

C.R.NO.51

1

M.A.Ex.135

**IN THE COURT OF SPECIAL JUDGE(C.B.I.) FOR GREATER
BOMBAY**

MISC. APPLICATION EX.135
IN
SPECIAL CASE NO.83 OF 2003

Anup Kumar Gond

Age:50 years, Occ:Service,
R/o.116, Juhu Sagar,
New D.N. Nagar, Andheri(W),
Mumbai:400 053.

...Applicant/Accd.No.3

V/s.

The State of Maharashtra

(RC4(E)/2002/CBI/BS&FC/Mumbai)

...Complainant

Shri.Nitin Pradhan, Adv. for Applicant/Accused No.3

Shri. S.D.Gonsalves, Spl.P.P. for C.B.I.

**Coram: His Honour the Special Judge(C.B.I.)
Shri.M.V. Kulkarni.**

**Dated : 2nd July, 2012.
(Court Room No.51)**

ORDER

1 This application for discharge U/s.227 of Cr.P.C. filed by accused No.3 was rejected by my Ld. predecessor by his order dt.7/7/2010. Matter was carried to Hon'ble Bombay High Court in Writ Petition No.675/11. Hon'ble Bombay High Court vide order dt.3/8/11 quashed and set aside the order of rejection. The matter is remitted back to this Court to consider issue as to whether petitioner is public servant or not, in the light of observations made by Hon'ble Apex Court in the case of **S.S. Dhanoa V/s. Municipal Corporation of Delhi 1981(3) SCC 431.**

2 In short, the contention of the applicant/accused No.3 is that in 1983, he joined Indian Railways as Special Class Apprentice. After completion of his probation in year 1987, he was posted as Assistant Mechanical Engineer at Jabalpur. In 1996, he was serving as Deputy Chief Mechanical Engineer(Axil) under the Ministry of Railways. Thereafter by virtue of notification dt.4/11/1998 issued by Government of India, Ministry of Surface Transport(Shipping Wing), the applicant was appointed as Commissioner, Seamen's Provident Fund Organization with effect from 9/2/06 for a period of four years.

3 By virtue of provisions of sub-section (7) of Section 7 of Seamen's Provident Fund Act, the applicant is employee of the Board and not a Government employee or a public servant. As per prosecution case, the applicant, while working as Commissioner, Seamen's Provident Fund Organization, during years 1998-2002, entered into a criminal conspiracy with accused No.1 Sanjay Agarwal, Director of M/s.Lloyds Brokerage/ Euroasian Securities, Accused No.2 Ketan Seth, Director of M/s.Ketan Seth & Co., Accused No.4 Chandulal Thadani, Senior Assistant Seamen's Provident Fund and others, the object of which was to commit criminal breach of trust and cheating the Seamen's Provident Fund which was entrusted to him, in the matter of purchase and sale of Government Securities for and on behalf of Seamen's Fund and during the said transaction caused wrongful loss to the Seamen's Provident Fund and wrongful gain to himself, accused No.4 Chandulal Thadani, accused No.1 Sanjay Agarwal and accused No.2 Ketan Seth and others.

4 Chargesheet reveals that on 20/10/03, sanction U/s.197 of Cr.P.C. and U/s.19(1) of Prevention of Corruption Act was accorded by the

Government of India, Ministry of Railways(Railways Board) for the prosecution of the applicant as the Commissioner of Seamen's Provident Fund, as a public servant. However, applicant was not a public servant and provisions of Prevention of Corruption Act would not attract.

5 The applicant was appointed as the Commissioner, Seamen's Provident Fund. Under the provisions of Section 7 of Seamen's Provident Fund Act, 1966, the method of recruitment, salary and allowances, discipline and other conditions of service of other officers and employees of the Board shall be such as may be specified by the Board with the approval of the Government. All the persons appointed under this section shall be the employees of the Board. The term "Board" has been defined U/s.2(b) of the Act of 1966 which means the Board of Trustees. The Central or State Government in no manner whatsoever contribute to the Seamen's Provident Fund. Board of Trustees is neither local authority nor a corporation established by or under Central, Provincial or State Act or an authority or body owned or controlled or aided by the Government or a Government company. Commissioner of Seamen's Provident Fund is also not a person in the service or pay of Government or remunerated by the Government.

6 The applicant is before the Court, being shown as public servant. However, the applicant not being public servant cannot be tried for offences under Prevention of Corruption Act, 1988. Entire prosecution is without jurisdiction. In view of settled law in the case of **S.S. Dhanoa (cited supra)**, member of the Indian Administrative Service, who has been sent on deputation to Co-operative Society, is not a public servant. Consequently, applicant may be discharged of offences under Prevention of

Corruption Act, 1988.

7 Respondent/CBI resisted the application vide say Ex.154. It is alleged that the applicant is facing trial for commission of offence U/s.120-B , 409, 420, 465, 467, 468 and 477-A of IPC and Sec.13(2) r/w. 13(1)(d) of P.C. Act along with other accused. Applicant/Accused No.3 was public servant. Reliance placed on the judgment of Hon'ble Supreme Court in the case of **S.S.Dhanoa(cited supra)** is totally misplaced. Seamen's Provident Fund Act, 1966 was passed by the Parliament. Seamen's Provident Fund is constituted under the provisions of the said Act. It is not in dispute that the accused No.3 during the relevant period was working as Commissioner of the Seamen's Provident Fund. The provisions of Section 2(c) of P.C. Act are very clear that any person in service of a Corporation established by or under an Act is a public servant. It is also that he was appointed as such by Government of India. This is also considering the fact that he could not have been removed from service by any other authority. It is clear that the accused No.3 was very much a public servant as defined under the provisions of the PC Act, 1988. The offence U/s.120-B of IPC is a separate and distinct offence. At the stage of framing of charges, minute scrutiny of the material available in the chargesheet is not required. The applicant, therefore, does not deserve to be discharged.

8 As stated earlier, my learned predecessor by order dt.7th July, 2010 had rejected the discharge application Ex.135. He had framed the point for determination as to whether there is sufficient material for framing charge against the applicant. Hon'ble High Court in its order in Criminal Writ Petition No.675/11 observed that case of **S.S. Dhanoa V/s. Municipal Corporation of Delhi 1981(3) SCC 431**, was cited and it was

urged that petitioner is not a public servant. However, said submissions were not considered. Consequently, this Court has been directed to decide whether petitioner is a public servant or not in the light of observations made by Hon'ble Apex Court in the case of S.S. Dhanoa(supra).

9 By going through the order passed by my learned predecessor dt.7th July, 2010, it becomes clear that it was submitted that Section 2(c)(iii) was pointed out on behalf of the accused. My predecessor has quoted Section 2(c)(viii) which refers to the person authorised or required to perform any public duty. My predecessor also referred to Section 2(b) which defines public duty. My predecessor, therefore, came to the conclusion that the applicant was a public servant and therefore, not entitled for discharge in respect of offences under the Prevention of Corruption Act.

10 Heard Shri.Nitin Pradhan, the Ld. Counsel for the applicant/accused No.3 and Shri.Gonsalves, learned Spl.P.P. for C.B.I. Both made submissions on expected lines.

11 On the basis of rival contentions of parties, following points arise for my determination. I have noted my findings against them for the reasons stated below:-

POINTS**REASONS**

1 Was the applicant not a public servant and consequently entitled for discharge in respect of offences under PC Act?

Yes.

2 What order?

As per final order

REASONS**AS TO POINT NO.1:-**

12 Shri.Gonsalves, the learned SPP made oral submissions as well as filed written arguments. Shri.Gonsalves pointed out towards para 3 and 4 of his reply Ex.154 which are already referred to in para 7 above. He has also pointed towards Section 7(1) of the Seamen's Provident Fund Act, 1966. Accordingly, the Government shall appoint a Seamen's Provident Fund Commissioner who shall be the Chief Executive Officer of the Board and shall be subject to the general control and superintendence of the Board. It is submitted by the prosecution that accused No.3 was appointed as a Commissioner by the Government U/s.7(1) of Seamen's Provident Fund Act 1966. He was appointed as Commissioner, Seamen's Provident Fund Organization by Hon'ble President of India vide notification dt.11/4/1998. He served the Government of India, Ministry of Surface Transport during the period of his deputation. Thus, accused No.3 was appointed as such by Government of India and therefore, a public servant. By no stretch of imagination, he ceases to be a public servant merely because the organization manages funds of people who are not public servants. For that matter even a public sector bank manages funds of private persons. However, the officials of such bank are public servants. Further, whenever a person goes on deputation to another department/corporation, that period is counted as part of the service for pension purpose or any other benefit, meaning thereby that the person continues to remain part of the organization/department that lent him. The applicant joined the service of Indian Railways as a Special Class Apprentice in 1983 and thereafter, was on deputation to SPF. He also can not be removed

from service by any other authority except Government of India. Even the sanction order to prosecute has been issued by Railway Board, Ministry of Railways, Government of India. Considering the provisions of Law, it is submitted that accused No.3 was very much a public servant as defined under the provision of Prevention of Corruption Act, 1988.

13 Prosecution has placed sufficient material in the form of statements of witnesses and documents collected during investigation before this Court. The materials establish a prima facie case made out against the accused persons as per chargesheet filed by the CBI. The applicant is buying time and inordinately delaying the case. Therefore, discharge application deserves to be discharged.

14 Shri.Gonsalves has placed reliance on following judgments in support of his submissions.

1 Naresh Kumar Madan V/s. State of M.P. AIR 2008 Supreme Court 385. As per para 14, the officers of the State Electricity Board are required to carry out public functions. They are public authorities. Their action in one way or the other way entail civil or evil consequences to the consumers of electrical energy. They may prosecute a person. They are empowered to enter into house of the Board's consumers. It is only for proper and effective exercise of those powers, the statute provides that they would be public servants, wherefor a legal fiction has been created in favour of those employees, when acting or purporting to act in pursuance of any of the provisions of the Act within the meaning of Section 21 of the Indian

Penal Code. Indian Penal Code denotes various persons to be public servants. It is, however, not exhaustive. A person may be a public servant in terms of another statute. However, we may note that a person who, inter alia, is in the service or pay of the Government established by or under a Central, Provincial or State Act, would also come within the purview thereof. Section 2(1)(c) of the 1988 Act also brings within its embrace a person in the service or pay of a corporation established by or under a Central Act. As per para 15, we, therefore, fail to see any reason as to why the appellant would not answer the description of public servant within the provisions of the said Act.

2 G.A. Monterio V/s. State of Ajmer 1956-LAWS(SC)-9-1. As per para 13, The true test, therefore, in order to determine whether a person is an officer of the Government is: (1) whether he is in the service or pay of the Government, and (2) whether he is entrusted with the performance of any public duty. If both these requirements are satisfied it matters the least what is the nature of his office, whether the duties he is performing are of an exalted character or very humble indeed. As has been stated in Bacon's Abridgment at Vol.6, page 2, in the article headed "Of the nature of an officer and several kinds of officers.". "The words "officium' principally implies a duty and in the next place, the charge of such duty; and that it is a rule that where one man hath to do with another's affairs against his will, and without his leave, that this is an office, and he who

is in it is an officer.” The next paragraph thereafter may also be referred to in this context: “There is a difference between an office and an employment, every office being an employment; but there are employments which do not come under the denomination of offices; such as an agreement to make hay, herd a flock, and c.; which differ widely from that of steward of a manor” and c.

15 It is the submission of Shri.Gonsalves that Section 2(c)(viii) of PC Act will have to be considered which brings in its sweep any person who holds office by virtue of which he is authorised or required to perform any public duty making him public servant. It is the submission of Shri.Gonsalves that on the other hand **S.S. Dhanoa**'s case relates to Section 197 of Cr.P.C.

16 Learned advocate Shri.Pradhan also made elaborate submissions and also filed written submissions as well as compilation. It is the submission of Shri.Pradhan that Seamen's Provident Fund is autopoiesis body which means self making body. Public servant and Government servants are two independent and different concepts. Section 2(c) of PC Act notifies the characteristics of public servant covered by the said Act.

17 It is the submission of Shri.Pradhan that there are many types of Provident Funds, some of which are Government Provident Fund and some of which are private. As per statement of objects and reasons of Seamen's Provident Fund Act, 1966, the question or providing social security for Seafarers has been under consideration of the Government of India for a long time. The National Welfare Board for Seafarers, a statutory

body, set up under Merchant Shipping Act, 1958, at its meeting held at Madras on 11th January, 1964, appointed a Tripartite Committee comprising of the representatives of the Shipowners, Seamen and Government. This Committee recommended that the Contributory Provident Fund Scheme for Seamen should be introduced with effect from 1st July, 1964, the rate of contribution by the employee and the employer being 6% of the wages up to 31-6-1968 and 8% of wages thereafter. The report of the Tripartite committee was placed before the National Welfare Board for Seafarers at its meeting held in Bombay on the 23rd December, 1964 and was unanimously approved by the Board. Section 8 of the Act provides for the scheme. According to it, every employer to whom this Act applies, shall, in respect of each seamen (being a member) employed by him, contribute to the Fund for the period beginning with the 1st day of July, 1964 and ending with the 31st Day of March, 1968 at the rate of six per cent..... Section 2(d) defines contribution as payable in respect of a member under the scheme. Section 5 provides that 1) the Government shall by notification in the Official Gazette, constitute, with effect from such date as may be specified therein, a Board to be known as the Board of Trustees of the Seamen's Provident Fund which shall be a body corporate having perpetual succession and a common seal and may, by that name, sue and be sued, 2) the head office of the Board shall be in Bombay or at such other place as the Government may, by notification in the official gazetted, specify, 3) the Board shall consist of (a) a Chairman to be appointed by the Government; (b) not more than three persons appointed by the Government from amongst its officials. Sub Section 5 provides that the Board shall administer the Fund vested in it in such manner as may be specified in the scheme. Sub Section 6 provides that the Board shall perform such other functions as may be required to perform

by or under any provision of the Scheme. Section 7 provides that the Government shall appoint a Seamen's Provident Fund Commissioner who shall be the Chief Executive Officer of the Board and shall be subject to the general control and superintendence of the Board. Sub-section 7 provides that all persons appointed under this Section shall be employees of the Board. It is the submission of Shri.Pradhan that Seamen's Provident Fund is self sustained organization and does not receive any contribution from the Government. If applicant/accused No.3 was deputed to Seamen's Provident Fund as Commissioner, he was not under the control of Government, but was subject to general control and superintendence of Board. His salary was paid out of administration fund wholly contributed by ship owners over which there was no control or Contribution of Central Government.

18 Shri.Pradhan placed reliance on judgment of Hon'ble Supreme Court in **S.S. Dhanoa V/s. Municipal Corporation of Delhi reported in 1981 (3) SCC 431**. There the appellant was member of Indian Administrative Service on deputation to a government owned registered Co-operative Society. The Super Bazaar was established in agreement with Government of India by Cooperative Store Ltd., a registered Society controlled by Department of Cooperation, Ministry of Agriculture. It is held that Super Bazaar is not an instrumentality of the State. Hence, a Government officer sent on deputation to the Super Bazaar is not "employed in connection with the affairs of the Union" within the meaning of Section 197 of Cr.P.C. There the appellant was sought to be prosecuted for offence U/s.7 r/w.16 of Prevention of Food Adulteration Act. Appellant raised preliminary objection that the cognizance of the case by

the Metropolitan Magistrate was barred under Section 197 of Cr.P.C. as he was public servant. Hon'ble Supreme Court held that a Corporation is an artificial being created by law having a legal entity entirely separate and distinct from the individuals who compose it with the capacity of continuous existence and succession, notwithstanding changes in its membership. In addition, it possesses the capacity as such legal entity of taking, holding and conveying property, entering into contracts, suing and being sued, and exercising such other powers and privileges as may be conferred on it by the law of its creation just as a natural person may. The Super Bazaar together with its branches, is not an instrumentality of the state. It is owned and managed by the Cooperative Store Ltd and not by the Central Government. Therefore, the appellant was not employed in connection with the affairs of the Union within the meaning of Section 197 of Cr.P.C.

19 As per para 10, there is a distinction between a corporation established by or under an Act and a body incorporated under an Act. The distinction was brought out by this Court in *Sukhdev Singh V. Bhagatram Sardar Singh Raghuvanshi (1975) 1 SCC 421*. Accordingly, a company incorporated under the Companies Act is not created by the Companies Act but comes into existence in accordance with the provisions of the Act. There is thus a well marked distinction between a body created by a statute and a body which, after coming into existence, is governed in accordance with the provisions of a statute....., the society does not have a statutory character like the Oil and Natural Gas Commission, or the Life Insurance Corporation or Industrial Finance Corporation. It is a society incorporated in accordance with the provisions of the Societies Registration Act. The fact that the Prime Minister is the President or that the

Government appoints nominees to the governing body or that the government may terminate the membership will not establish anything more than the fact that the government takes special care that the promotion, guidance and cooperation of scientific and industrial research, the institution and financing of specific researches, establishment or development and assistance to special institutions or departments of the existing institutions for scientific study of problems affecting particular industry in a trade, the utilisation of the result of the researches conducted under the auspices of the Council towards the development of industries in the country are carried out in a responsible manner. Whatever has been said with regard to the Council of Scientific and Industrial Research, which was a society registered under the Societies Registration Act, equally applies to the Cooperative Store Limited, which is a society registered under the Bombay Cooperative Societies Act, 1925. It is not a statutory body because it is not created by a statute. It is a body created by a group of individuals in accordance with the provisions of a statute.

20 As per para 11, explanation to Rule 2(a) of the All India Services(Conduct) Rules, 1968 and Rule 2(c) of the All India Services (Discipline and Appeal) Rules, 1969, on which reliance was placed, can be of no avail. Explanation to Rule 2(a) enlarges the meaning of the expression "serving in connection with the affairs of the Union or in connection with the affairs of the State". It provides that a member of the Service whose services are placed at the disposal of a company, corporation or other organisation or a local authority by the Central Government or the Government of a State, shall, for the purpose of those rules, be deemed to be a member of the Service serving in connection with the affairs of the

Union or in connection with the affairs of the State, as the case may be, notwithstanding that his salary is drawn from the sources other than the Consolidated Fund of India or the Consolidated Fund of the State. The legal fiction contained in Explanation to Rule 2(a), is for a limited purpose. This is evident by the use of the words “for purpose of these rules”. Rule 2(a) of the All India Services (Discipline and Appeal) Rules, 1969 defines Government to mean (I) in the case of a member of the Service serving in any company, association or body of individuals whether incorporated or not, which is wholly or substantially owned or controlled by the Government of a State, or in a local authority set up by the Act of the Legislature of a State, the Government of that State; and (ii) in any other case, the Central Government. That again is for purpose of these rules. These provisions cannot be pressed into service for improving upon the language of clause Twelve of Section 21 of the Indian Penal Code.

21 Shri.Pradhan then relied on following judgments of Hon'ble Apex Court in

1) **Dalco Engineering Private Limited V/.s. Satish Prabhakar Padhye & ors. (2010) 4 SCC 378.** As per para 32, “We should not lose sight of the fact that the words “corporation established by or under a Central, Provincial or State Act: is a term used in several enactments, intended to convey a standard meaning. It is not a term which has any special significance or meaning in the context of the Disabilities Act or any other socio-economic legislations. It is a term used in various enactments, to refer to statutory corporations as contrasted from non-statutory companies.

Any interpretation of the said term, to include private sector, will not only amount to overruling the clear enunciation in Dhanoa which has held the field for nearly three decades, but more importantly lead to the erasure of the distinction maintained in the Constitution between statutory corporations which are “State” and non-statutory bodies and corporations for the purposes of enforcement of fundamental rights. The interpretation put forth by the employee would make employees of all companies, public serving, amenable to punishment under the provisions of the Penal Code and the Prevention of Corruption Act; and would also result in all non-statutory companies and private sector companies being included in the definition or “State” thereby requiring them to comply with the requirements of non-discrimination, equality in employment, reservations, etc.”

2) **Mohd. Hadi Raja V/s. State of Bihar (1998) 5 SCC 91**. As per para 20, “Although the instrumentality or agency with a corporate veil, for all intents and purposes may be held to be a third arm of the Government and such instrumentality discharges the duties and functions which the State intends to do as indicated in *Ajay Hasia Case* (1981) 1 SCC 712 such instrumentality or agency is none the less a juridical person having a separate legal entity. Therefore, such instrumentality must be held to have an independent status distinct from the State and cannot be

treated as a government department for all purposes. Therefore, even if an officer of such instrumentality or agency takes or receives, keeps or expends any property or executes any contract, such acts even though in ultimate analysis may be held to have been done in the interest of the State, such action cannot be construed as a rule, an action of the Government by its employees or by an authority empowered by the Government. It may be indicated here that it is not necessary that persons falling under any of the descriptions given in various clauses under Section 21 of IPC need to be appointed by the Government. If such person falls under any of the descriptions as contained in various clauses of Section 21 of the Indian Penal Code, such person must be held to be a public servant.”

“As per para 21, it is to be noted that though through the contrivance or mechanism of corporate structure, some of the public undertakings are performing the functions which are intended to be performed by the State, ex facie, such instrumentality or agency being a juridical person has an independent status and the action taken by them, however important the same may be in the interest of the State cannot be held to be an action taken by or on behalf of the Government as such within the meaning of Section 197 CrPC.”

the State function, 2) salary and allowances paid from consolidated fund and 3) State instrumentality. It is further submitted that there are only 50 to 60 shipping companies and 50,000 to 60,000 seamen. It is the submission of Shri.Pradhan that Seamen's Provident Fund is not State function on the lines that running a bakery like Modern Bakery is not a State function. Seamen's Provident Fund is a private organization.

3) **N.K. Sharma V/s. Abhimanyu JT 2005 (12) SC 491.** It is held that “An employee of the State, whose services have been placed at the disposal of a company, corporation or organization or a local authority or university would be deemed to be a Government employee despite the fact that his salary has been drawn from sources other than the consolidated fund of the State, for the purpose of the said rules. The definition of the 'Government employee' cannot be extended for purposes other than sought to be achieved thereby. Provisions of the rules of 1987, therefore, cannot be invoked for affording protection under Section 197 of the Code of Criminal Procedure..... In terms of Section 123, only an employee who is engaged in the recovery of loans or a person who has been appointed as a liquidator or an arbitrator shall be treated as a public servant. By reason for the said provision, a legal fiction has been created. As the Managing Director of the Haryana State Cooperative Land Development Bank Ltd., the appellant was not engaged in the recovery of loans or appointed as a liquidator or an arbitrator and in that view of

the matter, the limited purpose for which the legal fiction has been created would have no application in the instant case.”

4) **Satish Prabhakar Padhye V/s. Union of India [2006 (109) FLR 84] Bombay.** However, this view has been overruled in **Dalco's case** cited supra.

23 There is bar U/s.197 of Cr.P.C. to the prosecution of Judges and Public Servants as when any person who is or was a Judge or Magistrate or a Public Servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty. IPC Section 14 defines Servant of the Government as any officer or servant continued, appointed or employed in India by or under the authority of Government. Public Servant has been defined U/s.21 of IPC. It denotes a person falling under 12 categories given in the Section. Under clause 12, Every person- (a) in the service or pay of the government or remunerated by fees or commission for the performance of any public duty by the Government; (b) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in Section 617 of the Companies Act, 1956. Under Section 2(c) of PC Act, public servant has been defined. Under clause(iii), any person in the service or pay of a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government company as denifed in section 617 of the Companies Act, 1956. Under

clause (ii), any person in the service or pay of a local authority. This provision is more or less similar to clause 12 of Section 21 of IPC. Under section 2(c)(i), any person in the service or pay of the Government or remunerated by the Government by fees or commission for the performance of any public duty. Public duty has been defined U/s.2(b) as a duty in the discharge of which the State, the public or the community at large has an interest;

24 There is no dispute that the applicant was a Railway employee. He was deputed as Commissioner, Seamen's Provident Fund Organization with effect from 9/2/2006 for a period of four years. Seamen's Provident Fund Act was passed in the year 1966 to provide for the institution of provident fund for seamen. U/s.5, Government has to constitute a Board to be known as Board of Trustees of Seamen's Provident Fund which shall be a body corporate having perpetual succession and a common seal and may, by that name, sue and be sued. As per statement of objects and reasons of Seamen's Provident Fund Act, 1966, the question of providing social security for Seafarers has been under consideration of the Government of India for a long time. The National Welfare Board for Seafarers, a statutory body, set up under Merchant Shipping Act, 1958, at its meeting held at Madras on 11th January, 1964, appointed a Tripartite Committee comprising of the representatives of the Shipowners, Seamen and Government. This Committee recommended that the Contributory Provident Fund Scheme for Seamen should be introduced with effect from 1st July, 1964, the rate of contribution by the employee and the employer being 6% of the wages up to 31-6-1968 and 8% of wages thereafter. The report of the Tripartite committee was placed before the National Welfare Board for Seafarers at its

meeting held in Bombay on the 23rd December, 1964 and was unanimously approved by the Board.

25 U/s.7, the Government shall appoint a Seamen's Provident Fund Commissioner who shall be the Chief Executive Officer of the Board and shall be subject to the general control and superintendence of the Board. U/s.15, the Government may, by notification in the Official Gazette, appoint such employees of the Board, as the Government thinks fit, to be Inspectors for the purposes of this Act and the Scheme, and may define their jurisdiction. Under sub-section (4), every Inspector shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.

26 Relying on the judgment of **S.S. Dhanoa** (cited supra), Shri. Pradhan has submitted that Apex Court distinguished between ownership and shareholding in a corporate body. Despite Central Government having 97% shares, the ownership is of the juristic person and i.e. the Cooperative stores Ltd. As per para 10(a), the incumbents of supervisory and other key posts including that of the General manager cannot be appointed or removed without the prior approval of the Central Government. The Apex Court further held that legally speaking the Super Bazaars are owned and managed by the Society and not the Central Government and, therefore, the appellant(Dhanoa) was not employed in connection with the affairs of the Union within the meaning of Section 197 of Code of Criminal Procedure. As per para 8, a Corporation is an artificial being created by law having a legal entity entirely separate and distinct from the individuals who compose it with the capacity of continuous existence and succession, notwithstanding

changes in its membership.

27 No doubt, the Seamen's Provident Fund has come into existence under Central enactment and is a Corporation and the applicant was in the service of that Corporation. Shri.Pradhan has relied on judgment of Hon'ble Apex Court in **Mohd. Hadi Raja V/s. State of Bihar (1998) 5 SCC 91**. It is held that sanction order is not required for prosecution of officers of Government, companies or public undertakings even if such companies or undertakings fall within the definition of State under Art.12. These instrumentalities or agencies of the State, even though perform some of the functions of the State, have their own separate entity and cannot be equated with departments directly run by the Government. Therefore, action taken by them, however important the same may be in the interest of the State, cannot be held to be an action taken by or on behalf of the Government as such within the meaning of Section 197 of Cr.P.C.

28 Shri.Pradhan has also relied on judgment of Hon'ble Apex Court¹⁾ in **N.K. Sharma V/s. Abhimanyu JT 2005 (12) SC 491. (supra)** 2) In Criminal Appeal No.344 of 1985 in the case of **The State of Maharashtra V/s. Dr. Rustom Franroze Hakim decided on 15th March, 2000**, the appellant was a panel doctor under the Employees State Insurance Scheme and was sought to be prosecuted under the PC Act. U/s.93 of Employees State Insurance Act, 1948, all officers and servants of the corporation shall be deemed to be public servants within the meaning of section 21 of IPC. It is observed that panel doctors are appointed by way of a contract signed between the Corporation and such private practitioners and they are responsible to provide medical treatment to the insured

persons as well as to the families who are registered with them and for such medical service rendered by them, they submit the bills which are reimbursable by the Corporation as per the rates stipulated or agreed upon. The medical benefits so provided are from the dispensary/hospital/consulting room of such panel doctors and they are limited to such insured persons who are registered under them. The relationship between the Corporation and such panel doctors is therefore merely a contractual without any specific term of tenure and obviously the tenure is at the pleasure of each of the parties to the contract, as is clear from a copy of the contract which has been placed on record.

29 In the case at hand also Seamen's Provident Fund Act provides that only Inspectors are public servants. If the legislature wanted, it could have included all the employees and the officers of Seamen' Provident Fund in the ambit of public servants. Moreover, Seamen's Provident Fund Organization cannot be called a State instrumentality discharging functions of the State. As rightly submitted by Shri.Pradhan, Seamen's Provident Fund is one among the many private provident funds. Though it has come into existence under the Central Legislation Act, it is not funded by the Central Government nor Central Government is having direct control over the Seamen's Provident Fund. Consequently, the applicant who was Commissioner of Seamen's Provident Fund is not covered by clause(iii) of Section 2(c) of PC Act to come into the ambit of Public Servant.

30 As stated earlier, my learned predecessor had found that the applicant is covered by Section 2(c) clause (viii) of PC Act and therefore, he is a public servant and therefore, prosecutable under the PC Act. Section

2(c)(viii) proves that public servant means any person who holds an office by virtue of which he is authorised or required to perform any public duty and public duty U/s.2(b) means a duty in the discharge of which the State, the public or the community at large has an interest.

31 My learned predecessor in para 17 of his order observed that SPF was enacted for benefit of Seamens to provide Provident Fund under the Seamens Provident Fund Act. SPF Act was enacted to manage the SPF funds. The Board of trustee was created. The Commissioner was crucial person in the entire scheme of SPF. Therefore, it can be stated that the Commissioner was authorised to perform public duty for the benefit of Seamen's Provident Fund and therefore, Section 2(c)(viii) is applicable to the facts of present case.

32 Now the question whether for performance of public duties, person must hold a public office or not. On behalf of both the parties, reliance has been placed on judgment of Hon'ble Apex Court in **G.A. Monterio V/s. The State of Ajmer 1957 SC 13**. It is held that the true test in order determine whether a person is an officer of the Government, is (1) whether he is in the service or pay of the Government and (2) whether he is entrusted with the performance of any public duty. There the applicant was employed as chaser in Railway Carriage Workshops. In para 12, observations by Calcutta High Court in *Nazamuddin V/s. Queen Empress, ILR 28 Cal 344* have been quoted. That was a case under clause (9) of Section 21 of IPC. It was held that the officer means some person employed to exercise to some extent and in certain circumstances a delegated function of Government. He is either armed with some authority

or representative character, or his duties are immediately auxiliary to those of some person who is so armed. In this sense, the peon would come within section 21 clause(9).

33 Shri.Pradhan on the other hand drew my attention towards para 15. Accordingly, if therefore on the facts of a particular case the Court comes to the conclusion that a person is not only in the service or pay of the Government but is also performing a public duty, he has delegated to him the functions of the Government or is in any event performing duties immediately auxiliary to those of some one who is an officer of the Government and is therefore an officer of the Government within the meaning of Section 21 (9) of Penal Code.

34 It is submission of Shri.Pradhan that public duty referred to in clause(viii) in Section 2(c) of PC Act specifies the public duty in the context of any person who holds an office by virtue of which he is authorised or required to perform any public duty. Holding of office which authorizes or requires to perform public duty is the main ingredient. Every office the person is holding is not covered by Section 2(c)(viii) of PC Act which otherwise has been drafted with the general terms. It cannot be said that the Chairman and Managing Director of a public Limited Company having millions of shareholders is covered by Section 2(c)(viii), as his performance qua the protection of financial interest of his shareholders is covered by public duty. The public duty in the private sector and the public duty attached to the Governmental office and /or service have a different context and repercussions. By no stretch of imagination a person holding the position and dealing with huge amount of finances of public shareholders,

can be said to be performing a public duty in as much as the amount which he is holding, is being contributed by private parties and therefore is no governmental contribution through its Consolidated Fund.

35 It is further submitted that public duty is one in the discharge of which the public, the community at large, has an interest as affecting their legal rights or liabilities. For example, the duties of a Police Officer, concerns all citizens, they relate to and affect the whole body of people. Police officer is paid out of the Consolidated Fund of the State, for the duty he performs towards the public. The Police Officer and alike are, therefore, covered by Section 2(c)(i) PC Act. Public duty means service or pay or remuneration paid by the Government in the context of the affairs of the State which can be called a public duty.

36 Shri.Pradhan has pointed towards para 10(A) of Dhanoa's judgment cited supra. Accordingly, The Super Bazaar at Connaught Place together with its 12 branches in Delhi, is not an instrumentality of the State. In a welfare State like ours, there is greater participation by government in various commercial activities. Sometimes the government directly engages itself in such commercial activities by acquiring a monopoly in trade in the public interest. Or, it may, by an Act of Legislature, establish statutory corporations like the State Trading Corporation, Life Insurance Corporation of India, the Industrial Finance Corporation, the Oil & natural Gas Commission etc., or it may set up Government companies under Section 617 of the Companies Act, 1956, like the Hindustan Steel Limited etc. By no stretch of imagination, could it be said that the appellant was employed in connection with the affairs of the Union within the meaning of

Section 197 of the Code of Criminal procedure, 1973. The Super Bazaars are not owned by the Central Government. They are owned and managed by the Cooperative Store Limited. Pursuant to an agreement executed between the Cooperative Store Limited and the Union of India, the Central Government has advanced a loan of Rs.40,00,000/- to the Society for establishment and management of the Super Bazaars, and the Central Government also holds more than 97 per cent shares in the total shareholding of the Society.....Legally speaking, the Super Bazaars are owned and managed by the Society and not by the Central Government and, therefore, the appellant was not employed in connection with the affairs of the Union within the meaning of Section 197 of Code of Criminal Procedure, 1973.

37 Way back on 10th February, 1875, Honb'le Bombay High Court in the appeal between **Reg. V/s. Ramajira v Jivbajira v and another** held that Izaphatdar, i.e., a lessee of a village who has undertaken to keep an account of its Forest revenues and pay a certain proportion to the Government, keeping the remainder for himself, is not an officer, and, therefore, not a public servant within the meaning of Section 21. It is submitted by Shri.Pradhan that there must be entrustment, authorisation or requirement to perform public duty. On the other hand Seamen's Provident Fund is non Governmental Provident Fund. Public duty means duty in relation to office entrusted by Government.

38 Shri.Pradhan has relied on following judgments of Hon'ble Apex Court

- 1) **State of Maharashtra V/s. Laljit Rajshi Shah**

(2000)2 SCC 699. There the question was whether Chairman and Members of Managing Committee of a cooperative society under the Maharashtra Cooperative Societies Act are public servants and it has been answered in the negative.

2) **Federal Bank Ltd v/s. Sagar Thomas AIR 2003 SC 4325, Kerla** There the question was whether private company carrying on banking business as a scheduled bank can be termed as an institution or company carrying on any statutory or public duty and it has been answered in the negative.

3) **Ajay Hasia V/s. Khalid Mujib Sehravardi (1981)1 SCC 722.** It is held that test of being instrumentality or agency of the State is required to be applied to registered society as contemplated under Article 12 of Constitution.

4) **N. Vaghul V/s. State of Maharashtra 1986 Bank.J. 634, Bombay.** It is held that Chairman, Director, Manager and other employees of banking company are not public servants within the meaning of Chapter IX.

5) **Brijlal Sadasukh Modani V/s. State of Maharashtra 2008 ALL MR (Cri.) 733, Bombay, Aurangabad Bench.** It is held that General Manager, Osmanabad Janata Sahakari Bank cannot be termed as public servant as defined under PC

Act, Government or Reserve Bank of India or any other statutory authorities having no role to in day-to-day functioning of the bank much less exercise control over the recruitment of the staff, its service conditions, etc.

39 I am in agreement with Shri.Pradhan that duty as contemplated U/s.2(b) of PC Act must be duty discharged in relation to office entrusted by the Government and not in relation to a private office. Officers of private banks are entrusted with funds of large section of population. However, since his duties are not related to any public office, he cannot come under the ambit of public servant. In the same analogy, present applicant cannot be called a person who holds office by virtue of which he is authorised or required to perform any public duty. Consequently the applicant cannot be prosecuted under the provisions of PC Act. I, therefore, answer point No.1 in the affirmative and proceed to pass following order:-

ORDER

1 Applicant/accused stands discharged of offence u/s.13(2) r/w.13(1)(c)(d) of P.C.Act,1988 u/s. 227 of Cr.P.C.

(M.V. KULKARNI)
Special Judge (C.B.I.)
Greater Bombay.

Date :2/7/2012.
Dictated on :2/7/2012.
Transcribed on :3 & 4/7/2012.
Signed on :