IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved in W.P.(CRL) 1401/2002 On :15.10.2015
Judgment Reserved in CRL.REV.P. No.338/2014 On : 08.12.2015
Judgment Pronounced On: 13.01.2016

W.P.(CRL) 1401/2002

ASHOK KUMAR AGGARWAL ..... Petitioner

Through Mr. Ram Jethmalani, Sr. Advocate with Mr. Aman Vachher, Mr. Ashutosh Dubey and Mr. Abhishek Chauhan, Mr. Chirag Madan, Mr. Aniruddh and Ms. P.R. Mala, Advocates along with petitioner

versus

CBI & ORS. ..... Respondents

Through Mr. Sanjeev Bhandari, Spl. PP for CBI
Mr. Sanjeev Narula, CGSC for UOI with Mr. Ajay Kalra, Advocate

CRL.REV.P.338/2014 & CRL.M.A.9095/2014 & CRL.M.A.10597/2014

ASHOK KUMAR AGGARWAL ..... Petitioner

Through: Mr. Ram Jethmalani, Sr. Advocate with Mr. Aman Vachher, Mr. Ashutosh Dubey and Mr. Abhishek Chauhan, Mr. Chirag Madan, Mr. Aniruddh and Ms. P.R. Mala, Advocates along with petitioner

versus

CENTRAL BUREAU OF INVESTIGATION ..... Respondent

Through: Mr. Sanjeev Bhandari, Spl. PP for CBI

CORAM:
HON'BLE MR JUSTICE SIDDHARTH MRIDUL

<u>J U D G M E N T</u>

<u>SIDDHARTH MRIDUL, J</u>

1. By way of the present petitions Mr. Ashok Kumar Aggarwal (hereinafter referred to as 'the petitioner') assails the orders granting sanction dated 21.06.2002 and 26.11.2002 passed by the Competent Authority, Department of Revenue, Ministry of Finance, Government of India; the charge sheet in RC No. SI8 E0001 1999 submitted by the Central Bureau of Investigation (hereinafter referred to as 'the CBI') in the Court of the Special Judge, CBI, Delhi dated 28.06.2002; the order on charge dated 17.12.2005 in RC No.SI8 E 0001 1999 dated 29.01.1999 in CC No.26 of 2002 passed by the Special Judge, CBI, Delhi; and the order of the Special Judge, CBI 03 (PC Act) dated 24.05.2014 in RC No. SI9 1999 E0006 dated 07.12.1999 in CC No. 55/02. The present petitions raise common issues and are being disposed of by this common order.

2. According to the petitioner, the genesis of the present litigation is the disagreement between him and his immediate superior qua the discharge of the former's official duties, which were of a sensitive nature. The present is a manifestation of how the career of an IRS Officer has been blighted by litigation between him on the one hand and the official respondents on the other. The present is the umpteenth round of litigation between the parties arising out of the subject RCs.

3. At the very outset it is noticed that as a consequence of the registration of the subject RCs, the petitioner was placed under suspension which was renewed from time to time for a period of over 14 years during the pendency of a Disciplinary Enquiry. The suspension was finally revoked and set aside by the Hon'ble Supreme Court of India vide order dated 22.11.2013 rendered in Civil Appeal No. 9454/2013, as elaborated hereinafter. The Supreme Court, returned a finding that the proceedings against the petitioner suffered from the vice of legal malice. It is further noticed that when the Supreme Court passed the afore-stated judgment and order dated 22.11.2013, a period of 9 years remained for the petitioner to attain the age of superannuation. Currently, only 6 years remain till the petitioner reaches the age of superannuation. The petitioner was also arrested on two occasions namely, 23.12.1999 and 09.12.2000 in relation to the subject RCs.

4. The case in RC No. SI8 E0001 1999 is grounded entirely on the disclosure statement of one Mr. Abhishek Verma. The curious flip flops of Mr. Abhishek Verma, on whose sole testimony, the entire proceedings against the petitioner are dependant are elaborated later in this order, eventually leading to a retraction of the former's statement as contained in an application dated 31.07.2014 filed before the Special Judge to the effect that he had been forced, pressurized, coerced and threatened by the Investigating Officer in the RC No. SI8 E0001 1999 to make the afore-stated disclosure.

5. The facts relevant for the disposal of Writ Petition (Criminal) No.1401/2001 relating to RC No.SI8 E 0001 1999 dated 29.01.1999 are as follows :-

(1) The petitioner herein was the Deputy Director of Enforcement Directorate (Delhi Zone), Ministry of Finance during 1997-1998.

(2) On 01.01.1998, the petitioner conducted a raid at the office of one Mr. Subhash Chandra Barjatya (hereinafter referred to as 'Mr. Barjatya') at the Maurya Sheraton Hotel, Delhi and seized a Fax message dated 23.12.1997 (for short 'the Fax in question') from the top of the Fax Machine of the latter. It is an

admitted position that the Fax in question was a debit advice purportedly from the Swiss Bank Corporation, Zurich, Switzerland and reflected that a sum of USD 150,000 was transferred from the account of one Royalle Foundation held in the said bank to one Mr. S.K. Kapoor in the latter's account in HSBC Bank, Hong Kong.

(3) The said Mr. Barjatya is stated to be a Delhi based jeweler.

(4) Interestingly enough, in the report of the Superintendent of Police, CBI (hereinafter referred to as 'SP's report dated 30.10.2001') dated 30.10.2001 it is asserted that the team members who conducted the search at the shop of the said Mr. Barjatya on 01.01.1998 accepted the latter's hospitality and took lunch at Maurya Sheraton Hotel, Delhi paid for by the latter. However, it is uncertain as to who were the said 9 officers out of the total 13 officers/officials of the search party, who are alleged to have partaken lunch at the expense of Mr. Barjatya.

(5) Mr. Barjatya filed a complaint dated 04.01.1998 addressed to the Director, Directorate of Enforcement, wherein he alleged that the fax in question from the Swiss Bank Corporation,

Zurich, Switzerland was forged and planted in his premises during the course of search on 01.09.1998.

(6) The said Mr. Barjatya was arrested on 28.01.1998 on the basis of the Fax in question by the Enforcement Directorate (Delhi Zone). It is an admitted position that subsequent to a complaint filed on behalf of Mr. Barjatya, that has fructified into the subject RC No.SI8 E 0001 1999 dated 29.01.1999 as well as order granting sanction for prosecution dated 21.06.2002 and order framing charges dated 17.12.2012, no investigation whatsoever has been conducted against the said Mr. Barjatya *qua* the Fax in question by the official respondents.

(7) Later in March, 1998 Mr. Barjatya submitted to the Enforcement Directorate a letter dated 17.02.1998 obtained by one Mr. Mandeep Kapur, the Chartered Accountant of Mr. Barjatya allegedly from one Mr. Eric Huggenberger stated to be an attorney of the Swiss Bank Corporation, to the effect that the Fax in question was forged and fabricated. In the SP's Report dated 30.10.2001 it is asserted that when this letter was produced before the concerned court in India, the Enforcement

Directorate questioned the authenticity of the said letter, and Mr. Mandeep Kapur, Chartered Accountant went to Zurich once again and obtained a letter dated 20.03.1998 from the Swiss Bank Corporation to the effect that Mr. Eric Huggenberger was the attorney of the Bank and was authorized to author the said letter. Thereafter, on the basis of the said letter dated 20.3.1998 Mr. Barjatya was released on bail by the Sessions Court.

(8) On the contrary, from a telling piece of the puzzle by an admitted Fax dated 13.01.1998 (for short 'the relevant Fax') on record, dispatched by the Swiss Bank Corporation, in reply to a Fax from Mr. Barjatya dated 30.01.1998 (the date is allegedly mentioned wrongly), it becomes evident that the letter dated 17.02.1998 of Mr. Eric Huggenberger was an afterthought, since the said relevant Fax dated 13.01.1998 reads as follows:-

> "To: Mr. S.C. Barjatya
> 0091113023095
> C/o: Precious Arts & Jewels, New Delhi
>
> Re: Your Fax dated January 30, 1998
>
> Dear Mr. Bajarya
>
> Kindly be informed that the Fax message you have received has been sent to you by mistake and was not supposed to be sent to this Fax number. It seems that a

transmission error has occurred as it is almost impossible to dial so many wrong digits.

We therefore kindly apologize for any inconveniences caused and consider this matter as settled.

With kind regards.

Sd/-
R.Dretiker"

(9) It is the case of the petitioner that as Deputy Director, he was handling sensitive cases including cases of violations under Foreign Exchange Regulation Act, 1973 (hereinafter referred to as 'FERA'), and was enforcing various provisions of the law including that of FERA. The petitioner was allegedly compelled to change the track of his investigations, leading him to make number of written representations to the Revenue Secretary against the then Director of Enforcement between July, 1998 and November, 1998. An explanation was also sought by the Revenue Secretary based on the afore-mentioned representations by the petitioner from the Director of Enforcement. It is stated by the petitioner that perturbed by this, the Director forwarded the year old complaint of Mr. Barjatya dated 04.01.1998 to the Central Vigilance Commission

(hereinafter referred to as ‘CVC’) on 09.12.1998. The CVC vide letter dated 28.12.1998 ordered the CBI to investigate the said complaint made by Mr. Barjatya.

(10) Consequently, the subject RC No.SI8 E 0001 1999 came to be registered on the basis of a written complaint of Mr. Abhijit Chakervertty, Additional Director, Enforcement Directorate, New Delhi vide letter No.A-11/13/96 dated 25.01.1999, addressed to Shri Balwinder Singh, DIG, SU, CBI, New Delhi. It is an admitted position that the subject RC is substantially founded on the basis of the material provided by the latter to the Director, Enforcement Directorate.

(11) A criminal case bearing RC No.SI8 1999 E 0001 was registered on 29.01.1999 under Section 120-B IPC read with Sections 195/467/469/471 IPC and Sections 7 & 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988 (hereinafter referred to as 'POCA') against ‘*unknown officials of the Delhi Zone of Enforcement Directorate*’.

(12) The petitioner had been in service for about 14 years, when he was placed under suspension vide order dated 28.12.1999 as a

consequence of the criminal cases (bearing RC Nos. SI8 E0001 1999 and SI9 E0006 1999) registered against him, which as afore-stated was extended from time to time.

(13) At the instance of the CBI, a letter-rogatory (for short 'LR') dated 29.01.2001 was dispatched to the Competent Judicial Authority in Switzerland.

(14) The said LR dated 29.01.2001 specifically alluded to the letter obtained by Mr. Mandeep Kapur, Chartered Accountant of Mr. Barjatya from Mr. Eric Huggenberger (an attorney of the Swiss Bank Corporation).

(15) It would be relevant to note that the relevant Fax dated 13.01.1998 sent by the Swiss Bank Corporation to Mr. Barjatya was not mentioned in the LR.

(16) The LR dated 29.01.2001 required the competent judicial authority in Switzerland to conduct investigation on the following points and furnish the following documents:-

> "4. <u>INVESTIGATION REQUIRED IN SWITZERLAND</u>
>
> 4.1 Investigation is required to be conducted in Switzerland for collecting evidence to corroborate the statement of accused Mr. Abhishek Verma because, the statement of an accused is not admissible in a Court of law in

India without independent corroborating evidence.

4.2 Investigation is required to be conducted and witness statements are required to be recorded by the Swiss authorities on the following points.

1) To check as to whether Royalle Foundation had an account with Swiss Bank Corporation, Zurich in December, 1997.

2) To ascertain as to whether the original fax message dt. 31.12.97 of Swiss Bank Corporation regarding the Debit advice bearing value date 23.12.97 of US $ 150,000 from the account of M/s Royalle Foundation to the account No.002-9-608080 of Mr. S.K. Kapoor in Hong Kong and Shanghai Banking Corporation, New Delhi was authentic or not. If authentic, to record the witness statement of the concerned bank officials.

3) To cross check again whether the "forged" fax recovered by the enforcement Directorate officials on 04.1.98 was issued by the Swiss Bank Corporation, Zurich, if not the witness statement of the concerned bank officials responsible for such transactions on 31.12.97 and 1.1.98 may be recorded.

4) The nature of the transaction in the original fax message of the bank value dated 23.12.97 and the forged fax message recovered on 1.1.98 be compared and any discrepancies in the format of the fax and the amount of the transaction in question be identified. Witness statement of the concerned bank officials be recorded.

5) To ascertain the telephone number in Delhi to which the original fax message of the Swiss Bank Corporation, Zurich

value dated 23.12.97 was faxed and to obtain a witness statement of the officer of the bank who actually faxed or under whose directions it was faxed.

6) To identify the holders of the account in the name of Royalle Foundation along with the names, addresses, telephone number, fax number and E-mail numbers. If possible to find out, whether they have any links with Mr. Barjatya, Mr. Abhishek Verma, Ms. Asmita Verma and Mr. Ashok Kumar Aggarwal.

7) To obtain all documents and details of the accounts held by Ms. Asmita Verma, Mr. Abhishek Verma, Mrs. Kamal Kumar and Mr. Subhash Chandra Barjatya with Swiss Bank Corporation, Zurich, with the date of opening of account, account number, swift code, detailed statements of accounts from the date of opening till December, 1997.

8) To authenticate the letters dated 17.02.98 and 20.3.98 of Mr. Eric Huggenberger and Mr. Rene Deitiker respectively addressed to Mr. Mandeep Kapur, Chartered Accountant of Mr. Barjatya.

5. LIST OF DOCUMENTS REQUIRED

1. Account opening form of Royalle Foundation and statement of accounts for the period October, 1997 to January, 1998.
2. Addresses, contact telephone numbers, passport details including place of issue of the authorized signatories of the account of Royalle Foundation, Zurich.
3. Copy of Debit advice, value dated 23.12.97, issued by Swiss Bank Corporation, Zurich, Switzerland which reflects a transfer of US $ 150,000 from the account of Royalle Foundation, Zurich, Switzerland in favour of

Mr. S.K. Kapoor, holder of account No.002-9-608080, Hong Kong & Shanghai Banking Corporation, Hong Kong.

4. Blank sample Fax Page used by Swiss Bank Corporation for transmitting copies of Debit advice to the customers.

5. Documents related to request of Royalle Foundation to transfer US$ 150,000 to the account of Mr. S.K. Kapoor in Hong Kong and Shanghai Banking Corporation, Hong Kong with the value date of 23.12.97.

6. That in order to comply with the requirements of the Swiss Laws, an undertaking is given by Government of India, vide affidavit dated 17th Day of July, 2000 of Mr. Hari Singh, Under Secretary to the Government of India, Ministry of Personnel, Public Grievances and Pension, Department of Personnel & Training, which is enclosed in original along with the photocopy. Reciprocity in extending the mutual cooperation for conducting such criminal investigation in India on the request of the Swiss Authorities can be provided in terms of Section 166-B of the Code of Criminal Procedure, 1973 (Act II of 1974)

<u>Procedure required to be adopted</u>

7. While conducting investigation in Switzerland, the statements of witnesses may be recorded as per the requirement of the law and procedure in vogue in Switzerland and duly authenticated by the officer recording the same. As far as possible, documents may be collected in original and in case copies of the documents are collected, each sheet may be certified to be true copy of the original in the manner of certification provided in law and ordinarily followed in Switzerland. Originals may be kept in safe custody.

8. As the instant case is at a crucial stage of investigation, it is requested that the competent authority in Switzerland may be requested to complete the investigation as soon as possible.
9. If required, the officers of the CBI can be deputed by the Government of India to come to Switzerland and to assist the concerned Swiss authorities in the prosecution of this letter rogatory.

Sd/-
29.1.2001
SPECIAL JUDGE
TIS HAZARI COURTS
DELHI"

(17) It is pertinent to note that in the LR dated 29.01.2001, the Fax in question was specifically alleged to be a 'forged' document.

(18) In response thereto the competent judicial authority in Switzerland responded to the LR dated 29.01.2001 by way of its reply dated 27.06.2001 as follows:-

"UBS AG
Postfach, 8098 Zurich

Office of the District Investigation Magistrate IV
Canton Zurich
Mr. Ivo Hoppler
Postbox 9680, 8036 Zurich (seal with date)

27 June 2001
Your Ref. 3/2001/000281
Our Ref. TT83 C363-YJI-2001-2315

Dear Mr. Hoppler,

This has reference to your order for entering/cooperating in the above mentioned case.

We would like to give the following answers to the queries raised in the Request of India.

A business connection (account) was existed at the said time in the name of Royalle Foundation, Vaduz at the former Swiss Bank Corporation Branch at Zurich-Paradeplatz. After checking the documents of opening of the account and the A-Form, we can confirm that the names mentioned in the Request, Viz. Asmita Verma, Abhishek Verma, Kamal Kumar, Subhash Chandra Barjatya and Ashok Kumar Aggarwal, were not entered as persons empowered for signing the documents or as operating persons. As already communicated over phone since no connection between our client and the persons mentioned in the Request could be traced, we are not in a position to give out any document of Royalle Foundation other than the following:

In the files we could find some documents which may have some connection with the case and could be used for investigation for clearing up the situation. We enclose the copies of the same.

>On 22nd December 1997, the former Swiss Bank Corporation got an order for transferring USD 150,000 - to one S.K. Kapoor, Hong Kong + Shanghai Bank. Corpn. In this connection, a fax should have been sent to Delhi. We enclose a copy of the order of transfer and the debit note. On the basis of the already made undertaking, we hold back the fax, number. However, we can confirm that it was not the fax No.0091 - 11 - 302 309 5 of Mr. S.C. Barjatya.

>Apparently the fax reached in the hands of Mr. Subhash Chand Barjatya to whom the bank had send communications (through his wife) on 30th January 1998 and 4th February 1998.

>With its fax of 13 January 1998 (the date was not correct while the letter of 30th January 1998 was mentioned in the fax) the bank had confirmed that the original fax was sent by mistake to Barjatya.

>The debit advice enclosed with the Request for Legal Assistance would have replaced the debit advice of 22nd December 1997 - and that it would have been presented in the bank. In the wake of this the bank would have given the confirmation which have been forwarded.

In our request we have asked for making further explanations on the details of accounts of Asmita Verma, Abhishek Verma, Kamal Kumar and Subhash Chandra Barjatya. We wonder whether such an explanation would be of any use in the given situation. If it is necessary, we would ask for further details of the persons such as date of birth, address etc. with which a formal identification would be carried out.

Yours faithfully,

UBS AG

Sd/-	Sd/-
Urs Wenzel	Patrik Meier
Legal Consul	Procurist"

(19) At this juncture one relevant fact emerges:

That the fax in question was dispatched by the Swiss Bank Corporation to Mr. Barjatya albeit by mistake as asserted in the response to the LR dated 27.06.2001.

(20) It is seen from the reply to the LR dated 27.06.2001 that apart from the answer that the Fax in question was sent to Mr. Barjatya by mistake by the Swiss Bank Corporation, none of the other questions in the LR dated 29.01.2001, were clearly, unambiguously, and unequivocally answered by the Swiss Bank Corporation.

(21) It would be relevant to observe from the said reply dated 27.06.2001 that the Competent Judicial Authority in Switzerland queried for further details of persons mentioned in the LR so as to enable the former to make further enquiries as to whether the said persons operated any accounts with the Swiss Bank Corporation.

(22) No such request requiring further information with regard to the persons mentioned in the LR that included Mr. Barjatya was forthcoming from the official respondents. The matter *qua* the investigation into the acts of omission or commission that may have been attributed to Mr. Barjatya was closed.

(23) On 30.10.2001, vide reference No.9582/3/Cr/1(E)/99-SIU-VIII the report of the concerned SP in RC No.SI8 1999 E 0001 along

with a draft sanction order seeking prosecution of the petitioner amongst others was sent to the Additional Secretary (Admn.) cum CVO, Department of Revenue, Ministry of Finance, North Block, New Delhi. The said communication dated 30.10.2001 was admittedly accompanied by a list of documents and a list of witnesses in this behalf.

(24) However, insofar as, the relevant documents themselves are concerned, although it has been asserted on behalf of the official respondents that they accompanied the communication dated 30.10.2001, on a specific query from this Court, counsel for the official respondents stated that the said documents are not available on the original file owing to the fact that the same were not retained. In other words, they have not been produced before this court for perusal.

(25) During the investigation, of the complaint by Mr. Barjatya, as afore-stated, one Mr. Abhishek Verma made a statement that he had forged the fax in question and had in fact planted it on Mr. Barjatya's fax machine at the instance of the petitioner. The purported motive for doing so was stated to be the reward that

the Enforcement would be entitled to as a consequence of the seizure of the Fax in question.

(26) The trial court by way of order dated 07.09.2001 accepted Mr. Abhishek Verma's application for being made an Approver in the case, in terms of the provision of Section 306 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') and granted him pardon. The order dated 07.09.2001 reads as follows:-

> "4. I have heard applicant/accused Abishek Verma in person and Sh. T.P. Singh, Sr. P.P. for CBI. I have gone through the FIR, Case Diaries, Statement of Witnesses recoded under section 161 Cr.P.C. and the statement of applicant/accused Abhishek Verma recorded under section 164 CrPC. I am satisfied that in the absence of the statement of applicant/accused Abhishek Verma Prosecution may not be able to prove the existence of criminal conspiracy between principal accused Ashok Kumar Aggarwal and the applicant/accused Abhishek Verma, forging of debit advice by the applicant accused on the direction of accused Ashok Kumar Aggarwal, demand and acceptance of illegal gratification of Rs. 10 lacs from applicant/accused Abhishek Verma by principal accused Ashok Kumar Aggarwal and certain other material facts. I am, therefore, of the belief that it would be expedient in the interest of justice to tender pardon to applicant/accused Abhishek Verma, with a view to unearth all facts of conspiracy and to establish the role played by principal accused Ashok Kr. Aggarwal, in framing Subhash Chander Barjartya in a FERA case and the receipt of illegal gratification of Rs.10,00,000/- by him."

(27) The petitioner, aggrieved by the order dated 07.09.2001 instituted a Criminal Miscellaneous Petition No.3741/2001 assailing the said order.

(28) This Court by way of the judgment and order dated 20.08.2007 set aside the order dated 07.09.2001 on the ground that the latter order was procured by suppression of material facts. The CBI carried the said judgment and order dated 20.08.2007 to the Hon'ble Supreme Court of India. The Criminal Appeal No.1837/2013 instituted on behalf of the CBI assailing the order dated 20.08.2007 passed by this Court was dismissed by the Hon'ble Supreme Court of India vide order dated 22.11.2013 and the trial court was directed to look into the matter of grant of tendering pardon to the said Mr. Abhishek Verma afresh.

(29) In terms thereof, the CBI moved an application before the trial court stating therein that it no longer supported the case of Mr. Abhishek Verma for being granted pardon and made an Approver in the subject case in RC No.SI8 E0001 1998, in view of his criminal antecedents.

(30) Mr. Abhishek Verma through an application dated 31.07.2014, made before the Special Judge, CBI, Delhi has retracted from his earlier statement under Section 164 of the Code, implicating the petitioner herein, asserting that the said statement was made under threat, coercion and intimidation from the investigating officer.

(31) In the meantime, the petitioner instituted a Writ Petition (Criminal) No.938/2001 on 31.07.2001 alleging therein that the investigation was being conducted in an impartial, unfair and *mala fide* manner and seeking transfer of the same from the Investigating Officer in the subject case to some other senior officer of the CBI. This Court by way of its order dated 09.04.2002 directed as follows:-

> "In view of this position, both sides agree to the disposal of this petition by the following order:
>
> Revenue Secretary and/or other concerned authorities who are seized of RCS 18/99 are directed to examine and consider the record of investigation fairly and objectively taking in regard all relevant factors and circumstances and then pass appropriate order under law within two months from receipt of this order.
>
> Director, CBI is also directed to examine the investigation record of RCS 19/99 and to consider all relevant aspects and factors in the light of petitioner's

> complaints and then to pass appropriate orders under law in the matter within two months from receipt of this order."

(32) The petitioner submitted a representation dated 23.04.2002 before the official respondents requesting them to consider all the relevant documents including the material relied upon by the CBI before granting sanction for prosecution of the petitioner herein.

(33) The sanction order dated 21.06.2002, impugned herein, was issued by the Government of India, Ministry of Finance, Department of Revenue. It would be pertinent to point out that the said order dated 21.06.2002 granting sanction was a verbatim copy of the draft sanction order that accompanied the communication dated 30.10.2001, dispatched by the CBI to the sanctioning authority.

(34) A charge sheet was filed against the petitioner on 28.06.2002 which is the subject matter of challenge in the present petition.

(35) After the charge sheet was filed, the petitioner made two representations to the Revenue Secretary dated 29.07.2002 and 13.08.2002 praying for the withdrawal of the order granting sanction for prosecution of the petitioner dated 21.06.2002 in

light of the LR dated 29.01.2001 and its reply by the Competent Authority in Switzerland dated 27.06.2001.

(36) While considering these representations, the officers of the Department of Revenue noted that various representations were made by the petitioner to the Revenue Secretary since 05.11.2001. The office notings bearing reference F.No.16/1/99-Ad.I-C made by senior officers of the Department of Revenue are reproduced below:-

> "17. Since the time limit of two months was expiring on 21.06.2002, a decision was taken to grant sanction of prosecution against Shri Aggarwal on the basis of SP's report only as desired by CBI Director and CVC, Investigation record of the case were, however, not made available to the Department as agreed to by CBI in the Hon'ble High Court of Delhi and as reflected in the order dated 09.04.2002 referred to in para 8 above for perusal and satisfaction of the sanctioning authority.
>
> xxxx xxxx xxxx xxxx xxxx
> xxxx xxxx xxxx xxxx xxxx
>
> 24. It is not clear as to how CBI, the apex investigating agency, did not consider it appropriate to, include such a vital information received in response to letter Rogatory in the SP's report while seeking grant of sanction for prosecution. The reply received by CBI on 30.07.2001 in response to Letter Rogatory brings out clearly that the alleged fax dated 23.12.1997 was genuine one.

xxxx xxxx xxxx xxxx xxxx
xxxx xxxx xxxx xxxx xxxx

26. From the foregoing, it is clear that had the CBI included the vital and established information received on 30.07.2001 in response to Letter Rogatory in the SP's report dated 30.10.2001, the allegation made by Shri Abhishek Verma for forgery of fax and subsequent conspiracy for financial consideration as well as other allegations against Shri Aggarwal would have not met the litmus test. It is also apparent that there might have been hardly any reason for the sanctioning authority to grant sanction for prosecution in the light of such established facts, as such a sanction would not have been in conformity with the principles laid down by the Hon'ble Supreme Court in their judgment relied upon by the CBI in their letter dated 10.09.2002 and referred to in para 21 above.

27. In view of the foregoing, Ministry of Law and Justice may please see the proposal for advice on the following issues:

(i) Whether the department should accept and examine representation from the officer after filing of the charge sheet against him. CBI contends that this should not be done.

(ii) Whether in the light of the facts forwarded by Minister, Embassy of India, Switzerland vide his letter dated 18.07.2001 annexing therewith the reply dated 11.07.2001 from Federal Department of Justice and Police in response to Letter Rogatory from the Court of Special Judge for CBI cases (referred to in para 18 above), confirming the genuineness of the alleged fax seized by E.D. officials, received by the CBI on 30.07.2001 and not narrated/included in the SP's report dated 30.10.2001 while seeking sanction for prosecution from the sanctioning authority, any case is made out against Shri Aggarwal as alleged by the CBI in the SP's report.

(iii) Whether under such circumstances, it would be appropriate and just for the sanctioning authority to withdraw the sanction for prosecution already granted against Shri A.K. Aggarwal

(iv) Whether the department should await further judicial pronouncement in the case."

(37) The present writ petition was filed by the petitioner only on 04.12.2012 as he asserts that it is only when the impugned charge sheet dated 28.06.2002 was filed by the respondent that the former became aware and acquired copies of the reply addressed by the competent judicial authority in Switzerland dated 27.06.2001 to the LR dated 29.01.2001 as well as communication dated 13.01.1998 sent by the Swiss Bank Corporation to Mr. Barjatya.

(38) The petitioner asserts that it is only then it dawned upon him that the order granting sanction to prosecute him was passed by the Competent Authority by way of order dated 21.06.2002 without considering the said relevant documents.

(39) This Court by way of order dated 21.01.2003 directed the Special Judge, Delhi to expeditiously decide the application of discharge including the issue of validity of the sanction order dated 21.06.2002 pending before it. The order dated 21.01.2003 read as follows:-

> " **The application for discharge including the issue of sanction filed by the petitioner is pending before the learned Special Judge, Delhi. We direct the learned Special Judge to decide the application of discharge as expeditiously as possible.**
>
> The matter is adjourned sine die with liberty to revive the petition immediately after the order is passed by the learned Special Judge.
>
> The learned Special Judge would decide the application of discharge without being influenced by the fact of pendency of this petition in this Court."

Emphasis Supplied.

(40) Thereafter an order on charge was passed on 17.12.2005 by the Special Judge, CBI, Delhi in RC No.SI8 1999 E 001/CBI/SPE : SIU-VIII in CC No.26 of 2002, and charges were framed against the petitioner u/s 120B IPC read with sections 468/469/471 IPC and Section 7 and 13(2) read with section 13(1) (d) of POCA. However, the Special Judge, CBI, Delhi

returned no finding on the validity of the order granting sanction for prosecution dated 21.06.2002.

(41) This Court vide order dated 21.02.2007 had directed the official respondents to produce notings of the Minister of Finance dated 18.06.2005, 27.12.2005 and 15.01.2007 for the perusal of this Court and the petitioner was granted the right to inspect the same. The official respondents filed Criminal Appeal No.353/2007 in the Hon'ble Supreme Court of India assailing the interlocutory order dated 21.02.2007 wherein the Hon'ble Supreme Court by way of order dated 15.03.2007 set aside the order of this Court and directed as follows:-

> "When the matter was heard on 12.03.2007, we requested the learned Additional Solicitor General to place before us the notings made on the file on 18.06.2005, 27.12.2005 and 15.01.2007 for our perusal and for issuing further directions. Accordingly, the relevant file was placed before us. We perused the file, in particular, the observations made on 18.06.2005 (page 55 of the file), 17.12.2005 (page 57 of the file) and 15.01.2007 (page 59-64 of the file) by the Hon'ble Minister of Finance. **Since the writ petition is pending, we request the High Court to peruse these notings and the observations made by the Hon'ble Finance Minister and thereafter issue appropriate directions to the parties to the action. Since the challenge is pending consideration before the High Court, we request the High Court to take up both the issues of maintainability and the validity of**

sanction for the prosecution simultaneously and decide the same on merits and in accordance with law and after affording opportunity to the parties to the action."

Emphasis Supplied.

(42) On a VIP reference from the Ministry of Finance relating to the legality of sanction for prosecution dated 21.06.2002 against the petitioner, the Ministry of Law & Justice tendered its opinion by way of reference bearing FTS No.167/JS&LA(MKS)/2011 dated 05.04.2011. The opinion stated as follows:

> "15. In the instant cases, in the sanction orders it is mentioned that sanction has been accorded after fully and carefully examining the material placed before him including the documents and statement of witnesses with regard to said allegations. **But the noting/correspondence of the files of the administrative Department do not subscribe to or support the claim made in the sanctions orders, as admittedly no such documents and statement of witnesses were ever provided to the sanctioning authority by CBI**.
>
> 16. In view of the above legal and factual analysis, it is established that the claim in both the orders that the sanction has been accorded after fully and carefully examining the material placed before him including the documents and statement of witnesses with regard to said allegations, is factually incorrect. **An inference may, therefore, be validly drawn that the sanction orders dated 21.06.2002 and 26.11.2002 had been issued without proper application of mind as all the relevant and relied upon material/documents which admittedly had not been**

> **supplied by the CBI to the sanctioning authority**. As such, both the aforesaid sanction orders suffer from legal infirmity and are invalid. Hence, in the interest of justice, the administrative department may take appropriate action(s) in the matters."
>
> Emphasis Supplied.

(43) Subsequently, it is seen from the Office Memorandum bearing reference F. No. 31/2/2014-Vig that a D.O. No.8298/3/1/99(Pt file)/2011/UW IV dated 05.08.2011 sent by Joint Director & Spl IGP, Head of Zone, Economic Offences, CBI was received by Law Secretary (Dy. No. 2378/LS) on 08.08.2011, wherein it was mentioned inter-alia that:

> "……..the legal opinion of Ministry of Law & Justice dated 05.04.2011 given by the M/o Law has direct bearing on the ongoing trial/writs/SLPs arising out of two cases, it is felt that the said opinion should be examined by the CBI in the interest of justice."

(44) The then Law Secretary after receiving D.O. No.8298/3/1/99 (Pt file)/2011/UW IV, reconsidered and withdrew the opinion of the Ministry of Law & Justice dated 05.04.2011 vide FTS No.2378/LS/2011 dated 08.08.2011 without a speaking order.

(45) With regard to this revision of opinion by the Law Secretary vide FTS No.2378/LS/2011 dated 08.08.2011, the CVC vide

OM No.014/ITX/016/241902 dated 20.03.2014 asked the Ministry of Law & Justice to submit the entire factual matrix in relation to the withdrawal of opinion dated 05.04.2011 by the Law Secretary on 08.08.2011.

(46) In response to the OM No.014/ITX/016/241902 dated 20.03.2014 of the CVC, the Ministry of Law & Justice vide F.No.31/2/2014-Vig dated 31.03.2014 referred to Para 83 of O&M instructions for the Department of Legal Affairs, wherein the procedure of tendering an opinion by the Ministry of Law & Justice is provided for, and opined as below:

> ".......(iv) Though, it is not specifically mentioned in the O&M instructions that once a legal opinion is given in a matter, it can be reviewed only with the approval of an authority one step above, it is the practice in this department that once a legal opinion is given in a matter by an officer, it is usually reviewed with the approval of an officer higher in rank to the officer who earlier expressed the opinion. In the present case, the opinion dated 5.4.2011 was approved by the then Law Secretary (Sh. D.R. Meena). At the time of reconsideration i.e. when the then Law Secretary (Sh. D.R. Meena) had reconsidered the earlier opinion dated 5.4.2011 as withdrawn vide opinion dated 8.8.2011, the matter was not brought to the notice of the then Hon'ble Minister of Law & Justice and had been tendered at his own level."

(47) The petitioner by way of Original Application No. 2842/2010 challenged the order of his suspension dated 28.12.1999, which was extended from time to time for about 12 years. The Central Administrative Tribunal (hereinafter referred to as 'CAT') vide order dated 16.12.2011 directed the official respondents to convene a Special Review Committee to consider the revocation of suspension of the petitioner, who had by then been under suspension for a period of almost 12 years. The Tribunal in its order observed that the respondents had primarily relied upon the opinion of CBI for not reinstating the petitioner.

(48) The Special Review Board passed an order dated 12.01.2012 whereby the suspension of the petitioner was continued on the ground that the views of the CBI were not available on the revocation of suspension of the petitioner. The order of the Review Committee was not a speaking order. By way of Original Application No. 495/2012 the petitioner challenged the said order of the Review Committee and the CAT passed an order dated 01.06.2012, reinstating the petitioner in service. This order was assailed by the official respondents before this

court in W.P. (Civil) No.5247/2012, wherein this Court upheld the decision of the CAT dated 01.06.2012. The decision of this Court was further challenged in Civil Appeal No.9454/2013 before the Supreme Court of India. Meanwhile, the official respondents again passed an order dated 31.07.2012, renewing the suspension of the petitioner. The Supreme Court of India also upheld the decision of the CAT dated 01.06.2012 by way of judgment and order dated 22.11.2013 and held that the order passed by the official respondents dated 31.07.2012 was in teeth of afore-stated order of the CAT.

(49) Further, on a representation by the petitioner dated 17.06.2014 addressed to the Revenue Secretary with a request for implementing the legal opinion dated 05.04.2011 given by Ministry of Law & Justice, the officers of Department of Revenue noted vide reference bearing F.No.16/1/99-Ad.ED dated 01.10.2014 to the following effect:-

> "7. In view of the foregoing and also keeping view **the fact that the withdrawal of legal opinion dated 05.04.2011 has been found to be improper to the extent that the said legal opinion was withdrawn by the then Law Secretary without following the established procedure, resulting in serious prejudice to Shri Aggarwal so far as the decision**

making process by the sanctioning authority is concerned, it is for consideration as to whether:-

(i) The present representation preferred by Shri Aggarwal for withdrawal of prosecution sanction in question may be accepted;

Or

(ii) Comments of Ministry of Law & Justice may be called for to proceed further in the matter.

Submitted, please."

Emphasis Supplied.

(50) Thereafter, the CVC vide its office memorandum No.014/ITX/016/280 dated 13.04.2015 observed:

> "2. The Commission while perusing the comments of CBI has observed that the sanction order dated 21.06.2002 and 26.11.2002 granted by the sanctioning authority in respect of Shri Ashok Kumar Aggarwal are not in conformity with the guidelines reiterated by DoP&T in circular dated 26.03.2015. Hence the Commission would advise administrative department i.e. D/o Revenue to take appropriate steps to undo the irregularity, if any."

(51) The PMO had requested the Department of Revenue to afford a personal hearing to the petitioner in light of the opinion of the Law Ministry and requested for an early hearing from the

Department of Revenue vide its letters dated 19.02.2015 and 18.04.2015.

(52) In this regard this Court vide order dated 06.08.2015 observed that no steps had been taken by the Department of Revenue to hear the petitioner and it had not proceeded to call him in view of a noting by the Director of the Department of Revenue. The order of this Court dated 06.08.2015 is reproduced below:

> " An application for adjournment has been circulated on behalf of Mr Sanjeev Narula, learned Central Government Standing Counsel (CGSC) appearing on behalf of the Union of India. Mr Ram Jethmalani, learned senior counsel appearing on behalf of the petitioner, opposes the said application for adjournment on the ground that the matter is part-heard before this court and the respondents herein have been seeking time all along.
>
> Mr Jethmalani, learned senior counsel has handed over a copy of a communication dated 19.02.2015 from the Prime Minister's Office to the Secretary, Department of Revenue which reads as under:-
>
> > **"PRIME MINISTER'S OFFICE**
> >
> > South Block
> > New Delhi-110011
> >
> > Please find enclosed a copy of a self-explanatory representation dated 17.12.2014, received in this office from Shri Ashok Kumar Aggarwal, IRS (Income Tax)
> >
> > 2. The undersigned is directed to request the Department of Revenue to afford a personal hearing to Shri Aggrawal and then take a decision

in the light of the Supreme Court orders dated 22.11.2013 and Law Ministry's advice. This office may be apprised of the decision taken.

Sd/-
(V. Sheshadri)
Director
Tel. No. 23013485

Secretary, Department of Revenue

PMO ID no.600/31/c27c2015-ES.2 Dated: 19.02.2015",

Mr ethmalani states that the Secretary, Department of Revenue has not paid any heed to the above communication.

It is observed that the present petition inter alia challenges the validity of the sanction granted by the competent authority for the prosecution of the petitioner.

Mr Ajay Kalra, learned counsel appearing on behalf of Mr Narula, CGSC, states that the latter is in a personal difficulty and, therefore, unavailable today. Mr Kalra, learned counsel, further submits that the CGSC shall be available to make his submissions on Monday, i.e., 10.08.2015 .

Mr S.Kumar, Under Secretary, Department of Revenue, is present in court along with the original file. A perusal of the said file reveals that in response to the communication dated 19.02.2015, the Department of Revenue has not taken any steps to hear the petitioner and has not proceeded to call him in view of a noting by the Director of the Department of Revenue to the following effect:-

"The matter is subjudice in various Courts, including the High Court, as mentioned in para 4 above. The view taken by the Department that prosecution sanction given by DOR in RC No. S-18/E-0006/99 is in order, has also been filed in the High Court in Writ Petition (Crl.) 1401/2002 and conveyed in all other litigation. Therefore, it precludes Department from giving a personal hearing or any other intervention in the issue, while the case is subjudice.

May please decide."

> On a query from the court Mr S.Kumar, Under Secretary, Department of Revenue, states that he has only joined the Department recently and is not aware whether a communication as desired by the Prime Minister's Office in this behalf has been forwarded to them.
>
> There is no gainsaying that the Prime Minister's Office has to be accorded the highest respect and held in the highest esteem, and ought to have been informed of the decision taken by the Director of the Department of Revenue at the earliest opportunity.
>
> Mr. Kalra, learned counsel appearing on behalf of UOI, states that he shall obtain instructions in this behalf and apprise the court on the next date of hearing.
>
> Renotify on 10.08.2015.
>
> A copy of this order be given *dasti* under signature of Court Master to counsel for the parties."

(53) In view of the foregoing order, a copy of communication dated 07.08.2015 was handed over to this Court on 10.08.2015 wherein it was stated that the petitioner was to be accorded a personal hearing on 24.08.2015 at 02:30 PM by the Department of Revenue in the Chamber of the Under Secretary of the Government of India. The Counsel appearing on behalf of the official respondents assured the court that a decision by way of a speaking order will be taken. In view of this assurance the matter was adjourned for further hearing.

(54) Subsequently, when the matter came up for hearing on 02.09.2015, the counsel appearing on behalf of the official

respondents urged that a decision had been taken by the Department of Revenue on the representation dated 25.08.2015 made on behalf of the petitioner and was pending approval of the Hon'ble Finance Minister. The said representation made by the petitioner has been rejected by way of order dated 07.09.2015.

6. The facts as are relevant for the disposal of Criminal Revision Petition No.338/2014 relating to RC No.SI9 E0006 1999 dated 07.12.1999 are as follows:

(1) The CBI registered a preliminary enquiry No.SI9 1999 E0002 on 17.09.1999 against the petitioner for disproportionate assets to the tune of Rs.8,38,456/- during the period 1985 to 1999, and after the conclusion of the preliminary enquiry it was alleged that the petitioner had acquired disproportionate assets worth Rs.40,42,234/- against an income of Rs.73,39,672/-, which comes out to be approximately 55% of disproportionate income to his total income.

(2) A Regular Case was registered on 07.12.1999 as RC No.S19 E0006 1999 in respect of the said disproportionate assets.

(3) Further investigations alleged that the disproportionate assets were to the tune of Rs.12,04,46,938/- which was 7615.45% of his known source of income during the check period from 01.04.1990 to 04.03.1999. It was also alleged that the petitioner was involved in money laundering, and for channeling his ill-gotten wealth had established a number of companies wherein his family members were the founding Directors.

(4) The CBI then sent a letter to the Ministry of Finance dated 24.05.2002 for accord of necessary sanction for prosecution of the petitioner. The same was accompanied by a Superintendent of Police's Report (hereinafter referred to as the 'SP's Report dated 24.05.2002') of 163 pages containing a detailed gist of the relevant statements and documents including the information on income tax returns, etc. The covering letter of the SP's Report dated 24.05.2002 stated as follows:

> "The SP's report sent herewith may please be treated as a secret document and no reference to it may be made in the sanction order when issued. In case the Ministry/Department, due to some reasons wants to depart from the material placed on record for issuing sanction, the matter may please be discussed with the undersigned so that the sanction for prosecution so accorded not found wanting legally.

> **Since the relied upon documents are very large in quantity, they are not being enclosed.** The Investigating Officer of this case Shri V.K. Pandey, will show the documents and also explain the evidence as and when required. Further List of witnesses and List of documents will be provided, if necessary."
>
> Emphasis Supplied.

(5) It is the case of the petitioner that the Investigating Officer continued with the investigation and recorded the statements of as many as 13 witnesses between 10.05.2002 to 16.10.2002, out of which statements of 10 witnesses were recorded after sending the SP's report dated 24.05.2002 to the sanctioning authority.

(6) The CVC after examining the said case advised the Ministry of Finance to grant sanction for prosecution. As per the respondents the Investigating Officer visited the Directorate of Income Tax (Vigilance) in September 2002 and placed necessary documents for the perusal of the Additional Director, Income Tax (Vigilance), who was seized of the matter pertaining to the sanction for prosecution of the respondent.

(7) The Finance Minister accorded sanction vide order dated 02.11.2002 and as a consequence thereof, the sanction order

was issued vide order dated 26.11.2002 under the seal and signature of the Under Secretary (V&L), Ministry of Finance. The order at para 27 reads as follows:

> "27. .....And whereas the Central Government, after fully and carefully considering the material placed before him and taking into account the available evidence including the case diaries and documents collected by the Investigating Officer during the course of investigation and statements of witnesses including the statements of witnesses recorded by the investigating officer u/s 161 Cr.P.C. and statements recorded before Magistrate u/s 164 Cr.P.C. with regard to the said allegations and circumstances of the case, is satisfied that Shri Ashok Kumar Aggarwal should be prosecuted in the competent Court of Law for the above mentioned offences and any other offences if made out on these facts."

(55) In the meantime, the petitioner instituted a Writ Petition (Criminal) No.938/2001 on 31.07.2001 alleging therein that the investigation was being conducted in an impartial, unfair and *mala fide* manner and seeking transfer of the same from the Investigating Officer in the subject case to some other senior officer of the CBI. This Court by way of its order dated 09.04.2002 directed as follows:-

> "In view of this position, both sides agree to the disposal of this petition by the following order:

> Revenue Secretary and/or other concerned authorities who are seized of RCS 18/99 are directed to examine and consider the record of investigation fairly and objectively taking in regard all relevant factors and circumstances and then pass appropriate order under law within two months from receipt of this order.
>
> **Director, CBI is also directed to examine the investigation record of RCS 19/99 and to consider all relevant aspects and factors in the light of petitioner's complaints and then to pass appropriate orders under law in the matter within two months from receipt of this order**."

Emphasis Supplied.

(8) A Charge Sheet was filed by the CBI before the Court of Special Judge, CBI, Delhi on 05.12.2002, on the basis of the same, the court took cognizance and issued summons to the petitioner on 10.01.2003.

(9) There were various representations by the petitioner challenging the validity of the sanction order dated 26.11.2002 addressed to the Department of Revenue, and while considering the said representations the Joint Secretary (Revenue), Ministry of Finance, Department of Revenue, addressed a letter dated 12.05.2004 to the Director General of Income Tax (Vigilance). The said letter stated as below:

> "The concerned Vigilance file has been examined in this Department and, prima facie, **it appears that the records relied upon by the CBI were not received in the office of DGIT (Vigilance) and were obviously, therefore, not examined before sanction of prosecution.**This was also pointed out to the Vigilance Department, including your predecessor, by the Revenue Secretary during discussions.
> It is, therefore, necessary that the concerned records including those of the I.T. Department for the relevant period be requisitioned from the CBI and examined by the Vigilance Wing of the Income Tax Department. The finding of the examination may be sent to them within 10 days, based on which a final view will be taken on the representation of Sh. Ashok Aggarwal."
>
> Emphasis Supplied.

(10) The Additional Director of Investigation (Vigilance), then sent a letter dated 17.05.2004 to the Deputy Inspector General of Police, CBI. The said letter stated as follows:

> "Kindly refer to your letter no. 164/3/S 19 1999 E 0006 dated 24-5-2002 on the above subject wherewith the SP's report No.3 dated 25-5-2002 in the above case had been forwarded to the Department of Revenue. **As mentioned in the said letter, the relied upon documents, being large in quantity, were not enclosed. Although the sanction for prosecution had been accorded in the case after considering the fact brought out in the CBI's report, as also the report of subsequent examination conducted by the Vigilance Wing of the Department, the Charged Officer Sh. Ashok Aggarwal has represented before the Secretary (Revenue),** challenging the sanction on the ground that the Department had not examined the investigation records, including the case diaries, documents collected, statement of witnesses, etc. that

> were relied upon by the case diaries, documents collected, statement of witnesses, etc. that were relied upon by the CBI. Directions have now been received from the O/o Secretary (R), that the concerned records may now be obtained from the CBI and examined, so that the officer's representation may be disposed of. I am directed to request you to kingly provide all the relied upon documents, as referred in your letter dated 24-5- 2002, as also all the relevant income tax records which are in CBI custody, to enable compliance to the directions received from the O/o Secretary (R). In case it is not possible to provide the original records, as above, authenticated copies thereof may be given endorsed. The matter may kindly be treated as most urgent."
>
> Emphasis Supplied.

(11) The Deputy Inspector General, CBI in response to the letter dated 17.05.2004 sent its letter dated 15.06.2004 to the Director General Income Tax (Vigilance) stated that the petitioner has already filed a petition in the trial court challenging the validity of the sanction for prosecution dated 26.11.2002, the matter is pending consideration in the trial court and is subjudice. This makes it apparent that the relevant documents were sought *ex-post facto* and were in fact never dispatched to the Department of Revenue on the ground that the matter was subjudice.

(12) The petitioner challenged the validity of the sanction order dated 26.11.2002 on the ground that no documents or records

were sent to the sanctioning authority for the grant of sanction except for the SP's Report dated 24.05.2002, by filing an application dated 01.05.2003 before the Special Judge (CBI). The learned Special Judge heard the said applications and dismissed the same vide order dated 28.07.2007, holding that it could not be determined at that particular stage that the order granting sanction dated 26.11.2002 was invalid. However, the Special Judge was constrained to observe that the case diaries, documents collected by the IO during the course of the investigation, statement of witnesses under section 161 and 164 of the Code were not considered by the sanctioning authority.

(13) Further, during trial the Special Public Prosecutor appearing on behalf of the official respondents on 11.07.2007, has conceded that only the SP's Report dated 24.05.2002 along with a list of evidence (oral and documentary) were sent to the sanctioning authority for the purpose of according the sanction dated 26.11.2002. The order dated 11.07.2007 passed by the Special Judge, CBI, Delhi is reproduced as below:

> "CBI vs. Ashok Kumar Aggarwal etc.
> 11.7.07

Present: Shri N.K. Sharma, Special PP alongwith Dy. S.P. Rajiv Dwevedi, Pairvi Officer.

"Accused Ashok Kumar Aggarwal, Vijay Aggarwal, Shish Ram Sainin and SM Jindal on bail with Mr. Ram Jethmalani, Senior Adv. alongwith Mrs. Lata Krishnamurthy and Mr. Girish Shukla, Adv."

Accused Smt. Urvashi Aggarwal, Smt. Sita Devi, Smt. Manju Aggarwal, Smt. Sangita Aggarwal, Ram Vilas Aggarwal, and Mohanlal Aggarwal are absent. they are exempted for today only on applications moved.

It is submitted by Shri Ram Jethmalani, Ld. senior Advocate that he does not press his prayer for leading evidence on the point of sanction as initially submitted in the affidavit dt.04.05.2002 of the accused Ashok Aggarwal.

It is conceded by Shri. NK Sharma, Ld. Special PP that only SPs report alongwith list of evidence oral and list of evidence documentary were sent to the sanctioning authority for the purpose of according sanction.

Args. on the point of sanction concluded.

Put up for orders on 24.07.2007.

Sd/-
Special Judge : Delhi:11.7.07"

Emphasis Supplied.

(14) This order of the Learned Special Judge was challenged by the petitioner by way of Revision Petition No.589/2007 filed before this Court. This Court vide its order dated 03.10.2007 set aside the order of the learned Special Judge dated 28.07.2007. It was

observed that the documents collected during investigation were not produced before the sanctioning authority and remanded the matter back to the learned Special Judge directing him to record a finding in terms of clause (b) of sub-section (3) and sub-section (4) of Section 19 of POCA that whether the non-production of relevant material has resulted in any 'failure of justice'. The said order reads as follows:

> "28. **So, this fact mentioned in the sanction order dated 26.11.2002 stating that "case diaries and documents collected by the investigating officer during the course of investigation, statement of witnesses under section 161 CrPC and under section 164 CrPC was considered by the sanctioning authority" is factually incorrect**. it leads to the conclusion that before according sanction the sanctioning authority has not considered the entire material available with the investigating agency, particularly the evidence of the witnesses recorded under section 161 CrPC, under section 164 CrPC and case diaries and the documents. Only list of witnesses and list of evidence (oral and documentary) were sent to the sanctioning authority. So, in light of these facts, it has to be seen as to whether it has resulted "in failure of justice" as envisaged in section 19(3) (b) of the Act.
>
> xxxx xxxx xxxx xxxx xxxx
>
> xxxx xxxx xxxx xxxx xxxx
>
> 30. **In the present case, petitioner has raised objections to the validity of sanction at the very initial stage, i.e. even before arguments on charge could be advanced**. However, the trial court has not recorded any finding in terms of clause (b) of subsection (3) and sub-section (4) of Section 19 of the

Act, that non production of the relevant material before the sanctioning authority at the time of grant of sanction “has not resulted in a failure of justice”.

31. Under these circumstances, it would be appropriate to require the trial court to record the findings in terms of clause (b) of sub-section (3) and sub-section (4) of Section 19 of the Act.

32. Hence, the impugned order, passed by the learned Special Judge is set aside and the matter is remanded back to the trial court with direction to record a finding in terms of clause (b) of sub-section (3) and sub-section (4) of Section 19 of the Act. **The trial court, if it deems fit, for this purpose, can examine the sanctioning authority as a witness even before charge, keeping in view the provisions of Section 311 CrPC.**

33. The trial court shall decide this matter within three months from today and thereafter, aggrieved party can seek appropriate remedy under the law available to it.”

Emphasis Supplied.

(15) Pursuant to the directions of the High Court proceedings were initiated before the Special Judge. On a direction by the Special Judge by way of order dated 12.10.2007, the former Hon'ble Finance Minister, who was the sanctioning authority when the subject sanction order dated 26.11.2002 was passed, filed an affidavit dated 03.11.2007. The relevant contents of the said affidavit are as below:

“4. I confirm the statement of facts in Paragraph 8 and 24 of the Order of the Hon'ble High Court. No

statement of witnesses or the documents relied in the charge sheet are ordinarily forwarded to the Finance Minister of the day. What is sent is a draft order, whereafter 'sanctioning' by the Minister in normally a routine acceptance of that draft. What was considered by me was only that which was sent or recommended to me.
If the obligation was to consider more than which was sent then that has not been done, therefore, unwittingly prejudice might have been caused and justice miscarried. I leave it to the court to decide the matter."

(16) On a VIP reference by the Ministry of Finance, the Ministry of Law & Justice tendered its opinion on the validity of sanction order dated 26.11.2002. The opinion of the Ministry of Law & Justice stated as below:

> "8. In another linked matter RC SI9 1999 E0006 dated 07.12.1999, regarding alleged disproportionate assets in possession of Shri Aggarwal, sanction has also been accorded only on the basis of SP's Report 24.5.2002 (F/D). It may be noted that while forwarding the aforesaid SP's Report No. 3, the relied upon documents were not forwarded by the CBI on the pretext of being voluminous. it is seen that on a representation made by Shri Aggarwal, the Department of Revenue had examined and scrutinized the case file of vigilance department **and it was established that the sanction order dated 26.11.2002 (F/N in linked file vol. III) had been granted without considering and examining the relevant material as the same had not been sent by the CBI. thereafter, despite being requested by Vigilance Department CBDT, CBI did not send the relied upon documents to the authorities (pp1812-1815, 1821, 1824 and 1826 of the linked file Vol. VI)**
> 9. the said sanction order dated 26.11.02 was challenged before the Trial Court and during the

arguments, it was fairly conceded by the ld. counsel of CBI on 11.02.2007 that only SP's Report along with the list of documents had been sent to the Sanctioning Authority (F/E in linked file Vol. VI). It is further noticed from the file that the lists sent along with the Sp's report were incomplete. **From the file, it is further noticed that a Crl. Rev. Petition No. 589/2007 filed by Sh. Aggarwal, the High Court of Delhi vide order dated 03.10.2007 (F/F in link file Vol. VI) had conclusively held that before according the sanction the sanctioning authority had not considered the entire material since the same was never sent by the CBI and the declaration in the aforesaid sanction order that before according sanction, the relied upon material had been, considered and examined by the sanctioning authority is incorrect (paras 23 and 28 of the Order).**

10. It is also important to note here that subsequently the sanctioning authority (i.e. the then Finance Minister) had filed an affidavit dated 03.11.2007 in the Trial Court (F/G) wherein statement of facts in paragraphs 8 and 24 of the order of the High Court 3.10.2007 were confirmed. In other words, it is undisputed that the list annexed with the SP's Report were incomplete and the statement of not even a single witness was sent to the sanctioning authority. Attention is invited to the following portion of the affidavit."

Emphasis Supplied.

(17) Thereafter, the CBI moved the Hon'ble Supreme Court of India vide Criminal Appeal No.1838/2013 impugning the order of this Court dated 03.10.2007. The Hon'ble Supreme Court also observed that the documents collected during investigation were

not placed before the sanctioning authority. However, without commenting on the validity of the sanction, the Supreme Court vide order dated 22.11.2013 upheld the order dated 03.10.2007 of this Court.

(18) The matter was remanded back to the learned Special Judge as a consequence of the order of the Supreme Court dated 22.11.2013 to decide on the issue whether the withholding of documents or material, which were not placed before the sanctioning authority has resulted 'in any failure of justice'. The learned Special Judge vide the impugned order dated 24.5.2014 observed that withholding of documents would have caused prejudice to the petitioner if in a situation when the documents or materials withheld, had been produced and considered by the sanctioning authority, it was of such a kind or nature or having an information that it would have persuaded the sanctioning authority, to consider not to give sanction to prosecute the petitioner. In this respect the Special Judge held that the petitioner was not able to produce any such document before it. Consequently, the learned Special Judge held that there had

been no 'failure of justice' in the instant case vide order dated 24.05.2014, impugned herein.

(19) Subsequently, it is seen from the Office Memorandum bearing reference F. No.31/2/2014-Vig that a D.O. No.8298/3/1/99(Pt file)/2011/UW IV dated 05.08.2011 sent by Joint Director & Spl. IGP, Head of Zone, Economic Offences, CBI received by Law Secretary (Dy. No. 2378/LS) on 08.08.2011, wherein it was mentioned inter-alia that:

> "…….the legal opinion of Ministry of Law & Justice dated 05.04.2011 given by the M/o Law has direct bearing on the ongoing trial/writs/SLPs arising out of two cases, it is felt that the said opinion should be examined by the CBI in the interest of justice."

(20) The then Law Secretary after receiving D.O. No.8298/3/1/99(Pt file)/2011/UW IV, reconsidered and withdrew the opinion of the Ministry of Law & Justice dated 05.04.2011 vide FTS No.2378/LS/2011 dated 08.08.2011, without a speaking order.

(21) With regard to this revision of opinion by the Law Secretary vide FTS No.2378/LS/2011 dated 08.08.2011, the CVC vide OM No.014/ITX/016/241902 dated 20.03.2014 asked the Ministry of Law & Justice to submit the entire factual matrix in relation to the withdrawal of opinion dated 05.04.2011 by the

Law Secretary on 08.08.2011. The Ministry of Law & Justice opined that the withdrawal of opinion by the Law Secretary was contrary to regular procedure adopted by the Ministry.

(22) Thereafter, the CVC vide its Office Memorandum No.014/ITX/016/280 dated 13.04.2015 observed that the order on sanction dated 26.11.2002 was not in conformity with the guidelines reiterated by the DoP&T in Circular dated 26.03.2015.

7. Mr. Ram Jethmalani, learned Senior Counsel appearing on behalf of the petitioner would urge that the sanction order dated 21.06.2002, which is the genesis of the cognizance taken by the Special Judge, CBI, Delhi in the subject case in RC No.SI8 E0001 1999 is invalid since apart from the SP's report dated 30.10.2001 and the draft sanction order that accompanied the said report, no other documents were sent to the sanctioning authority which circumstance is enough by itself to invalidate the sanction order dated 21.06.2002. It is then urged by Mr. Jethmalani that if the sanctioning authority would have had the benefit of examining the reply to the LR as well as the relevant Fax dated 13.01.1998, it would have been apparent to him that the charges levelled against the petitioner to the effect that the Fax in question was forged, fabricated and had been planted on the top of the Fax machine of Mr. Barjatya, was false and frivolous and it may have led him to deny sanction to prosecute the petitioner, as sought by the CBI.

8. Mr. Jethmalani, learned senior counsel would then urge that the order granting sanction dated 26.11.2002 was also invalid, as no record of investigation or statements of witnesses were perused by the sanctioning authority before the grant of sanction. Reliance was placed on the orders and judgments of the High Court dated 03.10.2007 and of the Honb'le Supreme Court dated 22.11.2013, to demonstrate that no record of investigation was sent to the sanctioning authority apart from the SP's report dated 24.05.2002. Further, reliance was placed on the affidavit dated 03.11.2007 of the then Finance Minister before the Special Judge and the statement of the Special Public Prosecutor before the Special Judge on 11.07.2007 conceding that no record of investigation was sent to the sanctioning authority before grant of sanction order dated 26.11.2002.

9. Mr. Jethmalani, learned Senior Counsel for the petitioner has invited my attention to the order dated 21.01.2003 passed by this Court whereby it directed the learned Special Judge, CBI, Delhi to decide the application of discharge filed on behalf of the petitioner, as well as the question of validity of the sanction, as expeditiously as possible, to urge that the learned Special Judge, CBI, Delhi fell into error in framing charges, without examining the said questions as to whether the sanction order dated 21.06.2002 was rendered invalid, as a consequence of the omission on the part of the Competent Authority to consider the relevant documents.

10. Mr. Jethmalani, learned Senior Counsel appearing on behalf of the petitioner has also invited the attention of this Court to the notings made by the Ministry of Finance, Department of Revenue in its reference bearing F.No.16/1/99-Ad.ED dated 01.10.2014considering the opinion of the Ministry of Law & Justice dated 05.04.2011, invalidating the sanction orders dated 21.06.2002 and 26.11.2002. It is submitted that the aforementioned notings are further endorsed by the CVC in its Office Memorandum dated 13.04.2015 and the letters of the PMO dated 19.02.2015 and 18.04.2015 requesting the Department of Revenue to afford a personal hearing to the petitioner.

11. In order to substantiate the afore-stated submissions, reliance has been placed on the decisions of the Hon'ble Supreme Court in ***State of Tamil Nadu* vs. *M. M. Rajendran***, reported as **(1998) 9 SCC 268** and ***Mansukhlal V. Chauhan* vs. *State of Gujarat***, reported as **AIR 1997 SC 3400.**

12. Mr. Jethmalani, learned Senior Counsel appearing on behalf of the petitioner would urge that the issue as to whether the sanction granted by the Competent Authority to prosecute the petitioner was valid or otherwise ought to have been determined by the Special Judge, CBI, Delhi at the time of taking cognizance, in terms of the provisions of Section 19(1) of POCA and, therefore, the Special Judge, CBI, Delhi failed to discharge the duty required by law in omitting to determine the said issue at the time of framing of charge in RC No.SI8 E0001 1999. Mr. Jethmalani, learned Senior Counsel would then urge that the Special Judge, CBI, Delhi was duty bound to determine the question of validity of sanction along with the application of discharge in terms of the directions passed by this Court in the present petition by way of order dated 21.01.2003.

13. Mr. Jethmalani, learned Senior Counsel would also urge that in terms of the provisions of Section 19(1) of POCA, which is a jurisdictional provision, no cognizance could have been taken at all by the Special Judge, CBI in the absence of a valid sanction. It was further urged that the provisions of Section 19 of the POCA specifically provide for consideration of the issue as to whether the sanction is valid or not at the following stages:-

(a) *Firstly*, under the provisions of Section 19(1) POCA where the court takes cognizance of the offence punishable under Sections 7,10,11,13 and 15, alleged to have been committed by a public servant, at which juncture the absence of a valid sanction operates as a complete bar.

(b) *Secondly*, at a stage consequent upon a finding, sentence or order passed by the Special Judge, CBI when it is assailed in any appeal, confirmation or revision, instituted by the person aggrieved by the order of conviction and sentence under the provisions of POCA.

14. Mr. Jethmalani, learned senior counsel would urge that it is only at the second stage as aforementioned that the court adjudicating the appeal, confirmation or revision has to determine whether a failure of justice has occasioned on account of any error, omission or irregularity in the grant of sanction.

15. Mr. Ram Jethmalani, learned Senior Counsel appearing on behalf of the petitioner would then urge that in fact sub-Section (4) of Section 19 of POCA also requires the Court to consider in every such appeal, confirmation or revision the fact as to whether the objection should and could have been raised at an earlier stage in the proceedings. It was pointed out that as observed in the order of this Court dated 03.10.2007, the petitioner had raised the objections of validity of sanction order dated 26.11.2002 at the very initial stage i.e. even before arguments on charge could be advanced.

16. Therefore, the submissions made on behalf of the petitioner are that the Special Judge, CBI cannot take cognizance of an offence punishable under Sections 7,10,11,13 and 15 of POCA unless it has determined the validity or otherwise of a sanction for prosecution of a public servant. In this behalf reliance was placed on the decision of the Privy Council in ***Gokulchand Dwarkadas Morarka* vs. *The King***, reported as **AIR (35) 1948 PC 82.**

17. It has furthermore been urged on behalf of Mr. Jethmalani, learned Senior Counsel appearing on behalf of the petitioner that the *non-obstante* requirement in Section 19(3) of POCA relates only to the Code, as specifically stipulated therein and consequently that provision does not override the mandate of the provisions of Section 19(1) of POCA. It was argued that section 19(3) POCA is only applicable to courts exercising revisional or appellate jurisdiction and the Special Judge is not bound by the requirement to look into 'failure of justice' under section 19(3) POCA. It was therefore submitted that the Special Judge while passing the impugned order dated 24.05.2014, lost sight of the bar to take cognizance under Section 19(1) POCA, in the absence of a valid sanction, and that the Special Judge erroneously applied the principle as contained in the provisions of Section 19(3) POCA in this behalf.

18. In order to buttress his submissions, Mr. Jethmalani, learned Senior Counsel has referred to the decision of the Supreme Court in ***Nanjappa vs. State of Karnataka,*** reported as **2015 (8) SCALE 171**, to urge that the order of the Special Judge dated 24.05.2014 is bad in law so far as it delves into the question of 'failure of justice' caused to the petitioner.

19. Mr. Jethmalani, learned Senior Counsel on behalf of the petitioner would also urge that there has been grave prejudice caused to the petitioner for the reason that the sanctioning authority was bound to consider the entire material of investigation and was prevented from doing so; and the orders on sanction dated 21.06.2002 and 26.11.2002 were passed without affording the protection under section 19(1) POCA and section 197 of the Code to the petitioner. It was also urged that a valid sanction is a pre-requisite to taking cognizance of an offence under the POCA, and since the Special Judge has taken cognizance despite there being an invalid sanction, the petitioner has been deprived of the protection provided under section 19(1) POCA. This has further caused prejudice to the petitioner. The prejudice caused to the petitioner is both legal and factual.

20. Insofar as, the threshold objection with respect to the maintainability of the present petition on the grounds that it raises disputed questions of fact on behalf of the official respondents is concerned, Mr. Jethmalani, learned Senior Counsel urged that the facts as gleaned from the documents, material and affidavits on record, led inevitably and inescapably to the conclusion that the relevant documents were not placed before the sanctioning authority, thereby, vitiating the grounds of sanction and the order dated 21.06.2002.

21. In other words, it was urged on behalf of the petitioner that since the order framing charges dated 17.12.2012 returned no finding on the validity of the order granting sanction, this Court ought to exercise its extraordinary powers under Article 226 of the Constitution of India to quash the subject Charge Sheet on the basis of the submissions afore-stated. In order to buttress this submission, reliance was placed on ***State of Haryana & Ors.* vs. *Bhajan Lal***, reported as **1992 SCC (Suppl.) 1 335**; ***Pepsi Food Ltd.* vs. *Special Judicial Magistrate & Ors.*** reported as **1998 (5) SCC 749**; ***State of***

West Bengal* vs. *Swapan Kumar Guha, reported as **1982 (1) SCC 561**; ***State of Orissa* vs. *Debendra Nath Padhi*** reported as **(2005) 1 SCC 568**.

22. Mr. Jethmalani, learned Sr. counsel appearing on behalf of the petitioner would also urge that the investigation conducted by the CBI in the subject criminal cases is tainted with *mala-fides*.

23. Further, Mr. Jethmalani, learned Senior counsel appearing on behalf of the petitioner invited the Court's attention to the *mala-fide* conduct displayed by the official respondents in not reinstating the petitioner till date despite the order dated 22.11.2013 of the Hon'ble Supreme Court in Civil Appeal No.9454/2013.

24. On the contrary, Mr. Sanjeev Narula, learned Central Government Standing Counsel and Mr. Sanjeev Bhandari, learned Special Public Prosecutor appearing on behalf of the Union of India and the CBI respectively would urge that the present writ petition under Articles 226/227 of the Constitution of India is not maintainable as it raises disputed questions of facts. In order to strengthen this submission, reliance was placed on ***Union of India* vs. *T.R. Verma***, reported as **(1958) SCR 499**, ***K.K. Das Chouhary* vs. *State of West Bengal***, reported as **(1972) 2 SCC 420** and ***State of Bihar* vs. *P.P. Sharma***, reported as **(1992) Suppl. 1 SCC 222**.

25. Learned counsel on behalf of the official respondents would then urge that this Court cannot look into the validity of the order granting sanction at this stage and that question can only be determined after evidence is adduced during trial. Reliance was placed on the decision of the Hon'ble Supreme Court in ***State of Maharashtra vs. Mahesh G. Jain*** reported as **(2013) 8 SCC 119.**

26. Furthermore, learned counsel appearing on behalf of the official respondents, based on the assumption that the relevant documents were placed before the sanctioning authority and were duly examined by it, would urge that the orders granting sanction dated 21.06.2002 and 26.11.2002 were valid.

27. The issues raised in the present writ petition were crystallized by the Hon'ble Supreme Court of India in Criminal Appeal No.353/2007 vide order dated 15.03.2007 had directed as follows:-

> "When the matter was heard on 12.03.2007, we requested the learned Additional Solicitor General to place before us the notings made on the file on 18.06.2005, 27.12.2005 and 15.01.2007 for our perusal and for issuing further directions. Accordingly, the relevant file was placed before us. We perused the file, in particular, the observations made on 18.06.2005 (page 55 of the file), 17.12.2005 (page 57 of the file) and 15.01.2007 (page 59-64 of the file) by the Hon'ble Minister of Finance. Since the writ petition is pending, we request the High Court to peruse these notings and the observations made by the Hon'ble Finance Minister and

> thereafter issue appropriate directions to the parties to the action. Since the challenge is pending consideration before the High Court, we request the High Court to take up both the issues of maintainability and the validity of sanction for the prosecution simultaneously and decide the same on merits and in accordance with law and after affording opportunity to the parties to the action."

28. In view of the foregoing, the issues that require adjudication and determination in the Writ Petition (Criminal) No.1401/2002 are:-

(i) Whether the present petition is maintainable under Articles 226/227 of the Constitution of India in view of the assertion made on behalf of the official respondents to the effect that it requires this Court to determine disputed questions of fact?

(ii) Whether the order passed by the learned Special Judge, CBI, Delhi on 17.12.2005 framing charges under Sections 120B IPC read with sections 468/469/471 IPC and Section 7 and 13(2) read with section 13(1) (d) of POCA is vitiated on account of the circumstance that the order dated 21.06.2002 granting sanction to prosecute the petitioner is non-est, void ab-initio, invalid and in violation of this Court's order dated 09.04.2002 in Writ

Petition (Criminal) No.938/2001 instituted by the petitioner herein?

29. The sole issue that arises for determination in Criminal Revision Petition No.338/2014 is whether the sanction order for prosecution dated 26.11.2002 is invalid and in violation of this Court's order in Writ Petition(Criminal) No.938/2001 instituted by the petitioner herein for non-production of relevant material as well as for want of due application of mind by the sanctioning authority?

30. For the determination of the issues raised in the present petition, it is necessary for brevity to reproduce the following statutory provisions:

(i) Section 19 of the POCA:-

"19. Previous sanction necessary for prosecution.—

(1) No court shall take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction,—

(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office.

(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;

(b) no court shall stay the proceedings under this 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;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such 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. Explanation.—For the purposes of this section,—

(a) error includes competency of the authority to grant sanction;

(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature."

(ii) Section 197 of the Code of Criminal Procedure, 1973:-

"197. **Prosecution of Judges and public servants**.

(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.

(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, Magis- trate or public servant is to be conducted, and may specify the Court before which the trial is to be held."

(iii) Section 8 of the Central Vigilance Commission Act, 2003 (hereinafter referred to as the 'CVC Act'):-

8. **Functions and powers of Central Vigilance Commission.-**

1. The functions and powers of the Commission shall be to

a. exercise superintendence over the functioning of the Delhi Special Police Establishment in so far as it relates to the investigation of offences alleged to have been committed under the Prevention of Corruption Act, 1988 or an offence with which a public servant specified in sub-section (2) may, under the Code of Criminal Procedure, 1973, be charged at the same trial;

b. give directions to the Delhi Special Police Establishment for the purpose of discharging the responsibility entrusted to it under sub-section (1) of section 4 of the Delhi Special Police Establishment Act, 1946:

Provided that while exercising the powers of superintendence under clause (a) or giving directions under this clause, the Commission shall not exercise powers in such a manner so as to require the Delhi Special Police Establishment to investigate or dispose of any case in a particular manner;

c. inquire or cause an inquiry or investigation to be made on a reference made by the Central Government wherein it is alleged that a public servant being an employee of the Central Government or a corporation established by or under any Central Act, Government company, society and any local authority owned or controlled by that Government, has committed an offence under the Prevention of Corruption Act, 1988 or an offence with which a public servant may, under the Code of Criminal Procedure, 1973, be charged at the same trial;

d. inquire or cause an inquiry or investigation to be made into any complaint against any official belonging to such category of officials specified in sub-section (2) wherein it is alleged that he has committed an offence under the Prevention of Corruption Act, 1988 and an offence with which a public servant specified in subsection (2) may, under the Code of Criminal Procedure, 1973, be charged at the same trial;

e. review the progress of investigations conducted by the Delhi Special Police Establishment into offences alleged to have been committed under the Prevention of Corruption Act, 1988 or the public servant may, under the Code of Criminal Procedure, 1973, be charged at the same trial;

f. review the progress of applications pending with the competent authorities for sanction of prosecution under the Prevention of Corruption Act, 1988;

g. tender advice to the Central Government, corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by the Central Government on such matters as may be referred to it by that Government, said Government companies, societies and local authorities owned or controlled by the Central Government or otherwise;

h. exercise superintendence over the vigilance administration of the various Ministries of the Central Government or corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by that Government:

Provided that nothing contained in this clause shall be deemed to authorize the Commission to exercise superintendence over the Vigilance administration in a manner not consistent with the directions relating to vigilance matters issued by the Government and to confer power upon the Commission to issue directions relating to any policy matters;

2. The persons referred to in clause (d) of sub-section (1) are as follows:—

a. members of All-India Services serving in connection with the affairs of the Union and Group 'A' officers of the Central Government;

b. such level of officers of the corporations established by or under any Central Act, Government companies, societies and other local authorities, owned or controlled by the Central Government, as that Government may, by notification in the Official Gazette, specify in this behalf:

Provided that till such time a notification is issued under this clause, all officers of the said corporations, companies, societies and local authorities shall be deemed to be the persons referred to in clause (d) of sub-section (1).

(iv) <u>Para 22.16 of The CBI Manual, 2005:-</u>

"22.16 On completion of investigation in cases covered in items 22.15.1 & 22.15.2 above, the CBI shall send its report to the Administrative Authority along with the relevant statement of witnesses recorded during investigation and the documents. The Supreme Court judgment in the State of Tamil Nadu v. M.M. Rajendran reported in 1999 SCC (Criminal) 1000 and the Circular No.21/33/98-PD dated 6.5.1999 issued by the policy division are also referred to in this regard."

(v) <u>Circular no.21/33/98-PD of CBI reads as follows:-</u>

"4. In view of the aforesaid judgment, it is imperative that along with the SP's Report, Branches must send the copies of all the relied upon "relevant material" including the statements of witnesses recorded by the Investigating Officer U/s 161 Cr.P.C. as well as Statements u/s 164 Cr.P.C. recorded by the Magistrate to the authority competent to grant sanction

> for prosecution. The concerned officers incharge of the case may also be deputed to produce the relevant materials for perusal by the competent authority and this fact be recorded in the case diary of the case."

31. I have heard the rival contentions of counsel appearing on behalf of the parties, examined the documents, and perused the official records placed before me in a sealed cover.

32. With regard to the first issue requiring determination i.e. the issue of maintainability, it would be necessary to collate the undisputed facts that emerge from the material on record and the submissions of the counsel on behalf of the parties:

1) A raid was in fact conducted in the office premises of Mr. Barjatya on 01.01.1998.
2) During the raid the Fax in question was recovered from the top of the Fax Machine of Mr. Barjatya.
3) Mr. Barjatya was arrested in connection therewith on 28.01.1998.
4) Mr. Barjatya sent a Fax to the Swiss Bank Corporation dated 30.01.1998(the date was allegedly mentioned wrongly) inquiring as to why the Fax in question was sent

to him, and to this the Swiss Bank Corporation replied vide relevant Fax dated 13.01.1998 stating that the Fax in question has been sent to him by mistake and was not supposed to be sent to his Fax Number. The Swiss Bank Corporation in its communication further stated that the Fax in question must have reached Mr. Barjatya due to a transmission error as it is impossible to dial so many wrong numbers.

5) Mr. Barjatya conducted a self serving investigation on his own and sent Mr. Mandeep Kapur, Chartered Accountant to Switzerland, who procured a letter from one Mr. Eric Huggenberger, an attorney of the Swiss Bank dated 17.02.1998 to the effect that the Fax in question was a forgery and was never written by the Swiss Bank Corporation. Mr. Mandeep Kapur, further procured a letter dated 20.3.1998 from the Swiss Bank, stating that Mr. Huggenberger was an authorized attorney of the former bank.

6) On a complaint instituted by Mr. Barjatya and based on the material provided by him, an investigation was conducted into the allegation that the Fax in question was forged and fabricated and had been planted by the petitioner.

7) A criminal case bearing RC No.SI8/1999/E0001 came to be registered on a 29.01.1999 under Section 120B IPC read with Sections 195/467/469/471 IPC and section 7 and 13(2) read with section 13(1)(d) POCA against 'unknown officials of Delhi Zone of Enforcement Directorate' on the basis of the complaint filed by Mr. Barjatya.

8) During investigations Mr. Abhishek Verma made a statement that he had forged and planted the Fax in question at the instance of the petitioner in lieu of the promise that he would be rewarded as an informant once the Fax in question was seized.

9) Mr. Abhishek Verma was made an approver and was tendered pardon vide order dated 07.09.2001 by the Trial

Court. The trial court further observed that in absence of the testimony of Mr. Abhishek Verma the case of the prosecution may not be proved.

10) The order granting pardon to Mr. Abhishek Verma dated 07.09.2001 was set aside by this court in Crl. M.P. 3741/2001 vide judgment and order dated 20.08.2007 on the ground that the former order was procured by suppression of material facts.

11) The Supreme Court further upheld the decision of the High Court dated 20.08.2007 in Criminal Appeal No. 1837/2013 instituted on behalf of the CBI, vide judgment and order dated 22.11.2013 and asked the trial court to look into the matter of grant of tender of pardon to Mr. Abhishek Verma, afresh.

12) Pursuant thereto, the CBI moved an application in the trial court that it does not support the case of Mr. Abhishek Verma for becoming an approver and grant of pardon in view of his criminal antecedents.

13) Mr. Abhishek Verma also moved an application dated 31.07.2014 before the learned Special Judge stating that he was coerced and threatened for life by the IO in the instant case to give a false statement against the petitioner. In view thereof, he retracted his statement u/s 164, Cr.P.C. implicating the petitioner.

14) At the instance of the CBI a LR was issued by the Competent Authority in India dated 29.01.2001 requesting the Competent Authority in Switzerland to investigate on certain questions and provide certain documents to the investigating authority in India. It is noticed that the questions posed in the LR dated 29.01.2001 are ill-directed and based on the assumption that the Fax in question is a forged one. On 27.06.2001 a reply was received from the Competent Authority in Switzerland stating that even though the Fax in question was sent by the Swiss Bank on 22.12.1997, the same was not sent to the Fax Number of Mr. Barjatya and reached the latter by mistake. The LR itself presumptuously refers

to the Fax in question as a 'forged' document, thus pre-judging the allegations levelled against the petitioner.

15) The Reply to the LR dated 27.06.2001 pertinently did not respond to the query in the LR which required the details of any other account operated by Mr. Barjatya along with other persons named in the LR. The Reply to the LR dated 27.06.2001, in turn asked for further details such as date of birth, address etc. of the persons named in the LR. The Reply to LR also did not confirm the genuineness of the letters procured by Mr. Mandeep Kaur, Chartered Accountant and relied upon by the CBI to charge the petitioner. Admittedly, no further information was sought by the Indian Authorities, and no such details were provided to the Swiss Bank Corporation as were asked for by the latter in the reply to the LR dated 27.06.2001. The reply to the LR, thus, suppresses more than it reveals.

16) On 30.10.2001 a SP's Report accompanied by a Draft Sanction Order and a list of documents and witnesses was

submitted to the sanctioning authority vide reference No. 9582/3/Cr/1(E)/99-SIU-VIII for grant of sanction of prosecution. From the perusal of the file it is seen that the Reply to LR dated 27.06.2001 although listed at Sl. No. 41 of the list of documents sent along with the SP's Report dated 30.10.2001, is not itself annexed in the file.

17) The SP's report dated 30.10.2001 finds no mention of the Reply to the LR dated 27.06.2001 or the relevant Fax dated 13.01.1998.

18) Consequently, an order granting sanction was passed by the sanctioning authority on 21.06.2002 in terms of the draft sanction order submitted to it by the CBI along with the SP's Report on 30.10.2001.

19) The sanction order dated 21.06.2002 was a verbatim copy of the draft sanction order and resultantly, finds no mention of the Reply to the LR dated 27.06.2001, or the relevant Fax dated 13.01.1998.

20) Representations dated 29.07.2002 and 13.08.2002 were made to the Revenue Secretary by the petitioner praying

for the withdrawal of sanction order dated 21.06.2002 in light of the LR and its reply by the Competent Authority in Switzerland.

21) While considering these representations the officials of the Department of Revenue noted vide reference F. No.16/1/99-Ad.I-C that from the perusal of files it was apparent that no supporting documents were sent to the sanctioning authority for its consideration.

22) The Department of Revenue sought the opinion of the Ministry of Law & Justice, and the latter tendered its opinion on 05.04.2011 vide reference bearing FTS No.167/JS&LA(MKS)/2011 stating that the sanction order dated 21.06.2002 had been issued without proper application of mind and the relevant material had not been supplied by the CBI to the sanctioning authority.

23) The Ministry of Law & Justice withdrew its opinion dated 05.04.2011 on 08.08.2011 as a result of a communication sent by the CBI vide D.O. No.8298/3/1/99(Pt file)/2011/UW IV dated 05.08.2011,

requesting the Ministry of Law & Justice to reconsider its opinion as the matter against the petitioner was subjudice.

24) However, on a communication by the CVC to the Ministry of Law & Justice vide OM No.014/ITX/016/241902 dated 20.03.2014 asking the Ministry of Law & Justice to present the entire factual matrix that led to the withdrawal of the opinion dated 05.04.2011, the Ministry of Law & Justice noted in F.No.31/2/2014-Vig dated 31.03.2014 that the opinion was withdrawn without following the proper procedure.

25) Representation dated 17.06.2014 was made to the Revenue Secretary by the petitioner praying that his representations for the withdrawal of sanction order dated 21.06.2002 be decided in light of the opinion of Ministry of Law & Justice dated 05.04.2011.

26) While considering these representations the officials of the Department of Revenue made the notings bearing reference No.F.No. 16/1/99/Ad.ED that the opinion of the Ministry of Law & Justice dated 05.04.2011 was valid

and in light of the same the order granting sanction to prosecute the petitioner dated 21.06.2002 was invalid.

27) The CVC vide its Office Memorandum bearing reference No.014/ITX/016/280 dated 13.04.2015 also opined that the order granting sanction to prosecute the petitioner dated 21.06.2002 was not in accordance with the guidelines issued by the DoP&T vide Circular dated 26.03.2015.

28) The PMO vide letter dated 19.02.2015 and 18.04.2015 directed the Department of Revenue to afford a personal hearing to the petitioner and decide his representations to the Department in light of the opinion of Ministry of Law dated 05.04.2011.

29) This Court also granted several opportunities to the official respondents to afford a personal hearing to the petitioner and render a decision on the latter's representations regarding the validity of order of sanction dated 21.06.2002 to the Department of Revenue.

The said representation has been rejected by way of order dated 07.09.2015.

30) The annexures to the SP's report dated 30.10.2001 have never been produced before this Court and have been stated to be unavailable on record although the list of evidence annexed along with the SP's report dated 30.10.2001 has been produced.

33. Moreover, it is an established position of law that under Article 226 of the Constitution of India, a High Court is not precluded from entering upon a decision on questions of fact raised in a petition to the extent that the same can be determined based on the pleadings of the parties, the admitted material placed on record by the contesting parties, the official records summoned by the court for its perusal and the submissions made by the counsel for the parties, even if the same are in dispute and do not require the taking of oral evidence. Rather, this is a matter of the discretion of the court and not a matter of jurisdiction, as has been propounded in ***State of Orissa* vs. *Miss. Binapani Dei***, reported as **(1967) 2 SCR 625**.

34. Thus, the extent of jurisdiction of the High Court under Article 226 of the Constitution of India is not confined to questions of law. This proposition is well established through a catena of decisions of the Apex Court, noticeably in the landmark decision of ***Century Spinning and Manufacturing Company Ltd. vs. Ulhasnagar Municipal Council and Anr.*** reported as **1970 (1) SCC 582**, wherein the Supreme Court set aside the order passed by High Court dismissing a petition in *limine* where relief was sought against the respondent in that case, whose actions with regard to the Century Spinning Co. were *prima facie* unjust in that case, it was observed as below:

> "8. The High Court may, in exercise of its discretion, decline to exercise its extraordinary jurisdiction under Article 226 of the Constitution. But the discretion is judicial if the petition makes a claim which is frivolous, vexatious, or prima facie unjust, or may not appropriately be tried in a petition invoking extraordinary jurisdiction, the Court may decline to entertain the petition. But a party claiming to be aggrieved by the action of a public body or authority on the plea that the action is unlawful, high-handed, arbitrary or unjust is entitled to a hearing of its petition on the merits. Apparently the petition filed by the Company did not raise any complicated questions of fact for determination, and the claim could not be characterized as frivolous, vexatious or unjust. The High Court has given no reasons for dismissing the petition in limine, and on a consideration of the averments in the petition and the materials placed before the Court we are satisfied that the Company was entitled to have its grievance against the action of the Municipality, which was prima facie unjust, tried.
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> xxxx xxxx xxxx xxxx xxxx
>
> 13. Mr Gokhale appearing on behalf of the Municipality urged that the petition filed by the Company apparently raised questions of fact which in the view of the High Court could

> not appropriately be tried in the exercise of the extraordinary jurisdiction under Article 226. But the High Court has not said so, and on a review of the averments made in the petition this argument cannot be sustained. Merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy, dilatory and expensive process by a civil suit against a public body. The questions of fact raised by the petition in this case are elementary."

35. Similarly in ***Gunwant Kaur vs. Municipal Corp, Bhatinda*** reported as **(1969) 3 SCC 769** it was held:

> "14. The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit-in-reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.

> 15. From the averments made in the petition filed by the appellants it is clear that in proof of a large number of allegations the appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under Section 4 by the Collector.
>
> 16. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the present, in our judgment, is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit-in-reply from the respondents, and should have proceeded to try the petition instead of relegating the appellants to a separate suit."

36. Following the decision of the Supreme Court in ***Gunwant Kaur*** *(supra)*, the Hon'ble Supreme Court in ***NTPC vs. Mahesh Datta*****,** reported as **(2009) 8 SCC 339,** held as follows:

> **"**39. It is not a case where oral evidence was required to be taken. There is no law that the High Court is denied or debarred from entering into a disputed question of fact. The issue will have to be determined keeping in view the fact situation obtaining in each case. If a disputed question can be determined on the basis of the documents and/or affidavit, the High Court may not ordinarily refuse to do so. In a given case, it may also examine witnesses."

37. Congruous with its earlier decision in ***Gunwant Kaur*** *(supra)*, the Supreme Court in ***ABL International Limited &Anr. vs. Export Credit***

Guarantee Corporation, reported as **(2004) 3 SCC 553**, held that where the dispute can be adjudicated upon by interpreting the meaning of the documentary evidence on record, the High Court can very well go into the question of facts and adjudicate the same.

38. In view of the afore-stated factual matrix, it emerges that there are no disputed questions of facts. The reply to the LR dated 27.06.2001 as well as the relevant Fax dated 13.01.19998 sent to Mr. Barjatya are conspicuous by their absence in the SP's Report dated 30.10.2001. It is not surprising, that the order granting sanction also does not allude to either of the afore-mentioned relevant documents, as it is a verbatim copy of the draft sanction order. The counsel appearing on behalf of the official respondents produced the original files that were sent to the sanctioning authority for the perusal of this Court. It was noticed from the file that the file only contains a list of documents and the relevant documents are not annexed therewith. On a query from the court, the counsel appearing on behalf of the official respondents conceded that the documents are not present in the file containing the SP's Report dated 30.10.2001 and justified this fact on the ground that the documents have not been retained in the file. A couplet by Daag Dehlvi is apropos to the conduct of the CBI:

"Khoobpardahaikichilman se lagebaithehain

Saafchuptebhinahin, samneaatebhinahi."

-DaagDehlvi

39. The notings of the Department of Revenue bearing reference Nos. F. No.16/1/99-Ad.I-C and F.No.16/1/99/Ad.ED, opinion of Ministry of Law & Justice dated 05.04.2011 and the CVC OM dated 13.04.2015, are clearly demonstrative of the fact that the relevant documents were not sent to the sanctioning authority, concomitantly this validates that there was no application of mind on behalf of the sanctioning authority before it granted the sanction for prosecution of the petitioner on 21.06.2002. In view thereof, there remain no disputed questions of facts, and the facts are as clear as daylight.

40. Even otherwise, in light of the decisions of the Hon'ble Supreme Court, this Court is not precluded from determining questions of fact under Articles 226/227 of the Constitution of India, since the dispute arising in the present case can be very well be determined by looking at the official documents and material on record including the pleadings of the parties.

41. Insofar as the question as to the stage at which the validity of sanction can be determined, it is noteworthy that this Court vide its order dated 21.01.2003 directed the Special Judge, Delhi to expeditiously decide the application of discharge including the issue of validity of sanction pending before it, which read as follows:

> " The application for discharge including the issue of sanction filed by the petitioner is pending before the learned Special Judge, Delhi. We direct the learned Special Judge to decide the application of discharge as expeditiously as possible.
>
> The matter is adjourned sine die with liberty to revive the petition immediately after the order is passed by the learned Special Judge.
>
> The learned Special Judge would decide the application of discharge without being influenced by the fact of pendency of this petition in this Court."

42. An order on charge was passed on 17.12.2005 by the Special Judge, CBI, Delhi in RC No.SI8 E 0001 1999 in CC No.26 of 2002, and charges were framed against the petitioner u/s 120B IPC read with sections 468/469/471 IPC and Section 7 and 13(2) read with section 13(1) (d) of POCA. It is critical to note that the Special Judge returned no findings on the validity of sanction, despite having been directed by this Court to do so by way of order dated 21.01.2003.

43. Thereafter, the order dated 21.02.2007 of this court, was challenged by of Criminal Appeal No.353/2007 before the Supreme Court of India by the official respondents. While allowing the appeal the Supreme Court by way of order dated 15.03.2007 had directed the High Court to decide the issue of maintainability as well as the issue of validity of sanction on merits.

44. This issue is also no longer *res-integra,* the Hon'ble Supreme Court in the case of ***State of Karnataka vs. C. Nagarajaswamy*,** reported as **(2005) 8 SCC 370**, held as follows:-

> "Ordinarily, the question as to whether a proper sanction has been accorded for prosecution of the accused persons or not is a matter which should be dealt with at the stage of taking cognizance. But in a case of this nature where a question is raised as to whether the authority granting the sanction was competent therefore or not, at the stage of final arguments after trial, the same may have to be considered having regard to the terms and conditions of service of the accused for the purpose of determination as to who could remove him from service. **Grant of proper sanction by a competent authority is a sine qua non for taking cognizance of the offence. It is desirable that the question as regard sanction may be determined at an early stage. But, even if a cognizance of the offence is taken erroneously and the same comes to the court's notice at a later stage a finding to that effect is permissible. Even such a plea can be taken for the first time before an appellate court.**"

Emphasis Supplied.

45. The Supreme Court, relying on ***C. Nagarajaswamy*** *(supra)* has held in ***Nanjappa vs. State of Karnataka,*** reported as **2015 (8) SCALE 171**, that what is important is that the grant of a valid sanction is essential before the court takes cognizance. The court held as follows:-

> "13. What is important is that, not only was the grant of a valid sanction held to be essential for taking cognizance by the Court, but the question about the validity of any such order, according to this Court, could be raised at the stage of final arguments after the trial or even at the appellate stage."

46. The Court relied on the earlier decisions in ***Yusofalli Mulla vs. The King*** reported as **AIR 1949 PC 264**, ***Basdeo Agarwalla vs. King Emperor*** reported as **AIR 1945 FC 16** and ***Budha Mal vs. State of Delhi***, Criminal Appeal No.17 of 1952 decided on 03.10.1952, and further went on to state that the validity of sanction affects the competence of the court to try the accused, and if the trial court proceeds despite invalidity of sanction then the proceedings before the trial court are rendered non-est. It was observed as follows:

> "6. **A plain reading of Section 19(1) (supra) leaves no manner of doubt that the same is couched in mandatory terms and forbids courts from taking cognizance of any offence punishable under Sections 7, 10, 11, 13 and 15 against public servants except with the previous sanction of the competent authority enumerated in clauses (a), (b) and (c) to sub-section (1) of Section 19. The provision**

contained in sub-section (1) would operate in absolute terms but for the presence of sub-section (3) to Section 19 to which we shall presently turn. But before we do so, we wish to emphasise that the language employed in sub-section (1) of Section 19 admits of no equivocation and operates as a complete and absolute bar to any court taking cognizance of any offence punishable under Sections 7, 10, 11, 13 and 15 of the Act against a public servant except with the previous sanction of the competent authority…

xxxx xxxx xxxx xxxx xxxx
xxxx xxxx xxxx xxxx xxxx

8. <u>In **Yusofalli Mulla's case** (supra), the Privy Council was examining whether failure to obtain sanction affected the competence of the Court to try the accused.</u> The contention urged was that there was a distinction between a valid institution of a prosecution on the one hand and the competence of the Court to hear and determine the prosecution, on the other. Rejecting the contention that any such distinction existed, this Court observed:

"The next contention was that the failure to obtain a sanction at the most prevented the valid institution of a prosecution, but did not affect the competency of the Court to hear and determine a prosecution which in fact was brought before it. This suggested distinction between the validity of the prosecution and the competence of the Court was pressed strenuously by Mr. Page, but seems to rest on no foundation. A Court cannot be competent to hear and determine a prosecution the institution of which is prohibited by law and Section 14 prohibits the institution of a prosecution in the absence of a proper sanction. **The learned Magistrate was no doubt competent to decide whether he had jurisdiction to entertain the prosecution and for that purpose to determine whether a valid sanction had been given, but as soon as he decided that no valid sanction had been given the Court became incompetent to proceed with the matter.** Their Lordships agree with the view expressed by the Federal Court in Agarwalla's case A.I.R. (32) 1945 F.C.

16 that a prosecution launched without a valid sanction is a nullity."

9. The Federal Court had in **Basdeo Agarwalla's case (supra)**, summed up the legal position regarding the effect of absence of a sanction in the following words:

"In our view the absence of sanction prior to the institution of the prosecution cannot be regarded as a mere technical defect. The clause in question was obviously enacted for the purpose of protecting the citizen, and in order to give the Provincial Government in every case a proper opportunity of considering whether a prosecution should in the circumstances of each particular case be instituted at all. Such a clause, even when it may appear that a technical offence has been committed, enables the Provincial Government, if in a particular case it so thinks fit, to forbid any prosecution. The sanction is not intended to be and should not be an automatic formality and should not so be regarded either by police or officials. There may well be technical offences committed against the provisions of such an Order as that in question, in which the Provincial Government might have excellent reason for considering a prosecution undesirable or inexpedient. But this decision must be made before a prosecution is started. A sanction after a prosecution has been started is a very different thing. The fact that a citizen is brought into Court and charged with an offence may very seriously affect his reputation and a subsequent refusal of sanction to a prosecution cannot possibly undo the harm which may have been done by the initiation of the first stages of a prosecution. Moreover in our judgment the official by whom or on whose advice a sanction is given or refused may well take a different view if he considers the matter prior to any step being taken to that which he may take if he is asked to sanction a prosecution which has in fact already been started."

10. So also the decision of this Court in **Budha Mal vs. State of Delhi** [Criminal Appeal No.17 of 1952 disposed of on 3/10/1952], this Court had clearly ruled that absence of a

valid sanction affected the competence of the Court to try and punish the accused. This Court observed:

"We are satisfied that the learned Sessions Judge was right in the view he took. Section 403 CrPC applies to cases where the acquittal order has been made by a court of competent jurisdiction but it does not bar a retrial of the accused in cases where such an order has been made by a court which had no jurisdiction to take cognizance of the case. It is quite apparent on this record that in the absence of a valid sanction the trial of the appellant in the first instance was by a Magistrate who had no jurisdiction to try him."

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xxxx xxxx xxxx xxxx xxxx

15. **The legal position regarding the importance of sanction under Section 19 of the Prevention of Corruption is thus much too clear to admit equivocation. The statute forbids taking of cognizance by the Court against a public servant except with the previous sanction of an authority competent to grant such sanction in terms of clauses (a), (b) and (c) to Section 19(1). The question regarding validity of such sanction can be raised at any stage of the proceedings. The competence of the court trying the accused so much depends upon the existence of a valid sanction. In case the sanction is found to be invalid the court can discharge the accused relegating the parties to a stage where the competent authority may grant a fresh sanction for prosecution in accordance with law. If the trial Court proceeds, despite the invalidity attached to the sanction order, the same shall be deemed to be non-est in the eyes of law and shall not forbid a second trial for the same offences, upon grant of a valid sanction for such prosecution.**"

Emphasis Supplied.

47. In the case of ***State of Goa vs. Babu Thomas***, reported as **(2005) 8 SCC 130**, the Supreme Court referred to section 19(1) POCA and laid down cognizance by a court is barred under the said provision unless there is a valid sanction backing it. The court held as follows:

> "11. …..The present is not the case where there has been mere irregularity, error or omission in the order of sanction as required under sub-section (1) of Section 19 of the Act. It goes to the root of the prosecution case. Sub-section (1) of Section 19 clearly prohibits that the Court shall not take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction as stated in clauses (*a*), (*b*) and (*c*)."

48. Similarly, in the case of ***Anil Kumar and Ors vs. M.K. Aiyappa and Anr,*** reported as **(2013) 10 SCC 705,** the Supreme Court held that the Special Judge could not have taken cognizance and ordered investigation under section 156(3) of the Code if there was no valid sanction.

49. Keeping in view the fact that this Court had remitted the question of validity of sanction to the Special Judge, CBI on an earlier occasion, and the Special Judge failed to return a finding on this issue, the order framing charges against the petitioner cannot be sustained. The Special Judge, evidently instead proceeded to frame charges against the petitioner, without looking into the question of validity of the sanction.

50. From a conspectus of the decisions of the Supreme Court as cited above the legal position that emerges is that the question of validity of a sanction must be decided as soon as it is raised and cannot be postponed to a later stage of trial, as an invalid sanction goes to the very root of the jurisdiction of the court that has taken cognizance. Considering that the cognizance taken by the Special Judge, CBI would be rendered non-est in light of section 19(1) of POCA, the dispute on validity must be adjudicated at the earliest. The soliloquy of Macbeth finds relevance here:

> *"If it were done when 'tis done, then 'twere well. It were done quickly."*
>
> *-Shakespeare, Macbeth (Scene VII)*

51. The decision of the Hon'ble Supreme Court in ***State of Maharashtra vs. Mahesh G. Jain*** *(supra)* does not come to the aid of the official respondents as the Supreme Court has categorically observed that the application of mind of the sanctioning authority must be apparent on the face of the sanction order and it is for the prosecution to prove that a valid sanction has been granted. In the instant case, the sanction order dated 21.06.2002 does not show that the sanctioning authority had perused all the relevant documents before granting the said sanction order and the official respondents have failed to show that the relevant documents were placed before the sanctioning authority.

52. It is trite to state that a sanction is a precursory sacrosanct step to initiate criminal proceedings against public officer, and the lack of a valid sanction precludes the court from taking cognizance of the an offence under section 19(1) POCA. Section 19(1) POCA affords protection to those public servants, who could get trapped in vexatious proceedings while discharge of their official functions. If this protection is not afforded to a public servant then the cognizance taken under section 19(1) POCA also stands vitiated.

53. In light of the direction of the Supreme Court dated 15.03.2007 in Criminal Appeal No.353/2007 and the decision of the Supreme Court in ***Nanjappa*** *(supra)*, this court is duty bound and empowered under its plenary powers to adjudicate on the issue of validity of the sanction order dated 21.06.2002.

54. In view of the above discussion, Issue No.(i) in Writ Petition (Criminal) No.1401/2002 is decided in favour of the petitioner and it is held that the present petition is maintainable under Articles 226/227 of the

Constitution of India. The submission made on behalf of the official respondents to the effect that this Court ought not to determine disputed questions of fact is unfounded, baseless and contrary to the record and is, therefore, categorically negated and traversed.

55. In relation to the question of validity of sanction order dated 21.06.2002, the facts that are germane are that neither the SP's Report dated 30.10.2001 nor the documents annexed therewith allude to the Reply to LR dated 27.06.2001, that evinces that the Fax in question was in fact a genuine one and backs the case of the petitioner. The notings of the officials of the Department of Revenue bearing reference Nos. F. No. 16/1/99-Ad.I-C and F.No. 16/1/99/Ad.ED, validate that this document was not sent to the sanctioning authority. The opinion of the Ministry of Finance dated 05.04.2011 also emphasizes the fact that the sanction order dated 21.06.2002 was passed without due application of mind by the sanctioning authority. The Office Memorandum of CVC dated 13.04.2015 further states that the sanction order dated 21.06.2002 was not in accordance with the guidelines laid down under the CBI Manual reiterated by the DoP&T in Circular dated 26.03.2015, wherein it is provided that the CBI has to send the entire record of investigation to the sanctioning authority to obtain sanction for prosecution against a public officer. The letter of the PMO dated 19.02.2015 also directs the Department of Revenue to decide the representation of the petitioner to the latter in light of the opinion of the Ministry of Law & Justice dated 05.04.2011.

56. In view of the directions of the Hon'ble Supreme Court of India vide order dated 15.03.2007, I have gone through the relevant notings dated 18.06.2005, 27.12.2005 and 15.01.2007 made by the then Hon'ble Finance Minister. After perusal of the same, I am of the considerate view that there is no elaborate conclusion drawn out in the said notings, which appear to have been made only after a cursory examination and the same do not come to the aid of the respondents. Hon'ble Finance Minister merely relies on the statement of the DSP (CBI) to come to a conclusion that all the relevant documents were shown to the sanctioning authority. A glaring irregularity is also noticed from these notings to the effect that the sanctioning authority who accorded sanction for prosecution was not the same as the authority, which 96ummarized96 the documents in the first instance.

57. The CBI Manual at para 22.16 stipulates that on completion of investigation, the entire record of the same must be sent to the sanctioning authority in view of the decision of the Supreme Court in ***State of Tamil Nadu* vs. *M.M. Rajendran*,** reported as **(1998) 9 SCC 268**.

58. In ***M.M. Rajendran*** *(supra),* the Supreme Court held as below:

> "1. This appeal is directed against the judgment dated 26-7-1995 passed by the Madras High Court in Criminal Appeal No. 9 of 1993. Such appeal was preferred by the respondent Mr M.M. Rajendran against the judgment of the IIIrd Additional Sessions Judge, Madras dated 18-12-1992 passed in CC No. 1 of 1991 (Crime No. 3/90 — Vigilance and Anti-Corruption Police, Madras). The respondent was a Sub-Inspector of Police, Crimes attached to Saidapet Police Station. He was convicted by the learned Sessions Judge, Madras by the said order dated 18-12-1992 for the offence under Sections 7, 13(2) read with Section 13(1)(d)(i)(ii) of the Prevention of Corruption Act and the consequential sentence passed for such offences. Before the High Court, it was alleged by the appellant that the said criminal case was not maintainable for not obtaining proper sanction required to be given by the appropriate authority for proceeding under the Prevention of Corruption Act. The trial court, however, proceeded on the footing that proper sanction was accorded by the City Commissioner of Police, Madras who was the proper authority to grant sanction against the accused. **The High Court, has come to the finding that all the relevant materials including the statements recorded by the Investigating Officer had not been placed for consideration by the City Commissioner of Police, Madras because only a report of the Vigilance Department was placed before him. The High Court has also come to the finding that although the Personal Assistant to the City Commissioner of Police, Madras has deposed in the case to substantiate that proper sanction was accorded by the City Commissioner of Police, the witness has also stated that the report even though a detailed one was placed before the Commissioner by him and on consideration of which the Commissioner of Police had accorded the sanction, it appears to us that from such deposition, it**

cannot be held conclusively that all the relevant materials including the statements recorded by the Investigating Officer had been placed before the Commissioner of Police. It appears that the Commissioner of Police had occasion to consider a report of the Vigilance Department. Even if such report is a detailed one, such report cannot be held to be the complete records required to be considered for sanction on application of mind to the relevant materials on records. Therefore, it cannot be held that the view taken by the High Court that there was no proper sanction in the instant case is without any basis. It, however, appears to us that if the sanction had not been accorded for which the criminal case could have been initiated against the respondent, there was no occasion either for the trial court or for the appeal court to consider the prosecution case on merits. Therefore, the High Court need not have made the finding on merits about the prosecution case. We make it clear that finding made by the courts on the merits of the case will stand expunged and will not be taken into consideration in future. In our view, the High Court should have passed the appropriate order by dropping the proceeding and not entering into the question of merits after it had come to the finding that the proceeding was not maintainable for want of sanction. It is, however, made clear that it will be open to the appellant-State of Tamil Nadu to proceed afresh against the respondent after obtaining necessary sanction if the State so desires. The appeal is accordingly disposed of."

(Emphasis supplied)

59. There is yet another issue that the paramount consideration for a valid sanction is 'due application of mind' by the sanctioning authority, which has been 98ummarized by the Hon'ble Supreme Court in the case of ***Mansukhlal Vithaldas Chauhan* vs. *State of Gujarat,*** reported as **(1997) 7 SCC 622** in the following words:

"19. Since the validity of "Sanction" depends on the applicability of mind by the sanctioning authority to the facts of the case as also the material and evidence collected during investigation, it necessarily follows, that the sanctioning authority has to apply its own independent mind for the generation of genuine satisfaction whether prosecution has to be sanctioned or not. The mind of the sanctioning authority should not be under pressure from any quarter nor should any external force be acting upon it to take decision one way or the other. Since the discretion to grant or not to grant sanction vests absolutely in the sanctioning authority, its discretion should be shown to have not been affected by any extraneous consideration**. If is shown that the sanctioning authority was unable to apply its independent mind for any reason whatsoever or was under an obligation or compulsion or constraint to grant the sanction, the order will be had for the reason that the discretion of the authority "not to sanction" was taken away and it was compelled to act mechanically to sanction the prosecution.**"

Emphasis Supplied.

60. The Supreme Court in its decision in ***State of Bihar and Anr. vs. P.P. Sharma, IAS and Anr***., reported as **1992 Supp (1) SCC 222** has 99ummarized on the importance of the entire investigation record to be made available to the sanctioning authority and in the sanction order the relevant facts as to the constitution of the offence must be apparent on the face of it, the court held as under:

"The sanction under Section 197Cr.P.C is not an empty formality. It is essential that the provisions therein are to be observed with complete strictness. The object of obtaining sanction is that the authority concerned should be able to consider for itself the material before the Investigation Officer, before it comes to the conclusion that the prosecution in the circumstances be sanctioned or forbidden. **To comply with the provisions of Section 197 it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is desirable that the facts should be referred to on the face of the sanction.** Section 197 does not require the sanction to be in any particular form. If the facts constituting the offence charged are not shown on the face of the sanction, it is open to the prosecution, if challenged, to prove before the court that those facts were placed before the sanctioning authority. It should be clear from the form of the sanction that the sanctioning authority considered the relevant material placed before it and after a consideration of all the circumstances of the case it sanctioned the prosecution."

Emphasis Supplied.

61. In ***State of Karnataka* vs. *Ameerjan***, reported as **2007 (11) SCC 273**, where sanction was given solely on the basis of the IG report and the material that was collected during investigation was not placed before the sanctioning authority, the Supreme Court has held that the order of the High Court holding that the sanction was illegal was proper. It was observed as follows:

"9. We agree that an order of sanction should not be construed in a pedantic manner. But, it is also well settled that the purpose for which an order of sanction is required to be passed should always be borne in mind. Ordinarily, the sanctioning authority is the best person to judge as to whether the public servant concerned should receive the protection under the Act by refusing to accord sanction for his prosecution or not.

> 10. For the aforementioned purpose, **indisputably, application of mind on the part of the sanctioning authority is imperative. The order granting sanction must be demonstrative of the fact that there had been proper application of mind on the part of the sanctioning authority. We have noticed hereinbefore that the sanctioning authority had purported to pass the order of sanction solely on the basis of the report made by the Inspector General of Police, Karnataka Lokayukta. Even the said report has not been brought on record. Thus, whether in the said report, either in the body thereof or by annexing therewith the relevant documents, IG Police, Karnataka Lokayukta had placed on record the materials collected on investigation of the matter which would prima-facie establish existence of evidence in regard to the commission of the offence by the public servant concerned is not evident.** Ordinarily, before passing an order of sanction, the entire records containing the materials collected against the accused should be placed before the sanctioning authority. In the event, the order of sanction does not indicate application of mind as (sic to) the materials placed before the said authority before the order of sanction was passed, the same may be produced before the court to show that such materials had in fact been produced."

Emphasis Supplied.

62. For the grant of sanction the Supreme Court has clearly laid down the process to be followed in the case of ***CBI* vs*. Ashok Kumar Aggarwal,*** reported as **(2014) 14 SCC 295** in the following words:

> "16. In view of the above, the legal propositions can be 101ummarized 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."

63. Similarly in the case of ***<u>P.L. Tatwal vs. State of Madhya Pradesh</u>***, reported as **(2014) 11 SCC 431** it was held as follows:

"12. The grant of sanction is only an administrative function. It is intended to protect public servants against frivolous and vexatious litigation. It also ensures that a dishonest officer is brought before law and is tried in accordance with law. Thus, it is a serious exercise of power by the competent authority. It has to be apprised of all the relevant materials, and on such materials, the authority has to take a conscious decision as to

> whether the facts would reveal the commission of an offence under the relevant provisions. No doubt, an elaborate discussion in that regard in the order is not necessary. But decision-making on relevant materials should be reflected in the order and if not, it should be capable of proof before the court."

64. In the case of ***Gokulchand Dwarkadas Morarka* vs. *The King***, (*supra*), it was pointed out that:-

> "The sanction to prosecute is an important matter, it constitutes a condition precedent to the institution of the prosecution and the Government have an absolute discretion to grant or withhold their sanction. They are not, as the High Court seen to have thought, concerned merely to see that the evidence discloses a prima facie case against the person sought to be prosecuted. They can refuse sanction on any ground which commends itself to them, for example, that on political or economic grounds they regard a prosecution of substance it is plain that the Government cannot adequately discharge the obligation of deciding whether to give or withhold a sanction without a knowledge of the facts of the case."

65. In the case of ***Jaswant Singh vs. State of Punjab,*** reported as **AIR 1958 SC 124,** the Hon'ble Supreme Court held as follows:

> "4. …It should be clear from the form of the sanction that the sanctioning authority considered the evidence before it and after a consideration of all the circumstances of the case sanctioned the prosecution and therefore unless the matter can be proved by other evidence, in the sanction itself the facts should be referred to indicate that the sanctioning authority had applied its mind to the facts and circumstances of the case."

66. In the case of ***C S Krishnamurthy vs. State of Karnataka***, reported as **(2005) 4 SCC 81**, the Supreme Court after citing the decision of ***Gokulchand Dwarkadas Morarka vs. The King,*** reported as, **AIR 1948 PC 82** held:

> "9. Therefore, **the ratio is sanction order should speak for itself and in case the facts do not so appear, it should be proved by leading evidence that all the particulars were placed before the sanctioning authority for due application of mind.** In case the sanction speaks for itself then the satisfaction of the sanctioning authority is apparent by reading the order."
>
> Emphasis Supplied.

67. In the case of ***Mohd. Iqbal Ahmed vs. State of Andhra Pradesh***, **(1979) 4 SCC 172** the Hon'ble Supreme Court has held that the onus of proving that a valid sanction has been obtained is on the prosecution. It has been held:

> "3 …..**It is incumbent on the prosecution to prove that a valid sanction has been granted by the Sanctioning Authority after it was satisfied that a case for sanction has been made out constituting the offence. This should be done in two ways; either (1) by producing the original sanction which itself contains the facts constituting the offence and the grounds of satisfaction and (2) by**

adducing evidence aliunde to show that the facts placed before the Sanctioning Authority and the satisfaction arrived at by it. It is well settled that any case instituted without a proper sanction must fail because this being a manifest difficult (sic-defect) in the prosecution, the entire proceedings are rendered void ab initio. In the instant case no evidence has been led either primary or secondary to prove as to what were the contents of the note mentioned in Exhibit P-16 which was placed before the Sanctioning Authority. The evidence of P.W. 2 or P.W. 7 is wholly irrelevant because they were not in a position to say as to what were the contents of the note which formed the subject-matter of the sanction by the Standing Committee of the Corporation. The note referred to above was the only primary evidence for this purpose. Mr. Rao Vehemently argued that although the Resolution, Exh. P-16 does not mention the facts, the Court should presume the facts on the basis of the evidence given by P.W. 2 and the order implementing sanction which mentions these facts. This argument is wholly untenable because what the Court has to see is whether or not the Sanctioning Authority at the time of giving sanction was aware of the facts constituting the offence and applied its mind for the same and any subsequent fact which may come into existence after the resolution granting sanction has been passed, is wholly irrelevant. The grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to government servants against frivolous prosecutions and must therefore be strictly complied with before any prosecution can be launched against the public servant concerned."

Emphasis Supplied.

68. In the case of ***State of Maharashtra vs. Mahesh G. Jain,*** reported as **(2013) 8 SCC 119,** the Supreme Court relied on the decision of **Mohd. Iqbal Ahmed** *(supra)* and held as follows:

> "14.1 It is incumbent on the prosecution to prove that the valid sanction has been granted by the sanctioning authority after being satisfied that a case for sanction has been made out.
>
> 14.2 The sanction order may expressly show that the sanctioning authority has perused the material placed before it and, after consideration of the circumstances, has granted sanction for prosecution..."

69. Considering the conspectus of decisions above-referred the following legal propositions can be culled out:

a) Grant of sanction is a sacrosanct act and is intended to provide safeguard to a public servant against frivolous and vexatious litigation.

b) The sanctioning authority after being apprised of all the facts, must be of an opinion that prima-facie a case is made out against the public servant.

c) Thus, for a valid sanction the sanctioning authority must be apprised of all the relevant material and relevant facts in relation to the commission of the offence.

d) This application of mind by the sanctioning authority is a sine qua non for a valid sanction.

e) The ratio of the sanction order must speak for itself and should enunciate that the sanctioning authority has gone through the entire record of the investigation. Thus, the sanction order must expressly show that the sanctioning authority has perused the material placed before it, and after considering the circumstances in the case against the public servant, has granted sanction.

f) If the application of mind by the sanctioning authority is not apparent from the sanction order itself then the burden of proving that the entire relevant record was placed before the sanctioning authority rests on the prosecution. The prosecution must establish and satisfy the court by leading evidence that the entire record of investigation was placed before the sanctioning authority.

70. In the present case, the respondents have despairingly failed to discharge the onus of proving that the sanction order dated 21.06.2002 is valid and that all the relevant documents were sent to the sanctioning authority for its perusal. None of the documents that go to demonstrate the innocence of the petitioner viz. the reply to the LR dated 27.06.2001 and the relevant Fax dated 13.01.1998 were shown to have been available to the sanctioning authority. These documents clearly and unequivocally establish that the Fax in question was in fact sent by the Swiss Bank Corporation, however, it is purported to have reached Mr. Barjatya by mistake. Resultantly, the Fax in question was a genuine one, and was not forged or fabricated as alleged by the prosecution.

71. The sanction order dated 21.06.2002 is a verbatim copy of the draft sanction order sent along with the SP's report on 30.10.2001 and illustrates non-application of mind by the sanctioning authority. I have gone through and compared the draft sanction order and the sanction order dated 21.06.2002 and it clearly appears that the sanctioning authority has given its imprimatur to the draft sanction order without applying its mind to the relevant material. The sanction order dated 21.06.2002 as well as the SP's report dated 30.10.2001 do not allude to the reply to LR dated 27.06.2001, or the relevant Fax dated 13.01.1998 sent by the Swiss Bank Corporation to Mr. Barjatya. Thus, the sanction order itself does not reflect that the afore-stated relevant documents were examined by the sanctioning authority before granting sanction for prosecution. The sanctioning authority who, purportedly went through the above-mentioned documents, as per the notings of the then Hon'ble Finance Minister, is not even the sanctioning authority that signed the sanction order dated 21.06.2002.

72. In light of the afore-stated circumstance, I am of the view that the case of the prosecution flounders when seen in light of the documents that did not form a part of the documents sent to the sanctioning authority. Therefore, it would be travesty of justice to call it a mere irregularity. There indeed has occasioned a failure of justice, of which the trial court has failed to take cognizance at the stage of framing of charges even after specific contentions were made on behalf of the petitioner in this regard. In view of the foregoing, the sanction order dated 21.06.2002 is invalid for want of due application of mind by the sanctioning authority. Consequently, the cognizance taken by the Special Judge, CBI in framing charges against the petitioner vide order on charge dated 17.12.2005 in RC No.SI8 E0001 1999 is non-est, void ab-initio, bad in law and in gross violation of the provisions of section 19(1) POCA.

73. Therefore, in view of the foregoing discussion, Issue No.(ii) raised in Writ Petition (Criminal) No. 1401/2002, is answered in the affirmative and it is held that the sanction order dated 21.06.2002 is invalid.

74. The only issue raised is Criminal Revision Petition No.338/2014 is whether the sanction order dated 26.11.2002 is invalid on account of the circumstance of failure to place the relevant documents on record as well as on account of non-application of mind by the sanctioning authority while granting the subject sanction.

75. In relation to this issue the following relevant facts may be set forth:

(1) The case bearing RC No. SI9 E0006 1999 was registered against the petitioner on 07.12.1999 u/s 13(2) read with 13(1)(e) POCA and investigations were taken up against the petitioner by the CBI.

(2) The CBI sent a SP's Report along with a cover letter and a list of documents (oral and documentary), on 24.05.2002. The cover letter stated that on the pretext that the relied upon documents are very large in quantity, the said documents were not enclosed with the SP's Report.

(3) The letter of the Joint Secretary (Revenue) to the Director General (Income Tax) dated 12.05.2004, specifically alluded to the fact that the documents relied

upon by the CBI were not sent to the sanctioning authority.

(4) In furtherance thereof, the Director General (Income Tax) (vigilance) sent a letter dated 17.05.2004 to the DIG, CBI asking for the entire record of investigation for the perusal of the Department of Revenue in order to dispose of the representations made by the petitioner to the latter.

(5) The DIG, CBI replied to the afore-mentioned letter vide letter dated 15.06.2004, and consequently denied the request of providing the entire record of investigation on the pretext that the matter on the validity of sanction dated 26.11.2002 was sub-judice. Thus, the relevant material was sought by the Department of Revenue only after the sanction order dated 26.11.2002 was passed and even thereafter, the material was not dispatched by the CBI on the ground that the matter was sub-judice.

(6) The Special PP on behalf of the official respondents on 11.07.2007 before the Special Judge, had conceded to

the fact that only the SP's Report dated 24.05.2002, which did not contain the record of investigation, was sent to the sanctioning authority.

(7) The Special Judge while determining the issue of validity of sanction also at para 31 in order dated 28.07.2007 acknowledged that the entire record of investigation was not sent to the sanctioning authority. However, the Special Judge held the sanction to be valid.

(8) The High Court vide its judgment and order dated 03.10.2007 stuck down the decision of the Special Judge dated 28.07.2007 on the issue of validity of sanction. The High Court observed on the basis of the above-stated letters, that no case diaries and documents collected during the course of the investigation, as well as statements under 161 and 164 of the Code were sent for the perusal of the sanctioning authority. The High Court directed the Special Judge to again look into the validity of sanction, and determine whether the non-

application of mind of the sanctioning authority has resulted in any 'failure of justice'. The High Court in its order dated 03.10.2007 also observed that the issue of validity of sanction had been raised at the very initial stage by the petitioner i.e. even before the arguments on charge could be advanced.

(9) The Supreme Court vide order dated 22.11.2013 in Criminal Appeal No.1838/2013 upheld the order of the High Court dated 03.10.2007 and also relied on the opinion of the Ministry of Law & Justice dated 05.04.2011 to opine that no documents collected during investigation were placed before the sanctioning authority before it granted the sanction for prosecution dated 26.11.2002.

(10) The CVC vide letter dated 13.04.2015, also observed that the sanction order dated 26.11.2002 was not in conformity of the guideline provided in the CBI Manual and reiterated by the DoP&T in Circular dated 26.03.2015.

76. In view of the afore-stated facts, it becomes crystal clear that the entire record of investigation including documents, and statements of witnesses under sections 161 and 164 of the Code, as well as the case diaries were not placed before the sanctioning authority in order for it to apply its mind before grant of sanction order dated 26.11.2002 and the said sanction order was passed only on the basis of SP's report dated 24.05.2002. In the first instance itself, the covering letter to the SP's Report dated 24.05.2002 is testament to the fact that the record of investigation in RC No.SI9 E0006 1999 was not sent to the sanctioning authority on the pretext that the investigation was very large in quantity. Further, the letter dated 12.05.2004 of the Joint Secretary (Revenue) to the Director General (Income Tax) and the letter dated 17.05.2004 of Director General (Income Tax) (Vigilance) sent to the Deputy Inspector General, CBI, expressly mention that the record of investigation was not sent to the sanctioning authority when the sanction for prosecution dated 26.11.2002 was granted. This fact is substantiated further by the decision dated 03.10.2007 of the High Court rendered in Revision Petition No.589/2007 and the decision of the Supreme Court dated 22.11.2013 in Criminal Appeal No. 1838/2013.

Therefore, the assertion in the sanction order dated 26.11.2002 that the sanctioning authority has gone through all the relevant documents before the grant of the subject sanction order is incorrect.

77. The law in this behalf has already been considered at length herein-above in adjudicating the same issue in Writ Petition (Criminal) No.1401/2002 and would apply to the facts and circumstances of the present Criminal Revision Petition No.338/2014 as well on all fours.

78. Resultantly, in view of the decisions of the Supreme Court in ***M.M. Rajendran*** *(supra)*, ***State of Karnataka vs. Ameerjan*** *(supra)*, ***CBI v. Ashok Kumar Aggarwal*** *(supra)*, and in view of para 22.16 of the CBI Manual, the sanction order dated 26.11.2002 is rendered invalid.

79. The Special Judge in its order dated 24.05.2014 lost sight of the established position of law that if the entire material of investigation is not sent to the sanctioning authority, the consequent sanction order becomes invalid on account of non-application of mind by the sanctioning authority. As observed above, a valid sanction is a *sine qua non* for initiating proceedings under POCA against a public officer. The Special Judge, CBI misdirected himself by taking recourse to section 19(3) POCA. The Special Judge overlooked the mandate that an order is bad in law if it is based on irrelevant material, or if it has failed to consider relevant material. And owing to the fact that the relevant material, (in the instant case, the entire material collected during investigation) was not placed before the Sanctioning Authority, the sanction order dated 26.11.2002 is invalid and the proceedings before the Special Judge are vitiated for want of a valid sanction as per the provisions of section 19(1) POCA.

80. In view of the foregoing, the issue raised in Criminal Revision Petition No. 338/2014 regarding the validity of the sanction order dated 26.11.2002 is invalid, void ab-initio and non-est. Consequently, the order of the Special Judge (CBI) dated 24.05.2014, impugned herein, is set aside and quashed.

81. A proper investigation into crime is one of the essentials of the criminal justice system and an integral facet of rule of law. The investigation by the police under the Code has to be fair, impartial and uninfluenced by external influences. Where investigation into crime is handled by the CBI under the Delhi Special Police Establishment Act, 1946 (hereinafter referred to as 'the DSPE Act'), the same principles apply and the CBI as a premier investigating agency is supposed to discharge its responsibility with competence, promptness, fairness, uninfluenced and unhindered by external influences. (Reference: ***Manohar Lal Sharma vs. Principal Secretary,*** reported as **(2014) 2 SCC 532**).

82. Reference can be made to the decision of the Hon'ble Supreme Court in ***P. Sirajuddin vs. State of Madras*** reported as **1970 SCC (CRI) 240** wherein it was observed as under:-

> "17. … Before a public servant, whatever be his status, is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The lodging of such a report against a person, specially one who like the appellant occupied the top position in a department, even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general."

83. In ***Manohar Lal Sharma*** *(supra)* an affidavit was filed on behalf of the Central Government elaborating its stand that the power of supervision for investigation to be conducted by the CBI has been shifted from the Government to the CVC.

84. The above stand of the Central Government is in keeping with the mandate of the provisions of Section 8 of the CVC Act, 2003 (hereinafter referred to as 'the CVC Act') stipulates that the Commission shall exercise superintendence over the functioning of the DSPE Act insofar as it relates to the investigation of offences alleged to have been committed under the

POCA or an offence with which a public servant specified in sub-Section 2 of Section 8 of the CVC Act may under the Code be charged at the same trial. The provision further stipulates that the commission shall give directions to the CBI for the purpose of discharging the responsibilities entrusted to the former under the provisions of Section 4 of the DSPE Act. Despite that the opinion of the CVC that the sanction orders dated 21.06.2002 and 26.11.2002 were invalid, has been ignored and overridden by the official respondents.

85. In ***Manohar Lal*** *(supra)* the CBI reiterated that the sole purpose for its seeking powers beyond what had been granted at this stage was to make the Director more empowered and ensure a more professional, efficient, expeditious and impartial conduct of CBI investigations in sync with its motto "industry, impartiality and integrity" and also to ensure the highest levels of disciplinary and ethical conduct by CBI personnel.

86. In ***Adesh Kumar Gupta vs. CBI*** in Writ Petition (Criminal) No.725/2015 decided on 02.09.2015 this court alluded to the luminous observations of the United States Supreme Court in ***Viteralli v. Seton,*** **359 U.S. 535: 3L.Ed. 1012** which was echoed in the landmark decision of the Hon'ble Supreme Court of India in ***R.D. Shetty vs. International Airport***

Authority of India and Ors., reported as **AIR 1979 SC 1628** that an executive agency must be rigorously held to the standards by which it professes its action to be judged.

87. In ***Adesh Kumar Gupta*** *(supra)* this Court further observed in para 20 of the report that "*It requires no reiteration that observance of due process of law is fundamental in the effective functioning of the executive machinery. The Supreme Court, since 1950, in the celebrated decision in* ***A.K. Gopalan vs. State of Madras,*** *reported as* ***AIR 1950 SC 27*** *has emphasized and re-emphasized the importance of following due process. The CBI is a premier investigating agency professing high standards of professional integrity and must be held strictly to those standards."*

88. In ***Zahira Habibulla H. Sheikh and Another vs. State of Gujarat and Others*** reported as **(2004) 4 SCC 158** the Hon'ble Supreme Court considered how justice itself can become a victim if the investigation is not fair. The Court in paragraph 18 of the report expressed thus:-

> "18. ..... When the investigating agency helps the accused, the witnesses are threatened to depose falsely and the prosecutor acts in a manner as if he was defending the accused, and the court was acting merely as an onlooker and when there is no fair trial at all, justice becomes the victim."

89. In ***State of Haryana vs.Bhajan Lal,*** reported as **1992 Supp (1) SCC 335**, the Supreme Court listed numerous categories where the High Court is entitled to exercise its extraordinary powers under Article 226 of the Constitution of India or inherent power under section 482 of the Code to secure the ends of justice and to prevent abuse of process of any court. One of the numerous categories listed by the Supreme Court reads as follows:

> "(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

90. In this background, I am compelled to comment on the manner in which the investigation in the subject case has been carried out. The investigation smacks of intentional mischief to misdirect the investigation as well as withhold material evidence which would exonerate the petitioner. These proceedings asseverate to be a glaring case of *suggestion falsi, suppresio veri* (Suppression of the truth is [equivalent to] the expression of what is false), and hence *mala fide*. It does not seem to be merely a case of faulty investigation but is seemingly an investigation coloured with motivation or an attempt to ensure that certain persons can go scot free. (Ref: ***Dayal Singh & Ors vs. State of Uttranchal,*** reported as **(2012) 8 SCC 263**). The above conclusion can be gathered from the following facts:

a) In view of the backdrop that the subject criminal cases came to be registered only after representations were sent by the petitioner against his seniors to the Revenue Secretary, and clarification was sought by the Revenue Secretary from those seniors.

b) Mr. Barjatya, whose premises were raided on 01.01.1998 and a debit advice from the Swiss Bank was recovered from his Fax machine, was not prosecuted at all for the reasons best known to the CBI.

c) Furthermore, the CBI relied upon the documents provided by Mr. Mandeep Kapur, Chartered Accountant of Mr. Barjatya obtained from Mr. Eric Huggenberger, attorney of the Swiss Bank Corporation, to prove a case against the petitioner, who had conducted the said raid. In the reply to LR dated 27.06.2001, the Swiss Bank Corporation did not confirm the authenticity of the above-mentioned letter. The CBI did not further inquire into the same. Such a procedure of investigation is unheard of and gives rise to a reasonable suspicion with respect to the intentions of the investigating agency.

d) The conduct of the CBI brings to mind a paraphrase of the often quoted aphorism by George Orwell:

> *"All [men] are equal, but some are more equal than the others."*
>
> *-George Orwell, Animal Farm*

e) The Swiss Bank Corporation in its Reply to the LR dated 27.06.2001 had asked for further details of Mr. Barjatya and other persons named in the LR, like date of birth, address, etc. to verify if they operate any account in the former bank. That was not done for reasons best known to the official respondents. The reply to the LR dated 27.06.2001 also did not confirm about the genuineness of the letter obtained by Mr. Mandeep Kapur, Chartered Accountant of Mr. Barjatya from Mr. Eric Huggenberger, attorney of the Swiss Bank Corporation. The CBI made no further inquiries in relation to any account of Mr. Barjatya in the Swiss Bank Corporation, nor did it confirm the genuineness of the afore-stated letter obtained by Mr. Mandeep Kapur, Chartered Accountant.

f) It is noticed that the CBI had sent a letter to the Law Secretary vide D.O. No.8298/3/1/99(Pt file)/2011/UW IV dated 05.08.2011 wherein he was asked to reconsider his opinion dated 05.04.2011, and it is only after this that the former withdrew his opinion without following proper procedure as is evident from the letter of Ministry of Law & Justice bearing reference F.No.31/2/2014-Vig dated 31.03.2014.

g) As has been observed above, the investigating agency also did not send the Reply to LR dated 27.06.2001 and the relevant Fax from the Swiss Bank dated 13.01.1998 sent to Mr. Barjatya. These documents clearly establish that the Fax in question was a genuine fax and establish the innocence of the petitioner *qua* the charges of fabricating the Fax in question.

h) The investigation record in RC No.SI9 E0006 1999 was not sent to the sanctioning authority before it granted the sanction dated 26.11.2002. The act of not placing relevant material before the sanctioning authority itself amounts to *mala-fide*.

i) The entire case of the CBI rested on the testimony of Mr. Abhishek Verma, the approver in the instant case, who vide his application dated 31.07.2014 had retracted his statement and stated that he had made the earlier statement under coercion and threat from the Investigating Officer in the instant case. The testimony of Mr. Abhishek Verma as opined by the learned Special Judge vide its order on approver dated 07.09.2001 is the basis of the allegations against the petitioner in RC No.SI8 E0001 1999. The official respondents themselves later assert that Mr. Abhishek Verma has criminal antecedents and is admittedly not creditworthy.

j) The opinion of the CVC dated 13.04.2015 were also not acted upon promptly by the CBI, despite the CVC being the supervising body for the CBI.

k) It is further noticed from the order of the CAT dated 16.12.2011 that the respondents have continuously opposed the application for the revocation of the suspension of the petitioner from service.

l) The opinion of Ministry of Law and Justice dated 05.04.2011 was also revoked consequent to a letter by the CBI vide D.O.

No. 8298/3/1/99(Pt file)/2011/UW IV dated 05.08.2011 to the Law Secretary, requesting him to reconsider his opinion.

91. In view of the foregoing, the substratum and the gravamen of the Charge against the petitioner in R.C. No.SI8 E 00011999 founders is denuded and without any substance whatsoever.

92. A couplet by Kaif Bhopali is apposite:

"Janab-e-'kaif' yeh Dilli hai 'Mir' o 'Ghalib' ki,

Yahan Kisi Ki Taraf-dariyan Nahin Chaltin."

-Kaif Bhopali

93. Accordingly, the present petitions are allowed. No costs.

94. The orders granting sanction dated 21.06.2002 and 26.11.2002 passed by the Competent Authority, Department of Revenue, Ministry of Finance, Government of India; the Charge Sheet in RC No.SI8 E0001 1999 submitted by the CBI in the Court of the Special Judge, CBI, Delhi dated 28.06.2002; the order on charge dated 17.12.2005 in R.C. No.SI8 E0001 1999 in CC No.26 of 2002 passed by the Special Judge, CBI, Delhi; and the order of the Special Judge, CBI dated 24.05.2014 in RC No. SI9 E0006 1999 in CC No.

55/02 are hereby set aside and quashed. All the pending applications also stand disposed of.

95. The original records have been perused and the same be sealed and returned to the Department of Revenue, Ministry of Finance.

96. The petitioner has suffered great prejudice since 1998 on account of the prolonged litigation between him and the official respondents. He has endured suffering, humiliation and considerable trauma. A sense of dubiety has persisted *qua* the petitioner since long which reminds one of the lyrics in the famous song by Bob Dylan:

"How many roads must a man walk down

Before you call him a man?"

97. Normally, the case would have been remitted back to the sanctioning authority for reconsideration on a fresh order of sanction. However, in the circumstance that the instant case commenced as far back as in 1998 and eighteen years have since lapsed; and in the light of the decision of the Supreme Court in ***Mansukhlal Vithaldas Chauhan vs. State of Gujarat*** *(supra)*, in my opinion it would be unfair, unjust and contrary to the interests of justice to expose the petitioner to another round of litigation and keep him on trial for an indefinitely long period. It would also offend the principle enshrined in the provisions of Article 21 of the Constitution of India. A quietus must be applied to the present proceedings. Thus, in the interest of justice, finality is given to these proceedings and it is directed that no further proceedings in relation to the subject sanction orders be initiated against the petitioner.

SIDDHARTH MRIDUL, J

JANUARY 13, 2016
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