IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO.101/2014

Shobha Dumaskar,
major, retired Govt. Servant.
Residing at C/o. Dhumaskar General
Hospital, Near Dena Bank,
Thivim, Bardez, Goa. ……. Petitioner.

V/s.

1. The State of Goa,
through Chief Secretary,
Government of Goa, Assembly Complex,
Alto-Porvorim, Goa.

2. Superintendent of Police,
Anti Corruption Bureau,
Directorate of Vigilance,
Police Head Quarters, Panaji, Goa.

3. Aires Rodrigues,
major, TI-B30, Ribandra Retreat,
Ribandar, Goa. 403 006. ……. Respondents.

Mr. S. D. Lotlikar, Senior Advocate with Ms. Marushka Furtado, Advocate for the petitioner.

Mr. Mahesh Amonkar, Additional Public Prosecutor for respondents No.1 and 2.

Respondent No.3 in person.

CORAM : R.M. BORDE, J.

DATE : 24th December, 2014.

ORAL JUDGMENT :-

Heard. Rule. With the consent of the parties, the petition is taken up for final disposal at the admission stage.

2. The petitioner is praying for quashment of the order dated 21st April, 2012, passed by the Principal District and Sessions Judge, North Goa, Panaji in Criminal Misc. Application No.5/2012 and order dated 6th September, 2014, passed by the Special Judge, Special Court for CBI in Goa at Mapusa in Criminal Misc. Application No. 24/2014, rejecting "A" summary report and directing issuance of process against the petitioner under Section 13(2), read with Section 13(1)(d)(i) and (ii) of the Prevention of Corruption Act, 1988.

3. The petitioner was functioning as a Director of Prosecution, Government of Goa since 2003 till October, 2012, until the date of her retirement on attaining age of superannuation. While functioning as the Director of Prosecution, respondent No.3 herein filed a report with the Police Inspector, Panaji Police Station, Panaji on 5th August, 2011 alleging commission of offences punishable under Section 408, 420 of the Indian Penal Code and Section 13(1)(d)(i) and

(ii) of the Prevention of Corruption Act, 1988 against the petitioner. Respondent No.3, in a written complaint presented to the Police Inspector, alleged that the petitioner herein having cheated the Government of Goa and also being guilty of criminal misconduct punishable under the provisions of the Prevention of Corruption Act, 1988 and the Indian Penal Code, on account of hiring premises admeasuring 76 sq. metres at 'Mutual Apartments' situate in Panaji, purportedly for user of the Public Prosecutor and Assistant Public Prosecutor on the grounds of lack of space for them in the Court premises, in the manner causing loss to the State exchequers and having done an act of undue favouritism, as per the facts narrated in the report.

4. It is alleged by respondent No.3 that the Director of Prosecution, on 11th August, 2008 moved a proposal to the State Government proposing to hire premises admeasuring 76 sq. metres for user of Pubic Prosecutors and Assistant Public Prosecutors on the ground that there is no sufficient space available for those Officers in the Court premises. The Chief Secretary on the same day, put remarks asking for the certification of rent from Public Works Department (PWD) and it is only thereafter a letter was obtained from M/s. Cosmos Ventures Pvt. Ltd. by the Director of Prosecution in respect of offer of

the premises. It is contended that there was no advertisement issued prior to selection of the premises and a better premises could have been made available at a lesser lease premium. Respondent No.3 also alleged that the premises taken on lease is a residential flat and there is no permission to use the premises for commercial purpose.

5. So far as fixation of rent is concerned, it is alleged that the rent quoted is exorbitantly on higher side considering the age of the building. It is contended that a similar premises could have been made available for a sum of Rs.5,000/- to Rs.10,000/- per month. It is alleged that the Director of Prosecution, by corrupt and by adopting illegal means and by abusing her position as Director of Prosecution, permitted the owner to secure pecuniary advantage at the cost of the State exchequers and exhibited undue favouritism to the owners of the premises, and as such is liable to be punished under Section 13(1)(d)(i) and (ii) of the Prevention of Corruption Act, 1988. Respondent No.3 also alleges that the annual increase of 10% per annum as agreed, is contrary to the PWD recommendations, so also the service tax which is directed to be paid to the owners of the residential premises, is against the policy of the State Government.

6. Respondent No.3 further alleges that the said premises is to have been transferred by M/s. Cosmos Ventures Pvt. Ltd., in favour of Dr. Surendra V. Borkar and Dr. (Mrs.) Usha S. Borkar and a request was made to pay the lease premium from new financial year in favour of the purchaser, which is a illegality, since there was no sanction for payment of the amount to the transferee. It is further alleged by respondent No.3 that the leasehold premises was not put to use by the Public Prosecutors which itself is indicative of the fact that undue favour has been shown to the owners in executing the lease agreement by Government, at the instance of the petitioner.

7. It transpires that on receipt of the complaint, the police authorities did not take steps and conveyed to respondent No.3 by letter dated 5.8.2011 that since the allegations are against the Head of Department i.e. the petitioner, the complaint/report tendered by respondent No.3 has been forwarded to the superior officer with a request to forward the same to the Vigilance Department. Respondent No.3, aggrieved by the communication referred to above, approached the Principal District and Sessions Judge, North Goa, Panaji by presenting Criminal Misc. Application No.5/2012, seeking directions to the police authorities to register an FIR and to investigate the matter.

The learned Sessions Judge, Panaji while disposing of Criminal Misc. Application presented by respondent No.3, issued directions to the police authorities to register FIR for offences punishable under Sections 420, 474 of IPC read with Section 13(1)(d)(i) and (ii) of the Prevention of Corruption Act, 1988 against the Director of Prosecution i.e. the petitioner and such other persons who allegedly flouted the procedure and to investigate the matter, so as to fasten the liability against the persons instrumental in commission of crime.

8. In pursuance of the directions issued by the learned Sessions Judge, the matter was investigated by the police. The police authorities, after conducting due investigation, tendered final report to the District and Sessions Judge, (Special Judge) North Goa, Panaji under Section 173 Cr.P.C.. The police authorities submitted "A" summary, meaning thereby, the complaint is true, but the evidence is weak and there is no substantive conclusive evidence to file a charge-sheet against the petitioner and others. Respondent No.3 objected to grant of "A" summary by presenting Criminal Misc. Application No.24/2014, which was considered along with the report of the police. Learned Special Judge for CBI, on consideration of the contentions raised by the police, as well as respondent No.3, rejected the prayer of

the Investigating Agency to grant "A" final summary and issued directions to register charge-sheet and to issue process against the petitioner for offence punishable under Section 13(2), read with 13(1)(d)(i) and (ii) of the Prevention of Corruption Act, 1988.

9. Learned Senior Counsel appearing for the petitioner impeached correctness of the order on several grounds. It is contended that the learned Sessions Judge, at Panaji erred in issuing directions to the police authorities in exercise of powers under Section 156(3) of the Code of Criminal Procedure to investigate the matter since learned Judge was not empowered to take cognizance of the offence alleged against the petitioner in view of Section 195 of Cr.P.C. as well as in view of Section 19 of the Prevention of Corruption Act, 1988 in the absence of valid order of sanction to prosecute the petitioner. It is contended that at the relevant time, the petitioner was functioning as the Director of Prosecution and, as such, the learned Sessions Judge ought not to have issued directions to the police authorities to investigate the matter in the absence of valid sanction order.

10. It is the contention of the petitioner that learned Special Court has exceeded its jurisdiction in coming to the conclusion that

prima facie case exists in respect of the commission of offence punishable under Section 13(2), read with Section 13(1)(d)(i) and (ii), against petitioner since the learned Special Judge at the same time did not find any evidence against the Executive Engineer and the Assistant Engineer of PWD, sufficient to take cognizance of the offence against them ipso-facto. It ought to have been held that there was no sufficient material warranting to take cognizance of offence against the petitioner as well. The accusation of the complainant was that the rent in respect of the premises was quantified at Rs.30,000/- which was disproportionately high, cannot be considered since quantification of rent was done by the Officers attached to the PWD, against whom closure report has been accepted. There was, therefore, no basis left for the prosecution to proceed against the petitioner. The learned Special Judge ought to have considered that it was not part of the duty of the petitioner at all to prepare the lease deed or finalise the terms thereof. That had to be done and was done after obtaining prior approval from the higher authority and in the instant case, the deed has been executed on behalf of the Home Department by the Under Secretary. There is neither pecuniary loss or disadvantage suffered by the Government on account of any act of omission on the part of the petitioner and the evidence collected by the Investigating Agency falls short for drawal of such inference. There is no material to indicate that any deed or omission of petitioner was actuated by any corrupt or illegal motive. As against this, circumstances and evidence collected by investigating agency in no uncertain terms lead to conclusion that the petitioner had acted bonfide. Even if it assumed that there were certain procedural lapses, those cannot be equated with the criminal misconduct alleged against the petitioner.

11. So far as the allegations in respect of grant of 10% yearly increase in the lease premium is concerned, the lease deed incorporating the term was vetted and approved by the Home Department. The clause relating to the increase in the rent was reviewed and struck off and the excess payment to the owners has been duly refunded to the Government. Thus, there is no financial loss caused to the Government. The observations made by the learned Special Court in that regard are contrary to the record. The learned Special Judge has acted on surmises and conjectures while reaching the conclusion that there is prima facie case against the petitioner and in the process has ignored the cogent and sufficient grounds, set out by the investigating agency supporting the request for closure of the proceedings.

12. Respondent No.3 appearing in person has supported the order passed by the Special Judge and contended that since the report under Section 173 of Cr.P.C., has been presented by the police in the matter, the stage of investigation having come to an end, the challenge raised to the order passed by the Special Judge thereby directing the police authorities to conduct investigation in view of the provisions of Section 156(3) of Cr.P.C. is not available for consideration at this late stage. Even otherwise, in the instant matter, such an objection is not entertainable since the petitioner is a retired employee and is not in employment of the Government of Goa. Respondent No.3 has supported the order passed by the learned Special Court and contended that in exercise of extraordinary jurisdiction under Article 227 of the Constitution of India, this Court may not cause interference in the well reasoned order passed by the trial Court. It is contended that while exercising jurisdiction under Section 482 of Cr.P.C., it is only in extreme cases wherein it is found that the order under challenge is perverse, interference in the order is permissible.

13. Inviting attention to the order passed by the learned Sessions Judge, Panaji while disposing of Criminal Misc. Application

No.5/2012 and directing registration of FIR and investigation under Section 156(3) of Cr.P.C., it is contended that it ought to have been examined whether there is a valid sanction under Section 19 of the Prevention of Corruption Act, and in absence of sanction, it was impermissible for the Sessions Judge to issue directions. It is contended that Section 197 of Cr.P.C. also creates a bar for taking cognizance of office. It is to be noted that the investigation in the matter is a precognizance stage and, as such, the bar as contended by the petitioner will not be attracted. The petitioner, relying upon the judgment in the matter of ***Anil Kumar and others vs. M.K. Aiyappa and another***, reported in (2013) 10 SCC 705, contended that the investigation under Section 156(3) of Cr.P.C. cannot be ordered without previous sanction under Section 19(1) of the Prevention of Corruption Act, 1988. It is true that in Anil Kumar's matter, the Supreme Court has warned against proceeding in the matter in the absence of valid sanction under Section 19(3) of the Prevention of Corruption Act even at pre-cognizance stage. However, in the instant matter, the ratio laid down in Anil Kumar's matter will be of little help to the petitioner, since the investigation is complete and report under Section 173 Cr.P.C. is presented to the Court. Apart from this, since the petitioner has already retired on attaining age of superannuation she is no more in Government employment and, as such, there is no necessity to secure an order of sanction. In this context, respondent No.3 has rightly placed reliance on the judgment of the Supreme Court in the matter of ***C.R. Bansi vs. State of Maharashtra*** reported in (1970) 3 SCC 537. The objection raised by the petitioner in respect of the validity of the order passed by the learned Sessions Judge, directing investigation under Section 156(3) of Cr.P.C., dated 21st April, 2012 does not deserve any consideration.

14. In the instant matter, the petitioner, then Director of Prosecution, tendered a note to the Chief Secretary, mentioning therein that the present room allotted to the Public Prosecutors and the Assistant Public Prosecutors for the purpose of user as office in the premises of District & Sessions Court, Panaji approximately admeasures 20 to 25 sq. metres. There are seven Prosecutors, excluding clerical staff and the police constables. Office space provided to them is very small and there is no space left to move around, freely. Besides, the staff and the Prosecutors, office requires space for the witnesses and the investigating officers summoned in the cases fixed on daily board. The Prosecutors need to refresh the memory of the witnesses prior to examining them in the Courts and therefore,

some space is required for the public prosecutor to render necessary guidance to witnesses visiting the office. It is further noted that there is absolutely no space for storage of stationery and books. It is in this context it was requested to consider the need for requisition of the premises for accommodating the Prosecutors and the staff. It was suggested that the office premises in Mutual Apartments, admeasuring 76 sq. metres owned by M/s. Cosmos Ventures Pvt. Ltd., represented by the Managing Director Shri Gautam Amonkar can be made available and the same has been inspected by the Director of Prosecution and found to be sufficient to meet requirement. The monthly rent quoted was Rs.30,000/-, including service charges. It was, therefore, requested to consider the proposal for requisition of additional premises for office purpose. On receipt of the note, the Chief Secretary directed the PWD to verify the aspect of reasonableness of the rent of the premises and submit report. Accordingly, aspect relating to reasonableness of the rent was considered by the PWD Officers and it was reported by the Executive Engineer, W.D.I, PWD, that the monthly rentals fixed of Rs.30,000/- quoted by the Managing Director of M/s. Cosmos Ventures Pvt. Ltd., is found to be reasonable. It also transpires from the record that the file was moved from one department to another and after due consultation, directions were issued to submit a draft lease deed.

15. The terms contained in the draft lease deed were also verified by the various Government officials, including the officials from Finance Department. It does appear that the draft of lease deed was finalised and the same was executed on 21st January, 2008. The lease deed has been executed by M/s. Cosmos Ventures Pvt. Ltd., in favour of the Government and the Under Secretary, Home Department, represented Government of Goa. One of the recitals noted in the lease deed is in respect of yearly increase of 10% towards the lease premium. Respondent No.3 has objected to the increase in the lease premium on the ground that the same has not been sanctioned by the authorities and the term has been surreptitiously included in the lease deed. In any case, the Director of Prosecution, the petitioner herein is not the author of the lease deed, nor has represented the Government while executing the lease deed. Apart from this, it does appear that the term relating to 10% yearly increase in the lease premium contained in the lease deed was not approved by the Finance Department and, as such, review was undertaken and the concerned recital was struck off and that the payment made to the owners in view of the above clause has been duly refunded by the owners of the premises. In this view of the matter, there is no scope to draw an adverse inference as regards the

criminal misconduct on the part of the petitioner.

16. So far as the allegations made by respondent No. 3 in respect of alleged financial loss to the Government towards the payment of lease rent is concerned, it ought to be noted that the matter of fixation of rent of the leasehold premises was dealt with by the officials of Government and the decision was taken on consideration of the report tendered by P.W.D. In order to cross check and to ascertain the fact whether the Engineers of PWD had proposed escalated amount in order to extend any benefit to the owners of the flat, the matter was referred to the Vigilance to ascertain reasonableness and correctness of recommendations by the PWD Engineers. Senior Technical Examiner, vide communication dated 20/4/2012, informed that the matter was inquired into by calling concerned Engineers of PWD and after seeking their explanation in respect of assessment of rent worked out by them, it was noticed that appropriate procedure had been adopted while working out the rent of the leasehold premises. The amount of lease rent has been fixed at Rs.30,000/- per month on the basis of the report of the PWD Officer and Technical persons of the Vigilance Department. The investigating agency in no uncertain terms reported that there is no doubt regarding fixation of the amount of Rs.30,000/- per months as

approved by the Engineers of PWD. As such, the allegation of respondent No. 3 that the Executive Engineer had not visited the flat to see the condition and had not placed on record the basis of calculation of the rent fixed at Rs.30,000/- is not substantiated. It is surprising to note as to how the learned Special Judge Court fastened the liability in respect of the fixation of the rent on the shoulders of the Director of Prosecution. The Director of Prosecution had no role in the matter of fixation of the rent of the leasehold premises and there is no material on record indicating any part played by the Director of Prosecution in the process. The findings recorded by the learned Special Judge in respect of the complicity of the Director of Prosecution in the matter of extending financial benefits to the owners of the premises by fixing exorbitant rent premium is not only erroneous, but is also perverse.

17. It has been reported by the investigating agency that there is absolutely no substance in the allegations as regards forgery of documents and there is no evidence in respect of securing for herself or for any other person any pecuniary benefits or valuable things. There is also absolutely no evidence on record to support allegation that the premises was not occupied by the Public Prosecutors, or Assistant Public Prosecutors or the officials, and thus remained vacant. The

findings recorded by the learned Special Judge in the order are apart from being contrary to the reports tendered by the investigating agency, are also not supported by any document. The only allegation as regards 10% yearly increase in lease premium is concerned, as has been observed above, the concerned recital contained in the lease deed has been rectified and the same has been struck off. The amount paid to the tune of Rs.61,200/- to the owners on account of increase in lease premium has already been recovered. In this regard also, no liability can be fasten against the petitioner, as the petitioner is neither signatory to the lease deed nor can she be said to have extended any financial benefit to the owners of the premises. There is absolutely no link established between the petitioner and the owners of the premises.

18. The petitioner has now retired on attaining age of superannuation and is no more holding the post of Director of Prosecution. Respondent No.3 has surely an axe to grind against the petitioner on account of the fact that the petitioner had refused to oblige him in connection with some criminal proceedings which he had filed against the Archbishop of Goa and Daman and chosen to involve the petitioner in a criminal case by making unjustified and unwarranted allegations which have been found to be substantially false by the

investing agency.

19. I am of the considered view that the petitioner cannot be said to be instrumental in obtaining for herself or any other person any valuable thing or pecuniary advantage by corrupt or illegal means or has abused her position as a public servant, in any manner.

20. Another aspect which is required to be considered is that admittedly, the amount of lease premium has been recommended by the Executive Engineer of PWD and the same has been finalised by the Officials of the Home Department. Lease deed has been finalised by the higher officers of the State Government who have not been implicated in the crime. In the absence of the Executive Engineer of PWD or the other officials who have recommended the amount of lease premium or such of those officers who have finalised the draft of lease deed and who have executed the lease deed on behalf of the State Government, no allegations can be substantiated against the petitioner alone who was, admittedly, functioning as the Director of Prosecution and was representing the State Government before the Criminal Courts. It is neither the official function assigned to the petitioner to execute or finalise the lease deed or to take any decision in respect of requisition

of the premises on lease basis, nor the petitioner can be said to have influenced the decision making process or has by corrupt means secured any pecuniary benefit for herself or for any other person. The petitioner merely has tendered a note to the Chief Secretary and pursued the matter with the Chief Secretary. If there are any procedural lapses in securing the premises on lease basis, those cannot be equated with criminal offences, alleged against the petitioner and no inference as regards the abuse of official position or adoption of corrupt or illegal means can be drawn against the petitioner. In the facts and circumstances of this case, by no stretch of imagination it can be inferred that ingredients of the offence under Section 13(1)(d)(i) and (ii) are stated to be present, so as to warrant prosecution of the petitioner.

21. Reliance is placed on the judgment in the matter of ***Ravindra Kumar Madhanlal Goenka and another vs. Rugmini Ram Raghav Spinners Private Limited***, reported in (2009) 11 SCC 529 to contend that while entertaining a petition under Section 482 of Cr.P.C., materials furnished by the defence cannot be looked into and the defence materials can be entertained only at the time of trial. When there is *prima facie* material available against the accused, a petition for

quashing the criminal proceedings need not be entertained. It is only in extreme cases criminal prosecution can be quashed by the Court at the very threshold.

22. Reference to the judgment in the matter of ***State of Haryana and others vs.Ch. Bajan Lal and others,*** reported in AIR 1992 SC 604 would be relevant for consideration. While laying down principles in respect of quashment of proceedings, the Honourable Supreme Court has prescribed certain guidelines. The observations of the Supreme Court and the guidelines contained in paras 107 and 108 of the judgment are relevant which read thus :

> " **107.** Mr Parasaran, according to whom the allegations in the present case do not make out an offence, drew our attention to a recent judgment of this Court in *State of U.P.* v. *V.R.K. Srivastava (1989) 4 SCC 59 : (AIR 1989 SC 2222)* to which one of us (S. Ratnavel Pandian, J.) was a party. In that case, it has been ruled that if the allegations made in the FIR, taken on the face value and accepted in their entirety, do not constitute an offence, the criminal proceedings instituted on the basis of such FIR should be quashed. The principle laid down in this case does not depart from the proposition of law consistently propounded in a line of decisions of this

court and on the other hand it reiterates the principle that the court can exercise its inherent jurisdiction of quashing a criminal proceeding only when the allegations made in the FIR do not constitute an offence and that it depends upon the facts and circumstances of each particular case.

108. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal

> proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.
>
> (7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.″

23. The respondent No.3 has also referred to the judgments in the matter of ***Dr. Subramanian Swamy vs. Director, Central Bureau of Investigation and another***, reported in AIR 2014 SC 2104, ***Dr. Subramanian Swamy vs. Dr. Manmohan Singh and anr.,*** reported in AIR 2012 SC 1185 and in the matter of ***R. S. Nayak vs. A. R. Antulay***, reported in (1984) 2 SCC 183.

24. So far as on the question of interference in the criminal matters is concerned, reference is made to the judgment in the matter of ***Nupur Talwar vs. Central Bureau of Investigation and another,*** reported in (2012) 2 SCC 188. Respondent No.3 has referred to the judgment in the matter of ***Chandan Kumar Basu vs. State of Bihar***,

reported in 2014 (86) ALL CC 856 on the point of sanction, as well as certain other judgments. Since I have recorded a finding that in the instant matter the question of sanction either under Section 19 of the Prevention of Corruption Act, 1988 or under Section 197 of Cr.P.C. does not arise, it would not be necessary to refer to all the judgments cited at the Bar.

25. In my considered view, the petitioner satisfies the tests laid down in the matter of ***State of Haryana and others vs.Ch. Bajan Lal and others*** (supra), and more particularly paragraphs 1 and 2 quoted above and as such, the order dated 6th September, 2014, passed by the Special Judge, Special Court for CBI Goa at Mapusa in Criminal Misc. Application No. 24/2014, refusing to approve "A" summary and further issuing directions to issue process against the petitioner under Section Section 13(2), read with Section 13(1)(d)(i) and (ii) of the Prevention of Corruption Act, 1988 deserve to be quashed and set aside and the same is, accordingly, quashed and set aside. Rule is made absolute accordingly.

R.M. BORDE, J.

ssm.