Neutral Citation No. - 2023:AHC-LKO:41765-DB

AFR
Reserved

Court No. - 9

Case :- CRIMINAL MISC. WRIT PETITION No. - 5682 of 2021

Petitioner :- Prof. Ashish Wakhlu
Respondent :- State Of U.P. Thru Addl. Chief Secretary Home Lko. And Ors.
Counsel for Petitioner :- Dr. V.K. Singh,Pranjal Krishna
Counsel for Respondent :- G.A.,Arun Sinha,Shubham Tiwari,Shubham Tripathi,Siddhartha Sinha

Hon'ble Attau Rahman Masoodi,J.
Hon'ble Mrs. Saroj Yadav,J.

(Delivered by Hon'ble A. R. Masoodi, J.)

1. The investigation of a crime is the bedrock of criminal administration of justice. For this reason, the fair investigation and fair trial is a part and parcel of Article 21 of the Constitution of India.

2. Normally this Court in exercise of its extraordinary powers under Article 226 of the Constitution of India, would not interfere with and delve into the legality of an FIR or investigation but for the exceptions which under well settled principles have been carved out by the apex court in catena of judgements and for our purpose, the broad principles laid down by the apex court in the case of **State of Haryana and others v. Bhajan Lal and others** reported in ***(1992) Supp (1) SCC 335***, as set out in paragraph 102 being relevant, are extracted hereunder:

> "102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration

wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

> (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 FIR 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.
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> (3) Where the uncontroverted 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.
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> (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.
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> **(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.***
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> ***(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.***
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> ***(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."***

3. Likewise in the case of **Kapil Agarwal and others v. Sanjay Sharma and others,** reported in **(2021) 5 scc 524,** apex court while emphasizing upon the powers of this Court under Article 226 of the Constitution or Section 482 CrPC to quash the FIR if the same appears to be an abuse of process of law and has been lodged only to harass the accused, has observed as under:

> "*18. However, at the same time, if it is found that the subsequent FIR is an abuse of process of law and/or the same has been lodged only to harass the accused, the same can be quashed in exercise of powers under Article 226 of the Constitution or in exercise of powers under Section 482 Cr.P.C. In that case, the complaint case will proceed further in accordance with the provisions of the Cr.P.C.*
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> *18.1 As observed and held by this Court in catena of decisions, inherent jurisdiction under Section 482 Cr.P.C. and/or under Article 226 of the Constitution is designed to achieve salutary purpose that criminal proceedings ought not to be permitted to degenerate into weapon of harassment. When the Court is satisfied that criminal proceedings amount to an abuse of process of law or that it amounts to bringing pressure upon accused, in exercise of inherent powers, such proceedings can be quashed.*
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> *18.2 As held by this Court in the case of Parbatbhai Aahir v. State of Gujarat (2017) 9 SCC 641, Section 482 Cr.P.C. is prefaced with an overriding provision. The statute saves the inherent power of the High Court, as a superior court, to make such orders as are necessary (i) to prevent an abuse of the process of any Court; or (ii) otherwise to secure the ends of justice. Same are the powers with the High Court, when it exercises the powers under Article 226 of the Constitution.*

4. The present writ petition has essentially questioned the legality of the FIR giving rise to Case Crime No. 56 of 2021 registered under Section 409, 420 IPC at PS Chowk, District Lucknow. The informant who is the Chief Proctor, KGMU, Lucknow, Prof. R.A.S. Kushwaha and the named accused in

the FIR is Dr. Ashish Wakhlu, the petitioner herein who was a Surgeon in the department of Paediatric Surgery, presently terminated from service on the premise of proceedings not related to the present case.

5. The petitioner while praying for quashing of the FIR has, inter alia, prayed for any other writ, order or direction which the Court may deem fit and proper under the circumstances of the case.

6. This Court since the inception of present proceedings has taken a serious view of the allegations and while staying the arrest of the petitioner by order dated 15.3.2021, several observations were made in the order passed to the effect that the purchase of 300 laptops for carrying out the online examinations of the students was a policy matter and was duly approved at the appropriate level, therefore, counter affidavit was called for to explain the justification under which the FIR had come to be lodged. The detailed order passed by this Court calling upon the respondents to explain as to how an offence under Section 409, 420 IPC can be said to have been made out in a situation where the purchase of laptops was transparently made from a government body and against the invoice of payment, goods were duly received by the University. The goods in question, however, at no point

of time came to be used for any personal advantage by the petitioner or being entrusted to him were misused, therefore, the very ingredients of the offence under which the FIR was lodged, became questionable.

7. During pendency of this writ petition, this Court passed the following order on 15.11.2022:

> *".....Learned counsel for the petitioner has vehemently submitted that twice the Final Report has been prepared in the present writ petition by the Investigating Officer, i.e., on 19.09.2021 and on 14.10.2022, respectively.*
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> *It transpires from the record that when the matter was taken up on 18.10.2022, learned AGA had informed this Court that Final Report dated 14.10.2022 would be submitted in the Court concerned shortly.*
>
> *Today when the matter was listed, this Court made a query whether the Final Report dated 14.10.2022 has been submitted in the Court concerned or not, to which learned AGA submitted that Deputy Commissioner of Police, Lucknow West Commissionerate, Lucknow has ordered for further investigation in the matter on 04.11.2022.*
>
> *In view of the above, we pass the following orders:-*
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> *(i) Deputy Commissioner of Police, Lucknow West Commissionerate, Lucknow is directed to ensure that the further investigation, which has been ordered by him, is concluded within a period of three weeks from today and submit police report in the Court concerned, in accordance with law.*
>
> *(ii) The Commissioner of Police, Lucknow West Commissionerate, Lucknow (respondent no.2) shall monitor the investigation of the case.*
>
> *(iii) Shri Siddhartha Sinha, learned counsel for respondent no.4- The University (K.G.M.U. Lucknow, Chowk, Lucknow) shall ensure that all the required documents would be made available to the Investigating Officer concerned, so that the investigation of the case is concluded as ordered above.*
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> *List the matter after three weeks, by which date learned AGA shall inform about the status of investigation."*

8. The investigating officer, Sri Prashant Kumar Mishra, after passing of the aforesaid order, has filed a short counter

affidavit on 20/21.2.2023, wherein it is stated that the final report in the case was drawn more than once but the same was not approved by the supervising authority/Circle Officer by raising certain objections with regard to the investigation and directed for further investigation in the matter. Several investigation officers have come to be changed in the present case. For a chronological view of the investigation, paragraphs 5 to 12 of the short counter affidavit being relevant are extracted below:

> *"5. That it is respectfully submitted after registration of the aforesaid F.I.R., the investigation of the case was started by Shri Amarnath Vishwakarma, Additional Inspector then posted at P.S. Chowk Lucknow and after his transfer, the investigation of the case was deputed to S.I. Shri Ramapati Singh, who after investigation has forwarded a Final Report dated 19.09.2021 to the Supervisory Authority/Circle Officer, Chowk, Lucknow.*
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> *6. That the supervisory Authority/ Circle Officer, Chowk, Lucknow has raised certain objections and directed for further investigation in the matter.*
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> *7. That thereafter the investigation of the case was deputed to S.S.I. Chandra Shekhar Singh, then posted at Police Station-Chowk, District-Lucknow, who vide his report dated 14.10.2022 has also supported the earlier Final Report dated 19.09.2021 and forwarded the Supervisory Authority/ Circle Officer, Chowk, Lucknow.*
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> *8. That the Supervisory Authority/ Circle Officer, Chowk, Lucknow again raised some objections with regard to investigation and directed for further investigation in the matter.*
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> *9. That thereafter vide order dated 04.11.2022 of the Deputy Commissioner of Police, West, Lucknow, the investigation of the case was allotted to the deponent.*
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> *10. That the deponent after taking over the investigation, has perused the earlier Parchas of the Case Diary and investigated the aforesaid F.I.R. in a fair and impartial manner.*
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> *11. That during the course of investigation, no credible evidence regarding offence under Section 420 I.P.C. has been found, therefore, the deponent has deleted Section 420 I.P.C. from the array of offence. However, on the basis of evidences,*

Section 120B/201 I.P.C. were added in the array of offence and names of Dr.Ravikant (Ex-Vice Chancellor, KGMU) and Dr. Arun Kumar Singh (Ex-Controller of Examination, KGMU) have been added in the list of accused persons.

12. That it is respectfully submitted that from investigation, sufficient credible incriminating evidences have been found against named accused / Petitioner - Prof. Ashish Wakhlu and also against accused persons, whose names were came into light during investigation namely 1- Arun Kumar Singh and 2- Ravikant, for offence under Sections 409, 120B, 201 I.P.C., therefore, a report was sent to the Deputy Commissioner of Police, West, District Lucknow for cancelling the earlier Final Report dated 19.09.2021."

9. Sri Prashant Kumar Misra was the investigating officer at the final stage when the aforesaid counter affidavit came to be filed before this Court. Paragraphs **13** to **16** of the short counter affidavit filed on **20/21.2.2023** for our purpose are also relevant and the same are extracted below:

"13. That the Deputy Commissioner of Police, West, District Lucknow has cancelled the earlier Final Report dated 19.09.2021 on 18.02.2023.

14. That thereafter, the deponent has prepared a Charge-Sheet dated 19.02.2023 against the named accused/petitioner-Prof.Ashish Wakhlu for offence under Sections 409, 120-B IPC and forwarded to the Supervisory Authority/Assistance Commissioner of Police, Chowk, District Lucknow and will be filed in the Court concerned at the earliest. Photocopy of the Charge-Sheet dated 19.02.2023 is being annexed herewith as Annexure No.SCA-1.

15. That the investigation of the case has concluded against named accused - Petitioner Prof. Ashish Wakhlu.

16 That at present, the investigation is pending against the accused persons, whose names have came into light during investigation i.e. Dr.Ravikant (Ex-Vice Chancellor, KGMU) and Dr. Arun Kumar Singh (Ex-Controller of Examination, KGMU) and only their arrest is remained. As soon as they are arrested, Supplementary Charge-Sheet will be filed against them and the investigation of the case will be concluded.

10. In a subsequent supplementary counter affidavit sworn by the same investigating officer on **25.2.2023** and filed on **2.3.2023,** in paragraph-**3,** following statement was made:

"3. That it is respectfully submitted that the investigation of case is pending against Dr. Ravikant (Ex-Vice Chancellor, KGMU) and Dr. Arun Kumar Singh (Ex-Controller of

> Examination, KGMU). The deponent is not pressing the paragraph no.16 of his earlier short counter affidavit dated 20.02.2023."

11. The chronological order of events as regards investigation clearly reveal that S/Shri Ramapati Singh on completion of investigation submitted a final report on 19.9.2021 to the supervising authority/Circle Officer, Chowk Lucknow which he objected against and directed for further investigation. Therefter SI Sri Chandra Shekhar Singh took over investigation and submitted the final report to the supervising authority on 14.10.2022 by supporting the earlier final report submitted by his predecessor on 19.9.2021. The supervising authority appears to have raised certain objections again and directed for further investigation. For achieving the desired objective, the investigation was handed over to Sri Prashant Kumar Misra vide order dated 04.11.2022 who on completion of investigation reported to the supervising authority for cancellation of the earlier report submitted on 19.9.2021. It is only after cancellation of earlier final report on 18.2.2023, the police report drawn by Sri Prashant Misra was submitted on 19.2.2023. Two final reports drawn on 19.9.2021 and 14.10.2022, therefore, stood superceded by the police report submitted on 19.2.2023 without any mention to the final report submitted on 14.10.2022.

12. This Court may note that the investigation of cognizable offence lies within the exclusive domain of the investigating officer and the Code of Criminal Procedure does not conceive of a procedure of fresh investigation by entering into the exercise of annulling any material collected by the earlier investigation officer. Further investigation or an order to that effect does not mean that the supervising authority may annul the earlier investigation altogether that too on the recommendation of a new investigation officer authorised to carry out further investigation.

13. In the short counter affidavit, the investigating officer has stated that now the investigation has completed except the arrest of the other accused persons and it is for this reason that the charge sheet against the petitioner was forwarded to the supervising authority which shall be filed before the competent court. The investigating officer before arresting the other accused persons alleged to have been involved in the commission of offence, once again chose to submit the charge sheet only against the present petitioner and thereafter a supplementary affidavit came to be filed to the effect that paragraph-16 of the short counter affidavit was not being pressed. It is in this manner that a clear picture of completion of investigation projected by the investigating

officer was again manipulated to defeat the Court order passed on 15.11.2022.

14. The supplementary affidavit in paragraph-3 takes somersault when the investigating officer withdrew the statement made in paragraph-16 of the short counter affidavit. The malice is evident on the face of pleadings sworn in the two affidavits. It is also evident that there is no mention of the fact that the supervising authority on submission of the police report by the investigating officer under Section 409 IPC read with Section 120-B and 201 IPC had ever directed for further investigation, therefore, the supplementary affidavit indicating that further investigation was pending is clearly with an ulterior motive of prolonging the investigation indefinitely so as to malign the image and career of the petitioner in a manner subversive of law.

15. The charge sheet submitted under Section 120-B IPC against the petitioner alone is clearly indicative of a legal malice once by filing a supplementary affidavit, the contents of paragraph-16 sworn in earlier were disowned by the investigating officer at the sweet will of the supervising authority which gives a clear impression that the investigating officer and the supervising authority were in hand in gloves with each other so as to victimize the petitioner and tarnish

his image otherwise all the three accused persons in a situation of offence being made out would have been subjected to the process of law in the like manner. Non-adherence to the well settled principles of investigation with an orientation of ulterior motive against the petitioner alone clearly smacks of abuse of process of law and the same is writ large on the face of record.

16. In the like manner since there is no allegation against the petitioner of having any financial gain in the process of the purchase of laptops nor there is any case of embezzlement or having committed breach of trust, therefore, there was no occasion or material before the investigating officer to level charge under Section 409 IPC against the petitioner. Reference may be made to an apex court judgement in the case of **N. Raghavender v. State of Andhra Pradesh, CBI** reported in **2021 SCC Online SC 1232**, wherein following observations have been made by the Court in paragraphs 41 to 45:

> 41. Section 409 IPC pertains to criminal breach of trust by a public servant or a banker, in respect of the property entrusted to him. The onus is on the prosecution to prove that the accused, a public servant or a banker was entrusted with the property which he is duly bound to account for and that he has committed criminal breach of trust. (See: Sadupati Nageswara Rao v. State of Andhra Pradesh9).
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> 42. The entrustment of public property and dishonest misappropriation or use thereof in the manner illustrated under Section 405 are a sine qua non for making an

offence punishable under Section 409 IPC. The expression 'criminal breach of trust' is defined under Section 405 IPC which provides, inter alia, that whoever being in any manner entrusted with property or with any dominion over a property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property contrary to law, or in violation of any law prescribing the mode in which such trust is to be discharged, or contravenes any legal contract, express or implied, etc. 9 (2012) 8 SCC 547 shall be held to have committed criminal breach of trust. Hence, to attract Section 405 IPC, the following ingredients must be satisfied:

(i) Entrusting any person with property or with any dominion over property;

(ii) That person has dishonestly mis-appropriated or converted that property to his own use;

(iii) Or that person dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation of any direction of law or a legal contract.

43. It ought to be noted that the crucial word used in Section 405 IPC is 'dishonestly' and therefore, it pre-supposes the existence of mens rea. In other words, mere retention of property entrusted to a person without any misappropriation cannot fall within the ambit of criminal breach of trust. Unless there is some actual use by the accused in violation of law or contract, coupled with dishonest intention, there is no criminal breach of trust. The second significant expression is 'mis-appropriates' which means improperly setting apart for ones use and to the exclusion of the owner.

44. No sooner are the two fundamental ingredients of 'criminal breach of trust' within the meaning of Section 405 IPC proved, and if such criminal breach is caused by a public servant or a banker, merchant or agent, the said offence of criminal breach of trust is punishable under Section 409 IPC, for which it is essential to prove that:

(i) The accused must be a public servant or a banker, merchant or agent;

(ii) He/She must have been entrusted, in such capacity, with property; and

(iii) He/She must have committed breach of trust in respect of such property.

45. Accordingly, unless it is proved that the accused, a public servant or a banker etc. was 'entrusted' with the property which he is duty bound to account for and that such a person has committed criminal breach of trust, Section 409 IPC may not be attracted. 'Entrustment of property' is a wide and generic expression. While the initial onus lies on the prosecution to show that the property in question was

> 'entrusted' to the accused, it is not necessary to prove further, the actual mode of entrustment of the property or misappropriation thereof. Where the 'entrustment' is admitted by the accused or has been established by the prosecution, the burden then shifts on the accused to prove that the obligation vis-à-vis the entrusted property was carried out in a legally and contractually acceptable manner.

17. This Court in the normal circumstances does not enter into the merits of the FIR once the allegations levelled therein, *prima facie*, make out a cognizable offence, however, in exceptional circumstances the Court is under a bounden duty to lift the veil so that the criminal prosecution of an accused is not resorted to by way of a malicious and mala fide exercise.

18. From a perusal of the record it would transpire that though the FIR was lodged on **18.2.2021** pursuant to approval granted by the Vice Chancellor to the resolution adopted in the meeting of Executive Council held on **8.6.2020** as is evident from letter dated **12.6.2020** written by the Registrar to the Proctor, KGMU wherein it has been mentioned that the approval of the Vice Chancellor having been granted, an FIR be registered on behalf of the University in the light of the provisions of Clause **2.09 (13)** of the First Statute, **2011** but neither in the resolution adopted in the meeting dated **8.6.2020** nor the letter written by the Registrar on **12.6.2020** addressed to the Proctor mentions therein the name of any suspect who may be prima facie guilty for the offence to be

probed. The resolution only recites that it has been resolved by the Executive Council that an FIR be lodged for the administrative/financial irregularities committed in the process adopted by the **IT Cell** in the matter of purchase of 300 laptops and all necessary assistance be extended to the police administration. The letter of the Registrar dated 12.6.2020 addressed to Proctor, KGMU reads as under:

पत्र सं0–3086/जी0ए0 एवं सम्पत्ति/2020 दिनांक 12.06.2020

सेवा में,

कुलानुशासक,
किंग जॉर्ज चिकित्सा विश्वविद्यालय उ0 प्र0,
लखनऊ।

महोदय,

कृपया मा0 कार्यपरिषद की बैठक दिनांक 08.06.2020 के Any other Agenda (15) -Item No-01 पर किये गए विनिश्चय का सन्दर्भ ग्रहण करने की कृपा करे जिसकी छायाप्रति संलग्न है।

कृपया उक्त के सन्दर्भ में मा0 कुलपति जी के अनुमोदनोपरान्त किंग जॉर्ज चिकित्सा विश्वविद्यालय उ0प्र0, लखनऊ की प्रथम परिनियमावली 2011 के परिनियम 2.09(13) तीन में निहित प्राविधान के अर्न्तगत विश्वविद्यालय की ओर से प्राथमिकी दर्ज कराने की कृपा करें।

संलग्नक–यथोपरि।

भवदीय,
ह0 अपठनीय
12.6.2020
(आशुतोष कुमार द्विवेदी)
कुलसचिव

19. However, the letter written by the Chief Proctor, Prof. R.A.S. Kushwaha addressed to the Incharge Inspector, Kotwali Chowk, Lucknow on the same day i.e. 12.6.2020 mentions that the resolution arrived at in the agenda of the meeting held on 8.6.2000 having been approved by the Vice

Chancellor, an FIR be lodged on behalf of the University against Sri Ashish Wakhlu without naming anyone else whereas the resolution clearly recited that there are administrative/financial irregularities in the process adopted by **IT cell** in the purchase of 300 laptops, therefore, an FIR be lodged. Though the petitioner was the Member Secretary of the IT Cell but it seems without seeking any preliminary probe in the matter by including the other personnel working in the IT Cell, he has been projected to be the main culprit, overlooking his status and unblemished past services.

20. It appears that the decision to lodge an FIR in the matter having been taken in haste with one and only the petitioner being named, pricked the conscience of the University authorities and another meeting of Executive Council was held on 27.6.2020 wherein a further resolution was adopted that an inquiry committee comprising of external experts preferably from the field of Forensics (Hand-writing expert), I.T./Cyber expert, Retired Police Officer, Retired Judge, Administrative Officers from Finance/Audit sector, be constituted to inquire the matter, so that detailed report may be prepared, for necessary action. The Committee was required to submit its report at the earliest, preferably within three months.

21. Accordingly, the Incharge Inspector (Prabhari Nirikshak) of the concerned police station was informed that the matter was **reconsidered** in the subsequent meeting of Executive Council on 27.6.2020 and a fresh resolution was adopted and that it was only after the recommendations of the Committee is received and a decision by the Executive Council taken, any further action would be possible to be ensured by the office of the signatory (Prof R.A.S. Kushwaha, Chief Proctor).

22. In the above conspectus, it is clear that while lodging the FIR in the matter, the University did not feel it proper to obtain experts' advice and the opinion of the officers who are seized with such matters, before framing the petitioner as a suspect and in an unprepared and half hearted manner felt it convenient to implicate the petitioner and by the time they felt such necessity and convened the subsequent executive council meeting on 27.6.2020, the petitioner was publicized as the main accused of the entire irregularity, if any, though as is borne out of the record that he in the course of duty had associated in the purchase of laptops and tried to maintain total transparency in the transaction in consonance with the relevant guidelines and prevalent practice.

23. We may also take note of the fact that for any irregularity administrative or financial, it is permissible to the

University to initiate disciplinary proceedings which in the ordinary course cannot be substituted by criminal proceedings but in the instant case, the haste on the part of the Chief Proctor in naming the petitioner in his letter dated 12.6.2020 was clearly driven by some ulterior motive which reflects nothing but the abuse of the process of law.

24. For understanding the FIR in question, certain facts are necessary to be pointed out viz. under the digitization policy of the Government, the process of holding online examination was continuing since the year 2010 which was felt necessary in order to curtail the lengthy manual process and at the same time to minimize the expenditure being incurred in the process. The process of online examination was also beneficial in maintaining accuracy and transparency in the conduction of examinations. In the above background a meeting of the Information Technology of the University was held on 13.8.2014 wherein the Vice Chancellor had opined that IT committee of the University also needs to work towards a totally computer based examination system where the students would answer questions on a computer screen and have the result declared at the end of their test with the provisions of 300 students in one seating. The minutes of the meeting were

made a part of the annual report which was duly considered and resolved by the Executive Council of the University.

25. On 21.8.2015 the Assistant Accountant recorded on the concerned file that the Department of Medical Education vide letter dated 15.7.2015 had instructed that the computers could be purchased from the internal funds of the University and that the purchase may be approved by the Vice Chancellor from the examination fund. On 21.8.2015 itself the Finance Officer of the University granted his consent for purchase of the computers from the examination fund subject to the purchase being made on the minimum quoted price. The said proposal was duly approved by the Vice Chancellor on 28.8.2015.

26. Pursuant to the approval of the Vice Chancellor, the petitioner being the Member Secretary of the IT Cell issued a supply order on 11.9.2015 to M/s Uptron Powertronics, which is an authorised government nodal agency, for purchase of 300 laptops as it had quoted lowest price. On 18.1.2016 M/s Uptron delivered the laptops to the University against a sale invoice addressed to the Registrar who was also the consignee and also competent to make purchases on behalf of the University and to receive the consignment and forward the same to the relevant departments. The Registrar forwarded

the consignment to the IT Cell which was duly received by the petitioner being the Member Secretary.

27. The petitioner vide letter dated 11.2.2016 informed the Vice Chancellor about the purchase of 300 laptops for online examinations in furtherance to the recommendations and instructions of the Examination Committee. It is thereafter that the payment against the supply of laptops was made by the Controller of Examinations Prof. A K Singh and the Additional Controller of Examinations, Dr Girish Chandra by cheque dated 31.3.2016 to the tune of Rs. 1,60,34,100/-.

28. It is submitted that on 13.4.2016 the online examination software of the University was tested by five senior professors and the test being successful, the University authorities were accordingly informed. It is thereafter that the petitioner on 21.1.2017 informed Vice Chancellor and Controller of Examination as well as Dean, Faculty of Medicine amongst others through email, that the paperless examination in Ophthalmology was scheduled for 25.1.2017. The examinations were thereafter solely conducted by the Controller of Examinations after due approval of the Vice Chancellor.

29. It would thus be seen that during all the above period i.e. from the date of order of supply till conduction of

examination no question was raised and all the formalities were conducted with due approval of the competent authorities. However, in a meeting held on 29.5.2017 an agenda was dealt with by the Executive Council that due to lack of infrastructure and as per MCI/DCInorms **it was not possible to conduct online examinations in KGMU, therefore, a decision may be taken as to whether the said laptops may be distributed to various administrative offices and departments of the University/I.T. Cell wherever they are needed otherwise the same may become obsolete and unusable.** It is noteworthy that the agenda starts with the line *'with the approval of then Hon'ble Vice Chancellor, KGMU, IT Cell purchased 300 laptops'*. The Committee resolved to disburse the laptops to various administrative offices and at the same time constituted a three-member time bound enquiry committee to look into the matter of need, purchase of these laptops and KCI/DCI Norms for conduct of online exams. **This shift in the policy decision was taken without there being any complaint in regard to the purchase of laptops and it having been specifically mentioned in the agenda itself that the laptops were purchased with the approval of the then Hon'ble Vice Chancellor.** The Committee submitted its report on 6.6.2020 stating that in the record

made available to the enquiry committee, justifiable proposal, detailed project report, approval of executive council and the examination committee were not found. The Committee also observed that in the KGMU Act/Statute as well as Snatak Chikitsa Shiksha Viniyamavali, 1997 and Snatakottar Chikitsa Shiksha Viniyamawali, 2000 issued by MCI for Graduate and Post Graduate Students, there is no mention of guidelines for conducting online examination.

30. It is thereafter that an FIR came to be lodged against the petitioner, as aforesaid, under Section 409, 420 IPC pursuant to the letter written by the Chief Proctor, Prof. R.A.S. Kushwaha to the Incharge Inspector, Kotwali Chowk, Lucknow on 12.6.2020.

31. At this stage it would be profitable to take note of some relevant provisions of the First Statute, 2011, namely clause 2.03(18) and clause 2.05(12) & 2.05(20) and which are reproduced hereunder:

> *"FINANCE OFFICER*
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> *2.03 (18) The Finance Officer shall arrange the conduct of continuous internal audit of the accounts of the University, and shall pre-audit such bills as may be required in accordance with any standing orders in that behalf. However the accounts of the confidential section of controller examination section shall not be audited.*
>
> *THE CONTROLLER OF EXAMINATION*
>
> *2.05 (12) The Controller of Examination shall adopt methodology, innovations and procedures for conducting the University examinations as may be necessary to be introduced and implemented from time to time under the approval of Vice-Chancellor after consultation with the Exam Committee.*

(20) The Controller of Examination shall be directly answerable to the Vice-Chancellor for all actions taken by him pertaining to the examinations."

32. We are certainly displeased to notice that the administration in succession instead of streamlining the advanced technique of online examination has reversed the policy decision for the considerations right or wrong best known to them. The administration in succession has thereafter come out to defend the old pattern of conducting the examinations which in the wake of advanced technology and digitization is certainly unfriendly to the environment. **The conflict of opinion in policy decision i.e. to do away with the paper work and make the examination paperless has taken the controversy to the heights of wreak vengeance so as to justify the reversal of earlier policy decision by the new administration.** There is ample indication of internal conflicts of interest and the educational institution has not to suffer on that account at the cost of legal expenditure spent recklessly. We are certainly not oblivious of the fact that the online examination process would have brought about a positive change in the standards of medical education and there was nothing wrong with the online examination policy.

33. **The question that arises before us is as to whether a shift of policy decision of one administration and its reversal by the succeeding administration can at all be a subject matter of criminal**

prosecution and as to how the further investigation could go on once the Executive Council in its subsequent decision had resolved on 27.6.2020 for looking into the matter from a different angle. The investigation which was attempted to be concluded more than once by submitting a final report seems to have been interfered with by the supervising authority for which no reason whatsoever has been brought to our notice and on the contrary, a police report finalized overnight has come to be filed before the court concerned half-heartedly as is evident from the stand adopted by the investigating officer which has not taken the supervising officer by any surprise.

34. In our considered opinion, the whole exercise lacks the sanctity of law. The lodging of FIR in a hurried manner and without allowing the resolution of the Executive Council passed subsequently on 27.6.2020 to discover any criminal intent, the investigating agency having failed to act fairly, leaves us with no manner of doubt that the entire action is nothing but an abuse of the process of law.

35. The policy decision of holding online examinations was clearly a collective decision and the same does not seem to have any trappings of dishonest or criminal intent that could be attributed singly against an individual. On reversal of such a policy decision by the succeeding administration which

resulted into the distribution of laptops to the offices in order to save such equipment from going unused, by no stretch of imagination it would attract an offence under Section 409 IPC that could be attributed against any person having performed duty in the accomplishment of online examination process jointly or severally. The Investigating officer as well as the supervising authority having clearly conducted the proceedings unfairly and with an approach of utmost victimization against the petitioner clearly indicates that it does not serve the object for which the scope for booking a criminal case is postulated under criminal law. The lack of honesty has rather been fished out baselessly to settle scores on personal vendetta.

36. The State as well as the complainant (University) at this stage have argued that the police report having been filed against the petitioner followed by cognizance taken by the competent court, leaves no scope for this Court to exercise jurisdiction under Article 226 of the Constitution of India.

37. The submission put forth by learned counsel for the State and the counsel for the complainant when tested in the light of the judgement rendered by the apex court in the case of ***M/s Pepsi Foods Ltd. and another v. Special Judicial Magistrate***

and others, reported in ***AIR 1998 SC 128*** repels the contention when we look at the observation of the Court made as under:

> "Nomenclature under which petition is filed is not quite relevant and that does not debar the court from exercising its jurisdiction which otherwise it possesses unless there is special procedure prescribed which procedure is mandatory. If in a case like the present one the court find that the appellants could not invoke its jurisdiction under Article 226, the court can certainly treat the petition one under Article 227 or Section 482 of the Code. It may not however, be lost sight of that provisions exist in the Code of revision and appeal but sometime for immediate relief Section 482 of the Code or Article 227 may have to be resorted to for correcting some grave errors that might be committed by the subordinate courts. The present petition though filed in the High Court as one under Articles 226 and 227 could well be treated under Article 227 of the Constitution. "

38. It may also be profitable to refer to the decision of the apex court in the case of **Vinay Tyagi v. Irshad Ali** reported in **(2013) 5 SCC 762,** of which following paragraphs which deals with the 'further investigation' are relevant and the same are extracted hereinbelow:

> *22. 'Further investigation' is where the Investigating Officer obtains further oral or documentary evidence after the final report has been filed before the Court in terms of Section 173(8). This power is vested with the Executive. It is the continuation of a previous investigation and, therefore, is understood and described as a 'further investigation'. Scope of such investigation is restricted to the discovery of further oral and documentary evidence. Its purpose is to bring the true facts before the Court even if they are discovered at a subsequent stage to the primary investigation. It is commonly described as 'supplementary report'. 'Supplementary report' would be the correct expression as the subsequent investigation is meant and intended to supplement the primary investigation conducted by the empowered police officer. Another significant feature of further investigation is that it does not have the effect of wiping out directly or impliedly the initial investigation conducted by the investigating agency. This is a kind of continuation of the previous investigation. The basis is discovery of fresh evidence and in continuation of the same offence and chain of events relating to the same occurrence incidental thereto. In other words, it has to be understood in*

complete contradistinction to a 'reinvestigation', 'fresh' or 'de novo' investigation.

23. However, in the case of a 'fresh investigation', 'reinvestigation' or 'de novo investigation' there has to be a definite order of the court. The order of the Court unambiguously should state as to whether the previous investigation, for reasons to be recorded, is incapable of being acted upon. Neither the Investigating agency nor the Magistrate has any power to order or conduct 'fresh investigation'. This is primarily for the reason that it would be opposed to the scheme of the Code. It is essential that even an order of 'fresh'/'de novo' investigation passed by the higher judiciary should always be coupled with a specific direction as to the fate of the investigation already conducted. The cases where such direction can be issued are few and far between. This is based upon a fundamental principle of our criminal jurisprudence which is that it is the right of a suspect or an accused to have a just and fair investigation and trial. This principle flows from the constitutional mandate contained in Articles 21 and 22 of the Constitution of India. Where the investigation ex facie is unfair, tainted, mala fide and smacks of foul play, the courts would set aside such an investigation and direct fresh or de novo investigation and, if necessary, even by another independent investigating agency. As already noticed, this is a power of wide plenitude and, therefore, has to be exercised sparingly. The principle of rarest of rare cases would squarely apply to such cases. Unless the unfairness of the investigation is such that it pricks the judicial conscience of the Court, the Court should be reluctant to interfere in such matters to the extent of quashing an investigation and directing a 'fresh investigation'.

24. In the case of Sidhartha Vashisht v. State (NCT of Delhi) [(2010) 6 SCC 1], the Court stated that it is not only the responsibility of the investigating agency, but also that of the courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. An equally enforceable canon of the criminal law is that high responsibility lies upon the investigating agency not to conduct an investigation in a tainted or unfair manner. The investigation should not prima facie be indicative of a biased mind and every effort should be made to bring the guilty to law as nobody stands above law de hors his position and influence in the society. The maxim contra veritatem lex nunquam aliquid permittit applies to exercise of powers by the courts while granting approval or declining to accept the report.

25. In Gudalure M.J. Cherian & Ors. v. Union of India & Ors. [(1992) 1 SCC 397], this Court stated the principle that in cases where charge-sheets have been filed after completion of investigation and request is made belatedly to

reopen the investigation, such investigation being entrusted to a specialized agency would normally be declined by the court of competent jurisdiction but nevertheless in a given situation to do justice between the parties and to instil confidence in public mind, it may become necessary to pass such orders.

26. Further, in R.S. Sodhi, Advocate v. State of U.P. [1994 SCC Supp. (1) 142], where allegations were made against a police officer, the Court ordered the investigation to be transferred to CBI with an intent to maintain credibility of investigation, public confidence and in the interest of justice. Ordinarily, the courts would not exercise such jurisdiction but the expression 'ordinarily' means normally and it is used where there can be an exception. It means in the large majority of cases but not invariably. 'Ordinarily' excludes extra- ordinary or special circumstances. In other words, if special circumstances exist, the court may exercise its jurisdiction to direct 'fresh investigation' and even transfer cases to courts of higher jurisdiction which may pass such directions.

40. Having analysed the provisions of the Code and the various judgments as afore-indicated, we would state the following conclusions in regard to the powers of a magistrate in terms of Section 173(2) read with Section 173(8) and Section 156(3) of the Code :

40.1. The Magistrate has no power to direct 'reinvestigation' or 'fresh investigation' (de novo) in the case initiated on the basis of a police report.

40.2. A Magistrate has the power to direct 'further investigation' after filing of a police report in terms of Section 173(6) of the Code.

40.3. The view expressed in (2) above is in conformity with the principle of law stated in Bhagwant Singh's case (supra) by a three Judge Bench and thus in conformity with the doctrine of precedence.

40.4. Neither the scheme of the Code nor any specific provision therein bars exercise of such jurisdiction by the Magistrate. The language of Section 173(2) cannot be construed so restrictively as to deprive the Magistrate of such powers particularly in face of the provisions of Section 156(3) and the language of Section 173(8) itself. In fact, such power would have to be read into the language of Section 173(8).

40.5. The Code is a procedural document, thus, it must receive a construction which would advance the cause of justice and legislative object sought to be achieved. It does not stand to reason that the legislature provided power of further investigation to the police

> *even after filing a report, but intended to curtail the power of the Court to the extent that even where the facts of the case and the ends of justice demand, the Court can still not direct the investigating agency to conduct further investigation which it could do on its own.*
>
> *40.6.* ***It has been a procedure of proprietary that the police has to seek permission of the Court to continue 'further investigation' and file supplementary chargesheet. This approach has been approved by this Court in a number of judgments. This as such would support the view that we are taking in the present case."***

39. The Court in its view is equally supported by the apex court verdict rendered in the case of **Anand Kumar Mohatta and others v. State (Govt. of NCT of Delhi), Department of Home and others**, reported in ***AIR 2019 SC 210*** and reference may be made to paragraph 27 to 30 extracted below:

> "27. We are of the opinion that the present case falls under the 1st, 3rd and 5th category set out in the para 102 of the judgment in the case of Bhajan Lal (supra). In such a situation, the High Court erred in dismissing the petition of the Appellants filed under Section 482 of Cr.P.C. This was a fit case for the High Court to exercise its inherent power under Section 482 of Cr.P.C. to quash the FIR.
>
> 28. It is necessary here to remember the words of this Court in State of Karnataka v. L. Muniswamy and others 1977 (2) SCC 699 which read as follows: -
>
> > "7. …..In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in

> quashing the proceeding in the interest of justice…..”
>
> 29. We find that the prosecution is mala fide, untenable and solely intended to harass the Appellants. We are forfeited in view of the Respondent not having made any attempt to recover the deposit of Rs. One Crore through a civil action.
>
> 30. We have, therefore, no hesitation in quashing the FIR and the charge sheet filed against the Appellants. Hence, the FIR No.0139/2014 dated 20.08.2014 and charge sheet dated 03.08.2018 are hereby quashed.”

40. In its application to the case at hand, we gather from the record that the executive council in its subsequent resolution adopted on **27.6.2020** has not intended to proceed with the FIR and the matter is referred for experts’ opinion which is yet to be arrived at. We may also note that the non-auditable fund spent by the Controller of Examination with its due approval by virtue of clause **2.03(18)** and **2.05(12)** reproduced in the earlier part of the judgement may even not be a financial lapse as alleged. It is not the case before us that there was anything wrong with the policy decision or the ingredients of Section **409** IPC, by any interpretation of law, are made out notwithstanding the approval by the Vice Chancellor, and that the criminal prosecution has become imminent as a consequence of reversal of the policy decision and is the only course open under law.

41. The Division Bench decision cited by learned counsel for the complainant in **M/s V.S. Pharma Lucknow and another v.**

State of U.P. and another rendered by this Court in Criminal Misc. Writ Petition No. 17812 of 2015 as well as the Full Bench judgement in the case of **Ashok Kumar Dixit v. State of U.P. and another** reported in ***AIR 1987 All 235***, are based on entirely different set of facts and circumstances and have no bearing on the case at hand.

42. Thus the objection that the matter should have been raised in the petition under Section 482 CrPC does not stand to appeal and fails. Once the petitioner has approached this Court with promptitude under Article 226 of the Constitution, the prayer made by the petitioner can be moulded and considered by taking aid of Article 227 or Section 482 Cr.P.C. as these are the concomitant powers of the High Court itself. In appropriate cases the power under Article 226 for imparting complete justice stands strengthened by the supervisory or inherent jurisdiction of this Court provided under Article 227 or Section 482 CrPC deserving to be exercised sparingly.

43. Having applied our mind to the contents of the FIR as well as the investigation, as recorded above, the impugned FIR as well as the investigation held in pursuance thereof being based on the abuse of the process of law and guided

by mala fide exercise of power does not stand in the eye of law and the same deserves to be quashed.

44. Accordingly the impugned FIR dated 18.2.2021 registered against the petitioner as Case Crime No. 56 of 2021 under Section 409, 420 IPC at Police Station Chowk, District Lucknow as well as the police report submitted in pursuance thereof under Section 409 read with Section 120-B and 201 IPC including the summon issued by the competent court based thereon, if any, are quashed. The Executive Council upon a fresh consideration in terms of the subsequent resolution dated 27.6.2020, if so chosen, may consider the whole issue in the light of observations made hereinabove and proceed accordingly in the matter in accordance with law.

45. Before parting, we hope that the university authorities shall remain committed to the upgradation of educational standards and work collectively to boost the educational values by respecting the policy decisions taken for the welfare of the institution. Discipline in education and administration both must be achieved in order to avoid undue conflicts.

46. Resultantly, the writ petition is allowed. No order as to cost.

Order Date :- June 26, 2023
Fahim/-