# IN THE HIGH COURT OF JUDICATURE AT BOMBAY

## CRIMINAL APPELLATE JURISDICTION

## CRIMINAL APPLICATION NO.1611 OF 2018
## IN
## CRIMINAL APPEAL NO.1137 OF 2018

Mr.Sunil Hirasing Rathod,
Age- 48 yrs., Occu. Service,
Executive Engineer, BMC,
Residing at – S/4, Plot – 124,
Sector – 2, Charkop,
Kandivali – West, Mumbai. ... **Applicant**

V/s.

The State of Maharashtra
Through ACB, Mumbai,
vide C.R. No.74/2004. ... **Respondent**

.....

Mr.Amit Desai Senior Counsel with Mr.Subodh Desai, Mr.Ashwin C. Thool i/b. Mr.Nikhil Gawai, Advocate for the Applicant.

Mr.P.H.Gaikwad-Patil, APP for the Respondent/State.

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**CORAM : A.M.BADAR J.**

**DATED : 22nd OCTOBER 2018.**

**P.C. :**

1 This is an application for suspension of conviction of the offence punishable under Section 12 of the Prevention of Corruption Act, 1988 (hereinafter referred to as 'PC Act' for the

sake of brevity) recorded against the applicant/accused No.3 by the learned Special Judge (Under the PC Act), Greater Mumbai vide Judgment and Order dated 18/08/2018 passed in Special Case No.60 of 2015. The applicant/accused No.3 is sentenced to suffer rigorous imprisonment for three years for the offence punishable under Section 12 of the PC Act apart from directing him to pay fine of Rs.10,000/- and in default to undergo simple imprisonment for three months. (It appears that inadvertently in the operative portion of the Order, the conviction is stated to be for the offence punishable under Section 7 of the PC Act).

2 Heard the learned Senior Counsel appearing for the the applicant/accused No.3. He drew my attention to the fact that even according to the prosecution case, the alleged demand of illegal gratification was emanated from the accused Nos.1 and 2 *viz.* Vilas Khilari and Balaji Birajdar on 10/10/2014. Therefore, in submission of the learned Senior Counsel, there cannot be any abetment by the applicant/accused No.3 on 20/10/2014. It is further argued that charge-sheet in the instant case was filed on 18/09/2015. However, prior to that, the applicant/accused No.3 came to be exonerated of the charges levelled against him in the departmental enquiry on 23/03/2015. It is argued that standard of proof in the departmental enquiry is much lessor than the standard of proof in the criminal trial. Therefore, the learned trial Court erred in convicting the applicant/accused No.3. The learned

Senior Counsel further argued that the act alleged against the applicant/accused No.3 is post the crime and therefore, there cannot be any abetment to commit the offence punishable under Section 7 or 13 of the PC Act by the applicant/accused No.3. Reliance is placed on Judgment of this Court in the matter of ***Pravinkumar Deore v. The State of Maharashtra*[1], *Kishan Patil v. State of Maharashtra*[2], *Ashok Malhari Sonawane v. The State of Maharashtra*[3]** and ***Prasanta Kumar Patra v. State of Odisha (Vig.)*[4].** With the aid of these Judgments, it is argued that the impugned Judgment and Order of conviction and resultant sentence is bereft of any discussion on facts and evidence in order to infer complicity of the applicant/accused No.3 in the crime in question. In the entire Judgment, there is no discussion and finding after considering all evidence on record to conclude that the applicant/accused No.3 had abetted commission of the crime in question.

3 The learned Senior Counsel placed reliance on Judgment of the Honourable Apex Court in the matter of ***Shri Ram v. The State of U.P.*[5]** as well as in the matter of ***Raj Kumar v. State of Punjab & Haryana*[6]** to substantiate his contention that there must be some sort of action on the part of the accused with

1 2017 SCC OnLine Bom. 9585.
2 2017 (3) ABR (Cri.) 629.
3 MANU/MH/0452/2015.
4 2018 Cri.L.J. 2300.
5 AIR 1975 Supreme Court 175.
6 1983 Cr.L.J. 706 (P & H).

an intention to facilitate the commission of the offence, in order to establish the charge of abetment. With this, it is argued that considering the irreversible consequences of conviction which the applicant/accused No.3 would suffer if the conviction is not stayed, the application needs to be allowed.

4 The learned Additional Public Prosecutor placed on record the written submission and argued that evidence of P.W.No.1 Dilip Kudalkar and P.W.No.2 Jagdish Raje is consistent. He placed reliance on Judgment of the Honourable Apex Court in the matter of ***Shyam Narain Pandey v. State of Uttar Pradesh***[1] and argued that there cannot be stay to the conviction recorded by the trial Court after due trial.

5 I have considered the submissions so advanced and also perused material made available including the impugned Judgment and Order of conviction and resultant sentence as well as the copies of depositions of prosecution witnesses.

6 According to the prosecution case, P.W.No.1 Dilip Kudalkar and P.W.No.2 Jagdish Raje are partners of Tirupati Developers, who had undertaken work of redevelopment of Date Bhavan situated at Dadar, Mumbai. Accused No.1 Vilas Khilari is working as Assistant Engineer, accused No.2 Balaji Birajdar is working as the Deputy Engineer, whereas applicant/accused No.3

1 (2014) 8 Supreme Court Cases 909.

Sunil Rathod is working as the Executive Engineer with the Mumbai Municipal Corporation. Accused No.4 Satish Palav is an Architect, whereas accused No.5 Narayan Patil was working as Helper. According to the prosecution case, Tirupati Builders had submitted proposal for sanction of Building Plan and issuance of Intimation of Disapproval (IOD) to the Municipal Corporation in order to enable them to carry out the work of redevelopment. It is averred by the prosecution that accused No.1 Vilas Khilari, Assistant Engineer and accused No.2 Balaji Birajdar, Deputy Engineer had demanded illegal gratification amounting to Rs.15,00,000/- and Rs.10,00,000/- from Tirupati Builders for issuance of Intimation of Disapproval to P.W.No.1 Dilip Kudalkar and P.W.No.2 Jagdish Raje. According to the prosecution case, despite payment of Rs.25,00,000/- towards illegal gratification to him, the applicant/accused No.3 Sunil Rathod, Executive Engineer, who happens to be the official superior to accused No.1 Vilas Khilari and accused No.2 Balaji Birajdar had abetted them in demand of an amount of Rs.15,00,000/- and Rs.10,00,000/- towards illegal gratification for issuance of the Intimation of Disapproval, so also for acceptance of illegal gratification. Therefore, it was decided to lodge complaint to the Anti-Corruption Bureau. Accordingly, the same was lodged on 10/10/2014.

7 P.W.No.1 Dilip Kudalkar and P.W.No.2 Jagdish Raje

were examined by the prosecution during the course of the trial and they had deposed about demand made by accused No.1 Vilas Khilari and accused No.2 Balaji Birajdar. This verification of demand took place on 10/10/2014 as well as 16/10/2014. It was done by taking aid of a shadow panch and recording of the conversation. Ultimately, it was decided to trap accused No.1 Vilas Khilari and accused No.2 Balaji Birajdar on 20/10/2014. P.W.No.1 Dilip Kudalkar and P.W.No.2 Jagdish Raje produced an amount of Rs.15,00,000/- in currency notes in order to make part payment of illegal gratification demanded by accused Nos.1 and 2. Those currency notes were smeared with anthracene powder. Digital Voice Recorder was handed over to the complainant and panch witness Pawar was kept in company of the prosecution witnesses. According to the prosecution case, the incidence of abetment took place on 20/10/2014 and the applicant/accused No.3 had abetted commission of the offence punishable under Section 12 of the PC Act.

8 In the matter of ***Raj Kumar (supra),*** following are the observations of the Honourable Punjab and Haryana High Court so far as the term 'abetment' is concerned :

> “12. Expression 'instigate' in the Concise Oxford Dictionary is defined as 'urge on, incite, bring about by persuasion and in Webster, it has been defined as 'urge forward, provoke with synonyms of stimulate, urge, spur,

provide tempt, incite, impel, encourage, animate. The word 'instigate' in common parlance would mean to go, to urge forward or to provoke, incite or encourage to do an act."

9 Similarly, in the matter of ***Shri Ram (supra),*** the Honourable Supreme Court has held thus in paragraph Nos.6 and 7 of the said Judgment :

"**6.** The question which then arises for consideration, a question to which the Sessions Court and the High Court have not paid enough attention, is whether the only inference which arises from the fact that violet gave the particular shout is that by so doing, she intended to facilitate the murder of Kunwar Singh, Section 107 of the Penal Code which defines abetment provides to the extent material that a person abets the doing of a thing who "Intentionally aides, by any act or illegal omission, the doing of that thing." Explanation 2 to the section says that

"Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid and the doing of that act."

**7.** Thus, in order to constitute abetment, the abettor must be shown to have "intentionally" aided the commission of the crime. Mere proof that the crime charged could not have been committed without the interposition of the alleged abettor is not enough compliance with the requirements of section 107. A person may, for example, invite another casually or for a friendly purpose and that may facilitate the murder of the invitee. But unless the invitation was extended with intent to facilitate the commission of the murder, the person inviting cannot be said to have abetted the murder. It is not enough that an act on the part of the alleged abettor happens to facilitate the commission of the crime. Intentional aiding and therefore active complicity is the gist of the offence of abetment under the, third paragraph of section 107."

10 Section 107 of the Indian Penal Code defines the term 'abetment' and it reads thus :

"**107. Abetment of a thing.**—A person abets the doing of a thing, who—

(First) — Instigates any person to do that thing; or

(Secondly) —Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

(Thirdly) — Intentionally aids, by any act or illegal omission, the doing of that thing.

*Explanation 1*.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

> *Illustration*
> A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.
>
> *Explanation 2.*—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act."

Bare perusal of definition of term 'abetment' goes to show that aiding an offence can be done by doing anything in order to facilitate the commission of an offence either prior to or at the time of commission of an offence. By now, it is well settled that abetment does not involve the actual commission of crime but it is a crime apart. Abetment involves actual, active complicity on the part of the abettor prior to or at the time of commission of offence. Abetment is completed when the other is facilitated to commit an act of offence. The prosecution is required to establish that there was instigation, provocation, incitement or an encouragement by an accused to the others to commit the act of an offence.

11 In the case in hand, evidence of P.W.No.1 Dilip Kudalkar and P.W.No.2 Jagdish Raje is elaborating what took place on 20/10/2014 when they along with shadow panch Pawar had been to the office of the Municipal Corporation to comply the directions of accused No.1 Vilas Khilari and accused No.2 Balaji Birajdar. Congruous evidence of both these witnesses shows that

they initially went to cabin of the applicant/accused No.3 Sunil Rathod. It was informed to him that despite payment of Rs.25,00,000/- to him, there is demand of Rs.15,00,000/- by accused No.1 Vilas Khilari and demand of Rs.10,00,000/- by accused No.2 Balaji Birajdar. It was informed to the applicant/accused No.3 by P.W.No.1 Dilip Kudalkar and P.W.No.2 Jagdish Raje that they are having less amount with them and they have brought Rs.15,00,000/-. It is in evidence of both these witness that applicant/accused No.3 Sunil Rathod called Accused No.1 Vilas Khilari to his chamber and then accused No.2 Balaji Birajdar had also came in chamber of applicant/accused No.3 Sunil Rathod, who happens to be their official superior being the Executive Engineer of the Mumbai Municipal Corporation. Thereafter, as stated by the witnesses, applicant/accused No.3 Sunil Rathod had directed accused Nos.1 and 2 to accept the amount brought by the prosecution witnesses and to issue Intimation of Disapproval on that day itself. P.W.No.2 Jagdish Raje had stated that applicant/accused No.3 Sunil Rathod had informed him and his partner i.e. P.W.No.1 Dilip Kudalkar that in addition they will also have to pay some amount to one Gajargavkar. P.W.No.1 Dilip Kudalkar and P.W.No.2 Jagdish Raje further deposed that applicant/accused No.3 Sunil Rathod told them to pay remaining amount to accused No.1 Vilas Khilari and accused No.2 Balaji Birajdar within 8 or 12 days or else he himself will have to pay that amount from his own pocket.

12 Evidence of prosecution goes to show that subsequently, on that day i.e. on 20/10/2014, the amount of illegal gratification amounting to Rs.15,00,000/- was paid to accused No.1 Vilas Khilari and accused No.2 Balaji Birajdar. This was done by taking aid of accused No.4 Palav.

13 Though it is not the stage of appreciation of evidence meticulously, it is writ large on the face of record that Accused No.1 Vilas Khilari and accused No.2 Balaji Birajdar were subordinate officer and applicant/accused No.3 Sunil Rathod was their superior officer working as the Executive Engineer. He himself on the date of offence had directed both of them to accept the amount of illegal gratification brought by P.W.No.1 Dilip Kudalkar and P.W.No.2 Jagdish Raje. Accordingly, the amount of illegal gratification was paid to both of them. There is evidence of recovery of tainted currency notes from accused No.1 Vilas Khilari and accused No.2 Balaji Birajdar. In this view of the matter, it cannot be said that whatever was done by applicant/accused No.3 Sunil Rathod was after commission of crime of demand of illegal gratification and, therefore, he is not liable for the consequences thereof. *Prima facie,* it is seen that applicant/accused No.3 Sunil Rathod intentionally facilitated his subordinate officers in commission of offence of demand and acceptance of illegal gratification.

14 In this view of the matter, rulings cited by the learned Senior Counsel has no application to the case in hand. In the matter of ***Pravinkumar Deore (supra)***, sanction to prosecute him for the offence punishable under Section 7 and 13(1)(d) read with Section 13(2) of the PC Act was rejected twice by the State Government. Thereafter, though the charge-sheet was to the effect that he had committed the offence of demand of illegal gratification and acceptance thereof through the mediator, he was sought to be charged under Section 12 of the PC Act because of non-accord of sanction by the State Government to prosecute him. Such are not the facts of the case in hand.

15 In the matter of ***Kishan Patil (supra),*** the learned Single Judge of this Court considered that the applicant therein was on anticipatory bail throughout. There were two different political parties in the village and the complainant had contested village panchayat election from the rival party and lost that election. By proceeding on these aspects of the matter, conviction was stayed by the Aurangabad Bench of this Court.

16 In the matter of ***Ashok Sonawane (supra),*** the learned Single Judge of this Court relied on some material which was not even the part of the record of the trial Court for staying the conviction.

17 In the matter of ***Prasanta Patra (supra),*** the learned Single Judge of Orissa High Court considered the fact that the Judgment impugned in that matter was not containing the reasoning in order to conclude that the applicant therein was guilty of the alleged offences and that is how conviction was stayed. It was held that the Judgment therein passed by the learned trial Court is not in conformity with the provisions of Section 354 of Code of Criminal Procedure.

18 In the case in hand, in paragraph 22 of its Judgment, following are the observations of the learned trial Court, relevant portion of which reads thus :

> "22....... Therefore, in the light of the evidence of PW-1, PW-2 along with other prosecution witnesses and so also by taking into consideration the electronic evidence placed on record it becomes clear that the accused nos.1, 2 had demanded the bribe amount on 10/10/2014 to the complainant and also the accused No.3 had abetted to such offence. I answer point nos.1, 2 arise for my determination in affirmative"

19 I have already stated the material on which reliance was placed by the learned trial Court to conclude that the applicant had committed offence of abetment made punishable under Section 12 of the PC Act.

20 By now, the Honourable Apex Court has by catena of its Judgments crystallized the law in the matter of stay to the conviction recorded by the learned trial Court after following adjudicatory process. In the matter of ***K.C.Sareen v. CBI, Chandigarh***[1], the following are the relevant observations of the Honourable Apex Court found in paragraph 11 to 13 :

> "11. The legal position, therefore, is this: Though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389(1) of the Code, its exercise should be limited to very exceptional cases. Merely because the convicted person files an appeal in challenge of the conviction the court should not suspend the operation of the order of conviction. The court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance. It is in the light of the above legal position that we have to examine the question as to what should be the position when a public servant is convicted of an offence under the PC Act. No doubt when the appellate court admits the appeal filed in challenge of the conviction and sentence for the offence under the PC Act, the superior court should normally suspend the sentence of imprisonment until disposal of the appeal, because refusal thereof would render the very appeal otiose unless such appeal could be heard soon after the filing of the appeal. But suspension of conviction of the offence under the PC Act, de hors the sentence of imprisonment as a sequel thereto, is a different matter.

1 (2001) 6 Supreme Court Cases 584.

12 Corruption by public servants has now reached a monstrous dimension in India. Its tentacles have started grappling even the institutions created for the protection of the republic. Unless those tentacles are intercepted and impeded from gripping the normal and orderly functioning of the public offices, through strong legislative, executive as well as judicial exercises the corrupt public servants could even paralyse the functioning of such institutions and thereby hinder the democratic polity. Proliferation of corrupt public servants could garner momentum to cripple the social order if such men are allowed to continue to manage and operate public institutions. When a public servant was found guilty of corruption after a judicial adjudicatory process conducted by a court of law, judiciousness demands that he should be treated as corrupt until he is exonerated by a superior court. The mere fact that an appellate or revisional forum has decided to entertain his challenge and to go into the issues and findings made against such public servants once again should not even temporarily absolve him from such findings. If such a public servant becomes entitled to hold public office and to continue to do official acts until he is judicially absolved from such findings by reason of suspension of the order of conviction it is public interest which suffers and sometimes even irreparably. When a public servant who is convicted of corruption is allowed to continue to hold public office it would impair the morale of the other persons manning such office, and consequently that would erode the already shrunk confidence of the

people in such public institutions besides demoralising the other honest public servants who would either be the colleagues or subordinates of the convicted person. If honest public servants are compelled to take orders from proclaimed corrupt officers on account of the suspension of the conviction the fall out would be one of shaking the system itself. Hence it is necessary that the court should not aid the public servant who stands convicted for corruption charges to hold only public office until he is exonerated after conducting a judicial adjudication at the appellate or revisional level. It is a different matter if a corrupt public officer could continue to hold such public office even without the help of a court order suspending the conviction.

13 The above policy can be acknowledged as necessary for the efficacy and proper functioning of public offices. If so, the legal position can be laid down that when conviction is on a corruption charge against a public servant the appellate court or the revisional court should not suspend the order of conviction during the pendency of the appeal even if the sentence of imprisonment is suspended. It would be a sublime public policy that the convicted public servant is kept under disability of the conviction in spite of keeping the sentence of imprisonment in abeyance till the disposal of the appeal or revision."

21 Similarly, in the matter of ***Shyam Narain Pandey (supra),*** following are the observations found in paragraph Nos.9 to 13.

**“9** It may be noticed that even for the suspension of the sentence, the court has to record the reasons in writing under Section 389(1) Cr.PC. Couple of provisos were added under Section 389(1) Cr.PC pursuant to the recommendations made by the Law Commission of India and observations of this Court in various judgments, as per Act 25 of 2005. It was regarding the release on bail of a convict where the sentence is of death or life imprisonment or of a period not less than ten years. If the appellate court is inclined to consider release of a convict of such offences, the public prosecutor has to be given an opportunity for showing cause in writing against such release. This is also an indication as to the seriousness of such offences and circumspection which the court should have while passing the order on stay of conviction. Similar is the case with offences involving moral turpitude. If the convict is involved in crimes which are so outrageous and yet beyond suspension of sentence, if the conviction also is stayed, it would have serious impact on the public perception on the integrity institution. Such orders definitely will shake the public confidence in judiciary. That is why, it has been cautioned time and again that the court should be very wary in staying the conviction especially in the types of cases referred to above and it shall be done only in very rare and exceptional cases of irreparable injury coupled with irreversible consequences resulting in injustice.

**10** In **Ravikant S. Patil v. Sarvabhabhouma S. Bagali [(2007) 1 SCC 673]**, a three-Judge Bench of this

Court has held that the power to stay the conviction … "should be exercised only in exceptional circumstances where failure to stay the conviction would lead to injustice and irreversible consequences". In **Navjot Singh Sidhu v. State of Punjab and another [(2007) 2 SCC 574]**, following **Ravikant S. Patil case (supra)**, at paragraph-6, this Court held as follows:

> "6. The legal position is, therefore, clear that an appellate court can suspend or grant stay of order of conviction. But the person seeking stay of conviction should specifically draw the attention of the appellate court to the consequences that may arise if the conviction is not stayed. Unless the attention of the court is drawn to the specific consequences that would follow on account of the conviction, the person convicted cannot obtain an order of stay of conviction. Further, grant of stay of conviction can be resorted to in rare cases depending upon the special facts of the case."

**11** In **State of Maharashtra through CBI, Anti Corruption Branch, Mumbai v. Balakrishna Dattatrya Kumbhar [2012 (12) SCC 384]**, referring also to the two decisions cited above, it has been held at paragraph-15 that:

> "15. …the appellate court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the purpose of which, the applicant must satisfy the court as regards the evil that is likely to befall him, if the said conviction is not suspended. The court has

to consider all the facts as are pleaded by the applicant, in a judicious manner and examine whether the facts and circumstances involved in the case are such, that they warrant such a course of action by it. The court additionally, must record in writing, its reasons for granting such relief. Relief of staying the order of conviction cannot be granted only on the ground that an employee may lose his job, if the same is not done."

**12** **In State of Maharashtra v. Gajanan and another [(2003) 12 SCC 432]**, and **Union of India v. Atar Singh and another [(2003 12 SCC 434]**, cases under the Prevention of Corruption Act, 1988, this court had to deal with specific situation of loss of job and it has been held that it is not one of exceptional cases for staying the conviction.

**13** In the light of the principles stated above, the contention that the appellant will be deprived of his source of livelihood if the conviction is not stayed cannot be appreciated. For the appellant, it is a matter of deprivation of livelihood but he is convicted for deprivation of life of another person. Until he is otherwise declared innocent in appeal, the stain stands........."

22 Suffice to state that there is nothing on record to come to the conclusion that failure to stay the conviction would lead to injustice and irreversible consequences so far as the applicant is concerned. Depriving of sources of livelihood or termination from services does not amount to grounds for stay to the conviction.

23 In the result, I proceed to pass the following Order :

ORDER

(i) The application is rejected.

(ii) The hearing of the appeal is expedited in its category.

(iii) Needless to mention that observations in this Order are *prima facie* view of the matter and they shall have no bearing on disposal of the appeal on merits.

**(A.M.BADAR J.)**