IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.707 OF 2019

ANILKUMAR BALIRAM GAIKWAD)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Aabad Ponda, Senior Advocate a/w. Ms.Nilofer Sayed i/b. Ms.Shweta Rathod & Mr.Prashant Mairale, Advocate for the Applicant.

Mr.Pradeep Gharat, Special Public Prosecutor a/w. Mr.S.V.Gavand, APP for the Respondent – State.

CORAM : A. M. BADAR, J.

DATE : RESERVED ON 23rd JANUARY 2020
PRONOUNCED ON 19th MAY 2020

JUDGMENT :

1 By this application under Section 482 of the Code of Criminal Procedure (hereinafter referred to as the Cr.P.C. for the

sake of brevity) applicant/accused no.6 Anilkumar Baliram Gaikwad, Executive Engineer with the Public Works Department of the State Government is challenging the order dated 15th March 2019 passed by the learned Special Judge under the Prevention of Corruption Act, Greater Mumbai, below Exhibit 19 in Special Case No.48 of 2016 thereby rejecting his claim for discharge from the said case for offences punishable under Sections 13(1)(c), 13(1)(d) read with 13(2) of the Prevention of Corruption Act, 1988 as well as under Sections 420, 465, 468, 471, 474, 120B, 109 and 201 of the Indian Penal Code.

2 Facts, in brief, leading to the prosecution of applicant/accused no.6 can be summarized thus :

(a) Crime No.57 of 2015 for offences punishable under Sections 13(1)(c), 13(1)(d) read with 13(2) of the Prevention of Corruption Act, 1988 as well as under Sections 420, 465, 468, 471, 474, 120B, 109 and 201 of the Indian Penal Code came to be registered on the report of Dnyaneshwar Awari, Police Inspector, Anti-Corruption Bureau, Thane, on 23rd

September 2015 against the following accused persons :

(1) Fateh Mohd. Khatri, (2) Nisar Fateh Mohd. Khatri, (3) Jaitun Fateh Mohd. Khatri, (4) Aabid Fateh Mohd. Khatri, (5) Jahid Fateh Mohd. Khatri – all partners of the F.A.Enterprises/F.A.Construction and (6) Anilkumar Baliram Gaikwad, the then Executive Engineer, Presidency Division, Public Works Department, Mumbai. This First Information Report (FIR) came to be lodged after conducting full fledge preliminary inquiry in the matter by the Anti Corruption Bureau and consequently, all accused persons came to be charge-sheeted on 30th July 2016.

(b) According to the prosecution case, as reflecting from the FIR as well as the charge-sheet, to circumvent the Circular dated 17th October 2001 of the Konkan Irrigation Development Corporation, accused nos.1 to 5, who happen to be partners of the "F.A.Construction", had formed a new partnership firm under the name and style as "F.A.Enterprises", in order to get new work from the Konkan Irrigation Development

Corporation. The Circular dated 17th October 2001 of the Konkan Irrigation Development Corporation was a result of resolution passed in 12th meeting of its Executive Committee held on 11th September 2001. It was resolved in the said meeting of the Executive Committee of the Konkan Irrigation Development Corporation, not to allow new works to contractors having more than three works with the said Corporation. Accordingly, by the Circular dated 17th October 2001, the Konkan Irrigation Development Corporation had directed inclusion of following clause in tender documents that may be published in future. That clause reads thus :

> "No individual contractor, or a joint venture firm, or any of the joint venture partner(s) of the same joint venture as a separate entity; shall be considered eligible for tendering/ getting pre-qualified for this work; in case two Dam head works or in all three works are in execution with the firm or joint venture or partner(s) of the joint venture."

(c) According to the prosecution case, in the year 2006, a partnership firm named “F.A.Construction” was already doing six works with the Irrigation Department, and therefore, it was not entitled to bid for more work in the light of the Circular dated 17th October 2001 of the Konkan Irrigation Development Corporation. Noticing this, as per the Deed of Retirement cum Continuation of the Partnership dated 26th July 2006, the “F.A.Construction” has created a new partnership firm under the name and style the “F.A.Enterprises” by effecting retirement of some partners from the F.A.Construction. For getting F.A.Enterprises registered as Class 1A Contractor, on 5th August 2006, an application was made to the Office of the Executive Engineer, Presidency Division, Mumbai. The applicant/accused no.6 was holding the post of the Executive Engineer, Presidency Division of the Public Works Department at Mumbai at the relevant time. He had forwarded the proposal of the F.A.Enterprises for registration as Class 1A Contractor to the Public Works

Department, Mantralaya, Mumbai, with his report dated 11th September 2006. The said report dated 11th September 2006 was accompanied by a certificate issued by the applicant/accused no.6 to the effect that truthfulness of all certificates annexed to the proposal of F.A.Enterprises for registration as Class 1A Contractor is ascertained and confirmed by contacting the concerned offices. Bare look at this certificate makes it clear that it is signed by three officers from the Office of the Executive Engineer apart from signing the same by the applicant/accused no.6, who was holding the post of Executive Engineer. The Desk Officer of Public Works Department, Mantralaya, Mumbai, thereafter, vide letter dated 3rd October 2006 raised certain queries and returned the proposal for re-submission after removing the discrepancies therein. Vide his letter/report dated 16th March 2007, the applicant/accused no.6 – Executive Engineer, Presidency Division, Mumbai, then re-submitted the proposal by removing the discrepancies.

(d) It is pertinent to note that according to the prosecution case, the authority to grant registration as Contractor of Class 1A was with the State Government in Public Works Department. After scrutiny of the proposal of the F.A.Enterprises for registration as Class 1A Contractor vide letter dated 11th April 2007, the State Government in the Public Works Department through its Desk Officer, had communicated to the Executive Engineer, Presidency Division, Mumbai, that the State Government has decided to approve proposal of the F.A.Enterprises for registration as Class 1A Contractor with the Public Works Department for the period of three years. The Executive Engineer, Presidency Division, Mumbai, vide this letter dated 11th April 2007 of the State Government was directed to take necessary action for issuing registration certificate forthwith to the F.A.Enterprises and to send one copy of registration certificate to the State Government within ten days. That is how, the applicant/accused no.6, being holder of the post of the Executive Engineer, Presidency Division, Mumbai, had issued certificate of registration as Class 1A Contractor to the F.A.Enterprises on 12th April 2007. It is case of the prosecution that after few years thereafter, on the basis of this certificate of registration dated 12th April 2007 as Class 1A Contractor with the Public Works Department, the newly formed partnership firm F.A.Enterprises had participated in the tender process for construction of Balganga Dam Project floated by the Konkan Irrigation Development Corporation.

(e) So far as allegations against the applicant/accused no.6, who at the relevant time was holding the post of Executive Engineer, Presidency Division, Mumbai, are concerned, it is case of the prosecution that the partnership firm by name "F.A.Construction" was already having six works under different projects of the Irrigation Department. Therefore, in order to get additional work, by circumventing the Circular dated 17th October 2001 of the Konkan Irrigation Development Corporation, another partnership firm under the name and style as "F.A.Enterprises" came to be formed on 26th July 2006 by showing retirement of some partners from the F.A.Construction. For forming this new partnership firm, Deed of Retirement cum Continuation of the Partnership dated 26th July 2006 came to be executed by partners of the F.A.Construction. It is falsely shown in the said Deed of Retirement cum Continuation of the Partnership of the F.A.Construction that accused nos.1 to 3 namely Fateh Mohd. Khatri, Nisar Fateh Mohd. Khatri and Jaitun Fateh Mohd. Khatri are retired from the partnership firm "F.A.Construction". However, infact, these three partners of the F.A.Construction never retired from the "F.A.Construction" to form new partnership firm under the name and style of "F.A.Enterprises". It is case of the prosecution that income tax returns dated 31st March 2007 of the "F.A.Construction" reveal that accused nos.1 to 3 were infact continuing as partners of the said firm. Their Chartered Accountant Ramesh Joshi also disclosed to the Investigator that nobody retired from the partnership firm - "F.A.Construction" in the previous year ending 31st March

2007. Bankers of the “F.A.Construction” also informed the Investigator that the partnership firm “F.A.Construction” has not informed them about any change in partnership after 1st July 2006. Infact, whatever change was there, was vide Deed of Retirement cum Continuation of the Partnership of the “F.A.Construction” executed on 1st July 2006 whereby four partners had retired from the said firm. Therefore, according to the Investigator, Deed of Retirement cum Continuation of the Partnership of the “F.A.Construction” executed on 26th July 2006 is a bogus document prepared for obtaining certificate of registration as Class 1A Contractor for newly floated partnership firm the “F.A.Enterprises”. This document is prepared for the purpose of cheating the State Government. According to the charge-sheet, even a partner named Mukhtar Fateh Mohd. Khatri had stated that the earlier Deed of Retirement cum Continuation of the Partnership dated 1st July 2006 was not signed by him and it is a forged deed. According to the prosecution case, the applicant/accused no.6 had indulged in criminal conspiracy with the co-accused and had deliberately not investigated all these aspects prior to forwarding the proposal for registration of the F.A.Enterprises.

(f) So far as the applicant/accused no.6 is concerned, according to the prosecution case as reflected from the charge-sheet, vide letter dated 3rd October 2006, the Desk Officer of the Public Works Department had informed the office of the Executive Engineer, Public Works Department regarding discrepancy in the proposal for registration of the "F.A.Enterprises" as Class 1A Contractor and the applicant/ accused no.6 being the Executive Engineer had, reportedly, removed the discrepancy vide his report/communication dated 16th March 2007. According to the prosecution, the applicant/accused no.6 did all acts necessary and incidental, so that "F.A.Enterprises" could get certificate of registration as Class 1A Contractor and for this purpose, he had sent a false compliance report vide communication dated 16th

March 2007 to the Desk Officer of the Public Works Department, Mantralaya, Mumbai by indulging in criminal conspiracy with the co-accused. To the query as to whether Registrar of Firms had approved Deed of Retirement cum Continuation of the Partnership, the applicant/accused no.6 had informed the Desk Officer that for approval, the application is sent to the Registrar of Firms and the receipt thereof is enclosed. According to the prosecution, the receipt which was enclosed with the report/communication dated 16th March 2007 by the applicant/accused no.6 was a receipt of payment of registration charges for registration of Deed of Partnership of the "F.A. Enterprises". That receipt was not for payment of registration charges for registering the Deed of Retirement cum Continuation of the Partnership firm named the "F.A.Construction". By this act, according to the prosecution case, the State Government is misguided by the applicant/accused no.6. It is further averred in the charge-sheet that the applicant/accused no.6 had informed the State Government in the Public Works Department that the machinery of the "F.A.Enterprises" is sufficient, but infact, the machinery was owned by the "F.A.Construction". The applicant/accused no.6 had adopted incorrect procedure while re-submitting proposal for registration of F.A.Enterprises as Class 1A Contractor by committing breach of Government Resolution dated 11th February 2002. He had indulged in conspiracy with accused nos.1 to 5 and had committed criminal misconduct. False documents were submitted by the F.A.Enterprises with forged endorsement and signature of Shivling Rajmane, Sub-Divisional Engineer of Natuwadi Project Sub-Division. The applicant/accused no.6 had intentionally and knowingly sent a compliance report showing compliance of all discrepancies and thereby abetted other accused persons to cheat the State Government. Misleading information was transmitted by the applicant/accused no.6 to the Public Works Department to give undue benefit to the F.A.Enterprises in order to obtain certificate of registration as Class 1A Contractor. To achieve this object the applicant/accused no.6 has deliberately violated provisions of the Government Resolution dated 11th February 2002. These are the accusations against the present applicant/accused no.6 who was holding the post of the Executive Engineer, Presidency Division, Mumbai.

(g) It is accepted by the prosecution that file of registration of the "F.A.Enterprises" as Class 1A Contractor maintained at the Public Works Department of the Mantralaya and being kept at the Sub-Division of Public Works Department at Kurla (West) was found lost and this is done by some unknown public servant in order to cause disappearance of evidence after knowing that the offence has been committed. Thus, according to the prosecution case, by conduct of adopting erroneous procedure the applicant/accused no.6 made it sure that undue benefit is accrued to the F.A.Enterprises.

(h) After filing of the charge-sheet, the applicant/accused no.6 preferred an application Exhibit 19 seeking his discharge from the case. By the impugned order dated 15th March

2019, the learned Special Judge was pleased to reject the same by observing that there is strong prima facie case against the applicant/accused no.6 and that documents filed by the prosecution indicates his complicity with the co-accused in commission of the offence alleged by the prosecution. This order is sought to be impugned in the instant application under Section 482 of the Cr.P.C. by the applicant/accused no.6.

3 Heard. Rule. Rule made returnable forthwith. Heard finally by request and consent of parties and in view of judgment of the Hon'ble Apex Court in the matter of **Asian Resurfacing of Road Agency vs. Central Bureau of Investigation**[1] in view of the fact that the interim stay is operating in the matter. Though after hearing the parties, the case was ready for pronouncement of judgment, unfortunately due to lockdown imposed by the State, it could not be pronounced earlier. In view of praecipe filed by the applicant because of subsequent development, now the case is listed for pronouncement of judgment today.

[1] 2018 SCC Online SC 310

4 The learned senior counsel appearing for the applicant/accused no.6 argued that prosecution of the applicant/accused no.6 is abuse of process of court as his role being the Executive Engineer was only of processing the proposal for registration as Contractor with the Public Works Department. The registration approving authority is the Minister of the Public Works Department and the registration certificate came to be issued by the applicant/accused no.6 on the basis of instructions from the State of Maharashtra in the Public Works Department. His act is purely ministerial. It is further argued that certificates and documents submitted by the F.A.Enterprises with its proposal for registration as Class 1A Contractor were scrutinized by the Deputy Executive Engineer, Presidency Division, Senior Divisional Accounts Officer Grade I and each page of the proposal and documents annexed thereto submitted by the F.A.Enterprises came to be attested by the Deputy Executive Engineer from the Office of the Executive Engineer, Presidency Division, Mumbai. It is further urged that at the relevant time, Mr.Raghojiwar was the Deputy Executive Engineer and Mr.Jaiswal was the Senior Divisional

Accounts Officer. They both were concerned with the scrutiny of the proposal and documents annexed thereto. However, their statements were not recorded by the Investigating Officer deliberately. The applicant/accused no.6, being the Executive Engineer of the said Division, has relied on attestation made by Mr.Raghojiwar, Deputy Executive Engineer, on each page of the proposal and the documents annexed thereto. According to the learned senior counsel, even the certificate which is relied by the prosecution and which is allegedly issued by the applicant/accused no.6 certifying correctness of documents annexed to the proposal submitted by the F.A.Enterprises for registration as Contractor, bear signature of subordinate officers entrusted with the task of scrutiny of certificate and the said certificate is signed by Mr.Raghojiwar, Deputy Executive Engineer, as well as Mr.Jaiswal, Senior Divisional Accounts Officer, Grade I.

5 The learned senior counsel further argued that according to the prosecution case, forged and fabricated Retirement cum Continuation of Partnership Deeds are used by

the F.A.Enterprises for obtaining certificate of registration. Even if it is assumed that signature of Mukhtar Fateh Mohd. Khatri on such Deeds are forged and fabricated, then also the same is internal issue of F.A.Construction and F.A.Enterprises, with which, even according to the prosecution case, the applicant/accused no.6 is not concerned. In such a situation, only the author of such forged and fabricated document would be liable for prosecution as held by the Hon'ble Apex Court in the matter of **Sheila Sebastian vs. R. Jawaharaj**[2].

6 The learned senior counsel further argued that the prosecution has alleged that signature of Mr.Rajmane, Sub-Divisional Engineer of the Irrigation Department, on the documents annexed with the proposal submitted by the F.A.Enterprises, is a forged signature. However, the applicant/accused no.6 was not concerned with the said forged signature and he had relied on attestation made by the Officers from his own Division namely Mr.Raghojiwar – Deputy Executive Engineer.

2 2018(7) SCC 581

7 The learned senior counsel argued that even as per the prosecution case, it was the Registration Sanctioning Authority i.e. the Government of Maharashtra in the Public Works Department which was responsible for maintaining and preserving the original file concerning the proposal for registration of F.A.Enterprises as Class 1A Contractor. The said file, even according to the prosecution case, is missing from the Public Works Department, Mantralaya, Mumbai as communicated by the Public Works Department vide letter dated 16th September 2015 to the Anti Corruption Bureau. Thus, there is no iota of evidence against the applicant/accused no.6 even for raising suspicion against him.

8 The learned senior counsel further argued that documents annexed to the charge-sheet by the prosecuting agency makes it clear that the F.A.Enterprises was having plant and machinery required for the purpose of getting registration certificate. However, on the basis of assumptions and surmises, the applicant/accused no.6 is unnecessarily roped in the alleged offence by conveniently ignoring other officers of the Public Works

Department, such as, Desk Officer, Under Secretary, Deputy Secretary, Joint Secretary, Secretary as well as the Minister of the Public Works Department, who are authorities for scrutiny of the proposal for registration as Class 1A Contractor. It is further argued that the Registration Approving Authority is the Minister of the Public Works Department and though according to the prosecution case, the F.A.Enterprises was not entitled to have certificate of registration as Class 1A Contractor, no action is taken against the Registration Approving Authority or other high ranking officers of the Public Works Department working in the Mantralaya including the Secretary of the said department.

9 The learned senior counsel further argued that continuation of prosecution against the applicant/accused no.6, in the wake of Government Resolution dated 28th November 2018 which is having retrospective effect, amounts to abuse of process of court and therefore, the prosecution against the applicant/accused no.6 needs to be quashed and set aside.

10 In reply, the learned special public prosecutor argued that the application, as framed and filed, is not maintainable in view of availability of remedy of filing revision petition. The learned special public prosecutor drew my attention to the affidavit filed by the prosecuting agency and argued that for circumventing the circular of the Konkan Irrigation Development Corporation, a farce of retirement of few partners from the F.A.Construction was made. The applicant/accused no.6 intentionally did not examine various Deeds of Retirement cum Continuation of the Partnership of partnership firm "F.A.Construction" while processing the proposal for registration, submitted by the F.A.Enterprises. It is argued that on 1st July 2006 there were only five partners with the F.A.Construction and on 26th July 2006, fraudulently, three partners were shown to have been retired. Infact, there was no such retirement as seen from statement of Chartered Accountant Ramesh Joshi as well as recitals in the Income Tax Returns of the said firm. The learned special public prosecutor further argued that subsequent Deed of Retirement cum Continuation of the Partnership of the firm

F.A.Construction which is dated 28th May 2008 also states that three partners viz., accused nos.1 to 3, had continued in the said partnership firm.

11 It is further argued by the learned special public prosecutor that the applicant/accused no.6 had issued a certificate showing that veracity of all documents submitted with the proposal for registration is examined and the certificate to that effect came to be issued by the applicant/accused no.6. This certificate is a false certificate which has misled the authorities. According to the learned special public prosecutor, provisions of the Government Resolutions dated 11th February 2002 and 20th April 1998 were violated by the applicant/accused no.6 while processing the proposal of the F.A.Enterprises and issuing the certificate of correctness of documents. The proposal and documents annexed thereto were required to be attested by the Executive Engineer, Deputy Executive Engineer or Divisional Accounts Officer/Auditor. However, the copies of the proposal were attested by Mr.Rajmane, Sub-Divisional Engineer of

Natuwadi Project, who was not concerned with the matter. This fact was overlooked by the applicant/accused no.6. The applicant/accused no.6 had not verified the project costs of the projects completed by the Contractor. The F.A.Enterprises was not a registered firm and the documents with the proposal were shown to have been attested by the Sub-Divisional Engineer named Mr.Rajmane of Natuwadi Project. Ultimately, during investigation it was found that his signature was forged signature and he had not attested those documents. The learned special public prosecutor further argued that infact, the F.A.Enterprises was not having any machinery and plant and this aspect is ignored by the applicant/accused no.6. Thus, proper procedure was not followed by the applicant/accused no.6 while processing the proposal. The Deed of Retirement cum Continuation of the Partnership is not got registered with the Registrar of the Co-operative Societies as seen from statement of Girish Dinkar Kurane, Registrar of Co-operative Societies, State of Maharashtra. In submission of the learned special public prosecutor, the applicant/accused no.6 conspired with the co-accused in order to see that they gain wrongfully by enabling them to procure contract of construction of Balganga Dam Project. Reliance is placed by him on the judgment of this court in the matter of **Deodutta Marathe vs. The State of Maharashtra**[3]. With this, the learned special public prosecutor supported the impugned order of rejection of application for discharge.

12 Let us now deal with preliminary objection of the learned Special Prosecutor regarding maintainability of this application which is filed under Section 482 of the Cr.P.C. It is urged on behalf of the respondent/State that the instant application is not maintainable because of availability of remedy of filing revision under Section 397 of the Cr.P.C. before this court for challenging the impugned order passed by the learned Special Judge rejecting the application for discharge at Exhibit 19 on 15th March 2019.

13 In order to decide this preliminary objection regarding maintainability of the application under Section 482 of the Cr.P.C.,

[3] Criminal Writ Petition No.2928 of 2015 decided on 31st January 2020

one will have to look into the reasons given in the impugned order for rejecting the application for discharge. Reasons constitutes heart and soul of judicial orders. At this stage, it is apposite to quote following observations of the Hon'ble Apex Court in the matter of **Director, Horticulture, Punjab vs. Jagjivan Parshad**[4] :

> "Reasons substitute subjectivity by objectivity. Right to reason is an indispensable part of a sound judicial system. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the orders made, in other words, a speaking-out."

14 The learned Special Judge while rejecting the application at Exhibit 19 by the impugned order proceeded to record submissions made by the learned counsel appearing for the parties. The learned Special Judge, then, in paragraph 7 of the order proceeded to list the case law cited by the parties. This was done only by mentioning names of parties and the citation. No

4 2008 AIR SCW 2858

efforts were taken to cull out and mention the ratio of rulings so cited by the parties. No efforts were made by the learned Special Judge to see whether cited rulings are applicable to the facts of the case before the court. Thereafter, in paragraph 8 of the impugned order, the learned Special Judge cryptically observed that after scrutinizing the entire case record, it clearly appears that there is strong prima facie case against the accused no.6 and hence to discharge him from the alleged offence would be a travesty of justice. It is observed by the learned Special Judge that documents filed by the prosecution clearly indicate prima facie complicity of the accused no.6 in alleged offences and shows his complicity with accused nos.1 to 5 in commission of alleged offences. With these observations, without actually scrutinizing the material collected by the prosecution against the applicant/accused no.6 and without giving any reasons in support of its observations, the application for discharge came to be rejected by the impugned order by the learned trial court. In other words, the impugned order is bereft of any reasons. The learned Special Judge has not cared to examine whether there are or not sufficient grounds for proceeding against the applicant/accused no.6. It is not examined by the learned Special Judge as to whether material collected by the prosecution reflects that there is ground for presuming that the applicant/accused no.6 has committed alleged offences. Infact, not a single document from the voluminous charge-sheet is quoted by the learned Special Judge in the impugned order for supporting his finding about existence of prima facie case against the applicant/accused no.6.

15 In the light of the cryptic and unreasoned order of the learned Special Judge, it is apposite to quote observations of the Hon'ble Apex Court in the matter of **<u>Prabhu Chawla vs. State of Rajasthan and Another</u>**[5] found in paragraph 5, relevant portion of which reads thus :

> "5 ....In Madhu Limaye v. The State of Maharashtra this Court has exhaustively and, if I may say so with great respect, correctly discussed and delineated the law beyond mistake. While it is true that Section 482 is pervasive it should not subvert legal interdicts written into the same Code,

5 (2016) 16 Supreme Court Cases 30

such, for instance, in Section 397(2). Apparent conflict may arise in some situations between the two provisions and a happy solution “would be to say that the bar provided in sub-section (2) of Section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one or the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then, if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397(2) can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far between. The High Court must exercise the inherent power very sparingly. One such case would be the desirability of the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction". In short, there is no total ban on the exercise of inherent power where abuse of the process of the court or other extraordinary situation excites the court's jurisdiction. The limitation is self-restraint, nothing more. The policy of the law is clear that interlocutory orders, pure and simple, should not be taken up to the High Court resulting in unnecessary litigation and delay. At the other extreme, final orders are clearly capable of being considered in exercise of inherent power, if glaring injustice stares the court in the face. In between is a tertium quid, as Untwalia, J. has pointed out as for example, where it is more than a purely interlocutory order and less than a final disposal. The present case falls under that category where the accused complain of harassment through the court's process. Can we state that in this third category the inherent power can be exercised ? In the words of Untwalia, J.: (SCC p. 556, para 10) "The answer is obvious that the bar will not operate to prevent the abuse of the process of the Court and/or to secure the ends of justice. The label of the

> petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an appropriate case under its inherent powers. The present case undoubtedly falls for exercise of the power of the High Court in accordance with Section 482 of the 1973 Code, even assuming, although not accepting, that invoking the revisional power of the High Court is impermissible."

It is, thus, clear that there cannot be a total ban on exercise of powers under Section 482 of the Cr.P.C. because of availability of remedy of filing revision petition. Similarly, in the matter of **Dhariwal Tobacco Products Ltd. vs. State of Maharashtra**[6] the Hon'ble Apex Court has held that the inherent power of the High Court is not conferred by statute but has merely been saved thereunder. With this, it is further held that it is, thus, difficult to conceive that the jurisdiction of the High Court would be held to be barred only because the revisional jurisdiction could also be availed of. In this view of the matter, I see no merit in submission of the learned Special Prosecutor that the application, as framed and filed, is not maintainable.

6 (2009) 2 SCC 370

16 As the applicant/accused no.6 is claiming discharge by contending that continuation of criminal trial against him amounts to abuse of process of court, let us put on record law laid down by the Hon'ble Apex Court in regard to the claim for discharge by an accused. The Honourable Apex Court in the matter of **State of Tamil Nadu vs. N. Suresh Rajan & Ors. (2014) 11 Supreme Court Cases 709** has held as follows :

> “We have bestowed our consideration to the rival submissions and the submissions made by Mr.Ranjit Kumar commend us. True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouth piece of the prosecution or act as a post-office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and

the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage. Reference in this connection can be made to a recent decision of this Court in the case of Sheoraj Singh Ahlawat and Ors. v. State of Uttar Pradesh and Anr., AIR 2013 SC 52 : (2012 AIR SCW 6171), in which, after analyzing various decisions on the point, this Court endorsed the following view taken in Onkar Nath Mishra v. State (NCT of Delhi) (2008) 2 SCC 561 : (AIR 2008 SC (Supp) 204 : 2008 AIR SCW 96):

"11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence." " .

17 Considering the offences alleged against the applicant/ accused no.6 in the instant case, it will have to be seen that accepting the entire material collected by the prosecution and taking the prosecution case as it is, whether there is ground for presuming that the applicant/accused no.6 has committed offences alleged against him or whether such scrutiny reveals that the charges sought to be levelled against him are groundless. This can be done by sifting and weighing the evidence for the limited purpose of finding out whether or not a prima facie case against the applicant/accused no.6 has been made out. In other words, if

evidence which the prosecution proposes to adduce to prove guilt of the applicant/accused no.6, even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, cannot show that the applicant/accused no.6 committed the offence, then it can be said that there is no sufficient ground for proceeding with the trial. Similarly, it is well settled that if two views are equally possible on scrutiny of the entire charge-sheet and the court is satisfied that the evidence collected by the Investigator is giving rise to some suspicions but not grave suspicion against the accused, then the court can discharge the accused.

18 For quashing the criminal proceedings against him, the applicant/accused no.6 is invoking provisions of Section 482 of the Cr.P.C. and is relying on the Government Resolution of the State of Maharashtra in Public Works Department dated 28th November 2018 which is retrospective in its effect. It is trite that under Section 482 of the Cr.P.C., this court has inherent powers to make such orders, as may be necessary, to give effect to any order

under the Cr.P.C. or to prevent the abuse of process of any court or otherwise to secure ends of justice. These powers are required to be exercised for achieving objects mentioned in Section 482 of the Cr.P.C. carefully and cautiously.

19 The learned senior counsel appearing for the applicant/accused no.6 drew my attention to the Government Resolution bearing No.CST/2018/PC127/EM-2 dated 28th November 2018 and contended that in the light of instructions given by the State Government in the Public Works Department vide this Government Resolution, prosecution of the applicant/accused no.6 is now nothing but abuse of process of the court requiring exercise of inherent powers of this court for quashing the impugned order.

20 I have carefully perused the Government Resolution of the State Government in Public Works Department dated 28th November 2018. The preface to the said Government Resolution and more particularly recitals in paragraph 2 thereof makes it

clear that the State Government has found that in past, Contractors in the State had submitted false documents with tenders. It is further mentioned in paragraph 2 of the said Government Resolution that the State Government has also found that in the past, for getting certificate of registration with the Public Works Department, Contractors have submitted false and fabricated documents to the Public Works Department. With such observations, the State Government, in the said Government Resolution has stated that it is not possible for officers of the Public Works Department to scrutinize veracity and truthfulness of all such documents by conducting forensic examination thereof, due to heavy work load, paucity of manpower and because of uploading of voluminous documents in E-tendering process. Vide this Government Resolution dated 28th November 2018, the State Government further noticed that despite these difficulties, several Field Officers of the Public Works Department are required to face departmental inquiries as well as prosecution under the Indian Penal Code etc. due to police action. After noting these aspects, the State Government further noted in the said Government

Resolution dated 28th November 2018 that deep study of such various difficulties was undertaken at the level of the State Government and after overall examination from all angles of all such aspects and difficulties, it has decided to give suitable instructions on this subject of submission of false and fabricated documents by Contractors and others with the Public Works Department. Paragraph 9 of this Government Resolution dated 28th November 2018 makes it crystal clear that the instructions so given in the said Government Resolution are applicable retrospectively. The State Government has then proceeded to give several instructions in the said Government Resolution and particularly in Clauses 4, 5, 6 and 7 thereof for protecting officers and employees of the Public Works Department so also Divisional Accountants from prosecution under penal laws due to submission of false and fabricated documents by Contractors. Vide this Government Resolution, the State Government has given clear directions that for submission of any false or forged documents to the Public Works Department, Contractors, Individuals, Partnership Firms, Companies etc., who had submitted such false and fabricated documents, shall be solely responsible for all penal consequences thereof. This Government Resolution, which has retrospective effect, further directs that for works costing more than Rs.150 lakh, condition of registration of the contractor with the Public Works Department is removed. According to the recitals of this Government Resolution, if it is found that the Contractor, Partnership Firm or Individual, Management of the Company etc. has submitted false and fabricated documents to the Public Works Department, then the concerned Executive Engineer should lodge the FIR against such concerned individual, firm or company. With this, the Government Resolution dated 28th November 2018 in clear terms instructed and ordered that Officers or Employees of the Public Works Department, Members of the Committees, Divisional Accountants etc. who may be entrusted with the work of scrutiny of documents submitted by Contractors, Partnership Firm, Individual or Companies to the Public Works Department, shall not be held responsible for penal consequences in respect of scrutiny of such false and fabricated documents. Thus, by this Government Resolution, the State Government in the Public Works

Department has in no unclear terms directed with retrospective effect that its officers shall not be made liable for criminal prosecutions with reference to false and fabricated documents furnished by Contractors and others. At the end of this Government Resolution, the State Government has directed that instructions so given in the Government Resolution should be strictly followed and compliance report should be submitted to the State Government.

21 Thus, overall and careful scrutiny of the Government Resolution dated 28th November 2018 makes it clear that the State Government in the Public Works Department has taken a cautious decision of not making its employees, officers, members of the Document Scrutiny Committees or Divisional Accountants entrusted with the work of scrutiny of documents submitted by the contractors, liable for penal consequences regarding lapses if any on their part in conducting scrutiny of documents for ascertaining veracity and truthfulness of such documents. The entire liability of submitting forged and fabricated documents is,

thus, cast on Contractors, Individuals, Firms or Companies submitting such documents by making them liable for prosecution at the instance of the concerned Executive Engineer of the Public Works Department. This Government Resolution, in no unclear terms, states that instructions contained therein are retrospective in operation. Thus, by this Government Resolution, the State has chosen not to fasten penal liability on its officers / employees for lapses, if any, in scrutinizing and testing veracity and truthfulness of documents submitted by Contractors. As this Government Resolution has retrospective effect, continuation of prosecution against the applicant/accused no.6, which is essentially with an allegation that he has not ascertained veracity and truthfulness of the documents submitted by the "F.A.Enterprises", would certainly amount to abuse of the process of court and for securing ends of justice, it needs to be put to an end by quashing and setting aside the impugned order. In the light of decision of the State Government reflected in the Government Resolution dated 28th November 2018 having retrospective effect, continuation of prosecution against the applicant/accused no.6 which is primarily for alleged lapses in scrutiny of proposal for registration would amount to undue harassment to the applicant/accused no.6 and would result in causing grave miscarriage of justice. Therefore, in the light of this Government Resolution, I am of the considered opinion that ends of justice requires quashment of impugned prosecution so far as the applicant/accused no.6 is concerned. The decision of the State to make the provisions of the Government Resolution dated 28th November 2018 retrospective in operation makes the case in hand rarest of rare case requiring interference at the hands of this court in exercise of its inherent powers saved by provisions of Section 482 of the Cr.P.C. This is must for doing real and substantial justice and for preventing injustice which is being caused to the applicant/accused no.6 despite the State having taken the decision to protect its officers and employees from exposure to such prosecutions due to act of Contractor in submitting false and fabricated documents with the Public Works Department of the State.

22 One may argue that this Government Resolution dated 28th November 2018 cannot be made applicable to the case in hand as offences alleged against the applicant/accused no.6 also include offences punishable under Sections 13(2) read with 13(1)(c) and 13(1)(d) of the Prevention of Corruption Act, 1988. It is apposite to quote these sections for better understanding of the matter. They read thus :

> “**13 Criminal misconduct by a public servant -**
>
> **(1)** A public servant is said to commit the offence of criminal misconduct -
>
> (a) …..
>
> (b) …..
>
> **(c)** if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person to do so; or
>
> **13(1)(d)** If he -
>
> (i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or
>
> (ii) by abusing his position as a public servant, obtains for himself or for any other person any

> valuable thing or pecuniary advantage; or
> (iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest;
>
> **"13(2)** Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall not be less than four years but which may extend to ten years and shall also be liable to fine."

It is, thus, clear that for making out the offence of criminal misconduct by a public servant, the prosecution has to place on record evidence to demonstrate that the accused public servant had obtained for himself or for any other person any valuable thing or pecuniary advantage either by abusing his position as a public servant or by adopting corrupt or illegal means. There has to be material evidence to show that such public servant had obtained for any person any valuable thing or pecuniary advantage without any public interest. Dishonest or fraudulent misappropriation or otherwise conversion of any property entrusted or under control of a public servant for his own use by a public servant also amounts to an offence of criminal misconduct punishable under Section 13(2) of the Prevention of Corruption Act. Perusal of the entire charge-sheet does not reveal iota of evidence for even prima facie demonstration of an offence of criminal misconduct on the part of the applicant/accused no.6. With the assistance of learned counsel appearing for both parties, I have gone through the entire charge-sheet meticulously and thoroughly. I could not find out any material in the charge-sheet which may disclose ingredients constituting the offence punishable under Section 13(2) of the Prevention of Corruption Act, 1988. There is no material in the charge-sheet to come to even prima facie inference that there are grounds for presuming that the applicant/accused no.6 has committed the offence of criminal misconduct by obtaining for himself or for any other person any valuable thing or pecuniary advantage by indulging in corrupt or illegal means or by abusing his position as a public servant. It is not even the case of prosecution that any property entrusted to him was either converted or fraudulently/dishonestly misappropriated by the applicant/accused no.6. Despite repeated queries by this court, the learned special public prosecutor was not in a position to show any material from the charge-sheet which can enable the court to frame a Charge for offences punishable under Sections 13(2) read with 13(1)(c) or 13(1)(d) of the Prevention of Corruption Act, 1988 against the applicant/accused no.6.

23 It is now well settled that for the purpose of proving offence punishable under Section 7 as well as Section 13(1)(d) read with 13(2) of the Prevention of Corruption Act, 1988, it is obligatory on the part of the prosecution to prove that there was demand of illegal gratification by a public servant in respect of showing favour or disfavour, rendering any service or disservice in respect of official act, and he, infact, received or obtained the money as bribe by corrupt or illegal means or by abusing his position as a public servant. Mere recovery of money dehors the demand would not be sufficient to convict the public servant for such offences. At this juncture, it is apposite to quote relevant portions of paragraphs 7 to 9 from the judgment of the

Honourable Apex Court in the matter of **B. Jayaraj vs. State of Andhra Pradesh**[7]

> "7 In so far as the offence under Section 7 is concerned, it is a settled position in law that demand of illegal gratification is sine qua non to constitute the said offence and mere recovery of currency notes cannot constitute the offence under Section 7 unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe. The above position has been succinctly laid down in several judgments of this Court. By way of illustration reference may be made to the decision in C.M. Sharma Vs. State of A.P.[(2010) 15 SCC 1] and C.M. Girish Babu Vs. C.B.I.[(2009) 3 SCC 779]."
>
> "8 ....Mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under Section 7. The above also will be conclusive in so far as the offence under Section 13(1)(d)(i)(ii) is concerned as in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be established."

[7] (2014) 13 Supreme Court Cases 55

"9 In so far as the presumption permissible to be drawn under Section 20 of the Act is concerned, such presumption can only be in respect of the offence under Section 7 and not the offences under Section 13(1)(d)(i)(ii) of the Act. In any event, it is only on proof of acceptance of illegal gratification that presumption can be drawn under Section 20 of the Act that such gratification was received for doing or forbearing to do any official act. Proof of acceptance of illegal gratification can follow only if there is proof of demand. As the same is lacking in the present case the primary facts on the basis of which the legal presumption under Section 20 can be drawn are wholly absent."

24 Similarly, legal position as explained by the Hon'ble Apex Court in the matter of **A. Subair vs. State Of Kerala**[8] also needs to be put on record. Relevant paragraphs from the report reads thus :

"14 Insofar as Section 13(1)(d) of the Act is concerned, its essential ingredients are: (i) that he should have been a public servant; (ii) that he

[8] (2009) 6 Supreme Court Cases 587

should have used corrupt or illegal means or otherwise abused his position as such public servant and (iii) that he should have obtained a valuable thing or pecuniary advantage for himself or for any other person."

"15 In **C.K.Damodaran Nair v. Government of India**[9], this Court had an occasion to consider the word "obtained" used in Section 5(1)(d) of the Prevention of Corruption Act, 1947 (now Section 13(1)(d) of Act, 1988), and it was held:

> "12 The position will, however, be different so far as an offence under Section 5(1)(d) read with Section 5(2) of the Act is concerned. For such an offence prosecution has to prove that the accused "obtained" the valuable thing or pecuniary advantage by corrupt or illegal means or by otherwise abusing his position as a public servant and that too without the aid of the statutory presumption under Section 4(1) of the Act as it is available only in respect of offences under Section 5(1)(a) and (b) -- and not under Section 5(1)(c), (d) or (e) of the Act. "Obtain" means to secure or gain (something) as the result of request or effort (Shorter Oxford

[9] AIR 1997 SC 551

Dictionary). In case of obtainment the initiative vests in the person who receives and in that context a demand or request from him will be a primary requisite (1997) 9 SCC 477 for an offence under Section 5(1)(d) of the Act unlike an offence under Section 161 IPC, which, as noticed above, can be, established by proof of either "acceptance" or "obtainment"."

25 In the matter of **N. Sunkanna vs. State of Andhra Pradesh**[10] it is held thus, in paragraph 5 :

"5 ....It is settled law that mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under Section 7, since demand of illegal gratification is sine-qua-non to constitute the said offence. The above also will be conclusive insofar as the offence under Section 13(1)(d) is concerned as in the absence of any proof of demand for illegal gratification the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be established. It is only on proof of

[10] (2016) 1 Supreme Court Cases 713

> acceptance of illegal gratification that presumption can be drawn under Section 20 of the Act that such gratification was received for doing or forbearing to do any official act. Unless there is proof of demand of illegal gratification proof of acceptance will not follow. Reference may be made to the two decisions of three-Judge Bench of this Court in B. Jayaraj vs. State of Andhra Pradesh [(2014) 13 SCC 55] and P. Satyanarayna Murthy vs. The District Inspector of Police and another [(2015 (9) SCALE 724].

26 This makes it clear that the legal position is no more res integra that primary requisite of an offence under Section 13(1)(d) of the Act is proof of a demand or request of a valuable thing or pecuniary advantage from the public servant. In other words, in the absence of proof of demand or request from the public servant for a valuable thing or pecuniary advantage, the offence under Section 13(1)(d) cannot be held to be established. However, in the case in hand, there is absolutely no iota of evidence/material in the charge-sheet which may show either demand of any valuable thing or pecuniary advantage by the

applicant/accused no.6 public servant. Similarly, there is no evidence/material in the charge-sheet to show that the applicant/ accused no.6 public servant had obtained either for himself or for any other person any valuable thing or pecuniary advantage. As these ingredients of the offence punishable under Section 13(2) of the Prevention of Corruption Act are missing in the charge-sheet and as there is no iota of evidence in this regard, it needs to be put on record that there is no sufficient ground for proceeding with the trial against the applicant/accused no.6 for the offence alleged against him under the Prevention of Corruption Act. In this view of the matter, as per instructions given by the State in the Government Resolution dated 28th November 2018, the prosecution of the applicant/accused no.6 cannot continue as the same is abuse of process of the court.

27 The controversy in the instant application is revolving around the issue of proposal for grant of certificate as Class 1A Contractor with the Public Works Department. The issue involved and which needs consideration in the instant application is the

proposal submitted by the F.A.Enterprises for grant of registration as Class 1A Certificate and orders passed on that proposal by various officers of the Public Works Department right up to the level of the Hon'ble Minister of the Public Works Department of the State Government. The procedure, as to how such application for registration of contractors with the Public Works Department needs to be dealt with, is explained by the Government Resolution of the Public Works Department dated 11th February 2002. This Government Resolution is relied by the prosecution for alleging breach thereof by the applicant/accused no.6. This Government Resolution dated 11th February 2002 of the Public Works Department is the part of the charge-sheet. Perusal of this Government Resolution makes it clear that the State Government had consolidated the instructions given by earlier circulars and provided for revised procedure for dealing with such applications for grant of certificate of registration as Contractor with the Public Works Department. Clause 5 of this Government Resolution dated 11th February 2002 contains the procedure for scrutiny of documents annexed with the proposal for registration as the

Contractor. Clause 5.1 of this Government Resolution states that Executive Engineer with whom the proposal for registration as the Contractor is submitted by the Contractor should contact the office/authority which had issued certificates and documents annexed with the application/proposal for registration as the Contractor and should get the veracity/truthfulness of such documents confirmed. As per Clause 5.2 of the Government Resolution dated 11th February 2002, on confirming the veracity of original certificates and documents, the Executive Engineer / Deputy Executive Engineer/Divisional Accounts Officer / Divisional Accountant of the department submitting such proposal for registration should certify the copies of original certificates / documents submitted with the proposal as true copies under their signature. As per Clause 5.3 of this Government Resolution, if the Contractor has submitted certificates showing execution of private works, then the concerned Executive Engineer should verify as to whether such work is really done by the Contractor. Clause 5.4 provides that in some cases certificates issued by the Sugar Factory / Yarn Factory is submitted. In those cases, such certificate should have counter signature of either the Commissioner of Sugar, Director of Handloom Powerloom or Textile or Competent Officer in that office. As per Clause 5.5 of this Government Resolution, while sending the proposal for approval to the Competent Officer, the Executive Engineer should give certificate to the effect that - "Certified that correctness of all documents/certificates annexed with the proposal for registration for particular class submitted by the Contractor has been verified by contacting the concerned offices."

28 Thus, according to the Government Resolution dated 11th February 2002, after undertaking all such formalities, the Executive Engineer of the concerned division is required to forward such proposal for registration of Contractor to the Public Works Department of the State at Mantralaya, Mumbai.

29 The prosecution has also relied on Government Resolution of the Public Works Department dated 20th April 1998. This resolution also deals with procedure for registration of Contractors. According to the case of prosecution, registration

sanctioning authority for Class 1A Contractor with the Public Works Department is the Hon'ble Minister of the Public Works Department of the State. How such proposal for registration as the Contractor of Class 1A category is to be dealt with, is explained by witness Chandrashekhar Bhatkhande, the Deputy Engineer and the then Desk Officer of the Public Works Department, in his statement dated 17th November 2015. As per his statement, on receipt of the proposal by the Public Works Department at Mantralaya firstly, it is scrutinized by the officer of the rank of the Desk Officer. Then it is forwarded to the Deputy Secretary of the Public Works Department. Thereafter, on scrutiny by the Deputy Secretary of the Public Works Department, if the proposal is found to be in order, then it is submitted for further scrutiny to the Secretary of the Public Works Department. If the Secretary of the Public Works Department comes to the conclusion that the proposal for registration as the Contractor is in order, then the same is submitted to the Hon'ble Minister for the Public Works Department for orders. If such proposal is approved by the Hon'ble Minister of the Public Works Department, then only such fact of approval is communicated to the concerned Executive Engineer with a direction to such Executive Engineer to issue Certificate of Registration of Contractor with the Public Works Department.

30 In the case in hand, the proposal submitted by the F.A.Enterprises for registration as Class 1A Contractor with the Public Works Department was firstly scrutinized by the Office of the applicant/accused no.6 namely Office of the Executive Engineer, Presidency Division, Mumbai. It was then forwarded to the Public Works Department, Mantralaya, Mumbai, where it was scrutinized by the Desk Officer (witness Chandrashekhar Bhatkhande), thereafter by the Deputy Secretary, then by the Joint Secretary and last by the Secretary of the Public Works Department. Then it was put up before the Hon'ble Minister of the Public Works Department for necessary orders. Undisputedly, according to the case of prosecution, the Hon'ble Minister of the Public Works Department was pleased to approve the proposal for grant of registration to the F.A.Enterprises as Class 1A Contractor

with the Public Works Department. The charge-sheet contains a letter dated 11th April 2007 issued by witness Chandrashekhar Bhatkhande, Desk Officer and addressed to the Executive Engineer, Public Works Department, Presidency Division, Mumbai, communicating the decision of the State Government in the Public Works Department to grant approval for registration of the F.A.Enterprises as Class 1A Contractor with the Public Works Department. Recitals in this letter dated 11th April 2007 of the Desk Officer of the Public Works Department makes it clear that the State Government in the Public Works Department has taken the decision to approve the proposal submitted by the F.A.Enterprises. This letter contains a direction to the Executive Engineer, Public Works Department, Presidency Division, Mumbai, that action for issuance of registration certificate to the F.A.Enterprises should be taken forthwith and one copy of such certificate be sent to the State Government. That is how the registration certificate bearing no.142 as Class 1A Contractor came to be issued by the applicant/accused no.6 who was holding the post of Executive Engineer, Public Works Department, Presidency Division, Mumbai on 12th April 2007, which is part of the charge-sheet.

31 At this juncture, it is apposite to note that the Government Resolution dated 20th April 1998 of the Public Works Department relied by the Investigating Officer contains following clause in Appendix II thereof :

> “(b) The registration sanctioning authority should preserve all the above documents produced by the Contractor and those should not be returned to the Contractor under any circumstances.”

Clause (d) of Appendix II to the Government Resolution dated 20th April 1998 of the Public Works Department makes it clear that the Executive Engineer to whom the proposal for registration is submitted should forward the same to the concerned registration sanctioning authority. This, obviously, will have to be done after scrutiny of the proposal as per the relevant Government Resolution. However, the position is clear. The entire proposal along with documents and annexures thereto is required to be forwarded by the Office of the Executive Engineer to the Public

Works Department, Mantralaya, Mumbai for orders of the Registration Sanctioning Authority. Infact, this is the case of the prosecution also reflected from the charge-sheet.

32 As it is alleged that procedural formalities are not regularly done by the applicant/accused no.6, who was holding the position of the Executive Engineer while dealing with the proposal it was obligatory on the part of the prosecution to place the entire proposal of the F.A.Enterprises with documents and annexures thereto as well as the relevant file maintained at the Public Works Department of the Mantralaya with the charge-sheet. However, according to the prosecution case, as reflected from the charge-sheet, the file containing the proposal of the F.A.Enterprises along with documents and annexures thereto and record of scrutiny of such proposal at different levels is lost from the Public Works Department of Mantralaya, Mumbai. Witness Chandrashekhar Bhatkhande, the Desk Officer of the Public Works Department, working in Mantralaya, in his statement dated 17th November 2015 made to the Investigating Officer, has

categorically stated that unless he sees the original file, he is unable to tell whether proper official procedure was followed or not by the applicant/accused no.6 in granting Class 1A Contractor Certificate to the F.A.Enterprises. He has categorically stated in the said statement that for want of file containing the proposal for registration of the F.A.Enterprises and record of scrutiny of such proposal, he is unable to tell whether discrepancies mentioned by him in his letter dated 3rd October 2006 addressed to the Executive Engineer, Public Works Department, Presidency Division, Mumbai, were removed/complied or not by the office of the applicant/accused no.6. According to the prosecution case against the applicant/accused no.6, as reflected from the charge-sheet, there was faulty compliance of discrepancies mentioned in this letter dated 3rd October 2006 by the applicant/accused no.6. It is alleged by the prosecution that the applicant/accused no.6 has deliberately failed to comply with the discrepancies pointed out by the Desk Officer vide this letter dated 3rd October 2006 in order to see that the co-accused make wrongful gain by cheating the State. However, witness Chandrashekhar Bhatkhande, the

Desk Officer, who has raised queries vide his letter dated 3rd October 2006 and who is concerned with the first scrutiny of the proposal after its receipt in the Mantralaya from the office of the Executive Engineer, has stated to the Investigator that he is unable to tell whether the discrepancies pointed out by him by his letter dated 3rd October 2006 were removed/complied with or not by the applicant/accused no.6. In other words, material collected by the Investigating Officer reflected in the charge-sheet does not show faulty compliance of discrepancies pointed out by the Public Works Department, by the applicant/accused no.6. When witness Chandrashekhar Bhatkhande, the Desk Officer, Public Works Department Mantralaya has candidly stated that without perusal of the office file he is not in a position to accuse the applicant/accused no.6 of faulty compliance, it cannot be said that there are grounds for proceeding against the applicant/accused no.6. The prime evidence i.e. the original file of proposal for registration is missing from the office of the Public Works Department at Mantralaya, Mumbai, and as such, this is a case of no evidence against the applicant/accused not.6.

33 The Investigating Officer has recorded statement of Sahadev Laxman Patil, Clerk working with the Public Works Department, Mantralaya, Mumbai. He has stated that he had searched for the original file containing the proposal for registration as Contractor submitted by the F.A.Enterprises. He stated that despite search in the office of the Public Works Department in Mantralaya, Mumbai, so also at the office of the Sub-Division, Public Works Department, Kurla, the said original file could not be traced out. Thus, the prosecution has not placed on record with the charge-sheet, the original proposal submitted by the F.A.Enterprises with documents and annexures thereto in order to ascertain whether such proposal, documents and annexures thereto are attested by authorities mentioned in the Government Resolution dated 11th February 2002. Clause 5.2 of the said Government Resolution requires attestation of such proposal and documents by the Executive Engineer / Deputy Executive Engineer / Divisional Accounts Officer / Divisional Accountant. In this view of the matter, there is no iota of evidence in the charge-sheet to come to the conclusion that the proposal of

the F.A.Enterprises and documents annexed thereto were only attested under forged signature of Mr.S.M.Rajmane, Sub-Divisional Engineer, Natuwadi Project, who was not at all the authority for attestation of the proposal of the F.A.Enterprises. As against this, it is the contention of the applicant/accused no.6 that the document and annexures to the proposal of the F.A.Enterprises were attested by the officers from his Division and that he has relied on such attestation done by Mr.Raghojiwar, the Deputy Executive Engineer. The applicant/accused no.6 being the Executive Engineer of the Presidency Division, Mumbai, according to the prosecution case is not responsible for loss of original file of the F.A.Enterprises at the Public Works Department, Mantralaya, Mumbai. The Investigator has alleged the offence punishable under Section 201 of the Indian Penal Code against unknown public servant from Public Works Department, Mantralaya, Mumbai.

34 According to the prosecution case, act of retirement of partners from F.A.Construction and formation of new firm by them

named and styled as F.A.Enterprises was for circumventing the Circular dated 17th October 2001 of the Konkan Irrigation Development Corporation. It is case of the prosecution that registration of Contractors with the Public Works Department is governed by Government Resolution dated 11th February 2002 and 20th April 1998. The Government Resolution dated 20th April 1998 and more particularly Clause 18 of Appendix II to the said Circular deals with floating of new firm by partners of any registered firm. Clause 18 of Appendix II of the Government Resolution dated 20th April 1998 reads thus :

> "18 If some of the partners of any registered firm desire to float a new firm and apply for registration by seeking benefit of experience gained and annual turnover by virtue of their being the partners in that firm having some percentage sare to their credit, such benefit equivalent to their share can be granted to the newly floated firm for registration in appropriate case, provided they retire from the First firm and produce retirement deed along with other required documents to the registering authority. It should further be verified that the classification of

> original firm does not get adversely affected as a result of withdrawal of a major partner. If any partner who desires to join another Company without retiring from original Company can be permitted subject to condition that he will not claim his experience gained for registration of this new Company."

35 Bare perusal of this clause makes it clear that partners of the existing partnership firm can float a new firm and can apply for registration by seeking benefit of experience gained while being partner of the earlier firm. This clause makes it clear that such partners floating the new firm should produce Retirement Deed along with other required documents to the Registering Authority for getting registration with the Public Works Department. Thus, requirement of Clause 18 of Appendix II to the Government Resolution dated 20th April 1998 is very specific. The partners, who retire and float a new firm are required to submit Retirement Deed along with other required documents to the Registering Authority for getting the new firm registered as Contractor with the Public Works Department. Neither of these

two Government Resolutions provide that such Deed of Retirement is required to be registered with the Registrar of Firms or with any other authority. There is no requirement in any of the Government Resolution that either Retirement Deed or new Partnership Deed is required to be registered with the Registrar of Co-operative Societies before it being acted upon by the Public Works Department. Therefore, it cannot be said that because of acting on the unregistered Deed of Retirement cum Continuation of the Partnership firm of the F.A.Construction, the applicant/accused no.6 had adopted irregular procedure and had committed any offence under the Indian Penal Code. The application for registration of the new Partnership Firm as Contractor with the Public Works Department is required to be moved in the format prescribed at Annexure "A" as referred to in Rule 3. The application for registration as Contractor by the F.A.Enterprises is in the same format. This format also does not mandate that Deed of Retirement cum Continuation of the Partnership or Deed of New Partnership Firm is required to be registered with any of the authorities including the Registrar of

Co-operative Societies, as alleged by the prosecution and argued by the learned special public prosecutor. If that was the mandatory requirement, then the question might have arisen as to acting on such unregistered Deeds, whether the public servant concerned had committed any offence punishable under the Indian Penal Code or the Prevention of Corruption Act. However, such is not the requirement of any Rule or statutory instructions reflecting in the Government Resolution dealing with the subject matter.

36 It is argued that the applicant/accused no.6 has not verified the plant and machinery of the F.A.Enterprises, and infact, the machinery shown in the application for registration was belonging to the F.A.Construction. However, the charge-sheet shows otherwise. In the checklist forwarded by the office of the Executive Engineer, Presidency Division, Public Works Department, Mumbai on 11th September 2006, at Serial No.14, description of the machinery owned by the F.A.Enterprises is mentioned. The charge-sheet contains several sale letters sent by

the F.A.Construction in favour of the F.A.Enterprises reflecting sale of plant and machinery for valuable consideration. The charge-sheet itself contains documentary evidence to show that the F.A.Enterprises is owner of plant and machinery which is required for registration as Contractor with the Public Works Department. Movable property can be transferred even orally but in the case in hand, the charge-sheet contains several documents reflecting sale of plant and machinery by the F.A.Construction to the F.A.Enterprises. Therefore, it cannot be said that there is material in the charge-sheet to infer that the applicant/accused no.6 had adopted incorrect procedure and had not verified ownership of plant and machinery by the F.A.Enterprises. Moreover, that was not the obligation on the part of the applicant/accused no.6, who was the Executive Engineer of the Presidency Division, Public Works Department, Mumbai. The Government Resolution dated 11th February 2002 only casts an obligation on office of the Executive Engineer to verify authenticity of certificates/documents annexed with the application for registration.

37 It was argued that Retirement cum Continuation of Partnership Deed of F.A.Construction dated 26th July 2006 is bogus because it is not signed by witness Mukhtar Fateh Mohd. Khatri, who happens to be a partner of the said firm. It is also argued that Chartered Accountant Ramesh Joshi has stated that he was not aware about such Deed. How the applicant/accused no.6 or for that matter, any one in the Public Works Department can apprehend that signature of Mukhtar Fateh Mohd. Khatri has been forged or fabricated, is a matter which is not getting explanation from the charge-sheet. Assuming that signature of Mukhtar Fateh Mohd. Khatri was forged on such Deeds, then such act cannot be attributed to the applicant/accused no.6, who at the relevant time, was working as the Executive Engineer with the Public Works Department. It was certainly an internal issue of F.A.Construction and F.A.Enterprises for which the partners are being prosecuted by the prosecuting agency. It is not even case of the prosecution that the applicant/accused no.6 had forged/fabricated any document including Retirement cum Continuation of the Partnership Deed, and therefore, there is no material against him to proceed for

offences punishable under Sections 420, 465, 468, 471 and 474 of the Indian Penal Code etc. The Hon'ble Supreme Court in the matter of **Sheila Sebastian (supra)** has held that only the author of forged/fabricated document can be held responsible for having committed forgery. The inter se dispute between partners of the firm and their acts of forging documents provide no material for proceeding against the applicant/accused no.6. It is alleged by the prosecution that queries raised by the Desk Officer of the Public Works Department, Mantralaya, Mumbai vide his letter dated 3rd October 2006 were not complied with properly by the applicant/accused no.6 and he had shown compliance of those queries incorrectly vide his report dated 16th March 2007. The query raised by the Desk Officer relied by the prosecution us Query No.3A which is to the effect that whether the Registrar of Firms had approved Retirement Deed of retired partners. This query is as vague as it can be. The applicant/accused no.6 vide his report dated 16th March 2007 had replied to this query by stating that application for approval is moved to the Registrar of Firms and that receipt is annexed. This receipt is for registration of partnership firm F.A.Enterprises. Subsequently, as stated in foregoing paragraphs, the proposal of F.A.Enterprises was further scrutinized by the Desk Officer, the Deputy Secretary, the Joint Secretary as well as the Secretary of the Public Works Department. The compliance report submitted by the Executive Engineer came to be accepted by the Public Works Department. They had an opportunity to peruse the receipt annexed with the report dated 16th March 2007. However, no further queries were raised in the matter, and therefore, this compliance cannot be termed as improper compliance warranting penal action. Moreover, Chandrashekhar Bhatkhande, the Desk Officer, who had raised this query, has candidly stated that without perusal of the original file of the F.A.Enterprises with the Public Works Department, Presidency Division, Mumbai, he is unable to state that the discrepancy raised by him vide his letter dated 3rd October 2006 was properly complied with or not.

38 So far as certificate issued by the applicant/accused no.6 is concerned, that certificate is bearing signature of the

Deputy Executive Engineer Mr.Raghojiwar, so also the Senior Divisional Accounts Officer Mr.Jaiswal. This is according to provisions of Clause 5.2 of the Government Resolution dated 11th February 2002. It is a matter of common knowledge that the proposal of registration of Contractor is required to be routed through hierarchy of different officials at the office of the Executive Engineer. This is also clear from Clause No.5 of the Government Resolution dated 11th February 2002. Atleast three officers of the Public Works Department have scrutinized the annexures and documents enclosed with the proposal for registration submitted by the F.A.Enterprises and relying on their recommendation, the applicant/accused no.6 had signed this certificate. Thereafter also, the proposal was scrutinized at various levels at the Public Works Department, Mantralaya, Mumbai. It has undergone several checks and balances and ultimately it was approved by the Hon'ble Minister of the Public Works Department. This court, vide order dated 28th January 2020, had directed the learned special public prosecutor to ascertain whether other officers of the Public Works Department including officers at the level of the Mantralaya, Mumbai, who approved the proposal are made an accused in the instant case or in some other case with such accusation. However, it is informed to the court by the learned special public prosecutor that except the applicant/accused no.6, no other officer of the Public Works Department is made an accused with similar allegations. Thus, what was expected of the applicant/accused no.6 was to verify the documents and certificates annexed to the proposal. His act was a meticulous act done by him relying on reports and notes put up before him by the subordinate officers of the office of the Executive Engineer. His role was to process the proposal for registration. No element of deceit by the applicant/accused no.6, which has to be since inception, is seen from the charge-sheet. Similarly, there is absolutely no iota of evidence of criminal conspiracy by the applicant/accused no.6 with other accused persons nor was he concerned with allotment of work of Balganga Dam Project of the Irrigation Department.

39 In the matter of **Deodutta Marathe (supra)** the controversy arose out of development of a plot of the Regional Transport Office, Mumbai, by a private Contractor. It is alleged that the petitioner/accused in that case had fabricated records and twisted facts for accepting proposal of the private Contractor. In the case in hand, there are no such allegations about fabrication of record and twisting of facts by the applicant/accused no.6. In the matter of **Deodutta Marathe (supra),** as seen from paragraph 37 of the judgment, the petition could not be entertained as disputed questions of facts were involved in it. Such is not the case in hand. Even by accepting all material in the charge-sheet, it cannot be said in the instant case that there are sufficient grounds for proceeding against the applicant/accused no.6.

40 The net result of foregoing discussion requires me to hold that the impugned order passed below Exhibit 19 in Special Case No.48 of 2016 rejecting the claim for discharge made by the applicant/ accused no.6 cannot be sustained. The same is accordingly quashed and set aside. Hence the order :

ORDER

i) The application is allowed.

ii) Rule is made absolute in terms of Prayer Clause (B).

iii) The application for discharge at Exhibit 19 made by the applicant/ accused no.6 in Special Case No.48 of 2016 for offences punishable under Sections 13(1)(c), 13(1)(d) read with 13(2) of the Prevention of Corruption Act, 1988 as well as under Sections 420, 465, 468, 471, 474, 120B, 109 and 201 of the Indian Penal Code is allowed and the applicant/accused no.6 is discharged from the said case.

(A. M. BADAR, J.)

Arti V. Khatate

Digitally signed by Arti V. Khatate
Date: 2020.05.19 17:49:51 +0530