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Reserved on: December 19th, 2008

Date of Decision: February 13 , 2009

Criminal Revision Petition No. 930 of 2006

Shri Dharambir

..... Petitioner
Through: Mr. Siddharth Luthra, Sr. Advocate
with Mr. Abhijat and Mr. Sunil
Kumar, Advocates.

Versus

Central Bureau of
Investigation

Through: Respondent
Mr. Ashiesh Kumar, Advocate
Mr. R.M. Tewari, Advocate

AND

Criminal Revision Petition No. 6 of 2007

Shri K.M. Johri

Through: Petitioner
Mr. Atul Kumar, Advocate.

Versus

The State & Anr.

..... Respondents
Through: Mr. Ashiesh Kumar, Advocate
Mr. R.M. Tewari, Advocate

AND

Criminal Revision Petition No.891 of 2006

Shri M.K. Sharma

Through: Petitioner
Mr. Mukesh Anand with Mr.
Shailesh Tiwari, Advocates.

Versus

State through CBI

..... Respondent
Through: Mr. Ashiesh Kumar, Advocate
Mr. R.M.Tewari, Advocate

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

J U D G M E N T

MANMOHAN, J

1. The present three criminal revision petitions have been filed under Sections 397, 401 and 482 of the Criminal Procedure Code, 1973 (hereinafter referred to as 'Cr.P.C.') seeking quashing of the order framing Charges dated 23rd September, 2006 passed by Mr. G.P. Mittal, learned Special Judge, CBI, Delhi. Since the impugned order is common to all the three revision petitions which arise out of one charge sheet, all the three petitions are being disposed of by a common order.

2. The details of the Charges mentioned in the Charge Sheet filed by the respondent is reproduced hereinbelow for ready reference:-

“This case was registered on the basis of source information. The allegation made in the FIR is that Sh. Dharamvir Khattar entered into a criminal conspiracy with S/Sh. S.K. Mittal and P.L. Garg, both JEs of DDA and other unknown DDA officials and in furtherance of the said conspiracy attempted to cheat and cause pecuniary loss to Gov. exchequer by using the premises of Bhairon Mandir Samiti and Hari Chand Prakash Wanti Trust as hotel as against the agreed religious purposes and the said DDA officials facilitated the same. Investigation has revealed that on 17.01.1986, an area of 600 sq. meters was allotted to Bhairon Mandir Samiti for religious purposes, through Sh. Dharamvir Khattar at Plot No. 1 near Kalindi College, East Patel Nagar Institutional Area, Prasad Nagar, New Delhi. The said allotment for religious purposes was apparently made on the basis of false declarations by Sh. Dharamvir Khattar and even the building plan was got sanctioned on the basis of false declarations in the form of proposed building plan. The following construction upto second floor was falsely proposed

as neither the construction nor the use of the allotted land/plot was done as per the aforesaid declarations:-

- 1) Basement for storage purposes.*
- 2) Ground floor having 3 rooms i.e. one Account Room, one Manager's Room, one Store, one Kitchen, one Sitting Room, 7 toilets, lift and staircase.*
- 3) Mezzanine floor having 4 store rooms and staircase.*
- 4) First floor having one library room, one dispensary, one reading room, one Doctor's/waiting room, one yoga room each for ladies and gents, 4 bathrooms, 3 toilets and one store.*
- 5) The second floor having one prayer hall, 3 store rooms, one meditation room each for ladies and gents, 2 toilets, one pantry and one lift.*

Investigation has revealed that the construction was got carried out by Sh. Dharamvir Khattar in blatant violation of the aforesaid approved plan. On 08.07.1988 Sh. Dharamvir Khattar applied to DDA for issue of completion certificate.

The inspection of the premises was referred/ marked to Sh. K.M. Johri, JE, Building Branch, DDA, Vikas Sadan, New Delhi as Prasad Nagar area was under his jurisdiction. As JE (Building), he was required to inspect and correctly submit a report about the site regarding unauthorised construction on the land allotted by the DDA. However, Sh. K.M. Johri entered into criminal conspiracy with Sh. Dharamvir Khattar and in pursuance thereof inspected the premises of Bhairon Mandir Samiti and submitted dishonestly a false NOC report on 16.08.1988 to the effect that the building had been constructed upto second floor only i.e. as per sanctioned building plan. Investigation revealed that during the relevant period the said building was unauthorizedly constructed upto 4th floor on Plot No. 1, Prasad Nagar and thus Sh. K.M. Johri dishonestly allowed Sh. Dharamvir Khattar to utilize the unauthorised construction in the premises of Bhairon Mandir Samiti, unhindered. On the basis of said false inspection report, the completion/ occupancy certificate was issued by DDA.

It has also come to light during investigation that from 1989 onwards, Sh. Dharamvir Khattar started misusing the aforesaid unauthorizedly constructed premises as a restaurant named 'Atithi'. Investigation has revealed that during 1992- April, 1993 Delhi Fire Service and MCD during their inspection found that the aforesaid building was named as "Atithi Guest House" and not "Bhairon Mandir Samiti". The Delhi Fire Service also found that the premises consisted of 4 floors with 8 Guest Rooms all very well furnished. A restaurant, reception office, Kitchen was also situated in the ground floor. The premises was named as "Atithi Guest House" and not "Bhairon Mandir Samiti".

Investigation has also revealed that Sh. S. Phogat, JE also inspected the site on 17.08.1993 and reported that a hotel in the name of 'Baseri' was running on Plot No. 1, Prasad Nagar, New Delhi allotted to Bhairon Mandir Samiti. The inspection of the said building was not allowed and as observed from outside

a basement, ground floor and 4 floors were existing at that time. Investigation further revealed that in violation of sanctioned building plan, Sh. Dharamvir Khattar constructed the said building upto 4th floor including basement and store and a toilet on terrace floor. The set back were also covered unauthorisedly. Even in the year 1997, the misuse of the premises and unauthorised construction continued unhindered due to complicity of Sh. Dharamvir Khattar with Sh. M.K. Sharma, JE as revealed during investigation. It transpired that as required, on reference of DDA vigilance, Sh. M.K. Sharma being JE, Institutional Land (having jurisdiction over Prasad Nagar area), DDA, Vikas Sadan, New Delhi gave dishonestly false report on 01.05.1997 that there was no misuse of the said premises and again on 09.06.1998 on another reference from DDA, Vigilance said M.K. Sharma was required to inspect and correctly submit a report about the alleged misuse of the aforesaid land allotted by DDA in Prasad Nagar area as he was posed as JE, Institutional Land Branch, DDA, Vikas Sadan, New Delhi. However, Sh. M.K. Sharma dishonestly suggested in his inspection reports that the said premises was not being misused. However, on 11.06.1998, the CVO, DDA alongwith other officials of DDA inspected the premises of Bhairon Mandir Samiti and found that in fact a Hotel having 35 rooms with facility of AC, TV was being run by Sh. Dharamvir Khattar at the above site/ building.

It has also found during investigation that in the year 1999 Sh. Dharamvir Khattar applied in the office of DCP(Lic) for grant of license under Entertainment Regulation Act, under the grab of "Atithi Dharmshala". In that application he admitted in his own hand that 8 guests rooms exists on Ist, second and third floor and total floor area utilized for the guest house was 934.50 sq. mtrs. Whereas the approved area was 599.181 sq. mtrs. and the said building was to be constructed upto second floor only as per the sanctioned building plan. Even while the lease cancellation order in respect of the aforesaid premises was issued by the DDA, after inspection by CVO, DDA on 11.06.1998, the premises continued to be misused in the year 2000-03. During investigation, searches were conducted at the office of Bhairon Mandir Samiti, Plot No. 1, Prasad Nagar Institutional Area, East Patel Nagar, New Delhi in March, 2003 in connection with another case i.e. RC AC-3/2003-A-0002 against Sh. Dharamvir Khattar and during searches one bill book for the period 01.04.2002 to 26.02.2003 and photocopy of current visitor book was seized which revealed the booking details by travel agency. During 2002-03, a travel agency by name and style "Supreme Universal International", Bangalore and "M/s City Heart Travel, Old Golf Compound, Delhi were arranging accommodation for tourists at the premises which was known as BMS (Bharion Mandir Samiti) Hotel. A number of tourists had stayed at BMS Hotel at 1, Prasad Nagar Institutional Area, East Patel Nagar, New Delhi during the year 2002-03. M/s. Supreme Universal International, Bangalore had

issued a bank draft in favour of BMS Hotel towards the payment of stay of tourists arranged by them and the said demand draft was deposited in the A/c No. 7264 at Canara Bank, Pahar Ganj standing in the name of Sh. Kamal Kumar, S/o Sh. Dharmvir Khattar. Sh. HC Sharma, GM Bharion Mandir Samiti being in conspiracy with Dharamvir Khattar also intentionally facilitated misuse of the premises for commercial purposes. He had also made correspondence with regard to stay of tourists at the said BMS Hotel. The brochure of BMS Hotel shows that photographs of four storied hotel with interior restaurant, corridor, parking house, banquet / conference hall, air-conditioned rooms, reception, lobby, etc. printed on it with detail of facilities available in the hotel. It also revealed that the persons who stayed in the said premises were not involved in any religious activities nor they observed / saw any religious activities in the said hotel. It is also revealed that the said hotel was used exclusively for commercial purpose and no religious activities of any kind ever took place in the said premises. In fact there was also a bar-cum restaurant in the hotel. A number of foreign tourists used to stay in the said hotel and the hotel had a banquet hall where the birth day / wedding functions were frequently done by the nearby residents.

Investigation has also established that Sh. Dharamvir Khattar, not only got the aforesaid plot allotted under the false cover of religious purposes thereafter also made unauthorized construction on the plot and used the premises commercially but also did not pay DDA the ground rent which was about Rs. 2,67,810/0. Thus, Sh. Dharamvir Khattar in criminal conspiracy with Sh. K.M. Johri, JE (B) and Sh. M.K. Sharma, JE (IL) both of DDA dishonestly usurped the DDA land but did not put it to the intended welfare purposes and put the DDA to a wrongful loss of about Rs. 2,67,810/-.

During investigation it was also revealed that various other DDA officials committed gross mis-conduct but their acts of omission / commission do not disclose criminal intent, therefore, the DDA has been moved to intimate RDA for major penalty proceedings against them for their lapses.

The sanction for prosecution in respect of the said Sh. K.M. Johri and Sh. M.K. Sharma is enclosed in original.

The aforesaid facts and circumstances disclose commission of offences by S/Sh. Dharamvir Khattar, H.C. Shama, M.K. Sharma and K.M. Johri U/s 120-B, r/w 420 IPC and Section 13(2) r/w 13(1)(d) of PC Act, 1988 and substantive offences U/s 420 IPC and Section 13(2) r/w 13(1)(d) of PC Act, 1988.

It is, therefore, prayed that Sh. Dharamvir Khattar, Sh. M.K. Sharma, Sh. K.M. Johri and Sh. H.C. Sharma may kindly be summoned and tried in accordance with law."

3. Mr. Siddharth Luthra, Learned Senior Counsel appearing for Mr. Dharamvir Khattar contended that the acts and omissions complained of in

the present charge sheet are prior to coming into force of the Prevention of Corruption Act, 1988 (hereinafter referred to as 'P.C. Act, 1988') on 9th September, 1988. Consequently, he submitted that the P.C. Act, 1988 has no application and that there cannot be a Charge of conspiracy to commit offences under the said Act.

4. Mr. Luthra further submitted that there was lack of any material to frame Charges as in the present case neither the statements made under Section 161 CrP.C. nor documents filed with the charge sheet satisfy at the inception the ingredients of Sections 415/420 of the Indian Penal Code (hereinafter referred to as 'IPC') as admittedly application for allotment was made in 1984, the plot was allotted in 1985 and the alleged unauthorized construction/misuse commenced in late 1980s or early 1990s. He further contended that there was no document or other material on record which would even remotely suggest that any unlawful consideration was paid either by society or the petitioner. He stated that even a bald allegation to this effect was not present in the charge sheet. According to Mr. Luthra for substantiating the allegations against the petitioner, prosecution was required to produce material with the charge sheet which would show existence of mens rea of the petitioner at the time when the Society initially applied for allotment of plot in the year 1984. According to him, development of mens rea subsequently cannot indicate that the petitioner had an intention to cheat at the time of making its application to DDA. In this connection he referred to the judgment of the Apex Court in *Anil Mahajan v. Bhor Industries Ltd. & Another*, reported in (2005) 10 SCC 228, wherein the Hon'ble Supreme Court observed as under:-

“..... A distinction has to be kept in mind between mere breach of contract and the offence of cheating. It depends upon the intention of the accused at the time of inducement. The subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent, dishonest intention is shown at the beginning of the transaction.”

5. Mr. Luthra, submitted that by merely making unauthorized construction, misusing the premises and not paying ground rent, the Petitioner cannot be charged under IPC or P.C. Act, 1988. According to him, these alleged contraventions are actionable under the Delhi Municipal Corporation Act or the Delhi Development Authority Act or under the provisions of the Lease Deed but not either under IPC or P.C. Act, 1988.

6. He further stated that in a suit filed by Bhaironji Mandir Society challenging the cancellation of the Lease, the trial court had passed a decree in favour of the Society declaring the cancellation of Lease by Delhi Development Authority (hereinafter referred to as ‘DDA’) as illegal. He further stated that even the appeal filed by DDA had been subsequently dismissed.

7. He further stated that the petitioner was a separate legal entity from the Society which had been allotted land. He submitted that there was no concept of fastening of vicarious liability under the IPC or the P.C. Act, 1988. In this context, he referred to and relied upon the judgment of the Hon’ble Supreme Court in *Maksud Saiyed v. State of Gujarat and others*, reported in (2008) 5 SCC 668.

8. Mr. Luthra stated that the charge sheet alleges that Shri Dharambir Khattar while committing the aforesaid acts, acted in criminal conspiracy

with Shri K.M. Johri [JE(B)] and Shri M.K. Sharma, JE(IL). According to him in the present instance, no witness has even remotely suggested that there was a meeting of minds between Mr. Khattar and the other co-accused. He submitted that mere allegation made by the I.O. in the chargesheet that the petitioner acted in criminal conspiracy with the public servant co-accused is not enough. He submitted that the chargesheet is only the opinion of the I.O. The law requires more than this, even at the stage of framing of Charge.

9. Mr. Luthra further submitted that without any material on a mere bald allegation or mere suspicion or speculation, Charges could not have been framed against the petitioner. In this connection, he referred to and relied upon the following judgments:-

(A) In ***Soma Chakravarty v. State through CBI***, reported in (2007) 5 **SCC 403**, the Hon'ble Supreme Court has observed as under:-

“.....Charge may although be directed to be framed when there exists a strong suspicion but it is also trite that the court must come to a prima facie finding that there exist some materials therefor. Suspicion cannot alone, without anything more, it is trite, from the basis therefor or held to be sufficient for framing charge.”

(B) In ***State of U.P. v. Dr. Sanjay Singh & Another***, reported in 1994 **Supp (2) SCC 707**, the Hon'ble Supreme Court in paragraph 19 has observed as under:-

“19. When we scrutinize the entire material placed on record, even if unrebutted or totally accepted, we are of the view that they do not make out a case for conviction and the mere suspicion of motive cannot serve as a sufficient ground for framing the charges in the absence of any material, prima facie showing that the particular motive has passed into action and that the accused is connected with that action in question.”

10. Mr. Atul Kumar, learned counsel appearing for Mr. K.M. Johri reiterated that P.C. Act, 1988 was not applicable to the present case because even as per the prosecution, the alleged offence is stated to have been committed by Mr. K.M. Johri on 16th August, 1988 whereas P.C. Act, 1988 came into force on 9th September, 1988. In this connection he referred to and relied upon a judgment of this Court in ***Sukhwant Singh AC. v. Union of India***, reported in ***1997 (1) All India Criminal Law Reporter 460***, wherein it has been held, “*From the above discussion, it is clear that so far as the first charge is concerned the authority did not apply its mind. The petitioner could not have been convicted or sentenced for this charge under Section 7 of the Prevention of Corruption Act, 1988 because the offence alleged to have been committed during March, 1986 i.e. prior to coming in force of the Act of 1988.*” Therefore, according to him neither the P.C. Act, 1988 nor Section 13(1)(d) of the said Act was applicable to Mr. K.M. Johri.

11. He submitted that there is a distinction between Section 5(1) of the old Prevention & Corruption Act, 1947 (hereinafter referred to as ‘ old P.C. Act, 1947’) and Section 13(1) of the P.C. Act, 1988. According to him, Section 13(1)(d) of the P.C. Act, 1988 is more wide and liberal as it has contemplated various alternatives whereas Section 5(1)(d) of the old Act is a far more strict provision and further there are no presumptions under the old P.C. Act, 1947.

12. He further submitted that there was no material/evidence on the trial court record to show that the accused had received any pecuniary advantage or valuable thing for himself or for any other accused person and, therefore, he cannot be held guilty of offences under Section 5(1)(d) of the old P.C. Act, 1947 or Section 13(1)(d) of the P.C. Act, 1988. He submitted that to

frame Charges under Section 5(1)(d) of the old P.C. Act, 1947, it is mandatory to show that the accused had obtained any pecuniary advantage or valuable thing for himself or for any other person. According to him, pecuniary advantage or valuable thing connotes gratification or bribe and further that pecuniary advantage or valuable security should be in reward for giving of favour. According to him, gratification cannot be over stretched to mean any benefit derived by the beneficiary. He submitted that “the other person” mentioned in Section 5(1)(d) of the old P.C. Act, 1947 did not include the beneficiary of favour. According to him, use of word “other” excludes the public servant and the beneficiary. Further according to Mr. Atul Kumar, the important ingredient is obtaining by the accused either for himself or for any other person. He emphasized that obtaining has to be from beneficiary of the favour and, therefore, the beneficiary cannot be the “other person” under Section 5(1)(d) of the old P.C. Act, 1947. According to him the demand is a mandatory ingredient to attract Section 5(1)(d) of old P.C. Act, 1947. In this context, he relied upon the following judgments:-

(A) **C.K. Damodaran Nair Vs. Govt of India** reported in **(1997)9 SCC 477 page 52 :-**

“12. The position will, however, be different so far as an offence under Section 5(1)(d) read with Section 5(2) of the Act is concerned. For such an offence prosecution has to prove that the accused “obtained” the valuable thing or pecuniary advantage by corrupt or illegal means or by otherwise abusing his position as a public servant and that too without the aid of the statutory presumption under Section 4(1) of the Act as it is available only in respect of offences under Section 5(1)(a) and (b) -- and not under Section 5(1)(c), (d) or (e) of the Act. “Obtain” means to secure or gain (something) as the result of request or effort (Shorter Oxford Dictionary). In case of obtainment the initiative vests in the person who receives and in that context a demand or request from him will be a primary requisite for an offence under Section 5(1)(d) of the Act

unlike an offence under Section 161 IPC, which, as noticed above, can be, established by proof of either “acceptance” or “obtainment”.

(B) **Trilok Chand Jain v. State of Delhi**, reported in **1977 Criminal Law**

Journal 254, wherein it has been held as under:-

“.....that the gratification must have been received by the accused as “a motive or reward” for committing any act or omission in connection with his official functions. It must be shown that there was an understanding that the bribe was given in consideration of some official act or conduct. It is true that in law the incapacity of the government servant to show any favour or render any service in connection with his official duties does not necessarily take the case out of the mischief of these penal provisions. Nevertheless, it is an important factor bearing on the question as to whether the accused had received the gratification as a motive or reward for doing or forbearing to do any official act or for showing any favour or disfavour in the exercise of his official functions. This question as to whether the government servant receiving the money had the requisite incriminatory motive is one of fact. Could it be reasonably said in the circumstances of the instant case that the money was handed over to the appellant or received by him as a motive or reward such as mentioned in Section 161 Penal Code?”

(C) **S.P. Yellappa Gowder v. State of Karnataka** reported in **1977**

Criminal Law Journal (NOC) 154 (KANT), wherein it has been observed as under:-

“(B) Prevention of Corruption Act (1947), S.5(1)(d) – “Abusing his position as public servant” – Accused (Excise Superintendent and Inspector) staging raid on godown of tobacco merchant – No evidence regarding demand and acceptance of illegal gratification – No offence.”

(D) **C. Chenga Reddy & others v. State of A.P.**, reported in **(1996) 10**

SCC 193, wherein the Hon’ble Supreme Court has observed as under:-

“On a careful consideration of the material on the record, we are of the opinion that though the prosecution

has established that the appellants have committed not only codal violations but also irregularities by ignoring various circulars and departmental orders issued from time to time in the matter of allotment of work of jungle clearance on nomination basis and have committed departmental lapse yet, none of the circumstances relied upon by the prosecution are of any conclusive nature and all the circumstances put together do not lead to the irresistible conclusion that the said circumstances are compatible only with the hypothesis of the guilt of the appellant and wholly incompatible with their innocence. In Abdulla Mohammed Pagarkar v. State (Union Territory of Goa, Daman and Diu), under somewhat similar circumstances this Court opined that mere disregard of relevant provisions of the Financial Code as well as ordinary norms of procedural behavior of government officials and contractors, without conclusively establishing, beyond a reasonable doubt, the guilt of the officials and contractors concerned, may give rise to a strong suspicion but that cannot be held to establish the guilt of the accused. The established circumstances in this case also do not establish criminality of the appellants beyond the realm of suspicion and, in our opinion, the approach of the trial court and the High Court to the requirements of proof in relation to a criminal charge was not proper. That because of the actions of the appellants in breach of codal provisions, instructions and procedural safeguards, the State may have suffered financially, particularly by allotment of work on nomination basis without inviting tenders, but those acts of omission and commission by themselves do not establish the commission of criminal offences alleged against them. We may reiterate that once the report, Ext. P 11, is ruled out of consideration as inadmissible, then it is not safe to rely on the mere impressions of the witnesses to hold the appellants guilty of the offences alleged against them.....

“.....There have been some irregularities committed in the matter of allotment of work to the appellant or breach of codal provisions, circulars and departmental instructions, for preparation of estimates etc. and those irregularities give rise to a strong suspicion in regard to the bonafides of the officials of the department and their link with the appellant, but that suspicion cannot be a substitute of proof. The courts below appear to have drawn inferences by placing the burden of proving innocence on the appellant which is an impermissible course. In our opinion none of the circumstances relied upon by the prosecution against the appellant can be said to have been proved satisfactorily and all those circumstances, which are not of any clinching nature,

even if held to be proved do not complete the chain of evidence so complete as to lead to an irresistible conclusion consistent only with the hypothesis of the guilt of the appellant and wholly inconsistent with his innocence. The prosecution has not established the case against the appellant beyond a reasonable doubt. This appeal, therefore, succeeds and is allowed.....”

(E) **G.N. Mathur v. C.B.I.**, reported in **2006(2) JCC 1081**, it has been observed as under:-

“.....Insofar as the question of Section 13(1)(d) of the Prevention of Corruption Act, 1988 is concerned, the same clearly contemplates the deriving of some valuable thing or pecuniary advantage by the public servant either for himself or for someone else. In the present case, no valuable thing or pecuniary advantage has been derived so as to bring the conduct of the petitioner under section 13(1)(d) of the said Act. This is so even as per the facts of the prosecution case. Therefore, there is no question of framing any charge under Section 13(1)(d) and consequently, Section 13(2) would also not be applicable.....”

(F) **Naveen Chand Johri & Another v. State**, reported in **1991 JCC 442**, it has been observed as under:-

“.....By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.”

13. Mr. Mukesh Anand, learned counsel appearing for Mr. M.K. Sharma submitted that his client had been charged by way of a presumption and that too on the basis of two reports dated 1st May, 1997 and 9th June, 1998 prepared by his clients, but which were subsequently verified by higher officers like Assistant Engineer and Director (Land) and accordingly a show cause notice dated 17th June, 1998 was issued to Bhairon Mandir Samiti on

the above reports. He stated that there was no material on record to indicate that the petitioner had obtained any pecuniary advantage or valuable security by abusing his position.

14. He further submitted that an inference of presumption had been drawn against Mr. Sharma by the trial court only on the basis of the role of another co-accused Mr. K.M. Johri. In this connection, he relied upon paragraphs 19,20 and 21 of the impugned order which are reproduced hereinbelow for ready reference:-

“19. Of Course, the prosecution has not placed any direct evidence on record which could show that accused K M Johri had drawn any valuable thing or pecuniary advantage for himself or for any other person but from the conduct of the accused an inference of criminal misconduct can be drawn as this report was made by K M Johri so that the unauthorized construction may not come to the notice of the DDA and the building could be illegally used by accused Dharamvir Khattar. The words “by abusing his position” would mean that the public servants does not act as a prudent man and discards all the normal and statutory rules and is prepared to accommodate the third party which may cause loss to the Government. In Krishna Govind Patil Vs. State of Maharashtra, AIR 1973, SC 1388, allottees of Government Waste lands had agreed to pay the price of the land as also the price of the trees standing thereon. Assistant Gram Sewak, who was one of the accused, was found to be responsible for wrong counting of the trees and illegal cutting of excess trees, on allotted land as also on the Govt. land. It was held by the Hon’ble Supreme Court that the Act of the accused constituted misconduct punishable U/s 5 (1) (d) and Section 5 (2) of the PC Act. For these reasons I am of the view that there are grounds for presuming that accused K M Johri has committed an offence punishable U/s 13(2) read with Section 13(1)(d) of the P C Act and there are grounds for presuming that accused Dharamvir Khattar and K M Johri have committed an offence U/s 120 B IPC read with Section 13(2) and 13(1)(d) of the P C Act.

20. Now I turn to the case as against accused M K Sharma. As per the allegations of prosecution he had

made false report with regard to the existence of unauthorized construction and misuse of the premises on 1.5.97 and 9.6.98. Shri Anupam Sharma, learned Counsel for the accused has taken me through two reports made by the accused and has urged that there is nothing false in these reports.

21. I have carefully gone through the two reports. In the report dated 1.5.97 accused M K Sharma has stated that the building has been constructed up to top floor with basement and mezzanine floor. I have already observed above that there was no mezzanine floor. Moreover, he has not given the number of floors constructed to show that it was an unauthorized construction. The information withheld by accused M K Sharma was very material and vital. Similarly, in his report dated 9.6.98, accused M K Sharma made a mention of obtaining of occupancy certificate, rather he enclosed a copy of the occupancy certificate, with his report which was sufficient to show that as per occupancy certificate there was construction of the basement, ground floor, first floor, second floor and mezzanine floor. As against this, there was construction of basement, ground floor, first, second, third and fourth floor. In view of my discussion herein above in the case of accused K M Johri an inference of criminal misconduct can be drawn against accused M K Sharma also. Thus, I am of the view that there are grounds for presuming that accused M K Sharma has committed an offence U/s 13(2) read with Section 13(1)(d) of the P C Act and there are grounds for presuming that accused Dharamvir Khattar and M K Sharma have committed offences punishable U/s 120 B IPC read with section 13(2) and 13(1) (d) of P C Act.....”

15. Mr. Mukesh Anand referred to and relied upon the following judgments :-

A) ***K.R. Purushothaman v. State of Kerala***, reported in (2005) 12 SCC 631, wherein the Hon’ble Supreme Court has observed as under:-

“13. 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 till the termination of agreement.

14. The suspicion cannot take the place of legal proof and prosecution would be required to prove each and every circumstance in the chain of circumstances so as to complete the chain. It is true that in most of the cases, it is not possible to prove the agreement between the conspirators by direct evidence but the same can be inferred from the circumstances giving rise to conclusive or irresistible inference of an agreement between two or more persons to commit an offence.....

20. The accused-appellant was convicted under Sections 13(1)(c) and (d) of the Prevention of Corruption Act, 1988. To constitute an offence under Clause (c) of Section 13(1) of the Act, it is necessary for the prosecution to prove that the accused has dishonestly or fraudulently misappropriated any property entrusted to him or under his control as a public servant or allows any other person to do so or converts that property for his own use. The entrustment of the property or the control of the property is a necessary ingredient of Section 13(1)(c). On the findings arrived at by the High Court, it is obvious that the property was neither entrusted nor was under the control of the accused-appellant and thus the accused-appellant could not have been convicted under the Section.

21. To, attract the provisions of Section 13(1)(d) of the Prevention of Corruption Act, public servant should obtain for himself or for any other person any valuable thing or pecuniary advantage by corrupt or illegal means or by abusing his position as a public servant. Therefore, for convicting a person under the provisions of Section 13(1) (d) of the Prevention of Corruption Act 1988, there must be evidence on record that the accused has obtained for himself or for any other person, any valuable thing or pecuniary advantage by corrupt or illegal means or by abusing his position as a public servant obtained for himself, or for any person, or obtain for any person, any valuable thing, or pecuniary advantage without any public Interest. What we find in the present case is that there is no evidence on record to prove these facts that the accused-appellant had obtained for himself or for any other person any valuable thing or pecuniary advantage. We may clarify that the charge of conspiracy being not proved under Section 120B I.P.C, the accused appellant could not be held responsible for the act done by A-3. The prosecution has failed to prove that he has obtained for himself or for any other person any valuable thing or pecuniary advantage, Similarly, we do not find any evidence on record to convict accused-appellant under Sections 403, 477-A I.P.C.”

(B) **Shri Sukh Ram v. CBI**, reported in **2001 (1) JCC (Delhi) 113**, wherein it has been observed as under:-

“13. Learned counsel for the parties have taken me through the entire record of the case. It is an accepted principle that once the tenders are accepted by a competent authority, changes can only be brought about in accordance with contract, therefore, the Price Negotiation Committee (PNC) could review the price in terms of the contract only. Any digression therefrom was contrary to accepted lawful norms of commercial transaction. Once a Department of the Government chooses to enter the market by way of tenders, it cannot arrogate to itself the powers of re-evaluating the entire tender without cancelling the original one. Smt. Runu Ghosh’s dissent note brings out clear illegalities that were being committed by the Price Negotiation Committee (PNC) and, therefore, being a member of the Committee had full right to air her opinion. Her dissenting note is clear and cannot be taken to be an expression of causing wrongful gain to any particular party. Besides, she was only one of the members of the decision making process and could very well be overruled by superior authorities....

16. *It is submitted by Mr. Dutt, learned counsel for the CBI that it is not for us to take into consideration what price was earlier fixed and reasons behind it, but we are only to Judge the aspect of loss suffered by the exchequer when it could have been saved. This, to my mind, is not a correct approach when dealing with commercial venture. Every time a Government loses in a commercial venture, does not ipso facto means that all those who contributed to the decision are guilty of violation of the Prevention of Corruption Act. What is necessary is to show that there is mens rea to cause the wrongful gain or loss by acts of omission or commission that would violate the provisions of Prevention of Corruption Act. Similarly, to show a loss is not sufficient to attract the provisions of the Act. At the cost of reputation price had already been fixed when tenders were finalized. The prosecution does not find any fault with that, but wants to say that the new PNC was wiser than the earlier one. This, to my mind, is hardly sufficient to hold that any dissent would bring a public servant within the mischief of the Prevention of Corruption Act. If ultimately the Price Negotiation Committee (PNC) had found that earlier price not fixed properly, the tender could have been cancelled and fresh one called. Having not done so, it was not permissible to re-evaluate the tender on all aspects other than that provided under the tender. There is, therefore, no material on record to show that the Minister had in any manner exceeded his brief and/or deliberately by any act of omission and commission unfairly caused loss to the Government exchequer. There is no material to indicate any foul play. It has been argued before me that conspiracies are hatched in mysterious ways. Therefore, prosecution should be allowed to proceed to bring out the mysteries. I am not satisfied with this argument. The material on record must spell out a grave suspicion in respect of the conspiracy before framing of charges. It is a serious matter and should be dealt with accordingly. Mere suspicion is not enough. It must be a grave suspicion.*

17. *While swiftening the material put up for the purposes of framing of charges, the Courts should desist from approaching the subject with suspicion and with a negative attitude. A Court is required to examine the material without any preconceived notion, positively and objectively. The material placed before it must speak for itself giving rise to grave suspicion. No presumption can be drawn unless there is cause to do so based on the material being examined.*

18. *I do not find any material to support the charges framed. A Court is bound by the material placed before*

it and not what is in the mind of the prosecution. Over the time Supreme Court has made us wise on how to deal with these matters. In Satish Mehra v. Delhi Administration and another (1996) 9 SCC 766, the Supreme Court has elaborately dealt with what the Courts should take into consideration while framing charge. If two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused. Valuable time of the Court should not be wasted for holding a trial only for the purpose of formally completing the procedure to pronounce the conclusion on a future date. I am certain that the trial would only be an exercise in futility or a sheer waste of time. I, therefore, find it a fit case to truncate the proceedings at this stage.

19. *As I have already stated I am of the opinion that from the material on record, it cannot be inferred that there was sinister design, malice or motive to bring the action of the accused within the mischief of the Prevention of Corruption Act. Governments are not expected to act as shopkeepers [(1993) (3) SCC 499]. Fairness in the dealings must reflect in each and every action. I find from the material available before me that no prima facie case has been made out against the accused. This is not a fit case to be sent up for trial. Even if the evidence produced gave rise to some suspicions, the same is not a grave suspicion that will justify the accused being sent up for trial.”*

(C) **R. Natarajan & Ors. v. State**, reported in **129(2006) Delhi Law**

Times 403, wherein it has been held as under:-

“4. Law in this regard is well settled. Charge can be framed only when the material collected during investigations gives rise to a grave suspicion and mere suspicion is not enough. It is also well settled that even the offence of conspiracy as defined under the Penal Code has to be proved like any other offence. It is true that the offence of conspiracy is normally proved by the circumstantial evidence. Whatever may be the difficulties, framing of the charge does affect the liberty of the citizen and in the absence of sufficient material, the order directing the framing of charge could not sustain.”

16. Mr. Ashiesh Kumar, learned standing counsel appearing for respondent Central Bureau of Investigation (hereinafter referred to as 'CBI') stated that the Case No. RC 39(A)/03-DLI was registered on 11.7.03 on the basis of source information. According to him, investigation disclosed that on 17.1.1986 an area of 600 sq. mtr. was allotted by DDA to Bhairon Mandir Samiti for religious purposes through Sh. Dharamvir Khattar near Kalinki College, East Patel Nagar, Institutional Area, Prasad Nagar, New Delhi. He stated that as per the building plan for the said plot, the basement was for storage purpose, ground floor was for Account Room, Manager's Room, one store, one kitchen, one sitting room, seven toilets, lifts and staircase; first floor was for library room, one dispensary, one reading room, one doctors/waiting room, one yoga room each for ladies and gents, four bathrooms, three toilets and one store room and the second floor was for one prayer hall, three store rooms, one meditation room each for ladies and gents, two toilets, one pantry and one lift.

17. According to Mr. Kumar, Sh. Dharamvir Khattar got the plan sanctioned for construction of building having two floors, however, in violation of this sanctioned plan he constructed a building having basement, ground floor plus four floors. After construction of the building Dharamvir Khattar applied to DDA on 8.7.88 for issue of completion certificate. He stated that Sh. Dharamvir Khattar had straightaway raised a building having five floors in 1988-89 and was running one Hotel Atithi as established during the investigation. According to him, Dharamvir Khattar got institutional land allotted only for religious purpose, however, his intention was to use this land for constructing a hotel, which he did after the allotment of land. Therefore, according to him, Dharamvir Khatar committed offence U/s 420 IPC.

18. He further stated that the inspection of the premises was done by Shri K.M. Johri, JE, Building Branch, DDA, Vikas Sadan. He further alleged that Shri K.M. Johri had furnished a false NOC Report on 16.8.88 in pursuance to a criminal conspiracy with Sh. Dharamvir Khattar, stating that the above building had been constructed upto second floor only i.e. as per sanctioned building plan which was contrary to the facts as instead of two floors Shri Dharamvir Khattar had constructed basement, ground floor plus four more floors on the said land. According to him, investigation had further revealed that on reference by DDA, Vigilance, another inspection was conducted by Sh. M.K. Sharma, JE, DDA (Institutional Land Branch). Shri M.K.Sharma also submitted false report on 1.5.97 in pursuance to a criminal conspiracy with Dharamvir Khattar stating that there was no misuse of the said premises. Thereafter on receipt of another reference from DDA, Vigilance, Shri M.K. Sharma again submitted false report on 09.06.98 that the said premises was not being misused. However, on 11.6.98, the CVO(DDA) inspected the premises of Bhairon Mandir Samiti and found that in fact a hotel having 35 rooms with facility of AC, TV was being run by Sh. Dharamvir Khattar at the said site.

19. Mr. Kumar referred to the order framing Charges and handed over a chart indicating different Sections under which the petitioners have been charged and the basis for leveling of charges against the petitioners. The said chart is reproduced hereinbelow for ready reference:-

<i>S. No</i>	<i>Name of accused</i>	<i>U/s</i>	<i>Reasons</i>
<i>1</i>	<i>Dharamvir Khattar, President,</i>	<i>420 IPC and for offence punishable U/s 120 B IPC r/w</i>	<i>Use of premises of Bhairon Mandir Samiti (BMS) for Hotel instead of religious</i>

	<i>Bhairon Mandir Samiti</i>	<i>Section 13(2) and Section 13(1)(d) of PC Act</i>	<i>purpose and unauthorized construction and non-payment of ground rent-he obtained allotment of land and did unauthorized construction and used it as Hotel by misrepresentation</i>
2	<i>K.M. Johri, JE DDA, Building Branch, Vikas Sadan, New Delhi</i>	<i>13(2) r/w 13(1)(d) of PC Act and U/s 120 IPC r/w Section 13(2) and 13(1)(d) of PC Act, 1988</i>	<i>He gave false inspection report dated 16.8.88 with regard to construction on BMS being up to 2nd floor but the premises was upto 4th floor.</i>
3	<i>M.K. Sharma, JE, DDA, Building Branch, Vikas Sadan, New Delhi</i>	<i>13(2) r/w 13(1)(d) of PC Act and U/s 120 IPC r/w Section 13(2) and 13(1)(d) of PC Act, 1988</i>	<i>He submitted false report dated 09.06.98 suggesting that premises of BMS was not being misused and did not indicate any unauthorized construction where as CVO DDA on 11.06.98 found misuse and unauthorized construction on the premises and on the basis of such inspection show cause notice dated 17.06.98 containing the observation of inspection dated 11.06.98.</i>

20. Mr. Kumar also referred to an evidentiary chart giving the gist of allegation, the witnesses and the documents relied upon for leveling such Charges by the CBI. The evidentiary chart filed by the CBI counsel against the three petitioners is reproduced hereinbelow for ready reference:-

EVIDENTIARY CHART IN CASE OF SH. DHARAMVIR KHATTAR

<i>GIST OF ALLEGATION</i>	<i>Obtaining allotment of plot no. 1, Prasad Nagar, Rajender Nagar, New Delhi on 17.01.96 having an area of 600 sq. mtr. for religious purposes in the name of Bhairon Mandir Samiti on false declaration.</i>
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PROSECUTION WITNESS	PW-9 Sh. Manish Garg, Deputy Director, Institution Land Branch, DDA proved that the plot above was allotted for religious purposes and premises. PW-2 S.R.Kailey R/o Prasad Nagar, proved that a Hotel Athithi in the above premises was existing which was a four or five storied building constructed in 1988-89. The construction of the building was not constructed in parts and the same was constructed in one time and started to be used as Hotel since then. He also proved that about 15 years back he attended the marriage function of his friend in the basement of the said building and that no religious activities were ever noticed by him in the premises. PW-1 K.K.Gupta, R/o Prasad Nagar and a retired Air Force Officer proved that he conducted marriage of his daughter in the basement of the said premises and also that Hotel was in existence since 1980s or early 1990s. PW-14 Sh. R.S. Yadav proved that on the asking of Dharamvir Khattar he prepared a site plan as per the actual structure about four storey of the said premises, he also proved that during physical inspection in 1991 by him he found that the premises was a Hotel with a restaurant running at ground floor. All the rooms are very well furnished containing TV, ACs etc. and there was no sign of any religious activity going on in that building.
PROSECUTION DOCUMENTS	D-19 is perpetual lease deed dated 17.01.86 showing allotment of plot in question to BMS through Dharamvir s/o late Hari Chand on lease basis for religious purposes.
GIST OF ALLEGATION	Obtaining sanction of the building plan in the form of proposed sanction building plan, which contained false declarations/ dimensions of the building.
PROSECUTION WITNESS	PW Tapan Mandal, Joint Director (Building) sanction building plan on Bharion Mandir Samiti of proposed under the signature of Sh. Dharamvir Khattar and his Architect and the same was sanctioned on 11.03.86 for construction upto second floor.

	<i>PW-16 Sh. Avdesh Kumar, AE Building, DDA proved that the accused K.M. Johri conducted inspection of premises at Plot No.1, East Patel Nagar, in August 88.</i>
PROSECUTION DOCUMENTS	<i>D-20 dated 25.08.88 is the occupancy certificate issued by Sh. Avdesh Kumar regarding construction upto 2nd floor.</i> <i>D-22 dated 16.8.88 is the NOC report of K.M. Johri regarding construction upto 2nd floor only.</i>
CONCLUSION	<i>Statement of the above witness coupled with the fact straight away a five storied building with different dimensions which could be used as a Hotel was constructed instead of a different set up as was mentioned in the building sanction plan clearly established accused Dharamvir Khattar had an intention to run a Hotel instead of using the building for religious activity. The accused Dharamvir Khattar got allotted an institutional land for religious purpose with an intention to use it for Hotel and thus, he has committed the offence of cheating U/s 420 IPC. There was an inducement to DDA to allot the institution land year marked for religious purpose on which a Hotel was to be run.</i>
GIST OF ALLEGATION	<i>Using the plot and constructed premises for Hotel for commercial purposes instead of religious purposes.</i>
PROSECUTION WITNESS	<i>PW-2 S. Tangraj, Lecturer, Bishop Cotton Women Christian College proved that in the year 2002 he along with his students stayed in the Bhairon Mandir Samiti Hotel as tourists as part of the adventure club and made relevant entries in the register maintained therein.</i> <i>PW-5 Sayyad Abdul Azim, Proprietor, Supreme Universe International, Bangalore, proved that he had several time arranged stay of tourists in Hotel Bhairon Mandir Samiti and even to Hotel Hari Prakash. He also stated that co-accused H.C.Sharma, Manager of the Hotel boasted of his close relations with Dharamvir Khattar and</i>

	<i>Devraj Khattar.</i> <i>PW-6 Sh. Brijender Rai, Chief Vigilance Officer of DDA proved that in June 1988 he acted on an information that Dharamvir Khattar using the above premises as Hotel instead of religious purposes for which the land allotted by DDA to Khattar and also that unauthorized construction took place on the plot. Firstly, he personally verified the information and found it to be true and on a specific query the staff of the Hotel assured him he would get anything in the Hotel food, whisky and women for a price. He also observed unauthorized construction in the premises. Thereafter, a formal surprise check was conducted by a team headed by him.</i> <i>PW-7 Sh. P.S. Utarvar, Deputy Director, DDA, Vikas Sadan proved that in August 1993, the unauthorized construction and use of the premises as Hotel was detected by Sh. S.Phogat, JE and Sh. Ripin Prakash, AE.</i> <i>PW-8 Sh. Sukhbir Phogat, JE proved that on inspection he found the premises having unauthorized construction containing basement, ground floor, first floor, second floor, third floor and fourth floor and a Hotel was running in the premises namely Basera.</i> <i>PW-10 R.P. Gola, Zonal Inspector, Special Cell, MCD, Karol Bagh that in March 1992 MCD found that the above property consisted of basement, first floor, second floor, third floor and fourth floor and there was Hotel Athithi being run in it. He also stated that on 13.03.96 President Bhairon Mandir Samiti wrote to MCD that the premises was not open to public which was complete lie as in 1998 itself it was found that it was used as Hotel. Since, the Assistant of the Hotel had been confirmed the ratable value of the premises was fixed as applicable on commercial premises at Rs. 20,00,000/- on even in March, 1998. Even in October, 2001 it was found by the MCD that there was one small room which was being used as Mandir and that the premises had a five star building and owner was running as a Hotel.</i> <i>PW-12 Sh. Hari Kishan, Assistant Divisional Officer, Delhi, Fire Service proved that in March, 1992 on a reference from DCP Licensing the above premises was inspected and it was found that it contained four floors and each floor containing eight guest rooms</i>
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	<i>and terrace floor having kitchen, lift room etc. He also proved that the premises was being used as a Hotel.</i> <i>PW-13 Rajender Prasad, Head Constable, DCP Licensing proved that Sh. Dharamvir Khattar vide his application dated 17.11.99 in the office of DCP Licensing admitted that the said premises was construed upto the fourth floor, each floor consisted of eight rooms. No license was granted to Bhairon Mandir Samiti for running a Guest House/Dharamshala.</i> <i>PW-15 Sh. Akhilesh Kumar Barnawal, Addl. Commissioner (Admn.) Meerut Division, Meerut.</i> <i>PW-16 Sh. Avdesh Kumar, AE Building, DDA proved that accused K.M. Johri conducted inspection of premises of Plot No. 1, East Patel Nagar in August, 88.</i> <i>PW-17 Sh. Amar Chatterjee, Deputy Director, IL, DDA proved that accused M.K. Sharma, JE in his report suggested that there was neither unauthorized construction nor any misuse of premises as Hotel (BMS) and that DDA Vigilance on 11.06.1998 found that premises of Bhairon Mandir Samiti was being used as Hotel and unauthorized as Hotel and the construction therein was unauthroised. He also proved report submitted by M.K. Sharma was false which allows Dharamvir Khattar to utilise unauthorized construction.</i> <i>PW-18 Sh. J.B. Sharma, Photographer, DDA proved that he took photograph of Bhairon Mandir Samiti on 5.11.93 along with Sh. Phogat, JE and found that the said premises was being used as a Hotel and the building was palatial and luxurious and that he did not see religious working.</i>
PROSECUTION DOCUMENTS	<i>D-14 is the rough sketch showing unauthorized construction at</i> <i>D-15 is the report of S. Phogat regarding pasting of show cause notice.</i> <i>D-16 and D-17 are the false inspection report dated April, 1997 and June, 1998.</i> <i>D-19 is perpetual lease deed dated 17.01.1986 showing allotment of plot in question to BMS</i>

	<i>through Dharamvir S/o late Hari Chand on lease basis for religious purposes.</i> <i>D-23 is application dated 17.11.1999 signed by Dharamvir Khattar showing construction upto 4th floor and each floor containing eight rooms.</i> <i>D-25 is the brochure of BMS showing unauthorized construction and luxurious structure.</i> <i>D-26 is the letter dated 11.12.2003 of Accounts Officer of DDA addressed to SP CBI showing non-payment of ground rent in respect of BMS.</i> <i>D-27 is the pending ground rent including interest.</i> <i>D-28 dated 14.06.2003 is the video graphy memo showing that basement in BMS was used for marriage function and consisted of 4 floor and each containing 8 rooms and also that all the rooms are furnished in fantastic manner with double bed CTV and AC (which have already been removed).</i> <i>D-32 dated 08.08.2001 is the inspection report of Delhi Fire Service.</i>
CONCLUSION	<i>The above evidences clearly established that after taking control of land from the DDA with dishonest intention and in furtherance of conspiracy, accused Dharamvir Khattar not only continued to use the premises for Hotel against declared religious purposes but also did not pay the ground rent and put the DDA to a wrongful loss of Rs. 2,67,810/-.</i>

EVIDENTIARY CHART IN CASE OF SH. K.M. JOHRI

GIST OF ALLEGATION	<i>Accused K.M. Johri prepared false NOC report in connivance with accused Dharamvir Khattar in getting the occupancy certificate for the building.</i>
PROSECUTION WITNESS	<i>PW-16 Sh. Avdesh Kumar, AE Building DDA proved that accused K.M. Johri inspected the premises at Plot No. 1, East Patel Nagar and prepared and submitted the NOC report dated 16.08.1998 and on the basis of such NOC report Dharamvir Khattar</i>

	was issued occupancy certificate dated 05.08.1988. PW-2 S.R. Kailey R/o Prasad Nagar proved that a Hotel Athithi in the above premises was existing which was a four or five storied building constructed in 1988-89. The construction of the building was not constructed in parts and the same was constructed in one time and started to be used as Hotel since then. He also proved that about 15 years back he attended the marriage function of his friend in the basement of the said building and that no religious activities were ever noticed by him in the premises. PW-1 K.K. Gupta R/o Prasad Nagar and a retired Air Force Officer proved that he conducted marriage of his daughter in the basement of the said premises and also that Hotel was in existence since 1980s or early 1990s.
PROSECUTION DOCUMENTS	D-22 is the NOC report shows construction of two store rooms, 6 rooms, 1 kitchen, 7 toilets, 1 lift, and one stair case on the first floor, one hall, two rooms, 2 stores, 1 pantry, 2 toilets, 1 lift and 1 stair case on the second floor and a mezzanine floor consisting of just 4 rooms and a stair case.
CONCLUSION	The above evidences clearly established the criminal misconduct on the part of Sh. K.M. Johri as he has prepared the false inspection report so that unauthorized construction may not come to the notice of the DDA and the building could be illegally used by accused Sh. Dharamvir Khattar and in this way accommodated the third party i.e. accused Dharamvir Khattar causing loss to the Government.

EVIDENTIARY CHART IN CASE OF SH. M.K. SHARMA

GIST OF ALLEGATION	Accused M.K. Sharma prepared false inspection reports so that the unauthorized construction and misuse of premises of Bhairon Mandir Samiti continues in connivance with accused Dharamvir Khattar.
PROSECUTION WITNESS	PW-6 Sh. Brijender Rai, Chief Vigilance Officer of DDA proved that in June 1988 he acted on an information that Dharamvir Khattar using the above premises as Hotel instead of religious purposes for which the land allotted by DDA to Khattar and also

	<i>that unauthorized construction took place on the plot. Firstly, he personally verified the information and found it to be true and on a specific query the staff on the Hotel assured him he would get anything in the Hotel food, whisky and women for a price. He also observed unauthorized construction in the premises. Thereafter, a formal surprise check was conducted by a team headed by him.</i> <i>PW-17 Sh. Amar Chatterjee, Deputy Director, IL, DDA proved that accused M.K. Sharma, JE in his report suggested that there was neither authorized construction nor any misuse of premises as Hotel (BMS) and that DDA Vigilance on 11.06.1998 found that premises of Bhairon Mandir Samiti was being used as Hotel and unauthorized as Hotel and the construction therein was unauthorized. He also proved report submitted by M.K. Sharma was false which allows Dharamvir Khattar to utilize unauthorized construction.</i>
PROSECUTION DOCUMENTS	<i>D-16 and D-17 are the false inspection reports dated April 1997 and June 1998.</i> <i>D-25 is the brochure of BMS showing unauthorized construction and luxurious structure.</i> <i>D-28 dated 14.06.2003 is the video graphy memo showing that basement in BMS was used for marriage function and consisted of 4 floors and each containing 8 rooms and also that all the rooms are furnished in fantastic manner with double bed CTV and AC (which have already been removed).</i>
CONCLUSION	<i>The above evidences clearly established that Sh. M.K. Sharma has not given the number of floors constructed to show that it was an unauthorized construction. The information withheld by accused M.K. Sharma was very material and vital. In his report dated 09.06.1998 accused M.K. Sharma made an invention of occupancy certificate, rather he enclosed a copy of occupancy certificate which was sufficient to show that as per occupancy certificate there was construction of basement, ground floor, first floor had mezzanine floor as against this there was actual construction of basement, ground floor, second, third, fourth floor. Thus, Sh. M.K. Sharma prepared his reports so that unauthorized construction including the misuse may not come to the notice of DDA and thus accommodated the third party i.e. Dharamvir Khattar, causing loss to the Government pay the ground rend and put the DDA to a wrongful loss of Rs.2,67,810/-."</i>

21. Mr. Ashiesh Kumar referred to and relied upon the following judgments:-

A) ***M. Narayanan Nambiar v. State of Kerala*** reported in **1963 (2)**

Crl.L.J. 186, where the Apex Court held as under:-

“9.....The preamble indicates that the Act was passed as it was expedient to make more effective provisions for the prevention of bribery and corruption. The long title as well as the preamble indicate that the Act was passed to put down the said social evil i.e. bribery and corruption by public servant. Bribery is a form of corruption. The fact that in addition to the word “bribery” the word “corruption” is used shows that the legislation was intended to combat also other evil in addition to bribery. The existing law i.e. Penal Code was found insufficient to eradicate or even to control the growing evil of bribery and corruption corroding the public service of our country. The provisions broadly include the existing offences under Ss.161 and 165 of the Indian Penal Code committed by public servants and enact a new rule of presumptive evidence against the accused. The Act also creates a new offence of criminal misconduct by public servants though to some extent it overlaps on the pre-existing offences and enacts a rebuttable presumption contrary to the well known principles of Criminal Jurisprudence. It also aims to protect honest public servants from harassment by prescribing that the investigation against them could be made only by police officials of particular status and by making the sanction of the Government or other appropriate officer a pre-condition for their prosecution. As it is a socially useful measure conceived in public interest, it should be liberally construed so as to bring about the desired object, i.e. to prevent corruption among public servants and to prevent harassment of the honest among them.”

B) ***Ram Narayan Popli v. Central Bureau of Investigation*** reported in **(2003) 3 SCC 641**, where the Apex Court held as under:-

“342.It would be appropriate to deal with the question of conspiracy. Section 120B of IPC is the provision which provides for punishment for criminal conspiracy. Definition of 'criminal conspiracy' given in Section 120A reads as follows:

"120A--When two or more persons agree to do or cause to be done,--

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

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

The elements of a criminal conspiracy have been stated to be: (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and in the jurisdiction where the statute required an overt act. The essence of criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Law making conspiracy a crime, is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support with co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. For an offence punishable under Section 120-B prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act: the agreement may be proved by necessary implication. Offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means.

343. No doubt in the case of conspiracy there cannot be any direct evidence. The ingredients of offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing by illegal means an act which itself may not be illegal. Therefore, 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, and

it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused.”

22. Having perused the judgments and having heard the parties at length, I am of the opinion that where the material placed before the Court disclose grave suspicion against the accused, the court would be fully justified in framing a Charge and proceeding with the trial. In ***Soma Chakravarty’s*** case (supra) and in ***Union of India (UOI) Vs. Prafulla Kumar Samal and Anr.*** reported in ***AIR 1979 SC 366***, the Apex Court has succinctly outlined the approach to be adopted by the trial courts while framing Charges. The relevant observations of the Hon’ble Supreme Court in both the cases are reproduced hereinbelow for ready reference:-

A) In ***Soma Chakravarty v. State through CBI*** (supra), the Hon’ble Supreme Court has observed as under:-

“10. It may be mentioned that the settled legal position, as mentioned in the above decisions, is that if on the basis of material on record the Court could form an opinion that the accused might have committed offence it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of the charges the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution has to be accepted as true at that stage. Before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commitment of offence by the accused was possible. Whether, in fact, the accused committed the offence, can only be decided in the trial.

xxx

xxx

xxx

14. In our opinion when a person signs on a document he or she is expected to make some enquiry before

signing it. In fact, accused Soma Chakravarty was never assigned any duty in respect of processing or signing the bills for ad hoc advertisements, and she was assigned duty only of regular advertisements. Moreover, these bills were not sanctioned/approved by the competent authority i.e. the Chairman/Executive Director.

15. No doubt Soma Chakravarty contended that she signed these fake bills by negligence but without any mala fide intention, but this is a matter which, in our opinion, is to be seen at the time of the trial. There are serious allegations of misappropriation of a huge amount of money belonging to the government, and it cannot be said at this stage that there is no material at all for framing the charge against her. Hence, we agree with the view taken by the High Court in this connection.”

(emphasis supplied)

B) In *Union of India (UOI) Vs. Prafulla Kumar Samal and Anr.*

(supra), the Hon’ble Supreme Court has observed as under:-

“10. Thus, on a consideration of the authorities mentioned above, the following principles emerge :

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out:

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced Court cannot act merely as a Post Office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the

documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(emphasis supplied)”

23. Keeping the above approach in mind, this Court finds that the present case is based on circumstantial evidence and the following facts prima facie disclose a grave suspicion against Mr. Khattar:-

- (i) Mr. Khattar was the President of Bhairon Mandir Society.
- (ii) Mr. Khattar executed the Lease Deed between Bhairon Mandir Society and DDA.
- (iii) Mr. Khattar’s continuously corresponded with DDA in regard to this property.
- (iv) Allotment of the institutional plot at concessional rates was for religious purposes.
- (v) The sanction of the building plan was for a two-storied building.
- (vi) Building was constructed by Bhairon Mandir Society at one go and not in stages.
- (vii) In 1988-89 i.e. at the initial stage itself a five-storied building had been constructed by the Society during the tenure of Mr. Khattar as its president.
- (viii) Since late 1980s or early 1990s that means at the initial stage itself the said building was being used as a hotel with well furnished rooms containing TVs and ACs, a restaurant and with no signs of religious activity for which the plot had been allotted to the society. In fact, during the year 1992-93, Delhi Fire Service in its inspection found that the aforesaid building was being used as “Athithi Guest House” and that the premises consisted of four floors with eight well furnished guest rooms. A restaurant, reception office and a kitchen were found operational during the said inspection. Even brochures, booking material and bill books were recovered which show that the premises were being used as a Hotel.

24. The aforesaid facts would show not only unauthorized construction

and misuse of the premises but would also prima facie disclose a grave suspicion that Mr. Khattar had an intention to cheat at the inception stage, that means, at the initial stage of applying for land to DDA itself. In my opinion, in the cases of circumstantial evidence, as rightly pointed out by Mr. Ashiesh Kumar, there is rarely available any direct evidence in the form of a witness suggesting meeting of minds between the various co-accused.

25. As far as Mr. M.K. Sharma and Mr. K.M. Johri are concerned, the fact that they gave inspection reports in August, 1988 as well as May 1997 and June, 1998 that the building constructed by Bhairon Mandir Society was in conformity with the building plan and its user raises a grave suspicion that Mr. K.M. Johri and Mr. M.K. Sharma while holding offices as a public servant, obtained for Mr. Khattar and the Bhairon Mandir Society a pecuniary advantage without any public interest. Consequently, it cannot be said at this stage that the Charge framed against the petitioners are either groundless or baseless or based on mere suspicion or speculation.

26. As far as arguments that Mr. Khattar is an independent separate legal entity from Bhairon Mandir Samiti and that for lapses/breaches committed by the said Society, Mr. Khattar cannot be blamed, are concerned, I am of the view that the circumstantial evidence in the present case prima facie discloses that it was Mr. Khattar who was not only the President of the said Society but also the moving force behind the organisation and that he executed the lease deed with DDA and continuously corresponded the with officials of DDA.

27. This Court is further of the view that the petitioners' argument that violation of DMC/DDA Act or building by-laws can never constitute offences under IPC or P.C. Act, is untenable in law because if direct or

circumstantial evidence discloses ingredients of offences under IPC or P.C. Act, then the same would be attracted as is the present case.

28. As far as Mr. Luthra's submission with regard to suit by Bhairon Mandir Society having been decreed declaring DDA's cancellation of Lease Deed as illegal is concerned, this Court is of the considered view that the said judgment would offer no assistance to the petitioners inasmuch as in the said civil proceedings admittedly neither the allegations nor the evidence mentioned in the charge sheet had been placed on record or considered.

29. This Court is further of the view that the petitioners' argument that P.C. Act, 1988 has no application to the present case is misconceived on facts and untenable in law inasmuch as the present RC had been registered by CBI on the basis of source information on 11th July, 2003, whereas by virtue of Section 30(1) of P.C. Act 1988, the old P.C. Act of 1947 stood repealed on 9th September, 1988. This Court is further of the opinion that after 9th September, 1988, no FIR or charge sheet could have been filed charging any accused with offences under the old P.C. Act, 1947. In fact, Section 30(2) of P.C. Act, 1988 clearly stipulates that any action taken or purported to have been taken under the old P.C. Act, 1947 shall be deemed to have been done or taken in pursuance to the P.C. Act of 1988. Section 30 of the P.C. Act, 1988 is reproduced hereinbelow for ready reference:-

“THE PREVENTION OF CORRUPTION ACT, 1988

30. Repeal and saving.—(1) The Prevention of Corruption Act, 1947 (2 of 1947) and the Criminal Law Amendment Act, 1952 (46 of 1952) are hereby repealed.

(2) Notwithstanding such repeal, but without prejudice to the application of section 6 of the General Clauses Act, 1897 (10 of

1897), anything done or any action taken or purported to have been done or taken under or in pursuance of the Acts so repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under or in pursuance of the corresponding provision of this Act.”

(emphasis supplied)

30. In my view, the judgment of ***Sukhwant Singh***'s case (supra) is inapplicable to the facts of the present case as in the said judgment it was held that the petitioner could not have been convicted under the provision of Section 7 of the P.C. Act, 1988 because the said provision was not in force at the relevant time. In the present case, the only dispute is whether the old P.C. Act, 1947 was to apply or the P.C. Act, 1988. In my opinion, in view of the categorical language used in Section 30 of the P.C. Act, 1988, it is the new P.C. Act, 1988 that will apply in the present case.

31. Undoubtedly, Section 13(1) of the P.C. Act, 1988 is far more wide in its language and ambit in contrast to Section 5(1) of the old P.C. Act, 1947. Both Section 5(1) of the old P.C. Act, 1947 and Section 13(1) of the P.C. Act, 1988 are reproduced hereinbelow for ready reference :-

“PREVENTION OF CORRUPTION ACT, 1947

5. Criminal misconduct in discharge of official duty.

(1) A public servant is said to commit the offence of criminal misconduct in the discharge of his duty –

(a) If he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification (other than legal remuneration) as a motive or reward such as is mentioned in Section 161 of the Indian Penal Code, 1860 (Act 45 of 1860); or

(b) If he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration

which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any, person whom he knows to be interests in or related to the person so concerned; or

(c) If he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do; or

(d) If he, by corrupt or illegal means, or by otherwise, abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage.

PREVENTION OF CORRUPTION ACT, 1988

“13. Criminal misconduct by a public servant :--(1) A public servant is said to commit the offence of criminal misconduct, -

(a) If he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification other than legal remuneration as a motive or reward such as is mentioned in Section 7; or

(b) If he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any, person whom he knows to be interests in or related to the person so concerned; or

(c) If he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do; or

(d) If he, -

(i) By corrupt 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; or

(e) If he or any person on his behalf, is in possession or has, at any time during the Period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.

Explanation. -For the purposes of this section "known sources of income" means income received from any lawful source and such receipt has been intimated in accordance, With the provisions of any law, rules or orders for the time being applicable to public servant."

(emphasis supplied)

32. Consequently, Section 13(1) is not only more wide, but it also contemplates various alternatives and provides for more presumptions. Further as I have already reached the conclusion that the P.C. Act, 1988 applies to the present proceedings, the argument of Mr. Atul Kumar with regard to absence of necessary ingredients of Section 5, namely that there was no material/evidence to show that the accused had received any pecuniary advantage or valuable thing, ceases to be of any relevance or consequence.

33. As far as Mr. K.M. Johri and Mr. M.K. Sharma's contentions that they only gave preliminary inspection report which had been verified by higher officers and further as a consequence of these reports, a show cause notice was issued to Bharion Mandir Society, are concerned, this Court is of the view that these are defences of the accused on merits and they cannot be considered at the present stage of framing of charges.

34. Moreover, I may mention that I am exercising revisional jurisdiction and as I do not find any illegality, impropriety, irregularity in the impugned order, I dismiss each of the three petitions. However, it is clarified that any observation made in the present order would not prejudice either of the parties and the trial court would apply its mind independently and decide the case in accordance with law.

MANMOHAN, J

FEBRUARY 13 , 2009
sb/rn