

**HIGH COURT OF TRIPURA
AGARTALA
B.A. NO.134 OF 2019**

Shri Badal Choudhury,
S/o. Late Debendra Kumar Choudhury,
R/o-MLA Hostel No.2,
P.S.-West Agartala,
Agartala, West Tripura.

----Accused Person

The accused person being lodged in custody,
the present petition is preferred
& presented by his wife,

Smti. Namita Gope,
W/O Shri Badal Choudhury,
R/o- MLA Hostel No.2,
P.S.-West Agartala,
Agartala, West Tripura.

----Petitioner

Versus

The State of Tripura

-----Respondent

For petitioner(s)	:	Mr. Bikash Ranjan Bhattacharjee, Sr. Advocate Mr. S.K. Deb, Sr. Advocate Mr. P. Roy Barman, Advocate Mr. H. Debnath, Advocate Mr. A. Bhattacharjee, Advocate Ms. R. Guha, Advocate Ms. R. Purakayastha, Advocate Mr. T.D. Majumder, Advocate Mr. S. Lodh, Advocate Mr. R. Mukherjee, Advocate Mr. Samarjit Bhattacharjee, Advocate Mr. K. Nath, Advocate Mr. D.P. Ghosh, Advocate
For Respondent(s)	:	Mr. A.K. Bhowmik, Advocate General Mr. Ratan Dutta, P.P. Mr. Raju Datta, Advocate
Date of hearing	:	30.10.2019
Date of delivery of Judgment & order	:	31.10.2019
Whether fit for reporting	:	YES

HON'BLE MR. JUSTICE ARINDAM LODH

J U D G M E N T & O R D E R

The accused person, Sri Badal Choudhury, is an ex-minister and presently, a Member of the Legislative Assembly. Mr.

Choudhury has been arrested in connection with West Agartala PS Case No.2019 WAG 251 registered under Section 409, 418, 420, 201, 120B of the Indian Penal Code and Section 13 of the Prevention of Corruption Act, 1988. This application under Section 439 CrPC has been filed by Smt. Namita Gope, wife of the accused person, for releasing him on bail.

2. From the FIR dated 13.10.2019 it is revealed that there are two other accused persons, namely, Sri Yashpal Singh, IAS, former Chief Secretary and Principal Secretary, Public Works Department under the Government of Tripura and Sri Sunil Bhowmik, former Chief Engineer, Public Works Department under the Government of Tripura.

3. The essential facts of the case, for purpose of consideration of the present bail application, are as follows:

3.1. A complaint was lodged by SI Badal Dutta of the Vigilance Organization, Government of Tripura on 13.10.2019 which was registered as formal FIR, as aforesaid. It is stated that a vigilance enquiry was conducted during which major wrongdoings and criminal conspiracy came to light for finalization of tenders and awarding of projects at cost plus basis to some Public Sector Units(PSUs) and some private sector construction agencies during financial year 2008-09 for implementation of major infrastructural development projects by the State PWD.

3.2. The State of Tripura, in view of huge influx of funds to mobilize infrastructural development within the territory of Tripura undertook many projects. To bring transparency and cost

effectiveness in implementing various project works, the Public Works Department(PWD) of the Government of Tripura had proposed to frame a specific policy for implementation and execution of various projects; and for that purpose, a memorandum was prepared for placing before the Council of Ministers(COM) vide Memorandum dated 31.05.2008. After considering various facets to facilitate quality and expeditious execution of works by the PWD, Government of Tripura, the said memorandum was placed before the COM and accordingly, it was approved by the COM, which would be evident from the record of decision of the meeting of COM held on 03.06.2008.

3.3. It is apparent from the said policy that the COM had taken into consideration many important facets to implement and complete the projects within a stipulated period and it is noticed that the COM had also decided to provide incentives to the contractors or implementing agencies if the works were completed before the stipulated date. Salient features of the memorandum for the COM dated 31.05.2008 may be reproduced here-in-below for convenience, in *extenso*:

"1.

2. *To overcome this typical situation and for the interest of smooth implementation of different sanctioned projects in time, the following proposals are submitted for kind perusal and decision please:*

(i) PWD may be allowed to award the implementation of various projects directly to the Public Sector Undertakings at cost plus basis (Limited upto 10% of the estimated cost).

(ii) PWD may also be allowed to award works to the well reputed Private Sector Construction Agencies short listed after invitation of Expression of Interest with pre-

determined conditionalities as well as evaluation of their technical and financial capabilities, experience in the respective fields, etc. directly at cost plus basis(Limited upto 10% of the estimated cost).

3. *Cost of the projects for this purpose is to be assessed based on the current Schedule of Rates prepared by State PWD. State PWD will update the Schedule of Rates at the earliest and will continue to update the same in the month of January every year subsequently on regular basis.*

4. *All relevant preliminary activities viz. survey, preparation of site plan/architectural drawing/preliminary estimate/detailed working and structural drawings/detailed estimate, sub-soil investigation etc. and submission of the said reports/documents to PWD followed by obtaining approval on the same by PWD shall be within the scope of such assignment, beside execution of the project and quality control.*

5. *Since, PWD intends to implement number of projects through such system, the proposal of PWD at Para 2, 3 and 4 herein above is submitted for consideration and approval by the Council of Ministers.*

6.”

3.4. In view of the said memorandum, the then Chief Minister of Tripura had approved to place the matter before the Council of Ministers(COM) for consideration. From the memorandum dated 03.06.2008, it is revealed that the said policy, which was placed for consideration of the COM, was approved and the decision of the COM, as approved by the Chief Minister, was forwarded under Rule 20(2) of the Rules of Executive Business.

3.5. It was decided at sub-clause 2.1 that *"PWD may be allowed to award the implementation of the various projects directly to the public sector undertaking at cost plus basis (limited upto 10% of the estimated cost)."*

At sub-clause 2.2 it has again been stipulated that *"PWD may be allowed to award works in the well reputed private sector construction agencies shortlisted after invitation of Expression Of Interest with determined conditionality's as well as evaluation of their technical and financial capabilities, experience in the respective field etc. directly at cost plus basis (limited upto 10% of the estimated cost)."*

At sub-clause 2.3 it was again stipulated that *"Cost of the projects for this purpose is to be assessed based on the current schedule of rates prepared by the State PWD. State PWD will update the Schedule of Rates at the earliest and will continue to update the same in the month of January every month subsequently on regular basis."*

At clause 4 under the head, "Invitation of Expression of Interest (EOI) from PSUs" it is stated under sub-clause 4.1 that *"Government of Tripura has intended to implement certain important/major roads/bridge projects and buildings including Project Consultancy services through the Central and State governments Public Sector Undertakings(PSUs) and reputed Private Sector Construction Agencies on cost plus percentage basis(Project Cost based on Schedule of Rates(SOR) 2008 Tripura)."*

3.6. The above clauses, as decided by the COM, appear to be very firm over the cost plus percentage, i.e. Schedule of Rates, 2008 can be decided for an estimated project cost and it may be increased up to 10%.

3.7. In the present case, it is alleged that when Expression of Interest(EOI) were invited from various PSUs and Private Sector

Construction Agencies(for both technical and financial), the approved clauses were suppressed and ceiling limit of 10% for award of works at cost plus basis was waived off and never mentioned in the tender documents. So, according to the complaint, all the accused persons, *i.e.* the then Chief Engineer, PWD, the then Principal Secretary, PWD and Sri Badal Choudhury, the then Minister for PWD had flouted the approved terms and conditions of the bid.

3.8. It is stated in the complaint that as per preliminary assessment, the estimated cost of the project including all the three sectors was Rs.638.30 crores whereas the total cost put to tender was Rs.866.64 crores, which was above by 35.73% (average) of the total estimated cost. Thus, based on the preliminary assessment there was an excess expenditure of Rs.164.27 crores.

4. According to the complaint, all the accused persons had collusively violated/disregarded such important clauses. Further allegations are that on preliminary assessment, for the works under 10 packages, *i.e.* 4 nos. bridges packages, 4 nos. building packages and 2 nos. road packages, excess amount of Rs.20.50 crores was incurred which was 47.20% higher than the estimated cost of 10% above. It has also been alleged that Rule 172 of General Financial Rules, 2005 regarding separate bidding for technical and financial bids *i.e.* 'two bid system' was also not followed and even prior to that Request for Proposal (for short-RFP under Rule 171, GFR) was also not complied, rather PWD directly went for inviting financial bid. According to the informant, as described in FIR, aiming to give

unfair advantages to the private construction agencies, PSUs were given 14 days period for submission of financial bids whereas private agencies were given 26 days for the same task and despite the fact that post tender negotiation is strictly banned by the Central Vigilance Commission, said practice was encouraged under the chairmanship of Mr. Y.P Singh and despite having procedural weaknesses, WAB was persuaded by PWD to overlook the same as one time measure. It is also alleged that the then Principal Secretary, PWD, Mr. Y.P. Singh communicated that the Council of Ministers was briefed by him on 10.12.2008 regarding tender process followed, bids selected and SAB/WAB decision regarding overlooking the procedural weaknesses as one time measure vide his Note No.2 dated 10.12.2008 (*Annexure VI to the FIR*) but no such cabinet briefing/agenda was found in the memo/minutes of meeting of Cabinet of that day and in said Note No.2, Sri Badal Choudhury has also signed. Finally, it has been stated that vital documents and record including bids, comparison sheet relating to the finalization of tenders and award of those works were also found missing from the office of the Chief Engineer, PWD (NH) and separate FIR has been lodged to that effect.

5. After the registration of FIR, as aforesaid, Sri Badal Choudhury had filed an application under Section 438 CrPC before the learned Sessions Judge, West Tripura, Agartala for granting him anticipatory bail but on hearing, the said application was rejected by the learned Sessions Judge vide order dated 16.10.2019 in Bail Application No. 236/2019.

6. Thereafter, an anticipatory bail application was moved before this Court on 21.10.2019 numbered as AB 137/2019. The matter was heard substantially and was reserved for passing orders. On 22.10.2019 the matter was listed again for clarification of some aspects when the learned counsels appearing for the parties had informed this Court that the accused person, Mr. Badal Choudhury was admitted in the ILS Hospital, Agartala when he was arrested by the Investigating Agency which rendered the anticipatory bail application as infructuous. The arrest led the petitioner to file the present application under Section 439 CrPC for releasing the accused persons on bail.

7. Heard Mr. B.R. Bhattacharjee, learned Sr. counsel with Mr. S. Deb, learned Sr. counsel along with other counsels appearing for the petitioner as well as Mr. A.K. Bhowmik, learned Advocate General, assisted by Mr. Ratan Dutta, learned P.P. appearing for the respondent.

8. Mr. B.R. Bhattacharjee, learned Sr. counsel appearing for the accused person strenuously argued that a plain reading of the FIR and the complaint therein does not constitute any offence as alleged to be committed by the accused person. Learned Sr. counsel appearing for the accused person had emphasized that the investigating agency has only stated in the FIR that the practice so adopted in fixing or enhancing the cost plus price above 10% was done to "*pave a way*" for committing misappropriation of Government funds. What learned Sr. counsel wanted to submit was that the allegation was that the accused person did not misappropriate any Government fund but only tried to "*pave a*

way” for such misappropriation of Government funds. According to learned Sr. counsel, there is no direct allegation of misappropriation/defalcation of Government fund by the accused person.

9. Mr. Bhattacharjee, learned Sr. counsel contended that all the rates as enhanced had the approval of the Public Accounts Committee(PAC) and Works Advisory Board(WAB). There was no irregularity or illegality and there was no violation of any of the terms and conditions of the policy laid down and all actions were approved by the Council of Ministers.

10. The next submission on behalf of the accused person was that he, being the Minister-In-Charge of Public Works Department had only signed the documents on the basis of the notes prepared by the officers of the Department and he had no role over that.

11. Next, it was contended that the PAC and WAB had ample power as these bodies are the highest decision making authorities for fixing the rate considering the feasibility of execution of various project works.

12. Learned Sr. counsel appearing for the accused person had invited my attention to a decision of the SAB and WAB meeting held on 28.11.2008 which reads as under:

"Decision of SAB and WAB meeting held on 28.11.2008.

This item was discussed thread-bare including the legal and procedural aspects. The proposal of this type submitted by PWD(R&B) as its first initiative to achieve quantum jump in capital expenditure. Keeping totality of the experience of spending of capital related funds in the State over past few

years and in view of the enormous increase in capital fund coming from the Govt. of India, the WAB was persuaded by the Department to overlook, the procedural weakness as a onetime measure and also with assurance that these would be addressed while processing next such proposal. It was also emphasized from the Department to consider the proposal in view of involvement of CPSU's and major private sector companies for entrusting the works. Considering all these points in view, the proposal of the department is approved.

*Sd/- Illegible
Member Secretary, SAB
(Spl. Secretary, Finance)"*

13. Mr. Bhattacharjee, learned Sr. counsel appearing for the accused person further contended, drawing my attention to Note No.2 that, the Council of Ministers in its meeting held on 10.12.2008 was briefed in regard to award of project to the PSUs and reputed private sector construction agencies. At para 2 of the said Note No.2 it is stated that *"It was clarified that CMO is being briefed to appraise about progress on the subject. It was informed that the work orders would be issued to the selected/eligible PSUs/private companies who have quoted lowest rate based on SOR 2008 rather than cost basis. It was also informed that the EOI was floated in National and local dailies."*

14. At para 5 it is noted that after scrutiny of the bids, 8 PSUs and 7 private companies were found eligible. At para 6 of the note it is stated that *"PSUs bids were opened on 24.09.2008 while bids of Private sector companies were opened on 17.10.2008."* At para 7 of the said note, the decision of the SAB held on 28.11.2008 was recapitulated in verbatim. At para 9 of the said note, it is further noted that *"Chief Secretary also informed the COM about the decision taken in the SAB as stated above"*, and at para 10 it is

noted that "COM, after the briefing, gave its go ahead for implementation of the projects."

15. This Note No.2 was prepared by Y.P. Singh, Principal Secretary, PWD, Government of Tripura on 10.12.2008 and also signed by Mr. Badal Choudhury as Minister for Finance Department.

16. Based on the aforesaid factual aspects, Mr. Bhattacharjee, learned Sr. counsel appearing for the accused person, Mr. Badal Choudhury contended that the accused person being the Minister-In-Charge of the Public Works Department, at the relevant point of time did not commit any irregularity or illegality and is entitled to be released on bail. It is further contended that the FIR did not disclose any ingredient of constituting offence under Sections 120B/420 of IPC. There was no criminal conspiracy as would be evident from the contents of the FIR itself.

17. According to learned Sr. counsel, the FIR does not disclose any such material from which it could be said that Mr. Badal Choudhury, being the Minister-In-Charge of the PWD had of any monetary gain and used any of the enhanced amounts of money beyond the stipulated cost plus price at the rate of 10% for his own use. The FIR does not disclose anything about disproportionate assets of Mr. Badal Choudhury, being the Minister-In-Charge of PWD.

18. Lastly, and most importantly Mr. Bhattacharjee, learned Sr. counsel quite strenuously argued that the State, being the prosecutor had failed to come up with any such plea that the work

order at such enhanced rate was not actually incurred or spent by the contractors, and it was not the case that any of the awarded works was not executed by the private companies. Mr. Bhattacharjee, learned Sr. counsel quite emphatically had submitted that all the expenditures were approved through the Assembly Proceedings and the Court has no power or authority to examine the legality and validity of the Assembly Proceedings.

To support his submission, Mr. Bhattacharjee had heavily relied upon the following decisions:

- (i) ***Piarelal Singh vs. State of Madhya Pradesh, Nagpur, AIR 1955 Nagpur 11,***
- (ii) ***Rai Sahib Ram Jawaya Kapur & Ors. vs. State of Punjab, AIR 1955 SC 549,***
- (iii) ***V. Ramachandra Rao & Ors. vs. Andhra Pradesh Regional Committee, AIR 1965 Andhra Pradesh 306.***

Relying upon the aforesaid decisions, learned Sr. counsel contended that the instant FIR on the basis of preliminary enquiry by the vigilance is wholly baseless, illegal and was actually a political vendetta by the present Government against the previous regime.

19. On the other hand, learned Advocate General Mr. A.K. Bhowmik appearing for the State with all vehemence opposed the prayer for grant of bail to the accused person, Mr. Badal Choudhury by urging that the accused person being the Minister-In-Charge of PWD at the relevant point of time was directly involved with all the

transactions in the process of awarding work orders in favour of the private construction agencies.

20. Learned Advocate General appearing for the State had submitted that being Minister-In-Charge of Public Works Department, Government of Tripura, the accused Mr. Badal Choudhury was also one of the members of the Council of Ministers(COM) and was well within his knowledge of the decision of the Memorandum dated 03.06.2008 of the Council of Ministers, wherein, it was decided that PWD would be allowed to award works to the well reputed private sector construction agencies or PSUs directly at cost plus basis(limited up to 10% of the estimated cost) and, as such, the petitioner ought not to have made any departure from the policy decision of the Council of Ministers. The present petitioner had entered into criminal conspiracy along with two other FIR named accused, viz. Sri Y.P. Singh and Sri Sunil Bhowmik, who were the Principal Secretary and Engineer-in-Chief of the Public Works Department respectively at the relevant point of time and all three had flouted the established norms and directions of the Council of Ministers and gave unfair advantage to the selected private players making wrongful gains with dishonest intention and committed criminal breach of trust and offences under Sections 409, 418, 420, 201 and 120B of the Indian Penal Code and Section 13 of the Prevention of Corruption Act, 1988 by allowing others to misappropriate the public funds to the tune of Rs.164.31 crores.

21. Next, Mr. Bhowmik, learned Advocate General had drawn the attention of the Court to the Cabinet Memo. dated 31.05.2008 and the decision of the Council of Ministers wherein the

decision to award works to public sector undertakings(PSUs) and private sector companies at cost plus basis(limited upto 10% of the estimated cost).

22. Learned Advocate General had further contended that it would appear from the Memorandum of Works Advisory Board(WAB) that the accused persons had invited tenders flouting the decision of the Council of Ministers by way of fixing date of opening of financial bids of bidders in the public sectors prior to the last date for submitting tenders by the bidders of private companies, thereby, allowing the private sector bidders to know the rates quoted by the public sector bidders.

23. That apart, according to learned Advocate General that one of the PSUs, namely NPCC stood lowest in respect of package numbers 2, 3, 7 and 8(bridge works) but it was awarded only one work(namely item No.3) and other three works were allotted to the private bidders(page 44 of the bail application) by way of favouritism.

24. Learned Advocate General further added that the most important and gross violation of the direction of the Council of Ministers to award the contracts of 9 bridges, 5 buildings and 4 roads at cost plus basis, limited upto 10 percent of the estimated cost was such that the contracts were allowed at average 35% to 47% above the estimated cost by way of favouring the private bidders illegally and with ill motive and allowing the bidders to misappropriate huge money which amounted to Rs.164.31 crores causing wrongful loss to the Government. The estimated cost of the projects was Rs.638.00 crores.

25. Learned Advocate General had further submitted that the admission of the mischief would be manifest from the Note No.2 dated 10.12.2008(page 59 of the bail application) of the accused Y.P. Singh and signed by accused Badal Choudhury as Minister-In-Charge falsely stating therein that the Council of Ministers in its meeting held on 10.12.2008 was allegedly briefed by Y.P. Singh regarding departure from the directions contained in the Cabinet Memo. dated 31.05.2008(page 28 of the bail application) and the decision of the Council of Ministers dated 03.06.2008(page 30 of the bail application) and that the COM had allegedly, after briefing, gave its go ahead signal for implementation of the project and based on such misrepresentation the accused persons awarded the works at much higher rate allowing the contractors to misappropriate the Government funds amounting to Rs.164.31 crores which, according to him was a serious economic offence involving crores of rupees and was wholly unwarranted.

26. Learned Advocate General had further submitted that beside the present FIR named accused persons, prosecution is required to find out other persons who misappropriated the money. Interpreting Section 13 of the Prevention of Corruption Act, 1988, learned Advocate General contended that a person who misappropriates public fund commits the said offence, and the person who allows other persons to misappropriate public fund is also liable for the said offence and such offence being an economic offence, granting of bail was not warranted. Learned Advocate

General in support of his submission had referred the following decisions:

- (i) ***Nimmagadda Prasad vs. Central Bureau of Investigation, (2013) 7 SCC 466(para 23, 24, 25 and 26)***
- (ii) ***Kalyan Chandra Sarkar vs. Rejesh Ranjan alias Pappu Yadav & Anr., (2005) 2 SCC 42(para 18)***
- (iii) ***Y.S. Jagan Mohan Reddy vs. Central Bureau of Investigation, (2013) 7 SCC 439(para 34)***
- (iv) ***State of Gujarat vs. Mohanlal Jitamalji Porwal & Anr., (1987) 2 SCC 364(para 5)***
- (v) ***P. Chidambaram vs. Directorate of Enforcement, (2019) SCC Online SC 1143(paras 70, 76 and 79 to 85)***

27. On the basis of the aforesaid rival submissions, first, I have perused the decision of the Council of Ministers as mentioned in the preceding paragraphs wherein PWD was authorized to award the implementation of various projects to the PSUs and private sector construction agencies after invitation of Expression of Interest(EOI) with determined conditionalities as well as evaluation of their technical and financial capabilities, experience in respect of respective fields, etc. directly at cost plus basis(limited upto 10 percent of the estimated cost). It is further established from the said Memorandum that the cost of the projects had to be assessed based on the current Schedule of Rates prepared by the State PWD, and it would update the Schedule of Rates at the earliest and will continue to update the same in the month of January every month subsequently on regular basis.

28. From a plain reading of the backgrounds of the Memorandum for WAB vide Memo.No.8(226)/PC/(PR-1)2006(page 32 of the bail application), the Council of Ministers had taken into consideration all sorts of difficulties which might come in the way of implementing and execution of project works maintaining proper quality, as well as expeditious execution of work on or before the specified date. At clause 7.2(page 42 of the bail application), the Council of Ministers had also declared to provide incentive at a certain rate for early completion of the works than that of the specified date. In my opinion, provision of such incentive was made only to boost and encourage the contractors to complete the works on time.

29. This Court has taken into consideration the price variation clause at 7.4 of the Memorandum where it was clearly stated that *"If during the progress of the works the price of steel, cement and bitumen required in the works and/or wages of labour increases or decreases by more than 10% the agency shall be reimbursed/deducted from their bill(as the case may be) for such variation in price/wages more than 10%. No reimbursement/deduction shall be effective for variation in price of steel, cement and bitumen and wages of labour upto 10%."*

This price variation clause makes it amply clear that Government also had taken into consideration the various situations, which the contractors would face in course of the execution of various project works awarded to them. Thus, according to this Court, the limitations for incurring the expenditures at different situations are explicit.

30. After taking due care of the submissions of Mr. B.R. Bhattacharjee, learned Sr. counsel appearing for the accused person as well as Mr. A.K. Bhowmik, learned Advocate General appearing for the State, this Court is at loss to understand what prompted the accused persons to open bids on two different dates. The bids of public sector units were opened on 24.09.2008 whereas the bids of the private sector construction agencies were opened on 17.10.2008. Naturally, the private construction agencies were put in an advantageous position than those of the PSUs, because of the fact that the bids/offer rates quoted by the PSUs came to the fore of the private companies.

The question arises:- *(i) Is it the norms of inviting tenders? (ii) Can it be said a fair competition?*

Curious enough, the PSUs were given less importance in awarding the projects, though, they had better infrastructures and experience. The private companies were preferred for the maximum projects, which would be revealed from bridge and road packages. The questions remain unanswered, leading this Court to draw adverse presumption against the doctrine of fairness and transparency in the realm of awarding the contract works.

31. I have given my thoughtful considerations to the fact that what prompted the accused persons to violate and go beyond the well-thought policy decision of the Council of Ministers that the cost plus rates would be limited upto 10 percent of the estimated cost. As I said earlier, the Council of Ministers had considered all the pros and cons, which might be faced by the contractors in implementing and execution of the works.

32. In the meeting of the Council of Ministers held on 03.06.2008, award of projects to PSUs and reputed Private Sector Companies under PWD was approved, which would be evident from item No.3.1 of the Memorandum for WAB. It is also evident that the Government of Tripura had intended to implement certain important works, like bridge projects, etc. through PSUs and private players on cost plus percentage basis having Project cost based on Scheduled of Rates(SOR) 2008, Tripura.

Again, the question comes up why the cost plus percentage basis at the rate of 10 percent was not mentioned in the Expression of Interest(EOI) and why only cost plus percentage basis without mentioning the rates of percentage was mentioned in the EOI. At this situation, in my considered view, conspiracy of extending some undue advantage to the contractors of their choice has become apparent even before the commencement of inviting the Expression of Interest(EOI). In other words, why the limitation upto 10 percent of the estimated cost as has been stated earlier has not been mentioned in the invitation of EOI?

33. Further, the estimated cost of the project was Rs.638.30 crores. By adding 10% above, the permissible limit to award contracts was Rs.638.30 crores + Rs.63.83 is = Rs.702.13 crores. The total payment to the bidders was Rs.866.44 crores and the said money, *prima facie*, appears to be misappropriated to the tune of Rs.866.44 – Rs.702.13 is = Rs.64.31 crores.

34. When Council of Ministers restricted a Department or any delegated authority expressly ear-marking the limitation for

enhancement of rate at cost plus basis *i.e.* at the rate of 10%, at this stage, it is very difficult to conceive that a sum of Rs.164.31 crores have allegedly been siphoned off in one of the smallest and poorer States like Tripura. Whatever the rate on percentage basis is increased, it is increased totally keeping the Council of Ministers in dark as it is revealed from the minutes of the meeting of the Council of Ministers held on 10.12.2008 at 10.30 am in the Cabinet room. After careful reading of various items in the said minutes, even there is no mention that the Council of Ministers was briefed in regard to the award of projects which are the subject matter of this bail application. But the present accused person who was the Minister-In-Charge of the PWD has concurred the note of the then Principal Secretary, Sri Y. P. Singh and the then Engineer-in-Chief, Sri Sunil Bhowmik who are also the accused persons in connection with the present case. There can be no manner of doubt that the present accused person Sri Badal Choudhury being the Minister-In-Charge of PWD and a member and one of the participants in the meeting was well within the knowledge of the decision of the Council of Ministers. The question again comes up how and why he had given his consent to such abnormal increase of cost plus basis price when he was well aware of various conditionalities discussed in the Council of Ministers in this regard and after elaborate discussions having considered all the pros and cons, the Council of Ministers had imposed a restriction upon all the authorities concerned limiting the cost plus basis price upto 10%. The departure from such decision and the enormous and unreasonable increase of cost plus basis price at the rate of 47%, 38%, etc. leads this Court to hold, *prima facie*, that the matter is required to be

thoroughly investigated as to why the Government policy decision was flouted which had a direct impact on the economy of the State. The investigation is further necessary to find out the beneficiaries of such unreasonable increase of cost plus basis price.

35. Constitution has been given by the people to themselves thereby affirming republican character of the polity and sovereignty of the people. In ***Keshavanand Bharati vs. State of Kerala [MANU/SC/0445/1973: AIR 1973 SC 1461]***, per Hon'ble M.H. Beg, J. drew distinction between "*political sovereignty*" and "*legal sovereignty*" and held that *legally, the British Parliament transferred the whole of its legal sovereignty over the people and territories of this country in British India to the Constituent Assembly which spoke in the name of the people of India*. It is held that it is the constitution which is "legal sovereign" although the ultimate political sovereignty may and does reside in the "people". In the said judgment, Hon'ble Shelat and Grover, JJ. also held as such that *Constitutional structure can be illustrated but not catalogued as republican and democratic form of the Government and sovereignty of the country. Sovereignty lies in the people and people send their representative to the Parliament*. As held in ***Keshavananda Bharti (supra)***, the "*legal sovereignty*" lies in the Constitution and under the Constitution the Parliament and the State has been given power to make laws in their respective fields carved out in List-I, List-II and List-III under Articles 245 and 246 of the Constitution.

36. I have given my anxious consideration to the submission of learned Sr. counsel, Mr. B.R. Bhattacharjee appearing for the

accused person that the above increase of cost plus basis price has been approved by the Public Accounts Committee constituted by the State Assembly and also by the Supply Advisory Board as well as WAB and as such, these bodies are the part and parcel of the Constitutional authorities of the Assembly, and as such, judicial intervention in this regard is not called for.

37. Under Articles 245 and 246 of the Constitution, Parliament has power to make laws read with Entry 74 of List-I which is extracted here-in-below:

"74. Powers, privileges and immunities of each House of Parliament and of the members and the Committees of each House: enforcement of attendance of persons for giving evidence or producing documents before committees of Parliament or commissions appointed by Parliament."

Likewise, the State has also power under Article 246 of the Constitution read with Entry 39 of List-II, which is extracted here-in-below:-

"39. Powers, privileges and immunities of the Legislative Assembly and of the members and the committees thereof, and, if there is Legislative Council, of that Council and of the members and the committees thereof: enforcement of attendance of persons for giving evidence or producing documents before committees of the Legislature of the State."

38. Under Article 208 of the Constitution of India, House of Legislature of the State is empowered to make rules for regulating its procedure and conduct of its business. In exercise of the powers conferred by Clauses 2 and 3 of Article 166 of the Constitution of India, the Governor of Tripura had framed Rules which is called "*Rules of Executive Business of the Government of the State of Tripura, 1972*" (for short, The Rules).

39. Under Rule 7, Part-I, which deals with ALLOCATION AND DISPOSAL OF BUSINESS, it stipulates:-

"7. The Council shall be collectively responsible for all executive orders issued in the name of the Governor in accordance with these Rules, whether such orders are authorized by an individual Minister on a matter appertaining to his portfolio or as the result of discussion at a meeting of the Council, or howsoever otherwise."

Rule 9 of the said Rules stipulates:-

"9. Without prejudice to the provisions of Rule 7, the Minister in charge of a Department shall be primarily responsible for the disposal of the business appertaining to that Department."

40. Rule 17 of Part-II which deals with the PROCEDURE OF THE COUNCIL has stipulated thus:

"17. When it has been decided to bring a case before the Council, the Department to which the case belongs shall, unless the Chief Minister otherwise directs, prepare a Memorandum indicating with sufficient precision the salient facts of the case and the points for decision. Such Memorandum and such other papers as are necessary to enable the case to be disposed of shall be circulated to the Ministers. Copies of the Memorandum and other papers shall at the same time be sent to the Governor."

Most importantly, Rule 20 of the Said Rule, in my opinion, has a direct bearing to the subject matter of the present case. It lays down thus:-

"20 (1). When a case has been decided by the Council after discussion at a meeting, the Minister concerned shall take action to give effect to the decision. If, however, any deviation is proposed to be made from that decision, the case shall be submitted to the Chief Minister by the Minister concerned and further action on it will be taken according to any directions of the Chief Minister. The Secretary in Department concerned will in each such case cause to be supplied to the Secretary to the Council such documents as the latter may require to enable him to maintain his record of the case."

(2) The decision of the Council relating to each case shall be separately recorded and after approval by the Chief Minister or any other Minister presiding, shall be placed with the record of the case. An advance copy of the draft of the decision and also of the approved draft shall be sent to the Governor."

Sub Rule (iii) of Rule 20.A (inserted by the Thirty-fourth Amendment Rules, 1999) further stipulates:-

"(iii) Notwithstanding anything contained in the Rule 14, the Standing Committee shall have the power to consider and take decisions on matters falling within its functions either suo moto or on a reference to it by the Minister concerned or the Chief Minister, and any decision so taken shall be placed before the Council for information at the earliest opportunity."

Rule 14 stipulates that—

*"14. All **cases** referred to in the Second Schedule shall be submitted to the Chief Minister after consideration by the Minister in charge, with a view to obtaining his orders for circulation of the case under Rule 15 or for bringing it up for consideration at a meeting of the Council."*

Rule 15(1) lays down thus:-

"15(1). The Chief Minister may direct that any case referred to in the Second Schedule may, instead of being brought up for discussion at a meeting of the Council, be circulated to the Ministers for opinion, and if all the Ministers are unanimous and the Chief Minister thinks that a discussion at a meeting of the Council is unnecessary, the case shall be decided without such discussion. If the Ministers are not unanimous or if the Chief Minister thinks that a discussion at a meeting is necessary, the case shall be discussed at a meeting of the Council."

The word "**Case**" as defined under Sub-Rule(e) of Rule 2 reads as under:-

"(e) "Case" includes the papers under consideration and all other papers and notes connected therewith;"

41. I have given a glimpse on Second Schedule, wherein, I find that Rule 19 deals with the present issue. It states as follows:-

"19. Proposals involving any important change of policy or practice."

42. A conjoint reading of the aforesaid restricted Rules, makes it clear that the proposal initiated by the PWD at the relevant point of time proposing for changing the important policy of the State Government in regard to the departure of its policy laid down for cost plus basis price had to be submitted to the Chief Minister by the minister concerned of the department for consideration and then, the Chief Minister would produce the same to the Council of Ministers by circulation or, if necessary, might arrange a discussion at a meeting of the Council.

Rule 20 further fortifies that any deviation from the decision of the Council of Ministers must be placed before the Chief Minister for further action.

43. In the instant case, a bare reading of the Rules enumerated above, clearly manifests that all the accused persons including the Minister-In-Charge, the present accused person did not have due regard to the statutory Rules and had flouted the well-thought policy decision of the State Government.

44. In course of hearing, Mr. Bhattacharjee, learned Sr. counsel appearing for the accused person had tried to persuade this Court that the actions taken by the present accused person being Minister in charge of the PWD was mere irregularities and should not be treated to be illegalities.

45. I have given my thoughtful consideration to the said submission of Mr. Bhattacharjee, learned Sr. counsel. Tripura is a small State having small budgetary allocation, is totally dependent

on the allocation of Central fund. It is admitted by the learned Sr. counsel for the accused person that there were irregularities and if that be so, why those irregularities would not to be enquired into to find out whether there is any criminal conspiracy for misappropriation of such huge sum of money? What I found in the day to day proceeding of this bail application that materially and literally "*investigation*" is yet to be commenced against the present accused person. Though an "*Arrest Memo*" against the accused person is issued but virtually and in reality, he is not under the active control of the police *i.e.* the investigating agency as he is under the care and control of the Hospital. After rejection of anticipatory bail, the accused person got admitted to the ILS Hospital, Agartala, due to Cardiac complaint and after his discharge from the Hospital though he was taken to the West Agartala Police Station but again he was brought to be admitted to the AGMC and GBP Hospital at Agartala. As a result, the accused person could not be brought before the Magistrate and on different dates the Magistrate has passed orders that the investigating authority has been informing the concerned Court of Judicial Magistrate regarding the health conditions of the present accused person by submitting each and every dates medical report. However, I refrain myself to enter into this issue at this stage and it is left open.

46. Rules are framed for strict observance having regard to doctrine of fairness and transparency in dealing with the public money. The Council of Ministers is the political executive head of the Government. Being executive head, the decision of the Council of Ministers is final and any deviation or departure from the said

policy decision would lead to adverse inference and in my considered opinion, the Court has no other alternative but to, *prima facie*, draw a presumption that public exchequer is misused/misutilised for the purpose for which it was being allocated by the Council of Ministers and thus, there is chance of misappropriation/defalcation of the public money badly affecting the Government Exchequer.

47. Learned Sr. counsel, Mr. Bhattacharjee appearing for the accused person has strongly argued that there is no question of vicarious liability in criminal jurisprudence. The present accused was a Minister in charge of the Department and has no direct role over the matter. He only put his signature in the note initiated by the other accused persons and, over and above, where Public Accounts Committee(PAC) has approved the said expenditure, the chapter in question cannot be re-opened.

48. Faced with this submission, I again have perused Rule 19 of the Rules that Minister in charge of a Department shall be primarily responsible for the disposal of the business appertaining to that Department.

Rule 20 mandates that any deviation from the policy decision of the Government is proposed to be made, that has to be placed before the Chief Minister who may circulate the 'case' to all the Ministers or may convene a meeting of the Council for discussion of such proposal.

49. In view of the aforesaid provisions of law, *prima facie*, I do not find any force in the submission of the learned Sr. counsel

appearing for the accused person. In regard to the submissions of approval of PAC, I have perused Rule 240 of *Rules of Procedure and Conduct of Business in the Tripura Legislative Assembly, 5th Edition (January, 2013)* as adapted by the Legislative Assembly on the 20th September, 1973 and updated upto 31st December, 2013.

Rule 240 of the said Rules is extracted below:-

"240. (1) There shall be a Committee on Public Accounts consisting of eleven members for the examination of the reports of the Comptroller & Notification of allocation of time order. Disposal of outstanding matters at the appointed hour. Variation in the allocation of time. Constitution of the Committee.

Auditor General of India relating to the Appropriation Accounts of the State, the Annual financial Accounts of the State, or such other accounts or financial matters as are laid before it by the House or which the Committee deems necessary to scrutinise.

(2) The members of the Committee shall be elected by the House every year from amongst its members according to the principle of proportional representation by means of single transferable Vote:

Provided that no Minister shall be appointed a member of the Committee and if a member of the Committee is appointed a Minister he shall cease to be a member of the Committee from the date of such appointment."

50. After careful reading of Rule 240 relating to powers and functionalities of the Public Accounts Committee, I do not find any such provision that PAC is vested with the power to deviate/depart from the policy decision of the Government or make any amendment to such decision of the Government. There should not be any dispute in the Bar that all the Committees constituted by the Parliament or Assembly, though, statutory in form but are advisory in nature. They are to function within the ambit of the policy of the State Government. and it is their solemn duty to bring it to the notice of the Parliament or the State Assembly through the

Prime Minister or the Chief Minister in regard to the appropriate or inappropriate expenditure of public fund. The PAC has the bounded duty to point out any departure from the policy by any delegated authority and it may advise the Government about the corrective measures for considerations of the Government.

51. In my considered view, in no way the PAC or any other committee have any right or authority to approve any such proposal, which, on the face of the record, appears to be a direct departure from the policy decision of the Government. The Rules of Executive Business clearly have laid down how the business of the House will be transacted. Here, I find clear violation of law, the Rules of Executive Business, being statutory in nature. Thus, reiterating the submission of learned Sr. counsel appearing for the accused person, according to me, such violation is not mere irregularity but illegality, particularly, when it is related to financial matters involving public exchequer. None of the Committees like WAB, SAB and PAC has any right or authority to give one time relaxation leading to huge financial burden upon the State Government deviating from the well founded policy decision of the COM.

52. I have an occasion to take note of the decisions in ***Nimmagadda Prasad vs. CBI (MANU/SC/0485/2013)*** at Para 26 and 27 and ***State of Karnataka vs. J. Jayalalitha & Ors. [MANU/SC/0157/2017:(2017) 6 SCC 263]*** and also in ***Jagan Mohan Reddy vs. CBI (MANU/SC/0487/2013)*** where the Apex Court had held that, economic offences having deep rooted conspiracies and involving huge loss of public funds need to be viewed seriously. It was also held that, grant of bail in cases

involving economic offences will have to be dealt with differently. The same view was followed by the Delhi High Court in **P. Chidambaram vs. CBI [2019 SCC Online SC 1143]**.

53. After perusal of the decisions in **Piarelal Singh (supra)**; **Rai Sahib Ram Jawaya Kapur (supra)** and the case of **V. Ramachandra Rao (supra)** where the challenge was made in regard to different budgetary allocations by the State Assembly and the Hon'ble Courts had observed that such allocations are completely within the domain of the Parliament or State Assemblies. As such, I do not find any relevance of the subject in dispute of the aforesaid cases in the context of the present bail application.

54. Mr. Bhattacharjee, learned Sr. counsel elaborating his submission contended that the FIR does not constitute any offence as alleged to be committed by the accused person. His pointed submission is that in the FIR it is only alleged by the complainant that accused person had paved the way of committing misappropriation of Government fund. If that be so, I am at a loss to understand as to why a person who had paved the way of committing misappropriation of Government fund should be kept outside the scanner for the purpose of investigation and why his complicity in regard to hatching of criminal conspiracy along with other accused persons, and why he will not be booked under Section 13 of the Prevention of Corruption Act, 1988, particularly under sub-section 1(c) of the said provision? After perusal of the FIR, it is found that the complainant has stated that there was no fair competition and unfair advantage has been given to certain players. FIR further states that "*this practice was deliberately adopted by all the three accused persons collusively to pave a way*

of committing misappropriation of government fund.” Why a Minister will discharge his solemn obligation and responsibility in such a manner which will certainly encourage others to misappropriate government funds? In my opinion, it is a matter of investigation, and it requires investigation. Arrest, police custody, investigation and remand of an accused are all well-established mechanisms of investigation by the police in the realm of criminal jurisprudence.

In furtherance thereof, it is settled law that FIR is not an encyclopedia which is expected to contain all the details of the prosecution case and it is sufficient if the broad effects of the prosecution case are disclosed in the FIR.

55. In my opinion, this is not the appropriate stage to decide the “*illegality and sustainability of the evidence*”, but, while granting bail, the Court has to keep in mind as to whether there are reasonable grounds for believing the accusations levelled against the accused person which needs thorough investigation for collection of evidence. After all, the State Legislature and its members including the Ministers are answerable and accountable to public.

56. Having regard to the discussions that I have made in regard to the factual aspects of the case, *prima facie*, I find there is illegal departure of the policy decision of the Council of Ministers and without any prior sanction of the COM which is the executive head of the Government and is required to be investigated, and in view of the provisions of Rule 9 of the Rules of Executive Business of the Government of Tripura that the Minister-In-Charge of a

Department shall be primarily responsible for the disposal of the business appertaining to that Department and in addition thereof, keeping in view the materials so far surfaced in the Case Diary produced before this Court, I am of the considered view that the prosecution has been able to make out a case against the accused person, Sri Badal Choudhury in regard to committing offences under Sections 409, 418, 420, 201, 120B of IPC and 13 of the Prevention of Corruption Act, 1988. I have also considered the allegations made in the FIR that a number of important documents relating to the subject matter of the case are missing. As such, at this stage, I am not inclined to grant bail in favour of the accused person. In my opinion, thorough investigation is necessary to unearth the truth and to lift the veil behind the mirror. Now, it is a preliminary stage of investigation and materially, in all literal meaning, substantial investigation in consonance with different phases of investigation prescribed under the Code of Criminal Procedure, are yet to be commenced.

57. Accordingly, the bail application filed by the petitioner Smt. Namita Gope on behalf of accused Sri Badal Choudhury is hereby rejected and dismissed.

58. I have perused the medical reports of Sri Badal Choudhury. Needless to say, the State Government shall take all measures to provide proper health care and appropriate medical attention to Sri Badal Choudhury.

Return the Case Diary to learned P.P.

JUDGE