

IN THE COURT OF THE SPECIAL JUDGE, (SPE/CBI)-I, ERNAKULAM

Present: Sri. Anil.K.Bhaskar, Special Judge, Ernakulam

Monday the 25th day of October, 2021/3rd Karthika, 1943

Crl.M.P.No.273/2020

in

C.C.No.06/2012

Petitioner/Accused No.4:-

Nithin Radhakrishnan, aged 34 years,
S/o.V.M Radhakrishnan, Verkote Manjeri Thodi
House, Nivethitha, DPD Road, Palakkad, Kerala,
678 014.

By Adv. Sri. Manu Tom Cheruvally

Adv. Jithin K.R.

Adv. Balu Tom Cheruvally

Adv. Balamurali K.P

Respondent/Complainant-

The Central Bureau of Investigation Cochin

By Smt.K.R Biju Babu

Senior Public Prosecutor, CBI

This petition coming on for hearing before me on 21.10.2021 and the Court on the 25.10.2021 passed the following:

ORDER

1. The fourth accused preferred the above application invoking Section 239 Cr.P.C, seeking discharge with regard to the offences brought against him by the prosecution under Section 120B IPC r/w Sections 7, 13(2) r/w 13(1) (d) of PC Act and also under Section 12 of the PC Act.

2. The respondent/prosecution filed counter statement opposing the application.

3. Brief facts of the case is as follows:-

'India tourism' under Department of Tourism, Government of India is the

agency/authority to issue Star classifications to the Hotels, who apply for the same and who fulfill the required standards/facilities as per the regulatory conditions prescribed by the Government of India, Department of Tourism and its office is at Wellington Island, Cochin. This office is headed by an Officer of the rank of Manager/Assistant Director and supported by two Tourist Information Officers. In addition to the above one casual worker is also engaged in the above office to work as peon/Attender on daily wages. The Hotels in Kerala, which are in need of 'Star' Classification will have to apply to the Regional Director, India tourism, Chennai with all required documents as per the guidelines issued/revised in January 2011 by the Tourism Department of Govt. of India. On receipt of application, complete in all respects, the hotel will be inspected by a classification committee for 03 star and below hotels, consisting of:-

a) Chairperson, Secretary (Tourism) of the concerned State Govt. or his nominee who should not be below the rank of a Deputy Secretary to the Govt. of India. In his absence the Regional Director, India tourism who is also Member Secretary, Regional HRACC

b) Regional Director, Indiatourism Office / local India tourism office

c) Representative from FHRAI

d) Representative from HAI

e) Representative from IATO

f) Representative from TAAI

g) Principal Institute of Hotel Management

4. The Chairperson and any 3 members will constitute a quorum. The

recommendations will be sent to HRACC Division (Ministry of Tourism, Govt. of India) within 5 working days and the recommendations of the HRACC inspection committee will be approved by the Chairperson (HRACC) / Addl. Director General (Tourism) expeditiously.

5. After the application with all documents are received at the Regional Director's Office, the same will be scrutinized by the concerned Assistant Director and if the documents are in order the Assistant Director informs the Secretary Tourism, Kerala State Govt. who is the Chairman of the Hotel & Restaurant Approval & Classification Committee (HRACC) to fix a date for the inspection of Hotels for classification. After the date for Inspection was received from the Secretary of State Govt. the Assistant Directors informs the other committee members about the proposed inspection of Hotel(s) for classification. The Assistant Director of the Local Office (Wellington Island office) will have to coordinate with other agencies/members of the Inspection Committee for the inspection. The date of inspection of hotels will also be informed to the concerned hotels by the Assistant Director. Accordingly as per the date announced, the inspection will be carried out by the committee and the committee make its observation/marks of the facilities available in the hotel observed during inspection in the check list carried out by the convener and make their recommendation with their signatures on the said report. The above recommendation is forwarded by the Assistant Director (if he was a member of the above committee) to the Director General India tourism, New Delhi which is the Head Office of Department of Tourism for approval and the Director General after examining the recommendations of HRACC conveys its decision to

the Regional Director and the Regional Director Chennai issued order to the concerned hotels. The classification so issue will be valid for a period of five years.

6. A1 Shri.N.Velmurugan had been working as Assistant Director/Manager India tourism, Cochin since 02.11.2010. In addition to his other duties as Assistant Director/Manager India tourism, Cochin, A1 was also required to coordinate with the State Tourism Director/Secretary for scheduling the dates of inspection of pending hotels for classification/re-classification since Secretary or his representative is the Chairman of the Committee. He is also a member of the inspection committee and also does verification of documents/NOC submitted by the hotels at the time of inspection.

7. A2 Shri.K.S. Sabu was working as Tourist Information Officer (ad hoc) at the India tourism Office, Wellington Island, Cochin since 03.02.2010. He was assigned the duties of Hotel Project Approval/Classification by A1, who was the Officer-In-Charge of India tourism Cochin, vide Order No.ITK/Admn/AD/TIO/2010 dt.01.12.2010.

8. One Mr.P.K.Kunjan was the other Tourist Information Officer and one Mr.P.J.Radhakrishnan was the peon working in that office at that time. Initially they were made as accused in the crime but on completion of investigation, they were deleted from the array of accused, for want of evidence.

9. A3 M/s.Sreebala Developers & Hotel (P) Ltd., Soorya Towers, Kunnathurmedu, Palakkad is a private limited company registered under the Companies Act 1956 on 03.06.2009 for its business of running a hotel in the name of Hotel Soorya Galaxy, Feroke, Calicut and is represented by A4 its authorised

representative. During December 2010 A4 Shri.Nithin Radhakrishnan, the then Managing Director of M/s.Sreebala Developers & Hotel (P) Ltd., had submitted an application for 03 Star classification of the above Hotel Soorya Galaxy, Feroke, Calicut. As per the said application, inspection for the above 03 Star classification to the hotel was conducted at the said Hotel Soorya Galaxy, Feroke, Calicut by the Hotel and Restaurant Approval & Classification Committee (HRACC) of India tourism, consisting of Dr.Rathan Kelkar, Additional Director, Dept. of Tourism, Govt. of Kerala, Shri.Mubashir, GM IATO, Shri.Nelvin C. John, GM FHRAI, Shri.N.V.Joseph of TAAI, Shri.L.V.Kumar, Principal, Institute of Hotel Management & Catering Technology, Kovalam and A1, Assistant Director, India tourism as Convener, on 29.09.11. The said committee recommended for 03 Star classification to the Hotel Soorya Galaxy, Feroke, Calicut on the same day.

10. On 01.10.2011 a surprise check was conducted at the India tourism Office, Wellington Island Cochin by the CBI and during the surprise check unaccounted cash amounting to ₹4,72,500/- was recovered from the locked office drawer of A2 along with large number of gift items and India made foreign liquor bottles, which were in the custody of A2. During the surprise check a handwritten slip prepared by A2 was also recovered from A2 and in the said slip written in pencil, it was mentioned as under:-

1. ₹30,000/- against Pearl View Regency, Thalassery,
2. ₹50,000/- against Lyndas Regency Kuthuparampa,
3. ₹75,000/- against Vintage Residency Kuthuparampa,
4. ₹35,000/- against Broad Bean Kakkayangad,

5. ₹25,000/- against Rydges Inn Kottakkal,
6. ₹1,50,000/- against Soorya Residency and Soorya Galaxy,
7. ₹75,000/- against Surya Edakkad.

11. According to the prosecution, after the inspection of the hotel premises on 29.09.11, A1, initially hatched a criminal conspiracy with A2 to obtain pecuniary advantage for himself and for A2 in the matter of issuance of 03 Star classification and also to demand and accept illegal gratification and thereby dishonestly directed A4, Managing Director of M/s.Sreebala Developers & Hotel (P) Ltd., through Shri.Deepak, Chief Executive Officer of Soorya Group of Hotels including the above Hotel Soorya Galaxy, Feroke, Calicutl, to come to India tourism Office Cochin on 30.09.11 with the hotel documents in the pretext of document verification and A2 in furtherance of the said conspiracy contacted A4 Shri.Nithin Radhakrishnan through Shri.Deepak Chandra the C.E.O of Soorya Group of Hotels and demanded ₹75,000/- as illegal gratification for speeding up the issuance of 03 Star classification, and thereupon A4 Shri.Nithin Radhakrishnan, joined as a party to the criminal conspiracy and engaged with A1 and A2 for the doing of the conspired act and directed his CEO Shri.Deepak Chandra to visit the India tourism Office Cochin on 01.10.11 and to pay the bribe amount to A2 together with gift items and liquor bottles and thereon the CEO Shri.Deepak Chandra visited the India tourism office Cochin on 01.10.11 and A2 has obtained pecuniary advantage as illegal gratification to the tune of ₹75,000/- (Total ₹1,50,000/- @ ₹75,000/- each for Hotel Soorya Regency, Kavungal Malappuram and Hotel Soorya Galaxy, Feroke, Calicut) and also wrist watches with two liquor bottles from Shri.Deepak Chandra for himself

and for A1.

12. Prosecution would allege that A1 and A2 the public servants had individually committed the offences punishable under Section 7 (obtaining bribe by the public servant) and under Section 13(1)(d) r/w 13(2) (committing criminal misconduct by public servant), A3 company and A4 individually committed the offence punishable under Section 12 (abetment of offence punishable under PC Act), and lastly all the accused together committed the offence of criminal conspiracy punishable under Section 120 B IPC.

13. Petitioner/4th accused would contend that the charges levelled against him are groundless, not sustainable, hence he is entitled to get an order of discharge. He had put forward manifold contentions to support his plea of discharge. With equal force the respondent had raised counter points challenging the plea of discharge. Points and counter points raised will be discussed later in due course.

14. Heard both sides.

15. The points that arise for consideration are:

1. Whether the charge levelled by the prosecution against the petitioner/4th accused are groundless?
2. Whether the petitioner is entitled to get for an order of discharge?

16. **The Points**: I will now briefly take into the contentions taken up by both sides and then go into its merits.

17. **Contention of the petitioner**: The petitioner/4th accused is roped with 120 B IPC to make him liable for the commission of the offences under the PC Act.

It is trite law that the most basic ingredient of the offence under Section 120B is prior meeting of minds between the accused. In the instant case, the CBI has no allegation that the petitioner had ever contacted either A1 or A2 or any one else in the office of India tourism, Wellington Island, Cochin. There is no allegation that the petitioner has contacted them either before the inspection of his hotel by the classification committee, or after it. Admittedly, the petitioner/A4 was not present at the hotel premises during the inspection on 29.09.2011. The CBI has no allegation that he had ever visited the office of India Tourism at Wellington Island, Cochin. Even going by the version of the CBI, after inspection of the hotel by (HRACC) Committee headed by Dr. Retan Kelkar, IAS, Addl. Director, Department of Tourism, Government of Kerala on 29.09.2011, the petitioner's hotel was approved for the 3 Star Classification then and there. Moreover according to the guidelines of Ministry of Tourism, Government of India (prosecution document) once the inspection is concluded and approval is granted, the recommendation of the HRACC Committee shall be sent to HRACC Division within five working days and the same will be approved by the Chairperson expeditiously. Therefore, there arise no question of bribing the public servant on 01.10.2011 for getting 3 Star Classification to the petitioner's hotel or for speeding up the process. It is highly improbable and unimaginable that the petitioner had joined the conspiracy to his own disadvantage and parted with a huge amount of ₹75,000/-.

18. CBI attempts to connect the petitioner with the alleged incident of paying bribe to the public servants, through Deepak Chandra the CEO of Soorya Hotels. According to CBI, A1 had asked the CEO to inform A4 to visit his office at

Cochin on the next day for paying bribe under the pretext of verification of records. Then CEO contacted A4 and got his approval and thereafter handed over the bribe money, wrist watches and liquor bottles to A2 on 1.10.2011. That means, prosecution solely rely upon the oral testimony of CW17 Deepak Chandra the CEO to prove the involvement of A2. The prosecution even though had collected the call details of A2, failed to collect the call details of the phone used by CEO Deepak Chandra or that of the petitioner/A4. It is fatal to the prosecution. There is absolutely no evidence to prove that the petitioner had joined the conspiracy hatched by A1 and A2, and in furtherance of the conspiracy any bribe was paid.

19. In addition to that the petitioner would point out that even if the prosecution allegation is true it can only be said that Deepak Chandra had handed over the bribe money, wrist watches and liquor bottles in his capacity as the CEO out of his own wisdom and volition pursuant to the demand of A2. Since there is no evidence to connect the petitioner to the payment of bribe he cannot be vicariously made liable for the personal acts of CW17, only for the reason that, at that time petitioner was the Managing Director of A3 company the applicant for 03 Star classification.

20. Another crucial aspect is that the statement of CW17 Deepak Chandra which is undisputedly in the nature of a confession. He is a party to the alleged commission of the offence. Therefore his further statement that the bribe amount was paid as per the direction of the petitioner, is inadmissible and devoid of any value at all. It is hit by Section 30 of the Evidence Act. A confession by a co-accused is not a substantial piece of evidence. It can only be used for

corroboration. His statement cannot be gone into unless there is other substantive evidence which is completely lacking in this case. It is argued that, even if he is treated as an accomplice, the position will be the same.

21. Another contention taken up is that mere acceptance of money and other illegal gratification by a public servant will not amount to the offences under Section 7 and 13(1)(d) of the PC Act. The acceptance of illegal gratification shall be pursuant to the demand made by the public servant to constitute the above offences. CBI have no case that the petitioner either himself or through any one including CW17 Deepak Chandra had offered any illegal gratification either to A1 or to A2. The prosecution case itself is that the very first demand for illegal gratification was made by A2 for himself and on behalf of A1 to CW17. Therefore there arise no question of petitioner joining the conspiracy and agreeing to comply the demand of illegal gratification. It is trite law that "offering bribe is not the one and the same thing as 'coercive bribe' giving. Both are entirely different. At no stretch of imagination 'compulsive or coercive bribe' giving can be castigated or equated as offering bribe which only amounts to 'intentional aiding' under Section 107 IPC made punishable under Section 12 of the PC Act". The prosecution allege both abetment and conspiracy, both the allegations are vague and evasive.

22. To the most it can be suggested that petitioner have compulsively complied illegal demand of A1 and A2. In this context it is relevant to note that the recent amendment of the PC Act. Section 8 of the present act provides that any person who is compelled to give an undue advantage as defined in the said Act is not liable to be punished for the offence under the said Section. The said

amendment was made for the benefit of the person who are compelled to give bribe or undue advantage and it is liable to be extended to the pending cases, in other words it is retrospective in operation.

23. As a concluding note, the learned counsel for the petitioner would argue that there is total lack of any material which would establish the involvement of the petitioner for the commission of the alleged offences. The alleged charges are patently groundless and unsustainable in law. Even if the un-controverted allegations are assumed to be true for the sake of arguments, none of the offences alleged are made out and therefore, the charges will not sustain.

24. To provide legal backing to the main contentions taken up by the petitioner, the learned counsel relied upon the following decisions of higher courts.

1. Scope of Discharge.

- a) 2010 KHC 4058 – *Vijayan P. v. State of Kerala (SC)*
- b) 2007 KHC 3614 – *Soma Chakravarthy v. State through CBI*
- c) 2017 KHC 4989 – *Srinivase Rao D v. State (Hyderabad HC)*

2. Scope and Nature of Evidence of Accomplice.

- a) 1969 KHC 645 – AIR 1969 SC 17 – *Dalpat Singh & Another v. State of Rajasthan.*
- b) 1952 KHC 317 – AIR 1952 SC 159 – *Kashmira Singh v. State of M.P.*
- c) 1964 KHC 540 – AIR 1964 SC 1184 – *Haricharan Kurumi & another v. State of Bihar.*
- d) 1998 KHC 1188 – AIR 1998 SC 3258 – *Suresh Budharmal Kalani @ Pappu Kalani v. State of Maharashtra.*

3. Abetment.

- a) 2017 KHC 5632 – *Kamal Kumar Nanda v. State of Orissa.*
- b) 2015 KHC 3673 – *Sekharan N.R. v. State of Kerala.*
- c) 1975 KHC 850 – 1975 SCC (Cri.) 725 – *Trilok Chand Jain v. State of Delhi.*
- d) 1975 KHC 708 – AIR 1975 SC 175 – *Shri.Ram v. State of U.P.*

4. Retrospective Operation of Beneficial Legislation.

- a) 2004 KHC 1552 – AIR 2004 SC 5100 – *Zile Singh v. State of Haryana & Others.*
- b) 2005 KHC 1400 – AIR 2005 SC 3685 – *Govt. of India & Others. v. Indian Tobacco Association.*
- c) *Delhi High Court Judgment dated 04.09.2019 in Financial Intelligence Unit, India v. Corporation Bank & Others.*

5. Conspiracy – Proof Required.

- a) 2009 KHC 4660 – 2009 (3) SCC (Cri.) 66 – *Baldev Singh v. State of Punjab.*

6. Vicarious liability

- a) *Ravindranatha Bajpe v. Mangalore Special Economic Zone Ltd. & Others etc.; (Crl. Appeal Nos.1047 & 1048 of 2021 dated 27.09.2021) (SC)*

25. **Contention of the Prosecution:** Learned Public Prosecutor would submit that the materials collected by the prosecution and placed before the court are sufficient to prove the charge of conspiracy against the petitioner. There is sufficient evidence made available to prove that the payment of bribe was made willfully by A4 on behalf of A3 company through CW17 and the subsequent

recovery of the bribe money and other goods by CBI during surprise check conducted on the very next day would also corroborate this. Offence of conspiracy is a continuing offence. It continues to subsist till it is executed or rescinded or frustrated by choice or necessity. Similarly it is also not necessary that every conspirator must take part in each and every conspiratorial act. Lastly it is pointed out that at this stage accused cannot demand the court to evaluate the evidence placed by the prosecution to find out whether the prosecution witnesses are speaking truth or falsehood. At this stage the statement of the witnesses recorded under Section 161 are to be accepted as true. Evaluation is a process to be carried out after the trial. The above petition is filed on experimental basis. The materials produced by the CBI and the facts emerging there from, taken at face value, disclose the existence of all the ingredients constituting the alleged offences and there is sufficient ground for this court to proceed further for framing charge against the petitioner and the other accused.

26. The learned Prosecutor relied upon the following decisions:-

1. Scope of Discharge.

a) *Kurien v. State of Kerala (2007) KLT 36*

b) *Indu Jain v. State of Madhya Pradesh and Others (2009) 3 SCC (Cri) 996*

c) *Mauvin Godinho & Other v. State of Goa (2018 SC Cri 63)*

2. Conspiracy – Proof

a) *Easher Singh v. State of AP, AIR 2004 (SC) 3030*

b) *State of HP v. Krishnan Lal Pradhan, AIR 1987 SC 993.*

3. Scope of abetment.

a) *P. Nallammal v. State Rep. By Inspector of Police, AIR 1999 SC 2556.*

4. Criminal Misconduct.

a) *Dhaneshwar Narain Saxena v. The Delhi Administration, 1962 AIR 195.*

b) *State of U.P v. Bhaiya Lal Verma (Crl. Appeal No.285 of 2001) (SC)*

27. Legal Aspects:

Section 239 Cr.P.C deals with discharge. It says that upon considering the police report and the documents sent with it under Section 173 and making such examination, if any, of the accused, and after hearing both sides if the court considers the charge against the accused to be groundless he shall discharge the accused and record his reasons for doing. Section 240 deals with framing of charge. It says that upon the consideration mentioned above, the court is of the opinion that there is ground for presuming that the accused has committed an offence, shall frame in writing a charge against the accused and proceed further. Both the above sections are to be read together. A combined reading will make it clear that if the court comes to a conclusion that there are sufficient grounds for proceeding it may frame a charge under Section 240, if not, court will discharge the accused. Sufficiency of grounds for discharging the accused would depend upon the nature of the evidence recorded by the police or the documents produced before the court.

28. The scope and ambit of 'discharge' stands well settled by the pronouncements of the higher court. In **Vijayan P v. State of Kerala and another (2010 KHC 4058)**, Hon'ble Apex Court held as follows:- *"If two views are possible*

and one of them gives rise to suspicion only, as distinguished from grave suspicion, the Trial Judge will be empowered to discharge the accused and at this stage he is not to see whether the trial will end discharge the accused and at this stage he is not to see whether the trial will end in conviction or acquittal. Further, the words 'not sufficient ground for proceeding against the accused' clearly show that the Judge is not a mere Post Office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the Court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the Court, after the trial starts. At the stage of S. 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the Court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him. As discussed earlier, S.227 in the new Code confers special power on the Judge to discharge an accused at the threshold if upon consideration of the records and documents, he find that 'there is not sufficient ground' for proceeding against the accused. In other words, his consideration of the record and document at that stage is for the limited purpose of ascertaining whether or not there is sufficient ground for proceeding against the accused. If the Judge comes to a conclusion that there is sufficient ground to proceed, he will frame a charge under

S. 228, if not, he will discharge the accused. This provision was introduced in the Code to avoid wastage of public time which did not disclose a prima facie case and to save the accused from avoidable harassment and expenditure". Since the position stands well defined, I don't find it necessary to refer the other decisions cited by both sides on this aspect.

29. A1 and A2 are the public servants. They are alleged to have committed the offence punishable under Section 7 (obtaining bribe) and Section 13(1) (d) r/w 13(2) (committing the offence of criminal misconduct by corrupt or illegal means, obtaining for himself or for any other person any valuable thing or pecuniary advantage). The petitioner/4th accused is said to be the person who had given the bribe money to A1 and A2. Prosecution would say that the petitioner was a party to the conspiracy, in furtherance of that, the offence of criminal misconduct and illegal gratification was committed and in fact the petitioner has abetted the commission of the said offence by paying the bribe money, hence liable under Section 120 B of IPC and Section 12 of PC Act.

30. There can be no doubt that conspiracy ordinarily is hatched in secrecy hence it is almost impossible to get direct evidence to prove the same. The court for the purpose of arriving at a finding as to whether the said offence has been committed or not may take into consideration the circumstantial evidence. While however doing so, it must be born in mind that meeting of the mind is essential; mere knowledge or discussion would not be. It has been held by Hon'ble Supreme Court that *"to constitute a conspiracy, meeting of mind of two or more persons for doing an illegal act or an act by illegal means is the first and primary condition and*

it is not necessary that all the conspirators must know each and every detail of conspiracy. Neither it is necessary that every one of the conspirators takes active part in the commission of each and every conspiratorial acts. The agreement amongst the conspirators can be inferred by necessary implications. In most of the cases, the conspiracies are proved by the circumstantial evidence, as the conspiracy is seldom an open affair. The existence of conspiracy and its objects are usually deducted from the circumstances of the case and the conduct of the accused involved in the conspiracy. While appreciating the evidence of the conspiracy, it is incumbent on the Court to keep in mind the well known rule governing circumstantial evidence viz., each and every incriminating circumstance must be clearly established by reliable evidence and the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn, and no other hypothesis against the guilt is possible. The criminal conspiracy is an independent offence in Indian Penal Code. The unlawful agreement is sine quo non for constituting offence under Indian Penal Code and not an accomplishment. Conspiracy consists of the scheme or adjustment between two or more persons which may be express or implied or partly express and partly implied. Mere knowledge, even discussion, of the Plan would not per se constitute conspiracy. The offence of conspiracy shall continue til the termination of agreement.” (Reference: K.R.Purushothaman v. State of Kerala 2005 (12) SCC 631, Baldev Singh v. State of Punjab 2009 KHC 4660). The fundamentals stated in all the other decisions cited are the same, hence not repeated.

31. Coming to abetment, Our Hon'ble High Court in **Sekharan N.R. v. State of Kerala, 2015 KHC 3673** observed as follows:- *“When illegal gratification is paid the public servant will have two options. He can either accept it knowing that it is illegal gratification, in which case he will be liable to prosecution under the PC Act. The person who paid the amount also will be liable as abettor under Section 12 of the PC Act”*.

32. Hon'ble Apex Court in **Shri Ram v. State of U.P, (1975 KHC 708)** held that to constitute abetment, *“the abettor must be shown to have intentionally, aided the commission of the crime. It is not enough that an act on the part of the alleged abettor happens to facilitate the commission of the crime. Intentional aiding and therefore active complicity is the gist of the abetment”*.

33. In **Kamal Kumar Nanda v. State of Orissa (2017 KHC 5632)**, Hon'ble Orissa High Court held that *“Abetment under the Indian Penal Code involves active complicity o the part of the abettor at a point of time prior to or at the time of the actual commission of the offence, and it is of the essence of the crime of abetment that the abettor should substantially assist the principal culprit towards the commission of the offence. Nowhere concurrence in the criminal acts of another without such participation therein as helps to effect the criminal act or purpose is punishable under the Code.”*

34. Hon'ble Apex Court in **Shri Ram v. State of UP (1975 KHC 708)** held that *“In order to constitute abetment, the abettor must be shown to have “intentionally”, aided the commission of the crime. Mere proof that the crime charged could not have being committed without the interposition of the alleged*

abettor is not enough complaints with the requirement of Section 107."

35. The position of law regarding the confession made by a co-accused and that of the statement given by an accomplice, is to be addressed next. Confession of a co-accused is not a substantive evidence. It is a weak type of evidence. As per Section 30 of the Indian Evidence Act a confession made by a co-accused can be taken into consideration as against other persons only if both persons were tried jointly for same offence. As per Section 114(b), the court may presume that an accomplice is unworthy or credit, unless he is corroborated in material particulars. As per Section 133 an accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

36. The question, what would be its evidentiary value has been succinctly answered by the Hon'ble Apex Court in **Kashmira Singh v. State of M.P (1952 KHC 317)**, with the following words. *"The proper way to approach a case of this kind is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."*

37. Later in **Suresh Budharmal Kalani @ Pappu Kalani v. State of Maharashtra (1998 KHC 1188)**. Hon'ble Apex Court held that at the stage of framing charge the court is required to confine its attention to only those materials collected during investigation which can be legally translated into evidence and not upon further evidence (dehors those materials) that the prosecution may adduce in the trial, which would commence only after the charges are framed and accused denies the charges. That be so, the confession statement of co-accused cannot be taken into consideration for framing charge.

38. As regards requirement of corroboration of accomplices and approvers, the Hon'ble Apex Court in **Kashmira Singh's** case (supra) held that *“prudence will dictate the same rule of caution. But all these are only Rules of prudence. As far as law is concerned, a conviction can be based on the uncorroborated testimony of an accomplice provided the Judge has the Rule of Caution in mind and gives reasons why he things it would be safe in a given case to disregard it. It follows that the testimony of an accomplice can in law be used to corroborate another though it ought not to be so used save in exceptional circumstance and for reasons disclosed.”*

39. It means, the court can decide the question whether uncorroborated testimony of an accomplice/approver can be used to base conviction, only after taking evidence. That means the statement of approver/accomplice cannot be discarded for the purpose of framing charge.

40. Coming to criminal misconduct by the public servant Hon'ble Apex Court in **Dalpat Singh and Another v. State of Rajasthan (1969 KHC 645)** held

that “to bring home an offence under Section 5(1)(b) (under the old Act, Section 13(1)(d) is the corresponding section in the amended Act), it is not necessary to prove that the acts complained of were done by the appellants in the discharge of their official duties. It was explained that the words occurring in the penal sections “in the discharge of his duties” do not constitute an essential ingredient of the offence. The ingredients are (1) that the accused should be a public servant, (2) that he should use some correct or illegal means or otherwise abuse his position as a public servant; (3) that he should have obtained a valuable thing or pecuniary advantage, and (4) for himself or any other person. The above position has been reiterated in the subsequent decision of Hon'ble Apex Court in **State of UP v. Bhaiya Lal Verma (Crl.Appeal No.285 of 2001)**.

41. As far as the vicarious liability of Managing Directors of the company Hon'ble Apex Court in **Ravindranatha Bajpe v. Mangalore Special Economic Zone Ltd & others etc (Crl. Appeal No.1047 & 1048 of 2021)** held that for initiating criminal proceedings against them court has to record its satisfaction about a prima facie case against the said person and the role played by him in his respective capacity which is *sine qua non*. In other words an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, only if there is sufficient evidence of his active role coupled with criminal intent.

42. Another legal stand taken by the petitioner is that, amendment brought out to the PC Act, in re-defining the offences, are to be held retrospective and that the petitioner is entitled to get benefit out of it. The decision cited by the petitioner in

support, doesn't specifically deals with PC Act. Our Hon'ble High Court in **Ramesh K.R. and Others v. CBI and Another (2020 (4) KHC 220)** had made it clear that amendment to PC Act are only prospective and the accused charged under the unamended penal provisions cannot take benefit out of the amended provision. The position as clarified and settled by our Hon'ble High Court rule the field.

43. Now with a clear perception of the law on the point, I will survey the evidence collected by the prosecution for the limited purpose to find out they are sufficient to prima facie prove the case put forward against the petitioner. Here the petitioner had submitted an application for 03 Star classification of Hotel Soorya Galaxy, Feroke, Calicut being the Managing Partner of A3 Company which own the said hotel. Accordingly the committee empowered to award classification inspected the hotel on 29.09.2011. A1 was a member of the said committee. At the time of inspection petitioner was not present in the hotel but the CW17 Deepak CEO of Soorya group of hotels which takes into Hotel Soorya Galaxy, Feroke, Calicut also, was present. After inspection the committee made its recommendation for approval. What remains to be done was that, the recommendation of the committee is to be forwarded from the office of A1, to the Chairperson HRACC, and as per the guidelines, this is to be done within five working days and the Chairman has to give the final approval. Immediately after the inspection, A1 informed CW17 to ask the petitioner the Managing Director of the hotel to visit the office of A1. Subsequently A2 called CW17 and asked to pay bribe amount of ₹75,000/- together with gift and two bottles of liquor each to A1 and A2 for speeding up the issuance of 3 Star classification. CW17 passed over the information to the petitioner and as directed

by the petitioner CW17 collected ₹75,000/- from Hotel Soorya City, Palakkad, gifts (wrist watches) from Hotel Soorya Regency, Kavungal and liquor bottles from Hotel Fort Palace and thereafter gone to Ernakulam in car No.KL41-B.999 and handed it over to A2.

44. To prove its case, the prosecution cited 31 witnesses, relied upon 42 documents and three material objects. The witnesses cited by the prosecution can broadly be classified into 5 groups. The first consist of the official group, persons working with India tourism office and members of the inspection team. The second group consist of persons attached to Soorya group of Hotels. It includes the staff members and auditor. The third group consist of officials from BSNL for proving call detail records and the issuance of SIM. The fourth is the miscellaneous group which includes the shop owners from where wrist watches were purchased, official to prove the registration of the company, Bank officials, forensic expert etc. and the fifth group consist of the CBI officials. The documentary evidence includes those recover from the office of India tourism, official guidelines, and the documents recovered from Soorya group of hotels. One main document is a scribbling note seized from the possession of A2 during immediate surprise inspection by CBI officials from the office of India tourism at Wellington Island. The material objects are those seized during the surprise inspection. They include Titan Watches together with paper carry bags, liquor bottles and currency notes said to be the bribe amount.

45. The prosecution mainly rely upon the witness statements of the persons attached to Soorya group of Hotels and documents seized from the Soorya

group of Hotels, the call details obtained from BSNL and the material objects and scribbling notes seized from the possession of A2 during surprise inspection.

46. CW17 CEO Deepak Chandra had given a detailed 161 statement. It is stated that he was present at the time of inspection by the classification committee members. After inspection A1 had summoned the Managing Director to his office on the next day. Thereafter A2 telephoned CW17 and demanded bribe, gift and liquor bottles to speed up the issuance of 3 Star classification. As stated by CW17, his phone number is 9387640001. He further stated that all these information was passed over to the petitioner and his father Shri.V.M.Radhakrishnan and as directed by them, he collected money from Hotel Soorya City, Palakkad, wrist watches from Hotel Soorya Regency, Kavungal and liquor bottles from Hotel Fort Palace and handed it over to A2 by going to Wellington Island office of India tourism, in car.

47. CW5 is the Manager of Soorya City Palakkad. She had given statement that, as instructed by the petitioner and his father Shri.V.M.Radhakrishnan she paid the money to CEO Deepak Chandra. CW6 is the accountant of Hotel Soorya Regency, Kavungal. He had given statement that he had personally purchased Titan Watches and later handed it over to Deepak Chandra. He had identified the watches produced as material objects in this case. He had identified his signature in the vouchers and cashbook statement accounts of the hotel which carry the expense for purchasing the watches. CW8 is the Manager of Soorya Group of Hotels who was attached to Hotel Soorya Regency, Kavungal. He had given statement to the effect that the Titan watches were

purchased as per the direction of the Managing Director of the Hotel. CW19 is the chartered accountant and auditor of petitioner's business company since 1995. He had spoken about the balance sheet for the trading profit and loss account for the year ended 31.03.2012. According to him, the amounts withdrawn for the purpose of paying it to A1 and A2, were shown as suspense account towards CEO Deepak Chandra.

48. The documents seized from Soorya group of companies includes cashbook statement, vouchers, retail invoices, daily statement and payment vouchers (Document Nos.12 to 18). These document fully support the versions of the witnesses named above. The scribbling note (document No.11) specifically mentioned about the graft received from the hotel of A4.

49. Coming to the material objects, the Titan watches seized from the possession of A2 are the very same watches purchased under the instruction of the petitioner. CW16 the dealer who sold it, had spoken about it. The liquor bottles seized were also those handed over by CW17 as per the direction of the petitioner. CW4 is the driver of CW17. He had given statement regarding the travel made by CW17 from Palakkad to Ernakulam on 01.10.2011 and handing over of gift packets and other items in the office of India tourism situated at Wellington Island.

50. The petitioner would say that if we go by the prosecution version CW17 knowingly handed over bribe money and other gift items to A2. That means, on all aspects he is to be treated as an accused person. His statement to the police is confessional in nature. Therefore his statement is only to be treated as a confession statement of an accused. Even otherwise his status is that of an accomplice.

Therefore at this stage his statement cannot be looked into.

51. The said contentions is not sustainable. Prosecution doesn't have a case that CW17 has committed an offence. His statement is to the effect that he was just a carrier for the petitioner and he had done all the acts as directed by the petitioner. Prosecution stick on to this version. CW17 has not been arrayed as an accused. At this stage the court cannot point out any finger of accusation against CW17. In the post cognizance stage, only in the course of trial, by invoking Section 319 Cr.P.C, the court can add a new person as an accused. At this stage CW17 cannot even be treated as an accomplice. In **Chandran @ Manichan @ Manian v. State of Kerala [2011 (5) SCC 161**, Hon'ble Apex Court held that it is perfectly legal for the prosecution not to use a person as an accomplice but as a witness. Even otherwise there are other substantive evidence available to prove that the payment of bribe money, handing over of gifts and liquor bottles, were done as instructed by the petitioner.

52. There can be no doubt that a person who had intentionally paid the bribe amount will be liable as abettor under Section 12 of the PC Act. Petitioner would say that, even according to the prosecution bribe amount was paid under compulsion not for gaining any advantage since it is evident that even before the demand for bribe the committee had recommended 03 Star classification for the hotel owned by the petitioner, therefore it cannot be said that the petitioner intentionally instigated A1 and A2 to receive illegal gratification. The said contention cannot be accepted. There can be no doubt that to bring home an offence of criminal misconduct by the public servants, it is not necessary to prove that the acts

complained of were done by the public servants in discharge of their official duties. Therefore there can be criminal conspiracy to commit the said offence. Outsiders can also be a party in the said criminal conspiracy. [Reference: **P.Nallammal v. State represented by Inspector of Police (AIR 1999 SC 2556)**]. Here, the petitioner had not raised any complaint regarding the demand for illegal gratification made by A1 and A2. There is nothing to suggest that A1 and A2 received bribe money by extortion. In other words the payments were made by the petitioner under compulsion. On the other hand materials on record indicate that bribe money, gift items and liquor bottles were provided to the public servants by the petitioner expecting official favours from A1 and A2. Materials on record will further indicate that Soorya group of hotels (which includes the hotel owned by A4 and his father V.M.Radhakrishnan) used to pay bribe and shower favours in abundance on the public servants working in India tourism office. This is not a stray incident. This is clear from the evidence of CW17 and CW14. CW17 had stated to the investigating officer, that, prior to the date of inspection, in the first week of 2011, A2 contacted petitioner's father V.M.Radhakrishnan over telephone and told him that he wanted to visit Palakkad on 05.08.2011 and returned to Trivandrum on 06.08.2011. As directed by the petitioner's father CW17 sent a vehicle for picking A2 from Ernakulam on 05.08.2011. As directed by the petitioner's father CW17 arranged stay and food at the Fort Palace Hotel, Palakkad. As directed by the petitioner's father CW17 paid to 10,000/- to A2 during the above visit as demanded by A2. As directed by the petitioner's father CW17 had breakfast with A2 and also purchased an AC Train ticket in Amrutha Express to travel on 06.08.2011. CW14 is the

receptionist of Hotel Fort Palace, Palakkad. His statement fully support the version of CW17. CW14 handed over the computer print out of the hotel bill to the investigating officer. All these evidence collected by the prosecution will prima facie prove that the petitioner abetted the commission of the offence by the public servant under the PC Act.

53. Here prosecution was able to collect materials to point out the direct involvement of the petitioner in paying bribe to public servants. Petitioner was not arrayed as an accused merely as a representative of A3 company. The liability is both vicarious as well as personal.

54. As far as criminal conspiracy is concerned, even though the prosecution had not collected the call details of the mobile phones used by the petitioner and CW17, the call details of the mobile phones of A2 made available before the court together with the statements given by the officers of BSNL will prove that on the concerned dates A2 made telephone calls to the mobile number of CW17. There can be no dispute that, mostly conspiracies are hatched in secrecy and it is very difficult to get direct evidence to prove the same. Inferences are to be drawn from circumstantial evidence. Upon evaluating the materials produced by the prosecution and after considering the probabilities of the case, it appears to me that there exist sufficient ground against the petitioner and other accused for framing a charge. It is needless to say that the materials at the hands of the prosecution are sufficient or not are matters for trial. At this stage it cannot be claimed that there is no sufficient grounds for proceeding against the petitioner and discharge is the only remedy. Further, whether the trial will end in conviction or acquittal is immaterial. To

sum the discussions I find that the petition is not entitled to get a discharge. He has to face trial. For all these reasons the petition deserves a dismissal. The above points are answered against the petitioner.

In the result, petition stands dismissed.

Dictated to the Confidential Asst., typewritten by her directly to computer system, corrected and pronounced by me in open court on this the 25th day of October, 2021.

Sd/-

Anil K. Bhaskar
Special Judge (SPE/CBI)-I

Appendix:-Nil

Id/-

Special Judge (SPE/CBI)-I
(By Order)

//True Copy//

Sd/-

Sheristadar