

Bail Slip in CRL. A. NO. 651 OF 2003

The Appellant/Accused, namely G.Veeraraghavan S/o. Ganapathy Iyer 2nd Accused in SCC No.1/1999 on the file of the Special Court No.1/X Additional Court, Chennai was released on bail as per order dated 17.04.2003 in Crl MP.NO.3644/03 IN CRL A.NO.651/2003 on the file of this Hon'ble court.

Bail Slip in CRL. A. NO. 644 OF 2003

The Appellant/Accused, namely E.Hariharane S/o. Subramaniya Iyer 1st Accused in SCC No.1/1999 on the file of the Special Court No.1/X Additional Court, Chennai was released on bail as per order dated 16.04.2003 in Crl MP.NO.3588/03 IN CRL A.NO.644/2003 on the file of this Hon'ble court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
24.01.2020	04.02.2020

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

CRL. A. NOS. 644 & 651 OF 2003

1. E.Hariharane, I.P.S. (Decd.)
(rep. By P-2)

2. Mary Priyadarshini Samuel

.. Appellant in Crl A 644/03

(P-2 impleaded as per order of
Court dt. 5/3/18 in Crl. M.P. 1849/18)

G.Veeraraghavan, I.P.S.

.. Appellant in CrlA 651/03

- Vs -

State of Tamil Nadu
rep. By Addl. Superintendent of Police
CB-CID, Head Quarters,
Chennai.

.. Respondents in both appeals

Criminal Appeals filed u/s 374 (2) of the Code of Criminal Procedure r/w Section 27 of the Prevention of Corruption Act, against the conviction and sentence dated 4.4.03 on the file of the Special Judge I -cum X Additional Judge, Chennai, made in C.C. No.1 of 1999.

For Appellants : Mr. K.S.Dinakaran, SC, for
Mr. S.Karthikeyan in CA 644/03
Mr. V.Gopinath, SC, for
M/s. Geetha Asokan in CA 651/03

For Respondent : Mr. C.Iyyapparaj, APP

COMMON JUDGMENT

One of the oldest case on the file of this Court on the criminal side, which has been confined within the four walls, serving its life imprisonment and beyond, is being released from incarceration by this common judgment.

2. The appellants in these appeals, viz., A-1 and A-2, were officers of the Indian Police Service, who were, at the relevant points of time, functioning as Director of Fire Service and with regard to certain purchases made by them for the Fire & Rescue Services Department during their respective tenures, initially DVAC probe was initiated against them and, thereafter, CB-CID probe was initiated against them culminating in trial against those persons under the Prevention of Corruption Act and other offences under the Indian Penal Code.

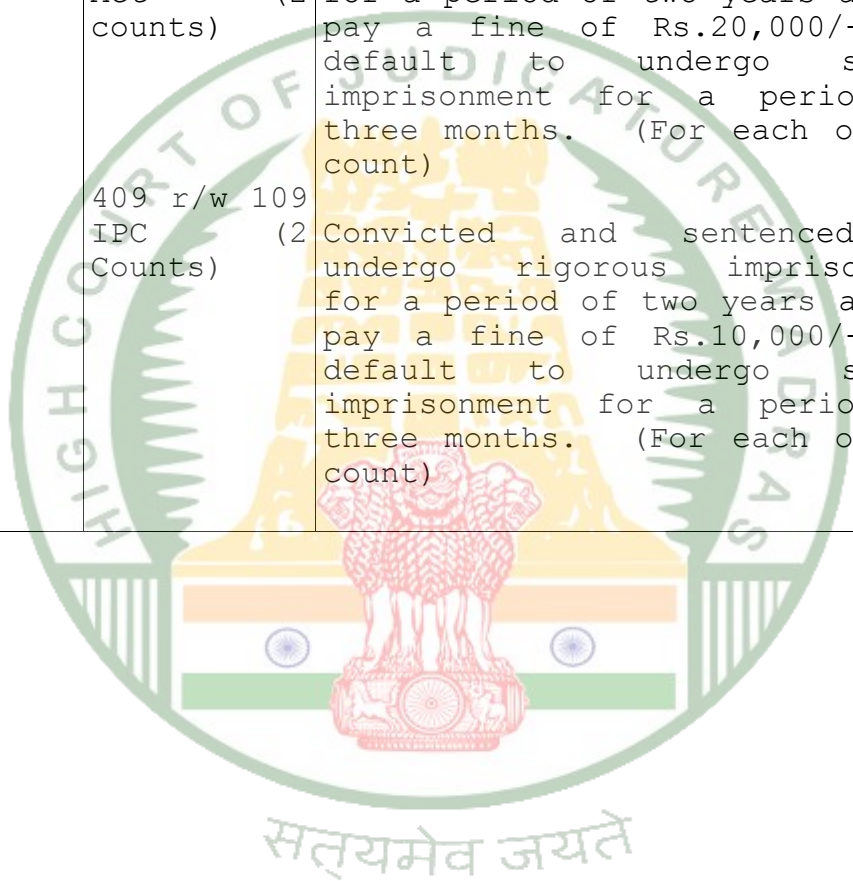
3. Corruption and Bribery, an evil engulfing the society, which needs to be curbed with iron hands and eradicated by weeding out its roots, has fructified in the passage of the Prevention of Corruption Act in the year 1947 and over the passage of time, has seen amendments to it in the year 1952 and 1964 so as to widen its scope and enhancing the penalties for the offences so as to strengthen the provisions by addressing the inadequacy and to deal with corruption more effectively. It underwent an amendment in the year 1988, in and by which punishment for certain offences stood enhanced. Finally, in the year 2013, the Act was amended vide the Amending Act, viz., The Lokpal and Lokayuktas Act, 2013.

4. In the above backdrop of the historical intent of the Parliament in enacting the said legislation, the present appeals are before this Court, filed by the appellants herein, who were arrayed as A-1 and A-2, along with two

other accused, viz., A-3 and A-4, against the conviction and sentence recorded by the trial court vide its order dated 4.4.03, made in C.C. No.1 of 1999. In the said case, the appellants herein, along with the other accused, viz., A-3 and A-4, were charged under various provisions of the Prevention of Corruption Act as also the Indian Penal Code and after trial, the trial court, while found A-1, A-2 and A-3 guilty of the following charges and, accordingly convicted and sentenced them as under, however, found A-4 not guilty of any of the charges framed and, accordingly, acquitted him :-

Accused	Section	Sentence
A-1	120-B IPC, 13 (2) r/w 13 (1) (C) of PC Act	Convicted and sentenced to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.20,000/-, in default to undergo simple imprisonment for a period of three months.
	13 (2) r/w 13 (1) (d) (ii) of PC Act	Convicted and sentenced to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.20,000/-, in default to undergo simple imprisonment for a period of three months.
	409 r/w 109 IPC	Convicted and sentenced to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.10,000/-, in default to undergo simple imprisonment for a period of three months.

A-2	120-B IPC, 13 (2) r/w 13 (1) (C) of PC Act (2 counts)	Convicted and sentenced to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.20,000/-, in default to undergo simple imprisonment for a period of three months. (For each of the count)
	13 (2) r/w 13 (1) (d) (ii) of PC Act (2 counts)	Convicted and sentenced to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.20,000/-, in default to undergo simple imprisonment for a period of three months. (For each of the count)
	409 r/w 109 IPC (2 Counts)	Convicted and sentenced to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.10,000/-, in default to undergo simple imprisonment for a period of three months. (For each of the count)



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A-3	120-B IPC, 13 (2) r/w 13 (1) (C) of PC Act (3 counts)	Convicted and sentenced to undergo rigorous imprisonment for a period of four years and to pay a fine of Rs.10,000/-, in default to undergo simple imprisonment for a period of three months. (For each of the count)
	13 (2) r/w 13 (1) (d) (ii) of PC Act (3 counts)	Convicted and sentenced to undergo rigorous imprisonment for a period of four years and to pay a fine of Rs.10,000/-, in default to undergo simple imprisonment for a period of three months. (For each of the count)
	409 r/w 109 IPC (3 Counts)	Convicted and sentenced to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.10,000/-, in default to undergo simple imprisonment for a period of three months. (For each of the count)

5. The sentences were directed to run concurrently and set off, as provided for u/s 428 Cr.P.C. was also ordered. Aggrieved by the said conviction and sentence, the present appeals have been preferred by the appellants herein, who are A-1 and A-2 in the said trial, questioning the sustainability of the said conviction and sentence. The appeal in CrI. A. No.603/03, preferred by A-3 in the above case before the trial court was dismissed as having abated vide order dated 14.3.18. For the sake of convenience, the appellants herein and the other accused will be referred to as A-1 to A-4 as arrayed before the trial court.

6. The case of the prosecution is that between May, 1989 and July, 1992, a conspiracy was hatched between A-1 to A-3 for the purchase of 50 Bachert pumps, construction of emergency rescue tender and purchase of 60 high capacity portable pumps and in furtherance of the said conspiracy, tender was floated and finalised leading to the award of contract to A-3, in breach of not only the tender conditions, but also the giving a go-by to the specifications as mandated under the IS and BIS specifications, thereby facilitating in the gaining of pecuniary advantage to A-3 by A-1 and A-2 and, thereby, A-1 and A-2 have wilfully violated the provisions of the Financial Code to the detriment of the exchequer.

7. It is to be pointed out even at the very outset that three tenders were floated, the first and second tender by A-1 and the third tender by A-2 and that the first tender was approved by A-1 while the 2nd and 3rd tenders were approved by A-2.

8. The prosecution case unfolds through the complaint of P.W.28, the then Secretary to Government, Home Department (SC) on 16.9.96 to the respondent, which was registered in Crime No.34 of 1996 for the offences u/s 120 (B) r/w 109, r/w 409 and 409 IPC and Section 13 (2) r/w 13 (1) (c) and (d) of the Prevention of Corruption Act initially against the appellants herein as well as against six other persons, but who are arrayed as witnesses in the present case. However, on completion of investigation, final report was laid only as against the appellants herein and two other accused, who were arrayed as A-3 and A-4, dropping the other persons, who were shown in the first information report.

9. After full fledged investigation, the charge sheet was laid against the appellants herein and the other accused, and the trial court, after furnishing the relied upon documents u/s 207 Cr.P.C. to the accused, framed, in all, 25 charges against the accused for the offences under various provisions of the Indian Penal Code as also under the Prevention of Corruption Act. When questioned, the accused pleaded not guilty.

10. To prove the case, the prosecution examined P.W.s 1 to 38 and marked Exs.P-1 to P-281. When the accused were questioned u/s 313 Cr.P.C. about the incriminating circumstances appearing against them, they denied the same as false. On the side of the accused, though no oral evidence was adduced, Exs.D-1 to D-7 were marked. The Court, of its motion, marked Exs.C-1 to C-4 as Court exhibits. The trial court, after hearing either side and after considering the materials, both oral and documentary, on record, convicted and sentenced A-1 to A-3 as noted above, while acquitting A-4. Aggrieved by the said conviction and sentence, the appellants herein, who were A-1 and A-2 before the trial court, preferred the present appeals.

11. Mr. K.S.Dinakaran, learned senior counsel, appearing on behalf of the appellant in Crl. A. No.644/03, who is arrayed as A-1 before the trial court, at the outset, submitted that the judgment passed by the trial court not only suffers from the vice of perversity and illegality, but also suffers from total non-application of mind to the materials available on record. It is the submission of the learned senior counsel that the judgment of the trial court is ridden with holes everywhere and not in a particular phase, but in its entirety it bristles with very many infirmities and omissions.

12. It is the submission of the learned senior counsel appearing for A-1 submitted that the criminal machinery, though is projected to be set in motion by way of the letter, Ex.P-222, written by P.W.28 to the Director General of Police, based on which the FIR in connection with the said crime is alleged to be registered, however, the earlier probe conducted by the Directorate of Vigilance and Anti Corruption has not been taken into consideration and the necessity for the present probe by the respondent has not been highlighted. It is the submission of the learned senior counsel that the probe conducted by the DVAC as well as the respondent herein is one and the same and, therefore, without marking the report of the DVAC probe before the Court below, the present probe by the respondent, which could only be stated to be a continuation of the above probe, is impermissible in law.

13. It is the submission of the learned senior counsel for A-1 that in the earliest statement recorded by the DVAC, the witnesses, who were initially shown as accused in the FIR, have not implicated the appellants herein, however, curiously, after the crime was registered, P.W.s 20 to 24, who were initially arrayed as accused in the FIR and who were members of the Technical Committee, which was constituted by the appellants, had recommended the purchase of the Berchat pumps, had gone diametrically opposite to their stance taken before the DVAC and have implicated the appellants herein. In such circumstances, the non-marking of the report of the DVAC coupled with P.W.s 20 to 24 being left out as accused only to be arrayed as witnesses is not only detrimental to the case of the prosecution but it strikes at the very root of the prosecution theory that the appellants herein had wilfully and deliberately violated the provisions of the Financial Code to the detriment of the exchequer, thereby, facilitating A-3 to gain pecuniary advantage. It is the further submission of the learned senior counsel for A-1 that inspite of the petition filed by the appellants u/s 91 Cr.P.C. calling upon the prosecution to provide the statements given by P.W.s 20 to 24 in the probe conducted by DVAC, however, till date, neither the statements have been provided to the appellants, nor were they placed before the trial court for consideration.

14. It is the further submission of the learned senior counsel for A-1 that applications filed by the appellants praying for provision of a copy of the statement of the witnesses recorded by the DVAC and the report filed by the DVAC were dismissed by the trial court. However, the report was the basis of the investigation by the CB-CID and without the appellants herein having an opportunity of perusing the reports, it would be nothing but travesty of justice and against the principles of natural justice to reject the appellants of their rights guaranteed under the Constitution.

15. It is the further submission of the learned senior counsel that though P.W.s 20 to 24 were initially arrayed as accused, without grant of pardon as per the provisions of the Code of Criminal Procedure, statements of P.W.s 20 to 24 have been recorded u/s 164 Cr.P.C., which statements are unsustainable in law.

16. It is the further contention of the learned senior counsel for A-1 that though it is the case of the prosecution, which culminated in a charge, that the specifications as mandated under the BIS Notification has not been followed, however, the BIS Notification was issued only on 4.1.90, but the tender was floated during May, 1989 and the same was finalised in September/October, 1989. In the absence of any notification prescribing any particular specification on the date of finalising and awarding the tender, the question of non-following of the specification as prescribed in the notification is per se incorrect and is legally unsustainable.

17. It is the further contention of the learned senior counsel for A-1 that every year, the Accountant General of Tamil Nadu audits each of the department of the Government and in the same breath, the audit of the Fire Department had also taken place in the year 1990-1991 for the period ending 1989-1990 and in the audit report for the period 1990-1991, neither any adverse remarks have been noted by the audit department nor any violation either in the procedural formality or in award of tender has been noted. However, after a span of six years, a special audit was undertaken in the year 1997 after the registration of the case. There being no adverse remarks in the audit report for the period 1989-1990, the conduct of a special audit during the year 1997 without any fresh adverse material having come to light, the necessity for the order of a special audit itself raises a big query and puts a question mark on the sanctity of the said special audit.

18. It is the further contention of the learned senior counsel for A-1 that sanction of prosecution has been granted by P.W.s 30 and 31. P.W.30 had granted sanction for prosecution in respect of A-1, A-2 and A-4, while the Central Government has granted sanction for prosecution in respect of A-1 and A-2. Though it is the categorical deposition of P.W.s 30 and 31 in chief examination that they had applied their mind to the materials placed before them before according their sanction for prosecuting the accused, however, curiously, in cross examination, P.W.s 30 and 31 have admitted that they are not aware of the result of the probe done by the DVAC and P.W.31 had even gone to the extent of stating in cross examination as to whether he had at all perused the files pertaining to the probe conducted by the DVAC. It is therefore the submission of the learned senior counsel that in the absence of the DVAC report before the sanctioning authority, the sanction accorded by P.W.s 30 and 31 basing their sanction on the materials available on

record, is not only bad in law, but it reflects total non application of mind on the part of the sanctioning authority and the sanction granted cannot be said to be sustainable.

19. It is the further contention of the learned senior counsel for A-1 that based on the note prepared by Vivekanandan (since deceased), P.W.1 had prepared the note on which A-1 had passed the order to call for tenders. Accordingly, tenders were called for and on the constitution of the Technical Committee comprising P.W.s 20 to 24, physical demonstration of the equipments by the tenderers were evaluated by the Technical Committee and reports were submitted with regard to each and every equipment and the Technical Committee finally opined that the equipment demonstrated by A-3 was recommended by the Technical Committee to the exclusion of other equipments for reasons stated in the report. The appellants had acted on the said recommendation and had placed the orders for the equipments from A-3. Though it is alleged that certain lapses were noted by the DVAC for which departmental action was recommended by the DVAC, however, curiously, keeping the said report in abeyance from 1991 till 1996, prosecution through CB-CID was launched in the year 1997 culminating in the trial thereafter. It is the contention of the learned senior counsel that though P.W.s 20 to 24 had given their statements before the DVAC, however, they have not implicated A-1 and A-2 before DVAC. However, after the respondent taking up investigation after a lapse of 6 years, P.W.s 20 to 24 have pointed finger on A-1 and A-2. No new material having been unearthed, which formed the basis of the investigation by the respondent, leaving P.W.s 20 to 24 from the ambit of probe and making them prosecution witnesses, though the basis of the order of the appellants was the report submitted by P.W.s 20 to 24, who were members of the Technical Committee, is nothing but a veiled attempt by the prosecution to rope in the appellants and fasten them with culpability to the exclusion of P.W.s 20 to 24 and, therefore, the present action of the respondent is unsustainable in law.

20. It is the further contention of the learned senior counsel for A-1 that though the prosecution has alleged that the earnest money deposit and security deposit were reduced by A-1, and the said act of A-1 had caused loss to the exchequer, however, the prosecution has not quantified the pecuniary loss caused by the said act of the respondent. It is contended by the learned senior counsel for A-1 that the allegation relating to pecuniary loss is only a hypothetical one and not based on any materials. It is further contended by the learned senior counsel for A-1 that the Tamil Nadu Financial Code as well as the Tamil Nadu Fire Service Manual empowers the competent authority to waive the security deposit and earnest money deposit. Such being the case, it is the stand of A-1 that A-1 is empowered to lower the security deposit and earnest money deposit and such act cannot be said to be illegal and arbitrary. Further, it is contended by the learned senior counsel for A-1

that A-1 has not totally waived off the security deposit to be deposited by A-3, but has waived it only to such an extent that instead of paying the security deposit for all the 60 pumps for which order has been placed, A-3 was permitted to deposit the security deposit only insofar as the number of pumps supplied by A-3 every month. Therefore, theoretically as well as practically, there is no loss to the exchequer. Further, the security deposit, paid by A-3 has to be returned back to A-3 on his fulfilling the monthly supply of pumps and, therefore, it cannot be said to be a loss to the exchequer. It is the further contention of the learned senior counsel for A-1 that the Tamil Nadu Financial Code empowers A-1 to waive/reduce the earnest money deposit. In this regard, learned senior counsel for A-1 drew the attention of this Court to the deposition of P.W.38 in cross, wherein, P.W.38 has categorically deposed that Instruction 17 (a) of Rule 3 of Article 125 of the Financial Code prescribes for earnest money deposit and that the same can be dispensed with for reputed firms. It is the further deposition of P.W.38 in cross that Article 129 gives discretion to the Tendering Officer to waive the security deposit in case of firms of established reputation.

21. It is the contention of the learned senior counsel for A-1 that it is not the case of the respondent that A-3 firm is not an established or a reputed firm. In fact, it is the deposition of P.W.s 20 to 24, who were members of the Technical Committee, that the pumps purchased by A-1 in the year 1989 are still in use, i.e., the year in which they are deposing, i.e., 1999, which clearly means that the pumps have been in use for over a decade. That being the case, the allegation that the pumps purchased by A-1 in violation of the BIS and IS standards/specification and against the Financial Code and Fire Service Manual is devoid of merits. It is the further submission of the learned senior counsel that the Financial Code, being only administrative in nature and not a statutory prescription, any deviation cannot be said to be illegal and impermissible.

22. Learned senior counsel for A-1 further contended that the earnest money deposit as well as the security deposit are to be paid in the name of the Government/Department of the Government and not in any individual name. It is further submitted by the learned senior counsel for A-1 that no monetary transaction has been made in the name of A-1 and that there is no allegation to the said effect. Further, the Tamil Nadu Financial Code as well as the Tamil Nadu Fire Service Manual empowers the competent authority to exercise his discretion in the matter of earnest money deposit and security deposit and that the deposit made by the successful bidder, required to be paid on the successful completion of the contract, the allegation of the respondent that wrongful loss has been caused by the act of A-1 is too far fetched and is illusory and, therefore, the said allegation lacks substance.

23. Learned senior counsel for A-1 further submitted that the Tamil Nadu Financial Code empowers the competent authority to make payment of the cost of equipments in advance and any instructions issued in this regard is only directory and not mandatory. That being the case, the appellants, being the head of the Fire Services Department, the equipment in the said department is to be kept in readiness as the services of the fire services is required at a moment's notice, in their wisdom, had thought it fit to approve the recommendation of the Technical Committee for purchasing the pumps and the DVAC probe not having revealed any loss to the Government, in the absence of any new material, the respondent having held that there is a loss to the tune of Rs.88,66,140/- without there being any subjective material available on record to validate the said loss, the allegation as made in Ex.P-222, by P.W.28, is not sustainable and is contrary to records. Attention of this Court was drawn by the learned senior counsel for A-1 to the deposition of P.W.37, the person attached with the AG audit, who had performed Special Audit in the year 1997, wherein, P.W.37 had deposed that there is no loss caused to the Government. It is therefore the submission of the learned senior counsel that there being no loss caused to the Government, as is evident from the deposition of P.W.37, the allegation that there is a loss to the exchequer to the tune of Rs.88,66,140/- is without any basis and lacks merit.

24. Learned senior counsel for A-1 further contended that the allegation of conspiracy, alleged by the prosecution has no legs to stand. The office of the Director of Fire & Rescue Services was under the occupation of A-1 from the year 1988 till the end of 1989 and that on A-1 being relieved from the said post, A-2 took charge of the post held by A-1. For a charge u/s 120 (B) IPC to be made out, the very essential ingredient is that there should be meeting of minds between the conspirators. In the case on hand, on A-1 being relieved from the post, A-2 took charge of the said post. There was no opportunity for A-1 and A-2 to meet each other. Further, when A-1 was holding the post and had floated the two tenders, of which one was finalised by him, the incoming incumbent, viz., A-2, had merely carried on the official duties of the office of the Director of Fire and Rescue Services and had finalised the tender floated by A-1. The floating of tender by A-1 was in the course of his routine duties as the head of the department and the act of A-2 in finalising the tender floated by A-1 was also the mere discharge of official duty by A-2 in the capacity of Director/Head of the Department. Further, all the finalisation were carried out based on the recommendations of the Technical Committee and, therefore, imputing allegations of conspiracy without the basic ingredient of Section 120 (B) not being fulfilled, clearly shows the nebulous nature of the prosecution version, which is nothing but an attempt to harass the appellants for their rightful and honest discharge of their function.

25. Learned senior counsel for A-1 drew the attention of this Court to Ex.D-6, the judgment rendered in another trial of similar nature, wherein the appellant herein, who was accused of a similar crime was acquitted. The present case on hand, standing on similar footing and similar allegations having been raised, the trial court has not taken into consideration the said judgment to arrive at a subjective finding exonerating A-1 from the prosecution, but has, on mere surmises and conjectures and in total disregard to the materials available on record, has rendered an erroneous finding, which deserves interference.

26. In fine, it is the submission of the learned senior counsel for A-1 that not only the ingredients of Section 120 (B) IPC not being fulfilled, but the conspiracy also not having been proved and that there being no actual loss caused to the exchequer, nor A-1 having been alleged to have obtained any pecuniary advantage and the further fact that on the date of calling for tender and finalising the same, BIS specifications not having been notified and that A-1 having finalised the equipments on the recommendation made by the Technical Committee consisting of P.W.s 20 to 24 and that the previous statements of the witnesses, viz., P.w.s 20 to 24 recorded during the investigation by DVAC not placed either before the court nor copy of the said statements having been given to the accused and the statements of P.W.s 20 to 24 recorded by the respondent being in total contradiction to their earlier statement of the year 1991 and which imports a new version in the probe conducted in the year 1996-1997 and that there being no adverse remarks by the AG audit for the year 1990-1991 with regard to the audit of the year 1989-1990 and the special audit conducted during 1997, though without any new material available on record, but which also clearly speaks that no loss has been caused to the Government and the further fact that the pumps, which were admittedly purchased by A-1 during the year 1989, even as per the deposition of P.W.s 20 to 24, working even as on the date of the deposition of P.W.s 20 to 24 and the sanction accorded to prosecute A-1 not in consonance with the well established principles and clearly showcases total non-application of mind on the part of the sanctioning authority, it would be less said the better that the conviction and sentence recorded by the trial not only bristles with infirmities and inconsistencies, but it is also against the well established precedents relating to prosecution under the Prevention of Corruption Act and in the absence of cogent, convincing and reasonable evidence, both oral and documentary, the judgment of the trial court deserves to be set aside.

27. Learned senior counsel appearing for A-1 placed reliance on very many judgments in support of his contentions and this Court would refer to the case laws on the issues raised in these appeals at the appropriate place.

28. Placing the arguments on behalf of the appellant in C.A. No.651/03, who is arrayed as A-2, Mr.V.Gopinath, learned senior counsel, while reiterated the contention advanced on behalf of A-1 that the loss on purchase has not been quantified, further submitted that there were three tenders, of which two tenders were floated by A-1 the first of which was confirmed by A-1 relating to purchase of Bechart pumps and the second of it was confirmed by A-2 relating to purchase of Emergency Rescue Tender and the third tender was floated by A-2 for the purchase of portable pumps for fire fighting, which was confirmed by A-2. Therefore, it is clear from the above that the routine works of the office of Director, which was discharged by A-1 till the date of his relief from the said post was discharged by A-2 on assuming the office of Director. It is the further submission of the learned senior counsel for A-2 that on A-1 being relieved from the post of Director, A-2 assumed charge of office and there was no meeting between A-1 and A-2 till the said point of time. Therefore, the charge of conspiracy, alleged between A-1 and A-2 is illusory and merely a tool to club the two transactions into one. It is the further submission of the learned senior counsel for A-2 that the prosecution having not proved the meeting of minds between A-1 and A-2, which is the essential ingredient to attract a charge u/s 120 (B) IPC, clubbing of two different sets of transaction and prosecuting both A-1 and A-2 by conducting a joint trial is impermissible in law and it amounts to misjoinder of parties.

29. Learned senior counsel appearing for A-2 further contended that the prosecution has made an allegation against A-2 relating to non-insisting of payment of security deposit. In this regard, reliance is placed on Rule 129 (b) of the Tamil Nadu Financial Code which permits the head of the department to dispense with the collection of deposit/waiver of security deposit. It is the further contention of the learned senior counsel for A-2 that G.O. Ms. No.3064 dated 7.12.1982 vests power on the head of the department to grant advance. It is therefore the submission of the learned senior counsel for A-2 that when the Financial Code empowers the competent authority to waive/dispense with the security deposit and also for granting advance, and A-2 has acted within the four boundaries of the Financial Code, the allegation as made by the prosecution cannot be sustained.

30. While reiterating the submissions as advanced by the learned senior counsel for A-1 on the issue of sanction of prosecution granted by P.W.s 30 and 31, learned senior counsel appearing for A-2 drew the attention of this Court to the deposition of P.W.31 in cross examination where P.W.31 has deposed that he does not remember whether the tender files relating to purchase of high capacity portable pumps and fabrication of emergency rescue tender were sent along with the proposal and has further deposed that he is also not aware of the technical details regarding the construction of emergency

fire rescue tender. This clearly shows non-application of mind on the part of P.W.31.

31. It is contended by the learned senior counsel for A-2 that there is no mandate that manufacturers alone can participate and bid. Further, there is no bar in the tender forms prescribing that the contracts should not be awarded to contractors, who are agents.

32. It is the further submission of the learned senior counsel for A-2 that though one of the standards, viz., IS 12727, alleged to have been not followed by A-2 while procuring high capacity portable pumps, attention of this Court was drawn to the deposition of P.W.25 in cross examination, where it has been categorically deposed that even as on the date when deposition is given in Court, i.e., on 21.11.2000, to the knowledge of P.W.25, who is an expert, there is no manufacturer to possess IS 12717. It is the further deposition of P.W.25 in cross examination that IS 12717/89 came into force only in December, 1989. Therefore, it is contended by the learned senior counsel that the particular specification having come into force only during December, 1989, well after the finalisation of the tender and that the said specification is not possessed of by any manufacturer till the date of deposition, the allegation made by the prosecution is without any basis and is only an attempt to wreak vengeance against the appellants.

33. It is the further contention of the learned senior counsel for A-2 that ISI specification did not lay down anything on the weight of the portable pumps. That being the case, the allegation raised by the prosecution that the weight of the portable high capacity pumps were over and above the weight mandated under the ISI specification is against the materials available on record.

34. It is the further submission of the learned senior counsel for A-2 that the chassis for the emergency rescue tender was procured from Ashok Leyland and though the transport corporations were addressed for the fabrication of the body, however, both Pandian Transport Corporation as well as Cheran Transport Corporation pleaded their inability to build the body, as it was a special fabrication and the communication, Ex.P-205, addressed to Pallavan Transport Corporation did not yield any response inspite of reminders and, therefore, left with no other alternative, the department being one, which is to be in readiness and to serve the needs at all times round the clock, the appellants thought it fit to build the body through an external agency. Such being the case, the allegation of the prosecution that the services of the transport corporations for fabrication of the body was not utilised and, thereby, loss has been caused to the exchequer cannot be sustained.

35. In fine, learned senior counsel appearing for A-2 summed up his contentions stating that the criminal conspiracy as alleged by the prosecution having not been proved, that there was no meeting of mind between A-1 and A-2 and further the fact that A-2 had occupied the post after A-1 was relieved from the said post and was only discharging the administrative functions, that too within the framework of law and further the allegations with regard to waiver of security deposit and earnest money deposit and payment of advance amount to A-3 all being within the powers of the head of the department/competent authority as envisaged under the Financial Code and that the of pumps being in consonance with the recommendations of the Technical Committee and also adhering to the specifications mandated by BIS and IS as available on the date of purchase of the pumps, and further none of the transport corporations have come forward to fabricate the emergency rescue tender, the allegations as raised by the prosecution against A-2 is neither supported by oral nor documentary evidence and, therefore, the prosecution launched after the probe by the DVAC without any new material being available on record, only goes to show that the prosecution is only to harass the appellants and not on any founded materials and the trial court, without considering all the materials in proper perspective, has convicted and sentenced the appellants, which requires interference at the hands of this Court.

36. Countering the submissions advanced by the learned senior counsel for the appellants, Mr. Iyyapparaj, learned Addl. Public Prosecutor, appearing for the respondent submitted that the probe conducted by DVAC itself shows that there were certain lapses in the award of tender and had even recommended departmental action against certain persons. However, the Government deliberated on the said report and, thereafter, took a decision to probe the issue more deeper than was actually probed by the DVAC, the outcome of which is the present prosecution. Therefore, it is submitted that the contention of the appellants that the probe by the respondent is not on the basis of any new material, as DVAC has already probed the matter in depth is unacceptable for the simple reason that the present probe is a continuous process, a process following the DVAC probe, which has made some recommendations for action, which led the Government to reignite the probe after deliberating on the report.

37. It is the contention of the learned Addl. Public Prosecutor that the recommendation of the DVAC for departmental action cannot in any way preclude the Government from proceeding further with the erring officials by initiating criminal prosecution.

38. It is submitted by the learned Addl. Public Prosecutor that after scrutinising the report of the DVAC and deliberating on the same, it was assessed by the Government that there were

many lapses in the tender process from the invitation of tenders, failure of the successful tenderer to submit NSIC certificate, the act of A-1 and A-2 to accept a reduced security deposit, paying advance amount to the successful tenderer and non following of specifications as contemplated under the BIS and IS standards while finalizing a product, which did not meet with the requisite specifications and also accepting a tender, which is on the higher side, while rejecting the lowest quote all unerringly pointed that all is not well with the tender process and warranted a detailed probe so as to not only fix the culpability, but also assess the quantitative loss suffered by the exchequer, which led to the probe by the respondent leading to the present prosecution. Therefore, it cannot be just brushed aside that there were mere procedural and administrative lapses and that there was no financial loss to exchequer. In fact, the special audit was conducted, which has pin-pointed the lapses in the tender process as spoken to by P.W.37 and in fact, the Court, of its own volition, had marked the Special Audit Report as Ex.C-4, which goes to show the importance involved in the Court marking the said document as a court exhibit.

39. It is the further submission of the learned Addl Public Prosecutor that the deposition of P.W.21 clearly reveal that the members of the Technical Committee were forced by the appellants to approve the pumps of A-3, to the detriment of the other good quality pumps, which were placed for test by other tenderers. P.W.21 has categorically deposed that A-1 had threatened him with dire consequences and had even prevailed upon him to recommend the pumps supplied by A-3. Therefore, the above evidence conclusively show that the report submitted by the Technical Committee was only at the behest of the appellants and, therefore, the stand of the appellants that they had approved the product of A-3 only on the basis of the guidance/recommendation made by the Technical Committee is an unacceptable defence.

40. It is further submitted by the learned Addl. Public Prosecutor that P.W.22, one of the members of the Technical Committee has given a dissenting report and recommended a different make of pump. However, the appellants, brushing aside the said report of P.W.22 and without assigning any reasonwhatsoever, have decided to purchase the pumps from A-3, which shows mala fide intent, more so, when the amount quoted for the said pumps was lesser compared to the amount quoted by A-3. Thereby, it is clearly evident that the appellants having approved a pump, which is higher in value than the lower value pump, which is said to be equivalent to the pump supplied by A-3, they have clearly caused a loss to the exchequer and, thereby, enabled A-3 to gain a pecuniary advantage and, therefore, the prosecution initiated against the appellants cannot be said to be unsustainable.

41. It is the further submission of the learned Addl. Public Prosecutor that though the Government Orders clearly mandate that fabrication of body for the emergency rescue tender should be done by the Transport Department, however, without adhering to the said Government Order, fabrication has been done with A-3, which is impermissible and, thereby, substantial loss has been caused to the exchequer.

42. It is the further submission of the learned Addl. Public Prosecutor that the appellants, without adhering to the BIS and IS standard specifications have approved the pumps of A-3. Adherence to the standard specification is a necessary concomitant for approving a proper tender, that too in a department, which is required to be in a state of alert as well as maintain state of the art equipments and non-following the same would not only be a violation of procedural formalities but also would be detrimental to the welfare of the society at large. The prosecution was launched not only for the procedural infraction, but also for putting the society at peril and also causing loss to the exchequer by buying sub-standard equipments not meeting the specification.

43. It is further contended by the learned Addl. Public Prosecutor that since the calling for tenders culminating in its approval revolves around the two appellants, who have headed the Fire Services Department, but for their proximity and hatching the conspiracy, the tenders could not have been taken to its logical conclusion culminating in the award of the tender to A-3. Though it is contended that on the demitting of office by A-1, A-2 took charge and, therefore, there could have been no meeting of minds between A-1 and A-2 to attract the ingredients necessary for an offence u/s 120 (B) IPC, it is submitted that both the appellants, being officers of the higher echelons of the government, definitely it cannot be stated that they did not have access to each other and would definitely have been known to each other and, therefore, the tenders called for by A-1 were duly executed by A-2 knowing fully well that there were not only procedural violations, but also the equipments did not meet the standards and, therefore, it cannot be contended that meeting of minds has not been proved by the prosecution. It is submitted that the prosecution need not prove meeting of minds through oral or documentary evidence, but an inference could be very well drawn from the materials available on record, which the prosecution has proven clearly

44. In fine, it is the submission of the learned Addl. Public Prosecutor that the prosecution had produced very many documentary materials, which have been spoken to by the witnesses in detail, establishing the nexus of the appellants and the conspiracy hatched between them with a clear intent not only to cause financial loss to the exchequer, but also to enable A-3 to obtain pecuniary advantage and, therefore, the trial court, on thorough analysis of the materials, both oral

and documentary, has come to the inexplicable conclusion that the prosecution has proved the guilt of the accused beyond reasonable doubt and had convicted and sentenced the accused as above and, therefore, no interference is warranted with the well considered findings recorded by the court below.

45. This Court paid its unceremonious attention to the erudite arguments advanced by the respective learned senior counsel appearing for the appellants and the vehement contentions of learned Addl. Public Prosecutor, who countered those submissions to substantiate the prosecution's case and also perused the material documents available on record and the decisions to which this Court's attention was drawn.

46. The following issues arise for consideration in these appeals :-

i) Whether the approval for the purchase of Bechart Pumps, Emergency Rescue Tender and High Capacity Portable Pumps have been granted by the appellants on the recommendations made by the Technical Committee and whether the recommendation was made by the Technical Committee approving the equipments of A-3 to have satisfied the tender requirements by rejecting the other pumps, which did not satisfy the tender requirements.

ii) Whether BIS standard was in existence on the date of purchase of the equipments by the appellants and if so, whether they have flouted the specification and purchased equipments not adhering to the requisite specifications.

iii) Whether the fabrication of the body of the Emergency Rescue Tender from an outside agency without entrusting it to the Transport Corporation is sustainable.

iv) Whether the waiver of Security Deposit/Reduction in EMD by the appellants is permissible.

v) What is the relative value that could be attached to the Special Audit Report vis-a-vis the Annual Audit Report of the year 1990-1991 and whether there is any financial loss to the exchequer, much less pecuniary advantage to the appellants.

vi) Whether the prosecution has been initiated by the respondent based on any new material not reflected in the DVAC Report and whether non-placement of DVAC report before the trial court is fatal to the prosecution.

vii) Whether the sanction for prosecution of the appellants has been granted exercising due application of mind.

ISSUE NO.1 :

Whether the approval for the purchase of Bechart Pumps, Emergency Rescue Tender and High Capacity Portable Pumps have been granted by the appellants on the recommendation made by the Technical Committee and whether the recommendation was made by the Technical Committee approving the equipments of A-3 to have satisfied the tender requirements by rejecting the other pumps, which did not satisfy the tender requirements.

47. It is not in dispute that a Technical Committee was constituted to assess the suitability of the equipments and submit its report and that P.W.s 20 to 24 are the members of the Technical Committee, who were in the rank of Deputy Directors and DFO's and ADFO's. The Technical Committee had assessed the pumps of four concerns, including the concern of A-3. The test reports were submitted pertaining to the pumps tested and their suitability and fitness. Exs.P-82 to 86 are the pump test report with regard to the pumps showcased by M/s.Kirloskar Brothers, A-3, M/s.Kooverji Devshi and M/s.United Manufacturing Co. Based on the Pump test report, reports were submitted by the Technical Committee in Exs.P-88 to P-93. A perusal of the pump test reports along with the reports submitted by the Technical Committee reveal that while the pump demonstrated by A-3 satisfied the tender specification, however, the pumps of the other bidders, did not satisfy the tender specifications and meet the requirements. The pump test reports as well as the report of the Technical Committee is exhaustive and self-explanatory and this Court is not inclined to dwell more deep into the same, but only to say that the pumps of the various bidders were tested and reports were given assessing their suitability and fitness.

48. One other piece of document which is of relevance is Exs.P-98 and P-99. Ex.P-98 is memo from the Director to the Members of the Technical Committee relating to the purchase of 15 Nos. Bachert Portable Pumps from A-3 company and requesting the Technical Committee to test check one or two of the above pumps and report about their fitness condition and whether they are supplied as per the specification.

49. To the abovesaid communication, Ex.P-98, the Technical Committee, after test checking the pumps have addressed the communication, Ex.P-99 to the Director of Fire Service in which it is stated as under :-

"The Committee found the pumps are in fit condition and as per the specification. The committee also allowed the pumps to run for four hours and found them to be performing well."

50. Therefore, it is clear from the above communication that the pumps supplied by A-3 company are found fit and are as per specification. Therefore, the stand of the respondent that the pumps did not meet the requisite specification is contrary to the materials available on record.

51. However, it is the contention of the learned Addl. Public Prosecutor that the evidence of the witnesses speak of coercion and stress on the part of the appellants to recommend the pumps supplied by A-3 company, which led the members of the Technical Committee to submit such a report, as above. It is the further contention of the learned Addl. Public Prosecutor that one of the members of the Technical Committee, viz., P.W.22 did not recommend the pump of A-3, but had in fact, recommended some other pump, which has not been taken into consideration.

52. Even at the very outset, it is to be stated that the said contention is liable to be rejected for more than one reason. The Technical Committee was constituted to evaluate the pumps and submit their report and, accordingly, the pumps were evaluated and reports have been submitted. As stated above, a perusal of the test reports as also the reports of the Technical Committee clearly show that the pumps of A-3 company alone satisfied the tender requirement and was according to specifications, whereas the pumps of the other bidders did not meet the specifications. The said recommendation of the Technical Committee finds corroboration in the evidence of P.W.s 20, 21, 23 and 24. Though, as contended by the learned Addl. Public Prosecutor, P.W.22 had given a dissenting view and had recommended some other pump, but, as pointed out above, the test reports of the pump show that only the pumps of A-3 company satisfied the specifications and passed the fitness test and none of the other pumps of the other bidders were even near the specification, leave alone satisfying the fitness test. Therefore, in such a scenario, it is not open to the respondent to claim that the pumps of A-3 did not meet the specification nor did they pass through the fitness test.

53. The above documents are coupled with the fact that the members of the Technical Committee, viz., P.W.s 20, 21, 23 and 24 have deposed in affirmation about the fitness of the pump supplied by A-3 company and the fulfillment of the specification by the same pumps. In cross examination, P.W.20 has deposed that he is not aware whether there is any ISI standard for portable pumps in the year 1989. P.W.20 has further deposed in cross that the recommendation of the Technical Committee is based on facts found out during the test of the pumps. It is the further deposition of P.W.20 in cross examination that imported pumps have been in usage in the Fire Service Department even before the purchase by the appellants. P.W.20 has further deposed in cross examination that he was initially shown as an accused and, thereafter, his statement was recorded u/s 164

Cr.P.C. and even at that time, he did not reveal this to the Magistrate, who recorded the statement. It is further the categorical deposition of P.W.20 that the pumps supplied by A-3 company are still in use even as on the date of his deposition, which effectively shows that the pumps purchased in the year 1989 are functioning for more than 10 years.

54. P.W.21 has almost deposed in identical terms as P.W.20 with regard to the pump test reports and the reports submitted by the Technical Committee. P.W.21, in chief examination has further deposed that even in the year 1989, he was trapped by the officials of DVAC and remanded to judicial custody on the influence of A-1, which shows that P.W.21 is biased and has an animosity towards A-1. It is the categorical deposition of P.W.21 that the pumps demonstrated by Kirloskar did not satisfy the specifications and that the pump did not work continuously for four hours, which is a mandatory specification. Similarly, with regard to Kooverji Devshi pumps and pumps showcased by the other manufacturers as well, the Technical Committee did not recommend the said pump as it failed to meet the specifications. Only the pumps showcased by A-3 company satisfied the requirements and, therefore, the said pump was recommended. P.W.21 has also categorically admitted that the Technical Committee was constituted by the appellants with the senior-most Deputy Directors in the Fire Service Department.

55. P.W.22 is one of the members of the Technical Committee, who had submitted a dissenting opinion, Ex.P-103, with regard to the pump to be purchased. P.W.22, in his dissenting opinion, which has been spoken to in his deposition, has stated that the pump demonstrated by A-3 company was a foreign make and, therefore, getting spares for the same would be difficult. P.W.22 has further stated that he had recommended the pump demonstrated by Kooverji Devshi. However, it is evident from the pump test reports as well as the reports given by the majority members of the Technical Committee that the pump demonstrated by Kooverji Devshi did not meet the specifications and, therefore, the said pump was not recommended. P.W.22 has further deposed that his act of giving a dissenting note incurred the wrath of A-1, who scolded him and he was charged under Rule 17 (b) of the Tamil Nadu Civil Service Conduct Rules.

56. The deposition of P.W.s 23 and 24, who were also members of the Technical Committee are almost on identical lines to that of P.W.s 20 to 22. It is also to be pointed out, as could be culled out from the said deposition, that against all the witnesses, viz., P.W.s 20 to 24, there were cases registered by the DVAC or the respondent at one time or other before this case and even in this case, as noted above, P.W.s 20 to 24 were initially cited as accused and, thereafter, at the time of filing of charge sheet, they were shown as witnesses. However, no pardon, as prescribed under the Code of Criminal Procedure has been granted to them. In this regard, one piece of

deposition of P.W.23 in cross examination is crucial. P.W.23 has stated that the respondent suggested P.W.23 to give a statement before the Magistrate and also told the Magistrate to whom P.W.23 is to give the said statement u/s 164 Cr.P.C.

57. P.W.14 is the Vice President of Kirloskar, who in his evidence has stated about the manufacturing activity carried on by them and what are the accessories and pumps manufactured by them. P.W.14, in cross examination has admitted that there was deviation in the specification with regard to the pumps demonstrated by their company. Similarly, the pumps demonstrated by the other bidders, even as per the Technical Committee report, was not in consonance with the specifications and, accordingly, they were rejected by the Technical Committee.

58. P.W.13 is the Regional Manager of Kirloskar, who has deposed the bid submitted by their company for the supply of high capacity portable pumps. In his deposition in cross, P.W.13 has admitted that some of the components of the pump, which was submitted for demonstration, were imported and that the entire pump was not imported. In fact, P.W.13 had deposed in cross examination that the engine of the pump was imported. P.W.13 has further deposed in cross examination that the pump demonstrated by their company failed in the endurance test.

59. Though it is the contention of the learned Addl. Public Prosecutor that there were veiled threats from the appellants to the Technical Committee to approve the pumps of A-3 company, for which there is deposition by P.W.s 20 to 24 to that effects, however, the same does not merit acceptance for two-fold reasons. Firstly, their statement before the DVAC had not implicated the appellants, but only after six years, when the respondent took up the investigation by arraying them as accused initially, and while interrogating them, certain statements were alleged to have been made by them, which necessitated them to be made as witnesses. As discussed above, the report of the DVAC not being part of the materials placed during trial, merely placing reliance on the present statement would be fallible and the presumption u/s 114-G of the Evidence Act has not been satisfied by the respondent for this Court to draw an inference that what is stated herein is what has been stated before the DVAC. Secondly, P.W.s 20 to 24 had axe to grind against the appellants, in that, at one time or the other, they were under the scanner of the DVAC during their tenure under the appellants and at times, they have been warned by the appellants with regard to the discharge of their duties. In fact, P.W.21 had been remanded to judicial custody by DVAC on the basis of the complaint given by A-1 and in that regard, definitely there would exist a bias on the part of P.W.21 towards A-1, which, in the considered opinion of this Court had transformed itself into the accused being made as witnesses against the appellants at a point of time too late.

60. The above evidence, both oral and documentary, not only covers the purchase of Bachert Pumps during the tenure of A-1, but it also pertains to the purchase of Emergency Rescue Tender and High Capacity Portable Pumps during the tenure of A-2. Insofar as the purchase of pumps during the tenure of both the appellants, the above evidence squarely covers both the tenures and the fixation of liability on the appellants alone, who are only approving authority based on the recommendation of the Technical Committee, of which P.W.s 20 to 24 are members, cannot be said to be in good taste, that too after a lapse of six years from the time investigation was made by DVAC.

61. On an overall analysis of the evidence of P.W.s 20 to 24, coupled with the evidence of P.W.s 13 and 14 and the documents available on record, viz., Exs.P-82 to P-86, the pump test reports and Exs.P-88 to P-93, the reports of the Technical Committee along with Ex.P-98 and P-99, the report pertaining to the working of the pumps supplied by A-3 goes to show that on the basis of the reports submitted by the experts along with the technical reports pertaining to the pumps concerning specification and satisfying the tender conditions, the appellants had approved the recommendation made by the Technical Committee for the purchase of pumps from A-3. Once this Court holds that the approval has been granted based on the recommendation of the Technical Committee and not by the appellants standing alone, leaving the members of the Technical Committee from the ambit of prosecution and launching the prosecution only as against the appellants and A-3 company cannot stand the test of judicial scrutiny. Once the prosecution has fallen back on the evidence of P.W.s 20 to 24, equally so, they have to accept the report of the Technical Committee, which has recommended the pumps and merely on the basis of oral statements, that too after a lapse of six years, in contra to their original statements, the prosecution cannot now beat hammer and tongs contending that it the appellants alone who are responsible for the purchase of the pumps, which did not satisfy the specifications and that the cost was also on the higher side, which is against the tender policy of the Government. Therefore, it cannot be contended that the approval granted by the appellants could be said to be a one man show, when in fact, the materials on record collectively show that it is only on the basis of the recommendation of the Technical Committee, the appellants have approved the purchase.

62. May be, the appellants, as the head of the department, may have used a bit harsher way to accomplish the task of purchase at an early date, however, what should be borne in mind is that the purchase is for a department, which is to be in readiness round the clock to tackle any emergent situation that may arise due to fires that cause not only damage to property but lead to loss of human lives. In such a situation, the appellants, stamping their administrative authority in a legal manner to get the work done at the earliest from the support

staff could in no way be said to be a one man show to purchase an equipment of their choice to the detriment of the finance of the exchequer.

ISSUE NO.2 :

Whether BIS standard was in existence on the date of purchase of the equipments by the appellants and if so, whether they have flouted the specification and purchased equipments not adhering to the requisite specifications.

63. It is the case of the prosecution that the specification as mandated under BIS and IS have not been followed and giving a go-by to the said specification, the pumps have been purchased and, therefore, it can not only be said to be a procedural irregularity, but it is more, in that it is only to aid the purchase of the pumps of A-3 company and, thereby, enabling A-3 to gain a pecuniary advantage.

64. On this allegation of the prosecution, it is the strenuous contention of the learned senior counsel for the appellants that as on the date of floating the tenders for the purchase of pumps, both Bachert pumps and High Capacity Portable Pumps, BIS specification was not in effect. It is the submission of the learned senior counsel for A-1 that while the tenders were floated and finalised by September/October, 1989, BIS standard was notified only on 4.1.90 and, therefore, the BIS standard not being in force on the date of purchase, the said purchase by not following the above BIS standard cannot be said to be an irregularity.

65. The main allegation as regards irregularity relates to the portability of the pumps. P.W.12, who is a member of the IS Standards committee, was examined to speak about portable pumps. P.W.12 in his deposition in cross examination has deposed that the main purpose of portable pumps is for bailing the water and throwing it out for fire fighting purpose. P.W.12 has further deposed that no standard has been specifically made for engines which provide motive power for driving the fire fighting pumps. P.W.12 has made a categorical deposition that he was not examined by the investigating agency with reference to the tender documents or annexures thereto.

66. P.W.25 is the Director of Bureau of Indian Standard, who was examined to speak about the necessity of BIS standard and the purpose of the same. It is the categorical admission of P.W.25 in cross examination that there is no weight requirement for specification relating to IS 12717/1989. It is the further deposition of P.W.25 in cross examination that till September, 1991, i.e., even a year and a half after the purchase of the pumps by the appellants, there was no manufacturer of high capacity pumps with IS 12717 certification. In fact, P.W.25 went one step further to depose that till the date of his

deposition, i.e., 21.11.2000, there is no manufacturer, who possesses IS 12717 specification. It is the further deposition of P.W.25 that IS 12717 specification came into existence only in December, 1989 and that he is not aware whether orders were placed for Bachert pumps six months prior to December, 1989.

67. It is to be pointed out here that the main thrust of the defence is that the BIS standard was not in existence on the date when the pump was purchased. Such being the case, there has been no effort on the part of the prosecuting agency to establish that BIS standard was in existence on the date of purchase. Ex.P-42 has been marked by the prosecution which speaks about the Indian Standard Specification for performance requirements for spark ignition engines for automotive purpose. However, with regard to BIS standard, no document as to its existence on the date when the purchase was made by the appellants have been placed before the court to hold its existence on the date to come to a conclusion that the appellants have violated the standards while procuring the pumps.

68. Similarly, on the other standard, which is pushed to the forefront in the present case is IS 12717/1989, as pointed out above, only in December, 1989, IS 12717 was specified and that P.W.25, as noted above has categorically deposed that till the date of his deposition in the year 2000, there is no manufacturer, who manufactures pumps to the specification of IS 12717. That being the case, there being no manufacturer, who satisfies the IS 12717 Standard and BIS certification not being in existence on the date when the pumps were purchased, the allegation against the appellants could only be termed to be a futile exercise.

69. Even otherwise, not purchasing the pumps of a particular standard would once again be termed to be a procedural irregularity and to bring such an irregularity within the ambit of the provisions of the Prevention of Corruption Act, no material whatsoever is placed before this Court. As already discussed above, there being no financial loss caused to the exchequer and the allegation relating to pecuniary advantage to A-3 not having been established, as the approval was made on the basis of the recommendation of the Technical Committee, it is to be held that the charges framed under the Prevention of Corruption Act does not survive.

ISSUE NO.3 :

Whether the fabrication of the body of the Emergency Rescue Tender from an outside agency without entrusting it to the Transport Corporation is sustainable.

70. It is the contention of the prosecution that fabrication of Emergency Rescue Tender is to be carried out only by the Transport Corporation as per the Government Orders and in

gross violation of the Government Orders, A-2 has given the work of fabrication to A-3 company and the same is a violation of the Government guidelines and further that advance amount having been paid, it is alleged that the same is against the Government Order and, therefore, the prosecution is justifiable.

71. True it is that advance amount was paid for the fabrication of Emergency Rescue Tender by A-3. Though it is the contention of the prosecution that the same is in violation of G.O. No.1124, Transport Department dated 15.10.85, equally it is submitted that the work had not been entrusted to the Transport Corporations, and without ascertaining about the feasibility of the Transport Corporation to fabricate the Emergency Rescue Tender, the fabrication work had been assigned to A-3.

72. In this regard, Ex.D-5 is the letter addressed by the Department of Fire Services to the Deputy Manager, Pallavan Transport Corporation, has been marked by the defence to substantiate that the procedural formality of requesting the Transport Corporation as to their feasibility to fabricate the Emergency Rescue Tender was made, however, as no reply was forthcoming, the services of the Emergency Rescue Tender, being an urgent necessity, left with no other alternative, A-2 had proceeded to hand over the fabrication to A-3.

73. It is not the case of the prosecution that as on the date of purchase of the Emergency Rescue Tender, the Transport Corporations within the State were fully capable of fabricating the body works to the drawings of the Fire Department. In fact, as could be seen from Ex.D-5, on the request of the Fire Department, no communication has emanated from the Transport Corporation with regard to its capability to fabricate. The prosecution has not placed any materials to substantiate that the Transport Corporation was capable of carrying out the fabrication. In fact, across the Bar, it was submitted that till the year 1999, none of the Transport Corporations were fabricating the body works for the Fire Services Department, which was special in nature and after 1999, some of the Transport Corporations are fabricating the body works. That being the admitted position on record and the stated position across the Bar, it cannot be said that in contravention of the Government Orders, fabrication was placed with A-3 and not with the Transport Corporations. May be, paying an advance to a third party, not a Government approved entity, may be termed a procedural violation, but by no stretch of imagination, the same could be said to be an act attracting the provisions of the Prevention of Corruption Act unless it is shown that A-2 or A-3 had gained pecuniary advantage, to which end, no evidence is available on record to come to the said conclusion.

74. Insofar as the procurement of hydraulic rescue tools, though it is the contention of the prosecution that the same has not been procured from Vijaya Corporation, as deposed by P.W.17,

however, P.W.38, the investigating officer, in his cross examination, has deposed that during investigation it has come to light that Vijaya Fire Systems Corporation has defaulted in the supply to Karnataka Fire Service for which penalty was imposed. Therefore, A-2 has rightly decided not to place the purchase order with the said concern, even though it may have quoted a lower value, as a defaulter cannot be given a chance to default once over, that too in regard to a department, which is doing life saving activity and, therefore, on its toes 24 X 7. Therefore, the act of A-2, though is attributed with colour by the prosecution, in the considered opinion of this Court, cannot be found fault with.

ISSUE NO.4 :

Whether the waiver of Security Deposit/Reduction in EMD by the appellants is permissible.

75. The loss, both pecuniary as well as financial loss, in one way, is being quantified on the basis of the appellants waiving/reducing the security deposit/EMD. In this regard, it is the case of the prosecution that the act of the appellants in waiving/reducing the security deposit/EMD has caused financial loss to the exchequer and in turn, has given pecuniary advantage to A-3 company. However, the said allegation is countered by the appellants contending that the Tamil Nadu Financial Code as well as the Tamil Nadu Fire Service Manual vests power with the Director/Head of the Department to waive/reduce the security deposit/EMD and in such a backdrop, the allegation itself deserves to be rejected.

76. The narrow issue that requires to be considered is whether the power is vested with the Director/Head of the Department, viz., the appellants herein to waive/reduce the security deposit/EMD.

77. P.W.36 is the Assistant Audit Officer under the Accountant General of Tamil Nadu, who was deputed for the purpose of conduct of special audit relating to the purchase of Emergency Rescue Tender. In cross examination, it is the deposition of P.W.36 that power is vested with the Director/Head of the Department for waiver of security deposit. P.W.26 has deposed in cross examination that security deposit and earnest money deposit are normally taken by way of demand draft in the name of the party and are placed with the Fire Services Department and that those deposits are not made in the form of cash or in the account of the Director of Fire Service. P.W.38, the investigation officer, in cross examination, has deposed that Article 129 of the Financial Code gives discretion to the Tendering Officer to waive the security deposit in case of firms of established reputation.

78. Learned senior counsel appearing for A-1 relied on the decision of the Apex Court in C.Chenga Reddy & Ors. - Vs - State

of A.P. (19956 (10 SCC 193), wherein the Hon'ble Supreme Court has held that mere disregard to relevant provisions of the Financial Code may give rise to a strong suspicion but that cannot be held to establish the guilt of the accused. In that context, the Hon'ble Apex Court held as under :-

"22. On a careful consideration of the material on the record, we are of the opinion that though the prosecution has established that the appellants have committed not only codal violations but also irregularities by ignoring various circulars and departmental orders issued from time to time in the matter of allotment of work of jungle clearance on nomination basis and have committed departmental lapse yet, none of the circumstances relied upon by the prosecution are of any conclusive nature and all the circumstances put together do not lead to the irresistible conclusion that the said circumstances are compatible only with the hypothesis of the guilt of the appellants and wholly incompatible with their innocence. In *Abdulla Mohd. Pagarkar v. State (Union Territory of Goa, Daman and Diu)* [(1980) 3 SCC 110 : 1980 SCC (Cri) 546] under somewhat similar circumstances this Court opined that mere disregard of relevant provisions of the Financial Code as well as ordinary norms of procedural behaviour of government officials and contractors, without conclusively establishing, beyond a reasonable doubt, the guilt of the officials and contractors concerned, may give rise to a strong suspicion but that cannot be held to establish the guilt of the accused. The established circumstances in this case also do not establish criminality of the appellants beyond the realm of suspicion and, in our opinion, the approach of the trial court and the High Court to the requirements of proof in relation to a criminal charge was not proper. That because of the actions of the appellants in breach of codal provisions, instructions and procedural safeguards, the State may have suffered financially, particularly by allotment of work on nomination basis without inviting tenders, but those acts of omission and commission by themselves do not establish the commission of criminal offences alleged against them. We may reiterate that once the report, Ex. P-11, is ruled out of consideration as inadmissible, then it is not safe to rely on the mere impressions of the witnesses to hold the appellants guilty of the offences alleged against them. The prosecution has failed to

establish that in 1979-80, no work of jungle clearance in the Gandipalem Project Division was undertaken and that false and fabricated documents were prepared with a view to misappropriate government funds. The prosecution has not even been able to establish that less work of jungle clearance was undertaken but payment was shown to have been made for excessive work and some amount out of the payments made for the work was thus misappropriated by the appellants in connivance with the contractors. The conviction and sentence imposed against the appellants (which had been reduced by the High Court to a token sentence) under the circumstances cannot be sustained and we accordingly accept the appeal and set aside their conviction and sentence. Fine paid by the appellants shall be refunded to them."

(Emphasis Supplied)

79. It is manifestly clear from the ratio laid down by the Apex Court in the above decision coupled with the above uncontroverted deposition of the witnesses, that the Directors/Head of the Department is clothed with power to waive/reduce the security deposit/EMD and that the said power flows from the Tamil Nadu Financial Code and the Tamil Nadu Fire Service Manual. In exercise of the said power, the appellants have waived/reduced the security deposit/EMD to be deposited by A-3 and, therefore, the said exercise cannot be said to be an illegality/irregularity or one without authority. Further, it is to be pointed out that A-3 had paid EMD for the pumps that are supplied in the respective months and the said fact has also been spoken to by witnesses. The established circumstances in this case also do not establish criminality of the appellants beyond the realm of suspicion and, therefore, actions of the appellants in breach of codal provisions, instructions and procedural safeguards, the State may have suffered financially, particularly by allotment of work to a bidder, who has quoted higher, but those acts of omission and commission by themselves do not establish the commission of criminal offences alleged against them. That being the case, it cannot be said that the action of the appellants is unsustainable and deserves to be prosecuted.

ISSUE NO. 5 :

What is the relative value that could be attached to the Special Audit Report vis-a-vis the Annual Audit Report of the year 1990-1991 and whether there is any financial loss to the exchequer, much less pecuniary advantage to the appellants.

80. It is not in dispute that audit of each of the Department of the Government is conducted by the Accountant General every year relating to the preceding financial year. In the same breath, it is to be pointed out and which is also not in dispute that audit of the year 1989-1990, the period during which purchase of Bachert Pumps, Emergency Rescue Tender and High Capacity Portable Pumps have been purchased was conducted during the year 1990-1991.

81. It is not the case as well as it cannot be the case of the prosecution that irregularities in the purchase, pointed in the audit report of the year 1990-1991, necessitated a special audit, as the special audit was taken up after a lapse of six years.

82. Be that as it may. It is also not in dispute that there are no adverse remarks in the audit report of the year 1990-1991 relating to the purchase of Bachert pumps, Emergency Rescue Tender and High Capacity Portable Pumps. However, a special audit was undertaken by P.W.19 insofar as the purchase relating to Bachert Pumps, approved and purchased by A-1 and by P.W.37 insofar as the purchase relating to Emergency Rescue Tender as well as High Capacity Portable Pumps, approved and purchased by A-2. For a special audit to be undertaken, atleast the bare necessity should be an adverse report on some illegality and that too the said special audit should be within a short time frame. However, neither there is any irregularity unearthed in the audit report nor there is any new material based on which a special audit was undertaken. Merely, P.W.s 19 and 37 state that on the directions of the Accountant General, special audit was undertaken. In this scenario, this Court is ordained with the task of finding out whether the special audit unearthed any irregularities and illegalities in the purchase made by the appellants.

83. P.W.19 has deposed about the direction of the Accountant General pursuant to which he undertook special audit insofar as the purchase of Bachert pumps by A-1. Ex.P-105 is the report submitted by P.W.19 insofar as the audit conducted by him. It is relevant to note that P.W.19 has raised a query as to the appropriateness of the irregularities pointed out by him for the reasons stated in his concluding portion of the report. It is more curious to note the discussion the one of the investigation officer is said to have had with P.W.19 during audit and for better clarity, the same is extracted hereunder :-

"In this connection, the following are also submitted for consideration :

The IR Para pending with us relates to Fabrication of Crash Tender and Purchase of Bachert Pumps only. From the note file relating to purchase of emergency Rescue Tender, it is seen that these files were also taken over by the Director of Vigilance and anti-Corruption (DVAC)

in August 1990 before finalising the tender and returned to the Director of Fire Service in October 1990. It is not known when the records were taken back by DVAC and whether we had checked the records relating to the purchase of above emergency rescue tender and purchase of high capacity portable pumps during local audit. Under the circumstances, it is not clear how far it will be appropriate to include these two cases also in our factual note at this distance of time without any reason/cause like that they were not produced to audit earlier, etc.

During the discussion, one of the IOs expressed that the defence counsel may raise the issue in the court that the record were already scrutinized by audit and they did not make any adverse comment during local audit and only at the instance of Police Department/Government, the audit is raising the issue now. Further our comment will become more important now, according to IOs, since the Government may await our remarks and the defence counsel would attempt to make an advantage of our report on two grounds.

(i) if the points included in the charge-sheets find place in our report also they may claim that the report was prepared at the instance of Government.

(ii) on the other hand, if we omit one or two items in our report on technical grounds, they may try to take advantage of the position that the audit had not included those aspects in the report."

(Emphasis Supplied)

84. From the above report, it is amply clear that while the report was prepared, the investigating officers had a say in the preparation of the report with regard to the detriment that may be caused in the event of the special audit giving a report in one or the other way. It is to be pointed out that the audit is to be conducted in a free and fair manner, as the AG Audit is a statutory body, not under the control of the Government and it is bound to place on record the factual position. Some irregularities, which on analysis, reveal are procedural, are alleged to have been detected in the purchase of the pumps. Even the deposition of P.W.19 is to the effect that there are procedural irregularities in the purchase. However, there is a categorical deposition by P.W.19 in cross examination that there are no adverse remarks in the audit report insofar as purchase of Bachert Pumps is concerned and further it is his deposition that a Committee was formed for the purchase of the said pumps and that the majority recommendation was for purchase of the imported pumps. It is further the categorical deposition of P.W.19 that security deposit was collected for the pumps

delivered each month. It is the further deposition of P.W.19 that the Head of the Department is vested with power to dispense with the collection of deposit amount if the firm is a reputed one.

85. P.W.36 had conducted audit insofar as Emergency Rescue Tender is concerned and in his evidence in cross, P.W.36 has deposed that the Director has power to reduce/waive security deposit/EMD.

86. P.W.37 is one other officer of the audit department, who has also, on direction, had conducted audit insofar as High Capacity Portable Pumps is concerned. It is the deposition of P.W.37 that there was no comparative statement for evaluation of tenders for the purchase of the High Capacity Portable Pumps. Though P.W.37 has deposed that the pumps were not purchased after conducting tests, however, in equal vehemence, has once again deposed that only after conduct of various tests, the Deputy Directors have filed their report to the Director. One other crucial deposition of P.W.37 in cross examination is that he has categorically opined that there was no financial loss to the Government.

87. It is true that some procedural irregularities have been pointed out in the purchase of the pumps by A-1 and A-2. Equally, it is also the allegation that though equivalent pumps were available whose cost was low, however, in finance detriment to the exchequer, the appellants have purchased pumps of higher value and, thereby loss has been caused to the exchequer. It is to be pointed out that cost comes into play only when two equals are pitched against each other, i.e., when two pumps are identically placed in terms of fitness and specification and in that scenario, it is incumbent on the part of the approving authority to approve the pumps, which are of a lower value, predominantly with a view to save excess outflow of finance from the exchequer. However, in the case on hand, it is clear from the oral as well as documentary evidence that the pumps demonstrated by the different bidders were not equals and, therefore, approving the pumps that satisfied the fitness and specifications cannot be said to be illegal and against the tender policy of the State. By no means could it be said that financial loss has been caused to the exchequer or that the appellants have gained pecuniary advantage from the said transaction. It is to be pointed out here that the pump test reports, Exs.P-82 to 86 coupled with the reports of the Technical Committee, viz., Exs.P-88 to 93 clearly and unequivocally reveal that except for the pumps demonstrated by A-3, none of the other pumps of the other bidders met with the fitness and specification mentioned in the tender. In fact, except for the pump demonstrated by A-3, all the pumps demonstrated by the other bidders fell flat both on fitness and specification and, in fact, they were ruled to be out of contest for it to be considered for a crucial department such as Fire

Services Department, in which quality, credibility, fitness, consistency and durability are of paramount concern and cost being considered only secondary and only in the event of there being two equals, cost comes into play.

88. The appellants, who were the then Directors, on the recommendation of the Technical Committee, have thought it fit to recommend the pumps on which no adverse remarks have been pointed out in the local audit in their report during 1990-1991 and the special audit, though points out certain irregularities, but they being just procedural irregularities and the further fact that the investigation officers have tried to prevail upon the special audit in the submission of the report, which is very clearly evident in the special audit report, Ex.P-105, this Court is of the considered view that the special audit, conducted once over the local audit of the year 1990-1991, without there being any credible material to go for the same, clearly and manifestly establish that the prosecution, being not only belated, but having been pursued for sinister purpose/motive cannot also be ruled out. However, this Court, at this distant point of time, is not inclined to venture into the same and only limits itself to conclude that the special audit, in no way, furthers the case of the prosecution.

ISSUE NO.6 :

Whether the prosecution has been initiated by the respondent based on any new material not reflected in the DVAC Report and whether non-placement of DVAC report before the trial court is fatal to the prosecution.

89. It is not in dispute that preceding the investigation by the respondent leading to the prosecution, there was an investigation by the DVAC Department, which is evident from Ex.P-222, the letter of P.W.28 to the Director General of Police. Ex.P-222 further reveals that certain lapses and irregularities committed by A-1 to A-4, P.W.s 18, 20 to 24 and Vivekanandan (since deceased), who was P.A. to the Director of Fire Services, were brought to the notice of the Government by the Directorate of Vigilance and Anti-Corruption Department. In all, the DVAC has outlined 15 lapses/irregularities committed. Based on the said report of the DVAC, the Government had requested the appropriate enquiry authority to enquire into the following allegations :-

"Between November 1989 and July 1991, Tvl. E.Hariharane, IPS and G.Veeraraghavan, IPS, the then Directors of Fire Service, without observing the provisions of the Tamil Nadu Fire Service Manual and the Tamil Nadu Financial Code, with the connivance of some of his subordinates, placed orders with the firm Tvl. Nisarzs and Co., Chennai, for the supply of 50 foreign made bachert portable pumps at the rate of

Rs.2,39,000/-, 275 suction hose couplings at the rate of Rs.748/- each, Emergency Rescue Tender at an exorbitant rate of Rs.31,56,000/- and 60 pumps at the rate of Rs.2,69,000/- each and exempted the firm from the payment of security deposit and paid 50% advance."

90. Based on the enquiry initiated, the enquiry authority enquired into the above allegation and submitted its report to the Government holding that A-1 to A-4, P.W.s 18, 20 to 24 and one Vivekanandan (since deceased), who was P.A. to the Director, have colluded and committed the following offences :-

i) Not indicating the BIS Specification in the tender notification dated 5.5.89;

ii) Initially A-1 rejected the request of A-3 for exemption from payment of security deposit, but subsequently, A-1 conceded to the request of A-3 and permitted them to pay security deposit only on the number of portable pumps that is supplied every month;

iii) The tender notice failed to specify that the hose couplings were part and parcel of the portable pumps and this aspect was not brought to the notice of A-1 by P.W.s 18 and 20 to 24;

iv) Earnest Money Deposit was improperly fixed in contravention of the Financial Code and Fire Service Manual by A-1 and Vivekanandan;

v) Incorrect note submitted by A-4 and Vivekanandan to the effect that NSIC furnished and EMD exempted insofar as A-3 company is concerned, though A-3 company had not submitted NSIC certificate;

vi) NSIC certificate not furnished by A-3 company, but A-2 acceded to their request for exemption from security deposit;

vii) A-2 sanctioned advance to A-3 for fabrication, inspite of it being brought to his notice by A-4 and Vivekanandan, that advance could be sanctioned only to State Transport Corporation as per G.O. Ms. No.1124, Transport Department, dated 15.10.85;

viii) A-2, in collusion with P.W.s 20, 21 and 22 issued order for purchase of diesel driven pump from A-3 company, deviating from IS No.12717/89 which prescribes petrol engine driven portable pump;

ix) Though P.W.s 20 to 22 recommended for reduction in weight of the pump, however failed to verify the weight at the time of its supply;

x) Inspite of protest lodged by one other tenderer relating to production of only diesel driven pump by A-3, though quotation was given for both petrol and diesel driven pumps, the same

was not considered by P.W.s 20 to 22 at the time of test and A-2 also failed to look into the said complaint;

xi) In contravention of tender rules and conditions and provisions of the Financial Code and Fire Service Manual, A-2 exempted A-3 from payment of security deposit to the tune of Rs.15.90 Lakhs; and

xii) A-2 failed to adhere to the Government instruction in choosing only pumps which conformed to I.S. 12717/89 standard, while sending proposal to the Government for approval.

91. In pursuance to the report of the enquiry authority, P.W.28 had requested the Director General of Police to initiate criminal proceedings under the Prevention of Corruption Act against the officials mentioned in Ex.P-222. It is to be pointed out that the lapses/irregularities pointed out by the DVAC, on the basis of its enquiry, was once again enquired into by the enquiry authority after a lapse of six years in the year 1997. Accordingly, the Government had directed initiation of criminal proceedings against the above individuals, including the appellants herein.

92. It is the deep rooted contention of the learned senior counsel for the appellants that the report of the DVAC was of the year 1991 and the same having been put in cold storage for a period of almost six years, in the year 1997, curiously and out of the blue, enquiry was conducted once over on the same set of allegations, without there being any new material brought to the notice of the Government and the appellants along with other accused were proceeded with. It is the further contention of the appellants that some of the persons, who were alleged to have committed lapses/irregularities by the DVAC and who were arrayed as accused in the FIR registered by the respondent, curiously were deleted as accused and made as witnesses while filing the charge sheet and that the DVAC report, which is the basis of the present enquiry was not provided to the accused persons nor marked by the prosecution before the trial court.

93. The Hon'ble Supreme Court, as early as in Chandrama Tewari - Vs - Union of India (1987 Supp SCC 518 : 1988 SCC (L&S) 226) has dealt with the necessity of supplying of relevant documents to the accused and in that context held as under:-

"9. It is now well settled that if copies of relevant and material documents including the statement of witnesses recorded in the preliminary enquiry or during investigation are not supplied to the delinquent officer facing the enquiry and if such documents are relied in holding the charges framed against the officer, the enquiry would be vitiated for the violation of principles of natural justice. Similarly, if

the statement of witnesses recorded during the investigation of a criminal case or in the preliminary enquiry is not supplied to the delinquent officer that would amount to denial of opportunity of effective cross-examination. It is difficult to comprehend exhaustively the facts and circumstances which may lead to violation of principles of natural justice or denial of reasonable opportunity of defence. This question must be determined on the facts and circumstances of each case. While considering this question it has to be borne in mind that a delinquent officer is entitled to have copies of material and relevant documents only which may include the copy of statement of witnesses recorded during the investigation or preliminary enquiry or the copy of any other document which may have been relied on in support of the charges. If a document has no bearing on the charges or if it is not relied on by the enquiry officer to support the charges, or if such document or material was not necessary for the cross-examination of witnesses during the enquiry, the officer cannot insist upon the supply of copies of such documents, as the absence of copy of such document will not prejudice the delinquent officer. The decision of the question whether a document is material or not will depend upon the facts and circumstances of each case."

(Emphasis supplied)

94. The fulcrum of the prosecution case is the DVAC report. The said fact is admitted by P.W.28 in his deposition in cross, wherein, P.W.28 has stated that the complaint preferred by him was on the basis of the DVAC report. Further, P.W.28 has deposed in cross that the DVAC report recommended only for departmental action. It is also seen from the deposition of P.W.28 in cross that the report of the DVAC was not forwarded to the Director General of Police while recommending for registration of the complaint.

95. P.W.28 has further deposed in cross that DVAC was initially requested to enquire into the matter and, thereafter, report was received by P.W.28 from the DVAC. Thereafter, the appropriate enquiry authority conducted an enquiry and, thereafter, Ex.P-222 was addressed based on which complaint, the criminal machinery was set in motion.

96. A careful perusal of Ex.P-222, as noted above, clearly reveals that the lapses/irregularities pointed out by the DVAC and the allegations made in the enquiry report are identical. There is strictly no new material based on which the second

enquiry by the respondent was initiated. Ex.P-222 does not anywhere speak about the fallacies in the report of the DVAC, which requires a fresh enquiry by the respondent. In the absence of any new material, the investigation by the respondent, that too after a lapse of six years, cannot be sustained, more so, when no irregularities have been pointed in the DVAC report and there being no necessity highlighted for conducting a fresh enquiry. Therefore, the fresh investigation initiated on the basis of Ex.P-222 borders on unsustainability.

97. Coupled with the investigation bordering on the brink of unsustainability, the non-marking of DVAC report before the trial court and not providing the DVAC report to the accused, which is the crux of the prosecution case, is detrimental to the prosecution. Though marking of any document is strictly in the hands of the prosecutor, however, when it is the case of the accused that the statement of P.W.s 20 to 24 before the DVAC was totally in contradiction with their reports before the respondent and that subsequent to their contra report, their names have been deleted as accused and they were made as witnesses, while filing the charge sheet. It is not as if non-marking or non-providing of the report of the DVAC to the accused could be brushed aside as a mere omission on the part of the prosecution, in the light of the petition filed by A-1 before the trial court u/s 91 Cr.P.C., seeking production of the said document. The said petition was dismissed by the trial court. This Court is at a loss to understand as to how the right of the accused could be jeopardized, more especially when the said report, which is requested for, is the basis of the genesis of the prosecution.

98. Further, it is to be pointed out that it is the stand of the accused all along, which has been even elicited from the deposition of P.W.s 20 to 24 in cross examination that their evidence before the DVAC is different to the one given before the respondent. It is the deposition of P.W.s 20 to 24 in cross examination that they have not implicated the appellants while their statements were recorded by the DVAC. However, curiously, after a span of six years, when investigation was taken up by the respondent/CB-CID, P.W.s 20 to 24 have deposed to the contra. In this regard, it should be borne in mind that initially P.W.s 20 to 24 were shown as accused in the FIR, however, they were made as witnesses when the charge sheet was laid before the Court. It is also to be pointed out that requisite pardon has not been granted as per the procedure contemplated under the Code of Criminal Procedure before making P.W.s 20 to 24 as witnesses. Therefore, treating them as approvers is by itself a questionable exercise and coupled with the fact that their statement before the respondent is contrary to their initial statement before the DVAC, it is all the more necessary and mandatory for the respondent to mark the report of the DVAC before the trial court and also provide copies of the statements to the accused for the purpose of their defence.

99. P.W.38, the investigating officer, in cross examination, has categorically deposed that he had received the report of the DVAC pertaining to the investigation conducted by it. P.W.38 has also deposed in cross that he did not examine the investigation officer, who had conducted the DVAC enquiry. P.W.38, however, has deposed that he had not gone through the report of the DVAC in its entirety, however, in equal terms, in cross he has deposed that the DVAC had recommended departmental action against all the accused.

100. It is not the case of the prosecution that the report of the DVAC was scrapped and the Government had ordered a fresh investigation by filing the complaint. Even the complaint, Ex.P-222, clearly shows that the DVAC report is the basis for filing the present complaint on the basis of which the criminal machinery was set in motion. That being the case, it is obligatory on the part of the respondent to have placed the DVAC report before the trial court and the trial court ought to have acceded to the request of the accused to have access to the report. In the above backdrop of the factual matrix and also the materials which led to the weaving of the prosecution web clearly show that the DVAC report was the basis on which the whole prosecution unfolded and in such circumstances, the act of the prosecution in not placing the earlier report of DVAC and providing a copy of the statements of P.W.s 20 to 24 recorded by DVAC and the further act of the trial court denying copy of the said report, leave alone access to the said report to the accused definitely vitiates the case of the prosecution.

ISSUE NO.7 :

Whether the sanction for prosecution of the appellants has been granted exercising due application of mind.

101. The next crucial question that emanates from the materials on record, which are put forth by way of vociferous arguments by the learned senior counsel for the appellants is the manner of sanction accorded for the prosecution of the appellants. In this regard, the law on the subject of accord of sanction for prosecution has been dealt with by the Hon'ble Apex Court in Centre for Public Interest Litigation - Vs - Union of India (2005) 8 SCC 202 : (2006) 1 SCC (Cri) 23), wherein the Hon'ble Apex Court held as under :-

"9. The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in

the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty. If the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case."

102. From the above decision, it is explicitly clear that the protection given to a Government servant is not only to safeguard him from malicious prosecution, but equally to enable the Government to prosecute him for acts, which reflects in the discharge of his public duties. However, the grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to government servants against frivolous prosecutions and must therefore be strictly complied with before any prosecution can be launched against the public servant concerned.

103. Yet again, the Supreme Court in the case of State of Punjab - Vs - Mohd. Iqbal Bhatti (2009) 17 SCC 92 : (2011) 1 SCC (Cri) 949) has dealt with the validity of the sanction and the application of mind on the part of the sanctioning authority and in that context, held as under :-

"7. Validity of an order of sanction would depend upon application of mind on the part of the authority concerned and the material placed before it. All such material facts and material evidence must be considered by it. The sanctioning authority must apply its mind on such material facts and evidence collected during the investigation. Even such application of mind does not appear from the order of sanction, extrinsic evidence may be placed before the court in that behalf. While granting sanction, the authority cannot take into consideration an irrelevant fact nor can it pass an order on extraneous consideration not germane for passing a statutory order. It is also well settled that the superior courts cannot direct the sanctioning authority either to grant sanction or not to do so. The source of power of an authority passing an order of sanction must also be considered. (See Mansukhlal Vithaldas Chauhan v. State of Gujarat [(1997) 7 SCC 622 : 1997 SCC (L&S) 1784 : 1997 SCC (Cri) 1120] .) The authority concerned cannot also pass an order of sanction subject to ratification of a higher authority. [See State v. Dr. R.C. Anand [(2004) 4 SCC 615 : 2004 SCC (Cri) 1380] .]"

(Emphasis supplied)

104. From the above proposition of law, it is amply clear that before according sanction to prosecute, the competent authority has to satisfy himself on such material facts and material evidence must be considered by it to come to the conclusion that an offence has been committed by the public servant. The sanctioning authority must apply its mind on such material facts and evidence collected during the investigation. In case the order of the sanctioning authority does not reveal

application of mind, it is also open to the prosecution to adduce extrinsic evidence before the court in that behalf.

105. Keeping the ratio laid down by the Hon'ble Apex Court in mind, this Court would now proceed to dissect the materials available on record as to whether there has been application of mind on the part of the competent authority in according sanction for prosecution as no extrinsic evidence has been placed before this Court to prove the same.

106. P.W.s 30 and 31 are the persons, who accorded sanction to prosecute the appellants. The sanction orders accorded by P.W.30 are marked as Exs.P-231, P-232 and P-233 and the sanction accorded by P.W.31 is marked as Exs.P-234 and P-235. Firstly, a perusal of the above Exs.P-231 to P-235 leaves no room for doubt that the sanction orders are issued on the basis of the report of the respondent. At this juncture, it is to be pointed out that the outcome of the DVAC report in the year 1991 only led to the enquiry in the year 1997 leading to the registration of the case. However, curiously, the sanction orders does not even whisper a word about the investigation conducted by DVAC nor does it reflect the that the report of the DVAC was placed before it for consideration while according sanction. Therefore, it would be a futile exercise to rely merely on Exs.P-231 to P-235 to hold that the sanctioning authorities have applied their mind while according sanction for prosecution.

107. In the backdrop of lack of clarity in the sanction orders relating to application of mind of the sanctioning authority to the DVAC report, this Court has to turn back on to the evidence of P.W.s 30 and 31 to find out whether the said sanction orders were based on consideration of the DVAC report which was the basis of the prosecution case.

108. P.W.30, in chief examination has deposed the procedural formality in the accord of sanction for prosecution. However, even in chief examination, P.W.30 has deposed that he does not remember whether the sanction of the Government was given for registering the case. In the same breath, P.W.30 has also stated in chief examination that he does not remember as to what are the materials that were sent to the President of India requesting sanction and P.W.30 has further went on to add that the copies of the sanction orders, viz., Exs.P-231 and P-232 would have been sent to the President of India. It is very curious to note the said reply of P.W.30, since as the sanctioning authority, P.W.30 is not even conversant as to what are the materials that were forwarded to the President. P.W.30 has deposed in cross examination that the investigation and result of the probe by the DVAC is not reflected in the sanction orders and the conclusion of the DVAC is also not incorporated in the sanction orders.

109. One more curious thing that could be observed that for many questions, though there is no recording that the respondent has raised objection, the Court, of its motion has raised objection. The questions, as could be seen are elemental questions that are posed in a trial to test the remembrance and veracity of the witness. Such questions are the hallmark of in-depth cross-examination, which the trial court has objected in the absence of any objection from the respondent.

110. P.W.31, while narrating the sequence of events in the grant of sanction in chief examination, in cross-examination has deposed that he does not remember as to the documents sent by the State Government requesting sanction for prosecution. P.W.31 has not only stated that he does not remember what are all the documents received from the State Government, he has also deposed that the deciding authority for grant of sanction is his superiors. P.W.31 has only received the proposal requesting sanction. P.W.31, in cross examination has admitted that the proposal sent by the State Government were not produced by him. P.W.31, in cross examination, has further deposed that in Exs.P-234 and 235, there is no mention about the prior investigation conducted by DVAC. P.W.31 has further deposed in cross examination that whether he had gone through the said file of DVAC. Therefore, it is clear from the deposition of P.W.31 that he is not aware of the probe of DVAC and does not remember going through the files pertaining to the investigation by DVAC and that he also does not remember the documents that were received from the State Government based on which sanction has been accorded.

111. In this regard, useful reference can be had to the judgment of the Hon'ble Apex Court in Barium Chemicals Ltd. - Vs - A.J. Rana (1972 (1) SCC 240), wherein the necessity to examine all the documents while considering the case for grant of prosecution has been dealt with. In the above context, the Hon'ble Apex Court held as under :-

"14. The words "considers it necessary" postulate that the authority concerned has thought over the matter deliberately and with care and it has been found necessary as a result of such thinking to pass the order. The dictionary meaning of the word "consider" is "to view attentively, to survey, examine, inspect (arch), to look attentively, to contemplate mentally, to think over, meditate on, give heed to, take note of, to think deliberately, bethink oneself, to reflect" (vide Shorter Oxford Dictionary). According to Words and Phrases - Permanent Edition Vol. 8-A "to consider" means to think with care. It is also mentioned that to "consider" is to fix the mind upon with a view to careful examination; to ponder; study; meditate upon, think or reflect with care. It is

therefore, manifest that careful thinking or due application of the mind regarding the necessity to obtain and examine the documents in question is sine qua non for the making of the order. If the impugned order were to show that there has been no careful thinking or proper application of the mind as to the necessity of obtaining and examining the documents specified in the order, the essential requisite to the making of the order would be held to be non-existent.

15. A necessary corollary of what has been observed above is that mind has to be applied with regard to the necessity to obtain and examine all the documents mentioned in the order. An application of the mind with regard to the necessity to obtain and examine only a few of the many documents mentioned in the order, while there has been no such application of mind in respect of the remaining documents, would not be sufficient compliance with the requirements of the statute. If, however, there has been consideration of the matter regarding the necessity to obtain and examine all the documents and an order is passed thereafter, the Court would stay its hand in the matter and would not substitute its own opinion for that of the authority concerned regarding the necessity to obtain the documents in question."

(Emphasis supplied)

112. Keeping in mind the ratio laid down by the Hon'ble Apex Court in Barium Chemicals case (supra), on a careful consideration of the entire deposition of P.W.s 30 and 31, it is unequivocally clear that the said witnesses were mere signatories to the sanction orders and are in no way connected with applying their mind to the materials available on record while according sanction. Therefore, to be precise, the persons, who had approved sanction of prosecution of the appellants, have not been examined. However, even the evidence of P.W.s 30 and 31 unambiguously show that the sanction orders does not reveal about the DVAC probe conducted preceding the investigation by the respondent and that they are also not aware of the DVAC probe conducted prior to the investigation by the respondent. In such circumstances, the only inference that could be drawn from the said deposition is that the report of the investigation conducted by DVAC was not before the concerned competent authority who accorded sanction and without considering the said report, accord of sanction granted by the said competent authority would definitely be an act, which shows clear non-application of mind. If the report had not been placed before the sanctioning authority and sanction had been granted on the basis of the reports placed before them, the non-

placing of the report pertaining to the prior investigation by the DVAC definitely vitiates the case prosecution case and, in the absence of placing the report before the sanctioning authority, the sanction granted without there being consideration of the said DVAC report could only be termed to be a sanction non-est in law and the sanction cannot be treated to be a proper sanction as mandated u/s 197 Cr.P.C.

113. The prosecution has rested its theory on Section 120 (B) IPC and had framed a charge against the appellants on the allegation that in pursuance of a conspiracy, they have colluded and acted in a manner prejudicial to the interest of the exchequer and had caused financial loss to the tune of Rs.1.77 Crores and Rs.31.56 Lakhs and, thereby, a pecuniary gain to A-3.

114. Conspiracy consists of an agreement or a combination or confederation between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or a criminal act or to do a lawful act by unlawful means. The agreement may be express or implied, or in part express and in part implied. Therefore, for an offence to fall under this section, bare engagement and association to break the law is the requirement and the methods employed should be illegal. However, the onus is on the prosecution to prove the charge of conspiracy by cogent evidence, direct or circumstantial.

115. The Hon'ble Supreme Court in V.C. Shukla - Vs - State (Delhi Admn.) (1980 (2) SCC 665 : 1980 SCC (Cri) 561), held as under :-

"8. Before we proceed further, we might indicate that it is well settled that in order to prove a criminal conspiracy which is punishable under Section 120-B of the Penal Code, 1860, there must be direct or circumstantial evidence to show that there was an agreement between two or more persons to commit an offence. This clearly envisages that there must be a meeting of minds resulting in an ultimate decision taken by the conspirators regarding the commission of an offence. It is true that in most cases it will be difficult to get direct evidence of an agreement to conspire but a conspiracy can be inferred even from circumstances giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence.

"

(Emphasis Supplied)

116. From the ratio laid down above, it is emphatically clear that to bring home a charge u/s 120 (B) IPC, it is necessary for the prosecution to show, either through direct or circumstantial evidence that there was an agreement between two or more persons to commit an offence. It is the case of the

prosecution that A-1 and A-2 conspired with A-3 to reap pecuniary gain for the benefit of A-3, thereby causing loss to the exchequer. The necessary ingredient here is the meeting of minds between the conspirators.

117. In the case on hand, A-3 is a supplier of pump, who had bid in an open tender and on the recommendations of the Technical Committee, as noted above, has been declared as successful. Except for giving some leeway to A-3 in the deposit of earnest money, which A-1 had permitted A-3 to pay on the basis of the pumps supplied each month, the prosecution has not placed any material either with regard to A-1 or A-2 showing conspiracy with A-3. Mere assertion with regard to conspiracy would not be sufficient to bring home the charge. Therefore, conspiracy of the appellants with A-3 has not been established.

118. In the same tenor, coming to the conspiracy alleged between A-1 and A-2, it is not in dispute that A-2 succeeded A-1 as the Director of Fire Service. It is borne out by record that on the day of A-1 demitting office as the Director of Fire Service, A-2 took charge as the Director of Fire Service. No evidence has been placed on record by the prosecution, either direct or circumstantial for this Court to infer that A-1 and A-2 had prior association with each other and had, thus, conspired to cheat the exchequer. The necessary ingredient is the meeting of minds between the conspirators. There being no meeting between the conspirators, as evident from the records, meeting of minds is a totally illusory one. The optical illusion of meeting of minds has been fabricated by the prosecution only on the basis of A-2 going ahead with the tenders floated by A-1 and finalising the same on the basis of the recommendations of the Technical Committee. Ironically, A-3 came out the successful bidder in all the bids, which was recommended by the Technical Committee leading to the approval by A-1 and A-2. To put it precisely, A-2 had carried on the administrative functions and discharged the same that was left over due to the vacuum created on the demitting of office by A-1. If discharging the administrative actions could be deemed to be a conspiracy with the erstwhile predecessor of the incumbent successor, non-performing of any act, even illegal, if it so finds, could be stated to be a dereliction of duty on the part of the authority. Therefore, in the absence of any justifiable material to prove the conspiracy, the finding arrived at by the trial court with regard to conspiracy does not only suffer from the vice of perversity, but is grossly illegal and without due application of mind.

119. On the failing of the charge under Section 120-B IPC, the other offences lose their roots, as without the aid of Section 120-B IPC, it cannot be spelled out or deduced even though the appellant stands directly charged for specific offences, with and without the applicability of Section 120-B IPC. This Court is clearly at a loss to spell out the

complicity of the appellants in the loss of money suffered by the exchequer, which could only be said to be illusory, which stands proved even by the prosecution's own case through P.W.37, the special audit, which has clearly spelt that no loss has been caused to the Government.

120. Therefore, on an overall conspectus of the findings recorded above, this Court is only in complete disagreement with the findings rendered by the trial court, which only reveals the total non-application of mind on the part of the trial court to the materials available on record, both oral and documentary. It also shows that the trial court totally got carried away by the figures portrayed than by the materials, in black and white, available before it to come to a reasonable and justifiable conclusion. Therefore, left with no other alternative, this Court is inclined to set aside the conviction and sentence recorded by the trial court as being devoid of any merits and is totally against the materials available on record.

121. In the result, both the appeals are allowed setting aside the conviction and sentence dated 4.4.03 on the file of the Special Judge I-cum-Additional Sessions Judge, Chennai, made in C.C. No.1 of 1999. The appellants are acquitted of all the charges framed against them. Bail bonds, if any, executed by them, shall stand cancelled. Fine amount, if any paid, shall stand refunded.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

GLN

To

1. The Special Judge I -cum-
X Additional Sessions Judge
Chennai.

2.The Public Prosecutor, High Court, Madras.

3.The DSP,

CB-CID, Head Quarters,
Chennai.

4.The Additional Superintendent of Police
CB-CID, Head Quarters,
Chennai.

+3ccs to Mr.S.Karthikeyan , Advocate SR.No. 8411

CRL. A. NOS. 644 & 651 OF 2003

RSV

A.SK(05/03/2020)

A.SK(16/03/2020)

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