

"C.R"

P.UBAID, J.

~~~~~  
**Crl.R.P.No.206 of 2014**  
~~~~~

Dated this the 23rd August, 2017

ORDER

M/s.SNC Lavalin is a Canadian Consultant Company having long standing association and transactions with the Kerala State Electricity Board (K.S.E.B). In the political and social circles in Kerala, "Lavalin" is a controversial figure, and Lavalin is now the subject matter of political discussions and political fights in Kerala. Some contracts between M/s. SNC Lavalin (Lavalin) and the K.S.E.B gave rise to the present case, started long back. "Lavalin" had undertaken some projects under the K.S.E.B on earlier occasions, like the Kuttiyadi project, Idukki project etc. There were no complaints or allegations regarding those projects undertaken and carried out by Lavalin. In 1995, the K.S.E.B took a decision for the renovation and modernisation of three Hydro Electrical Projects at a time when there was severe shortage of electricity in Kerala. Those are the "Pallivasal, Sengulam and Panniyar projects" (PSP Projects). After effective negotiations

between the officials and office bearers of the K.S.E.B and the senior Vice President of the S.N.C. Lavalin, the parties came to terms preparatory to the making of enforceable contracts, and accordingly, as a first step, a Memorandum of Understanding (MOU) was signed on 10.8.1995. After further discussions, regarding the terms of the contract and the nature of the modernisation and renovation works required for the three projects, the K.S.E.B and Lavalin executed three separate contracts on 24.2.1996 with respect to the three Hydro Electrical Projects. For the smooth functioning of the works relating to the projects, the parties decided to have three different contracts. In the making of the three contracts, the K.S.E.B was represented by the Electrical Member, and the SNC Lavalin was represented by its senior Vice President. The works were undertaken by the SNC Lavalin for a total consideration of ₹ 243.49 cores. The works proceeded in terms of the contracts, but finally, the K.S.E.B had to meet a total expenses of ₹389 crores. Such excess payment happened to be made, consequent to the replacement of the three

Consultancy Contracts by three supply contracts dated 10.2.1997. At that juncture also, no allegation came from any quarter, and the KS.E.B cleared the payments also. Doubts and complaints regarding the projects and the excess payments made by the KS.E.B came when the Principal Accountant General of Audit (Kerala) found out and reported some serious irregularities and anomalies in the project. The Principal Accountant General (PAG) found out, that there was very serious violation of the prescribed and accepted procedure in the matter of awarding contracts, that the K.S.E.B decided to modernise and renovate the three projects without conducting any feasible study, that the various equipments replaced as part of modernisation later developed defects, and that in spite of such renovation and modernisation, the K.S.E.B could not make any achievement in the generation of electric energy. The PAG also found out that excess payments were made to the Lavalin Company unauthorisedly, and thus, the K.S.E.B had to incur a loss of crores of rupees. The PAG even reported that the whole renovation process turned out to be a waste.

2. The report of the PAG triggered off a controversy, which led to an enquiry by the Vigilance and Anti-Corruption Bureau (VACB). On enquiry, the VACB found some substance in the report of the PAG as regards the suspicious circumstances, and elements of misconduct in the making of the contracts. The VACB also detected the dishonest and vicious involvement of some officials and officers of the K.S.E.B including the then Chairman in the making of the contracts. Accordingly, a crime was registered on 27.9.2006, as Crime No.1/2006 of the Eastern Range of the VACB, Kottayam. Investigation proceeded to unearth the dishonest involvement, and the elements of corruption in the making of the contracts. While such investigation was going on, some writ petitions came before this Court, seeking investigation by the Central Bureau of Investigation (C.B.I). After hearing all concerned, and on an examination of the various aspects of the issues involved, this Court ordered investigation by the C.B.I (Writ Petition Nos.29124/2006, 32298/2006 and 33393/2006). The C.B.I accordingly took over investigation, and re-registered the Crime as

RCMA1/2007(A) under Sections 120B, 409, 420, 465, 468 and 471 I.P.C, and under Section 13 (1) (c) and (d) read with Section 13 (2) of the Prevention of Corruption Act, 1988 ("the P.C Act" for short).

3. Before going to the further details of the crime, and the investigation that proceeded, let me see in what circumstance the K.S.E.B decided to renovate and modernise the three Hydro Electrical Projects. The K.S.E.B thought of renovation and modernisation of the three projects, and the K.S.E.B decided to entrust the works to the SNC Lavalin, in view of the long standing association with the SNC Lavalin. Lavalin had undertaken some works and projects of the K.S.E.B formerly, and had successfully carried out the works entrusted. It was in such a circumstance, the Lavalin Company was chosen by the K.S.E.B for the renovation and modernisation works also. Whether there was any vicious or dishonest element of corruption or misconduct in the making of the contracts in question, will be examined later. The K.S.E. B would justify the projects on the ground that the three Hydro Electrical Projects had surpassed their normal

life period by 1995. The Pallivasal project was commissioned in 1940, the Sengulam project was commissioned in 1951, and the Panniyar project was commissioned in 1964. There was acute shortage of electricity in Kerala in 1995, when the K.S.E.B thought of renovating and modernising the three projects with the object of increasing the efficiency and generation capacity of the three projects. The K.S.E.B also assessed that the generating system and the allied machineries had become technologically outdated, resulting in frequent shortage in production due to frequent mechanism failure. The rationale of the decision taken by the K.S.E.B for modernising and renovating its projects cannot be subjected to judicial scrutiny. That is the internal affair of the K.S.E.B. The court's concern must be whether there was anything vicious, or whether there was any element of corruption or misconduct in the making of the contracts and the follow-up actions for the renovation and modernisation of the projects, or whether any public servant within the K.S.E.B, or attached to the K.S.E.B otherwise by virtue of his official status, had in any manner

misused or abused his position, due to which he or somebody else derived any unlawful benefit or gain. In a prosecution brought under Section 13 (1) (d) of the P.C. Act, the court's concern must be only whether any public servant had abused his official position, or had acted illegally, with the object of obtaining or causing any unlawful gain or benefit to himself or somebody else, or with the knowledge that somebody outside the K.S.E.B would be unlawfully benefited by the said deal. The various allegations made by the prosecuting agency as regards the making of the contracts will be discussed later. Finding the absolute necessity of modernisation and renovation of the projects, the K.S.E.B went ahead, and accordingly the K.S.E.B entered into three consultancy contracts with SNC Lavalin on 24.2.1996.

4. As part of the transaction between K.S.E.B and Lavalin, a Memorandum of Understanding (MOU) was first signed on 10.8.1995. The MOU was later replaced by three consultancy contracts dated 24.2.1996. The three consultancy contracts were later replaced by three supply

contracts dated 10.2.1997. The supply contracts provided for the purchase of machineries from Canada with financial assistance from the Export Development Corporation (EDC), Canada. Though the total amount agreed for the three projects was ₹243.49 crores, the KSEB had to spend an amount of ₹389 crores. This difference was examined by the PAG. It was suspected that the SNC Lavalin was illegally benefited by the contracts, and in such a circumstance, complaints came that the Chairman and the other office bearers of the K.S.E.B including the Chief Engineer, who promoted the contracts, had done something dishonestly, and by such dishonest acts amounting to corruption and misconduct, the SNC Lavalin got undue monetary benefits.

5. The crime was originally registered by the VACB against the following persons:

First Accused - Sri.K.Mohanachandran, the former Principal Secretary to the Government, Electricity Department, who later became Chairman of the KSEB.

Second Accused - Sri.K.G Rajasekharan Nair, the former Accounts (Member) of the KSEB, and also the

Financial Advisor and Chief Accounts Officer

Third Accused - Sri.M.M Mathew Roy, the former Member (Electrical) of the KSEB

Fourth Accused - Sri.R.Sivadasan, the former Financial Commissioner and Ex-officio Secretary of the Government of India, who later became Chairman of the KSEB

Fifth Accused - Sri.Kasthuri Ranga Iyer, the former Chief Engineer (Generation) of the KSEB

Sixth Accused- Sri.R.Gopalakrishnan, the former Member (Electrical) of the KSEB.

Seventh Accused - Sri.P.A Sidhartha Menon, the former Chairman of the KSEB

Eighth Accused- Sri.Klaus Triendl, Senior Vice President of the SNC Lavalin

6. The case in the FIR is, that the accused named in the FIR and late Sri.Rajagopalan, the former Chairman of the KSEB entered into a criminal conspiracy with SNC Lavalin, and in prosecution of the object of the said criminal design for making gain to themselves and to SNC Lavalin, the accused abused their official position and awarded

renovation and modernisation contracts to SNC Lavalin at very exorbitant rates, without conducting any study regarding the nature of the works required, and the machinery requirements, and also without studying the prevalent rate at the international level, the accused also came to an understanding for some grant for setting up a cancer centre at Thalassery (by-name Malabar Cancer Centre), the said grant offered by SNC Lavalin was treated as a consideration for awarding contracts without inviting global tenders or without effective bargain regarding the rates, later the accused failed to get a legally enforceable contract executed by SNC Lavalin as regards the said grant, and thus SNC Lavalin was illegally benefited in all respects.

7. Investigation was later taken over by the CBI as directed by this court. The CBI made investigation on the various aspects concerning the transaction between the KSEB and SNC Lavalin. Some persons, who had active involvement in the making of the contracts were "absolved" by the CBI on the ground that clear evidence and materials could not be collected as against them. The CBI also found

out that the conspiracy hatched by the accused in 1995 continued till 1998, and that some other persons also joined this conspiracy by misusing their official position, either to make monetary gain for themselves, or with the object of causing monetary gain to the SNC Lavalin. Accordingly, the then Electricity Minister and also the then Joint Secretary of the Electricity Department were arraigned as accused. After omitting some persons from the array of accused, and after arraigning some others on the allegation of continued conspiracy, the CBI gave a final touch to the case, and submitted final report against the following persons.

First Accused- Sri.K.Mohanachandran, the former Power Secretary to the Government of Kerala and the former Chairman of the KSEB

Second Accused-Sri.K.G Rajasekharan Nair, the former Chief Accounts Officer of the KSEB

Third Accused - Sri.R.Sivadasan, the former Chairman of the KSEB, who was formerly the Financial Commissioner and Ex-Offico Secretary to the Govt. of India.

Fourth Accused -Sri.Kasthuri Ranga Iyer, the Chief Engineer of the KSEB at the relevant time

Fifth Accused- Sri.P.A Sidhartha Menon, the former Chairman of the KSEB

Sixth Accused- Sri.Klaus Triendl, the Senior Vice Chairman of the SNC Lavalin

Seventh Accused- Sri.Pinarayi Vijayan, former Minister of Electricity, Government of Kerala

Eighth Accused- Sri.A.Francis, The Joint Secretary, Power Department, Government of Kerala at the relevant time.

Ninth Accused- M/s.SNC Lavalin, Canada, represented by the Senior Vice Chairman Klaus Triendl

8. The CBI submitted final report in February, 2007 and cognizance was taken in 2009 as CC 9/2009. Due to the absence of one or the other of the accused, framing of charge was unnecessarily delayed. At that juncture, the accused Nos.5 and 7 approached this Court with O.P (CrI) No.1025/2013 and O.P (CrI) 1068/2013, for a direction to split up the case against the SNC Lavalin and the 6th

accused, so that the trial as against the others could proceed. After hearing both sides in detail, this court found that waiting indefinitely for the appearance of the accused Nos.6 and 9 will cause loss and hardship to the others, and accordingly this court directed the trial court to split up the case against the accused Nos.6 and 9. The trial court acted accordingly, and the case against the other accused continued as CC 44/2011.

9. In the final report, the allegations made by the CBI against the accused are as follows:

The accused Nos.1 to 5 and late Sri. M.M Mathew Roy (A3 in the F.I.R) hatched a criminal conspiracy and a criminal design with SNC Lavalin in August, 1995, for awarding a contract to the SNC Lavalin for the renovation and modernisation of three Hydro Electrical Projects of the K.S.E.B, (Pallivasal, Sengulam and Panniyar), the accused awarded such contracts to the SNC Lavalin at exorbitant rates in February, 1996, without making any study regarding the renovation and

modernisation required or regarding the prevalent rate at the international level, and they all acted with dishonest intention, with the object of causing wrongful gain to the SNC Lavalin, and also with the dishonest object of making some financial gain out of it. The said criminal conspiracy continued till April, 1998, and in 1996, the accused Nos.7 and 8 also joined the conspiracy, and as instructed and directed by the 7th accused, the consultancy contracts entered into in 1996 were converted to supply contracts at fixed rates in February, 1997 in total violation of the accepted procedure and the directions of the Government of India, the accused even agreed to avail financial assistance from EDC Canada, without obtaining permission from the Government of India, an offer made by SNC Lavalin for some grant for setting up a Cancer Centre at Thalassery by-name "Malabar Cancer Centre" (MCC), was accepted as a consideration for awarding the contracts at exorbitant rates, but later

the accused Nos. 1 and 7 failed to get a binding contract executed by SNC Lavalin, as a result of which, the SNC Lavalin could retract from the promise to provide grant, and this also caused unlawful gain to the SNC Lavalin. Thus by misusing their official position, the accused allowed the SNC Lavalin to make huge and unlawful gain out of the transaction.

10. Pending the proceedings, some of the accused made application for discharge before the trial court. The accused Nos.2 and 3 (K.G Rajasekharan Nair and R.Sivadasan) did not make application for discharge. The 1st accused K. Mohanachandran filed CMP 83/2012, the 4th accused Kasthuri Ranga Iyer filed CMP 106/2013, the 5th accused Sidhartha Menon filed CMP 24/2012, the 7th accused Pinarayi Vijayan filed CMP 102/2013, and the 8th accused Francis filed CMP 84/2012 for discharge. When the applications for discharge came up for hearing, the accused Nos.2 and 3 supported the applications, and they also pleaded for discharge, though application was not filed by

them. After hearing both sides, the learned trial Judge allowed the applications and discharged the accused Nos.1 to 5, 7 and 8 by order dated 5.11.2013, under Section 239 Cr.P.C. Aggrieved by the said order of discharge, the CBI has come up in revision before this Court.

11. The main grounds on which the CBI has brought this revision are as follows:

a. The trial court wrongly granted discharge in favour of the accused Nos.2 and 3, who have not made application for discharge;

b. The trial court wrongly and unnecessarily interpreted the scope and ambit of Section 13 (1) (d) of the Prevention of Corruption Act, and decided the said question of law at the very preliminary stage of framing charge;

c. Instead of examining the prosecution records to see whether there is a prima facie case to proceed against the accused, the learned trial Judge examined the whole evidence, and practically decided the case on merits, and thereby exceeded the limit of jurisdiction.

d. The trial court has not properly gone into the

various aspects of corruption or misconduct as against the different accused, and without probing into those aspects, the trial court mainly dealt with the allegations against the 7th accused, and gave a pre-mature termination to the whole trial process wrongly.

12. The offences alleged in the final report by the CBI are under Sections 420 I.P.C and 120B I.P.C, and also under Section 13 (1) (d) read with Section 13 (2) of the P.C Act, 1988. Before going to the legal aspects of the essentials of the offence alleged under Section 13 (1) (d) of the P.C Act, 1988, let me examine the grievance of the CBI, that instead of examining whether there is a prima facie case to proceed against all, or any of the accused, the trial court has practically decided the whole case on merits. Of course, at the stage of framing charge, the entire evidence need not be examined in detail by the trial court, and when the matter comes before the High Court in revision, the High Court is also not expected to go to the merits of the materials and evidence deeply. Every document or material relied on by the prosecution, or every circumstance projected by the

prosecution, to arraign the different persons as accused, need not be discussed in detail one by one by the trial court or the High Court, at the stage of framing charge. When the accused in a criminal case makes a plea for discharge, the trial court will have to examine the grounds on which discharge is sought by the accused, and for taking a decision, the trial court will have to examine the important materials relied on by the prosecution to substantiate the allegations in the final report. A detailed exercise by way of examining the entire materials or evidence, or examining the merits and demerits of the prosecution case is not warranted at that stage. Of course, it is true that the accused Nos.2 and 3 had not made application for discharge. However, they not only supported the others in the matter of discharge, they also pleaded for discharge on factual and legal grounds. It is nowhere prescribed that application shall be specifically filed by the accused for discharge. Even without such application, or even when discharge is not pleaded by the accused, the trial court is bound to examine the case records, or the important

materials relied on by the prosecution, to decide whether there is a case to proceed, or whether there is the necessity of framing a charge. It is well settled that even when discharge is not specifically pleaded or applied for by the accused, the trial court can discharge the accused, if the court finds no material for framing a charge. So just because no application was made by the accused Nos.2 and 3, the order passed by the trial court in their favour cannot be assailed as legally wrong. The court's concern must be whether there is any material to frame charge against them. If the court finds that there is no definite material warranting the framing of a charge against them, there is nothing wrong in giving them the benefit of discharge along with the others. So the very material question is whether there is definite material to frame charge against all the accused or against some of them.

13. As already stated, some persons, who were named as accused in the F.I.R, were deleted by the CBI, when the CBI brought final report. The CBI thought not proper to arraign them for the reason that no material could

be collected during investigation to prove their complicity. The persons so "absolved" by the CBI are Sri.G.Karithikeyan, the Power Minister at the relevant time, and Sri.R.Gopalakrishnan, the former Member of the KSEB. The CBI had detected some vicious or dishonest role of Sri.M.M. Mathew Roy, who was named as 3rd accused in the F.I.R. Pending investigation, he died. Sri.V.Rajagopalan, was the Chairman of the K.S.E.B at the time of execution of the supply contracts in February, 1997. He also died pending the investigation process. Pending the revision proceedings before this Court, the 5th accused, Sidhartha Menon also died. During investigation, the CBI found out a story of extended conspiracy, and picked and chose some accused. I will discuss later, how the accused Nos.7 and 8 happened to be arraigned as accused on a theory of extended conspiracy found out by the CBI. The whole basis of the prosecution must be the consultancy contracts executed on 24.2.1996, converted to supply contracts on 10.2.1997. The court will have to mainly examine the elements of misconduct in the making of these contracts, and the role

and complicity of the parties to these contracts. To decide whether there is scope to frame charge against one or the other accused, the court will have to examine the allegations against each accused, the circumstances surrounding the making of the contracts at the initial stage in February, 1996, the role and complicity of each person in the making of those contracts, the circumstances in which those contracts were replaced by supply contracts in February, 1997, and also the role and complicity of the persons, who executed the supply contracts. As against the others, who are not in fact parties to the contracts, what is alleged by the CBI is criminal conspiracy. The court will have to examine the reason and rationale of the allegations made by the CBI to arraign the accused Nos.7 and 8, as the persons who allegedly joined the conspiracy at a later stage. It is pertinent to note that the CBI has no case at all that the accused Nos.1,7 and 8 had any role or complicity in the making of the basic contracts in February, 1996. When the CBI alleges criminal conspiracy to add some accused who had no role and involvement in the making of the

contracts in question, the court will have to examine what exactly are the materials relied on by the CBI to rope in the additional accused, or how the CBI found out elements or conspiracy against them, or how the CBI would allege an extended conspiracy, when the accused Nos.1, 7 and 8 had no involvement in the conspiracy that first ensued in the making of the contracts. Before going to the factual aspects, or before examining the nature of the materials relied on by the prosecution against the different accused, let me see what are the legal objections raised by the parties. Much was argued by the learned Additional Solicitor General (Ad.SG) representing the CBI, about the scope of the powers of trial courts in the matter of framing charge. The learned Ad.SG submitted that the trial court in fact grossly exceeded the limits, examined the whole evidence in detail, and practically decided the case on merits finally. Of course, on a perusal of the impugned order, I find some substance in the arguments raised by the CBI. At the same time, I am not inclined to set aside the impugned order in toto. One point raised by the CBI has already been answered, that just

because the accused Nos.2 and 3 did not apply for discharge, they cannot be denied the benefit of discharge, if they are entitled for discharge in law.

14. In so many decisions, the Hon'ble Supreme Court has explained and clarified the scope of the powers, and also the nature of the powers of trial courts in the matter of framing charge. This Court is now deciding a revision brought against an order of discharge. As regards the revisional powers of this Court, things need not be discussed much. In deciding whether there is sufficient material to frame charge against the accused, even the High Court will have to confine itself to the scope of such powers, settled by the Hon'ble Supreme Court. In **Union of India v. Prafulla Kumar Samal and Another** ((1979) 3 SCC 4], the Hon'ble Supreme Court held that in the matter of framing charge, the trial court should weigh the evidence and form an opinion only on the limited question whether there are prima facie materials to frame a charge. On an examination of the earlier authorities on the point, the Hon'ble Supreme Court held in the said case, that while

considering the question of framing charge, the trial court will have the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out, that the test to determine a prima facie case would naturally depend upon the facts of each case, and it is difficult to lay down a rule of universal application, and that in exercising the jurisdiction in the matter of framing charge, the trial Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmity appearing in the case, and so on. The Hon'ble Supreme Court also cautioned that this exercise of power shall not authorise the court to make a roving enquiry into the pros and cons of the matter and weigh the evidence, as could be done during trial.

15. In **Sheoraj Singh Ahlawat and others v. State of Uttar Pradesh and Another** [(2013) 11 SCC 476], the Hon'ble Supreme Court held that in the matter of

framing charge, the trial 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 the existence of the ingredients constituting the offence alleged. The Hon'ble Supreme Court also held that the court is not required to go deep into the probative value of the materials on record. If two views are possible, and the materials indicate mere suspicion, not being grave suspicion, against the accused, then he may be discharged. The court will have to examine whether there are sufficient materials to presume that the accused might have committed the offence alleged. In **Sajjan Kumar v. Central Bureau of Investigation [(2010) 9 SCC 368]**, the Hon'ble Supreme Court held that at the stage of framing charge, or while considering the discharge application filed by the accused, the trial court shall not analyse all the materials including the pros and cons, and the reliability or acceptability thereof. Only at the end of trial, the trial Judge can appreciate the evidentiary value and the credibility or otherwise of the materials produced by the prosecution, the

veracity of the various documents, etc. This decision gives an indication as to what shall not be done by the trial court at the time of framing charge, or in deciding the request of the accused for discharge. In **State of Madhya Pradesh v. S.B. Johari and others [(2000) (2) SCC 57]**, the Hon'ble Supreme Court held that in the matter of framing charge, the trial court has only to see whether there are sufficient prima facie materials for proceeding against the accused, and the court cannot appreciate and evaluate the entire evidence for a conclusive finding as regards the allegations in the final report. In **Indu Jain v. State of Madhya Pradesh and others [(2008) 15 SCC 341]**, the Hon'ble Supreme Court explained the considerations in the matter of framing charge, and held that at the stage of framing charge, the court is not required to go into the details of the case, but only to arrive at a prima facie finding on the materials made available, as to whether a charge could be sustained as recommended in the final report. The Hon'ble Supreme Court deprecated the holding of a mini trial by the trial court at the time of framing charge and

evaluating the merits of the materials relied on by the prosecution, including the probative value and effect of the materials. What is required is only a prima facie satisfaction about the commission of the offence alleged by the prosecution. In **State of Tamil Nadu v. N.Suresh Rajan and others [(2014) 11 SCC 709]**, the Hon'ble Supreme Court held that the trial court is not expected to go deep into the materials produced by the prosecution, and hold that the materials would not warrant a conviction, and cautioned that a mini trial shall not be conducted by the trial court. The court can only examine the materials produced, and relied on by the prosecution, to see whether framing of a charge would be justifiable, or to see whether the offences alleged by the prosecution against the accused are prima facie made out by the materials.

16. Section 5 of the Prevention of Corruption Act, 1988 provides that in trying the accused persons under the P.C Act, the Special Court shall follow the procedure prescribed by the Code of Criminal Procedure, 1973 for the trial of warrant cases by the Magistrates. If so, the

procedure applicable must be the procedure prescribed under Sections 239 and 240 Cr.P.C. Section 239 Cr.P.C provides that if, upon considering the police report, and the documents sent with it under Section 173 Cr.P.C, and making such examination, if any, of the accused as the Magistrate thinks necessary, and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused. Thus, Section 239 mandates discharge of the accused, if the court finds that the charge against the accused is groundless.

17. Section 240 of the Cr.P.C provides that if the court is of opinion, upon a consideration of the police report, and the documents produced by the Police, and also after examination of the accused, if any, and hearing the parties, that there is ground for presuming that the accused has committed an offence, he shall frame in writing a charge against the accused. Thus, Section 240 Cr.P.C authorises the trial court to frame a charge against the accused, if the court makes an opinion, on an examination of all the

materials, that there is ground for presuming that the accused has committed an offence. This means that, if the court is not in a position to make such an opinion, that there is ground for a presumption that the accused has omitted an offence, the court can discharge the accused.

18. The word "presume" occurring in Section 240 Cr.P.C shall not be misconstrued. What is authorised under Section 240 Cr.P.C is not presumption of the guilt of the accused. Presumption is a rule of evidence. If the word "presuming" occurring in Section 240 Cr.P.C is interpreted to mean presumption of guilt, it would be against the principles of criminal law, and criminal justice. What I understand on a close examination of the various decisions on the point is that by using the word "presuming" in Section 240 Cr.P.C, what is meant and intended is that the materials furnished by the prosecution must be sufficient on a prima facie examination, to form a judicious opinion or to justify the making of a judicious opinion, that the accused might have committed the offence alleged against him, or that the materials prima face indicate that the accused

might have committed the offence. If, on the other hand, the court finds that such materials are not sufficient to form an opinion against the accused, on a judicious evaluation of the materials, that the accused might have committed the offence, or if the court finds otherwise on a judicious evaluation, that those materials would not make out the offence alleged by the prosecution, or that the materials produced by the prosecution would not even prima facie show the involvement or complicity of the accused in the offence alleged against him, the court can very well discharge the accused.

19. Before going to the factual aspects, as regards the making of the contracts in question forming the basis of the prosecution, and as regards the vicious elements and dishonest involvements amounting to elements of corruption or misconduct, as the CBI would allege, let me examine the scope of Section 13 (1) (d) of the P.C Act, 1988.

20. The main offence alleged by the CBI against the accused is under Section 13 (1) (d) read with 13 (2) of the P.C Act, 1988. The accused who are said to have misused or

abused their official position as the office bearers of the K.S.E.B are the accused Nos.2 to 5. As against the accused Nos.1, 7 and 8, the prosecution would allege criminal conspiracy along with the accused Nos.2 to 6 for making unlawful gain to the SNC Lavalin. Incidentally, the persecution would also allege that the accused cheated the KSEB by their acts of dishonesty and conspiracy to cause huge monetary gain to the SNC Lavalin. Prominently and practically, the allegation made by the CBI against the accused Nos. 2 to 5 is that as the office bearers of the KSEB, they abused their position as public servants, and they caused huge monetary benefit to the SNC Lavalin by illegally awarding contracts to the SNC Lavalin for the renovation and modernisation of the three Hydro Electrical Projects, in total violation of the accepted procedure, or without inviting global tenders, and at exorbitant rates, or without making study of the various requirements, or without studying whether repair of the projects would have served the purpose instead of renovation and modernisation.

21. The offence defined under Section 13(1)(d) of the P.C Act has three components. What is punishable under clause (i) of Section 13 (1) (d) is the act of a public servant in obtaining any valuable thing or pecuniary advantage for himself or any other person by some corrupt or illegal means. What is made punishable under clause (ii) of Section 13 (1) (d) is the act of a public servant in obtaining any valuable thing or pecuniary advantage for himself, or for any other person, by abusing his position as a public servant, and what is made punishable under clause (iii) of Section 13 (1) (d) of the P.C Act is the act of a public servant in obtaining any valuable thing or pecuniary advantage for any other person without any public interest, while holding office as a public servant. The difference in the application of the three clauses will have to be analysed. To bring the accused, or to make them liable for punishment, under clause (i), there must be a situation of the public servants acting illegally or by corrupt means, with the object of obtaining some monetary gain or pecuniary advantage to themselves or to some other person, whereas under clause

(ii), the public servant can be made liable in criminal law, only if he has abused his position as a public servant for obtaining some pecuniary advantage or monetary benefit to himself or to some other person. Whether it is under clause (i) or clause (ii), what is prominently and essentially required is the mens rea or mental element on the part of the public servant to obtain for himself or any other person, some valuable thing or pecuniary advantage, either by corrupt or illegal means, or by abusing his position as a public servant. In answer to the question from the court as to what exactly is the offence alleged by the CBI in this case against the accused, the learned Ad.SG submitted that the allegations would come under clause (iii). The learned Ad.SG submitted that mental element or mens rea is not required for the offence punishable under clause (iii). He submitted that if the public servant has obtained any monetary benefit or pecuniary advantage for any other person, simply by virtue of his holding the position as a public servant, he can be made liable for punishment under clause (iii), and it is quite immaterial whether the public

servant had any mens rea or guilty intention. The firm stand taken by the CBI is that the offence alleged by the CBI will come under clause (iii) on the allegation, that by the act of the accused as public servants, they caused wrongful gain to the SNC Lavalin by awarding contracts at exorbitant rates. Now let me see what exactly is the offence made punishable under clause (iii) of Section 13 (1) (d) of the P.C Act, or whether any mental element by way of mens rea or otherwise is required in the commission of the offence punishable under Section 13(1) (d) (iii) of the P.C Act.

22. One ground on which the trial court discharged all the accused, is that on the allegations in this case, a prosecution under Section 13 (1)(d) r/w Section 13(2) of the P.C Act cannot be allowed to proceed. The learned Ad.SG submitted that the court below has not properly understood the scope of clause (iii) of Section 13 (1) (d) of the P.C Act. The finding of the lower court is that when the prosecution does not allege, and when the materials also do not disclose, any dishonest intention or mens rea on the part of the accused in awarding contract to the SNC Lavalin, or in the

subsequent transactions, a prosecution is not possible under section 13 (1) (d) of the P.C Act.

Clause (d)of Section 5 (1) of the P.C Act, 1947 stood as follows:

"Section 5. Criminal Misconduct in discharge of official duty:-

(1) A public servant is said to commit the offence of criminal misconduct

(d) If he, by corrupt or illegal means, or by otherwise abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage"

23. The said provision dealing with misconduct by way of corrupt or illegal means, or by abuse of position as a public servant, was expanded to cover three different instances of misconduct under the P.C Act of 1988. Under the P.C Act of 1988, Section 13 deals with criminal misconduct by public servants. Clause (d) of Section 13 (1) of the P.C Act 1988 is as follows:

"d. If he

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

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

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

24. Thus, we see that the concept of misconduct underwent a thorough change, when the Parliament expanded its scope, and provided three different instances of misconduct under clause (d) of Section 13 (1) of the P.C Act of 1988.

25. There is no doubt at all that the instances of misconduct meant under clauses (i) and (ii) require guilty intention or mens rea. The submission made by the learned Ad.SG is that such elements of mens rea including

dishonest intention need not be there in the commission of the offence defined under clause (iii). If abuse of position or corrupt or illegal means will make him liable under clause (i) or clause (ii), the very fact that he caused some gain to any other person without any public interest by using his position as a public servant will come under clause (iii). When the elements of the offence under clause (i) or clause (ii) involve abuse of position as a public servant, or corrupt or illegal means by such abuse, such an abuse is absent in clause (iii). This means that even by using his office as a public servant, a public servant can obtain some pecuniary advantage, or monetary benefit for some other person. Acts of nepotism will come under Clause (iii). The learned Ad.SG submitted that if we closely read and understand clause (iii), it is quite clear that the offence defined under clause (iii) does not require any mens rea or guilty intention like dishonest intention. The learned Ad.SG cited a Division Bench decision of the Delhi High Court in Crl.A Nos.482/2002, 509/2002, and 536/2002 (**2011 SCC OnLine Delhi 5501**) wherein, the Delhi High Court interpreted

clause (iii) of Section 13 (1) (d) of the P.C Act, and held that the offence defined under clause (iii) does not require any mens rea.

26. In **Subash Parbat Sonvane v. State of Gurarat [(2002) 5 SCC 86]** the Hon'ble Supreme Court interpreted the word "obtain" in clause (d) of Section 13 (1) of the P.C Act, and held that for a conviction under Section 13 (1)(d), there must be a situation where the public servant obtained some benefit or advantage for himself, or for any other person, and the word "obtain" must be given the meaning as interpreted by the Supreme Court in the earlier decisions, that "obtaining something must involve some request or effort to gain something".

27. In **R.Balakrishna Pillai v. State of Kerala [(2003) 9 SCC 700]**, the Hon'ble Supreme Court held that the element of mens rea in the form of dishonest intention or otherwise must accompany the culpable act or conduct of

the public servant, for a conviction under Section 5 (1) (d) of the P.C Act, 1947. Of course, that was not at a situation, where the misconduct defined under clause (d) of Section 5 of the P.C Act, 1947 had wide ambit covering different instances as provided in Section 13 (1) (d) of the P.C Act of 1988. It is pertinent to note that the word "obtain" occurs in all the three sub-clauses of clause (d) of Section 13(1) of the P.C Act, 1988. The process of "obtaining" must involve some element of effort, or request, or act, or solicitation to gain something. So, it cannot be said that the offence defined under sub-clause (iii) does not require any sort of mental element. The very presence of the word "obtain" in sub-clause (iii) will indicate that the act of offence defined in sub-clause (iii) must involve some sort of mental element, though not mens rea or dishonest intention as such. The use of the word "obtain" indicates that there must be some sort of nexus between the public servant, and the person who made monetary gain or pecuniary advantage. Had the intention of the legislature been otherwise, the parliament would have used the word "cause" in sub-clause (iii),

instead of the word 'obtain'. Causing some sort of pecuniary advantage or gain to a person is different from obtaining such gain or advantage for that person. There can be instances where a person happened to obtain some benefit or pecuniary advantage incidentally, due to the act of a public servant, or due to his malfeasance or misfeasance. In such cases where the public servant did not intend to cause such benefit or advantage, or did not even think of somebody making some gain out of his act, the public servant cannot be made liable under sub-clause (iii). That is why I said that there must be some sort of nexus between the public servant, and the person who gained pecuniary advantage or valuable thing due to the acts of the public servant. This nexus need not always be in the form of mens rea or dishonest intention. Even the public servant's knowledge of the consequences of his act in the given situation, that his act may cause or will cause undue or illegal benefit to other persons, or his interest to cause such benefit to other persons will be sufficient as mental element. Innocent acts, or acts by oversight, or even

careless acts on the part of the public servant by which he caused some gain to somebody else, can be appropriately dealt with only by way of disciplinary proceedings.

28. In the Delhi decision cited supra, the Delhi High Court held thus in paragraph 78:

“The State in its myriad functions enters into contracts, of various kinds, involves itself in regulation, awards or grants largessee, and holds property. Each action of the State must further the social or economic goals sought to be achieved by the policy. Therefore, when a public servant's decision exhibits complete and manifest disregard to public interest with the corresponding result of a third party obtaining pecuniary advantage or valuable thing, he is fastened with responsibility for “criminal misconduct” under Section 13 (1) (d) (iii). There is nothing reprehensible in this interpretation, because the “act” being “without public interest” is the key, the controlling expression, to this offence. If one contrasts this with “abuse” of office resulting in someone “obtaining” “pecuniary advantage or valuable thing”, it is evident that Section 13 (1) (d) (ii) may or may not entail the act being without public interest. This offence under Section 13 (1) (d) (iii) advisedly does not require proof of intent, or *mens rea*, because what

Parliament intended was to punish public servants for acts which were without public interest."

29. The purport of the said decision is that in cases where a public servant acted without any public interest, or in complete and manifest disregard to the public interest, or in violation of the accepted procedure prescribed in the interest of public revenue, and thereby the public servant caused some gain to somebody, he can be prosecuted under sub-clause (iii) of Section 13 (1)(d) of the P.C Act. In paragraph 79 of the judgment cited supra, the Delhi High Court held thus:

"There can be no doubt that all acts prejudicial to public interest, can be the subject matter of judicial review. In those cases, courts consider whether the decision maker transgressed the zone of reasonableness, or breached the law, in his action. However,. It is only those acts done with complete and manifest disregard to the norms, and manifestly injurious to public interest, which were avoidable, but for the public servant's overlooking or disregarding precautions and not heeding the safeguards he or she was expected to, and which result in pecuniary advantage to

another that are prosecutable under Section 13 (1) (d) (iii). In other words, if the public servant is able to show that he followed all the safeguards, and exercised all reasonable precautions having regard to the circumstances, despite which there was loss of public interest, he would not be guilty of the offence. The provision aims at ensuring efficiency and responsible behaviour, as much as it seeks to outlaw irresponsibility in public servant's functioning which would otherwise go unpunished."

30. On an examination of the Division Bench decision of the Delhi High Court cited supra, what I find is that the Delhi High Court interpreted sub-clause (iii) of Section 13 (1) (d) of the P.C Act to mean that in any case where the public servant transgressed the zone of reasonableness and acted in total violation of the accepted procedure meant for securing public interest or public revenue, and the public servant acted irrationally or in utter disregard to the interest of the public revenue, or acted in such a way as to cause loss from public revenue without any justification in public interest, or where the public servant acted in

violation of accepted principles and without ensuring measures to save and protect public interest or public revenue, the public servant can be prosecuted under sub-clause (iii) of Section 13 (1) (d) of the P.C Act. I find that, what the Delhi High Court practically meant is that the act of a public servant must involve some mental element, though not in the form of *mens rea* or guilty intention, or in the form of dishonest intention. Practically what emerges from an interpretation of the sub-clause in the light of the various authorities, is that though *mens rea* or guilty intention as commonly understood is not required for an offence punishable under sub-clause (iii) of Section 13 (1) (d) of the P.C Act, there must be some material to show some sort of link or nexus between the public servant and the person who made benefit. This mental element need not be in the form of dishonest intention. It can even be the knowledge of the consequence of the acts of the public servant, that such acts done without any public interest, or in total violation of the accepted principles and procedure by transgressing the zone of reasonableness, or irrationally committed in

manifest disregard to public interest may cause loss to the public revenue and corresponding gain or advantage to somebody. Let me examine whether the accused, or any of them had done, or acted in total violation of the accepted principles and procedure for the protection of public revenue, or acted unreasonably and irrationally with manifest disregard to public interest, either with the object of making some monetary gain out of it, or with the object of causing some gain to the SNC Lavalin, or with the definite knowledge of consequence that such acts of malfeasance will definitely cause loss to public revenue and corresponding gain to SNC Lavalin.

31. Now let me come to the factual aspects as regards the contracts in question, the circumstance in which the contracts were executed, and the vicious circumstances surrounding the making of the contracts, as alleged by the prosecution. Before proceeding for a discussion on the material aspects, I would like to appreciate the sincere and brilliant efforts made by the learned Senior Counsel Sri. Hareesh Salve, the learned Additional Solicitor General

Sri.Natarajan, the other learned Senior Counsel, their Instructing counsel, and also the learned counsel appearing for the other accused, to present the factual and legal aspects involved in this case in detail.

32. The inquisitive thought of everybody including our media, anxiously waiting for this judgment, must be whether the Government of Kerala would collapse. Let me devote this paragraph to expose the defiled civic sense of our society. After this case was reserved for judgment, I got some anonymous letters; some containing communalised political concerns, and some containing politicised communal concerns. The object of everybody, who sent those letters, was just to create some sort of prejudice in the mind of the court. This approach of the society is highly condemnable. This is the way in which the society approaches or thinks of this case. Everybody's concern is to make political gain or communal gain. This sort of approach is not at all conducive to a healthy, rational, civilized, educated and cultured democratic society. Let this be thought of seriously by every member of the society.

33. Now let me see whether the accused, or any of them can be prosecuted under Section 13 (1) (d) of the P.C Act, or specifically under sub-clause (iii) thereof, and also whether there are sufficient materials and circumstances to form a judicious opinion in the mind of the court, that there is every reason to proceed against the accused by framing a charge against them, or that the materials and circumstances produced by the prosecution would make the court believe prima facie that the accused or any one or more of them might have committed the offence alleged by the prosecution. I have gone through the very material documents produced by the CBI. It is well settled that every piece of paper need not be examined by the court, or that every material perused or examined by the court need not be discussed in detail for the purpose of framing a charge, or for passing an order of discharge. This Court is called upon to examine the legality and correctness of the order of the trial court, as a court of revision. The main and material documents relied on by the prosecution are the different contracts between the KSEB and the SNC

Lavalin, the different communications between the KSEB and the SNC Lavalin, the Minutes and proceedings of the Full Board of the KSEB, the Minutes of the State Cabinet at the relevant time, the correspondence and communications between the Government and the SNC Lavalin, as regards the proposed grant for the establishment of MCC at Thalassery etc. All these material papers and documents were examined by me to see whether anybody had any vicious or dishonest role in the making of the contracts in question, or whether there was anything wrong, or any culpable violation of procedure, in the making of the contracts in question, or whether the Port-folio Minister and the Government Secretaries had any role or involvement in the affairs between the KSEB and the SNC Lavalin, except as Minister or Secretaries officially, or whether failure on the part of the Government to obtain an enforceable contract from SNC Lavalin regarding the grant offered by the SNC Lavalin for establishment of cancer centre, will cause a prosecution under Section 13 (1) (d) of the P.C Act.

34. The things that transpired years back are being now examined in this case. The present crime was registered in 2006 by the VACB, and it was transferred to the CBI in 2007, as ordered by this Court. After investigation, the CBI submitted final report on 12.2.2007 under Section 13 (1)(d) read with Section 13 (2) of the P.C Act, and under Sections 120B and 420 I.P.C. The case initially came up before the Special Court at Ernakulam, and it was later transferred to the Special Court at Thiruvananthapuram. The SNC Lavalin has not so far made appearance. So the case against the accused Nos.6 and 9 stands split up. The very material issues now being considered are the rationale and the reasonableness of some contracts between the KSEB and SNC Lavalin, the circumstances surrounding such contracts including the circumstances which led the KSEB to take a decision for the renovation and modernisation of three Hydro Electrical Projects, the legality and propriety of the procedure adopted by the KSEB for executing the contracts in question, the agreements and understanding between the KSEB and SNC Lavalin incidental to the making

of the contracts, the gain made by SNC Lavalin, the monetary loss sustained by the KSEB etc.

35. The main grounds urged by the CBI to allege conspiracy and dishonest elements in the making of the consultancy contracts and the supply contracts between the KSEB and SNC Lavalin are as follows:

(a) No feasibility study was made by the KSEB regarding the proposed modernisation and renovation of the Hydro Electrical Projects;

(b) The KSEB did not obtain any technical study report from Experts, regarding the nature of the works required, or whether necessary repairs would suffice instead of modernisation of the projects;

(c) Contracts were awarded to the SNC Lavalin, without inviting global tenders;

(d) Contracts were awarded to the SNC Lavalin at very exorbitant rates, and even after obtaining the report of **Subaida Committee** and report from the NHPC, the KSEB awarded the

supply contracts at high fixed rates;

(e) Instead of a single project covering the three Hydro Electrical Projects, the KSEB designed three different projects, and executed three different agreements, with the object of circumventing the directions of the Central Electrical Authority, that permission of the Central Authority shall be obtained for any project causing an expense of more than ₹ 100 crores;

(f) The KSEB entered into contracts with SNC Lavalin without the full Board approval of the KSEB;

(g) The KSEB ignored the report of **Balanandan Committee** that necessary repairs would ensure proper generation of electricity, and that meeting huge expenses for renovation and modernisation project could be avoided;

(h) The KSEB did not approach the Bharath Heavy Electricals Limited (BHEL) for the

purchase of machineries.

(i) The KSEB misinterpreted the report of the NHPC regarding the rate of contract, and presented a distorted picture before the Cabinet.

(j) Though the grant offered by the SNC Lavalin for the establishment of a Cancer Centre at Thalassery was talked over and settled as a consideration for awarding the supply contracts to the SNC Lavalin, the 7th accused did not obtain such a contract from SNC Lavalin at the time of awarding the supply contracts in 1987, and thus, the SNC Lavalin could conveniently back out of the terms of the contract, and thereby the Government sustained loss. The loss sustained by the KSEB is ₹98.3 crores, by such retraction made by the SNC Lavalin from the offer made for grant.

36. The three consultancy contracts executed on 24.2.1996, were preceded by a Memorandum of

Understanding between the KSEB and the SNC Lavalin, signed on 10.8.1995. The parties to the said MOU are the 3rd accused Sivadasan, (the then Chairman of the KSEB), representing the KSEB and the 6th accused Klaus Triendl, the Senior Vice Chairman of the SNC Lavalin, representing the company. The said MOU was witnessed by the 2nd accused Rajasekharan Nair, who was at that time, the Financial Advisor and Accounts Officer of the KSEB. There are materials to show that the 2nd accused had active role and involvement in the preparation of the MOU.

37. The parties to the three consultancy contracts dated 24.2.1996 are late Mathew Roy, (the third accused in the FIR), the then Electrical Member of the KSEB, and the 6th accused Klaus Triendl, representing the SNC Lavalin. Execution of these contracts was witnessed by the 4th accused Kasthuri Ranga Iyer, who was the Chief Engineer of the KSEB at that time. There are materials including the correspondence and the minutes of the KSEB to show that the 4th accused had active role and involvement in the making of the consultancy contracts.

38. The three consultancy contracts were converted to supply contracts, and three such contracts were executed on 10.2.1997. The 7th accused Pinarayi Vijayan was the Portfolio Minister of Electricity at that time. The parties to these supply contracts are late Dr.Rajagopalan, the then Chairman of the KSEB, and the 6th accused Klaus Triendl representing the SNC Lavalin. Execution of these three contracts was witnessed by the 2nd accused Rajasekharan. Annexures to the supply contracts were signed by deceased 5th accused Sidhartha Menon on behalf of the KSEB. As regards the grant offered by the SNC Lavalin for the establishment of MCC, a MOU was signed on 25.04.1998. The parties to the said MOU are the 1st accused Mohana Chandran, representing the Government of Kerala as Power Secretary, and the 6th accused Klaus Triendl. The said MOU remained as MOU for ever, and the Government did not obtain an executable contract from SNC Lavalin, it is alleged. Whether such a contract could have been obtained, or whether such a contract would be enforceable in law, is a different matter. On a perusal of the entire materials, I find prima facie that

the MOU dated 10.8.1995 was perpetrated and brought about by the accused Nos.2 and 3, and that the three consultancy contracts dated 24.2.1996, were perpetrated and brought about by late Mathew Roy, and the 4th accused Kasthuri Ranga Iyer. On 10.2.1997, the three consultancy contracts gave way to supply contracts, and some annexures were also added to the supply contracts. These supply contracts and the annexures were perpetrated and brought about by late Dr.Rajagopalan, the 2nd accused Rajasekharan and deceased 5th accused Sidhartha Menon. Now the question for consideration in the matter of framing charge, is whether the materials produced by the prosecution would show that the accused Nos.2 to 4 and deceased 5th accused Sidhartha Menon had any vicious role or complicity in the making of the contracts, or whether they had made any gain out of the contracts, or whether they all acted against the interest of the KSEB and the public exchequer, and whether they thus caused unlawful gain to the SNC Lavalin. The role of Mathew Roy, Dr.Rajagopalan and Sidhartha Menon need not be discussed now because

they are no more. The 1st accused was only the Principal Secretary of the Department of Electricity, at the time of execution of the supply contracts. His specific role as a party to the transactions with the SNC Lavalin, is only as a party to the MOU dated 25.4.1998, in his capacity as Secretary to the Government. Definite materials are not there to show that the 1st accused had any active or vicious role in the making of the consultancy contracts or the supply contracts. Of course, he had acted or done something in his capacity as the Port-folio Secretary. To prosecute him under Section 13 (1) (d) of the P.C Act, or with the aid of Section 120B I.P.C, there must be materials to show that he had some vicious or dishonest role in the making of the contracts, or that he had derived some benefits out of the transactions, or that he did things with the object of causing huge monetary gain to the SNC Lavalin. On an examination of the important materials relied on by the CBI, I find that the 1st accused had acted only as the Principal Secretary of the Electricity Department, and that he had also accompanied the Port-folio Minister in 1997, to Canada for

making discussions with the SNC Lavalin prior to the making of the supply contracts. But the position of the accused Nos.2 to 4 is different.

39. This is a case where the CBI alleges elements of corruption in the making of the consultancy contracts and the supply contracts. When such elements of corruption are alleged by the prosecution, the allegations would imply or hint indirectly that some monetary gain was made by the parties to the contracts, or that the public servants had shared the gain made out of the transaction. The allegation as against the 7th accused is that, he took undue interest in the execution of the supply contracts in 1997, and he made the the SNC Lavalin offer money for the establishment of a cancer centre at Thalassery. The prosecution would allege that the said offer for financial grant was talked over and settled as a consideration for the contracts, and it was accordingly a MOU was signed by the parties. But later, the Government omitted to get an enforceable contract. I will discuss the specific allegations against each of the accused later, to come to a finding whether there are prima facie

materials to frame charge.

40. The allegation made by the CBI that the KSEB entered into contracts with the SNC Lavalin without conducting a feasibility study, or without obtaining technical reports from experts, will have to be gone into during trial. Those factual aspects cannot be examined in detail at this stage. Another allegation is that the KSEB awarded contracts to the SNC Lavalin without inviting global tenders. This is also a matter to be probed into during trial. In all these areas, what matters is the role of the KSEB officials in the making of the contracts. Another point urged by the CBI is that contracts were awarded to SNC Lavalin at exorbitant rates, and in 1997, the supply contracts were given at fixed rate. Here also, the liability must be that of the KSEB Officials, because they are the parties to the contracts. How the KSEB fixed the rate, or how the parties to the contract came to terms regarding the rate of contract, or on what basis, the KSEB agreed to the rate claimed by the SNC Lavalin, are all matters to be gone into deeply during trial. Such an exercise cannot be undertaken at this stage.

41. Another point urged by the CBI is that, in stead of a single project covering the three Hydro Electrical Projects, the KSEB wrongly and dishonestly executed three different agreements for the three projects, and the KSEB did so with the object of circumventing the directions of the Central Electrical Authority. I do not find any substance in this allegation. The three Hydro Electrical Projects are three different projects, and the only thing in common is that all the projects are under the KSEB. That apart, there is nothing common and the three different projects were started at three different times. The life span of the three projects will be different, and the works required for the renovation and modernisation of each project also will be different. So there was nothing wrong in the KSEB making three different contracts for the three projects. I do not think that the CBI will seriously project these things during trial.

42. Another point raised by the CBI is that everything was done by the officials of the KSEB without obtaining the Full Board approval. Of course, it is true that Full Board approval was not obtained for every act or every

transaction. However, such Full Board approval was obtained later. Whether such approval obtained later would suffice, or whether the omission on the part of the KSEB officials to obtain timely approval of the Board involved any vicious element or dishonest element, will have to be gone into during trial. One committee by-name **Balanandan Committee** was appointed to look into the proposal made by the KSEB for the renovation and modernisation of the three projects. **Balanandan Committee** reported that some repair works would suffice. The CBI would allege that the KSEB officials ignored this report and proceeded for renovation and modernisation, as already thought of and conspired. It is for the KSEB to decide how to maintain its projects. Whether a project requires renovation to meet the requirements of the people, or whether necessary repairs would energize the project to meet the requirements, must be the things to be decided within the KSEB. Instead of carrying out repairs, the KSEB decided to renovate and modernise the projects, because every project had by the time surpassed the life expectancy, and the KSEB took a

decision at a time when there was acute shortage of electricity in Kerala. I do not think that the KSEB could be found fault with, for having decided to renovate and modernise the projects. It is for the KSEB to decide to repair or to renovate. The court's concern must be whether the renovation project in fact involved any element of corruption or dishonesty, as the prosecution would allege. So this point urged by the CBI need not be discussed much.

43. Another point urged by the CBI is that the report of one committee called **Subaida Committee** was also ignored by the KSEB, and the KSEB, without any basis awarded contracts at exorbitant rates unacceptable at the international level. The KSEB would justify its stand on the basis of a report obtained from the NHPC. The CBI would allege that the real purport of the report given by the NHPC was not brought to the notice of the Cabinet by the KSEB, and that is how the Cabinet happened to approve the proposal made by the KSEB. Let these things be looked into during trial. Such factual aspects, which require some sort of evidence for decision, cannot be examined and decided at

this stage. Let it be decided during trial, whether the rate of contract was legally or properly fixed by the parties to the contract, or whether the KSEB allowed exorbitant rate without any basis, with the object of causing huge gain to the SNC Lavalin. I do not feel it proper and legal to go to those aspects at this stage.

44. Yet another point urged by the CBI is that, had the BHEL been approached by the KSEB for the required machinery, the KSEB could have made good profits. As per the contracts, the KSEB had agreed to purchase machineries from Canada. Let this aspect also be gone into during trial. What proposal was feasible, or what proposal was acceptable, or what proposal was profitable, are all matters to be gone into deeply during trial. In deciding the rationale of the contract, and the terms of the contract, the court may have to look into the circumstances in which the KSEB opted to purchase machinery from Canada, or why the KSEB could not have purchased the machinery from the BHEL. Such factual aspects cannot be examined at this stage. Let such things also be probed into during trial.

45. The SNC Lavalin deal with the KSEB, or the project for the renovation and modernisation of the three Hydro Electrical Projects is in fact a matter of contract between the KSEB and the SNC Lavalin. The CBI has no case that the Minister of Electricity, or the Additional Secretary or the Principal Secretary had any prominent or vicious or dishonest role at the initial stage of the making of the contracts in February-March 1996. Everything including the prospects and viability of the project, and also the various terms and conditions of the contract were designed and decided by the Chairman and the other office bearers of the KSEB, and they all perpetrated the contracts. Thus, everything at the initial stage, constituting the prominent steps and measures for the project, and for carrying out the projects, were designed and perpetrated by the officers within the KSEB. Persons outside the KSEB allegedly stepped in at a later stage according to the CBI. Whether the Chairman and the other office bearers of the KSEB had any dishonest involvement in perpetrating the contracts, or in designing the terms and conditions of the contracts, or

whether they had any intention to make gain out of it, or whether they had in fact made such monetary gain or financial benefit, is a matter for decision on trial. There are so many documents and materials prima facie revealing the undue haste and lack of circumspection on the part of the Chairman and the other office bearers of the KSEB. Whether they showed such irrational haste and decided to go for the deal with the SNC Lavalin without inviting global tenders or without conducting a feasibility study regarding the proposed projects as part of a criminal design to help the SNC Lavalin and to make gain out it, will have to be thoroughly examined during trial. Thus, I find scope for a detailed probe into those aspects, which according to the prosecution would constitute corruption elements and misconduct as defined under the law in view of the settled position as regards the essentials for a prosecution under Section 13 (1) (d) of the P.C Act. The court will have to make a probe, and make an assessment of the various materials and circumstances to see whether the Chairman and the other office bearers of the KSEB acted without any

public interest, or against the interests of the K.S.E.B. Those important aspects concerning the corruption elements and misconduct alleged against the KSEB officials cannot be gone into and decided at this stage.

46. As already stated in the foregoing paragraphs, the persons who actually designed the project, the contracts, and the terms of the contracts, and who perpetrated the project and the contracts are (1) Sri.Mathew Roy, former Electrical Member of the KSEB, (2) Sri. R.Gopalakrishnan, former Electrical Member of the KSEB, (3) Dr.V.Rajagopalan, former Chairman of the KSEB, (4) Sri.K.G.Rajasekharan, former Accounts (Member) and Financial Adviser of the KSEB, (5) Sri.R.Sivadasan, former Chairman of the KSEB, (6) Sri. Kasthuri Ranga Iyer, former Chief Engineer (Generation) of the KSEB, and (7) Sri.P.A Sidhartha Menon, former Chairman of the KSEB. Of them, Sri.Mathew Roy and Sri.Rajagopalan died pending the investigation, and Sri.Sidhartha Menon died pending this revision petition. Sri.R.Gopalakrishnan was "absolved" by the C.B.I. The living persons on the party array as accused

among the seven are the 2nd accused Sri.K.G.Rajasekharan, the 3rd accused Sri.R.Sivadasan and the 4th accused Sri.Kasthuri Ranga Iyer. These three persons must necessarily face trial for the reasons I would explain later. I find that these three persons and the 5th accused were wrongly discharged by the trial court. I will explain later why the accused Nos.2 to 4 must face trial along with the SNC Lavalin and the 6th accused.

47. The 1st accused Sri.Mohanachandran, the 7th accused Sri.Pinarayi Vijayan, and the 8th accused Sri.A Francis were arraigned as accused by the CBI on the basis of some communications in between them and the SNC Lavalin, or in between them and the KSEB, concerning the projects in question. At the time of execution of the consultancy contracts, the 1st accused Sri.Mohanachandran had nothing to do with the affairs or internal matters of the KSEB, and his involvement was only in his capacity as the Principal Secretary of the Electricity Department. In fact, he took charge as Secretary only in June, 1996, after the execution of the consultancy contracts, and he continued as

Secretary till February, 1999. In February, 1999, he assumed charge as the Chairman of the KSEB. Thus, by the time, he joined the KSEB as chairman, all the affairs and deals of the KSEB with SNC Lavalin were settled. So also, Sri.Pinarayi Vijayan was nowhere in the picture, when the consultancy contracts were signed. He assumed office as the Electricity Minister in the Kerala Cabinet only in June, 1996, and he continued as Minister of Electricity till December, 1998. It was during his period as Minister, the supply contracts were executed replacing the consultancy contracts of February, 1996. The 8th accused Sri.A.Francis was only the Joint Secretary of the Electricity Department at that time. The role and involvement of a Joint Secretary in the affairs and internal matters of the KSEB, including the dealings of the KSEB with other agencies, will be very limited, when the Port-folio Minister and the Principal Secretary are there as the persons having charge and control of the Electricity Department. Admittedly, the accused Nos.1, 7 and 8 had no direct involvement in the execution of the contracts between the KSEB and SNC Lavalin. The CBI arraigned them, or

"roped" them with the "magical net of conspiracy" punishable under Section 120B I.P.C. The history of administration of criminal justice will tell us unerringly that Section 120B I.P.C. or the concept of criminal conspiracy, is something very often misused by the Police to rope in persons of their choice, or to pick and choose persons of their choice. Now let me see whether these three persons were arraigned as accused by the CBI on the basis of any definite material indicating their vicious or dishonest involvement in the dealings and affairs of the KSEB with SNC Lavalin, either with the object of making any gain out of it, or with the object of helping the SNC Lavalin unlawfully, or whether they had acted only in exercise of their official functions.

48. There is absolutely no material to show that the 1st accused had any sort of involvement in the making of the consultancy contracts executed in February, 1996. His tenure as Chairman of the KSEB was from 18.2.1999 to 30.5.2000. During this period, he could not have done anything vicious or dishonest in the controversial deal

between the KSEB and SNC Lavalin, the terms of which were finally settled in February, 1997 by way of supply contracts. The allegations as against him appear to be, that he had made some dishonest involvement in the execution of the supply contracts in February, 1997, and also in the transactions between the Government and the SNC Lavalin concerning the offer made by the SNC Lavalin for grant for the construction of the Malabar Cancer Centre. The materials as against the 8th accused are really feeble in nature. As the Joint Secretary, he had his own limits and constraints to make interference in the affairs of the KSEB when there was the Principal Secretary to supervise the affairs. Let me examine whether there are sufficient materials to prosecute these three persons on a charge of criminal conspiracy. In **Baldev Singh v. State of Punjab [(2009) 6 SCC 564]**, the Hon'ble Supreme Court held that for the purpose of arriving at a finding against an accused being prosecuted on a charge of criminal conspiracy, as to whether the alleged offence was committed by him, or whether he had role or involvement in the commission of the

offence as a conspirator, the court will have to take into consideration all the circumstances pointed out against him by the prosecution. The Hon'ble Supreme Court cautioned that criminal conspiracy is something hatched in secrecy, and that the courts will have to bear it in mind, that the prosecution will have to prove meeting of the minds of the accused, and the criminal design made by them to commit an illegal act, and that mere knowledge of the accused, of the design made by the Principal Offenders, or the mere discussion the alleged conspirator had with the Principal Offenders, will not be sufficient at all for a conviction under Section 120B I.P.C. In **State of Madhya Pradesh v. Sheetla Sahai and others** [(2009) 8 SCC 617], the Hon'ble Supreme Court held thus in paragraphs 38 to 40:

"38.

.....
What is necessary is not thoughts, which may even be criminal in character often involuntary, but offence would be said to have been committed thereunder only when that take concrete shape of an agreement to do or cause to be done an illegal act or an act which although

not illegal by illegal means and then if nothing further is done the agreement would give rise to a criminal conspiracy. Its ingredients 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.

39. What is, therefore, necessary is to show meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means. While saying so, we are not oblivious of the fact that often conspiracy is hatched in secrecy and for proving the said offence substantial direct evidence may not be possible to be obtained. An offence of criminal conspiracy can also be proved by circumstantial evidence.

40. In **Kehar Singh v. State (Del Admn)**, this Court has quoted (at SCCp.731, paragraph 271) the following passage from *Russel on Crimes* [12th Edn Vol.1)

“The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to

do them, but in the forming of the scheme or agreement between the parties. Agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se enough".

49. The Hon'ble Supreme Court also cautioned that Section 120B I.P.C, or an allegation of criminal conspiracy cannot be used to pick and choose persons for prosecution. The spirit and purport of the decision of the Hon'ble Supreme Court is that the design hatched by the accused by meeting in secrecy for the commission of an illegal act must have taken concrete shape of an agreement to do the said illegal act, to make an offence of criminal conspiracy, and that just because, the accused did something involuntarily without active involvement in designing the object and carrying out the design, he cannot be punished under Section 120B I.P.C. In fact, the said decision of the Hon'ble Supreme Court contains a caution against picking and choosing persons on allegations of criminal conspiracy, without concrete and definite materials and circumstances to prove such conspiracy.

50. On an examination of the important materials including the communications between the KSEB and the SNC Lavalin, and also between the KSEB and the Government of Kerala, I find some substance in the following allegations made by the prosecution, as regards the contracts in question, and also the dishonest and corrupt elements surrounding the deal between the KSEB and the SNC Lavalin.

(a) The SNC Lavalin was awarded contracts for the renovation of the Hydro Electrical Projects, without making a feasible study regarding the necessity of such renovation and modernisation and also without inviting global tenders. The accused Nos.2 to 4 will have to explain during trial why and how the contracts happened to be awarded to the SNC Lavalin arbitrarily at fixed rate, without inviting global tenders, and how the rate was fixed by the KSEB. There is clear allegation that contract was awarded at exorbitant rate without conducting

any study or evaluation of the prevalent rate at the international level. On a perusal of the materials, I do not find anything prima facie to justify the rate fixed in between the KSEB and SNC Lavalin, or for explaining away the failure on the part of the KSEB to invite global tenders for ensuring transparency in the deal, and for ruling out any possible allegation of arbitrariness. This aspect is very important in examining and evaluating the allegations of corruption and criminal misconduct in the deal.

(b) Another allegation of the prosecution is that the KSEB designed a project for renovation and modernisation of the three projects without conducting any authentic or scientific feasibility study regarding the requirements of the three projects, or regarding the necessity of renovation and modernisation, or regarding the power capacity and performance of the machineries. On an examination of the various materials, I could

not find anything prima facie to show that any such feasibility study was scientifically made by the KSEB before designing a project for the renovation and modernisation of the three Hydro Electrical Projects. This circumstance constituting lack of circumspection on the part of the KSEB officials may also have to be analysed and examined. This particular aspect assumes importance in view of the study report submitted by the Central Power Research Institute (CPRI) Bangalore, after visiting the projects, that the real object of the proposed renovation and modernisation could not in fact be achieved.

(c) Under the contract with the SNC Lavalin, the KSEB had to pay exorbitant amount by way of cost of machinery and consultancy charges. M/s.Bharath Heavy Electricals Ltd (BHEL) had conducted an indepth study of the machineries and components supplied by the SNC Lavalin for the projects, and on an evaluation of

the quality and performance of the different components and machineries, M/s. BHEL came to a finding that those machineries and components could have been domestically purchased from M/s. BHEL at a lesser cost. The amount assessed by M/s.BHEL as the probable cost of machinery is ₹123.73 crores, but exorbitant amount, much above the assessment made by M/s.BHEL was paid by the KSEB to the SNC Lavalin. Things will have to be examined why or in what circumstance, the KSEB decided to purchase machineries from abroad through the SNC Lavalin at a very high cost when such machineries could have been purchased at a lower cost domestically.

(d) As regards the rates and cost, one committee constituted by the KSEB by-name, **"Subaida Committee"** had submitted a report, but this was ignored by the KSEB. The prosecution would allege that in view of this

report, the KSEB could have made bargain with the SNC Lavalin to reduce the cost, and the KSEB could have thus reduced expenditure from public revenue. I find some substance in this allegation on an examination of the various aspects reported by the **Subaida Committee**.

(e) The CBI would allege that, with the object of overcoming the cost aspects highlighted in the report of the Subaida Committee, the 2nd accused obtained a cost evaluation report from the NHPC, and that such report was obtained without providing the required data in detail to the NHPC. The prosecution allegation is that the NHPC happened to make such an evaluation just because the required materials and data were not furnished by the KSEB, and the KSEB concealed the very material aspects with the object of getting a favourable report from the NHPC. This serious allegation made by the prosecution will have to be examined during trial. The accused

will have to explain why an evaluation report was sought from the NHPC when the KSEB could have acted upon the report of the **Subaida Committee."**

51. As discussed in the foregoing paragraphs, I find that a thorough probe is required during trial, into the various factual aspects alleged by the prosecution regarding the corruption elements and elements of misconduct surrounding the making of the contracts, and the rationale of the deal between the SNC Lavalin and the KSEB. The role and involvement of the accused Nos.2 to 4 in designing things, allegedly favourable to the SNC Lavalin, without any public interest will have to be thoroughly examined during trial. The trial court will have to examine whether the Chairman and the other office bearers of the KSEB including the accused Nos.2 to 4 had made any financial gain or monetary benefit out of the deal. In this context, the court will have to examine whether there was any unholy nexus between the accused Nos.2 to 4 and SNC

Lavalin. These are all factual aspects which require thorough probe, and such factual aspects cannot be probed into and decided at the preliminary stage of framing charge. These aspects were not examined seriously by the trial court, and while discharging the accused Nos.1,7 and 8, the others were also granted the benefit of discharge by the trial court.

52. Now let me examine the allegations against the accused Nos.1, 7 and 8, who were roped in by the CBI on the allegation of criminal conspiracy. Admittedly these three persons had no direct involvement or role in the making of the consultancy contracts or the supply contracts. Admittedly, they had no involvement or role in the modernisation and renovation projects designed by the KSEB. Let me examine whether the 1st accused acted only in his capacity as Secretary of the Electricity Department, or whether the 7th accused had done anything in excess of his functions as the Port-folio Minister, and also whether the 8th accused could have done anything vicious or dishonest.

53. The allegations as against the 1st accused in relation to the supply contracts of February, 1997 are

practically casual. I find that the main and prominent allegations against him are concerning the deal between the Government and the SNC Lavalin, as regards the proposal made by the SNC Lavalin for the grant for the construction of the MCC. Of course, it is true that the MCC was a dream project of the Government of Kerala at that time, and when the SNC Lavalin made a proposal for arranging grant from different sources, in connection with the deal with the KSEB, the Government readily accepted the proposal and agreed to accept the grant offered by the SNC Lavalin. Necessary communications were made between the 1st accused and the SNC Lavalin as regards such an offer. A Memorandum of Understanding was also signed between the 1st accused and SNC Lavalin regarding such a proposal. There is an allegation that approval of the Full Board of the KSEB was not obtained for the projects and for the execution of the contracts, and that at different stages, the 1st accused managed to obtain the approval of the Cabinet without presenting the full facts before the Cabinet, and he did it as instructed by the Port-folio Minister. Of course, it is true that

the approval of the Full Board of the KSEB was not obtained in advance by the accused Nos.2 to 4 and the others for the execution of the contracts, but approval was later given by the Full Board of the KSEB. The allegation as against the 1st accused appears to be that the full details of the dealings of the KSEB with the SNC Lavalin were not placed by the 1st accused before the Cabinet. On a perusal of the various materials, I find that this allegation is really baseless. There is nothing to show that the first accused had any sort of vicious involvement or object when he submitted notes of the facts before the Cabinet. There is also nothing to show that the 7th accused had given any wrong advise or instructions to him to mislead the Cabinet. The 1st accused happened to place the matters as reported by the KSEB, and with the available machinery, the 1st accused had verified the things before presenting the matters before the Cabinet. I do not find anything definite to show that the Cabinet was in any manner misguided or misled by the 1st accused in the matter of accepting and approving the proposal made by the KSEB in connection with the deal with

the SNC Lavalin. Just because, he happened to act as the Principal Secretary in his official capacity, he cannot be prosecuted. The Government Secretaries are often bound to carry out the decisions and directions of the Cabinet. Of course, when a Secretary finds something wrong or something vicious or illegal, he will have to bring this to the notice of the Cabinet. In this case, the 1st accused could not have noticed any mal-practice or illegality on the part of the KSEB, and he happened to put up notes on the basis of the reports received from the KSEB. There is nothing to show that there was any sort of unholy or vicious nexus between the 1st accused and the SNC Lavalin.

54. Another allegation against the 1st accused is as regards the grant for MCC, and the undue interest shown by the 7th accused in the said matter. Admittedly, a Memorandum of Understanding was signed by him and the SNC Lavalin as regards the proposal for the grant for the MCC. As the Government Secretary, he had to do it and he was bound to do it as instructed by the Port-folio Minister. Later, the Government failed to obtain an enforceable

contract from the SNC Lavalin concerning the said offer. If the Government failed, or if the Minister failed in getting the necessary things done legally, the Government Secretary cannot be found fault with, because the Secretary is always bound to carry out the directions of the Cabinet or the Portfolio Minister, and the Secretary is not expected to act without the approval or the directions of the Portfolio Minister or the Cabinet in important matters. The first accused was admittedly not a party, directly or indirectly, to the consultancy contracts, or the supply contracts. These contracts are the pivotal things involved in the present prosecution. The 1st accused cannot be prosecuted unless there are strong and definite materials and circumstances to show that he had some sort of unholy nexus with the SNC Lavalin or the other accused.

55. It is very pertinent to note that the CBI has not alleged anywhere in the final report that the accused Nos.1,7 and 8 had made any unlawful gain or monetary benefit out of the deal between the KSEB and the SNC Lavalin. Of course, as regards the other accused, things will

have to be examined during trial, to find out whether they had made any such gain, or whether they had their own interest or unholy nexus with SNC Lavalin to cause unlawful gain to SNC Lavalin. The position and circumstances of the accused Nos.1,7 and 8 are entirely different from that of the accused Nos.2 to 4 and the others, who designed and perpetrated the deal. The accused Nos.1, 7 and 8 are persons outside the KSEB, brought in or arraigned by the CBI on the allegation of conspiracy later. But the accused Nos 2 to 4 and the others are persons within the KSEB who designed the projects and perpetrated the contracts.

56. The main allegation against the 7th accused Sri. Pinarayi Vijayan appears to be that he showed undue haste and interest in the execution of the supply contracts in February, 1997, and the KSEB happened to execute such a contract at the instance of the Port-folio Minister in a haste, when the SNC Lavalin offered some grant for the construction of the MCC.

57. Of course, the supply contracts were executed when the 7th accused was the Electricity Minister. The

prosecution would allege that by suppressing some material facts, the 7th accused hastily obtained approval of the Cabinet in the matter. I do not find any material to substantiate such an allegation that anything concerning the supply contracts between the SNC Lavalin and the KSEB was suppressed by the 7th accused from the Cabinet. The documents produced by the prosecution include a Cabinet Note also, signed by the then Chief Minister. On a consideration of the various aspects reported by the KSEB through the Principal Secretary, the proposal was approved by the Cabinet. Thus, it was a Cabinet decision. If so, there is no explanation why the CBI picked and chose the Electricity Minister for prosecution. The CBI does not have any satisfactory explanation as to what vicious role or dishonest role, the Electricity Minister had in the deal, when he got the things approved by the Cabinet, or when the Cabinet as a whole approved the proposal of the KSEB. It is pertinent to note that what the Cabinet approved is not the proposal of the Electricity Minister, but the proposal of the KSEB. The Cabinet happened to give approval on the basis

of the materials furnished and reported by the KSEB. If so, it would be unjust and illegal to pick and choose the Electricity Minister and prosecute him, for the wrong or illegality committed by the KSEB. There is reason to believe that the 7th accused acted in his capacity as the Port-folio Minister, and that he had no knowledge of any sort of unholy nexus between the KSEB and SNC Lavalin, when he presented the matter before the Cabinet and got Cabinet approval.

58. Of course, it is true that the proposal for the construction of a Cancer Centre at Thalassery was mooted by the 7th accused during his visit to Canada in 1997. Before the execution of the supply contracts, a team led by the Port-folio Minister had visited Canada, and had consultation with the SNC Lavalin. The 1st accused was also a member of the team. Some details regarding the deal between the KSEB and SNC Lavalin concerning the projects, for modernisation and renovation of the Hydro Electrical Projects were discussed in between them, and the discussion was mainly regarding the foreign loan, which the

KSEB would avail, for the project. It is pertinent to note that the intervention of the 7th accused and his active involvement as Minister could prevail upon SNC Lavalin, and the extent of foreign component in the loan transaction could be reduced. The CBI would not dispute the fact that machineries worth about 15% of the equipments agreed to be purchased from Canada through the SNC Lavalin could be shifted to the domestic Market. This is an important aspect in examining whether the 7th accused had any dishonest involvement in the deal otherwise than as the Port-folio Minister, or whether he had any object to make any gain out of the deal.

59. The prosecution would allege that the proposal for the construction of the MCC and the grant offer made for it by the SNC Lavalin was discussed and settled as a consideration for the supply contracts. The case of the CBI is that as the MCC was a dream project of the Electricity Minister, he prevailed upon the Cabinet, and got approval for such a scheme, and it was accordingly the Government accepted the proposal.

60. Of course, it is true that such a proposal was mooted by the 7th accused, and he had made some involvement also in his capacity as the Electricity Minister to procure a proposal from the SNC Lavalin for some grant for the construction of the MCC. During discussions with the SNC Lavalin people, the Electricity Minister happened to make a proposal for a project, and being a project in public interest, he also got it approved by the Cabinet. To prosecute the 7th accused on an allegation of misconduct or conspiracy, the CBI would allege that such a proposal was mooted and accepted as a consideration for the supply contracts between the SNC Lavalin and the KSEB. It is pertinent to note that such a proposal does not figure anywhere as one of the essential terms of the supply contracts, between the KSEB and SNC Lavalin. If something is projected and accepted as a consideration for a contract, or as one of the essential terms of a contract, it must find a place in the contract, when it is a written contract. Here, there are three written supply contracts, binding the KSEB and the SNC Lavalin. The proposal for the construction of a

Cancer Centre or the grant offered by the SNC Lavalin, is nowhere mentioned as one of the essential terms of the contract. I fail to understand why the CBI would allege that it was mooted and accepted as a consideration for the project. Of course, the KSEB officials and also the Chairman who signed the contracts, might have considered the offer made by the SNC Lavalin, in the matter of settling the terms of the contract. It is quite probable that the Chairman and other office bearers of the KSEB gave some concession to the SNC Lavalin, or they extended some monetary benefit to the SNC Lavalin, in fixing the rate of contract, or in deciding to forego the accepted procedure, in view of the fact that the SNC Lavalin has agreed to pay some grant for the construction of MCC. This is something different. If at all, the KSEB people had given some concession to the SNC Lavalin unlawfully, or if they extended some benefits to the SNC Lavalin liberally and unlawfully in fixing the terms of the contract, in view of the offer made by the SNC Lavalin to the Government, the said offer cannot at all be treated as part of the essential terms of the contract. If the KSEB people

have done anything wrong or illegal, or if they acted dishonestly in settling the terms of the contract, and they gave some concession unauthorisedly, or extended some benefit to the SNC Lavalin unlawfully, just because the SNC Lavalin made another offer to the Government, it cannot be said that the said offer was considered and accepted as one of the essential terms of the contract. The essential terms of the contract or the consideration agreed upon by the parties, must necessarily find a place in the contract. Some understanding or agreement made outside the contract, cannot at all be enforced as part of the contract.

61. The main allegation of the CBI against the 7th accused is that he failed as Electricity Minister in his duties, and he did not care to obtain an enforceable contract from the SNC Lavalin regarding the offer made by the Company for some grant for the construction of a Cancer Centre. A mere offer will not constitute a contract. What the SNC Lavalin offered is some grant, and the understanding was that the SNC Lavalin would procure it from different agencies. If at all, the Government had

obtained such an agreement, it could not have been enforced in law, because to make it enforceable, there must be a valid contract. A mere agreement or a mere offer for some grant gratuitously, will not make a contract, and such an offer or agreement cannot be enforced in law. What I find on a perusal of the entire materials is that some grant was gratuitously offered by the SNC Lavalin, and even the understanding was that the SNC Lavalin would arrange it from different agencies. The agreement was not that the SNC Lavalin would directly make payment from their funds. The Company agreed to procure amount from different agencies, and agreed to pay the amount as grant. There is no doubt that it was meant as a gratuitous grant. It was not intended or accepted as one of the terms of the supply contracts. It might be that in view of such a grant offered by the SNC Lavalin, the KSEB people acted wrongly, and liberally extended some concession or benefit to the SNC Lavalin. That is a different matter.

62. There is no reason why the CBI would find fault with the 7th accused alone, and allege that he failed to

obtain an enforceable agreement from the SNC Lavalin. Admittedly, the 7th accused had been in power as Electricity Minister for a short period. Many Ministers succeeded him, and during the tenure of the successors also, there were communications between the Government and SNC Lavalin regarding the offer made by the Company. The 7th accused had no sufficient tenure to expedite things and get an enforceable contract from the SNC Lavalin. He was succeeded by another Minister in the same Ministry. There is no explanation why the CBI would not allege such failure on the part of the Ministers who succeeded the 7th accused. I find that the office of the 7th accused had made many communications with the SNC Lavalin, requesting them to execute an agreement as a follow-up of the Memorandum of Understanding signed by the 1st accused, and the SNC Lavalin. I find that the CBI picked and chose one Minister alone for prosecution, on an allegation of conspiracy. It is here, the cautions and directions given by the Hon'ble Supreme Court in **Sheetla Sahai's case** assumes importance.

63. There is no explanation why the CBI did not probe into the failure on the part of the other Ministers, who succeeded the 7th accused. This is not a case of failure on the part of one Minister alone. There are documents to show that the 7th accused had made earnest efforts during his tenure to get a contract executed by the SNC Lavalin, and he had made some communications also during his tenure. When he ceased to be the Electricity Minister, the successor Ministers should have pursued follow-up actions and they also could have made earnest efforts to obtain a contract. Nobody cared to obtain such a contract. When it is a fact that there was such failure on the part of many Ministers, who succeeded the 7th accused, the CBI picked and chose the 7th accused alone on a wild allegation of conspiracy without any legal and supporting materials.

64. It is pertinent to note that the CBI has not alleged anywhere in the final report or other materials that the 7th accused had derived or obtained any sort of benefit out of the deal between the SNC Lavalin and the KSEB. There is no allegation that the 7th accused was otherwise benefited by

the retraction on the part of the SNC Lavalin from the offer. I do not find anything to show that the proposal for grant for the construction of a Cancer Centre was made by the SNC Lavalin and accepted by the Government as a consideration for the supply contracts. It was only a gratuitous offer, though it was mooted and discussed very seriously in connection with the other deal between the KSEB and SNC Lavalin, and the Government took it very seriously because it was a dream project of the Minister. Just because it was taken up and accepted by the Government in view of the special interest shown by the Electricity Minister, it cannot be said that it was part of the other contract, or that it was thought of, and accepted as a consideration for the other contracts. No doubt, it was discussed and projected in connection with the other contracts, but to obtain a contract on that offer, the parties must have accepted it as one of the essential terms of the contract. The 7th accused cannot be found fault with, because if at all he had obtained such a contract, it could not have been legally enforced. It was projected, proposed

and accepted simply as a gratuitous grant. If the KSEB officials wrongly extended some benefit to the SNC Lavalin, in view of such an offer made by the Company, the KSEB officials must be liable for it. The Minister happened to accept the offer, and the Cabinet also accepted it, only as a gentleman's offer made gratuitously, of course, in connection with the other transaction between the Company and the KSEB. The court below has discussed the various aspects of the offer and has come to a finding that the mere failure on the part of the Electricity Minister to obtain a contract from SNC Lavalin on this aspect cannot at all be considered as an instance of misconduct punishable under Section 13 (1) (d) of the P.C Act, 1988. If at all there was such a failure on the part of the 7th accused, such failure by itself will not amount to an act of misconduct as defined under the law. If at all, the SNC Lavalin retracted from the promise, it cannot be said that the company was unlawfully benefited, or that the Government or the Minister caused some unlawful gain to the company. Thus, I find that without any basis or material, the 7th accused was picked

and chosen by the CBI for prosecution.

65. Now let me see what is the allegation against the 8th accused. He was only the Joint Secretary of the Government at the relevant time. The allegation as against him is that he conspired with the 1st accused, and the others in the preparation of the Cabinet Notes, and without presenting the true facts before the Cabinet, he caused to obtain approval of the Cabinet for the supply contracts signed on 10.2.1997. The prosecution would allege that some vital facts were suppressed by him from the Cabinet. It is not known, what vital aspects or material aspects were suppressed by him from the Cabinet. The notes made by the Joint Secretary would definitely be scrutinized by the Principal Secretary, and it will go to the Cabinet through the Port-folio Minister. It is really fallacious to allege that a Joint Secretary could manipulate things and suppress vital aspects and material facts, from the Principal Secretary, and the Port-folio Minister, or that a Joint Secretary could easily misguide the Cabinet. As already observed, things were approved by the Cabinet, and the prosecution records

contain the Minutes signed by the Chief Minister. It is not known how this Joint Secretary could wrongly and dishonestly obtain Cabinet approval for the projects.

66. On a perusal of the materials, I find that the 8th accused had not done anything dishonestly, or in excess of his authority as Joint Secretary. Everything done by him, or every note prepared by him was scrutinized and supervised by the Principal Secretary, and the Joint Secretary could not have placed anything directly before the Cabinet. I find that the Joint Secretary happened to prepare the notes for presentation before the Cabinet on the basis of the materials and data furnished from the KSEB. There is nothing to show that he had any vicious or dishonest involvement or role in preparing such notes for Cabinet approval. There is nothing to show that the 8th accused had any sort of dishonest involvement as part of a conspiracy or otherwise, or that he did anything dishonestly with the object of making any gain, or that he was in any manner benefited by the deal between the SNC Lavalin and the KSEB. I find that the allegation as against the 8th accused is also baseless, and

the prosecution does not have any definite material or circumstance to allege criminal conspiracy against him. I find that he was also rightly discharged by the trial court.

67. As discussed in the foregoing paragraphs, I find that the prosecution in this case does not have sufficient and satisfactory materials, which would make out a prima facie case against the accused Nos.1,7 and 8. To frame a charge against them, there must be something before the court, to form a judicious opinion that they might have committed the offences alleged. Even if the allegations as against these three accused are accepted, such acts will not by itself amount to an act of misconduct punishable under Section 13 (1) (d) of the P.C Act. In the absence of any material or circumstance to show that these three persons had any sort of involvement as part of any conspiracy, they cannot be roped in under Section 120B I.P.C also. The materials produced by the prosecution as against these three accused are not sufficient to form a judicious opinion and to come to a prima facie finding that these three accused had any dishonest role or involvement in the deal between the SNC

Lavalin and the KSEB. There is reason to believe that the accused Nos.1 and 8 acted only as Government Secretaries and they placed materials before the Cabinet only on the basis of the materials furnished by the KSEB. There is nothing to show that these Government Secretaries had any dishonest role at any stage of the transaction, or that they had any reason to cause any wrongful gain to the SNC Lavalin, or that they had made any gain unlawfully. As regards the 7th accused, I find that despite materials showing failure and inaction on the part of many Ministers who succeeded him, the CBI wrongly picked and chose the 7th accused for prosecution on an allegation of conspiracy, without the support of any material. Just because the SNC Lavalin retracted from the gratuitous promise which was not at all accepted as one of the essential conditions of the contract between the SNC Lavalin and the KSEB, the Minister who obtained such a promise and who later omitted to obtain an enforceable contract, cannot be prosecuted because, there cannot be such a contract on gratuitous

terms. If at all such a contract is there, it cannot, in any circumstance, be legally enforced. The Government would not sustain any loss due to the retraction made by the SNC Lavalin from a gratuitous promise. Had the said promise been made as a consideration for the other contracts, or as one of the essential terms and conditions of the contracts, it would have found a place in the written contracts. So I find that the accused Nos.1,7 and 8 were rightly discharged by the trial court. But the circumstances of the other accused are entirely different. They are the persons who designed the projects for the renovation and modernisation of the Hydro Electrical Projects, they are the persons who perpetrated the contracts which happened to be executed in suspicious circumstances, and they are the persons who allegedly caused monetary gain and pecuniary advantage to the SNC Lavalin. The circumstance and the manner in which the accused Nos.2 to 4 caused such gain, will have to be examined in the light of the essentials under Section 13 (1) (d) of the P.C Act, and it will also have to be examined whether the accused Nos.2 to 4 had made or derived any

gain or benefit, in the said deal. Those factual aspects cannot be probed into at this stage. Those are things which require thorough probe and examination during trial. I find some materials and circumstances substantiating the allegations as against these persons. The other persons who also had involvement in the making of the contracts are no more. Two of them died pending the investigation process, and one died pending the revision petition. So the remaining three, who are the accused Nos.2 to 4 must face trial. Things and allegations as against them require examination and probe during trial. Without a trial, the court cannot take a decision on the allegations made against them. I find materials to form a judicious opinion against them as regards the allegations made by the prosecution, that the accused Nos.2 to 4 might have abused their official position to cause gain to the SNC Lavalin, or to make some gain out of the deal. Let the truth of the allegations be examined during trial. Of course, if they had no vicious or dishonest role or involvement, they would get an acquittal. The merits of the allegations as against these accused

cannot be now gone into and decided. Let things be examined and decided by the trial court. Thus, I find that a charge will have to be framed appropriately against the accused Nos.2 to 4.

In the result, this revision petition is allowed in part. The order of discharge passed by the trial court in favour of the accused Nos.1,7 and 8 is confirmed. But the order of discharge made by the trial court in favour of the accused Nos.2 to 4 will stand set aside. The order of the trial court dated 5.11.2013 on Crl.M.P No.106/2013 will accordingly stand set aside. The case (CC 44/2011) as against the accused Nos.2 to 4 will stand revived in the trial court, and the trial court will proceed for trial against the accused Nos.2 to 4. The trial court is hereby directed to frame charge appropriately against the accused Nos.2 to 4 and proceed further according to law.

**Sd/-
P.UBAID
JUDGE**

ma

/True copy/

P.S to Judge