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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: September 10, 2024*

+ W.P.(CRL) 3270/2023, CRL.M.A. Nos. 30436/2023 & 9560/2024

LAMBODAR PRASAD PADHY Petitioner

Through: Mr. N. Hariharan, Sr. Advocate with
Mr. Saurabh Rajpal, Mr. Siddhant
Singh, Mr. Vinay Kumar Singh, Mr.
Sharian Mukherjee, Ms. Rekha
Angara and Mr. Aman Akhtar,
Advocates.

versus

CENTRAL BUREAU OF INVESTIGATION Respondent

Through: Mr. Anupam S. Sharma, SPP with Mr.
Prakarsh Airan, Ms. Harpreet Kalsi,
Mr. Abhishek Batra, Mr. Ripudaman
Sharma, Mr. Vashisht Rao and Mr.
Syamantak Modgill, Advocates.

CORAM:

HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA

% **J U D G M E N T**

ANOOP KUMAR MENDIRATTA, J.

1. Petition under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') has been preferred on behalf of the petitioner for quashing of FIR/RC No.2172022A0002, under Section 120B read with Section 477A IPC & Section 13(2) read with Section 13(1)(b) of The Prevention of Corruption Act, 1988 (hereinafter, referred to as the 'PC Act') registered at CBI/AC-II, New Delhi and proceedings emanating therefrom, *qua* the petitioner.



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BRIEF FACTS

2. In brief, RC No.2172022A0002 was registered by CBI/AC-II, New Delhi on 29.03.2022 under Section 120B read with Section 477A IPC & Section 13(2) read with Section 13(1)(b) PC Act on the basis of findings of Preliminary Enquiry No.PE2172018A0002-CBI/ACU-V/AC-II/New Delhi (hereinafter, referred to as the 'PE') on written complaint dated 28.03.2022 of Shri Vipin Kumar Gupta, Sub-Inspector, CBI, AC-II/New Delhi. The said PE was registered on 29.11.2018 to investigate the irregularities in various road projects awarded to M/s Isolux Corsan India Engineering and Construction Pvt. Ltd. by National Highways Authority of India (NHAI).

3. As per the findings in Preliminary Enquiry (PE), during the period 2008-2017, projects Surat-Hazira Port Section of NH-06, Kishangarh-Ajmer-Beawar Section of NH-08 and Varansai-Aurangabad Section of NH-02 were awarded by NHAI to the Consortium of M/s Isolux Corsan India Engineering and Construction Pvt. Ltd. and M/s Soma Enterprises. Accordingly, Special Purpose Vehicles viz. M/s Soma Isolux Surat- Hazira Tollway Pvt. Ltd., M/s Soma Isolux Varansasi-Aurangabad Tollway Pvt. Ltd. and M/s Soma Isolux Kishangarh-Beawar Tollway Pvt. Ltd. were formed for execution of these three projects. The specific allegations against the petitioner pertain to the project of Kishangarh-Ajmer-Beawar Section of NH-08.

4. As per respondent (CBI), during execution of Kishangarh-Ajmer-Beawar Section of NH-08 project, Shri D.P. Soni, the then Project Director, Shri Anil Kumar Jain, the then Manager (Technical), both in Kishangarh-Ajmer-Beawar Section of NH-08 project and Shri L.P. Padhy, GM, DK-II, NHAI (petitioner herein) entered in criminal conspiracy with M/s Isolux



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Corsan India Engineering and Construction Pvt Ltd., M/s New Construction Co. & M/s. Goyal Construction Co. Jaipur, Shri Guillermo Garcia Moliz, the then CFO, M/s ICIECPL, Shri Jose Luis Murillo Esteban, the then CGM (Construction), M/s ICIECPL, Shri Gustavo Munoz Lopez, the then Head-Administration, M/s ICIECPL, Shri Javier Hidalgo, the then Dy. Project Manager, Ajmer, M/s ICIECPL. In furtherance of said criminal conspiracy, Shri D.P. Soni (then Project Director), Shri Anil Kumar Jain, then Manager Technical, both in Kishangarh-Ajmer-Beaver Section of NH-08 project, Shri L.P. Padhy, GM DK-II, NHAI are alleged to have habitually accepted monthly cash amount in different denominations (1 lac-2 lacs) from M/s Isolux Corsan India Engineering and Construction Pvt. Ltd. during execution of the said project for its smooth functioning.

5. It is further the case of the prosecution that the enquiry was initiated on the basis of hard disk seized from co-accused Guillermo Garcia Moliz, the then CFO, M/s Isolux Corsa India Engineering & Construction Pvt. Ltd. by Income Tax Department during survey under Section 133A of Income Tax Act, 1961 on 22.06.2016. On scrutiny of the hard disk, it was found that it contained excel files named as Varanasi Site as on 23.10.12, Surat Site as on 21.11.12, Ajmer Site as 11.2012 etc. allegedly containing details of Sub-Contractors, false invoices provided by Sub-Contractors for cash generation, names of Indian officials of M/s Isolux Corsan to whom cash was provided by Spanish accused persons for further delivering the same to NHAI officials.

A sum of Rs.8,50,000/- is alleged to have been paid to the petitioner on three different instances (i.e. Rs.3,00,000/- on 28.08.2012, Rs.3,00,000/- on 13.09.2012 and Rs.2,50,000/- on 31.10.2012).



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6. On 22.06.2021, CBI wrote a letter to Ministry of Road Transport & Highways (MoRT&H), Government of India thereby seeking permission under Section 17A of the Prevention of Corruption (Amendment) Act, 2018 {hereinafter, referred to as the 'Section 17A of the PC (Amendment) Act, 2018} to proceed with investigation against 10 officers of NHAI including petitioner on account of irregularities in 03 NHAI projects, which was further forwarded by MoRT&H vide Letter No.13019/2/2021-Vig. dated 29.06.2021 to Chairman, NHAI.

7. Secretary, MoRT&H-cum-Chairman, NHAI on 06.12.2021 sent a speaking order to CBI on behalf of MoRT&H declining to grant permission to CBI under Section 17A of the PC (Amendment) Act, 2018 to proceed with investigation against the 10 officers including petitioner on the ground that no irregularity was found and since no corroborating evidence had been made available to NHAI for establishing the fact particularly with regard to illegal gratification. It was therein observed that there is no concrete evidence of wrong doing.

8. However, since the respondent/CBI proceeded with registration of RC, despite declining of approval by the Competent Authority, under Section 17A of PC (Amendment) Act, 2018, the present writ petition has been preferred for quashing the aforesaid RC No.2172022A0002 dated 29.03.2022, under Sections 120B read with Section 477A IPC & Section 13(2) read with Section 13(1)(b) PC Act, 1988 registered at CBI/AC-II, New Delhi *qua* the petitioner.

SUBMISSIONS ON BEHALF OF THE PETITIONER

9. Learned counsel for the petitioner submits that RC registered by respondent/CBI is based on false, unsubstantiated and baseless allegations,



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since the petitioner was neither provided with any responsibility, nor had any power vested with him in relation to the execution of the said projects. Petitioner was only involved at the time of signing of agreement vide which tender was granted to the accused company, but post agreement, petitioner was not involved, at any stage, in execution of NHAI projects. It is pointed out that entire FIR/RC does not attribute any allegation of alleged falsification of account under Section 477A IPC by the petitioner in any manner. Further, no offence under Section 13(1)(b) PC Act, 1988 is made out against petitioner as respondent failed to attribute *mens rea* for the purpose of accepting or obtaining or agreeing to accept or attempt to obtain any valuable thing with or without consideration. The RC is stated to be in violation of Section 17A of the PC (Amendment) Act, 2018, which mandates that no ‘**enquiry, inquiry or investigation**’ into any offence alleged to have been committed by a public servant in discharge of his official functions or duties shall be taken without prior approval of the Competent Authority specified therein. Learned counsel for the petitioner further points out that petitioner has been discharged in another connected FIR titled as ‘*State v. Dheeraj Kumar Singh & Ors.*’, vide order dated 05.09.2023 passed by learned Trial Court, since no oral or documentary evidence was placed on record by prosecution regarding allegation of entering into conspiracy with co-accused.

10. Relying upon *Yashwant Sinha & Ors. v. CBI Through Its Director & Anr.*, 2020 (2) SCC 338, it is further urged on behalf of the petitioner that unless there is prior approval under Section 17A of the PC (Amendment) Act, 2018, there can neither be inquiry, enquiry or investigation and the same constitutes a bar against the proceedings undertaken by CBI. Referring to S.



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P. Gupta v. State of Karnataka & Anr., 2018 SCC OnLine Del 10487, it is contended that the allegations in RC/FIR are interlinked and have to be interpreted and construed in their entirety. The act/offence attributed to petitioners is claimed to be interlinked and inseparable from the discharge of his official duty as GM, NHAI. The scope of determining ‘discharge of official functions’ by public servant, is also stated to have been considered in ***Z.U. Siddiqui v. Bal Kishan Kapoor & Ors., 2005 SCC OnLine Delhi 584***. It is emphasized that Section 17A of PC (Amendment) Act, 2018 has to be interpreted to advance the objective in favour of public servants. Reliance is further placed upon ***P.K.Pradhan v. State of Sikkim through CBI, 2001 II AD (Crl.) SC 581*** to submit that there has to be a reasonable connection with the act complained of and ‘discharge of official duty’, which is missing in the present case.

11. Learned counsel for the petitioner further relies upon ***Yogesh Nayyar & Anr. v. State of Madhya Pradesh & Anr., Misc. Crl. Case No.42558/2020*** wherein Hon’ble Division Bench of the High Court of Madhya Pradesh quashed the investigation conducted by EOW Bhopal pursuant to the registration of FIR under Sections 420/120B IPC and Sections 7(c), 13(1)(a) and 13(2) PC Act, 1988 on the ground that prior approval was not obtained under Section 17A of the PC (Amendment) Act, 2018. Reliance is also placed upon ***Himanshu Yadav v. State of Rajasthan & Ors., 2022 SCC OnLine Raj 2960*** and ***Shreeroopa v. State of Karnataka, 2022 SCC OnLine Kar 1714*** along with ***State of Haryana & Ors. v. Bhajan Lal & Ors., 1992 Supp. (1) SCC 335*** wherein guidelines have been laid down by Hon’ble Apex Court for purpose of quashing of FIR.



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SUBMISSIONS ON BEHALF OF RESPONDENT/CBI

12. Learned counsel for the respondent/CBI opposes the petition and submits:

(i) That action of the petitioner is not relatable to any recommendation or decision taken by the public servant in the discharge of his official functions or duties, and the offence of bribery is pegged to receiving or agreeing to receive undue advantage and not the actual performance of the act, for which undue advantage is obtained.

(ii) Further, Section 17A of the PC (Amendment) Act, 2018 only provides protection to officers/public servants who discharge their functions and duties with diligence, fairly in an unbiased manner without any motive for personal advantage or favour. However, when any act of public servant is *ex-facie* criminal or constitutes an offence, prior approval of Government would not be necessary. Reference is made to *Devender Kumar v. CBI*, AIR 2019 Del 42, *Rajendra Prasad v. State of Bihar*, 2022 SCC OnLine Pat 1194, *Kishor Kumar v. State of Bihar*, 2023 SCC Online Pat 4587, *CBI v. Santosh Karnani & Anr.*, 2023 SCC Online SC 427.

He further emphasizes that under Section 17A of the PC (Amendment) Act, 2018, approval is to be taken only when it is found that the act or omission of the public servant constituting an offence is relatable to any recommendation or decision taken by the public servant in discharge of his official functions or duties. For aforesaid purpose, Section 17A of the PC (Amendment) Act, 2018 envisages a two-step identification process. First, one must identify involvement of a public servant in commission of the offence, but, mere identification of a



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public servant involved in the offence would not automatically trigger the mandate of Section 17A. After identification of the public servant, second step identification is whether the act or omission of the public servant constituting an offence is relatable to any recommendation or decision taken by the said public servant in discharge of his official functions or duties or not. It is emphasized that only after the prosecuting agency is certain that the offence is relatable to any recommendation or decision taken by the said public servant in discharge of his official functions or duties, approval under Section 17A of the PC (Amendment) Act, 2018 would become mandatory. He further contends that if it is made out that public servant is engaged in the offence of bribery, protection under Section 17A of PC (Amendment) Act, 2018 would stand nullified and no approval of whatsoever nature would be required for the purpose of enquiry, inquiry or investigation. The protection sought on behalf of petitioner under Section 17A of PC (Amendment) Act, 2018, as such, is stated to be misconceived. Reliance is further placed upon *Sita Soren v. Union of India*, 2024 SCC Online SC 229.

(iii) Next, it is contended by learned counsel for respondent/CBI that at the time of initiation of PE, identity of public servants involved in commission of offence was unknown and as such PE was launched against unknown public servants and thus, there was no occasion for seeking approval under Section 17A of the PC (Amendment) Act, 2018. He further urges that reliance placed by the petitioner on *Yashwant Sinha & Ors. v. CBI Through its Director & Anr.* (supra) is misplaced, since in the said case identity of public servants was unknown. Reliance



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is further placed upon *Satish Pandey v. UOI*, 2020 SCC OnLine Chh 1612, *CBI v. UBI through Sanjay Manocha*, W.P.(Crl.) 1909/2022 decided on 24.08.2022, *CBI v. BOB through Priya Ranjan*, W.P.(Crl.) 2070/2020 decided on 07.09.2022, *CBI v. State Bank through Rajinder Kumar Dhingra*, W.P.(Crl.) decided on 29.11.2022 and *Ravinder Kumar Chandolia v. CBI*, 2012 SCC OnLine Del 729.

(iv) Learned counsel for respondent/CBI further submits that protection of Section 17A of PC (Amendment) Act, 2018 is only extended to offences introduced by the Amendment Act 16 of 2018. It is urged that offences under Sections 7, 8, 9, 10 and 13 have been substantially amended creating new rights and liabilities and Section 17A having been newly inserted with such amendments is applicable only to the said amended/newly inserted offences under the PC Act. The substantive amendment under Section 17A is contended to be not applicable retrospectively to the offences like Section 13(1)(b) which has been deleted under the Amendment Act, 2018. Reference in this regard is made to *State of Rajasthan v. Tejmal Chaudhary*, 2021 SCC Online SC 3477 and *State of Telangana v. Managipet @ Mangipet Sarveshwar Reddy*, AIR Online 2019 SC 1686. Learned counsel emphasizes that PC (Amendment) Act, 2018, by which Section 17A was inserted, is applicable with effect from 26.07.2018 and intention of the Legislature was to make the amendments applicable prospectively and not retrospective or retroactive with reference to offences which were committed earlier in point of time. The thrust of the submissions is that approval under Section 17A of the PC (Amendment) Act, 2018 is required only for offences post amendment, though sanction under



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Section 19 is required for offences committed in both pre and post amendment period. Reliance is further placed upon *Central Bureau of Investigation v. A. Raja, 2021(2) RCR (Criminal) 692, Dhanraj Malvi v State of Madhya Pradesh, MANU/MP/1123/2019, Madhu Koda v. State through CBI, Crl. A. 1186/2017*, decided on 22.05.2020, *Vijendra Kumar Kaushal v. Union of India and Ors., MANU/MP/1607/2020, S. Murukesan & Ors. v State of Deputy Superintendent of Police, CBI/Anti-Corruption Branch, Nungambakkam & Ors., MANU/TN/2101/2019, K. R. Ramesh & Ors. v. CBI, MANU/KE/1706/2020, The State of Telangana v. Sri Managipet @ Mangipet Sarveshwar Reddy, AIR Online 2019 SC 1686.*

(v) He further points out that Clause (e) of Section 6 General Clauses Act stipulates that the repeal shall not affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment. Further Section 6 also provides that any such investigation, legal proceeding or remedy may be instituted, continued or enforced and such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed. The right to investigate the crime, institute proceedings and prosecute the accused persons as such is stated to be saved and not affected by the Amendment of 2018. Reliance is further placed upon *M.C. Gupta v. CBI, (2012) 8 SCC 669.*

(vi) Learned counsel for CBI further submits that approval under Section 17A of the PC (Amendment) Act, 2018 was sought on account of irregularities in NHAI projects and illegal gratification on the part of



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NHAI officers. However, speaking order dated 06.12.2021 passed by the Competent Authority reveals that the same deals with reference to issues of irregularities in the projects as raised in PE but is silent on the aspect of illegal gratification and merely mentions that no corroborating evidence has been made available to NHAI for establishing such facts. It is urged that it is for the Trial Court to adjudicate requirement of approval under Section 17A. The act of bribery is stated to be not covered in discharge of official functions/duties and approval is stated to have been sought only by way of abundant caution. Further, denial of the same does not impede the right to register FIR. Reliance is further placed upon *Shadakshari versus State of Karnataka, 2024 SCC Online SC 48*.

(vii) Without prejudice to the aforesaid contentions, it is also contended that petitioner is also charged with offences under Section 120B read with 477A IPC and alleged lack of approval under Section 17A has no bearing on enquiry, inquiry or investigation of such offences. Reliance is further placed on *P.K. Thungon v. CBI, 2009 SCC OnLine Del 417*, *P.K. Thungon v. CBI*, judgment dated 03.08.2009 in SLP (Crl) No. 4990 of 2009, *Ebha Arjun Jadeja v. State of Gujarat, (2019) 9 SCC 789* and *Nara Chandrababu Naidu v. State of Andhra Pradesh & Anr., 2024 SCC Online SC 47*.

(viii) He further contends that judgment passed by Hon'ble Supreme Court in *Nara Chandrababu Naidu v. State of Andhra Pradesh & Anr.* (supra) is distinguishable, since the realm governing Section 17A remains fluid. Reliance is also placed upon *Neeharika Infrastructure (P) Ltd. v. State of Maharashtra, (2021) 19 SCC 401*.



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ANALYSIS AND FINDINGS

13. At the outset, it may be noticed that CBI at its own end, after considering the mandate of Section 17A of the PC (Amendment) Act, 2018 decided to seek approval of the Competent Authority, prior to proceeding with the investigation against the 10 officers of NHAI on account of alleged irregularities in 03 NHAI projects, namely, (i) Surat-Hazira Port Section of NH-06 Project (ii) Varanasi-Aurangabad Section of NH-02 & (iii) Kishangarh-Ajmer-Beawar Section of NH-08. The same was based on the preliminary enquiry dated 19.11.2018 initiated on source information.

14. However, the speaking order dated 06.12.2021 passed by Shri Giridhar Aramane, Secretary, MoRT&H-cum-Chairman NHAI (Additional Charge) declined the approval under Section 17A of PC (Amendment) Act 2018, to proceed with the investigation against the 10 officers of NHAI, as the findings in PE were not found to be justified, in view of observations of Vigilance, comments furnished by Technical Division and examination of record.

15. It is pertinent to notice, the detailed factual observations of Secretary MoRT&H-cum-Chairman NHAI dealing with the findings in the preliminary enquiry by CBI, relating to tendering and execution of projects along with the role of the petitioner, as under:

“3. The irregularities so observed by CBI in each of the three projects have been examined by vigilance on the basis of records and comments furnished by Technical divisions. I had gone through these documents accordingly my observations with respect to each of the paras are as under.

3.1.Reduction in median width from 11.5 m to 4.5 m after award of the work and during signing of Concession Agreement.

The Schedule-D of Concession Agreement (CA) provides no deviation from the manual as far as median width is concerned. The Manual of



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specifications and standards for Four laning of National Highways through PPP (fanning part of CA & Schedule-D) provide raised median width as 4.5 m in case of rural section and in case of urban /Built up section with central crash barrier as 1.2 m. Median width of 7m has been specified in case of depressed median. The TCS in the booklet (available in digitized record of NHAI's library) shows median width as 4.5 and 1.2 m in rural and in urban section respectively and nowhere median width of 11.5 m has been shown in the TCS. From the perusal of Draft Schedule of Dec-2008 and in absence of any deviation in Sch-D towards median width, it is observed that RFP had provision of median of 4.5 m. The apprehension of 11.5 m median width does not seem to be supported with available standard records.

Moreover, in the cost analysis submitted by CES vide their letter dated 17.12.2018 for the project with 4.5 m median width which is the project under implementation was observed to be costlier and therefore, there does not appear any benefit given to any bidder owing to adoption of 4.5 m median width option... ”

3.2.Opening of financial bid before the approval of the CCEA and even before the submission of the compliance to the observations of PPP AC 'and draft CCEA note to MoRTH on 30.12.2008.

The implementation for upgradation of Guj/Mah Border-Surat-Hazira section of NH-6 on BoT(Toll) including several other sections of NHs, had administrative/in-principal approval of Government Cabinet. The Procurement was done in two stages. In First stage i.e. RFQ stage the Bidders will get shortlisted. Thereafter the RFP document will be issued on payment basis to shortlisted bidders who chose to purchase the "document. It was direction MoRTH's vide direction dated 08.10.2008 to issue RFP for 23 projects including the instant project pending approval of SFC/PPP AC.

The RFP document of Surat Hazira was issued to 03 shortlisted Bidders who opted to purchase with Bid Due Date as 26.11.2008 which was lastly extended upto 29.12.2008 with the approval of Competent Authority. The Bid Due Date i.e. Date of Financial Bid Opening of this project including other projects was frozen by the Competent Authority of NHAI and were under review of Ministry. Meanwhile the PPPAC vide approval dated 08.12.2008 granted approval of the project with certain condition that Project may be taken up as 4-laning with design capacity of 60000PCU and cost may be rationalized by constructing service lane only when traffic reaches 60000PCUs.

Subsequent to approval of PPPAC vide Ministry of Finance OM dated 08.12.2008, draft CCEA note was submitted to MoRT&H by NHAI vide letter dated 30.12.2008 and CCEA approved the proposal on 05.2.2009.



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Finally, LOA was issued to the successful Bidder only after the CCEA approval as per the direction of Board dated 11.02.2009. Hence, the Surat - Hazira project had Administrative in-principal approval of cabinet for implementation and Bid due date was also decided by Competent Authority of NHAI as prioritized by MoRT&H.

3.3.As per submission of NHAI before PPPAC that bye passes and service roads were not proposed in parallel; however as per schedule-B Appendix-B III & B-IV of Concession Agreement, the service road of 34.806 km out of 86.842 km was proposed parallel to bypass in scope of work.

Total length of the project stretch consisting of 03 bypasses (aggregate length of bypasses 63.81 km) is 132.913 km. In the entire project stretch, provision of service road in aggregate length of 43.42 Km was made which included 18.644 Km of service road in 03 bypasses. The individual length of bypasses vis-a-vis service road provisioned are as under:

S.No.	Name of Bypass	Length of Bypass	Length of Service Road (in Km)
1	Vyara	11.230	0.475
2	Basipura	5.267	0.766
3	Bardoli Ichhapure	47.313	17.403
	Total	63.81	18.644 oth side)

In the appraisal note dated 13.10.2008, it was suggested to re-examine whether both service road and bypasses are necessary to construct in parallel: PPPAC while granting approval in its meeting dated 21.11.2008 had advised that cost of the project may be brought down by constructing service road in bypasses when traffic reaches 60,000 PCUs.

In compliance to the appraisal note of PPPAC observing that whether both service road parallel to bypasses are necessary, NHAI vide letter dated 14.11.2008 had submitted its reply to MORTH for consideration and approval with the submission that Bypass and service road have not been proposed in parallel; Some stretch - of existing SH, 187 & SH 16.8, is a part of Bardoli-Ichhapore bypass and service road has been provided in built up areas of these SHs; and Service road as proposed in PPP AC proposal is absolutely required as per clause 2.2.1 of 4-laning manual that local traffic in built up areas shall be separated with the provision of service road. Hence Construction of service road only when traffic reaches 60,000 PCU is not justified and construction of service road in some length of bypass was essential due to existence of built area in bypasses.



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3.4. Draft Concession Agreement for the project of Varanasi - Aurangabad section of NH-6 was amended and the VGF limit was enhanced without obtaining approval of final Authority i.e. Cabinet Committee on Economic Affairs (CCEA). Based on this change, the project was awarded at 19.84% VGF of total project cost.

Regarding higher equity support (VGF), B.K. Chaturvedi Committee in its meeting dated 08.08.2009 had recommended that for 'NHDP Phase-V overall VGF cap could be raised to 10% and individual projects in low traffic GQ stretches could be considered with VGF upto 20% within an overall cap of 500 km out of the 5080 km of the Phase-V programme yet to be awarded. Accordingly, the proposal to enhance VGF as an amendment to clause 25.2.2 of DCA under Addendum/Corrigendum -III was proposed. As regards approval of CCI (Cabinet Committee on Infrastructure) to the recommendation of B.K. Chaturvedi Committee report dated 08.8.2009 referred above, it is seen that MoRTH vide OM dated 05.11.2009 had already conveyed the approval of Competent Authority i.e. CCI for acceptance of all recommendation of B.K. Chaturvedi Committee. Hence approval of CCI was there prior to award of the work.

3.5. Due to reduction in scope of work i.e. (Service road 71.60 km, 15 nos. PUP and conversion of 6 nos.: VUP to PUP) Schedule-B and Schedule-C were revised. However, the corresponding cost of Rs. 200 Cr. was not reduced from the total project cost and it was conveyed to PPPAC that the construction of service road has been merely deferred, the TPC remain un-changed. Hence, the aforementioned facts of reduction in scope of work were hide and mislead PPP AC.

PPP AC in its 19th meeting held on 21.11.2008 had granted approval for the project with inter-alia condition that the cost of the project may be rationalized by constructing service lane only when traffic reaches a level of 60000 PCU. The record of discussion for aforesaid PPPAC meeting was issued by DOEA vide OM dated 08.12.2008. It is observed that soon after PPPAC meeting, the matter was discussed by Division with DPR consultant and accordingly modification in schedule and reduction in project cost was submitted by DPR Consultant vide their letter dated 26.11.2008 and 01.12.2008. Thus, it is observed that during ongoing bidding process, the TPC was not reduced as the Scope of work to construct service road in aggregate length of 71.60 Km was not deleted rather deferred as Concessionaire was required to construct service road in aggregate 71.60 Km at later stage when the traffic reaches 60000 PCUs through Addendum No. 2.

However after opening of Financial Bid on 26.12.2008 the said bidding process was annulled as the L-1 bidder had quoted grant of Rs. 1096 Cr.



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(38.48% of TPC). Thereafter, RFP was re-invited on 16.02.2010 with bid due date 19.03.2010. Hence, no irregularity is noticed in the bidding process.

3.6.83.30% (983.42 Ha) of encumbrance free land was not handed over to concessionaire, as per agreement clause 10.3.1. due to which the cost of penalty for delay in financial close i.e. Rs. 11.04 Crore, could not be recovered from the Concessionaire.

The Concession Agreement for the project was executed on 30.07.2010. As per Article-4 of Concession Agreement, Authority and Concessionaire both of them have to fulfill condition precedent as per clause 4.1.2 and 4.1.3 of Concession Agreement respectively within 180 days from the date of signing of Concession Agreement i.e. 26.01.2011. In case of any delay, provision of damages for delay by Authority and delay by Concessionaire is applicable as per clause 4.2 and 4.3 of Concession Agreement.

The Concessionaire was required to achieve financial close within 180 days from the date of Concession Agreement i.e. 26.01.2011, however, financial closure was achieved from 20.05.2011 with the delay of 114 days. However, as per clause 24.1.1 no damages shall be payable if delay in financial close has occurred solely as a result of any default or delay by the Authority in procuring satisfaction of the condition precedent specified in clause 4.1.2 or due to Force Majeure. In connection with delay in Financial close, procurement of ROW in accordance with provision of clause 10.3.1 to Concessionaire, was one of the condition precedents to be fulfilled by Authority. Apart from this, the Authority had to issue toll fee notification, procure GAD of ROBs and procure all applicable permits relating to environment protection and conservation of site. The records revealed that toll notification was issued on 16.06.2011 and approval of GADs of all 03 ROBs from Railways was not available till 02.09.2011.

The proposal for fixation of financial closure date as 25.05.2011 without penalty was considered as delay in fulfillment of all condition precedent from the Authority side and still some of the condition precedent have not been fulfilled. Accordingly, Executive Committee accorded approval for treating the financial close date as 20.05.2011 without any penalty. The damages payable by the Concessionaire was waived off with approval of Competent Authority based on the offer of the Concessionaire vide letter dated 25.08.2011 that Concessionaire will waive off the damages payable by Authority under clause 4.2 and J 0,3A of CA if Authority waives off the damages payable by the Concessionaire under clause 4.1.3.

Thus, this was a case of mutual waiver since neither the Authority nor the Concessionaire had fulfilled their conditions precedent within stipulated time frame i.e. 180 days from signing of Concession Agreement and both



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were liable to pay damages for their default. It is also reported that 3G award was revised after implementation of RFCTLARR Act 2013-14 as there was stalemate between NHAI and State Govt. regarding effective date of implementation of RFCTLARR Act and rate to be considered for preparation of the awards. More than 1.5 year was lost in arriving at the consensus which was finally arrived in the year 2018. Further, it is also to mention that as on date about 11.82 km length of the project is still affected due to acquisition; Arbitration etc.

3.7. Award of work to M/s. Isolux-Soma Consortium on 21.04.2019 in terms of clause 3.3 of RFP.

On the bid due date 23.12.2008, 04 bid were received. M/s. Navinya Buildcon Pvt. Ltd. & Atlantia S.P.A Consortium had emerged as H-1 bidder. However, work could not be awarded as it was disqualified in terms of clause 2 .1.14 of RFP (Conflict of Interest) on the basis of opinion dated 12.02.2009 of Solicitor General of India. Thereafter, all remaining 03 bidders were asked vide letters dated 20.02.2009 to match the bid of highest bidder before 11:00 Hrs. on 27.02.2009 in accordance with clause 3.3.3 of RFP. On due date i.e. 27.02.2009 only one bidder namely, M/s ISOLUX-SOMA Consortium have submitted the proposal. The work was thereafter awarded to M/s ISOLUX-SOMA Consortium on 21.04.2009. Further, it is also clarified that as per provision of Clause 3.3.3 of RFP, it may be seen that in case two or more Bidders would have matched the highest Bidder in the second round of bidding, the Selected Bidder would be ISOLUX-SOMA Consortium, in view of its H-2 position in First round of bidding. Accordingly, it appears that there would not be any effect of more participation by bidders in second round of bidding on award of Contract to M/s ISOLUX- SOMA consortium.

4. CBI in its preliminary enquiry has mentioned about Illegal Gratification on parts of NHAI Officers i.e. regular pay out to the officers on monthly basis by the Concessionaire. However, no corroborating evidences have been made available to NHAI for establishing such facts.

5. As per records made available me and the factual position brought out to my notice and also observed in foregoing paras 3 and 4 against irregularities observed by CBI, no concrete evidence of wrong doing is observed. Hence permission u/s 17A to proceed with investigation against 10 officers of NHAI is not justified and hence denied.”

16. Apparently, the gist of the findings of the Competent Authority denying the approval under Section 17A of PC (Amendment) Act, 2018, reflects that all the issues raised by CBI based on the preliminary enquiry



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were considered in detail. Further, no irregularity was found in reduction in median width from 11.5m to 4.5m after award of the work and during signing of the Concession Agreement (CA).

Also, LOA was found to be issued to the successful bidder only after the approval of the Cabinet Committee on Economic Affairs (CCEA), as per directions of the Board, whereby the Surat-Hazira project had administrative in-principle approval of the Cabinet, for implementation and bid due date was also decided by the Competent Authority of NHAI as prioritized by MoRT&H. Further, it was noticed that construction of service road only when traffic reaches 60000 PCU, is not justified and construction of service road in some length of bypass was essential due to existence of built area in bypasses.

With regard to amendment of the draft Concession Agreement for the project of Varanasi-Aurangabad Section of NH-06 and raising of VGF limit without obtaining approval of CCEA, it was observed that the approval of Competent Authority i.e. Cabinet Committee on Infrastructure (CCI) was duly conveyed and as such the approval of CCI was prior to award of the work.

With reference to the hiding of reduction in scope of work and corresponding cost of Rs.200 crore and misleading PPAC, it was clarified that there is no irregularity in the bidding process. It was observed that during ongoing bidding process, the TPC was not reduced as the scope of work to construct service road in aggregate length of 71.6 Km. was not deleted, rather deferred, as Concessionaire was required to construct service road in aggregate 71.60 Km. at later stage when the traffic reaches 60000 PCUs through Addendum No.2.



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The Executive Committee is stated to have accorded the approval for treating the financial close date as 20.05.2011 without any penalty and damages payable by the Concessionaire waived off with approval of Competent Authority, as there was delay in fulfillment of all conditions precedent from the side of the Authority and still some conditions were to be fulfilled. The case of waiver, as such, is stated to be of mutual waiver, since neither the Authority, nor the Concessionaire, had fulfilled their condition precedent within stipulated time frame. Also, it was reflected that on account of implementation of RFCTLARR Act, 2013-14 there was stalemate between NHAI and State Government, regarding effective date of implementation of RFCTLARR Act and rate to be considered for preparation of award. Further, more than 1.5 years were lost in arriving at consensus which was finally reached in the year 2018.

So far as the award of work to M/s Isolux Soma Consortium on 21.04.2009 is concerned, on the due date i.e. 17.02.2009 only one bidder namely, M/s ISOLUX SOMA Consortium is stated to have submitted the proposal as H1 bidder was disqualified, and all the three bidders were asked to match the bid of the highest bidder which was fulfilled by M/s ISOLUX SOMA Consortium. It was also pointed out that there would not be any effect of more participation of bidders in second round of bidding on award of contract to M/s ISOLUX SOMA Consortium.

The allegations regarding illegal gratification on the part of NHAI officers as a regular pay out were found to be insufficient for establishing any such fact, in the absence of any irregularity in the execution of the project, relied by CBI in its preliminary findings.



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17. It cannot be ignored that despite the fact that no irregularities were found in awarding or execution of project and the case was not found fit for grant of approval under Section 17A of the PC (Amendment) Act, 2018 by the Competent Authority, CBI went ahead with registration of RC. Petitioner stands implicated merely on assumption of receipt of convenience money, based on an entry in an excel file, without any supporting evidence or demand or receipt of money. Even no complaint in this regard was received from any quarter.

18. It is well settled that for prosecution of offences exclusively under the Prevention of Corruption Act, 1988, requirement of obtaining the sanction is mandatory prior to taking of cognizance of offences punishable as specified therein, whereas in cases under penal law against the public servant, the grant of sanction is provided under Section 197 Cr.P.C. depending upon the factual aspects.

The test for determining whether the provisions of Section 197 Cr.P.C. would come to an aid of an accused, has been exemplified by the Hon'ble Supreme Court in ***P.K. Pradhan v. State of Sikkim represented by the Central Bureau of Investigation, 2001 II AD (Cr.) SC 581*** as under in para 15:

“15. Thus, from a conspectus of the aforesaid decisions, it will be clear that for claiming protection under Section 197 of the Code, it has to be shown by the accused that there is reasonable connection between the act complained of and the discharge of official duty. An official act can be performed in the discharge of official duty as well as in dereliction of it. For invoking protection under Section 197 of the Code, the acts of the accused complained of must be such that the same cannot be separated from the discharge of official duty, but if there was no reasonable connection between them and the performance of those duties, the official status furnishes only the occasion or opportunity for the acts, then no sanction would be required.....”



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There is no dispute as to the proposition of law that Section 197 Cr.P.C. does not extend its protective cover to every act or omission of a public servant while in service and is restricted only to those acts or omissions which are done by public servant in discharge of official duties, as referred to and relied upon in the judgments referred by the learned counsel for respondent. The factual position has to be considered in the light of facts and evidence in respective cases.

However, on the face of record, allegations against the petitioner have been made in respect of his conduct in discharge of official duties, which in the opinion of this Court, attracts the protective shield of sanction under Section 197 Cr.P.C. as well as Section 19 of the PC Act, 1988.

Merely on the basis of an alleged computer entry revealed in the course of enquiry under Income Tax Act, petitioner cannot be presumed to have committed the alleged offences, without any corroboratory evidence. Specifically so, in the light of the findings of the Competent Authority wherein no anomaly or irregularity was found in the execution of project or infirmity in the conduct of the petitioner. Further, petitioner was not even responsible for preparation of any bills for execution, which was being monitored by the other officials responsible for the same.

19. It has been further contended on behalf of the petitioner that considering the mandate of Section 17A of the PC (Amendment) Act, 2018 that there can neither be any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant in discharge of his official functions or duties, without previous approval of the Competent Authority, the CBI proceeded to seek prior approval. Further, after refusal of prior approval by the Competent Authority, CBI could not have taken a u-



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turn to ignore the factual position, by claiming that the prior approval is not required in respect of offences committed prior to the PC (Amendment) Act, 2018.

20. It may be noticed that Section 17A was inserted in the Prevention of Corruption Act, 1988 by Act 16 of 2018 and the same came into effect on 26.07.2018. The provision mandates seeking prior approval by the Competent Authority before initiating enquiry, inquiry or investigation against the public servants under the PC (Amendment) Act, 2018.

The overarching objective behind Section 17A of the PC (Amendment) Act, 2018 is to provide a protective shield preventing arbitrary 'enquiry or inquiry or investigation' against the public servants, who may be wary of taking *bona fide* decisions under existing provisions of PC Act, 1988, which impedes the functioning of the Government. The purpose is to protect the honest officials and not hurdle the curbing of corruption.

The preliminary enquiry against unknown persons may not be strictly barred under Section 17A of PC (Amendment) Act, 2018, if the offenders are unknown, but at the same time the same cannot be used as a garb by the Investigating Agency to bypass the provision for seeking prior approval under Section 17A of the PC (Amendment) Act, 2018.

21. In the present case, the alleged offences relate to the period 2008-2017 prior to insertion of Section 17A, though the preliminary enquiry was registered on 29.11.2018 i.e. after the amendment *w.e.f.* 26.07.2018. The RC has been finally registered on 29.03.2022 despite the denial of approval by the Competent Authority on 06.12.2021. The authorities relied both on behalf of petitioner as well as respondent with reference to Section 17A of PC (Amendment) Act, 2018 now need to be seen in the light of split verdict



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in the case of *Nara Chandrababu Naidu v. State of Andhra Pradesh & Anr.* (supra), wherein the matter has been referred for consideration to a Larger Bench of the Hon'ble Apex Court.

22. In *Nara Chandrababu Naidu v. State of Andhra Pradesh & Anr.* (supra), petitioner, a former Chief Minister, was arrested in connection with Skill Development Scheme in the State in between 2014 and 2019 and FIR was registered in 2021 without obtaining prior approval from the Governor as required under Section 17A of the PC (Amendment) Act, 2018. A contention was raised on behalf of the petitioner that steps taken against the petitioner under PC Act ought to be invalidated in view of violation of Section 17A of the PC (Amendment) Act, 2018, since prior approval of the Competent Authority had not been obtained.

Hon'ble Mr. Justice Aniruddha Bose therein observed that previous approval under Section 17A of the PC (Amendment) Act, 2018 will have to be obtained after provisions became operational on 26.07.2018, failing which an enquiry or investigation against the public servant under the PC Act shall be illegal. It was accordingly held that petitioner therein could not have been proceeded against offences under Section 13(1)(c) and 13(1)(d) alongwith 13(2) PC Act, 1988 on the ground of non-procurement of prior approval as required under Section 17A of the PC (Amendment) Act, 2018 from the Competent Authority.

However, Hon'ble Ms. Justice Bela M. Trivedi held that provisions of Section 17A of the PC (Amendment) Act, 2018 could not be made applicable retrospectively and would only apply to the amended and newly inserted provisions of the PC Amendment Act, 2018. It was also observed that if submission that Section 17A of the PC (Amendment) Act, 2018 is



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retroactive is accepted, then all the pending proceedings of enquiry, inquiry and investigation as on 26 July, 2018 carried out in respect of offences existing prior to 2018 amendment would become infructuous and frustrate the very object of the Act, which is to combat corruption. More so, when public servant is also charged with other offences under IPC in respect of the same set of allegations.

23. The issues identified by the Hon'ble Apex Court in *Nara Chandrababu Naidu v. State of Andhra Pradesh & Anr.* (supra), relate to the definition of enquiry/inquiry/investigation and if Section 17A is procedural or substantive in nature. Further, whether Section 17A has retrospective/prospective application. However, it needs to be underscored that the overarching object of the provision is to prevent arbitrary or vexatious investigations against the public servants.

24. Reverting back to the facts of the present case, the findings of the Competent Authority in response to request of CBI for prior approval under Section 17A of the PC (Amendment) Act, 2018 could not have been ignored by the Investigating Agency, unless there were cogent reasons. The refusal of prior approval by the Competent Authority under Section 17A is akin to consideration of sanction by the Competent Authority under Section 19 of PC Act, 1988 and is binding on the Investigating Agency unless some new incriminating evidence comes on record, since the Competent Authority is in the best position to factually assess and consider, if there has been any irregularity/illegality, giving an opportunity to the concerned public servant for an uncalled for conduct.

25. As already noticed by this Court, the allegations enquired into by the respondent/CBI relate to receipt of some amount for smooth functioning by



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the petitioner during the discharge of official functions, though there was no complaint in this regard. The enquiry has been initiated *suo moto* on the basis of an entry made in computer record as revealed in enquiry conducted by the Authorities under Income Tax Act. In view of categorical finding by the Competent Authority that no anomalies regarding the entire process had been found, it appears to be imprudent to ignore the said findings. Specifically so, as there is absolutely no evidence by way of complaint, demand of money or receipt of money by the petitioner. The proceedings against the petitioner appear to be simply a fishing or roving enquiry by the Investigating Agency. It needs to be underscored that Section 17A of the PC (Amendment) Act, 2018 as well as Section 197 Cr.P.C., though conceptually acting in different fields, provide a safeguard to the innocent public servants and discourages frivolous and vexatious prosecution.

26. In the light of guidelines laid by the Hon'ble Apex Court in *State of Haryana & Ors. v. Bhajan Lal & Ors.* (supra) and for the reasons recorded above, this Court is of the considered view that the proceedings against the petitioner merely on the basis of a computerized entry, in absence of any supporting evidence is a mere abuse of the process of the Court.

The registration of RC and proceedings initiated *qua* the petitioner along with proceedings emanating therefrom, are accordingly quashed.

Petition is accordingly disposed of. Pending applications, if any, also stand disposed of.

(ANOOP KUMAR MENDIRATTA)
JUDGE

SEPTEMBER 10, 2024/v/sd