IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE HARUN-UL-RASHID

MONDAY, THE 6TH DAY OF JANUARY 2014/16TH POUSHA, 1935

Crl.MC.No. 688 of 2013

CRL.M.P.NO: 998/2012 IN V.C.NO: 9/2004 OF ENQUIRY COMMISSIONER AND SPECIAL JUDGE,THIRUVANANTHAPURAM.

PETITIONER/ACCUSED NO.2:

JOSEPH MATHEW,
S/O.JOSEPH, GOVERNMENT QUARTER NO.II, KOWDIAR,
THIRUVANANTHAPURAM.

BY ADVS.SRI.P.VIJAYA BHANU (SR.)
SRI.M.SREEKUMAR
SRI.A.ABDUL KHARIM
SRI.M.REVIKRISHNAN

RESPONDENTS/DEFACTO COMPLAINANT & STATE:
----

1. **NEYYATTINKARA P.NAGARAJ,**
   S/O.S.P THYAGARAJAN, AYYAPPA NIVAS,
   OPPOSITE COURT COMPLEX, NEYYATTINKARA 695 121.

2. **STATE OF KERALA,**
   REPRESENTED BY PUBLIC PROSECUTOR,
   HIGH COURT OF KERALA, ERNAKULAM 682031

   R2 BY PUBLIC PROSECUTOR SMT. S.HYMA

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 06-01-2014, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

Msd.

Crl.MC.No. 688 of 2013

APPENDIX

PETITIONER(S) ANNEXURES:

ANNEXURE A: TRUE COPY OF THE F.I.R NO: 9/2004 OF VACB SIU POLICE STATION, THIRUVANANTHAPURAM DATED 06-11-2004.

ANNEXURE B: TRUE COPY OF THE FINAL REPORT SUBMITTED BY THE VACB SIU-1,THIRUVANANTHAPURAM IN V.C NO: 9/2004.

ANNEXURE C: TRUE COPY OF THE ORDER IN CRL. M.A NO: 998/2012 IN V.C NO 9/2004 OF THE ENQUIRY COMMISSIONER AND SPECIAL JUDGE THIRUVANANTHAPURAM DATED 06-12-2012.

ANNEXURE D: TRUE COPY OF THE CIRCULAR NO:11375/E3/2004/VIG DATED 15-11-2004

RESPONDENT(S)' ANNEXURES:

NIL

//TRUE COPY

P.A.TO JUDGE.

Msd.

K. RAMAKRISHNAN, J.

....

Crl.M.C.No.688 of 2013

....

Dated this the 10th day of July, 2015.

O R D E R

The second accused in Crl.M.P.No.998/2012 in V.C.No.9/2004 of Enquiry Commissioner and Special Judge, Thiruvananthapuram, is the petitioner herein.

2. It is alleged in the petition that the petitioner was arrayed as the second accused in V.C.No.9/2004 on the file of the Enquiry Commissioner and Special Judge, Thiruvananthapuram, which was a case suo motu registered by the VACB Special Investigation Unit, Thiruvananthapuram alleging commission of 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. The crime was registered on 6.11.2004.

3. The prosecution case was that accused 1 and 2, who were holding the post of Chief Engineer, National Highways and Chief Engineer, Roads and Bridges respectively had entered into a criminal conspiracy with the third accused, who was awarded the contract of installing gantry sign boards on the side of Highways by abusing their official positions and in

pursuance of the conspiracy, the first accused had issued orders on 12.10.1998 permitting the third accused to erect gantry sign boards on the side of National Highways and State Highways in violation of the guidelines issued by the Ministry of Surface Transport. By virtue of the agreement executed between accused 2 and 3, the period of erection of sign boards and period of contract were enhanced to 2 years and 30 years from six months and 5 years respectively without obtaining approval from the Government and thereby caused financial loss to the State Government and financial advantage to the third accused and thereby committed the offence. Annexure-A is the suo motu First Information Report registered in respect of the same.

4. The second respondent had conducted a detailed investigation and during investigation it was revealed that loss sustained to the Government cannot be quantified or it is not possible to determine the loss since Government of India had not fixed any amount payable to the Government. The precise allegation against the petitioner, who is the second accused, was that he enhanced the period of erection of sign boards and period of contract without getting approval from the Government. After completion of the investigation, factual

report was submitted before the Government seeking sanction to prosecute the petitioner and the Government had declined sanction and Annexure-B final report was filed by the second respondent before the Special Judge requesting to drop further action in this regard. The first respondent had filed Crl.M.P.No.998/2012 for rejecting the report and ordering further investigation and after considering the materials on record, the Special Judge has passed Annexure-C order directing further investigation in the matter. This order is being challenged by the petitioner by filing this petition under Section 482 of the Code of Criminal Procedure (hereinafter referred to as 'the Code') to quash the order.

5. Heard counsel for the petitioner, Sri. Vipin Narayan and Public Prosecutor Sri. Shibu Joseph appearing for the second respondent as first respondent remained absent.

6. The counsel for the petitioner submitted that the Government had after considering all the materials came to the conclusion that though there is some procedural irregularities committed by the second accused in ordering the contract, it was done in public interest and no financial loss has been caused to the Government on account of the acts and

as such, no criminal prosecution need be launched against him and he can be dealt with departmentally for the laches on his part in not getting approval from the Government for this purpose. The order passed by the court below will amount to directing the Government to review the order of sanction, for which the court has no power. So the order passed by the court below is without jurisdiction and the same is liable to be quashed. He had relied on the decisions reported in **Krishnamoorthy v. State of Karnataka** [2005 (2) KLT SN 56 (SC)] and **Sanjaysinh Ramrao Chavan v.Dattatray Gulabrao Phalke and others** (2015(1) SCALE 457) and **State of Himachal Predesh v. Nishant Sareen** (AIR 2011 SC 404) in support of his case.

7. On the other hand, the learned Public Prosecutor submitted that the Government did not give sanction for prosecuting the second accused on the ground that there is no material to show that any financial loss has been caused to the Government. If the period of contract was limited to 5 years, then any amount collected by way of advertisement charges on the gantry boards can be realized by the Government and unfettered right has been given to the third accused to collect

advertisement charges thereby he will be getting undue financial advantage. If proper investigation is conducted, probable loss that could be caused to the Government can be assessed and if those materials are placed before the Government, then the possibility of Government reviewing the order cannot be ruled out. Further, it is the prerogative of the Special Judge either to accept or reject the report and order further investigation and what was done by the court below is only exercise of that power, which cannot be said to be illegal. So the order does not call for any interference invoking the power under section 482 of the Code.

8. It is an admitted fact that the first accused was working as Chief Engineer, National Highways and second accused was working as Chief Engineer, Roads and Bridges. Later, he became the Chief Engineer, National Highways as well. It is also an admitted fact that there was a scheme launched by the Central Government namely, the Ministry of Surface Transport for erecting of sign boards on the National Highway and State Highways. As per the scheme, the period for erection is six months and the period of contract should be not more than 5 years and an agreement has to be executed

in this regard. Further, as per the scheme, tenders will have to be called for from the entrepreneurs showing the amount for which the same can be done by them and it is only after evaluating the tenders, contract will have to be given. The scheme was intended to be implemented on the side of the National Highways alone. The first accused had awarded the contract without inviting tenders from the entrepreneurs and infringing guidelines issued by the Ministry of Surface Transport, Government of India and awarded the work to the third accused. Later when the second accused while holding the post of Chief Engineer, Roads and Bridges had issued sanction to the third accused permitting him to install 30 gantry sign boards on the side of the National Highways in Kerala State. Further, he had not obtained necessary sanction and approval from the Government for implementing the same in State Highways as well and got an agreement executed between himself and the third accused on 17.8.1999 whereby he had amended the terms and conditions of the original agreement executed between the first accused and the third accused dated 12.10.1998 and the period of licence was extended up to 30 years and the period of completion of the erection was extended up to 5 years. Further, he had raised the number to 76 from 15 sign boards mentioned in the original agreement without obtaining any application from the third accused for that purpose.

9. As per the agreement, maintenance of the gantry sign boards have to be done by the third accused with his own funds and he had permitted to collect advertisement charges on a portion of the sign boards during the period of licence granted to him. It is true that as per the Government scheme, there was no provision for collecting any amount from a the awardee for implementing the work. But, once the original period is over, then the sign boards erected will become the property of the Government and they will be getting right to collect advertisement charges from the persons, who wanted to advertise on the gantry sign boards. Further, there was no attempt made by the investigating officer to ascertain the actual expenses incurred by the third accused for erecting the sign boards and the amount required for its maintenance and the amounts collected by him from others towards advertisement charges. If any unlawful gain has been made by the third accused on account of the same, then it may amount to loss

sustained by the Government, if a longer period of licence is given without getting any benefit for the Government. Since there were no materials produced before the Government by the investigating officer, the Government had come to a conclusion that since there was no material to show that there was loss sustained by the Government, no prosecution need be taken.

10. If materials were collected and datas were provided by the investigating officer showing the amount incurred by the third accused for erection of the sign boards and probable amount required for maintaining the same during the period of contract and the actual amount that has been received by the third accused by collecting advertisement charges from the persons who wanted to put up advertisement in a portion of the sign boards as per the agreement, then it could have been inferred from the materials as to whether any unlawful financial gain has been made by the third caused on account of the act of accused 1 and 2 and thereby any possibility of loss to the Government has been caused. If any act has been done, which is likely to cause financial loss to the Government, then it cannot be treated as an act done in public interest and if that was done by misusing the financial position and violating the

guidelines and circulars and directions in the scheme, then it will amount to misconduct under section 13(1)(d) of the Prevention of Corruption Act, which is punishable under Section 13(2) of the Act.

11. It is true that in the decision reported in **Sanjaysinh Ramrao Chavan's case** (cited supra) the Hon'ble Supreme Court has held that once the Magistrate had exercised his power to accept the final report requesting for dropping the proceedings by writing a reasoned order, the High Court cannot reverse the same using the revisional jurisdiction and direct the Government to accord sanction as it may amount to judicial review of the orders passed by the Government which is not permitted under law. But in the same decision it has been observed by the Supreme Court that the Magistrate has got power under section 173(8) of the Code when a final report is filed under section 173(2) of the Code either to accept the same or reject the same or even order further investigation in the matter. That was a case where the Magistrate has for reasons recorded decided to accept the final report dropping further action and the Hon'ble Supreme Court has held that the order of the High Court refusing the order of the Magistrate and

directing the Government reassess the order refusing sanction was found to be beyond jurisdiction as the Hon'ble Supreme Court has observed that the order passed by the trial court is reasonable and after appreciating the materials available on record, it cannot be said to be perverse and the High Court invoking the revisional jurisdiction cannot substitute its own finding to reverse the order passed by the Magistrate.

12. There is no dispute regarding the proposition laid down in the decision reported in **Nishant Sareen's case** (cited supra) that unless there are new materials produced before the Government, the Government cannot review the order granted or refuse the sanction to prosecute under section 197 of the Code and section 19 of the Prevention of Corruption Act on the same set of facts. Further, the court cannot using the power of judicial review, review the order passed by the Government in this regard and it is within prerogative of the Government to grant sanction or not to grant sanction for the prosecution. So it is clear from the above dictum that if further materials are provided by the investigating agency to review the order refusing sanction, then power of the Government is not fettered to re-appreciate further materials provided and review the

earlier order granting or refusing sanction and pass appropriate orders on the basis of the new materials placed before it.

13. In this case the court below had come to the conclusion that since the investigating officer had not taken any steps to find out the probable loss that could be caused to the Government on account of misusing of official position and granting licence for a longer period as done in this case, the court below felt that it is necessary to conduct further investigation on that aspect and place materials before the Government so as to enable the Government to form its own opinion whether on the basis of the further materials collected sanction will have to be granted or not to be granted afresh. It cannot be said that it is a direction given by the Special Judge to the Government to review the order. What is done by the court below is, on not satisfaction with the manner in which the investigation was conduced in a matter involving corruption, directed the investigating agency to conduct proper investigation invoking the power under section 173(8) of the Code which cannot be said to be beyond the powers of the Special Judge requiring interference at the hands of this Court invoking the power under section 482 of the Code. Since there

is no illegality committed by the court below in ordering further investigation invoking the power under Section 173 (8) of the Code so as to collect further materials to find out whether any loss has been caused to the Government or there is any possibility of probable loss being sustained by the Government on the basis of the contract awarded to the third accused in this regard and place materials so collected before the Government so as to reconsider the order refusing sanction and it cannot be said to be beyond the powers of the Special Judge. So there is no merit in the petition and the same is liable to be dismissed.

In the result, this petition is dismissed. Interim order of stay granted is vacated.

K. RAMAKRISHNAN, JUDGE.

cl