IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 22.05.2020

\+ **CRL.A. 1186/2017**

MADHU KODA .....Appellant

versus

STATE THROUGH CBI ..... Respondent

Advocates who appeared in this case:

For the Appellant :Mr Abhimanyu Bhandari, Ms Gauri Rishi, Ms Srishti Juneja, Ms Aashima Singhal and Mr Vinay Prakash, Advocates.

For the Respondent :Mr R. S. Cheema, Sr. Advocate (SPP) with Ms Tarannum Cheema, Ms Smrithi Suresh, Ms Hiral Gupta and Mr Akshay Nayarajan, Advocates.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

CRL.M.(BAIL) 2273/2017 & CRL.M.A. 38740/2019

1. The appellant has filed the present applications, *inter alia*, praying that the operation of the impugned order dated 13.12.2017 passed by the learned Special Judge convicting the appellant of the offence of criminal misconduct under sub-clauses (ii) and (iii) of clause (d) of sub-section (1) of section 13 read with sub-section (2) of section 13 of the Prevention of Corruption Act, 1988 (hereafter 'PC Act'), be stayed.

2. The appellant desires to contest for election to public offices, including contest elections for the Legislative Assembly of the State of Jharkhand but is disqualified to do so on account of his conviction. The appellant states that he was elected as a member of Bihar Legislative Assembly for the first time in the year 2000. On 15.11.2000, the State of Jharkhand was carved out from the erstwhile State of Bihar. The appellant held the office of the Minister of the State for Rural Engineering Organization thereafter and continued to do so till the year 2003. It is stated that thereafter, he held the office of Minister of Panchayati Raj of Special Arrangement. The appellant successfully contested the elections for the Legislative Assembly in the year 2005 and in September 2006 was appointed the Chief Minister of the State of Jharkhand. He continued to hold the said office till 23.08.2008.

3. The appellant has been convicted by the impugned order in a case captioned *"CBI v. M/s Vini Iron and Steel Udyog Limited and Ors."*arising from FIR No. RC 219 2012E 0012. The Trial Court found that the appellant had abused his position as a public servant in order to obtain the allocation of Rajhara Coal Block in favour of M/s Vini Iron and Steel Udyog Limited (hereafter 'VISUL'), without any public interest.

Submissions

4. Mr Abhimanyu Bhandari, learned counsel appearing for the appellant advanced contentions on, essentially, three fronts. First, he

submitted that there is neither any allegation nor any evidence to establish, that the appellant had demanded any illegal gratification, which is *sine qua non* of an offence under Section 13(1)(d) of the PC Act. He stated that in absence of any such finding, the appellant's conviction under Section 13(1)(d) of the PC Act is *ex facie* unsustainable. He relied on the deicions of the Supreme Court in ***Khaleel Ahmed vs State of Karnataka: (2015) 16 SCC 350; B.Jayaraj vs State of Andhra Pradesh: (2014) 13 SCC 55; P Satyanarayana Murthy v Dist Inspector of Police and Others: (2015) 10 SCC 152; Mrs Neeraj Dutta vs State (Govt. of NCT of Delhi); and State of Maharashtra v Dyaneshwar Laxman: (2009) 15 SCC 200*** in support of his contention that demand of illegal gratification was a necessary ingredient of an offence under Section 13(1)(d) of the PC Act.

5. Second, he submitted that the PC Act was amended with effect from 26th July 2018 and the provisions of Section 13(1)(d) stand deleted by virtue of the Prevention of Corruption (Amendment) Act, 2018 (hereafter the 'PC Amendment Act, 2018'). He submited that the allegations made against the appellant no longer constitute an offence and, therefore, he is entitled to be acquitted by virtue of the doctrine of beneficial construction. He relied on the decision of the Supreme Court in ***T. Barai v enry AH Hoe and Another: (1983) 1 SCC 177*** in support of his contention.

6. Third, he submitted that the appellant's conviction rested on the assumption that he was close to one Vijay Joshi who controlled

VISUL. It is alleged that the machinery of the Government of Jharkhand had worked to favour VISUL on account of the close relationship between the appellant and Sh. Vijay Joshi. However, he submitted, that there was no admissible evidence, which would even remotely link or establish any such connection between the appellant and Sh. Vijay Joshi. He contended that thus, the allegations of any conspiracy must fail.

7. Mr R.S. Cheema, learned senior counsel appearing for CBI countered the aforesaid submissions. He stated that the provisions of Section 13(1)(d) of the PC did not necessarily require establishing that any illegal gratification had been demanded or paid to the public servant. He relied upon the decisions of Supreme Court in ***Neera Yadav v CBI: (2017) 8 SCC 757; C.K. Jaffer Shareiff v State: (2013) 1 SCC 205; R Venkatkrishnan vs CBI: (2009) 11 SCC 737;*** *and* ***State of Rajasthan vs Fatehkaran Mehdu: (2017) 3 SCC 198.***

8. He briefly narrated the facts as found by learned Trial Court and submitted that the same clearly establish that VISUL had been favoured with allocation of the Coal Block at the instance of the appellant. He also countered the submission that the benefit of PC Amendment Act, 2018 could be extended to the appellant. He referred to Section 6(d) of the General Clauses Act, 1897 (hereafter 'the General Clauses Act') and contended that since the appellant had been convicted prior to the PC Amendment Act, 2018 coming into force, the benefit of the same could not be extended to the appellant.

9. Next, he submitted that this was a case of conspiracy and the facts of the case clearly established that the appellant was complicit in the offence notwithstanding that his connection with Vijay Joshi had not been irrefutably established.

10. Lastly, he submitted that whilst at the interim stage, the sentence awarded to a convict can be suspended on the basis of a *prima facie* view; his conviction cannot be stayed without considering the wider ramifications. He referred to the decisions in ***KC Sareen vs CBI: 2001(6) SCC 584; CBI v MN Sharma: 2008(8) SCC 549 and Md. Dilawar Mir Vs CBI: 2014 SCC Online Del 6424*** in support of his contentnion.

The factual context

11. Before proceeding further, it would be relevant to briefly narrate the factual context in which the present controversy arises.

12. On 13.11.2006, the Ministry of Coal, Government of India issued an advertisement inviting applications for allocating thirty-eight coal blocks pertaining to power, steel and cement sectors. This also included Rajhara (North, Central & Eastern) Coal Block (hereafter referred to as "Rajhara Coal Block").

13. On 08.01.2007, M/s VISUL submitted its application for allocation of Rajhara Coal Block situated in the State of Jharkhand, to the Ministry of Coal, under the signatures of its Director, Shri Vaibhav Tulsyan. The said Coal Block was intended to be used for an

integrated steel plant proposed to be set up in the State of Jharkhand. A copy of the application filed by VISUL was also sent to the State of Jharkhand for its comments.

14. It is stated that while processing VISUL's application for allotment of the Rajhara Coal Block, it was found that VISUL's requirement was low and therefore the State of Jharkhand did not recommend allocation of any Coal Block in favour of VISUL. It sent letters dated 07.12.2007 and 16.01.2008 recommending that the Rajhara Coal Block be allocated jointly to M/s Zoom Vallabh Steel Ltd. and M/s Mukund Limited.

15. It is stated that the Ministry of Steel, Government of India had also set down a criteria for recommendation for allotment of coal blocks. This included categorising applicants under various categories depending upon their existing production capacity and proposed capacity. It is stated that all companies which did not propose achieving 0.3 MTPA capacity by December 2010 were not placed under any category and, therefore, were ineligible for being recommended for allocation of any coal block.

16. It is stated that based on the said criteria, VISUL was ineligible for being recommended for allocation of any coal block. Therefore, Ministry of Steel also did not recommend allocation of any coal block in favour of VISUL.

17. Prior to May 2008, the State Government of Jharkhand was not considering VISUL's application favorably for recommendation. But

in the month of May 2008, the ownership of M/s VISUL changed hands from the Tulsyan family to one Vijay Joshi, who is alleged to be a close associate of the appellant. And, with the change in the shareholding of VISUL, its fortunes also changed for the better.

18. All applications pertaining to steel and cement sector were considered by the 36th Screening Committee headed by the Secretary, Ministry of Coal, Government of India at its meetings held on 07.12.2007, 08.12.2007, 07.02.2008, 08.02.2008 and on 03.07.2008. The said Committee made the final recommendations in its meeting held on 03.07.2008.

19. On 02.07.2008, Shri B.K. Bhattacharya – who was a Section Officer with the Department of Mines, State Government of Jharkhand – prepared a note stating that the performance of M/s Zoom Vallabh Steel Ltd was not satisfactory but the progress of VISUL was, and therefore VISUL be recommended for allocation of the Rajhara Coal Block.

20. It is stated that one of the co-accused, A.K. Basu, the then Chief Secretary, Government of Jharkhand attended the final meeting of the 36th Screening Committee held on 03.07.2008 as a representative of the State, Government of Jharkhand. And, despite being aware that VISUL was not recommended for allocation of a coal block, he allegedly insisted at the said meeting that M/s VISUL be considered for allocation of Rajhara Coal Block. He also emphasized that the

Appellant (who was the chief minister of the State of Jharkhand) desired that the Rajhara Coal Block be allocated to VISUL.

21. The 36th Screening Committee recommended the allocation of Rajhara Coal Block jointly in favour of VISUL and Mukund and on 17.07.2008, the Prime Minister approved the same with some modifications.

22. It is stated that thereafter, on 28.07.2008, a note was prepared for recommending the allotment of Rajhara Coal Block exclusively to VISUL. The said note was put up through the Deputy Secretary, Secretary and the Chief Secretary before the Chief Minister (appellant) on 28.07.2008 and he made an endorsement recommending allotment of Rajhara Coal Block in favour of VISUL exclusively, on the same date.

23. Shri A.K. Basu sent a letter on 28.07.2008 recommending that VISUL be allocated the Rajhara Coal Block exclusively and Mukund be allocated some other coal block. But, by that time, the 36th Screening Committee had made its recommendations and the Prime Minister had approved the allocation of the Rajhara Coal Block in favour of VISUL and Mukund Ltd. jointly. Therefore, the said recommendation was not considered.

Reasons and Conclusion

24. The first and foremost question to be addressed is whether it was necessary for the prosecution to establish that the appellant had

demanded illegal gratification, for securing the appellant's conviction for committing an offence under section 13(1)(d) of the PC Act.

25. Section 13(1)(d) of the PC Act, as in force at the material time, is set out below:

> "**13. Criminal misconduct by a public servant.** – (1) A public servant is said to commit the offence of criminal misconduct, -
>
> xxxx xxxx xxxx xxxx
>
> (d) if he, -
>
> (i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or
>
> (ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or
>
> (iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest."

26. A plain reading of sub clause (ii) and sub-clause (iii) of clause (d) sub-section (1) of section 13 of the PC Act indicates that a public servant would commit an offence of criminal misconduct if he, by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage. A plain reading of the sub-clauses of clause (d) of section 13(1) of the PC Act do not indicate that a demand of illegal gratification is a necessary

ingredient of the offence of criminal misconduct. Thus, there is no reason to read-in such a condition in the said sub-clauses.

27. Mr Bhandari had rested his contention on the strength of certain decisions rendered by the Supreme Court. In ***B. Jayaraj*** (*supra*), the Supreme Court had observed as under:

> "7. Insofar as the offence under Section 7 is concerned, it is a settled position in law that demand of illegal gratification is sine qua non to constitute the said offence and mere recovery of currency notes cannot constitute the offence under Section 7 unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe. The above position has been succinctly laid down in several judgments of this Court. By way of illustration reference may be made to the decision in *C.M. Sharma v. State of A.P.*[2] *and C.M. Girish Babu v. CBI*.
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> 8. In the present case, the complainant did not support the prosecution case insofar as demand by the accused is concerned. The prosecution has not examined any other witness, present at the time when the money was allegedly handed over to the accused by the complainant, to prove that the same was pursuant to any demand made by the accused. When the complainant himself had disowned what he had stated in the initial complaint (Ext.P-11) before LW 9, and there is no other evidence to prove that the accused had made any demand, the evidence of PW-1 and the contents of Ext. P-11 cannot be relied upon to come to the conclusion that the above material furnishes proof of the demand allegedly made by the accused. We are,

> therefore, inclined to hold that the learned trial court as well as the High Court was not correct in holding the demand alleged to be made by the accused as proved. The only other material available is the recovery of the tainted currency notes from the possession of the accused. In fact such possession is admitted by the accused himself. Mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under Section 7. The above also will be conclusive insofar as the offence under Section 13(1)*(d)(i)* and *(ii)* is concerned as in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be established."

28. The decision of the Supreme Court in ***B. Jayaraj*** (*supra*) was followed by the Supreme Court it in its subsequent decision in ***Khalil Ahmed v. State of Karnataka*** (*supra*).

29. In ***P. Satyanarayana Murthy v. District Inspector of Police and Anr.*** (*supra*), the Supreme Court reiterated that the proof of demand of an illegal gratification is the gravamen of an offence under section 7 and sub-clauses (i) and (ii) of section 13(1)(d) of the PC Act. The relevant extract of the said decision is set out below:

> "20. In a recent enunciation by this Court to discern the imperative pre-requisites of Sections 7 and 13 of the Act, it has been underlined in *B. Jayaraj* in unequivocal terms, that mere possession and recovery of currency notes from an accused without proof of demand would not establish an offence Under Section 7 as well as 13(1)(d)(i) and (ii) of the Act. It has been

propounded that in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be proved. The proof of demand, thus, has been held to be an indispensable essentiality and of permeating mandate for an offence under Sections 7 and 13 of the Act. Qua Section 20 of the Act, which permits a presumption as envisaged therein, it has been held that while it is extendable only to an offence under Section 7 and not to those under Sections 13(1)(d)(i) & (ii) of the Act, it is contingent as well on the proof of acceptance of illegal gratification for doing or forbearing to do any official act. Such proof of acceptance of illegal gratification, it was emphasized, could follow only if there was proof of demand. Axiomatically, it was held that in absence of proof of demand, such legal presumption under Section 20 of the Act would also not arise.

21. The proof of demand of illegal gratification, thus, is the gravamen of the offence under Sections 7 and 13(1)(d)(i) & (ii) of the Act and in absence thereof, unmistakably the charge therefore, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would thus not be sufficient to bring home the charge under these two sections of the Act.

22. As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence under Sections 7 or 13 of the Act would not entail his conviction thereunder."

30. Although the above proposition appears attractive, a closer examination of the aforesaid decisions clearly indicate that the same cannot be read as authorities for the proposition that demand of an illegal gratification is a necessary condition for convicting a public servant for an offence of misconduct, as contemplated under Section 13(1)(d) of the PC Act. This is for two reasons. First of all, the plain language of Section 13(1)(d) of the PC Act does not indicate that a demand of illegal gratification by the public servant is an essential ingredient of an offence of misconduct.

31. Secondly, a bare perusal of the judgments cited on behalf of the appellant indicates that in all those cases, charges against the accused were also framed under Section 7 of the PC Act. In terms of Section 7 of the PC Act, whoever being or expecting to be a public servant accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification whatever, other than the legal remuneration as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show in exercise of his official functions in favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, would be punishable for committing an offence under the said section. In other words, Section 7 of the PC Act refers to an offence of demanding or obtaining illegal gratification. In all the cases referred to on behalf of the appellant, the accused were charged with the offence of demanding/accepting illegal gratification. In addition, the accused were also charged with the

offence under Section 13(1)(d) of the PC Act in conjunction with the offence under Section 7 of the PC Act. Clearly, in order to establish the offence in such cases, it would be necessary for the prosecution to establish that the accused had demanded or had obtained illegal gratification either himself or by any other person as the same is necessary for securing a conviction of an offence under Section 7 of the PC Act.

32. Apart from criminal misconduct being in conjunction of demand for illegal gratification, an offence under Section 13(1)(d) of the PC Act could also be established as a standalone offence. In ***Neera Yadav v. CBI*** (*supra*), the Supreme Court had examined the provisions of Section 13 of the PC Act as then in force and had explained the ingredients necessary for commission of the said offence. Paragraphs 16 and 17 of the said decision are relevant and are set out below:

> "16. Section 13 of the PC Act in general lays down that if a public servant, by corrupt or illegal means or otherwise abusing his position as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage, he would be guilty of "criminal misconduct". Sub-section (2) of Section 13 speaks of the punishment for such misconduct. Section 13(1)(*d*) read with Section 13(2) of the PC Act lays down the essentials and punishment respectively for the offence of "criminal misconduct" by a public servant. Section 13(1)(*d*) reads as under:
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> > "**13. *Criminal misconduct by a public servant*.**— (1) A public servant is said to commit the offence of criminal misconduct—

* * *

(d) if he—

(*i*) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(*ii*) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(*iii*) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or"

17. A perusal of the above provision makes it clear that if the elements of any of the three sub-clauses are met, the same would be sufficient to constitute an offence of "criminal misconduct" under Section 13(1)(*d*). Undoubtedly, all the three wings of clause (*d*) of Section 13(1) are independent, alternative and disjunctive. Thus, under Section 13(1)(*d*)(*i*), obtaining any valuable thing or pecuniary advantage by corrupt or illegal means by a public servant in itself would amount to criminal misconduct. On the same reasoning "*obtaining a valuable thing or pecuniary advantage*" by abusing his official position as a public servant, either for himself or for any other person would amount to criminal misconduct."

33. Ms Neera Yadav was, at the material time, the chairperson and the Chief Executive Officer of Noida (New Okhla Industrial Development Authority). In that case, the prosecution had alleged that

Smt. Neera Yadav had abused her official position for allotment of a plot bearing no. B002 in Sector 32 in the draw of lots. It was alleged that within a week of the allotment of the said plot, Ms Neera Yadav had made a request for allotment of a plot in any of developed sectors through conversion. The allotment of the plot bearing no. B002, which was allotted in Sector 32, was converted to an allotment of a plot in Sector 14A Noida comprising of an area of 415 square meters (Plot No. 26). It was further alleged that after conversion of the plot, the Chief Architect Planner of Noida had put up a note on the directions of Smt. Neera Yadav for proposing a revision in the layout plan of Plot Nos. 26, 27 and 28 in Sector 14A, by increasing their size from 450 square meters to 562 square meters, 525 square meters and 487.5 square meters respectively. Smt. Neera Yadav approved the same to her benefit. It was alleged that by a subsequent change in the plan, a 7.5 meter wide road was carved out to the east of plot no. 26, which also resulted in benefitting her. In addition to the above, the prosecution established that Smt. Neera Yadav had abused her position in securing allotments of two plots in favour of her daughters. Both her daughters were allotted shops in Noida and on the basis of such allotment, they had applied for allotment of residential plots, which were also allotted to them. Since the allegations against Ms Neera Yadav were established, she was convicted for criminal misconduct under Section 13(1)(d) of the PC Act read with Section 13(2) of the PC Act. She was sentenced to undergo rigorous imprisonment for a period of three years with the fine of ₹1,00,000/. The Allahabad High Court upheld her conviction. Ms Neera Yadav

appealed to the Supreme Court. The Supreme Court upheld her conviction but reduced her prison sentence from three years to two years. In this case, there was no question of any demand for illegal gratification as Ms Neera Yadav had abused her position as a public servant for securing valuable property for herself and her children.

34. In ***R. Venkatkrishnan v. CBI*** (*supra*), the Supreme Court had explained the import of sub-clause (iii) of Section 13(1)(d) of the PC Act in the following manner:

> "161. xxxx xxxx
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> Section 13 in general lays down that if a public servant, by corrupt or illegal means or otherwise abusing his position as a public servant obtained for himself or for any other person any valuable thing or pecuniary advantage he would be guilty of "criminal misconduct". Sub-section (2) thereof speaks of the punishment for such misconduct. (See *C.K. Damodaran Nair* v. *Govt. of India.)*
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> 162. The ingredients of sub-clause (*iii*) of Section 13(1)(*d*) contemplate that a public servant who while holding office obtains for any person any valuable thing or pecuniary advantage without any public interest would be guilty of criminal misconduct. Sub-section (2) of Section 13 provides for the punishment for such criminal misconduct. Minimum sentence is prescribed under Section 13(2) of the 1988 Act and a public servant who abuses his position as such for obtaining for himself or for any other person any valuable thing or pecuniary advantage cannot be punished for a term of imprisonment, which is less than for the duration of one year.

> 163**.** For convicting the person under Section 13(1)(*d*)(*iii*), there must be evidence on record that the accused "obtained" for any other person any valuable thing or pecuniary advantage without any public advantage."

35. In this case also, the prosecution had neither established nor was required to establish that the accused had demanded or obtained any illegal gratification for obtaining for any person any valuable thing or pecuniary advantage.

36. Thus, the contention that it is necessary for the prosecution to establish a demand for illegal gratification for sustaining the allegation of an offence under Section 13(1)(d) of the PC Act as in force prior to 26th July 2018, is without merit.

37. Having stated the above, it is also necessary to observe that mere arbitrary or unreasonable exercise of official power to confer any benefit or pecuniary advantage to an unconnected party, may be not be sufficient to impute that the exercise of such power is culpable misconduct under sub-clause (ii) of clause (d) of sub-section (1) of Section 13 of the PC Act. First of all, it would be necessary for the prosecution to establish that the public servant had abused his official position; that is, used it for wrongdoing and for a purpose he ought not to have. Secondly, the same was for securing a valuable thing or pecuniary advantage for himself or for any other person, without any public interest. Obviously, if the third person, who has acquired a valuable thing or pecuniary advantage, is unconnected with the public

servant, it would be difficult to accept that the conduct of the public servant is culpable in terms of Sub-clause (ii) of clause (d) of Sub-section (1) of Section 13 of the PC Act.

38. The legislative intent is not to punish a public servant for any erroneous decision; but to punish him for corruption. The preamble of the PC Act indicates that it was enacted "*to consolidate and amend the law relating to the prevention of corruption and for matters connected therewith.*" Thus, to fall within the four corners of Sub-clause (ii) of clause (d) of Sub-section (1) of Section 13 of the PC Act, the decision/conduct of the public servant must be dishonest amounting to corruption. Transparency International defines corruption as "the abuse of entrusted power for private gain".

39. *Mens rea*, the intention and/or knowledge of wrongdoing, is an essential condition of the offence of criminal misconduct under Section 13(1)(d)(ii) of the PC Act. Section 20 of the PC Act does not apply to offences under Section 13(1)(d) of the PC Act and therefore, *mens rea* cannot be presumed. It is, thus, necessary for the prosecution to establish the same.

40. The scope of contentions advanced before this court are limited and therefore, at this stage, it is not apposite to examine whether the prosecution has established the necessary ingredients of Section 13(1)(d)(ii) of the PC Act. Needless to state that this aspect and the evidence obtaining in this case would be required to be examined at the stage of final hearing.

41. The next question to be considered is whether the appellant is liable to be acquitted in view of the enactment of the PC (Amendment) Act, 2018. It was contended on behalf of the appellant that he is entitled to the benefit of the doctrine of beneficial construction. Since the misconduct as contemplated under Section 13(1)(d) of the PC is no longer an offence punishable under the PC Act as amended by virtue of the PC Amendment Act 2018, the benefit of the same ought to be extended to the appellant. Mr Bhandari had sought to draw strength from the decision of the Supreme Court in ***T. Barai*** (*supra*) for canvassing the above contention.

42. Section 13, as amended by virtue of the PC (Amendment) Act, 2018 and as is currently in force, reads as under:

> "**13. Criminal misconduct by a public servant.**—(1) A public servant is said to commit the offence of criminal misconduct:—
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> (a) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or any property under his control as a public servant or allows any other person so to do; or
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> (b) if he intentionally enriches himself illicitly during the period of his office.
>
> *Explanation* 1.—A person shall be presumed to have intentionally enriched himself illicitly if he or any person on his behalf, is in possession of or has, at any time during the period of his office, been in possession of pecuniary resources or property disproportionate to his known sources of income which the public servant cannot satisfactorily account for.

> *Explanation* 2.—The expression "known sources of income" means income received from any lawful sources.".
>
> (2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than four years but which may extend to ten years and shall also be liable to fine."

43. In ***T. Barai*** (*supra*), the question, which fell for consideration before the Supreme Court, related to the applicability of Section 16A of the Prevention of Food Adulteration Act, 1954 as inserted by the Prevention of Food Adulteration (Amendment) Act, 1976 (referred to as 'the Central Amendment Act') in relation to the prosecution that was launched under Section 16(1)(a) as applicable in the State of West Bengal between the period 29.04.1974 to 01.04.1976. The offences in question were punishable with imprisonment for life and therefore triable by the Court of Sessions by virtue of the Act as amended by Prevention of Adulteration of Food, Drugs and Cosmetics (West Bengal Amendment) Act, 1973. The Division Bench of the Calcutta High Court held that by virtue of the Prevention of Food Adulteration (Amendment) Act, 1976 (Central Act) – which came into force on 01.04.1976 – all pending proceedings for trial of offences punishable under Section 16(1)(a) of the Act as amended by the Prevention of Adulteration of Food, Drugs and Cosmetics (West Bengal Amendment) Act, 1973 (referred to as the West Bengal Amendment Act), that had not been concluded would cease to be governed by the West Bengal Amendment Act and would come within the purview of the Prevention of Food Adulteration Act, 1954 as amended by the

Prevention of Food Adulteration (Amendment) Act, 1976. Accordingly, the Court directed the Magistrate to proceed with the trial because the punishment prescribed under the amended scheme were significantly lower for the offences in question and, therefore, such offences were triable by the Magistrate. In the aforesaid context, following questions were framed by the Supreme Court for its consideration – (i) whether the Central Amendment Act impliedly repealed the West Bengal Act with effect from 01.04.1976 and, if so, the effect of such repeal; (ii) whether the High Court was justified in holding that the West Bengal Amendment Act was deemed to have been obliterated from the statute book for all intents and purposes and, therefore, excluded the operation of Section 8 of the Bengal General Clauses Act, 1899 (which is *pari materia* to the Section 6 of the General Clauses Act, 1897.); and (iii) whether the pending proceedings were governed by the Central Amendment Act and whether the repealed West Bengal Amendment Act preserved the punishment to be imposed.

44. The court held that the Central Amendment Act had the effect of completely obliterating the West Bengal Amendment Act and would have a retrospective effect as it covered the same offence that was the subject matter of the West Bengal Amendment Act. The Central Act neither created a new offence nor posited that the offending act had ceased to be an offence. It is settled law that an *ex post facto* legislation, which enhances the punishment for an offence and creates a new offence, cannot be applied retrospectively as the

same would violate Article 20(1) of the Constitution of India. However, an *ex post facto* law that mitigates the rigors of law, does not foul fall of Article 20(1) of the Constitution of India. There is no reason to restrict the retrospective operation of such an enactment, which reduces the rigors of the law. In view of the aforesaid principles, the Supreme Court held that merely because the Central Amendment Act had not expressly repealed the West Bengal Amendment Act, it could not be said that the former was not retrospective in its operation. The Supreme Court found that the legislation had substituted the scheme and, therefore, the Act as amended by the West Bengal Amendment Act stood repealed. The Court was also of the view that the intention of the legislature was to do so with retrospective effect. It is material to note that one of the reasons that persuaded the Supreme Court to take the said view was the fact that the Central Amendment Act was in respect of the same offence that was earlier punishable under Section 16(1)(a) of the Act.

45. The provisions of Section 13 of the PC Act were substituted by virtue of the PC (Amendment) Act, 2018. It is well settled that the effect of substitution of a statutory provision by another is that the earlier provision is repealed and is replaced by the provisions so enacted. The provisions existing prior to the substitution cease to exist and the provisions enacted in substitution of the earlier provisions replace the earlier ones. Subject to any savings provision, the effect would be to write down the substituted provision in the Act as originally enacted. In ***Zile Singh v. State of Haryana & Ors.: (2004) 8***

SCC 1, the Supreme Court had explained the effect of substitution of a statutory provision in the following words:

> "24. The substitution of one text for the other pre-existing text is one of the known and well-recognised practices employed in legislative drafting. "Substitution" has to be distinguished from "supersession" or a mere repeal of an existing provision.
>
> 25. Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision (See Principles of Statutory Interpretation, ibid, p.565). If any authority is needed in support of the proposition, it is to be found in West U.P. Sugar Mills Assn. and Ors. Vs. State of U.P. and Ors.: (2002) 2 SCC 645, State of Rajasthan Vs. Mangilal Pindwal: (1996) 5 SCC 60, Koteswar Vittal Kamath Vs. K. Rangappa Baliga and Co.: (1969) 1 SCC 255 and A.L.V.R.S.T. Veerappa Chettiar Vs. S. Michael & Ors.: AIR 1963 SC 933. In West U.P. Sugar Mills Association and Ors.'s case (supra) a three-Judges Bench of this Court held that the State Government by substituting the new rule in place of the old one never intended to keep alive the old rule. Having regard to the totality of the circumstances centering around the issue the Court held that the substitution had the effect of just deleting the old rule and making the new rule operative. In Mangilal Pindwal's case (supra) this Court upheld the legislative practice of an amendment by substitution being incorporated in the text of a statute which had ceased to exist and held that the substitution would have the effect of amending the operation of law during the period in which it was in force. In Koteswar's case (supra) a three-Judges Bench of this Court emphasized the distinction between "supersession" of a rule and "substitution" of a rule and held that the process of substitution consists of two steps : first, the old rule is

made to cease to exist and, next, the new rule is brought into existence in its place."

46. The Statement of Objects and Reasons of the Prevention of Corruption (Amendment) Bill, 2013 makes it clear that the said Bill was introduced pursuant to India's ratification of the United Nations Convention against Corruption (UNCAC) in May 2011, judicial pronouncements, and the need to bring domestic laws in line with international practices. The Statement of Objects and Reasons reads as under:-

> "The Prevention of Corruption Act, 1988 provides for prevention of corruption and for matters connected therewith. The ratification by India of the United Nations Convention Against Corruption, the international practice on treatment of the offence of bribery and corruption and judicial pronouncements have necessitated a review of the existing provisions of the Act and the need to amend it so as to fill in the gaps in description and coverage of the offence of bribery so as to bring with it in line with the current international practice and also to meet more effectively, the country's obligations under the aforesaid convention."

47. The said Bill was introduced in the Rajya Sabha on 19.08.2013 and was referred to the Department related Standing Committee on Personnel, Public Grievances, Law and Justice which presented its 69th Report on the Bill to the Parliament on 06.02.2014. The Law Commission also submitted a Report (254th Report) expressing its views on the amendments. The Select Committee of Rajya Sabha on Prevention of Corruption (Amendment) Bill, 2013 was constituted on 11.12.2015 to examine the Bill and the amendments proposed by

Government and the members and to submit its Report to the Rajya Sabha.

48. The current international practices as laid down by the United Nations Convention Against Corruption does not provide any reason for substitution of Section 13 of the PC Act. The Report of the Law Commission is also silent on the amendment to Section 13 of the PC Act. However, the Select Committee of Rajya Sabha on Prevention of Corruption (Amendment) Bill, 2013 does briefly indicate that the Government had proposed as many as thirty official amendments to the aforesaid Bill in 2015. The Select Committee had considered the said amendments and also elicited the views of various stakeholders including the Central Bureau of Investigation. It held several sittings to examine the said amendments proposed by the Bill. The Committee also noticed that Section 13(1)(d)(iii) of the PC Act had covered a new species of crime related to corruption, which was not contemplated under the Prevention of Corruption Act, 1947. The Committee also referred to the decision of this Court in the matter of ***Runu Ghosh and Ors. v. Central Bureau of Investigation: 2011 SCC Online Del 5501***, wherein a Division Bench of this court had articulated the aforesaid view and rejected the challenge to the provisions of Section 13(1)(d)(iii) of the PC Act. In that case, this Court had also held that *mens rea* was not an essential ingredient of the offence under Section 13(1)(d)(iii) of the PC Act. The Report submitted by the Select Committee further indicates that most of the stakeholders had agreed to the amendment proposed by the Government, which had the effect

of deleting the provisions of section 13(1)(d)(iii) of the PC Act. It does appear from the above that the intention of substituting Section 13 by enacting the PC (Amendment) Act, 2018 was to exclude the act of any public servant obtaining any valuable thing or pecuniary advantage for any person, without any public interest as an offence of criminal misconduct.

49. It is relevant to note that PC Act was enacted, *inter alia*, to make the then existing anti corruption laws more effective by widening their coverage and strengthening the provisions. It was enacted to consolidate and amend the law relating to prevention of corruption and for matters related thereto. The Prevention of Corruption Act, 1947 did not include any offence of the nature as specified under Section 13(1)(d)(iii) of the PC Act. It does appear that the said provision was introduced only for the purpose of expanding the scope and coverage of the law relating to prevention of corruption. Thus, for the first time, an act/conduct resulting in a pecuniary advantage to a third party was held culpable, as a species of corruption, merely because such an act or conduct was without public interest.

50. There were serious concerns expressed that decisions which did not involve any *mens rea* or any guilty intention or knowledge could, nonetheless, be considered as offences under the PC Act. Some stakeholders also expressed the view that such an interpretation would make public servants reluctant to make any decisions involving grant of any advantage to any third party.

51. It is apparent that said concerns were addressed by substituting Section 13 of the PC Act. The enactment of the PC (Amendment) Act, 2018 to substitute the provisions of Section 13 does indicate the legislative intent to exclude any such act, which was construed as criminal misconduct only for the reason that the conduct was against public interest.

52. Since the PC Amendment Act addressed the concerns regarding Sub-clause (iii) of Section 13(1)(d) of the PC Act, it would stand to reason to accept that the legislative intent was always to ensure that *mens rea* be considered as an integral part of any offence of corruption. As noticed herein before, the very definition of corruption, as is commonly understood, includes an element of dishonesty and abuse of power by a public servant.

53. However, this Court is unable to accept that the PC (Amendment) Act, 2018 seeks to repeal the provisions of Section 13(1)(d) of the Act, as it existed prior to 26.07.2018 *ab initio*. *Mens rea* is an integral part of the offence under Sub-clause (ii) of Section 13(1)(d) of the PC Act. The use of the word 'abuse' in the said Sub-clause indicates so. Thus, there is no reason to assume that the legislative intent of repealing Section 13 of the PC Act was to exclude the said offence from the scope of PC Act with retrospective effect.

54. In view of the above, Section 6(d) of the General Clauses Act is applicable and persons convicted of committing the offence of criminal misconduct under Section 13(1)(d) of the PC Act would not

be absolved of their offences or the liability incurred prior to the PC Act coming into force. It is also relevant to note that the offence of criminal misconduct as falling under the provisions of Section 13(1)(d) of the PC Act prior to its amendment, is not the same offence as is now covered under the amended provision.

55. In view of the above, this Court is unable to accept that if it is established beyond reasonable doubt that the appellant had abused his position for securing a pecuniary advantage to VISUL, the benefit of any beneficial construction of the PC (Amendment) Act, 2018 could be extended to him.

56. In the present case, the contention on behalf of the appellant is that the prosecution had failed to establish any relationship between Sh. Vijay Joshi and the appellant and, therefore, the appellant is liable to be acquitted is a matter of evaluating the evidence. Whilst the contention advanced by the appellant is *prima facie* merited, this Court does not consider it apposite to consider this aspect in any detail at this stage.

57. In the light of the above, the principal question to be examined is whether the conviction of the appellant is liable to be stayed. The power of a court to stay a conviction has been considered by the Supreme Court in several decisions. In ***Navjot Singh Sidhu v. State of Punjab: (2007) 2 SCC 574***, the Supreme Court had summarized the legal position as under:

"4. Before proceeding further it may be seen whether there is any provision which may enable the Court to suspend the order of conviction as normally what is suspended is the execution of the sentence. Sub-section (1) of Section 389 says that pending any appeal by a convicted person, the appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond. This Sub-section confers power not only to suspend the execution of sentence and to grant bail but also to suspend the operation of the order appealed against which means the order of conviction. This question has been examined in considerable detail by a Three Judge Bench of this Court in Rama Narang v. Ramesh Narang & Ors. (1995) 2 SCC 513 and Ahmadi, C.J., speaking for the Court, held as under (para 19 of the reports) :-

> "19. That takes us to the question whether the scope of Section 389 (1) of the Code extends to conferring power on the Appellate Court to stay the operation of the order of conviction. As stated earlier, if the order of conviction is to result in some disqualification of the type mentioned in Section 267 of the Companies Act, we see no reason why we should give a narrow meaning to Section 389(1) of the Code to debar the court from granting an order to that effect in a fit case. The appeal under Section 374 is essentially against the order of conviction because the order of sentence is merely consequential thereto; albeit even the order of sentence can be independently challenged if it is harsh and disproportionate to the established guilt. Therefore, when an appeal is preferred under Section 374 of the Code the appeal is against both the conviction and sentence and, therefore, we see no reason to place a narrow

> interpretation on Section 389(1) of the Code not to extend it to an order of conviction, although that issue in the instant case recedes to the background because High Courts can exercise inherent jurisdiction under Section 482of the Code if the power was not to be found in Section 389(1) of the Code. We are, therefore, of the opinion that the Division Bench of the High Court of Bombay was not right in holding that the Delhi High Court could not have exercised jurisdiction under Section 482 of the Code if it was confronted with a situation of there being no other provision in the Code for staying the operation of the order of conviction. In a fit case if the High Court feels satisfied that the order of conviction needs to be suspended or stayed so that the convicted person does not suffer from a certain disqualification provided for in any other statute, it may exercise the power because otherwise the damage done cannot be undone; the disqualification incurred by Section 267 of the Companies Act and given effect to cannot be undone at a subsequent date if the conviction is set aside by the Appellate Court. But while granting a stay or suspension of the order of conviction the Court must examine the pros and cons and if it feels satisfied that a case is made out for grant of such an order, it may do so and in so doing it may, if it considers it appropriate, impose such conditions as are considered appropriate to protect the interest of the shareholders and the business of the company."

5. The aforesaid view has recently been reiterated and followed by another Three Judge Bench in Ravi Kant S. Patil v. Sarvabhouma S. Bagali JT 2006 (1) SC 578. After referring to the decisions on the issue, viz., State of Tamil Nadu v. A. Jaganathan (1996) 5 SCC

329, K.C. Sareen v. C.B.I., Chandigarh (2001) 6 SCC 584, B.R. Kapur v. State of T.N. &Anr. (2001) 7 SCC 231 and State of Maharashtra v. Gajanan &Anr. (2003) 12 SCC 432, this Court concluded (para 12.5 of the report) :

> "16.5. All these decisions, while recognizing the power to stay conviction, have cautioned and clarified that such power should be exercised only in exceptional circumstances where failure to stay the conviction, would lead to injustice and irreversible consequences."

The Court also observed :-

> "11. It deserves to be clarified that an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. An order of stay, of course, does not render the conviction non- existent, but only non-operative."

6. The legal position is, therefore, clear that an appellate Court can suspend or grant stay of order of conviction. But the person seeking stay of conviction should specifically draw the attention of the appellate Court to the consequences that may arise if the conviction is not stayed. Unless the attention of the Court is drawn to the specific consequences that would follow on account of the conviction, the person convicted cannot obtain an order of stay of conviction. Further, grant of stay of conviction can be resorted to in rare cases depending upon the special facts of the case."

58. In view of the above, there is no doubt that this Court does have the power to stay the conviction. However, such power is to be

exercised in exceptional circumstances and in cases where this Court is convinced that not staying the conviction would lead to injustice and irreversible consequences. In ***K.C. Sareen v. CBI, Chandigarh: (2001) 6 SCC 584***, the Supreme Court had also explained that the Court while considering the question whether to stay the conviction pending hearing of the appeal, must also consider the wider ramifications of the same.

59. This Court is of the view that the appellant has a *prima facie* case. However, this Court is not persuaded to accept that his conviction is liable to be stayed on this ground alone. The appellant has been convicted of an offence after trial. One of the consequences of the conviction is that the appellant is not qualified to run for public office. While it is contended that this would lead to injustice and irreversible consequences, the Court must also consider wider ramifications of the same.

60. In recent times, there has been an increasing demand that steps be taken for decriminalization of politics. A large number of persons with criminal antecedents or who are charged with heinous crimes stand for and are elected to Legislative Assemblies and the Parliament. This has been a matter of some concern. In ***Public Interest Foundation and Ors. v. Union of India and Ors.: (2019) 3 SCC 224***, the Supreme Court had observed as under:

> "2. The constitutional functionaries, who have taken the pledge to uphold the constitutional principles, are charged with the responsibility to ensure that the

> existing political framework does not get tainted with the evil of corruption. However, despite this heavy mandate prescribed by our Constitution, our Indian democracy, which is the world's largest democracy, has seen a steady increase in the level of criminalization that has been creeping into the Indian polity. This unsettlingly increasing trend of criminalization of politics, to which our country has been a witness, tends to disrupt the constitutional ethos and strikes at the very root of our democratic form of government by making our citizenry suffer at the hands of those who are nothing but a liability to our country."

61. The Court considered the plea of the petitioner in that case to disqualify persons who were charged with heinous offences to contest elections to public offices. The Law Commission, in its 244th Report, had also recommended that a person against whom the charges have been framed be disqualified from standing for elections.

62. The Supreme Court in ***Public Interest Foundation v. Union of India*** (*supra*), had extensively referred to the recommendations of the Law Commission and, after noting various decisions, had observed as under:

> "118. We have issued the aforesaid directions with immense anguish, for the Election Commission cannot deny a candidate to contest on the symbol of a party. A time has come that the Parliament must make law to ensure that persons facing serious criminal cases do not enter into the political stream. It is one thing to take cover under the presumption of innocence of the accused but it is equally imperative that persons who enter public life and participate in law making should be above any kind of serious criminal allegation. It is true

> that false cases are foisted on prospective candidates, but the same can be addressed by the Parliament through appropriate legislation. The nation eagerly waits for such legislation, for the society has a legitimate expectation to be governed by proper constitutional governance. The voters cry for systematic sustenance of constitutionalism. The country feels agonized when money and muscle power become the supreme power. Substantial efforts have to be undertaken to cleanse the polluted stream of politics by prohibiting people with criminal antecedents so that they do not even conceive of the idea of entering into politics. They should be kept at bay."

63. Clearly, if the wider opinion is that persons charged with crimes ought to be disqualified from contesting elections to public offices, it would not be apposite for this Court to stay the appellant's conviction to overcome the disqualification incurred by him.

64. It would not be apposite to facilitate the appellant to contest elections for any public office, till he is finally acquitted.

65. In view of the above, the applications filed are dismissed.

VIBHU BAKHRU, J

MAY 22, 2020
RK/pkv