[2023] 10 S.C.R. 11 : 2023 INSC 971

A. SRINIVASULU

v.

THE STATE REP. BY THE INSPECTOR OF POLICE

(Criminal Appeal No. 2417 of 2010)

JUNE 15, 2023

[V. RAMASUBRAMANIAN* AND PANKAJ MITHAL, JJ.]

Penal Code, 1860: ss.120B, 193, 420, 468 and 471 – Criminal conspiracy and cheating – Prosecution case that the appellant, officials of PSU and other private persons entered into a criminal conspiracy to cheat the PSU in the matter of award of contract – Contract granted to one company after resorting to limited/ restricted tenders causing wrongful loss to the PSU – Illegalities alleged in the procedure followed for inviting the tender – FIR lodged u/s. 120B r/w ss. 193, 420, 468, 471 r/w ss. 13 (2) and 13(1)(d) of PC Act – Final report against accused persons including the public servants-officers of PSU – Two accused died during trial – Special judge acquitted one but convicted four – Upheld by the High Court – On appeal, held: Culpability of the appellants for offences under the IPC and the PC Act not established and proved – Thus, the judgment of the Special Court convicting the appellants for various offences and judgment of the High Court confirming the same set aside – Prevention of Corruption Act, 1988 – s.13.

Code of Criminal Procedure, 1973:

s. 197(1) – Prosecution of public servant – Previous sanction – Requirement of – Executive director of PSU with a view to confer an unfair and under advantage, went for restricted tender by dictating the names of four bogus companies along with the name of the one chosen to whom the contract was awarded – Allegations that he got into a criminal conspiracy with others to commit offences – He retired five years before filing of the final report – Previous sanction u/s. 197 not sought for prosecuting the executive director – Correctness of – Held: Prosecution ought to

* Author

have taken previous sanction in terms of s. 197(1) for prosecuting the executive director for the offences under the IPC – Sanction is required not only for acts done in the discharge of official duty but also required for any act purported to be done in the discharge of official duty and/or act done under colour of or in excess of such duty or authority – If the very same act of the co-conspirators fell in the realm of commercial wisdom, it is impossible that the act of executive director, as part of the criminal conspiracy, fell outside the discharge of his public duty, so as to disentitle him for protection u/s.197(1) – His act, even if alleged to be lacking in bona fides or in pursuance of a conspiracy, would be an act in the discharge of his official duty, making the case come within the parameters of s. 197(1).

ss. 306, 307 – Tender of pardon to approver – Procedure prescribed by s. 306(4)(a) – Compliance of – On facts, the additional Chief Judicial Magistrate granted pardon at the stage of investigation and the prosecution examined him before the Special Court – Plea that the approver, in cases covered by s.306(1), should be examined twice, once as court witness before committal and then as prosecution witness at the time of trial – Held: When the Special Court chooses to take cognizance, the question of the approver being examined as a witness in the court of the Magistrate as required by s. 306 (4)(a) does not arise – Object of examining an approver twice, is to ensure that the accused is made aware of the evidence against him even at the preliminary stage, so as to enable him to effectively cross examine the approver during trial, bring out contradictions and show him to be untrustworthy – On facts, the object stood fulfilled – Magistrate who recorded the confession examined him and the Additional Chief Judicial Magistrate who granted pardon also examined – Thus, no violation of the procedure prescribed by s. 306(4)(a) – Prevention of Corruption Act, 1988 – s.5.

Allowing the appeals, the Court

HELD:

1. The judgment of the Special Court convicting the appellants for various offences under the Penal Code and the Prevention

of Corruption Act, 1988, and the judgment of the High Court confirming the same are set aside. [Para 139]

2.1 A-1 to A-4, being officers of a company were 'public servants' within the definition of the said expression under Section 21 of the IPC and under Section 2(c)(iii) of the PC Act. Therefore, there is a requirement of previous sanction both under Section 197(1) of the Code and under Section 19(1) of the PC Act, for prosecuting A-1 to A-4 for the offences punishable under the IPC and the PC Act. [Para 29]

2.2 Until the amendment to the PC Act under the Prevention of Corruption (Amendment) Act, 2018 (Act 16 of 2018), with effect from 26.07.2018, the requirement of a previous sanction under Section 19(1)(a) was confined only to a person "who is employed". On the contrary, Section 197(1) made the requirement of previous sanction necessary, both in respect of "any person who is" and in respect of "any person who was" employed. By the amendment under Act 16 of 2018, Section 19(1)(a) of the PC Act was suitably amended so that previous sanction became necessary even in respect of a person who "was employed at the time of commission of the offence". [Para 30]

2.3 The case on hand arose before the coming into force of the Prevention of Corruption (Amendment) Act, 2018 (Act 16 of 2018). Therefore, no previous sanction under Section 19(1) of the PC Act was necessary insofar as A-1 was concerned, as he had retired by the time a final report was filed in the year 2002. But previous sanction under Section 19(1) of the PC Act was required in respect of A-3 and A-4, as they were in service at the time of the Special Court taking cognizance. Therefore, the Agency sought sanction, but the Management of PSU refused to grant sanction not once but twice, insofar as A-3 and A-4 are concerned. It is by a quirk of fate or the unfortunate circumstances of having been born at a time (and consequently retiring at a particular time) that the benevolence derived by A-3 and A-4 from their employer, was not available to A-1. The refusal to grant sanction for prosecution in respect of A-3 and A-4 may not have a direct

bearing upon the prosecution of A-1. But it would certainly provide the context in which the culpability of A-1 for the offences both under the IPC and under the PC Act has to be determined. [Paras 31, 32, 34]

2.4 The existing policy shows that A-1 at least had an arguable case, in defence of the decision he took to go in for Restricted Tender. Once this is clear, his act, even if alleged to be lacking in bona fides or in pursuance of a conspiracy, would be an act in the discharge of his official duty, making the case come within the parameters of Section 197(1) of the Code. Therefore, the prosecution ought to have obtained previous sanction. The Special Court as well as the High Court did not apply their mind to this aspect. [Para 47]

2.5 The FIR actually implicated only four persons, namely PW-16, A-3, A-4 and A-5. A-1 was not implicated in the FIR. It was only after a confession statement was made by PW-16 in the year 1998 that A-1 was roped in. The allegations against A-1 were that he got into a criminal conspiracy with the others to commit these offences. But the Management of PSU refused to grant sanction for prosecuting A-3 and A-4, twice, on the ground that the decisions taken were in the realm of commercial wisdom of the Company. If according to the Management of the Company, the very same act of the co-conspirators fell in the realm of commercial wisdom, it is inconceivable that the act of A-1, as part of the criminal conspiracy, fell outside the discharge of his public duty, so as to disentitle him for protection under Section 197(1) of the Code. In view thereof, the prosecution ought to have taken previous sanction in terms of Section 197(1) of the Code, for prosecuting A-1, for the offences under the IPC. [Paras 52, 53]

3.1 A careful look at the anatomy of Section 306 of the Code shows that it provides a plethora of steps either in the alternative or in addition. Section 307 of the Code empowers the Court to which the commitment is made, to tender pardon. The power can be exercised at any time after the commitment of the case but before judgment is passed. [Paras 61, 62]

3.2 Sub-section (1) of s. 5 of the PC Act empowers the Special Judge to take cognizance of offences without the accused being committed to him for trial. It also says that while trying the accused persons, the Special Judge is obliged to follow the procedure prescribed by the Code for the trial of warrant cases by the Magistrates. The Special Judge under the PC Act, while trying offences, has a dual power of the Sessions Judge as well as that of the Magistrate and that such a Special Judge conducts the proceedings both prior to the filing of the charge sheet and for holding trial. In contrast, Section 5(2) of the PC Act does not speak about the stage at which pardon may be tendered by a Special Judge. This is perhaps in view of the express provisions of sub-section (1) of Section 5 which empowers the Special Judge himself to take cognizance without the accused being committed to him for trial. But the second part of sub-section (2) of Section 5 of the PC Act creates a deeming fiction that the pardon tendered by the Special Judge shall be deemed to be a pardon tendered under Section 307 of the Code. However, this deeming fiction is limited for the purposes of Sub-sections (1) to (5) of Section 308 of the Code. [Para 65]

3.3 When the Special Court chooses to take cognizance, the question of the approver being examined as a witness in the Court of the Magistrate as required by Section 306 (4)(a) does not arise. [Para 76]

3.4 The object of examining an approver twice, is to ensure that the accused is made aware of the evidence against him even at the preliminary stage, so as to enable him to effectively cross examine the approver during trial, bring out contradictions and show him to be untrustworthy. The said object stands fulfilled in the instant case, since the confession statement of the approver before the Metropolitan Magistrate was enclosed to the Charge Sheet. The approver was examined as PW-16 during trial and he was cross examined on the contents of the confession statement. The Magistrate who recorded the confession was examined as PW 17 and the Additional Chief Judicial Magistrate who granted pardon was examined as PW-

18. The proceedings before the Metropolitan Magistrate, the petition under section 306 of the Code and the proceedings on tender of pardon were marked respectively. All the accused were given opportunity to cross examine these witnesses both on the procedure and on the contents. There was no violation of the procedure prescribed by Section 306(4)(a) of the Code. [Paras 78, 79]

4.1 The trial court and the High Court came to the conclusion that the names of two big companies were included in Exhibit P-26 chit only to lend credibility to the process adopted. But it was on record through the statement of PW-4, Manager of L&T Company that a tender enquiry was received by them from the PSU. If the inclusion of the names of those two companies were intended to be a make belief affair, A-1 would not have taken the risk of sending the letter and that too to a company like L&T. Therefore, the evidence of PW-16 was not worthy of credit; that even assuming that it has some credibility, his statement that "he recommended the contract to be given to A-5 not because of A-1's interest", made the whole edifice upon which the case of the prosecution was built, collapse; and that there was no other evidence to connect A-1 with the commission of these offences. [Para 102]

4.2 The only person found by both the courts to be guilty of the offence under Section 120B was A-1. Therefore, an argument was advanced that a single person cannot be held guilty of criminal conspiracy. But this contention was repelled by the courts on the ground that PW-16 was the second person with whom A-1 had entered into a conspiracy. In other words, the reasoning adopted by the trial court and the High Court was that only A-1 and PW-16 were part of the conspiracy. Such a reasoning was a huge climbdown from the original charge that A-1 to A-7 entered into a criminal conspiracy, to cause wrongful loss to PSU and to confer a wrongful gain to A-5 to A-7. Once an offence of Section 120B is not made out against A-5 to A-7, the very foundation for the prosecution becomes shaky. Therefore, the conviction of A-1 for the offences under Section 120B read with Sections 420, 468, Section 471 read with Section 468 and Section 193 IPC and Section 13(2) read with

Section 13(1)(d) of the PC Act cannot be sustained. [Para 103]

4.3 A-1 was found guilty of an offence under Section 193. Section 193 applies only to false evidence given in any stage of a judicial proceeding or the fabrication of false evidence for the purpose of being used in any stage of a judicial proceeding. The allegation against A-1 was not even remotely linked to any of the Explanations under Section 193 of the IPC. Therefore, the judgment of the trial court and that of the High Court convicting A-1 for the said offences and sentencing him to imprisonment of varying terms and fines of different amounts are liable to be reversed. [Para 104]

4.4 No Court shall take cognizance of any offence punishable under Section 193 IPC, except on a complaint in writing of that Court or of some other Court to which that Court is subordinate. This bar is found in Section 195(1)(b)(i) of the Code. No complaint was ever made by any Court or by any officer authorized by any Court that A-1 or A-3 or A-4 committed an offence punishable under Section 193 IPC. But unfortunately, the trial court convicted A-1, A-3 and A-4, of the offence under Section 193 without any application of mind and the same has been upheld by the High Court. [Para 108]

4.5 The reading of the trial court and the High Court as though this Committee of which A-3, A-4 and the Approver were a part, was actually a Tender Committee having a larger role to play, is completely misconceived. In fact, the prosecution had to stand or fall on the strength of the testimony of the Approver namely PW-16. Despite the assertion on the part of PW-16 giving a clean chit to A-3 and A-4, the trial court found both of them guilty on a convoluted logic that they were part of a Tender Committee and that "every word and every description in the Tender Committee proceedings had been written by them with a view to cheat PSU" and that "if A-3 and A-4 were innocent they should have questioned and asked for details regarding the contractors." Such a reasoning given by the trial court and approved by the trial court and approved by the High Court was completely perverse. [Paras 110-112]

4.6 A-4 had no role in choosing the tenderers, but entered the picture only after the offers were received from the tenderers. Admittedly, A-4 was subordinate to both PW-16 and A-3.The competent authority refused to grant sanction to prosecute A-3 and A-4 for the offences under the PC Act. The trial court and the High Court did not find A-4 as a co-conspirator, which is why he was not held guilty of the offence under Section 120-B IPC. Section 193 IPC had been included completely out of context. The conviction of A-4 by the trial court as confirmed by the High Court is wholly unsustainable and is liable to be set aside. [Paras 113-115]

4.7 Three out of four bank officials examined by the prosecution to show that A-7 applied for demand drafts on behalf of four bogus firms, did not identify A-7 as the person who applied for the demand drafts. They did not also identify the handwriting in Exhibits P-66, P-90 and P- 92 as that of A-7. The only person who stated something in favour of the prosecution was PW-32 and it was in relation to Exhibit P-76. [Para 122]

4.8 There was a colossal failure on the part of the prosecution to establish that Exhibits P-66, P-76, P-90 and P-92 were in the handwritings/signatures of A-7. This is despite the prosecution examining the bank officials as PW-22, PW-32, PW-40 and PW-41 and the handwriting expert as PW-30. [Para 128]

4.9 Unfortunately, the trial court adopted a very curious reasoning that since he was a beneficiary of the money diverted to the account of sister concern, he must have had participation and knowledge that the demand drafts were purchased to cheat PSU. Such a reasoning is wholly unacceptable in view of the fact that A-7 was accused of forgery and charged u/s. 468 IPC, in relation to these very same applications for demand drafts. Therefore, it was necessary for the prosecution to prove forgery and also to show that the purpose of such forgery was cheating. Both were absent. The High Court fortunately realised the pitfall in the reasoning of the trial court. But in an over-anxiety to somehow convict A-7, the High Court adopted a very peculiar route, namely that of undertaking the task of comparing the admitted signatures/ handwritings with the

disputed ones u/s. 73 of the Evidence Act. [Paras 129, 130]

4.10 There was no signature or writing available before the High Court, which had been admitted or proved to the satisfaction of the Court to have been written or made. The High Court did not also direct A-7 to write any words or figures for the purpose of enabling a comparison. Without following the procedure so prescribed in Section 73, the High Court invented a novel procedure, to uphold the conviction handed over by the trial court through a wrong reasoning. Even in the questioning under Section 313 of the Code, no specific question was put to A-7 whether Exhibits P-66, P-76, P-90, P-92 and P- 75 were in his handwritings and whether they contained his signatures. Therefore, what was contained in Exhibit P-75 was not even admitted signatures. In the absence of either admission or proof of the admitted signatures, the High Court could not have resorted to Section 73 of the Evidence Act. In view thereof, the finding recorded by the trial court and the High Court as though A-7 committed forgery and cheating by making applications for the issue of demand drafts in the names of bogus firms is wholly unsustainable. [Paras 132, 135-137]

4.11 The only connecting link pointed out against A-7 was the transfer of money to the total extent of Rs.1,52,50,000/- to the account of a firm of which he was a partner. This by itself will not constitute any offence. Therefore, the charge that A-7 abetted the commission of the crime by the other accused, should also fail. This is especially so when A-5, whose proprietary concern bagged the contract, not only lost the contract but also allowed the bank guarantee to be invoked by the PSU and in addition, left a huge amount of Rs.2.60 crores still with the PSU. Therefore, the conviction and sentence awarded to A-7 cannot be sustained. [Para 138]

Suresh Chandra Bahri vs. State of Bihar **1995 Supp (1) SCC 80:[1994] 1 Suppl. SCR 483 – distinguished.**

Bangaru Laxman vs. State (through CBI) **(2012) 1 SCC 500 : [2011] 13 SCR 268;** *State through CBI vs. V. Arul*

Kumar **(2016) 11 SCC 733 : [2016] 2 SCR 486;** *Sardar Iqbal Singh vs. State (Delhi Administration)* **(1977) 4 SCC 536 : [1978] 2 SCR 174;** *Yakub Abdul Razak Memon vs. State of Maharashtra* **(2013) 13 SCC 1 : [2013] 15 SCR 1;** *Sarwan Singh vs. State of Punjab* **1957 SCR 953;** *Ravinder Singh vs. State of Haryana* **(1975) 3 SCC 742 : [1975] 3 SCR 453 – relied on.**

Matajog Dobey vs. H.C. Bhari **[1955] 2 SCR 925;** *Dr. Hori Ram Singh vs. The Crown* **1939 SCC OnLine FC 2;** *State of Orissa through Kumar Raghvendra Singh vs. Ganesh Chandra Jew* **(2004) 8 SCC 40 : [2004] 3 SCR 504;** *K. Kalimuthu vs. State by DSP* **(2005) 4 SCC 512 : [2005] 3 SCR 1;** *Rakesh Kumar Mishra vs. State of Bihar* **(2006) 1 SCC 557 : [2006] 1 SCR 124;** *Devinder Singh vs. State of Punjab through CBI* **(2016) 12 SCC 87 : [2016] 6 SCR 295;** *D. Devaraja vs. Owais Sabeer Hussain* **(2020) 7 SCC 695 : [2020] 6 SCR 453;** *Parkash Singh Badal vs. State of Punjab* **(2007) 1 SCC 1 : [2006] 10 Suppl. SCR 197;** *Harshad S. Mehta vs. State of Maharashtra* **(2001) 8 SCC 257 : [2001] 2 Suppl. SCR 577;** *State through Central Bureau of Investigation, Chennai vs. V. Arul Kumar* **(2016) 11 SCC 733 : [2016] 2 SCR 486;** *A. Devendran vs. State of T.N.* **(1997) 11 SCC 720 : [1997] 4 Suppl. SCR 591;** *P.C. Mishra vs. State (CBI)* **(2014) 14 SCC 629 : [2014] 4 SCR 183;** *M.O. Shamsudhin vs. State of Kerala* **(1995) 3 SCC 351 : [1995] 2 SCR 900 – referred to.**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2417 of 2010.

From the Judgment and Order dated 17.09.2010 of the High Court of Madras in CRLA No. 437 of 2006.

With

Criminal Appeal Nos. 16 of 2011 and 2444 of 2010.

Nagamuthu, Mrs. V. Mohana, Huzefa A. Ahmadi, Sr. Advs., Vijay Kumar, B. Ragunath, N. Sridhar, Mrs. N. C. Kavitha, Karthick Subramani, Ms. Ranjeeta

Rohatgi, Kaushik Mishra, Ms. Rashmi Singh, Ms. Samten Doma Lachungpa, Nishant Sharm, Rakesh K. Sharma, Advs. for the Appellant.

Sanjay Jain, ASG, A K Kaul, Ms. Srishti Mishra, Padmesh Mishra, Ms. Shradha Deshmukh, Madhav Sinhal, Arvind Kumar Sharma, Advs. for the Respondent.

The Judgment of the Court was delivered by

V. RAMASUBRAMANIAN, J.

1. These three criminal appeals arise out of a common Judgment passed by the Madurai Bench of the Madras High Court confirming the conviction of the appellants herein for various offences under the Indian Penal Code, 1860[1] and the Prevention of Corruption Act, 1988[2].

2. We have heard Shri Huzefa A. Ahmadi, Shri S. Nagamuthu, Mrs. V. Mohana, learned senior counsel and Shri S.R. Raghunathan, learned counsel appearing for the appellants and Shri Sanjay Jain, learned ASG assisted by Shri Padmesh Misra, learned Counsel for the Central Bureau of Investigation.

3. The brief facts leading to the above appeals are as follows:

   (i) Seven persons, four of whom were officers of BHEL, Trichy (a Public Sector Undertaking), and the remaining three engaged in private enterprise, were charged by the Inspector of Police, SPE/ CBI/ACB, Chennai, through a final report dated 16.07.2002, for alleged offences under Section 120B read with Sections 420, 468, Section 471 read with Section 468 and Section 193 IPC and Section 13(2) read with Section 13(1)(d) of the PC Act. Cognizance was taken by the Principal Special Judge for CBI cases, Madurai in CC No.9 of 2002. During the pendency of trial, two of the accused, namely, A-5 and A-6 died.

   (ii) By a judgment dated 08.09.2006, the Special Court acquitted A-2 and convicted A-1, A-3, A-4 and A-7 for various offences. These four convicted persons filed three appeals in Criminal Appeal (MD)

1 For short, *"IPC"*

2 For short, *"PC Act"*

Nos.437, 445 and 469 of 2006, on the file of the Madurai Bench of the Madras High Court.

(iii) By a common Judgment dated 17.09.2010, the High Court dismissed the appeals, forcing A-1, A-3, A-4 and A-7 to come up with four criminal appeals, namely, Appeal Nos. 2417, 2443 and 2444 of 2010 and 16 of 2011.

(iv) However, during the pendency of the above appeals, A-3 (R. Thiagarajan) died and hence Criminal Appeal No.2443 of 2010 filed by him was dismissed as abated.

(v) Therefore, what is now before us, are three criminal appeals, namely, Criminal Appeal Nos.2417 and 2444 of 2010 and 16 of 2011 filed respectively by A-1, A-7 and A-4.

4. Since the charges framed against all the appellants were not the same and also since all the appellants herein were not convicted uniformly for all the offences charged against them, we present below in a tabular form, the offences for which charges were framed against each of them, the offences for which each of them was held guilty and the offences for which they were not held guilty.

Status of Accused	***Name & Occupation***	***Charges framed by Special Court***	***Convicted for offences under***	***Not convicted for offences under***
A1	A. Srinivasulu, Executive Director of BHEL	Section 120B read with 420, 468, 471 read with 468 and 193 IPC and Section 13(2) read with 13(1)(d) of the PC Act.	Section 120B read with 420, 468, 471 read with 468 and 193 IPC and Section 13(2) and 13(1)(d) of the PC Act.	-
A2	Krishna Rao, General Manager, BHEL	Section 120B read with 420, 468, 471 read with 468 and 193 IPC and Section 13(2) read with 13(1)(d) of the PC Act.	Nil	Acquitted of all charges

A3	R. Thiagarajan, Assistant General Manager of Finance	Section 120B read with 420, 468, 471 read with 468 and 193 IPC and Section 13(2) read with 13(1)(d) of the PC Act. In addition, he was charged also under Section 109 IPC.	Section 109 IPC read with 420, 468, 471 read with 468 and 193 IPC.	Not convicted for offences under the PC Act, since the competent authority refused to grant sanction for prosecution against him. Not found guilty of Section 120B.
A4	K. Chandrasekaran, Senior Manager in BHEL	Section 120B read with 420, 468, 471 read with 468 and 193 IPC and Section 13(2) read with 13(1)(d) of the PC Act. In addition, he was charged also under Section 109 IPC.	Section 109 read with 420, 468, 471 read with 468 and 193 IPC.	Sanction for prosecution was not granted by the competent authority for the offences under the PC Act. Not convicted for offence under Section 120B.
A5	Mohan Ramnath, proprietor of Entoma Hydro Systems	Section 120B read with 420, 468, 471 read with 468 and 193 IPC and Section 13(2) read with 13(1)(d) of the PC Act. In addition, he was charged also under Section 109 IPC.	Died during the pendency of trial.	-
A6	NRN Ayyar, Father of A-5			
A7	N. Raghunath, Brother of A-5 and son of A-6	Section 120B read with 420, 468, 471 read with 468 and 193 IPC and Section 13(2) read with 13(1)(d) of the PC Act. In addition, he was charged also under Section 109 IPC.	Section 471 read with 468 and 109 IPC read with Section 13(2) read with 13(1)(e) of the PC Act.	Not found guilty of the offences under Section 120B read with Section 420 and 193 IPC.

5. For easy appreciation, the punishments awarded offence-wise to each of the accused, by the Special Court and confirmed by the High Court, are again presented in a tabular column as follows:

Accused	***Offence under Section***	***Punishment***
A1	120B read with Section 420 IPC	RI for 3 years and fine of Rs.2000/-
	468 IPC	RI for 3 years and fine of Rs.2000/-
	193 IPC	RI for 1 year
	13(2) read with 13(1)(d) of the PC Act	RI for 3 years and fine of Rs.2000/-
A3	Section 109 read with Section 420	RI for 2 years and fine of Rs.1000/-
	Section 468 IPC	RI for 2 years and fine of Rs.1000/-
	Section 471 read with Section 468	RI for 2 years and fine of Rs.1000/-
	Section 193	RI for 1 year
A4	Section 109 read with Section 420	RI for 2 years and fine of Rs.1000/-
	Section 468 IPC	RI for 2 years and fine of Rs.1000/-
	Section 471 read with Section 468	RI for 2 years and fine of Rs.1000/-
	Section 193	RI for 1 year
A7	Section 471 read with 468	RI for 1 year and fine of Rs.1000/-
	Section 109 IPC read with Section 13(2) read with Section 13(1)(e) of the PC Act	RI for 1 year and fine of Rs.1000/-

6. The background facts leading to the prosecution of the appellants herein and their eventual conviction, may be summarised as follows:-

(i) During the period 1991-92, the Tamil Nadu Water Supply and Drainage Board decided to set up "ROD Plants" (Reverse Osmosis Desalination Plants) to provide potable water to drought-prone areas in Ramnad District of Tamil Nadu. They entrusted the work to BHEL, Tiruchirapalli.

(ii) After resorting to limited/restricted tenders, BHEL awarded the contract to one Entoma Hydro Systems.

(iii) A Letter of Intent was issued to the said Company on 06.07.1994 and on 02.08.1994, an interest free mobilisation advance to the tune of Rs.4.32 crores was released to M/s Entoma Hydro Systems.

(iv) But subsequently, the contract was also cancelled on 04.10.1996; the bank guarantee furnished by the Contractor was invoked on 27.09.1996; and a payment of Rs.4,84,13,581/- was realised by BHEL.

(v) Thereafter, on 31.01.1997, CBI registered a First Information Report in Crime No. RC 8(A) of 97 against four individuals, three of whom were officials of BHEL and the fourth, the contractor. It was alleged in the First Information Report that the three officials of BHEL and the contractor entered into a criminal conspiracy to cheat BHEL and caused loss to BHEL to the tune of Rs.4.32 crores by awarding the contract to the aforesaid concern. The FIR was for offences under Section 120B read with 420, Section 420 IPC and Section 13(2) read with Section 13(1)(d) of PC Act.

(vi) In November 1998, the person first named in the FIR namely K.Bhaskar Rao, DGM, was arrested and released on bail by CBI itself. Thereafter, he gave a confession before the XVIII Metropolitan Magistrate, Chennai under Section 164 of the Code of Criminal Procedure. After the confession so made, CBI moved an application in Criminal Miscellaneous Petition No.562 of 2000 under Section 306 of the Code, before the Chief Judicial Magistrate, Madurai for the grant of pardon to K.Bhaskar Rao. The petition was made over to the Additional Chief Judicial Magistrate, Madurai, who passed an order dated 18.07.2000 granting pardon to Bhaskar Rao.

(vii) Thereafter, CBI requested the Chairman, BHEL to grant sanction to prosecute the other two officials named in the FIR, for the offences under the PC Act. But by letter dated 02.05.2001, the Chairman, BHEL refused to grant the permission to prosecute those two officers named in the FIR for the offences under the PC Act.

(viii) After completion of investigation, CBI filed a final report on 16.07.2002 against seven accused namely, (i) A Srinivasulu,

formerly Executive Director, BHEL; (ii) R. Krishna Rao, Retired General Manager, BHEL; (iii) R. Thyagarajan, Assistant General Manager (Finance), BHEL; (iv) K. Chandrasekaran, Deputy General Manager, BHEL; (v) Mohan Ramnath Proprietor, Entoma Hydro Systems; (vi) NRN Ayyar; and (vii) N. Raghunath. The final report was filed directly before the Principal Special Court for CBI Cases, Madurai.

(ix) In the final report, the prosecution charged:-

- ⁕ A-1 to A-7 for the offences under Section 120B read with Sections 420, 468, Section 471 read with Section 468, Section 193 IPC and Section 13(2) read with Section 13(1)(d) of the PC Act.
- ⁕ A-1 and A-2 for offences under Section 13(2) read with Section 13(1)(d) of the PC Act, 1988 and Section 109 IPC read with Sections 420, 468, Section 471 read with Section 468 and Section 193 IPC.
- ⁕ A-3 and A-4 for offences under Section 109 IPC read with Sections 420, 468, Section 471 read with Section 468 and Section 193 IPC.
- ⁕ A-5, A-6 and A-7 for offences under Sections 420, 468, Section 471 read with Section 468, Section 193 IPC and Section 109 IPC read with Section 13(1)(d) of the PC Act.

(x) The Special Judge framed the charges on 04.07.2003.

(xi) The prosecution examined 44 witnesses and marked 94 documents. A-5 and A-6 died pending trial and hence the charges against them were abated.

(xii) By a judgment dated 08.09.2006, the Principal Special Judge for CBI cases acquitted A-2 but convicted A-1, A-3, A-4 and A-7 for various offences indicated in Column No. 4 of the Table under paragraph 4 above.

(xiii) Challenging the conviction and punishment, A-1 filed a separate appeal in Criminal Appeal No.437 of 2006 on the file of the Madurai Bench of the Madras High Court. A-3 and A-4 joined together and

filed a common appeal in Criminal Appeal No.469 of 2006. A-7 filed a separate appeal in Criminal Appeal No.445 of 2006.

(xiv) By a judgment dated 17.09.2010, the Madurai Bench of the Madras High Court dismissed all the three appeals.

(xv) Therefore, A-1, A-3, A-4 and A-7 filed four independent appeals before this Court respectively in Criminal Appeal Nos.2417, 2443 and 2444 of 2010 and 16 of 2011. But A-3, the appellant in Criminal Appeal No.2443 of 2010 died pending appeal and hence his appeal was dismissed as abated. Therefore, we are now left with three appeals filed by A-1, A-4 and A-7 arising out of concurrent judgments of conviction.

7. In brief, the case of the prosecution was that A-1 to A-7 entered into a criminal conspiracy to cheat BHEL in the matter of award of contract for the construction of desalination plants. In pursuance of the said conspiracy, A-1, the then Executive Director of BHEL instructed Bhaskar Rao, the DGM (who turned Approver) to go in for limited/restricted tenders without following the tender procedure of pre-qualification of prospective tenderers before inviting limited tenders. According to the prosecution, A-1 dictated the names of four bogus firms along with the name of M/s Entoma Hydro Systems represented by its proprietor A-5, for inviting limited tenders. As per the dictates of A-1, the Approver put up a proposal suggesting the names of the five firms (including four bogus firms) together with the names of two companies which were not in the similar line of work. Thereafter, A-2, knowing well that the firms were bogus and were neither pre-qualified nor selected from the approved list of contractors, processed the note submitted by the Approver and sent it to A-1. When tender enquires were made, A-5 responded to the same not only in the name of M/s Entoma Hydro Systems but also on behalf of the four bogus firms. A-7, the brother of A-5 obtained demand drafts for Rs.20,000/- each in the names of the bogus firms by remitting cash into Indian Bank, Royapettah Branch, State Bank of India, Velachery Branch, State Bank of Mysore, T. Nagar Branch and Bank of Madura, Mount Road Branch and also by filling up demand draft applications and signing the same in the names of the bogus firms. Thereafter, the Tender Committee consisting of the Approver, A-3 and A-4 processed the names of all these firms and recommended the award of contract to

M/s Entoma Hydro Systems, giving false justifications for recommending them though the said firm did not have necessary experts or technical expertise. The Committee even recommended the sanction of interest free mobilisation advance, in violation of existing practice, to cause pecuniary advantage to A-5. Accordingly, an interest free mobilisation advance of Rs.4.32 crores was paid to A-5's firm. The amount was deposited in the account of the firm with Indian Bank. From the said account, a sum of Rs.1.52 crores was diverted to a sister concern of A-5, in which A-5, his father (A-6) and his brother (A-7) were partners. By such an action, A-5 to A-7 obtained wrongful gain from BHEL. The Prosecution alleged that by these actions, A-1 to A-7 committed the offences charged against them.

8. As stated in para 6 above, the Prosecution examined 44 witnesses, which included the Approver, who was examined as PW-16. 94 documents were marked as exhibits on the side of the prosecution. One witness was examined on the side of the defence as DW-1 and 6 documents were marked as exhibits Ex. D-1 to D-6.

9. In its judgment dated 08.09.2006, the Special Court brought on record the charges, the evidence and the rival contentions from paragraphs 1 to 60. The actual discussion and analysis by the Court began from paragraph 61.

10. To begin with, the Special Court took up for consideration the contention of the accused that BHEL did not suffer any wrongful loss and that, therefore, the charge under Section 420 IPC does not lie. But this contention of the accused was rejected by the Trial Court on the ground that the entire interest free mobilisation advance of Rs.4.32 crores was deposited in the account of M/s Entoma Hydro Systems with Indian Bank and that out of the same, a sum of Rs.1,52,50,000/- was transferred to a firm by name M/s Insecticides & Allied Chemicals, of which A-5 to A-7 were partners. Therefore, the Special Court came to the conclusion that on the date on which the transfer of money took place, a direct wrongful monetary loss was caused to BHEL and a direct wrongful monetary gain caused to A-5 to A-7. The Special Court also held that after the termination of the contract with M/s Entoma Hydro Systems, BHEL divided the contract into several parts and awarded the contracts to various persons and that, therefore, the money paid

to each of such contractors was a wrongful loss to BHEL. Though the Special Court also found that BHEL actually recovered Rs.4.32 crores (by invoking the bank guarantee), the Court concluded that there was no proof to show that money was paid out of the firm M/s Insecticides & Allied Chemicals. Therefore, the Special Court first concluded that BHEL suffered wrongful loss and that therefore, the offence under Section 420 IPC was made out.

11. The Trial Court then took up for consideration, the argument that the confession statement of PW-16 (Approver) marked as Exhibit P-44 had to be rejected, in view of the fact that PW-16 had not stated anything self-incriminating in his confession statement. But this contention advanced on behalf of A-1 was rejected by the Court on the ground that Exhibit P-26 is the chit in which PW-16 admittedly wrote down the names of four bogus firms and the name of M/s Entoma Hydro Systems, as dictated by A-1 and that this was sufficient to show that PW-16 was incriminating himself in the charge of criminal conspiracy with A-1.

12. When it was pointed out that as per the evidence on record, PW-1 was on leave26.11.1992, due to the death of his mother-in-law and that therefore, he could not have had any discussion on that date, the Trial Court turned this very argument against A-1 and held that A-1 should not have approved the Approval Note dated 25.11.1992 marked as Exhibit P-27, if he was on leave and had not carried out a background check.

13. The Trial Court thereafter held that the prosecution had successfully proved that the four other firms whose names were found in the chit Exhibit P-26 were all bogus. This was on the basis of the evidence of PW-2, PW-3, PW-5, PW-6, PW-7, PW-9, PW-10 and PW-13.

14. Believing the statement of PW-16 to be true, the Special Court came to the conclusion that A-1 predetermined the award of contract to A-5 and created circumstances and records to show as though proper procedure was followed and that therefore A-1 was guilty of the charges.

15. Coming to the charges against A-2, the Special Court held that the only role played by him was to prepare the Approval Note dated 25.11.1992 and that in view of the overwhelming evidence against A-1, the contract would have, in any case, been awarded to the firm in question. Therefore, the Special Court came to the conclusion (in paragraph 79 of the

judgment) that A-2 was merely asked to sign in Exhibit P-27, only to give credibility to the list prepared by A-1 and the Approver acting in conspiracy. After reaching such a finding, the Special Court acquitted A-2 of the charges framed against him.

16. Insofar as A-3 and A-4 are concerned, it was argued that they came into the picture only after 23.12.1992, when the Negotiation Committee comprising of A-3, A-4 and the Approver was formed. But this argument was rejected by the Trial Court by holding that what was constituted was a Tender Committee, as seen from Exhibit P-36 (proceedings of the Committee) and that therefore if they were innocent, they should have questioned and sought details regarding the contractors. Interestingly, the Trial Court after holding in paragraph 79 that the charges against A-2 were not proved, again went back to the question of guilt of A-2, after holding A-3 and A-4 guilty, through a reversal of the logic.

17. Coming to the role played by A-7, the Trial Court held that it was he who purchased the demand drafts in the names of the bogus firms, with a view to cheat BHEL and that he obtained wrongful gain for himself as a partner of the firm Insecticides & Allied Chemicals. On the basis of these findings, the Trial Court convicted the accused for the offences mentioned by us in the table under paragraph 4 and sentenced them to imprisonment and fine indicated in the table under paragraph 5.

18. While dealing with the appeals filed by A-1, A-3, A-4 and A-7, the High Court divided the same into two categories, the first dealing with the complicity of A-1, A-3 and A-4 and the second dealing with the complicity of A-7. This was perhaps for the reason that A-1, A-3 and A-4 were Officers of BHEL, while A-7 was a private individual.

19. On the complicity of A-1, A-3 and A-4, the High Court primarily relied upon the evidence of PW-8, the Technical Examiner of the Central Vigilance Commission as well as the evidence of PW-16, the Approver. On the basis of their evidence, supported by documents, the High Court held that the complicity of A-1, A-3 and A-4 was proved. On the question as to whether the action of the accused resulted in monetary loss to BHEL, the High Court held that the subsequent remedial measure taken by BHEL by invoking the bank guarantee and realizing the money, cannot lead to the conclusion that there was no wrongful loss.

20. Insofar as the complicity of A-7 is concerned, the High Court held that the signatures contained in the applications presented to various banks for obtaining demand drafts for procuring the tender document, were obviously that of A-7. In fact, the applications for securing demand drafts were marked as Exhibits P-66, P-76, P-90 and P-92 and these exhibits had been sent to a handwriting expert for his opinion. The handwriting expert was examined as PW-30. His report was marked as Exhibit P-68. The specimen writings and signatures of A-7 were marked as Exhibit P-75 through PW-30.

21. But the High Court found in paragraph 44 of the impugned judgment that the handwriting expert had not furnished any opinion in his report as to the comparison of the writings found in Exhibit P-75 with the demand draft application forms Exhibits P-66, P-76, P-90 and P-92. The High Court also found (in paragraph 49 of the impugned judgment) that the admitted handwritings and the signatures were not compared by the handwriting expert. After recording such a finding, the High Court took upon itself the task of making a comparison by itself, by invoking Section 73 of the Evidence Act. By so invoking Section 73, the High Court came to the conclusion that the signatures found in the demand draft applications were that of A-7 and that the diversion of funds to M/s. Insecticides & Allied Chemicals is a circumstance which corroborated the same.

22. It was argued before the High Court on behalf of A-3 and A-4 that BHEL Administration had refused to accord sanction to prosecute them for the offences under the PC Act and that therefore they cannot be held guilty of other offences. But this contention was rejected by the High Court, on the ground that the decision taken by the Management of the Company cannot have a bearing upon the prosecution case.

23. On the basis of the above findings, the High Court dismissed the appeals and confirmed the conviction and sentence awarded by the Trial Court.

24. Appearing on behalf of A-1, Shri Huzefa Ahmadi, learned senior counsel contended:-

(I) That there was no evidence to connect A-1 with the commission of any of the offences and that none of the charges stood established beyond reasonable doubt;

(II) That the substratum of the allegations was based entirely upon

the statement of the approver (PW-16), but the same suffers from serious irregularities;

(III) That though no sanction was required to prosecute A-1 for the offences under the PC Act in view of his retirement before the filing of the final report, a previous sanction was necessary under Section 197(1) of the Code, but the same was not obtained; and

(IV) That the prosecution failed to establish the necessary ingredient of *"obtaining any valuable thing or pecuniary advantage either for himself or for any other person"* for holding him guilty of the offences under Section 13(1)(d) of the PC Act.

25. Appearing on behalf of A-4, it was contended by Shri S.R. Raghunathan, learned counsel:-

(i) that A-4 played no role either in the preparation of tender or in choosing the tenderers;

(ii) that what was constituted on 23.12.1992, after the tenderers were shortlisted, allegedly by PW-16 at the instance of A-1, was only a Negotiation Committee;

(iii) that in the said Committee comprising of three members, namely A-3, A-4 and PW-16, he (A-4) was the one who was subordinate to the other two members and hence the logic applied to A-2 should have been extended to him also;

(iv) that both the Special Court and the High Court overlooked the evidence of PW-14 to the effect that no tender committee was constituted;

(v) that no wrongful loss was caused to BHEL;

(vi) that on the contrary, due to the role played by A-4, a bank guarantee to the tune of Rs.4.84 crores was obtained from Entoma Hydro Systems;

(vii) that the bank guarantee was invoked and the entire amount paid by BHEL towards mobilization advance was recovered;

(viii) that as a matter of fact a sum of Rs. 2.60 crores is due and payable by BHEL to Entoma Hydro Systems, after the bank guarantee was invoked and the accounts reconciled;

(ix) that despite repeated requests of the CBI, the Management of BHEL refused to give sanction to prosecute A-3 and A-4, on the ground that they acted in the best commercial interest of the Company; and

(x) that once A-4 is not held guilty of the offence under Section 120B, it was not possible to convict him for the other offences, especially in the facts and circumstances of the case.

26. Appearing on behalf of A-7, it was contended by Shri S. Nagamuthu, learned senior counsel:-

(i) that the confession statement of PW-16 was recorded by the XVIII Metropolitan Magistrate, Chennai, but pardon was granted by the Additional Chief Judicial Magistrate, Madurai and the final report was filed directly before the Special Court for CBI cases;

(ii) that since the Additional Chief Judicial Magistrate granted pardon in this case, this case is covered by Sub-section (1) of Section 306 and hence the prosecution ought to have followed the procedure prescribed under Section 306(4)(a) of the Code;

(iii) that there is no particular reason as to why the petition for pardon was made before the Additional Chief Judicial Magistrate, when the confession statement was recorded by the Metropolitan Magistrate and there is no reason why the prosecution chose to file the final report directly before the Special Court under section 5(1) of the PC Act 1988;

(iv) that neither the evidence of PW-44 (I.O.) nor the evidence of PW-16 (approver) had anything incriminating A-7;

(v) that A-7 has been roped in, merely because of his relationship with A-5 and also on account of a sum of Rs.1,52,50,000/- being transferred to the firm of which he is a partner, from out of the account of Entoma Hydro Systems;

(vi) that while the Special Court, without going into the report of the handwriting expert marked as Exhibit P-68 and without putting any question to A-7 under Section 313 of the Code in relation to his specimen signatures marked as Exhibit P-75 came to the conclusion that the applications for demand drafts bore his handwriting and

signatures, the High Court rejected the said reasoning but took to the route available under Section 73 of the Indian Evidence Act, 1872.

(vii) That the procedure under Section 73 of the Evidence Act is available to a Court only when there are admitted or proved handwritings, which were absent in this case;

(viii) That in any case there was no loss caused to BHEL, which is a *sine qua non* for the offence under the PC Act; and

(ix) That by a strange logic A-7 was convicted for the offence under Section 13(1)(e) of the PC Act.

27. Countering the submissions made on behalf of the appellants, it was argued by Shri Padmesh Mishra, learned counsel for the State:

(i) that there was cogent evidence, both oral and documentary, to connect all the accused with the offences for which they were found guilty;

(ii) that the evidence of the Approver (PW-16) stood corroborated by the testimonies of other witnesses, on all aspects such as the deliberate act of going in for limited tender, predetermining the person in whose favour the contract was to be awarded, sanction of an interest free mobilisation advance far in excess of the normal business norm, diversion of such advance by the contractor to another firm in which he was a partner along with is father and brother and the eventual termination of the contract on account of these malpractices;

(iii) that there is no requirement in law that actual loss should have been suffered for an offence under Section 13(1)(d) of the PC Act to be made out;

(iv) that in any case what was recovered by the invocation of the bank guarantee was the loss suffered in the first instance;

(v) that it is well settled that previous sanction to prosecute under Section 197(1) of the Code is necessary only when the act complained of is in the discharge of official duties;

(vi) that an offence of cheating cannot by any stretch of imagination be seen as part of official duties;

(vii) that the power to grant pardon is available concurrently to the Chief Judicial Magistrate/ Metropolitan Magistrate as well as the Court of Session;

(viii) that therefore there was nothing wrong in the Additional Chief Judicial Magistrate, Madurai granting pardon; and

(ix) that therefore the concurrent judgments of conviction of the appellants do not warrant any interference.

28. We have carefully considered the rival contentions. For the purpose of easy appreciation, we shall divide the discussion and analysis into three parts, the first dealing with the contention revolving around Section 197 of the Code, the second dealing with the correctness of the procedure adopted while granting pardon under Section 306 of the Code and the third revolving around the merits of the case *qua* culpability of each of the appellants before us.

Discussion and Analysis

Part-I (Revolving around Section 197 of the Code)

29. There is no dispute about the fact that A-1 to A-4, being officers of a company coming within the description contained in the *Twelfth* item of Section 21 of the IPC, were 'public servants' within the definition of the said expression under Section 21 of the IPC. A-1 to A-4 were also public servants within the meaning of the expression under Section 2(c)(iii) of the PC Act. Therefore, there is a requirement of previous sanction both under Section 197(1) of the Code and under Section 19(1) of the PC Act, for prosecuting A-1 to A-4 for the offences punishable under the IPC and the PC Act.

30. Until the amendment to the PC Act under the Prevention of Corruption (Amendment) Act, 2018 (Act 16 of 2018), with effect from 26.07.2018, the requirement of a previous sanction under Section 19(1)(a) was confined only to a person ***"who is employed".*** On the contrary, Section 197(1) made the requirement of previous sanction necessary, both in respect of *"any person who is"* and in respect of *"any person who was"* employed. By the amendment under Act 16 of 2018, Section 19(1)(a)

of the PC Act was suitably amended so that previous sanction became necessary even in respect of a person who *"was employed at the time of commission of the offence".*

31. The case on hand arose before the coming into force of the Prevention of Corruption (Amendment) Act, 2018 (Act 16 of 2018). Therefore, no previous sanction under Section 19(1) of the PC Act was necessary insofar as A-1 was concerned, as he had retired by the time a final report was filed. He actually retired on 31.08.1997, after 7 months of registration of the FIR (31.01.1997) and 5 years before the filing of the final report (16.07.2002) and 6 years before the Special Court took cognizance (04.07.2003). But previous sanction under Section 19(1) of the PC Act was required in respect of A-3 and A-4, as they were in service at the time of the Special Court taking cognizance. Therefore, the Agency sought sanction, but the Management of BHEL refused to grant sanction not once but twice, insofar as A-3 and A-4 are concerned.

32. It is by a quirk of fate or the unfortunate circumstances of having been born at a time (and consequently retiring at a particular time) that the benevolence derived by A-3 and A-4 from their employer, was not available to A-1. Had he continued in service, he could not have been prosecuted for the offences punishable under the PC Act, in view of the stand taken by BHEL.

33. It appears that BHEL refused to accord sanction by a letter dated 24.11.2000, providing reasons, but the CVC insisted, vide a letter dated 08.02.2001. In response to the same, a fresh look was taken by the CMD of BHEL. Thereafter, by a decision dated 02.05.2001, he refused to accord sanction on the ground that it will not be in the commercial interest of the Company nor in the public interest of an efficient, quick and disciplined working in PSU.

34. The argument revolving around the necessity for previous sanction under Section 197(1) of the Code, has to be considered keeping in view the above facts. It is true that the refusal to grant sanction for prosecution under the PC Act in respect of A-3 and A-4 may not have a direct bearing upon the prosecution of A-1. But it would certainly provide the context in which the culpability of A-1 for the offences both under the IPC and under the PC Act has to be determined.

35. It is admitted by the respondent-State that no previous sanction under section 197(1) of the Code was sought for prosecuting A-1. The stand of the prosecution is that the previous sanction under Section 197(1) may be necessary only when the offence is allegedly committed ***"while acting or purporting to act in the discharge of his official duty".*** Almost all judicial precedents on Section 197(1) have turned on these words. Therefore, we may now take a quick but brief look at some of the decisions.

36. ***Dr. Hori Ram Singh*** vs. ***The Crown***[3] is a decision of the Federal Court, cited with approval by this court in several decisions. It arose out of the decision of the Lahore High Court against the decision of the Sessions Court which acquitted the appellant of the charges under Sections 409 and 477A IPC for want of consent of the Governor. Sir S. Varadachariar, with whose opinion Gwyer C.J., concurred, examined the words, "*any act done or purporting to be done in the execution of his duty*" appearing in Section 270(1) of the Government of India Act, 1935, which required the consent of the Governor. ***The Federal Court observed at the outset that this question is substantially one of fact, to be determined with reference to the act complained of and the attendant circumstances***. The Federal Court then referred by way of analogy to a number of rulings under Section 197 of the Code and held as follows:-

> "The reported decisions on the application of sec. 197 of the Criminal Procedure Code are not by any means uniform. In most of them, the actual conclusion will probably be found to be unexceptionable, in view of the facts of each ease; but, in some, the test has been laid down in terms which it is difficult to accept as exhaustive or correct. Much the same may be said even of decisions pronounced in England, on the language, of similar statutory provisions (see observations in Booth v. Clive . **It does not seem to me necessary to review in detail the decisions given under sec. 197 of the Criminal Procedure Code which may roughly be classified as falling into three groups, so far as they attempted to state something in the nature of a test. In one group of cases, it is insisted that there must be something**

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in the nature of the act complained of that attaches it to the official character of the person doing it: cf. In re Sheik Abdul Khadir Saheb ; Kamisetty Raja Rao v. Ramaswamy, AmanatAli v. King-emperor, King-Emperor v. Maung Bo Maung and Gurushidayya Shantivirayya Kulkarni v. King-Emperor. In another group, more stress has been laid on the circumstance that the official character or status of the accused gave him the opportunity to commit the offence. It seems to me that the first is the correct view. In the third group of cases, stress is laid almost exclusively on the fact that it was at a time when the accused was engaged in his official duty that the alleged offence was said to have been committed [see Gangaraju v. Venki , quoting from Mitra's Commentary on the (criminal Procedure Code). The use of the expression "while acting" etc., in sec. 197 of the Criminal Procedure Code (particularly its introduction by way of amendment in 1923) has been held to lend some support to this view. While I do not wish to ignore the significance of the time factor, it does not seem to me right to make it the test. To take an illustration suggested in the course of the argument, if a medical officer, while on duty in the hospital, is alleged to have committed rape on one of the patients or to have stolen a jewel from the patient's person, it is difficult to believe that it was the intention of the Legislature that he could not be prosecuted for such offences except with the previous sanction of the Local Government"

37. It is seen from the portion of the decision extracted above that the Federal Court categorised in ***Dr. Hori Ram Singh*** (supra), the decisions given under Section 197 of the Code into three groups namely ***(i)*** **cases where it was held that there must be something in the nature of the act complained of that attaches it to the official character of the person doing it;*(ii)* cases where more stress has been laid on the circumstance that the official character or status of the accused gave him the opportunity to commit the offence; and *(iii)* cases where stress is laid almost exclusively on the fact that it was at a time when the accused was engaged in his official duty that the alleged offence was said to have been committed.** While preferring the test laid down in the first category of cases, the Federal Court rejected the test given in the third category

of cases by providing the illustration of a medical officer committing rape on one of his patients or committing theft of a jewel from the patient's person.

38. In ***Matajog Dobey*** vs. ***H.C. Bhari***[4] a ConstitutionBench of this Court was concerned with the interpretation to be given to the words, *"any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty"* in Section 197 of the Code. After referring to the decision in ***Dr. Hori Ram Singh,*** the Constitution Bench summed up the result of the discussion, in paragraph 19 by holding: ***"There must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty."***

39. In ***State of Orissa through Kumar Raghvendra Singh*** vs. ***Ganesh Chandra Jew***[5]***,*** a two Member Bench of this Court explained that the protection under Section 197 has certain limits and that it is available only when the alleged act is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. The Court also explained that if in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection.

40. The above decision in ***State of Orissa*** (supra) was followed (incidentally by the very same author) in ***K. Kalimuthu*** vs. ***State by DSP***[6] and ***Rakesh Kumar Mishra*** vs. ***State of Bihar***[7]***.***

41. In ***Devinder Singh*** vs. ***State of Punjab through CBI***[8]***,*** this Court took note of almost all the decisions on the point and summarized the principles emerging therefrom, in paragraph 39 as follows:

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4 (1955) 2 SCR 925

5 (2004) 8 SCC 40:

6 (2005) 4 SCC 512

7 (2006) 1 SCC 557

8 (2016) 12 SCC 87

*"**39.** The principles emerging from the aforesaid decisions are summarised hereunder:*

***39.1.** Protection of sanction is an assurance to an honest and sincere officer to perform his duty honestly and to the best of his ability to further public duty. However, authority cannot be camouflaged to commit crime.*

39.2. Once act or omission has been found to have been committed by public servant in discharging his duty it must be given liberal and wide construction so far its official nature is concerned. Public servant is not entitled to indulge in criminal activities. To that extent Section 197 CrPC has to be construed narrowly and in a restricted manner.

39.3. Even in facts of a case when public servant has exceeded in his duty, if there is reasonable connection it will not deprive him of protection under Section 197 CrPC. There cannot be a universal rule to determine whether there is reasonable nexus between the act done and official duty nor is it possible to lay down such rule.

39.4. In case the assault made is intrinsically connected with or related to performance of official duties, sanction would be necessary under Section 197 CrPC, but such relation to duty should not be pretended or fanciful claim. The offence must be directly and reasonably connected with official duty to require sanction. It is no part of official duty to commit offence. In case offence was incomplete without proving, the official act, ordinarily the provisions of Section 197 CrPC would apply.

…."

42. In ***D. Devaraja*** vs. ***Owais Sabeer Hussain[9],*** this Court explained that sanction is required not only for acts done in the discharge of official duty but also required for any act purported to be done in the discharge of official duty and/or act done under colour of or in excess of such duty

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or authority. This Court also held that to decide whether sanction is necessary, the test is whether the act is totally unconnected with official duty or whether there is a reasonable connection with the official duty.

43. Keeping in mind the above principles, if we get back to the facts of the case, it may be seen that the primary charge against A-1 is that with a view to confer an unfair and undue advantage upon A-5, he directed PW-16 to go for limited tenders by dictating the names of four bogus companies, along with the name of the chosen one and eventually awarded the contract to the chosen one. It was admitted by the prosecution that at the relevant point of time, the Works Policy of BHEL marked as Exhibit P-11, provided for three types of tenders, namely ***(i)*** Open Tender; ***(ii)*** Limited/Restricted Tender; and ***(iii)*** Single Tender.

44. Paragraph 4.2.1 of the Works Policy filed as Exhibit P-11 and relied upon by the prosecution laid down that as a rule, only works up to Rs.1,00,000/- should be awarded by Restricted Tender. However, paragraph 4.2.1 also contained a rider which reads as follows:

"4.2.1 … However even in cases involving more than Rs.1,00,000/- if it is felt necessary to resort to Restricted Tender due to urgency or any other reasons it would be open to the General Managers or other officers authorised for this purpose to do so after recording reasons therefor."

45. Two things are clear from the portion of the Works Policy extracted above. One is that a deviation from the rule was permissible. The second is that even General Managers were authorised to take a call, to deviate from the normal rule and resort to Restricted Tender.

46. Admittedly, A-1 was occupying the position of Executive Director, which was above the rank of a General Manager. According to him he had taken a call to go for Restricted Tender, after discussing with the Chairman and Managing Director. The Chairman and Managing Director, in his evidence as PW-28, denied having had any discussion in this regard.

47. For the purpose of finding out whether A-1 acted or purported to act in the discharge of his official duty, it is enough for us to see whether he could take cover, rightly or wrongly, under any existing policy. Paragraph 4.2.1 of the existing policy extracted above shows that A-1 at least had an arguable case, in defence of the decision he took to go

in for Restricted Tender. Once this is clear, his act, even if alleged to be lacking in *bona fides* or in pursuance of a conspiracy, would be an act in the discharge of his official duty, making the case come within the parameters of Section 197(1) of the Code. Therefore, the prosecution ought to have obtained previous sanction. The Special Court as well as the High Court did not apply their mind to this aspect.

48. Shri Padmesh Mishra, learned counsel for the respondent placed strong reliance upon the observation contained in paragraph 50 of the decision of this Court in ***Parkash Singh Badal*** vs. ***State of Punjab***[10]***.*** It reads as follows:-

"50. 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."

49. On the basis of the above observation, it was contended by the learned counsel for the respondent that any act done by a public servant, which constitutes an offence of cheating, cannot be taken to have been committed while acting or purporting to act in the discharge of official duty.

50. But the above contention in our opinion is far-fetched. The observations contained in paragraph 50 of the decision in ***Parkash Singh Badal*** (supra) are too general in nature and cannot be regarded as the ratio flowing out of the said case. If by their very nature, the offences under sections 420, 468, 471 and 120B cannot be regarded as having been committed by a public servant while acting or purporting to act in the discharge of official duty, the same logic would apply with much more vigour in the case of offences under the PC Act. Section 197 of the Code does not carve out any group of offences that will fall outside its purview. Therefore, the observations contained in para 50 of the decision in ***Parkash Singh Badal*** cannot be taken as carving out an exception judicially, to a statutory prescription. In fact, ***Parkash Singh Badal*** cites with approval the other decisions (authored by the very

10 (2007) 1 SCC 1

same learned Judge) where this Court made a distinction between an act, though in excess of the duty, was reasonably connected with the discharge of official duty and an act which was merely a cloak for doing the objectionable act. Interestingly, the proposition laid down in ***Rakesh Kumar Mishra*** (supra) was distinguished in paragraph 49 of the decision in ***Parkash Singh Badal,*** before the Court made the observations in paragraph 50 extracted above.

51. No public servant is appointed with a mandate or authority to commit an offence. Therefore, if the observations contained in paragraph 50 of the decision in ***Parkash Singh Badal*** are applied, any act which constitutes an offence under any statute will go out of the purview of an act in the discharge of official duty. The requirement of a previous sanction will thus be rendered redundant by such an interpretation.

52. It must be remembered that in this particular case, the FIR actually implicated only four persons, namely PW-16, A-3, A-4 an A-5. A-1 was not implicated in the FIR. It was only after a confession statement was made by PW-16 in the year 1998 that A-1 was roped in. The allegations against A-1 were that he got into a criminal conspiracy with the others to commit these offences. But the Management of BHEL refused to grant sanction for prosecuting A-3 and A-4, twice, on the ground that the decisions taken were in the realm of commercial wisdom of the Company. ***If according to the Management of the Company, the very same act of the co-conspirators fell in the realm of commercial wisdom, it is inconceivable that the act of A-1, as part of the criminal conspiracy, fell outside the discharge of his public duty, so as to disentitle him for protection under Section 197(1) of the Code.***

53. In view of the above, we uphold the contention advanced on behalf of A-1 that the prosecution ought to have taken previous sanction in terms of Section 197(1) of the Code, for prosecuting A-1, for the offences under the IPC.

Part-II (Revolving around grant of pardon)

54. As we have indicated elsewhere, the FIR was filed on 31.01.1997 against 4 persons namely K. Bhaskar Rao (the person who turned Approver later) and A-3 to A-5. K. Bhaskar Rao, who later turned approver, was arrested in August, 1998 and released on bail by the

respondents themselves. After his release, the said K. Bhaskar Rao gave a confession statement under Section 164 of the Code before the XVIII Metropolitan Magistrate, Chennai on 16.11.1998. On the basis of the statement so given by K. Bhaskar Rao, prosecution filed a petition in Criminal M.P No.562 of 2000 before the Chief Judicial Magistrate, Madurai under Section 306 of the Code for the grant of pardon. On the said petition so filed on 22.06.2000, the Additional Chief Judicial Magistrate, Madurai (to whom it was made over) summoned K. Bhaskar Rao to appear before him on 17.07.2000. After broadly informing K. Bhaskar Rao of the consequences of his action, the Additional Chief Judicial Magistrate adjourned the matter to 18.07.2000. On 18.07.2000, the Additional Chief Judicial Magistrate read out the contents of his confession statement and asked Bhaskar Rao whether it was voluntarily given by him after knowing the consequences. Once K. Bhaskar Rao answered the questions in the affirmative, the Additional Chief Judicial Magistrate passed an order on 18.07.2000 granting pardon to K. Bhaskar Rao under Section 306 of the Code. Thereafter, the respondents filed a final report on 16.07.2002 directly before the Special Judge for CBI cases, Chennai, without the case being committed by the Magistrate. Since the aforesaid K. Bhaskar Rao had already been granted pardon by the Additional Chief Judicial Magistrate, the prosecution examined him as PW-16 before the Special Court for CBI cases and marked ***(i)*** the statement of K. Bhaskar Rao under Section 164 of the Code as Exhibit P-44; ***(ii)*** the copy of the petition filed under Section 306 of the Code dated 22.06.2000 as Exhibit P-51; and ***(iii)*** the proceedings dated 17.07.2000 and 18.07.2000 of the Additional Chief Judicial Magistrate, Madurai, relating to the tender of pardon, as Exhibit P-52.

55. Appearing on behalf of A-7, Shri S. Nagamuthu, learned senior counsel assailed the procedure so followed. According to the learned senior counsel, the Chief Judicial Magistrate/Metropolitan Magistrate is empowered to grant pardon during investigation, inquiry or trial and a Magistrate of first class is empowered to grant pardon while inquiring into or trying an offence. This is by virtue of sub-section (1) of Section 306 of the Code. In the case on hand, the Additional Chief Judicial Magistrate granted pardon at the stage of investigation. Therefore, it is contended by the learned senior counsel that the approver, in cases

covered by Section 306(1), should be examined twice, once before committal and then at the time of trial. The difference between the examination of an approver at these two stages is that the approver is examined as a court witness before committal, but as a prosecution witness during trial. Therefore, the learned senior counsel contended that such examination of an approver twice, is a mandatory requirement of clause (a) of sub-section (4) of Section 306 and that it has been held by a catena of decisions that the non-compliance with Section 306(4)(a) would vitiate the proceedings. It is the contention of the learned senior counsel that if the Magistrate, who grants pardon, has failed to examine him as a witness as soon as pardon is accepted by the approver, the evidence of the approver is liable to be eschewed from consideration. It is submitted by the learned senior counsel that in this case, the Additional Chief Judicial Magistrate examined as PW-18 had not complied with the requirement of Section 306(4)(a) of the Code and that therefore the evidence of the approver is liable to be eschewed.

56. Shri S. Nagamuthu, learned senior counsel also submitted that the requirement of examining an approver once as a court witness before committal and then as a prosecution witness during trial, prescribed by Section 306(4)(a), will not be applicable to a case covered by Section 307 of the Code, which empowers the Court to which the case is committed for trial, itself to grant pardon. But in the case on hand, the case was not committed by any Magistrate/Additional Chief Judicial Magistrate to the Special Court and hence, the prosecution cannot even rely upon Section 307 of the Code.

57. Adverting to the provisions of sub-sections (1) and (2) of Section 5 of the PC Act, it was contended by Shri S. Nagamuthu, learned senior counsel that the power to tender a pardon was available even to the Special Court. The pardon so tendered by the Special Court is deemed under sub-section (2) of Section 5 to be a pardon tendered under Section 307 of the Code. But this deeming fiction is limited in its applicability only for the purposes of sub-sections (1) to (5) of Section 308 of the Code. In other words, the power of the Court to grant pardon under Section 307 of the Code is materially different from the power of the Special Court under Section 5(2) of the PC Act. In fact, Section 5(1) of the PC Act empowers the Special Court to take cognizance without the case being committed to it by any Magistrate. The provisions of Section 193 of the Code thus stand

excluded in their application. The Special Court is thus conferred by Section 5(1) of the PC Act, original jurisdiction to take cognizance. This principle has been recognized by this Court in ***Bangaru Laxman*** vs. ***State (through CBI)***[11], wherein it was held that the Special Judge has a dual power, namely that of a Court of Session and that of a Magistrate. Relying upon the decision in ***Harshad S. Mehta*** vs. ***State of Maharashtra***[12] and the decisions in ***P.C. Mishra*** vs. ***State (Central Bureau of Investigation)***[13] and ***State through Central Bureau of Investigation, Chennai*** vs. ***V. Arul Kumar***[14]**,** the learned senior counsel contended that the request for pardon should have been made in this case at the stage of investigation only before the Special Court. Even assuming that it was a curable defect, there must be an evidence of good faith on the part of PW-18 (the Additional Chief Judicial Magistrate). In the absence of such an evidence, it is contended that the testimony of the approver was liable to be eschewed in this case.

58. We have carefully considered the above submissions.

59. Before we proceed with our analysis, it is necessary to bring on record Sections 306 and 307 of the Code and Section 5 of the PC Act. Section 306 and 307 of the Code reads as follows:

"306. Tender of pardon to accomplice.-(1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

(2) This section applies to—

11 (2012) 1 SCC 500

12 (2001) 8 SCC 257

13 (2014) 14 SCC 629

14 (2016) 11 SCC 733

(a) any offence triable exclusively by the Court of Session or by the Court of a Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952)

(b) any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.

(3) Every Magistrate who tenders a pardon under sub-section (1) shall record-

(a) his reasons for so doing;

(b) whether the tender was or was not accepted by the person to whom it was made,

and shall, on application made by the accused, furnish him with a copy of such record free of cost.

(4) Every person accepting a tender of pardon made under sub-section (1)—

(a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any,

(b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

(5) Where a person has accepted a tender of pardon made under sub-section (1) and has been examined under sub-section (4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case,

(a) commit it for trial-

(i) to the Court of Session if the offence is triable exclusively by that Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate;

(ii) to a Court of Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952), if the offence is triable exclusively by that Court;

(b) in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself.

307. Power to direct tender of pardon.—At any time after commitment of a case but before judgment is passed, the Court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person."

60. Section 5 of the PC Act reads as follows:

"5. Procedure and powers of special Judge.—(1) A special Judge may take cognizance of offences without the accused being committed to him for trial and, in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1973 (2 of 1974), for the trial of warrant cases by the Magistrates.

(2) A special Judge may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof and any pardon so tendered shall, for the purposes of sub-sections (1) to (5) of section 308 of the Code of Criminal Procedure, 1973 (2 of 1974), be deemed to have been tendered under section 307 of that Code.

(3) Save as provided in sub-section (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as they are not inconsistent with this Act, apply to the proceedings before a special Judge; and for purposes of the said provisions, the Court of the special Judge shall be deemed to be a Court of Session and the person conducting a prosecution before a special Judge shall be deemed to be a public prosecutor.

(4) In particular and without prejudice to the generality of the provisions contained in sub-section (3), the provisions of sections 326 and 475 of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as may be, apply to the proceedings before a special Judge and for the purposes of the said provisions, a special Judge shall be deemed to be a Magistrate.

(5) A special Judge may pass upon any person convicted by him any sentence authorised by law for the punishment of the offence of which such person is convicted.

(6) A special Judge, while trying an offence punishable under this Act, shall exercise all the powers and functions exercisable by a District Judge under the Criminal Law Amendment Ordinance, 1944 (Ord. 38 of 1944)."

61. A careful look at the anatomy of Section 306 of the Code shows that it provides a plethora of steps either in the alternative or in addition. They are as follows:-

(i) Section 306(1) divides a criminal case into three stages, namely, ***(i)*** investigation; ***(ii)*** inquiry; and ***(iii)*** trial of the offence.

(ii) A Chief Judicial Magistrate or a Metropolitan Magistrate is empowered to grant pardon to any person, at any of the three stages, namely the stage of investigation, the stage of inquiry or the stage of trial. In contrast, the Magistrate of the first class can grant pardon only in two stages, namely the stage of inquiring into or the stage of trying the offence.

(iii) Sub-section (2) of Section 306 makes the provisions of Section 306 applicable to any offence triable exclusively by a Court of Session or a Court of Special Judge appointed under the Criminal Law Amendment Act, 1952 and to any offence punishable with imprisonment which may extend to seven years or more.

(iv) Sub-section (3) of Section 306 obliges the Magistrate tendering pardon, not only to record reasons for doing so but also to state whether the tender was accepted by the person to whom it was made;

(v) Sub-section (4) of Section 306 makes it mandatory that every person accepting a tender of pardon made under sub-section (1) shall be examined as a witness both in the Court of the Magistrate taking cognizance and in the subsequent trial. Sub-section (4) also imposes an additional condition that the person accepting a tender of pardon shall be detained in custody till the termination of the trial, except when he is already on bail.

(vi) A careful look at clauses (a) and (b) of sub-section (4) shows that the procedure prescribed therein is applicable only to cases covered by sub-section (1).

(vii) Sub-section (5) prescribes that once a person has accepted a tender of pardon under sub-section (1) and has been examined under sub-section (4) then the Magistrate taking cognizance should commit the case for trial either to the Court of Session or to the Court of Special Judge. In cases not covered by clause (a) of sub-section (5), the Magistrate taking cognizance should make over the case to the Chief Judicial Magistrate in terms of clause (b).

62. Section 307 of the Code empowers the Court to which the commitment is made, to tender pardon. The power can be exercised at any time after the commitment of the case but before judgment is passed.

63. Coming to Section 5 of the PC Act, it is seen that sub-section (1) empowers the Special Judge to take cognizance of offences without the accused being committed to him for trial. It also says that while trying the accused persons, the Special Judge is obliged to follow the procedure prescribed by the Code for the trial of warrant cases by the Magistrates. This is why this court held in ***Bangaru Laxman*** (in para 40 of the report) that ***the Special Judge under the PC Act, while trying offences, has a dual power of the Sessions Judge as well as that of the Magistrate and that such a Special Judge conducts the proceedings both prior to the filing of the charge sheet and for holding trial.*** In fact what was in question in ***Bangaru Laxman*** was whether the pardon tendered by the Special Judge, one day before the filing of the charge sheet, was correct or not. This court found the same to be in order.

64. Interestingly, sub-section (2) of Section 5 which empowers the Special Judge to tender a pardon, does not speak about the stage at which a Special Judge may tender pardon. This point can be appreciated if we go back once again to Sections 306 and 307 of the Code which lays down the following rules:-

(i) A Chief Judicial Magistrate or a Metropolitan Magistrate is empowered to tender pardon at any of the three stages;

(ii) The Magistrate of first class is empowered to tender pardon at two stage; and

(iii) The Court to which commitment is made (meaning thereby either a Court of Session or a Court of Special Judge named in sub-clauses (i) and (ii) of clause (a) of sub-section (5) of Section 306) is empowered to tender pardon at only one stage namely the trial of the offence. Though the word trial, used in Section 306(1) is not used in Section 307, the words appearing in Section 307, namely *"at any time after commitment of a case but before judgment is passed"* can only indicate the stage of trial, in view of the fact that under sub-section (5) of Section 306, committal takes place after cognizance is taken.

65. In contrast, Section 5(2) of the PC Act does not speak about the stage at which pardon may be tendered by a Special Judge. This is perhaps in view of the express provisions of sub-section (1) of Section 5 which empowers the Special Judge himself to take cognizance without the accused being committed to him for trial. But the second part of sub-section (2) of Section 5 of the PC Act creates a deeming fiction that the pardon tendered by the Special Judge shall be deemed to be a pardon tendered under Section 307 of the Code. However, as rightly contended by the learned Senior Counsel for A-7, this deeming fiction is limited for the purposes of Sub-sections (1) to (5) of Section 308 of the Code.

66. It appears that before the advent of the Code of Criminal Procedure, 1973, the Courts were taking a view that the Magistrates had the power to tender pardon even after the commitment of the case for trial to the Court of Session/Special Judge. This was because of the way in which Section 338 of the Code of Criminal Procedure, 1898 was worded. A comparison of Section 307 of the Code of Criminal Procedure, 1973 with Section 338 of the Code of Criminal Procedure, 1898 will make the position more clear.

Section 307 of the Code of Criminal Procedure, 1973	***Section 338 of the Code of Criminal Procedure, 1898***
307. Power to direct tender of pardon.—At any time after commitment of a case but before judgment is passed, the Court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person.	**338. Power to direct tender of pardon.** - At any time after commitment, but before judgment is passed, the Court to which the commitment is made may, with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender, ***or order the committing Magistrate or the District Magistrate to tender, a pardon*** on the same condition to such person.

67. The change brought about by the legislature to the procedure prescribed in Sections 306 and 307 of the Code of 1973 was noted by this Court in ***A. Devendran*** vs. ***State of T.N.***[15]***.*** Incidentally, a question arose in ***A. Devendran*** (supra) as to whether the non-examination of the Approver as a witness after grant of pardon was a non-compliance of sub-section (4)(a) of Section 306 and whether it would vitiate the proceedings. Paragraph 10 of the decision in ***A. Devendran*** is of importance and hence it is extracted as follows:-

"10. ***The next question that arises for consideration is as to whether non-examination of the approver as a witness after grant of pardon and thereby non-compliance of sub-section 4(a) of Section 306 vitiates the entire proceeding.*** In the case in hand there is no dispute that after the Chief Judicial Magistrate granted pardon to the accused he was not examined immediately after the grant of pardon and was only examined once by the learned Sessions Judge in course of trial. The question that arises for consideration is: When an accused is granted pardon after the case is committed to the Court of Session would it be necessary to comply with sub-section (4)(*a*) of Section 306 of the Code. The contention of Mr Mohan, the learned counsel appearing for the State, in this connection is that Section 307 merely mandates that pardon should be tendered on the same condition and such condition obviously refers to the condition indicated in sub-section (1) of Section 306, namely, on the accused making a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof. According to the learned counsel, sub-section (4) of Section 306 is not a condition for tendering pardon but is merely a procedure which has to be followed when a person is tendered pardon by a Magistrate in exercise of power under Section 306. Since after a case committed to the Court of Session pardon is tendered by the court to whom the commitment is made, it would not be necessary for such court to comply with sub-section (4)(*a*) of Section 306. **Mr Murlidhar, the learned counsel appearing for the appellants, on the other hand contended, that the object and purpose engrafted in clause**

15 (1997) 11 SCC 720

(a) of sub-section (4) of Section 306 is to provide a safeguard to the accused who can cross-examine even at the preliminary stage on knowing the evidence of the approver against him and can impeach the said testimony when the approver is examined in court during trial, if any contradictions or improvements are made by him. This right of the accused cannot be denied to him merely because pardon is tendered after the proceeding is committed to the Court of Session.

68. As seen from what is extracted above, the Chief Judicial Magistrate granted pardon to the accused in that case but he was not examined immediately after the grant of pardon and was only examined once before the Sessions Judge in the course of trial. Therefore, the question that arose was whether it was necessary to comply with sub-section (4)(a) of Section 306, when an accused is granted pardon after the case is committed to the Court of Session. As seen from the argument advanced before this Court in ***A. Devendran*** was that the object of clause (a) of sub-section (4) of Section 306 is to provide a safeguard to the accused so that he can cross examine even at the preliminary stage on knowing the evidence of the approver and can impeach the said testimony when the approver is examined in Court during trial.

69. For finding an answer to the said question, the Court in ***A. Devendran,*** first made a distinction between a case where tender of pardon was made before the commitment of the same to the Court of Session and a case where pardon is tendered after commitment. After making such a distinction, on the basis of whether pardon was tendered before or after the committal, this Court held in ***Devendran*** (para 11) as follows:-

"11. … A combined reading of sub-section (4) of Section 306 and Section 307 would make it clear that ***in a case exclusively triable by the Sessions Court if an accused is tendered pardon and is taken as an approver before commitment then compliance of sub-section (4) of Section 306 becomes mandatory and non-compliance of such mandatory requirements would vitiate the proceedings*** but if an accused is tendered pardon after the commitment by the Court to which the proceeding is committed in exercise of powers under Section 307 then in such a case the provisions of sub-section (4) of Section 306 are not attracted. …"

70. To come to the above conclusion, this Court relied upon its previous decision in ***Suresh Chandra Bahri*** vs. ***State of Bihar***[16]***,*** whereinit was held as follows:-

> **"30.** A bare reading of clause (*a*) of sub-section (4) of Section 306 of the Code will go to show that every person accepting the tender of pardon made under sub-section (1) has to be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. Sub-section (5) further provides that the Magistrate taking cognizance of the offence shall, without making any further enquiry in the case commit it for trial to any one of the courts mentioned in clauses (*i*) or (*ii*) of clause (*a*) of sub-section (5), as the case may be. Section 209 of the Code deals with the commitment of cases to the Court of Session when offence is tried exclusively by that court. ***The examination of accomplice or an approver after accepting the tender of pardon as a witness in the Court of the Magistrate taking cognizance of the offence is thus a mandatory provision and cannot be dispensed with and if this mandatory provision is not complied with it vitiates the trial.*** As envisaged in sub-section (1) of Section 306, the tender of pardon is made on the condition that an approver shall make a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence. Consequently, ***the failure to examine the approver as a witness before the committing Magistrate would not only amount to breach of the mandatory provisions contained in clause (a) of sub-section (4) of Section 306 but it would also be inconsistent with and in violation of the duty to make a full and frank disclosure of the case at all stages. The breach of the provisions contained in clause (a) of sub-section (4) of Section 306 is of a mandatory nature and not merely directory and, therefore, non-compliance of the same would render committal order illegal.*** The object and purpose in enacting this mandatory provision is obviously intended to provide a safeguard to the accused inasmuch as the approver has to make a statement disclosing his evidence at the preliminary stage before the committal order is made and the accused not only becomes aware of the evidence

16 1995 Supp (1) SCC 80

against him but he is also afforded an opportunity to meet with the evidence of an approver before the committing court itself at the very threshold so that he may take steps to show that the approver's evidence at the trial was untrustworthy in case there are any contradictions or improvements made by him during his evidence at the trial. It is for this reason that the examination of the approver at two stages has been provided for and if the said mandatory provision is not complied with, the accused would be deprived of the said benefit. This may cause serious prejudice to him resulting in failure of justice as he will lose the opportunity of showing the approver's evidence as unreliable. Further clause (*b*) of sub-section (4) of Section 306 of the Code will also go to show that it mandates that a person who has accepted a tender of pardon shall, unless he is already on bail be detained in custody until the termination of the trial. ***We have, therefore, also to see whether in the instant case these two mandatory provisions were complied with or not and if the same were not complied with, what is the effect of such a non-compliance on the trial?"***

71. It is interest to see that in ***Suresh Chandra Bahri,*** this court first held that the procedure prescribed in Section 306(4)(a) of the Code is mandatory and not directory and that its non-compliance will render the committal order illegal. After so holding, this court raised a question in the last line of para 30 extracted above, as to what is the effect of such non-compliance on the trial. While answering this question, this court found in ***Suresh Chandra Bahri,*** that the Court to which the case was committed, noticed this irregularity even at the threshold and hence remanded the matter back to the Magistrate for recording the evidence of the approver. Thus the defect got cured before trial and hence this court held in paragraph 31 of the decision ***that eventually no prejudice or disadvantage was shown to have been caused to the accused.***

72. Thus, there were two distinguishing features in ***Suresh Chandra Bahri.*** The first was that the Chief Judicial Magistrate who tendered pardon in that case committed the case to the Court of Session for trial (unlike the case on hand) without examining the approver as a witness in the Court. The second distinguishing feature was that the Court to whom the case was committed for trial noticed the defect and hence remanded

the case back to the Court of Chief Judicial Magistrate. Therefore, this court applied the prejudice test in that case.

73. ***But more importantly, what was held in Suresh Chandra Bahri to be vitiated, was the committal order.*** Therefore, it was concluded eventually in ***Suresh Chandra Bahri*** that the moment the defect in the committal order is cured before trial, the trial does not get vitiated.

74. But in cases where a Special Court itself is competent to take cognizance and also empowered to grant pardon, the procedure under Section 306 of the Code gets by-passed, as held by this Court in ***State through CBI*** vs. ***V. Arul Kumar[17].*** An argument was advanced in ***Arul Kumar*** (supra) (*as seen from paragraph 20 of the Report*) that Section 306 of the Code has no application to cases relating to offences under the PC Act. In support of the said argument, the decision in ***P.C. Mishra vs. State (CBI)[18]*** was also relied upon. While dealing with the said contention, this Court held in ***Arul Kumar*** as follows:-

"21. Sub-section (1) of Section 5, while empowering a Special Judge to take cognizance of offence without the accused being committed to him for trial, only has the effect of waiving the otherwise mandatory requirement of Section 193 of the Code. Section 193 of the Code stipulates that the Court of Session cannot take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under the Code. Thus, embargo of Section 193 of the Code has been lifted. It, however, nowhere provides that the cognizance cannot be taken by the Magistrate at all. There is, thus, an option given to the Special Judge to straightaway take cognizance of the offences and not to have the committal route through a Magistrate. However, normal procedure prescribed under Section 190 of the Code empowering the Magistrate to take cognizance of such offences, though triable by the Court of Session, is not given a go-by. Both the alternatives are available. In those cases where charge-sheet is filed before the Magistrate, he will have to commit it to the Special Judge. In this situation, the provisions of Section 306 of the Code would be applicable and the Magistrate would be empowered

17 (2016) 11 SCC 733

18 (2014) 14 SCC 629

to exercise the power under the said provision. In contrast, in those cases where Special Judge takes cognizance of offence directly, as he is authorised to do so in view of Section 5(2) of the PC Act, 1988, Section 306 of the Code would get bypassed and as the Special Judge has taken cognizance, it is Section 307 of the Code which would become applicable. Sub-section (2) of Section 5 of the PC Act, 1988 makes this position clear by prescribing that it is the Special Judge who would exercise his powers to tender of pardon as can clearly be spelled out by the language employed in that provision. Section 5(2) is to be read in conjunction with Section 5(1) of the PC Act, 1988. The aforesaid legal position would also answer the argument of the learned counsel for the respondent based on the judgment of this Court in *A. Devendran [A. Devendran* v. *State of T.N.*, (1997) 11 SCC 720 : 1998 SCC (Cri) 220] . In that case, this Court held that once the proceedings are committed to the Court of Session, it is that court only to which commitment is made which can grant pardon to the approver. The view taken by us is, rather, in tune with the said judgment."

75. In other words, this Court recognised in ***Arul Kumar*** two types of cases, namely ***(i)*** those which come through the committal route; and ***(ii)*** those where cognizance is taken directly by the Special Judge under Section 5(1) of the PC Act. In the second category of cases, the Court held that Section 306 of the Code would get by-passed.

76. Therefore, it is clear that when the Special Court chooses to take cognizance, the question of the approver being examined as a witness in the Court of the Magistrate as required by Section 306 (4)(a) does not arise. Shri Padmesh Mishra, learned counsel for the respondent is therefore right in relying upon the decisions of this Court in ***Sardar Iqbal Singh*** vs. ***State (Delhi Administration)***[19]and ***Yakub Abdul Razak Memon*** vs. ***State of Maharashtra***[20]

77. In ***Sardar Iqbal Singh*** (supra) the offence was triable by the Special Judge who also took cognizance. Therefore, there were no committal proceedings. Though ***Sardar Iqbal Singh*** arose under the 1898 Code, sub-section (2) of Section 337 of the 1898 Code was in *pari materia* with

19 (1977) 4 SCC 536

20 (2013) 13 SCC 1

Section 306(4)(a) of the 1973 Code. Therefore, the ratio laid down in ***Sardar Iqbal Singh*** was rightly applied in ***Yakub Abdul Razak Memon*** (supra) for coming to the conclusion that where a Special Judge takes cognizance of the case, the occasion for examining the approver as a witness arises only once.

78. In any case, all decisions cited so far, uniformly say that the object of examining an approver twice, is to ensure that the accused is made aware of the evidence against him even at the preliminary stage, so as to enable him to effectively cross examine the approver during trial, bring out contradictions and show him to be untrustworthy. The said object stands fulfilled in this case, since the confession statement of the approver before the XVIII Metropolitan Magistrate was enclosed to the Charge Sheet. The approver was examined as PW-16 during trial and he was cross examined on the contents of the confession statement. The Magistrate who recorded the confession was examined as PW 17 and the Additional Chief Judicial Magistrate who granted pardon was examined as PW-18. The proceedings before the XVIII Metropolitan Magistrate, the petition under section 306 of the Code and the proceedings on tender of pardon were marked respectively as EXX. P-50, 51 and 52. All the accused were given opportunity to cross examine these witnesses both on the procedure and on the contents.

79. In view of the above, we are of the considered view that there was no violation of the procedure prescribed by Section 306(4)(a) of the Code. Thus, we answer the second issue against the appellants.

Part-III (Revolving around the merits of the case qua culpability of each of the appellants before us)

As regards A-1

80. Though we have found in Part-I of this judgment that the failure of the prosecution to take previous sanction under Section 197(1) of the Code has vitiated the proceedings against A-1, we would nevertheless deal with his case on merits to see if the offences under the IPC or under the PC Act stood proved beyond reasonable doubt.

81. To recapitulate, the allegations against A-1 are ***(i)*** that by entering into a criminal conspiracy to cheat BHEL and award the tender to A-5's firm and by instructing PW-16 to go in for limited tenders without following the procedure of pre-qualification of prospective tenderers and without selecting any one from the approved list of contractors, he committed various offences punishable under the IPC; and ***(ii)*** that by abusing his official position and awarding the contract to A-5, he caused a wrongful loss to the tune of Rs. 4.32 crores to BHEL.

82. For proving the allegations with regard to the criminal conspiracy and for establishing that A-1 decided to go in for Restricted Tender for the purpose of awarding the contract to a chosen firm and also for showing that A-1 directed the inclusion of four bogus firms, the prosecution relied upon its star witness, namely PW-16. But PW-16 was the first-named accused in the FIR, who later turned approver by giving a confession statement.

83. As rightly contended by Shri Huzefa Ahmadi, learned senior counsel, this Court has laid down two tests in ***Sarwan Singh*** vs. ***State of Punjab***[21]***,*** to be satisfied before accepting the evidence of an approver. The *first* is that the approver is a reliable witness and the *second* is that his statement should be corroborated with sufficient evidence. Again, in ***Ravinder Singh*** vs. ***State of Haryana***[22] this Court pointed out that, ***"an approver is a most unworthy friend"*** and that he having bargained for his immunity, must prove his worthiness for credibility in court. The test to be fulfilled was pithily put in paragraph 12 of the Report by this Court as follows:-

> **"12.** … This test is fulfilled, firstly, if the story he relates involves him in the crime and appears intrinsically to be a natural and probable catalogue of events that had taken place. The story if given of minute details according with reality is likely to save it from being rejected *brevi manu.* Secondly, once that hurdle is crossed, the story given by an approver so far as the accused on trial is concerned, must implicate him in such a manner as to give rise to a conclusion of guilt beyond reasonable doubt. In a rare case taking into consideration all the factors,

21 1957 SCR 953

22 (1975) 3 SCC 742

circumstances and situations governing a particular case, conviction based on the uncorroborated evidence of an approver confidently held to be true and reliable by the Court may be permissible. Ordinarily, however, an approver's statement has to be corroborated in material particulars bridging closely the distance between the crime and the criminal. Certain clinching features of involvement disclosed by an approver appertaining directly to an accused, if reliable, by the touchstone of other independent credible evidence, would give the needed assurance for acceptance of his testimony on which a conviction may be based."

84. Section 133 of the Indian Evidence Act, 1872 declares an accomplice to be a competent witness and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. However, while considering the import of Section 133. this Court held in ***M.O. Shamsudhin*** vs. ***State of Kerala***[23] that the court is bound to take note of a precautionary provision contained in ***Illustration (b) to Section 114 of the Evidence Act, which provides that an accomplice is unworthy of credit unless he is corroborated in material particulars.***

85. Keeping the above principles in mind, if we turn our attention to the evidence of PW-16, it will be seen that he was trying to shift the burden on A-1, to save his own skin. The following admissions made by him during the cross-examination showed that he was unworthy of credit:-

(i) There was no approved list of contractors maintained at BHEL, Trichy, till 1994;

(ii) It is not correct to say that open tender system was not at all resorted to by Civil Engineering Department in BHEL, Trichy till 1994. I cannot recollect single instance of open tender as I have forgotten;

(iii) During my tenure I did not initiate anything to cancel the award of contract to Entoma Hydro Systems. It is true that I did not take steps to annul the contract as the circumstances did not warrant that;

(iv) I am the competent person to call the tenderers for negotiation and in that capacity I wrote several letters to the contractors;

23 (1995) 3 SCC 351

(v) Exhibit P-55 is the letter dated 02.01.1993 by me to Entoma Hydro Systems asking them to send fresh offer before 07.01.1993;

(vi) Exhibit P-53 is one such letter dated 31.12.1992 written by me to Mercantile Construction Corporation;

(vii) In Exhibits P-53 and P-54 it is mentioned as *"in continuation of the telephonic conversation we had"*;

(viii) As per Exhibit P-39, one Mr. R. Ilango represented Mercantile Construction Corporation in the meeting held on 11.01.1993. As per Exhibit P-40 one Mr. J.N.J. Chandran attended the meeting held on 11.01.1993 representing Raghav Engineers and Builders; and

(ix) As per the limited tender policy, tender enquiry ought to be addressed only to eligible and qualified parties. Keeping it in my mind I have prepared Exhibit P-27 note, dated 25.11.1992.

86. In his examination-in-chief, PW-16 claimed that *somewhere in 1992 he came to know for the first time from A-1 regarding the proposal for construction of Desalination Plants and that one day A-1 called him to his office and said that he had located a person in Chennai who was a dynamic person, resourceful person, go-getter and an achiever.* It was his positive assertion in chief examination that on the same day A-1 told him to prepare tender documents and hence he returned to his office and instructed the Tender Department to prepare the tender document. What has happened subsequently is narrated by PW-16 in chief examination as follows:

"… After some time A1 again called me to his office and told me that he had collected the names and addresses of some contractors from TWAD Board who were in a position to take up the work if awarded. Then I told him that the tender documents were ready and that I could send the same if it was furnished with the names and address of the contractors. Then, A1 dictated the following 5 names

1) Entomo Hydro Systems, Madras.

2) East Coast Builders, Madras.

3) Turn Key Construction Company, Madras.

4) Raghava Engineers and Builders, Madras.

5) Mercantile Construction Company, Madras.

I noted down these names. Then I told him that I had no knowledge of any of these 5 companies, might be they were exclusively the TWAD Board contractors and I might not be aware of them. Some of these names like East Coast Builders, Turn Key Construction Company, Raghava Engineers and Builders appeared to be similar to the names of big companies i.e. may be subsidiaries of some big companies. I further told him that big companies like L&T and Geo Miller could also be included in that list because it would give some respectability to the list. A1 thought for some time and told me that these two companies may also be included."

87. But in cross-examination, he admitted that Exhibit P-33 was a letter dated 22.10.1992 written by one Sri Kantarao, Manager (Civil/Design) to Ganesan (PW-14) and that there was a note in that letter to the effect that Ganesan has discussed this matter with DGM, Civil. PW-16 further admitted that it was possible that Ganesan might have discussed with him.

88. The above statement in cross-examination shows that the discussion between PW-16 and PW-14 took place on 22.10.1992. But the discussion with A-1 and the dictation of five names took place even according to PW-16, only in November, 1992. In fact, Exhibit P-33 letter which was dated 22.10.1992, according to PW-16 dealt with inviting limited tender.

89. If discussions had taken place between PW-16 and someone else in October, 1992 and a decision taken in that meeting to go for limited tender, it is inconceivable as to how the original sin can be attributed to A-1, especially when the discussion between PW-16 and A-1 took place only in November, 1992 wherein the dictation of four bogus names and that of the prospective contractor allegedly took place.

90. PW-16 admitted during cross-examination that he discussed with A-1 on the day when tender documents were dispatched through 'speed post' and that was on 26.11.1992. But it was brought on record through the evidence of DW-2 and DW-3 that A-1 was absent on 26.11.1992 due to the death of his mother-in-law. In any case, PW-16 admitted in cross-examination that he had signed Exhibit P-27 note even on 25.11.1992, which was one day before the date on which he had discussion with A-1.

91. The story advanced by PW-16 that the other four firms were actually bogus firms, is belied by his own statement to the effect that as per

Exhibits P-39 and P-40, two individuals represented two out of those four firms in the meeting held on 11.01.1993. If those firms were bogus firms, there is no explanation as to how they were represented in the meeting.

92. It was admitted by PW-16 that in Exhibits P-53 and P-54, (letters written to two of those firms) there was an indication as though the letters were in continuation of the telephonic conversation they had.

93. In other words, two of the four firms, which were branded as bogus firms by PW-16, have had discussions with PW-16 and they have also attended the meetings.

94. To cap all this, PW-16 admitted:

"I recommended the contract to be given to Entoma who was the lowest tenderer. I recommended the contract to be given to A5 not because of A1's interest."

95. Therefore, nothing more was required to show that PW-16 was unworthy of credit and the conviction based upon such a person as a star witness, cannot be sustained.

96. On the question whether BHEL suffered a wrongful loss or whether A-5 or any other firm with which he was associated had a wrongful gain, the evidence of PW-24 who was the Deputy Manager (Finance) BHEL is crucial. In his cross-examination, PW-24 stated as follows:-

"…In the course of the enquiry by the CBI official they asked me to send a detailed account copies. As per their request I sent them. Ex. D1 is the true copy of the accounts I sent to CBI. As far as this contract is concerned as the bank guarantee was revoked M/s BHEL Trichy has not lost any money in this contract. As a matter of fact A.5 the contractors' money to the tune of Rs.1,61,86,234/- in with M/s BHEL Trichy. Apart from this amount an amount of Rs.98,52,286/- is payable to accused No.5 by BHEL towards the work done by him…"

97. Two things are borne out of the above admission made by PW-24. The first is that even at the time of investigation, PW-24 had provided to the I.O., a detailed accounts copy showing that BHEL had not suffered any loss and that on the contrary, a sum of Rs.2.60 crores was payable to Entoma. But for some inexplicable reason, the copy of the said accounts

statement was not produced by the CBI before the Court. The same had to be marked as Defense Exhibit D-1 while cross-examining PW-24. Therefore, it is clear that this statement of account was burked, so that a picture is painted as though BHEL suffered wrongful loss.

98. The second thing that flows out of PW-24's cross-examination extracted above, is that even after invoking the bank guarantee and appropriating the same towards the monies already paid, BHEL was still left with the contractor's money of Rs.1,61,86,234/- apart from an amount of Rs.98,52,286/- payable to A-5 by BHEL towards the work done.

99. Therefore, it is clear that it was A-5 who actually got into a mess, both financially and legally, by bagging the contract. Rather than making any gain much less unlawful gain, the contractor has lost the above two amounts, in addition to having the bank guarantee invoked.

100. Unfortunately, the Trial Court fell into a trap because of the statement that an amount of Rs.1,52,50,000/- was transferred by Entoma Hydro Systems from the amount of mobilization advance, to the account of another firm of which A-5 to A-7 were partners. The Trial Court concluded that the partnership firm M/s Insecticides & Allied Chemicals had a wrongful gain to the extent of this amount, forgetting for a moment that if it was BHEL's money that was received by the said firm, what was paid back, by the same logic should have been the firm's money. There cannot be two different yardsticks, one relating to the money received by the partnership firm and another relating to the money realized by BHEL. As a matter of fact, mobilization advance is intended to be used for the purchase of materials. The DGM (EMS), BHEL, examined as PW-34 stated even in chief examination that in the initial stages, the contract had gone very well and that up to the stage of water quality testing, the contractor was doing well. Therefore, the mobilization advance was necessarily to be spent. A suspicion cannot be thrown, solely on the basis of the person to whom the payments were made. If what was paid by BHEL to A-5 had been shared by A-6 and A-7, what was realized from A-5 through the invocation of the bank guarantee, cannot be taken advantage of to contend that A-6 and A-7 did not repay the money. The logic adopted by Trial Court in this regard was completely flawed.

101. Both the Trial Court and the High Court considered the oral evidence of PW-2 (a Chartered Accountant), PW-3 (an officer of the Chennai

Telephones) and a few others to come to the conclusion that the names of four other firms included in Exhibit P-26 chit were bogus. But both the Trial Court and the High Court overlooked the admissions made by PW-16 that he held negotiations at least with two out of those four firms and that the representatives of those two firms even attended the meetings.

102. The Trial Court and the High Court came to the conclusion that the names of two big companies were included in Exhibit P-26 chit only to lend credibility to the process adopted. But it was on record through the statement of PW-4, Manager of L&T Company that a tender enquiry was received by them from BHEL. If the inclusion of the names of those two companies were intended to be a make belief affair, A-1 would not have taken the risk of sending the letter and that too to a company like L&T. Therefore, ***we are of the view, (i) that the evidence of PW-16 was not worthy of credit; (ii) that even assuming that it has some credibility, his statement that "he recommended the contract to be given to A-5 not because of A-1's interest", made the whole edifice upon which the case of the prosecution was built, collapse; and (iii)that there was no other evidence to connect A-1 with the commission of these offences.***

103. In fact, the only person found by both the Courts to be guilty of the offence under Section 120B was A-1. Therefore, an argument was advanced that a single person cannot be held guilty of criminal conspiracy. But this contention was repelled by the Courts on the ground that PW-16 was the second person with whom A-1 had entered into a conspiracy. In other words, the reasoning adopted by the Trial Court and the High Court was that only A-1 and PW-16 were part of the conspiracy. Such a reasoning was a huge climbdown from the original charge that A-1 to A-7 entered into a criminal conspiracy, to cause wrongful loss to BHEL and to confer a wrongful gain to A-5 to A-7. Once an offence of Section 120B is not made out against A-5 to A-7, the very foundation for the prosecution becomes shaky. Therefore, we are of the view that the conviction of A-1 for the offences under Section 120B read with Sections 420, 468, Section 471 read with Section 468 and Section 193 IPC and Section 13(2) read with Section 13(1)(d) of the PC Act cannot be sustained.

104. We are surprised that A-1 was found guilty of an offence under Section 193. Section 193 applies only to false evidence given in any stage of a judicial proceeding or the fabrication of false evidence for the purpose of being used in any stage of a judicial proceeding. The allegation against A-1 was not even remotely linked to any of the Explanations under Section 193 of the IPC. Therefore, the judgment of the Trial Court and that of the High Court convicting A-1 for the aforesaid offences and sentencing him to imprisonment of varying terms and fines of different amounts are liable to be reversed.

As regards A-4

105. As can be seen from the judgment of the Trial Court, A-4 was convicted for the offences under Section 109 read with Section 420, 468 IPC, Section 471 read with 468 IPC and Section 193 IPC.

106. As we have pointed out in the last paragraph dealing with the case of A-1, Section 193 IPC deals with punishment for false evidence, given intentionally in any stage of a judicial proceeding. It also includes fabrication of false evidence for the purpose of being used in any stage of a judicial proceeding. There are three Explanations under Section 193. Explanation 2 under Section 193 makes an investigation directed by law preliminary to a proceeding before a Court of Justice, to be a stage of judicial proceeding, though that investigation may not take place before a Court of Justice. Similarly, Explanation 3 makes an investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, to be a stage of judicial proceeding, though that investigation may not take place before a Court of Justice.

107. Interestingly, there was no allegation that either A-1 or A-3 or A-4 either gave false evidence or fabricated false evidence in any stage of a judicial proceeding, falling within any of the three Explanations under Section 193. But unfortunately, the Trial Court found A-4 guilty of the offence under Section 193, without there being any specific allegation in the charge-sheet and without there being any specific finding on merits.

108. As rightly contended by Shri S.R. Raghunathan, learned counsel for A-4, no Court shall take cognizance of any offence punishable under Section 193 IPC, except on a complaint in writing of that Court or of some other Court to which that Court is subordinate. This bar is found

in Section 195(1)(b)(i) of the Code. No complaint was ever made by any Court or by any officer authorized by any Court that A-1 or A-3 or A-4 committed an offence punishable under Section 193 IPC. But unfortunately, the Trial Court convicted A-1, A-3 and A-4, of the offence under Section 193 without any application of mind and the same has been upheld by the High Court.

109. Even according to the prosecution, the only role played by A-4 was that of being a member of a Committee constituted on 23.12.1992. Much ado was sought to be made, about the nature of the Committee and as to whether it was a Tender Committee or Negotiation Committee. Due to the heat and dust created about the role and the name of the Committee, it was completely overlooked that this Committee came into the picture only after much water had flown under the bridge, by ***(i)*** deciding to go for a Restricted Tender; ***(ii)*** by issuing tender notices to seven identified contractors; ***(iii)*** by receiving the offers from five contractors; and ***(iv)*** by opening the tender documents on 18.12.1992 for the purpose of further processing. For the purpose of establishing an offence of cheating, what is important is the mindset at the beginning, when the criminal conspiracy was hatched. At the time when the criminal conspiracy was allegedly hatched in October/November, 1992, A-3 and A-4 were not at all in the picture. They came into the picture only on 23.12.1992. The Note dated 23.12.1992 by which the Negotiation Committee was constituted brings on record the fact that five named contractors had submitted their offers. The names and addresses of all the five contractors, the amounts quoted by them and the date and mode of receipt of the offers are all presented in the form of a table in the Note dated 23.12.1992. After noting all these particulars, the Note date dated 23.12.1992 proceeds to state the object behind the constitution of the Committee as follows:-

> "As the quoted value by the tenderers are very high, it is proposed to conduct negotiation with the lowest three tenderers under Serial Nos.1 to 3."

110. Therefore, the reading of the trial Court and the High Court as though this Committee of which A-3, A-4 and the Approver were a part, was actually a Tender Committee having a larger role to play, is completely misconceived.

111. In fact, the prosecution had to stand or fall on the strength of the testimony of the Approver namely PW-16. But this is what PW-16 said about the role played by A-3 and A-4.

> "A3 Thiagarajan and A4 Chandrasekaran had absolutely nothing to do in choosing the contractors in this case. Their only job was to negotiate with the three lowest tenderers. With that their job will be over. As the members of the committee A3 and A4 did their job well. In this case the contractor awarded 50% as mobilization advance and that was reduced to 30% because of the negotiation by the committee. The negotiation committee had insisted the bank guarantee for the amount and obtained the bank guarantee also. Though the negotiations were completed as early as in January, 1993 letter of intent came to be issued only in July 1994 i.e. after 18 months. It is true that because of the efforts of the negotiation committee the contractor was persuaded not to hike the rate because of the delay of 18 months in issuing the work order."

112. Despite the above assertion on the part of PW-16 giving a clean chit to A-3 and A-4, the Trial Court found both of them guilty on a convoluted logic that they were part of a Tender Committee and that *"every word and every description in Exhibit P-36 (Tender Committee proceedings) had been written by them with a view to cheat BHEL" and that "if A-3 and A-4 were innocent they should have questioned and asked for details regarding the contractors."* Such a reasoning given by the trial Court and approved by the Trial Court and approved by the High Court was completely perverse.

113. As rightly contended by the learned counsel, A-4 had no role in choosing the tenderers, but entered the picture only after the offers were received from the tenderers. Admittedly, A-4 was subordinate to both PW-16 and A-3.

114. At the cost of repetition, it should be pointed out that the competent authority refused to grant sanction to prosecute A-3 and A-4 for the offences under the PC Act. The Trial Court and the High Court did not find A-4 as a co-conspirator, which is why he was not held guilty of the offence under Section 120-B IPC. Section 193 IPC had been included completely out of context.

115. For all the above reasons, we are of the view that the conviction of A-4 by the Trial Court as confirmed by the High Court is wholly unsustainable and is liable to be set aside.

As regards A-7

116. The role attributed to A-7 was that he applied for and obtained demand drafts, in the names of four different bogus firms, drawn in favour of BHEL for a sum of Rs.20,000/- each to make it appear as though they were real firms, though they were not in existence. A-7 was also accused of causing wrongful loss to BHEL along with A-5 and A-6 to the tune of Rs.4.32 crores. A-7 was also accused of abetting A-1 and A-2 to commit criminal misconduct by misusing their official position and obtaining pecuniary advantage to themselves.

117. To establish that A-7 filed applications with different banks for the issue of demand drafts in the names of four bogus firms, the prosecution examined PW-22, a Senior Manager of Indian Bank, PW-32, the Branch Manager of State Bank of India, PW-40, the Senior Manager of Bank of Madura, PW-41, the Chief Manager of State Bank of Mysore and PW-30, the handwriting expert. The prosecution marked Exhibits P-66, P-76, P-90 and P-92, which were the applications submitted in the names of the four bogus firms, to these banks for the issue of demand drafts.

118. PW-22 through whom Exhibit P-66 was marked did not say even in the chief-examination that the application form was signed by A-7. PW-32 through whom Exhibit P-76 was marked, stated in the chief-examination that on the date of the application for the issue of demand draft he was not working in that branch and that he joined the branch six years later. He also admitted that he could not know anything about the demand draft application personally. But he claimed in the chief-examination that A-6, the father of A-5 and A-7, was the owner of the premises in which the branch was located and that he could identify the signature of A-7 in Exhibit P-76. However, in cross-examination he admitted:

> "the applicant's signature was available in the branch. I did not compare the specimen signature with the signature in the DD Application. When I was examined by CBI, I did not ask for the specimen signature of the applicant."

119. PW-40 through whom Exhibit P-90 was marked, did not say anything in the chief-examination that A-7 signed the application form for demand draft. He merely identified the demand draft application form and the party on whose behalf the demand draft was taken. In other words, PW-40, like PW-22 did not implicate A-7 as the person who signed the application for the issue of demand draft on behalf of some bogus firms.

120. PW-41 through whom Exhibit P-92 was marked, merely stated as to who obtained the demand draft. He did not also specifically name A-7 as the person who signed the application form or who received the demand draft.

121. In fact, PW-40 stated that no statement under Section 161 of the Code was recorded by the I.O. though he was examined. Similarly, PW-41 stated that he was examined by the Inspector, CBI but he did not know whether a statement under Section 161 was recorded.

122. Thus, three out of four bank officials examined by the prosecution to show that A-7 applied for demand drafts on behalf of four bogus firms, did not identify A-7 as the person who applied for the demand drafts. They did not also identify the handwriting in Exhibits P-66, P-90 and P-92 as that of A-7. The only person who stated something in favour of the prosecution was PW-32 and it was in relation to Exhibit P-76.

123. It is on account of the slippery nature of their evidence that the prosecution chose to send Exhibits P-66, P-76, P-90 and P-92 for examination by the handwriting expert. The handwriting expert was examined as PW-30 and his Report dated 16.09.1998 was marked as Exhibit P-68.

124. The specimen writings and signatures of A-5 were identified by PW-30 as S1 to S31 and marked as Exhibit P-70. The specimen writings/ signatures of A-7 were identified as S63 to S73A and marked as Exhibit P-75 series.

125. In the chief-examination, PW-30, the handwriting expert stated that in his opinion, the writer of the specimen writings/ signatures marked as S1 to S31 in Exhibit P-70, was the person responsible for writing the red-encircled questioned writings in certain documents. The writer of the specimen writings and signatures identified in Exhibit P-70 was A-5 and not A-7.

126. Similarly, PW-30 identified the writer of the specimen writings in S40 and S41 marked as Exhibit P-73 as the person responsible for writing Exhibit P-26. This related to K. Bhaskar Rao (PW-16) and the reference was to the chit in which the names of five firms were originally dictated and the names of two later included. Similarly, PW-30 identified in chief examination, the specimen writings marked in S42 to S62 and S93 to S96 in Exhibit P-74 as that of the person whose writings are found in Exhibit P-26. S42 to S62 and S93 to S96 were that of A-6.

127. After thus relating the specimen writings and signatures of A-5, PW-16 and A-6 to some of the questioned writings, the handwriting expert made it clear even in his chief examination that it was not possible for him to express any opinion on the rest of the questioned items on the basis of the material on hand. In other words, the handwriting expert examined as PW-30, did not go to the rescue of the prosecution even in his chief examination in so far as A-7 is concerned. His report marked as Exhibit P-68 did not implicate A-7 as the person in whose handwriting and signature, Exhibits P-66, P-76, P-90 and P-92 were written and signed.

128. Thus, there was a colossal failure on the part of the prosecution to establish that Exhibits P-66, P-76, P-90 and P-92 were in the handwritings/signatures of A-7. This is despite the prosecution examining the bank officials as PW-22, PW-32, PW-40 and PW-41 and the handwriting expert as PW-30.

129. Unfortunately, the Trial Court adopted a very curious reasoning in paragraph 91 (the only paragraph in which the reasons were given in this regard) that since he was a beneficiary of the money diverted to the account of Insecticides & Allied Chemicals, he must have had participation and knowledge that the demand drafts were purchased to cheat BHEL. Such a reasoning is wholly unacceptable in view of the fact that A-7 was accused of forgery and charged under Section 468 IPC, in relation to these very same applications for demand drafts. Therefore, it was necessary for the prosecution to prove forgery and also to show that the purpose of such forgery was cheating. Both were absent.

130. The High Court fortunately realised the pitfall in the reasoning of the Trial Court. But in an over-anxiety to somehow convict A-7, the High

Court adopted a very peculiar route, namely that of undertaking the task of comparing the admitted signatures/ handwritings with the disputed ones under Section 73 of the Evidence Act.

131. For invoking Section 73, there must first have been some signature or writing admitted or proved to the satisfaction of the Court, to have been written or made by that person. The Section empowers the Court also to direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures.

132. There was no signature or writing available before the High Court, which had been admitted or proved to the satisfaction of the Court to have been written or made. The High Court did not also direct A-7 to write any words or figures for the purpose of enabling a comparison. Without following the procedure so prescribed in Section 73, the High Court invented a novel procedure, to uphold the conviction handed over by the Trial Court through a wrong reasoning.

133. In fact, the High Court considered Exhibit P-75 to be the document containing the admitted handwritings and signatures of A-7 and compared what was found therein with the handwritings/signatures found in Exhibits P-66, P-76, P-90 and P-92.

134. But what was contained in Exhibit P-75 was never admitted by A-7 to be in his handwriting. Exhibit P-75 was marked through PW-30, the handwriting expert, and not even by the I.O. At least if the I.O. had identified and marked the specimen writings and signatures of A-7 as Exhibit P-75, it was possible for the prosecution to contend that the specimen signatures stood proved. But the I.O. did not identify Exhibit P-75. PW-30 through whom Exhibit P-75 was marked did not directly obtain the specimen writings of A-7. The statement of PW-30 that the specimen writings of A-7 are in Exhibit P-75 was only hearsay evidence, as he did not directly obtain those specimen signatures. Thus, Exhibit P-75 never stood proved.

135. Even in the questioning under Section 313 of the Code, no specific question was put to A-7 whether Exhibits P-66, P-76, P-90, P-92 and P-75 were in his handwritings and whether they contained his signatures. Therefore, what was contained in Exhibit P-75 was not even admitted

signatures.

136. In the absence of either admission or proof of the admitted signatures, the High Court could not have resorted to Section 73 of the Evidence Act.

137. In view of the above, the finding recorded by the Trial Court and the High Court as though A-7 committed forgery and cheating by making applications for the issue of demand drafts in the names of bogus firms is wholly unsustainable.

138. The only connecting link pointed out against A-7 was the transfer of money to the total extent of Rs.1,52,50,000/- to the account of a firm of which he was a partner. This by itself will not constitute any offence. Therefore, the charge that A-7 abetted the commission of the crime by the other accused, should also fail. This is especially so when A-5, whose proprietary concern bagged the contract, not only lost the contract but also allowed the bank guarantee to be invoked by BHEL and in addition, left a huge amount of Rs.2.60 crores still with BHEL. Therefore, the conviction and sentence awarded to A-7 cannot be sustained.

Conclusion

139. In the light of the above discussion, all the appeals are allowed and the judgment of the Special Court for CBI cases convicting the appellants for various offences and the judgment of the High Court confirming the same are set aside. The appellants are acquitted of all the charges. The bail bonds, if any, furnished by them shall stand discharged.

Headnotes prepared by: Nidhi Jain (*Assisted by :* Tamana, LCRA)

Result of the case: Appeals allowed.