

G.Mohandas vs State

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Court : Kerala

Decided On : Apr-26-2022

Judge : Honourable Mr. Justice Sunil Thomas

Appeal No. : Crl.Rev.Pet/762/2014

Appellant : G.Mohandas

Respondent : STATE

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE SUNIL THOMAS
TUESDAY, THE 26TH DAY OF APRIL 2022 / 6TH VAISAKHA, 1944
OP(CRL.) NO. 82 OF 2021 (CRL.M.P.NO.494/2015 IN CC NO.15/2006
OF THE SPECIAL JUDGE SPE/CBI- II ERNAKULAM) PETITIONER/S:
A.B.A.DUBASH @ ADI ARDESHIR DUBASH S/O.LATE BOMANJI
ARDESHIR DUBASH,MOUNT NAPEAN,LADY LAXMI DAS
MARG,MUMBAI-400036, RESIDENT OF NO.3,ENNISMORE
GARDENS,FLAT 1,LONDON SW7,U.K. BY ADVS. R.ANIL
SRI.M.SUNILKUMAR SRI.SUJESH MENON V.B. SRI.THOMAS
ABRAHAM (NILACKAPPILLIL) SRI.T.ANIL KUMAR SRI.THOMAS
SABU VADAKEKUT SHRI.MAHESH BHANU S. SMT.S.LAKSHMI

SANKAR SHRI.RESSIL LONAN RESPONDENT/S: CENTRAL BUREAU OF INVESTIGATION/SPE, KOCHI,PIN-682030,REPRESENTED BY ITS PROSECUTOR. SRI.B.RAMAN PILLAI(SR.) FOR THE PETITIONER , CGC,SRI.SUVIN R.MENON & S.MANU (ASG OF INDIA)FOR THE RESPONDENT THIS OP (CRIMINAL) HAVING COME UP FOR ADMISSION ALONG WITH OP(CRL)No.92 OF 2021 & CRL.R.P.No.762 of 2014 ON 6.04.2022, THE COURT ON 26.04.2022 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE SUNIL THOMAS TUESDAY, THE 26TH DAY OF APRIL 2022 / 6TH VAISAKHA, 1944 OP(CRL.) NO. 92 OF 2021 (CRL.M.P.NO.495/2015 IN CC NO.15/2006 OF THE SPECIAL JUDGE SPE/CBI- II ERNAKULAM) PETITIONER/S:

M/S.ARDESHIR.B.CURSETJEE AND SONS LTD. MACKINNON MACKENZIE BUILDING, 4, SHOORJI VALLABHDAS MARG, BALLARD ESTATE, MUMBAI-400001, REPRESENTED BY ITS DIRECTOR, CHANDRASEKAR KRISHNAMURTHY. BY ADVS. B.RAMAN PILLAI (SR.) SRI.M.SUNILKUMAR SRI.SUJESH MENON V.B. SRI.THOMAS ABRAHAM (NILACKAPPILLIL) SRI.T.ANIL KUMAR SRI.A.RAJESH SRI.THOMAS SABU VADAKEKUT SHRI.MAHESH BHANU S. SMT.S.LAKSHMI SANKAR SHRI.RESSIL LONAN SRI.R.ANIL

RESPONDENT/S: CENTRAL BUREAU OF INVESTIGATION/SPE /SPE, KOCHI, PIN-682030, REPRESENTED BY THE STANDING COUNSEL. SRI.B.RAMAN PILLAI(SR.) FOR THE PETITIONER , CGC,SRI.SUVIN R.MENON & S.MANU (ASG OF INDIA)FOR THE RESPONDENT THIS OP (CRIMINAL) HAVING COME UP FOR ADMISSION ALONG WITH OP(CRL)No.82 OF 2021 & CRL.R.P.No.762 OF 2014 ON 6.04.2022, THE COURT ON 26.04.2022 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE SUNIL THOMAS
TUESDAY, THE 26TH DAY OF APRIL 2022 / 6TH VAISAKHA, 1944
CRL.REV.PET NO. 762 OF 2014 (AGAINST THE ORDER DATED
7.3.2014 IN CRL.M.P.NO.2000/2008 IN CC.NO.15/2006 ON THE FILE
OF THE SPECIAL JUDGE (SPE/CBI) - II ERNAKULAM)

REVISION PETITIONER/ACCUSED: G.MOHANDAS S/O P.GOPALAN,
SIVAM, APR-6, AMBELIPADAM ROAD, VYTTILA, COCHIN-683019. BY
ADVS. SRI.S.RAJEEV SRI.K.K.DHEERENDRAKRISHNAN
RESPONDENT/COMPLAINANT/STATE: STATE REP. BY THE
STANDING COUNCIL, CENTRAL BUREAU OF INVESTIGATION, HIGH
COURT OF KERALA, ERNAKULAM-682031 (CRIME NO.RC-
13(A)/2004 DATED 27.5.2004) CGC,SRI.SUVIN R.MENON FOR THE
RESPONDENT CGC,SRI.SUVIN R.MENON & S.MANU (ASG OF
INDIA)FOR THE RESPONDENT THIS CRIMINAL REV5ISION
PETITION HAVING COME UP FOR ADMISSION ALONG WITH
OP(CRL)No.82 OF 2021 & OP(CRL)NO.92 OF 2021 ON 8.04.2022, THE
COURT ON 26.04.2022 DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

----- OP(CrI)No.82/2021, OP(CrI)92/2021 and
CrI.R.P.No.762 of 2014 ----- Dated this the 26th day
of April 2022

COMMON ORDER

The above Original Petitions are filed by accused No.11 and 10 respectively and the CrI.R.P. is filed by accused No.14, in CC No.15/2006 on the files of the special Judge, CBI/SPE-II,Ernakulam, for offences punishable under sections 120B read with section 420 IPC and section 13(2) read with section 13(1)(d) of Prevention of Corruption Act.

2. The facts, as are discernible from the available records, indicate that

accused Nos.1 to 9, 12 & 13 were public servants of the Government of India, officiating in various capacities in FACT, which is a public sector undertaking of the Government of India. Accused No.10 is one ABC Sons & company Ltd., a Private Limited Company with accused No.11, as its Chairman. FACT Ltd. had two plants in the suburbs of Cochin city, one at Udyogamandal and the other at Ambalamedu. FACT, had a storage plant of ammonia at Willington Island near Cochin port. Liquid ammonia that were brought by ships were stored at liquid ammonia storage plant at Willington Island. It was carried to Udyogamandal plant, using barges. A contract was entered into, with the 10 th accused for carrying ammonia from Willington Island to the plant at Udyogamandal for a period of ten years. The above Contract to cover a distance of 15 k.m was entered into through an open tender. The agreed rate for such transportation was Rs.390/- per metric ton, with 2% increase per annum. Thus, ammonia that was imported from abroad through ship, would be stored at Willington Island storage plant, from where it would be transported in two barges of ABC company at the above quoted rates. While so, pursuant to the orders of the High court of Kerala, that the ammonia plant situated at Willington Island posed threat to the public, it was ordered to be decommissioned. Consequently, FACT decommissioned the above storage plant and commissioned a new ammonia plant at Udyogamandal. This necessitated transfer of liquid ammonia from Udyogamandal plant to Ambalamedu, which was another production unit of the FACT.

3. Since the contract with the 10 th accused for transporting from

Willington Island was subsisting, the Board of Directors of FACT resolved to negotiate with the 10th accused for continuing with above facility for transporting liquid ammonia in barges from Udyogamandal to Ambalamedu, in variation of the original contract. Consequently, by order dated 7/7/1994 of the CMD, Abraham Thomas, who was also arrayed as accused, but died pending the proceedings, a committee consisting of first accused, the third accused, 4th accused , 7th accused and 13th accused was authorized to negotiate with the 10th accused as well as the 5th accused. All the above persons were the senior officers of FACT. It seems that pursuant to a series of negotiations, a proposal was placed before FACT for awarding the contract at a very enhanced rate. While this was under

consideration, under the direction of the Central Government it was resolved to go for a public tender. Public tender was conducted. A committee for scrutinizing the tender, finalising it and to make recommendations for the transportation of liquified ammonia from Udyogamandal and Ambalamedu, was constituted. The above committee included senior officers of FACT, some among whom had also been the members of the earlier committee constituted by the CMD. The above committee, after rejecting the tenders of several tenderors, accepted the tender of the 10th accused as well as that of another tenderor, M/s. Ocean Dredging India Ltd., Udyogamandal.

4. It was alleged by the prosecution that all the accused along with the

CMD, had entered into a conspiracy to cheat the Government of India and to cause wrongful gain to the 10 th accused, by accepting the tender offered by the 10th accused at a very high rate. It was also alleged that, the new committee acted in continuation and in tune with the decision of the earlier committee to award contract to the 10 th accused. Even after the tendering process, methods were allegedly adopted by the accused, to promote the 10th accused by modifying the conditions of tender, to suit the qualifications of the 10th accused and to reject the tenders of other companies which stood otherwise qualified. Further they accepted the tender of another benami company of the 10th accused company. It was alleged that the above accused, by abusing their official position as public servants, in order to show undue favour to ABC & Sons Ltd., dishonestly prescribed one years experience in water transportation of liquified gas as essential for participating in the tender, as against one year experience in water transportation, which was originally prescribed by the Department of Fertilizers. The further allegation was that only 22 days time for preparation and submission of tenders was granted, whereas designing and casting itself of the barges to be used, would have taken few months. The committee rejected three tenders of Great Eastern Company, Mumbai, Kerala Shipping and Inland Navigation Corporation, (a Government of Kerala Undertaking) and M/s. Goodwill Engineering Works, Pondichery, quoting lack of one years experience in water transport of liquified gas and rejected another tender submitted by M/s.

Ocean Dredging Ltd., which had three years experience in water transportation of liquified ammonia, but at the same time accepted the tender in the name of Nafthomar Shipping Company Ltd., which was a binami tenderer of M/s. ABC & Sons Ltd. It was later revealed that the earnest money deposit for the above tenderer was arranged by the 11th accused, confirming that it was only a benami tenderer of the 10th accused. It was further alleged that the tender of Nafthomar Shipping company was defective also, for various other reasons.

5. On the basis of the investigation conducted, final report was laid for

offences punishable under the provisions of the Indian Penal Code as well as the provisions of the Prevention of Corruption Act. Pursuant to the summons, the petitioners herein appeared and along with two other accused filed discharge applications. By an order dated 7.3.2014 and another common

order dated 30/10/2020, all the discharge applications were dismissed.

Aggrieved by the above order, petitioners have approached this court.

6. Heard the learned senior counsel for the original petitioners, the learned counsel for the revision petitioner and ASGI for CBI. Perused the available records. The common order of this court in Crl.R.P.No.702/2020, court.

7. The records indicate that, the Director Board in its decision No.

318.07 had authorized the CMD to hold discussions with ABC Company.Ltd, regarding the transportation by barge from Udyogamandal to Ambalamedu. It seems that the Board did not consider the possibility of inviting fresh tenders . One of the reason stated was that the original contract with ABC company, the 10th accused, was subsisting and was to expire only in 2010. Premature cancellation of it would have invited huge damages. The committee conducted discussions with M/s. ABC & Sons Ltd, for several days and arrived at certain decisions. The rate at which the committee agreed upon was Rs.1641/- per ton. It seems that a proposal was also put up, to have night navigation of the barges to save transportation charges. It seems from the report that the possibility of transport during night was

discussed in several rounds of discussion with ABC Sons & company. It was done in the background that Port Trust and Inland Waterways Authority of India had informed that there were no statutory restrictions on night navigation. The view of the committee was that night navigation would increase the effective utilization of barges, reduce the requirement of new barges and thereby substantially bring down the per ton transportation cost. However, this proposal was not acceptable to ABC Sons & company Ltd., on the ground that hazardous chemical like ammonia cannot be transported during night for safety reasons, since barges will have to be carefully maneuvered through the narrow spaces between the pillars of existing bridges, whose offsets were submerged in water and were uneven. It was also stated that there could be lack of proper visibility in the curved portion of the water ways. It was further stated that there was a practice among the local fishermen, setting fishing nets in the waterways, during night, which would hinder the free movement of the barges and may jeopardize the safe transportation of the hazardous cargo. They also pointed out that, ports all over the world do not permit piloting of vessels, carrying ammonia to the harbour, after sunset.

8. While so, Central Government directed that contract shall be

awarded only by an open tender. It was directed by the Ministry to invite competitive bids from among the experienced and reputed contractors in the field of water transportation and to award the contract to selected bidder following the normal tender procedure. Accordingly, it was resolved to invite global tenders by publication in newspapers. A committee was thereafter constituted by the CMD consisting of some of the accused for finalising the tender procedure and for the scrutiny of the bids received, overseeing the activities as finalization of the tender documents, issue of tenders, scrutiny of the bids received and thereafter making suitable recommendations. According to the prosecution, in the above process, several changes were made to the tender process, rules were flouted and conditions were modified to ensure that the 10th accused turned out to be the successful bidder.

9. A copy of the chargesheet was produced before this court by the

revision petitioners. It discloses that the specific allegation against the accused was that the CMD conspired with accused Nos.10 and 11 and appointed A1,A3,A4,A7 and A13 for conducting negotiation with M/s.ABC Sons & company Ltd. It was alleged that all those accused, without calling for records of ABC Sons & Company Ltd. accepted the capital cost and variable cost (expenditure of repairs, maintenance, insurance charges, wages and fuel charges), accepted the suggestions of ABC. Further, they accepted the suggestion of the above company not to resort to night navigation, though Cochin Port Trust and Inland Water Authority of India had asserted that there was no ban on night navigation and IWA had offered to provide all facilities for night navigation. It was also alleged that the accused approved Rs.17.39 crores as cost of each barge, though two barges were purchased by ABC & Sons only about six years back, at the rate of Rs.500 Lakhs each. Further, the cost of barges quoted by yards at Goa were Rs.10 Crores and 12 Crores respectively. It was charged by the prosecution that, hence the price offered by the company and accepted by the negotiation committee was highly excessive. It was also alleged that road transportation which was less costly was not recommended by the committee. Yet another allegation against the committee was that, as the maintenance charges for four barges, the committee accepted Rs.27.80 Crores, whereas the actual expenses incurred by the same company for the entire fleet of barges and other transportation methods for seven years was only 4.93 crores. The further allegation was that, the wages for the employees was accepted at a higher rate than the actual wages paid during the previous period. Prosecution has yet another allegation that an unsolicited offer made by one Ocean Dredging India Ltd. for carrying out operation for Rs.175 per metric ton was rejected and the same committee accepted the offer made at a much higher rate by the 10 th accused at Rs.1620/- per metric tons.

10. It was further alleged that the tender committee had prescribed a

qualification of one year experience on water transportation of liquid ammonia which was contrary to the suggestion given by the Ministry. It was stated that Department of Fertilizer, Government of India, had suggested experience in water transportation alone as the condition for qualification in the tender. It was suggested that three tenders submitted by M/s.Great Eastern Company

Ltd., Mumbai, M/s. Kerala Shipping and Inland Navigation Corporation, (a Kerala Government Undertaking) and M/s. Goodwill Engineering Works, Pondicherry were rejected, quoting lack of one year's experience in water transportation of liquefied gas. Committee rejected another tender submitted by M/s. Ocean Dredging India Ltd. Udyogamandal, which had three years experience in water transportation of liquefied ammonia. There was a further allegation that however the tender of M/s. Nafthomar Shipping and Trading Company, which was a binami tenderer of M/s. ABC Sons, signed by one Captain Lickhari with the earnest money deposit arranged by the 11th accused was accepted, though the tender did not fulfill several important conditions. It was alleged that the committee had recommended a rate of Rs.1600/- per metric ton for barge transportation of liquefied ammonia to Ambalmedu, which was later awarded to M/s. ABC & Sons Ltd. at a rate of Rs.1550/- per metric ton. It was alleged that the accused thus caused wrongful loss of minimum Rs.78.56 Crores to the FACT, and corresponding wrongful gain to themselves.

11. Charge sheet laid by the prosecution clearly show that the

prosecution allegation has essentially two parts. Charge Nos. 1 to 7 related to the acts done pursuant to the decision taken by the Director Board to negotiate with the existing contractor, the 10th accused. A committee was constituted which consisted of some of the accused. Charges 1 to 7 related to the misfeasance and malfeasance allegedly committed by the members of the committee in combination with the CMD, to favour the 10th accused. The crux of the allegation is that in the course of the negotiation, the committee blindly accepted the proposal made by the 10th accused at the rate of Rs.1620/- per ton for ten years, without verifying the records and statements to satisfy the claim of the 10th accused. The allegation was that there was a huge escalation of the rate from the agreed rate of Rs.390/- with 2% enhancement per year entered into in 1990, for a period of ten years.

12. The specific charges against accused No.10 and 11 are charges

No.14, 15, 32 and 33. The specific charges against accused No.14 are charges NO.36 and 37. Challenging the charges it was vehemently contended by the

learned senior counsel for the original petitioners that none of the allegations set up by the prosecution against the revision petitioners would lie. It was contended by the learned senior counsel that the final report dated 16.12.2006, was based on an incomplete investigations. Hence sufficient materials to constitute offences under S.120 B and 420 IPC, which above were varied against the said accused. It was pointed out that on 30.6.2006, Investigating Officer had informed the court that to complete the conspiracy and cheating. The investigating officer wanted to conduct investigation in 5 foreign countries and 26 specific points. Hence before submitting the final report no evidence could be collected. Another contention set up was that, none of the witnesses except capt Likhari who was made an approvior. It was further contended that all the statements of Capt Likhari would show that tender by M/S. nanftomar was submitted pursuant to introduction of that company and that his statement would show that A & C company was not in any manner involved in submission of tender.

13. Regarding the allegation of inflated rate of transportation capital

costs etc. and that it was intimated to induce the members to arrive at the reasonable bench rate of M1620, the stand of the company was that such an argument was fallacious since no body had even dream of that FACT would go for tender proceedings at any point of time for awarding the contract of LFG Transportation. The allegations that the rates were relatively higher was also without any basis and was essentially based on surmises. Investigating Officer, had not questioned any Director or Officer or staff of M/s ABC Company to find out actual expenses. However, it is pertinent to note that Capt Likhari had given incriminating statements about M/s.ABC Company. The rates were based by CBI on the basis of entries in papers seized from GM of Annie Division of FACT. Again it was contended that though in the 2 nd final report dated 17.10.2008, none of the additional document and statement of contentions gathered, improved the prosecution case.

14. Another contention of the original petitioners was that awarding of

contract to M/S ABC was challenged in OP.No.36403/2001 and OPNo.2375/2022. CBI investigation was sought. However, Division Bench of this court did not grant

that relief. It was also contended that granting of pardon to the 12th accused was not proper.

15. Aggrieved by the rejection of Crl.M.P.2000/2008, the 14 th accused

has approached this court by filing Crl.R.P.No.762/2014. The above revision petitioner was a State Government nominee to the Board of Directors of FACT. According to him, he was implicated on the mere reason that he had sent three letters inducing the Chairman and Managing Director to award contract to ABC sons.

16. Referring to the 3 controversial letters sent on 1.4.1996, 23.4.1996

and 11.7.1996 and produced as Annexure III series in Crl.R.P.No.762/2014, the learned counsel vehemently contended that the letter would show that the petitioners had made all efforts to protect the interest of the company from huge loss. It was further contended that by those letters he did not recommend any company, but only expressed the anxiety regarding the loss that may be sustained, due to delay, if any, in execution of the project. Another major contention set up by the learned counsel for the petitioner was that in charges 36 and 37, though allegations of Section 420 IPC and 120 IPC were attributed along with other offences, no material to substantiate the above allegations were laid before trial court. Another contention was that the investigating agency did not establish any objectionable features in proposing water transportation as the mode of transportation of materials.

17. It was contended by the petitioners that, the revision petitioners

were appointed by the CMD to negotiate with the 10 th accused, pursuant to a decision taken by the Board of Directors. The Board of Directors, in its wisdom had resolved, after considering all possible contingencies and also that the contract with the 10th accused was subsisting and premature termination of the contract may entail huge financial burden by way of damages on the FACT. It was contended that after negotiation, report was submitted to the Director Board which considered all the pros and cons, evaluated the various factors involved and

ultimately approved Rs.1620/- per ton for a period of ten years with a further extension on mutual agreement . The crux of the contention of the learned counsel for the revision petitioners was that the negotiation committee could not be fastened with any criminal liability on a mere allegation that they had favoured the 10 th accused. The specific contention was that decision to negotiate with the 10 th accused for continuation of the contract on fresh terms, in the light of the changed circumstances, was taken consciously by the Board of Directors. The Negotiation Committee was only authorized to negotiate and to arrive at a negotiated rate. The matter was again placed before the Director Board which was competent to take decision. Viewing from this angle, when the ultimate decision was to be taken by the Director Board, no criminal liability can be fastened on the negotiation committee on the mere ground that they had omitted to take into consideration of few parameters, which according to the prosecution were relevant, unless there are materials to establish criminal conspiracy among the parties.

18. The specific allegation of the prosecution was that, an international

bid was not adopted, pursuant to a conspiracy among all the accused. It was also charged by the prosecution that had an international tender been floated, it would have resulted in more competitive offers. There cannot be any dispute that the original contract for a sum of Rs.390/- per ton with an annual escalation at the rate of 2% would have continued till 2000, if the contract had continued. Due to the decommissioning of the ammonia plant at Willington Island, FACT was constrained to seek alternative arrangements. It is also on record that various proposals were mooted by FACT to commission the ammonia plant at Udyogamandal in March 1997 and necessarily a new arrangement for transportation to Ambalamedu had to be eventually looked into. It was also contended by the learned counsel for accuse, that the possibility of an international tender was considered by the Board of Directors and rejected. The allegation that the negotiation committee did not consider the possibility of night travel which would have considerably reduced the rate and saved huge amount, was not correct . It was considered by the Director Board and found to be not feasible. The allegation that alternative modes of transportation was not considered by the negotiation committee was also not correct, in the light of the

fact that it was beyond the scope of the negotiation committee to suggest for alternative method of transportation, when they were authorized only to negotiate on the rates for transportation of ammonia in barges in a different route. The further allegation was that pursuant to the conspiracy, an unsolicited offer made by M/s.Ocean Dredging was rejected by the negotiation committee, though they had offered a lesser rate.

19. It seems that the scope of an international tender was considered

by the Director Board. However, the committee for cogent reasons decided to proceed with negotiation . It was also contended that alternate methods of transportation was also considered by the Director Board. It is pertinent to note that even from 1990 onwards, liquid ammonia was being transported through barges, though road access was still available. Transportation by rail was not possible, since the Udyogamandal plant did not have rail accessibility. The alternate mode was considered by the Board of Directors and rejected on the specific reason that road transport will not be permitted even for Naphtha. Hence, none of the above alternate modes could be thought of. It was contended by the learned counsel for the petitioner that night travel was also considered by the committee at the time of negotiation and placed before the Director Board at point No. 9.0, which had considered it. The committee had discussed with ABC & Sons Company to consider night navigation, as Cochin Port Trust and Inland Waterways Authority of India had informed that there was no statutory restriction on the night navigation. It was suggested by the committee that the night navigation would increase the effective utilization of barges and reduce the requirement of new barges thereby bringing down the per ton transportation charge substantially.

20. However, the above proposal was rejected by ABC company stating

that hazardous cargo like ammonia could not be recommended for night navigation on safety consideration. Barges will have to be carefully maneuvered through narrow spaces between pillars of the existing bridges which were stated to be submerged and uneven. There was lack of proper visibility at the curved portions of the waterways. Another hitch was that the fisherman in that area had a practice of setting fishing nets in the waterway during night, hindering the

movement of barges. This was reported by the

committee as evident from the common order of this court in Crl.R.P.No.702/2020 and other cases. This was considered by the Director Board in detail and accepted, as evident from the above common order.

21. The prosecution has the specific case that the various para meters

which were placed by the 10th accused for claiming a huge escalation in rates were accepted by the negotiation committee without any basis. Prosecution alleged that escalation in rates proposed by the 10 th accused under several heads were sought to justify the total claim of Rs.1620/- per ton. The specific allegation of the prosecution was that, had the records of the company been called for and the expenses incurred by the company under the corresponding heads during the previous period counter checked, it could have been established that their claims were highly inflated and exorbitant increase was sought without any basis. No doubt, there is a huge escalation of price from Rs. 390/- with 2% enhancement originally entered into, which would have continued, had the contract been in force till its original expiry year of 2000, to an enhanced rate of Rs.1620/- per ton for a further period. The question whether all the data suggested by the 10 th accused were accepted blindly by the committee, whether there were any latches on the part of the committee in not requiring the 10 th accused to produce documentary materials to substitute their claim for enhanced rate on various grounds or whether those parameters were not taken into consideration purposefully pursuant to a conspiracy are matters of evidence. The basis of the contention of the learned ASG was that prosecution was essentially relying on the materials gathered by the CBI to prove conspiracy However, criminal liability can be fastened on the committee constituted for the purpose of negotiation only if the following factors are established by the prosecution; a)whether the committee was merely authorised to negotiate on the rates but were also authorised to consider the feasibility of awarding the contract to 10th accused? b). Whether the committee accepted the rates offered without any materials to substantiate it, with the malafide intention to help the 10 th accused? c). Whether the action of committee members were actuated by motives or were pursuant to a conspiracy

with 10 th and 11th accused ?. d). Whether the action of the subsequent committee in accepting the tender of the 10th accused, after disqualifying other qualified tenderer was in continuation of the action of the earlier negotiation committee and pursuant to conspiracy entered into by all of them?

22. However, whether the remaining parameters which were not

considered and which formed part of the charge No.1 and whether it was a mere negligence or whether it was purposefully omitted to be considered are matters to be established heavily by the prosecution. Only then criminal liability can be fastened on the accused. Merely because the petitioners had entered into negotiation and had omitted to consider certain parameters or

facts or relevant materials by itself cannot fasten criminal liability on the

revision petitioners, unless the prosecution succeeds in establishing that it was done as a part of larger conspiracy. It seems that the court below did not consider the discharge application of the petitioners in the above perspective.

23. An offer of M/s.Ocean Dredging India was specifically rejected by

the Director Board after considering the fact that it was only a unsolicited offer and the negotiation was an internal affair of the FACT. It was also mentioned that the above company was floated by a former employee of the 10 th accused. Hence,the liability of rejecting the application cannot be fastened on the members of the negotiation committee.

24.The second part of the allegation which formed part of the subject

matter of charge No.8 onwards relate to the global tender floated by FACT. It seems that a direction was issued by the Ministry to call for competitive bids from experienced and reputed contractors in the field of water transportation and award the contract to the party selected after following the normal tender procedure. The allegation of the prosecution was that in the above tender a new condition previous experience of one year in transporting liquified ammoniawhich was not

directed to be incorporated by the Ministry was added at some point of time. It was alleged that this was specifically intended to ensure that only the 10th accused remained in the fray. The prosecution has a contention that a committee was constituted by the CMD which included the negotiation committee members as well as several other new members. It was alleged by the prosecution that the new committee also continued with the attempt made by the earlier committee to help and to ensure that the 10th accused turned out to be the only bidder. Though the tender was expected to be floated internationally, it was published only in few Indian newspapers. It was further alleged that, though altogether ten companies including the 10th accused had participated in the tender. Except M/s. Nafthomar Company, all other companies were disqualified. Nafthomar Shipping and Trading Company was a binami tender of the 10 th accused. All other tenders were disqualified by the committee for one reason or other. It was specifically alleged that three tenderers of major players viz. Great Eastern Company, Mumbai, Kerala Shipping and Inland Navigation Corporation, (a Government of Kerala Undertaking) and M/s. Goodwill Engineering Works, Pondicherry, were rejected on the ground that they did not have one year experience in water transportation of liquified gas. It was

also alleged that the tender of M/s. Ocean Dredging India Ltd., Udyogamandal, a company floated by a person who had three year experience in water transportation of liquified ammonia was not accepted, though the tender of allegedly benami company of the 10 th accused was accepted. It was later proved that the earnest money for the above company was arranged by the 11th accused, the managing director of the 10 the accused company. There is a specific allegation that the tender of M/s. Nafthomar company was defective also.

25. It seems that out of the ten companies, only three companies were

found to be qualified which included M/s. Nafthomar Shipping and Trading Company. It seems to have been a decision taken by the committee unanimously. It seems that for rejection of the tenders submitted by each of the other companies, reasons have been given by the committee. 26. The contention of the learned counsel for the revision petitioners

was that, contrary to the allegation, the tender was an international tender and publication was effected in Khaleej Times on 10/6/1996. It was also stated that the matter was taken up by Indian Embassy at the Netherlands, which ensured that copy of the advertisement was published in the newspapers in that country and gave sufficient publicity. Accordingly, suitable publicity was directed to be given in Holland through the Indian Embassy. According to the revision petitioners, this ensured that it was a global tender, though confined to UAE and the Netherlands.

27 .Whether this was sufficient and whether the reason stated by the

committee in its wisdom are sufficient for rejection of the remaining tenders and whether it was purposefully done by the committee pursuant to a conspiracy with the 10th accused are matters of evidence. Definitely to fasten criminal liability on the committee of members, and also on the 14 th accused, higher degree of evidence is required. The prosecution can establish the liability only if the conspiracy angle is also proved. It seems that the court below has not specifically considered whether prima facie materials establishing conspiracy have been placed by prosecution.

28. An appreciation of the above facts show that, though the original

petitioners are sought to be implicated in the criminal offence on the alleged conspiracy entered into between accused Nos. 10 and 11 on one side and other accused in the opposite side whether they had any criminal intention or whether the acts done by them amounts to criminal conspiracy or was a bona fide mistake, are matter which require cogent evidence. Same applies in the case of accused NO.14. I feel that the court below while considering the discharge applications of the original petitioners herein though have specifically referred to few inferences in para 32, but it has not adverted to the points raised in paras 16 to 26. In the case of the impugned order in CrI.R.P.No.762/2014 also, court has not entered into the above. This has to be evaluated in the light of the materials placed by the prosecution, however, within the requirements of a discharge application. Since the entire materials produced by the prosecution have not been made available, I am inclined to set aside the impugned order. The impugned order in original petition is composite one, dismissing all the discharge applications. Hence, the

entire

order stands set aside. Impugned order in Crl.M.P.No.2000/2008 also stands

set aside. I am inclined to remand the matter for reconsideration of all discharge applications already filed by the petitioners, in the light of the materials placed. Considering the entire facts, court below shall take up discharge applications without delay, at the earliest. With these observations, original petitions and revision petition are allowed .

Sd/- SUNIL THOMAS, Judge dpk APPENDIX OF OP(CRL.) 82/2021 PETITIONER EXHIBITS EXHIBIT P1 TRUE COPY OF THE FIR REGISTERED AS R.C.NO.13 (A) OF 2004(KER) DATED 27.05.2004 BY THE CBI, KOCHI. EXHIBIT P2 TRUE COPY OF THE FINAL REPORT DATED 16.12.2006 FILED BEFORE THE COURT OF THE SPECIAL JUDGE SPE/CBI-II, ERNAKULAM REGISTERED AS C.C.NO.15/2006.

EXHIBIT P3 TRUE COPY OF THE FINAL REPORT/CHARGE SHEET NO.01/NICN/08/KER DATED 17.10.2008 FILED BEFORE THE COURT AS A FRESH CHARGE SHEET. EXHIBIT P4 TRUE COPY OF THE JUDGMENT DATED 21.05.1997 OF THIS HON'BLE COURT IN O.P.NO.14761 OF 1996. EXHIBIT P5 TRUE COPY OF THE JUDGMENT DATED 18.12.2003 OF THIS HON'BLE HIGH COURT IN O.P.NO.36403 OF 2001 AND O.P.NO.2375 OF 2002. EXHIBIT P6 TRUE COPY OF THE WRITTEN STATEMENT WITH

AFFIDAVIT DATED 14.06.2007 FILED BY THE PETITIONER AS DEFENDANT NO.3 IN O.S.NO.42 OF 2007 BEFORE THE SUBORDINATE JUDGES COURT, NORTH PARAVUR EXHIBIT P7 TRUE COPY OF THE VARIOUS STATEMENTS OF CAPT.LIKHARI. EXHIBIT P8 TRUE COPY OF THE LETTER DATED 10.02.1995 ISSUED BY THE PETITIONER'S GENERAL MANAGER(SHIPPING) TO THE NAUTICAL ADVISOR OF THE GOVERNMENT OF INDIA. EXHIBIT P9 TRUE COPY OF THE LETTER DATED 13.02.1995 ISSUED BY THE PETITIONER'S GENERAL MANAGER(SHIPPING) TO THE NAUTICAL ADVISOR OF THE GOVERNMENT OF INDIA TO THE PETITIONER.

EXHIBIT P10 TRUE COPY OF THE WATER WAY NOTICE NO.1/1999 DATED 04.10.1999 ISSUED BY THE DIRECTOR OF INLAND WATERWAYS AUTHORITY OF INDIA(IWAI)UNDER THE MINISTRY OF SURFACE TRANSPORT. EXHIBIT P11 TRUE COPY OF THE WATER WAY NOTICE NO.4/2004 DATED 01.03.2004 ISSUED BY THE DIRECTOR OF INLAND WATERWAYS AUTHORITY OF INDIA(IWAI)UNDER THE MINISTRY OF SURFACE TRANSPORT.

EXHIBIT P12 TRUE COPY OF THE LIST OF DOCUMENTS EXHIBITED BY THE PETITIONER BEFORE THE HON'BLE MR.JUSTICE K.T.THOMAS IN THE ARBITRATION PROCEEDINGS. EXHIBIT P13 TRUE COPY OF THE ORDER DATED 05.11.2012 OF THE ARBITRATOR. EXHIBIT P14 TRUE COPY OF THE ORDER DATED 12.04.2013 OF THE DISTRICT JUDGE IN O.P.NO.1115/2012 FILED BY FACT BEFORE THE DISTRICT COURT,ERNAKULAM EXHIBIT P15 TRUE COPY OF THE ORDER DATED 03.12.2013 PASSED BY THIS HON'BLE COURT IN O.P. (C)NO.3339/2013 FILED BY FACT. EXHIBIT P16 TRUE COPY OF THE ORDER DATED 17.12.2013 PASSED BY THE HON'BLE SUPREME COURT OF INDIA SLP(C)NO.038012/2013 FILED BY FACT. EXHIBIT P17 TRUE COPY OF THE AWARD DATED 01.01.2014 PASSED BY HON'BLE MR.JUSTICE K.T.THOMAS. EXHIBIT P18 TRUE COPY OF THE PROCEEDINGS IN C.C.NO.15/2006. EXHIBIT P19 TRUE COPY OF THE DISCHARGE PETITION IN CRL.M.P.NO.494/2015 DATED 02.07.2015 FILED BY THE PETITIONER IN C.C.NO.15/2006. EXHIBIT P20 TRUE COPY OF THE COMMON ORDER DATED 30.10.2020 IN CRL.M.P.NO.495/2015 IN C.C.NO.15/2006. APPENDIX OF OP(CRL.) 92/2021 PETITIONER EXHIBITS EXHIBIT P1 TRUE COPY OF THE FIR REGISTERED AS RC NO. 13A OF 2004 (KER) DATED 27/05/2004 BY THE CBI, KOCHI. EXHIBIT P2 TRUE COPY OF THE FINAL REPORT DATED

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02.07.2015 FILED BY THE PETITIONER IN CC NO. 15/2006. EXHIBIT P20 TRUE COPY OF THE COMMON ORDER DATED 30.10.2020 IN CRL MP NO.495/2015 IN CC NO. APPENDIX OF CRL.REV.PET.NO.762 OF 2014 PETITIONER'S/S EXHIBITS: ANNEXURE I COPY OF THE PETITION SUBMITTED UNDER SECTION 173(8) CR.P.C BY THE INVESTIGATING AGENCY. ANNEXURE II COPY OF THE ORDER 28.08.2008 IN CRL.M.P.NO.1442/2008 IN CC.NO.15/2006 PASSED BY THE SPECIAL JUDGE (SPE/CBI)II, ERNAKULAM. ANNEXURE III SERIES COPY EACH OF THE LETTER DATED 01.04.1996, 23.04.1996 AND 11.07.1996.

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