REPORTABLE

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

\+ **CRIMINAL REVISION PETITION NOS. 192 & 466 OF 2008**

Reserved on : 22nd September, 2010.
% **Date of Decision**: 22nd December , 2010.

N.L. MANCHANDA .... Petitioner in CRP No.192.
ASHOK SHETTY .... Petitioner in CRP No.466.
Through Mr. Jugal Wadhwa, advocate.

VERSUS

CENTRAL BUREAU OF INVESTIGATION .....Respondent
Through Mr.Vikas Pahwa, Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? YES
3. Whether the judgment should be reported in the Digest ? YES

SANJIV KHANNA, J.:

These two criminal revision petitions have been filed by Mr. N. L. Manchanda and Mr. Ashok Shetty for setting aside Order dated 13th November, 2007 directing framing of charges against the petitioners under Section 120-B of the Indian Penal Code, 1860 (hereinafter referred to as IPC, for short) r/w Section 5(1)(d) and 5(2) of the Prevention of Corruption Act, 1947 (hereinafter referred to as P.C. Act, for short). Substantive charge has also been directed to be framed against the petitioner-Mr. N. L. Manchanda under Section 5(1)(d) r/w 5(2) of the P.C. Act.

2. The petitions raise three contentions. Petitioners have questioned the impugned Order on the point of charge, on merits. Secondly, sanction under Section 6 of the Act has been challenged on the ground that it has not been issued by the competent authority and lastly, sanction under Section 188 of Code of Criminal Procedure, 1973 (hereinafter referred to as

the Code, for short) has been challenged on the ground that it has not been issued by the competent authority as per Government of India (Allocation of Business) Rules, 1961 (hereinafter referred to as the Rules, for short). The first and the third contentions have been seriously argued by the parties.

3. It was submitted on behalf of the petitioners that as per the Rules, sanction should have been obtained from the Ministry of Home Affairs or from the Ministry of Personnel and Training but the sanction under Section 188 of the Code has been obtained from the Ministry of Water Resources. Reference in this regard was made to the following decisions : ***Mahesh Prasad versus State of Uttar Pradesh***, 1954 SCR 965; ***R. J. Ahluwalia versus State of Delhi***, (1970) 3 SCC 451; ***State of Rajasthan versus A. K. Datta (Dr)***, (1980) 4 SCC 459 and ***Gopikant Choudhary versus State of Bihar***, (2000) 9 SCC 53.

4. I am not required to deal with this contention as raised in detail as I am of the opinion that sanction under Section 188 of the Code is not required in the present case. Section 188 of the Code reads:-

> "**Sec.188 – When an offence is committed outside India-**
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> a) by a citizen of India, whether on the high seas or elsewhere; or
> b) by a person, not being such citizen, on any ship or aircraft registered in India,
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> he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found :
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> *Provided* that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government."

5. Section 188, by a legal fiction, stipulates that offences committed by citizens of India on high seas or elsewhere i.e. anywhere, even outside

India, or by any person including a foreign national on any ship or aircraft registered in India can be directed to be dealt with as if the accused had committed them at any place within India at which he may be found. The proviso to Section 188 of the Code puts an embargo that such offences will not be inquired into or tried in India except with the previous sanction of the Central Government. Normally, judicial power of a State extends to punish all offences committed by whomsoever against the municipal laws of the State within the national territory. The State has power to punish all offences committed within the State. Sections 177-186 of the Code deal with the venue or the place of inquiry or trial of crimes. As per Section 177 of the Code, proper and ordinary situs for the trial of a crime is the area of jurisdiction in which acts have occurred or are alleged to constitute the crime. However Code envisages flexibility and there are several exceptions to Section 177. Further, the code is a procedural provision to ensure a fair and just trial and also to bring offenders to justice to meet out punishment to them in accordance with prescribed procedure.

6. In the case of ***Ajay Aggarwal versus Union of India and others*** (1993) 3 SCC 609, K. Ramaswamy, J. examined Sections 3 and 4 of the Indian Penal Code, 1860 (hereinafter referred to as the IPC, for short) and observed that Section 4 postulates that IPC will apply to any offence committed by an Indian citizen outside India or by any person on any ship or aircraft registered in India, wherever it may be. Section 3, IPC prescribes for punishment of offences committed beyond territory of India but which by law may be tried within India. The provisions of Section 120A and 120B, IPC were examined with reference to offences of conspiracy. It was observed that criminal conspiracy is an independent offence which is punishable separately. Further criminal conspiracy must be put into motion and thoughts even criminal in character are not crimes till they

take concrete shape in the form of an agreement to do or cause to be done an illegal act or an act which is not illegal by illegal means. However, it is not necessary that each conspirator must know all details of the scheme and he need not be a participant at every stage. Criminal conspiracy has three elements: (1) an agreement, (2) which must be between two or more persons by whom the agreement is effected and (3) a criminal objective which may be either the ultimate aim of the agreement or may constitute the means or one of the means by which the aim is to be accomplished. It was noted that conspiracy is hatched in secrecy and in many cases it is impossible to adduce direct evidence of the same. The offence of conspiracy is normally proved from inferences drawn from acts or illegal omissions committed by the conspirators in pursuance to a common design. On the question whether conspiracy is a continuing offence, K.Ramaswamy J. has held as under :-

> "11. The question then is whether conspiracy is a continuing offence. Conspiracy to commit a crime itself is punishable as a substantive offence and every individual offence committed pursuant to the conspiracy is separate and distinct offence to which individual offenders are liable to punishment, independent of the conspiracy. Yet, in our considered view, the agreement does not come to an end with its making, but would endure till it is accomplished or abandoned or proved abortive. Being a continuing offence, if any acts or omissions which constitute an offence are done in India or outside its territory the conspirators continuing to be parties to the conspiracy and since part of the acts were done in India, they would obviate the need to obtain sanction of the Central Government. All of them need not be present in India nor continue to remain in India. ....."

7. The Hon'ble Judge thereafter referred to the judgments, in the case of ***Lennart Schussler versus Directorate of Enforcement*** (1970) 1 SCC 152, ***Abdul Kader Saleh Mohomed versus State*** AIR 1964 Bom. 133 and some English judgments on the question of conspiracy

having trans-border repercussions and examined the question of situs or cause of action with reference to the criminal offence of conspiracy. It has been observed :

> **"24.** Thus, an agreement between two or more persons to do an illegal act or legal acts by illegal means is criminal conspiracy. If the agreement is not an agreement to commit an offence, it does not amount to conspiracy unless it is followed up by an overt act done by one or more persons in furtherance of the agreement. The offence is complete as soon as there is meeting of minds and unity of purpose between the conspirators to do that illegal act or legal act by illegal means. Conspiracy itself is a substantive offence and is distinct from the offence to commit which the conspiracy is entered into. It is undoubted that the general conspiracy is distinct from number of separate offences committed while executing the offence of conspiracy. Each act constitutes separate offence punishable, independent of the conspiracy. The law had developed several or different models or technics to broach the scope of conspiracy. One such model is that of a chain, where each party performs even without knowledge of the other a role that aids succeeding parties in accomplishing the criminal objectives of the conspiracy. An illustration of a single conspiracy, its parts bound together as links in a chain, is the process of procuring and distributing narcotics or an illegal foreign drug for sale in different parts of the globe. In such a case, smugglers, middlemen and retailers are privies to a single conspiracy to smuggle and distribute narcotics. The smugglers knew that the middlemen must sell to retailers; and the retailers knew that the middlemen must buy of importers of someone or another. Thus the conspirators at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their settlers. The accused embarked upon a venture in all parts of which each was a participant and an abettor in the sense that, the success of the part with which he was immediately concerned, was dependent upon the success of the whole. It should also be considered as a spoke in the hub. There is a rim to bind all the spokes together in a single conspiracy. It is not material that a rim is found only when there is proof that each spoke was aware of one another's existence but that all promoted in furtherance of some single illegal objective. The traditional concept of single agreement can also accommodate the situation where a well-defined group conspires to commit multiple crimes; so long as all these crimes are the objects of the same agreement

or continuous conspiratorial relationship, and the conspiracy continues to subsist though it was entered in the first instance. Take for instance that three persons hatched a conspiracy in country *A* to kill *D* in country *B* with explosive substance. As far as conspiracy is concerned, it is complete in country *A*. One of them pursuant thereto carried the explosive substance and hands it over to third one in the country *B* who implants at a place where *D* frequents and got exploded with remote control. *D* may be killed or escape or may be diffused. The conspiracy continues till it is executed in country *B* or frustrated. Therefore, it is a continuing act and all are liable for conspiracy in country *B* though first two are liable to murder with aid of Section 120-B and the last one is liable under Section 302 or 307 IPC, as the case may be. Conspiracy may be considered to be a march under a banner and a person may join or drop out in the march without the necessity of the change in the text on the banner. In the comity of International Law, in these days, committing offences on international scale is a common feature. The offence of conspiracy would be a useful weapon and there would exist no conflict in municipal laws and the doctrine of *autrefois convict* or *acquit* would extend to such offences. The comity of nations are duty-bound to apprehend the conspirators as soon as they set their feet on the country's territorial limits and nip the offence in the bud.

25. A conspiracy thus, is a continuing offence and continues to subsist and committed wherever one of the conspirators does an act or series of acts. So long as its performance continues, it is a continuing offence till it is executed or rescinded or frustrated by choice or necessity. A crime is complete as soon as the agreement is made, but it is not a thing of the moment. It does not end with the making of the agreement. It will continue so long as there are two or more parties to it intending to carry into effect the design. Its continuance is a threat to the society against which it was aimed at and would be dealt with as soon as that jurisdiction can properly claim the power to do so. The conspiracy designed or agreed abroad will have the same effect as in India, when part of the acts, pursuant to the agreement are agreed to be finalised or done, attempted or even frustrated and vice versa.

26. In *K. Satwant Singh* v. *State of Punjab* a Constitution Bench of this Court was to consider as to when Section 188 of the Code would be applicable to a case. The facts therein was that the appellant had cheated the Government of Burma whose office was at

Simla punishable under Section 420 IPC. The accused contended that the part of the act was done at Kohlapur where payment was to be made and on that basis the court at Simla had no jurisdiction to try the offence without prior sanction of the political agent. Considering that question this Court held that if the offence of cheating was committed outside British India, the sanction would be necessary but on facts it was held that:

> "... It seems to us, on the facts established in this case, that no part of the offence of cheating was committed by the appellant outside British India. His false representation to the Government of Burma that money was due to him was at a place in British India which induced that Government to order payment of his claims. In fact, he was paid at Lahore at his own request by means of cheques on the Branch of the Imperial Bank of India at Lahore. The delivery of the property of the Government of Burma, namely, the money, was made at Lahore, a place in British India, and we cannot regard, in the circumstances of the present case, the posting of the cheques at Kohlapur either as delivery of property to the appellant at Kohlapur or payment of his claims at Kohlapur. The entire argument founded on the provisions of Section 188 of the Code, therefore, fails."

Far from helping the appellant the ratio establishes that if an offence was committed in India the need to obtain sanction under Section 188 is obviated. In *Purushottamdas Dalmia* v. *State of W.B.* this Court, when the appellant was charged with offences punishable under Sections 120-B, 466 and 477, the appellant contended that offence of conspiracy was entered into at Calcutta, the offences of using the forged documents was committed at Madras. Therefore, the court at Calcutta had no jurisdiction to try the offence under Section 471 read with Section 466 IPC, even though committed in pursuance of the conspiracy and in course of the same transaction. This Court held that the desirability of trying the offences of all the overt acts committed in pursuance of a conspiracy together is obvious and Sections 177 and 239 of the Code leave no manner of doubt that the court which has the jurisdiction to try the offence of criminal conspiracy has also the jurisdiction to try all the overt acts committed in pursuance of it even though outside its territorial jurisdiction. In *L.N. Mukherjee* v. *State of Madras* it

was further held that the court having jurisdiction to try the offences committed in pursuance of the conspiracy, has also the jurisdiction to try the offence of criminal conspiracy, even though it was committed outside its territorial jurisdiction. This view was further reiterated in *R.K. Dalmia* v. *Delhi Administration* and *Banwari Lal Jhunjhunwala* v. *Union of India*. Therein it was held that the court trying an accused for offence of conspiracy is competent to try him for offences committed in pursuance of that conspiracy irrespective of the fact whether or not overt acts have been committed within its territorial jurisdiction. The charges framed therein under Section 409 read with Sections 120-B, 420 IPC and Section 5(1)(D) read with Section 5(2) of the Prevention of Corruption Act were upheld.

27. Thus we hold that sanction under Section 188 is not a condition precedent to take cognizance of the offence. If need be it could be obtained before trial begins. Conspiracy was initially hatched at Chandigarh and though itself is a completed offence, being continuing offence, even accepting appellant's case that he was at Dubai and part of conspiracy and overt acts in furtherance thereof had taken place at Dubai and partly at Chandigarh; and in consequence thereof other offences had ensued, since the offences have been committed during the continuing course of transaction culminating in cheating PNB at Chandigarh, the need to obtain sanction for various offences under proviso to Section 188 is obviated. Therefore, there is no need to obtain sanction from Central Government. The case may be different if the offences were committed outside India and are completed in themselves without conspiracy. Perhaps that question may be different for which we express no opinion on the facts of this case. The ratio in *Fakhrulla Khan* has no application to the facts in this case. Therein the accused were charged for offences under Sections 420, 419, 467 and 468 and the offences were committed in native State, Mysore. As a result the courts in British India i.e. Madras province had no jurisdiction to try the offence without prior sanction. Equally in *Verghese case* the offences charged under Section 409 IPC had also taken place outside British India. Therefore, it was held that the sanction under Section 188 was necessary. The ratio in *Kailash Sharma case* is not good at law. The appeal is accordingly dismissed."

8. R.M. Sahai, J. (as his lordship then was) in his concurring judgment has held that the language of Section 188 of the Code is plain and simple and it operates when an offence is committed by a citizen of India outside the country. It does not apply when an offence is committed in India. The object behind the proviso to Section 188 of the Code is to provide safeguards to an Indian citizen against unwanted harassment when it is alleged that he has committed an offence outside India. The proviso which requires sanction begins with a non-obstante clause and is mandatory but would come into play only when the principal clause is applicable i.e. when an offence is committed outside the country. It was noticed that the appellant therein had raised two contentions viz. he was in Dubai when the offence was committed and the Bill of Lading and Exchange were prepared and were submitted to the concerned bank in Dubai and payments were also received at Dubai. However, the contention of the appellant therein was rejected after observing that any offence or any act for the purpose of IPC normally means an act or omission made punishable by any law for the time being in force. None of the offences for which the appellant therein was charged had, 'residence' as one of the ingredients. Thus, residence of the accused was not decisive but what was decisive was the situs or the place of the commission of the offence. It was accordingly observed as under:-

> "**31.** What has to be examined at this stage is if the claim of the appellant that the offence under Section 120-B read with Section 420 and Section 471 of the IPC were committed outside the country. An offence is defined in the CrPC to mean an act or omission made punishable by any law for the time being in force. None of the offences for which the appellant has been charged has residence as one of its ingredients. The jurisdiction to inquire or try vests under Section 177 in the court in whose local jurisdiction the offence is committed. It is thus the commission of offence and not the residence of the accused which is decisive of jurisdiction. When two or more persons agree to do or

cause to be done an illegal act or an act which is not illegal by illegal means such agreement is designated a criminal conspiracy under Section 120-A of the IPC. The ingredients of the offence are agreement and not the residence. Meeting of minds of more than two persons is the primary requirement. Even if it is assumed that the appellant was at Dubai and he entered into an agreement with his counterpart sitting in India to do an illegal act in India the offence of conspiracy came into being when agreement was reached between the two. The two minds met when talks, oral or in writing, took place in India. Therefore, the offence of conspiracy cannot be said to have been committed outside the country. In *Mobarik Ali Ahmed* v. *State of Bombay* this Court while dealing with the question of jurisdiction of the courts to try an offence of cheating committed by a foreign national held that the offence of cheating took place only when representation was made by the accused sitting in Karachi to the complainant sitting in Bombay. The argument founded on corporeal presence was rejected and it was observed:

> "What is, therefore, to be seen is whether there is any reason to think that a foreigner not corporeally present at the time of the commission of the offence does not fall within the range of persons punishable therefor under the Code. It appears to us that the answer must be in the negative unless there is any recognised legal principle on which such exclusion can be founded or the language of the Code compels such a construction."

If a foreign national is amenable to jurisdiction under Section 179 of the CrPC an NRI cannot claim that the offence shall be deemed to have been committed outside the country merely because he was not physically present.

32. Preparation of bill of lading at Dubai or payment at Dubai were not isolated acts. They were part of chain activities between the appellant and his associates with whom he entered into agreement to cheat the bank at Chandigarh. Any isolated act or omission committed at Dubai was insufficient to constitute an offence. The illegal act of dishonestly inducing the bank at Chandigarh was committed not by preparation of bill at Dubai but its presentation in pursuance of agreement to cheat. The submission thus founded was on residence or on preparation of bills of lading or encashment at Dubai are of no consequence.

> **33.** Nor is there any merit in the submission that even part of the offence would attract Section 188 as the section operates when offence is committed outside India. An offence is committed when all the ingredients are satisfied. The section having used the word offence it cannot be understood as part of the offence. Section 179 CrPC empowers a court to try an offence either at a place where the offence is committed or the consequences ensue. On the allegations in the complaint the act or omissions were committed in India. In any case the consequence of conspiracy, cheating and forgery having taken place at Chandigarh the offence was not committed outside the country therefore the provisions of Section 188 CrPC were not attracted."

9. The allegations made in the charge sheet show that the offence of conspiracy as alleged was committed in India. The allegations on the basis of which charges have been directed to be framed are that contrary to clause 73 of the contract, Mr. Ashok Shetty, Managing Director of M/s. Mahalingam Shetty & Company, and Mr. Mool Chand Jain, Director of M/s. Road Construction Co. Pvt. Ltd. had moved a representation for waiver of hire charges on dumpers which were payable for executing the work at Iraq. The allegation is that Mr. N.L. Manchanda (then Dy. General Manager) and other public servants, their co-conspirators entered into a criminal conspiracy for undue personal advantage, by abusing their position as public servants by granting unauthorized illegal monetary concessions. No doubt the contractual work was undertaken in Iraq and the dumpers were provided at Iraq, but the acts and allegations in relation to the alleged conspiracy or the offence under the PC Act have occurred or taken place in India. Situs of work is one aspect, but situs of work is not the allegation constituting the acts amounting to the offence of conspiracy or the offence under the PC Act. The acts of conspiracy or the offence under the PC Act as per the prosecution have "situs" in India. These allegations are noticed in next two paragraphs.

10. On 29th June, 1982, an agreement was executed between National Project Construction Corporation (hereinafter referred to as NPCC, for short) and two companies for execution of "Drainage Canal Earth Work under Bill no.6, Irrigation Canal Earth Work under Bill no.7, Road Construction Work under Bill no. 14 at Iraq. This work was stipulated to be completed within 22 months commencing on 15th July, 1982. Clause 73 of the contract dealt with supply of machinery and equipments and provided that four dumpers were to be supplied to the two contractors by NPCC free of cost on transfer from Nahar Saad Project. Four dumpers, as stipulated, were supplied by NPCC between 10th August, 1982 and 5th October, 1982. Two of these dumpers were found to be non-operational and were replaced by new dumpers. As per clause 73 of the contract, hire charges were payable by the two constructor to NPCC for any extra/additional equipment provided by NPCC to the contractors. In October 1982 on a visit to Iraq by some of the public servants/accused, they decided that any extra equipment if provided, to these contractors by NPCC, hire charges would be recovered. This proposal was approved.

11. In November, 1983, a representation was made by the contractors to Mr. S. K. Relan, Director (Finance) who is also an accused, that in actual practice extra lead was involved and it necessitated additional dumpers for the work. This representation was moved personally by Mr. Ashok Shetty and Mr. Mool Chand Jain to Mr. S. K. Relan, Director (Finance) at New Delhi. Mr. S. K. Relan again decided that charges for the two extra/additional dumpers would be recovered from the contractors if they were paid extra lead. Pursuant to this decision, accused- Mr. B. B. Gupta had sent a letter dated 2nd December, 1983 to Mr. P.Y. Koche, then Chief Projects Manager reiterating the earlier decision taken on 9th October, 1982 regarding recovery of hire charges for the additional dumpers. The

allegation in the charge sheet that this letter was deliberately kept unattended till 30th November, 1985. In April, 1984 Mr. D.K. Sharma (accused who has expired), took over the charge as Chief Project Manager upon transfer of his predecessor. The allegation is that accused- Mr. S.K. Relan, Mr. D. K. Sharma, (deceased) and Mr. B. B. Gupta and Mr. N.L. Manchanda in connivance with Mr. Ashok Shetty and Mr. Mool Chand Jain in order to cause pecuniary advantage to the said contractors reversed the original decision without approval of the then Chairman cum Managing Director on the subject. The aforesaid exercise is the subject matter of charge sheet. These file notings were made in New Delhi and letters were written to NPCC and by the officers/accused in New Delhi. Therefore, the entire "situs" of the offence is in India. Contract or execution of contract in Iraq is not an offence. The acts which constitute the allegation of the offence have situs in India and not abroad. In this regard it may be relevant to refer to the prime facie findings of the learned Trial Court as recorded in the impugned Order in paras 6 to 8, which read:

> "6 It is further alleged that clause 73 of the contract dealing with supply of machineries and equipments provided that four dumpers were to be supplied to each of the sub-contractors by NPCC free of cost on transfer from Nahar Saad Project which within the Iraq Territory. Accordingly, these dumpers were supplied by the NPCC to them during the period between 10.8.1982 and 5.10.1982. Two dumpers each provided to these sub-contractors were non operational, therefore, NPCC replaced them with two new MAN Dumpers each. It was envisaged in clause 73 of the contract that any extra equipment to be provided by NPCC it was to charge the hire charges from them. During the visit of the then CMD Sh. D.R. Sikka and accused S.K. Relan, Director (Finance) to Iraq in the month of October, 1982, it was decided by the accused S.K. Relan that for any extra equipment, if provided to the sub-contractors by NPCC, hire charges would be recovered. This proposal of accused SK Relan was approved by the then CMD D.R. Sikka.

> 7 It is further I investigation that in November, 1983 the contractors represented to the Director (Finance) Accused S.K. Relan that machinery listed at time of agreement was for the works with normal lead since in actual practice extra lead was involved and therefore, additional dumpers were needed. These additional dumpers therefore, were to be treated as included in the agreement list and its effect was to be given in the payments. Accused Ashok Shetty and Moolchand Jain moved this representation personally to accused S.K. Relan that the hire charges on dumpers would be recovered from the two associates if they were paid extra lead. Pursuant to this decision accused B.B. Gupta addressed a letter dated 2.12.1983 to Sh. P.Y. Koche, the then Chief Projects Manager and reiterated the earlier decision of Accused SK Relan dated 9.10.1982 with regard to the recovery of hire charges. The aforesaid letter remained unattended till 30.11.1985. The accused no. 2 D K Sharma (since deceased) had taken over the charge as Chief Project Manager following the transfer to his predecessor in April, 1984. Accused persons namely S.K. Relan, D.K. Sharma (since deceased), B. B. Gupta, N. L. Manchanda in connivance with accused Ashok Shetty and Mool Chand Jain in order to cause pecuniary advantage to the aforesaid two associates reversed the original decision without the approval of the then C.M.D. on this subject.
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> 8 It is further revealed in the investigation that accused DK Sharma in his letter No.109119/conf./2072 dated 30.11.1985 addressed to the Director (Finance) mentioned inter-alia that even if lead payment is made to the sub contractors, the hire charges on dumpers should not be recovered from them. This letter was processed by accused BB Gupta and NL Manchanda in their joint note dated 30.1.1986. These officers also agreed with the recommendation of accused DK Sharma (since deceased). This recommendation was finally approved by accused S.K. Relan and the same was communicated by accused BB Gupta to accused DK Sharma vide letter No. 7109403/ RCC dated 12.2.1986. These accused persons thus caused the benefit of Rs. 40 lacs to M/s MCO and M/s RCC by not charging the legal and agreed hire charges from them for extra Dumpers supplied."

12. The aforesaid acts which form the core basis of the alleged offences have taken place in New Delhi, India and in these circumstances in view of the ratio of the Supreme Court decision in the case of ***Ajay Aggarwal***

(supra), I do not think Section 188 of the Code is applicable and there is no need or requirement of sanction under the proviso in respect of the said charges. The third contention of the petitioners therefore fails and has no merit.

13. The contention raised by Mr. N. L. Manchanda with regard to the sanction under Section 6 of the P.C. Act is that the sanction dated 25th March, 1994 has been granted by the Chairman-cum-Managing Director of NPCC but Mr. N.L. Manchanda and other officials accused were appointed either by approval of the Cabinet Committee of appointment of the Government of India or by the Board of Directors of NPCC. Accordingly, Special Judge should not have taken cognizance on the basis of an invalid sanction granted under Section 6 of the P.C. Act by Chairman-cum-Managing Director of NPCC.

14. In the present case Section 6(1)(c) of the P.C. Act is applicable and not Section 6(1)(a) or (b) of the Act. The said Section reads:-

> "**6. Previous sanction necessary for prosecution**.—[(1)] No Court shall take cognizance of an offence punishable under Section 161 [or Section 164] or Section 165 of the Indian Penal Code or under sub-section (2) [or sub-section (3-A)] of Section 5 of this Act, alleged to have been committed by a public servant except with the previous sanction,—
> (*a*) in the case of a person who is employed in connection with the affairs of the [Union] and is not removable from his office save by or with the sanction of the Central Government, [of the] Central Government;
> (*b*) in the case of a person who is employed in connection with the affairs of the [a State] and is not removable from his office save by or with the sanction of the State Government, [of the] State Government;
> (*c*) in the case of any other person, of the authority competent to remove him from his office.
> [(2) Where for any reason whatsoever any doubt arises whether the previous sanction as required under sub-sanction (1) should be given by the Central or State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time

when the offence was alleged to have been committed.]

15. The manner in which the petitioner Mr. N. L. Manchanda was appointed is not relevant for section 6(1)(c) of the P.C. Act. For the purpose of said Section we have to see whether the sanctioning authority is competent to remove the petitioner Mr. N.L. Manchanda from the office or not.

16. Clause 83 of the Articles of Association of NPCC elucidates the powers of the directors. Sub-clause 5 thereof states that the directors have the power to create all posts below the board level irrespective of the pay and to appoint, and at in their discretion, remove or suspend such employees from time to time. Under Article 84, the President can appoint one of the directors as Managing Director (the term 'Managing Director' as per Article 81(4) also means Chairman and Managing Director) and the Managing Director is authorized to exercise such powers, which may be delegated to him and are not required to be done by the Board of Directors of the company at their general meeting under the Act. In the sanction dated 25th March, 1994, it has been stated by Mr. S.R. Sahasrabudhe, Chairman-cum-Managing Director that he has the authority to remove Mr. N.L. Manchanda from office. In ***R.S. Nayak Vs. A.R. Antulay*** (1984) 2 SCC 183 it has been held that the authority, which is entitled to remove public servant against whom sanction is sought, is the competent authority to grant sanction. This is because the competent authority alone would know the nature and functions discharged by the public servant holding the office.

17. In ***K. Veeraswami Vs. Union of India and Ors***, (1991) 3 SCC 665 it has been held that it is not necessary that the authority competent to give sanction for prosecution or the authority competent to remove the

public servant should be vertically superior in the hierarchy in which the office of the public servant exists. There is no such requirement in Section 6 of the P.C. Act (in the present case we are not concerned with Article 311 of the Constitution). Accordingly, it was observed as under:-

> "112. There are several fallacies in this argument. Section 6(1)(*c*) speaks of "authority competent to remove" which plainly indicates the substantive competence of the authority to remove, not merely the procedural or formal part of it. In other words, the authority itself should be competent to remove or the one to decide the question of removal and not one which merely obeys or implements the decision of some other authority. This conclusion is reinforced by the above extract from the *Antulay decision*, which speaks of the vertical hierarchy between the authority competent to remove the public servant and the nature of the office held by the public servant indicating that the removing authority should have the competence to take a decision on the material placed before it for the purpose of deciding whether the public servant against whom sanction is sought, has been *prima facie* guilty of abuse of his office so that there is occasion to bring about cessation of interrelation between the office and abuse by the holder of the office by his removal therefrom. Obviously, the competent sanctioning authority envisaged thereby is a vertical superior in the hierarchy having some power of superintendence over the functioning of the public servant. Where no such relationship exists in the absence of any vertical hierarchy and the holder of the public office is a constitutional functionary not subject to power of superintendence of any superior, Section 6 can have no application by virtue of the scheme engrafted therein. The expression "authority competent to remove" under Section 6(1)(*c*), unless construed in this manner, will foul with the construction made of Section 6 and its scheme in the *Antulay decision*."

18. In ***Shivendra Kumar Vs. State of Maharashtra*** (2001) 9 SCC 303 , the Supreme Court has opined:-

> "**11.** On a perusal of Section 6 of the Act, it is clear that previous sanction is mandatorily required for launching prosecution against a public servant who is alleged to have committed an offence punishable under Section 161 or 164 or 165 IPC or under sub-section (2) or sub-section (3-A) of Section 5 of the Act. Indeed the language of the section is in the

> form of a prohibition against any court taking cognizance of such offences except with previous sanction. The authority/authorities to grant such sanction are specified in clauses (*a*), (*b*) and (*c*) of sub-section (1). Under clause (*a*) it is laid down that in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with sanction of the Central Government, of the Central Government. Under clause (*b*), it is provided that in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of the State Government; and under clause (*c*) in the case of any other person, of the authority competent to remove him from his office. The difference in the language used in clauses (*a*) and (*b*) on the one hand and clause (*c*) on the other, cannot be lost sight of. While in the former, the Central Government or the State Government, as the case may be, is to grant the sanction, under clause (*c*) it is specifically provided that the authority competent to remove the delinquent public servant from office is one who is competent to grant the sanction."

19. In view of the aforesaid position, the second contention raised on behalf of Mr. N. L. Manchanda fails and cannot be accepted.

20. The first contention deals with merits of the allegations against the accused. It has been vehemently argued that Clause 73 of the contract stipulated that machinery free of cost, both old and new, would be given to the contractors but the said machinery was required to be in a working condition. It is further submitted that originally the contract was only for 22 months commencing on 15th July, 1982 till 15th May, 1984 but the period/project got prolonged till 1986. The dumpers/machinery was supplied in October 1982 without any repair or overhauling, contrary to the spirit of the contract and the dumpers were not in a good working condition. Reference was made to some internal notings relating to the condition of the dumpers. It was stated that the original agreement envisaged transportation of 3.30 lac cu.mts. of earth work but the quantity of work had increased about six times more -- upto 20 lacs cu.mts.

Therefore, there was no criminal conspiracy between the contractors and the public officials of NPCC nor any pecuniary disadvantage was caused by the petitioners to NPCC. It is submitted that these aspects were ignored by the learned Trial Court while framing the charges. It is further submitted that amendment to Clause 73 of the contract did not require approval of the Chairman-cum-Managing Director.

21. Allegations in brief against the petitioners have been noted above. As noticed, in 1982 itself request made by the contractors for waiver of hire charges for extra dumpers was rejected. The allegation in the chargesheet is that inspite of the specific rejection, the two contractors in criminal conspiracy with the public servants revived the said request once again in November-December 1982 but this request was deliberately kept pending. The said request remained unattended till 30th November, 1985. By then Mr. D.K. Sharma (deceased), had taken charge as the Chief Project Manager. Letter dated 30th November, 1985 was then written to Director (Finance) and processed by accused- Mr. B. B. Gupta and Mr. N. L. Manchanda in their joint note dated 30th January, 1986. They agreed with the recommendation of Mr. D. K. Sharma (deceased) for non deduction of hire charges for the extra equipment. The recommendation was finally approved by accused- Mr. S. K. Relan and communicated by accused-Mr. B. B. Gupta to accused-Mr. D. K. Sharma, by letter dated 12th February, 1986. In this regard, learned Trial Court has in paragraphs 25 to 29 of the impugned Order has examined the allegations in depth and detail and has noted the relevant facts. The relevant facts as noted in paragraphs 25 to 29 of the impugned Order read:-

> "25. As per Clause 73 of the original agreement dated 29.6.1982 between accused No.5 & 6 and National Projects Construction Corporation Ltd., 4 Dump Trucks were to be provided to each accused Nos. 5 & 6 free of cost by NPCC from Naharsaad after

July, 1982 besides some other equipments. It is further provided in the clause that any extra amount required over and above the said machines, if required and if available with NPCC at Iraq, will be given on hire as per the rules of the Corporation (Document No.D-1). It was also earlier proposed by P.Y. Khoche, Chief Project Manager vide D-7 that as per agreement 8 Dumpers were to be provided to the associates (accused Nos. 5 & 6) and accordingly 8 Volvo Dumpers have been provided and out of 8 Dumpers, 4 Dumpers were almost new but the other 4 were old and he proposed that 4 additional Dumpers be provided and this proposal was processed on 9.10.1982 and vide note dated 9.10.1982 accused No.1 noted that :-

> 'We may go with the purchase as proposed but the associates may be asked to pay hire charges which may be mutually settled as per agreement. Really speaking, we may get a demand from them since they had worked out their requirements for doing earth work to the extent of 8000 M/3 per day.
>
> Sd/- S.K.Relan
> 9/X/82'

26. This proposal as recommended by accused No.1 was accepted by the then Chairman Cum Managing Director at the bottom of the note of accused No.1 on 10.10.1982.

27. Vide letter dated 30.11.1985 (D-4) accused No.2 D.K.Sharma (since deceased) proposed that as per original contract documents, the transportation of only 3,30,000 cubic meter of earth was envisaged and only 8 Dumpers (4 to each associate) were considered and as per revised estimate, the total transportation quantity shall be above two million cubic meter and he recommended even if lead payment is made, the hire charges may not be recovered from the associates (accused Nos. 5 & 6). This proposal of accused No.2 D.K.Sharma (since deceased) was processed by accused Nos. 3 & 4 and vide their note (D-5) dated 30.1.1986, they also recommended that even if the lead payment is made, the hire charges may not be recovered from the associates (accused Nos. 5 & 6). At the bottom of their recommendations the accused No.1 has approved the note on 31.1.1986 and accordingly vide letter dated 12.2.1986 (D-5) the accused No.3 communicated to accused No.2 D.K.Sharma (since deceased) that recommendations contained in his letter have been accepted about hire charges for Dumpers.

28. It has come in the statement of PW-6 S.K. Garg, Deputy Manager (Finance) NPCC Baroda

(Gujarat) that he joined NPCC as Assistant Manager (Finance) on 22.10.1982. He stated that as per clause 73, certain equipments were to be made available to the associates (accused Nos. 5 & 6) for execution of the free order of cost and any extra amount required over and above the machinery if available with NPCC at Iraq will be given on hire. He stated that NPCC was bound only to provide old and used equipments including the Dump Trucks and Sh. P.Y. Khoche, the then CPM of NPCC Iraq had put up a proposal dated 9.10.82 for purchase of additional new 4 Dumpers while according to financial concurrence on the proposal of purchase of Dumpers, the then Director Finance (accused No.1) concurred with the proposal with the condition that the associates (accused Nos. 5 & 6) would bear the hire charges at mutually agreed rates and this proposal and decision was a clear departure from the provisions of the contract and spirit behind it. He further stated that departure/deviation of contract agreement can be effected only with the approval of the competent authority who has powers to award the initial contract, if at all it is to be so and in this case neither pre factor nor post facto approval of the CMD or for that matter of the board has been obtained before deviating clause 73 of the agreement. He further stated that even though the original proposal was limited to purchase of only 4 new Dumpers, but 8 new Dumpers were purchased for the use of associates i.e. 4 each and the NPCC was required to provide the two associates, 8 old and used Dumpers which became surplus in Naharsahar Project and in the circumstances provisions of 4 additional new Dumpers in lieu of 4 old and used Dumpers were not justified and it was a breach of clause 73 of the agreement. He further stated that even if 4 new Dumpers were added to the fleet of machinery as a replacement of 4 old Volvo Dumpers, the hire charges amounting to US $ 2,33,660/- were recoverable from the associates as per concurrence accorded at the time of purchase by DCF and this non recovery of hire charges tantamount to extending undue financial benefits to the associates. He further stated that recommendation of accused No.2 for non recovery of hire charges goes against the decision of recovery of hire charges taken at the time of purchase of additional Dumpers and also against the spirit of clause 73 of the contract agreement. He stated that unjustified decision has been taken by Director Finance (accused No.1) who was not at all competent to deviate from original terms and conditions and caused financial loss.

29. The accused No.1 earlier himself proposed to recover hire charges from accused Nos. 5 & 6 on 9.10.1982 vide his note on the recommendation of Sh.

> P.Y. Kohoche (D-7) which was also approved by the then Chairman Cum Managing Director and hence, prima facie there was no occasion for accused No. 1 to accept and approve the recommendations of accused Nos. 3 & 4 on the basis of the proposal of accused No. 2 D.K. Sharma (since deceased). The clause 73 of the agreement is also evident that if any other machinery is required, if available with DPCC at Iraq would be given on hire as per the rules of the Corporation. The accused No. 1 was not at all competent to approve the proposals of waiving the hire charges which was only with the Chairman Cum Managing Director, who has executed the agreement with the associates i.e. accused Nos. 5 & 6."

22. On the point of charge, scrutiny of allegations and evidence relied upon by the prosecution is made to decide whether there are sufficient grounds to proceed against the accused. The object is not to decide the case on merits after evaluating the possible defense and make judgmental assessment of the prosecution evidence; but to decide whether there are sufficient grounds for the court to proceed with the trial or not. Probative value of the material is not gone into depth. Materials brought on record by the prosecution have to be accepted as true at this stage. The material is evaluated on the face value to decide whether it discloses existence of all ingredients constituting the alleged offence. At this stage even a strong suspicion founded on material which leads the court to form presumptive opinion on existence of factual ingredients constituting the offence alleged would justify the framing of charge. If the evidence which the prosecution proposes to adduce even if fully accepted, before it is challenged in cross examination or rebutted by defense evidence, does not show that the alleged offence was committed then there is no sufficient ground for proceeding with the trial and the accused is entitled to discharge. In the present case, the allegation is that of criminal conspiracy (also Section 5 of the PC Act against Mr. N. L. Manchanda) and the prosecution relies upon circumstantial evidence. Learned trial court has discussed the said aspect

in the aforesaid paragraphs. At this stage, it cannot be said that sufficient grounds do not exist for the framing of charges. The view and observations of trial court are based upon relevant material relied upon by the prosecution. It is not a fit case, which requires interference in exercise of revisionary jurisdiction.

Revision petitions are accordingly dismissed.

Observations made above are for the disposal of the present revision petitions. These observations/ findings are not binding on the trial court.

(SANJIV KHANNA)
JUDGE

DECEMBER 22, 2010.
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