

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

CRIMINAL APPLICATION (APL) 410 OF 2019

State of Maharashtra,
through Deputy Superintendent of Police,
Anti Corruption Bureau, Nagpur

....**APPLICANT**

VERSUS

1. Gurudas S/o. Sahadev Mandavkar,
aged 61 yrs, r/o. Plot No.1,
Anand Nagar, Atre Layout,
Nagpur.
2. Sanjay s/o. Laxman Kholapurkar,
aged 57 yrs, R/o. 77B, Pandy Lay Out,
Khamla, Nagpur
3. Sopan s/o. Ramrao Suryavanshi,
aged 65 yrs, r/o. Malhar,
Plot No. 21,
Sahakar Nagar, Usmanpura,
Aurangabad
4. Rohidas s/o. Maruti Landge,
aged 66 yrs, r/o. A-1/601,
Bhairavi I.C.S. Colony,
Bhosle Nagar, Pune

.... **RESPONDENTS**

Mr. M.K. Pathan, APP for the applicant/State.

Mr. P.V. Navlani, counsel for respondent 3.

Mr. R.R. Vyas, counsel for respondent 2 and 4

CORAM : ROHIT B. DEO, J.

DATE : 05.03.2021

ORAL JUDGMENT :

Heard Mr. M.K. Pathan, the learned APP for the applicant/State, Mr. R.R. Vyas, the learned counsel for respondent 2 and 4 and Mr. P.V. Navlani, the learned counsel for respondent 3.

2. The State of Maharashtra is assailing the order dated 25.10.2018, rendered by the learned Additional Sessions Judge, Nagpur in Special Case 26/2018, whereby the respondents (hereinafter referred to as the “accused”) are discharged from offences under sections 420, 109 of the Indian Penal Code (“IPC”) and sections 13(1)(c)(d) read with section 13(1)(b) of the Prevention of Corruption Act (“Act” for short) solely on the ground that in view of the amended provisions of section 17-A of the Act, the Court is precluded from taking cognizance of the offences in the absence of previous approval from the State Government.

3. The learned Additional Sessions Judge reasons thus:

“9] I have given my anxious consideration to the submissions advanced by the respective counsels of accused No.1 to 4. It is matter of record that the present chargesheet is filed only for the alleged offences U/s. 13(1)(c)(d) R/w 13(1)(b) of P.C. Act. It is also admitted fact on record that the chargesheet was filed on 2/08/2018 i.e. after coming into force the amended provisions of the Prevention of Corruption Act. Therefore, it is evident on the face

of record that the present chargesheet is being filed after coming into force of the amended provisions of the P.C. Act i.e. after 26th July, 2018.

10] I found substantial force in the arguments advanced by the learned counsel for the accused that the present case is based on the accusations that the accused No.1 to 4 in discharge of their official functions and duty and they have recommended and have taken decision in their official capacity. Therefore, I am of the considered opinion that the accused No.1 to 4 are covered to the parameters of Section 17(A) of the P.C. Act and therefore it was incumbent upon the part of the investigating agency to obtain previous approval for obtaining sanction order from the competent authority as envisaged U/s. 19 of the P.C. Act.

11] It is the case that the allegations against the accused persons are made for the alleged offences U/s. 13(1)(c)(d) R/w 13(1)(b) of P.C. Act. However, this court further makes it very clear that although in absence of any previous approval cognizance of the alleged offences at this juncture cannot be taken that will not result closing the doors of the investigating agency from alleging the act on the part of the accused persons before the Court of Law.

12] The remedy available with the Investigating Officer would be to apply before the competent authority for grant of approval / sanction order for launching prosecution against the accused persons for the alleged offences. Upon filing such applications it will be open for the competent authority to pass an appropriate order upon taking into consideration the material collected by the investigating agency either to grant or refuse the sanction in their own wisdom as per rules and prevailing law. Investigating Officer would be at liberty to file fresh chargesheet after fulfilling the

precondition of obtaining approval for filing prosecution against the accused person as per law.

13] It is made clear that this Court has not dealt with the merits of the allegations and the factual aspects involved in the case and all the contentions of the parties in such context are kept totally open. In the light of elaborate discussion made in aforesaid paras, as amended provisions of Section 17-A of the Act creates an embargo for taking cognizance of the alleged offence. In my humble and considered opinion the cognizance for the alleged offences in view of the filing of chargesheet after came into force of Section 17-A of the P.C. Act cannot be taken and I am not inclined to take cognizance for the alleged offences against the accused persons. With these observations, I come to the conclusion that the chargesheet as presented in the present form is not maintainable. Hence, the accused persons are entitled for discharge. In consequences thereof conclusion values the order as under”.

4. The learned APP Mr. M.K. Pathan would submit that the learned Additional Sessions Judge committed a grave error in invoking the provisions of section 17-A of the Act. The learned APP would submit that section 17-A was inserted on the statute book by Act XVI of 2018 w.e.f. 26.07.2018 and the embargo that no police officer shall conduct any inquiry or investigation into any offence alleged to have been committed by a public servant under the Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in

discharge of his official functions or duties, without the previous approval of the State Government, would apply only to an enquiry or investigation undertaken after the coming into force of the said provision. Extending the submission further, the learned APP would submit that the previous approval is contemplated only if the alleged offence is committed by a public servant under the Act and relates to any recommendation made or decision taken by such public servant in discharge of his official functions or duties. The learned APP would submit that in view of the allegation that the accused misused and abused the office with the intention of facilitating the contractor M/s. Hindustan Construction Company to secure the work valued at Rs. 110,09,39,255/- (Rupees One Hundred Ten Crores Nine Lacs Thirty Nine Thousand Two Hundred Fifty Five), and the further allegation that the accused shared a common intention with accused 5 and 6, who represent the said contractor, to commit the offence of cheating, it was not necessary to seek approval of the State Government. The learned APP emphasizes that the requirement of prior approval would come into play only if the alleged offence is committed under the Act and not if the offence is punishable under the IPC and that too, if the offence is relatable to any recommendation made or

decision taken in discharge of official functions or duties. It is submitted that misuse and abuse of office and cheating to facilitate the contractor to gain wrongfully at the expense of the State Exchequer is not, by any stretch of imagination, relatable to a decision taken in discharge of official functions or duties.

5. The learned counsel for the accused Mr. R.R. Vyas would support the order impugned. Mr. R.R. Vyas would submit that section 17-A is clearly attracted since the chargesheet was filed after the said provision came into effect.

6. Reference to certain facts is inevitable in order to appreciate the rival submissions.

7. In deference to the order dated 12.12.2014, rendered by this Court in Public Interest Litigation 83 of 2012, and 192/2012, the Government of Maharashtra decided to conduct an open enquiry into the allegation of commission of massive irregularities in the execution of work by the Vidarbha Irrigation Development Corporation. Mr. Anirudh Puri, the then Police Inspector, Anti-Corruption Bureau, Nagpur was directed to conduct the open enquiry as regards the work executed in

connection with Ghodazari canal. The open enquiry culminated in submission of report dated 3.2.2017 on the basis of which, the Anti-Corruption Bureau decided to register an offence against the accused. During the investigation, several irregularities were noticed and the accused were prima facie found to have misused and abused their office to help the successful bidder M/s. Hindustan Construction Company to wrongfully gain at the expenses of the State Exchequer. It would not be necessary to note, in any detail, the prima facie material unearthed during the investigation which impelled the Investigating Agency to charge the accused with the offences under the Act and the IPC which are referred to supra. Suffice it to note, that, the allegation is that the accused not only helped the contractor to secure the contract, further during the course of the execution of the contract, the contractor was showered with certain indulges. Illustratively, the contractor was paid Rs. 10.49 crores as mobilization advance, which was not contemplated by the terms and conditions of the tender. It is inter alia, alleged, that the terms and conditions of the tender including the valuation of the work were revised to benefit the contractor.

8. The culmination of the investigation led to the submission of the final report under section 173(2) of the Code of Criminal Procedure (“Code”). The Investigating Agency, presumably as abundant caution, did seek the sanction from the State Government vide communication dated 13.7.2018. The prosecution contends that in view of the response of the State Government that sanction is not required in view of the superannuation of the public servants, the Investigating Agency proceeded to submit the chargesheet. While the sanction was presumably sought under section 19 of the Act, the correspondence is pressed in service only to emphasize that the investigation was complete before the coming into force of section 17-A of the Act.

9. The accused sought discharge on several grounds, inter alia, on the ground that the material on record is not sufficient to warrant a trial. The learned Additional Sessions Judge has not considered the said ground on the premise that the accused are entitled to discharge on the short ground that the Court is precluded from taking cognizance in the absence of approval under section 17-A of the Act.

10. In my considered view, the order impugned is manifestly erroneous, and is liable to be quashed for reasons spelt, hereinafter.

11. Section 17-A, was introduced in the statute book w.e.f. 26.7.2018 and reads thus:

“17-A. Enquiry or Inquiry or investigation of offences relatable to recommendations made or decision taken by public servant in discharge of official functions or duties.—No police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, without the previous approval—

(a) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of the Union, of that Government;

(b) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of a State, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed:

Provided that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person:

Provided further that the concerned authority shall convey its decision under this section within a

period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month.

12. The legislative intent is to protect an honest public servant from frivolous or unnecessary prosecution, where the allegation is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties. The protective shield legislatively extended envisages a previous approval from the appropriate Government or authority as a *sine qua non* to conduct any enquiry or investigation in the allegations.

13. The requirement of seeking previous approval presupposes that the offence alleged is committed under the Act and that the alleged offence is relatable to any recommendation made or decision taken by the public servant in discharge of his official functions or duties.

14. The expression “discharge of his official functions or duties” reflects the legislative intent that the protection envisaged is not a blanket protection. The intent is to protect an honest and

responsible public servants if the recommendation made or decision taken is in discharge of his official functions or duties. As a necessary corollary, previous approval is required only if the recommendation made or decision taken is directly concerned with the official functions or duties of the public servant. A recommendation or decision which is not directly and reasonably connected with the official functions or duties of the public servant, is not entitled to the protective umbrella of section 17-A of the Act.

15. Section 197 of the Code extends a similar protective shield to a Judge or Magistrate or Public Servant, who is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty.

16. Section 197 of the Code reads thus:

197. Prosecution of Judges and public servants.—

(1)When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction 1[save as otherwise provided in the Lokpal and Lokayuktas Act, 2013]—

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:

2[Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted.]

[Explanation.—For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under section 166A, section 166B, section 354, section 354A, section 354-B, section 354C, section 354-D, section 370, section 375, section 376, (section 376A), section 376C, section 376D, Section 376-DA, section 376-DB, or section 509 of the Indian Penal Code (45 of 1860).]

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring

therein, the expression "State Government" were substituted.

4[(3A)Notwithstanding anything contained in sub-section (3),no court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1)of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(3-B)Notwithstanding anything to the Contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a court upon such sanction, during the period commencing on the 20thday of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1)of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the court to take cognizance thereon.]

(4)The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held.

17. Section 197 of the Code envisages a previous sanction if the alleged offence is committed by the public servant “while

acting or purporting to act” (emphasize supplied) in the discharge of his official duty. The expression “purporting to act” is significant and widens the scope of the protective umbrella by extending the protective cover not only to acts which are done in discharge of official duty, further to acts which are purportedly done in discharge of official duties. While it would not be necessary, for the purpose of deciding the legality of the order impugned, to dilate on the implication of the difference in the language used in section 197 of the Code and section 17-A of the Act, it would be useful to note certain decisions of the Supreme Court interpreting the scope and ambit of section 197 of the Code.

18. The Supreme Court has held that where the acts are performed using the office as a mere cloak for unlawful gains, such acts are not protected. The observations of the Supreme Court in paragraphs 7 to 9 in *Inspector of Police and Another vs. Battenapatla Venkata Ratnam and Another*, (2015) 13 SCC 87, read thus:

“7. No doubt, while the respondents indulged in the alleged criminal conduct, they had been working as public servants. The question is not whether they were in service or on duty or not but whether the alleged offences have been committed by them "while acting or purporting to act in discharge

of their official duty". That question is no more res integra. [In Shambhoo Nath Misra v. State of U.P.](#) at paragraph-5, this Court held that : (SCC p.328)

"5. The question is when the public servant is alleged to have committed the offence of fabrication of record or misappropriation of public fund etc. can he be said to have acted in discharge of his official duties. It is not the official duty of the public servant to fabricate the false records and misappropriate the public funds, etc. in furtherance of or in the discharge of his official duties. The official capacity only enables him to fabricate the record or misappropriate the public fund, etc. It does not mean that it is integrally connected or inseparably interlinked with the crime committed in the course of the same transaction, as was believed by the learned Judge. Under these circumstances, we are of the opinion that the view expressed by the High Court as well as by the trial court on the question of sanction is clearly illegal and cannot be sustained."

8. [In Parkash Singh Badal v. State of Punjab](#), at paragraph-20, this Court held that: (SCC pp. 22-23).

"20. The principle of immunity protects all acts which the public servant has to perform in the exercise of the functions of the Government. The purpose for which they are performed protects these acts from criminal prosecution. However, there is an exception. Where a criminal act is performed under the colour of authority but which in reality is for the public servant's own pleasure or benefit then such acts shall not be protected under the doctrine of State immunity." and thereafter, at paragraph-38, it was further held that:([Parkash Singh Badal](#) case SCC p. 32.)

"38. The question relating to the need of sanction under [Section 197](#) of the Code is not

necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein. This question may arise at any stage of the proceeding. The question whether sanction is necessary or not may have to be determined from stage to stage."

9. In a recent decision in Rajib Ranjan and others v. R. Vijaykumar, at paragraph-18, this Court has taken the view that : (SCC p.521)

"18.even while discharging his official duties, if a public servant enters into a criminal conspiracy or indulges in criminal misconduct, such misdemeanour on his part is not to be treated as an act in discharge of his official duties and, therefore, provisions of [Section 197](#) of the Code will not be attracted". (emphasis supplied)

19. A relatively recent decision of the Supreme Court in ***Station House Officer, CBI/ACB/Bangalore..vs. B.A. Srinivasan and another, (2020) 2 SCC 153***, reiterates that, at times, it would only be after the evidence is led that the question where the alleged act is intricately connected with the discharge of official functions and whether such act would be covered by the expression "while acting or purporting to act in discharge of official duty" could be answered. The Supreme Court referred to the following observations in ***PK. Pradhan vs. State of Sikkim represented by The Central Bureau of Investigation, (2001)6 SCC***

704.

“15. Thus, from a conspectus of the aforesaid decisions, it will be clear that for claiming protection under [Section 197](#) of the Code, it has to be shown by the accused that there is reasonable connection between the act complained of and the discharge of official duty. An official act can be performed in the discharge of official duty as well as in dereliction of it. For invoking protection under [Section 197](#) of the Code, the acts of the accused complained of must be such that the same cannot be separated from the discharge of official duty, but if there was no reasonable connection between them and the performance of those duties, the official status furnishes only the occasion or opportunity for the acts, then no sanction would be required. If the case as put forward by the prosecution fails or the defence establishes that the act purported to be done is in discharge of duty, the proceedings will have to be dropped. It is well settled that question of sanction under [Section 197](#) of the Code can be raised any time after the cognizance; may be immediately after cognizance or framing of charge or even at the time of conclusion of trial and after conviction as well. But there may be certain cases where it may not be possible to decide the question effectively without giving opportunity to the defence to establish that what he did was in discharge of official duty. In order to come to the conclusion whether claim of the accused, that the act that he did was in course of the performance of his duty was reasonable one and neither pretended nor fanciful, can be examined during the course of trial by giving opportunity to the defence to establish it. In such an eventuality, the question of sanction should be left open to be decided in the main judgment which may be delivered upon conclusion of the trial.”

20. The protection envisaged under section 17-A of the Act is, on a plain reading of provisions, is not wider or more extensive in scope and amplitude than the protection conferred to public servants under section 197 of the Code.

21. Considering the allegations, the learned Additional Sessions Judge clearly erred in discharging the accused on the premise that the recommendations made and decisions taken were in discharge of official functions and duties. However, it is not necessary to dilate further on the said aspect, as I am inclined to accept the submission of the learned APP Mr. M.K. Pathan that section 17-A of the Act is clearly not attracted to an investigation undertake, much less completed, prior to its introduction on the statute book. In the factual matrix, irrefutably, the alleged offence is committed prior to the introduction of section 17-A on the statute book and the material on record overwhelmingly suggests that, notwithstanding the submission of the chargesheet after the date of coming into force of section 17-A, the investigation was complete prior to the coming into force of the said provision.

22. Section 17-A creates an embargo which precludes an enquiry and investigation. The embargo clearly applies only to such enquiry or investigation which is initiated after the coming into force of section 17-A. Any other view, would do violence to the plain language of the statute and would be subversive of the legislative intent. The legislative intent is certainly not to set the clock back to invalidate investigation or enquiry which is undertaken, much less an investigation which is complete, prior to the coming into force of section 17-A. While the legislative intent is to protect honest and responsible public servants where the allegation is relatable to the recommendations made or decisions taken in discharge of official functions or duties, section 17-A must receive a reasonable interpretation, particularly, since the said provision fetters the right of the Investigating Agency to inquiry into a cognizable offence and is vulnerable to the challenge that the statutory scheme, inter alia section 155 of the Code, is dented. It is stated at the bar that the Supreme Court has issued notice in Special Leave Petition challenging the constitutional validity of section 17-A.

23. In *State of Telangana vs. Sri Managipeth @*

Magnipeth Sarveshwar Reddy (Criminal Appeal 1662 of 2019), the Supreme Court considered the submission that the amended provisions of the Act would be applicable as the chargesheet was submitted after the Amending Act come into force, thus:

*“37. Mr. Guru Krishna Kumar further refers to a Single Bench judgment of the Madras High Court in **M. Soundarajan v. State through the Deputy Superintendent of Police, Vigilance and Anti Corruption, Ramanathpuram** to contend that amended provisions of the Act as amended by Act XVI of 2018 would be applicable as the Amending Act came into force before filing of the chargesheet. We do not find any merit in the said argument. In the aforesaid case, the learned trial Court applied amended provisions in the Act which came into force on 26th Ju,y, 2018 and acquitted both the accused from charge under Section 13(1)(d) read with 13(2) of the Act. The High Court found that the order of the trial Court to apply the amended provisions of the Act was not justified and remanded the matter back observing that the offences were committed prior to the amendments being carried out. In the present case, the FIR was registered on 9th November, 2011 much before the Act was amended in the year 2018. Whether any offence has been committed or not has to be examined in the light of the provisions of the statute as it existed prior to the amendment carried out on 26th July, 2018.”*

24. In my considered view, the learned Additional Sessions Judge committed a grave error in discharging the accused on the premise that section 17-A of the Act is attracted.

The said provision has no applicability to enquiry or investigation undertaken prior to its coming into force. The protective cover is not available to acts done by using the offence as a cloak for unlawful gains. Considering the allegations, the accused are not protected by the requirement to seek previous approval, assuming arguendo, that the said provision comes into play.

25. The learned Additional Sessions Judge has not considered the other contentions in support of the discharge applications since the learned Additional Sessions Judge wrongly assumed that previous approval is required. In this view of the matter, while the order of discharge impugned is quashed and set aside, the learned Additional Sessions Judge is directed to decide the discharge applications of the accused afresh and record finding qua the contention that the material on record is not sufficient to warrant a trial.

26. The accused shall appear before the learned Additional Sessions Judge on 16th March, 2021 and shall bring this order to the notice of the learned Judge.

27. The learned APP Mr. M.K. Pathan is requested to forward a copy of this judgment to the learned District Government Pleader and Public Prosecutor, to enable him to appear before the learned Additional Sessions Judge on 16th March, 2021.

28. The learned Additional Sessions Judge shall decide the discharge applications within the next 15 days and if the discharge applications are found unmerited, to conduct and conclude the trial, as expeditiously as possible, and in any event, within the next six months.

Judge

Belkhede