GASG010003612022

IN THE COURT OF THE SPECIAL JUDGE,

SOUTH GOA, AT MARGAO.

(Before Shri Irshad Agha, Special Judge)

SPECIAL CASE (SPCC) NO.2 OF 2022.

S T A T E,
(through CBI/ACB/Goa). ... Complainant.

V e r s u s

1. Mr. Mohan Kapse,
   son of Mr. Keshav Kapse,
   r/o. 15/302, Hill View Society,
   Megathane, Borivali (E),
   Mumbai.

2. Mr. Charudatta Ozarkar,
   son of Mr. Madhukar Ozarkar,
   Occupation: Businessman,
   r/o CPWD Quarters No.9,
   Type 2 Quarter, Mukundnagar,
   Pune.

3. Ms. Nagma Shaikh,
   daughter of Mr. Javed Shaikh (Late),

r/o House No.551,
Dr. Gama Pinto Road,
Panaji, Goa.

4. Ms. Saira Shaikh,
daughter of Mr. Hussain F. Shaikh,
occupation: Housewife,
r/o House No.7/140,
Bhatlem, Near Sati Temple,
Panaji, Goa.
Currently in UK with spouse
Mr. Imran Shaikh. ... Accused

Learned P.P. Shri Noushad P.M. for the State present at the time of arguments and orders.

Learned Advocate Shri H. G. Dharmadhikar for the accused no.1 present at the time of arguments and Learned Advocate Shri J. Caleb, holding for Learned Advocate Shri H. G. Dharmadhikar, present at the time of orders.

Learned Advocate Shri B. Retawade for the accused no. 2 present at the time of arguments and Learned Advocate Shri Z. Dias, holding for Learned Advocate Shri B. Retawade, present at the time of orders.

Learned Advocate Shri.V. P. Thali for the accused nos. 3 and 4 present at the time of arguments and present through Video Conferencing at the time of orders.

O R D E R

(On Exhibits 44, 51, 42 and 43 as well on framing of Charges)

(Delivered on this the 10th day of the month of November of the year 2023)

This order shall dispose of applications for discharge filed by accused nos.1, 2, 3 and 4 at Exhibits 44, 51, 42 and 43, respectively.

2. The charge against the accused persons is that during the period from 2017 to 2019, accused no.1 Mohan Kapse entered into a criminal conspiracy with accused no.2 Mr. Charudatta Ozarkar to cheat the Customs Department and to obtain undue advantage and in pursuance of the above conspiracy, accused no.1, without following the tender formalities, dishonestly issued 114 work orders for purchase of office furniture, electronic and electrical items, partition/renovation works in different sections of Customs House Goa in the name of different firms. Out of the 114 work orders, 80 work orders were issued to four fictitious firms, namely M/s Apna Bazaar, M/s Stylo, M/s Manoj Enterprises and M/s Mahalaxmi Trading Company, floated by

accused no.2 Shri Charudatta Madhukar Ozarkar, amounting to about ₹1.22 crores.

3. It is further alleged that accused no.1, being Assistant Commissioner of Customs, Goa, in pursuance of the conspiracy with the accused no.2, dishonestly obtained fake quotations at exorbitant rates for the above mentioned work orders from the non-existing firms of accused no.2 and processed them without following the prescribed guidelines and thereafter, issued the work orders. It is also alleged that accused no.1 split the main work into piecemeal in violation of the laid down tender procedures for execution of the work and issued the work orders dishonestly to the fictitious firms of accused no.2, who quoted exorbitant rates for the said works. Accused no.1 dishonestly made payments for the works to fictitious firms of accused no.2 without ensuring completion of works.

4. Accused no.2 had employed accused no.4 Ms. Saira Shaikh, resident of Bhatlem, Panaji Goa, to work as a

saleswoman in his shop M/s Stylo in July 2013. Her job in the shop was to manage sales, accounts, tagging, wrapping and folding of clothes. He had also employed accused no.3 Ms. Nagma Shaikh, who is sister of accused no.4, in the same shop as a saleswoman, who worked in the said shop till November, 2018.

5. Accused no.2 requested accused no.4 to open a firm in her name as accused no.2 was not from Goa. She agreed and on 14.07.2017, a current account in the name of M/s Creative Enterprises was opened at Oriental Bank of Commerce, Panaji, by using KYC documents of accused no.4. The proof of address of the firm was shown as a rental premises taken by accused no.4 from her mother-in-law Mrs. Nurbanu Bi. The said agreement was forged as accused no.2 signed in the place of mother-in-law of accused no.4, who is paraplegic and cannot write. Stamp of one Advocate from Panaji as well as his signatures were forged by accused no.2. Accused no.2 forged trade licence showing that it was issued to M/s Creative

Enterprises, when in reality, the trade licence was issued to another business entity M/s Sean C & F Agency. The mobile number, which was actually registered in the name of Mr. Imran Shaikh, the spouse of accused no.4, was used by accused no.2.

6. Accused nos.1 to 4 are all charged for the offences punishable under Section 120-B read with Sections 420, 468 and 471 of I.P.C., Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 and Section 7 of the Prevention of Corruption Act, 1988 (as amended in 2018). The Investigating Agency proposed to make accused no.3 as an approver.

7. When the matter was posted for hearing arguments before charge, all the accused persons filed separate applications for discharge. Exhibit 44 is an application for discharge filed by accused no.1 under Section 239 of Cr.P.C. It is his case that he has been falsely implicated and that he is innocent. According to accused no.1, he exercised due diligence by following the

procedure prescribed under the General Financial Rules, 2017 and has taken approval from his senior, i.e. the Commissioner of Customs before finalizing the work; that all the supplies from whom purchase orders were placed had bank accounts and therefore, there was bonafide and right belief that the parties are genuine. There is no any proof or demand of bribe or acceptance of bribe and the charge is based on hypothetical assumptions. Section 13 of the Prevention of Corruption Act is invoked without satisfying essential ingredients of Section 13(1)(d) of the Prevention of Corruption Act. The FIR was registered on 07.01.2020 and the Prevention of Corruption Act was amended in the year 2018. Offences under Section 120-B read with Sections 420, 468 and 471 of I.P.C. are invoked without satisfying the essential ingredients. Hence, prayed to discharge accused no.1.

8. Exhibit 51 is an application for discharge filed by accused no.2 under Section 239 of Cr.P.C. It is his case that FIR is registered without any material on record. There is delay in

registering FIR because the acts were allegedly committed between the years 2017 to 2019. The firm of accused no.2 does not come under the category of ton over which is required to file GST. Accused no.2 did not submit the GST ID with the quotations. However, unfortunately and surprisingly, M/s Stylo, M/s. Apna Bazaar, M/s Mahalaxmi Trading and M/s Manoj Enterprises found that there are false GST IDs mentioned by unknown sources. The accused no.2 has been falsely trapped in the said offence. Accused no.2 suffers from various health issues like kidney stones, diabetes, BP and so on. There is no material evidence on record to frame charge against the accused no.2. The delay in registering the FIR is not explained. Preliminary inquiry was not conducted before registering FIR. Investigation was not conducted in impartial manner. Hence, prayed to discharge accused no.2.

9. Exhibit 42 is an application for discharge filed by accused no.3 under Section 239 of Cr.P.C. It is her case that she has been falsely implicated in the present case. There is no prima

facie material to frame charge against accused no.3. The charges levelled against accused no.3 are groundless and therefore, accused no.3 is entitled to be discharged.

10. Exhibit 43 is an application for discharge filed by accused no.4 under Section 239 of Cr.P.C. It is her case that she has been falsely implicated in the present case. There is no prima facie material to frame charge against accused no.4. The charges levelled against accused no.4 are groundless and therefore, accused no.4 is entitled to be discharged.

11. The prosecution filed replies at Exhibits 45, 46 and 48 stating that there is material to frame charge against the accused persons.

12. Heard arguments. Learned Advocate Shri G. H. Dharmadikari appearing for accused no.1 submitted as under:

1. No any sanction is obtained under Section 196 of Cr.P.C. to prosecute accused persons for the

offences punishable under the Indian Penal Code.

2. Sanction is required whenever an accused performs any act under his official capacity.
3. No cognizance could have been taken by this Court in the absence of any sanction.
4. No offence can be made out under Sections 7 and 13(1)(d) of the Prevention of Corruption Act in the absence of undue advantage.

13. Besides oral arguments, Learned Advocate Shri Dharmadhikari also filed written arguments at Exhibit 49, brief synopsis in rejoinder at Exhibit 63 and recapitulating list of arguments filed on behalf of accused no.1 at Exhibit 66. He also relied upon the judgments in the cases of ***Anil Kumar Bose vs. State of Bihar {(1974) 4 SCC 616}; Samir Sahay alias Sameer Sahay vs. State of Uttar Pradesh and another {(2018) 14 SCC 233}; Neeraj Dutta vs. State (Government of NCT of Delhi) {2022 SCC OnLine SC 1724}; Jamil Akhtar vs. State of West***

Bengal {(2001) SCC OnLine Calcutta 128}; State of Madhya Pradesh vs. Sheetla Sahai and others {(2009) 8 SCC 617}; Adalat Prasad vs. Rooplal Jindal and others {(2004) 7 SCC 338}; A.K. Ganju and others vs. CBI {CDJ 2013 DHC 1724}; ORYX Fisheries Pvt. Ltd. vs. Union of India {2011 (266) E.L.T. 422 SC}; M/s Firestone Tyre and Rubber Co. of India Pvt. Ltd. vs. Workmen Employed represented by Firestone Tyre Employees {CDJ 1981 SC 035}; Vishwanath @ Vishu Praniraj Gopi Bhat vs. State of Karnataka {ILR 2020 KAR 3798}; Roopesh vs. State of Kerala {2019 SCC Online Ker 3009}; Dr. Kafeel vs. State of U.P. {2021 SCC Online All 565}; Ratan Babulal Lath vs. State of Karnataka { 2021 SCC OnLine SC 875}; Jagan M. Seshadri vs. State of T.N. {(2002) 9 SCC 639}; Radha Pisharassiar Amma vs. State of Kerala {(2007) 13 SCC 410}; Alpic Finance Ltd. vs. P. Sadasivan & anr. {(2001) 3 SCC 513}; Nand Ram Shrilal Meena vs. CBI {SCC OnLine GUJ}; C Chenga Reddy vs. State of A.P. {(1996) 10 SCC 193}; Rajani Dabar vs. State of MP; {ILR 2018 M.P. 253 (DB)}; Abdulla Mohammed Pagarkar vs. State {(1980) 3 SCC 110};

Jatan Kumar Garg vs. Satayanarayan Tiwari & ors. {ILR (2017) MP 467}; Union of India vs. Prafulla Kumar Samal {(1979) 3 SCC 4 and State of MP vs. Mohanlal Soni {(2000) 6 SCC 338}.

14. Learned Advocate Shri B. Retawade appearing for accused no.2 filed written arguments at Exhibit 56.

15. Learned Advocate Shri V. P. Thali appearing for accused nos. 3 and 4 filed brief synopsis at Exhibit 52 and brief written arguments in rejoinder at Exhibit 71 and his submissions are as under:

1. The point is whether sanction was required against accused no.1 for the offences punishable under the Indian Penal Code. If sanction is required, entire proceedings against accused no.1 as well as accused nos. 3 and 4 vitiates.
2. The sanction issued for the offences punishable under the Prevention of Corruption Act cannot be considered

as sanction for the offences punishable under the Indian Penal Code.

3. Offences under the Prevention of Corruption Act will not apply because accused nos.3 and 4 are not Government servants.
4. The FIR was lodged only against accused nos.1 and 2.
5. Amounts were not credited in the account of accused no.4.
6. Ingredients of forgery under Section 465 of the Indian Penal Code are not made out.
7. Issue of process for the offences under the Prevention of Corruption Act is without any basis and bad in law because cognizance of the offences was taken on 29.04.2022 and the sanction order was obtained on 09.05.2022 and therefore, the cognizance is bad.
8. He placed reliance on the judgments in the cases of ***Shreekantiah Ramayya Munipalli and another vs. State of Bombay {AIR 1955 SC 287}; Amrik Singh vs. State of Pepsu {AIR 1955 SC 309}; Pukhraj vs. State***

of Rajasthan and another {(1973) 2 SCC 701}; Matajog Dobey vs. H.C. Bhari {(1955) 2 SCR 925}; B. Shah and others vs. M.S. Kochar {(1979) 4 SCC 177}; K. Kalimuthu vs. State by DSP {(2005) 4 SCC 512}; Capt. Percy Meher Master vs. State of Maharashtra { 2017 SCC Online Bom 8605}; Sushil Sethi and another vs. State of Arunachal Pradesh and others {(2020) 3 SCC 240}; Vijay Kumar Ghai and others vs. State of West Bengal and others {(2022) 7 SCC 124}; Hira Lal Hari Lal Bhagwati vs. CBI, New Delhi {(2003) 5 SCC. 257}; Rekha Jain vs. State of Karnataka and another {2022 SCC OnLine SC 585}; Mohammed Ibrahim and others vs. State of Bihar and another {(2009) 8 SCC 751}; Sheila Sebastian vs. R. Jawaharaj and another {(2018) 7 SCC 581}; Vasantkumar and others vs. State of Maharashtra {2022 SCC OnLine Bom 712}; Bilal Hajar alias Abdul Hameed vs. State represented by Inspector of Police {(2019) 17 SCC 451}; Indra Devi

vs. State of Rajasthan and another {(2021) 8 SCC 768}; D. Devaraja vs. Owais Sabeer Hussain {(2020) 7 S.C.C. 695}; N.K. Ganguly vs. Central Bureau of Investigation, New Delhi {(2016) 2 SCC 143} and Shri Atchut Mucund Alornekar and others vs. Central Bureau of Investigation, Goa {Criminal Application Main No.78 of 2012}.

16. Learned P.P. Shri Noushad P.M., appearing for the prosecution, submitted as under:

(i) There is enough material to show that the accused no.1 alongwith other accused persons committed the alleged illegal act. The accused nos.3 and 4 helped accused no.2 in doing all the work. The accused no.4 produced forged trading license while opening an account. The accused no.3 has put some forged signatures on some quotations. The accused no.2 has used accused nos.3 and 4 in doing the alleged illegal act.

(ii) Section 196 of Cr.P.C. gives the types of cases for which sanction is required. Sanction is required only against the offences falling under Chapter VI of the Indian Penal Code and not otherwise. The offences are interlinked.

(iii) Sanction is required against public servant when the alleged offence committed is an act committed while performing official duty.

(iv) The sanction produced by the prosecution is sanction for the offences committed under the Prevention of Corruption Act as well as for the offences committed under the Indian Penal Code.

(v) Sanction can be produced subsequently. In the present case, the sanction which is produced after cognizance of the offences under the Prevention of Corruption Act taken by this Court. If any sanction is produced at a later stage, it should be considered.

(vi) The period of offence from the year 2017 to the year 2019 covered the applicability of the old Act and therefore charges have been correctly invoked against the accused persons.

17. Besides the oral arguments, Learned P.P. has filed brief synopsis on behalf of the prosecution at Exh.58 and relied upon the judgments in the cases of ***Dr. Arun Kumar Chowdhary vs. State of U.P. {43692 of 2012 dated 24.01.2013; Neera Yadav vs. CBI {Cri. Revision No.2282 of 2004}; Om Prakash Kapoor vs. CBI Delhi {Criminal Revision No.1432 of 2019 dated 07.12.2019}; State of NCT Delhi vs. Shiv Charan Bansal & Others {2019 (4) Crimes 298}; CBI vs Mukesh Praveen Chandra {2009(16) SCC 429}; Hemchand vs. State of Jharkhand {2008 (5) SCC 113}; Om Wati vs. State of Delhi {2001 SCC Cri. 685}; K. Raghuram Reddy and others vs. State of Telengana {2018(3) ALT (Crl) 98}; Pirthi Singh Chauhan vs. State of Hariyana {2013(28) RCR (Crl) 68}; OnkarNath Mishra & Others vs. State of Delhi {2008 (2) SCC 561}; Sanghi Brothers (Indore) Pvt. Ltd. vs. Sanjay Chaudhary &***

Others {2009 Cri.L.J. 338} and ***R. Venkatakrishnan vs. CBI {2009 (11) SCC 737}***.

18. The following points arise for my determination alongwith the findings given below:

Sr. No.	*POINTS*	*FINDINGS*
1.	Whether there is prima facie material to frame charge for the offences punishable under Sections 13(2) read with 13(1)(d) and Section 7 of the Prevention of Corruption Act?	In the affirmative
2.	Whether there is material to frame charge for the offences punishable under Section 120-B of the Indian Penal Code?	In the affirmative
3.	Whether the accused persons are entitled for discharge for want of sanction under the Prevention of Corruption Act?	In the negative
4.	Whether the accused persons are entitled for discharge for the offences punishable under Sections 420, 468 and 471 of I.P.C. for want of sanction under the Indian Penal Code?	In the affirmative

R E A S O N S

19. ***POINT NO.1***: There is prima facie material produced on record showing that while accused no.1 was working as Assistant Commissioner of Customs Goa during the period from 2017 to 2019, 114 work orders were issued for purchase of office furniture, electronic and electrical items, for partition/renovation works in different sections of Customs House in Goa in the name of different firms. The material brought on record also shows that out of all the 114 work orders, around 80 work orders were issued in favour of for fictitious firms namely M/s Apna Bazaar, M/s Stylo, M/s Manoj Enterprises and M/s Mahalaxmi trading Company. All these fictitious firms were floated by the accused no.2. Totally an amount of ₹1.22 crores worth work was given to the above four firms.

20. The accused no.2 dishonestly obtained fake quotations at exorbitant rates from the above four non existing firms. These

quotations were processed by accused no.1 without following the prescribed guidelines and thereafter, work orders were issued. The accused no.1 had powers to deal with quotations up to a particular limit. Whenever the work was more than the prescribed limit, the accused no.1 would split the main work into parts and obtain quotations in piecemeal so as to fall within the ambit of his limitations up to which he could entertain quotations.

21. Whenever any work has to be performed by calling professionals, the Officer incharge has to follow certain guidelines, rules and regulations. Every such Officer is required to follow the General Financial Rules (GFR-2017). As per Rule 154 prevailing at the relevant time, goods up to the value of ₹25,000/- could be purchased directly without obtaining any quotation and on the basis of a Certificate issued by the competent authority as regards the quality, technical specification, reliability of the supplier and reasonableness of the price of the articles.

22. As per Rule 155, goods of value between ₹25,000/- to ₹2.5 lakhs can be purchased on the recommendation of a local purchase committee of three members of the appropriate level constituted by the Head of the Department. The Committee's task is to conduct a market survey to ascertain the reasonableness of the rate, quality and technical specifications. The Committee also had to identify the supplier and make their recommendation.

23. As per Rule 157, the total requirement should not be split up into smaller portions to eliminate the necessity of obtaining sanction from a higher authority associated with the overall value of such goods.

24. As per Rule 158, for goods not covered under the provisions of Rules 154 and 155, all other goods could be purchased via issue of tenders, such as advertised tender enquiry, limited tender enquiry, two stage bidding, single tender enquiry or electronic reverse auction as applicable.

25. The Commissioner of Customs Goa is designated as the Head of the Department of Commissionerate of Customs and has full financial powers to accord expenditure sanction in respect of (a) furniture and fixtures (purchase and repairs), (b) hire of office furniture, fans, heaters, coolers, cloaks, call bells, etc, (c) stores and (d) all office equipment as per one Circular dated 15.09.2011.

26. The accused no.1 was posted as Assistant Commissioner (Preventive) and Officer incharge of Custodian Section from 15.06.2017 to 08.11.2019 and he functioned as the senior most member of the purchase committee at Customs Goa. The accused no.2 opened fake accounts in the name of fictitious firms and after the money was credited in the said accounts, the said amount was misappropriated by accused no.2 alongwith accused nos.1, 3 and 4. Accused no.4 helped accused no.2 in opening fake accounts in the name of her relations and thereby, helped accused nos.1 and 2 in the illegal acts. Accused no.3, as per the chargesheet, also helped the other accused persons while

doing the illegal acts. However, I would not discuss much on the role of accused no.3 because at the end of the chargesheet, the prosecution has themselves prayed that accused no.3 be declared as approver. In other words, even if there is material against accused no.3, charge need not be framed against the accused no.3.

27. As per the procedure followed in the Customs Department for procurement of goods and works, firstly the decision to purchase goods/services was taken by the Commissioner, followed by the survey taken by accused no.1. In the present case, accused no.1 was assisted by accused no.2. Sometimes, the survey was to be conducted in the presence of the Commissioner of Customs. After completion of survey, the accused no.2 was to hand over three quotations. These quotations were to be collected by the purchase committee in closed covers. The envelopes containing quotations were to be opened in the presence of all the three members of the purchase committee and these envelopes are to be signed by all the

members of the purchase committee. However, this procedure was not followed by accused no.1. The quotation envelopes were casually opened and put in a file in an open state. The other purchase committee members were forced and pressurized to sign on these quotations at a later time.

28. The quotations were never submitted with a view to ensure competition, but were instead simply used to make up the numbers as the purchase committee is required to consider a minimum of three quotations before making its recommendation as to the most viable option of the three. The invoice alongwith sanction order had to be submitted to the Accounts Section, who then proceed to make a contingency bill in line with the relevant provisions of GFR and Government Accounting Rules (GAR). If the bill amount exceeded ₹1,00,000/-, the bill would be sent by the Accounts Section to the Pay and Accounts Officer for a pre-check, to ensure that all the paper work relating to the sanction, etc was valid and in order. Once the file returned after

pre-check, the file would be routed through the DDO and would go in for final payment.

29. The material placed on record shows that accused nos.2 and 4 claimed and received payment of ₹17,36,507/- and ₹4,47,140/- from Customs Goa in favour of their firms on the pretext that the said amount would be deposited with the GST Department. However, neither accused no.2 nor accused no.4 is found registered with the GST Department. Thus, the material shows that the Customs Goa was cheated by the accused persons.

30. In some of the cases, it is found that out of the quotations submitted in respect of the particular work, two of the quotations were received from the firms which were owned by the accused no.2 himself. In some cases, the quotations were submitted in the name of fake firms. The accused nos.3 and 4, who worked for accused no.2, have put forged signatures on some of the quotations.

31. Accused nos.3 and 4 are sisters. Accused no.4 has used her minor sister accused no.3 in doing the illegal acts. Records also show that in some cases, works were fully not executed and still full payment was made by accused no.1. The records also show that the rates and quotations were exorbitant. The evaluation by CPWD altogether revealed that there is a wrongful loss of ₹25,95,689/- to the Customs Department and wrongful gain to accused nos.2 and 4. The details of the works, which were carried out in piecemeal manner in order to overcome the limitation of the powers, are given in detail in the chargesheet supported by documents. There is enough material to frame charges against accused persons except accused no.3 under the Prevention of Corruption Act.

32. Section 13(2) of the Prevention of Corruption Act is a penalty clause. As per section 13(2), any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than four years

but which may extend to ten years and shall also be liable to fine.

33. The Prevention of Corruption Act was amended w.e.f. 26.07.2018 and offence under Section 13(1)(d) was deleted. As per Section 13(1)(d), any public servant is said to commit the offence of criminal misconduct if he, by correct or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or (ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or (iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest, such a person can be penalized under Section 13(2). Although Section 13(1) starts with the word public servant, it also includes any benefit or advantage that he may create or give to any other person. The beneficiary in this Act is not only the public servant, but it can be some other person in a disproportionate asset case. A person may misappropriate money for his interest and for the interest of

his family members and in case the family members are aware that the money so brought by the accused no.1 are from corrupt practices, the said family member could also be liable.

34. In the present case under consideration, the accused nos.2 and 4 and to a minimum extent, accused no.3 helped accused no.1 in the act of misconduct and therefore, they all become part of the criminal act of misconduct. Since the prosecution has prayed for declaring accused no.3 as approver, no charge can be framed against her.

35. Offence under Section 7 is an offence committed by a public servant. When any public servant obtains or accepts or attempts to obtain from any person, an undue advantage, with the intention to perform or cause performance of public duty improperly or dishonestly or to forbear or cause forbearance to perform such duty either by himself or by another public servant, could be liable under Prevention of Corruption Act. Such a public servant shall also be liable when he obtains or

accepts or attempts to obtain, an undue advantage from any person as a reward for the improper or dishonest performance of a public duty or for forbearing to perform such duty either by himself or another public servant shall be liable under this Act. Any public servant, who does such an act in anticipation of, or in consequences of accepting of undue advantage from any person, would be liable under this Act. Any such public servant shall be punished with imprisonment which shall not be less than three years but which may extend to seven years and shall also be liable for fine.

36. In the case of ***Neeraj Dutta vs. State (Govt. of N.C.T. of Delhi*** *(supra)*, accused was charged for demanding and accepting bribe amount. Accused was convicted and conviction was upheld by the Hon'ble High Court. The Division Bench of the Hon'ble Supreme Court found that decision of Three Judge Bench of the Hon'ble Supreme Court, in the cases of ***B. Jayaraj vs. State of Andhra Pradesh {(2014) 13 SCC 55} and P. Satyanarayana Murthy vs. District Inspector of Police, State of***

Andhra Pradesh {(2015) 10 SCC 152} were in conflict with an earlier Three Judge Bench decision in the case of ***M. Narsinga Rao vs. State of Andhra Pradesh {(2001) 1 SCC 691}***. The point was referred to a larger bench. The point was "whether in the absence of evidence of complainant/direct or primary evidence of demand of illegal gratification, is it not permissible to draw inferential deduction of culpability/guilt of a public servant under Sections 7 and Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 based on other evidence adduced by the prosecution." The Constitution Bench of the Hon'ble Supreme Court held that in the absence of the complainant's testimony, it is permissible to draw inferential deduction of culpability/guilt of a public servant under Sections 7 and Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 based on other evidence adduced by the prosecution. Reference was returned back to decide accordingly. Thereafter, the Division Bench of the Hon'ble Supreme Court, by judgment and order dated 17.03.2023, found that there is no material and set aside conviction of the accused.

The said decision was on merits of the case. However, at this stage, there is prima facie material to frame charge for the offences under the Prevention of Corruption Act. In ***State of M.P. vs. Mohanlal Soni*** *(supra),* it is held that at the stage of framing charge, only prima facie material has to be considered.

37. In the present case under consideration, there is enough material to frame charge against accused nos.1, 2 and 4 for the offences punishable under Section 13(2) read with 13(1)(d) and Section 7 of the Prevention of Corruption Act.

38. For the reasons mentioned above, point no.1 is answered in the affirmative.

39. ***POINT NO. 2***: The accused persons have also been charged for the offence under Section 120-B of the Indian Penal Code. The offence of criminal conspiracy is defined under Section 120-A. When two or more persons agree to do, or cause to be done an illegal act, or an act which is not illegal by illegal

means, such an agreement is designated as criminal conspiracy. The proviso to section 120-A states that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such an agreement in pursuance thereof. It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object. The ingredients of the offence are that there should be an agreement between the persons who are alleged to conspire and the said agreement should be for doing of an illegal act, or for doing by illegal means an act which by itself may not be illegal. In other words, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both.

40. In the case of ***Bilal Hajar alias Abdul Hameed vs. State, represented by Inspector of Police*** (supra), it is held that in order to invoke offence of criminal conspiracy, there should be material on record to show that there was meeting of minds

between two or more persons to commit an illegal act or an act by illegal means. It is not necessary that all the conspirators must know each and every detail of conspiracy nor necessary to prove their active role in such meeting since presence and participation in meeting is sufficient. In the present case, there is material to show that there was meeting of minds.

41. The offence of criminal conspiracy is complete as soon as the agreement to commit the offence is naive. It is immaterial whether the substantive offence pursuant to such conspiracy is committed or not. ***Rajeev Gandhi Assassination case*** gave principles governing the law of conspiracy. It held that the offence of criminal conspiracy is committed when two or more persons have agreed to do an illegal act. Acts subsequent to achieving the object may tend to prove that the accused was part of the conspiracy. Such conspiracy is hatched in a private or in secrecy. A charge of criminal conspiracy may prejudice the accused because it forces them into a joint trial. It is partnership in crime. The responsibility of the conspirator extends not only

to what is done by any of the conspirators/persons to the original agreement, but also to co-lateral acts incidental to and growing out of the original purpose.

42. Section 13(2) of the Prevention of Corruption Act is merely a punishment clause. The Hon'ble Supreme Court, in the case of ***Union of India vs. Prafulla Kumar Samal and another (supra),*** upheld discharge order passed by the Special Court and held that charges cannot be framed in the absence of prima facie material on record. However, in the present case, there is enough material on record and hence, charge has to be framed.

43. Therefore, there is material to frame charge against the accused nos.1, 2 and 4 for the offence punishable under Section 120-B of the Indian Penal Code.

44. For the reasons mentioned above, point no.2 is answered in the affirmative.

45. ***POINT NO.3***: The main contention in the application for discharge by the accused persons is that the proceedings were vitiated because there is no sanction obtained by the prosecution for the offences punishable under the Prevention of Corruption Act at the time when the cognizance of the offences under the Prevention of Corruption Act was taken by this Court. The charge sheet was presented on 29.12.2021 for the offences punishable under Section 13(2) read with Section 13(1)(d) and Section 7 of the Prevention of Corruption Act as well as Sections 120-B, 420, 468 and 471 of Indian Penal Code. Cognizance was taken for the offences punishable under Section 13(2) read with Section 13(1)(d) and Section 7 of the Prevention of Corruption Act on 29.04.2022 and summons were issued to the accused persons returnable on 01.06.2022. At the time of filing of the chargesheet, no any sanction was obtained by the prosecution.

46. Admittedly, the sanction was obtained after filing of the chargesheet and after taking cognizance of the offence. The

sanction is dated 05.05.2022 and the same was produced before the Court vide application dated 01.06.2022 at Exh.10. That means, on the first date of hearing, the sanction was placed on record. The sanction order is in detail issued under Section 19(1)(a) of the Prevention of Corruption Act. Although the sanction is obtained after filing of the chargesheet and after taking cognizance of the offences punishable under the Prevention of Corruption Act, the said sanction can be considered. Therefore, the application for discharge filed by the accused persons cannot be allowed on the ground that there was no any sanction order under section 19(1)(a) as on the date of filing of the chargesheet and at the time of taking cognizance by the Court.

47. The Hon'ble Supreme Court, in the case of ***Suresh vs. Pandey Ajay Bhushan {(1998)1 SCC 205}***, held that sanction can be considered at any stage of the proceedings. The Hon'ble High of Karnataka, in the case of ***Vishwanath @ Vishu Phaniraj Gopi Bhat and another vs. The State of Karnataka,***

through Gokarna Police Station *(supra)* and the Hon'ble High Court of Kerala in the case of ***Roopesh vs. State of Kerala*** (supra) and the Hon'ble High Court of Allahabad in the case of ***Dr. Kafeel vs. State of U.P.*** and another *(supra),* held that prior sanction is required before taking cognizance. This point cannot be raised before this same court because cognizance is already taken by me. However, the facts further show that prosecution submitted sanction on the first date of hearing itself.

48. In the case of ***K. Kalimuthu vs. State by DSP*** *(supra*), the Hon'ble Supreme Court has held that point of sanction can be raised at any stage of the proceedings. In ***Jaswant Singh vs. State of Punjab*** ***(supra),*** cognizance of the offence taken by the Special Court in the absence of sanction was not disturbed by the Hon'ble Supreme Court. In present case, sanction is now produced on record.

49. For the reasons mentioned above, point no.3 is answered in the negative .

50. ***POINT NO. 4*** : The accused persons are also charged for the offences punishable under Sections 420, 468 and 471 of Indian Penal Code. The case of the accused persons is that the sanction relied by the prosecution is under the Prevention of Corruption Act and not under the provisions of Criminal Procedure Code. Section 197 of the Criminal Procedure Code deals with Prosecution of Judges and Public Servants.

51. Section 197 of Criminal Procedure Code reads as under:

> ***197. Prosecution of Judges and public servants.-***
>
> (1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction [save as

otherwise provided in the Lokpal and Lokayuktas Act, 2013]-

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:

Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" was substituted.]

[Explanation.—For the removal of doubts, it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under section 166-A, section166-B, section 354, Section 354-A, section 354-B, Section 354-C, Section 354-D, Section 370, Section 375, Section 376, [Section 376-A, Section 376-AB, Section 376-C, Section 376-D, Section 376-DA, Section 376-DB] or Section 509 of the Indian Penal Code (45 of 1860)].

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of

the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

[(3-A) Notwithstanding anything contained in sub-section (3), no Court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(3-B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State

Government or any cognizance taken by a Court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the Court to take cognizance thereon.

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be

conducted, and may specify the Court before which the trial is to be held."

52. Section 197 of Cr. P. C. affords protection to a Judge or a Magistrate or a public servant not removable from his office save by or with the sanction of the government against any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty. If he commits an offence not connected with is official duty, he has no privilege. It is prohibition imposed by the State from taking cognizance. The accused after appearing before the Court, by an application, indicating that Section 197(1) is attracted, merely assists the Court to rectify its error where jurisdiction has been wrongly exercised. Sanction can be considered at any stage of the proceedings. The question always is not whether the public servant was in service or on duty or not but whether the alleged offences have been committed by them 'while acting or purporting to act in discharge of their official duty'. The principle of immunity protects all acts which the public servant

has to perform in the exercise of the functions of the Government. The purpose for which they are preformed protects these acts from criminal prosecution. However there is an exception. Where a criminal act is performed under the colour of authority, but which in reality, is for the public servants own pleasure or benefit, then such acts shall not be protected under the doctrine of State Immunity. Primary object is to protect public officers who have acted in discharge of their duties or purported to act in discharge of such duties.

53. In the cases of ***B. Saha and others vs. M. S. Kochar (supra), Pukhraj vs. State of Rajasthan and another (supra), K. Kalimuthu vs. State by DSP (supra), N. K. Ganguly vs. CBI (supra)***, the Hon'ble Supreme Court has held that the question with regard to sanction under Section 197 of Cr.P.C. can be raised at any stage of the proceedings. Further, in considering the question whether or not sanction for prosecution was required, it is not necessary for the Court to confine itself to the allegations in the complaint and it can take into account all the

material on record at the time when the question is raised and falls for consideration.

54. The difference between Section 197 of Cr.P.C. and Section 19 of the Prevention of Corruption Act is that sanction for prosecution of a public servant for offences under the Indian Penal Code is required under Section 197 of the Code and the same can be given by the Central or State Government. But, sanction under Section 19 of the Prevention of Corruption Act stands on a different footing and the same can be granted also by the authorities specified in Section 19.

55. In ***Anil Kumar Bose vs. State of Bihar*** (supra), fictitious bills were allegedly prepared by a public servant. The accused was acquitted of the offence punishable under section 420 of I.P.C. since mens rea, which is an important ingredient of Section 420 of I.P.C., was found missing.

56. In ***Samir Sahay alias Sameer Sahay vs. State of U.P. and another*** (supra), accused was discharged of the offence punishable under Section 420 of I.P.C. as the Hon'ble Supreme Court found that inducement is not intentional. The Hon'ble Supreme Court held that inducement under Section 420 of I.P.C. must be fraudulent and dishonest which depends upon the intention of the accused at the time of inducement.

57. In the case of ***Radha Pisharassiar Amma vs. State of Kerala*** *(supra)* the Hon'ble Supreme Court acquitted the accused of the offences under Prevention of Corruption Act since there was no evidence brought on record of offences punishable under the Indian Penal Code. Same is on the merits of the case and hence cannot be considered now at the stage of framing charge.

58. The prosecution relied upon the judgment in the case of ***Smt. Neera Yadav vs. CBI*** (supra) to say that once sanction is

obtained for the offences under the Prevention of Corruption Act, no further sanction is required under the Criminal Procedure Code, but in the present case, the sanction relied by the prosecution do not make reference to the offences under the Indian Penal Code.

59. In the present case under discussion, admittedly sanction is obtained only under Section 19 of the Prevention of Corruption Act. There is no any sanction obtained under Section 197 of Cr.P.C. As discussed earlier, the sanction produced and relied by the prosecution does not make mention of Section 197 of Cr.P.C. nor it makes any reference to the offences under the Indian Penal Code.

60. For the reasons mentioned above, point no.4 is answered in the affirmative.

61. I, therefore, pass the following order:

O R D E R

The applications for discharge at Exhibits 44, 51 and 43 filed by accused nos.1, 2 and 4 are partly allowed.

The accused nos.1, 2 and 4 are discharged of the offences punishable under Sections 420, 468 and 471 of I.P.C.

Charge to be framed against accused nos. 1, 2 and 4 for the offences punishable under Section 13(2) read with Section 13(1)(d) and Section 7 of the Prevention of Corruption Act, read with Section 120-B of the Indian Penal Code.

The application for discharge at Exhibit 42 filed by accused no. 3 is hereby allowed.

The accused no. 3 stands discharged of the offences punishable under Section 13(2) read with Section 13(1)(d) and Section 7 of the Prevention of Corruption Act and Sections 120-B, 420 , 468 and 471 of the Indian Penal Code.

Bail bond and surety furnished by accused no. 3 stands discharged and released after the appeal period is over.

Margao.

Dated: 10.11.2023

Irshad Agha
10/11/2023

(Irshad Agha)
Special Judge,
South Goa
Margao.

*Sf.