IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE R. NARAYANA PISHARADI

FRIDAY, THE 23RD DAY OF JULY 2021 / 1ST SRAVANA, 1943

WP(C) NO. 12672 OF 2021

PETITIONER:

T O SOORAJ
AGED 62 YEARS
S/O. OSMAN KHAN, RESIDING AT B5, KENT,
NAALLUKETTU, ERNAKULAM-682 028

BY ADVS.
S.SREEKUMAR (SR.)
M.A.MOHAMMED SIRAJ

RESPONDENTS:

1 STATE OF KERALA
REP. BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM, PIN-682 031

2 THE DEPUTY SUPERINTENDENT OF POLICE,
VIGILANCE AND ANTI CORRUPTION BUREAU, ERNAKULAM,
PIN-682 031

BY ADVS.
SRI.T.A.SHAJI, DIRECTOR GENERAL OF PROSECUTIONS
SHRI.P.NARAYANAN, ADDL.PUBLIC PROSECUTOR
SHRI.A.RAJESH, SPL.PUBLIC PROSECUTOR, VACB

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 13.07.2021, THE COURT ON 23.07.2021 DELIVERED THE FOLLOWING:

"CR"

R.NARAYANA PISHARADI, J

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W.P.(C).No.12672 of 2021

Dated this the 23rd day of July, 2021

J U D G M E N T

The petitioner is the fourth accused in the case registered as V.C.01/2019 by the Vigilance and Anti-Corruption Bureau (VACB), Ernakulam Unit under Section 13(1)(d) read with 13(2) of the Prevention of Corruption Act, 1988 (for short 'the Act') and also under Section 120B of the Indian Penal Code.

2. The facts leading to the registration of the above criminal case are as follows: The Palarivattom Flyover was constructed on the National Highway-66 at Palarivattom Junction in Ernakulam District for reducing the acute traffic congestion there. The flyover was opened for traffic on 12.10.2016. Within a few weeks, potholes and hairline cracks appeared on the flyover.

The Minister of Public Works Department, Government of Kerala sent a communication as letter No.141/M(PWD&R)/2019 dated 03.05.2019 to the Chief Minister of Kerala in which it was alleged that irregularities had been committed in the construction of the flyover. The Chief Minister passed an order on this letter to conduct vigilance enquiry in the matter. As per letter No.156/E(2)/2019/Vig dated 06.05.2019, the Government of Kerala ordered the Director, VACB to conduct a vigilance enquiry in the matter. As per letter No.C-(VE-01/2019/(CRE)14247/ 2019 dated 07.05.2019, the Director, VACB forwarded the same to the Superintendent of Police, VACB, Central Range, Ernakulam for conducting the enquiry. As per order No.VE-01/2019/CRE dated 07.05.2019, the Superintendent of Police, VACB directed the Deputy Superintendent of Police, VACB, Ernakulam Unit to conduct the enquiry. Since the vigilance enquiry revealed commission of the offences under Section 13(1)(d) read with 13(2) of the Act and under Section 120B of the I.P.C, Ext.P2 first information report (FIR) was registered on 03.06.2019 as

V.C.No.01/2019 of the VACB, Ernakulam Unit.

3. The material averments/allegations in Ext.P2 FIR read as follows:

> "The enquiry revealed that Kerala Road Fund Board (KRFB) was directed by the Government of Kerala to provide financial assistance for the implementation of the Palarivattom Fly over at NH 66 in Ernakulam District during the period from 2013 to 2017. The work was entrusted to Roads and Bridges Development Corporation of Kerala Ltd (RBDCK) under SPEEID Kerala Project of PWD. M/s Kerala Industrial and Technical Consultancy Organization Ltd (KITCO) was appointed as the design and supervision consultant for the project. Technical sanction for the work was issued for an amount of Rs.47.70 Crores. The work was awarded to M/s RDS Project Ltd on Engineering, Procurement and Construction (EPC) mode. The design and drawing were prepared by M/s Nagesh Consultant, Bangalore on behalf of the contractor and the work was executed as per the drawings

and design approved by the consultant M/s KITCO Ltd. After the opening of the flyover, within a few week, damages like potholes are seen. Now the bridge is closed and the rectification work is going on as per the supervision of IIT Madras. The hairline cracks found on the girders and piers during the inspection as may be due to several reasons such as improper structure design, lack of quality of the concrete and lack of proper supervision of the work. All the agencies involved in the implementation of the work of the flyover are responsible for the distress of the flyover. As part of the vigilance enquiry the documents were perused, site inspection conducted, and lab report examined revealed that the work of the Palarivattom Fly over is a substandard one and thereby it caused financial loss to the public exchequer. As financial loss sustained to the Government exchequer, due to the substandard work executed, the accused persons ie, A1 Shri.Sumeet Goyal, M.D, RDS Project Ltd (contractor), A2 M/s Nagesh Consultancy, Bangalore (Designer), A3 officials of KITCO (consultant), A4 officials of RBDCK (implementing

agency) and unknown others (A5) are responsible and it is substantiated in evidence for it. From the enquiry conducted it is revealed that A1 to A5 conspired together and as the result of this conspiracy A3 and A4 abused their official position as public servant and by corrupt or illegal means acted without any public interest thereby caused to obtain pecuniary advantage to A1. There is every reason to believe that all the accused persons gained undue pecuniary advantage. But that can be proved only through a detailed probe."

4. Following are the reliefs sought in this writ petition.

"Therefore it is humbly prayed that this Hon'ble court may be pleased to:

(i) set aside Exhibit.P1 inquiry report and Exhibit.P2 FIR and all further proceedings in V.C.No.1 of 2019 of VACB, Ernakulam Unit.

(ii) pass such other orders as may be necessary in the interest of justice."

5. The investigating officer has filed a detailed statement narrating the facts leading to the registration of the case and also the facts revealed in the investigation so far conducted.

6. Heard Sri.S.Sreekumar, learned senior counsel who appeared for the petitioner and Sri.T.A.Shaji, learned Director General of Prosecutions.

7. There are several legal as well as factual grounds stated in the writ petition to challenge Ext.P1 vigilance enquiry report and Ext.P2 F.I.R. However, at the time of hearing, learned senior counsel for the petitioner has raised only the following contentions. (i) The petitioner was a public servant who was employed in connection with the affairs of the State. The preliminary enquiry conducted by the VACB, without the previous approval of the State Government, as envisaged under Section 17A of the Act, was illegal and improper and Ext.P1 report made by the VACB pursuant to such enquiry is invalid. (2) Ext.P2 F.I.R registered on the basis of Ext.P1 enquiry report, without the previous approval of the State Government as envisaged under Section 17A of the Act, is not maintainable under law. The investigation conducted against the petitioner by the VACB, without such previous approval, is wholly illegal.

8. Learned Director General of Prosecutions submitted that, it was the Government which ordered to conduct the preliminary enquiry and therefore, there is no basis for the contention raised by the petitioner that there was no previous approval of the State Government as envisaged under Section 17A of the Act for conducting the enquiry. Learned Director General of Prosecutions also submitted that, at the time of registration of Ext.P2 F.I.R, the petitioner was not an accused in the case and therefore, there was no question of obtaining previous approval by the VACB for conducting investigation against him pursuant to the registration of the case. Learned Director General of Prosecutions further submitted that, once previous approval is granted by the authority concerned for conducting enquiry, it is not necessary for the police officer to again obtain previous approval for registration of F.I.R or conducting investigation, if the preliminary enquiry conducted disclosed commission of cognizable offences under the Act.

9. The rival contentions raised by the parties focus on the

provisions contained in Section 17A of the Act. This provision was introduced in the Act by way of amendment, as per Act 16 of 2018, with effect from 26.07.2018.

10. Section 17A of the Act reads as follows:

> *"17A. Enquiry or Inquiry or investigation of offences relatable to recommendations made or decision taken by public servant in discharge of official functions or duties.--*
>
> *No police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, without the previous approval--*
>
> *(a) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of the Union, of that Government;*
>
> *(b) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in*

connection with the affairs of a State, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed:

Provided that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person:

Provided further that the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month."

11. A close scrutiny of the provisions contained in Section 17A of the Act would reveal the following: (1) The bar under Section 17A of the Act operates against a police officer (2) It prohibits a police officer from conducting any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under the Act without the previous approval

of the prescribed authority (3) The bar under the provision operates or applies only when the offence allegedly committed by a public servant under the Act relates to any recommendation made or decision taken by such public servant in discharge of his official functions or duties (4) The authority competent to grant previous approval for enquiry or inquiry or investigation is the Central Government in the case of a person employed in connection with the affairs of the Union (5) The authority competent to grant previous approval for enquiry or inquiry or investigation is the State Government in the case of a person employed in connection with the affairs of the State (6) The authority competent to grant previous approval for enquiry or inquiry or investigation in the case of any other person is the authority competent to remove the public servant from his office (7) The provision also applies in case of a retired public servant. The previous approval envisaged under Section 17A of the Act is necessary even if the public servant has retired from service (8) Section 17A of the Act does not apply to cases involving

arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person (9) The time which shall be taken by the authority concerned to convey its decision on granting of approval is three months (10) The authority may, for reasons to be recorded in writing, extend the above time by a further period of one month.

12. The object of Section 17A of the Act is to protect public servants from malicious, vexatious and baseless prosecution. However, it cannot be considered as a protective shield for corrupt public servants. It is a safeguard only for the honest officers. A public servant cannot be left to be under constant apprehension that bona fide decisions taken by him would be open to enquiry, inquiry or investigation on the basis of frivolous and false complaints made against him. If every decision taken by a public servant is viewed with suspicion, the public administration will come to a grinding halt as the persons responsible for taking decisions would lose their enthusiasm. Section 17A of the Act intends to avoid such a situation. The

requirement of seeking previous approval presupposes that the offence under the Act allegedly committed by the public servant is relatable to any recommendation made or decision taken by him in discharge of his official functions or duties.

13. The expression "discharge of his official functions or duties" in Section 17A of the Act reflects the legislative intent that the protection envisaged is not a blanket protection. The purpose is to protect an honest and responsible public servant if the recommendation made or decision taken by him is in discharge of his official functions or duties. As a necessary corollary, previous approval is required only if the recommendation made or decision taken is directly concerned with the official functions or duties of the public servant. When a recommendation or decision is made by a public servant, which is not directly and reasonably connected with his official functions or duties, he is not entitled to get the protection under Section 17A of the Act.

14. As already noticed, the provisions under Section 17A

of the Act would apply only when the offence under the Act alleged to have been committed by the public servant relates to a recommendation made or decision taken by the public servant in discharge of his official functions or duties. Emphasis has been made on this aspect by the Madhya Pradesh High Court in **Kavindra Kiyawat v. State of M.P (MANU/MP/1150/2020)** by holding as follows:

> *"From the plain reading of Section 17A of Prevention of Corruption Act, 1988, it is clear that an officer can claim protection from "enquiry" or "investigation" only when he has made any "recommendation" or "decision". The general meaning of word "decision" means, the action or process of deciding something or resolving a question. Thus, it can be said that a "decision" means an act by which an Executive or Authority decides to act in a particular manner in a given set of facts or problems. Therefore, in order to apply the provisions of Section 17A of Prevention of Corruption Act, 1988, there must be "decision" or "recommendation" by an authority against which an enquiry or investigation is under contemplation. Maintaining silence on a particular issue cannot be*

said to be a "recommendation" or "decision".

15. In the present case, the petitioner was a public servant as defined under Section 2(c) of the Act. He was the Secretary to Government, Public Works Department at the time when the offence under the Act was allegedly committed. He has retired from service on 31.05.2018.

16. Learned senior counsel for the petitioner contended that the preliminary enquiry, which culminated in Ext.P1 report, was conducted by the VACB without the previous approval of the State Government as envisaged under Section 17A of the Act. Learned senior counsel submitted that the enquiry was conducted into offences under the Act allegedly committed by public servants including the petitioner and such offences related to recommendation made/decision taken by the petitioner in discharge of his official functions or duties. Therefore, it is submitted that previous approval by the competent authority was absolutely necessary to conduct such an enquiry.

17. In **Yashwant Sinha v. C.B.I : (2020) 2 SCC 338**, the Apex Court has considered the importance of the provision

contained in Section 17A of the Act and it was observed as follows:

> *"In terms of Section 17A, no police officer is permitted to conduct any enquiry or inquiry or conduct investigation into any offence done by a public servant where the offence alleged is relatable to any recommendation made or decision taken by the public servant in discharge of his public functions without previous approval, inter alia, of the authority competent to remove the public servant from his office at the time when the offence was alleged to have been committed. In respect of the public servant, who is involved in this case, it is clause (c), which is applicable. Unless, therefore, there is previous approval, there could be neither inquiry or enquiry or investigation. It is in this context apposite to notice that the complaint, which has been filed by the petitioners in Writ Petition (Criminal) No. 298 of 2018, moved before the first respondent CBI, is done after Section 17A was inserted. The complaint is dated 4.10.2018. Para 5 sets out the relief which is sought in the complaint which is to register an FIR under various provisions. ..... the petitioners have filed the complaint fully knowing that Section 17A constituted a bar to any*

inquiry or enquiry or investigation unless there was previous approval. In fact, a request is made to at least take the first step of seeking permission under Section 17A of the 2018 Act. Writ Petition (Criminal) No. 298 of 2018 was filed on 24.10.2018 and the complaint is based on non-registration of the FIR. There is no challenge to Section 17A. Under the law, as it stood, both on the date of filing the petition and even as of today, Section 17A continues to be on the statute book and it constitutes a bar to any inquiry or enquiry or investigation. The petitioners themselves, in the complaint, request to seek approval in terms of Section 17A but when it comes to the relief sought in the writ petition, there was no relief claimed in this behalf. Even proceeding on the basis that on petitioners' complaint, an FIR must be registered as it purports to disclose cognizable offences and the Court must so direct, will it not be a futile exercise having regard to Section 17A. I am, therefore, of the view that though otherwise the petitioners in Writ Petition (Criminal) No.298 of 2018 may have made out a case, having regard to the law actually laid down in Lalita Kumari [Lalita kumari v. State of U.P : (2014) 2 SCC 1] and more importantly, Section 17A of the Prevention of Corruption Act, in a review petition, the petitioners

> *cannot succeed. However, it is my view that the judgment sought to be reviewed, would not stand in the way of the first respondent in Writ Petition (Criminal) No.298 of 2018 from taking action on Ext.P-1, complaint in accordance with law and subject to first respondent obtaining previous approval under Section 17A of the Prevention of Corruption Act."*

18. The decision of the Supreme Court in **Yashwant Sinha** (supra) is authority for the proposition that, in respect of a complaint filed or information given to a police officer, after the insertion of Section 17A in the Act, regarding commission of an offence committed by a public servant under the Act and which relates to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, unless there is previous approval of the authority concerned, the police officer cannot conduct any enquiry or investigation into such offence.

19. The embargo under Section 17A of the Act applies only to such enquiry or investigation which is initiated after the introduction of that provision in the statute. The legislative intent

is certainly not to set the clock back to invalidate investigation or enquiry which was undertaken prior to the coming into force of that provision.

20. Ext.R2(b) is the copy of the letter No.156/E(2)/ 2019/Vig dated 06.05.2019 sent to the Director, VACB by the Joint Secretary, Vigilance Department. As per this letter, direction was given to immediately conduct vigilance enquiry regarding the irregularities committed in the construction of the Palarivattom Flyover and to file report to the Government. Learned Director General of Prosecutions submitted that it was on the basis of Ext.R2(b) letter sent by the Government that the VACB conducted vigilance enquiry and filed Ext.P1 report.

21. Learned senior counsel for the petitioner contended that Ext.R2(b) is only an executive order passed on the basis of the direction given by the Chief Minister of Kerala and it is not an order passed on behalf of the Governor of Kerala as provided under Article 166 of the Constitution of India and therefore, it has no validity.

22. Article 154(1) of the Constitution of India states that the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Article 166(1) of the Constitution of India provides that all executive action of the Government of a State shall be expressed to be taken in the name of the Governor. Article 166(2) of the Constitution states that, orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor. Article 166(3) of the Constitution provides that, the Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this

Constitution required to act in his discretion.

23. Rule 12 of the Rules of Business of the Government of Kerala, framed by the Governor under Article 166(3) of the Constitution of India, states that every order or instrument of the Government of the State shall be signed by a Secretary, an Additional Secretary, a Joint Secretary, a Deputy Secretary, an Under Secretary or by such other officer as may be specially empowered in that behalf and such signature shall be deemed to be the proper authentication of such order or instrument. Rule 12 permits every order or instrument of the Government of the State to be signed by a Secretary, an Additional Secretary, a Joint Secretary, a Deputy Secretary, an Under Secretary or by such other officer as may be specially empowered in that behalf.

24. When a Minister takes an action according to the Rules of Business, it is both in substance and in form the action of the Governor (See **A.A.Padmanabhan v. State of Kerala : AIR 2018 SC 2982**).

25. In **A.Sanjeevi Naidu v. State of Madras : AIR 1970**

SC 1102, a Constitution Bench of the Supreme Court has held as follows:

> *"Under our Constitution, the Governor is essentially a constitutional head, the administration of State is run by the Council of Ministers. But in the very nature of things, it is impossible for the Council of Ministers to deal with each and every matter that comes before the Government. In order to obviate that difficulty the Constitution has authorised the Governor under sub-article (3) of Article 166 to make rules for the more convenient transaction of business of the Government of the State and for the allocation amongst its Ministers, the business of the Government. All matters excepting those in which Governor is required to act in his discretion have to be allocated to one or the other of the Ministers on the advice of the Chief Minister".*

The Constitution Bench has further held as follows:

> *"The cabinet is responsible to the legislature for every action taken in any of the ministries. That is the essence of joint responsibility. <u>That does not mean that each and every decision must be taken by the cabinet</u>. The political responsibility of the Council of Ministers does not and cannot predicate the personal responsibility of the Ministers to*

discharge all or any of the governmental functions. Similarly an individual Minister is responsible to the legislature for every action taken or omitted to be taken in his ministry. This again is a political responsibility and not personal responsibility. Even the most hardworking Minister cannot attend to every business in his department. If he attempts to do it, he is bound to make a mess of his department. In every well planned administration, most of the decisions are taken by the civil servants who are likely to be experts and not subject to political pressure. The Minister is not expected to burden himself with the day to day administration. His primary function is to lay down the policies and programmes of his ministry while the Council of Ministers settle the major policies and programmes of the Government. When a civil servant takes a decision, he does not do it as delegate of his Minister. He does it on behalf of the Government. It is always open to a Minister to call for any file in his ministry and pass orders. He may also issue directions to the officers in his ministry regarding the disposal of Government business either generally or as regards any specific case. Subject to that over all power, the officers designated by the 'Rules' or the standing orders, can take decisions on

behalf of the Government. These officers are the limbs of the Government and not its delegates".

(emphasis supplied)

26. In **Samsher Singh v. State of Punjab : AIR 1974 SC 2192**, a seven Judge Bench of the Supreme Court has held as follows:

"The expression "Business of the Government of India'' in clause (3) of Article 77, and the expression "Business of the Government of the State'' in clause (3) of Article 166 includes all executive business. In all cases in which the President or the Governor exercises his functions conferred on him by or under the Constitution with the aid and advice of his Council of Ministers he does so by making rules for convenient transaction of the business of the Government of India or the Government of State respectively or by allocation among his Ministers of the said business, in accordance with Articles 77(3) and 166(3) respectively. ..... Both Articles 77(3) and 166(3) provide that the President under Article 77(3) and the Governor under Article 166(3) shall make rules for the more convenient transactions of the business of the Government and the allocation of business among the Ministers of the said business. The rules of business and the allocation

among the Ministers of the said business all indicate that the decision of any Minister or officer under these two Articles viz., Article 77(3) in the case of the President and Article 166(3) in the case of the Governor of the State is the decision of the President or the Governor respectively. ..... Where functions entrusted to a Minister are performed by an official employed in the Minister's Department there is in law no delegation because constitutionally the act or decision of the official is that of the Minister. The official is merely the machinery for the discharge of the functions entrusted to a Minister. .... The decision of any Minister or officer under rules of business made under any of these two Articles 77(3) and 166(3) is the decision of the President or the Governor respectively. These articles did not provide for any delegation. Therefore, the decision of Minister or officer under the rules of business is the decision of the President or the Governor".

27. In **State of Punjab v. Mohammed Iqbal Bhatti : (2009) 17 SCC 92**, it has been held as follows:

"It is now well-known that in the event it appears from the order and the records produced before the court, if any occasion arises therefor that even if a

valid order is not authenticated in terms of Clause (3) of Article 166 of the Constitution of India, the same would not be vitiated in law. Failure to authenticate an executive order is not fatal. The said provision is directory in nature and not mandatory".

28. In the present case, the Chief Minister had made an endorsement on the letter sent to him by the Minister of Public Works Department, ordering vigilance enquiry in the matter. As per Ext.R2(b) letter, the Joint Secretary, Vigilance Department communicated the decision of the Chief Minister to the Director, VACB. Rule 4 of the Rules of Business provides that, the business of the Government shall be transacted in the Department specified in the First Schedule to the Rules and shall be classified and distributed between those departments as laid down therein. Vigilance Department comes under the First Schedule to the Rules. Rule 9 of the Rules of Business states that, without prejudice to the provisions of Rule 7, the Minister in charge of a department shall be primarily responsible for the disposal of the business appertaining to that department. There is no dispute

with regard to the fact that the Chief Minister was also the Minister for the Vigilance Department. When the Minister takes an action, it is an action taken by the State Government. In such circumstances, in the light of the authoritative pronouncements of the Apex Court referred to earlier, there can be no doubt with regard to the fact that the order or decision to conduct vigilance enquiry which was communicated to the Director, VACB by the Joint Secretary, Vigilance Department as per Ext.R2(b) letter was the order/decision of the State Government.

29. Learned senior counsel for the petitioner contended that Ext.R2(b) instrument is not valid because it does not state that it was issued "By order of the Governor".

30. In **R. Chitralekha v. State of Mysore : AIR 1964 SC 1823**, a question arose before the Constitution Bench whether a letter signed by the Under Secretary communicating the decision of the Government is valid or not. The Apex Court held as follows:

> *"Ex facie this letter shows that it was a communication of the order issued by the*

> *Government under the signature of the Under Secretary to the Government, Education Department. Under Article 166 of the Constitution all executive action of the Government of a State shall be expressed to be taken in the name of the Governor, and that orders made in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor and the validity of an order which is so authenticated shall not be called in question on the ground that it is not an order made by the Governor. If the conditions laid down in this Article are complied with, the order cannot be called in question on the ground that it is not an order made by the Governor. <u>It is contended that as the order in question was not issued in the name of the Governor</u> the order was void and no interviews could be held pursuant to that order".*

After making reference to the other decisions of the Apex Court, it was concluded by the Constitution Bench as follows:

> *"It is, therefore, settled law that provisions of Article 166 of the Constitution are only directory and not mandatory in character and, if they are not complied with, it can be established as a question of fact that the impugned order was issued in fact by*

the State Government or the Governor".

31. In **Krishna Iyer v. State of Kerala : 2005 (1) KLT 391**, a Division Bench of this Court has held as follows:

> *"Even if it is not written that 'By order of Governor', it will still be an order passed by the State if it is passed by Secretary on behalf of the Government."*

32. In **Udayakumar v. State of Kerala : 2001 (2) KLT 895**, this Court has held as follows:

> *"But then Article 166(1) of the Constitution provides that all executive action of the Government of a State shall be expressed to be taken in the name of the Governor. It would have been appropriate therefore that the impugned order specifically mentioned the fact that it was issued by the order of the Governor. It is not so done. However, this does not appear to be a material defect which would invalidate the sanction. No authority has been placed before me to show that the absence of such a mention would render the sanction void. In the circumstances, the sanction granted in the case cannot he held to be invalid for this reason".*

33. In the light of the decisions referred to above, there is no merit in the contention of the learned counsel for the petitioner that Ext.R2(b) letter or instrument is not valid for the

reason that it does not bear the words "By order of the Governor".

34. Learned senior counsel for the petitioner would then contend that Ext.R2(b) letter does not show that the State Government had given previous approval for conducting enquiry against the petitioner.

35. The decision taken by the State Government was to conduct vigilance enquiry into the irregularities committed in the construction of the Palarivattom Flyover. The vigilance enquiry was not specially directed against the petitioner or any other public servant. Therefore, Ext.P1 vigilance enquiry report cannot be challenged by the petitioner on the ground that the previous approval given was not for conducting enquiry specifically against the petitioner. In fact, Ext.P1 enquiry report would show that the petitioner was then not even a suspected officer.

36. In the above circumstances, the challenge made by the petitioner to Ext.P1 enquiry report fails. The prayer made by the petitioner to quash Ext.P1 report is liable to be rejected.

37. The other contention raised by the learned senior counsel for the petitioner is that there was no previous approval of the State Government obtained by the VACB for registration of Ext.P2 F.I.R and for conducting investigation against the petitioner and therefore, Ext.P2 F.I.R is not maintainable under law.

38. Learned Director General of Prosecutions has contended that the petitioner was not an accused in the case at the time of registration of Ext.P2 F.I.R and therefore, there was no question of obtaining previous approval of the Government for registration of the case or conducting investigation against him. Learned Director General of Prosecutions would also contend that once previous approval under Section 17A of the Act is given by the authority concerned for conducting preliminary enquiry, it is not necessary for the police officer to again obtain such approval for conducting investigation.

39. When the authority concerned had given previous approval for conducting preliminary enquiry and during such

enquriy, if commission of any cognizable offence under the Act by a public servant, relating to a decision taken or recommendation made by him in connection with his official duties, is disclosed, is it then necessary for the police officer to again obtain previous approval for registration of FIR and conducting investigation into such offence? I am of the firm view that the answer to the above question should be in the negative. The reasons are as follows.

40. True, in Section 17A of the Act, the word "or" is used between the words "enquiry", "inquiry" and "investigation". If a literal interpretation is given to this provision, then previous approval of the authority concerned would be required for conducting preliminary enquiry and then again for conducting investigation. But, considering the object and purpose of the Act and also in particular of the provision under Section 17A, such an interpretation is not warranted. The provision must receive a reasonable interpretation particularly when it fetters the right of the police officer to conduct the investigation into a cognizable offence.

41. In **Dr.Subramanian Swamy v. Dr.Manmohan Singh : AIR 2012 SC 1185**, it has been observed as follows:

> *"Today, corruption in our country not only poses a grave danger to the concept of constitutional governance, it also threatens the very foundation of Indian democracy and the Rule of Law. The magnitude of corruption in our public life is incompatible with the concept of a socialist, secular democratic republic. It cannot be disputed that where corruption begins all rights end. Corruption devalues human rights, chokes development and undermines justice, liberty, equality, fraternity which are the core values in our preambular vision. Therefore, the duty of the Court is that any anti - corruption law has to be interpreted and worked out in such a fashion as to strengthen the fight against corruption. That is to say in a situation where two constructions are eminently reasonable, the Court has to accept the one that seeks to eradicate corruption to the one which seeks to perpetuate it."*
>
> (emphasis supplied)

Dealing with the protection given to a public servant under Section 19 of the Act, the Apex Court proceeded further and observed as follows:

> *"These protections are not available to other citizens. Public servants are treated as a special class of persons enjoying the said protection so that they can perform their duties without fear and favour and without threats of malicious prosecution. However, the said protection against malicious prosecution which was extended in public interest cannot become a shield to protect corrupt officials. These provisions being exceptions to the equality provision of Article 14 are analogous to provisions of protective discrimination and these protections must be construed very narrowly. These procedural provisions relating to sanction must be construed in such a manner as to advance the causes of honesty and justice and good governance as opposed to escalation of corruption."*
>
> (emphasis supplied)

42. In **Seaford Court Estates Ltd. v. Asher: 1949 (2) KB 481**, Lord Denning has observed as follows:

> *"Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of*

mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature."

43. With regard to corruption, what is the present social condition in India? In **K.C.Sareen v. C.B.I : AIR 2001 SC 3320**, it was observed as follows:

"Corruption by public servants has now reached a

> *monstrous dimension in India. Its tentacles have started grappling even the institutions created for the protection of the republic. Unless those tentacles are intercepted and impeded from gripping the normal and orderly functioning of the public offices, through strong legislative, executive as well as judicial exercises the corrupt public servants could even paralyse the functioning of such institutions and thereby hinder the democratic polity. Proliferation of corrupt public servants could garner momentum to cripple the social order if such men are allowed to continue to manage and operate public institutions".*

44. In **Neera Yadav v. C.B.I : AIR 2017 SC 3791**, the Apex Court has observed as follows:

> *"Corruption has spread its tentacles almost on all the key areas of the State and it is an impediment to the growth of investment and development of the country. If the conduct of administrative authorities is righteous and duties are performed in good faith with the vigilance and awareness that they are public trustees of people's rights, the issue of lack of accountability would themselves fade into insignificance".*

45. The amendments made to the Prevention of Corruption

Act by Act 16 of 2018 were with the intention to strengthen it to bring it in line with the current international practice. The PC Act, 1988 is a special statute. The preamble of it shows that it has been enacted to consolidate and amend the law relating to the prevention of corruption and for the matters connected therewith. It is intended to make the corruption laws more effective by widening their coverage and by strengthening the provisions. As noticed earlier, the object of Section 17A of the Act is to give protection to honest public servants to take decisions without any fear of vexatious prosecution against them.

46. In the aforesaid scenario, as held in **Dr.Subramanian Swamy** (supra), a provision like Section 17A in an anti-corruption law has to be interpreted in such a fashion as to strengthen the fight against corruption. Where two constructions are eminently reasonable, the Court has to accept the one that seeks to eradicate corruption than the one which seeks to perpetuate it. If such an interpretation is given to the provision contained in Section 17A of the Act, it can be found that, in a

case where the police officer has obtained previous approval for conducting enquiry and if commission of a cognizable offence under the Act (relating to a decision taken or recommendation made by a public servant) is disclosed in such enquiry, then the police officer is not again obliged to get previous approval for conducting investigation into such offence.

47. Ext.P2 FIR was registered on 03.06.2019. The petitioner was implicated in the case as an accused only on 30.08.2019. Learned senior counsel for the petitioner contended that, after implicating the petitioner as an accused in the case, but before conducting any investigation against him, approval of the State Government should have been obtained under Section 17A of the Act.

48. Section 17A of the Act, as interpreted earlier, does not permit me to accept the above contention. If the above contention of the petitioner is accepted, it would very often result in absurd situations. During the course of investigation into an offence under the Act, the role played by many persons, other

than the persons who are already arrayed as accused in the FIR, may come to light. Many of them may be public servants. If the contention of the learned senior counsel is accepted, it would mean that, when a person who is a public servant is implicated as an accused in the case subsequent to the registration of the FIR, then before conducting investigation against such person, the police officer has to obtain approval of the authority concerned. Then, when the role of another public servant in the commission of the offence under the Act is revealed during the investigation and if he is implicated as an accused in the case, the police officer has to again obtain approval of the authority concerned before conducting investigation against that particular public servant. This may go on and go on as a continuing process. Section 17A of the Act cannot be given such an absurd interpretation. What is contemplated under Section 17A of the Act is "previous" approval for conducting investigation into an offence committed by a public servant. Once previous approval is given for conducting investigation into an offence committed

by any public servant and once investigation has commenced, then there is no question of granting "previous" approval for conducting investigation against each public servant who may subsequently be implicated in the case.

49. In many cases, when an FIR is registered under a provision of law, the names of the accused who have committed the offence may not be known and their names may not be stated in the FIR. FIR is not an encyclopedia disclosing all facts and details relating to the offence allegedly committed. FIR is not meant to be a detailed document containing chronicle of all intricate and minute details. When the information contained in the FIR does not furnish all details, it is for the investigating officer to find out those details during the course of investigation and collect necessary evidence. It is well known that, whenever an offence is committed, it is not necessary that the investigation shall be confined to the role of only those arrayed as accused in the FIR or with reference to the penal provisions mentioned in it. Once a case is registered, under whatever provision, during the

course of the investigation conducted, the situation may warrant inclusion of the names of new persons as accused or deletion of the names of existing accused and also invocation of new or different penal provisions other than those mentioned in the FIR. Section 17A of the Act cannot be interpreted in such a manner that previous approval of the authority concerned shall be obtained by the police officer before implicating any new person, who is a public servant, as an accused in the case and conducting investigation against him.

50. At this juncture, it is also to be taken note of the fact that the petitioner was implicated as an accused in the case as early as on 30.08.2019 but he filed this writ petition only on 23.06.2021. He had been arrested and remanded to judicial custody during the course of the investigation. Therefore, he cannot pretend that he was earlier not aware of the fact that he was implicated as an accused in the case. In the statement filed by the investigating officer it is mentioned that the investigation of the case has been completed. When the investigation has

reached the fag end, it is not proper to quash the F.I.R.

51. In the statement filed by the investigating officer, it is mentioned that the investigation has revealed that the petitioner has committed the offences punishable under Sections 13(1)(c) and 13(1)(d) read with 13(2) of the Act and also under Sections 409 and 120B of the Indian Penal Code. It is further mentioned in the statement filed by the investigating officer that the petitioner had recommended sanction of mobilization advance for the construction of the fly over fixing interest at the rate of 7% only which was less than the approved rate with a view to give pecuniary advantage to the contractor. During the investigation, it has been revealed that, subsequent to the release of the mobilization advance, the son of the petitioner had purchased 17 cents of land on 01.10.2014 for a consideration of 140 lakhs rupees but the actual payment in connection with the above transaction was 330 lakhs rupees. It is also stated that, out of the aforesaid amount, the petitioner had handed over an amount

of 80 lakhs rupees in cash on 22.05.2014, 20 lakhs rupees on 04.08.2014 and 25 lakhs rupees on 19.09.2014 as advance. It means that, during the investigation of the case, it is revealed that offences which have no connection whatsoever with the official duties of the petitioner were committed by him. If that be so, the petitioner is not entitled to get the protection under Section 17A of the Act in respect of those offences.

52. The investigation has revealed that the petitioner has committed an offence punishable under Section 13(1)(c) of the Act. This provision, as it stood before the amendment of the Act, reads as follows:

> *"13(1) A public servant is said to commit the offence of misconduct, – (c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person to do so."*

53. In **Shambhoo Nath Misra v. State of U.P : AIR 1997 SC 2102**, the Apex Court has held as follows:

> *"It is not the official duty of the public servant to*

fabricate the false record and misappropriate the public funds etc. in furtherance of or in the discharge of his official duties. The official capacity only enables him to fabricate the record or misappropriate the public fund etc. It does not mean that it is integrally connected or inseparably interlinked with the crime committed in the course of same transaction."

54. In **Parkash Singh Badal v. State of Punjab : AIR 2007 SC 1274**, it has been held as follows:

"The principle of immunity protects all acts which the public servant has to perform in the exercise of the functions of the Government. The purpose for which they are performed protects these acts from criminal prosecution. However, there is an exception. Where a criminal act is performed under the colour of authority but which in reality is for the public servant's own pleasure or benefit then such acts shall not be protected under the doctrine of State immunity".

55. In **Devender Kumar v. Central Bureau of Investigation : 2019 (1) Crimes 726**, the Delhi High Court has observed as follows:

"*Section 17A as it reads and the legislative intent in*

its enactment can only be to protect public servants in the bonafide discharge of official functions or duties. However, when the act of a public servant is ex-facie criminal or constitutes an offence, prior approval of the Government would not be necessary".

56. In **Satish Pandey v. Union of India: MANU/CG/0097/2020**, the Chattisgarh High Court has observed as follows:

"Amassing wealth by misappropriation or embezzlement is never considered to be in discharge of official duties. The provision (Section 17A of the PC Act) has been inserted only to provide protection to officers/public servants who discharge their official functions and/or duties with diligence, fairly, in an unbiased manner and to the best of their ability and judgment, however, it does not seek to protect any person who is involved in garnishing wealth by corrupt means".

57. In **All India Private Schools Legal Protection Society v. The Chief Secretary, Government of Tamil Nadu: MANU/TN/7248/2020**, the Madras High Court has observed as follows:

"Section 17A of the Prevention of Corruption Act

> *cannot be made applicable in those cases where the act of the public servant that amounts to an offence appears on the face of it lacking in good faith. Issuing public building license and no objection certificates for the 11th respondent cannot be said to be acts done in good faith. Where the performance of public function is grossly improper, the safe conclusion at least at the initial stage can be that it was in anticipation of or in consequence of accepting an undue advantage from the beneficiary".*

58. Use or utilization of public funds by a public servant under the colour of authority but really for his own benefit cannot be considered as an act done in discharge of his official functions or duties. Such an act is not entitled to get the protection under Section 17A of the Act.

59. The quintessence of the discussion above is that, neither Ext.P1 enquiry report nor Ext.P2 FIR, is liable to be quashed at the instance of the petitioner.

Consequently, the writ petition is dismissed.

(sd/-) **R.NARAYANA PISHARADI, JUDGE**

jsr

APPENDIX OF WP(C) 12672/2021

PETITIONER'S EXHIBITS

Exhibit P1	TRUE COPY OF THE ENQUIRY REPORT NO. VE-01/209/CRE DATED 28.05.2019.
Exhibit P2	TRUE COPY OF THE FIR IN CRIME NO.1 OF 2019 DATED 03.06.2019 OF THE VACB,ERNAKULAM UNIT.
Exhibit P3	TRUE COPY OF REPLY DATED 14.11.2019 ISSUED BY D.Y.S.P VACB, ERNAKULAM UNIT.
Exhibit P4	TRUE COPY OF G.O. (MS) NO.57/14/PWD DATED 15/07/2014.
Exhibit P5	A TRUE COPY OF THE REMAND REPORT DATED 30/08/2019.

RESPONDENTS' EXHIBITS:

ANNEXURE R2(a) : TRUE COPY OF THE LETTER NO.139/M(PWD & R)/2019 DATED 03.05.2019.

ANNEXURE R2(b) : TRUE COPY OF THE COMMUNICATION NO.156/E2/2019/Vig DATED 06.05.2019 ISSUED BY THE ADDITIONAL CHIEF SECRETARY TO GOVERNMENT TO THE DIRECTOR, VACB.

ANNEXURE R2(c) : TRUE COPY OF THE RELEVANT PAGES OF THE NOTE FILE OF THE VIGILANCE (E) DEPARTMENT OF THE GOVERNMENT.

ANNEXURE R2(d) : TRUE COPY OF THE COMMUNICATION NO.C-(VE 1/2019/CRE) 14247/2019 DATED 22.06.2019.

ANNEXURE R2(e) : TRUE COPY OF THE RELEVANT PAGES OF THE NOTE FILE (NOTE 21 & 22) OF VIGILANCE (E) DEPARTMENT.

ANNEXURE R2(f) : TRUE COPY OF THE COMMUNICATION NO.Vig-E2/156/2019-Vig DATED 26.08.2019 ISSUED BY ADDITIONAL CHIEF SECRETARY TO GOVERNMENT TO THE DIRECTOR OF VACB.

ANNEXURE R2(g) : TRUE COPY OF THE NOTE NO.31 AND 34 IN THE NOTE FILE OF VIGILANCE (E) DEPARTMENT.

TRUE COPY

PS TO JUDGE