IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

WEDNESDAY, THE 17TH DAY OF JANUARY 2024 / 27TH POUSHA, 1945

CRL.REV.PET NO. 691 OF 2021

VC NO.3/2012 OF VACB, KANNUR

AGAINST THE ORDER IN CMP 1101/2018 IN C.C 17/2017 OF COURT OF ENQUIRY COMMNR. & SPECIAL JUDGE, KANNUR AT THALASSERY

REVISION PETITIONER/ACCUSED NO.3:

P.P. FAROOQUE,
AGED 62 YEARS,
S/O. ABDUL KHADER, HIRA HOUSE, NEAR MANIKKAVU,
THANA,KANNUR.

BY ADVS.
M.RAMESH CHANDER (SR.)
BONNY BENNY
BEJOY JOSEPH P.J.
GOVIND G. NAIR
BALU TOM

RESPONDENT/COMPLAINANT:

DEPUTY SUPERINTENDENT OF POLICE,
VIGILANACE AND ANTI CORRUPTION BUREAU,
KANNUR 670 002

BY ADV
SRI.RAJESH A,SPL GOVERNMENT PLEADER (VIGILANCE)
SMT.REKHA,PUBLIC PROSECUTOR

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 17.01.2024, ALONG WITH CRL.REV.PET.65/2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

WEDNESDAY, THE 17TH DAY OF JANUARY 2024 / 27TH POUSHA, 1945

CRL.REV.PET NO. 65 OF 2022

CRIME NO.3/2012 OF VACB, KANNUR

AGAINST THE ORDER IN CMP 394/2019 IN CC 17/2017 OF COURT OF ENQUIRY COMMNR. & SPECIAL JUDGE, KANNUR AT THALASSERY

REVISION PETITIONER/PETITIONER/ACCUSED NO.1:

CAPT.HARIDAS G.NAIR,
AGED 65 YEARS,
S/O.VELAYUDHAN NAIR, SREEHARI HOUSE,
ISLAND AVENUE, POONKUNNAM, THRISSUR - 680 002.

BY ADVS.
SRINATH GIRISH
P.JERIL BABU

RESPONDENT/RESPONDENT/STATE:

THE STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA - 682 031.

BY ADV
SRI.RAJESH A,SPL GOVERNMENT PLEADER (VIGILANCE)
SMT.REKHA,PUBLIC PROSECUTOR

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 17.01.2024, ALONG WITH CRL.REV.PET.691/2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

'C.R'

K.BABU, J.

Criminal.R.P Nos.691 of 2021 & 65 of 2022

Dated this the 17th day of January, 2024

O R D E R

The petitioners, the accused in C.C No.17/2017 on the file of the Court of the Enquiry Commissioner and Special Judge, Thalassery, challenge the dismissal of their application seeking discharge under Section 239 Cr.P.C. The petitioner in Crl.R.P No.65/2022 is accused No.1. The petitioner in Crl.R.P No.691/2021 is accused No.3. They face charges under Sections 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 and Section 120-B of the Indian Penal Code.

2. The prosecution case is that the petitioners and the other accused hatched a criminal conspiracy in the matter of granting the permit for the disposal of dredged materials from Azheekkal Port, Kannur, by adopting different criteria for different dredgers in fixing the quantity of the dredged materials and thereby caused pecuniary loss to the tune of Rs.3,20,000/- to the public exchequer.

3. The Vigilance and Anti-Corruption Bureau, Kannur Unit,

investigated the allegations and submitted the final report against the petitioners and others before the Trial Court. The Court took cognizance of the offences. The petitioners and the other accused appeared on summons. They filed applications as CMP Nos.1101/2018, 393/2019 and 394/2019 seeking discharge under Section 239 Cr.P.C. The learned Trial Judge dismissed the applications holding that no ground was found to discharge the accused.

4. Heard the learned counsel for the revision petitioners and the learned Special Government Pleader (Vigilance).

Submissions

Petitioner in Crl.R.P No.65/2022

5. The investigation of the offences, the final report and the subsequent proceedings are invalid in the eye of the law as a major part of the investigation was conducted by a Police Officer, who is not empowered to investigate the offences under Section 17 of the Prevention of Corruption Act, 1988.

5.1. The allegation that a dummy meeting was convened with the intent to award a contract in favour of accused No.3 is baseless, as the meeting convened was official in character.

5.2. The petitioner served as the Port Officer only for 14 months.

Petitioner in Crl.R.P No.691/2021

6. No material shows that the alleged act amounted to loss to the public exchequer.

6.1. As no guidelines have been published by the Government as provided in Section 68 of the Indian Ports Act, 1908, the assessment of loss has no foundation.

Competence of the Investigating Officer

7. The major part of the investigation was done by the Inspector of Police, VACB, Kannur. Sri.Srinath Girish, the learned counsel for the petitioner in Crl.R.P No.65/2022, submitted that the Inspector of Police is incompetent to conduct the investigation. The learned counsel submitted that as per Section 17 of the Prevention of Corruption Act, the Deputy Superintendent of Police or a Police Officer of equivalent rank shall investigate any offence punishable under the Prevention of Corruption Act. The learned counsel relied on **State (Inspector of Police) v. Surya Sankaram Karri [(2006) 7 SCC 172]** to substantiate his contentions.

8. Sri. A.Rajesh, the learned Special Government Pleader

submitted that as per proviso to Section 17 of the Prevention of Corruption Act, the State Government may authorise an officer not below the rank of an Inspector of Police to conduct investigation into the offences alleged and such authorisation was effected by the Government as per Notification No.12094/C1/88/Vig dated 02.03.1993.

9. Section 17 of the Prevention of Corruption Act, 1988 reads thus:

> **"Section 17 - Persons authorised to investigate.-** Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no police officer below the rank,-
>
> (a) in the case of the Delhi Special Police Establishment, of an Inspector of Police;
>
> (b) in the metropolitan areas of Bombay, Calcutta, Madras and Ahmedabad and in any other metropolitan area notified as such under sub-section (1) of section 8 of the Code of Criminal Procedure, 1973 (2 of 1974), of an Assistant Commissioner of Police;
>
> (c) elsewhere, of a Deputy Superintendent of Police or a police officer of equivalent rank, shall investigate any offence punishable under this Act without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefore without a warrant:
>
> Provided that if a police officer not below the rank of an Inspector of Police is authorised by the State Government in this behalf by general or special order, he may also investigate any such offence without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make arrest therefore without a warrant:
>
> Provided further that an offence referred to in clause (b) of sub-section (1) of section 13 shall not be investigated without the order of a police officer not below the rank of a

Superintendent of Police."

10. Section 17(c) mandates that the Deputy Superintendent of Police or a Police Officer of equivalent rank shall investigate any offence punishable under the Act without the order of a jurisdictional Magistrate. The first proviso to Section 17 says that the State Government may authorise a Police Officer not below the rank of an Inspector of Police to investigate any offences under the Act. The second proviso says that an offence referred to in clause (b) of sub-section (1) of Section 13 shall not be investigated without the order of a Police Officer not below the rank of a Superintendent of Police.

11. The learned Special Government Pleader produced Notification No.12094/C1/88/Vig, dated 02.03.1993, which reads thus:

> "S.R.O No.790/93:- In exercise of the powers conferred by the first proviso to section 17 of the Prevention of Corruption Act, 1988 (Central Act 49 of 1988), the Government of Kerala hereby authorise police officers not below the rank of an Inspector of Police to investigate any offence punishable under the said Act without the order of a Magistrate of the First Class, or to make arrest therefor without a warrant, within the area of jurisdiction of the particular police station to which the police officer is attached for purposes of investigation, provided that an offence referred to in clause (e) of sub-section (1) of section 13 of the above said Act shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police."

12. The vires of the notification was challenged before this

Court in **Sankarankutty v. State of Kerala (2000 KHC 311)**. A Division Bench of this Court in **Sankarankutty** held that in view of the notification mentioned above, the investigation conducted by the Inspector of Police referred to above is with proper authority and jurisdiction. The Court held that the first proviso to Section 17 is not in any way abridging or nullifying the operative portion of Section 17, and it is only in the lawful exercise of the powers conferred under the first proviso that the State Government has issued the statutory notification empowering the Police Officers not below the rank of Inspector of Police for conducting the investigation. Therefore, the challenge of the incompetence of the investigation done by the Inspector of Police in the present case falls to the ground.

13. Moreover, a defect or irregularity in investigation, however serious, would have no direct bearing on the competence or procedure relating to cognizance or trial unless a miscarriage of justice has been caused thereby {**Ashok Tshering Bhutia v. State of Sikkim, [(2011) 4 SCC 402]** and **Vinodkumar v. State [(2020) 2 SCC 88]**}.

14. The prosecution allegations are discernible from

paragraph Nos.4 and 5 of the statement submitted by the Investigating Officer, which are extracted below:

> "4. File No.485/2003 was seized from the office of the Senior Port Conservator, Azhikkal which was opened in connection with the removal of sand at Azhikkal Port by dredging manually. On 10.03.2003 Port officer, Kozhikkode (A1) sent letter granting permission for manual dredging of sand from Azheekkal port. Then till 30.06.2004, Senior Port Consrvator (A2) granted permit to 42 individuals for manual dredging of sand. On 28.07.2004 Director of Port, Thiruvananthapuram through fax message gave direction to Port Officer, Kozhikkode (A1) to cease all dredging licenses issued by the Senior Port Conservator (A2). On 07.08.2004, Senior Port Conservator convened a meeting to discuss the matter of sand mining. This meeting was presided by the Port Officer (A1). In this meeting Sri.N.Kunhikrishnan, Addl.Sub Inspector Valapattanam, Sri.Panneri Sredharan and Sri.Uthaman (representatives of Azhikkode MLA), Sri.T.K.Balan, Sri.P.P.Farooq, Sri.P.P.M.Ashraf (officer bearers of Port Development Committee), Senior Port Conservator (A2), Sri.Ajinesh Madankara (Wharf Supervisor) were attended. In this meeting it was decided to issue permit to dredge 100 ton of sand per month to individual licensees and also decided to restore the 42 ceased licenses and to entrust Victory Maritime Agency to dredge at wharf area. Victory Maritime Agency submitted application only on 09.08.2004. Two licenses were issued to Victory Maritime agency and permitted to dredge using 4 boats. On 09.06.2005, P.P.Farooq (A3) requested A2 not to grant permission to other licensees to dredge at Ship Channel.
>
> 5. It is submitted that notwithstanding the strict order of the Director of Ports not to issue new license for manual dredging, a new firm named "Victory Maritime Agency" owned by the petitioner (later arrayed as accused No.3) was issued two new licences for dredging. No dredging area was earmarked for any of the 42 licenses for dredging of sand. However, wharf area was earmarked exclusively for the firm owned by the petitioner. Many of the dredgers had applied for permission for dredging at wharf area. The version of A1 Port Officer, that no one other than the petitioner was ready to dredge at wharf area is baseless. Rather, the petitioner (A3)

had given letter to A1 Port Officer requesting that no permission shall be granted to other. As per the license issued to the petitioner, he had to dredge from wharf area only. But he was found to be engaged in dredging at Kappakkadav which was more than 1 Km away from wharf area. As per norms one can dredge 100 ton of sand per month using one boat, one boat for one license, where as petitioner was permitted to use for boats of 5 tone and to dredge 400 ton, but he paid fee for 200 ton only. In 2007, in pursuance of the decision of not to allow dredging beyond permitted quantity of sand, Port Director suspended all licenses for dredging except Petitioner's and Building Materials Marketing Co-operative Society Ltd, Kannur. These two firms were allowed to dredge at vessel channel in the wharf. Petitioner was permitted to dredge 100 ton sand per one boat per month and levied fees for it. But the other firm mentioned above got permission to dredge 100 ton sand, following same criteria, had to pay fee for 225 to 250 ton sands per month. It clearly shows the conspiracy between the petitioner and A1 Port Officer."

15. The learned Trial Judge, after considering the rival submissions based on the materials placed before the Court, rejected the prayer for discharge. The relevant portion of the order impugned is extracted below:

"16. The FIR in this case originated from an enquiry conducted by the VACB Unit, as directed by the Director of VACB, Thiruvananthapuram, in connection with the irregularities, discrimination and abuse of power in issuing permit of sand mining from the said Port. In the investigation it is found that on 07.08.2004 a dummy meeting was convened by A1 inviting A3 who is running 'Victory Maritime Agency' formed along with A4. In that meeting dredging permit was granted to that agency for dredging 200 ton of sand using 4 boats per month. At the same time permit was granted to others only for 100 ton using one boat per month. A3 and A4 dredged monthly 225 to 250 ton per boat and obtained pecuniary advantage of Rs.4,55,000/- by the corrupt or illegal means adopted by A1 and A2. So as per the charge sheet the crux of the matter is that the meeting held of 07.08.2004 was a dummy meeting, permit was granted to A3

and A4 exceeding the quantity allotted to others and A3 and A4 dredged excess quantity of sand from the port. In the charge sheet 36 witnesses were cited and 31 documents were produced. The learned counsel for defence side as well as prosecution side admitted that CW4 is the witness who spelled out the details with respect to the alleged assessment of pecuniary gain obtained by A3 and A4.

17. CW4 was the wharf Supervisor of Azheekkal Port during the relevant period of this case. His duty was to check the vessels reached at the port and releasing of them after examining bills. Since there were only few vessel movement at the port he was engaged in other office work. He has further stated that in the year 2002 a proposal was opened in his office as file No.485/2003 to remove sand and Silt from the Valapattanam river in order to facilitate ship movement to the port. He himself kept the accounts and details of the removed silt from port as directed by Senior Port Conservator who is the head of his office. He began to record the details of removed sand and silt from the port from 01.08.2003. For the development of the port it was decided to remove silt from the ship channel and to grant permission to remove sand and silt from the port area and the Port Officer, Kozhikode issued a letter dated 10.03.2003 for that purpose. No scientific method was adopted for the assessment of quantity of sand removed from the port and also he has no knowledge that such scientific method was there for that purpose. On 28.07.2004 Director of Port, Thiruvananthapuram stopped the sand removal from the port.

18. Scrutiny of the records shows that the statements given by CW4 and CW13 are the basis for the calculation of loss caused to the Government. In his statement CW4 says that from August 2005 to October 2006 (45 months) the firm of A3 and A4 remitted fee for dredged sand @ 200 ton per month. But A3 and A4 had to remit cash for 400 ton sand per month, since permission was granted to them for 4 country boats. Thus this witness has stated that they have to remit fee @ Rs.30/-x 400 ton x 15 months and thus they are liable to pay Rs.1,80,000/-. But they have remitted only half of the amount ie; @ 200 ton x 15 month x Rs.30/- = Rs.90,000/-. From 2006 November to 2007 January A3 and A4 remitted tonnage of the sand for 400 ton. So there was no loss during that period. He has further stated that from January 2007 to May 2008 permission was granted to Kannur Building Material (Marketing) Co-op Society @ 225/250 ton sand for a country boat per month. At the same time permission was continued to the firm of A3 and A4 @ 400 ton 4 country boats

per month. The firm of A3 and A4 paid only Rs.1,92,000/- instead of actual payment of Rs.4,32,000/-. So Rs.2,40,000/- was the loss caused to the government. From 2008 June to 2008 October tonnage fee was Rs.50/-, but the firm of A3 and A4 paid only Rs.1,00,000/- instead of Rs.2,25,000/- and thus the loss of Rs.1,25,000/- caused to the Government. Thus CW4 has stated that total loss caused to the government by the act of the accused is Rs.4,55,000/- (Rs.90,000/- +Rs.2,40,000/-+Rs.1,25,000/-).

19. CW1 was the Senior Port Conservator of the Port from December 2008 to December 2009 and from 17.10.2011 till the date of recording his statement by the Investigating Officer. The power for manual dredging from the port and in the year 2002 a proposal sent to the department for removing sand and silt from the port. He has stated that from the year 2004 mechanical and manual dredging done in the port in order to increase the vessel channel depth. He has specifically stated that the Senior Port Conservator has the power and authority for granting dredging permit but for that, there was no specific procedure or guidelines till the month of March 2010. The procedure and guidelines for manual dredging were introduced in March 2010. Issuing and cancellation of license for manual dredging were under the control of Port Officer and the department permitted manual dredging for Vessel Channel Turning Circle. Port Officer Kozhikode issued an Order on 10.03.2003 for manual dredging for the port area. The basis of that Order is the proposal prepared by the Shipping Department sent in the year 2002 to remove sand and silt from the Azheekkal Port in order to create shipping channel. Department of Port has the power to remove sand and silt from the Port and shipping channel. Earlier the removal of silt and dredging was done by giving payment to the contractors. Later permit was granted to the private individuals for dredging fixing Rs.20/- per ton sand and subsequently permit was granted only for the Societies.

20. Another important fact emerged from the statement of CW1 is that the Department of Port has the authority to issue permit for dredging port area and the Port Officer has the power to issue permit for manual dredging. Therefore his statement prima facie shows that A1 and A2 are directly responsible for the activities of port, including the dredging of sand. The assessment of illegal pecuniary gain of Rs.4,55,000/- obtained by A3 and A4 alleged in the charge sheet is supported by the statement of CW4 and CW13. Their statements are supported by the files produced along with the charge sheet, especially Ext A to F note files produced by

> the prosecution. Both CW4 and 13 calculated the illegal gain of A3 and A4 based on the permit granted to them. With respect to the fixation of price of the dredged sand, CW1 says that there was no prescribed procedure or guidelines for manual dredging till 2010 March. So the question arises is that how and why the rate of sand fixed by A1 and A2. Therefore the records and statements of CW1, 4 and 13 prima facie shows that with out adopting any standard for fixing the price of the sand, A1 and A2 given permission to A3 and A4 to dredge and taken away that valuable natural resource from the port area, that also giving monopoly to them to dredge the wharf area. Therefore prima facie case of doubtful circumstance leading to the criminal conspiracy exists against all accused persons as alleged in the final report. The absence of specific guidelines for fixing the rate of sand removed from the port and for issuing permission for manual dredging is not a ground to do the alleged high handed action by A1 and A2. More over CW13 has clearly stated that there is no material to show the formation of Port Development Committee and approval given to such committee by any authority of government. So the witness stated that the attendance and involvement of private party, A3 and A4, in at official meeting of the Port is impermissible. He has further stated that the vessel agents, A3 and A4 with selfish motive behaved as the office bearers of a bogus committee and influenced the office of the port in order to achieve profit and obtained permit for sand dredging from the wharf area of the port. So all the above materials, facts and circumstance necessitate full fledged trial of the case against all accused."

16. Sections 239 and 240 of the Code of Criminal Procedure deal with discharge and framing of charge.

17. The obligation to discharge the accused under Section 239 Cr.P.C. arises when "the Magistrate considers the charge against the accused to be groundless."

18. The primary consideration at the stage of framing charge is the test of the existence of a *prima facie* case. The probative

value of materials on record is not to be gone into at this stage.

19. The Apex Court in **Onkar Nath Mishra and others v. State (NCT of Delhi) and another [(2008) 2 SCC 561]** while considering the nature of evaluation to be made by the Court at the stage of framing of charge held thus:-

> "11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the Accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the Accused in respect of the commission of that offence."

20. In **State of Maharashtra v. Som Nath Thapa [(1996) 4 SCC 659]**, while dealing with the question of framing charge or discharge the Apex Court held thus:

> "32...if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the Accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the Accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the

> materials brought on record by the prosecution has to be accepted as true at that stage."

21. In **State of M.P. v. Mohanlal Soni [(2000) 6 SCC 338]** the Apex Court held thus:-

> "7. The crystallised judicial view is that at the stage of framing charge, the court has to prima facie consider whether there is sufficient ground for proceeding against the Accused. The court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the Accused."

22. In **Sheoraj Singh Ahlawat and others v. State of Uttar Pradesh and another [(2013) 11 SCC 476]**, the Apex Court observed that while framing charges the Court is required to evaluate the materials and documents on record to decide whether the facts emerging therefrom taken at their face value would disclose existence of ingredients constituting the alleged offence. It was further held that the Court cannot speculate into the truthfulness or falsity of the allegations, contradictions and inconsistencies in the statement of witnesses at the stage of discharge.

23. Section 239 envisages a careful and objective consideration of the question whether the charge against the Accused is groundless or whether there is ground for presuming that he has committed an offence. What Section 239 prescribes is

not, therefore, an empty or routine formality. It is a valuable provision to the advantage of the Accused, and its breach is not permissible under the law. But if the Judge, upon considering the record, including the examination, if any, and the hearing, is of the opinion that there is "ground for presuming" that the Accused has committed the offence triable under the chapter, he is required by Section 240 to frame in writing a charge against the Accused. The order for the framing of the charge is also not an empty or routine formality. It is of a far-reaching nature, and it amounts to a decision that the Accused is not entitled to discharge Under Section 239, that there is, on the other hand, ground for presuming that he has committed an offence triable under Chapter XIX and that he should be called upon to plead guilty to it and be convicted and sentenced on that plea, or face the trial {See: V.C. **Shukla v. State through CBI (AIR 1980 SC 962)**}.

24. In **Superintendent and Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja [(AIR 1980 SC 52)]** the Apex Court stated thus:

> "At this stage, even a very strong suspicion founded upon materials before the Magistrate, which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged, may

justify the framing of charge against the accused in respect of the commission of that offence."

25. In **State by Karnataka Lokayukta, Police Station, Bengaluru v. M.R.Hiremath [(2019) 7 SCC 515]** the Apex Court held thus:

> "25. The High Court ought to have been cognizant of the fact that the trial court was dealing with an application for discharge under the provisions of Section 239 Cr.P.C. The parameters which govern the exercise of this jurisdiction have found expression in several decisions of this Court. It is a settled principle of law that at the stage of considering an application for discharge the court must proceed on the assumption that the material which has been brought on the record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on its face value, disclose the existence of the ingredients necessary to constitute the offence. In State of T.N. v. N. Suresh Rajan (2014) 11 SCC 709), adverting to the earlier decisions on the subject, this Court held: (SCC pp. 721-22, para 29)
>
> > *29. ... At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the Accused has been made out. To put it differently, if the court thinks that the Accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the Accused has committed the law does not permit a mini trial at this stage."*

26. In **State through Deputy Superintendent of Police v. R. Soundirarasu and Ors. (AIR 2022 SC 4218)** the Apex Court while

dealing with the scope of Section 239 Cr.P.C. held thus:

> "61. Section 239 of the Code of Criminal Procedure lays down that if the Magistrate considers the charge against the Accused to be groundless, he shall discharge the Accused. The word 'groundless', in our opinion, means that there must be no ground for presuming that the Accused has committed the offence. The word 'groundless' used in Section 239 of the Code of Criminal Procedure means that the materials placed before the Court do not make out or are not sufficient to make out a prima facie case against the Accused. .....
>
> 73. This would not be the stage for weighing the pros and cons of all the implications of the materials, nor for sifting the materials placed by the prosecution- the exercise at this stage is to be confined to considering the police report and the documents to decide whether the allegations against the Accused can be said to be "groundless".
>
> 74. The word "ground" according to the Black's Law Dictionary connotes foundation or basis, and in the context of prosecution in a criminal case, it would be held to mean the basis for charging the Accused or foundation for the admissibility of evidence. Seen in the context, the word "groundless" would connote no basis or foundation in evidence. The test which may, therefore, be applied for determining whether the charge should be considered groundless is that where the materials are such that even if unrebutted, would make out no case whatsoever."

27. Therefore, the obligation to discharge the accused under Section 239 Cr.P.C. arises when the Magistrate/Special Judge considers the charge against the accused to be groundless that is, there is no legal evidence or when the facts are such that no offence is made out at all and no detailed evaluation of the materials or meticulous consideration of the possible defences need be undertaken at this stage nor any exercise of weighing

materials in golden scales is to be undertaken.

28. I shall consider the rival submissions in the light of the principles discussed above. The prosecution alleges that a dummy meeting was convened on 07.08.2004 by accused No.1 inviting accused Nos.3 and 4. The dredging permit was granted to many licensees. The firm named 'Victory Maritime Agency' owned by accused Nos.3 and 4, was granted permission to dredge 200 tons of sand using 4 boats per month. Other licensees were given permits to dredge 100 tons of sand using one boat per month. The investigation revealed that accused Nos.3 and 4 dredged 225 to 250 tons per boat in a month and obtained pecuniary advantage to the tune of Rs.4,55,000/-. This was facilitated by the corrupt and illegal means adopted by accused Nos.1 and 2. The Investigating Agency examined 36 witnesses and produced 31 documents. A Wharf Supervisor of Azheekkal Port during the relevant period is a crucial witness. He had the responsibility to check the vessels. He himself kept the accounts and details of the removed silt from the port as directed by the Senior Port Conservator, who is the head of the office. He recorded the details of the removed sand and silt. On 28.07.2004, the Director of Ports, Thiruvananthapuram stopped the

removal of sand from the port. CW4 stated that till 30.06.2004, 42 licences were issued for manual dredging of sand. The Port Director issued directions to stop dredging from 28.07.2004. The responsibility was entrusted to accused No.2, the Senior Port Conservator, by accused No.1, the Port Officer, Kozhikode. Accused No.2 wrote a letter to accused No.1 stating the necessity of dredging, and the people approached her for dredging from the wharf area. Then, accused No.2 convened a meeting presided over by accused No.1 on 07.08.2004. Accused Nos.3 and 4 (P.P.Farooque and P.P.M.Ashraf) attended the meeting. In the meeting, it was decided to continue the permission for manual dredging by 42 licensees and Victory Maritime Agency owned by accused Nos.3 and 4. CW4 specifically stated that the Victory Maritime Agency had not submitted any application for manual dredging up to 07.08.2004, and they submitted the application only on 09.08.2004. All others were given permits to dredge 100 tons of sand using one boat, while the Victory Maritime Agency was given a permit to dredge 200 tons of sand using four boats. CW4 deposed that the officials noticed excessive dredging of sand by the firm run by accused Nos.3 and 4 violating the permission. CW4 brought this matter to

accused No.2. No action was taken by accused No.2. CW4 would further state that permission to dredge was limited to the wharf area, whereas he noticed Victory Maritime Agency dredging at Kappakadavu, away from the wharf area. Till August 2005, individual licensees were permitted to dredge 100 tons of sand using two boats. The Victory Maritime Agency was permitted to dredge 200 tons of sand using four boats.

29. The details of the loss sustained by the Government and the unlawful gain earned by the Victory Maritime Agency are explained by the Investigating Agency as follows:

> "7. From August 2005 to October 2006 (15 months) Victory had to pay fees for 400 ton per month (400 ton x 15 months x30/-=1,80,000/-). But they paid for 200 ton (200 ton x 15 months x30/-=90,000/- Loss sustained was 9,000/- From February 2007 to May 2008, instead of remitting 4,32,000/- they remitted only 1,92,000/- and loss sustained was 2,40,000/- From June 2008 to October 2008 instead of remitting 2,25,000/- Victory remitted 10,000/- only and the loss sustained was 125000 Hence From 2005 to 2008 total amount lost to the exchequer was 4,55,000/- and this amount was the pecuniary benefit to Victory."

30. The Investigating Agency submitted that the investigation reveals misconduct and conspiracy of accused Nos.1 and 2 in collusion with accused Nos.3 and 4. The Investigating Agency further concluded as follows:

> "8. It is submitted that the investigation revealed

> the misconduct and conspiracy of A1, and huge loss occurred to the State. Sand fee for per ton was 30/- and permit for per boat for one month was 100 ton sand. Here the petitioner, in collusion with A1 and A2, deceived others in the pretext that he was using 4 small boats of 50 ton, using two licenses, actually used 4 big boats to dredge 400 ton sand per month and paid fee only for 200 ton during the year 2005 to 2006. During the period 2007 to 2008 two firms only were permitted to dredge sand and the number of boats and quantity of sand were same. But the fee for per ton of sand was hiked from 30/- to 50/-. The petitioner was supposed to dredge 200 ton of sand per month using two licenses only by using two boats. But he used four big boats and dredged 400 ton sand per month. He paid fee only for 200 ton. As such petitioner, in collusion with A1 Port Officer and A2 Senior Port Conservator, inflicted loss to the exchequer to the tune of 4,55,000/-....."

31. The learned counsel for the revision petitioner in Crl.R.P No.691/2021, relying on Section 68 of the Indian Ports Act, 1908 submitted that in the absence of any specific guidelines for fixing the rate of sand removed from the port and for issuing permissions for manual dredging, the assessment of loss allegedly fixed by the Investigating Agency has no foundation. The learned counsel relied on **State of Kerala and Others v. M/s Meka Dredging Co. Pvt Ltd. and Others (2018 KHC 416)** to buttress his arguments. As per Section 68 of the Indian Ports Act, every declaration, order and rule of a Government made in pursuance of this Act shall be published in the Official Gazette, and a copy thereof shall be kept in the office of the conservator and at the custom-house, if any, of every port to

which the declaration, order or rule relates, and shall there be open at all reasonable times to the inspection of any person without payment of any fee.

32. It is submitted by the learned counsel for the revision petitioners that as the guidelines for fixing the criteria of dredging and the rates to be charged have not been published as provided in Section 68 of the Act, the assessment of loss by the Investigating Agency with the aid of the evidence given by the officials concerned cannot be used to attribute a criminal liability against the petitioners. In **State of Kerala and Others v. M/s Meka Dredging Co.Pvt Ltd. and Others** (supra), the Division Bench of this Court held that the berthing charges of vessels, so long as they remained unpublished, it fell foul of Section 68 and could not have taken effect. The fixation of rate for dredging, berthing etc, without publication as provided in Section 68 of the Indian Ports Act will necessarily have civil consequences. The question before this Court in the present prosecution is that, as part of a conspiracy, third parties were permitted to dredge over and above the quantity allotted to them by the competent authorities. Admittedly, accused Nos.3 and 4 were permitted to dredge monthly 225-250 tons per

boat.

33. It has come out in evidence that they dredged an excess quantity of sand from the port with the connivance of accused Nos.1 and 2, which would *prima facie* disclose the offences alleged. The challenge on the prosecution based on the mandate of Section 68 of the Act, therefore, will not stand. This Court is of the view that there are factual ingredients constituting the offences alleged, and there is nothing to show that the charges levelled against the petitioners are groundless.

34. Sri.Srinath Girish, the learned counsel for the revision petitioner in Crl.R.P No.65/2022, submitted that the prosecution could not produce any material to connect accused No.1 with the alleged conspiracy.

35. The circumstances of the transactions involved point to the involvement of accused No.1 in the alleged conspiracy. The knowledge of the accused regarding the alleged transactions and the inaction on his part may be sufficient to infer his involvement in the conspiracy. The Supreme Court in **Rajiv Kumar v. State of U.P. [(2017) 8 SCC 791]** held thus:

> "44. The essential ingredients of the offence of

> criminal conspiracy are: (i) an agreement between two or more persons; (ii) the agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. It is, therefore, plain that meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is sine qua non of criminal conspiracy. It is extremely difficult to adduce direct evidence to prove conspiracy. Existence of conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. In some cases, indulgence in the illegal act or legal act by illegal means may be inferred from the knowledge itself."

36. In the present case, the prosecution could produce the materials to show that accused No.1 had knowledge regarding the alleged transactions, and his inaction led to unlawful gain by accused Nos.3 and 4 and loss to the Government.

37. Unless the order passed by the Magistrate is perverse or the view taken by the court is wholly unreasonable, or there is nonconsideration of any relevant material, or there is palpable misreading of records, the Revisional Court is not justified in setting aside the order, merely because another view is possible. The Revisional Court is not meant to act as an appellate court. The whole purpose of the revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal jurisprudence. The revisional power of the court under Sections 397 to 401 Cr.P.C is not to be equated with that of an

appeal. Unless the finding of the court, whose decision is sought to be revised, is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously, the courts may not interfere with decision in exercise of their revisional jurisdiction. {Vide: **Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke [(2015) 3 SCC 123], Munna Devi v. State of Rajasthan & Anr [(2001) 9 SCC 631)]** and **Asian Resurfacing of Road Agency Pvt. Ltd. v. Central Bureau of Investigation [(2018) 16 SCC 299)]**}.

38. In **Asian Resurfacing of Road Agency Pvt. Ltd. v. Central Bureau of Investigation [(2018) 16 SCC 299)]** the Apex Court held that interference in the order framing charges or refusing to discharge is called for in the rarest of rare cases only to correct a patent error of jurisdiction.

39. The finding of the Court below that it could come to the conclusion that the commission of the offences alleged against the petitioners is a probable consequence and requires no interference in revisional jurisdiction.

40. This Court is of the view that the order impugned is not affected by any patent error of jurisdiction.

41. All the challenges in these revision petitions, therefore, fail. This Court fails to find that the impugned order is untenable in law or grossly erroneous or unreasonable.

The Criminal Revision Petitions stand dismissed.

Sd/-
K.BABU,
JUDGE

KAS

APPENDIX OF CRL.REV.PET 65/2022

PETITIONER ANNEXURES

Annexure A1	CERTIFIED COPY OF FIR NO.3/2012 DATED 3/3/2012 BEFORE THE ENQUIRY COMMISSIONER AND SPECIAL JUDGE, THALASSERY, REGISTERED BY THE DY.SP,VACB, KANNUR UNIT.
Annexure A2	CERTIFIED COPY OF THE FINAL REPORT IN C.C.17/2017 BEFORE THE ENQUIRY COMMISSIONER AND SPECIAL JUDGE, THALASSERY.
Annexure A3	TRUE COPY OF THE PETITION C.M.P.NO.394/2019 DATED 14/2/2019 SUBMITTED BY THE PETITIONER BEFORE THE ENQUIRY COMMISSIONER AND SPECIAL JUDGE, THALASSERY.
Annexure A4	CERTIFIED COPY OF THE STATEMENT DATED 26/7/2019 SUBMITTED BY THE DEPUTY SUPERINTENDENT OF POLICE, VACB, KANNUR UNIT.
Annexure A5	CERTIFIED COPY OF THE ORDER DATED 8/11/2021 IN CMP 1101/2018, CMP 393/2019 AND CMP 394/2019 IN C.C.17/2017 ON THE FILE OF THE ENQUIRY COMMISSIONER AND SPECIAL JUDGE, THALASSERY.