Court No. - 46

Case :- CRIMINAL MISC. WRIT PETITION No. - 9873 of 2010

Petitioner :- Vinayendra Nath Upadhyay And Others
Respondent :- State Of U.P. & Ors.
Petitioner Counsel :- Rituvendra Singh,A.K.Pandey
Respondent Counsel :- Govt. Advocate

Connected with

Criminal Misc. Writ Petition No. 9674 of 2010

Lallan Prasad.....Petitioner

Versus

State of UP and others.....Respondents

Connected with

Criminal Misc. Writ Petition No. 9871 of 2010

Madhusudan Pandey and another.....Petitioners

Versus

State of UP and others.....Respondents

Connected with

Criminal Misc. Writ Petition No. 9567 of 2010

Sanjay Kumar Singh and another.....Petitioners

Versus

State of UP and others.....Respondents

Connected with

Criminal Misc. Writ Petition No. 9992 of 2010

Shiva Nand Tiwari and another.....Petitioners

Versus

State of UP and others.....Respondents

Connected with

Criminal Misc. Writ Petition No. 10676 of 2010

Amar Deep Singh and others.....Petitioners

Versus

State of UP and others.....Respondents

Connected with

Criminal Misc. Writ Petition No. 10731 of 2010

Brij Nath Sharma and another.....Petitioners

Versus

State of UP and others.....Respondents

Connected with

Criminal Misc. Writ Petition No. 11172 of 2010

Kashi Nath Singh and another.....Petitioners

Versus

State of UP and others.....Respondents

Connected with

Criminal Misc. Writ Petition No. 11572 of 2010

Punita Mishra.....Petitioner

Versus

State of UP and others.....Respondents

Connected with

Criminal Misc. Writ Petition No. 11790 of 2010

Dinesh Kumar Yadav.....Petitioner

Versus

State of UP and others.....Respondents

and

Criminal Misc. Writ Petition No. 11791 of 2010

Lalit Kumar Pandey.....Petitioner

Versus

State of UP and others.....Respondents

Hon'ble Amar Saran,J.
Hon'ble S.C. Agarwal,J.

(Delivered by Hon'ble Amar Saran, J)

All the aforesaid connected writ petitions have been sent to this Bench headed by one of us (Amar Saran, J.) by order of Hon'ble the Chief Justice dated 5.7.2010.

We have heard Sri Umesh Narain Sharma, Sri V.P. Srivastava, and Sri G.S. Chaturvedi, Senior Advocates for the petitioners in some of the petitions, the learned counsel for the other petitioners Punita Mishra, Dinesh Kr. Yadav, Shivanand Tiwari, , Amar Deep Singh and others, Lalit Kumar Pandey, Lallan Prasad have also raised some submissions. Other counsel have adopted their contentions. We have also heard Sri A.K. Sand, and Sri Vikas Sahai, learned Additional Government Advocates for the State and have perused the records

of the writ petitions, and have also summoned and seen the records in Civil Misc. Writ Petition No. 23250 of 2010, Special Appeal (Defective) No. 610 of 2010 and in Civil Misc. Contempt Petition No. 1724 of 2004.

The petitions are an offshoot of orders passed by Hon'ble Arun Tandon, J on 13.5.2010 in Civil Misc. Writ petition No. 23250 of 2010, wherein the learned single Judge observed as follows:

"Shri M.C. Chaturvedi, Chief Standing Counsel is present in the Court. He submits that the matter is in active consideration of the State Government. It is stated that certain disciplinary proceedings have been initiated against the persons responsible. He further submits that the embezzlement of the money from the GPF account is not in dispute, however the quantification is to be done.

This Court is of the firm opinion that for the embezzlement of the public money, criminal liability does occurs. Therefore, First Information Report has to be lodged against the persons guilty and they must be brought to book.

Let necessary be done by 24.5.2010.

Put up as unlisted on 24.5.2010."

In an earlier order dated 5.5.2010 in writ petition No. 23250 of 2010 Hon'ble Arun Tandon, J. observed as follows: "Two aspects of the matter are involved, (a) how the 12 crores of rupees, which have been deposited by the teachers and employees in the hope that on retirement they will get the money encashed from the said General Provident Fund and survive during old age, is to be recouped, inasmuch as ultimately such teachers and staffs would suffer if the money is not restored, and (b) no fraudulent withdrawal from the Government Treasury through the office of the District Inspector of Schools, Ballia is prima facie possible from the General Provident Fund unless officers and employees working in the aforesaid two offices collude with the private management and the person concerned."

Pursuant to the aforesaid orders of this Court, the District Inspector of Schools, Ballia lodged an FIR on 23.5.2010 at case crime No. 271 of 2010, under sections 409, 467, 468, 471, 419, 420 IPC, police station Kotwali, district Ballia. The said FIR which nominates the then District Inspector of Schools (DIOS), Sri Brijnath Pandey, Accounts Officer, Sri Kamla Kant and Accounts Clerk, (the petitioner Lallan Prasad, in Cr. Writ Petition No. 9674 of 2010), and the teaching and non-teaching employees in some aided secondary institutions in Ballia numbering 47, and which also implicates the then managers and principals of the said institutions, has been challenged by the petitioners in the bunch of petitions before us.

The FIR mentioned that it was being registered pursuant to the order of the High Court in Writ-A No. 23250 of 2010. It was mentioned in the FIR that during the period October 2005 and April 2006 the Principals and Managers of the non-government aided secondary and higher secondary colleges at Ballia entered into a criminal conspiracy with certain teachers and non-teaching staff of their institutions and the then District Inspector of Schools, Accounts Officer and the Accounts Clerk with the objective of embezzling public money. Forged documents were manufactured with the aim of illegally paying salaries to teaching and non-teaching employees whose appointments were unauthorised after showing false dates of appointments. Arrears were paid without authorization from the competent authority, and funds meant for the GPF accounts were diverted for distribution as arrears of salary. The details of the concerned teaching and non-teaching employees, and the illegal payments received by each, and the role of the aforementioned DIOS, accounts officer and clerk, and the Principals and Managers and some illustrations of the modus operandi adopted at the concerned institutions in Ballia are given in an audit report which was conducted by an Audit team of the Education Directorate Allahabad, pursuant to earlier complaints, and is annexed to the FIR. The FIR and the audit report further show that in some instances the college records were dishonestly removed to hamper audit, in other cases the teaching and non-teaching employees got payments made in furtherance of their conspiracy with the aforesaid educational authorities without even producing the relevant papers from the College. In a case the GPF amount standing to the credit of a regular teacher was unauthorizedly withdrawn by collusively affixing the photograph of another person which was verified by the principal of the institution (Langtu Baba Inter College, Harihankala), and the withdrawal was approved by the principal and the manager (the then DIOS Brajnath, who was acting as the manager) after forged ledgers were got prepared, which bore the signatures of the college principal and the then accounts officer and the accounts clerk (petitioner Lallan Prasad, in Cr. Misc. Writ Petition No. 9674 of 2010) at the DIOS office.

It was submitted by Sri V.P. Srivastava and some other learned counsel for the petitioners that the teaching and non teaching employees had been validly appointed and that there were orders of the High Court in different writ

petitions validating their appointments or directing either payment of salary or to consider their representations within a stipulated period of time. Some of these orders have even been annexed.

Furthermore in Civil Misc. Contempt Petition No. 1724 of 2004 an order dated 12.7.05 was passed directing payment of salaries to the petitioners in whose cases final orders had been issued in the writ petitions filed by them. This Contempt was filed to ensure compliance of an order dated 25.2.04 passed in C.M.W.P. No. 25885 of 2003. Hence the petitioners could not be faulted for receiving the salaries.

It may be noted that the said contempt petition was eventually dismissed by an order dated 12.12.05.

Significantly in Civil Misc. Writ Petition No. 25885 of 2003, which was the basis for the direction in the Civil Contempt, the single judge was looking at the illegal and fraudulent appointments in the educational institutions at Ballia where the matters had been handed over to the CBCID for investigation. The CBCID had even recommended lodging of criminal cases and the salary of 329 employees had been with-held. The Director of Education (Secondary) had found that 104 employees had approached the High Court and obtained orders in writ petitions directing payments of salaries pending completion of enquiry. It was also noticed in the said order dated 25.2.04 that the enquiry had resulted in favourable reports for 75 employees. But significantly the single Judge observed:

> " I have perused the enquiry report submitted in respect of 75 teachers/employees, which has been forwarded to the State Government. From this report, I find that the individual cases have not been considered in detail. The interim order of this court for making the payment of the salaries until the conclusion of the enquiry have been found to be conclusive to validate the appointment. In some case, casual observations have been made that the appointments are valid on the ground that there are sanctioned posts available in the institution. The report concerning sanction of posts and validity of the appointments by following proper and due procedure have not been considered and discussed. In the aforesaid facts and circumstances, I find that the department must give due expediency to the matter and each case must be considered individually. The enquiry officer must

record findings about each and every appointment separately. Where the appointments are found valid immediate action must be taken for restoration of payment of the salary. The department must not wait for the entire matter to be considered. The decision may be taken at the level of Director of Education. In case, he finds that the appointment was valid. In any case, the entire enquiry must be concluded as expeditiously as possible and not later than 3 months from today".

The issues and criteria that are to be considered in individual cases for ad hoc appointments against substantive or short term vacancies, such as the requirement to first fill up the available vacancies by promotions, and only in the absence of eligible persons, by direct recruitment, the need for intimation of vacancies to the Education Services Commission through the DIOS, the time period allowed to the Commission to appoint suitable candidates, before the management could take steps for filling up vacancies, the need for inviting applications for the vacancies through the employment exchange and by publication in two local newspapers which have a wide circulation in the State, the essential qualifications required for different posts, the cases where prior or subsequent approvals by the DIOS are needed, the position when a regular person is selected by the Education Services Commission in the cases where an ad hoc employee has been appointed, have been spelt out in depth by the Full Bench of this Court in Kumari Radha Raizada and others v. Committee of Management, Vidyawati Darbari Girls Inter College and others,1994 (3) UPLBEC 1551, after considering the statutory provisions contained in the U.P. Secondary Education Services Commission and Selection Board Act, 1981, the U.P. Intermediate Education Act, 1921, and the various U.P. Education Services Commission (Removal of Difficulties) Orders.

In another Full Bench decision in Gopal Dubey v. District Inspector of Schools, Maharajganj and another, 1992(2) AWC 962, interpreting the provisions of section 9 of the U.P. High Schools and Intermediate Education Colleges (Payment of Salaries of Teachers and other Employees) Act 1971 it has been held that unless the post for which the salary has been paid is approved by the State government (Director

of Education), the payments made by the management of the institution to such employees will not be re-reimbursed by the State.

The individual appointments and payments made therefore needed to be tested on the aforesaid criteria spelt out in the Full Bench decisions. If it was found that the appointments did not meet the said criteria, as they had simply been made or continued pursuant to orders of in the High Court in pending or disposed of writ petitions, which gave directions to consider the representations of the petitioners, or to pay salaries or to show cause etc., and where regular persons had been appointed by the Commission, then the ad hoc appointments made by the managements needed to be set aside. Steps for seeking vacation of single or division bench High Court orders in Civil Writs and Contempt petitions which were in the teeth of the decision of the Full Bench in Radha Raizada and statutory provisions, by filing Special Appeals before the Division bench or the Supreme Court were required. But it appears that these steps have deliberately not been taken in a mala fide manner, and the petitioners and others may have colluded with educational authorities for obtaining favourable orders.

It must be stated emphatically that in any view of the matter, there could be absolutely be no justification for payment of salaries for such teachers from the General Provident Fund, from which as the Chief Standing Counsel admitted before the Single Judge in Bhim Singh's case, there had been illegal withdrawals to the tune of Rs. 12 crores. The said G.P.F. money is held in trust, and the proper holders of the GPF will be severely harmed if they are unable to receive due payments at retirement or otherwise. The DIOS in the contempt petition could have pleaded inability to comply with the order of the contempt Judge, until budgetary allocation of

> salaries were made by the State government, or the management itself could have made the necessary payments from its own sources, if it was so advised. Withdrawal of salaries from funds earmarked for GPF of bona fide employees could never be countenanced.

It was next submitted that the petitioners were merely teaching and non teaching employees, managers and Principals of the institutions concerned and were wholly unaware of the source of the funds or that the disputed funds were earmarked for G.P.F. Also the payments had been released by the DIOS, Accounts officer and other educational authorities to save their own skins in the contempt petition. The payments were not made at the instance of the petitioners. Pressure was brought to bear on the petitioners by the DIOS by orders dated 28/29.3.2006 and 18/20.4.2006 to submit the salary bills.

> In our view considering the scale at which the withdrawals have been made from the GPF money, it is difficult to believe that the petitioners were only unwary and innocent recipients of the money, and their hands were absolutely clean. There was no need for the DIOS and other educational authorities to have gone out of their way for facilitating the dubious appointments of the petitioners, unless they were swayed by extraneous considerations. The single judge appears to have rightly observed in his order dated 5.5.10 that "no fraudulent withdrawal from the Government Treasury through the office of the District Inspector of Schools, Ballia is prima facie possible from the General

Provident Fund unless officers and employees working in the aforesaid two offices collude with the private management and the person concerned."

Specifically it was argued by Sri. U.N. Sharma, learned Senior counsel appearing for Vinayendra Upadhyay, that the FIR was unauthorised as it has been instituted on the direction of the Single Judge in Civil Misc. Writ petition No. 23250 of 2010, whilst hearing a service matter and the said bench had no jurisdiction to issue a general direction for lodging FIRs against known and unknown persons, particularly as the petitioner in the said writ petition Bhim Singh had mainly sought a relief of getting the GPF refunded from one Ashok Kumar Singh, who was arrayed as respondent no.10 in the said writ petition. Such a direction, if at all, could have been issued only by a bench hearing Public Interest Litigations (PILs). Also no opportunity was given to the petitioners to raise objections before the Single Judge bench which had issued the general direction for lodging the FIRs and the said order was in violation of the principles of natural justice, as they were not parties in Civil Misc. Writ petition No. 23250 of 2010. For these reasons the Division Bench in Special Appeal (Defective) No. 610 of 2010, by an order dated 30.6.2010 finally disposing of the Special Appeal had stayed the operation of the order of the single judge in Civil Misc. Writ Petition No. 23250 of 2010 directing registration of the FIR so far as it related to the case of the petitioner Vinayendra Nath Upadhyaya.

It may be noted that the prayers in the single judge writ petition No. 23250 of 2010, apart from the first prayer for a mandamus directing the concerned authorities to recover the amount of G.P.F. which had been misappropriated by respondent No. 10 (Ashok Kumar Singh) were to:

"b) issue a writ, order or direction in the nature of mandamus directing to the competent authorities to take appropriate action against guilty teachers/employees; Manager/ Principal and officials/Officers, who are involved in said misappropriation of funds of G.P.F in the light of audit report dated 4.12.2006 (Annexure no.11 of the writ petition) and in the light of order dated 4.1.2008, passed by Additional Director of Education(Annexure

no.12 of the writ petition);

c) issue a writ, order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case".

Thus the general direction for lodging the FIRs was issued in terms of the audit report dated 4.12.06 which produced evidence of the diversion of funds meant for GPF for payment of salaries of employees, whose appointments were illegal and unauthorized, and false dates of appointment were mentioned based on forged documents. There were instances of dishonest removal of service papers to hamper audit etc.

The single judge further rightly justifies his order dated 13.5.2010 directing registration of FIRs for embezzlement of public money by observing that Sri M.C. Chaturvedi, Chief Standing Counsel "submits that the embezzlement of the money from the GPF account is not in dispute, however the quantification is to be done."

In Nirmal Singh Kahlon v. State of Punjab, AIR 2009 SC 984 the Supreme Court saw no difficulty in a private interest litigation being changed to a public interest litigation, or in issuing directions of a general nature where large scale systematic irregularities or fraud was noticed by the High Court. In this regard it was observed in paragraph 32 : "The High Court while entertaining the writ petition formed a prima facie opinion as regards the systematic commission of fraud. While dismissing the writ petition filed by the selected candidates, it initiated a suo motu public interest litigation. It was entitled to do so. The nature of jurisdiction exercised by the High Court, as is well known, in a private interest litigation and in a public interest litigation is different. Whereas in the latter it is inquisitorial in nature, in the former it is adversarial. In a public interest litigation, the court need not strictly follow the ordinary procedure. It may not only appoint committees but also issue directions upon the State from time to time. {See Indian Bank vs. Godhara Nagrik Co-op. Credit Society Ltd. and Anr. [2008 (7) SCALE 363] and Raju Ramsing Vasave v. Mahesh Deorao Bhavpurkar and others, [2008 (12) SCALE 252].

Further in Dwarka Nath v. Income Tax Officer, Special Circle, D. Ward, Kanpur, AIR 1966 SC 81 and Padma v. Hiralal Motilal Desarda, AIR 2002 SC 3252 it has been held that in view of the comprehensive phraseology in Article 226, which gives powers to the

High Court not only to issue specified writs, but to issue orders and directions for "any other purpose", an ex facie power is conferred on the High Court to reach injustice wherever it is found, and to mould its relief for meeting the complicated requirements of a case.

Also it has been laid down in A.R. Antulay v. Ram Das Sriniwas Nayak, AIR 1984 SC 718 in paragraph 6 that the concept of locus standi is foreign to Indian jurisprudence, and if a cognizable offence has been committed, anyone can put the criminal law in motion, unless the statute restricts the right to file the FIR to a particular category of persons. The relevant passage reads thus:

"*It is a well recognised principle of criminal jurisprudence that anyone can set or put the criminal law into motion except where the statute enacting or creating an offence indicates to the contrary. Locus standi of the complainant is a concept foreign to criminal jurisprudence save and except that where the statute erecting an offence provides for the eligibility of the complainant, by necessary implication the general principle get excluded by such statutory provision. Punishment of the offender in the interest of the society being one of the objects behind penal statutes enacted for larger good of the society. Right to initiate proceedings cannot be whittled down. circumscribed or fettered by putting in into a strait-jacket formula of locus standi unknown to criminal jurisprudence. save and except specific statutory exception."*

A Court in any jurisdiction is no less a citizen than a private person. If the Court in the course of hearing a case finds that a cognizable offence is committed by some persons, it can never be barred from bringing these facts to the notice of the investigating agency, who in turn in view of section 154 of the Code is bound to investigate the said offence, not because the order has emanated from the Court, but because a cognizable offence is disclosed.

In M. Narayandas v. State of Karnataka,(2003) 11 SCC 251 it has been held that in view of section 154 (1) of the Code, a duty has been cast on the investigating officer to reduce any "information" about the commission of a cognizable case in writing. The expression 'credible

information' or reasonable complaint has deliberately not been used in the provision by the legislature. Therefore the investigating officer has no option but to lodge the FIR and to proceed with investigation if any information about the commission of a cognizable offence is received.

Paragraph 33 of M. Narayandas may be usefully extracted here- "It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information."

So far as the other criticism against the single judge's order for having violated principles of natural justice was concerned, it may be noted that as on examining the petition filed by Bhim Singh and obtaining responses from the Standing Counsel, the Single Judge reached a conclusion about large scale irregularities in appointments and illegal diversion of GPF money, he could only order a general investigation and lodging of FIRs against persons who may be involved in the crime. As the single judge had no knowledge as to all the persons who could be involved in the fraud, there was no question of issuing notices to the potential accused at that stage.

By the order dated 13.5.10 the single judge had simply directed that a "First Information has to be lodged aginst the persons guilty and they must be brought to book." Thereafter if the investigating agency was prima facie satisfied of the complicity of any person in an offence, there was no requirement in law of providing an opportunity of hearing to the accused before registration of the FIR.

At the stage of investigation the accused has no locus standi or right of prior hearing before the FIR is lodged. In Union of India v. W.N. Chadha, AIR 1993 SC 1082, it has been clarified that an accused has no right to challenge the letter rogatory issued by an Indian Court to a foreign Court for obtaining evidence regarding the source of funds kept in the Swiss Bank. As no

deprivation of liberty or property was involved, hence the principle of audi alteram partem, was not attracted.

The subsequent stage of investigation by the police is governed by the Code of Criminal Procedure (hereafter called the Code). Chapter 12 of the Code confers no right of prior hearing to the accused at the stage of investigation, but the right of hearing is only provided when the Sessions Judge or Magistrate considers whether to discharge or to frame a charge against the accused under sections 227/228 or 239/240 of the Code. Under section 235(2) in the case of a Sessions triable case, or section 248(2) in a warrant case triable by a Magistrate again the accused have a right of being heard.

That the accused has no right of hearing at the stage of investigation and does not come into the picture till the order taking cognizance has been passed has also been emphasized in Chandra Deo Singh v. Prakash Chandra Bose, AIR 1963 SC 1430 Shashi Jena & Ors. v. Khodal Swain & Anr., (2004) 4 SCC 236 and a catena of other decisions.

Significantly it has been observed in paragraph 98 in Union of India v. W.N. Chadha:

98."*If prior notice and an opportunity of hearing are to be given to an accused in every criminal case before taking any action against him, such a procedure would frustrate the proceedings, obstruct the taking of prompt action as law demands, defeat the ends of justice and make the provisions of law relating to the investigation as lifeless, absurd and self-defeating. Further, the scheme of the relevant statutory provisions relating to the procedure of investigation does not attract such a course in the absence of any statutory obligation to the contrary."*

It also appears to us that the order in Special Appeal (Defective) No. 610 of 2010, dated 30.6.2010 staying the operation of the order of the single judge in Civil Misc. Writ Petition No. 23250 of 2010 directing registration of the FIR so far as it related to the case of the petitioner Vinayendra Nath Upadhyaya was passed as the division bench was under the impression that no action had yet been taken on the direction of the single judge for registration of the FIR. Thus it was observed in the order in the Special Appeal (Defective), that :

"Sri Pandey, learned Advocate rightly points out that against the report no stay has been given. That appears to be rightly so. Once there is order of this court directing lodging of first information report and that has been executed/ complied there may not be possibly any occasion for any co-ordinate bench to grant relief." (Emphasis supplied). Thus the Special Appeal Court was proceeding on the footing that no FIR had been registered till then. This position was factually incorrect, because pursuant to the order of the single judge dated 13.5.2010, the FIR had already been registered at Case Crime No. 271 of 2010 on 23.5.10, whereas the order disposing of the Special Appeal was passed only on 30.6.2010.

After the registration of the FIR, the said FIR could only be challenged before a bench hearing criminal writs, and not before a bench disposing of a Special Appeal against an order of a single judge directing registration of the FIR.

Another argument raised by Sri V.P. Srivastava was that as an earlier FIR dated 25.4.2002 naming 11 persons had been lodged against some of the petitioners for obtaining ad-hoc appointments illegally in which the arrests had been stayed in various writ petitions and after charge sheets, proceedings had been stayed on applications under Section 482 Cr.P.C., the present FIR could only be considered an enlargement of the earlier FIR and it could not have been filed as it was in violation of the law laid down in T.T.Antony v. State of Kerala and others etc., (2001) 6 SCC 181 and Upkar Singh v. Ved Prakash and others, (2004) 13 SCC 292. It was argued that a second FIR is only permissible when a cross version of the incident is given by the accused, and there can be no second FIR for introducing some other material or for implicating additional accused with respect to the earlier incident.

It may be noted that in the decision of Upkar Singh itself, it is mentioned in paragraphs 21 and 22 as corrected, vide Official Corrigendum No. F.3/Ed. B.J./86/2004 that:

"21. From the above it is clear that even in regard to a complaint arising out of a complaint on further investigation if it was found that there was a larger conspiracy than the one referred to in the previous

complaint then a further investigation under the Court culminating in another complaint is permissible.

22. A perusal of the judgment of this Court in Ram Lal Narang's case (supra) not only shows that even in cases where a prior complaint is already registered, a counter complaint is permissible but it goes further and holds that even in cases where a 1st complaint is registered and investigation initiated, it is possible to file a further complaint by the same complainant based on the material gathered during the course of investigation. Of course, this larger proposition of law laid down in Ram Lal Narang's case is not necessary to be relied on by us in the present case. Suffice it to say that the discussion in Ram Lal Narang's case is in the same line as found in the judgments in Kari Choudhary and State of Bihar v. J.A.C. Saldanna (supra). However, it must be noticed that in T. T. Antony's case Ram Lal Narang's case was noticed but the Court did not express any opinion either way." (Emphasis added).

> Recently in Nirmal Singh Kahlon v. State of Punjab, AIR 2009 SC 984 , the case law on the point has been reviewed, and the Apex Court, has re-affirmed the above noted view in Upkar Singh, and opined that if the new conspiracy is different or covers a larger canvas, and even some new accused are added (although some accused may be common in the two FIRs), there is no fetter on lodging the second FIR.

In the instant case we find that the earlier FIR dated 25.4.02 nominated 10 named government employees, 7 of whom were clerks, an accounts officer, and two accountants. The said 10 accused persons are completely different from the three government officials, i.e. the DIOS, Accounts officer and accounts clerk named in the present case. There are no allegations in the earlier case of diversion of General Provident Fund Money, but the allegations were of getting fake appointments and payments made to 131 persons who were ineligible for employment. There was thus no difficulty in the second FIR being registered.

Contrary to the aforesaid submission of duplication of FIRs, Sri G.S.

Chaturvedi has argued that the FIR should be quashed because for multiple causes of action, and multiple conspiracies of unrelated teachers from different educational institutions with educational authorities in Ballia a single FIR at crime No. 271 of 2010 had been lodged in the present case, and that there should have been multiple FIRs. He placed reliance on a decision of this Court in Rashid Aziz v. State of U.P., 1997 (34) ACC 726. The FIR in the said case appears to have been quashed with liberty to file separate FIRs principally because the FIR by the District Magistrate in Rashid Aziz was unwarranted as the DM himself was the sanctioning authority in that case under section 39 of the Arms Act.

Moreover, looking to the complex nature of allegations, and the case being in the nature of a scam, of diversion of GPF money to wrongfully appointees, where the modus operandi of the criminal activity alleged may have been similar, the investigation by a single agency was desirable. Indeed scams of such magnitude are usually investigated together by pivotal agencies like the CBI or the CBCID. Questions relating to misjoinder of charges under section 223 of the Code can be agitated at the stage of framing of charges, and not at the initial stage of investigation. There is also nothing to prevent the investigating officer from filing separate charge sheets in exercise of his powers under section 173 (2) of the Code, if he is so advised. It is open for the supervisory agencies in the police establishment to look into this issue, and give appropriate guidance to the investigating officer.

> In Satvinder Kaur v. State (Government of NCT, Delhi), AIR 1999 SC 3596, where the goods in the marriage had been entrusted in Patiala, but the FIR was lodged in Delhi, the lack of territorial jurisdiction with the investigating officer, was held not to be a ground for refusing to lodge the FIR or to investigate the case. In Union of India. v. Prakash P. Hinduja, AIR 2003 SC 2612, relying on H.N. Rishbud v. State of Delhi, (AIR 1955 SC 196) it has been held that any illegality in an investigation does not vitiate the trial, unless it has caused a miscarriage of justice. In the latter case, the investigation into a

case under the Prevention of Corruption Act was conducted by an officer below the rank of Dy. Superintendent of Police. This was in violation of section 5-A of the Prevention of Corruption Act. It was observed that even an invalid investigation does not vitiate an order of cognizance, unless miscarriage of justice has resulted.

It was further submitted by Sri G.S. Chaturvedi, that offences under the provisions alleged i.e 409, 467, 468, 419 and 420 IPC are not made out. We refrain from giving elaborate comment on this point as it may prejudice, the investigation or trial. Suffice it is to state that the money meant for GPF was money which was to be held in trust for the bona fide employees and was to be utilized in a particular manner in accordance to the directions in law. There would be a criminal breach of trust, if the said money was diverted for payment of salaries of some employees. As per the FIR there are allegations of preparation of forged documents by mentioning false dates of appointments and for withdrawing the GPF etc. which have been made for causing wrongful losses to the public exchequer or to bona fide employees. Thus prima facie it cannot be said that offences under the aforesaid sections are not disclosed.

In Rajesh Bajaj v. State NCT of Delhi, (1999) 3 SCC 259 it has been observed that there cannot be a hypertechnical approach at the stage of investigation, and whether an offence under a particular section is disclosed cannot be sieved through a cullender of the finest gauzes at this stage. Thus in paragraph 12 at page 263 the aforesaid law report notes: "The High Court seems to have adopted a strictly hypertechnical approach and sieved the complaint through a cullendar of finest gauzes for testing the ingredients under Section 415 IPC. Such an endeavour may be justified during trial, but certainly not during the stage of investigation."

It was also submitted by Sri G.S. Chaturvedi, that the payments were made and salaries paid from the GPF accounts only for compliance of the Court's orders and the said actions were

protected under section 78 of the Penal Code.

As we have already clarified above, salaries cannot be paid arbitrarily from any source or account, and withdrawal of money from the GPF account, which is money held in trust for the regular bona fide employees would amount to criminal breach of trust. Moreover, Section 78 of the Penal Code only takes away the criminality of an act done in good faith in pursuance of or which is warranted by the judgment or order of a court. The act of giving appointments to employees who may not be entitled to employment under the statutory provisions, only on the strength of some interim or final orders of the Court, and then making payments to them from the GPF money of bona fide employees, which is a criminal act, as it is against the law or directions as to how a trust has to be executed, can never be described as an act in good faith justified by Court orders.

It was next submitted by Sri V.P. Srivastava, that there was no embezzlement, but only a temporary withdrawal of GPF sums for ensuring compliance of the High Court's orders.

Even a temporary unlawful diversion of money perhaps with the intent to restore it in future, is a dishonest act which would amount to an offence. In Ram Narain Poply v. CBI, 2003 Cri.L.J 4801 it has been observed that "When a person misappropriates to his own use the property that does not belong to him, the misappropriation is dishonest even though there was an intention to restore it at some future point of time."

One last submission was raised by learned counsel that in several writ petitions arising out of the present crime number the arrest of the petitioners have been stayed by different orders of this Court.

We notice that in some cases the writ petitions have been dismissed straight away. There are other cases on which the petitioners' counsel rely, where the writ petitions have been dismissed or disposed of, with an interim relief, that till submission of charge sheets their arrests should be stayed, without even saying anything on the merits of the matter. The said orders are in the teeth of the decision of the Full Bench of this Court, in Ajeet Singh v State of U.P., (2007 Cri.L.J.170) (FB), which has disapproved of orders orders staying arrests by non-

reasoned orders whilst dismissing or disposing of the petition. Relying on the decisions in State of Orissa v. Madan Gopal Rungta, AIR 1952 SC 12, Amarsarjit Singh v. State of Punjab, AIR 1962 SC 1305, State of Orissa v. Ram Chandra Dev, AIR 1964 SC 685, State of Bihar v. Rambalak Singh "Balak", AIR 1966 SC 1441, Premier Automobiles Ltd. v. Kamlakar Shantaram Wadke, AIR 1975 SC 2238 it is observed in paragraph 83 by the Full Bench: "the writ Court has no competence to issue any direction protecting the right of the petitioner interregnum, for the reason that writ does not lie for granting only an interim relief and interim relief can be granted provided the case is pending before the Court and rights of the parties are likely to be adjudicated upon on merit"

Considering the scope of interference under Article 226 of the Constitution, and after the considering the conspectus of authorities on the point, it has been observed in paragraph 19 by the Full Bench in Ajeet Singh's case:

19. "The power of quashing the criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R. or complaint and the extraordinary and inherent powers of Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor it can 'soft pedal the course of justice' at a crucial stage of investigation/proceedings. (Vide State of West Bengal v. Swapan Kumar Guha, AIR 1982 SC 949; Madhavrao Jiwaji Rao Scindia v. Sambhajirao Chandrojirao Angre, AIR 1988 SC 709; The Janata Dal v. H. S. Chowdhary, AIR 1993 SC 892; Mrs. Rupan Deol Bajaj v. Kanwar Pal Singh Gill, AIR 1996 SC 309; G. Sagar Suri v. State of U.P., AIR 2000 SC 754 : (2000 All LJ 496); and Ajay Mitra v. State of M.P., AIR 2003 SC 1069)."

We may mention here that after extensive hearing to the parties, and reserving the case for orders on 19.7.2010, an affidavit dated 20.7.10 was filed in Cr.Misc. Writ Petition No. 9873 of 2010, Vinayendra

Nath Upadhyay v State of U.P. and others annexing therein an order of the Apex Court dated 19.7.10 in Special Leave to Appeal (Crl) No(s) 5429/2010, Om Prakash Chaubey v. State of U.P. & Ors. The said order read as follows:

"*Issue notice.*

By way of ad-interim relief, it is directed that the petitioner shall not be arrested."

In deference to the aforesaid interim order of the Supreme Court issuing notice on the aforesaid appeal and staying the arrest of the appellant therein, we had granted an interim stay of arrest of the petitioners till 4.8.2010 by our orders dated 22.7.2010 and 28.7.2010.

But subsequently we have been informed by the High Court's Computer section, that after a lengthy hearing by the Supreme Court on 19.7.2010 in the case of Dr. Lalendra Pratap Singh, SLP (Criminal) 5412 of 2010, the Principal of Sukhpura Inter College, who was a co-accused along with the petitioners in the same Crime number and whose Criminal Writ petition was earlier dismissed by the High Court, which had been challenged in the Supreme Court. When the Apex Court was about to dismiss the petition, the petitioner's counsel made an oral prayer for withdrawing his petition, whereupon the bench consisting of Hon'ble Mr. Justice Harjit Singh Bedi and Hon'ble Mr. Justice C.K. Prasad, dismissed the petition as withdrawn by the following order :

UPON hearing counsel the Court made the following

ORDER

> "After arguing the matter at very length and when we were about to make an order of dismissal, the learned counsel for the petitioner prays that the petition be dismissed as withdrawn. Ordered, as prayed for."

In view of the aforesaid it cannot be said that the First Information Report and other material on record does not disclose any cognizable offence, and that any ground exists either for questioning the investigation or for staying the arrests of any of the petitioners. We therefore dismiss all the writ petitions. The interim orders granted

earlier are vacated. The investigating agency is directed to proceed expeditiously in concluding the investigation.

It is also made clear that the observations hereinabove have only been made in answer to the submissions raised by learned counsel. The investigating agency and the trial court are expected to apply their independent minds for reaching their own conclusions.

The records of the single judge C.M.W.P. No. 23250 of 2010, Bhim Singh v. State of U.P., Special Appeal (Defective) No. 610 of 2010 and also of Civil Misc. Contempt Petition No. 1724 of 2004 which were earlier summoned by this Court may now be sent back to their appropriate sections.

Order Date :- 4.8.2010

Ishrat