

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P. (C) No. 578/2010**

% *Judgment reserved on: 05.11.2012*
Judgment delivered on: 11.01.2013

ASHOK KUMAR ASWAL Petitioner

Through: Mr. Sanjay Parekh, Mr. Shanmuga
Patro, Mr. Shivanath Mahanta and
Mr. Sanjay Aiswal, Advocates.

Versus

UOI AND ORS. Respondents

Through: Dr. Ashwani Bhardwaj and
Mr. Jitender Choudhary, Advocates for
Respondent No. 1.
Mr. R.V. Sinha, Mr. A.S. Singh and
Mr. Pradeep Kumar Singh, Advocates
for Respondent CVC (R-2).
Mr. P.K. Sharma, Standing Counsel
with Mr. Anil Kumar Singh, Advocate
for Respondent CBI (R-3).

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

+ **W.P. (C) No. 578/2010**

1. The present petition has been directed against the order dated 21.10.2009, whereby the respondent No. 1 has accorded sanction under Section 19(1) (a) of the Prevention of Corruption Act, 1988 for the prosecution of the petitioner for the offences punishable under Section 120-B IPC and Section 7/13 (2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988.

2. It is very pertinent to mention here that while dictating the judgment, this Court noticed that as per the Memo of Parties filed by the petitioner, inadvertently, the respondent Nos. 2 and 3 have been shown/arraigned as under:-

“ *ASHOK KUMAR ASWAL*
R/o.M-80, (2nd Floor)
Guru Harkishan Nagar,
Paschim Vihar,
New Delhi – 87.

VERSUS

1. *Union of India through*
The Chairman,
Central Board of Excise and Customs,
Ministry of Finance,
North Block, New Delhi.
2. *The Director,*
Central Bureau of Investigation,
CGO Complex, Lodhi Road,
New Delhi – 110 003.
3. *The Central Vigilance Commissioner,*
CVC, Satarkta Bhawan, Block- A,
GPO Complex, INA,
New Delhi – 110 023.”

However, as per the pleadings in the petition and the counter-affidavits filed by the respective respondents, the correct sequence of the aforesaid respondent Nos. 2 and 3 should have been as under:-

“ *ASHOK KUMAR ASWAL*
R/o.M-80, (2nd Floor)
Guru Harkishan Nagar,
Paschim Vihar,

New Delhi – 87.

VERSUS

1. *Union of India through
The Chairman,
Central Board of Excise and Customs,
Ministry of Finance,
North Block, New Delhi.*
2. *The Central Vigilance Commissioner,
CVC, Satarkta Bhawan, Block- A,
GPO Complex, INA,
New Delhi – 110 023.”*
3. *The Director,
Central Bureau of Investigation,
CGO Complex, Lodhi Road,
New Delhi – 110 003.”*

Therefore, this Court is deciding the instant petition on the basis of the aforementioned Memo of Parties, wherein respondent Nos. 2 and 3 have been highlighted.

3. Vide the instant petition, the petitioner has challenged the aforesaid impugned order passed without application of mind for the reasons that the respondent No. 1 has arbitrarily revised its decision repeatedly. The earlier recommendations/decisions of the same read as under:-

- “a) *On 29.03.2007 Respondent No. 1 recommended RDA against the petitioner only for Minor Penalty and specifically recommended that no prosecution needs to be launched.*

- b) *On 01.10.2007 the Respondent No. 1 granted sanction only to prosecute Sh. Rajeev Aggarwal and impliedly refused to grant sanction to prosecute the Petitioner.*
- c) *In July 2008, Respondent No. 1 while considering CVC's advice dated 04.03.2008 observed that "ends of Justice would be met, if an administration warning is issued to the Petitioner" and requested Respondent No. 2(CVC) to reconsider its advises dated 03.05.2007, 09.08.2007 and 04.03.2008 whereby CVC advised for RDA for major penalty and prosecution against the Petitioner.*
- d) *On 12.08.2009 the Respondent No. 1 granted sanction to prosecute the petitioner u/s 109, 120B, 467 & 471 of IPC read with Sections 7, 13(1)(d), 13(1)(e) and 13(2) of PC Act.*
- e) *On 18-24/08.09 the Respondent No. 1 served a Memorandum on the Petitioner stating therein that it has decided to hold RDA against the Petitioner for Major Penalty on the basis of the aforesaid Sanction order dated 12.08.2009.*
- f) *On 14.09.2009 the Respondent No. 1 vide a corrigendum deleted certain penal sections from the Sanction order dated 12.08.2009. However continued with RDA, which was instituted on the basis of Sanction Order dated 12.08.2009.*
- g) *On 21.10.2009 the Respondent No. 1 on its own revised Sanction Order dated 12.08.2009 and issued a fresh Sanction Order to prosecute the Petitioner."*

4. As stated in the petition, all aforesaid steps were taken by the respondent No. 1 on the basis of the same material and CBI did not

provide any new material in support of the changes carried out by the respondent No. 1 in its decision.

5. In the instant case, contrary to its mandates and while acting on CBI's request and influence, CVC (respondent No. 2) repeatedly reviewed and changed its advice as under:-

- “a) On 3.5.07 vide its **Initial Ist stage advice** recommended RDA for major penalty proceedings against the Petitioner.*
- b) On 9.8.2007 observed that “there has been neither recovery nor any incriminating evidence of demand of money by the Petitioner” and gave **First reconsidered Ist stage advice** recommending RDA only for major penalty proceedings against the Petitioner – not Sanction to prosecute the Petitioner;*
- c) On 4.3.2008 vide its **Second reconsidered Ist Stage advice** recommended Sanction to prosecute the Petitioner (not RDA for major penalty proceedings) despite the Committee of Expert's clear observation that “there is no direct evidence such as transcript on record of any meeting between Shri Aswal and Shri Chataiwala to establish direct demand or receipt of illegal gratification by Shri Aswal”;*
- d) On 30.7.2008 vide its **Third reconsidered Ist stage advice** recommended Respondent No. 1 to follow prescriptions of DoPT OM No. 399/33/2006-AVDIII dated 06.11.2006 and OM No. 134/2/85-AVDI dated 17.10.1986 for reconsideration for commission's reconsidered advice for prosecution of Shri A.K. Aswal, A.C.”*

6. The facts, in brief, of the case are that the petitioner while posted as Assistant Commissioner (Preventive) at Raigarh, a Customs case

vide reference No.V/VI/Raigarh/2004 against one M/s. New Era Exports (A 100% EoU) was initiated for duty evasion. This case was under investigation by one Mr. S. Bhattacharya, Superintendent (Preventive). On 11.05.2004, the petitioner along with five other officials inspected the premises of M/s. New Era Exports and realized that one more Unit, namely, M/s. Oriental Enterprises was also operating from the same premises and one Mr. Khalik Chataiwala is the Proprietor of both the Units.

7. As per procedure, proceedings of the inspection were recorded, *panchnama* was drawn and copies thereof were given to the Units concerned. Thereafter, repeatedly summons were issued under signatures of the Superintendent (Preventive) to the concerned persons of the said two Units including Mr. Chataiwala. On 12th and 28th May, 2004, statements of the Manager of the Units and Mr. Chataiwala were recorded. On 28.05.2004, Mr. Chataiwala assured to produce relevant records on 31.05.2004; however, no records were produced thereafter. Between 3rd and 24th of June 2004, again summons were issued under signatures of the Superintendent (Preventive). However, neither anyone appeared nor any requisite records were produced thereafter. Mr. Chataiwala, in the meantime moved an anticipatory bail application being No.ABA746/2004 before the Sessions Court, Brihan Mumbai and obtained some relief for which the Department could not take him into custody.

8. For the purposes of aforesaid investigation, the petitioner used three persons, namely, Shri Rajesh Madhawan, Shri Mange Arora and Shri Wasim Bhai, as sources.

9. It is pertinent to state here that the Department had used Mr. Madhawan earlier for investigation in FN.SG/MISC.-95/SP/2002/SIIB(import), whereby the Department had recovered Rs.1.1 crores. Shri Mange Arora's services were sought for his views and opinions on Textile (Quality and Market) and Shri Wasim Bhai's, being a buyer from the defaulting Units. In total, the petitioner met with these persons separately three times and discussed the case with them. These meetings led to discovery of bills of entry showing that the goods in question were imported by the defaulting Units from Tuticorin Port through a transporter's office at Vashi, New Mumbai. Based on the knowledge so acquired, letters were sent to Tuticorin Port Authority for cooperation and summons were issued to third parties under the signatures of the Superintendent (Preventive).

10. Mr. Sanjay Parekh, Ld. Counsel for the petitioner submitted that while the aforesaid investigation was going on, the accused in the aforesaid Customs case (Shri Khalik Chataiwala) to stall and jeopardize the aforesaid ongoing investigation under Customs Act lodged a false complaint with CBI (respondent No.3) alleging demand of bribe by the Commissioner, which led to registration of FIR bearing No.RCBA 1/2004-CBI/A0031, wherein the petitioner was also arrayed as an accused. The allegations against him are as under:-

- “i. On 22nd May, 2004, Shri Rajiv Agarwal (the Commissioner) allegedly said to Mr. Khalik Chataiwala that he should handover bribe amount to the Petitioner.*
- ii. One Bangi Arora told Mr. Khalik Chataiwala that Shri Rajesh was Petitioner’s friend and will deliver the money to the Petitioner;*
- iii. On 7th June, 2004 Shri Rajiv Agarwal allegedly was angry and said to Mr. Khalik Chataiwala that he should immediately handover remaining 40 lakhs to the Petitioner.*

(Note: on both the occasions Shri Rajiv Agarwal and Mr. Khalik Chataiwala, met at the former’s residence wherein the Petitioner was not even present);

- iv. Allegedly Mr. Khalik Chataiwala met the Petitioner and the Petitioner said “Commissioner, Mr. Agarwal was very angry with him as he has not completed the commitment by then”;*
- v. The Petitioner allegedly directed Mr. Chataiwala to handover remaining 40 lakhs bribe to Shri Rajesh;*
- vi. Mr. Chataiwala allegedly expressed his inabilities to give the entire bribe amount at one go and sought time from the Petitioner to give in instalments;”*

11. During the investigation, the petitioner cooperated with CBI in investigating the matter. Some of the instances of cooperation are as under:-

- “a) On 25.06.2004, CBI team searched the Petitioner’s office in his absence. Nothing found to indicate the Petitioner’s involvement in the case;*

- b) *On 28.06.2004, CBI team searched the Petitioner's house. Nothing found to indicate the Petitioner's involvement in the case;*
- c) *On 29.06.2004, Shri Rajesh was interrogated and his statement was recorded. Nothing found therein to incriminate the Petitioner;*
- d) *On 02.07.2004 Shri Rajesh filed Crl. A. No. 2820 of 2004 before the Bombay High Court, for being tortured by CBI to implicate the Petitioner and the High Court gave relief to Sri Rajesh by permitting his counsel to accompany him during his interrogation by CBI. In such proceedings nothing found against the Petitioner.*
- e) *The Petitioner was thoroughly interrogated by Shri Pratap Reddy, SP and Shri E. Naryana, Addl SP CBI on several occasions including 02.07.2004, 22.07.2004 and 23.07.2004. During this lengthy interrogation involving numerous hours, the Petitioner fully cooperated with CBI and as such CBI has no grievance against the Petitioner on this count;*
- f) *On 02.07.2004, a lady officer interrogated the Petitioner's wife, she also fully cooperated CBI.*
- g) *On 30.06.2004 Rajesh lodged complaint with Colaba, Mumbai Police against the I.O., CBI for being tortured by the I.O., who apparently insisted him to give a statement to implicate the Petitioner in the matter. The Petitioner did nothing to prevent investigation by CBI despite of such important revelation in his favour.*
- g) *CBI laid a trap to catch the bribe collector/his agent red handed. For that purpose on 09.06.2004, Mr. Chataiwala requests Sri Wasim to collect money on the Petitioner's behalf, also he told Wasim that the Petitioner asked him to receive*

money. Mr. Wasim, however, refused. Nothing incriminating found against the Petitioner.”

12. As stated by the petitioner, the aforesaid instances of cooperation by him demonstrate his innocence. Sometime in March, 2007, CBI sought sanction from the respondent No.1 *intere-alia* to prosecute the petitioner. It is pertinent to mention here that as a matter of practice and procedure, respondent No. 1 before granting sanction seeks advice of respondent No. 2(CVC). For this purpose, respondent No.1 considered the investigating agency's request seeking sanction and formulated its own recommendations to be considered by respondent No. 2 for advice. On 29.03.2007, the respondent No. 1 considered CBI's request seeking sanction and recommended 'no prosecution' and only 'minor penalty' proceedings against the petitioner. Such recommendation was sent to respondent No.2(CVC) for its advice. Upon consideration of CBI's request and respondent No.1's comments, the respondent No.2 (CVC) on 03.05.2007 gave its initial first stage advice, whereby only 'major penalty' proceedings against the petitioner was advised. It is pertinent to mention here that at that stage, the respondents differed in their views on the issue of sanction to launch prosecution.

13. On 22.07.2007, CVC convened a meeting to determine the issue of sanction of prosecution, wherein officials of CBI, CBEC and respondent No.2 (CVC) have also participated. They all discussed the allegations and evidence against the petitioner. Pursuant to such meeting, respondent No. 2(CVC) vide its OM dated 09.08.2007

advised only ‘major penalty’ proceedings against the petitioner. The aforesaid OM *inter alia* reads as under:-

“ Considering the facts of the case, the Commission in agreement with the CBI and the CBEC, have Sanctioned prosecution of Shri R.K. Agarwal, Commissioner. As regards Shri A.K. Aswal (Petitioner), the Commission has observed that there has been neither recovery nor any incriminating evidence of demand of money by Shri A.K. Aswal. The Commission, therefore, in agreement with the CVO, CBEC holds the view that initiation of major penalty proceedings against Shri A.K. Aswal as already advised would suffice.”

14. Thus, the respondent No. 1 never wanted to institute major penalty proceedings against the petitioner, therefore, it recommended only minor penalty.

15. Be that as it may, the aforesaid advice was approved by the Disciplinary Authority on 11.09.2007 and the sanction order bearing No.19/07 dated 01.10.2007 was issued by the respondent No. 1 only against the Commissioner (Rajiv Kumar Agarwal). Based on such sanction order, CBI filed a charge sheet before the Special Judge, Mumbai in Special Case No.8/2008 sometime in April, 2008. The aforesaid incident constitutes a conclusive denial of sanction by the respondent No.1 for prosecuting the petitioner, consequently, rejecting the CBI’s request seeking sanction to prosecute the petitioner.

16. However, while filing the said charge sheet, the CBI made the petitioner an accused in the aforesaid case despite the fact that respondent No. 1 granted the prosecution only against the Commissioner, mentioned above and not against the petitioner.

17. Contrary to the law and practice, the CBI made the petitioner also an accused in the aforesaid charge sheet and that too in the absence of sanction order, which is violative of the procedure indicated in Chapter 22 (Prosecution) of the CBI Manual. The relevant portion whereof reads as under:-

“22.1 In a case where a decision has been taken to prosecute the accused, a charge sheet under Section 173(2) Cr.P.C. shall be filed in the prescribed form in a Court of competent jurisdiction after obtaining the sanction for prosecution, wherever required. Detailed instructions on filing of charge-sheets have been issued vide Policy Division Circular No.13/2003, dated 10-06-2003 which should be strictly complied with. The Branch Public Prosecutor will vet the charge-sheets in all cases and ensure that—

- (a) charge-sheet has been prepared on the final orders passed by the Competent Authority in CBI.*
- (b) these are prepared in accordance with the law, and are complete and correct in all respects;*
- (c) the lists of witnesses and documents are correctly entered in the charge-sheet or attached thereto;*
- (d) no names of witnesses or documents necessary to prove the prosecution case are omitted.”*

18. Upon receipt of summons from the Court of Special Judge, Greater Mumbai, the petitioner filed an application and sought his discharge. The aforesaid application was considered on different dates i.e. on 05.03.2009, 20.04.2009, 22.04.2009, 27.04.2009 and finally on 07.05.2009 the petitioner was discharged by the Special Court, despite

the fact that on all these dates of hearing, CBI continuously attended the Court.

19. Mr. Sanjay Parekh, learned counsel appearing on behalf of the petitioner submitted that the CBI repeatedly wrote letters to respondent No.1 stating that if the petitioner is discharged by the Court, then respondent No.1 would be held responsible.

20. Learned counsel has drawn the attention of this Court to the office memorandum dated 03.05.2007 issued by respondent No.2 wherein stated as under:-

“ The Commission has examined the CBI’s investigation report vis-à-vis comments of the administrative authorities therein, and in agreement with the CBI, it would advise initiation of major penalty proceedings against Sh. R.K. Agarwal, Commissioner and Sh. A.S. Aswal, Assistant Commissioner.

As regards issue of prosecution sanction, the Commission has decided to hold a joint meeting in order to resolve the difference of opinion between the CBI and the CBEC, the dates for which will be intimated separately.”

21. The respondent No.2 also issued office memorandum dated 9.8.2007 wherein stated as under:-

“ As regards Shri A.K. Aswal, the Commission has observed that there has been neither recovery nor any incriminating evidence of demand of money by Shri A.K. Aswal. The Commission, therefore, in agreement with the CVO, CBEC, holds the view that initiation of major penalty proceedings against Shri A.K. Aswal, as already advised, would suffice.”

22. And vide office memorandum dated 04.03.2008 the respondent No.2 sent the communication to respondent No.1 as under:-

“ CBI’s proposal for reconsideration of the case for issue of prosecution sanction in respect of Shri A.K. Aswal, Assistant Commissioner, has been examined by the Commission. After analyzing the available evidence and the contentions of both the CBEC and the CBI, the Committee of Experts constituted by the Commission for the purpose has held the view that circumstantial evidence on record has established the active role of Shri Aswal as a facilitator or abettor in the demand and acceptance of bribe by Shri Agarwal, Commissioner. Minutes of the meetings of Committee of Experts have already been communicated vide OM of even number 20.02.2008.

The Commission would, therefore, on reconsideration of its earlier advice tendered vide its OM of even number dated 09.08.2007, advised the Competent Authority for issue of sanction for prosecution of Shri A.K. Aswal, Assistant Commissioner.”

23. Mr. Parekh has further submitted that in meetings of the Committee of Experts held on 22.01.2008 and 31.01.2008 while considering the CBIs proposal for consideration of the case of the petitioner, regarding issue of sanction for prosecution recorded as under:-

“ Committee of Experts met on 22.1.2008 and thereafter on 31.1.2008 in terms of DoPT’s Order No. 399/33/2006-AVD-III dated 6.11.2006, to reconsider the issue of prosecution sanction in respect of Sh. A.K. Aswal, Assistant Commissioner of Central Excise. The Commission had earlier, in agreement with the CBEC, not recommended for issue of prosecution sanction against Shri A.K. Aswal

vide its OM No. 004/CEX/124 dated 9.8.2007 CBI had proposed for reconsideration of the advice.”

24. Vide this memorandum dated 30.07.2008 the respondent No.2 advised the respondent No.1 as under:-

“ The Commission would therefore, advise the CBEC to follow the aforesaid extant procedure in the subject case and refer the case directly to DoPT if it propose for reconsideration of Commission’s reconsidered advice for prosecution of Shri A.K. Aswal, A.C.”

25. Learned counsel has further submitted that despite the aforesaid communications between the respondent Nos. 1 & 2, the CBI continued to pressurize the respondent No.1 for granting the sanction to prosecute the petitioner. The CBI vide its communication dated 6.4.2009 to respondent No.1 stated as under:-

“ However, inspite of lapse of more than one year and the repeated reminders, the requisite sanction for prosecution is still awaited from you. Now, Shri, A.K. Aswal, Assistant Commissioner has filed application in the Hon’ble CBI Court, Mumbai for his discharge on the grounds of non availability of sanction for prosecution against him. The date of hearing in the Hon’ble Court in this matter is 20.04.2009 and you are requested to issue the sanction for prosecution against Shri A.K. Aswal expeditiously before 20.04.2009 so that the charge sheet against the accused Shri A.K. Aswal can be stopped from being discharged.

You may, therefore, kindly ensure expeditious issue of sanction for prosecution of A.K. Aswal, Assistant Commissioner before 30.04.2009 and fax the same to this office on the above mentioned fax number immediately.”

26. Thereafter, the respondent No.3, CBI vide communication dated 21.04.2009 communicated to the office of the respondent No.1 as under:-

“ However, inspite of lapse of more than one year and the repeated reminders the requisite sanction for prosecution is still awaited from your office. Now, Shri A.K. Aswal, Assistant Commissioner has filed application in the Hon’ble CBI Court Mumbai for his discharge on the ground of non-availability of sanction for prosecution against him. If the accused gets discharged from the Hon’ble Court to the want of the sanction for prosecution, the responsibility of the same will be upon your office.”

27. He further submitted that the CBI sent another communication dated 23.07.2009 to the respondent No.2 whereby it is requested that CBEC may be directed to grant sanction against the petitioner.

28. Thereafter the respondent No.3 CBI vide communication dated 2.10.2009 wrote to respondent No.1 by stating as under:-

“ However on the basis of legal advice it was found that it will not be proper to file the sanction for prosecution along with corrigendum in the CBI court, which may imply the non application of mind by the sanctioning authority. Therefore, it will be proper to have a revised sanction for prosecution against Shri Ashok Kumar Aswal containing all the necessary corrections. Further page No. 2,3 & 4 of the sanction for prosecution is photocopy of the draft sanction order and this also needs to be typed afresh, to avoid the impression of giving of sanction mechanically by the sanctioning authority.

Therefore, the original Sanction for Prosecution as well as the corrigendum is here with returned with a request to correct the above anomalies and send the corrected Sanction for Prosecution to this office at the earliest.”

29. Respondent No.1 vide its communication dated 21.10.2009 communicated to the CBI (respondent No.3) as under:-

“Subject:- Case No. AC-RC-BAI/204/A0031 dated 8.6.2004 regarding against Sh. A.K. Aswal—regarding.

Sir,

I am directed to refer to your letter No. DP 026, 2009/8065/31/A/04 dated 2/5-10-2009 on the subject mentioned above. A revised sanction order as advised by you is enclosed herewith for further necessary action at your end.

The Sanction Order No. 12/2009 dated 12.08.2009 and corrigendum thereof dated 14.09.2009 in this regard stands superseded.”

30. Counsel for the petitioner submitted, during the course of investigation of the Customs case mentioned above, CBI sought sanction from respondent No.1 (CBEC) to prosecute Sh. Rajiv Kumar Aggarwal, Commissioner as well as the petitioner in the case FIR bearing No. RCBA 1/2004-CBI/A0031 which was registered on the complaint of one Mr. Khalik Chataiwala, who is principal accused in the Customs case mentioned above.

31. The respondent No.1, after consultation with the CVC and due application of mind granted sanction to prosecute Sh. Rajiv Kumar Aggarwal only vide sanction order dated 01.10.2007. Despite absence of sanction against the petitioner, the CBI filed charge sheet before the concerned trial court and arrayed the petitioner as an accused. Since there was no sanction against the petitioner, therefore, the Trial Court duly discharged the petitioner vide order dated 07.05.2009.

32. As discussed above, the CBI instead of respecting the rule of law and following the procedures, kept on pressurizing and influencing both CBEC (respondent No.1) and CVC (respondent No.2) to obtain sanction to prosecute the petitioner on the basis of the same very material in consideration whereof CBEC and CVC earlier denied sanction. Unfortunately, CVC came under such influence and changed its earlier opinion dated 9.8.2007. Thereafter recommended sanction to prosecute petitioner, while doing so, CVC vide its own circular No. 17/507 dated 13.06.2007 which is reproduced stated as under:-

“In accordance with the guidelines issued by M/o Personnel, Public Grievances & Pensions (Deptt. Of Personnel & Training) vide O.M. No. 399/33/2006-AVD-III dated 6.11.2006 , a committee of experts is to be set up by the Central Vigilance Commission (with experts drawn from civil services, public sector undertakings and banks) to examine such reconsideration proposals received from various ministries/departments/organizations.”

33. And vide DOP&T OM dated 6.11.2006 which is as under:-

“ Subject: Guidelines for checking delay in grant of sanction for prosecution.

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2 (i) In cases investigated by the Central Bureau of Investigation against any public servant who is not removable from his office except with the sanction of the President, the CBI forwards its final report of investigation to the CVC and also simultaneously endorses a copy of the report to the administrative Ministry/Department concerned, the competent authority shall within three weeks formulate its tentative view regarding the action to be taken and seek the advice of the CVC in the matter.

(ii) The CVC would tender its advice within ten days to the concerned administrative Ministry/Department which shall finalize its view in the matter within a week and issue orders for sanction for prosecution accordingly.

(iii) The concerned Ministry/Department shall refer the case to CVC for reconsideration only in exceptional cases when new facts come to light. The committee of experts proposed to be set up by the CVC, with experts drawn from the civil services, public sector undertakings and banks shall examine the CBT's recommendation and the tentative view of the concerned Ministry/Department in greater detail and CVC would render appropriate advice to the competent authority based on the findings of the expert committee within a fortnight.

(iv) If the CVC on reconsideration advises for grant of sanction, the concerned Ministry/Department will issue the requisite orders immediately. However, if the concerned Ministry/Department proposes not to accept the reconsidered advice of the CVC, the case will be referred to the Department of Personnel and Training for a final decision, as per the DOP&T O.M. No./134/2/85-AVD-I dated 17.10.1986."

34. Counsel for the petitioner submitted, at this stage CBEC for the second time came to the conclusion that the petitioner should not be prosecuted and sought reconsideration of CVC's recommendation dated 4.3.2008. The respondent No.1 accordingly observed as under:-

" The mater in its totality has been examined. The core issue is as to CBI on the basis of material available on record has established misconduct, negligence or dereliction of duty on the part of the Petitioner in investigating the duty evasion case or quantifying the duty liability. He also issued summons regularly and gave opportunities to Sri Chataiwala to produce records in his defence, which was avoided by him and he failed

to appear initially. However, he appeared on 28.05.2004 and promised to submit the documents by 31.05.2004 but again failed. He also failed to appear on further summons. Sensing no remedy, Sri Chataiwala appears to have switched over to illegal gratification to Commissioner to hush up the ongoing investigation which also failed. Finding no let up in the investigation by Raigad Commissionerate, he ultimately filed an application for Anticipatory bail on 18.06.2004 before Hon'ble Sessions Court Brihan, Mumbai without submitting documents to investigating team as promised by him on 28.05.2004.

It is important to mention that the past record of Sri Chataiwala is also not satisfactory as several cases were under Investigation by the Department for duty evasion in fraudulent manner, whereas the antecedents of Sri Aswal had been found unblemished. He had detected many duty evasion cases involving crores of revenue. Further, when his house was searched by the CBI, nothing incriminating was recovered. These all accumulatively establish that Sri Aswal has not acted as a facilitator in the demand of illegal gratification by Sri Agarwal.

This Directorate, did not recommend launching of Prosecution against Sri Aswal on the reason that no action of Sri Aswal indicated/established Criminal Conspiracy either with Sri Agarwal or Sri Chataiwala and three private persons. However, based on available facts at that time, this Directorate considered meeting of Sri Aswal with private persons as misconduct on his part and so recommended for Minor Penalty proceedings. The CBI's observation that Sri Aswal had used a private mobile having No. 9820654453 in official matter in order to conceal his activities from official eyes and, as such, acted in a manner unbecoming of a Govt. servant appears unreasonable. When the entire facts now revealed in the matter have been re-examined, it is observed that the alleged meetings with private persons took place under compulsion to obtain inputs for completing the ongoing investigation against Sri Chataiwala as he was neither responding to the summons nor submitting the relevant documents. It is now established that

due to inputs obtained from these private persons, the investigation in the duty evasion case progressed further and a team was sent to Tuticorin Port. On considering the matter in its entirety, it is evident that in fact no action is warranted against Sri Aswal and hence, this Directorate feels that Commission's advice for RDA for major Penalty appears harsh and ends of justice would be met, if an Administrative Warning is issued to Sri Aswal for meeting the private persons for official matters without bringing the same to the knowledge of his immediate superior officer.

In view of above, this Directorate feels that the Commissions advice for RDA for major penalty as well as sanction of Prosecution require reconsideration in the light of evidences/facts emerged at this stage."

35. Thereafter on 30.07.2008 CVC asked CBEC to refer the matter to DOPT for the reasons mentioned as under:-

" Respondent No.2 (CVC) refused to consider Respondent No. 1's aforesaid request and gave its third reconsidered first stage advice on 30.07,2008 thereby instructing Respondent No.1 to seek DoPT's views in terms of DOPT's OM No. 399/33/2006-AVDIII dated 06.11.2006 and OM No. 134/2/85-AVDI dated 17.10.1986 to resolve the difference of opinions. Note: CVC could not have refused to consider Respondent No.1's request seeking reconsideration of its earlier advice in terms of binding orders of DOPT."

36. Due to the aforesaid discussion, deliberation and communication between CVC and CBEC, the CBI became vindictive and started taking on terms to CBEC and wrote the communication as discussed above which forced to grant the sanction. Unfortunately, the CBEC abdicated its duties and granted sanction to prosecute the petitioner vide sanction order dated 12.08.2009, despite there not being any fresh material and contrary to its earlier decision "not to grant sanction".

37. The aforesaid impugned sanction order has been issued which suffers from lack of application of independent mind, absence of consultation with CVC and not following due procedure as stipulated in the DOPT's relevant OMs.

38. The important fact in the present case is that the CBEC earlier denied the sanction upon consideration of material placed by CBI, however, now in the absence of any fresh material the respondent No.1 (CBE) granted sanction purely under the influence of CBI and in total violation of established principles regarding grant of sanction.

39. Learned counsel for the petitioner further submitted that grant of sanction should be observed with complete strictness. The Sanctioning Authority has absolute discretion to grant or withhold sanction. The Sanctioning Authority must apply its independent mind to the material before it. The mind of Sanctioning Authority should not be under pressure from any quarter nor there any external force to take a decision one way or the other. If this discretion of "not granting sanction" is taken away, the sanction becomes mechanical act and thus a nullity.

40. To strengthen his arguments, he has relied upon the following judgments:-

- a) ***Gokul Chand Dwarkadas Morarka Vs. King AIR 1948 PC 82;***
- b) ***R.S. Naik Vs. A.R. Antulay (1984) 2 SCC 183;***
- c) ***Mansukh lal Vs. Chauhan vs. State of Gujarat: (1997) 7 SCC 622;***
- d) ***State of Karnataka Vs. Amir Jan: (2007) 11 SCC 273;***

41. Counsel for the petitioner further submitted that if earlier the sanction was declined then in the absence of any fresh material a sanction cannot be granted. To strengthen his arguments, he has relied upon the judgment of the Supreme Court in ***State of Punjab & Anr. Vs. Mohd Iqbal Bhatti*** (2009) 17 SCC 92.

42. As the respondents have raised the preliminary objection on the territorial jurisdiction, the counsel for the petitioner submitted that the respondent No.1 CBEC, who issued the impugned order and the respondent No.2 CVC who granted sanction to prosecute the petitioner, are in Delhi and the orders/recommendations forming the subject matter of this writ petition are passed by the authorities present and posted in Delhi. Apart from that, the petitioner is also posted at Delhi. CBI is only a proforma party in this case. The petitioner is neither challenging the trial instituted by the CBI nor the charge sheet filed by the CBI. The challenge in this petition is in relation to the sanction order dated 21.10.2009, which is purely an administrative order. Moreover, the Trial Court has already discharged the petitioner vide order dated 07.05.2009. Therefore, today there is no material exists on record connecting the petitioner with the criminal trial.

43. In support of his submissions, he has relied upon the judgment of the Supreme Court in the case of ***Ambica Industries Vs. Commissioner of Central Excise***, (2007) 6 SCC 769.

44. Learned counsel submitted that the writ petition under Article 226 of the Constitution of India is the only remedy if the question raised is with regard to the violation of the principle of natural justice,

order or a proceeding being without jurisdiction and writ is filed for enforcement of any fundamental right etc.

45. Learned counsel has also relied upon the case of ***Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & Ors. (1998) 8 SCC.***

46. After going through all the judgments mentioned above, collectively and conclusively, held as under:

“a) Order granting sanction to prosecute in an administrative order amenable to judicial review under Article 226 of the Constitution of India.

b) The Court within whose territorial jurisdiction sanction order has been passed shall have jurisdiction to examine legality, propriety and constitutionality of the Sanction Order.

c) Sanction orders should be judicially considered at the earliest opportunity as otherwise the entire trial gets vitiated if at the end it is held by competent Court that the sanction order is a nullity in law; sanction is a condition precedent to prosecution and trial, hence questions in relation to validity of a sanction order has to be decided at the outset.

d) Validity of a sanction order can be decided only by High Court under Article 226 of the Constitution of India. Trial Court will have no jurisdiction to examine whether the sanction order is malafide or bonafide and whether the same suffer from arbitrariness contrary to Article 14 and 21 of the Constitution. When a Sanction order is challenged on such grounds before High Court, it will have exclusive right, prerogative and duty to examine validity of an order passed by the sanctioning authority.

e) In the absence of fresh material, the authority will have no powers to recall and revise the sanction order issued earlier; even fresh look at the earlier order required fresh material for the authority intending to differ from its earlier decision.

f) The authority competent to grant sanction should be free from external influences and forces from any quarter whatsoever while exercising the discretion vested in it and it has to apply of own independent mind for generation of genuine objective satisfaction whether prosecution has to be sanctioned or not.

g) Highlighting certain portion of the same material, which was placed earlier before the sanctioning authority, which rejected the request for sanction, cannot constitute fresh material and / or replace the burden of providing fresh material while requesting for revision of the earlier order.”

47. Counsel for the petitioner submitted that without obtaining sanction an investigative agency is not permitted to commence prosecution and/or file charge sheet before a criminal court. CBI can only provide material to the Sanctioning Authority and CVC while requesting to grant sanction; under no circumstances, can insist upon sanction by the competent authority and/or recommendation in favour of grant of sanction from CVC. The respondent No.2 CVC can reconsider its recommendations in appropriate cases only upon receipt of request from the competent authority and not otherwise. In absence of fresh material, revision of sanction orders or order refusing sanction cannot be revised.

48. Counsel for the petitioner has drawn the attention of this Court to the counter affidavit filed by the respondent No.1 wherein in para 15 it is stated that the issue was considered afresh in the light of the CVC's re-considered advice and the sanction was accorded as a result of conscious decision. In para 29 it is stated that the authority signing the sanction order had shown revised draft of sanction order to the higher authorities before issue. It did not require a fresh decision,

therefore, there was no need for fresh consultation with CVC at that stage.

49. In Para 22 of the counter affidavit it is stated that a revised sanction order was issued by the respondent No.1 accepting the suggestion of the CBI regarding need for issue of fresh sanction order.

50. Learned counsel has also drawn the attention of this Court to the counter affidavit filed by the CBI wherein it is stated in Para 6 that the facts which were not considered at the time of the first advice were further highlighted by the CBI for consideration of CVC, hence, the same were re-considered by the CVC.

51. In the counter affidavit filed by the CVC in Para 5 it is stated that the CBI thereafter requested CVC for consideration of advice and expressed the view that there was sufficient evidence to launch prosecution against the petitioner who was at the heart of criminal conspiracy.

52. Learned counsel has further submitted that the CBEC had revised its orders time and again without any fresh material on record or further investigation in the matter. None of the respondents stated in the counter affidavits or furnished any material to show availability of fresh material to support fresh/revised sanction order in the instant case.

53. Issuance of sanction order dated 01.10.2007 only against Rajiv Kumar Agarwal and discharge of the petitioner by the Trial Court further established refusal of sanction by appropriate authority qua the petitioner. The aforementioned sanction was with respect to certain request made by the CBI by which it sought sanction to prosecute two

officials. The CBEC has not placed anything on record as to why they refused the sanction of the petitioner.

54. The CVC's advice dated 03.05.2007, 11.07.2007 and 09.08.2007, which are at pages 64 to 66 of the paper book, wherein the Commission agreed with the CBEC for initiation of major penalty proceedings against the petitioner. Thus, CBEC refused to grant sanction to prosecute the petitioner at the first instance. Once the CVC agreed with the CVO of CBEC that no sanction of prosecution against the petitioner was required and only major penalty would suffice also constitutes refusal to grant sanction.

55. Counsel for the petitioner further submitted that since Section 12 of the CVC Act stipulates that every proceeding before the Commission is a judicial proceeding, CVC's advices are the outcome of the proceedings before it.

56. Mr. Sinha, learned counsel appearing on behalf of the respondent No.2 CVC, submitted that the said respondent has to render advice and that is in corruption cases. It's first advice not to grant sanction was vide communication dated 03.05.2007. However, vide communication dated 04.03.2008, it advised the respondent No.1 to issue sanction order for prosecuting the petitioner. Moreover, in the minutes of meeting of the Committee of Experts held on 22.01.2008 it was unanimously resolved that it was a fit case for grant of prosecution sanction against the petitioner by the competent authority.

57. He further submitted that vide communication dated 30.07.2008, as quoted above, the CBEC was advised to refer the case directly to the DOP&T for re-consideration of Commission's advice.

58. Mr. Ashwani Bhardwaj, learned counsel for the respondent No.1 CBEC submitted that Chapter 22 of the Manual of CBI on charge sheet has prescribed as under:-

“22.1 In a case where a decision has been taken to prosecute the accused, a charge sheet under Section 173(2) Cr.P.C. shall be filed in the prescribed form in a Court of competent jurisdiction after obtaining the sanction for prosecution, wherever required. Detailed instructions on filing of charge-sheets have been issued vide Policy Division Circular No.13/2003, dated 10-06-2003 which should be strictly complied with. The Branch Public Prosecutor will vet the charge-sheets in all cases and ensure that—

- (a) charge-sheet has been prepared on the final orders passed by the Competent Authority in CBI.*
- (b) these are prepared in accordance with the law, and are complete and correct in all respects;*
- (c) the lists of witnesses and documents are correctly entered in the charge-sheet or attached thereto;*
- (d) no names of witnesses or documents necessary to prove the prosecution case are omitted.”*

Work of Pairvi

22.2 Investigating Officers should realise that their duty does not end when the investigation has been completed. They should render all possible assistance and facilities to the Prosecutors during the conduct of the cases in Courts. The Pairvi of a case is not adequately taken care of if the I.O. reaches the Court on the day the evidence of witnesses is to be recorded. The stakes of the accused facing trial in the Court are high and they leave no stone unturned to win over the witnesses. They do not do this on the final day when the

witnesses come to the Court but much before that in their hearths and homes by bringing about various pressures upon them through relatives and friends and even by giving them allurements. In each case, there are a few witnesses who are important and whose statements are essential to unfold the truth. Such witnesses should be identified and thereafter the Pairvi Officer should be required to keep a close liaison with these witnesses as frequently as possible when he goes out on tour to the relevant places for any duty.

59. To strengthen his arguments, he has relied upon the case of ***State of Himachal Pradesh Vs. Nishant Sareen (2010) 14 SCC 527*** in which the Supreme Court has observed as under:-

“10. In Romesh Lal Jain v. Naginder Singh Rana and Ors. (2006) 1 SCC 294, it was held by this Court that an order granting or refusing sanction must be preceded by application of mind on the part of the appropriate authority. If the complainant or accused can demonstrate such an order granting or refusing sanction to be suffering from non-application of mind, the same may be called in question before the competent court of law.”

60. Mr. Bhardwaj, further submitted that the respondent No.1 for the first time applied its independent mind and issued the impugned sanction order. As established through discussion and investigation that the petitioner had conspired on 17.05.2004 with Shri Rajiv Agarwal, Commissioner of Central Excise and others to obtain Rs. 1 crore, an illegal gratification, from Shri Khalik Chatailwala, proprietor

of M/s Oriental Enterprises and Power of Attorney holder of M/s New Era Exports.

61. Further submitted, earlier, there were discussions and deliberations with the CVC and the CBI; however, no final decision was taken qua the petitioner. For according sanction, the concerned authority has to apply its mind independently without any influence or pressure, as has happened in the instant case. The respondent No. 1 has taken its decision after perusing the record placed before it.

62. Though there is no relief claimed against the CBI, however, Mr. Pradeep Sharma, Ld. counsel for the CBI has justified its communications made to the respondents No.2 & 3 and submitted that it is also the duty of the CBI to investigate fairly and properly and if material is on record then it is also the duty of the CBI to let the other authorities know about the same. If the CBI has communicated through their communications relating to the material before them, that does not mean the CBI had forced it to take particular decision. The respondent No.1, CBEC has taken its independent decision without being influenced by CBI.

63. Counsel for the CBI has relied upon a case of ***CBI Anti-Corruption Branch, Mumbai Vs. Narayan Diwakar, (1994) 4 SCC 656*** wherein the Supreme Court has held as under:-

“2. We have heard learned counsel for the parties. The main question that arises for consideration in this case is whether, on the facts and in circumstances of the case, the Gauhati High Court had jurisdiction to entertain and decide the writ petition filed by the respondent.

Another question which also arises is whether on the facts and in the circumstances of the case, the High Court was right in quashing the First Information Reports lodged against the respondent.

.....

4. After receipt of the First Information Reports, a wireless message was sent by the Superintendent of Police, CBI, ACB, Bombay to the Chief Secretary, Arunachal Pradesh. Itanagar with a request to advise the respondent to meet Shri A.K. Asthana. Inspector of Police, CBI, ACB, Bombay in connection with investigation of RC 64(A)/93-BOM in PWD Guest House at 10.30 AM on 27.4.1994. It was stated in the message that the matter was most urgent. On being informed about the wireless message, the respondent filed the Writ petition in the High Court of Gauhati with the prayer, inter alia, to quash the First Information Reports and for other consequential benefits.

.....

6. The thrust of the submissions made by Ms. K. Amareshwari, the learned Senior Counsel appearing for the appellant was that the High Court of Gauhati had no jurisdiction to entertain and decide the writ petition since no part of the cause of action for filing the case arose within the territorial jurisdiction of the court. Referring to the wireless message, the learned Counsel submitted that it cannot be said to provide any cause of action to the respondent to file the writ petition seeking quashing of the First Information Report for the simple reason that the wireless message does not even state that the First Information Report contains certain allegations against the respondent and does not give any indication about the nature of the allegations made against him. According to the learned counsel all that the wireless message contains is a request to the respondent to meet the Inspector, CBI, ACB, Bombay on the day, place and time mentioned in the message, in

connection with the investigation of case No. RC64(A) 93-BOM.

.....

8. In view of what has been fairly stated by the learned Counsel for the respondent, it is not necessary for us to enter into merits of the case, suffice it to say that on the facts and circumstances of the case and the material on record, we have no hesitation to hold that the Gauhati High Court was clearly in error in deciding the question of jurisdiction in favour of the respondent. In our considered view, the writ petition filed by the respondent in the Gauhati High Court was not maintainable.”

64. He has also relied upon ***Dinesh Kumar Vs. Chairman, Airport Authority of India and others, (2012) 1 SCC 532*** wherein the Supreme Court has held as under:-

“8. The provisions contained in Section [19\(1\), \(2\), \(3\) and \(4\)](#) of the P.C. Act came up for consideration before this Court in Parkash Singh Badal. In paras 47 and 48 of the judgment, the Court held as follows:(SCC p.37)

47: The sanctioning authority is not required to separately specify each of the offences against the accused public servant. This is required to be done at the stage of framing of charge. Law requires that before the sanctioning authority materials must be placed so that the sanctioning authority can apply his mind and take a decision. Whether there is an application of mind or not would depend on the facts and circumstances of each case and there cannot be any generalised guidelines in that regard.

48: The sanction in the instant case related to the offences relatable to the Act. There is a distinction between the absence of sanction and the alleged invalidity on account of non-application of mind. The former question can be

agitated at the threshold but the latter is a question which has to be raised during trial.

.....

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 bias of the sanctioning authority or the order of sanction having been passed by an authority not authorised or competent to grant such sanction. The above grounds are only illustrative and not exhaustive. All such grounds of invalidity or illegality 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 Parkash Singh Badal, the challenge to which can always be raised in the course of trial.

.....

13. In our view, having regard to the facts of the present case, now since cognizance has already been taken against the Appellant by the Trial Judge, the High Court cannot be said to have erred in leaving the question of validity of sanction open for consideration by the Trial Court and giving liberty to the Appellant to raise the issue concerning validity of sanction order in the course of trial. Such course is in accord with the decision of this Court in Parkash Singh Badal and not unjustified.”

65. He further submitted that at the time of the first advice given by the CVC, certain material facts were not taken into consideration which were further highlighted by the CBI for consideration of the CVC. Accordingly, the same were reconsidered by the CVC.

66. He concluded his arguments by stating that as per the investigation, there is substantial material against the petitioner, therefore, this Court should not interfere with the decision taken by the respondent No.1. The instant petition may be dismissed accordingly.

67. I have heard the learned counsel for the parties.

68. As far as the issue of jurisdiction is concerned, there is no case pending against the petitioner at Mumbai before any court. He is presently working at Delhi and the impugned order has also been issued from Delhi Office. The petitioner has not challenged the merits of the criminal case. In addition, respondent No.3 CBI is only the proforma party in this case and the petitioner is neither challenging the trial instituted by the CBI nor the charge sheet filed by the CBI. The challenge in this petition is in relation to sanction order dated 21.10.2009, which is purely an administrative order. Moreover, the Trial Court has already discharged the petitioner vide order dated 07.05.2009. Since the petitioner is only challenging the impugned order issued by the respondent No.1 from Delhi Office, therefore, in my considered view, under Article 226 of the Constitution of India, this Court has the jurisdiction to adjudicate upon the instant petition. The Apex Court in case of *Whirlpool Corporation (supra)* has held that the Court within whose territorial jurisdiction sanction order has been passed shall have jurisdiction to examine legality, propriety and constitutionality of the sanction order.

69. On merit, upon hearing learned counsel for the parties, it is emerged that respondent No.1 vide communication dated 29.03.2007 recommended departmental inquiry against the petitioner only for minor penalty and specifically mentioned that no prosecution needs to be launched against him. Thereafter, on 01.10.2007, respondent No. 1 had granted sanction only to prosecute Sh. Rajeev Aggarwal, whereas,

the CBI sought sanction to prosecute the petitioner also. In July 2008, respondent No. 1 while considering CVC's advice dated 04.03.2008 had observed that ends of justice would be met, if an administrative warning is issued to the petitioner. It is further requested to respondent No. 2(CVC) to reconsider its advices dated 03.05.2007, 09.08.2007 and 04.03.2008 whereby CVC advised for departmental inquiry for major penalty and prosecution against the petitioner. The respondent No. 1, however, granted the sanction on 12.08.2009 to prosecute the petitioner for the offences mentioned above. On 18-24/08/2009, the respondent No. 1 served a Memorandum upon the petitioner stating therein that they have decided to hold RDA against the petitioner for major penalty on the basis of the aforesaid sanction. However, the respondent No. 1 vide corrigendum dated 14.09.2009 deleted certain penal Sections from the sanction order dated 12.08.2009, but continued with RDA, which was instituted on the basis of the sanction order dated 12.08.2009. The respondent No. 1 on 21.10.2009, on its own revised aforesaid sanction order dated 12.08.2009 and issued a fresh sanction order to prosecute the petitioner.

70. Admittedly, there was no fresh material before the respondent No. 1 to vary from its earlier decision.

71. I note that the CVC (respondent No.2) repeatedly reviewed and changed its advice. On 03.05.2007, vide its initial Ist stage advice, the CVC recommended departmental inquiry for major penalty proceedings against the petitioner. On 09.08.2007 while observing that there has been neither any recovery nor any incriminating evidence of

demand of money by the petitioner, therefore, only major penalty proceedings would be justified. It was specifically mentioned not to grant sanction for prosecution against the petitioner. However, CVC (respondent No. 2) vide second reconsidered Ist stage advice on 04.03.2008 recommended sanction to prosecute the petitioner despite the Committee of Expert's clear observation that there was no direct evidence such as transcript on record of any meeting between the petitioner and the complainant.

72. It is not denied by either of the respondents that the petitioner did not cooperate in the investigation with the CBI. It is also not the case of the respondents that during the search of the office as well as the house of the petitioner any incriminating document or evidence found against the petitioner.

73. It is pertinent to mention here that as a matter of practice and procedure, respondent No.1 (CBEC) before granting sanction, sought advice of respondent No. 2 (CVC). For this purpose, respondent No.1 considered the investigating agency's request seeking sanction and formulated its own recommendations to be considered by respondent No. 2 for advice. On 29.03.2007, the respondent No. 1 had considered CBI's request seeking sanction and recommended 'no prosecution' and only 'minor penalty' proceedings against the petitioner. Such recommendation was sent to respondent No.2 (CVC) for its advice. Upon considering CBI's request and respondent No.1's comments, the respondent No.2 (CVC) gave its initial first stage advice on

03.05.2007, whereby only 'major penalty' proceedings against the petitioner were advised.

74. It is further pertinent to mention here that on 22.07.2007, CVC convened a meeting to determine the issue of sanction to prosecute the petitioner, wherein officials of CBI, CBEC and respondent No.2 (CVC) had participated. All of them had discussed the allegations and evidence against the petitioner. Pursuant to such meeting, respondent No. 2(CVC) vide its OM dated 09.08.2007 had advised only 'major penalty' proceedings against the petitioner. It is specifically stated in the aforesaid OM that considering the facts of the case and in agreement with the CBI and the CBEC, the Commission had sanctioned prosecution of Shri R.K. Agarwal, Commissioner. It is further stated that as regards the petitioner, the Commission has observed that since there has been neither recovery nor any incriminating evidence of demand of money by the petitioner, therefore, the respondent No. 2 (CVC) in agreement with the CBI and the CBEC held the view of initiation of major penalty proceedings against the petitioner as already advised.

75. From the above discussion, it is established that the respondent No.1, i.e. the Competent Authority, never wanted to institute even major penalty proceedings against the petitioner, therefore, it recommended only minor penalty proceedings. The aforesaid advice was approved by the Disciplinary Authority on 11.09.2007 by issuing the sanction order only against the Commissioner (Rajiv Kumar Agarwal).

76. It is not out of place to mention here that based upon sanction order, CBI had filed a charge sheet before the Special Judge, Mumbai in Special Case No.8/2008 sometime in April, 2008, wherein the CBI made the petitioner an accused despite the fact that respondent No. 1 granted prosecution only against the Commissioner mentioned above and not against the petitioner. The said process of CBI was violative of the procedure indicated in Chapter 22 (Prosecution) of the CBI Manual.

77. Be that as it may, upon receipt of summons from the Court of Special Judge, Greater Mumbai, the petitioner had filed an application and sought his discharge on the ground of non-granting of sanction for prosecution against him. The aforesaid application was considered by the Trial Court in the presence of CBI and finally on 07.05.2009, the aforesaid Special Court had discharged the petitioner from the case mentioned above.

78. During the pendency of the aforesaid application, the CBI had repeatedly wrote letters to respondent No.1 stating therein that if the petitioner is discharged by the Court, then respondent No.1 would be held responsible.

79. Vide memorandum dated 30.07.2008, the respondent No.2 had advised respondent No.1 to follow the extant procedure in the subject case and refer the case directly to DoPT if it propose for reconsideration of Commission's reconsidered advice for prosecution of the petitioner. Despite the aforesaid communications between the respondent Nos. 1 & 2, the CBI had continued to pressurize respondent

No.1 for granting the sanction to prosecute the petitioner. The CBI in its communication dated 06.04.2009 to respondent No.1 stated that “inspite of lapse of more than one year and repeated reminders, the requisite sanction for prosecution is still awaited from you”. Also stated, the petitioner had filed an application in the Hon’ble CBI Court, Mumbai for his discharge on the grounds of non availability of sanction for prosecution against him. It is further stated that “kindly ensure expeditious issue of sanction for prosecution of A.K. Aswal, Assistant Commissioner (petitioner herein).”

80. Thereafter, vide communication dated 21.04.2009, CBI stated that “if the accused gets discharged from the Hon’ble Court for want of sanction for prosecution, the responsibility of the same will be upon your office.”

81. The respondent No. 3, CBI vide its communication dated 23.07.2009 to respondent No.2, had requested that CBEC, i.e. respondent No. 1, may be directed to grant sanction against the petitioner.

82. Again on 02.10.2009, CBI sent a communication to respondent No.1 stating therein as under:-

“However on the basis of legal advice it was found that it will not be proper to file the sanction for prosecution along with corrigendum in the CBI court, which may imply the non application of mind by the sanctioning authority. Therefore, it will be proper to have a revised sanction for prosecution against Shri Ashok Kumar Aswal containing all the necessary corrections. Further page No. 2,3 & 4 of the sanction for prosecution is photocopy of the draft sanction

order and this also needs to be typed afresh, to avoid the impression of giving of sanction mechanically by the sanctioning authority.

Therefore, the original Sanction for Prosecution as well as the corrigendum is here with returned with a request to correct the above anomalies and send the corrected Sanction for Prosecution to this office at the earliest.”

83. In response to above, respondent No.1 vide its communication dated 21.10.2009 communicated to the CBI (respondent No.3) as under:-

“ I am directed to refer to your letter No. DP 026, 2009/8065/31/A/04 dated 2/5-10-2009 on the subject mentioned above. A revised sanction order as advised by you is enclosed herewith for further necessary action at your end.

The Sanction Order No. 12/2009 dated 12.08.2009 and corrigendum thereof dated 14.09.2009 in this regard stands superseded.”

84. I have no hesitation to say that respondent No. 1, after consultation with CVC (respondent No.2), deliberations with CBI (respondent no. 3) and after due application of mind, granted sanction to prosecute Sh. Rajiv Kumar Aggarwal only vide sanction order dated 01.10.2007. Undisputedly, the petitioner has been discharged by the Trial Court vide order dated 07.05.2009.

85. It is pertinent to mention here that this Court vide order dated 18.02.2010 stayed the impugned prosecution against the petitioner.

86. On perusal of the aforesaid communications sent by the CBI (respondent No.3) to CBEC (respondent No. 1) and CVC (respondent

No.2), it is established that respondent No.2 CVC changed its earlier opinion due to which CBEC (respondent No. 1) came under the influence of the repeated pressure tactics adopted by the CBI.

87. It is pertinent to mention here that for the first time, CBEC (respondent No.1) came to the conclusion that the petitioner should not be prosecuted, therefore, sought reconsideration of the CVC's recommendation dated 04.03.2008, wherein the CBEC specifically mentioned that the petitioner had issued summons regularly and gave opportunities to Sri Chataiwala to produce records in his defence, which was avoided by him and he failed to appear initially. Therefore, it establishes misconduct, negligence or dereliction of duty on the part of the petitioner in investigating the Customs case. It is further specifically stated that the past record of the complainant Shri Chataiwala was also not satisfactory as several cases were under investigation against him for duty evasion in fraudulent manner wherein the antecedents of the petitioner had been found unblemished. It is further stated that the petitioner had detected many duty evasion cases involving Crores of rupees. When his house was searched by the CBI, nothing incriminating was recovered. Further recorded, that all these accumulatively establish that the petitioner has not acted as a facilitator in the demand of illegal gratification by Shri Agarwal.

88. The respondent No. 1 further observed in the aforesaid communication that the Directorate did not recommend launching of prosecution against the petitioner for the reason that no action of him indicated/established criminal conspiracy either with Shri Agarwal or

Shri Chataiwala and three other private persons. It is also recorded that on considering the matter in its entirety, it is evident that in fact no action was warranted against the petitioner, therefore, the Commission's advice for departmental inquiry for major penalty appears harsh and ends of justice would be met, if an administrative warning was issued to the petitioner for meeting the private persons in official matters.

89. As per above discussion, the CBEC, i.e. respondent No.1, abdicated its duties and granted sanction to prosecute the petitioner vide sanction order dated 12.08.2009, despite there being any fresh material to do so and that too contrary to its earlier decision "not to grant sanction".

90. In my considered view, the aforesaid impugned sanction suffers from lack of application of independent mind, however, in the absence of any fresh material granting of the impugned sanction is purely under the influence of CBI (respondent No.3).

91. The law is well settled, as discussed above, that the Sanctioning Authority has absolute discretion to grant or withhold sanction. The Sanctioning Authority must apply its independent mind to the material before it. The mind of the Sanctioning Authority should not be under pressure from any quarter nor there any external force to take a decision one way or the other. If the discretion of 'not granting sanction' is taken away, the sanction becomes mechanical act and thus a nullity. Moreover, in para-15 of the counter-affidavit filed by the respondent No.1, it is stated that the issue was considered afresh in the

light of CVC's re-considered advice and sanction was accorded as a result of conscious decision. Whereas, in para-29 it is stated that the authority signing the sanction order had shown revised draft of sanction order to the higher authorities before issue. In para 22 it is admitted that a revised sanction order was issued by the respondent No.1 by accepting the suggestion of the CBI regarding need for issue of fresh sanction order.

92. Additionally, CBI in para-6 of its counter-affidavit stated that the facts which were not considered at the time of the first advice were further highlighted by the CBI for consideration of CVC, hence, the same were re-considered by the CVC.

93. Moreover, the CVC's advices dated 03.05.2007, 11.07.2007 and 09.08.2007, which are at page Nos. 64 to 66 of the paper book, wherein the Commission agreed with the CBEC that initiation of major penalty proceedings against the petitioner, as advised by the Commission, would suffice, clearly indicates that the CBEC had refused to grant sanction to prosecute the petitioner at the first instance. Once the CVC agreed with the CVO of the CBEC that no sanction of prosecution against the petitioner was required and only major penalty proceedings would suffice, that itself constitutes refusal to grant sanction.

94. In view of the above discussion and the legal position, the impugned sanction order dated 21.10.2009 is hereby set aside.

95. The petition is allowed.

96. No order as to costs.

CM No. 1215/2010 (for stay)

Since the instant application has become infructuous, therefore, the stay granted by this Court vide order dated 18.02.2012 is vacated. The application is dismissed being infructuous.

SURESH KAIT, J.

JANUARY 11, 2013

sb/RS