IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPLICATION (MAIN) NO. 203 OF 2015

State
Through its Police Inspector/
Investigation Officer, (major)
Crime Branch,
Ribandar, Goa. ... Applicant

Versus

Shri Digambar Vasant Kamat,
(major)
s/o late Vasant Balkrishna Kamat,
H.No.401, Sanrit Appartments,
Malbhat, Saudade Street,
Margao Goa ... Respondent

Mr. S. R. Rivankar, Public Prosecutor for the applicant.

Mr. S. G. Dessai, Senior Advocate with Mr. Parag Rao and Mr. A. V. Pavitran, Advocates for the respondent.

CORAM :- **C. V. BHADANG, J.**

Reserved on : 13th October, 2015

Pronounced on : 16th October, 2015

ORAL ORDER :

Whether the pre-arrest bail granted to the respondent by the learned Special Judge (CBI Court) at Panaji needs interference in the exercise of jurisdiction under Section 482 of the Criminal Procedure Code (Cr.P.C.) is the question, which falls for determination in this case.

2. The facts, necessary for the disposal of the application, may be stated thus :

The first respondent is a sitting MLA from Margao constituency and Former Chief Minister of Goa. Indisputably, the first respondent was earlier elected to the Goa Legislative Assembly on a BJP ticket in the year 1994 and was also the member of the Council of Ministers in the year 2000. It is further undisputed that some time in the year 2005, the first respondent changed alliance and contested the election to the Goa Legislative Assembly on Congress ticket and was eventually elected as a M.L.A. from the Margao constituency. It is further undisputed that on 08/06/2007, the first respondent was appointed as the Chief Minister and worked as such till March, 2012. After March, 2012, BJP came in power and is presently the ruling party.

3. The Goa Government had availed of the Official Development Assistance (ODA) from Japan International Cooperation Agency (JICA) for its project of Augmentation of Water Supply and Sewerage in the State of Goa. On 23/07/2007, a Cabinet decision was taken approving the constitution of various committees for implementation of the said project in the matter of

execution of the project and a Project Implementation Unit (PIU) was formed, delegating required administrative and financial powers vide notification dated 07/08/2008 on the Principal Chief Engineer, PWD, who was heading the said PIU. Bid Evaluation Committees came to be formulated and the Government accorded approval for adopting JICA norms and procedure and stage-wise review and concurrence by JICA.

4. As per the JICA guidelines, the Project Management Consultants were required to be appointed as a first step for implementation of the project and for this, an exercise for empanelment of the project consultants was started in terms of the JICA guidelines.

5. It appears that bids were invited and on evaluation by the Bid Evaluation Committee (BEC), the same were finalised and approved by JICA. In the bid, Neon Sudu Consultant Company Ltd. (Japan), a Consortium bidder, with other partners, including Luis Berger (USA), Shah Technical Consultants (India) and NJS Consultant Company Ltd. (Japan) ranked first. The consortium had quoted an amount of Rs.1,018,00,00,000/- which on negotiations was reduced approximately to Rs.75.54 Lakhs. It appears that on 21/09/2007, a memorandum was executed

between JBIC and PWD, confirming the minutes of the discussion dated 07/06/2007 with the following material terms :

(a) PIU headed by the Project Director was to be responsible for the entire implementation.

(b) The estimate for consultancy contract was pegged at Rs.75 Crores (equal to 1427 Japanes Yen).

6. On 10/10/2007, the Principle Chief Engineer, PWD sent a report to the Government, seeking constitution of the committees and PIU.

7. On 14/11/2007, the Joint Secretary to the Government of Goa puts up a note stating that the project should be accorded highest priority (as the file was said to be pending with the then PWD Minister, Mr. Churchill Alemao (Accused no.1).

8. On 15/01/2008, the Chief Secretary requested the respondent to impress upon Mr. Churchill Alemao to clear the report file.

9. On 24/01/2008, Mr. Churchill Alemao clears the report file, recommending the constitution of the Committees with himself as the Chairman.

10. On 29/01/2008, three notifications are issued constituting (i) a State Level Committee headed by the PWD Minister(ii) PWD Level Coordination Committee, headed by PWD Minister and (iii) Project Implementation Unit (PIU) headed by the Project Director, Mr. Wachasunder.

11. On 31/03/2008, the JBIC objects to the constitution of the committee under the Chairmanship of PWD Minister (professedly for the reason that the same is against the JICA guidelines).

12. On 01/04/2008, PIU invites global tenders for empanelment of the consultants for the consultancy contract, in which the consortium bidder Neon Sudu Company Limited (Japan) (with three other consortium members as above), is eventually allotted the consultancy contract.

13. On 26/05/2009, the consultancy contract is executed with Neon Sudu Company Ltd., the lead partner of the Consortium.

14. On 19/06/2009, the work order in respect of the

consultancy contract is issued to Neon Sudu Company Ltd. by the Project Director Mr. Wachasunder.

15. The entire dispute started when proceedings were initiated before the District Court of New Jersey (USA) under the provisions of Foreign Corrupt Practises Act, 1977. For the present purpose, the corrupt practises so far as India is concerned were set out in paragraphs 25 to 27 of the attachment B which reads as under :

> *"25. On or about December 30, 2009, a consortium partner sent an e-mail to agents of the Company, stating, "I enclose the working for the share between the firms for the Goa Project. Pls go through the same and we could discuss. Pls see the sheet 'Master'.*
>
> *26. On or about August 17, 2010, a consortium partner sent an e-mail to James McClung, stating, "As discussed I enclose the details as provided by [third party intermediary]. I have also added the details of amounts paid to [the Company] as of date by [the consortium partner] in the same sheet". The attachment included an entry, "Paid by [an agent of the Company] to Minister on behalf of agent".*
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> ***27.** On or about August 26, 2010, a consortium partner prepared a payment tracking schedule stating that the Company had paid $976,630 in bribes in connection with the Goa Project to date."*

16. It appears that pursuant to the proceedings before the New Jersey Court, some news items, were published, which were about the alleged payment of a bribe in respect of the consultancy contract in relation to the JICA Project.

17. On 21/07/2015, Ms. Neetal Amonkar, the Under Secretary (home), Government of Goa sent a communication to the Director General of Police which reads thus :

> *"To,*
> *The Director General of Police,*
> *Panaji-Goa.*
>
> *Sub:- Regarding Newspaper reports in local dailies alleging bribery charges against a Minister in Government of Goa in the year 2010.*
>
> *Sir,*
>
> *The undersigned has been directed to inform that certain media reports that appeared in the newspapers on Saturday i.e.19th July, 2015, do reveal that one foreign company namely M/s. Louis Berger International Inc. have allegedly paid an amount of Rs.$976000/- to some Minister in the Government of Goa in the year 2010.*
>
> *A copy of the documents sourced through internet from the United States District Court, District of New Jersey also confirms the said points. Copies of*

above clippings are enclosed for ready reference.

In the light of above media reports, the Government has desired that the matter may be investigated by the Police. Accordingly, further necessary action may be taken in this regard, under intimation to the Government.

Yours faithfully
sd/-
(Neetal P. Amonkar)
Under Secretary (Home)"

18. It appears that on the basis of the same, an FIR came to be registered on the same day. By virtue of the said FIR, an offence at Crime Nl.93/2015 was registered with the Crime Branch under Section 120-B of I.P.C., read with Sections 7, 8, 9 and 13 of the Prevention of Corruption Act against the following persons / entities:

(i) The Minister in the Government of Goa in the year 2010;

(ii) M/s. Luis Berger International Inc.

19. During the course of investigation, on 22/07/2015, about 18 documents/ files came to be attached from the JICA office.

20. On 23/07/2015, the respondent sent an application

under the Right to Information Act, seeking copies of the files of the Consultancy Contract. A reply is sent to the application, stating that the Police have attached all the files relating to the consultancy contract. This aspect has some bearing on the rival contentions as to the apprehension expressed on behalf of the applicant / State about the respondent making an attempt to interfere/ influence the investigation. Some more documents / files are attached from JICA Office, PWD on 23/07/2015.

21. On 27/07/2015, the statement of prosecution witnesses Shivram Prasad Maladi, an Ex-employee of Luis Berger International Inc. and Sanjay Zindal is recorded before the learned Magistrate under Section 164 of Cr.P.C.

22. On 28/07/2015, a notice is served on the respondent under Section 41-A of Cr.P.C., requesting him to attend the Crime Branch for investigation.

23. On 29/07/2015, the respondent attends the Crime Branch pursuant to the notice and was interrogated.

24. On 31/07/2015, the statement of one Prasanna Shah, Director of Shah Consultancy is recorded by Magistrate under

Section 164 of Cr.P.C.

25. On 03/08/2015, the respondent is interrogated for the second time.

26. On 04/08/2015, the respondent approached the learned Special Judge, under Section 438 of Cr.P.C. for anticipatory bail, apprehending his arrest in connection with the investigation of Crime No.93/2015, which came up for consideration before the learned Special Judge on 05/08/2015.

It appears that on the basis of a concession on behalf of the State, interim protection was granted to the respondent, which continued during pendency of the application.

27. On 07/08/2015, the Investigating Officer (I.O.) filed his say, opposing the prayer for anticipatory bail. It is for the first time on 07/08/2015 that a claim is made on behalf of the applicant/ State setting out a need for custodial interrogation of the respondent.

28. On 12/08/2015, the respondent is again interrogated.

29. By an order dated 19/08/2015, the application for

anticipatory bail filed by the respondent is allowed by the learned Special Judge, thereby granting pre-arrest bail on the following conditions :

> "*Application stands allowed. Applicant shall be released in Cr.no.93/15 of CID/CB in case of his arrest, on executing personal bond of Rs.1,00,000/- with one solvent surety in like amount to the satisfaction of IO and on following conditions :-*
>
> *1. Applicant shall attend the Police Station of CID/CB as and when called upon and co-operate with the investigating agency;*
>
> *2. Applicant shall not leave State of Goa without permission of this Court;*
>
> *3. Applicant shall deposit his passport if any with this Court within one week;*
>
> *4. Applicant shall not directly or indirectly make any inducement, threat promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence.*"

30. Feeling aggrieved, the State filed the present application purportedly under Section 439(2) read with Section 482 of Cr.P.C.. It appears that on behalf of the respondent, an objection was raised as to maintainability of the application. This Court (K. L. Wadane, J.), by an order dated 04/09/2015 held that under Section 482 of Cr.P.C., this Court can examine the legality

and correctness of the order passed by the learned Special Judge. Thus, the challenge to the order passed by the learned Special Judge, is confined to one under Section 482 of Cr.P.C.

31. Normally, this would have been the end of the narration of the facts, but for some subsequent developments.

32. On 28/09/2015, chargesheet is filed against in all seven accused before the learned Special Judge, in which, the name of the respondent is shown in column No.12 as “a suspect.” The details of the accused may be reproduced thus :

Sr. No.	Name of the accused	Charge	Arrested on
1)	Churchill Alemao, PWD Minister	S.120-B IPC & S.7,8,9 and 13 of Prevention of Corruption Act, 1988 (P.C.Act)	05/08/2015
2)	Anand Wachasunder, Ex. Project Director of JICA Project, Goa	S.120-B IPC & S.7,8,9 and 13 of P.C.Act	27/07/2015
3)	James Andrew McClung, Former Manger	S.120-B IPC & S.7,8,9 and 13 of P.C.Act	Absconding
4)	Satyakam Mohanty, Business/ Independent Consultant	S.120-B IPC & S.7,8,9 and 13 of P.C.Act	03/08/15

5)	Raichand Soni	S.120-B IPC & S.7,8,9 and 13 of P.C.Act	07/08/15
6)	Arthur D'Silva	S.120-B and 201 of IPC.	Without arrest
7)	Louis Berger Group Inc.	S.120-B IPC & S.7,8,9 and 13 of P.C.Act	-

33. Accused No.1 Churchill Alemao and Accused no.2 Anand Wachasunder are released on regular bail by the Special Court on 12/10/2015.

34. In so far as the respondent is concerned, following are the special remarks, including the reasons for not chargesheeting the respondent :

> "*1. Investigation conducted so far revealed that the accused Digamber Kamat has been found to be main criminal conspirator of the deal.*
>
> *2. The principal conspirator accused Digamber Kamat, the then Chief Minister in the Government of Goa in connivance with the then PWD Minister of Goa Shri Churchill Alemao was responsible for holding the file relating to the awarding of JICA consultancy work in Goa without justifiable reasons. Shri Digamber Kamat thereafter accorded the permission to the committees formed by the accused Shri Churchill Alemao violating JICA guidelines in order to control*

the JICA project. Hence custodial interrogation of the accused Digamber Kamat will put further light on the criminal conspiracy of holding the JICA Goa project.

3. Prime conspirator accused Digamber Kamat is also the criminal conspirator in concealing the main noting file of awarding of JICA consultancy in Goa in connivance with the other co-accused Mr. Anand Wachasunder (the then JICA-Goa Project Director) and Mr. Churchill Alemao (the then PWD Minister of Goa) in order to hide the noting's in the main file which would put light on the misdeeds of the accused Shri Anand Wachasunder, accused Shri Digamber Kamat and accused Shri Churchill Alemao. The main file with the noting's relating to the awarding of the JICA consultancy work has to be recovered at the instance of the accused Shri Digamber Kamat as the same is still not traceable.

4. Prime conspirator accused Digamber Kamat also received cash of around 120,00,000/- approximately from Shri Sanjay Jindal, Regional Director of North Region of Louis Berger International Inc. (India) as per the disclosure under Section 164 of Cr.P.C. before the Hon'ble Judicial Magistrate First Class, Panaji and the same has to be recovered at the instance of the accused.

5. During the recording of the witnesses in this crime, which revealed to the Judicial Magistrate First Class, Panaji, the name of the accused Digamber Kamat and Churchill Alemao who happened to be the former Chief Minister and former PWD minister respectively *whom they paid a bribe in crores for the consultancy contract of the JICA water supply and sewage project. The involvement of accused Digamber Kamat is established and more evidence is required to be collected at his instance.*

6. Since the FIR was registered accused applicant was interrogated on two occasions before the grant of anticipatory bail and on another two occasion under interim relief granted by the Hon'ble Special Court during the arguments on anticipatory bail. However the accused applicant did not co-operate with the investigation and therefore further investigations required in respect of accused Digamber Kamat.

7. Trail of the bribe money Rs.120,00,000/- approximately which exchanged hands has to be investigated.

8. The massive wealth accumulated by the accused applicant in his name as well as in the names of his family members needs to be verified with the help of the accused Digamber Kamat and the same would be possible by interrogating the accused applicant in the Police custodial interrogation.

9. The offence committed by the principal conspirator Digamber Kamat alongwith the other co-accused has tarnished the image of Goa and has brought dishonour to this country. Hence further detail investigation has to be carried out in respect of accused Digamber Kamat to bring this case to its logical end.

10. Anticipatory bail granted by the Hon'ble Special Court, Panaji to the prime accused Digamber Kamat *has been challenged before the Hon'ble High Court of Bombay at Goa by filing application for the cancellation of anticipatory bail in order to interrogate the accused in police custody to unearth the deep rooted conspiracy against the society.*

11. Matter relating to the cancellation of the anticipatory bail granted to the accused Shri Digamber Kamat before the Hon'ble High Court of Bombay at Goa is pending and the same is in advance stage.

12. It is submitted that the witnesses have come forward and disclosed under Section 164 of Cr.P.C. before the Hon'ble Judicial Magistrate First Class that the bribes were demanded by the prime accused Digamber Kamat and eventually the same were paid to him on different occasions. However custodial interrogation of the prime accused Digamber Kamat could not be carried out to unearth the truth since he has not co-operated with the investigating authority to reveal the trail of bribe money under the interim relief of anticipatory bail.

13. Hence it is submitted that further investigation in respect of principal accused Digamber Kamat cannot be completed without the police custodial interrogation.

In view of the above mentioned circumstances supplementary report under section 173 of Cr.P.C. against the accused Digamber Kamat will be submitted."

35. I have heard Shri Rivankar, the learned Public Prosecutor for the applicant and Shri S. G. Dessai, the learned Senior Counsel for the respondent at length. With the assistance of the learned Counsel for the parties, I have perused the impugned order as also the relevant record, including the copies of the chargesheet produced.

36. The learned Public Prosecutor made the following submissions :

(i) That under the JICA guidelines, the various committees were to be headed by an executive and not a politician. Notwithstanding this, on 24/01/2008, a fresh note reconstituting the committee was put up, which was approved by the respondent, which was in violation of the JICA guidelines.

(ii) The respondent was called for interrogation on four occasions, namely on 29/07/2015, 03/08/2015, 12/08/2015 and 17/08/215. It is submitted that the respondent was no cooperating with the investigation during interrogation and this was so recorded in the case diary.

(iii) The learned Special Judge misconstrued the scope, ambit and effect of Section 41 and 41-A of Cr.P.C. on the prayer for grant of anticipatory bail. In this regard, the learned Special Judge failed to properly appreciate the ratio in the case of ***Arnesh Kumar Vs State of Bihar,*** reported in (2014)8 SCC 273.

(iv) That ***Arnesh Kumar's*** case (supra) nowhere holds that in a case where there is non-compliance with Section 41-A of Cr.P.C., anticipatory bail can be granted even though prima facie case of involvement in the offence is made out. In other words, it is submitted that once there is material to show prima facie involvement of the respondent in the offence even the alleged non-compliance with section 41 cannot come to the aid of the respondent in seeking anticipatory bail.

(v) That under Section 41(1)(b)(ii) of Cr.P.C. the requirement of recording reasons by the Police Officer is "while making arrest". It is submitted that as held by the Hon'ble Apex Court in ***Siddharam Satlingappa Mhetre Vs. State of Maharashtra and others,*** reported in (2011)1 SCC 694, such reasons can be recorded even after making the arrest. Thus, the learned Special Judge attached too much importance to the absence of the reasons and the consequent non-compliance with Section 41 of Cr.P.C., while granting bail. It is submitted that such reasons were recorded in the reply filed on 07/08/2015 and thereafter, in the case diary on 12/08/2015 and 17/08/2015.

(vi) The learned Special Judge although has considered the entries dated 29/07/2015 and 03/08/2015 in the case diary, the entries dated 12/08/2015 and 17/08/2015 are not considered. Thus, the learned Special Judge has not properly considered and appreciated the material on record.

(vii) The learned Special Judge failed to properly consider that the respondent had made an attempt to interfere with the investigation, through accused Arthur D'Silva, who is Chair Person of the Margao Municipal Council, in obtaining the reply under Right to Information Act, in order to show that the Investigating Agency has seized all the files relating to consultancy contract.

(viii) That the custodial interrogation of the respondent is necessary for following reasons :

(a) Recovery of original noting file for allotment

of the consultancy contract;

(b) To recover/ trace the bribe money and/ or to obtain a trail thereof ; and

(c) To avoid possibility of the respondent tampering or interfering with the investigation.

(ix) That economic offences, which have a bearing on the economic well being of the public bodies, State and the Country as a whole are offences, which are class apart and are considered to be serious offences. It is submitted that the concern of the Legislatures is evident from the fact that Section 13 of the Prevention of Corruption Act is amended with effect from 06/01/2014, by which the maximum punishment has been enhanced from seven years to ten years of imprisonment.

(x) The learned Public Prosecutor has referred to answers given by the respondent to the interrogation conducted on 12/0/2015 against (in particular to question nos.3, 17 and 19, in order to submit that the respondent had not cooperated with the investigation.

(xi) That the filing of the chargesheet and the release of some of the co-accused on regular bail would not be a material change in the circumstance in support of the impugned order, granting anticipatory bail to the respondent.

(xii) That the case of the respondent about the action being actuated out of political vendetta, cannot be accepted in as much as the Investigating Officer had initially proceeded under Section 41 of Cr.P.C.

(xiii) That custodial interrogation is qualitatively different than questioning a suspect, who is armed with an order of anticipatory bail.

37. It may be mentioned that the chronology of events filed by the learned Public Prosecutor under the signature of I.O. contains two entries at Sr. Nos.33 and 35. In entry at Sr. No.33, a reference was made to a raid conducted and documents attached under a panchanama on 16/09/2015 while an entry at Sr. No.35 pertains to a mail received on 22/09/2015 from Tobias Trautner furnishing information regarding this case. However, I.O. and the learned Public Prosecutor chose not to place reliance on these circumstances and accordingly, the entries at Sr. Nos.33 and 35 were deleted.

38. The learned Public Prosecutor has placed reliance on the following decisions, in support of his various submissions :

(1) Popular Muthiah Vs. State represented by Inspector of Police; reported in (2006) 7 SCC 296;

(2) Central Bureau of Investigation Vs. V. Vijay Sai Reddy; reported in (2013)7 SCC 452;

(3) Y. S. Jaganmohan Reddy vs. Central Bureau of investigation; reported in (2013)7 SCC 439;

(4) Nimmagadda Prasad Vs. Central Bureau of Investigation; reported in (2013)7 SCC 466;

(5) State represented by the CBI Vs. Anil Sharma; reported in 1997(3) Crimes 252 (SC);

(6) Arnesh Kumar vs State of Bihar and another; reported in (2014)8 SCC 273;

(7) Siddharam Satlingappa Mhetre Vs. State of Maharashtra and others; reported in (2011)1 SCC 694;

(8) State of Maharashtra Vs. Suraj Pal and Ors; reported in 2014 Law Suit (Bom) 2315;

(9) Pramod Kalpund Vs. Savita; (Criminal Application no.905/2014)**.**

39. On the contrary, Shri Dessai, the learned Senior Counsel for the respondent made the following submissions :

(i) The entire action against the respondent is actuated by political vendetta.

(ii) That under Article 21 of the Constitution of India, no person can be deprived of life or personal liberty otherwise than by a procedure established by law.

(iii) Section 41 of Cr.P.C. is material in the context of the claim made for custodial interrogation in as much as if there is non-compliance with the requirement of recording reasons, the same will have bearing on the bonafides of the claim for custodial interrogation.

(iv) That such reasons have to be recorded in the case diary and the mentioning of the reasons in the reply, opposing the application for bail, which was filed on 07/08/2015, would not be material and in fact it will indicate that the claim for custodial interrogation is by way of an afterthought.

(v) Reliance is placed on the decision of ***Arnesh Kumar*** (supra), in order to submit that the ratio in the said case would apply to all offences, which are punishable upto 7 years of imprisonment as in the present case. Thus, the learned Special Judge was right in placing reliance on the said decision and the non-compliance with Section 41 of Cr.P.C., while granting anticipatory bail.

(vi) That there is no material to show that any such file containing the noting about consultancy contract exists. The learned Senior Counsel would submit that such a file is a figment of imagination of the

Investigating Officer for claiming custody. The learned Senior Counsel has referred to the contents of the chargesheet, in order to show that the existence of such a consultancy file being missing, is falsified by their own prosecution witnesses.

(vii) That the fact that such a file was in existence and/or was missing could have been detected/ recorded at the earliest on 22/07/2015, when some 18 files were seized from the JICA office.

(viii) That the applicant had staked similar claim of necessity of custodial interrogation of the co-accused Mr. Wachasunder and Mr. Churchill Alemao, for recovery of the file.

(ix) That the Comptroller and Auditor General of India, which is a constitutional office had audited the accounts for the period from 2008-2009 to 2012-2013. It is submitted that the accounts could not have been audited, if the file was missing. In short, it is submitted that in the absence of any adverse finding in the Audit Report, ending March, 2013, no responsibility can be fastened on the respondent as admittedly, the respondent is not in power from March, 2012.

(x) That the claim for custodial interrogation for recovery of any such missing file is misconceived.

(xi) In so far as the claim for custody for recovery/ trace of the bribe money is concerned, it is submitted that the applicant had already had four raids conducted, two each at the residential premises of the respondent and the relatives. It is submitted that for effecting any such recovery, the prosecution cannot justifiably seek custody of the respondent.

(xii) That the respondent in a bonafide attempt, tried to obtain the copies of all the files by application under RTI on 23/07/2015 and there was nothing questionable if he asked Arthur D'Silva (Accused no.4) to carry the application.

(xiii) That now that the chargesheet is filed, the apprehension of interference with the investigation cannot survive. It is submitted that the fact that the applicant has filed chargesheet in the matter would show that investigation is complete and only by way of a subterfuge, the respondent is shown as a suspect in column no.12 of the chargesheet to claim that the investigation qua the respondent is still incomplete.

(xiv) The learned Senior Counsel placed reliance on a

Division Bench judgment of this Court in the case of (Khanwilkar J.) ***Gyanchand Verma vs. Sudhakar Pujari***, (Criminal Writ Petition No.3143/2009), in order to submit that a person cannot be shown as a suspect. It is submitted that merely by showing the name of the respondent in column 12 as suspect, the applicant cannot show that the investigation is in fact incomplete, in order to seek cancellation of the anticipatory bail.

(xv) The learned Senior Counsel, while supporting the impugned order, sought to challenge certain findings as to the existence of the prima facie case recorded by the learned Special Judge. The learned Senior Counsel has taken me through the gazette dated 28/08/2008 as also the minutes of the meeting and the constitution of Project Implementation Committee and Bids Evaluation Committee, in order to submit that the respondent had no role to play in the award of the consultancy contract. The learned Senior Counsel was at pains to point out that the quotation of the successful bidder was reduced from 118 Crores to 75.54 Crores by negotiations. It is submitted that for effecting such reduction of about 40 Crores nobody would pay any illegal gratification as it is inconceivable.

(xvi) That the entire episode has started on the basis of the proceedings initiated under Foreign Corrupt Practises Act, before the New Jersey Court in which (and for the matter of that, even in the FIR,) the name of the respondent does not figure as one of the beneficiaries.

(xvii) That the scope of interference under Section 482 of Cr.P.C. is limited and this Court would not sit as an Appellate Court over the order of the learned Special Judge. Thus, unless and until it is demonstrated that there is some manifest perversity, which has resulted into a miscarriage of justice, no interference is called for.

(xviii) That the ground raised in paragraphs 3(A) to 3(J) of the application are not relatable to Section 482 of Cr.P.C. and thus, can only be raised under Section 439(2) of Cr.P.C. It is submitted that the grounds in 3(K) to 3(L) are also not grounds, which can be said to arise out of a challenge under Section 482 of Cr.P.C. as the expression "miscarriage of justice" is different and has different legal connotation from expression “ends of justice”, which is not raised in any of the grounds.

He, therefore, submitted that the application be rejected.

40. In support of his submissions, Mr. Dessai, the learned Senior Counsel has placed reliance on the following decisions :

1. ***Nandini Satpathy V/s P.L. Dani & Anr***., reported in (1978) 2 SCC 424;
2. ***State of Maharashtra V/s Ramdas Shrinivas Nayak & Anr.***, reported in (1982) 2 SCC 463;
3. ***Printers (Mysore) Pvt. Ltd. V/s. Pothan Joseph***; reported in AIR 1960 SC 1156;
4. ***Connelly V/s. DPP***, reported in (1964) (2) ALL E.R. 401;
5. ***State of Haryana and Others V/s. Bhajan Lal and others***, reported in 1992 Supp (1) SCC 335;
6. ***Mohit V/s. State of UP,*** reported in 2013 (7) SCC 789;
7. ***Amit Kapur V/s.*** **Ramesh Chander,** reported in 2012 (9) SCC 460;
8. ***Devinder Pal Singh Bhullar V/s. State of Punjab,*** reported in 2011 (14) SCC 770;
9. ***Laxman Irappa Hati & Anr. V/s. State,*** reported in 2004 (2) Bom. C.R.(Cri.) 525;
10. ***Sanjay Chandra V/s. CBI,*** reported in 2012 (1) SCC 40;
11. ***Gyanchand Verma V/s. Sudakar B. Pujari & Ors.,*** (Crim. W.P. No.3143/2009);
12. ***Shri Gurbakash Singh Sibbia & Ors. V/s.***

State of Punjab Sanjay Chandra, reported in 1980 (2) SCC 565;

13. ***Siddharam Satlingappa Mhetre V/s. State of Maharashtra and Ors.,*** reported in 2011 (1) SCC 694;

14. ***Arnesh Kumar V/s. State of Bihar and anr***., reported in 2014 (8) SCC 273;

15. ***Bhadresh Bipinbhai Sheth V/s. State of Gujarat and anr.,*** (Crim. Appeal Nos. 1134 – 135 of 2015);

16. ***Teesta Setalvad and anr. V/s. CBI and anr.,*** (Anticipatory Bail Application No.1057/2015 a/w Crim. Appln. No.656 of 2015);

17. ***Dolat Ram and Ors. V/s. State of Haryana***, reported in (1995 (1) SCC 349);

18. ***Savitri Agarwal & Ors. V/s. State of Maharashtra & anr.***, reported in 2009 (8) SCC 325;

19. ***P. Satyanarayana Murthy V/s. The Dist. Inspector of Police and Anr.,*** (Crim. Appeal No.31 of 2009).

41. I have given my anxious consideration to the rival circumstances and the submissions made. Although the parties have argued the matter at great length, the issue for determination essentially lies in a narrow compass. The material question is whether the applicant has been able to demonstrate a need for custodial interrogation in the context of the allegations and the material available on record and whether the impugned

order needs interference in exercise of jurisdiction under Section 482 of Cr.P.C., particularly in the context of the subsequent developments, namely filing of the chargesheet and the release of the co-accused on regular bail. Incidentally, the question about the effect and interplay between the requirements of recording reasons for arrest under Section 41 of Cr.P.C. and the claim for custodial interrogation also arises in the matter.

42. It is now well settled that Section 482 of Cr.P.C. does not create or confer any new remedy, but declares and saves the inherent powers of the High Court which already exist. Under Section 482 of Cr.P.C., the High Court can make such orders as may be necessary (i) to give effect to any order under the Code or (ii) to prevent abuse of the process of any Court or (iii) otherwise to secure the ends of justice. It cannot be accepted that only by virtue of the wording or the phraseology as used in grounds set out in the application that they do not relate to a challenge under Section 482 of Cr.P.C. There cannot be a hairsplitting of the words and phrases so as to differentiate between the expression "miscarriage of justice" and the expression "ends of justice". In other words, if it is shown that there is miscarriage of justice, the fact that the Court would act to correct the same would itself tantamount that the Court is acting

to secure the ends of justice. Thus, the submission that the petition does not contain a ground which is relatable to section 482 of Cr.P.C. Has to be refuted. The scope and ambit of the challenge has to be confined to, as is available under Section 482 of Cr.P.C., in as much as this Court (K. L. Wadane, J.) has already held that the application can only be entertained under Section 482 of Cr.P.C. The nature, scope and ambit of the powers available to this Court under Section 482 of Cr.P.C. is no longer *res integra* as it is subject matter of several decisions, both of the Hon'ble Supreme Court and various High Courts.

43. In the case of ***Popular Muthiah*** (supra), the Hon'ble Supreme Court in para 30(iii), *inter alia,* held thus :

> *"(iii) It is, however, beyond any doubt that the power under Section 482 of the Code of Criminal Procedure is not unlimited. It can inter alia be exercised where the Code is silent, where the power of the court is not treated as exhaustive, or there is a specific provision in the Code; or the statute does not fall within the purview of the Code because it involves application of a special law. It acts ex debito justitiae. It can, thus, do real and substantial justice for which alone it exists."*

44. In the case of ***Monika Kumar Vs. State of U.P.***,

reported in (2008)8 SCC 781, it has been held that the inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the test specifically laid down in the section itself.

45. Before considering the rival contentions it is necessary to state, that at this stage, a detailed and in-depth enquiry into the evidence and other material on record is neither necessary nor warranted. This is because the chargesheet is filed against some of the accused and the investigation is said to be in progress in respect of the present respondent. It was submitted during the course of arguments at bar that the chargesheet, which is filed is under Section 173(2) of Cr.P.C. and the Investigating Agency can file a supplementary chargesheet, after carrying out further investigation, which is permissible under Section 173(8) of Cr.P.C. The learned Senior Counsel for the respondent submitted that in fact no permission of the Special Court was necessary for carrying out any such further investigation. That apart, factually speaking, such permission is granted and according to the applicant/ State, further investigation is in progress. Thus, in depth appreciation of the evidence and material on record would neither be necessary nor appropriate as it may tend to prejudice either of the parties at the trial.

46. The learned Senior Counsel for the respondent has placed reliance on the decision of this Court in the case of ***Gyanchand Verma*** (supra), in order to submit that the respondent could not have been shown as a suspect. In the case of ***Gyanchand Verma*** (supra), the following question had arisen for consideration of the Division Bench :

> *Whether naming any person as suspect in the police report/ chargesheet filed under Section 173(2) and more-so under Section 173(8) of Cr.P.C. is just, fair and proper and is in consonance with the procedure established by law. Incidentally, the question is whether on account of naming of any person as suspect in the police report/ chargesheet, it has inevitable effect of sullying the reputation of that person irrespective of nature of pending criminal action.*

It was held in para 24 of the judgment that naming of a person as suspect in the final police report/ chargesheet filed under Section 173(2) and Section 173(8) of Cr.P.C. cannot be countenanced as it would be opposed to criminal jurisprudence.

The submissions based on the aforesaid case would not be of much consequence and relevance, particularly in the context of the issue which falls for determination in this case. That apart, the following observations in para 33 of the judgment in the case of ***Gyanchand Verma*** (supra) can be reproduced as under:

> *"For the aforestated reasons the relief claimed in the petition had to succeed. That, however, does not mean that the petitioner cannot be proceeded against at the appropriate stage, if the fact situation so warrants, including by resorting to further investigation under Section 173(8) of Cr.P.C. or to proceed against him under Section 319 of Cr.P.C. If it appears from the evidence during the course of enquiry into or trial that even if he is not named as accused, has committed an offence, for which he can be tried together with the named accused. These aspects will have to be considered at the appropriate stage. The same are left open."*

It can thus be seen that the case of ***Gyanchand Verma*** (supra) did not involve the issue of grant or cancellation of anticipatory bail.

47. In the Constitution Bench decision of the Hon'ble Apex Court in the case of ***Gurbaksh Singh Sibbia*** (supra), it has been held that Section 438 of Cr.P.C. calls for liberal interpretation in

the light of Article 21 of the Constitution of India. It has been further held that any statutory provision concerned with the personal liberty cannot be whittled down by reading restrictions and limitations into it.

48. In a more recent decision on which both the parties have placed reliance, is the case of ***Siddharam Mhetre*** (supra). In that case, it has been *inter alia,* held that there is no justification for reading into Section 438 of Cr.P.C., limitations, mentioned in Section 437 of Cr.P.C. The plentitude of Section 438 must be given its full play. There is no requirement that the accused must make out "a special case", for exercise of powers to grant anticipatory bail and this would virtually reduce the salutary power conferred by Section 438 to a dead letter. It would be worthwhile to reproduce the observations in paragraphs 88 to 90 as under :

> *"88. The gravity of charge and the exact role of the accused must be properly comprehended. Before arrest, the arresting officer must record the valid reasons which have led to the arrest of the accused in the case diary. In exceptional cases the reasons could be recorded immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also be properly evaluated by the court.*
> *89. It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion must be exercised on the basis of the available material and the facts of the particular*

case. In cases where the court is of the considered view that the accused has joined investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided.

90. A great ignominy, humiliation and disgrace is attached to the arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage."

49. Finally, the Hon'ble Apex Court held thus in paras 112 to 114 as under :

*"**112**. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:*

i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

ii. The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

iii. The possibility of the applicant to flee from justice;

iv. The possibility of the accused's likelihood to repeat similar or the other offences;

v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

x. Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

***113.** Arrest should be the last option and it should be* *restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.*

114. *These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly visualize all situations and circumstances in which a person may pray for anticipatory bail. If a wise discretion is exercised by the concerned judge, after consideration of the entire material on record then most of the grievances in favour of grant of or refusal of bail will be taken care of. The legislature in its wisdom has entrusted the power to exercise this jurisdiction only to the judges of the superior courts. In consonance with the legislative intention we should accept the fact that the discretion would be properly exercised. In any event, the option of approaching the superior court against the Court of Sessions or the High Court is always available."*

It was not disputed by the learned Public Prosecutor that the considerations as set out in paragraph 112(ii) to (iv) do not arise in this case.

The Hon'ble Apex Court further held in paras 117 and 118 of the judgment as under :

*“**117.** In case, the State considers the following suggestions in proper perspective then perhaps it may not be necessary to curtail the personal liberty of the accused in a routine manner. These suggestions are only illustrative and not exhaustive:*
(1) Direct the accused to join the investigation and only when the accused does not cooperate with the investigating agency, then only the accused be arrested.

(2) Seize either the passport or such other related documents, such as, the title deeds of properties or the fixed deposit receipts/share certificates of the accused.

(3) Direct the accused to execute bonds.
(4) The accused may be directed to furnish sureties of number of persons which according to the prosecution are necessary in view of the facts of the particular case.

(5) The accused be directed to furnish undertaking that he would not visit the place where the witnesses reside so that the possibility of tampering of evidence or otherwise influencing the course of justice can be avoided.

(6) Bank accounts be frozen for small duration during investigation.

***118.** In case the arrest is imperative, according to the facts of the case, in that event, the arresting officer must clearly record the reasons for the arrest of the accused before the arrest in the case diary, but in exceptional cases where it becomes* *imperative to arrest the accused immediately, the reasons be recorded in the case diary immediately after the arrest is made without loss of any time so that the court has an opportunity to properly consider the case for grant or refusal of bail in the light of reasons recorded by the arresting officer."*

50. It can, thus, be seen that the consideration of prayer for grant of anticipatory bail essentially involves a balance between two conflicting considerations of upholding the personal liberty as guaranteed under Article 21 of the Constitution of India and the larger societal interest for the proper investigation of the crimes. In an appropriate case, the Court can strike this balance by imposing appropriate conditions.

51. A perusal of the impugned order would show that the learned Special Judge has noticed the changes effected under Section 438 of Cr.P.C. by the Criminal Procedure Code (Amendment) Act No.25 of 2005 and has found that the use of the word "*inter alia*" among other things makes it clear that the power of the Court is wide enough to cover other aspects as held in the case of ***Gurbaksh Singh Sibbia*** (supra). The learned Special Judge found that in as much as the offences alleged against the respondent were carrying a maximum punishment upto 5/7 years imprisonment, the provisions of Section 41 of Cr.P.C. would come

into play and the I. O will have to follow the procedure as laid down therein.

52. The learned Special Judge has then noticed the provisions of Section 41-A of Cr.P.C. and the decision of the Hon'ble Supreme Court in the case of ***Arnesh Kumar*** (supra) and the guidelines laid down therein and has found that the respondent had attended the office of the Crime Branch on two occasions i.e. on 29/07/2015 and then on 03/08/2015, when he was interrogated and was allowed to go. The learned Special Judge, therefore, found that the I.O. was exercising the powers under Section 41-A of Cr.P.C. as at that time, there was no credible information or reasonable suspicion, which could be said to be existing that the respondent has committed a cognizable offence. It has thereafter been found that clause (3) of Section 41-A would come into play, wherein it is provided that when such a person complies or continues to comply with the notice, he should not be arrested in respect of the offences referred to in the notice, unless for reasons to be recorded, the Police Officer is of the opinion that he ought to be arrested. Thus, it has been found that it was necessary for the I.O. to record the reasons as to why the arrest of such person is required and without such reasons being recorded "in the case diary", it was not permissible for the I.O. to arrest

such person when, he is complying or continues to comply with the notice under Section 41-A of the Cr.P.C. The learned Special Judge, thereafter, has found on perusal of the case diary that no such reasons were recorded. This is the principal reason for which the learned Special Judge has exercised the discretion in granting anticipatory bail. In so far as the need for custodial interrogation is concerned, it has been found that since March, 2012, the respondent is not in power. The documents are either with the Project Director or PWD and it cannot be said that the respondent had deliberately concealed the same and no witness has stated so far that such noting file is missing since the time the respondent stepped down as the Chief Minister. It was found that being out of power from 2012, the respondent would not have any access to the record.

53. On the basis of the judgments of the Hon'ble Supreme Court in the cases of ***Y. S. Jaganmohan Reddy, Nimgadda Prasad and Vijay Sahai Reddy,*** (supra), which pertain to the economic offences, the learned Special Judge came to the conclusion that the present case would be a “class apart”, as held by the Hon'ble Apex Court. The learned Special Judge has then noticed the grounds for grant of bail under Section 439 of Cr.P.C. namely, (i) nature of accusation and evidence; (ii) severity of

punishment which conviction will entail; (iii) Character and circumstances which are peculiar to accused; (iv) Reasonable possibility of securing presence of the accused at trial; (v) Reasonable apprehension of witnesses being tampered with; and (vi) Larger interest of public/ State and other similar situation.

54. The Special Judge has negatived the contention of the respondent that the action was politically motivated as the FIR was registered on the basis of the report published in the newspaper and the proceedings before the New Jersey court against Luis Berger International Inc. and in view of the statement of the witnesses, who have disclosed about the involvement of the respondent. The learned Special Judge has found that the theory of the action being politically motivated cannot be accepted as in that event, the respondent could have been placed under arrest on the very first date.

55. The learned Special Judge refused to accept that the respondent had any criminal antecedents, after holding that there was no material to even prima facie show that there is any criminal background of the respondent. While reaching this finding, the learned Special Judge considered the decision of the Hon'ble Apex Court in the case of ***Goa Foundation versus Union***

of India ;(2014)6 SCC 590 by which the report of the Justice Shah Commission (in respect of Mining Scam) was not accepted and as no prosecution could be launched on that basis. The learned Special Judge has found that the respondent has so far attended the Investigating Agency and cooperated in the investigation. It was also found that the respondent had firm roots in the society and there was no possibility of the respondent fleeing from justice since he was a sitting MLA.

56. The learned special Judge has then reverted back to Section 41 of the Code and found that it was mandatory for the Investigating Officer to record specific reasons of his intention to arrest the respondent which was absent in the case diary. This was found to be in violation of the law laid down by the Honble Apex Court in the case of ***Arnesh Kumar*** (supra).

57. It can thus be seen that mainly and predominantly on the ground of non-compliance of Section 41 of the Cr.P.C. that the learned Special Judge had granted pre-arrest bail to the respondent. Therefore, in order to examine the challenge it would be necessary to consider the aforesaid sections in the context of the decision in the case of ***Arnesh Kumar*** (supra). That was a case, in which the petitioner was apprehending arrest

in connection with offences under Section 498-A of I.P.C. and Section 4 of the Dowry Prohibition Act. The Hon'ble Apex Court, after considering the provisions of Section 41 of Cr.P.C., held as under :

> *"**7.1.** From a plain reading of the aforesaid provision, it is evident that a person accused of an offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on his satisfaction that such person had committed the offence punishable as aforesaid. A police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts.*
>
> ***7.2.** The law mandates the police officer to state the facts and record the reasons in writing which led him to come to a conclusion covered by any of the provisions aforesaid, while making such arrest. The law further requires the police officers to record the*

reasons in writing for not making the arrest.

7.3. *In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of clause (1) of Section 41 Cr.PC."*

It has further held in paras 8.2 to 8.3 as under :

"***8.2.*** *Before a Magistrate authorises detention under Section 167 CrPC, he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person arrested are satisfied. If the arrest effected by the police officer does not satisfy the requirements of Section 41 of the Code, Magistrate is duty-bound not to authorise his further detention and release the accused. In other words, when an accused is produced before the Magistrate, the police officer effecting the arrest is required to furnish to the Magistrate, the facts, reasons and its conclusions for arrest and the Magistrate in turn is to be satisfied that the condition* *precedent for arrest under Section 41 CrPC has been satisfied and it is only thereafter that he will authorise the detention of an accused.*

8.3. *The Magistrate before authorising detention will record his own satisfaction, may be in brief but the said satisfaction must reflect from his order. It shall never be based upon the ipse dixit of the police officer, for example, in case the police officer considers the arrest necessary to prevent such person from committing any further offence or for proper investigation of the case or for preventing an accused from tampering with evidence or making inducement, etc. the police officer shall furnish to the Magistrate the facts, the reasons and materials on the basis of which the police officer had reached its conclusion. Those shall be perused by the Magistrate while authorising the detention and only after recording his satisfaction in writing that the Magistrate will authorise the detention of the accused."*

The Hon'ble Apex Court has then considered the provisions of Section 41-A of Cr.P.C. and has held thus in para 9 as under :

".......The aforesaid provision makes it clear that in all cases where the arrest of a person is not required under Section 41(1) CrPC, the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an

accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police officer is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged under Section 41 CrPC has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid.

***10.** We are of the opinion that if the provisions of Section 41 CrPC which authorises the police officer to arrest an accused without an order from a Magistrate and without a warrant are scrupulously enforced, the wrong committed by the police officers intentionally or unwittingly would be reversed and the number of cases which come to the Court for grant of anticipatory bail will substantially reduce. We would like to emphasis that the practice of mechanically reproducing in the case diary all or most of the reasons contained in Section 41 CrPC for effecting arrest be discouraged and discontinued."*

The Apex Court in para 11 gave the following directions :

*"**11.** Our endeavour in this judgment is to ensure that police officers do not arrest the accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following directions:*

***11.1.** All the State Governments to instruct its police officers not to automatically arrest when a case under*

Section 498-A IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 CrPC;

11.2. *All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);*

11.3. *The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;*

11.4. *The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;*

11.5. *The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;*

11.6. *Notice of appearance in terms of Section 41-A CrPC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;*

11.7. *Failure to comply with the directions aforesaid shall apart from rendering the police officers* *concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before the High Court having territorial jurisdiction.*

11.8. *Authorising detention without recording reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.*"

It is clear from the reading of para 12 of the said judgment that although the said case arose out of an offence under Section 498-A of I.P.C., the directions were to apply for all offences, which are punishable with imprisonment for a term which may extend to 7 years, with or without fine.

58. Turning to the present case, evidently, the I.O. had initially resorted to Section 41-A and thus, it can be safely assumed that the arrest of the respondent was not required in the opinion of the I.O. under subsection (1) of Section 41 of Cr.P.C. It is further evident from the record that the respondent had attended the office of the Crime Branch on 29/07/2015 and 03/08/2015 and was interrogated. It is further evident that on the basis of a concession, there was an interim protection granted to the respondent initially. It is for the first time i.e. on 07/08/2015 when a reply opposing the application was filed by the State that a

need for arrest and custodial interrogation was spelt out. Till this date, there is no satisfaction recorded in the case diary.

59. The learned Public Prosecutor by inviting attention to the phraseology as used in Section 41 has submitted that the I.O. is required to record the reasons “at the time of arrest” and in some cases, it can even be thereafter, as held in the case of ***Siddharam Mhetre*** (supra). It is true that under Section 41, such reasons are to be recorded at the time of making arrest or thereafter as held by the Hon'ble Apex Court. The question would depend upon facts and circumstances of each case. In the present case, the reasons are neither recorded antecedent to the opinion formed by the I.O. nor immediately after the said opinion was for the first time reduced into writing in the reply. Normally, such reasons will have to be found in the case diary, which is contemporary record of the investigation being made. In the present case, it is also not found that such reasons are recorded immediately after the I.O. formed an opinion about the necessity of arrest as recorded in the reply. Such reasons are for the first time recorded in the case diary on 12/08/2015 on the ground that the respondent had not disclosed anything during interrogation and thus, was not found cooperating with the investigation. I have also perused the question nos.3, 17 and 19, which were referred to

by the learned Public Prosecutor. It would not be appropriate to set out the details as according to the applicant/ State, the investigation against the respondent is still in progress.

60. I have given my anxious considerations to the rival circumstances and the submissions made and I do not find that the reasons as required were recorded antecedent to the forming of the opinion or immediately after such opinion was formed as reflected in the reply, filed on 07/08/2015.

61. A perusal of para 8.2 of the judgment in the case of ***Arnesh Kumar*** (supra) would show that the Court can authorise detention under Section 167 (which would be consequent on arrest) only on satisfaction that the arrest made is legal and in accordance with law and further that the Court is duty bound not to authorise further detention if the arrest effect by the Police Officer does not specify the requirements of Section 41 of the Code. Thus, I do not find any reason to take exception to the reliance placed by the learned Special Judge on non-compliance with Section 41 of Cr.P.C. as a ground for grant of the anticipatory bail.

62. The cancellation of the anticipatory bail granted is

basically claimed on account of a need for having custodial interrogation (i) to recover the original file, containing the noting relating to the award of the consultancy contract and (ii) the recovery of the bribe amount. In so far as the recovery of the file is concerned, prima facie, at this stage, it appears that on 22/07/2015, the I.O. had seized 18 files from the office of JICA and there is nothing on record to show that when this seizure was made, it was noticed that the original file about the noting was missing. It was specifically asked to the learned Public Prosecutor as to whether while making the seizure of 18 files, the I.O. had recorded about the original noting file being missing, nothing was pointed out to show that such a record was made. In this regard, the statement of Mr. Anand Wachasunder which was recorded on 23.07.2015 (and who is now arraigned as an accused). He states as under:

> *"I say the initial noting file concerned with this project is not traceable in the office of JICA, Altinho, Panaji. This file may be found in the office of Principal Chief Engineer or in the office of Finance Secretary, Porvorim. I submit that I will conduct search of the noting file relating to JICA Project and furnish the same to the Crime Branch when found."*

Indisputably the respondent is not in power since March, 2012. In such circumstances, the ground of arrest/custodial interrogation for recovery of the said file, in my considered view cannot be accepted.

63. This takes me to the issue of recovery of bribe amount. In this regard, the prosecution evidence at this stage, is in the form of the statements of Shivram Prasad Maladi and Sanjay Zindal, recorded under Section 164 of Cr.P.C. Shivram Prasad Maladi happens to be an Ex-employee of Luis Berger International Inc., while Sanjay Zindal was the Regional Director. They have stated about handing over of the cash in the year 2010-2011. The learned Senior Counsel for the respondent has tried to point out certain discrepancies interse in the statements of these two witnesses. However, such an exercise would not be permissible at this stage. However, the fact remains that the I.O. has carried out raids on four occasions, two each at the residence/ establishment of the respondent and his relatives. Moreover, this requirement of the arrest and custody of the respondent for recovery of the bribe amount appears to have been first recorded on 17/08/2015.

64. This takes me to the ground about tampering with the investigation by obtaining the information under Right to

Information Act. The contention is that the respondent wanted to make a show on the basis of the reply to his application under RTI that all the files pertaining to the JICA Project were already seized. In this regard, it appears that the respondent had sent two applications under RTI one on 23/07/2015 and the other on 04/08/2015. It was submitted by the learned Public Prosecutor that the respondent had intentionally sent these applications on his letter head, showing himself as Ex-Chief Minister and the sitting MLA of the Margao Constituency. It is submitted that this was with a view to influence the officers of the PWD. I am afraid that at this stage, merely because the respondent has used his letter head, such an inference cannot be drawn. The material allegation is that in the application dated 23/07/2015, the respondent had sought for the following documents :

> "*(i) All files with noting concerning/ relating to appointment of Project Management Consultants for the JICA Project;*
>
> *(ii) The copy of Agreement made with JICA by Government of Goa;*
>
> *(iii) Work order issued to Project Manager Consultant of JICA Project;*
>
> *(iv) The Agreement made with Project Management Consultant in relation to JICA Project.*"

65. The prosecution witness Laxmikant Chodankar has

stated that in so far as the documents at Sr. No.1 are concerned, he had made a noting that the said files are not available with him. However, the reply eventually issued by another prosecution witness Dattaram Porob stated that the said files at Sr. No.1 are not available "as the same have been taken by the Crime Branch Police Station, Ribandar." Shri Dattaram Porob states that he has not verified and checked the contents of the said letter (reply) as per the noting made by Laxmikant Chodankar, as there was no such practise.

66. In so far as the second application is concerned, the copy shows that the following information was asked for :

> "*(i) Kindly let me know the exact date as to when all the files with noting relating to appointment of Project Management Consultant with the JICA Project have been taken by the Crime Branch Police Station, Ribandar from your office.*
> *(ii) Kindly also provide copy of the minutes of the Goa State Works Board (GSWB) meeting held between 01/06/2009 to 31/07/2009.*
> *(iii) The copy of the noting moved by JICA for the agenda of GSWB meeting, which was held on 17/07/2009.*"

67. According to the prosecution, the third document which entry appears in handwriting, was interpolated, which

would be evident from the fact that the reply dated 11/08/2015 only pertains to the first two documents. It is also contended that the respondent sent these applications through Arthur D'Silva, Chair Person of Margao Municipal Council, who was Ex-employee of PWD, with a view to obtain a favourable reply. I have considered the circumstances and the submissions made. I find that the investigation on this aspect is already completed. It may be mentioned that Arthur D'Silva is also arrayed as the co-accused in the chargesheet and Laxmikant Chodankar and Dattaram Porob are cited as prosecution witnesses. Thus, the said ground in my considered view, would not come to the aid of the prosecution, for seeking custody.

68. There cannot be any dispute with the proposition that the custodial interrogation is qualitatively different than questioning a person, who is protected by an order under Section 438 of Cr.P.C. (See ***Anil Sharma's*** case (supra)). However, whether custodial interrogation is necessary would always be a question of fact, to be decided in the facts and circumstances of each case.

69. In the case of ***Suraj Pal*** (supra), there was an application for cancellation of regular bail filed under Section

439(2) of Cr.P.C.. In that context, it was held that the case of ***Arnesh Kumar*** (supra), does not lay down a principal where the offence involved is punishable upto 7 years imprisonment and when interrogation is not required, the person accused of that offence should be released on bail without considering other relevant parameters. It would be thus, clear that the said case is distinguishable on facts.

70. As stated earlier, the respondent has while supporting the impugned order, has sought to challenge certain findings, which are recorded against him, particularly as regards prima facie case and action being actuated out of political malice and vendetta. I have considered this aspect. Basically, the challenge is at the instance of the State to the grant of anticipatory bail, which has been examined on ground of the non-compliance with Section 41 of Cr.P.C. and a need for custodial interrogation. The material cannot be examined in depth so as to record a final and binding conclusion. The nature and extent of probative enquiry of the material would differ at different stages, for instance, at the stage of consideration of bail, framing of charge and then at the trial. Even so far as the claim that the action is actuated by political vendetta, the same has been negatived. I do not find that any exception can be taken to the finding recorded on these aspects by

the learned Special Judge at this stage.

71. A brief reference to the developments subsequent to the passing of the impugned order, namely the filing of the chargesheet and the release of the co-accused Churchill Alemao on regular bail, needs to be made at this stage. In so far as the second aspect about the release of the co-accused on bail is concerned, it would not be of much significance as the said accused has been released on regular bail and presently we are concerned with the challenge to the order of grant of anticipatory bail. In so far as the filing of the chargesheet is concerned, on one hand, it is claimed by the applicant/ State that the investigation qua the respondent is still incomplete and the applicant proposes to file a supplementary chargesheet in consequence of the investigation, to be carried out under Section 173(8) of Cr.P.C., on the other hand, it is claimed on behalf of the respondent that indeed, the investigation is complete and only in order to see that the same does not enure to the benefit of the respondent as a material change in circumstance, that the respondent has been shown as a suspect.

72. Here again, the issue has to be dealt with a certain amount of caution, so that none of the parties is prejudiced, as

admittedly the Special Court has granted permission and further investigation is being carried out. Prima facie, here is a situation where, in the chargesheet although the respondent is stated to be the principal conspirator, chargesheet is filed against the co-accused, showing the principal conspirator as a suspect. Be that as it may, as the further investigation is still stated to be in progress, I do not propose to place reliance on any of the subsequent developments, in support of the impugned order, as for reasons stated herein above, I find that the impugned order otherwise has to be confirmed. Thus, I do not find that the order granting anticipatory bail needs interference in exercise of inherent jurisdiction of this Court under Section 482 of Cr.P.C.

73. In the result, the application is hereby dismissed.

C. V. BHADANG, J.

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