RESERVED

In Chamber

Case :- MISC. BENCH No. - 792 of 2020
Petitioner :- Ajai Kumar & Another
Respondent :- State Of U.P.Through.Prin.Secy.Home & Others.
Counsel for Petitioner :- Pradeep Kumar Rai,Prakarsh Pandey,Praveen Kumar Shukla
Counsel for Respondent :- G.A.,A.P.Singh,Shishir Jain

Hon'ble Anil Kumar,J.
Hon'ble Manish Mathur,J.

(Delivered by Hon'ble Anil Kumar,J.)

Heard learned counsel for the petitioner, learned A.G.A. for the opposite party nos.1,2,4,6 and 7, Sri Shishir Jain, learned counsel for the opposite party no.3 and Sri A. P. Singh, learned counsel for the opposite party no.5.

With the consent of learned counsel for the parties, writ petition is being heard and decided at the admission stage.

By means of the present writ petition, the petitioner has prayed for following relief :

(a) That the order dated 31/08/2019 passed by opposite party no.3 whereby prosecution sanction for prosecuting the petitioners under Section 409/120B I.P.C. and under Section 13 (1) read with Section 13 (2) of Prevention of Corruption Act, 1988 has been granted, may be quashed as learned sanctioning authority has granted the impugned sanction without there being any evidence against the petitioners and without application of mind.

(b) That the petitioners are challenging the inquiry report prepared by the Lok Ayukta, U.P. in complaint no.2115-2012 without adhering to the legal provisions and without taking opinion/assistance of the technical experts on the subject matter.

(c) That the petitioner no.1 is also challenging the Open Vigilance Inquiry initiate against him in respect of the work done in the year 2007-2011 by the State Government on the basis of the report of Lok Ayukta, U.P.

Learned counsel for the petitioners submitted that State Government took a decision for construction of memorials and parks in Lucknow and Noida and in pursuance thereof three members Committee consisting of Managing Director of U.P. Rajkiya Nirman Nigam Limited, Lucknow, the Director of Department of Geology and Mining and its Joint Director was constituted for the purposes of making an inspection in the Ahrarra Region of District-Mirzapur for the purposes of verifying the sufficient quantity of pink stones and the Committee found that pink sandstones were available in sufficient quantity.

Thereafter the Committee of seven officials including three officers of earlier Committee submitted its report indicating therein that it was not possible to obtain approximately 2.00 lacks cubic feet of sandsone from one single area and such supply should be obtained from a number of lease areas and it was further recommended that a consortium of lease holders should be constituted for the purposes of entering into an agreement regarding supply of sandstones.

Accordingly, the formalities were completed and on the basis of quotation submitted by the respective supplier the rate of Rs.150 per cubic foot was accepted and a further amount of Rs.20/- per cubic foot was to be paid for the purposes of loading etc. in respect of the constructions at Lucknow..

The Noida Development Authority decided to construct the compound wall through U.P. Rajkiya Nirman Nigam Limited vide invitation dated 28.01.2008 and on the basis of the proposal of the Noida Development Authority the Rajkiya Nirman Nigam agreed to work on the basis of the schedule of the rates as applicable to C.P.W.D. (DSR) in the year 2007 and accordingly an agreement dated 10.04.2008 was entered into between the Noida Authority and the U.P.R.N.N.

Before commencement of the work the cost of the project and rates indicated therein was also examined and approved.

In order to maintain the uniformity and availability of the material and taking into consideration the rate fixed for the Lucknow project the purchase committee for fixing of the rates of Mirzapur stone regarding Noida project, considered the rates of Mirzapur sandstone rough size and fixed Rs.103.00 per cubic foot. It was provided that the supplier shall deliver 633.19 cubic feet rought size Mirzapur stone and against that the payment of cut size stone that is 434.74 cubic feet will have to be made at the rate of Rs.150 per cubic foot. This provision itself indicates that the rate determined and paid for the Noida project was at the rate of Rs.103 per cubic foot for cut size stone and not Rs.150 as is being alleged by the opposite parties.

The petitioners have not signed any agreement or supply order in regard to supply of the stones rather the work orders were issued by the Project Manager and petitioners were Assistant Engineers at the time of completion of the project.

The quantity of stone in question was also approved by the RITES an agency of the Government of India and there has never been any complaint regarding the quality or quantity.

The entire project was completed without there being any complaint either in respect of quality or in respect of quantity and the respect suppliers were also paid by the respective departments without there being any question regarding excessive rates but all of sudden the things reversed after the Government of Bahujan Samaj Party completed its term and U.P. State General Elections were held.

Thereafter in the year 2012 after U.P. General Elections the Samajwadi Party came in power and with a view to take political revenge from the erstwhile Bahujan Samaj Party an order was passed by the State Government in exercise of its power under Section 80 of the U.P. Lokayukta and U.P. Lokayuktas Act, 1975 (hereinafter referred to as the Act) to inquire into allegations of corruption and irregularities during the

period 2007-2011 with respect to supply of sandstone from District Mirzapur and other districts with the further directions that the Lokayukta shall obtain the services of Department of Economic Offences.

The Lok Ayukta in his report has indicated that information of consortium and payment through consortium was procedural fault adopted by the authorities, he has further indicated that obtaining stones from Rajasthan after carving was an additional expense, and the payment of sandstone at the rate of Rs.150 per cubic feet was also excessive. He has indicated that fixing the rate of Rs.150 per cubic feet of the sandstone was too high wihile the market rate of the same was at the most Rs.100/.

The report of the Lok Ayukta has been prepared calculating the rates of boulder/Patia which are normally used in laying foundation check dam or in roof works of the houses and as such the presumption has been drawn that there are material differences in the rates whereas the stones used in carve boundary wall were dimensional stones free from cracks and weathering which were dully checked by the Geologics of the State Mining Department.

The inquiry report of the Lok Ayukt has been challenged before the Hon'ble Court by filing Writ Petition No.54197 of 2013 (Panna Lal and 15 others vs. State of U.P. and others) wherein the mining lease granted to the petitioners of that petition was to be cancelled by the D.M. relying upon the report of Lok Ayukta and the lease holders were to be backlisted against which they approached the Hon'ble Court in which Hon'ble Court has directed the opposite parties to file counter affidavit and has stayed the operation of the order which was passed by D.M., Mirzapur regarding cancellation of mining lease.

In pursuance of the recommendation of the Lok Ayukt, F.I.R. No.1/2014 was lodged by the U.P. Vigilance Establishment, Sector-Lucknow on 01.01.2014 under Section 406/120-B I.P.C. and Section 13 (1) (d) and 13 (2) of P.C. Act at P.S.-Gomti Nagar, District-Lucknow against 19 persons as per the recommendation no.1 of the Lok Ayukt.

Despite the inquiry report of the Lokayukt being subjudice, in Writ Petition No.54197/2013, on 31.05.2019 the Government initiated inquiry in respect of the assets of the persons mentioned in recommendation no.2 through the U.P. Vigilance Establishment.

The proceedings initiated by the Government on the basis of report of Lok Ayukta is totally barred by Section 351-A of Civil Service Regulation. The bare reading of Section 351-A states that "the departmental proceedings can be initiated against a retired employee only with the sanction of the Hon'ble Governor and that too only in respect of an incident which had taken place not more than four years earlier to the institution of such proceedings. In the present case the petitioner no.1 retired in the year 2011 and the incident relates to the year 2007 as such the inquiry conducted by the Government is totally barred and without jurisdiction.

Despite being the report of the Lok Ayukta, subjudice in Writ Petition No.54197 of 2013 and despite the direction of the Hon'ble Court to file counter affidavit, the respondent no.1 and 3 are in most hurriedly manner, conducting the inquiry proceedings in the matter. The Special Secretary vide his letters dated 25.07.2019 and 08.08.2019 directed the M.D. U.P.R.N.N. (opposite party no.3) to immediately grant sanction for prosecution.

On 29.08.2019 the Special Secretary again directed the opposite party no.3 to accord prosecution sanction in the matter.

From the perusal of the impugned order dated 29.08.2019, it reveals that on one hand the sanctioning authority has referred the matter to the Principal Secretary, Lok Nirman for getting the matter inquired by high level committee and on the other hand the prosecution sanction has been accorded. In view of the above, it appears that the sanctioning authority while granting prosecution sanction was in the state of dilema and was not satisfied about the involvement of the petitioner and other persons in the alleged matter but has granted the sanction due to continuous pressure of

Special Secretary, Vigilance Section-4. The impugned sanction granted by the opposite party no.3 is not sustainable under law.

In view of the above said factual background, learned counsel for the petitioner has challenged the impugned orders on the following grounds, which are summarized as under :-

"(a) That the alleged investigation conducted by the Vigilance Department without there being any basis is totally without jurisdiction.

(b) That the impugned order of prosecution sanction has been passed without application of mind and without there being any legal basis thereof.

(c) That the impugned order dated 31.08.2019 is in violation of the Government Order dated 19.07.2005.

(d) That the sanctioning authority has granted the prosecution sanction under the influence of opposite party nos.1 and 2.

(e) That the petitioner has not been involved in the purchase of the alleged construction materials.

(f) That the recommendations of the Lok Ayukta are illegal and arbitrary as no opportunity of hearing was granted to the petitioner during the course of inquiry and as such, the Open Vigilance Inquiry being conducted against the petitioners is vitiated and is not tenable.

(g) The report submitted by the Lok Ayukta is beyond his jurisdiction and contrary to the provisions of the U.P. Lok Ayukta and U.P. Lok Ayukta Act, 1975.

(h) The said provision under Section 13 does not confer any power upon the Lok Ayukta to conduct any investigation or inquiry de-hors the provision of the Act itself.

Accordingly, it is submitted by the learned counsel for the petitioners that the impugned orders under challenge in the present writ petition, being contrary to law, are liable to be set aside.

Sri S. P. Singh, learned A.G.A. while rebutting the contends of learned counsel for the petitioner submitted that after perusal of the report of the Lokayukt, the decision was taken by the State Government to get the

open enquiry conducted in context of corruption and also on the allegation from disproportionate assets of the accused by the Vigilance Department for the supply of the sandstone to Rajkiya Nirman Nigam, for the period of 2007 to 2011 for construction of monuments and parks. After taking the decision the Administrative Department i.e. Public Works Department was asked to make available the proposal after verification in context of the recommendation made by the Lokayukta. Thereafter, verification of the properties i.e. movable and immovable of last five years was done by the Rajkiya Nirman Nigam Limited and it has been found that 26 employees of the Rajkiya Nirman Nigam and 16 employees of the Accounts Cadre had accumulated properties beyond their means.

Thereafter, decision was taken by the State Vigilance Department on its meeting, which was held on 04.08.2017 to re-examine the verification report and to also submit the fact to it. In pursuance to the decision taken by the State Vigilance Committee for initiating open Vigilance enquiry again the administrative departments had submitted the report. The meeting (158) of the State Vigilance Committee was again convened on 15-04-2019 under the Chairmanship of the Chief Secretary and thereafter decision was made for conducting open vigilance enquiry. After approval of the Hon'ble the Chief Minister, the letter dated 31.05.2019 was issued by the Vigilance Anubhag-4 for conducting open enquiry in context of the properties of the accused by the Vigilance Department.

It is further submitted that consortium of the lease holders and the officers of the Mining Department and the LDA was constituted only to loot the public money without there being any consent of the State Government in violation to the paragraph 19 of the Mining Regulation, which forbids constitution of consortium. In fact, the payment was directly made to the heads of the consortium whereas it should be made to the lease holders. By this way, brokers were allowed to function and the stones were purchased at higher rates, so the persons involved in the transactions were indirectly benefited and by this process, huge loss was caused to the public exchequer.

Purchase Committee had taken decision in violation to the paragraphs 63 to 84, 101, 102 and 102-A of Manual of the Rajkiya Nirman Nigam and further without tender materials were purchased above the Market Rate by fixing a Rs.150 square foot of the Mirzapur Sand Stone and for loading Rs.20/- and due to this reason the cost of royalty had increased and extra trade tax was paid.

During the course of investigation, it has been found that supply of sand stone measuring 3177100 cubic ft was made and it was purchased at the rate of Rs.150/- cubic ft, thus, an amount of Rs.476565087/- was spent, whereas if the stone was purchased on the rate fixed by the Mining Department i.e. Rs.25.50/- cubic ft. and as per the commercial tax department, the market rate of the Mirzapur Sand Stone was Rs.28.34/- cubic ft, then the money which might had been spent was Rs.95313014.40/-, thus, in this way, the Government money was cheated, therefore, it is clear that Mirzapur Stone cannot have a rate of more than 30 cubic ft. The rates of the Mirzapur Sand stone, which has been mentioned in the aforesaid paragraph is of year 2009, whereas when the offence was committed in the year 2007, even the rate of Mirzapur Sand Stone would not be more than Rs.50/. As such the petitioners are not entitled to any relief.

In addition to the above said facts, learned A.G.A. further submitted that the petitioners have got no locus or rights to challenge the order of sanction of prosecution dated 31.08.2019 passed by opposite party no.1 in view of the law laid down by a Division Bench of this Court in the case of **Satya Pal Singh and Anr. Vs. State of U.P. and Anr., 2014 Legal Eagle 2653,** this Court held as under:-

> *"We have considered the valuable arguments advanced by learned counsel for the parties and perused the authorities cited by them.*
>
> *In Dinesh Kumar's case (supra) and in Dr. R.C. Anand's case (supra), the charge-sheets were filed in court during the pendency of the writ petitions,*

therefore, the Apex Court permitted the accused persons to raise the plea of invalidity of sanction order before the trial court. In Ameer Jan's case (supra), the trial was concluded and after conviction of accused the High Court allowed the appeal on the ground of invalidity of sanction and the matter than,was considered by the Apex Court against the order passed by the High Court in appeal. In the case of Ashok Kumar Aggarwal's case (supra), the charge-sheet was filed in the trial court and only thereafter the validity of the sanction order was challenged in the High Court.

Admittedly, in all the writ petitions, the petitioners has been arrayed as accused and after conclusion of investigation, they were found to be involved in respective offenses by the Investigating Agency and thereafter the competent authority issued sanction orders to prosecute them.

It is not in dispute that grant or refuse of sanction order is statutory function of the competent authority. It is an absolute discretion of State Government or Central Government either to grant the sanction to prosecute its employee or not. There is no prescribed format for grant of sanction either under Section 197, Cr.P.C. or under Section 19 of P.C. Act. The prosecution yet to be launched and unless the prosecution is launched in the competent court, the accused persons cannot be allowed to challenge the proceedings during investigation, which are necessary to launch the prosecution. It is no doubt true that fair investigation and fair trial is the right of an accused, who is protected under Article 21 of the Constitution of India.

Article 21 of the Constitution of India provides protection of life and personal liberty of a person, which reads as under:

"21. Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law."

The integral part of Article 21 is that no person shall be deprived of from his life or personal liberty except according to procedure established by law.

It has been argued by learned counsel for the petitioners that if the petitioners are allowed to raise the plea of invalidity of the sanction at the appropriate stage of the trial, they would be compel to appear before the trial court in terms of Section 437, Cr.P.C. It is further submitted that the provisions of Section 438, Cr.P.C. are not applicable in the State of U.P., therefore, even if, remedy is available to the accused persons/petitioners to challenge the validity of sanction at the stage of trial this Court in view of non applicability of section 438 of Cr.P.C. under Article 226 of the Constitution of India can look into the validity of sanction order and if this Court finds that sanction order has not been validly granted, the accused persons shall not be compelled to appear before the trial court and to face trial unnecessary and their rights conferred under Article 21 would be safeguarded.

We are of the firm view that right to life and personal liberty is subject to restrictions imposed under Article 21 of the Constitution. The liberty of a persona may be deprived of in accordance with the procedure established by law. Petitioners are the proposed accused of the offenses for which they are sought to be

prosecuted. The investigation has been conducted with regard to the offenses as complained and the Investigating Agency found them involved in the offenses. The sanctioning authority has decided to proceed against them and to launch prosecution before the competent court. This all was done in accordance with the procedure established under law, therefore, the petitioners cannot be allowed to raise the plea of violation of fundamental rights conferred under Article 21 of the Constitution. If, the prosecution is launched, the same shall be in accordance with the procedure prescribed under law and rights conferred to an accused before trial court under the statute would be available to accused. The Courts cannot formulate a new procedure which is not akin to the the procedure already prescribed.

In all cases, the prosecution is yet to be launched and if, there is no material on record as alleged by learned counsel for the petitioners then there is another safeguard available to them, which is in the form of a court of law. In case there appears no material to launch prosecution the court competent to take cognizance may not take cognizance of the case and even if the cognizance is taken by the court, the accused persons would be entitled to raise their grievances either in the form of Revision under Sections 397/401 of Cr.P.C. or under Section 482, Cr.P.C. It is also well settled that courts cannot legislate law. The courts are to maintain the rule of law. The courts while interpreting the law if found that the same is against the provisions contained in the Constitution of India, declares such law ultra vires.

In this bunch of writ petition, the vires of any statute is not under challenged, therefore, in the light of the aforesaid discussion made by us, the writ petitioners cannot be permitted to claim violation of Articles 20 and 21 of the Constitution of India and on this score the petitioners have no case.

It is true that grant of sanction order against the public servant for prosecution is a serious thing and should not be lightly dealt with by the authorities but at the same time, it should not be forgotten that the purpose for which an order of sanction is required should always be borne in mind. Ordinarily, the sanctioning authority is the best authority to judge as to whether the public servant concerned should receive the protection under the Act or accord sanction for his prosecution or not as held in Gokulchand Dwarkadas Morarka Vs. The King; AIR (35) 1948 Privy Council 82. the said judgment of Privy Council was followed by the Apex Court in Jaswant Singh v. State of Punjab; AIR 1958 SC 124 and Mohd. Iqbal Ahmed Vs. State of Andhra Pradesh (1979) 4 SCC 172. The Apex Court in R.S. Nayak Vs. A.R. Antulay; (1984) 2 SCC 183 discussed the impact of Mohd. Iqbal Ahmed's case (supra), and held as under:

"The Legislature advisedly conferred power on the authority competent to remove the public servant from the office to grant sanction for the obvious reason that that authority alone would be able, when facts and evidence are placed before him to judge whether a serious offence is committed or the prosecution is either frivolous or speculative. That authority alone would be competent to judge whether on the facts alleged, there

has been an abuse or misuse of office held by the public servant. That authority would be in a position to know what was the power conferred on the office which the public servant holds, how that power could be abused for corrupt motive and whether prima facie it has been so done. That competent authority alone would know the nature and functions discharged by the public servant holding the office and whether the same has been abused or misused. It is the vertical hierarchy between the authority competent to remove the public servant from that office and the nature of the office held by the public servant against whom sanction is sought which would indicate a hierarchy and which would therefore, permit inference of knowledge about the functions and duties of the office and its misuse or abuse by the public servant. That is why the Legislature clearly provided that that authority alone would be competent to grant sanction which is entitled to remove the public servant against whom sanction is sought from the office."

In Prakash Singh Badal's case (supra), the Apex Court in paragraph 29 stated as under:

"The effect of sub-sections (3) and (4) of Section 19 of the Act are of considerable significance. In Sub-Section (3) the stress is on "failure of justice" and that too "in the opinion of the Court". In sub-section (4), the stress is on raising the plea at the appropriate time. Significantly, the "failure of justice" is relatable to error, omission or irregularity in the sanction. Therefore, mere error, omission or irregularity in sanction is considered fatal unless it has resulted in failure of justice or has been occasioned thereby. Section 19(1) is a matter of procedure and does not go to root of jurisdiction as

observed in para 95 of the Narasimha Rao's case (supra). Sub-section (3)(c) of Section 19 reduces the rigour of prohibition. In Section 6(2) of the Old Act (Section 19(2) of the Act) question relates to doubt about authority to grant sanction and not whether sanction is necessary."

In respect of alleged irregularities in grant of sanction under Section 19 of the P.C. Act, the Apex Court after relying upon the judgment in Prakash Singh Badal and Ameer Jan's case (supra) in Dinesh Kumar's case (supra)held in para 9 as follows:

"9. In our view, invalidity of sanction where sanction order exists, can be raised on diverse grounds like non availability of material before the sanctioning authority or the order of sanction having been passed by an authority not authorized or competent to grant such sanction . The above grounds are only illustrative and not exhaustive. All such grounds of invalidity of sanction would fall in the same category like the ground of invalidity of sanction on account of non application of mind- a category carved out by this Court in Prakash Singh Badal, the challenge to which can always be raised in the course of trial."

In view of above discussion, this Court is of the firm view that (1) grant of sanction order to prosecute the accused under the statute is not an administrative action of the competent authority. It would be a statutory function of the competent authority and subject to challenge in the proceedings launched against the accused in accordance with the procedure established under law.

(2) An accused cannot be allowed to challenge the order granting sanction to prosecute at pre-cognizance stage. As the same has no locus as held in Smt. Nagawwa vs Veeranna Shivallngappa Konjalgi and others; (1976) 3 SCC 736 and Raghu Raj Singh Rousha Vs. Shivam Sundaram Promoters Private Limited and another; (2009) 2 SCC 363.

In view of above, this bunch of writ petition is not maintainable and the same are liable to be dismissed.

The interim orders passed in the writ petitions are also liable to be vacated, therefore, the interim orders passed in the writ petitions stand vacated."

Accordingly, learned A.G.A. submitted that the present writ petition filed by the petitioners is not maintainable against the order sanction for the prosecution against the petitioners, is liable to be dismissed.

Learned counsel for the petitioners, in rebuttal, submitted that the Noida Works were executed in 2008-09 and not in 2007 and at that time both the petitioners were only holding the post of Assistant Resident Engineer and were not the Unit In-charge. As per the service rules/regulations of U.P.R.N.N. only the engineers of the rank of Resident Engineer can be made the unit in-charge. The said rule was followed in the year 2008-09 and some other persons duly eligible were given the charge of Unit In-charge and not the petitioners. In fact, the petitioner no.1 was promoted on the post of Resident Engineer in the year 2012 and petitioner no.2 was promoted on the said post on 09.02.2009 after the alleged incident.

From the perusal of the recommendation of the Lok Ayukta, it is crystal clear that he had directed the authority concerned to initiate the inquiry only against the unit in-charges/Project Managers and Accountants not against the Assistant Resident Engineers, and as such, since the petitioners were not unit in-charge at the time of execution of work and they could not have been subjected to investigation. The total work done in

respect of Noida was only Rs.2.59 crores and not alleged by the prosecution.

The departmental inquiry conducted by the order of the Managing Director, U.P.R.N.N. clearly shows that the petitioners were neither involved in the matter nor the illegality or embezzlement as alleged by the prosecution had taken placed. Further, without conducting any technical inquiry in the matter, the Investigating Officer has come to the conclusion that the stones were not purchased at the proper rate. Technically the sandsone is classified into two categories ; firstly, the white sandstone and secondly the red sandstone. All the light coloured sandstones are considered white and all the dark coloured sandstones whether dark red or dark brown are considered red, which can be seen in the Hon'ble High Court building at Lucknow. The white sandstone as indicated by the Investigating Officer does not mean that the same is likewise the marble stone used in Taj Mahal. Even the light pink sandstone which almost appears white is called white sandstone.

The State Government has recently purchased Mirzapur pink cut sandstones for road cobble in very small size at the rate of Rs.481/- per cubic foot plus G.S.T. in 2019 for use in Ayodhya. The Mirzapur pink stone which is being purchased in 2019 for Ayodhaya purposes is the same stone which has been purchased in Noida construction as such, there was no excess payment in procuring the same and the allegations itself stands falsified. Mirzapur pink stones were also used by L.D.A. and P.W.D. in 2007-08, in Smriti Upvan, Samta Mulak Chowk, V.I.P. Road, Lucknow without the involvement of U.P.R.N.N. at much higher rates. The D.S.R. and the valuation report of I.I.T. Delhi clearly indicates the value of Mirzapur pink stones at the rate of Rs.150/- per cubic foot before the commencement of Smarak Work in Noida.

The sanctioning authority has granted the prosecution sanction vide his order dated 31.08.2019 for taking cognizance and trial of the petitioners by the competent Court of law, as such, there was no occasion for passing the subsequent order of alleged sanction dated 13/16-12-2019,

which is without jurisdiction and without application of mind as the petitioners have been shown as unit in-charge at that time which is not correct.

It is well settled principle of law that the Administrative Authority cannot review his own order, as such, the subsequent order dated 16-12-2019 alleged to have been passed by M.D. U.P.R.N.N. is without jurisdiction and without looking into the contents of case diary as these documents were never sent by the Investigating Agency to the sanctioning authority.

In support of his argument, learned counsel for the petitioners has placed reliance on the judgment given by Hon'ble the Apex Court in the case of **Mansukhlal Vitthaldas Chauhan vs. State of Gujarat, AIR 1997 SC.**

Accordingly, it is submitted by learned counsel for the petitioners that the validity of sanction would therefore depend on the material placed before the sanctioning authority and the fact that all the relevant facts, materials and evidence have been considered by the sanctioning authority. The order of sanction must ex facie disclose that the sanctioning authority has considered the evidence and other material placed before it.

In the present case, while passing the impugned order of sanction, the competent authority has not applied his mind and without considering the material available on record under the influence of opposite party no.3/ Managing Director, U.P. Rajkiya Nirman Nigam Limited, Lucknow has passed the impugned sanction orders, so the same is liable to be set aside.

In addition to the above said argument, learned counsel for the petitioners has also placed reliance on the judgment given by Hon'ble the Apex Court in the case of ***C.B.I. vs. Ashok Kumar Agarwal (2014) 14 SCC 295***. and ***Devinder Singh and others vs. State of Punjab through CBI, (2016) 12 SCC 87.***

We have heard learned counsel for the parties and gone through the records.

In order to decide the controversy involved in the present case, it will be feel appropriate to go through the provisions of Section 197 Cr.P.C.

Section 197 Cr.P.C. :

(1) 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, no Court shall take cognizance of such offence except with the previous sanction-

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:

Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted.

Explanation - For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under Section 166A, Section 166B, Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Section 370, Section 375, Section

376, Section 376A, Section 376C, Section 376D or Section 509 of the Indian Penal Code(45 of 1860).

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub- section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub- section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

(3A) [1] Notwithstanding anything contained in sub- section (3), no court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(3B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of

Criminal Procedure (Amendment) Act, 1991 , receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the court to take cognizance thereon.]

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held.

In the case of ***R. Balkrishna Pillai vs. State of Kerala and another, 1996 (1) SCC 478***, Hon'ble the Apex Court held as under :

*"**6.** The next question is whether the offence alleged against the appellant can be said to have been committed by him while acting or purporting to act in the discharge of his official duty. It was contended by the learned counsel for the State that the charge of conspiracy would not attract Section 197 of the Code for the simple reason that it is no part of the duty of a Minister while discharging his official duties to enter into a criminal conspiracy. In support of his contention, he placed strong reliance on the decision of this Court in Harihar Prasad v. State of Bihar [(1972) 3 SCC 89 : 1972 SCC (Cri) 409 : 1972 Cri LJ 707] . He drew our attention to the observations in paragraph 74 of the judgment where the Court, while considering the question whether the acts complained of were directly concerned with the official duties of the public servants*

concerned, observed that it was no duty of a public servant to enter into a criminal conspiracy and hence want of sanction under Section 197 of the Code was no bar to the prosecution. The question whether the acts complained of had a direct nexus or relation with the discharge of official duties by the public servant concerned would depend on the facts of each case. There can be no general proposition that whenever there is a charge of criminal conspiracy levelled against a public servant in or out of office the bar of Section 197(1) of the Code would have no application. Such a view would render Section 197(1) of the Code specious. Therefore, the question would have to be examined in the facts of each case. The observations were made by the Court in the special facts of that case which clearly indicated that the criminal conspiracy entered into by the three delinquent public servants had no relation whatsoever with their official duties and, therefore, the bar of Section 197(1) was not attracted. It must also be remembered that the said decision was rendered keeping in view Section 197(1), as it then stood, but we do not base our decision on that distinction. Our attention was next invited to a three-Judge decision in B. Saha v. M.S. Kochar [(1979) 4 SCC 177 : 1979 SCC (Cri) 939] . The relevant observations relied upon are to be found in paragraph 17 of the judgment. It is pointed out that the words "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty" employed Section 197(1) of the Code, are capable of both a narrow and a wide interpretation but their Lordships pointed out that if they were construed too narrowly, the section will be rendered

altogether sterile, for, "it is no part of an official duty to commit an offence, and never can be". At the same time, if they were too widely construed, they will take under their umbrella every act constituting an offence committed in the course of the same transaction in which the official duty is performed or is purported to be performed. The right approach, it was pointed out, was to see that the meaning of this expression lies between these two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection. Only an act constituting an offence directly or reasonably connected with his official duty will require sanction for prosecution. To put it briefly, it is the quality of the act that is important, and if it falls within the scope of the aforequoted words, the protection of Section 197 will have to be extended to the public servant concerned. This decision, therefore, points out what approach the Court should adopt while construing Section 197(1) of the Code and its application to the facts of the case on hand." (See ***State of Maharashtra through Central Bureau of Investigation vs. Mahesh G. Jain, (2013) 8 SCC 119*** and ***Dinesh Kumar vs. Chairman, Airport Authority of India and another, (2012) 1 SCC 532****).*

In the case of ***State by Police Inspector vs. Venkatesh Murthy, (2004) 7 SCC 763***, Hon'ble the Apex Court held as under :-

*"**7.** A combined reading of sub-sections (3) and (4) makes the position clear that notwithstanding anything contained in the Code no finding, sentence and 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.

8. *Clause (b) of sub-section (3) is also relevant. It shows that no court shall stay the proceedings under the Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice.*

9. *Sub-section (4) postulates that in determining under sub-section (3) whether the absence of, or any error, omission or irregularity in the sanction has occasioned or resulted in a failure of justice, the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.*

10. *Explanation appended to the section is also of significance. It provides, that for the purpose of Section 19, error includes competency of the authority to grant sanction.*

11. *The expression "failure of justice" is too pliable or facile an expression, which could be fitted in any situation of a case. The expression "failure of justice" would appear, sometimes, as an etymological chameleon (the simile is borrowed from Lord Diplock in Town Investments Ltd. v. Deptt. of Environment [(1977) 1 All ER 813 : 1978 AC 359 : (1977) 2 WLR 450 (HL)]). The criminal court, particularly the superior court, should make a close examination to ascertain whether there was really a failure of justice or it is only a camouflage. (See Shamnsaheb M. Multtani v. State of*

Karnataka [(2001) 2 SCC 577 : 2001 SCC (Cri) 358] .)"

Hon'ble the Apex Court in the case of ***State of M.P. vs. Dr. Krishna Chandra Saksena, (1996) 11 SCC 439*** held as under :

"8...............sanctioning authority was satisfied after complete and conscious scrutiny of the records produced in respect of the allegation against the accused. Now the question whether all the relevant evidence which would have tilted the balance in favour of the accused if it was considered by the sanctioning authority before granting sanction and which was actually left out of consideration could be examined only at the stage of trial when the sanctioning authority comes forward as a prosecution witness to support the sanction order if challenged during the trial. As that stage was not reached the prosecution could not have been quashed at the very inception on the supposition that all relevant documents were not considered by the sanctioning authority while granting the impugned sanction."

(Emphasis Supplied)

Hon'ble the Apex Court while interpreting the provisions of Section 197 (1) Cr.P.C. in the case of ***Sankaran Moitra vs. Sadhna Das and another (2006) 4 SCC 584*** held as under :

"The High Court has stated that killing of a person by use of excessive force could never be performance of duty. It may be correct so far as it goes. But the question is whether that act was done in the performance of duty or in purported performance of duty. If it was done in performance of duty or purported performance of duty Section 197(1) of the Code cannot be by-passed by reasoning that killing a man could

never be done in an official capacity and consequently Section 197(1) of the Code could not be attracted. Such a reasoning would be against the ratio of the decisions of this Court referred to earlier. The other reason given by the High Court that if the High Court were to interfere on the ground of want of sanction, people will lose faith in the judicial process, cannot also be a ground to dispense with a statutory requirement or protection. Public trust in the institution can be maintained by entertaining causes coming within its jurisdiction, by performing the duties entrusted to it diligently, in accordance with law and the established procedure and without delay. Dispensing with of jurisdictional or statutory requirements which may ultimately affect the adjudication itself, will itself result in people losing faith in the system. So, the reason in that behalf given by the High Court cannot be sufficient to enable it to get over the jurisdictional requirement of a sanction under Section 197(1) of the Code of Criminal Procedure. We are therefore satisfied that the High Court was in error in holding that sanction under Section 197(1) was not needed in this case. We hold that such sanction was necessary and for want of sanction the prosecution must be quashed at this stage. It is not for us now to answer the submission of learned Counsel for the complainant that this is an eminently fit case for grant of such sanction."

Hon'ble the Apex Court in the case of ***Prakash Singh Badal and another vs. State of Punjab and others, (2007) 1 SCC 1***, Hon'ble the Apex Court held as under :

10. *The Law Commission of India in its Forty-first Report [**Ed.**: See para 15.123 et seq. of the said*

Report on the Code of Criminal Procedure, 1898 (Sept. 1969).] recommended amendment to Section 197 of the Code suggesting to grant protection of previous sanction to a public servant who is or was a public servant at the time of cognizance. Following the Report of the Law Commission of India, Section 197 of the Code was amended in 1969. The Act was enacted on 9-9-1988 and the Statement of Objects and Reasons indicated widening of the scope of the definition of "public servant" and the incorporation of offences already covered under Sections 161 to 165-A of the Penal Code, 1860 in the Act. New Section 19 as was enacted virtually the same as Section 6 of the old Act. Earlier to R.S. Nayak case [(1984) 2 SCC 183 : 1984 SCC (Cri) 172] this Court had occasion to deal with the issues in S.A. Venkataraman v. State [AIR 1958 SC 107 : 1958 Cri LJ 254] . In AIR para 14 it was stated as follows: (S.A. Venkataraman case [AIR 1958 SC 107 : 1958 Cri LJ 254])

"14. ... There is nothing in the words used in Section 6(1) to even remotely suggest that previous sanction was necessary before a court could take cognizance of the offences mentioned therein in the case of a person who had ceased to be a public servant at the time the court was asked to take cognizance, although he had been such a person at the time the offence was committed. ... A public servant who has ceased to be a public servant is not a person removable from any office by a competent authority."

35. *"8. The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings*

for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality

of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. ... This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case.

9. At this juncture, we may refer to P. Arulswami v. State of Madras [AIR 1967 SC 776 : 1967 Cri LJ 665] wherein this Court held as under: (AIR p. 778, para 6)

'It is not therefore every offence committed by a public servant that requires sanction for prosecution under Section 197(1) of the Criminal Procedure Code; nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary. It is the quality of the act that is important and if it falls within the scope and range of his official duties the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted. An offence may be entirely unconnected with the official duty as such or it may be committed within the scope of the official duty. Where it is unconnected with the official duty there can be no protection. It is only when it is either within the scope of the official duty or in excess of it that the protection is claimable.'

Hon'ble the Apex Court in the case of ***Prakash Singh Badal (Supra)*** further held as under :

"The section falls in the chapter dealing with conditions requisite for initiation of proceedings. That is, if the conditions mentioned are not made out or are absent then no prosecution can be set in motion. For instance, no prosecution can be initiated in a Court of Session under Section 193, as it cannot take cognizance as a court of original jurisdiction, of any offence, unless the case has been committed to it by a Magistrate or the Code expressly provides for it. And the jurisdiction of a Magistrate to take cognizance of any offence is provided by Section 190 of the Code, either on receipt of a complaint, or upon a police report or upon information received from any person other than a police officer, or upon his knowledge that such offence has been committed. So far as public servants are concerned, the cognizance of any offence, by any court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression, 'no court shall take cognizance of such offence except with the previous sanction'. Use of the words, 'no' and 'shall' make it abundantly clear that the bar on the exercise of power of the court to take cognizance of any offence is absolute and complete. The very cognizance is barred. That is, the complaint cannot be taken notice of. According to Black's Law Dictionary

the word 'cognizance' means 'jurisdiction' or 'the exercise of jurisdiction' or 'power to try and determine causes'. In common parlance, it means taking notice of. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have been committed during discharge of his official duty.

11. Such being the nature of the provision, the question is how should the expression, 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty', be understood? What does it mean? 'Official' according to the dictionary, means pertaining to an office, and official act or official duty means an act or duty done by an officer in his official capacity. In B. Saha v. M.S. Kochar [(1979) 4 SCC 177 : 1979 SCC (Cri) 939] it was held: (SCC pp. 184-85, para 17)

'17. The words "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty" employed in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the section will be rendered altogether sterile, for, "it is no part of an official duty to commit an offence, and never can be". In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between these two extremes. While on the one hand, it is not every offence committed

by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197(1), an act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution under the said provision.'

(emphasis in original)

Use of the expression, 'official duty' implies that the act or omission must have been done by the public servant in the course of his service and that it should have been in discharge of his duty. The section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty.

12. It has been widened further by extending protection to even those acts or omissions which are done in purported exercise of official duty. That is under the colour of office. Official duty therefore implies that the act or omission must have been done by the public servant in course of his service and such act or omission must have been performed as part of duty which, further, must have been official in nature. The section has, thus, to be construed strictly, while determining its applicability to any act or omission in the course of service. Its operation has to be limited to those duties which are discharged in course of duty. But once any act or omission has been found to have been committed by a public servant in discharge of his duty then it must be given liberal and wide construction so far its official nature is concerned. For instance, a public servant is not entitled to indulge in criminal activities. To that

extent the section has to be construed narrowly and in a restricted manner. But once it is established that that act or omission was done by the public servant while discharging his duty then the scope of its being official should be construed so as to advance the objective of the section in favour of the public servant. Otherwise the entire purpose of affording protection to a public servant without sanction shall stand frustrated. For instance, a police officer in discharge of duty may have to use force which may be an offence for the prosecution of which the sanction may be necessary. But if the same officer commits an act in course of service but not in discharge of his duty [and without any justification therefor] then the bar under Section 197 of the Code is not attracted. To what extent an act or omission performed by a public servant in discharge of his duty can be deemed to be official, was explained by this Court in Matajog Dobey v. H.C. Bhari [AIR 1956 SC 44 : 1956 Cri LJ 140] thus: (AIR p. 49, paras 17 & 19)

'The offence alleged to have been committed [by the accused] must have something to do, or must be related in some manner, with the discharge of official duty. ...

***

There must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable [claim], but not a pretended or fanciful claim, that he did it in the course of the performance of his duty.'

Hon'ble the Apex Court in the case of ***P.K. Pradhan v. State of Sikkim [(2001) 6 SCC 704*** held as under :

"5. The legislative mandate engrafted in sub-section (1) of Section 197 debarring a court from taking cognizance of an offence except with the previous sanction of the Government concerned in a case where the acts complained of are alleged to have been committed by a public servant in discharge of his official duty or purporting to be in the discharge of his official duty and such public servant is not removable from office save by or with the sanction of the Government, touches the jurisdiction of the court itself. It is a prohibition imposed by the statute from taking cognizance. Different tests have been laid down in decided cases to ascertain the scope and meaning of the relevant words occurring in Section 197 of the Code: 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty'. The offence alleged to have been committed must have something to do, or must be related in some manner, with the discharge of official duty. No question of sanction can arise under Section 197, unless the act complained of is an offence; the only point for determination is whether it was committed in the discharge of official duty. There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What a court has to find out is whether the act and the official duty are so interrelated that one can postulate reasonably that it was done by the accused in the performance of official

duty, though, possibly in excess of the needs and requirements of the situation."

Hon'ble the Apex Court in the case of ***Soma Chakravarty vs. State through CBI, (2007) 5 SCC 403*** held as under :

> *"**23.** In a case of this nature, the learned Special Judge also should have considered the question having regard to the "doctrine of parity" in mind. An accused similarly situated has not been proceeded against only because, the departmental proceedings ended in his favour. Whether an accused before him although stands on a similar footing despite he having not been departmentally proceeded against or had not been completely exonerated also required to be considered. If exoneration in a departmental proceeding is the basis for not framing a charge against an accused person who is said to be similarly situated, the question which requires a further consideration was as to whether the applicant before it was similarly situated or not and/or whether the exonerated officer in the departmental proceeding also faced same charges including the charge of being a party to the larger conspiracy."*

Hon'ble the Apex Court in the case of ***State of Madhya Pradesh vs. Sheetla Sahai and others, (2009) 8 SCC 617*** held as under :

> *"**49.** It is also interesting to notice that the prosecution had proceeded against the officials in a pick-and-choose manner. We may notice the following statements made in the counter-affidavit which had not been denied or disputed to show that not only those accused who were in office for a very short time but also those who had retired long back before the file was moved for the purpose of obtaining clearance for payment of additional amount from the Government viz.*

M.N. Nadkarni who worked as Chief Engineer till 24-3-1987 and S.W. Mohogaonkar, Superintending Engineer who worked till 19-6-1989 have been made accused but, on the other hand, those who were one way or the other connected with the decision viz. Shri J.R. Malhotra and Mr R.D. Nanhoria have not been proceeded at all. We fail to understand on what basis such a discrimination was made."

In the case of ***State of Punjab and another vs. Mohammed Iqbal Bhatti, (2009) 17 SCC 92***, Hon'ble the Apex Court held as under :

*"**6.** Although the State in the matter of grant or refusal to grant sanction exercises statutory jurisdiction, the same, however, would not mean that power once exercised cannot be exercised once again. For exercising its jurisdiction at a subsequent stage, express power of review in the State may not be necessary as even such a power is administrative in character. It is, however, beyond any cavil that while passing an order for grant of sanction, serious application of mind on the part of the authority concerned is imperative. The legality and/or validity of the order granting sanction would be subject to review by the criminal courts. An order refusing to grant sanction may attract judicial review by the superior courts.*

***7.** Validity of an order of sanction would depend upon application of mind on the part of the authority concerned and the material placed before it. All such material facts and material evidence must be considered by it. The sanctioning authority must apply its mind on such material facts and evidence collected during the investigation. Even such application of mind does not appear from the order of sanction, extrinsic evidence*

may be placed before the court in that behalf. While granting sanction, the authority cannot take into consideration an irrelevant fact nor can it pass an order on extraneous consideration not germane for passing a statutory order. It is also well settled that the superior courts cannot direct the sanctioning authority either to grant sanction or not to do so. The source of power of an authority passing an order of sanction must also be considered. (See MansukhlalVithaldas Chauhan v. State of Gujarat [(1997) 7 SCC 622). The authority concerned cannot also pass an order of sanction subject to ratification of a higher authority. [See State v. Dr. R.C. Anand [(2004) 4 SCC 615 : 2004 SCC (Cri) 1380] .]"

Hon'ble the Apex Court in the case of ***Dinesh Kumar vs. Chairman, Airport Authority of India and another, (2012) 1 SCC 532*** held as under :

*"**9.** While drawing a distinction between the absence of sanction and invalidity of the sanction, this Court in Parkash Singh Badal [(2007) 1 SCC 1 : (2007) 1 SCC (Cri) 193] expressed in no uncertain terms that the question of absence of sanction could be raised at the inception and threshold by an aggrieved person. However, where sanction order exists, but its legality and validity is put in question, such issue has to be raised in the course of trial. Of course, in Parkash Singh Badal [(2007) 1 SCC 1 : (2007) 1 SCC (Cri) 193] , this Court referred to invalidity of sanction on account of non-application of mind."*

Hon'ble the Apex Court in the case of ***C.B.I. vs. Ashok Kumar Agarwal (2014) 14 SCC 295,*** after taking into consideration the various cases, has summarized the legal position, which are as under :

> *"**16.1.** The prosecution must send the entire relevant record to the sanctioning authority including the FIR, disclosure statements, statements of witnesses, recovery memos, draft charge-sheet and all other relevant material. The record so sent should also contain the material/document, if any, which may tilt the balance in favour of the accused and on the basis of which, the competent authority may refuse sanction.*
>
> ***16.2.** The authority itself has to do complete and conscious scrutiny of the whole record so produced by the prosecution independently applying its mind and taking into consideration all the relevant facts before grant of sanction while discharging its duty to give or withhold the sanction.*
>
> ***16.3.** The power to grant sanction is to be exercised strictly keeping in mind the public interest and the protection available to the accused against whom the sanction is sought.*
>
> ***16.4.** The order of sanction should make it evident that the authority had been aware of all relevant facts/materials and had applied its mind to all the relevant material.*
>
> ***16.5.** In every individual case, the prosecution has to establish and satisfy the court by leading evidence that the entire relevant facts had been placed before the sanctioning authority and the authority had applied its mind on the same and that the sanction had been granted in accordance with law."*

Hon'ble the Apex Court in the case of ***Inspector of Police and another vs. Battenapatla Venkata Ratnam and another, (2015) 13 SCC 87*** held as under :

*"**7.** No doubt, while the respondents indulged in the alleged criminal conduct, they had been working as public servants. The question is not whether they were in service or on duty or not but whether the alleged offences have been committed by them "while acting or purporting to act in discharge of their official duty". That question is no more res integra. In Shambhoo Nath Misra v. State of U.P. [(1997) 5 SCC 326 : 1997 SCC (Cri) 676] , at para 5, this Court held that: (SCC p. 328)*

"5. The question is when the public servant is alleged to have committed the offence of fabrication of record or misappropriation of public fund, etc. can he be said to have acted in discharge of his official duties. It is not the official duty of the public servant to fabricate the false records and misappropriate the public funds, etc. in furtherance of or in the discharge of his official duties. The official capacity only enables him to fabricate the record or misappropriate the public fund, etc. It does not mean that it is integrally connected or inseparably interlinked with the crime committed in the course of the same transaction, as was believed by the learned Judge. Under these circumstances, we are of the opinion that the view expressed by the High Court as well as by the trial court on the question of sanction is clearly illegal and cannot be sustained."

***8.** In Parkash Singh Badal v. State of Punjab [(2007) 1 SCC 1 : (2007) 1 SCC (Cri) 193] , at para 20 this Court held that: (SCC pp. 22-23)*

"20. The principle of immunity protects all acts which the public servant has to perform in the exercise of the functions of the Government. The purpose for which they are performed protects these acts from

criminal prosecution. However, there is an exception. Where a criminal act is performed under the colour of authority but which in reality is for the public servant's own pleasure or benefit then such acts shall not be protected under the doctrine of State immunity."

and thereafter, at para 38, it was further held that: (Parkash Singh Badal case [(2007) 1 SCC 1 : (2007) 1 SCC (Cri) 193] , SCC p. 32)

"38. The question relating to the need of sanction under Section 197 of the Code is not necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein. This question may arise at any stage of the proceeding. The question whether sanction is necessary or not may have to be determined from stage to stage."

***9.** In a recent decision in Rajib Ranjan v. R. Vijaykumar [(2015) 1 SCC 513 : (2015) 1 SCC (Cri) 714] at para 18, this Court has taken the view that: (SCC p. 521)*

"18. ... even while discharging his official duties, if a public servant enters into a criminal conspiracy or indulges in criminal misconduct, such misdemeanour on his part is not to be treated as an act in discharge of his official duties and, therefore, provisions of Section 197 of the Code will not be attracted."

(emphasis supplied)

***10.** Public servants have, in fact, been treated as a special category under Section 197 CrPC, to protect them from malicious or vexatious prosecution. Such protection from harassment is given in public interest; the same cannot be treated as a shield to protect corrupt officials. In Subramanian Swamy v. Manmohan Singh*

[(2012) 3 SCC 64 : (2012) 1 SCC (Cri) 1041 : (2012) 2 SCC (L&S) 666] , at para 74, it has been held that the provisions dealing with Section 197 CrPC must be construed in such a manner as to advance the cause of honesty, justice and good governance. To quote: (SCC pp. 101-02)

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

11. *The alleged indulgence of the officers in cheating, fabrication of records or misappropriation cannot be said to be in discharge of their official duty. Their official duty is not to fabricate records or permit evasion of payment of duty and cause loss to the Revenue. Unfortunately, the High Court missed these crucial aspects. The learned Magistrate has correctly taken the view that if at all the said view of sanction is to be considered, it could be done at the stage of trial only."*

Hon'ble the Apex Court in the case of ***Surinderjit Singh Mand and another vs. State of Punjab and another, (2016) 8 SCC** 722* held as under :

> *"**15.** In order to support the conclusions drawn by the High Court, the learned counsel for Respondent 2 also drew our attention to Om Prakash v. State of Jharkhand [Om Prakash v. State of Jharkhand, (2012) 12 SCC 72 : (2013) 3 SCC (Cri) 472] wherein this Court held as under: (SCC p. 89, para 32)*
>
> *"32. The true test as to whether a public servant was acting or purporting to act in discharge of his duties would be whether the act complained of was directly connected with his official duties or it was done in the discharge of his official duties or it was so integrally connected with or attached to his office as to be inseparable from it (K. Satwant Singh v. State of Punjab [K. Satwant Singh v. State of Punjab, AIR 1960 SC 266 : 1960 Cri LJ 410]). The protection given under Section 197 of the Code has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection (State of Orissa v. Ganesh Chandra Jew [State of Orissa v. Ganesh Chandra Jew, (2004) 8 SCC 40 : 2004 SCC (Cri) 2104]). If the above tests are applied to the facts of the present case, the police must get protection given under Section 197 of the Code because the acts*

complained of are so integrally connected with or attached to their office as to be inseparable from it. It is not possible for us to come to a conclusion that the protection granted under Section 197 of the Code is used by the police personnel in this case as a cloak for killing the deceased in cold blood."

(emphasis supplied)

Hon'ble the Apex Court in the case of ***Devinder Singh and others vs. State of Punjab through CBI, (2016) 12 SCC 87*** held as under :

*"**26.** In State of Orissa v. Ganesh Chandra Jew [State of Orissa v. Ganesh Chandra Jew, (2004) 8 SCC 40 : 2004 SCC (Cri) 2104] this Court has held that protection under Section 197 is available only when the act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. The test to determine a reasonable connection between the act complained of and the official duty is that even in case the public servant has exceeded in his duty, if there exists a reasonable connection it will not deprive him of the protection. This Court has also observed that there cannot be a universal rule to determine whether there is a reasonable connection between the act done and the official duty nor is it possible to lay down any such rule. It was held thus: (SCC pp. 46-47, para 7)*

"7. The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that

they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a

reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty. If the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case."

However, it has also been observed that the public servant is not entitled to indulge in criminal activities. To that extent, the section has been construed narrowly and in a restricted manner."

This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an

offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties.

This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties.

If the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case.

Use of the expression 'official duty' implies that the act or omission must have been done by the public servant in the course of his service and that it should have been in discharge of his duty. The section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty.

If on facts, therefore, it is prima facie found that the act or omission for which the accused was charged had reasonable connection with discharge of his duty then it must be held to be official to which applicability of Section 197 of the Code cannot be disputed.

In nutshell, it can be said that the offence alleged to have been committed must have something to do, or must be related in some manner, with the discharge of official duty. No question of sanction can arise under Section 197, unless the act complained of is an offence; the only point to determine is whether it was committed in the discharge of official duty. There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits.

The submission made by learned counsel for the petitioner is that the impugned sanctioned order has been passed by the competent authority without application his mind, rather under the pressure of the higher authority, the same is illegal and arbitrary in nature. The validity of the sanction order is perfectly valid as per law laid down by Hon'ble the Apex Court in the case of ***Mansukhlal Vitthaldas (Supra)*** in which it has been observed that "Sanction lifts the bar for prosecution. The grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to the government servants against frivolous prosecution. Sanction is a weapon to ensure discouragement of frivolous and vexatious prosecutions and is a safeguard for innocent but not a shield for the guilty as the validity of sanction depends on the applicability of mind by the sanctioning authority to the facts of the case and also the material and evidence colleced during investigation. Sanctioning authority has to apply its own independent mind for generation of genuine satisfaction whether prosecution has to be sanctioned or not.

Thus, taking into consideration the facts and circumstances of the case as well as law as stated herein above, we ***dispose of*** the writ petition with a direction that the Investigating Agency shall conduct the investigation in pursuance to the order dated 31.08.2019 by which sanction has been granted for prosecution against the petitioners as per procedure

prescribed for the said purpose under law and thereafter shall file a police report before the competent Court/Court of Magistrate.

In case of filing of the police report by the Investigating Agency in the competent Court/Court of Magistrate against the petitioners, they shall have liberty to take all pleas in their defence including the plea that the prosecutions have wrongly been sanctioned against them.

Further, the competent Court/Court of Magistrate, before whom charge sheet has been filed and the plea regarding the sanction for the prosecution against the petitioners shall be taken by them as an preliminary issue and thereafter the same shall be decided finally as per law by the Court concerned.

Till the decision is taken by the competent Court/Court of Magistrate in regard to the sanction of prosecution against the petitioners that whether the same is valid or not, no coercive measure shall be taken against them.

(Manish Mathur,J.) **(Anil Kumar,J.)**

Order Dated :18.06.2020

Mahesh