HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL APPLICATION NO. 1039 OF 2014
IN
CRIMINAL APPEAL NO. 261 OF 2014

1) Babanrao Shankar Gholap .....Applicants
2) Shashikala Babanrao Gholap

V/s.

The State of Maharashtra ....Respondent

Mr. A. H. H. Ponda a/w Santosh Musale i/b Ms. Sharan Patole for Applicant
Mr. S. K. Shinde PP for the State.
Mr. S. S. Pednekar APP for State

CORAM : SMT. SADHANA S. JADHAV, J.
DATED : SEPTEMBER 4, 2014

PC :

1) This is an application under section 389 of Code of Criminal Procedure, 1973 seeking suspension of conviction during pendency of the appeal. Applicant no. 1 herein is convicted for an offence punishable under section 13 (1) (e) r/w 13 (2) of Prevention of Corruption Act, 1988 and sentenced to suffer rigorous imprisonment for 3 years and fine of Rs. 1,00,000/- by Special Judge, vide Judgment and order dated 21/03/2014 in Special ACB case no. 42/2001.

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2) Being aggrieved by the said Judgment and Order, applicants herein have filed an appeal. Appeal is admitted. The substantive sentence of the applicants is suspended. Applicant no. 1 was sitting member of Legislative Assembly of the State Legislature of Maharashtra on the date of Judgment. To consider the application seeking suspension of conviction, it would be necessary to consider the rival submissions advanced by the learned counsel for the applicants and learned Government Pleader representing the State.

3) Submissions of the learned counsel for the applicant as follows.

4) Learned counsel for the applicants submits that the applicant no. 1 had firstly contested elections to the State Legislative Assembly in the year 1985, but was defeated. Thereafter, he contested the elections in 1990 and was elected. Since then, he has contested the elections to the State Legislative Assembly consecutively and has been elected in 1995, 1999, 2004 and 2009. He had sufficient funds to contest the elections. It is submitted that during the pendency of the trial also, he had contested the elections and was elected. He was a Minister of Social Welfare, Women and Child Welfare and Ex-Army

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Man Welfare Committee. It is contended that in the absence of granting of suspension of conviction, applicant no. 1 who is also amongst the elector and has worked for social cause would be deprived of, to contest ensuing elections for the period 2014 to 2019.

5) Learned counsel for the applicants submits that in 1999 Milind Yevtekar lodged a complaint before Special Court alleging therein that applicant no. 1 has amassed huge wealth disproportionate to his known source of income and that the said wealth is amassed while he was officiating as a public servant and hence, he has committed offences punishable under section Prevention of Corruption Act, 1988. On the basis of the said complaint, learned Judge was pleased to pass an order under section 156 (3) of Code of Criminal Procedure, 1973. There was no valid sanction to prosecute him. That the learned Special Judge has not appreciated the evidence in its proper perspective. That the Judgment awarding conviction is based on surmises and conjecture and hence, the same is liable to be suspended during the pendency of the appeal.

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6) Learned counsel for the applicants has placed reliance upon the Judgment of the Hon'ble Apex Court in the case of **Anil Kumar and others v M. K. Aiyappa** and another reported in 2013 10, Supreme Court Cases, 705 wherein Hon'ble Apex Court has referred to the Judgment in the case of Maqsood Sayed and has held that Special Judge/Magistrate cannot refer the matter under section 156 (3) of Code of Criminal Procedure, 1973 against a public servant without a valid sanction order. Hon'ble Apex Court has thus held as follows.

> "Once it was noticed that there was no previous sanction, the Magistrate could not order investigation against a public servant while invoking powers u/s. 156(3) of Code of Criminal Procedure, 1973."

Hon'ble Apex Court has referred to the Judgment in Criminal Appeal No. 257/2011 in the case of **General Commanding Officer V/s CBI** reported in 2012 (2) Bombay Criminal, 623, Supreme Court Cases, wherein it was opined as follows.

> "Thus, in view of the above, the law on the issue of sanction can be summarised to the effect that the question of sanction is of paramount importance for protecting a public servant who has acted in good faith

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while performing his duty. In order that the public servant may not be unnecessarily harassed on a complaint of any unscrupulous person, it is obligatory on the part of Executive Authority to protect him. If the Law requires sanction and the Court proceeds against the public servant without a sanction, the public servant has a right as to raise the issue jurisdiction as the entire action can be rendered void ab-initio."

7) Learned counsel has further placed implicit reliance upon section 8 (4) of the Representation of the People Act 1950 as it stood prior to 10/07/2013 (Applicant is convicted by Judgment and Order dated 21/03/2014). Section 8 (4) of RPA Act reads thus:

"Notwithstanding anything [in sub-section (1), sub-section (2) or sub-section (3)] a disqualification under either subsection shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court."

According to the learned counsel for the applicants, section 8 (4) as it then

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stood is sufficient to hold that applicant deserves suspension of conviction on the ground that applicants have preferred the appeal within 3 months and that their substantive sentence has been suspended, hence, applicants deserves suspension of conviction.

8) Learned counsel for the applicants submits that in the case of **K. Prabhakaran v P. Jayarajan,** Hon'ble Apex Court has framed an issue as follows:

> "What is the purport of Sub-section (4) of Section 8 of RPA? Whether the protection against disqualification conferred by Sub-section (4) on a member of a House would continue to apply though the candidate had ceased to be a member of Parliament or Legislature of a State on the date of nomination or election?"

Hon'ble Apex Court has observed thus :

> "A comparative reading of Sub-sections (3) and (4) of Section 8 of the RPA shows that Parliament has chosen to classify candidates at an election into two classes for the purpose of enacting disqualification. These two classes are :
>
> "(i) a person who on the date of conviction is a member of Parliament

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or Legislature of a State, and (ii) a person who is not such a member. The persons falling in the two groups are well defined and determinable groups and, therefore, form two definite classes. Such classification cannot be said to be unreasonable as it is based on a well laid down differentia and has nexus with a public purpose sought to be achieved."

9) It is observed by the Hon'ble Apex Court that the factum of pendency of appeal against conviction is irrelevant and inconsequential as the appeal is an extension of the original proceeding. It is further observed that sub-section 4 of Section 8 of RPA is an exception carved out from sub-section 1,2 & 3 is the saving from disqualification. Sub-section 4 of section 8 of RPA is an exception carved out from sub-section 1, 2 & 3. The saving from disqualification is preconditioned by the person convicted being a member of a House on the date of conviction. The benefit of such saving is available only so long as the House continues to exist and the person continues to be a member of a House. The saving ceases to apply, if the House is dissolved or person ceases to be a Member of a House. According to the learned counsel for the applicants, both contingencies were not in existence on the date of

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conviction.

10) Article 191 (1) (e) of the Constitution of India reads thus:

"(1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State —

(e) if he is so disqualified by or under any law made by Parliament."

This is to be read in consonance with the provisions of Prevention of Corruption Act, 1988, wherein pursuant to the conviction and sentence imposed for more than 2 years, such person would stand disqualified for being chosen as and for being a Member of the Legislative Assembly and Legislative Counsel of the State. Hence, applicant has filed application seeking suspension of conviction.

11) In continuation to the Judgment of the Hon'ble Apex Court, in the case of **K. Prabhakaran v P. Jayarajan**, learned counsel has relied upon the Judgment of the Hon'ble Apex Court in the case of **Lily Thomas and another V/s Union of India and others** wherein, Hon'ble Apex Court has held:

"Accordingly, sub-s. (4) of S. 8 of the Act which carves out a saving in

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the case of sitting members of Parliament or State Legislature from the disqualifications under sub-sections (1), (2) and (3) of S. 8 of the Act or which defers the date on which the disqualification will take effect in the case of a sitting member of Parliament or a State Legislature is beyond the powers conferred on Parliament by the Constitution. Parliament has exceeded its powers conferred by the Constitution in enacting sub-section 8 of the Act and accordingly sub-section 4 of section 8 of the act is ultra vires of the Constitution."

Hon'ble Apex Court has further observed as follows:

"Sitting members of Parliament and State Legislature who have already been convicted for any of the offences mentioned in sub-section (1), (2) and (3) of S. 8 of the Act and who have filed appeals or revisions which are pending and are accordingly saved from the disqualifications by virtue of sub-s. (4) of S. 8 of the Act should not, in our considered opinion, be affected by the declaration now made by us in this judgment."

12) Learned counsel for the applicants refers to the Judgment of the

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Hon'ble Apex Court in the case of Central Member **Dawoodi Bohra V/s State of Maharashtra**, a 5 Judges Bench of Supreme Court has held that :

> "A Bench of lesser quorum cannot express disagreement with, or question the correctness of, the view taken by a Bench of larger quorum. A view of the law taken by a Bench of three judges is binding on a Bench of two judges and in case the Bench of two judges feels not inclined to follow the earlier three-Judge Bench decision then it is not proper for it to express such disagreement; it can only request the Chief Justice for the matter being placed for hearing before a three-Judge Bench which may agree or disagree with the view of the law taken earlier by the three-Judge Bench. As already noted this view has been followed and reiterated by at least three subsequent Constitution Benches referred to hereinabove. "

13) Learned counsel for the applicants submits that the doctrine of binding precedent of a larger Bench cannot be given a go by. According to learned counsel, the 5 Judge Bench in the case of K. Prabhakaran (cited supra) had observed that sub-section 4 of section 8 of the RPA is an exception carved out from sub-section 1,2 & 3. According to the learned counsel, it was also observed by the Hon'ble Apex Court in the case of **K. Prabhakaran** cited cupra that it is a reasonable classification based on a well laid down

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differentia and had nexus with a public purpose sought to be achieved. Learned counsel submits that in view of this, the Judgment in the case of **Lily Thomas** which is delivered by a Bench of 2 Judges would not have a binding effect as against the Judgment in the case of **K. Prabhakaran**. It is further emphasised that the Hon'ble Apex Court in the case of **Siddharam Mhetre V/s State of Maharashtra** has held that:

> "The analysis of English and Indian Law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a co-equal strength is also binding on a Bench of judges of co-equal strength. "

Hon'ble Apex Court further observed that:

> "In case there is no judgment of a Constitution Bench or larger Bench of binding nature and if the court doubts the correctness of the judgments by two or three judges, then the proper course would be to request Hon'ble the Chief Justice to refer the matter to a larger Bench of appropriate strength. "

14) Learned counsel for the applicants further submits that Parliament had in fact tabled bill no. LXII OF 2013 in RPA (Second amendment and validation) In the Representation of People Act 1951, in section 8, for sub-

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section 4, the following sub-section shall be substituted.

> "(4) Notwithstanding anything 8 [in sub-section (1), sub-section (2) or sub-section (3)] a disqualification under either subsection shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect, if an appeal or an application for revision is filed in respect of the conviction or sentence is stayed by the Court."

The object and reasons as stated by then Law Minister proposed on 23/08/2013 had taken into consideration the Judgment of the Apex Court in the case of Lily Thomas V/s Union of India and others. The Law Minister had apprised the House that Government has filed a petition for review of the same. However, without waiting for the outcome of the said review petition, there is a need of suitably addressing the situation arising out of the said Judgment of Hon'ble Supreme Court. Therefore, it has been proposed to amend the said act. The bill was introduced in the Rajyasabha. However, the bill was withdrawn for the reasons best known to the House.

15) Learned counsel for the applicants has placed reliance on the Judgment of Hon'ble Apex Court in the case of **Rama Narang V/s Ramesh Narang and another** reported in 2009 16 Supreme Court Cases, 126 wherein Hon'ble

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Apex Court has held that:

> "Section 389(1) empowers the Appellate Court to order that the execution of the sentence or order appealed against be suspended pending the appeal. What can be suspended under this provision is the execution of the sentence or the execution of the order, the order referred to in Section 389(1) must be an order capable of execution. An order of conviction by itself is not capable of execution under the Code. If the order of conviction is to result in some-disqualification of the type mentioned in Section 267 of the Companies Act we see no reason why we should give a narrow meaning to Section 389(1) of the Code to debar the court from granting an order to that effect in a fit case. In certain situations the order of conviction can be executable, in the sense, it may incur a disqualification as in the instant case. In such a case the power under Section 389(1) of the Code could be invoked. Therefore, when an appeal is preferred under Section 374 of the Code the appeal is against both the conviction and sentence and therefore, we see no reason to place a narrow interpretation on Section 389(1) of the Code not to extend it to an order of conviction. Although that issue in the instant case recedes in the background because High Courts can exercise inherent jurisdiction under Section 482 of the Code if the power was not to be found in Section 389(1) of the Code. The disqualification incurred by Section 267 of the Companies Act and given effect to cannot be undone at a subsequent date if the conviction is set aside by the Appellate Court. But while granting a stay of

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suspension of the order of conviction the Court must examine the pros and cons and if it feels satisfied that a case is made out for grant of such an order, it may do so and in so doing it may, if it considers it appropriate, impose such conditions as are considered appropriate to protect the interest of the shareholders and the business of the company."

16) Learned counsel for the applicants submits that the Judgment of Rama Narang V/s Ramesh Narang (cited supra) is also a Judgment delivered by 3 Judges whereas the Judgment in the case of Lily Thomas has been passed by a 2 Judge Bench and hence, the view taken in the case of Rama Narang is also a majority view of a larger Bench. Learned counsel submits that although, the case refers to the provisions of section 267 of the Companies Act, the same can be read in respect of chapter 3 section 7 of the Representation of the People Act 1951. It is submitted that applicant no. 1 herein had received the mandate of the people for 4 consecutive terms which clearly establishes his popularity. In the eventuality that the conviction is not stayed under section 389 (1) of Code of Criminal Procedure, 1973, applicant no. 1 would suffer disqualification. Then it would be a loss to the public at large as they would be deprived of the services of a good representative.

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17) Learned counsel has further submitted that there are lacunas in the investigation as well as the recording of evidence in the present case, which would entitle the applicants to an acquittal and hence, the damage done in 2014 cannot be undone at a later stage, in the eventuality that the applicants are acquitted of the charges levelled against them. The reliance is further placed on the Judgment of the Hon'ble Apex Court in the case of **Ravikant S Patil v/s Sarvabhouma S. Bagali** , wherein, the Apex Court has again relied upon the Judgment of **K. Prabhakaran and Rama Narang** (cited supra) and has stayed the conviction of the accused to enable him to contest the elections. Hence, according to the learned counsel, it would be necessary in the larger interest of the society to suspend the conviction recorded against the applicant no. 1 in order to enable him to contest the elections to the State Legislative Assembly to be held in the State of Maharashtra.

18) As against this, learned Government Pleader, Shri. S. K. Shinde has vehemently urged that taking into consideration the facts of the present case, this is not a fit case to suspend the conviction of the present applicants

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recorded by the Special Court. Learned Government Pleader at the outset has drawn the attention of this Court to the observations of the Hon'ble Apex Court in the case of K. Prabhakaran cited supra and had emphasized the following observations:

> " While "a strict and narrow construction" may not be adopted which may have the effect of "shutting of many prominent and other eligible persons to contest elections" but at the same time "in dealing with a statutory provision which imposes a disqualification on a citizen, it would not be unreasonable to take merely a broad and general view and ignore the essential points". What is at stake is the right to contest an election and hold office. "A practical view, hot pedantic basket of tests" must, therefore, guide courts to arrive at appropriate conclusion. The disqualification provision must have a substantial and reasonable nexus with the object sought to be achieved and the provision should be interpreted with the flavour of reality bearing in mind the object for enactment. "

19) It is further submitted that in the present case, in the eventuality that the applicant no. 1 is permitted to contest the elections, he would continue to indulge in the same activities for which he has been convicted and the object and purpose for enacting section 7 of the RPA Act 1951 would stand

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frustrated. It is rightly submitted by the Government Pleader that it is true that in the case of Anil Kumar, Hon'ble Apex Court has held that it is necessary to seek sanction before passing an order under section 156 (3) of Cr.P.C., however, in the facts of the present case, at the time of filing of a private complaint under section 2 (d), a private person, would not be armed with all the material to seek sanction. The complainant does not have access to the appropriate sanctioning authority. In addition, the sanctioning authority cannot consider the material placed before it by a private person and therefore, complainant would be deprived of seeking sanction as contemplated under section 19 of the Prevention of Corruption Act, 1988.

20) Learned Government Pleader further submits that it is true that the investigating officer had not placed on record any material to show that he was validly authorized to conduct the investigation in the present case. Learned Government Pleader refers to section 156 (2) of Code of Criminal Procedure, 1973 which reads thus:

> "No proceeding of a police officer in any such case (being investigated as per directions under 156) shall at any stage be called in question on the ground that the case was one which such officer was not

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empowered under this section to investigate."

21) Learned counsel Mr. Shinde submits that in the case of Rama Narang V/s Ramesh Narang and another (cited supra) the case was under the Companies Act. Hon'ble Apex Court had held that there would be a disqualification under section 267 of the Companies Act.

It is observed thus:

"In a fit case if the High Court feels satisfied that the order of conviction needs to be suspended or stayed so that the convicted persons does not suffer from a certain disqualification provided for in any other statute, it may exercise the power because otherwise the damage done cannot be undone ."

22) According to learned Government Pleader, the emphasis is on the words **"In a fit case if the High Court feels satisfied."** According to him, therefore, in every case, the Court need not stay the conviction of the applicant just for the asking and it has to be granted with great caution.

23) The next submission is by a reference to the Judgment of the Hon'ble Apex Court in the case of **K. C. Sareen V/s C.B.I., Chandigarh** reported in 2001 (6), Supreme Court Cases, 584. It is observed by the Hon'ble Apex

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Court as follows:

> "Though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389 (1), Cr. P.C., its exercise should be limited to very exceptional cases. Merely because the convicted person files an appeal in challenge of the conviction, the Court should not suspend the operation of the order of conviction. The Court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance. When conviction is on a corruption charge against a public servant, the appellate court or the revisional court should not suspend the order of conviction during the pendency of the appeal even if the sentence of imprisonment is suspended. It would be a sublime public policy that the convicted public servant is kept under disability of the conviction in spite of keeping the sentence of imprisonment in abeyance till the disposal of the appeal or revision."

According to learned Government Pleader, suspension of substantive sentence and admission of the appeal by itself would not entitle the convicted accused to seek order of suspension of conviction.

24) As far as sanction to prosecute is concerned, learned Government Pleader has reiterated that the challenge to sanction can be considered at the

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time of final hearing of the appeal which would necessitate appreciation of evidence and the same cannot be considered at the present stage when the applicants are seeking suspension of conviction. Reliance is placed on the Judgment of Apex Court in the case of **State of Maharashtra through CBI, Anti Corruption Brnanch, Mumbai V/s Balakrishna Dattatrya Kumbhar** reported in 2012 (12) Supreme Court Cases, 384. The Hon'ble Apex Court has held as follows:

> "A clear picture emerges to the effect that, the Appellate Court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the purpose of which, the applicant must satisfy the Court as regards the evil that is likely to befall him, if the said conviction is not suspended. The Court has to consider all the facts as are pleaded by the applicant, in a judicious manner and examined whether the facts and circumstances involved in the case are such, that they warrant such a course of action by it. The court additionally, must record in writing, its reasons for granting such relief. Relief of staying the order of conviction cannot be granted only on the ground that an employee may lose his job, if the same is not done."

Learned Government Pleader therefore submits that it is necessary to consider the case of the applicant/appellant as against the interests of the

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society at large.

25) Learned Government Pleader has placed reliance upon the Judgment in the case of **Central Bureau of Investigation, New Delhi V/s M. N. Sharma** reported in 2008 (8) Supreme Court Cases, 549 wherein, Hon'ble Apex Court has held:

> "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. When a public servant is found guilty of corruption after a judicial adjudicatory process conducted by a court of law, judiciousness demands that he should be treated as corrupt until he is exonerated by a superior court. The legal position can be laid down that when conviction is on a corruption charge against a public servant the appellate court or the revisional court should not suspend the order of conviction during the pendency of the appeal even if the sentence of imprisonment is suspended."

26) As far as the objection regarding the effect of the Judgment delivered by the Hon'ble Apex Court in the case of **Lily Thomas** in contrast to the Judgment of the Hon'ble Constitutional Bench in the case of **K. Prabhakaran**, it is submitted by the learned Government Pleader that in the

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case of **Lily Thomas V/s Union of India and others** (cited supra) Hon'ble Division Bench of the Hon'ble Apex Court has, while recording the findings of the Court has specifically stated as follows:

> "We will first decide the issue raised before us in these writ petitions that Parliament lacked the legislative power to enact sub-s. (4) of S. 8 of the Act as this issue was not at all considered by the Constitution Bench of this Court in the aforesaid case of K. Prabhakaran."

It is urged in reference to para 12 of the Judgment in the case of **Lily Thomas** as follows:

> "Mr. Nariman and Mr. Shukla submitted that in K. Prabhakaran v. P. Jayarajan etc. the validity of sub-s. (4) of S. 8 of the Act was not under challenge and only a reference was made to the Constitution Bench of this Court on certain questions which arose in civil appeals against judgments delivered by the High Court in election cases under the Act."

27) According to learned Government Pleader, **in this case**, there is no question of considering the issue as to whether Judgment delivered in the case of **Lily Thomas** would be in contradistinction to the Judgment delivered by the Hon'ble Constitution Bench. Hence, taking into consideration the said submission, the issue of the Judgment of a majority Bench prevailing over the

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Judgment of Bench of lesser coram need not be considered in the present case as it is a settled issue.

28) As far as the first Amendment and Validation Bill 2013 under the Representation of People Act is concerned, the amendment reads thus:

> "1(2) it shall be deemed to have come into force on the 10th day of July, 2013. (2) In the Representation of the People Act, 1951 (herein after referred as the principal Act) in section 7, in (b) after the words "or Legislative Council of a State". The words under the provisions of this chapter and on no other ground shall be inserted."

29) It is submitted that the Judgment in the case of **Lily Thomas** was delivered on 10/07/2013 and the amendment has been given retrospective effect from 10/07/2013. Although, the statement of objects and reasons are given along with proposed amendment on 23/08/2013. It is clarified in statements of objects and reasons as follows:

> "To amend the definition of the term "disqualified" in clause (b) of section 7 so as to expressly provide that a member of Parliament or the Legislature of a State shall be disqualified for being chosen as or for being such member only if he is so disqualified under the provisions of Chapter III of Part II of the said Act and on no other ground."

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30) Hence, according to learned Government Pleader the disqualification on conviction as contemplated under section 8 of the RPA Act 1951 would come into operation from the date of conviction. At this stage, learned Government Pleader has referred to section 8 (3) of the Representation of the People Act, 1951 which reads thus:

> " A person convicted of any offence and sentenced to imprisonment for not less than two years [other than any offence referred to in sub-section (1) or sub-section (2)] shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release."

31) Hence, it is submitted that on the day when the Judgment was delivered, the applicant no. 1 stood disqualified and the same cannot be kept in abeyance during the pendency of the appeal as he cannot take the benefit of the Judgment in the case of **K. Prabhakaran.**

FINDINGS:

32) The issue as far as the Judgment delivered in the case of **K. Prabhakaran** by Hon'ble Constitution Bench as against the Judgment in the

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case of **Lily Thomas** does not fall for consideration **in the present application** since it is clear that there was no challenge to the provisions under section 8 (4) of the RPA Act in the case of **K. Prabhakaran.** Hon'ble Constitution Bench had not at all considered the competency of the Parliament to enact Section 8 (4) of the RPA Act, 1951.

33) As far as the submissions in respect of the issue that the applicant no. 1 would be entitled to the saving clause under section 8 (4) of the RPA Act as was held by the Constitution Bench in the case of **K. Prabhakaran** is concerned, the submissions of learned Government Pleader are upheld. The issue of competency to enact the section 8 (4) of the RPA Act by the Parliament was not before the Court. It is pertinent to note that the issue of suspension of conviction was also not before the Court considering the case of **K. Prabhakaran** and therefore it need not be considered at this stage. What was before Hon'ble Constitution Bench was whether the protection against the disqualification conferred by sub section 4 of a Member of House would continue to apply for the candidate who had ceased to be a member of Parliament or Legislature of a State on the date of nomination or election?. In

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the present case, what would be relevant is section 8 (3) of the RPA Act which speaks of disqualification of a convicted person and the Statute mandates that a convicted person stands disqualified from the date of such conviction and continues to do so for a period of 6 years since his release. Therefore, there is a clear distinction of suspension of sentence and suspension of conviction as far as disqualification is concerned.

34) The clause, since his release would mean, after suspension of substantive sentence. However, conviction continues for a further period of 6 years. Hence, the submissions are unwarranted at this stage.

35) It is settled position of Law that suspension of substantive sentence and suspension of conviction is not one and the same thing. They operate in two different spheres. As has been held by the Hon'ble Apex Court “A substantive sentence can be executed.”

36) Conviction entails disqualification. The net result of a finding of conviction is the basis of passing an order of substantive sentence. Hence, a

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finding recorded on the basis of cogent and convincing evidence cannot be suspended at an interim stage.

37) Section 19 of Prevention of Corruption Act 1988 reads thus:

> "No court shall take cognizance of an offence punishable under section 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction."

38) Hon'ble Apex Court in the case of **Devarapalli Lakshminarayana reddy and others V/s Narayana Reddy and others** has held thus:

> "Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under s. 200 and the succeeding sections in Chapter XV of the Code of 1973, he is said to have taken cognizance of the offence within the meaning of s. 190(l)(a). If, instead of proceeding under Chapter XV, he has in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police under s. 156(3), he cannot be said to have taken cognizance of any offence."

39) In the present case, therefore, it cannot be said that while passing the

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order under section 156 (3) of Code of Criminal Procedure, 1973, the Magistrate had taken cognizance of the complaint. Section 19 of Prevention of Corruption Act bars taking of cognizance without a valid sanction and it does not pertain to initiating inquiry/investigation under section 156 (3) of Code of Criminal Procedure, 1973.

40) In the present case, one Mr. Milind Yevtekar had filed a complaint before Sessions Court, Mumbai alleging therein that present applicant no. 1 had amassed wealth disproportionate to his known sources of income by alleged corrupt practices and that he was aided and abetted by applicant/accused no. 2 who had been beneficial of the wealth so amassed and had acquired several immovable properties in her name. Learned Judge had rightly passed an order under section 156 (3) of Code of Criminal Procedure, 1973 leaving it open to the investigating agency to inquire into serious allegations levelled against present applicants. An Order under section 156 (3) was passed on 22/01/1999. The Assistant Commissioner of Police Mr. Bhalekar, pursuant to the directions of his superior had recorded the statement of complainant on the basis of which he had registered crime no. 10/1999 on

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28/02/1999 for offences punishable under sections 13 (1) (e) r/w 13 (2) of Prevention of Corruption Act, 1988 r/w section 109 of Indian Penal Code. It had transpired in the course of investigation, that applicant no. 1 herein was elected as Member of State Assembly for the first time on 01/04/1990. He has resigned from the Council of Ministers on 15/05/1999 and hence, the check period was fixed from 01/04/1990 to 15/05/1999. A detailed inquiry was conducted by investigating officer. In the absence of an order under section 156 (3), the check period could not have been ascertained. At that stage, there was no occasion to seek sanction for prosecution as only an offence had been registered under the provisions of Prevention of Corruption Act. It is pertinent to note that during the said check period, applicant no. 1 had worked as a Minister for Social Welfare, Women and Child Welfare and Ex-serviceman Welfare departments from 1995 to 1999. The port folios headed by him were belonging to under privileged classes and special class which required special attention i.e. department of women and child welfare. It was, while working as a head of the said departments, applicant had amassed wealth. This Court is therefore of the opinion that learned Government Pleader has rightly submitted that the sanction to prosecute could not have been obtained by the

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complainant at the stage of initiating complaint under section 2 (d) of Code of Criminal Procedure, 1973. Complainant have only set Law into motion.

41) In any case, section 19 (3) of the Prevention of Corruption Act 1988 contemplates:

> "(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973,-
> (a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby."

42) In the present case, there was no challenge to the grant of sanction prior to the commencement of the trial. Applicants herein had not filed any application seeking discharge on the ground that no valid sanction was obtained before filing of the charge-sheet which would bar taking of cognizance in the said case. It, therefore, would not be open to the applicants to raise the issue in appeal at an interim stage while seeking suspension of conviction. No doubt, it may be open for the applicants to raise the said issue

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at the time of final hearing of the appeal, wherein applicants may be able to demonstrate “miscarriage of justice.” Hence, the said issue is not being considered at this stage.

43) Hon'ble Apex Court in several Judgments as cited by the learned Government Pleader has specifically held that Suspension of conviction of a public servant should not be granted as in a routine manner, but only after considering the effect of keeping the conviction in abeyance. The Courts have been cautioned that if, convicted public servant is permitted to take advantage of his position, irrespective of his conviction and if he is allowed to hold the public office, it would impair the morale of the society at large and which would also impair the moral of other honest officers who are manning their respective offices. In the case of **K. C. Sareen V/s C.B.I., Chandigarh**, (cited supra), Hon'ble Apex Court has specifically laid down that if honest public servants are compelled to take orders from proclaimed corrupt officers on account of the suspension of the conviction, the fall out would be one of shaking the system itself. Hence, this Court is not inclined to suspend the conviction.

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44) At this stage, it would also be necessary to consider well founded reasons recorded by the learned Special Judge while recording conviction. In every case, where the convicted person seeks suspension of conviction, it is necessary to consider the facts of the case and the same cannot be granted only because section 389 of Code of Criminal Procedure, 1973 empowers the Court to suspend the conviction as well as the substantive sentence. Learned Special Judge has recorded the findings on the basis of substantive evidence recorded at the time of trial. The findings recorded by Special Judge need to be focused as follows.

> "It is also not disputed by accused no. 1 that his father used to manufacture footwear manually. Accused no. 1 & 2 have not produced on record anything to show their source of income prior to check period. The claims raised by accused persons before the Income Tax Authority were rejected. There was no proof of earning through sale of animals, agriculture and dairy business as well as income earned from production of movie."

45) Learned Special Judge on the basis of evidence adduced by the prosecution had specifically held that while working as Minister in the

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Government of Maharashtra, accused no. 1 misused his office and acquired assets disproportionate to his known sources of income in his name as well as in the name of accused no. 2 who abetted the commission of the said offence. Accused have failed to offer a proper explanation in order to justify the respective claims. He had acquired several properties by corrupt and illegal means. This is sufficient material to consider as to whether the applicants herein deserves suspension of conviction.

46) Learned counsel for the applicant placed reliance upon the Judgment of the Hon'ble Apex Court in the case of **Ravikant Patil & Navjot Singh Sidhu** (cited supra) that the Hon'ble Apex Court had granted suspension of conviction and the same had to be followed in the present case as in both the cases, applicants were public servants.

47) At this stage, the case of **Navjot Singh Sidhu & Ravikant Patil** needs to be distinguished from the case of the present applicant. Offences for which Navjot Singh Sidhu and Ravikant Patil were convicted were the offences committed by both of them in their private capacity. In the case of Ravikant

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Patil, accused had got married to the victim of rape, whereas in the case of Navjot Singh Sidhu, it was an act committed by the accused on the spur of moment without pre-meditation and thereby causing physical injury to the victim of the said incident.

48) In the present case, applicant no. 1 has been a public figure during the period when he had amassed huge properties at the cost of the public at large. However, it is clear from the records that he has caused public loss. Most of the part of disproportionate property earned by him would be a chunk of funds, which was meant for public utility and to impart social and economic justice to the people whom he was representing as well as other society at large. Hence, offence committed by the applicant is an economic offence and this Court does not feel the necessity to suspend the conviction in order to enable him to contest the elections and represent same people who have suffered injustice because of the economic offences committed by the present applicant.

49) Learned counsel for the applicants had submitted that present applicant

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no. 1 had lost the elections in the year 1990. It is matter of record as recorded by the Special Judge that prior to 1990, applicant had obtained the benefit of loan to the tune of Rs. 500/- from the scheme Sanjay Gandhi Niradhar Yojana. The checklist of the expenditure incurred by applicant no. 1 during the check period includes refund of Rs. 500/- to the Sanjay Gandhi Niradhar Yojana and Rs. 3/- towards education expenses of his daughter. Such was the financial condition of the applicant no. 1, who has built an empire from rags to riches only after he officiated as the Minister for Social Welfare, Women and Child Welfare and Ex-serviceman Welfare Committee. Learned counsel has submitted in defence that the said loan was obtained for extending the hand loan to a friend and not for personal use. The said submission is only a frail defence. A person could not offer to give a hand loan of Rs. 500/- to his friend and had to take the benefit under Sanjay Gandhi Niradhar Yojana cannot be said to have earned financial ability (without any known sources of income) to contest elections and earn huge properties. The ability to contest the elections to the State Legislative Assembly cannot establish that the applicant no. 1 had resourceful income. The wealth i.e. accumulated at the cost of the public would be utilized as election funds in the eventuality that he is given

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an opportunity to contest the elections.

50) In fact, this Court is of the opinion that when a person contests elections to the State Legislative Assembly or the Parliament he is driven with a noble cause to serve the public whom he represents. He therefore, is called a public servant. Applicant no. 1 seems to have lost sight of the fact that although he belonged to an under privileged class, the people had given him an opportunity to represent them with a belief that he would understand the pains, the grief of the under privileged class.

51) Hon'ble Delhi High Court in the case of **K. K. Verma V/s C.B.I.** Judgment delivered on 26/02/2014 has held thus:

> "Appellant has been charged with a serious offence that he offered bribe to an officer of CBI for the purpose of obtaining a report which could result in the inquiry being conducted by the complainant coming back to the Vigilance Department of FCI, where the appellant at that time was posted. The purpose obviously could be to favour the persons against whom the inquiry was directed, while examining the matter in the Vigilance Department of FCI. In my view, it would not in public interest to allow a public servant who has been convicted of an offence

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under the provisions of PC Act to continue in the public employment held by him, since there is a reasonable possibility of such a person indulging into corrupt practices so as to make money during the limited period he would be holding the public office. Application seeking suspension was dismissed."

52) A distinction between the Government salaried public servant and the Member of Legislative Assembly also needs to be taken into consideration in the sense that a public servant who draws salary from the exchequer of the State is working in a limited sphere. The salary drawn by applicant no. 1 happens to be his source of survival, whereas a Representative of the people under RPA, by his corrupt practices could be accumulating wealth at the cost of the survival of the people at large. While holding responsible offices as a Minister of Social Welfare, Women and Child Welfare, the applicant appears to have been insensitive to the welfare of the said classes. The electorate would lose faith in criminal administrative system, if a person convicted under the provisions of Prevention of Corruption Act would be held eligible to contest the elections. The Court cannot allow the applicant to mislead the electorate.

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53) Applicant no. 1 herein is seeking suspension on the ground that he desires to contest the ensuing elections to the Maharashtra Legislative Assembly. However, no submissions are advanced on behalf of applicant no. 2. Applicant no. 2 has no reason for seeking suspension of conviction. Hence, application as far as applicant no. 2 is also rejected.

54) Hence, this Court is not inclined to grant suspension of conviction under section 389 of Code of Criminal Procedure, 1973. Hence, following order.

O R D E R

(i) Application seeking suspension of conviction under section 389 of Code of Criminal Procedure, 1973, during the pendency of appeal is hereby rejected.

Application stands disposed of.

(SMT. SADHANA S. JADHAV, J.)

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