

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 29TH DAY OF MAY 2015/8TH JYAISHTA, 1937

CRL.A.No. 907 of 2001 (A)

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AGAINST THE JUDGMENT IN CC 18/1999 of ENQUIRY COMR.& SPL.JUDGE,  
KOZHIKODE, DATED 07.09.2001

APPELLANT(S):

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1. V.E.BADARUDEEN, PRESIDENT,  
PUDUNAGARAM PANCHAYAT, S/o.YOUSEFF ROWTHER,  
UMMARATH VEEDU, K.P. STREET,  
PUDUNAGARAM, PALAKKAD.
2. K.C. SHANMUGHAN, S/o.CHEMBUTHARAGAN,  
KANDATH HOUSE, KARIPPODE, PALAKKAD DISTRICT,  
(MEMBER, PUDUNAGARAM PANCHAYAT).

BY ADVS.SRI.K.RAMAKUMAR (SR.)  
SRI.S.M.PRASANTH  
SRI.M.MANOJKUMAR (CHELAKKADAN)  
SMT.ASHA BABU  
SRI.G.RENJITH  
SMT.AMMU CHARLES

RESPONDENT(S):

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STATE OF KERALA, REPRESENTED BY THE  
DEPUTY SUPERINTENDENT OF POLICE,  
VIGILANCE AND ANTI-CORRUPTION BUREAU,  
PALAKKAD.

BY PUBLIC PROSECUTOR SRI. K.K. RAJEEV.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 29-05-2015, ALONG  
WITH CRA. 908/2001, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**K. RAMAKRISHNAN, J.**

**[C.R]**

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Crl.Appeal Nos.907 & 908 of 2001

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Dated this the 29<sup>th</sup> day of May, 2015

**ORDER**

Criminal Appeal No.907/2001 was filed by accused Nos.1 and 2 and Criminal Appeal No.908/2001 was filed by the 3<sup>rd</sup> accused in C.C.No.18/2009 on the file of the Enquiry Commissioner and Special Judge, Kozhikode. Appellants along with original 4<sup>th</sup> accused were charge-sheeted by the Deputy Superintendent of Police, Vigilance and Anti Corruption Bureau, Palakkad, in V.C.8/94 of VACB Palakkad, alleging offences under Section 13(1)(d) and 13(1)(c) read with Section 13(2) of the Prevention of Corruption Act and Section 403 and 120B of Indian Penal Code.

2. The case of the prosecution in nut shell was that, accused Nos.1 and 2 were the president and member respectively of Pudunagaram Grama Panchayath, Palakkad, during 1991 and 92 and while so under the JRY Scheme, the Panchayath was accorded

sanction to undertake the work namely improvement to Unnanchathan theruvu-Kattutheruvu road, on an estimated cost of ₹1,30,700/- and third accused was selected as a convener for the work and as per the norms of the scheme, the work has to be done by the convener with the help of the local people and it cannot be done through any contractor and more than 50% of the advance amount should not be given, unless for the amount advanced, certification from the Assistant Engineer of the Block Supervising the work is obtained and produced along with the part bill for the work done. But accused Nos.1 and 2 entered into a conspiracy with third accused, the convener of the work and 4<sup>th</sup> accused the contractor engaged by him to misappropriate the funds earmarked for the work and pursuant to the conspiracy and violating the norms for payment of the advance, paid ₹88,000/- to the third accused by way of five installments and in spite of the amount given, the work was not completed and thereby accused Nos.1 and

2 have misusing the their official position with a dishonest intention of causing loss to the Panchayath and with a view to help accused Nos. 3 and 4 done these things, violating the rules and regulations and thereby misappropriated the amount to the tune of ₹56,075/- and thereby accused Nos.1 and 2 have committed the offence punishable under Section 13(1) (c) and (d) read with Section 13(2) of the Prevention of Corruption Act and all the accused have committed the offence punishable under Section 120B and 409 read with Section 34 of the Indian Penal Code.

3. After investigation, final report was filed and the case was taken on file as C.C.No.18/1999 on the file of the Enquiry Commissioner and Special Judge, Kozhikode. When the accused appeared before the court below, after hearing both sides, originally charge under Section 13(1)(d) read with Section 13(2) and Section 120B and 403 read with Section 34 of the Indian Penal Code was framed against accused Nos.1 and 2 and charge under Section 403

and 120B of Indian Penal Code was framed against accused Nos.3 and 4 along with accused Nos.1 and 2 and the same was read over and explained to them and they pleaded not guilty. Thereafter, since the Special Judge found that offence under Section 13(1)(c) of the Prevention of Corruption Act was also committed, the charge was amended including Section 13(1)(c) of the above Act also against accused Nos.1 and 2 and the same was also read over and explained to them and they pleaded not guilty.

4. In order to prove the case of the prosecution, PWs 1 to 20 were examined and Exts.P1 to P32 were marked on their side. After closure of the prosecution evidence, the accused were questioned under Section 313 of the Code of Criminal Procedure and they denied all the incriminating circumstances brought against them in the prosecution evidence. First accused has filed a statement under Section 313(5) of the Code of Criminal Procedure stating that, he had not committed any offence and as per

the request of the local people of the panchayath, Unnanchathan theruvu-Kattutheruvu road work was included in the JRY Scheme and Sri.Shaik Musthafa, a panchayath member was elected as convener earlier. Since the then panchayath executive officer was against the development activities of the panchayath and since complaints had been raised by some of the members in this regard, the matter was discussed in the meeting of the panchayath and an unanimous decision was taken to remove the executive officer from the joint signatory ship in respect of the JRY Scheme and authorized the president and the second accused Shanmugham/ member of Ward No.VII of the panchayath to sign the cheques for that purpose. Thereafter, entrusting the work of JRY Scheme as convener to the members of the Panchayath was not permitted and so in the place of Sri.Shaik Musthafa, third accused Shahul Hameed was unanimously selected as the convener and he executed the agreement in this regard. He was not having

school education and he is unable to read and write Malayalam. He can only speak Tamil and Malayalam and sign in English. His mother tongue is Tamil. He can read and write Tamil. On account of his integrity and intention to work for the welfare of the people, he has been selected as the president of the panchayath again. The JRY Scheme was managed by a clerk by name Sri. Yacob and he was in custody of all the documents and it was he who prepared the necessary documents and putting up note for taking decision and it is on the basis of his note that the decisions were taken and cheques were issued. No objection was raised for making any payment or issuing any cheque by the said clerk. All were relying on the advice given by Yacob for this purpose. No sanction under the Panchayath Raj Act was taken and so taking cognizance is not proper.

5. Second accused also filed a statement more or less adopting the statement given by the first accused. He had also submitted that, no sanction was obtained either

under the Prevention of Corruption Act or under Panchayath Act or under Criminal Procedure Code for initiating action against him. Third accused filed a statement stating that, he was working as Muthavally and Secretary of Kattutheruvu Shaik Mohayuddhin Kottapally, for the last 25 years and earlier Panchayath Member Sheik Musthafa was elected as convener for doing this work. Since there was restriction for the panchayath member to act as convener, he has been unanimously selected by the local people as convener, taking his position in the mosque. He was only a name lender. The work was done under the supervision of Shaik Musthafa and Santhakumaran and the work was entrusted to a contractor. He was only putting his signature in the documents prepared by the clerk of the panchayath and the amounts were withdrawn and spent by the contractor and no amount was used by him. He has not done this contract work. So he did not know about the legal formalities for the same. Except the tarring work, the other

works were done by the contractor. He had not committed any offence and he has not misappropriated any amounts. 4<sup>th</sup> accused had submitted that, he had not committed any offence and he has been falsely implicated in the case. DW1 was examined and Ext.D1 was marked on the side of the defence on behalf of accused Nos.1 and 2.

6. After considering the evidence on record, the court below found accused No.4 is not guilty of the offences alleged and he was acquitted of all the charges leveled against him under Section 248(1) of the Code of Criminal Procedure. Accused Nos.1 to 3 were found not guilty for the offence under Section 403 of the Indian Penal Code and they were acquitted of these charges under Section 248(1) of the Code of Criminal Procedure and accused Nos.1 and 2 were found not guilty of the offence under Section 13(1)(c) of Prevention of Corruption Act. But accused Nos.1 and 2 were found guilty for the offence under Section 13(1)(d) read with Section 13(2) of Prevention of Corruption Act and

Section 120B of the Indian Penal Code and third accused was found guilty for the offence under Section 120B and 109 of Indian Penal Code read with Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act and convicted them there under and sentenced accused Nos.1 and 2 to undergo rigorous imprisonment for two years and also to pay a fine of ₹10,000/-, in default to undergo imprisonment for six months more for the offence under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act and third accused was sentenced to undergo rigorous imprisonment for two years and also to pay a fine of ₹10,000/-, in default to undergo imprisonment for six months under Section 109 and Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act and no separate sentence was awarded for the offence under Section 120B of the Indian Penal Code, as they were convicted for the substantive offences, for which criminal conspiracy was hatched and set off was allowed for the

period of detention undergone by them under Section 428 of the Code of Criminal Procedure. Aggrieved by the same, accused Nos.1 and 2 were filed Crl.Appeal No.907/2001 while third accused filed Crl.Appeal 908/2001 respectively. Since both these appeals were filed against the same judgment, this court felt that, the same can be disposed of by a common judgment.

7. Heard, Sri.K.Ramkumar, Senior Advocate appearing for the appellants in both the cases and Sri.K.K.Rajeev, Public Prosecutor appearing for the respondent/State.

8. The Senior Counsel Sri.K.Ramkumar appearing for the appellants have submitted that, since accused Nos.1 and 2 were president and member of the panchayath and since the acts were done in discharge of their official duty as president of the panchayath, sanction under Section 122 of the Panchayath Act, 1960, was required, which was not taken in this case. Further, the

sanction was obtained under Section 19 of the Prevention of Corruption Act and 197 of the Code of Criminal Procedure only against first accused and second accused also being a past member of the panchayath, he is entitled to get that benefit. So he had relied on the decision reported in **State of Kerala v. Manikandan (2001(3) KLT 80)** in support of his proposition. He had further argued that, there is nothing to show that accused Nos.1 and 2 have obtained any illegal gratification for this purpose and even the evidence will go to show that, it was done in public interest, when people in the locality agitated for not forming the road and the evidence will go to show that he was only implementing the decision of the panchayath and as such, they have not committed any offence. Further the evidence will go to show that, even assuming that, any irregularity was committed in making the advance payment, the excess amount paid can be recovered from the person responsible for the loss said to have been sustained by the panchayath.

Further, mere non-observation of formalities without any dishonest intention will amount to any offence under the Prevention of Corruption Act. Assuming that, the entire evidence is accepted, it will only go to show that, there was some omission in following the guidelines for implementing the JRY Scheme and non-compliance of the circulars issued in this regard and if that was done in good faith, it cannot be said to be an offence falling under misconduct, if it was done with public interest. He had relied on the decision reported in **P.K. Narayanan v. State of Kerala (1995(1) SCC 142)**, **Jayaraj B. v. State of Andhra Pradesh [2014 (1) KLD 608 (SC)]**, **Shambhoo Nath Misra v. State of U.P. [1997 Crl.L.J. 2491 (SC)]** and **Parkash Singh Badal and Another v. State of Punjab and others (2007 (1) SCC)** in support of his case.

9. On the other hand, learned Public Prosecutor Sri.K.K.Rajeev submitted that, the evidence of the official witnesses examined will go to show that, the entire things

were done in violation of the directions given in Ext.P1 and P2 notification and the circular and the executive officer was purposefully kept away from the transactions, since he was not allowing the illegal activities of the panchayath members including the president and knowing that the work has not been completed and without getting the technical certification from the authorities, advance more than 50% of the estimated cost was given to A3 by A1 and A2, on account of the conspiracy hatched and the evidence will go to show that, the entire amount has not been utilized for that purpose and there is no satisfactory explanation forthcoming from the side of the accused regarding this aspect and that will show the dishonest intention and against public interest. So the court below was perfectly justified in convicting the appellants for the offences alleged.

10. The case of the prosecution as emerged from the prosecution witnesses was that, during 1991-92,

accused Nos.1 and 2 were the president and member of Ward No.VII respectively of Pudunagaram Grama Panchayath of Palakkad District. During that period, Panchayath had decided to improve the Unnanchathan theruvu-kattutherve road and included the same under the JRY Scheme on an estimated of ₹1,30,700/- and originally Sri.Shaik Musthafa, the member of Ward No.IV of the Panchayath was elected as convener for this purpose. Later there was a ban imposed for members of the panchayath acting as conveners. So third accused was elected as convener for the work and P3(k) and P3(l) agreements were executed for this purpose. As per Ext.P3(a) and P3(b) an advance amount of ₹25,000/- was given to A3 for this work. Later without competition of the work or submitting any part bill, an amount of ₹40,000/-, ₹12,000/-, ₹6,000/- and ₹5,000/- more were given as per Ext.P3(c), P3(d), P3(e), P3(f), P3(g), P3(h), P3(i) and P3(j). Thereafter, there were complaints raised and PW17, the then executive officer of

the panchayath sent Ext.P28 complaint along with Ext.P28 (a) covering letter to the authorities and PW1 the Youth Congress Mandalam President of Pudunagaram also sent a complaint to the concerned minister along with the paper cuttings published in Madhyamam Daily, regarding the allegation of malpractice in maintenance work of the road Unnanchathan theruve-Kattutheruve road, passing through Ward No. IV and V of that panchayath under JRY Scheme, stating that, there was malpractices and corruption in implementing the scheme. On the basis of the same, Government ordered quick verification and vigilance department had conducted enquiry and came to the conclusion that, there was misconduct on the part of accused Nos.1 and 2 and there was conspiracy and there was misappropriation of the public fund and filed a report recommending for prosecution and government have accorded necessary sanction for registering the crime, on the basis of which, PW19 registered Ext.P29 first

information report as Crime No.8/94, Vigilance under Section 13(1)(d) read with Section 13(2) of Prevention of Corruption Act and Section 403 read with Section 34 of the Indian Penal Code against accused Nos.1 to 3 originally. Thereafter, investigation in this case was conducted by PWs 19 and 20 and later PW18 also filed Ext.P13 report to add Section 120B of Indian Penal Code and to add 4<sup>th</sup> accused as additional accused. PW19 questioned PWs 1 to 3, 5, 9, 11,16, 14 and seized Ext.P3, P8 and P9 as per Ext.P7 mahazar as produced by PW7 and seized Ext.P6, P11 and P12 as per Ext.P10 mahazar as produced by PW7 and seized Ext.P25 and P26 as per Ext.P23 mahazer as produced by PW12 and returned those documents to PW12 as per Ext.P24 kaichit. He received Ext.P28 complaints sent by PW17 along with Ext.P28(a) covering letter. Further investigation in this case was conducted by PW20. He had seized Ext.P18 and P20 as per Ext.P32 mahazar produced by PW7, seized Ext.P16, P17 and P19 as per Ext.P15

mahazar as produced by PW7. He questioned PWs 7, 8 and 14 and recorded the statement. Further investigation in this case was conducted by CW21, who submitted final report and obtained Ext.P22 sanction for prosecuting the first accused and submitted final report before the court.

11. The points that arise for consideration are:

(i) Whether taking cognizance of the case as against accused Nos. 1 and 2 for want of sanction under Section 122 of the Panchayath Act, 1960, and 197 of the Code of Criminal Procedure is bad and on that ground they are entitled to get acquittal?

(ii) Whether the court below was justified in convicting accused Nos. 1 and 2 for the offence under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act and Section 120B of the Indian Penal Code?

(iii) Whether the court below was justified in convicting the third accused for the offence under Section 120B and 109 read with Section 13(1)(d) and 13(2) of the Prevention of Corruption Act?

(iv) Whether the sentence imposed is proper and legal?

12. Point No.(i): The counsel for the appellants in Crl.Appeal 907/2001 submitted that, since accused Nos.1 and 2 are president and member of the Panchayath and the

act complained of was done purporting to be in discharge of their official duty, sanction under Section 122 of Panchayath Act, 1960 is required. Further for proceeding against them for the offence under the Indian Penal Code, sanction under Section 197 of the Code of Criminal Procedure is required, though they seized to be public servants. He had relied on the decisions reported in **State of Kerala v. Manikantan Nair (2001(3) KLT 80)** and **R.Balakrishna Pillai v. State of Kerala and Another (1996(1) SCC 478)** in support of their case.

13. On the other hand, the learned Public Prosecutor submitted that, since accused Nos.1 and 2 were not in office, at the time when final report was filed and cognizance was taken, no sanction under Section 122 of the Panchayath Raj Act is required. Further, as regards the first accused is concerned, Ext.P22 sanction has been obtained in abundant caution and as such it cannot be said that the proceedings is vitiated for want of sanction.

He had relied on the decision reported in **Shambhoo Nath Misra v. State of U.P. and Others [1997 CrL.J.2491 (SC)]** and **Parkash Singh Badal and Another v. State of Punjab and Others (2007(1) SCC)**.

14. It is an admitted fact that, the first accused was the president of Pudunagaram Panchayath and the second accused was the member of the Panchayath elected from Ward No.VII of the same panchayath during 1991-1992 and the offence was said to have been committed during the time when they were acting as president and member of the Panchayath. It is seen from the evidence of PW14, the Deputy Director of Panchayath, Palakkad, that as per Ext.P17 notification, the period of the Panchayath committee was extended for a period of six months from 10.08.1993 and as per Ext.P16, it was further extended for a period of six months from 10.02.1994 to 13.09.1994. Thereafter, accused Nos.1 and 2 have seized to be the president and member of the panchayath as subsequent to

that fresh election was conducted. It is true that first accused was again selected as president of the panchayath. But at the time when final report was filed and case was taken cognizance by the Special Court, both of them were not the president or member of the panchayath.

15. Section 19 of the Prevention of Corruption

Act reads as follows:

**19. Previous sanction necessary for prosecution.-**

(1) No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction,-

(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;

(c ) in the case of any other person, of the authority competent to remove him from his office.

(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section(1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973(2 of 1974),-

(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.

16. Section 122 of the Panchayath Act, 1960,

reads as follows:

**122. Sanction for prosecution of President, executive authority or members of a Panchayat.-**

(1) When the President, executive authority or any member is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction of Government.

(2) Notwithstanding the provisions contained in the Code of Criminal Procedure, 1898, the executive

authority or the person authorized by the Panchayat to file complaints, who files such complaints in courts of law for offences under this Act or the rules or bye-laws made thereunder, need not be examined on such complaints before the issue of summons on them.

## 17. Section 197 of the Code of Criminal

Procedure reads as follows:

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

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

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

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

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

(3) The State Government may, by notification,

direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

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

[(3B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a Court upon such sanction, during the period commencing on the 20<sup>th</sup> day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment ) Act, 1991, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the Court to take cognizance thereon.]

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

The above three sections of different enactments

deals with prior sanction for taking cognizance of the offence against certain persons mentioned therein.

18. In the decision reported in **Parkash Singh Badal and Another v. State of Panjab and Others (2007(1) SCC)**, while considering the sanction required under Section 19 of the Prevention of Corruption Act, the Hon'ble Supreme Court has held that, if the public servant against whom final report has been filed for committing offence under the Prevention of Corruption Act and if he has seized to hold the office at the time of taking cognizance, then, no sanction is required for that purpose. This was so held in the decision reported in **State of Kerala V. Manikantan Nair (2001(3) KLT 80)** as well, relying on the decision reported in **State of Kerala v. Padmanabhan Nair (1999(5) SCC 690)**.

19. But as regards the sanction under Section 197 of Criminal Procedure Code is concerned, the wordings used in this Section was “when any person is or was a

public servant” and that question was considered by the Supreme Court in **R.Balakrishna Pillai v. State of Kerala and Another (1996(1) SCC 478)** and observed that, it is in pursuance of this observation that, the expression was came to be employed after the expression is to make the sanction applicable even in cases where the retired public servant is sought to be prosecuted. The same view has been reiterated in the decision reported in **Parkash Singh Badal and Another v. State of Punjab and Others. (2007(1) SCC).**

20. As regards the sanction under Section 122 of the Panchayath Raj Act is concerned, the question as to whether sanction is required, if they seized to be the president, executive authority or members of the panchayath has been considered in the decision reported in **State of Kerala v. Manikantan Nair (2001(3) KLT 80)** and observed that, sanction under Section 122 is required, only if the person holds the office of the executive authority

or any member and not otherwise at the time when the final report is filed. In that case, the accused was the executive officer of panchayath, who retired from service at the time when the final report was filed and it was held that, no previous sanction is required for prosecution under this section.

21. As regards the first accused is concerned, since he was elected for the second time, sanction has been accorded to prosecute the first accused for the offence under Section 19(1) of the Prevention of Corruption Act and 197 of the Code of Criminal Procedure. In fact, no such sanction is required at the time when the final report was filed, he had ceased to be the president of the panchayath as well, during 1999.

22. As regards the second accused is concerned, he was not a member of the panchayath at the time when cognizance was taken and Section 122 of the Panchayath Raj Act is not applicable to him. Similarly, since he was not

in office, Section 19 of the Prevention of Corruption Act is also not applicable. Since he was not a person removable from service and since offence against him was conspiracy and misappropriation of public fund, no sanction is required under Section 197 of the Code of Criminal Procedure as has been held in the decision reported in **Shambhoo Nath Misra v. State of U.P. and Others [1997 Crl.L.J.2491 (SC)]** and **Raghunath Anant Govilkar v. State of Maharashtra and Others [2008 (11) SCC 289]** and **N.Bhargavan Pillai (died) L.Rs. and another v. State of Kerala (AIR 2004 SC 2317)**. Further want of sanction or defect in sanction is not a ground for acquittal in the appeal, unless prejudice has been established by the accused. This was so held in the decision reported in **State of Orissa v. Mrutunjaya Panda (AIR 1998 SC 715)**. In this case, no such plea was taken except putting a suggestion which was denied by the witness examined to prove the sanction. There is no material showing that

failure of justice has occasioned due to error or irregularity in sanction established as well. So under the circumstances, there is no merit in the submission made by the counsel for the accused Nos.1 and 2 that the proceedings is vitiated for not obtaining sanction and on that ground they are not entitled to get acquittal. The point is answered accordingly.

23. Point Nos.(ii) & (iii): It is an admitted fact that, the maintenance of Unnanchathan theruvu-Kattutheruvu road, passing through Ward No.IV and V of Pudunagaram Panchayath of Palakkad District was included in the JRY Scheme during the year 1991-92 and accused Nos.1 and 2 were acting as president and member of Ward No.VII of the said panchayath at the relevant time. It is also admitted fact that, this sanction was accorded for the maintenance of the road at an estimated cost of ₹1,30,700/- and earlier Sheik Musthafa, member of Ward No.V was selected as the convener to carry out the work and due to

the restrictions later imposed, he was removed from the convenership and the third accused was elected as convener to carry out the work and he had executed Ext.P3 (k) and P3(l) agreements in favour of the panchayath in this regard. It is also an admitted fact that as per the JRY Scheme, the work has to be done by the convener himself with the aid of the local people and that should not be entrusted to the contractor. It is also an admitted fact that an amount of ₹88,000/- was given to third accused as advance for the work and he had withdrawn the amount as evidenced from Ext.P3(a), P3(b), P3(c), P3(d), P3(e), P3(f), P3(g), P3(h), P3(i) and P3(j) seen in Ext.P3(5) are the evidence of panchayat officials and treasury officials. It is seen from Exts.P1 and P2 the notification and the circular and the evidence of PW2, the project officer DRDA project, Palakkad and PW10 Sreekumar, Assistant Executive Engineer, DRDA, Palakkad, that, advance more than 50% of the estimated cost should not be given to the convener,

unless he completes the work and submits part bill for each release of the amount. It is also an admitted fact that, in this case, the amount released is more than 50% and it is come out in evidence of these witnesses that, even at that time, when the amounts were paid in five installments, the work of the road has not been completed to the extent it is required. Further it will be seen from Ext.P6 measurement book that, the extent of work was not entered in the measurement book and no certification of value of the work done was obtained from the concerned authorities, namely the Assistant Engineer of DRDA and approved by the Assistant Executive Engineer of DRDA in this case. Further it is seen from the evidence that, without getting part bill of the work done and without satisfying about the completion of the part work, further amounts were released by accused Nos.1 and 2 to the third accused on the basis of the applications given by him.

24. Though they were pretending ignorance

about the directions in Exts.P1 and P2, it will be seen from the evidence of PW17, the Executive Officer during the relevant time, that as per the norms relating to the execution of JRY Scheme, the cheques will have to be given under the joint signatures of the President and the Executive Officer or the President and Member of the panchayath, as authorized by the panchayath. It is also an admitted fact that as per resolution of the panchayath, PW17 was relieved from that obligation and second accused was authorized to sign as a joint signatory in relation to JRY Schemes. It is seen from Ext.27 minutes book of the panchayath as per Ext.27(a) resolution, the allegation was that, he was not co-operating with the development activities of the panchayath and that prompted the panchayath to pass such a resolution. It will be seen from the evidence of PW17 that, when he received complaint regarding the work of this project that, there was no work done and the road work was not completed in spite of

amounts given, he had sent original of Ext.28 complaint to the authorities. It is seen from the judgment of the lower court and also the evidence of the investigating officer that, no attempt was made to seize the original of Ext.P28 and produce the same before court and though Ext.P28 was seized, but it was not produced before court along with the final report, but it was produced only on the later stage during trial. However, any lapses on the part of the investigation on this aspect cannot affect the court to go into the allegations of corruption made, on the basis of other evidence available to prove this fact.

25. The evidence of PW16, the clerk in charge of JRY Scheme during the relevant time will go to show that, though he had insisted for getting the part bill and certification from the authorities regarding the work done, accused Nos.1 and 2 insisted that, the amount will have to be paid to third accused and it was on that basis that he had made the endorsement in the applications filed by the third

accused for release of the amount and accordingly the cheques were issued as seen from the counter foils in Ext.P12 series for the amounts of ₹25,000/-, ₹40,000/-, ₹12,000/-, ₹6,000/- and ₹5,000/-. Further it cannot be said that, A3 was not aware of the work done and he had not appropriated the amount allotted for the purpose of using the same for the implementation of the scheme for the maintenance of the said road and he is only a name lender cannot be accepted as rightly observed by the court below on the basis of evidence available on record. Further it will be seen from the evidence of PW16 that, all these decision to release the amount were taken at the instance of accused Nos. 1 and 2 in the presence of third accused.

26. It is seen from the evidence of PW16 /Yacob that, he was in charge of the JRY Scheme projects of the Panchayath and it was he who was making the notes for sanctioning the amount. He had admitted that endorsement made for the purpose of releasing the amount were in his

handwriting and it was after that accused Nos.1 and 2 have sanctioned the amount. Though he had a case at the time of examination that he had done so as insisted by accused Nos.1 and 2 and he insisted for getting part bill and certificate from the officials in respect of the satisfaction of the work done before sanctioning the amount, he had not stated so before the investigating officer when he was questioned by him and it was a development made by him at the time of evidence. Further it was brought out in the evidence of PWs 15 and 17, the Executive Officers of the Panchayath that it is a duty of the concerned section clerk to put note regarding the request made and orders to be passed on the same. Further it was brought out in the evidence of PW16 that he was not aware of Ext.P1 and P2 notification and circular and he was not aware that more than 50% of the amount should not be given as advance. It was also brought out in the evidence of PW6 Sri. Santhakumaran, the then Vice President and member of

Ward No.V that, the work of the road was done under the supervision of the respective ward members of Ward No.IV and V including himself. It is also brought out in evidence that all the amounts were sanctioned as per the decision of the Panchayath and first accused was implimenting the decision of the Panchayath in releasing the amount. He had also admitted in the evidence that there were complaints that necessary funds were not provided by the panchayath for completing the work and there was agitation by the local people in not completing the work in time.

27. Further it will be seen from the evidence of PW4/ the Assistant Executive Engineer, Mannarkad Local Works Sub Division that he had inspected the spot on 07.03.1994 after nearly two years of the work and submitted Ext.P4 and P5 reports after verifying Ext.P6 measurement book. He had admitted in his evidence that two layers of the metaling work of the road was completed and topping of the work with black tar alone has to be done.

Though according to him, the value of the total work done was ₹29,325/- as against the amount of ₹88,000/- as advance and a loss of ₹58,675/- occurred to the Panchayath, this aspect has not been accepted by the court below as there is no evidence to show the value of the actual work done by the 3<sup>rd</sup> accused in this regard and that was not assessed by the authorities correctly and exactly. It was also admitted by PW4 that, though metal was spread in two layers, that aspect was not mentioned in Ext.P6 measurement book. It is also admitted by him that the metal required for the length of 650 meters, but only works for 520 meters was done. It was also admitted by him that there was some dispute regarding the surrendering of land by the public and that was the reason why the work could not be completed for the required length. It is also admitted by him that in Exts.P4 and P5 reports he had mentioned that there was no shortage of metal collected found and he had also stated that, if any excess amount has been paid than the

value of the work done after estimation, necessary steps will have to be taken for recovery of the amount from the persons responsible. It is also seen from the evidence of PWs 9 and 10, the First Grade Overseer and Assistant Engineer that metal was collected and two layers of the metal were spread. It was also brought out in their evidence that there was some dispute regarding the surrendering of the land and that delayed the work. Though PWs 9, 10 and 11 have stated that, there were some flaw in the work and that was pointed out and directed to be rectified, it was admitted by them that it was not recorded and there is no document available on record in the files to prove this fact. Further the court below had come to the conclusion that the prosecution has failed to prove any misappropriation as such and the amount misappropriated and acquitted the accused Nos.1 to 3 for the offence under Section 13(1)(c) read with Section 13(2) of the Prevention of Corruption Act and Section 403 of the Indian Penal Code. But court below

had convicted the 3<sup>rd</sup> accused for the offence of abetment under Section 109 of Indian Penal Code for abetting of committing the offence by accused Nos.1 and 2 punishable under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, but no charge has been framed by the court below against the 3<sup>rd</sup> accused for this purpose. So without framing charge, convicting the 3<sup>rd</sup> accused for the offence under Section 109 of the Indian Penal Code for abettment of committing the offence of under Section 13(d) read with Section 13(2) of the Prevention of Corruption Act by accused Nos.1 and 2 is unsustainable in law and the same is liable to be set aside and I do so.

28. Section 13 of the Prevention of Corruption Act reads as follows:

**13. Criminal misconduct by a public servant.-**

(1) A public servant is said to commit the offence of criminal misconduct.-

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself

or for any other person any gratification other than legal remuneration as a motive or reward such as is mentioned in section 7; or

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

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

(d) if he,-

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or

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

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

(2) Any public servant who commits criminal

misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine.

29. In order to attract the offence under Section 13(1)(d), it must be proved by the prosecution that:

(i) The public servant by corrupt or illegal means obtains for himself or for any other person any valuable thing or pecuniary advantage or

(ii) But abusing his position as public servant obtained for himself or for any other person any valuable thing or pecuniary advantage or

(iii) While holding office as public servant obtains for any person any valuable thing or pecuniary advantage without any public interest.

30. There is no evidence adduced on the side of the prosecution to prove that accused Nos.1 and 2 have done any corrupt or illegal means for getting any pecuniary advantage or valuable thing for themselves or any other person so as to bring their act under sub Clause (i) and (ii) of Section 13(1)(d) of the Prevention of Corruption Act as they were acquitted for the offence under Section 13(1)(c) read with Section 13(2) of Prevention of Corruption Act and Section 403 of the Indian Penal Code. Then the misconduct

be only said to have committed under Section 13(1)(d)(iii) of the Act. In this case, there is no evidence to show that, the act committed by accused Nos.1 and 2 is without any public interest. It was brought out in evidence that there was agitation of the local people for not completing the work and there were complaints that Panchayath was not releasing necessary amount for completion of the work. Under such circumstances, it is brought out in evidence that Ext.P27(a) resolution was passed by the Panchayath unanimously by the persons attended to the meeting and it was on that basis PW17 was removed from the obligation of signing the cheques as a joint signatory along with first accused and in his place 2<sup>nd</sup> accused was nominated by the Panchayath to sign as a joint signatory for releasing the amount along with the President in respect of work relating to JRY Scheme alone. Further there is no evidence adduced on the side of the prosecution to prove that accused Nos.1 and 2 have obtained any unlawful advantage on account of

releasing the amount to the 3<sup>rd</sup> accused for proceeding with the work.

31. It is true that there were some latches on the part of the accused Nos.1 and 2 in not complying with the directions in Ext.P1 or P2 in respect of release of the advance amount. It is also true that certification from the technical staff namely the Assistant Engineer, Oversear and part bill from the Assistant Engineer and sanction by the Executive Engineer were not obtained before releasing the amount. But the prosecution had no case that no amount was spent for the formation of the road and the amount given was totally misappropriated. Further it was brought out in evidence that 3<sup>rd</sup> accused is not a technically qualified person in doing the contract work and the work was done with the help of the local people under the JRY Scheme. Further it was also brought out in evidence that the bitumen required for tarring the road was also purchased. Further the evidence of DW1 and also the evidence of the

prosecution witnesses will go to show that, major portion of the materials collected were utilized for the formation of the road and the allegation was that the length of the road was less and so much metal was not required for formation of the road work done. It is also brought out in the evidence of prosecution witnesses that, even if any excess amount has been paid, that can be adjusted at the time of final settlement of the bill and if there is any loss occurred, that can be recovered from the person concerned as well. Having found that, the prosecution has failed to prove the offence under Section 13(1)(c) read with Section 13(2) of the Prevention of Corruption Act and Section 403 of the Indian Penal Code, unless it is proved by the prosecution that an act done was without any public interest by accused Nos.1 and 2, that cannot be brought out under the definition of misconduct under Section 13(1)(d)(iii) of the Prevention of Corruption Act punishable under Section 13(2) of the Act. In this case, on going through the charge

framed by the court, there is nothing mentioned that the act done by accused Nos.1 and 2 was without any public interest. Further the evidence will go to show that they have paid the amount to 3<sup>rd</sup> accused for the purpose of the completion of the road sanctioned under the JRY Scheme in order to avoid lapse of the amount as unless the work was done within the particular time, the amount will lapse and that will cause loss to the Panchayath. So under the circumstances, it cannot be said that the prosecution has proved beyond reasonable doubt that the act done by accused Nos.1 and 2 is without any public interest so as to convict them for the offence under Section 13(1)(d)(iii) read with Section 13(2) of the Prevention of Corruption Act.

32. Merely because there was some latches in following the direction or circulars by accused Nos.1 and 2 in releasing the amount alone is not sufficient to convict them for the offence under Section 13(1)(d)(iii) of the Act unless it was proved by the prosecution that it was done

with some dishonest intention misusing their official position to help the accused against public interest. Further there is no evidence to show that accused Nos.1 and 2 have done anything with dishonest intention for making pecuniary benefits for themselves or for any other person in releasing the amount, which is also an ingredient to be proved for convicting accused Nos.1 and 2 for the offence of misconduct under Section 13(1)(d)(iii) of the Prevention of Corruption Act.

33. Further there is no evidence to show that there was any conspiracy hatched between accused Nos.1 to 3 for this purpose. What was done by them was releasing the amount for the purpose of completing the road within the time frame, so as to avoid lapse of the amount to the panchayath during the financial year itself. There may be latches on their part in releasing the amount and if any excess amount has been paid and any loss has been caused on account of that, that can be realized by taking

departmental action against them and also against the 3<sup>rd</sup> accused, if he had drawn more amount than the amount required for the work done by him in accordance with law. Mere procedural violation will not attract offence under Section 13(1)(d) of the Prevention of Corruption Act. Unless the ingredient of offence charged against accused are proved, mere suspicion however strong cannot be a ground for punishment. This was so held in the decision reported in **Varghese Mathew and Others v. State of Kerala (2008(3) KHC 817)**. If no dishonest intention on the part of the public servant is proved, no offence under Section 13(1)(d) of Prevention of Corruption will be attracted. This was so held in the decision reported in **C.K. Jaffer Sharief v. State (AIR 2013 SC 48)**.

34. The lower court had mainly relied on the act of removing PW17 from the obligation of being a joint signatory in signing the cheques relating to JRY schemes as a malafidie intention on the part of accused Nos.1 and 2 to

help 3<sup>rd</sup> accused for withdrawing the amount which appears to be not correct, as it is not the decision of the first and second accused alone, but it is the decision of the panchayath. Further it will be seen from the evidence that neither the executive officer/ PW17 nor the Section clerk PW16 had made any objection regarding payment of the amount to the 3<sup>rd</sup> accused without getting the technical sanction from the authorities so as to bring to the notice on the accused Nos.1 and 2 about the irregularities in payment of the amount as well. So under the circumstances, the finding of the court below that accused Nos.1 to 3 conspired together and committed the offence appears to be unsustainable in law and the same is liable to be set aside. So the finding of the court below that accused Nos.1 and 2 have committed the offence punishable under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act and Section 120B of the Indian Penal Code and 3<sup>rd</sup> accused had committed the offence punishable

under Section 120B and 109 of the Indian Penal Code read with Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act are unsustainable in law and the same are liable to be set aside and I do so. The accused are entitled to get acquittal of the charge leveled against him giving them the benefit of doubt. The points are answered accordingly.

35. Point No.(iv): In view of the finding of Point Nos 2 and 3, the sentence imposed by the court below is also not sustainable and the same is liable to be set aside. I do so. The point is answered accordingly.

In the result, both the appeals are allowed and the appellants succeed and the order of conviction and sentence passed against accused Nos.1 and 2 for the offence under Section 120B of the Indian Penal Code and Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act and against the 3<sup>rd</sup> accused for the offence under Section 13(1)(d) read with Section 13(2)

Prevention of Corruption Act read with Section 109 of the Indian Penal Code and Section 120B of Indian Penal Code are set aside and they are acquitted of the charge leveled against them giving them the benefit of doubt. They are set at liberty. The bail bond executed by them will stand cancelled. It is made clear that, if any loss has been occurred to the panchayath on account of the act committed by accused Nos.1 to 3, then the panchayath is at liberty to initiate departmental action against accused Nos.1 to 3 for realization of the amount in accordance with law. The fine amount if any remitted by them is directed to be returned to them.

Sd/-

**K. RAMAKRISHNAN, JUDGE**

// True Copy//

P.A. to Judge

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