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

Criminal Revision Application (Revn) No. 129 of 2021

Devendra Parshuram Shirke,
Aged about 66 years, Occ : Retired,
R/o. 50, Ishavasyam, Purnavaad
Nagar, Akashvani, Gangapur Road,
Nashik, Tq. And District : Nashik. **.... Applicant**

... Versus ...

The State of Maharashtra,
Through P.S.O. P.S. Sadar, Nagpur,
Tq. And District Nagpur. **.... Respondent**

Mr. Anil S. Mardikar, Senior Advocate with Mr. V. R. Deshpande, Advocate for the applicant
Mrs. K. R. Deshpande, APP for the State/non-applicant

CORAM : ROHIT B. DEO, J.
DATED : 23-12-2021

ORAL JUDGMENT:

Heard Mr. Anil Mardikar, the learned Senior counsel for the applicant and Mrs. K.R. Deshpande, the learned APP for non-applicant/State.

2. Admit.

3. The applicant Devendra Parshuram Shirke is arraigned as accused 5 in Special Case 25/2018 and is facing trial for offences

punishable Sections 13(1)(c), 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (Act). Mr. Devendra Parshuram Shirke shall be hereinafter referred to as the accused.

4. The accused preferred application dated 10.8.2018 Exhibit 42, seeking discharge on the premise that even if the material placed on record alongwith the final report is accepted at face value, no case is made out to proceed against the accused. The accused contended that on the same set of allegations, he was proceeded departmentally and was exonerated in toto.

5. The discharge application was opposed by the learned Public Prosecutor, who contended that as the Executive Director of Vidarbha Irrigation Development Corporation (VIDC) the accused was obligated to ensure compliance with rules and procedure which obligation, the accused failed to discharge, and it was the accused who finally approved the updation of tender value.

6. The discharge application was initially allowed, however, the said order was set aside by this Court in Criminal Revision 254/2018.

7. Having heard the learned Senior Counsel for the accused Mr. Anil Mardikar and the learned APP Mrs. K.R. Deshpande, I am inclined to allow this application.

8. Accused Sanjay Kholapurkar is discharged by this Court vide order dated 16.9.2021 in Criminal Revision Application 141/2019. The case of the accused stands on a better footing since he is exonerated in entirety. The Apex Court articulates in ***Ashoo Surendranath Tewari v. Deputy Superintendent of Police, Eow, CBI and another, (2020) 9 SCC 636 ("Ashoo Tewari")*** that if the accused is exonerated on merits in the Departmental Enquiry, criminal prosecution on the same set of facts and circumstances, cannot be allowed.

9. Considering that the learned APP Mrs. K.R. Deshpande is not disputing that the exoneration in the Departmental Enquiry is on the same set of facts and circumstances, it would not be necessary to make a detailed reference to the various judgments cited by the learned Senior Counsel Mr. Anil Mardikar.

10. The prosecution case is that the accused granted the final approval to the updation of the valuation of work. This approval is granted accepting the recommendations of the subordinate officers.

11. I have perused the proceedings of the Departmental Enquiry. I am satisfied that identical allegations were levelled and the accused is entirely exonerated.

12. In ***"Ashoo Tewari"***, the Apex Court noted several decisions and emphasized that the standard of proof in a departmental proceedings, being based on preponderance of probability, is somewhat lower than the standard of proof in a criminal proceedings where the case has to be proved beyond reasonable doubt. The Apex Court noted the findings recorded in the order of the Central Vigilance Commission which held the accused guilty, at the highest, of negligence without criminal culpability, and discharged the accused observing that the chances of conviction in a criminal trial involving the same facts appear to be bleak.

13. Mr. Anil Mardikar is justified in drawing support from the articulation of the Apex Court in ***"Ashoo Tewari"***.

14. Even de hors the issue considered in ***"Ashoo Tewari"***, in my considered view, there is no material in the final report as would be sufficient to infer the commission of offence under the penal provisions of the Act, which are invoked. Sections 13(1)(c) and 13(1)(d) of the Act as were on the statute book prior to the 2018 amendment, read thus :

> *"**13. Criminal misconduct by a public servant** – (1) A public servant is said to commit the offence of criminal misconduct -*
> *(a)......*
> *(b)......*
> *(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person to do so; or*
> *(d) if he, -*
> *(i) by corrupt or illegal means, obtains for himself orfor any other person any valuable thing or pecuniary advantage ; or*
> *(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage ; or*
> *(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest."*

15. The sine qua non ingredients of Section 13(1)(c) of the Act is dishonest or fraudulent misappropriation or conversion for own use any property entrusted to the accused or under his control, as a public servant or that the accused allows any other person to do so. Section 13(1)(d) of the Act envisages that any valuable thing or pecuniary

advantage is obtained by the accused for himself or for any other person by corrupt or illegal means or by abusing his position as a public servant or while holding office as a public servant, the accused obtains from any person any valuable thing or pecuniary advantage without any public interest.

In my considered view, administrative or procedural lapse simplicitor would not be sufficient even to raise strong suspicion of commission of offence in the absence of any material in the final report to prima facie suggest that the accused acted with dishonest or fraudulent intent and that, as a fact, the accused obtained any valuable thing or pecuniary advantage, for himself or any other person, or misappropriated or converted any property entrusted to him or under his control.

16. Adverting to the decisions cited by Mr. Anil Mardikar, ***Abdulla Mohammed Pagarkar etc. v. State (Union Territory of Goa, Daman and Diu)*** and ***C. Chengna Reddy and others v. State of Andhra Pradesh*** are rendered in appeals preferred challenging the judgments of conviction. ***State of Madhya Pradesh v. Sheetla Sahai and others***, inter alia, articulates that the recommendations made, by itself may not constitute a criminal misconduct since it was open to the State to ignore

the recommendations and to take an appropriate decision on the basis of material on record. ***Anil Kumar and others v. M.K. Aiyappa and another*** is not relevant in the context of the issue involved and the submissions canvased. The other decisions consider the parameters of discharge and the scope and ambit of the inherent powers under Section 482 of the Code.

17. It is trite law that at the stage of framing the charge, the Court is not expected to act as a mere post office. Limited sifting of material on record, is not only permissible, is expected, and the purpose is to ascertain whether there is a case for proceeding with the trial. It is true that a strong suspicion would suffice. However, the suspicion must be founded on some material which can be translated into evidence. The suspicion cannot be purely subjective based on the moral notions of the Judge nor can the suspicion be in the realm of surmises, conjectures and speculation. In ***Dipakbhai Jagdishchandra Patel v. State of Gujarat and another, (2019) 16 SCC 547***, the Apex Court observed thus :

> *"23. At the stage of framing the charge in accordance with the principles which have been laid down by this Court, what the Court is expected to do is, it does not act as a mere post office. The Court must indeed sift the material before it. The material to be sifted would be the material which is produced and relied upon by the prosecution. The sifting is not to be meticulous in the sense that the Court dons the mantle of the Trial Judge hearing arguments after the entire evidence has been adduced*

> *after a full-fledged trial and the question is not whether the prosecution has made out the case for the conviction of the accused. All that is required is, the Court must be satisfied that with the materials available, a case is made out for the accused to stand trial. A strong suspicion suffices. However, a strong suspicion must be founded on some material. The material must be such as can be translated into evidence at the stage of trial. The strong suspicion cannot be the pure subjective satisfaction based on the moral notions of the Judge that here is a case where it is possible that the accused has committed the offence. Strong suspicion must be the suspicion which is premised on some material which commends itself to the court as sufficient to entertain the prima facie view that the accused has committed the offence."*

18. In my considered view, if the material on record is scrutinized on the anvil of settled position of law, the irresistible conclusion is that the material is insufficient to presume the commission of an offence under the Act. The learned Special Judge fell in serious error in rejecting the application seeking discharge, and the order impugned is liable to be set aside, and is accordingly set aside.

19. The applicant/accused shall stand discharged from offences punishable under Sections 13(1)(c) and 13(1)(d) read with Section 13(2) of the Act, registered vide Crime 70/2018 with the Sadar Police Station, Nagpur.

20. The application is allowed in the aforestated terms.

<u>JUDGE</u>

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