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

CRIMINAL APPLICATION (APL) NO. 1371/2021

Sanjay S/o. Laxman Kholapurkar,
aged about 62 years, Occ. Retired,
R/o. 77-B, Pande Layout, behind Water
Tank, Khamla, Nagpur.

... **APPLICANT**

VERSUS

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

... **NON-APPLCANT**

Shri Shyam D. Dewani, Advocate applicant.
Shri. S. M. Ukey, Additional Public Prosecutor for non-applicant/State.

CORAM	:	**VINAY JOSHI, J.**
RESERVING THE JUDGMENT ON	:	**10/08/2022**
PRONOUNCING THE JUDGMENT ON	:	**09/11/2022.**

JUDGMENT :

Heard.

2. **Admit**.

3. By this application under Section 482 of the Code of Criminal Procedure ('Code') read with Article 227 of the Constitution of India, the applicant raises challenge to the order dated 02.11.2018 in Special Case No. 27/2018, whereby the Trial Court declined to discharge the applicant in terms of Section 227 of the Code.

4. The crime was registered vide Crime No. 3176/2016 against the applicant and others for commission of offence punishable under Sections 13(1)(c), 13(1)(d) and 13(2) of the Prevention of Corruption Act ('PC Act') and Sections 420, 468, 471, 109, 120-B of the Indian Penal Code. The said crime was registered by the Deputy Superintendent of Police, Anti Corruption Bureau, Nagpur alleging that the applicant (accused) by hatching criminal conspiracy, committed an offence of cheating, forgery of documents to favour the contractors as well as cost of estimate tender has been illegally increased.

5. The facts can be stated briefly that the applicant was serving as a Superintendent Engineer with the Irrigation Department of the Government of Maharashtra. Before his retirement, he was attached to Gosikhurd Project In-charge of Rehabilitation and Right Bank Canal in Bhandara and Chandrapur Districts. An Public Interest Litigation ('PIL') No. 83/2012 was filed alleging scam in various irrigation projects under the Vidarbha Irrigation Development

Corporation ('VIDC') on account of several irregularities. In pursuance of order passed in PIL, inquiry has been initiated regarding irregularities committed in Gosikhurd Projects. In pursuance of said inquiry, crime has been registered. It was revealed that the applicant has conspired in illegally qualifying M/s. Shradha Construction and Power Generation Pvt. Ltd., against norms. It is alleged against the applicant that during the years 2006 to 2010, while he was serving as a Superintendent Engineer, Gosikhurd Project Circle, in collusion with the co-accused involved in criminal acts caused wrongful gain to the successful contractors by abusing his position as a public servant. The applicant was head of the Pre-qualifying Scrutiny Committee. The applicant in collusion has held that M/s. Shradha Construction and Power Generation Pvt. Ltd., is qualified for competing tender process by granting marks while preparing a chart of marks and created illusory competition. Moreover, at the time of updation of tender, he included illegal items in tender and increased cost of tender by Rs. 7,38,66,000/-.

6. The applicant has applied for discharge on account of insufficiency of material to frame the charge. It is submitted that even if the contents of charge-sheet are taken to be true, it cannot be held that there is material to proceed further by framing of charge.

According to the applicant, the material, even if taken it to be true, the commission of offence under the PC Act cannot be presumed and at the most suggests administrative lapses but not criminal culpability. It is submitted that the applicant has already faced the departmental inquiry in which he was exonerated from similar charges. It is argued that other public servants facing similar charges have been discharged by this Court in different proceedings. The Government Resolution ('GR') dated 28.11.2018 makes it clear that Government has taken conscious decision that its employees and officers shall not be held liable for penal consequences regarding lapses, if any, on the part of the contractor in submitting documents.

7. The State resisted this application by contending that, at this juncture, deeper scrutiny of material is not required. Besides the charge under the PC Act, the applicant has also been charged for the offence of forgery and cheating. The learned APP submits that the updation of the value of the work was unwarranted and beyond the administrative power of the accused. It is pointed that in terms of Clause 2.11 of the Pre-qualification, the Committee can grant relaxation upto 20% only. However, it has been granted excess relaxation against the norms. By supporting impugned order, application is prayed to be rejected.

8. The applicant was posted as a Superintend Engineer in the year 2003 and was holding the post of Administrator Command Area Development Authority, Nagpur. The applicant was In-charge of Dam Construction Rehabilitation and Right Bank Canal in Bhandara and Chandrapur Districst. It is the prosecution case that the applicant has misused his position in the capacity of public servant by illegally qualifying ineligible contractor namely M/s. Shradha Construction and Power Generation Pvt. Ltd. It is alleged that the applicant has illegally recommended updation of tender by increasing the value of tender work which was contrary to the rules. It is the prosecution case that two contractors neither purchased tender forms nor participated in the pre-qualifying process, however, the applicant by conspiring with other, have prepared forged documents.

9. The Trial Court while rejecting the discharge application has held that the allegation against the applicant are of serious in nature. With an intention to assist successful bidder, bogus competition has been shown. Moreover, the applicant has illegally sanctioned the up-gradation of tender cost and thus, he does not deserve for discharge. The learned counsel appearing for the applicant would submit that similar type of cases have been filed against different public servants. One another case was also filed against the applicant bearing Special

Case No. 24/2018, in which similar allegations have been made under the PC Act. This Court has discharged the applicant from said case in criminal revision No. 141/2019. It is submitted that this Court has held that already departmental inquiry has been held and thus, on similar allegations criminal prosecution would not lie. The applicant has attracted my attention to the order dated 10.12.2021 passed in Criminal Application No. 1182/2021, (Devendra s/o. Parshuram Shirke Vs. State of Mahraashtra) in which this Court has discharged the then applicant a public servant under similar circumstances. The applicant relied on another decision of this Court dated 10.12.2021 in Criminal Revision Application No. 92/2021, (Mr. Dilip s/o. Deorao Pohekar Vs. The State of Maharashtra & anr.) wherein a Superintendent Engineer has been discharged by this Court under similar allegation. Likewise, the applicant would submit that this Court in one another case of similar nature in Criminal Application No. 734/2020 (Keshav s/o. Chandrakant Tayade Vs. The State of Maharashtra & anr.) vide order dated 20.06.2022 has quashed the proceeding holding that on the basis of similar allegation made in departmental inquiry, subsequent criminal prosecution is not tenable.

10. The applicant has pointed out that already departmental inquiry has been conducted, where the applicant has been exonerated

on principal charges and so far as the rest of the lapses are concerned, minor penalty has been imposed. The applicant has filed an appeal, wherein it has been noted that there is no financial loss to the Government Exchequer but there are procedural lapses on part of the applicant. Accordingly, the appeal was partly allowed and punishment was reduced by deducting of 3% monthly pension for the period of two years.

11. The learned counsel appearing for the applicant led more emphasis on the point that the applicant was not the sanctioning authority, but has recommended as a Committee member and therefore, no criminal liability would be fastened. The learned counsel appearing for the applicant has took me through the proviso to para 2.11.0 of the Pre-qualification form which provides criteria for relaxing minimum eligibility. As per proviso, if the number of contractors are not qualified in the process, the relaxation will be repeated once with relaxation in criteria of 20%. Moreover, he would submit that no criminal liability could be fastened, even if there are some administrative lapses.

12. My attention has been invited to the GR dated 28.11.2018, wherein under Clause 5, it has been clarified that the Government has taken conscious decision, if contractor has submitted forged and

fabricated documents, the Scrutiny Committee shall not be held responsible. The GR dated 28.11.2018 has adopted Clause No. 5 of earlier GR and made it applicable to the concerned department. Moreover, communication dated 12.12.2018 is pressed into service to show that the said Clause 4.15 has retrospective application. *Prima facie,* it reveals that the Government has taken such decision for not to fasten the criminal liability on the government officer for the acts committed by the contractor. In this regard, my attention has been invited to the decision of this Court in case of ***Anilkumar Baliram Gaikwad Vs. State of Maharashtra*** (Criminal Application No. 707/2019, decided on 19.02.202), wherein the issue was considered at length and held that the government officer cannot be held responsible for the contractors lapses or act of forgery.

13. The applicant relied on the decision of the Supreme Court in case of ***Ashoo Surendranath Tewari Vs. Deputy Superintendent of Police, EOW, CBI and another***, ***(2020) 9 SCC 739***, wherein it is ruled that if the accused was exonerated on merits in the departmental inquiry, criminal prosecution on the same set of facts and circumstances, cannot be allowed to continue. On the same line, further reliance is placed on the decision of the Supreme Court in case of ***State (NCT of Delhi) Vs. Ajay Kumar Tyagi, (2019) 9 SCC 685***. The

learned counsel for the applicant would submit that on account of administrative lapses, criminal liability cannot be fastened. For this purpose, he relied on the decision in cases of ***State of Madhya Pradesh, Vs. Sheetla Sahai and others, (2009) 8 SCC 617, C. Chenga Reddy and others Vs. State of A. P. (1996) 10 SCC 193*** and ***Abdulla Mohammed Pagarkar Vs. State (Union Territory of Goa, Daman and Diu and other connected matter, (1980) 3 SCC 110***.

14. On the other hand, besides irregularities, the learned APP has not pointed out criminal liability. Undoubtedly strong suspicion is sufficient to frame charge, however, in view of the decision of this Court in case of **Anilkumar Baliram Gaikwad** (*supra*), the Court has limited power to sift the material to find out whether the case is made out to proceed further. The learned APP would submit that besides the provisions of the PC Act, the applicant has also been charged for the offence of cheating, forgery and fraud. In order to constitute the offence under Section 420 of the Indian Penal Code, *prima facie,* it has to be demonstrated that accused had dishonest intention to deceive. In this regard, the learned counsel appearing for the applicant relied on the decision of Supreme Court in case of ***Thermax Limited and others Vs. K. M. Johny and others, (2011) 13 SCC 412***, wherein the Supreme Court has observed that mere conspiracy is not enough for cheating,

unless fraudulent or dishonest intention is shown right from the beginning of the transaction. The learned APP is unable to point out any other material from which at this stage, it can be pursued that at least a case of strong suspicion has been made out. The GR as referred above clarifies that for the contractors' fraudulent activities, the government officer shall not be held liable for criminal liability. Moreover, para 7 of the reply affidavit dated 07.01.2022 indicates that the applicant has not been specifically charged for forged and fabricated documents.

15. It is settled law that at the stage of framing the charge, detail evaluation of material not required, but limited sifting of material is expected for the purpose of ascertaining whether there is case for proceeding with the trial. No doubt, strong suspicion is sufficient, but it must be founded on some material which can be translated into evidence. Administrative or procedural lapses would not be sufficient to raise strong suspicion in absence of material to suggest that applicant acted dishonestly with fraudulent intent.

16. In view that, there is no sufficient material to presume commission of offence. The Trial Court erred in rejecting discharge application, therefore impugned order is liable to set aside. In conclusion, application is allowed. Impugned order dated 02.11.2018

is hereby quashed and set aside. The applicant stands discharged for all the charges levelled against him.

(VINAY JOSHI, J.)

Gohane