property. It is true, as pointed out on behalf of the appellants, that 5 Kanals of land also was proposed to be handed over to the respondents, but that was a subsequent decision of the Committee, subject to concurrence/approval of the competent authority. Under Rule 9 of the Business rules, except otherwise provided in the rules, all business allotted to a department are to be disposed of by or under the general or special directions of the Minister-in-charge. Further, under Rule 7, the Cabinet is collectively responsible for all executive orders issued in the name of the Governor or the Government of Jammu and Kashmir in accordance with Business Rules, whether such orders are authorized by an individual Minister on a matter pertaining to his portfolio or as the result of discussion at a meeting of the Cabinet, or otherwise.

In *Shamsher Singh vs. State of Punjab*, (1974) 2 SCC 831, it was held that Article 166 of the Constitution of India (Section 43 of the Constitution of J&K), does not provide for any delegation. The decision of a Minister or officer

under the Rules of Business is the decision of the Governor or the President as the case may be. The decision not being the result of delegation of power, once an order is issued on behalf of the Governor or the State or Government of State of Jammu and Kashmir, it is to be treated as a decision of the Governor/Government and the controversy, therefore, that the approval of the Cabinet was not taken under rule 8 read with entry 38 of the Second Schedule pales into insignificance, even if it were to be held that the proposal was covered by entry 38 of the Schedule.”

The Division Bench further observed as under:-

“It is true that without waiting for the Cabinet decision, the order was issued on 30.1.2002 and power house was handed over to respondents, but if under the Business Rules it was not essential to obtain the Cabinet’s approval, not much would turn on this.”

Issue : 3: Whether rate of Rs. 3/- per unit, suggested by the Committee is on higher side and same has been fixed arbitrarily?

The contention of the State was that fixation of rate of Rs. 3/- per unit was arbitrarily fixed. The premise on which this argument was raised, was based on the fact that the Committee constituted has suggested that the cost of generation of power would be less in case revival is undertaken by the Power Development Corporation, taking into account the subsidy from Government of India Ministry of Energy. What was being

contested was that by conferring undue benefit on the petitioner, the proposed tariff was accepted without taking into consideration the suggestions of the PDC, which had suggested that cost should be Rs. 1.74 per unit. The Division Bench, observed as follows:-

“ It may be that by submitting the revised project report, the respondents made their offer in consonance with the suggestions of the Central Electricity Authority, this, however, is not conclusive of the matter. The terms and conditions, as seen above, remained un-finalized. The Committee later considered the matter but the terms and conditions finalized by it were never approved.”

After the recommendations of the Committee were not accepted by the Government order No. 131-PDD of 2005 dated 21.04.2005 and impugned communication dated 22.04.2005 was questioned in another writ petition filed before this Court, bearing OWP no. 248/2005 which was decided by the learned Single Judge on 07.04.2006. While dealing with the issue of fixation of rates, it has been observed as under:-

“No doubt the committee constituted by the Power Development Corporation has worked the cost of power generation at Rs. 1.174 in the year 2001. This cost was assessed after taking into consideration incentive provided by the Government of India to the extent of 75% of the

capital investment subject to maximum of Rs. 2.00 Crore per MW in the form of subsidy. It is pertinent to note that subsidy is available only if the generation is made by the State, State Electricity Board and/ or its agency. The circular of Government of India, Ministry of Non-Conventional Energy sources provides incentive only for the project in State sector as is evident from para-8 of the circular noticed hereinabove. This factor was relevant at the time the State Government took the decision whether to go in for privatization or not. It was a question of policy of the State. It is also relevant to notice that according to the State's own admission, this project was left defunct for the last more than 20 years. Neither the State Government nor the Power Development Corporation (PDC) took any initiative for its renovation/modernization and to bring it in operational conditions. It appears that the State had limited resources and even when the Government of India's scheme for incentive was circulated in the year 2000. The State Government never availed these incentives to take up the project. Once the State Government decided to go in for privatization of Power Sector in the State and instead of investing its own money, asked the private entrepreneurs to invest and generate electricity, this factor becomes irrelevant. The generation price assessed by the PDC at Rs. 1.174 was worked out after taking into consideration 75% of the capital investment by way of subsidy from

Government of India. If the subsidy is not available, the generation price assessed by PDC is impossible. The price determined by PDC at Rs. 1.174 is with only 25% of the investment by State agency (75% being contributed by Government of India). If the generation price is to be assessed with full investment i.e. excluding the subsidy, it comes to Rs. 4.696 per unit. The generation price proposed by the petitioner at Rs. 3.00 per unit can not be said to be on higher side. The very premises of the ground of rejection is non-existent and it appears to be without any application of mind.”

It was further observed as under:-

“ It will not be out of context to say that 75% subsidy from Government of India is also a public money and if this subsidy amount is also conceded as capital investment in the Project, the price as determined by the Power Development Corporation in 2001, cannot hold good rather it may be much more than the price, as proposed by the petitioner at Rs. 3.00 per unit. It is also relevant to note that expert committee has further slashed the price per unit at Rs. 2.45 even while imposing additional liability of premium and ground rent upon the petitioner which is sure to escalate the capital investment of the Project, I am of the considered view that this ground is only a play-card and is not a valid ground to deny the project to the petitioner.”

The Writ Court further observed:-

“There is another interesting feature that FIR in question was registered pursuant to Cabinet Decision No. 90/6 dated 19.05.2003 and Government Order dated 21.05.2003. This Cabinet decision/ Government Order stand quashed. Without going into the implications of the quashment, suffice it to say that Pendency of investigation which is said to be complete in all respects, cannot be utilized by the respondents to nullify the findings and directions of writ court and LPA Bench referred to above, in earlier litigation. They are not entitled to take such a plea with the sole object of ignoring the recommendations of the expert-committee. Respondents have also not brought on record any material in this Writ petition to show that what has been prima facie established during the investigation. Investigation is said to be complete as per the statement of learned Advocate General. I do not feel that this can be a valid ground for rejection of the Report of the Expert-Committee.

After having recorded its findings on the issues, which are subject matter of investigation before the Vigilance Organization, desirability to allow this investigation to proceed, has to be determined by looking to the allegations leveled in the FIR.

The following things are revealed from the FIR:-

A- To augment its power generation and its distribution the State of Jammu and Kashmir

decided to encourage private entrepreneurs. Two private players, namely M/S Shakti Hydro-Electric Company Pvt. Ltd of Delhi and M/S Daberson Hydro Power Limited of Ludhiana submitted their proposals along with pre-feasibility reports, which are stated to have been favorably considered by the Chief Engineer, Civil Investigation and Design Wing of JKPDC in June, 2001.

B- Around April/May 2001, accused Ashok Jaitly, the then Chief Secretary in furtherance of criminal conspiracy with the present petitioner, got a proposal and feasibility report prepared from one Ashok Kumar, who had prepared the report for M/S Shakti Hydro-Electric Pvt. Ltd.. The report submitted by the petitioner was suggesting the cost of Rs. 3/- per unit while that of M/S Shakti Hydro-Electric Pvt. Ltd was Rs. 3.16 per unit. The petitioner is stated to have entered the fray in July, 2001. A meeting headed by accused Ashok Jaitly decided on 24.07.2001 to allow the private participation in power projects and cases of both M/S Shakti Hydro-Electric Pvt. Ltd and M/S Trehan Industries were to be evaluated after their

Techno-economic feasibility reports were obtained. On 31.07.2001 accused Ashok Jaitly, by abuse of his official position, got a letter issued to the Managing Director, JKSPDC, for taking steps to enter into Memorandum of Understanding with M/S Trehan Industries for modernization of Jammu Canal Power House, without waiting to complete the evaluation of Techno-economic feasibility report, as was decided on 24.07.2001.

- C- The Project report of the petitioner was referred to the Central Electricity Authority. Certain observations are stated to have been raised by the said Authority that in case the State Power Development Corporation undertakes the project, it will receive subsidy from the Central Government, which will reduce the cost of production per unit up to Rs. 1.174. The report further reveals that the cost of production per unit at Rs. 3/- assessed by the petitioner was based upon incentives provided by Punjab Energy Development Agency, which was relevant for new projects where the cost of civil works were higher where as Canal Power House was an existing project having number of

infrastructural facilities and as such it could not be compared with Punjab.

D- Without considering the objection raised by the Law Department and without any policy guide lines and in violation of codal procedure, Shri Ashok Jaitly has abused his official position while he was at the verge of retirement, by ensuring handing over of Canal Power House to M/S Trehan Industries in fulfillment of criminal conspiracy. The project was handed over on 30.06.2002 without any formal contract or Memorandum of Understanding.

E- As the Chairman of the Committee, Shri Ashok Jaitly, by abuse of his official position, accepted the price of Rs. 3/- per unit, offered by the petitioner, resulting in huge recurring loss to the public exchequer and corresponding gain to M/S Trehan Industries. It is also stated that vital official notes and documents pertaining to the above transaction have been removed and destroyed by the conspirators.

Analyzing the contours of this FIR, the material factual ingredients of substantive offences, which are stated to have been committed by the petitioner, are as under:-

- A- The proposal along with the feasibility report submitted by M/S Shakti Hydro-Electric Pvt. Ltd., was over-looked and instead petitioner was allowed to join the fray by accused Ashok Jaitly, even though the proposal of M/S Shakti Hydro-Electric Pvt. Ltd. Was prior point of time. In order to achieve this purpose the services of one Ashok Kumar, who had prepared the proposal and feasibility report of M/S Shakti Hydro-Electric Pvt. Ltd, were engaged to do the same for the petitioner, wherein the cost of production as proposed by the petitioner was claimed at Rs. 3 per unit and that of M/S Shakti Hydro-Electric Pvt. Ltd was Rs. 3.16 per unit. This was a conspiracy hatched by accused Ashok Jaitly and the petitioner with said Ashok Kumar, in order to ensure that petitioner's cost of production should be at lower side and that of M/S Shakti Hydro-Electric Pvt. Ltd on higher side.
- B- Acceptance of cost of production by Shri Ashok Jaitly, was without taking note of the observations made by the Chief Engineer, Civil Investigation and Design Wing of SPDC, that in case the project is undertaken by the

department itself, the cost would be Rs. 1.74 per unit, i.e. much lesser than what has been offered by the petitioner. The cost of production per unit at Rs. 3/- assessed by the petitioner was based upon incentives provided by Punjab Energy Development Agency, which was relevant for new projects where the cost of civil works were higher where as Canal Power House was an existing project having number of infrastructural facilities.

C- That without signing the Memorandum of Understanding, the power house was handed over to the petitioner, in violation of codal formalities and without advertisement or inviting tenders for the said work.

D- That the order of handing over was issued on the basis of the approval granted by the Chief Minister, without reference to the Cabinet.

These are the material facts which according to the prosecution, constitute the elements of substantive offences, which are stated to have been committed by the petitioner.

The investigation in the case has been concluded on the basis of the facts disclosed herein above. The conclusions of the investigation, in terms of report under Section 173 Cr.P.C, produced by learned Advocate General, are as under:-

a/ That without declaring the policy regarding the handing over the power projects to the private entrepreneurs, either by negotiation or by advertisement or calling of tenders, accused Ashok Jaitly, in meeting held on 24.07.2001 decided to allow participation of private players in this behalf, without seeking approval of the Cabinet.

b/ On 31.07.2001a decision was taken to enter into MOU with M/S Trehan Industries for renovation and modernization of Canal Power House, ignoring the claim of other private entrepreneur, namely, M/S Shakti Hydro-Electric Pvt. Ltd., regarding which a decision was taken on 24.07.2001. M/S Shakti Hydro-Electric Pvt. Ltd. Was awarded Mohra Power house when he actually has contended for Canal Power House.

c/ Tremendous pressure was brought on Shri A. M. Mattoo, Managing Director, SPDC, to handover the project to the petitioner from 31.07.2001 to 17.10.2001. The Managing Director issued communication on 18.10.2001, directing the petitioner to take over the project. It was done at the behest of Mr. Ashok Jaitly.

d/ The report submitted by Mr. A.M. Mattoo, MD, SPDC, resulted in preparation of three important reports, relating to the cost of renovating the aforesaid project, prepared by the petitioner, which suggested an investment of Rs. 5.95 crore. The calculated cost of production after final

investment was Rs. 3.56 per unit but petitioner offered to sell the power at Rs. 3 per unit. This was analyzed by Central Electricity Authority, which sought corrections in the report as well as on the cost of production of power. The report of the Authority suggested that in case the power production is undertaken by the State PDC, it will cost Rs. 1.174 per unit. The finding of the Investigating Officer is that the investment proposed by M/S Trehan Industries was highly inflated one.

e/ The report prepared by the Engineers of the SPDC stating that cost of production at Rs. 3 per unit was exorbitant was based upon the expert opinion and factually correct technical details but the same were rejected by Shri Ashok Jaitly, arbitrarily as no reasons were recorded.

f/ That on the transfer of Shri Ajit Kumar, Power Secretary, the new incumbent Shri B. R. Kundal found that the decisions taken on 31.07.2001 and 17.10.2001 were in violation of the procedure laid down in Secretariat Manual. The issue was being handled by Shri Ajit Kumar directly through the assistance of his personal section. No decisions are reported to have been recorded on the file on this behalf.

g/ Despite intense pressure brought on Shri B. R. Kundal by Mr. Jaitly, to handover the Power House to the petitioner, the administrative department, consisting of

Power Minister, Power Secretary and the Joint Director (P&S) made efforts in resisting the pressure of Shri Jaitly in the months of December 2001 and January, 2002. The following objections were raised:-

- (i) The decision taken by the earlier Power Secretary is not backed by valid approval as no file is available to clarify and indicate as to under what circumstances the decision was taken to handover the power house to the petitioner.
- (ii) Without approval of Board of Directors of JKSPDC, the Power House cannot be given to the petitioner till the techno-economic evaluation of DPR is complete.
- (iii) That cost of production of Rs. 3 per unit, offered by the petitioner was on the higher side as another firm namely M/S Shakti has offered Rs. 2.50 per unit.

h/ Faced with the opposition from the administrative department, Shri Ashok Jaitly, the then Chief Secretary, conceived a plan of circumventing the administrative department and the Cabinet, by deceiving the then Chief Minister and obtaining his approval on the basis of concealment of vital facts and distortion of factual position. In nut shell it is stated that the Chief Minister was mislead

by Mr. Jaitly, who succeeded in getting his approval on 28.01.2002. One of the circumstances indicated is that the then Power Minister had ordered recalling of the proposal as he felt that the project was being given to the petitioner without following the codal formalities like inviting tenders and biddings including their validation.

i/ Approval of the Chief Minister was obtained in GAD File no. 4/2003 which dealt with the issue of renovation of defunct Power Houses, while as, it, in fact, dealt only with the Canal Power House. The said file owes its origin to the Cabinet memo which was submitted by the Power Development Department for consideration of the Cabinet. Two options were provided by the Power Secretary; one to order the transfer pending approval by the Cabinet and the other suggested to send it to Cabinet for consideration. This suggestion was initially accepted by Shri Jaitly, who agreed for its inclusion in the Agenda of the Meeting, however, in view of the written instructions issued by the Power Minister, the file was recalled on the premise that the work needs to be allotted by inviting tenders. Feeling apprehensive, Mr. Jaitly called for this file from the General Administrative Department on 22.01.2002 and obtained the approval of the Chief Minister before its approval by the Cabinet. The intention and purpose of this was to conceal

the information from the Chief Minister, as was suggested by the Power Development Department.

j/ The approval of the Cabinet was again delayed in its meeting dated 25.02.2002 as the intention and purpose of Shri Jaitly was to finalize its terms and conditions including sale rate of the power, which decision was taken on 25.02.2002, on the date the Cabinet meeting was proposed to be held. The intention and purpose was to create a situation of fait accompli not only regarding the physical transfer of the Power House but also about the terms and conditions of such transfer. The assets had been transferred on 31.01.2002 but the terms and conditions had not been finalized before such handing over was done. Finally Cabinet took a decision on 24.04.2002 that matter be examined by the Law Department and its re-submission to the Cabinet. The opinion of the Law Department was contrary to what was decided by Mr. Jaitly. The opinion of the Law Department was based upon following facts:-

- I- That no policy was framed regarding the allotment of the Power House to the private entrepreneurs and opportunity should have been given to all the private entrepreneurs to participate in such process.

II- The capability of Shri Trehan should have been examined as to whether he has the expertise to undertake the project.

III- Before issuing orders, the terms and conditions should have been fixed.

k/ After the retirement of Shri Jaitly, the new incumbent Shri I. S. Malhi, in his note dated 31.07.2002 raised a query that the policy of the department that lease was to be for 20 years, but the period has been enhanced to 40 years by decision taken on 25.02.2002 when Mr. Jaitly was in command. The issue with respect to the cost of the production per unit was also examined.

l/ The investigation further reveals that Mr. Trehan is stated to have spent Rs. 5 crores while as the actual cost, as determined by the department, was Rs. 1.88 crore. The contention and purpose was to show more investment which would have directly raised the cost of per unit which is stated to have been done by him with active connivance of Mr. Jaitly.

m/ That whole exercise was done by Mr. Jaitly, who was the Chief Secretary, to give benefit to the petitioner, who is stated to be very close with him.

n/ The investigation also reveals that Empowered Committee headed by Dr. Haseeb Drabu has relied upon the highly sophisticated sensitivity analysis of tariff

mechanism. It is contended that Mr. Trehan has misled the Committee by showing his investment as Rs. 4.89 crores whereas unimpeachable and incontrovertible evidence has shown that it is less than Rs. 2.00 crores.

o/ That the criminal intention of Mr. Jaitly and Mr. Ajit Kumar, in allotting the contract without setting up the guide lines for allotment of Power House, was only with a view to benefit the petitioner.

p/ Regarding the involvement of Mr. Ashok Kumar Wahi, who is stated to have prepared the feasibility report of the petitioner on the stolen reports of M/S Shakti Hydro-Electric Pvt. Ltd. , the investigation has accepted the plea of Mr. Wahi, that he did not know that M/S Shakti Hydro-Electric Pvt. Ltd. Was still in competition. He has been deleted from the array of the accused persons by giving benefit of Section 169 of the Code of Criminal Procedure.

These are the circumstances indicating the criminal misconduct of the accused persons, which have finally culminated into allotment of the contract to the petitioner.

I have heard the learned counsel for the parties.

Various acts of omission and commission of the accused persons in the decision making process, alleged to have been taken with criminal intention, has become the subject matter of investigation, and on these facts the accused are to be put to trial.

The question that is required to be determined by this Court is whether it would be proper to allow the investigation in the case to go ahead on the basis of the acts of omission and commission committed by the accused in their decision making process, when admittedly, the decisions taken in pursuance to that have suffered a judgment of the Writ Court and confirmed by the Division Bench.

Before embarking upon this issue it will be relevant to indicate the decisions which have been taken in this behalf and have assumed finality, resulting in handing over of the project to the petitioner.

- A- Handing over of the Power House to the petitioner without execution of MOU and before settling the terms and conditions in this behalf.
- B- The allotment of the contract to the petitioner without advertisement and inviting tenders;

The decisions which have not assumed finality are as under:-

1. Fixation of rate at which the power is required to be supplied by the petitioner;
2. The proposed rate of Rs. 3/- per unit as cost of production has not been concluded and is subject to execution of Power Purchase Agreement. Besides that recommendations of the expert Committee,

which has reduced the rate to Rs. 2.45 per unit, which is stated to have been accepted by the petitioner.

3. The terms and conditions on the basis of which the project has been handed over.

In this backdrop the course of investigation and its conclusions as also the power of the Court to trench upon the jurisdiction of the Investigating Agency in the matter of investigation, is required to be determined.

In order to examine this aspect, it is important to note the offence for which the present petitioner is charged with along with other accused persons which are under Section 5(1)(d) of the Prevention of Corruption Act and Section 420, 120-B and 201 RPC.

Section 5(1)(d) indicates as under:-

“5. Criminal Misconduct.

(1) A public servant is said to commit the offence of Criminal misconduct:-

(a)

(b).....

(c).....

(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;”

Section 420 RPC reads as under:

Whoever cheats and thereby dishonestly induces the person deceives to deliver any property to any person or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 120-A reads:-

“ Definition of Criminal Conspiracy:

When two or more persons agree to do, or cause to be done:-

- (1) an illegal act, or
- (2) an act which is not illegal by means, such an agreement is designated a criminal conspiracy;

Provided that, no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Section 201 RPC reads:-

Whoever, knowing or having reasons to believe that an offence has been committed, causes any evidence of the commission of the offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false’

If a capital offence

shall, of the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall be liable to fine;

If punishable with imprisonment for life

and if the offence is punishable with imprisonment for life or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

If punishable within less than ten year’s imprisonment.

and if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for offence for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both”.

In order to attract the provisions of Section 5(1)(d), the necessary ingredients are that if a public servant by abusing his

official position obtains for himself or for any other person any valuable thing or pecuniary advantage. The factual basis on which this charge can be sustained is that the government servant by misuse of his official position has obtained either for himself or for any other person any valuable thing or pecuniary advantage.

Misconduct is defined as a transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior.

The word criminal-misconduct in the present context would mean, any act done in violation of duties in the office with an intent to confer benefit to some one by causing loss to the State.

In the light of this definition, the conduct of Mr. Jaitly has to be examined, as entailed in the report submitted by the Investigating Officer. Following are the acts of misconduct attributable to Mr. Jaitly:-

- (a) Decision taken by the accused on 24.07.2001 to allow private participation without seeking approval of the Cabinet;
- (b) Order dated 31.07.2001 to enter into MOU with M/S Trehan Industries for renovation and modernization of Canal Power House, ignoring the claim of

private player namely, M/S Shakti Hydro Electric Pvt. Ltd.

- (c) Putting pressure on Managing Director, SPDC, to handover the project to the petitioner from 30.07.2001 to 17.10.2001, which resulted in issuance of order dated 18.10.2001 by the Managing Director of SPDC for handing over of the project to M/S Trehan Industries.
- (d) Acceptance of rate of Rs. 3/- per unit by ignoring the observations of the Central Electricity Authority;
- (e) Obtaining approval of the Chief Minister by ignoring the objection raised by the Power Minister and Power Secretary, who have sought some clarifications before the matter is submitted to the Cabinet for approval;
- (f) Concealing the facts from the Chief Minister in respect of the objections raised by the Administrative Department by getting his approval before the matter is put up before the Cabinet for approval;
- (g) Deferring the decision to seek approval of the Cabinet till terms and conditions

including the sale rate of the power were fixed;

- (h) The opinion of the Law Department was contrary to what was being suggested in respect of transfer of this project to the petitioner.

To attract the provisions of Section 5(1)(d), the essentials of the offence are as under:-

- (a) That the accused has made departure from the normal course with oblique motive.
- (b) Mis-use of official position by the accused as a public servant for obtaining for himself or for any other person any valuable thing or pecuniary advantage;

The word “abuse” has been interpreted to mean “misuse” i.e. using position for some thing for which it is not intended. The word “otherwise than by corrupt or illegal means” would mean anything done dishonestly whereby wrongful loss is caused to the State by obtaining a pecuniary benefit for others.

Applying the interpretation of the Section, following things appear:-

- (a) If by corrupt or illegal means any pecuniary benefit has been obtained either for himself or for some other person by a public servant;
- (b) If otherwise abusing his position as a public servant, he obtains for himself any valuable

thing or pecuniary advantage for some body else.

The case of the petitioner is not covered by the first part of the section, meaning thereby that there is no allegation that the contract was obtained by corrupt or illegal means.

Accusation is under clause (b) which refers to the abuse of the official position with the intent to obtain any benefit for himself or for any other person.

Applying this test to the present case, what is being alleged is that Shri Ashok Jaitly, by abusing his official position, has conferred pecuniary benefit to the petitioner by allotting the contract, while causing wrongful loss to the State.

The allegations in the report under Section 173 Cr.P.C, as discussed herein supra, is that Shri Ashok Jaitly has influenced the course of decision making process by abusing his official position. However, there is no allegation that any pecuniary advantage has been obtained by Shri Ashok Jaitly in this behalf. The pecuniary advantage, which is the genesis of the charge is in respect of allotment of the contract in favour of the petitioner. The decision to allot the contract has been taken by the Chief Minister, who has not been arrayed as an accused in the case nor any of the functionaries of the government, who are stated to have been influenced by Shri Ashok Jaitly, in taking the decision. It cannot be said even by reading the report under Section 173 Cr.P.C and the material collected, that the order of allotment was

issued by the accused. It was a decision taken by the State which cannot be said to be a decision of an individual. It was an act of the State.

It is not the decision making process but the final decision which creates a right in a person. The right in favour of the petitioner was created only after the allotment was made by issuance of a government order. It is this decision which could become the basis for lodging the prosecution against the accused persons. The correctness of these decisions have already been affirmed by the Division Bench, which had examined all the material in this behalf, taking into consideration the decision making process also, as is reflected from the judgment itself.

The pecuniary advantage, which is stated to have been procured for the petitioner is in the shape of allotment of the contract. There is no evidence that any loss has been caused to the State in this behalf. The petitioner has taken over the project and invested huge amount and, in return, he has not been benefited in any manner as the power house has been ordered to be handed over to State Power Development Corporation.

It may be pertinent to mention here that the terms and conditions were not finalized at the time of handing over. Such terms and conditions were required to be determined at a later stage, for which a Committee was also constituted. It cannot, therefore, be said that any wrongful loss has been caused to the

State. The allegation that petitioner has shown to have invested huge amount in making the Power House functional, cannot be a ground to proceed against him as this is still subject to verification by the department. It, at best, could be said to be a claim made by the petitioner, which is still subject to acceptance by the State Government.

I am fortified in my view by a judgment of the Supreme Court in case *M. Narayanan Nambiar vs. State of Kerala*, reported as **Supreme Court Reports (1963) Supp. 724**, where it has been held as under:-

“Let us look at the clause “by otherwise abusing the position of a public servant”, for the argument mainly turn upon the said clause. The phraseology is very comprehensive. It covers acts done “otherwise” than by corrupt or illegal means by an officer abusing his position. The gist of the offence under this clause is that a public officer abusing his position as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage. “Abuse” means mis-use i.e. using his position for something for which it is not intended. That abuse may be by corrupt or illegal means or otherwise than those means. The word ‘otherwise’ has wide connotation and if no limitation is placed on it, the words ‘corrupt’, ‘illegal’ and ‘otherwise’ mentioned in the clause become surplusage, for on that construction every abuse of position is gathered by the clause. So some limitation will have to be

put on that word and that limitation is that it takes colour from the preceding words alongwith which it appears in the clause, that is to say something savouring of dishonest act on his part. The contention of the learned counsel that if the clause is widely construed even a recommendation made by a public servant for securing a job for another may come within the clause and that could not have been the intention of the Legislature. But in our view such innocuous acts will not be covered by the said clause. The juxtaposition of the word 'otherwise' with the words "corrupt or illegal means" and the dishonesty implicit in the word "abuse" indicate the necessity for a dishonest intention on his part to bring him within the meaning of the clause."

This view has been followed by the Apex Court in Major S. K. Kale vs. State of Maharashtra, reported as (1977) 2 SCC, 394.

The contention of the State is that the Division Bench has ordered for fresh determination of the issue by directing that the whole gamut of the controversy be determined by an expert committee. The Division Bench, while directing that whole gamut of the contract would be examined afresh by the expert committee was only intended to examine the technical aspect of the matter which related to the determination of the sale rate of production per unit. Since it was an issue which could only be decided by the expert Committee, the Committee has after due deliberations, come to the conclusion that Rs. 2.45 per unit would

be reasonable rate and not Rs. 3/- per unit. This rate has been accepted by the petitioner, once he challenged the order of the government issued in 2005, which had rejected the recommendations of the expert Committee. The allegation that some benefit had accrued to the petitioner on account of handing over of the project, cannot be accepted as the terms and conditions of the contract and the cost of production per unit, had yet to be finalized.

Regarding the offence under Section 420 RPC, even ingredients of Section 420 are admittedly not made out in the present case.

Bare reading of word “cheating” would suggest that there are two elements thereof, namely, deception and dishonest intention to do or omit to do something. In order to bring a case within the first part of this Section, it is essential that a person who delivers the property should have been deceived before he makes the delivery and, in the second place that he should have been induced to do so fraudulently or dishonestly. Where the property is fraudulently or dishonestly obtained, Section 415 would bring the said Act within the ambit of cheating provided the property is to be obtained by deception.

Applying the facts of the present case, it would be seen that there is no allegation that the State was deceived before the delivery of the project to the petitioner and such delivery was induced with a dishonest intention. The project was handed over

to the petitioner after the decision was taken by the government. No element of dishonesty can be perceived or conceived from the facts of the case. The decision to handover the property was taken by the government, which decision has been found to be legally correct. Nothing is attributable to the petitioner that he has induced the government to deliver this property with fraudulent or dishonest intention.

Regarding Section 120-A, it is submitted that the theory of conspiracy has been disbelieved by this Court while deciding petition under Section 561-A Cr.P.C. no. D-30/2004, filed by one Ashok Kumar who was arrayed as an accused in the FIR, as already quoted above.

Section 201 is not applicable in this case as, according to the prosecution the petitioner is stated to have connived with the officials of the PDD, SPDC in stealing important documents and record. The allegation shows that 41 documents were shown missing from the PDC and PDD offices, which pertained to the original proposal of M/S Shakti Hydro Electric Pvt. Ltd. who had submitted his offer by quoting his sale rate. The intend and purpose of this act was to examine the feasibility report and consequently prepare the proposal accordingly showing lesser sale rate of power.

This issue stands clinched by the Division Bench of this Court, as stated herein supra. Moreover the connivance of the petitioner is reported to be with some unknown PDD/PDC

officials, whose names are not mentioned therein. This section would apply only where the offence has been committed and the accused is guilty of disappearance of any evidence with intention of screening the offender from legal punishment. The offence, as per report under Section 173 Cr.P.C, committed by the petitioner is that he has allowed certain documents to disappear with intention to screen the offender. The documents are in relation to the papers submitted by M/S Shakti Hydro Electric Pvt. Ltd., only to obtain a clue about the rates which he had offered. The relevance of these documents is relatable to the exclusion of other competitor and will have no effect on the merits of the case. The alleged evidence, which is stated to have been allowed to disappear, is relatable to the non-participation of other competitor, which ultimately boils down to the issue as to whether the allotment made in favour of the petitioner was selective or was done in accordance with law. The issue stands already settled by the Division Bench of this Court, as stated herein above.

On the face of it no offence under Section 201 RPC is made out against the petitioner in view of the facts and circumstances of the case.

The conclusion from the aforesaid discussion is that on the facts as revealed from the complaint as also the subsequent investigation conducted, as revealed from the report under

Section 173 Cr.P.C, does not prima facie, reveals commission of offence by the petitioner, for the following reasons:-

a/ That the decision making process in which the role of the accused Ashok Jaitly has been identified, as being act of criminal misconduct, has been nullified by the judgment of the Division Bench of this Court;

b/ All the orders passed during the decision process would suggest that none of such orders have been issued by the petitioner but have been issued by the functionaries of the State, which finally concluded in the approval being granted by the Chief Minister, which decisions have been affirmed by the Division Bench of this Court.

c/ The allegations contained in the report under Section 173 Cr.P.C reveals that the accused Ashok Jaitly has influenced the decision making process. This perhaps is the main thrust of the respondents to put the accused on trial. The statement of the witnesses and the thrust of the investigation essentially is focused in this behalf. There are suggestions and some evidence to indicate the manner in which the decision making process has been conducted. Evidence has come on record more particularly the manner in which the approval has been obtained from the Chief Minister.

Examining the nature of the allegations, following decisions are stated to have been ignored or kept away from the Chief Minister, before his approval:-

a/ Fixing the rate at Rs. 3 per unit, which was on higher side, by ignoring the recommendations of the Committee constituted by the Administrative Department;

b/ Permitting participation of private players without formulating the policy;

c/ Allotting the contract to the petitioner without advertisement and inviting tenders.

Assuming these facts to be correct, as stated in the report under Section 173 Cr.P.C, it boils down to the fact that even if this information was withheld, the ultimate decision making process has led to taking a decision of handing over of the Power House, which has been found by the Division Bench to be strictly in accordance with the norms and law.

As stated herein above, the decision making process might have been faulty and some influence might have been exerted by the Chief Secretary, who was interested, as alleged, to handover the project to the petitioner, but this cannot lead to the conclusion that it constitutes commission of offence.

The allegation that the rate of Rs. 3/- per unit was exorbitant would pale into insignificance as the matter was still required to be worked out by the Committee. The rate of Rs. 3/- per unit was only a tentative rate and was subject to confirmation by the Power Purchase Committee. Subsequently, in view of the decision taken by the Expert Committee the rate of Rs. 2.45 has

been offered to the petitioner. As such, it cannot be said that the contract was allotted by accepting higher rate of Rs. 3/- per unit.

After having said so, the question arises, whether this Court can, by exercising the power under Article 226 of the Constitution of India, allow quashment of the FIR and subsequent investigation undertaken in this behalf.

Before advertng to this question, what is required to be stated is the power of the Court in such matters.

The issue with respect to exercise of powers under Article 226 of the Constitution, in respect of quashing an FIR and the consequent investigation, has been settled by the Courts in India. The legal position is well settled that if the offence is disclosed in the FIR, Court will not normally interfere with the investigation and will permit investigation into the offence alleged to be completed. If, however, the materials do not disclose an offence, no investigation should normally be permitted. Justice requires that a person who commits an offence has to be brought to book and must be punished for the same. If the Court interferes with the proper investigation in a case where an offence has been disclosed, the offence will go un-punished to the serious detriment of the welfare of the society and the cause of justice suffers. If, however, no offence is disclosed, an investigation cannot be permitted as any investigation, in the absence of any offence being disclosed, will result in unnecessary harassment to a party, whose liberty and property may be put to jeopardy for

nothing. The liberty and property of an individual are sacred and sacrosanct and the Court zealously guards them and protects them. An investigation is carried on for the purpose of gathering necessary materials for establishing and providing an offence which is disclosed.

It is not a rule of thumb that Courts will not interfere in an investigation where facts disclosed in the FIR and material collected during the course of investigation, do not disclose an offence. In such a situation the High Court has the power to stop the track of the investigation in order to ensure that a citizen is not harassed and put to trial on facts which do not disclose any offence. This view has been expressed by Supreme Court in *State of West Bengal vs. Swapan Kumar*, reported as AIR 1982 SC, 949, where it has been held as under:-

“If an offence is disclosed, the High Court under Art. 226 of the Constitution will not normally interfere with an investigation into the case and will permit investigation into the offence alleged to be completed; I, however, the materials do not disclose an offence, no investigation should normally be permitted. Justice requires that a person who commits an offence has to be brought to book and must be punished for the same. If the Court interferes with the proper investigation in a case where an offence has been disclosed, the offence will go unpunished to the serious detriment of the welfare of the society and the cause of the justice suffers. It is on the basis of this principle that the Court

normally does not interfere with the investigation of a case where an offence has been disclosed. But it cannot be said that an investigation must necessarily be permitted to continue and will not be prevented by the Court at the stage of investigation.

Whether an offence has been disclosed or not must necessarily depend on the facts and circumstances of each particular case. If on a consideration of the relevant materials, the Court is satisfied that an offence is disclosed, the Court will normally not interfere with the investigation into the offence and will generally allow the investigation in the offence to be completed for collecting materials for proving the offence. If, on the other hand, the Court on a consideration of the relevant materials is satisfied that no offence is disclosed, it will be the duty of the Court to interfere with any investigation and to stop the same to prevent any kind of uncalled for and unnecessary harassment to an individual.”

The second question that rises for consideration is that under what circumstances the Court can interfere while exercising its powers under Art. 226 of the Constitution.

The Supreme Court has examined this issue in detail in *State of Haryana vs. Ch. Bhajan Lal and Ors*, **AIR 1992, SC 604** and has enumerated certain principles where the power for quashing the proceedings or investigation can be exercised. The principles laid down are as under:-

- (1) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused;
- (2) Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;
- (3) where the un-controverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;
- (4) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;
- (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;
- (6) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the

Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;
 (7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

Applying the aforementioned principles in the present case, it be seen that the elements constituting the factual basis for commission of the offence in the present case do not disclose commission of an offence.

As already discussed herein above, involvement of the present petitioner and other accused is confined to the decision making process, concerning the allotment of the contract to the petitioner. The decision making process, which culminated in taking certain decisions, has already been concluded by the Division Bench of this Court, after examining the record.

The conduct of the accused persons in the decision making process may raise some eye-brow in the manner in which the decision has been taken but at the end of the day it is the decision which has culminated in allotment of the contract to the petitioner that would determine the complicity of the accused.

The finding recorded by the Writ Court and affirmed by the Division Bench is that the decision taken in allotting the contract is strictly in consonance with law and procedure and no irregularity has been found in the said decisions. Putting the accused to trial would be an exercise in futility, as the finding

recorded by the Division Bench on issues, will be binding on the criminal court.

Applying the principles laid down supra, it clearly emerges that the allegations made in the FIR, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out a case against the accused. The un-controverted allegations made in the FIR and the evidence collected during the course of investigation also do not disclose commission of any offence by the petitioner. The FIR and the subsequent investigation undertaken are, therefore, required to be quashed.

I, therefore, allow this writ petition and quash FIR no. 29 of 2003 registered at Police Station Vigilance Organization Jammu, and consequent investigation undertaken thereon.

(Sunil Hali)
Judge

JAMMU:
04.11.2010
Anil Raina, Secy.