

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION NO.22 OF 2017

TEJAS P. SHAH)...APPLICANT

Vs.

THE STATE OF MAHARASHTRA)...RESPONDENT

WITH

ANTICIPATORY BAIL APPLICATION NO. 5 OF 2017

JITENDRA V. KIKAVAT)...APPLICANT

Vs.

THE STATE OF MAHARASHTRA)...RESPONDENT

WITH

ANTICIPATORY BAIL APPLICATION NO. 6 OF 2017

WITH

CRIMINAL APPLICATION NO.166 OF 2017

IN

ANTICIPATORY BAIL APPLICATION NO. 6 OF 2017

KETAN RAJMAL SHAH)...APPLICANT

Vs.

THE STATE OF MAHARASHTRA)...RESPONDENT

WITH

ANTICIPATORY BAIL APPLICATION NO. 19 OF 2017

WITH

CRIMINAL APPLICATION NO.73 OF 2017

IN

ANTICIPATORY BAIL APPLICATION NO. 19 OF 2017

NARENDRA ROOPCHAND MADHANI)...APPLICANT

Vs.

THE STATE OF MAHARASHTRA)...RESPONDENT

WITH

ANTICIPATORY BAIL APPLICATION NO. 23 OF 2017

VIBHAS VIJAY ACHAREKAR)...APPLICANT

Vs.

THE STATE OF MAHARASHTRA)...RESPONDENT

WITH

ANTICIPATORY BAIL APPLICATION NO. 27 OF 2017

WITH

CRIMINAL APPLICATION NO.195 OF 2017

IN

ANTICIPATORY BAIL APPLICATION NO. 27 OF 2017

NALIN JAGDISH GUPTA)...APPLICANT

Vs.

**THE ASSISTANT COMMISSIONER OF
POLICE AND ORS.)...RESPONDENTS**

WITH

ANTICIPATORY BAIL APPLICATION NO.30 OF 2017

MANISH NARENDRA KASLIWAL)...APPLICANT

Vs.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Ashok P. Mundargi, Senior Advocate a/w Mr.Niranjan Mundargi, Mr.Yogesh Chawak, Mr.Chirag S. Dave, Mr.Rupesh Geete i/b. M/s.Legasis Partners, Advocate for the Applicant in ABA No.22 of 2017.

Mr.Pranav Badheka a/w. Mr.Viraj Maniar, Mr.Hiral Vora, Mr.Ryan Shrivastav i/b. Maniar Srivastav Associates, Advocate for the Applicant in ABA No.5 of 2017.

Mr.A.H.H.Ponda a/w. Mr.Mahesh Londhe, Mr.Anshuman Sujla i/b. M/s.Sanjay Udeshi & Co., Advocate for the Applicant in ABA No.6 of 2017.

Mr.A.H.H.Ponda a/w. Mr.Anand A.Pande i/b A.R. Pande, Advocate for the Applicant in ABA No.19 of 2017.

Mr.A.P.Mundargi, Senior Counsel, with Mr.Amol Patankar and Mr.Vatsal Thakkar, Advocate for the Applicant in ABA No.23 of 2017.

Mr.Rizwan Merchant a/w. Mr.Swapnil Wagh, Mr.Ramiz Shaikh, Mr.Mahesh Ahire i/b. Rizwan Merchant and Associates, Advocate for the Applicant in ABA No.27 of 2017.

Mr.Subhash Jha a/w. Ms.Sanjana Pardeshi, Mr.Hare Krishna Mishra i/b. Law Global, Advocate for the Applicant in ABA No.30 of 2017.

Mr. Deepak Thakare, Public Prosecutor a/w. Ms. J. S. Lohokare, APP, a/w Ms. P. P. Shinde, APP for the State.

Mr. Rajendra Chavan, Assistant Commissioner of Police, Colaba Division, Special Investigation Team, present in the court.

Mr. Santosh Jadhav, Police Sub-Inspector, Special Investigation Team, present in the court.

Mr. Vikram Pawar, Police Sub-Inspector, Special Investigation Team, present in the court.

CORAM : A. M. BADAR, J.

DATE : 23rd NOVEMBER 2017.

COMMON ORDER :

1 The applicants/accused in Crime No.166 of 2016 registered with Police Station Azad Maidan, initially for offences punishable under Sections 420, 197 and 120B of the Indian Penal Code (IPC), on the basis of report lodged by Manohar Pawar, Chief Engineer (Road and Transport), Municipal Corporation for Greater Mumbai, on 27th April 2016, by these applications are seeking pre-arrest bail. During the course of investigation, Section 464, 465, 467, 468 and 471 of IPC are added to the Case Diary of the crime

in question. These applications have now come up for hearing for determining whether the relief of ad-interim anticipatory bail granted in favour of all these applicants needs to be confirmed or not. Applicant/accused Jitendra Kikavat (Anticipatory Bail Application No.5 of 2017) is already granted ad-interim anticipatory bail by this court (Coram : Smt.Sadhana S. Jadhav, J.) on 5th January 2017. Applicant/accused Ketan Shah (Anticipatory Bail Application No.6 of 2017) is already granted ad-interim anticipatory bail by this court (Coram : Smt.Sadhana S. Jadhav, J.) on 5th January 2017. Applicant/accused Narendra Madhani (Anticipatory Bail Application No.19 of 2017) is already granted ad-interim anticipatory bail by this court (Coram : Smt.Sadhana S. Jadhav, J.) on 6th January 2017. Applicant/accused Tejas Shah (Anticipatory Bail Application No.22 of 2017) is already granted ad-interim anticipatory bail by this court (Coram : Smt.Sadhana S. Jadhav, J.) on 6th January 2017. Applicant/accused Nalin Gupta (Anticipatory Bail Application No.27 of 2017) is already granted ad-interim anticipatory bail by this court (Coram : Smt.Sadhana S. Jadhav, J.) on 9th January 2017. Applicant/accused Manish

Kasliwal (Anticipatory Bail Application No.30 of 2017) is already granted ad-interim anticipatory bail by this court (Coram : Smt.Sadhana S. Jadhav, J.) on 9th January 2017 and applicant/accused Vibhas Acharekar (Anticipatory Bail Application No.23 of 2017) is already granted ad-interim anticipatory bail by this court (Coram : Smt.Sadhana S. Jadhav, J.) on 9th January 2017.

2 Heard Shri A.P.Mundargi, the learned senior counsel appearing for applicant/accused Tejas Shah in Anticipatory Bail No.22 of 2017. The learned senior counsel drew my attention to paragraph 58 of the common order dated 19th December 2016 passed by the learned Additional Sessions Judge, Mumbai, rejecting the applications for anticipatory bail moved by the present applicants/accused, and argued that, upon considering the entire material collected by the Investigating Officer, it was found that none of the applicants/ accused have committed offences punishable under Sections 465, 467, 468 and 471 of the IPC. It is argued that claiming the amount of work which is allegedly not

executed by presenting the bills allegedly inflated as well as containing false information, but under the authority vested in the party under the contract, does not amount to forgery. The learned senior counsel submitted that then what remains is allegations in respect of offences punishable under Sections 420, 197 read with 120B of the IPC.

3 Shri A.P.Mundargi, the learned senior counsel, further argued that applicant Tejas Shah along with co-accused in this crime who are applicants before this court are on ad-interim anticipatory bail right from July 2016 till date, and they have not misused their liberty. The applicant/accused has attended the concerned Police station as directed by the learned Additional Sessions Judge, as well as by this court. The applicant/accused has co-operated the Investigating Officer by supplying entire documents which were with the applicant/accused. However, he is, thereafter, not called for investigation though the Investigating Officer was permitted to call him under orders of the court.

4 Shri A.P.Mundargi, the learned senior counsel, relying on the chart tendered by the learned Public Prosecutor has submitted that the allegations against the present applicant/accused are to the effect that his Company has done less digging of the road than what was prescribed under the contract, which resulted in less excavation of debris and less transport cost. The allegations are also to the effect that for constructing the road, there was less filling of material. Layers of the crust were not of the requisite thickness. The learned senior counsel drew my attention to the say filed by the prosecuting agency before the learned Additional Sessions Judge opposing the application for pre-arrest bail. By relying upon paragraph 9 of that say (record page 168) the learned senior counsel submitted that the allegations are to the effect that the work of construction of road was not done as per the design and specifications. By relying on the chart tendered by the prosecuting agency, the learned senior counsel argued that so far as the Contract for Work Code No.AE-15 is concerned, the amount of alleged cheating resulting in the loss to the MCGM is Rs.78.52 lakh and for Contract Work Code

No.AC-113, it is Rs.1.81 crore, totaling Rs.2.59 crore, in respect of both these contracts. However, total cost of this work is respectively Rs.115 crore and Rs.270 crore, totaling to about Rs.385 crore. As against this, the Municipal Corporation is having security deposit of Rs.48 crore deposited by the applicant/accused. It is argued that the applicant/accused is even willing to pay back the amount of Rs.2.59 crore purported to be alleged loss caused to the Municipal Corporation under protest and this is even reflected from the two letters dated 23rd July 2016 under which two Pay Orders for this entire amount were forwarded to the Investigating Officer.

5 It is further argued by the learned senior counsel that the contract contains Clauses nos.69 and 83 under which the employer i.e. Municipal Corporation can direct the contractor to remove any defect, shrinkage or other faults in the work. The Corporation can carry out post payment audit and can effect recoveries if it is found that the work is not done as per specifications.

6 The learned senior counsel drew my attention to the Project Report by Central Road Research Institute (hereinafter referred to as CRRI for the sake of brevity) filed in the additional affidavit dated 8th June 2017 and submitted that two road from each contract were got tested from the said Institution with an object to find out why there was variation in the thickness level and to ascertain whether the trial pits allegedly dug by the Internal Committee of Experts from the Corporation were dug in a proper manner. The report of the CRRI shows that the trial pits were not dug by the Internal Expert Committee of the Corporation properly and because of rising in subsoil water level, the crust layer of the road was likely to be disturbed. With this, the learned senior counsel submitted that the case in hand is not of a criminal misconduct and there is no case that crust layers of the roads under reconstruction were not laid at all. The contract takes care of removal of deficiencies and therefore, no prima facie case even for offences punishable under Sections 420, 197 and 120B of the IPC is made out.

7 According to the learned senior counsel, for investigation regarding stacking of debris, custodial interrogation of the present applicant/accused is not warranted.

8 I have heard Shri A.A.H.Ponda, the learned advocate appearing for applicant/accused Narendra Madhani (Anticipatory Bail Application No.19 of 2017). He vehemently argued that it is case of the prosecution that false claims are raised by contractors to whom the work of reconstruction of road was entrusted. By relying on judgments of the Hon'ble Apex Court as well as by Hon'ble Gujarat, Rajasthan and Madhya Pradesh High Courts in the matters of Mohd.Ibrahim vs. State of Bihar¹, Motisingh vs. State of Gujarat², State vs. Parasram³ and Shankarlal Vishwakarma vs. State of Madhya Pradesh⁴, the learned advocate argued that a person can be said to have made a false document if he makes or executes a document claiming to be someone else or authorised by someone else. Similarly, a false document can be said to have been made if a person alters or

1 2009 (8) SCC 751

2 AIR 1961 Gujarat 117

3 AIR 1965 Rajasthan 9

4 1991 Cri.L.J. 2808

tampers a document. Such is not the case in hand. Making a false or exaggerated claim, by a person in authority making such claim, cannot be said to be making a false document. The contractors were authorized to raise claims and accordingly, they made claims in respect of the work done by them. The receipts and running bills may contain false recitals or particulars, but that cannot be termed as forgery committed by the contractors.

9 It is further argued that Contract Work Code No.C-248 for laying down one road was entrusted to applicant/accused Narendra Madhani apart from Contract bearing Work Code no.AC-113 which his Company is executing under the Joint Venture with applicant/accused Tejas Shah (Anticipatory Bail Application No.22 of 2017) of Relcon Infraproject. By relying on the Chart annexed to the application as well as copies of running bills, the learned advocate for applicant/accused Narendra Madhani argued that Municipal Corporation is holding an amount of Rs.16,55,11,954/- of the Company of applicant/ accused Narendra Madhani, apart from amount deducted from the running bills to the tune of

Rs.76,18,845/- and Rs.4.10 lakh. As against this, it is alleged that so far as Contract Work Code No.C-248 in respect of one road is concerned, the applicant/accused is alleged to have cheated the Corporation by an amount of Rs.5.79 lakh. The contract value of this contract is Rs.114 crore. In joint venture with co-applicant Tejas Shah (Anticipatory Bail Application No.22 of 2017) of Relcon Infrastructure, project cost for Contract Work Code No.AC-113 is Rs.270 crore. As against this, the alleged deficiency is only of Rs.1.81 crore. Sufficient security deposit is with the Corporation for effecting deductions in terms of the contract. The learned advocate further argued that vide letter dated 20th September 2016, the applicant/accused demanded allegedly forged, fabricated or incomplete documents from the Municipal Corporation and the Inquiry Officer of the Municipal Corporation replied on 28th September 2016 that no such documents are available, meaning thereby that, no documents are fabricated. The learned advocate further referred to the spot inspection report dated 9th February 2016 to state that even the debris were checked by the Investigating Officer. With this, it is argued that, the

applicant/accused had attended the Investigating Officer as per directions of the learned Additional Sessions Judge as well as this court, and therefore, his further custodial interrogation is not warranted. It is pointed out that though the contract period, so far as Contract Work Code No.C-248 was initially for eighteen months, the same is extended up to March 2018, and the Running Account Bills submitted by the Company of the applicant/accused are being duly paid by the Municipal Corporation.

10 Mr.Ponda, the learned advocate further argued that time for completion of contract in respect of Contract No.C-248 is extended by the MCGM up to 31st March 2018 without penalty or supervision charges vide letter dated 17th April 2017. By drawing my attention to Clauses 69 and 87 of the General Conditions of Contract, the learned advocate argued that custodial interrogation of the applicant/accused is not warranted.

11 Anticipatory Bail Application bearing no.6 of 2017 is filed by applicant/accused Ketan Shah, Director of RPS

Infraprojects Pvt. Ltd. This firm has entered into Joint Venture Agreement with applicant/accused Manish Kasliwal (Anticipatory Bail Application No.30 of 2017) of K.R.Constructions. This Joint Venture is awarded with Contract Code No.W-271 in respect of five roads. Shri Ponda, the learned advocate appearing for applicant/accused Ketan Shah (Anticipatory Bail Application No.6 of 2017) argued that even prior to lodging the First Information Report (FIR) in the matter, an amount of Rs.5,04,48,617/- is recovered from the firm of the applicant/accused Ketan Shah for causing the alleged financial loss to the MCGM. He drew my attention to several letters issued by the MCGM showing that the rectification work was started by the contractor as per General Conditions of Contract No.69, in January to March 2016 i.e. even prior to lodging the FIR. It is argued that even the team of MCGM visited the spot and panchnamas effected reveals that debris of the excavated road were found on the spot.

12 While concluding his arguments, Shri Ponda, the learned advocate urged that, custodial interrogation of

applicants/accused is not warranted in view of the law laid down by the Hon'ble Apex Court in the matters of Gurbaksh Singh Sibia v. State of Punjab & Haryana⁵, Joginderkumar vs. State of Uttar Pradesh and Others⁶ Siddharam Satlingappa Mhetre v. State of Maharashtra And Others⁷, Arnesh Kumar vs. State of Bihar⁸ and Bhadresh b. Seth vs. State of Gujarat and Another⁹.

Relying on the ratio of these rulings, it is urged that even for effecting recoveries by resorting to Section 27 of the Evidence Act, relief of anticipatory bail cannot be denied to the applicants/accused and for that purpose, it is required to be considered that such an accused is deemed to have surrendered himself. Lastly, by relying on judgment of the Hon'ble Apex Court in the matter of Sunil Bharti Mittal vs. CBI¹⁰ it is argued that the Indian Penal Code, save and except in some matters, do not contemplate any vicarious liability on the part of the person. There is no vicarious liability in criminal law unless the statute takes that also within its fold. The Penal Code does not contain

5 AIR 1980 SC1632

6 (1994) 4 SCC 260

7 (2011) 1 SCC 694

8 (2014) 8 SCC 273

9 (2016) 1 SCC 152

10 2015(4) SCC 609

any provision for attaching vicarious liability on the part of the Managing Directors or Directors of the Company, when the accused is a Company. Therefore, when the Company is made an accused in this case, there is no necessity of custodial interrogation of the applicants/accused.

13 The learned advocate appearing for Jitendra Kikavat in Anticipatory Bail Application No.5 of 2017 argued that Mahavir Roads and Infrastructure Pvt. Ltd. of which the applicant/accused is the Managing Director was awarded Work Order in respect of Contract Work Code no.AE-49 for construction of 83 roads, but according to the prosecution case, deficiencies were found only in four roads constructed by the said Company. The learned advocate drew my attention to three reports dated 23rd December 2015, 24th February 2016 and 1st April 2016 of the Internal Experts of the MCGM. He argued that during the course of inquiry, the Internal Experts of the MCGM have deliberately avoided to direct the Contractors to remain present and the trial pits and other investigation in respect of construction of the road

was done behind the back of the Contractors. He pointed out the discrepancies in the Second and Third Inquiry Reports and submitted that, though Second Inquiry Report points out that granule sub-base layer was absent, the Third Inquiry Report shows that the granule sub-base layer was very much present and non-executed quantity thereof was from 1% to 45%. In submission of the learned advocate for applicant/accused Jitendra Kikavat, the granular sub-base layer was reduced under directions of the MCGM vide two letters dated 6th April 2015 and 29th April 2015 (record page 74 and 76). The MCGM had directed to reduce the lower most i.e. granular sub-base layer due to utilities underneath the road, and therefore, the entire case of the prosecution is false.

14 The learned advocate appearing for applicant/accused Jitendra Kikavat (Anticipatory Bail Application No.5 of 2017) further argued that the firm/company of the applicant/accused was served with a show cause notice dated 16th May 2016 warning blacklisting due to non-execution of the work, but subsequently, the time for performance is extended and that extension is still in

operation. By drawing my attention to the report dated 8th September 2015 submitted by the Engineer of the MCGM to the Chief Engineer, the learned advocate argued that lacunas in the contract work came to be noted by the third party auditor as well as by the MCGM and necessary penalty in terms of the contract was also imposed on the Contractor and the same is duly paid.

15 Shri Jha, the learned senior counsel appearing for the applicant/accused Manish Kasliwal (Anticipatory Bail Application No.30 of 2017) argued that two panchnamas dated 15th January 2016 point out that debris are stacked by the applicant/accused at Village Chipley and Village Ulwe. He further argued that several letters were issued by the MCGM to the Contractor as per the terms of the contract, imposing the penalty and effecting recoveries. The Contractor has duly complied those directions. He, further, argued that, raising inflated bills do not amount to forgery by placing reliance on the judgment in the matter of **C.O.Vergheese vs. M.K.Singh**¹¹

11 1997 (2) Mh.L.J. 243

16 Shri.Jha, the learned Senior Counsel further argued that the contract entered into between the parties provides various conditions governing the mutual bilateral relations between the parties to the contract and alleged breach does not amount to cheating the MCGM. To buttress his submission that the dispute is civil in nature, he placed reliance on Judgment of the Honourable Supreme Court in the matter of Sharon Michael & Ors. State of Tamil Nadu & Anr.¹² and Judgments in the matters of Smt.Sangeeta Upadhyay v. State of West Bengal & Anr.¹³, decided by High Court of Calcutta and Jamal Enterprise (Pvt.) Ltd. v. Mrs.Vanisri¹⁴, decided by High Court of Madras and K.Jayabalan & Anr. v. The State¹⁵, by Madurai Bench of Madras High Court.

17 I heard Shri.Rizwan Merchant, the learned Senior Counsel appearing for applicant Nalin Gupta (ABA No.27 of 2017). He argued that entire amount of Rs.721.09 Lakh of alleged deficiency was paid by the contractor to the MCGM by

12 (2009) 3 SCC 375

13 MANU/WB/0482/2010

14 2006 Cri.L.J.2699

15 CRL OP (MD) No.15726 of 2014

various Demand Drafts as reflected from the letter dated 27/06/2016 addressed to the Investigating Officer (Record Page 208). He further argued that after lodging the subject FIR on 27/04/2016, the investigation was complete in October 2016 itself resulting in filing charge-sheet against Ashok Pawar, the then Chief Engineer, MCGM and other accused persons. In Column No.16 of that charge-sheet names of present applicant as well as other applicants are figuring. Column 16 of that charge-sheet contains allegations that all applicants and other accused persons conspired and committed offences alleged against them. This charge-sheet, according to the learned Advocate, is a charge-sheet also against the present applicant and this fact goes a long way to show that the investigation of the crime in question is already over. To buttress this contention, the learned Advocate placed reliance on the Judgment of this Court in the matter of **Gyanchand Verma v. Sudhakar B. Pujari & Ors.**¹⁶ delivered by the **Hon'ble Shri.Justice A.M.Khanwilkar J.** (as His Lordship then) as well as the Judgment in the very same matter delivered

¹⁶ 2011 SCC Online Bom. 100

by the **Hon'ble Shri.Justice V.M.Kanade¹⁷** due to difference of opinion between **Hon'ble Shri.Justice A.M.Khanwilkar (as His Lordship then)** and **Hon'ble Shri.Justice A.PBhangale JJ.** With the aid of these Judgments, it is sought to be argued that the statutory requirements of the report under Section 173 of the Code would be complied with if various Judgments prescribed herein are included in the report and as the report contains name of present applicant as one of the accused in Column 16 of the charge-sheet against Ashok Pawar and others, investigation as against applicant Nalin Gupta is also over.

18 Shri.Mundargi, the learned Senior Counsel appearing for applicant Vibhas Acharekar (ABA No.23 of 2017) vehemently argued that the only allegation against this applicant, who is Executive Engineer with MCGM is to the effect that he got two letters issued through his subordinate Sectional Engineer addressed to the contractors though Clause 69 and 87 were not applicable to the contract and thereby got the investigation of the crime in question hampered. The learned Senior Coounsel argued

¹⁷ 2011 SCC Online Bom.524

that in past also even prior to lodging the FIR, similar letters were issued by the officers of the MCGM to the contractors relying on the General Conditions of Contract.

19 I heard Shri.Thakare, the learned Public Prosecutor at sufficient length of time. By relying on statements of several witnesses some of whom are officers of the Corporation namely Vasant Premanand Prabhu, Shitalaprasad Oriram Kori and Sanjay Pandurang Darade, the learned Public Prosecutor argued that the applicants have cheated the MCGM by not undertaking the contract work of construction of road according to the terms of contract. By relying on the Judgment of the Honourable Supreme Court in the matter of Dr.Sandeep Rane v. The Commissioner of Bombay Municipal Corporation & Ors.¹⁸, Shri.Thakare, the learned Public Prosecutor argued that availability of the motorable road is the constitutional right of the citizen and by constructing substandard roads, the applicants have committed breach of constitutional rights of the citizen. He further argued that the applicants have failed to upload data in V.T.E. for transportation of debris and their custodial interrogation is warranted.

¹⁸ 2006(6) ALL MR 67

20 I have carefully considered the rival submissions and also perused papers of investigation as well as documents produced on record by the applicants/accused.

21 At the outset, let us have a brief resume of the past events leading to the registration of the crime in question. In the beginning of the year 2014, Municipal Corporation of Greater Mumbai (hereinafter referred to as MCGM for the sake of brevity) through its Commissioner issued e-Tender Notice inviting quotations from the firms registered with it under Class “AA” Category C-III as well as from the contractors having equivalent Class and Category registered with other Government organizations. The quotations were invited for “Strengthening and Improvement of various major roads in Cement Concrete in City Division” as well as for “Strengthening and Improvement of various Major Roads in Asphalt and Mechanized Mastic Asphalt in City Division.” The e-Tender Notice was showing the estimated cost of the work tender as well as contract period which was generally for fifteen months excluding monsoon. Quotations were

to be submitted by the prescribed date, which for e-Packet “C” was 20th February 2014.

22 The companies/firms of all applicants/Contractor /accused herein submitted their quotations and quotations of the companies/firms of applicants/accused herein were accepted and accordingly Work Orders came to be issued in favour of their firms for executing work of various roads. Applicant/accused Vibhas Acharekar (Anticipatory Bail Application No.23 of 2017) is the Executive Engineer with the MCGM and he is not the Contractor. It is seen from the Tender documents that nature of works which were to be executed by the successful contractors were excavation for foundation, substructures, basements, tanks, manholes, trenches, poles etc., general building work in soft/disintegrated rock, levelling, watering and rolling. The Contracts were for providing and laying as well as spreading graded crushed stones to wet mix macadam satisfaction. Work of providing and laying and spreading of mixed material in uniform layers of compacted thickness with motor grader or paved on prepared murum surface

was also included in the e-Tender Notice. The successful contractors were to provide and apply TACK COAT with CATIONIC BITUMEN EMULSION. The other work was that of construction of roads in cement and concrete by excavating the existing roads. Work of construction of new footpaths, improving of existing footpaths by covering the drains, by removing and refixing concrete pavers, raising or lowering manholes etc. was also included in the e-Tender Notice.

23 Applicant/accused Tejas Shah in Anticipatory Bail Application No.22 of 2017 is partner in Relcon Infraproject. The said firm is a lead contractor of Joint Venture with R.K.Madhani and Co. The Joint Venture of applicant/accused Tejas Shah and applicant/accused Narendra Madhani (Anticipatory Bail Application No.19 of 2017) bagged Contract for Work Code No.AC-113 in respect of “Strengthening and Improvement” of in all 13 roads in City Division. This contract was for Major Asphalt and Mechanized Mastic Asphalt. Apart from this, firm of applicant/accused Tejas Shah was individually awarded with

Contract for Work Code No.AE-51 in respect of five roads. This contract was for improvements of various roads, side strips in flexible pavements and allied work in “S” and “T” Wards.

24 Firm named R.K.Madhani & Co. of applicant/accused Narendra Madhani (Anticipatory Bail Application No.19 of 2017) independently bagged Contract in respect of Work Code No.C-248 i.e. proposed reconstruction of broken C.C.Panels and improvement of Dr.B.A.Road in EP/South & F/North Wards City.

25 Firm Mahavir Roads & Infrastructure Pvt. Ltd. of applicant/accused Jitendra Kikavat (Anticipatory Bail Application No.5 of 2017) bagged Contract bearing Work Code No.AE-49 in respect of 83 roads. It was for improvement of various roads including major and minor roads in N & M West Wards of Eastern Suburbs in Flexible Pavements. According to the prosecution case, out of 83 roads, deficiencies were found in respect of execution of the contract work in respect of 4 roads in this contract.

26 Applicant/accused Ketan Shah (Anticipatory Bail Application No.6 of 2017) is the Director of R.P.S.Infraprojects Pvt. Ltd. This Company entered into the Joint Venture Agreement with K.R.Constructions – a Company belonging to applicant/accused Manish Kasliwal (Anticipatory Bail Application No.30 of 2017). This Joint Venture was awarded with the contract bearing Code No.W-271 for Improvement of various roads in cement concrete in K/East, P/South and P/North Wards in Western Suburbs.

27 The applicant/accused Jitendra Kikavat (Anticipatory Bail Application No.5 of 2017) is the Managing Director of Mahavir Roads and Infrastructure Private Limited. He bagged Contract under Work Code No.AE-49 in respect of 83 roads for improvement including Major and Minor roads in “N” and “M” West Wards of Eastern Suburbs in Flexible Pavements. Out of those roads, according to the prosecution case, deficiencies were found only in respect of four roads.

28 Applicant/accused Manish Kasliwal (Anticipatory Bail Application No.30 of 2017) is owner of a partnership firm named M/s.K.R.Constructions. His firm entered into the Joint Venture Agreement with a firm named J.Kumar of applicant/accused Nalin Gupta (Anticipatory Bail Application No.27 of 2017). This Joint Venture bagged Contract bearing Work Code No.W-266 for improvement of various roads in Western Suburbs. The road entrusted to this Joint Venture were six in number. Similarly, Joint Venture of M/s.K.R.Constructions owned by applicant/accused Manish Kasliwal (Anticipatory Bail Application No.30 of 2017) with R.T.S.Infraprojects of applicant/accused Ketan Shah (Anticipatory Bail Application No.6 of 2017) bagged Contract under Work Code No.W-271 for concretization of various roads in “K/E” and “P” Wards in Western Suburbs. Five roads were entrusted to them.

29 Applicant/accused Nalin Gupta (Anticipatory Bail Application No.27 of 2017) is one of the Director of a firm/company named M/s.J.Kumar. Quotation submitted by

M/s.J.Kumar was accepted by the MCGM for Contract under Work Code No.W-266 in respect of six roads.

30 Applicant/accused Vibhas Acharekar (Anticipatory Bail Application No.23 of 2017) is the suspended Executive Engineer of the MCGM.

31 Before going into nature of accusations against all applicants/accused, let us put on record what according to the prosecution is the civil liability of the Contractors, as the learned Public Prosecutor, during the course of his arguments, has tendered some charts in this regard, pointing out the deficiency amount assessed by the MCGM.

32 The following comprehensive Chart (prepared on the basis of information provided by the learned Public Prosecutor) is summarizing the details of the work allotted to the firms / companies of the applicants/accused, the cost of the work, deficiency amount fixed by the employer i.e. the MCGM and its

percentage to the total cost :-

Sr. No.	ABA No. & Name of Applicant/ Accused	Name of the Firm/Company	Contract Work Code & No.of Roads	Contract Cost Rs.	Deficiency amount fixed by MCGM in Lakh	Percentage of the deficiency to the total cost
1	05 of 2017 Jitenrdra Kikavat	Mahavir Roads & Infrastructure Pvt. Ltd.	AE-49 (4 roads in FIR)	1,53,46,19,019/-	13.79	0.089%
2	06 of 2017 Ketan Shah	RPS Infraprojects	W-271 (5 roads in FIR)	4,91,40,53,259/-	440.64	1.02%
3	19 of 2017 Narendra Madhani	R.K.Madhani & Company	C-248 (1 Road in FIR)	1,13,99,67,494/-	5.79	0.05%
			AC-113 (13 Roads in FIR)	2,70,08,42,860/-	181.13	0.67%
4	22 of 2017 Tejas Shah	Relcon Infraprojects Constructions of Roads	AC-113 (13 Roads in FIR)	2,70,08,42,860/-	181.13	0.67%
			AE-51 (5 Roads in FIR)	1,20,92,42,236/-	78.52	0.65%
5	27 of 2017 Nalin Gupta	J. Kumar	W-266 (6 roads in FIR)	4,21,15,91,157/-	721.09	1.71%
6	30 of 2017 Manish Kasliwal	K.R. Construction	W-266 (6 roads in FIR)	4,21,15,91,157/-	721.09	1.71%
			W-271 (5 roads in FIR)	4,91,40,53,259/-	440.64	1.02%

33 The chart in the foregoing paragraph thus points out the contract cost as well as amount assessed by the MCGM towards loss due to deficiencies in the contract work and percentage of the deficiency to the total cost. As against this, so far as the contract with applicant/accused Jitendra Kikavat (Anticipatory Bail Application No.5 of 2017) is concerned, his deposits with the MCGM towards EMO, Bank Guarantee, Contract Deposit, 5% Retention Money etc. is to the tune of Rs.28.83 crore. In a similar way, deposit of Rs.101.72 crore of applicant/accused Ketan Shah (Anticipatory Bail Application No.6 of 2017) is with the MCGM in the form of the Bank Guarantee, Additional Security Deposit and Contract Deposit. As against alleged loss of Rs.4.40 crore, an amount of Rs.5.04 crore is already recovered by the MCGM from his R.A.Bills for the period from January 2016 to February 2016. So far as applicant/accused Narendra Madhani (Anticipatory Bail Application No.19 of 2017) is concerned, for Contract under Work Code No.C-248, his total security available with the MCGM is Rs.11.21 crore. For contract under Work Code No.AC-113 which is undertaken by his firm with Relcon

Infraprojects Construction of Road, the security available with MCGM is to the tune of Rs.10.76 crore. Total deposit of applicant/accused Tejas Shah (Anticipatory Bail Application No.22 of 2017) with the MCGM is stated to be amounting to Rs.28.53 crore. Total deposit for two contracts i.e. W-266 and W-271 undertaken in Joint Venture by the firm of applicant/accused Manish Kasliwal (Anticipatory Bail Application No.30 of 2017) available with the MCGM is to the tune of Rs.197 crore. As against total recoveries of Rs.8,73,36,264/- the MCGM has already recovered an amount of Rs.8,93,90,264/- from the Joint Venture of the firm of applicant/accused Manish Kasliwal (Anticipatory Bail Application No.30 of 2017) with firms of applicant/accused Nalin Gupta (Anticipatory Bail Application No.27 of 2017) and applicant/accused Ketan Shah (Anticipatory Bail Application No.6 of 2017). The MCGM is having total deposit of Rs.86 crore as against the contract under the Work Code No.W-266 allotted to applicant/accused Nalin Gupta (Anticipatory Bail Application No.27 of 2017). This factual position is sufficient to demonstrate that as against the contract cost, the deficiency

amount is trivial. Similarly, the deficiency amount is insignificant if it is compared with deposits of the Contractors with the MCGM. Thus, in the event it is found that the Contractors are liable to recompense the MCGM, the interest of the MCGM is fully secured.

34 It is seen that the Contractors have availed extension of period for performing the work under the contract and the contract provides for the Defect Liability Period ranging from 5 years to 10 years. The MCGM has, infact, pointed out the faults, imperfections, defects and lacunas to all Contractors i.e. firms/companies of the applicants/accused with a direction to rectify the defects and to pay fine/penalty as per terms under the contract. It is not at all the case of the prosecution that after award of the contract, firms of the applicants/accused has not executed any work under the contract but claimed and withdrew money by submitting bills.

35 The case of the prosecution as reflected from the FIR lodged by the Chief Engineer, MCGM, after getting the reports

from the Experts on undertaking technical examination is to the effect that the work executed by the Contractors is substandard and less than the prescribed quantity. Upon examination of the Foundation crusts of the roads, it was revealed that thicknesses of layers were not as per the specifications. This implies utilization of less material for constructions of roads by the Contractors. It is further alleged that the work under the contract is not as per the design and the bill of quantity. Last portion of the FIR is to the effect that the Contractors have not dug the road (by excavating it for the purpose of lying crust layers). They have not actually transported debris but have claimed transportation charges of debris (of excavated roads).

36 Apart from these allegations in the FIR, perusal of reports submitted by the Experts from the MCGM shows that the Contractors were not called when the roads were inspected. The trial pits were dug in absence of the Contractors. The Experts of the MCGM dug trial pits on subject roads and concluded that the thickness of crust for different layers was not as per the

specifications under the contract. There is variation (minus) in thickness in various layers including Granular Sub Base, Wet Mix, Macadam layer. Minor variation was found so far as top two Asphalt layers. In other words, most of the discrepancies were found in Sub Base layers. In the Third Report, the Internal Experts of the MCGM pointed out non-executed quantities of the various works under the contract. With the aid of three reports of the Committee of Experts comprising of the Deputy Commissioner (Zone III), the Chief Engineer (Vigilance), the FIR came to be lodged against the applicants/accused.

37 By these applications, the applicants/accused are claiming pre-arrest bail. Therefore, now let us take a brief resume of the law on the point of relief in the nature of grant of anticipatory bail to a person accused of commission of non-bailable offence. The Constitutional Bench of the Honourable Apex Court in the case of **Gurbaksh Singh Sibbia v. State of Punjab & Haryana**¹⁹, has held that no restriction should be imported into the provisions of Section 438 Cr.P.C. and that this is

¹⁹ AIR 1980 SC 1632

required to be saved and not jettisoned. The Constitutional Bench went on to hold that no limitation, as mentioned in Section 437 or 439 Cr.P.C. could be read into Section 438 Cr.P.C. The relevant observations in this regard are as under:-

"21 The High Court says in its fourth proposition that in addition to the limitations mentioned in Section 437, the petitioner must make out a "special case" for the exercise of the power to grant anticipatory bail. This virtually, reduces the salutary power conferred by Section 438 to a dead letter. In its anxiety, otherwise just, to show that the power conferred by Section 438 is not "unguided or uncanalised", the High Court has subjected that power to a restraint which will have the effect of making the power utterly unguided. To say that the applicant must make out a "special case" for the exercise of the power to grant anticipatory bail is really to say nothing. The applicant has undoubtedly to make out a case for the grant of anticipatory bail. But one cannot go further and say that he must make out a "special case". We do not see why the provisions of Section 438 should be suspected as containing something volatile or incendiary, which needs to be handled

with the greatest care and caution imaginable. A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail."

38 The Honourable Supreme Court in Gurbaksh Singh Sibia's case (supra) has specified the consideration which need to be weighed while granting an order of anticipatory bail. It is observed by the Hon'ble Supreme Court that grant of bail depends upon answering to variety of circumstances, the cumulative effect of which must enter into judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail. It is further observed that the courts considering the application for

anticipatory bail ought to be left free in exercise of their judicial discretion to grant bail if they consider it fit so to do on particular facts and circumstances of the case and on such conditions as the case may warrant.

39 In Siddharam Satlingappa Mhetre v. State of Maharashtra And Others²⁰, the Hon'ble Supreme Court has exhaustively dealt with the principles of law underlying the grant of anticipatory bail, after discussing a catena of judgments. The relevant paragraphs of that judgment are reproduced herein below:

"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."

20 (2011) 1 SCC 694

“**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.”

“**111** No inflexible guidelines or straightjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any

event, this is the legislative mandate which we are bound to respect and honour.”

“**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 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** The 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 in these allegations are corroborated by other material and circumstances on record.”

“**116** Personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case.”

40 The Hon'ble Supreme Court has very categorically held in the case of **Siddharam Satlingappa Mhetre's case (supra)** that anticipatory bail is not an extra ordinary in the sense that it should be invoked only in exceptional and rare cases. The Hon'ble Supreme Court in the said case has observed that the police should be slow in arresting the accused and the court considering the bail applications are to maintain fine balance between societal interest vis-a-vis personal liberty while adhering to the

fundamental principle of the criminal jurisprudence that the accused is presumed to be innocent till he is found guilty by the Court. The Hon'ble Supreme Court has further held that platitude of Section 438 Cr.P.C. must be given its full play. There is no requirement that the accused must make out a "special case" for exercise of power for grant of anticipatory bail. If that is done, this virtually reduce the powers conferred by Section 438 Cr.P.C. to a dead letter. No doubt, the courts may have to exercise due caution and prudence on the facts and circumstances of the case but without subjecting the discretion to self-imposed limitations. No inflexible guidelines or straitjacket formula can be provided in this regard, but certain factors and parameters can certainly be kept in consideration while granting bail. These parameters generally are:-

- "(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 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".

41 It has been very aptly observed by the Hon'ble Supreme Court that arrest of a person lead to great ignominy, humiliation and disgrace. Thus, where the court is satisfied on the basis of above parameters that there is no likelihood of the accused persons evading the trial and their antecedents are also such where there is no previous case of criminality against them or that they are not likely to misuse the concession in any manner, then the case for grant of anticipatory bail would be made out.

42 One of the consideration which is kept in view is frivolous nature of the prosecution when there is some doubt about the alleged role and the allegations and there is no plea of tampering with the record, the accused person generally is held entitled to an order of bail. A personal liberty is a precious fundamental right and has to be curtailed only when the circumstances of the case would so demand. The Honourable Supreme Court has observed that arrest should be a last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of the case. The Honourable Supreme Court has suggested measures to avoid curtailment of personal liberty and in this regard has six suggestions, albeit illustrative ones and not exhaustive, given which might dispense with the necessity to curtail the liberty of the accused. These are as under :-

- (1) Direct the accused to join 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 a 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.

43 In the matter of Ravindra Saxena v. State of Rajasthan²¹, the Honourable Apex Court in Paragraphs 8 and 9 of its Order has held thus :

“8.....There is also no reason to deny anticipatory bail merely because the allegation in this case pertains to cheating or forgery of a valuable security. The merits of these issues shall have to be assessed at the time of the trial of the accused persons and denial of anticipatory bail only on the

21 (2010) 1 Supreme Court Cases 684

ground that the challan has been presented would not satisfy the requirements of Sections 437 and 438 Cr.PC.”

“9 In our opinion, the High Court committed a serious error of law in not applying its mind to the facts and circumstances of this case. The High Court is required to exercise its discretion upon examination of the facts and circumstances and to grant anticipatory bail "if it thinks fit".

44 After setting out the position of law on the subject, let us now examine, whether the applicants/accused herein have made out the case for grant of pre-arrest bail to them.

45 All contracts entered into by the MCGM with the applicants/contractors were containing Standardised General Conditions of Contract and its preface shows that those General Conditions of Contract came to be revised in order to bring them at par with World Bank Standard Bidding Documents. It was noted by the MCGM that revision of such conditions were necessary to make them suitable for International Competitive

Bidding as the World Bank insisted on use of their Standard Bidding Documents. Some clauses in the General Conditions of Contract which is entered into between the applicants/contractors and the MCGM are relevant for the purpose of deciding the instant applications.

46 The General Conditions of Contract refers the MCGM as the employer and the successful bidder as the Contractor. The contract is stated to mean the tender and acceptance thereof and the formal agreement, if any, executed between the parties. Clause 3 of the General Conditions of Contract deals with Instructions to e-Tenderers. Clause no.3.40 deals with the Contract Deposit and Retention Money. Within fifteen days of receipt of the notification of award of the contract, the Contractor, by this condition, is duty bound to furnish Contract Deposit of 2% of the contract sum for faithful compliance of the work. This Contract Deposit is required to be furnished in the form of Bank Guarantees. In addition to the Contract Deposit, the Retention Money at the rate of 5% of the bill amount is also to be deducted

from each Running Account Bill of the Contractor. The same is to be retained by the MCGM. The total security deposit, as per provision of Clause no.3.40(d) is 7% of the contract amount. The Contractor was also required to submit Performance Guarantee in addition to other prevailing deposits i.e. 2% Contract Deposit and 5% Retention Money. The amount of Performance Guarantee, as per the terms of contract, is ranging from 3% to 20% of contract sum. It is, thus, seen that the contract between the MCGM and the Contractor i.e. applicants/accused (except applicant/accused Vibhas Acharekar in Anticipatory Bail Application No.23 of 2017) takes full care of the interest of the employer by entrusting sufficient amount with the MCGM for compensating itself in the event of breach of the contract by the Contractors. This is one of the factor which needs to be kept in the mind while deciding the instant applications.

47 How the work awarded is required to be completed by the Contractor and the consequence for not fulfilling the obligations under the subject contracts is also provided in the

General Conditions of Contract. Clause no.64B provides for contingencies in which the contractor is entitled for extension of time for completion of the awarded work. Clause 65 deals with compensation for delay. If the contractor fails to complete the work within the prescribed time, then, the employer i.e. the MCGM is entitled to recover compensation for delay from the contractor as per this condition. Clause 68C deals with the Defect Liability Certificate. It provides that the contract shall not be considered as complete until the Defect Liability Certificate is signed by the Engineer and delivered to the Contractor. As per the General Conditions of Contract, the Defect Liability Period is 10 years from the date of completion of the work under the Contract meaning thereby that it is the liability of the Contractor to rectify the defects in the work even after its completion. Clauses nos.69, 87, 90 and 98A are also relevant for the purpose of deciding the instant application. Those read thus :

“Clause 69 - Liability for defects or imperfections and rectification thereof :

If it shall appear to the Engineer or to his representative at any time during construction or

reconstruction or during the defects liability period, that any work has been executed with unsound, imperfect or unskillful workmanship or that any material or article provided by the contractor for execution of thereof the work is unsound or of a quality inferior to that contracted for, or otherwise, not in accordance with the Contract, or that any defect, shrinkage or other faults have appear in the Work arising out of defective or improper materials or workmanship, the Contractor shall, upon receipt of notice in writing in that behalf from the Engineer forthwith rectify or remove or reconstruct the Work so specified in whole or part, as the case may require or, as the case may be and/ or remove the materials or articles so specified and provide other proper and suitable materials or articles at his own expense notwithstanding that the same may have been inadvertently passed, certified and paid for, and in the event of his failing to do so within the period to be specified by the Engineer in his notice aforesaid the Engineer may rectify or remove and re-execute the Work and/or remove and replace with others the materials or articles complained of, as the case may be, by other means at the risk and cost of the Contractor.

In case of repairs and maintenance work, splashes and dropping from whitewashing painting etc. shall be removed and surfaces cleaned simultaneously with completion of these items of work in individual rooms, quarters or premises etc., where the work is done, without waiting for completion of all other items of work in the contract. In case the Contractor fails to comply with requirement of this condition, the Engineer shall have the right to get the work done by other means at the risk and cost of the Contractor.

The Engineer shall give three days notice in writing to the Contractor before taking such action.

The Engineer reserves the right to decide the rates and prices of the works as executed by other means at the risk and cost of the Contractor.

The cost and expenses thereby incurred including supervision charges specified in the Annexure 'A' on the works and also such penalty as the Engineer may impose for such wrongful conduct of the contractor (which penalty, the Engineer shall be

competent to impose and against the imposition of which or the amount thereof by the Engineer an appeal shall lie only to the Commissioner within seven days of the order in that behalf of the Engineer and the decisions of the Commissioner shall be final and binding upon the Contractor) may be deducted from any money due or to become due to the Contractor, under this or any other contract between the Contractor and the Municipal Corporation.”

“Clause 87 - Overpayment and underpayment:

Whenever any claim for the payment of a sum to the Municipal Corporation rises out of or under this contract against the Contractor the same may be deducted by the Municipal Corporation from any sum then due or which at any time thereafter may become due to the Contractor under this contract and failing that under any contract with the Municipal Corporation or from any other sum due to the Contractor from the Municipal Corporation (which may be available with the Municipal Corporation) or from his security deposit/retention money, or he shall pay the claim on demand.

The Municipal Corporation reserves the right to carry out post payment audit and technical examination of the final bill including all supporting voucher, abstracts etc. The Municipal Corporation further reserves the right to enforce recovery of any over payment when detected.

If as a result of such audit and technical examination any overpayment is discovered in respect of any work done by the Contractor or alleged to have been done by him under the Contract, it shall be recovered by the Municipal Corporation from the Contractor by any or all the methods prescribed above or if underpayment is discovered the amount shall be duly paid to the Contractor by the Municipal Corporation.

Provided that the aforesaid right of the Municipal Corporation to adjust overpayment against amount due to the Contractor under any other contract with Municipal Corporation shall not extend beyond the period of two years from the date of payment of the final bill or in case the final bill is a "Minus" bill, from the date of the amount payable by the Contractor under the "Minus" bill is communicated to the Contractor.

Any amount due to the Contractor under this contract for underpayment may be adjusted against amount then due or which may at any time thereafter become due before payment is to the Contractor, from him to Municipal Corporation on any other contract or account whatsoever.

“Clause 90 - Cancellation of contract in full or in part:

If the contractor :

- a) At any time makes default in proceeding with the work with due diligence and continues to do so after notice in writing of fourteen days from the Engineer,or
- b) Commits default in complying with any of the terms and conditions of contract and does not remedy it within fourteen days after a notice in writing s given to him in that behalf by the Engineer,or
- c) Fails to complete the Works or items with individual dates of completion on or before the date(s) of completion, and does not complete them within the period specified in a notice given in writing in that behalf by the Engineer, or

d) Shall offer or give or agree to give to any person in Municipal Corporation's Service or to any other person on his behalf any gift or consideration of any kind as an inducement or reward for doing or forbearing to do or for having done or forborne to do any act in relation to the obtaining or execution of this or any other contract for the Municipal Corporation, or

e) Shall obtain a contract with the Municipal Corporation as a result of ring tendering or other non-bona-fide methods of competitive tendering or

f) being an individual or a firm, any partner thereof, shall at any time be adjudged insolvent or have a receiving order or order for administration of his estate made against him or shall take any proceedings for liquidation or composition (other than voluntary liquidation for the purpose of amalgamation or reconstruction) under any insolvency act for the time being in force or make any conveyance or assignment of his effects or composition or arrangement for the benefit of his creditors or purports so to do, if any application be made under any insolvency Act for the time being in force for the sequestration of his estate or if a trust deed be executed by him for his creditors, or

g) being a company, shall pass a resolution or the court shall make an order for the liquidation of his affairs, or a receiver or a manager on behalf of the debenture holders shall be appointed or circumstances shall arise which entitle the Court or debenture holders to appoint a receiver or a Manager, or

h) shall suffer an execution being levied on his goods and allow it to be continued for a period of 21 days,or

i) assigns, transfers, sublets (engagement of labour on a piece work basis or labour with materials not to be incorporated in the work, shall not be deemed to be subletting) or attempts to assign, transfer or sublet the entire works or any portion thereof without the prior written approval of the Commissioner. The Commissioner may without prejudice to any other right or remedy which shall have accrued or shall accrue thereafter to the Municipal Corporation by written notice cancel the contract as a whole or only such items of work in default from the contract.

The Commissioner shall on such cancellation have powers to:

- a) take possession of site and any materials, constructional plant, implements stores, etc. thereon and/or
- b) carry out the incomplete work by any means at the risk and cost of the Contractor.

On cancellation of the contract in full or in part the Engineer shall determine what amount, if any, is recoverable from the Contractor for completion of works or part of the works or in case the works or part of works is completed, the loss or damage suffered by the Municipal Corporation, in determining the amount, credit shall be given to the Contractor for the value of the work executed by him up to the time of cancellation, the value of the Contractor's material taken over and incorporated in the work, and use of construction equipment belonging to the Contractor.

Any excess expenditure incurred or to be incurred by the Municipal Corporation in completing the works or part of the works or excess loss or damages suffered or may be suffered by the Municipal Corporation as aforesaid after allowing such credit shall be recovered from any money due

to the Contractor on any account and if such moneys are not sufficient the Contractor shall be called upon in writing to pay the same within thirty days . If the Contractor shall fail to pay require sum within the aforesaid period of 28 days, the Engineer shall have right to sell any or all of the Contractor's unused materials, constructional plant, implements, temporary buildings, etc. and apply the proceeds of sale thereof towards the satisfaction of any sums due from the Contract or under the contract, and if thereafter there be any balance outstanding from the Contractor, it shall be recovered in accordance with provision of the contract.

Any sums in excess of the amounts due to the Municipal Corporation and unsold materials constructional plant,etc shall be returned to the Contractor, provided always that if cost or anticipated cost of completion by the Municipal Corporation of the works part of the works is less than the amount of which the Contractor would have been paid had he completed the works or part of the works, benefit shall not accrue to the Contractor.

Without prejudice to the generally of the foregoing, the amount deposited by the Contractor as security deposit shall be absolutely forfeited to the Corporation for such failure, or breach or determination of contract.”

“Clause 98A – Jurisdiction

In case of any claim, dispute of difference arising in respect of a contract, the cause of action thereof shall be deemed to have arisen in Mumbai and all legal proceedings in respect of any such claim, dispute or difference shall be instituted in a competent court in the City of Mumbai only.”

48 These provisions in the agreements between the MCGM and the Contractor makes it clear that if the Contractor fails to perform his obligation under the contract, the MCGM is entitled to get it performed by directing the Contractors to rectify, remove or reconstruct the work in whole or part as the case may be even by providing suitable material or articles at the expenses of the Contractors. If it is noticed by the MCGM even in the event of post payment audit and technical examination that any over payment is made to the Contractor, then the MCGM, under the

stipulation in the contract is entitled to recover or adjust the same. The stipulation in the contract also empowers the MCGM to cancel the contract if the Contractor makes default in proceeding with the work with due diligence. The employer i.e. the MCGM, under the terms of Contracts, is entitled to levy penalty and fine to the Contractors. It is, thus, clear that, every contingency which may arise during fulfilling the obligation under the contract is provided for under the terms of the contract.

49 At this juncture, it is also necessary to quote the provisions of Section 73 of the Contract Act, 1872, which provides for the consequences in case of breach of contract. Relevant portion thereof reads thus :

“73 Compensation for loss or damage caused by breach of contract – When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.”

50 Section 74 of the Contract Act speaks of compensation for breach of contract where penalty is stipulated. It deals with measure for damages in two class of cases i.e. where the contract fixes an amount to be paid in case of its breach and where the contract provides for any other stipulation by way of penalty.

51 It is crystal clear that the MCGM has invoked these conditions in the agreement to get the work executed from the Contractors. So far as applicant/accused Ketan Shah (Anticipatory Bail Application No.6 of 2017) is concerned, even prior to lodging the FIR, the MCGM had recovered an amount of Rs.5,04,48,617/- from his firm due to his failure to perform the obligations under the contract bearing the Contract Work Code No.W-271, and because of deficiencies found in execution of the contract work in respect of five roads. The MCGM had issued letters asking the Contractor for Contract Work Code No.W-271 i.e. firms of applicants/accused Ketan Shah and Manish Kasliwal to rectify the work executed by them which was found to be unsound and imperfect by invoking the provision of Condition No.69 of the General Conditions of Contract.

52 It is seen that the Executive Engineer (Roads MCGM) vide letter dated 29th January 2016 had informed Joint Venture of M/s.R.P.S.Infraprojects Private Ltd. and M/s.K.R.Constructions i.e. firms/companies belonging to applicants/accused Ketan Shah and Manish Kasliwal that on taking trial pit, it is observed that the thicknesses of various layers were less than the required. By this letter, as per provisions of Clause 69 of the General Conditions of Contract, the Joint Venture was directed to remove and redo such work immediately as per the specifications. The Joint Venture of applicants/accused Ketan Shah and Manish Kasliwal acknowledged the receipt of this letter and informed that the necessary action will be taken. Again, by another letter dated 29th January 2016, the Joint Venture of applicants/accused Ketan Shah and Manish Kasliwal was directed to pay an amount of Rs.37,08,156/- found due and payable to the MCGM due to less thicknesses of various layers. This letter was replied by letter dated 3rd February 2016 by the Joint Venture of these applicants/accused by assuring the MCGM that the work will be done as per specifications and bills shall be reconciled for any

excess amount. By another letter dated 29th January 2016, the Executive Engineer of the MCGM informed the Joint Venture of applicants/accused Ketan Shah and Manish Kasliwal that the trial pit in respect of Vasri Hill Road reflects that thicknesses of various layers were less than the required, and therefore, as per Clause 69 of the General Conditions of Contract, the defect be removed and the work be redone immediately as per the specifications. Necessary assurance was then communicated by the Joint Venture vide their letter dated 30th January 2016. By the letter dated 29th January 2016, the Joint Venture of applicants/accused Ketan Shah and Manish Kasliwal was informed by the Executive Engineer that as the trial pit in respect of Vasri Hill Road was reflecting lesser thicknesses of various layers, the Joint Venture should pay the amount of Rs.49 lakh to the MCGM immediately. By letter dated 3rd February 2016, the Joint Venture of applicants/accused Ketan Shah and Manish Kasliwal informed the MCGM that the work is in progress and hence, all payments are ad-hoc and therefore, bills shall be reconciled for excess payment, if any. Vide letter dated 29th January 2016, the Executive Engineer informed the Joint

Venture of applicants/accused Ketan Shah and Manish Kasliwal that the trial pit in respect of Jaychandlal Karwa Marg reflects that thicknesses of various layers in the crust were less than the required, and therefore, as per Clause 69 of the General Conditions of Contract, defects be removed and the work be redone. Similarly, vide letter of the same date, the Executive Engineer of the MCGM informed the Joint Venture of these applicants/accused that the amount of Rs.51,20,000/- be paid to MCGM as per the provisions of the contract, as thicknesses of various layers of Jaychandlal Karwa Road were found less than the required. Vide letter dated 29th January 2016, in respect of I.T.Park Road, the Executive Engineer of the MCGM informed the Joint Venture of applicants/accused Ketan Shah and Manish Kasliwal that the trial pit in respect of this road also shows that thicknesses of various layers were less than the required, and therefore, as per Clause 69 of the General Conditions of Contract, the defects be removed and work be redone. By letter dated 30th January 2016, the Executive Engineer of the MCGM informed the Joint Venture of applicants/accused Ketan Shah and Manish

Kasliwal that as layers of thicknesses in respect of Khadakpada Road, Malad (East) were found less than the required, the amount of Rs.2,42,88,264/- be paid to the MCGM immediately. The Joint Venture of these applicants/accused informed that as the work is in progress, the bills can be reconciled. So far as Reservoir Road is concerned, by similar letter, the Executive Engineer of MCGM informed the Joint Venture of both these applicants/accused that the trial pit is showing that thicknesses of various layers were less than the required, and therefore, the defects be removed and the work be redone. Vide letter dated 1st February 2016, the Executive Engineer of the MCGM informed the Joint Venture of applicants/accused Ketan Shah and Manish Kasliwal that the Joint Venture should pay the amount of Rs.1,19,60,353/- to the MCGM as excess payment has been made due to less thicknesses of various layers of Reservoir Road, Malad (East). Similar letters are also issued by the Executive Engineer of MCGM to the Joint Venture of these applicants/accused in respect of Guru Govind Singh Road, Andheri, for removing the defects of lesser thicknesses of various layers and for paying an amount of

Rs.37,08,156/- to the MCGM paid in excess due to less thicknesses of various layers of Guru Govind Singh Road in K Ward. The Office note dated 2nd March 2016 written by the Executive Engineer (Roads) for submitting to the Deputy Chief Engineer and the Chief Engineer of the MCGM shows that the Contractor has started rectification work in respect of Guru Govind Singh Road, where the crust layers are found less than the required. All these developments were going on in pursuant to various conditions of contract entered into between the employer and the Contractor, even prior to lodging of the FIR on 27th April 2016 by the Chief Engineer of the MCGM. Resorting to the various terms of contract entered into between the parties, the employer i.e. the MCGM was directing the Contractors to redo the work and to remove the defects found while executing the work due to non-adherence to the specifications in the contract and the Contractors were informing the employer i.e. MCGM that the direction so given shall be complied. In exercise of powers given under the contract, the authorities of the MCGM were directing the Contractors to pay the requisite amount to the MCGM which was found to be the

excess payment due to less execution of the work, than what was prescribed in the specifications. As thicknesses of various crust layers were found to be less than as specified in the contract, infact recoveries were directed from the amount paid to the Contractors and the Contractors were informing the MCGM that the bills can be adjusted and reconciled, so as to effect the recoveries as ordered. Suffice to mention that, the bilateral mutual rights and obligations were being exercised by both the parties to the contracts by resorting to the terms and conditions of the contract by resorting to remedies under the relevant clauses of the contract rather than treating the defects and deficiencies as the criminal misconduct on the part of the Contractors.

53 So far as applicant/accused Jitendra Kikavat (Anticipatory Bail Application No.5 of 2017) – Managing Director of Mahavir Roads and Infrastructure Private Limited is concerned, his firm/company was allotted contract of improvement of various roads including Major and Minor roads, 83 in number. The Work Order was issued on 6th September 2014 and the duration was

fifteen months excluding monsoon. Vide letter dated 6th December 2016 (record page 163) the Deputy Chief Engineer of the MCGM extended time for performance of work under the contract up to 31st March 2017, but by imposing penalty of Rs.1 lakh. The learned advocate argued that there is further extension for performance of contractual obligation under this Contract and this work is still going on and final bill is yet to be raised. In this case also, it is clear from the report (record page 67) submitted by the Sectional Engineer (Roads) to the Executive Engineer and the Deputy Chief Engineer of the MCGM on 2nd September 2015, that the employer i.e. the MCGM is exercising its right to get the work under contract executed from the Contractor and in suitable contingencies, by imposing the penalty as well as fine. This report dated 8th September 2015 shows that the Vigilance Department had noted deficiencies and imperfections in the execution of work in respect of Contract under Work Code No.AE-49 and the third party auditor i.e. M/s.S.G.S. gave its comments as well as report on such imperfections and lacunas. The MCGM, upon considering the observations of its Vigilance Department and observations of

the third party auditor M/s.S.G.S. imposed various penalties on the Contractor i.e. M/s.Mahavir Roads and Infrastructure Private Limited of applicant/accused Jitendra Kikavat (Anticipatory Bail Application No.5 of 2017). It is seen from this report that on various counts, penalties/fine are imposed on the Contractor by resorting to the conditions of the contract, for getting the work under the Contract executed as per the designs and specifications given in agreement.

54 It is worthwhile to note that the the firm/company of the applicant/accused Jitendra Kikavat (Anticipatory Bail Application No.5 of 2017) is served with a show cause notice dated 16th May 2016 (record page 141) in respect of irregularities found in execution of road work in respect of Contract Work Code No.AE-49. By this show cause notice, it was informed to the Contractor that an amount of more than Rs.20 crore was paid to him but it is found by Inquiry Committee that the work of crust layer below the PQC/Flexible Pavement layer is not executed and the quantity is less. The Contractor was asked to show cause why

recovery of loss suffered by the MCGM should not be effected and why the Contractor should not be blacklisted. With all this, by the subsequent order dated 6th December 2016 (record page 163) the Contractor is given extension of time to complete the contract by the MCGM. It is reported that the Contractor has paid penalty of Rs.41 lakh imposed on him from time to time. This position remained undisputed.

55 By appointing Internal Expert Committee, the MCGM had obtained the three reports from the said Committee. Those reports are dated 23rd December 2015, 24th February 2016 and 1st April 2016 (record page nos.81, 96 and 111 of Anticipatory Bail Application No.5 of 2017). One of the points raised for pointing accusing finger at the Contractor, is to the effect that the granule sub-base layer of the constructed road was found to be less than the specification. Letters dated 6th April 2015 and 29th April 2015 of the MCGM (record page nos.74 and 76 of Anticipatory Bail Application No.5 of 2017) unerringly points out that it was the MCGM, who had instructed the Contractors that taking into

consideration the locality where the work of road is being done and considering the site situation, the granule sub-base layer should be reduced than what is prescribed in the specifications. The object behind this direction to reduce the height of the granule sub-base layer as seen from those letters is not to disturb the Utilities underneath the road. It is observed in the said letters of the MCGM that Utilities comprising of bunch of service water pipes, electrical cables are laid at very shallow depth and existing service water pipes are laid haphazardly along the length of the road. Water mains are laid at shallow depth of about 0.75m. The rolling by vibratory roller by sub-grade and design crust depth may damage the Utilities. This also seem to be one of the causes for reducing the thickness of layers of the crust.

56 In a similar way, in exercise of its rights under the conditions of contract, Joint Venture of J.Kumar and K.R.Constructions owned by applicant/accused Nalin Gupta (Anticipatory Bail Application No.27 of 2017) and Manish Kasliwal (Anticipatory Bail Application No.30 of 2017) are served

with several letters such as letters dated 14th June 2016, 16th June 2016, 23rd June 2016 and 30th May 2016 (record page nos.213, 214, 218 and 222 of Anticipatory Bail Application No.30 of 2017), so far as Contract Work Code No.W-266 for improvement of various roads in Western Suburbs are concerned. By these letters, Joint Venture of applicants/accused Manish Kasliwal and Nalin Gupta – Contractors for Contract Code No.W-266 were informed that on inspection, thickness of various layers was found not to be as per given standards. The MCGM informed the Joint Venture of these applicants/accused about invocation of provisions of Clause Nos.69C and 87 of the General Conditions of Contract. The Joint Venture was directed to pay more than Rs.1,93,00,000/- vide letter dated 14th June 2016 and Rs.90,70,000/- vide letter dated 30th May 2016. By letter dated 23rd June 2016, the MCGM had informed the said Joint Venture that their bills are kept on hold and the Joint Venture is permitted to pay Rs.50 lakh towards recovery of payment. It is seen from the letter dated 16th June 2016 that the Joint Venture had paid an amount of more than Rs.1.93 crore to the MCGM, as directed.

57 From perusal of the Office note bearing No.DyChEng./9097/Roads/City dated 17th April 2017 moved by the Deputy Chief Engineer (Roads) to the Chief Engineer of the MCGM, it is seen that the proposal of the Deputy Chief Engineer to shift the date of completion for the Work Code No.C-248 [entrusted to R.K.Madhani & Co. of applicant/accused Narendra Madhani (Anticipatory Bail Application No.19 of 2017)] from 21st January 2017 to 31st March 2018 without penalty or recovery of any supervision charges from the Contractor and with the benefit of Escalation as admissible as per Clause No.74(b) of the General Conditions of Contract was approved by the Chief Engineer of the MCGM. This makes it clear that even equipped with reports of the Expert Committee regarding lapses by the Contractors, just before lodging the FIR in the matter, the extension for execution of the contract was granted to the firm of applicant/accused Narendra Madhani (Anticipatory Bail Application No.19 of 2017) by the First Informant - Chief Engineer of the MCGM.

58 Report dated 22nd December 2014 sent by the Chief Engineer (Vigilance) to the Deputy Chief Engineer (Roads) of the MCGM, shows that work under Work Code No.W-266 came to be inspected by the Vigilance Department of the MCGM in the year 2014 itself and the Road Department of the MCGM was asked to take action against the Contractors and to report compliance. It is seen that, accordingly, recoveries were effected from the Contractors.

59 Additional affidavit filed by applicant/accused Tejas Shah (Anticipatory Bail Application No.22 of 2017) shows that as the Internal Experts of the MCGM in their Inquiry had found that layers of crust were not of requisite thicknesses, his firm Relcon Infraprojects Limited had approached the Central Road Research Institute (hereinafter referred to as CRRI for the sake of brevity) for validation of the road crust / pavement. The CRRI, a premier national laboratory established in 1952, a constituent of Council of Scientific and Industrial Research (CSIR) is engaged in carrying out research and development projects on design, construction

and maintenance of roads and runways, traffic and transportation planning of mega and medium cities, management of roads in different terrains, improvement of marginal materials, utilization of industrial wastes in road construction, landslide control, ground improvements environmental pollution, road traffic safety and analysis and design, wind, fatigue, corrosion studies, performance monitoring/evaluation, service life assessment and rehabilitation of highway and railway bridges. The Institute provides technical and consultancy services to various user organizations in India and abroad. For capacity building of human resources in the area of highway Engineering to undertake and execute roads and runway projects, Institute has the competence to organize National and International Training Programmes continuing education courses since 1962 to disseminate the R&D finding to the masses.

60 Applicant/accused Ketan Shah (Anticipatory Bail Application No.22 of 2017) has placed on record validation of report pavement work vis-a-vis pavement design of four roads

under the Municipal Corporation of Greater Mumbai furnished by the CRRI on reference by the Relcon Infraprojects Limited. Two roads under Contract for Work Code No.AE-51 and two roads regarding Contract for Work Code No.AC-113 which are subject matter of the present applications, were examined by the CRRI. Accordingly, the report is furnished by the said Institute. It is apposite to quote observations of the CRRI found in paragraph 8.0 to 9.0, which is at record page 7 with Additional Affidavit dated 8th June 2017 filed on behalf of applicant/accused Tejas Shah (Anticipatory Bail Application No.22 of 2017). Paragraph 8.0 to 9 of the report submitted by CRRI read thus :

8.0 Other Observations :-

8.1 About Sampling for Inspection :

For verification of thicknesses of various layers MCGM has taken trial pits. In respect of 4 roads referred to us, we find that in case of one road one trial pit has been taken, for 2 roads 2 pits and for 1 road 3 pits were excavated. Thus no particular system/pattern has been followed and randomly pits have been taken and averaging has been done for entire road area. Moreover in most of the cases, pits have been taken at the edge of the road at the

end of camber i.e. abutting shoulder. In case camber is not proper in sub grade layer due to local disturbance and or if there are utilities in the vicinity then to keep uniform designed thicknesses of Bituminous layers it is possible that variation might have taken place in layer of Granular layers to maintain uniformity in profile of the road. It is seen that trial pits have been taken up to the depth where it was felt that GSB layer was over. It is felt that trial pits should have been excavated for full depth as shown in the drawings in order to ascertain that GSB had not got mixed up with sub base layer. Moreover no tests appears to have been conducted on materials from trial pits, hence we do not offer any comment on quality of materials used in construction of road.

8.2 Effect of rise of Sub soil water level :

M/s.Relcon has requested us to give opinion about effect of rise in sub soil water level. Mumbai in having higher water table in general, due to proximity of sea. During monsoon water table raises further due to rise in sub soil water level and this may affect GSB layer which may get disturbed and as such if trial pits are taken after monsoon

then it is likely that due to disturbance on account of rise in sub-soil water level and GSB getting partly mixed with soil the thickness of GSB might vary, if trial pits are taken after monsoon.

8.3 Observations based on Rating Value of Roads as per IRC – 82 – 2015 :

IRC – 82 – 2015, provides methodology of rating of roads, no doubt the code is for finding condition of roads in use and to take decision about maintenance/repairs to be carried out. During our site visit, we have carried out Visual condition survey as per clause Appendix 1, page no.62 of IRC – 82:2015, and have not observed any distress in the form of cracking, Ravelling, Potholes, Shoving, Patching, Settlements @ Rut depths to any of the 4 roads inspected by us. As per the table given on page no.74 of this code, to our opinion ratings of these 4 roads can be considered as “High” & condition as “Fair”. Copies of relevant pages of IRC – 82 – 2015 are placed as Annx. - VI. Moreover, we have found riding quality of these roads very satisfactory. Few photographs of condition of roads are enclosed as Annexure – VII. We did observe one patch work at Chandanwadi road during our inspection and

were informed that it was due to reinstatement of trench dug by utility provider after completion of road work.

9.0 Conclusion :

1) Existing Pavement condition of 4 roads referred to us and inspected by us is satisfactory with good riding quality as per Visual Inspection Survey.

2) As per analysis at above in respect of design of crust required as per IRC – 37 – 2001/2012 for various parameters such as traffic density, CBR value, Vehicle Damage Factor etc., it is noted that crust thicknesses considered by the Design Consultant in execution drawings are on higher side. Hence due to some deviation in thickness of Granular layers observed and reported by MCGM and said information submitted by M/s.Relcon to CRRI, there will not be effect on Service life of 10 years for the assumed CBR value and traffic volume considered in the design, considered by design consultants appointed by MCGM for these roads subject to condition that proper attention is given to routine and periodical maintenance of roads.

61 Bare perusal of these observations in the report makes it clear that because of monsoon causing rise in water table as well as due to water level in subsoil, GSB layer can get disturbed and if trial pits are taken after monsoon, then, thickness of GSB may vary because of rise in subsoil water level and GSB getting partly mixed with soil. The CRRI has rated four subject roads as “High” and their condition as “Fair”. These are the very same roads which were inspected by the Internal Experts Committee of the MCGM to infer criminal misconduct on the part of the Contractors after monsoon. The Work Orders in subject Contracts were issued by the end of February 2014 or in the beginning of March 2014 and the duration of contract was ranging from fifteen months onwards. Reports of Internal Experts of the MCGM filed along with Annexures with Anticipatory Bail Application No.5 of 2017 of applicant/accused Jitendra Kikavat shows that subject roads were inspected and examined by digging pits in the year 2016 i.e. after passing of monsoon season.

62 The foregoing discussion, as such, makes it clear that the parties were acting on terms of contract and performing their mutual obligations under the contracts entered into between them. Upon being asked, the learned Public Prosecutor has categorically stated that none of the Contractors in these cases is blacklisted by the MCGM nor the contracts were cancelled by the MCGM. Undisputedly, the contract work is still going on and the Defect Liability Period is ranging from 5 to 10 years. At this juncture, it also needs to reiterate that from time to time, by pointing out defects and deficiencies in performing the contractual obligations by the Contractors i.e. the applicants/accused herein, the employer i.e. the MCGM was directing them to remove the deficiencies by resorting to the General Conditions of Contract. Section 37 of the Contract Act deals with obligations of parties to a contract. The parties to a contract must either perform or offer to perform their respective promises unless such performance is dispensed with or excused under the provisions of the said Act or under any other law. In the case in hand, the employer i.e. MCGM is getting the contract performed by firms/companies of

applicants/accused. Section 39 of the Contract Act deals with effect of refusal of the party to perform promise wholly. It is prescribed therein that when a party to a contract has refused to perform or disabled himself from performing its promise in entirety, the promisee may put an end to the contract. In the case in hand, though the MCGM in its report lodged at Azad Maidan Police Station has complained about non-execution of the contract work as per the specifications by the accused persons, it has not put an end to the contract, though the relevant clause in the standardized General Conditions of Contract gives the MCGM the right to put an end to the contract. The documentary evidence reveals that, rather, contractual obligations were required to be performed by the Contractors at the instance of the MCGM before as well as after lodging the FIR by the MCGM. I have already reproduced provisions of Section 73 of the Contract Act, 1872, in foregoing paragraph. It was specifically asked to the learned Public Prosecutor as to whether assuming that the contract has been broken by firms/companies of applicants/accused, whether any action for compensation is initiated by the MCGM. The

learned Public Prosecutor has candidly answer that no such action is initiated by the MCGM as yet. This conduct on the part of the employer i.e. MCGM indicates that it is accepting the performance of obligations from the Contractors under the terms of the contract even after lodging the FIR against them. These aspects indicate that the dispute is prima facie civil in nature.

63 The foregoing discussion makes it clear that the contract is not put to an end and it is not the case of the prosecution that the contracted work was not at all done by the Contractors/accused. Infact, the record indicates that the major part of the work under the contract is already over by removing the imperfections and defects by following the agreement between the parties.

64 One may argue that inspection carried out by the team of Experts from the MCGM reflected that thicknesses of various layers of the crust were not of requisite specifications, still, the amount under the contract was claimed by submitting inflated

bills. Precisely, on this count, it is seen from record of investigation that the prosecution has invoked provisions of Section 465, 467, 468 and 471 of the IPC. The question which falls for consideration is, whether submitting inflated bills though the actual quantity was less by the Contractors under his authority in terms of the contract amounts to making a false document and indulging in forgery. The law on this point is no more res integra. Following are the observations of the Hon'ble Apex Court in the matter of **Mohd.Ibrahim (supra)** found in paragraphs 10 and 11, which read thus :

10. An analysis of [section 464](#) of Penal Code shows that it divides false documents into three categories:

10.1) The first is where a person dishonestly or fraudulently makes or executes a document with the intention of causing it to be believed that such document was made or executed by some other person, or by the authority of some other person, by whom or by whose authority he knows it was not made or executed.

10.2) The second is where a person dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part, without lawful authority, after it has been made or executed by either himself or any other person.

10.3) The third is where a person dishonestly or fraudulently causes any person to sign, execute or alter a document knowing that such person could not by reason of (a) unsoundness of mind; or (b) intoxication; or (c) deception practised upon him, know the contents of the document or the nature of the alteration.

11. In short, a person is said to have made a 'false document', if (i) he made or executed a document claiming to be someone else or authorised by someone else; or (ii) he altered or tampered a document; or (iii) he obtained a document by practicing deception, or from a person not in control of his senses.”

Similarly, in the matter of **Motisingh (supra)** it is held thus, by the Hon'ble Gujarat High Court in paragraph 9 of its judgment :

“**9** If the signature in column 4 is not of Hirabhai Manorbhai, the attestation in column 5 would mean

that the appellant made a false statement stating that the signature in column 4 is that of Hirabhai Manorbhai. That would amount to making a false statement and would not amount to making a false document. Even if the accused has made a part of the document, namely, column 5 of Ex.12 that part infact, was made or executed by the person by whom it purports to be executed, namely the accused and therefore cannot be said to have made a false document. Including in a document, certain false recitals or particulars is not forgery. The mere making of a false statement in a document would not come within Section 464, I.P.Code and would not amount to forgery.”

In the matter of **State vs. Parasram (supra)**, in paragraph 5 of its judgment, the Hon'ble Rajasthan High court has held thus :

“To bring the case within Clause 1 of Section 464, Indian Penal Code, it is necessary to establish that the accused' intended to induce a belief that a document was made, signed, sealed or executed by the authority of a person who did not make, sign, seal or execute it or that it was made, signed, sealed or executed at a time when it was not so done.

Evidently Section 464 cannot be invoked to cases where a Public Officer knowingly makes false entries initially in the public record on his own authority. The case against the present accused clearly is that he initially at the time of making entries in the girdawari record made wrong and unauthorised entries. There is no controversy that he was not competent to make those entries and in the absence of any material to show that he was responsible for alteration of the entries the entries made by the accused cannot amount to constitute false documents within the meaning of Section 466, Indian Penal Code. In this view of the matter, a charge under Section 466, Indian Penal Code, or for that matter for any offence relating to forgery, is not sustainable.”

In the matter of C.O.Vergheese (supra), this court has held thus :

“11..... Section 463 begins with the words 'whoever makes any false document' and the word making 'false document' is defined under Section 464 and the gist of this explanation is that the maker of false document who making the documents in such a way so as to represent to the outsider who are to act on the basis of that

representation that he has made, signed, sealed or executed the said document “by authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed”.

12 A reading of Sections 463 and 464 of the Indian Penal Code will clearly show that if a person writes a document in his own name and with intention that the person receiving the documents should accept it as a document coming from himself and not from any third person then he cannot be said to have committed forgery. The accused, in the present case was authorized to send telex messages in the discharge of his duty and accordingly he sent the telex message in his own name using his own powers and not in the name of his superiors nor in the name of somebody else in the bank. He has been duly authorized or empowered to send such a message, clearly, therefore, even from the allegations in the complaint, no offence under Sections 463 and 471 of the Indian Penal Code is made out against the present accused and the process issued by the Magistrate is liable to be quashed.”

It is, thus, clear that, making a false or inflated claim by a person who has authority to make such claim, does not amount to preparation of a false document or forgery.

65 Now let us examine case of the prosecution, so far as allegations of cheating punishable under Section 420 of the IPC are concerned. The essential ingredients for Section 420 IPC are-

“Section 420. Cheating -

Dishonest inducement to delivery property or to make, alter or destroy any valuable security or anything which is sealed or signed or is capable of being converted into a valuable security ; and

'mens rea' of the accused at the time of making the inducement.”

In the matter of International Advanced Research Center for Power Metallurgy and new materials (ARCI) and others v. Nimra Cerglass Technics Private Limited and another²², the Hon'ble Apex Court has held that the distinction between the breach of contract and the cheating. The Supreme Court held that the distinction would depend upon the intention of the accused at

22 2016 (1) SCC 348

the time of alleged inducement. If it is established that the intention of the accused was dishonest at the very time when he made a promise and entered into a transaction with the complainant to part with his property or money, then the liability is criminal. The accused is guilty of the offence of cheating. If it is established that a representation made by the accused has subsequently not kept, criminal liability cannot be foisted on the accused and the only right which the complainant acquires is the remedy for breach of contract in a civil court.

66 In the cases in hand, the MCGM has already invoked several conditions of the contract against the Contractors and by resorting to those conditions noted in foregoing paragraphs, is directing the Contractors to remove defects, imperfections, shrinkage or other faults by effecting reconstruction of the work, as specified. The Contractors have accordingly, removed or removing the deficiencies. In the even of failure to do so, the MCGM has right under the contract to get that work rectified at the cost of the Contractors. It is also seen that observing that the

thicknesses of various crust layers are not as per the specifications given in the designs and quantities provided are lesser than what were contracted for, as noted in foregoing paragraphs, the MCGM has even resorted for effecting recoveries resorting to Clause No.87 of the General Conditions of Contract from the Contractors i.e. firms/companies of the applicants/accused. From time to time, the MCGM has awarded extension of time to the firms/companies belonging to the applicants/accused for performance of obligations under the contract. It is also seen that atleast in one case, such extension is without imposing any penalty or supervision charges but by granting relief of claiming escalation charges to the Contractor. The Contractors, in turn, are paying the requisite amounts of recoveries as demanded by the MCGM under the contract. Though under Clause 90 of the General Conditions of Contract the Municipal Commissioner is empowered to cancel the contract as a whole or in respect of work in default, if on receipt of the notice the Contractor fails to rectify the defects and imperfections pointed out or if he commits defaults in complying with terms and conditions of the contracts or if the work is not

completed in the scheduled time; this power is not exercised by the MCGM in any case in hand. Contract with any applicant/accused or the part thereof is not cancelled by the MCGM till date. On the contrary, they are executing the work under the contract or have already executed it. This implies that, the parties to the contract are still adhering to the terms and conditions of the contract by exercising their rights under the contract and by performing their obligations thereunder. It is prima facie seen that thus what is alleged by the prosecution in substance is breach of contractual obligations by the firms of the applicants/accused.

67 In S.W.Palanitkar vs. State of Bihar²³, the Hon'ble Supreme Court held that in order to constitute an offence of cheating, the intention to deceive should be in existence at the time when the inducement was made. It is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise, to say that he committed an act of cheating. A mere failure to keep up promise subsequently cannot be

²³ 2002 (1) SCC 241

presumed as an act leading to cheating. In Anil Mahajan V. Bhor Industries Limited²⁴, the Hon'ble Supreme Court held that a distinction has to be kept in mind between mere breach of contract and the offence of cheating. The subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent, dishonest intention is shown at the beginning of the transaction. The Supreme Court held that the substance of the complaint is to be seen. Mere use of the expression 'cheating' in the complaint is of no consequence.

68 The question to be seen is whether mere failure of a person to keep up a promise subsequently would mean that there was a culpable intention at the beginning that is when he made the promise, cannot be presumed. A distinction has to be kept in mind between mere breach of contract and the offence of cheating. It depends upon the intention of the accused at the time of the inducement. The subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution

²⁴ (2005) 10 SCC 228

for cheating unless fraudulent and dishonest intention is shown at the beginning of the transaction. The substance of the FIR has to be seen. Mere use of the expression “cheating” is of no consequence. In the case in hand, there is no averment about deceit, cheating or fraudulent intention of the applicants/accused at the time of entering into the agreement from which it can be inferred that the applicants/accused had the intention to deceive the First Informant/MCGM. On the contrary, it is seen that after entering into contract with the MCGM, the applicants/accused commenced the work under the contract and executed major portion thereof. However, according to the First Informant, the work so executed is not as per the design and specification. Still, the payment as per the terms of the contract are received by the Contractors by raising the bills. This dispute, prima facie, appears to be a dispute in respect of contractual obligations, which at the most would have invoked civil liability. It is not the case of the prosecution that the work under the contract itself is not commenced or performed but contract money is withdrawn and appropriated.

69 So far as debris are concerned, several panchnamas executed by the officers of the MCGM shows that stacked debris were infact found on the spots pointed out by the Contractors. Undisputedly, though provided for in the relevant clause in the General Conditions of Contract, the MCGM has not provided its dumping ground to the Contractors for dumping the debris. General Conditions of Contract prima facie shows that V.T.S. was not applicable, so far as the work of removing the debris was concerned. Importantly, the MCGM has not even opted for cancellations of the contracts in question or initiating a civil action for claiming damages till date. In the wake of this fact situation emerging on record, prima facie, at this stage, no case for the offence punishable under Section 420 of the IPC is made out but the dispute appears predominantly of a civil nature.

70 It is not disputed that large amount of money towards security for fulfilling the obligations under the contract deposited by the Contractors i.e. firms/companies of the applicants/accused is lying with the MCGM. The amount of deficiencies, as alleged by

the prosecution, is of negligible percentage to the cost of contract as well as amount of the applicants/accused in deposit with the MCGM. Interest of the MCGM is fully secured by the amount which is held by it towards security for performance of contract which has a Defect Liability Period ranging from 5 to 10 years. Considering the fact that the entire dispute is predominantly of civil nature and all applicants/contractors/accused have joined investigation by submitting the documents which were in their possession, I am of the considered opinion that their custodial interrogation is not warranted. Undisputedly, all applicants/accused are on ad-interim anticipatory bail from June/July 2016. Undisputedly, they have followed the terms and conditions by those orders by attending the Police station as directed by the Sessions Judge, as well as by this court. It is not in dispute that all applicants/accused have supplied voluminous documents available with them to the Investigating Officer. On completion of the investigation, the charge-sheet has been filed against the co-accused. The entire case of the prosecution rests on the documentary evidence.

71 So far as applicant/accused Vibhas Achrekar (Anticipatory Bail Application No. 23 of 2017) is concerned, the allegations against him are found in the suspension order issued by the MCGM suspending him from service from 19th July 2016. It is averred in the suspension order that though Clause Nos.69 and 87 of the General Conditions of Contract were not applicable to the subject matter, he got two letters issued through the Sectional Engineer, which ultimately resulted in hampering the investigation. These letters are dated 14th June 2016 and 23rd June 2016 (record page 51 and 52). Perusal of those two letters show that in pursuant to the inspection by the Vigilance Department of the MCGM, the Contractors were directed to pay the amount towards recovery. Record shows that even prior to lodging the FIR in question, other Officers of the MCGM were issuing similar type of letters in discharge of their official duty to various Contractors. Some such letters are three letters dated 29th January 2016, one letter dated 30th January 2016 and one letter dated 1st February 2016. Under terms of the contract and particularly as per provisions of Clause 69 of the General

Conditions of Contract, the Engineers with the MCGM were duty bound to carry out inspection of the work and to take action by directing the Contractors to remove defects and deficiencies. Even if such act is done by the employee of the MCGM, that at the most may amount to service misconduct. In this view of the matter, even custodial interrogation of applicant/accused Vibhas Achrekar is also not warranted. That apart, as various representations were received by the MCGM from Contractors / agencies, higher officers of the MCGM including the Chief Engineer, prepared a note for approval of the Municipal Commissioner. The said note bearing No.CHE/406/SR/Roads and Traffic dated 30th September 2016 makes it clear that subject contracts are covered by General Conditions of Contract including Condition Nos.69 and 87.

72 In the light of foregoing discussion, I hold that all applicants/accused are successful in making out the case for grant of pre-arrest bail and therefore, by confirming the earlier orders granting pre-arrest bails to them, proceed to pass the following order :

ORDER

- i) All applications are allowed.
- ii) The orders granting ad-interim anticipatory bail to all applicants/accused herein are confirmed, by directing that in the event of their arrest in the subject crime, they shall be released on bail on their executing P.R.Bond in the sum of Rs.15,000/- and on furnishing surety in like amount, by each of them.
- iii) As a condition of this order, applicants/accused shall not tamper prosecution evidence in any manner.
- iv) Applicants/accused shall attend the Investigating Officer as and when directed by him for the purpose of investigation, by a written notice.
- v) Applicants/accused shall not directly or indirectly, make any inducement, threat or 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 the Investigating Officer.

vi) All applicants/accused should submit their residential address as well as cell phone number to the Investigating Officer and they should continue to inform the Investigating Officer about change, if any, in their residential address as well as cell phone numbers.

vii) All applicants/accused should not leave India without prior intimation to the Investigating Officer and they should inform their address at the foreign country to the Investigating Officer apart from the tour itinerary.

viii) Applications are disposed of accordingly.

73 Needless to mention that all observations in this order are prima facie in nature, having no bearing on the trial.

74 In view of disposal of all applications, pending Criminal Application Nos.166 of 2017, 73 of 2017 and 195 of 2017 stand disposed of.

(A. M. BADAR, J.)