**HIGH COURT OF MADHYA PRADESH**
**PRINCIPAL SEAT AT JABALPUR**

**DIVISION BENCH**

**Criminal Revision No.1422/2008**

Ajoy Acharya, aged 56 years, s/o Lt. Shri M.C. Acharya, r/o D-II/7, Cornwallis Road, Subramaniam Bharti Marg, New Delhi.

**versus**

State Bureau of Investigation Against Economic Offences, Bhopal.

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For the Petitioner: Shri Amit Prasad, advocate.
For the Resp./State: Shri S.K. Rai, Government Advocate.

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**PRESENT: HONOURABLE SHRI JUSTICE RAKESH SAKSENA**
**HONOURABLE SHRI JUSTICE M.A. SIDDIQUI**

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Date of hearing: 08/08/2011
Date of Judgment: 29/08/2011

**O R D E R**

**Per: Rakesh Saksena, J**

Petitioner has filed this revision against the order dated 11.4.2008, passed by Special Judge (Prevention of Corruption Act), Bhopal, in Special Case No.07/2007, rejecting the application filed by him under Section 239 of the Code of Criminal Procedure seeking discharge from the offences punishable under Sections 420, 120B of the Indian Penal Code and Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988.

**2.** The State Economic Offence Investigation Bureau, Bhopal, on 24.7.2004 registered a case at Crime No.25/2004 in respect of the offences punishable under Sections 409, 420, 467, 468 and 120B of the Indian Penal Code against the following office bearers of Madhya Pradesh State Industrial Development

Corporation (for brevity 'MPSIDC'), a Government Company registered under the Companies Act, 1956:-

**(i)** Rajendra Kumar Singh, the then Chairman
**(ii)** Ajay Acharya, the then Director
**(iii)** J.S. Ramamurthy, the then Director
**(iv)** M.P. Rajan, the then Managing Director
**(v)** Narendra Nahta, the then Chairman
**(vi)** S.R. Mohanty, the then Managing Director

and against the beneficiary Chairmen/Directors of 42 other companies.

On 6.8.2004, prosecution added Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (for brevity 'Act') also.

**3.** In short, the accusations against the Chairpersons and the Directors of MPSIDC are that they were involved in a conspiracy to defraud MPSIDC to the tune of crores of rupees and to misappropriate the surplus fund and in pursuance thereof, they passed resolution on 19.4.1995 knowing fully well that it was illegal and unauthorized act and, thereafter, continued to act upon it and in the process, also misappropriated additional sum of Rs.517 crores, secured as debt, by disbursing the entire money of MPSIDC, to various companies as loans in the name of Inter Corporate Deposits (ICDs), even without obtaining reasonably sufficient collateral security for repayment thereof.

**4.** As per charge sheet, M.P. Adyogik Vikas Nigam (MPAVN), which was renamed as MPSIDC was constituted to promote industrialization in the State of Madhya Pradesh and to provide financial assistance to Industrial Units in the State. The State Cabinet in a meeting held on 28.1.1994 appraised the activities of the Corporation as well as its financial status. A decision was taken to stop MPSIDC from financing the industries any further. For the sake of convenience resolution of the Cabinet Meeting is reproduced as under:-

***"Audyogik Vikas Nigam bhavishya me vittiya sahayata band kare tatha vrahad avam madhyam udyogon ko protsahan aur pradesh me udyogon ko buniyadi suvidhaon ke vikas ka karya prabalta se karen."***

In accordance with the Cabinet decision the Board of Directors of MPSIDC at its 225th meeting held on 31.1.1994 passed a resolution to stop the financial assistance forthwith. The corresponding agenda-note prepared by the Company Secretary Pankaj Dubey is reproduced as under:-

> *"That, after the review of performance, the Cabinet took the decision that in view of the recent liberalization on measures taken by the Government of India in respect of the economy and the Industry, the RBI approval to the All India Financial Institutions/ Banks to sanction projects up to Rs.50 crores, the lowering of interest rate by the Banks, the comfortable CRR and SLR of the Banks and consequent enhanced liquidity, the considerably enhanced degree of professional and commercial orientation requiring financing under the changed economic scenario, there is no justification for MPSIDC to engage in financing and it should be stopped forthwith. The Cabinet also noted that the performance of MPSIDC in respect of its financial operations had been rather unsatisfactory and has resulted in an adverse portfolio situation and evidenced by the asset classification as on 31.03.1993 whereby approx 60% of the loan account were in sub-standard/doubtful/loss category."*

Acting upon the Cabinet decision, Department of Commerce and Industry, Government of M.P., also issued a circular No.F-20/1/94/11/B dated 3.3.1994 requiring all the departments/institutions concerned including MPSIDC to discontinue financial assistance to industries and also to concentrate on development of basic infrastructure amenities to the large as well as medium scale industries in the State.

However, pursuant to a conspiracy hatched for defrauding the MPSIDC, the Board of Directors, in utter contravention of the policy decision taken by the Cabinet, consequent resolution and the circular dated 3.3.1994, passed a resolution at its 229th meeting held on 19.4.1995, authorizing M.P. Rajan, the

then Managing Director, to invest surplus funds of MPSIDC in Inter Corporate Deposits (ICDs), Fixed Deposits (Fds) or in any other form, and also to decide the period of investment and rate of interest from time to time. This resolution was also violative of (**a**) the Memorandum and Article of Association of MPSIDC and (**b**) the provisions of sub-section (1)(e) and sub-section(4) of Section 292 of the Companies Act, 1956, which imposed restrictions and conditions on the exercise by the Board of Directors of powers to advance loans. Moreover, in the 32nd Annual General Meeting of the MPSIDC held on 21.8.1998, the limit of financial assistance to the companies was enhanced from Rs.3.00 crores to Rs.15.00 crores, without obtaining any approval from the State Government, as contemplated under sub-clause (ii) of Article 110 of the Memorandum of Association.

At the 240th meeting of the Board of Directors held on 30.11.1998, M.P. Rajan, the then Managing Director, was able to get the borrowing capacity of MPSIDC increased from 175 crores to 500 crores on the ground that a total amount of Rs.173.72 crores had already been borrowed whereas by the end of the financial year, investment (presumably by way of ICDs) was expected to reach their limit of Rs.500 crores. By way of this resolution, the Managing Director was authorized to secure loans as well as to invest the amount thus obtained. This resolution was passed without prior approval of the State Government as required under Clauses 57, 58 and 60 of the Memorandum of Association, despite the fact that the Cabinet had already disapproved the activity of financing/funding by MPSIDC.

Under aforesaid resolution dated 30.11.1998, a total amount of Rs.511.57 crores was collected by M.P. Rajan and other Directors of MPSIDC as per the following details:-

| S.No. | Particulars of lending Institution | Amount (Rs.) |
|---|---|---|
| 1. | Indian Industrial Development Bank | 150.00 crores |
| 2. | Mumbai District Co-operative Bank | 110.00 crores |
| 3. | Bonds of MPSIDC (14.4%) | 81.61 crores |
| 4. | Bombay Mercantile Co-operative Bank Ltd. | 75.00 crores |
| 5. | Apex Urban Bank of Maharashtra and Goa. | 55.00 crores |
| 6. | Syndicate Bank (Overdrafts) | 12.00 crores |
| 7. | Subordinate Units of the Corporation and other Corporations of M.P. | 27.96 crores |
| | Total | 511.57 crores |

During the period from 1995 to 2002, all the accused named above, under the garb of the resolution dated 19.04.1995, distributed, even without taking adequate security for repayment, crores of rupees by way of ICDs to as many as 42 companies and thus, caused wrongful gain to the Directors of these Companies and corresponding wrongful loss to the MPSIDC.

M.P. Rajan was relieved of the charge from the post of Managing Director on 20.1.2000. However, at its 243rd meeting held on 25.5.2000 under the Chairmanship of Narendra Nahta, a decision was taken to continue with the financing by way of ICDs ignoring the adverse comments recorded in the Financial Status Report.

The Comptroller and Auditor General of India, in his report pertaining to the financial year ending 31st of March, 2000, also noted that while investing the surplus amount in the ICDs, the Board of Directors neither formulated policies/procedures/guidelines nor followed the directions issued by the Reserve Bank of India in this regard. It was also pointed out that conferment of power on the Managing Director to make loans without fixing the maximum limit of deposits was contrary to the provisions of Companies Act.

Reserve Bank of India, while observing that under Section 45-I(a) of the Reserve Bank of India Act, 1934, registration of MPSIDC as a non-banking

financial institution (NBFI) was a pre-condition for the purpose, also raised objection to the investment of surplus money in the ICDs. In the wake of the objection, the Board of Directors, at its 251st meeting, resolved to apply for the registration and, accordingly, on 6.11.2002, the then Dy. General Manager of MPSIDC forwarded the corresponding proposal to the RBI. In turn, the RBI issued a notice to show cause not only against proposed rejection of the registration application but also against prosecution for the offence punishable under Section 58B(4A) of the RBI Act of 1934 for functioning as a NBFI right from 19.4.1995 without ensuring that as on 31.12.2002, the Net Owned Fund (NOF) ought to have been Rs.200 lacs whereas the balance sheet reflected that as on 31.3.2002, NOF was minus Rs.9415.29 lacs. Ultimately, the RBI, not being satisfied with the explanation tendered on behalf of MPSIDC in its reply dated 30.7.2003, proceeded to reject the registration application vide its order dated 18.3.2004.

**5.** On the basis of above facts, the cognizance against the petitioner as well as other accused persons had been taken upon charge sheet being filed by the Economic Offence Investigation Bureau, Bhopal. A supplementary charge sheet was also presented by the Bureau on 31.3.2010 against the Directors and Promoters of other companies, who obtained benefits as a result of acts and conducts of the office bearers of MPSIDC.

**6.** According to prosecution, by the conduct of the Directors of the MPSIDC M/s Archana Airways Ltd. obtained illegal financial benefit of Rs.5.50 crores. Since the petitioner by corrupt and illegal means alongwith other accused persons helped the aforesaid company to obtain pecuniary advantage and made the Government to suffer heavy pecuniary loss, he was liable to be prosecuted for the offences under Sections 420, 120B of the Indian Penal Code and Section 13(1)(d) read with Section 13(2) of the Act. The petitioner, at the

time of commission of the offence, was Director of MPSIDC and also Commissioner of Industries of M.P. Government, but, at the time of filing of charge sheet, he was not occupying the said office and instead was posted as Financial Adviser (Acquisition) to the Ministry of Defence, Government of India, at Delhi, therefore, a charge sheet was filed without obtaining sanction under Section 19 of the Act and also sanction under Section 197 of the Cr.P.C.

**7.** Petitioner filed an application under Section 239 of the Code of Criminal Procedure for being discharged on the ground of absence of sanction to prosecute him by the concerned Government and also on the ground that from the accusation leveled against him, no commission of offence was disclosed against him, however, in view of the proposition laid down by the Apex Court in the case of ***Prakash Singh Badal and another vs. State of Punjab and others-(2007) 1 SCC 1*** and in the facts and circumstances of the case the same was dismissed by the impugned order, aggrieved whereby, the petitioner has filed this revision.

**8.** Shri Amit Prasad, learned counsel for the petitioner, submitted that the petitioner is a Government servant belonging to Indian Administrative Service, still continuing in Government service and was Additional Secretary in the Department of Defence Production, Government of India. Since petitioner was an officer of the Indian Administrative Service, the President of India was the appointing as well as dismissing authority. Even if he was encadred to State of M.P., or proceeded on deputation to any organization, or the Central Government, he was not removable from his service save with the sanction of Central Government. He submitted that in view of the provisions of Article 320 (3)(c) of the Constitution of India, on all the disciplinary matters affecting a person serving under the Government of India or the Government of a State in the civil capacity, the Union Public Service Commission or the State Public

Service Commission as the case maybe, should be consulted. All India Services were included in the Union List of VIIth Schedule of the Constitution. Therefore, the competent authority for according sanction for the prosecution of the petitioner was the Central Government. It did not make any difference that he was employed in connection with the affairs of the State or on deputation in Central Government. The petitioner was only a nominee Director on the Board of MPSIDC by virtue of his posting as Industries Commissioner. He was not getting any remuneration or salary or fees from the MPSIDC. He continued to be in Indian Administrative Service. It was part of his official duty to attend the Board meeting, once a notice was received from the MPSIDC. Learned counsel submitted that the ratio of the Apex Court decision rendered in case of ***Prakash Singh Badal'*** *(supra)* was not applicable to the petitioner.

**9.** Apart from the question of sanction, learned counsel for the petitioner submitted that the decision taken at the Cabinet Review Meeting and the meeting of the Board dated 31.1.1994, which adopted the decision of Cabinet meeting clearly showed that the 'financial assistance', as discussed in the said meetings, pertained only to project finance. While business of Project Finance was stopped, the expenditure continued to create a compelling situation for MPSIDC to generate profits on its own without there being any line of business. In these prevailing circumstances, the Agenda was circulated in the 229$^{th}$ Board Meeting of MPSIDC to be held on 19.4.1995. In the said meeting , the important phrases viz. "availability of surplus funds"; "to be given to reputed companies"; "for a period of 3-6 months"; "could be called back at the time of need"; "interest rates higher than 8.5% and 15.5%" were explained in detail. The agenda also provided that it was within the powers of the Board to give Inter Corporate Deposits. The Board Resolution was subsequently

confirmed in 230th Board Meeting, which was attended by Shri K.Shanker Narain, Member on the Board and also the Principal Secretary, Commerce and Industries. The Company Secretary Shri Pankaj Dubey, was responsible for ensuring the legal compliance of Board Minutes, yet no proceeding was initiated against him by the prosecution. The prosecution adopted 'pick and chose' policy in discriminatory manner. Prosecution committed error in inter-relating the transactions of "Project Finance" , "Term Loan", "Inter Corporate Deposits (ICDs)". Counsel further submitted that there was no allegation in the charge sheet that there was any kind of secrete meeting between petitioner and the beneficiaries of ICDs or other co-accused persons. It was not said by the prosecution that out of the proceeds of ICDs, some kick-back was given to the petitioner, or that petitioner desired to extend favour to any particular person. Sitting on the board of MPSIDC was a part of extension of his duty as Industries Commissioner by virtue of his official duty. As such, the petitioner was also entitled for the protection in accordance with Section 197 Cr.P.C.. Even if there was *bonafide* mistake or error in decision making, petitioner was not liable to be prosecuted on the charge of corruption in the absence of any dishonest or *malafide* intention on his part.

**10.** Shri S.K. Rai, learned Government Advocate, on the other hand, submitted that it was a situation where at the relevant time the petitioner was holding the office of a public servant as Industries Commissioner and also the Director of the Board of MPSIDC. The allegation against him pertained to his office of Director of the Board only and not as Industries Commissioner. For the purpose of this case, the petitioner ceased to be in the office of MPSIDC or even the Industries Commissioner as soon as he relinquished the said office. At the time when charge sheet was filed, he was on deputation with the Union Government as Additional Secretary to the Department of Defence Production.

In this situation, in view of the law laid down by the Apex Court in ***Prakash Singh Badal*** *(supra),* no sanction was required for taking cognizance against him, since the office, which, as a public servant, the petitioner abused, was different than his present assignment of deputation. The offence under Section 13(1)(d) read with Section 13(2) of the Act is the time-related offence. Placing reliance on the decision of ***Prakash Singh Badal*** *(supra),* learned Government Advocate submitted that the question relating to sanction under Section 197 Cr.P.C. Was not necessarily to be considered as soon as the complaint was lodged. This question might have arisen at any stage of the proceeding, and question whether the sanction was necessary or not might have to be determined from stage-to-stage. Apart from it, the offence of cheating under Section 420 IPC or for that matter offences relatable to Sections 467, 468, 471 and 120-B IPC, by their very nature not be regarded as having been committed by any public servant while acting or purporting to act in discharge of official duty. In such case, the official status was an opportunity for commission of the offence. Learned Government Advocate further submitted that despite the decision of the Cabinet Review Meeting dated 28.1.1994 and Board Meeting dated 31.1.1994 where the decision relating to discontinuance of Project Finance was taken, deliberately, the petitioner, who was present in the Board Meeting dated 19.4.1995 alongwith other Directors, passed resolution and engaged in the activities of financing on the pretext and the name of Inter Corporate Deposits due to which MPSIDC suffered heavy losses. The Board Resolution dated 19.4.1995 empowering the Managing Director to give Inter Corporate Deposits was in violation of the provisions of Section 292(1)(e) read with Section 292(4) of the Companies Act and also in violation of the Memorandum and Articles of Association.

**11.** Perusal of the charge sheet indicates that on 28.1.1994, in the meeting

of Cabinet, petitioner Ajoy Acharya was present. In the meetings of the Board held on 31.1.1994, 27.7.1994 and 19.4.1995 also petitioner was present as a Director. It is apparent that he knew fully well that Cabinet categorically issued directions for discontinuance of the Financial Assistance, yet, as a Director, he, by abusing his post in connivance of others, co-operated in passing the resolution about making Inter Corporate Deposits. To prove conspiracy, there cannot always be a direct evidence. Existence of a conspiracy can be inferred mostly by the circumstances. In fact, because of the difficulties in having direct evidence of criminal conspiracy, once reasonable ground is shown for believing that two or more persons have conspired to commit an offence then, anything done by anyone of them in reference to their common intention after the same is entertained becomes, according to Section 10 of the Evidence Act, relevant for proving both conspiracy and the offences committed pursuant thereto (***Noor Mohammad Mohd. Yusuf Momin v. The State of Maharashtra-AIR 1971 SC 885***).

**12.** Merely because Company Secretary, whose role was to ensure the legal compliance of the Board Minutes, was present in all the meetings, but was not prosecuted, did not exonerate the petitioner of his conduct of allowing the agenda to be passed in 229$^{th}$ Meeting. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-participators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator be interested.....even if some steps are resorted to by one or two of the conspirators without the knowledge of the others it will not affect the culpability of those others when they are associated with the object of the

conspiracy *(**Yash Pal Mittal v. State of Punjab, AIR 1977 SC 2433***).

**13.** As a director, petitioner also appears to have acted in contravention of the provisions of Section 292(1)(e) and sub-section (4) of the Companies Act, 1956. The relevant provision of Section 292 is quoted hereunder:-

> "**292. Certain powers to be exercised by Board only at meeting.**-(1) The Board of directors of a company shall exercise the following powers on behalf of the company, and it shall do so only by means of resolutions passed at meetings of the Board:-
>
> (a) .....
>
> (b) .....
>
> (c) .....
>
> (d) .....
>
> (e) the power to make lonas:
>
> [Provided that the Board may, by a resolution passed at a meeting, delegate to any committee of directors, the managing director, [***] the manager or any other principal officer of the company or in the case of a branch office of the company, a principal officer of the branch office, the powers specified in clauses (c), (d) and (e) to the extent specified in sub-sections (2), (3) and (4) respectively, on such conditions as the Board may prescribe:
>
> (2) Every resolution delegating the power referred to in clause (c) of sub-section (1) shall specify the total amount [outstanding at any one time] up to which moneys may be borrowed by the delegate.
>
> (3) Every resolution delegating the power referred to in clause (d) of sub-section (1) shall specify the total amount up to which the funds may be invested, and the nature of the investments which may be made, by the delegate.
>
> (4) Every resolution delegating the power referred to in clause (e) of sub-section (1) shall specify the total amount up to which loans may be made by the delegate, the purposes for which the loans may be made, and the maximum amount of loans which may be made for each such purpose in individual cases."

It is apparent by the above provisions that powers of the Board of Directors of Company have been restricted in the matter of advancing loan by putting limitation on it. In the instant case, no specific or definite guidelines were formulated. Apart from it, since the Financial Assistance by the MPSIDC was expressly discontinued by the Cabinet decision, no investment, advancement of loan or deposits ought to have been made by the Directors of the Board of

MPSIDC, except with the prior permission of the State Government. While appraising the financial transactions of the MPSIDC on 31st March 2000 Comptroller and Auditor General (CAG) observed that while taking decision of making Inter Corporate Deposits in the month of April 1995 the Board neither ascertained its policies, procedure and relevant guidelines, nor followed the directions issued by the Reserve Bank of India and delegated all the powers for taking all the relevant decisions in making deposits. Until the maximum limit of deposit was not ascertained, the delegation of powers in this regard was against the *proviso* of the Companies Act.

**14.** It was also brought to notice that the Industrial Development Corporations of all States were recognized as "Non-Banking Financial Institutions (NBFI)" after the 1997 amendment in the Reserve Bank of India Act, 1934 (Chapter III-B). As such, MPSIDC ought to have been registered as 'Non-Banking Financial Institution (NBFI)' with the Reserve Bank of India under the provisions of Section 45-I-A. On occasion, the objections in this regard were raised by the Auditors of the MPSIDC. In the year 2003, Reserve Bank of India, Bhopal, also issued a show cause notice to MPSIDC for working as NBFI without getting registered under the provisions of Reserve Bank of India Act, 1934.

**15.** It has come on record that by making Inter Corporate Deposits number of companies including MPSIDC suffered heavy losses. The argument advanced by the learned counsel for the petitioner that Economic Offences Bureau chose to prosecute Directors/Chairman of only those companies, who made default and left out those who returned the money, does not incur any benefit to petitioner. It is always open for the investigating agency and the court to see and summon those who appear involved in the commission of offence at different stages of investigation and the trial.

**16.** Placing reliance on the case of ***Soma Chakravarty v. State through CBI-(2007) 5 SCC 403***, learned counsel for the petitioner submitted that the courts although may take strict view of an offence where a fraud is alleged against a public servant, but only because it is found to have been committed, the same by itself may not be sufficient to arrive at a conclusion that all the officers who have dealt with the files at one point of time or the other would be taking part in conspiracy thereof or would otherwise be guilty for aiding or abetting the offence. It is necessary to deal with the individual acts of criminal misconduct for finding out a case therefor. It was also observed by the Apex Court that the court also should have considered the question having regard to the 'doctrine of parity' in mind.

**17**. In the instant case, there is evidence on record that in the Cabinet Meeting in which the Financial Assistance was decided to be stopped and in the Board Meeting in which the said decision was adopted by resolution, the petitioner was present. All the Directors and the Managing Directors were sought to be prosecuted. In these circumstances, it cannot be held that the petitioner was discriminated and or he was not connected with the said transaction.

**18.** The submission made by the learned counsel for the petitioner that the Inter Corporate Deposits (ICDs) cannot be equated with Financial Assistance, which was prohibited by the Cabinet, cannot, at this stage, be accepted, since it would be a matter of evidence to be appreciated during the trial. As commonly known, an Inter Corporate Deposit is essentially a short term assistance provided by one corporate with surplus fund to another in need of funds. It is an assistance given by cash-rich company to low rated cash and starved company unable to get a loan. Unsecured loan, but may be co-lateralized sometime for weaker companies to get benefit of credit

enhancement. Interest rates are higher than bank rate. The risk premium is also added in ICDs. It is considered as the last resource as a source of finance. In our opinion, at this stage it cannot be held that Inter Corporate Deposits did not amount to Financial Assistance.

**19.** Without critically scrutinizing and meticulously examining the evidence and material on record at this stage, it seems to us that the act and conduct of the petitioner cannot be described merely as an error of judgment and that he did not abuse his position in passing the resolution of making Inter Corporate Deposits (ICDs) in contravention of the decision taken in the Cabinet Meeting. At this stage, the proposition laid down by the Apex Court in case of ***State of Madhya Pradesh v. Sheetla Sahai and others-(2009) 8 SCC 617*** does not render any help to petitioner.

**20.** Learned counsel for the petitioner next submitted that without obtaining the previous sanction, prosecution under the provisions of Prevention of Corruption Act could not be launched against the petitioner. He could not be prosecuted for the other offences also in the absence of sanction by the appropriate government under Section 197 Cr.P.C. Since the petitioner was a member of Indian Administrative Service and was nominated as Director of the Corporation by the Governor because of his being Commissioner of Industries, Government of M.P., no cognizance against him in view of Section 19 of the Act and Section 197 of the Cr.P.C. could have been taken in the absence of sanction from the Central Government. Learned counsel referred various articles of the Constitution of India viz. Article 77(3), 311(2)(a), 312(2), 320(3)(c) and the Entry No.70 of the Union List of VIIth Schedule of the Constitution of India. Learned counsel submitted that since the nomination of the petitioner as Director was merely an extension of a service, it could not be held that he was not a public servant. Even his being on deputation with the Union

Government as Additional Secretary, Department of Defence Production, was an incident of a service/employment. Since the petitioner continued to be in the employment of the Union Government, he could not be said to have ceased to hold the office. Placing reliance on the decision of the Apex Court rendered in ***Balakrishnan Ravi Menon v. Union of India-(2007) 1 SCC* 45,** learned counsel contended that the petitioner could have been held to have not holding the said office if he might have retired, superannuated, discharged or dismissed, but it was not the case of the prosecution. He further submitted that for prosecution of the petitioner sanction under Section 197 of the Code of Criminal Procedure was also essential since the conduct attributed to the petitioner purported to be in the discharge of his official duty. The protection to public servant under Section 197 Cr.P.C. is available even after he ceased to hold the office. It is not disputed that MPSIDC is a Government Company. Since petitioner was Commissioner, Industries, he was nominated as a Director by the Governor in exercise of powers conferred by Clause 89(3) of the Memorandum of Articles of Association of the Company. Clause 89(3) provides as under:-

> "89(3). The tenure of all Directors including Chairman and excluding Managing Director shall be for the period as fixed or determined by the State Government from time to time. The Managing Director shall retire on his ceasing to hold the office of the Managing Director. A retiring Director shall be eligible for reappointment."

Clause 89(4) provides as under:-

> "89(4). The Governor shall have the power to remove any Director appointed and nominated by him including the Chairman and the Managing Director from Office at any time in his absolute discretion."

Clause 91 provides about the payment of salary and allowances to Director. Clause 91 reads as under:-

> "91. The Directors appointed shall be paid such salary and allowances subject to the provisions of Section 309 of the Act, as may from time to time be determined by the Governor, subject to the provisions of Section 314 of the Act."

**21.** From the above provisions in the Memorandum and Articles of Association of the Company it is apparent that the Governor had power to remove any Director appointed and nominated by him from the "Office" at any time in his absolute discretion. It is also apparent that a Director was to be paid salary and allowances subject to the provisions of Section 309 of the Companies Act and as may be determined by the Governor from time to time.

**22.** Learned counsel for the petitioner contended that the petitioner, as a Director, never received any payment or allowances from the Corporation, therefore, he could not be said to be a person in the service or pay of a Government Company. We are unable to accept the submission advanced by the learned counsel. Since the Directors were entitled for the salary and allowances, merely by the fact that they chose not to receive the same cannot change the nature of their service. In a similar situation, the Apex Court while explaining the term 'office of profit' in reference to Articles 102, 103(2) of the Constitution of India held that an 'office of profit' is an office, which is capable of yielding a profit or a pecuniary gain. The question whether a person holds an office of profit is required to be interpreted in a realistic manner.....for deciding the question as to whether one is holding an office of profit or not, what is relevant is whether the office is capable of yielding a profit or pecuniary gain and not whether the person actually obtains monitory gain. If the 'pecuniary gain' is 'receivable' in connection with the office then it becomes an 'office of profit', irrespective of whether such pecuniary gain is actually received or not.

**23.** Approving the ratio of the decision rendered by the Apex Court in case

of ***R.S. Nayak v. A.R. Antulay-AIR 1984 SC 684***, the Apex Court in ***Prakash Singh Badal*** *(supra)* held that the relevant date with reference to which a valid sanction is *sine qua non* for taking cognizance of an offence committed by a public servant as required by Section 19 is the date on which the court is called upon to take cognizance of the offence of which he is accused (Para 16). Where the act performed by the public servant under the colour of office is for the benefit of the officer or for his own pleasure Section 19(1) of the Act will come in. Therefore, Section 19(1) is time and offence related (Para 20 & 21). The contention as advanced in that case that even if the offending act is committed by a public servant in his former capacity and even if such a public servant has not abused his subsequent office, still such a public servant needs protection of Section 19 (1) of the Act throughout, as long as he continues to be in public employment, and that the judgment of the Supreme Court in ***R.S. Nayak's*** *case* **(1984) 2 SCC 183** holding that the subsequent position of the public servant to be unprotected was erroneous, was held to be clearly untenable as Section 19(1) of the Act was held to be time and offence related (Para 23 & 24).

**24.** In ***Prakash Singh Badal*** *(supra)*, the Apex Court with approval quoted in para-23 of the decision rendered in ***R.S. Nayak's*** case as under:-

> "**23.** Offences prescribed in Ss. 161, 164 and 165, I.P.C. and S. 5 of the 1947 Act have an intimate and inseparable relation with the office of a public servant. A public servant occupies office which renders him a public servant and occupying the office carries with it the powers conferred on the office. Power generally is not conferred on an individual person. In a society governed by rule of law power is conferred on office or acquired by statutory status and the individual occupying the office or on whom status is conferred enjoys the power of office or power of flowing from the status. The holder of the office alone would have opportunity to abuse or misuse the office. These sections codify a well-recognized truism that power has the tendency to corrupt. It is the holding of the office which gives an opportunity to use it for corrupt motives. Therefore, the corrupt conduct is directly attributable and flows from the power conferred on the office. This

> interrelation and interdependence between individual and the office he holds is substantial and not severable. Each of the three clauses of sub-section (1) of S.6 uses the expression 'office' and the power to grant sanction is conferred on the authority competent to remove the public servant from his office and S.6 requires a sanction before taking cognizance of offences committed by public servant. The offence would be committed by the public servant by misusing or abusing the power of office and it is from that office, the authority must be competent to remove him so as to be entitled to grant sanction. The removal would bring about cessation of interrelation between the office and abuse by the holder of the office. The link between power with opportunity to abuse and the holder of office would be severed by removal from office. Therefore, when a public servant is accused of an offence of taking gratification other than local remuneration for doing or forebearing to do an official act (S.161, I.P.C.) or as a public servant abets offences punishable under Sections 161 and 163 (S.164, I.P.C.) or as public servant obtains a valuable thing without consideration from person concerned in any proceeding or business transacted by such public servant (S.165, I.P.C.) or commits criminal misconduct as defined in Section 5 of the 1947 Act, it is implicit in the various offences that the public servant has misused or abused the power of office held by him as public servant. The expression 'office' in the three sub-clauses of Section 6(1), would clearly denote that office which the public servant misused or abused for corrupt motive for which he is to be prosecuted and in respect of which a sanction to prosecute him is necessary by the competent authority entitled to remove him from that office which he has abused. This interrelation between the office and its abuse if severed would render S.6 devoid of any meaning. And this interrelation clearly provides a clue to the understanding of the provision in S.6 providing for sanction by a competent authority who would be able to judge the action of the public servant before removing the bar, by granting sanction, to the taking of the cognizance of offences by the Court against the public servant. Therefore, it unquestionably follows that the sanction to prosecute can be given by an authority competent to remove the public servant from the office which he has misused or abused because that authority alone would be able to know whether there has been a misuse or abuse of the office by the public servant and not some rank outsider."

It is true that in ***Balakrishnan Ravi Menon*** *(Supra)* it was observed that in case where the person is not holding the said office as he might have retired, superannuated, be discharged or dismissed then the question of removing would not arise. In that case, the situation was that at the time of alleged offence, the petitioner was appointed by the Central Government, however, he demitted his office after completion of five years' tenure. Therefore, at the

relevant time, when the charge sheet was filed, the petitioner was not holding the office of Chairman of Goa Shipyard. Hence, there was no question of obtaining the sanction of the Central Government. In the present case, when the offence was alleged to have been committed by the petitioner, he was holding the office of Director of MPSIDC and or the Commissioner of Industries in the cadre of Government of M.P.. However, when charge sheet was filed, petitioner had ceased to hold that office and was on deputation as Additional Secretary in the Department of Defence Production, Government of India. Here it is relevant to note that the accusation against the petitioner was of abusing the office of Director MPSIDC, which is a Government Company. Apart from it, when he went on deputation, his cadre was changed and he ceased to hold the "office", which was said to have been abused or misused by him. In these circumstances, it cannot be held that the proposition laid down by the Apex Court in case of ***R.S. Nayak*** *(supra)* was limited only in the cases where the person demitted the office by retirement, superannuation, dismissal etc.

**25.** In ***Prakash Singh Badal*** *(supra)*, the Apex Court considered the above aspect as under:-

> "**23.** The main contention advanced by Shri Venugopal, learned Senior Counsel appearing for the appellant is that a public servant who continues to remain so (on transfer) has got to be protected as long as he continues to hold his office. According to the learned counsel, even if the offending act is committed by a public servant in his former capacity and even if such a public servant has not abused his subsequent office still such a public servant needs protection of Section 19(1) of the Act. According to the learned counsel, the judgment of this Court in *R.S. Nayak case* holding that the subsequent position of the public servant to be unprotected was erroneous. According to the learned counsel, the public servant needs protection all throughout as long as he continues to be in the employment.
>
> **24.** The plea is clearly untenable as Section 19(1) of the Act is time and offence related."

**26.** Learned counsel for the petitioner placed on record an Office Memorandum issued by the Government of India, Ministry of Personnel, Public

Grievances & Pensions, Department of Personnel & Training, New Delhi, and submitted that even according to the guidelines issued by the Ministry to investigating agencies, it is apparent that while holding different posts on transfer or promotion, a civil servant cannot be treated as holding different "Offices" within the meaning of relevant sections of the Prevention of Corruption Act. The only office held by him is that of the member of the service to which he belongs as a civil servant, irrespective of the post held on transfer/promotion etc. The requirement of Sanction under Section 19 of the said Act continues to be applicable so as the officer continues to be a member of civil service. For reference, the said Memorandum is quoted as under:-

No.107/13/2007-AVD.I
Government of India
Ministry of Personnel, Public Grievances & pensions
Department of Personnel & Training
***

North Block, New Delhi
Dated: June 27, 2008

OFFICE MEMORANDUM

Sub: Sanction for prosecution u/s 19(1) of the P.C. Act.

Section 19 of the Prevention of Corruption Act, 1988, .....:

"19 (1) .....

(a) .....

(b) .....

(c) .....

(2) .....

2. Hon'ble Supreme Court, in the case of R.S. Nayak vs. A.R. Antulay (1984) 2 SCC 183, while interpreting the corresponding provisions of

Prevention of Corruption Act, 1947, in regard to requirement of a sanction in a case where the accused public servant had ceased to hold the office which he is alleged to have misused or abused, though holding another office at the time when the Court is called upon to take congnizance of an offence, held that upon a true constructionof Section 6 of P.C. Act, 1947, it is implicit therein that sanction of that competent authority alone would be necessary which is competent to remove the public servant from the office which he is alleged to have been misused or abused for corrupt motive and for which a prosecution is intended to be launched against him. It held that if the accused has ceased to hold that office by the date the Court is called upon to take cognizance of the offences alleged to have been committed by such public servant, no sanction under Section 6 would be necessary despite the fact that he may be holding other office on the relevant date which may make him a public servant as understood in Section 21. The Hon'ble Court further held that some earlier judgments to the effect that if a public servant ceases to hold the earlier office abused by him but continuous to be a public servant by holding another office, sanction of the competent authority to remove him from latter office is required, as not laying down correct law and cannot be accepted as making a correct interpretation of Section 6 of the Prevention of Corruption Act, 1947 (corresponding to Sec. 19 of Prevention of Corruption Act, 1988).

3. These issues again came up before the Hon'ble Supreme Court in the cases of Prakash Singh Badal and Another vs. State of Punjab 2006(13) SCALE 54, K. Karunakaran Vs. State of Kerala 2006 (13) SCALE 88 and in the case of Lalu Prasad Yadav Vs. State of Bihar 2006 (13) SCALE 91. The Hon'ble Supreme Court endorsed the above propositions in the R.S. Nayak case and did not agree that the views expressed in R.S. Nayak vs. A.R. Antulay case are not correct or that the said decision should be taken as per incuriam or that it was a case of "causus omissus".

4. A question has been raised whether the ration of above cited judgments is applicable to civil servants who, while being member of a service or cadre, hold different posts on transfer or promotion etc. at different points of time in the course of their service. A perusal of the various judgments shows that in these cases, the litigating parties were political personalities who held offices like Chief Minister or MP or MLA etc. at different points of time and, therefore, though they were public servants in terms of Section 21 of the IPC while holding such offices, they were treated as holding different 'offices' at the time of taking of cognizance of the offence than one held and allegedly abused by them in respect of which the prosecution is sought to be launched. It is in the context of the nature of public offices held by the public figures involved in the above cases that the issues relating to public servant holding plurality of offices, or holding another office as a public servant etc. arose. These judgments did not discuss the case of a civil servant, who as a member of service/cadre holds different positions/posts on transfer or promotion in the course of his career in Government service. The issue whether holding of these different posts amounts to holding different

'offices' within the meaning of the relevant Sections of Prevention of Corruption Act was also not before the Hon'ble Court in the above cited cases.

5. The question raised has been examined in consultation with the Ministry of Law & Justice. It is, hereby clarified that while holding different posts on transfer or promotion, a civil servant can not be treated as holding different 'offices' within the meaning of the relevant Sections of the said Act. The only office held by him is that of member of the service to which he belongs as a civil servant, irrespective of the post held on transfer/promotion etc. Therefore, the requirements of seeking sanction of the competent authority under Section 19 of the Prevention of Corruption Act continues to be applicable so long as the officer continues to be a member of civil service and the protection under Section 19(1) of Prevention of Corruption Act cannot be said to have been taken away only on the consideration that at the time the officer holds charge of another post on transfer or promotion, than one alleged to have been abused. All the investigating agencies may, therefore, ensure that for seeking prosecution of a civil servant, they obtain sanction of the competent authority under Section 19(1) of Prevention of Corruption Act before the Court is called upon to take cognizance of an offence under Section 7,10,11,13 of Prevention of Corruption Act.

(VijayKumar)
Under Secretary to the Government of India

To,

1. All Ministries/Departments.
2. All State Governments/Union Territories.

After perusal of the above Memorandum, we are of the view that the interpretation of the various decisions given by the Ministry cannot be accepted in view of the observation made by the Apex Court in case of *Prakash Singh Badal (supra)* in para23 and 24 of the decision

**27.** In ***Prasar Bharti v. Amarjeet Singh-(2007) 9 SCC 539***, Supreme Court observed that there exists a distinction between "transfer" and "deputation". "Deputation" connotes service outside the cadre or outside the parent department in which an employee is serving. "Transfer", however, is limited to equivalent post in the same cadre and in the same department.

**28.** Regarding applicability of Section 197 Cr.P.C. with respect to

prosecution of the officers of the Government companies or public undertakings, the Supreme Court in Case of ***Mohd. Hadi Raja v. State of Bihar and another-(1998) 5 SCC 9*** in para 26 and 27 held as under:

> "**26.** Therefore, It will not be just and proper to bring such persons within the ambit of Section 197 by liberally construing the provisions of Section 197. Such exercise of liberal construction will not be confined to the permissible limit of interpretation of a statute by a court of law but will amount to legislation by court.
>
> **27.** Therefore, in our considered opinion, the protection by way of sanction under Section 197 of the Code of Criminal Procedure is not applicable to the officers of Government companies or the public undertakings even when such public undertakings are "State" within the meaning of Article 12 of the Constitution on account of deep and pervasive control of the Government."

We, however, need not dilate on the above aspect as in the instant case the petitioner already ceased to hold the office, which was alleged to have been abused by him. Even he ceased to hold the office of Commissioner, Industries in the Government of M.P., when charge sheet against him was filed in the Special Court and the court took cognizance of the offence.

**29.** As far as Section 197 of the Cr.P.C. is concerned, it is not disputed that the requirement of sanction under this provision cannot be dispensed with even after the public servant ceased to hold or demit the office. The relevant portion of Section 197 of the Cr.P.C. Iis reproduced as under:

> "**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-
> (a) In 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) .....

**30.** Since after the changes introduced in Section 197 Cr.P.C. by adding

words 'when any person who is or was a Judge or Magistrate or a public servant' it can no longer be held that the essentiality of the sanction under Section 197 Cr.P.C. for a public servant was not a condition precedent for his prosecution for an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty. In a decision of M.P. High Court in ***V.P. Sheth v. State of M.P.-2000 CRI.L.J. 1767*** in view of the observation of the Apex Court in case of ***Harihar Prasad vs. State of Bihar (1972) 3 SCC 89*** it had been held that "as far as offence of criminal conspiracy punishable under Section 120B r/w Section 409 of the Penal Code is concerned and also Section 5(2) of the Prevention of Corruption Act are concerned, they cannot be said to be of the nature mentioned in Section 197 of the Code. It is no part of duty of a public servant while discharging his official duty, to enter into a criminal conspiracy or to indulge in criminal misconduct. Want of sanction under Section 197, Cr.P.C. is, therefore, no bar to a prosecution under Section 120B r/w Section 409 of the Penal Code."

**31.** In an appeal against the said judgment, the Apex Court in ***V.P. Sheth v. State of M.P. and another-(2004) 13 SCC 767*** observed that "in our view the question whether sanction under Section 197 of the Criminal Procedure Code is required or not depends upon the facts and circumstances of the case. We, therefore, set aside that portion of the impugned judgment which holds that no sanction is required under Section 197 of the Criminal Procedure Code. We leave this question open to be urged after evidence is recorded."

**32.** The Apex Court again in case of ***Prakash Singh Badal*** *(supra)* held that the offence of cheating under Section 420 or for that matter offences relatable to Sections 467, 468, 471 and 120-B can by no stretch of imagination by their very nature be regarded as having been committed by any public

servant while acting or purporting to act in discharge of official duty. In such cases, official status only provides an opportunity for commission of the offence.

**33.** In view of the above proposition laid down by the Apex Court, the view taken by the trial court that no sanction under Section 197 of the Code of Criminal Procedure was required for taking cognizance against the petitioner cannot be held to be erroneous.

**34.** As far as the reference made by the learned counsel for the petitioner to the provisions enshrined in the Articles 77, 311, 312, 323(C) and the Entries 70 of the Union List of VIIth Schedule of the Constitution of India is concerned, it is not disputed that the petitioner was a member of All India Services, therefore, all the disciplinary matters affecting his service needed consultation with the Union Public Service Commission and Union Government, but, as discussed hereinabove, the question before this Court pertained to the criminal prosecution of the petitioner for the abuse of the office of MPSIDC as Director and the cognizance for that being taken by the Court against him when he already ceased to hold that office.

**35.** In view of the above factual situation and the well settled position of the law that Section 19(1) of the Act is time and offence related and the protection to public servant under Section 19(1) is not to be extended for the criminal act performed by him under the colour of the office for public servant's own pleasure and that the offence of cheating under Section 420 and Section 120B of the Indian Penal Code, by nature, be regarded as having been committed by the public servant while acting or purporting to act in discharge of his official duty, we find that the learned Special Judge committed no error in dismissing the application filed by the petitioner under Section 239 of the Code of Criminal Procedure.

**36.** Accordingly, the order dated 11.4.2008 passed by the Special Judge (Prevention of Corruption Act), Bhopal, in Special Case No.07/2007 is affirmed. The revision stands dismissed.

**37.** It is however observed that nothing observed by us in this order shall affect or prejudice the case of petitioner in the trial.

**(RAKESH SAKSENA)**
**JUDGE**

**(M.A. SIDDIQUI)**
**JUDGE**

*Shukla*

**HIGH COURT OF MADHYA PRADESH**
**PRINCIPAL SEAT AT JABALPUR**

**DIVISION BENCH**

**Criminal Revision No.1422/2008**

Ajoy Acharya

**versus**

State Bureau of Investigation Against Economic Offences, Bhopal

**O R D E R**

**For consideration**

**(Rakesh Saksena)**
**JUDGE**
**/08/2011**

**Hon'ble Shri Justice M.A. Siddiqui**

**JUDGE**
**__/08/2011**

**POST FOR /08/2011**

**(Rakesh Saksena)**
**Judge**
**__/08/2011**