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

Judgment delivered on: 29th March, 2016

+ **CRL.M.C. 2223/2011**

RAMNISH & ANR.

..... Petitioners

Represented by: Mr. Mohit Mathur, Senior Advocate with Mr. Madhav Khurana and Ms. Richa Narain, Advocates.

Versus

CBI & ORS.

..... Respondents

Represented by: Ms.Sonia Mathur, Standing Counsel for R1/CBI.
Mr.Rakesh Kumar Khanna, Senior Advocate with Mr.Naveen Malhotra, Mr.Aman Vachhar, Mr. Harsh Prabhakar & Mr.Anirudh Tanwar, Advocates for R2.
Mr. Rajesh Mahajan, ASC for R3/State.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. Vide the present petition filed under Section 482 of the Code of Criminal Procedure, 1973, (hereinafter referred as Cr P C) petitioners seek directions thereby quashing the order dated 11.01.2005 whereby they have been summoned in Crl. Complaint Case No.329/2001 pending before the Trial Court for the offences punishable under Sections 323/427/448 of the IPC.

2. The brief facts of the case are that on 29.01.1999, case FIR No.RC-

S-18-99-E0001 was registered by CBI against some unknown persons. On 04.03.1999, searches were conducted by petitioner no.1, the investigating officer of the case at the premises of respondent no.2 Ashok Kumar Aggarwal. On 17.09.1999, preliminary enquiry in respect of disproportionate assets alleged to have been accumulated by respondent no. 2 was registered. Thereafter on 07.12.1999, case FIR NO.RC-S-19-99-E0006 was registered against respondent no.2 for amassing disproportionate assets to his known sources of income to the tune of Rs.40.00 Lac. Upon culmination of the investigation, chargesheet was filed against respondent no.2, wherein the total disproportionate assets of respondent no.2 were assessed about Rs.12 Crores, which was 7500% of his known sources of income.

3. On 19.10.2000, respondent no. 2 was arrested as he did not respond to the notice under Section 160 Cr.P.C. issued by the petitioners. He remained in CBI custody from 19.10.2000 to 23.10.2000 and in judicial custody from 23.10.2000 to 27.11.2000. On 30.07.2001, respondent no. 2 filed a Civil Contempt Petition on. 336/2001 before this Court *inter alia* submitting therein that the guidelines laid down by the Supreme Court in the case of **Dilip K. Basu v. State of West Bengal: AIR 1997 SC 3017** had not been complied with at the time of his arrest. However, the said Contempt was dismissed by this Court vide order dated 28.08.2003. Thereafter, respondent no. 2 filed an SLP, same was also dismissed vide order dated 16.04.2004.

4. During the pendency of the aforementioned Contempt Petition, respondent no. 2 filed a Criminal Complaint No.329/2001 before the Chief Metropolitan Magistrate, Tis Hazari, Delhi, wherein vide order dated Crl.M.C. 2223/2011

11.01.2005, ld. MM issued summons against the petitioners for the offences punishable under Sections 323/427/448 IPC. Thereafter, respondent no.2 filed a Crl. Revision Petition no. 27/2007 on the ground that the ld. Trial Court did not issue summoning order against the petitioners for the offences punishable under Sections 218/166/343/120B IPC.

5. Mr. Mohit Mathur, ld. Sr. Counsel appearing on behalf of the petitioners submitted that complaint in question is a patent abuse of process of law on the ground that the allegations on which the summons have been issued have already been dealt by this Court in the Contempt Petition filed by respondent no.2. However, respondent no.2 never informed or brought to the notice of ld. CMM this fact which itself demonstrates that the said complaint was an abuse of process of law and malafide and instituted with the objective of wrecking vengeance upon the petitioners.

6. The petitioners being officers of the investigating team were discharging their duty and if any obstruction come in between, they are empowered to remove it. The petitioners are protected under Section 197 Cr.P.C. and Section 140 of Delhi Police Act. Respondent no.2 in his complaint has admitted that the alleged offence was committed by the petitioners while conducting raid at his residence. He had also taken up a plea of the conspiracy; however, the same has been rejected by the Revisional Court. Since, the issue raised in the complaint has already been decided, therefore, the rule of estoppel apply in the present case.

7. Mr.Mathur, submitted that as per Section 46 (2) of Cr.P.C. if any

person, who is to be arrested, forcibly resists the endeavour to arrest him or attempts to evade the arrest, the arresting officer may use all means necessary to effect the arrest. When the petitioners reached at the residence of respondent no. 2, he did not open the door and were seen moving with the files along with his brother. Therefore, having no option the petitioners broke open the sliding door of the house and entered accordingly. The respondent no.2 was arrested on 19.10.2000 and the MLC was conducted on 21.10.2000. On the date of arrest there were no allegations of assault made by the respondent no. 2 before the Doctor conducting the MLC.

8. As per Section 425 IPC while causing mischief, there must be intention behind that. In the present case, petitioners were discharging their official duty. Therefore, they had no intention to cause any injury or mischief. In *Panchnama* dated 19.10.2000, it is clearly mentioned that respondent no. 2 and his brother Vijay Kumar Aggarwal were seen moving inside the house with some files, but they were not opening the door. Petitioners reached at the residence of respondent no. 2 at 5 AM and waited till 5.30 AM. But due to the aforesaid reasons, they made force entry into the house by breaking the sliding door of the drawing room of the respondent no.2. In the said raid 16 incriminating documents / articles were recovered, which were mentioned in the aforesaid *Panchnama*. Moreover, in the said *Panchnama* it is clearly mentioned that during the search neither any bodily harm was caused to anybody nor any destruction of property was caused. The search was closed at 8.45 PM and respondent No.2 was produced before the Doctor. If the petitioners had done anything in performing their official duty, then the cognizance against them could not have been taken without prior sanction under Section 197 Cr.P.C.

Moreover, the petitioners are protected under Section 140 of Delhi Police Act. Thus, the impugned summoning order is illegal and without jurisdiction.

9. To strengthen his arguments, Id. Counsel has relied upon a case of ***D.T. Virupakshappa v. C. Subhash: AIR 2015 SC 2022*** wherein the Apex Court observed as under:

“5. The main contention of the Appellant is that the learned Magistrate could not have taken cognizance of the alleged offence and issued process to the Appellant without sanction from the State Government Under Section 197 of Code of Criminal Procedure, and that on that sole ground, the High Court should have quashed the proceedings.

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7. In the case before us, the allegation is that the Appellant exceeded in exercising his power during investigation of a criminal case and assaulted the Respondent in order to extract some information with regard to the death of one Sannamma, and in that connection, the Respondent was detained in the police station for some time. Therefore, the alleged conduct has an essential connection with the discharge of the official duty. Under Section 197 of Code of Criminal Procedure, in case, the Government servant accused of an offence, which is alleged to have been committed by him while acting or purporting to act in discharge of his official duty, the previous sanction is necessary.

8. The issue of 'police excess' during investigation and requirement of sanction for prosecution in that regard, was also the subject matter of State of Orissa through Kumar Raghvendra Singh and Ors. v. Ganesh Chandra Jew: (2004) 8 SCC 40, wherein, at paragraph-7, it has been held as follows:

7. The protection given Under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences

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

(Emphasis supplied)

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10. In our view, the above guidelines squarely apply in the case of the Appellant herein. Going by the factual matrix, it is evident that the whole allegation is on police excess in connection with the investigation of a criminal case. The said

offensive conduct is reasonably connected with the performance of the official duty of the Appellant. Therefore, the learned Magistrate could not have taken cognizance of the case without the previous sanction of the State Government. The High Court missed this crucial point in the impugned order.”

10. Further relied upon a case of **Mr. N.K. Ganguly v. Central Bureau of Investigation, New Delhi : (2016) 2 SCC 143**, wherein the Apex Court observed as under:

“25. Reliance was further rightly placed by the learned senior Counsel on the decision of a constitution bench of this Court in the case of Matajog Dobey v. H.C. Bhari: AIR 1956 SC 44, which pertained to an income tax investigation. It was alleged by the Appellant therein that while conducting a search, the officials of the income tax department had forcibly broke open the entrance door of the house and interfered with the boxes and drawers of the tables. It was also alleged by the Appellant therein that the officials tied him and beat him up. Upon an enquiry of the said complaint, the magistrate came to the conclusion that a prima facie case had been made out and issued process. During the course of trial, the issue pertaining to want of sanction was urged. This Court held as under:

15.....Article 14 does not render Section 197, Code of Criminal Procedure ‘ultra vires’ as the discrimination is based upon a rational classification.

Public servants have to be protected from harassment in the discharge of official duties while ordinary citizens not so engaged do not require this safeguard.

(Emphasis supplied)

On the other hand, ordinary citizens not so engaged do not require this safeguard. It was further observed that:

15.Whether sanction is to be accorded or not, is a matter for the Government to consider. The absolute power to accord or withhold sanction on the Government

is irrelevant and foreign to the duty cast on that Court which is the ascertainment of the true nature of the act.

The Court finally summed up the result of the discussion as follows:

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

(Emphasis supplied)”

11. Ld. Sr. Counsel further submitted that if in performing official duty, an officer acted in excess of his duty and there is a reasonable connection between the act and the performance of official duty, the excess will not be a sufficient ground to deprive the public servant of the protection. In the present case, the petitioners were performing their duty but when the respondent no. 2 did not allow them to perform their duty, they used force and broke open the sliding door of the drawing room of the respondent no. 2 and entered in the house.

12. Ld. Sr. Counsel submits that in the case of **Anil Kumar and Ors. v. M.K. Aiyappa and Anr.: 2013 10 SCC 705**, the Apex Court observed that once it is noticed that there was no previous sanction, the Magistrate cannot order for investigation against the public servants while invoking powers under Section 156 (3) Cr.P.C. Ld. Sr. Counsel has relied upon a case of **Mukesh Kumar v. State : 2012 1 JCC 457**, wherein this Court observed as under:

“29. Section 140 of Delhi Police Act bars firstly, the prior sanction is required. Secondly, the prosecution or suit shall not be entertained more than 3 months after the date of act complained of. In proviso of 140 (1), it is provided that even in

a case, if the previous sanction of the Administrator has been taken, in that case even the prosecution against such person may be entertained only within one year from the date of the offence.”

13. On the similar issue, Id. Sr. Counsel further relied upon the dictums of this Court in the cases of **Z.U. Siddiqui v. Bal Kishan Kapoor and Ors.:** 2005 82 SRJ 646 and **Kiran Bedi v. NCT of Delhi and Anr. :** 89 (2001) DLT 289.

14. Ld. Sr. Counsel submitted that once all the allegations have been dealt by this Court in the Contempt Case mentioned above, therefore, on the same facts of the allegations, the complaint of respondent No.2 cannot be entertained. Therefore, there cannot be any justification whatsoever to launch a criminal prosecution on the basis of same allegations afresh. It becomes paramount duty of the Court to protect an apparently innocent person, not to be subjected to prosecution on the basis of wholly untenable complaint.

15. On the issue of estoppels, Id. Counsel for the petitioners has heavily relied upon a case of **Ravinder Singh v. Sukhbir Singh and Ors.:** AIR 2013 SC 1048 wherein it is observed as under:

“25. The High Court has dealt with the issue involved herein and the matter stood closed at the instance of Respondent No. 1 himself. Therefore, there can be no justification whatsoever to launch criminal prosecution on that basis afresh. The inherent power of the court in dealing with an extraordinary situation is in the larger interest of administration of justice and for preventing manifest injustice being done. Thus, it is a judicial obligation on the court to undo a wrong in course of administration of justice and to prevent continuation of unnecessary judicial process. It may be so necessary to curb the menace of criminal prosecution as an instrument of

operation of needless harassment. A person cannot be permitted to unleash vendetta to harass any person needlessly. Ex debito justitiae is inbuilt in the inherent power of the court and the whole idea is to do real, complete and substantial justice for which the courts exist. Thus, it becomes the paramount duty of the court to protect an apparently innocent person, not to be subjected to prosecution on the basis of wholly untenable complaint.”

16. Ld. Sr. Counsel further submitted that respondent no. 2 had filed a complaint case on the allegations that the petitioners had committed contempt of Court by violating the directions of the Supreme Court issued in the case of **D.K. Basu (Supra)**, however after due deliberations and hearing both the parties at length, the contempt filed by the respondent no. 2 was dismissed. He neither mentioned this fact in his complaint nor in his deposition before the Trial Court and even not at the time of issuing summons against the petitioners. Thus, the said complaint is full of suppression of facts and deserves to be dismissed and any order consequent to that is perverse and illegal.

17. To strengthen his arguments on this issue, ld. Sr. Counsel has relied upon a case of **General Manager, Haryana Roadways v. Jai Bhagwan : (2008) 4 SCC 127** wherein it is observed as under:

“13. Suppression of material fact is viewed seriously by the Superior Courts exercising their discretionary jurisdiction. In S.J.S. Business Enterprises (P) Ltd. v. State of Bihar and Ors.:AIR2004SC2421, this Court on suppression of fact held:

13. As a general rule, suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. This rule has been evolved out of the need of the Courts to deter a litigant from abusing the process of Court by deceiving it. But the suppressed fact must be a material one in the sense that had it not been suppressed

it would have had an effect on the merits of the case.

The said observation was quoted with approval by one of us in Arunima Baruah v. Union of India (UOI) and Ors.: (2007) 6 SCC 120, wherein the question which was raised was: How far and to what extent suppression of fact by way of non- disclosure would affect a person's right of access to justice? The court notices that so as to enable it to refuse to exercise its discretionary jurisdiction, the suppression must be of material fact. What would be a material fact, suppression whereof would disentitle the Appellant to obtain a discretionary relief, would depend upon the facts and circumstances of each case.

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15. Had the aforementioned facts been brought to the notice of this Court, the Special Leave Petition might have been dismissed summarily. Even delay in filing the same might not have been condoned. The Court was not required to waste so much of time when the State itself had, for all intent and purport, accepted the award.”

18. On the other hand, Mr.Rakesh Kumar Khanna, learned Senior Counsel appearing on behalf of respondent no.2 submitted that respondent no.2 had been posted as Deputy Director of Enforcement (Delhi Zone) on 06.11.1996 where he dealt with the investigation of highly sensitive cases pertaining to influential persons under Foreign Exchange Regulation Act, 1973. Based upon concrete information, a search was conducted by the officials of Enforcement Directorate at the residential and business premises of a notorious hawala dealer, namely, Subhash Barjatya on 1.1.1998 which resulted in seizure of incriminating documents including a debit advice received by him on his fax machine installed in his office. According to the said advice US\$ 1.5 lacs had been transferred through hawala channel from the account of one Royale Foundation, Swiss Bank Corporation, Zurich, Switzerland to the account of one S.K. Kapoor, HSBC Hongkong. Subhash Barjatya made a complaint that the said debit

advice had been planted by ED officers during the course of search. Based upon the said complaint a case FIR No. S-18/E0001/99 dated 29.01.1999 was registered by CBI against 'unknown officers' of Enforcement Directorate and the investigation of the case was carried out by petitioner no.1 who was at that time Deputy Superintendent of Police, CBI.

19. During the course of investigation, a search was carried out by the said officer at the residence of respondent no.2 on 04.03.1999 resulting in seizure of his income tax and wealth tax returns as well as of his family members along with their passports.

20. Respondent no.2 was called many times by petitioner no.1 in CBI office and complete details of income and expenses along with documents were furnished to him. However, in order to falsely implicate respondent no.2, petitioner no.1 recommended to Vinod Pandey, petitioner no.2 on 17.09.1999 for registration of preliminary enquiry for disproportionate assets of Rs.8.38 Lac against respondent no.2 during check period between 01.04.1989 to 04.03.1999. While computing said disproportionate assets petitioner no.1 curiously included all the expenses prior to check period, i.e., 01.04.1989, but did not include his income prior to 01.04.1989. Had he included the income prior to aforesaid date, there was no case of registration of any preliminary enquiry. Moreover, while computing the expenses, the petitioner no.1 even added cost of property which the respondent no.2 had purchased even before joining the service on 17.12.1985. The said preliminary enquiry was converted into FIR No.S-19/E0006/1999 on 07.12.1999. In order to harass respondent no.2, a charge-sheet was filed by petitioner no.2, IO of the case on 5.12.2002 by clubbing the assets belonging to the family members of respondent no.2 in

his hands despite the facts that the said assets had already been assessed by income tax department in their respective hands for years together.

21. Ld. Senior Counsel further submitted that during the investigation of FIR in question, i.e., S-19/E0006/1999, respondent no.2 was examined by petitioner no.2 on 20 occasions between 3.2.2000 to 8.5.2000. Details of the visits of respondent no.2 to the office of petitioner no.2 is annexed at annexure X-2 at Page 221. Thereafter, respondent no.2 was not summoned at all since all the requisite information/documents had already been furnished by him. The respondent no.2 was under deemed suspension and during such period he was illegally transferred to Kolkata. The said order of transfer as well as his deemed suspension order were challenged by him before the Central Administrative Tribunal (hereinafter referred as CAT) by filing OA No. 783/2000. The said Tribunal after hearing the parties passed order dated 28.09.2000 directing the Ministry of Finance, Controlling Authority of respondent no. 2 to review the suspension of Respondent no.2 within a period of four weeks. Accordingly, respondent no. 2 made a written representation to Revenue Secretary on 06.10.2000 brining on record the said order and apprehending that CBI out of frustration may attempt to implicate / involve him in some other false cases. Pursuant to order dated 28.09.2000 of CAT, Addl. Director, Income Tax (Vigilance-I) wrote a letter dated 12.10.2000 to the Superintendent of Police, SIU-VIII, CBI, which was sent by special messenger requesting for latest position of the investigation in the case and the reasons if any for not revoking the suspension of the respondent No.2. It was specifically mentioned that a time bound action was required to be taken and as such, the required input be provided to the Department by 18.10.2000 positively.

The said letter was duly registered by SP, CBI and by petitioner no.2 on 12.10.2000 itself. Immediately, on receipt of the said letter, petitioner no.2 issued a notice under Section 160 Cr.P.C. on 13.10.2000 to respondent no. 2 and sought his presence in the CBI Office on 14.10.2000. Mr.Khanna submitted that it was not merely a co-incidence that petitioner no.2 had summoned respondent no. 2 after a gap of more than 5 months, i.e., after the last appearance on 08.05.2000 but the said summoning was out of sheer malafide and with an intention to harm respondent no.2 and to insure that the suspension of respondent no. 2 is not revoked. However, in compliance to the notice of 13.10.2000, respondent no.2 attended the office of petitioner no.2 on 14.10.2000. No investigation was carried out on that date and after some time the respondent no. 2 was allowed to go. However, another notice dated 14.10.2000 issued under Section 160 Cr.P.C against respondent No. 2 for his appearance on 18.10.2000 i.e. the last day when the Petitioners were supposed to send their comments to Ministry of Finance regarding revocation of suspension. On 18.10.2000, Respondent No. 2 could not attend the office of Petitioner No. 2 since he was suffering from fever. Accordingly, he sent a hand written letter on 18.10.2000 informing that in view of high fever, Respondent No. 2 was not in a position to attend CBI office and requested for a date next week.

22. The petitioners, instead of sending any reply or comments to Ministry of Finance on 18.10.2000 as requested by them earlier, under a well hatched conspiracy to ensure that respondent No. 2 is not reinstated in the service on 19.10.2000, came to his residence at 5.00 am in the morning of 19.10.2000, forcibly entered the main gate of the house, beaten up the guard inside, broke main sliding door of the drawing room and entered

inside the house and thereafter, forcibly dragged out respondent no. 2 from his bedroom in underwear and baniyan and without allowing him to wear proper clothes, locked up his family members in the bed room and then arrested him at 5.50 am along with his younger brother without any reason.

23. Ld. Senior Counsel further submitted that the medical report prepared at 8.45 am on 19.10.2000 by doctor at Deen Dayal Upadhyay Hospital, where Respondent No. 2 had been taken after arrest for medical checkup, clearly shows that on that day, Respondent No. 2 was suffering from fever and having blunt injuries on his body including abrasion over distal end of right forearm. Medical report is annexed at page 82.

24. Mr. Khanna further submitted that the petitioner No. 1 was the complainant of said DA case and he himself was leading the team of CBI officers to arrest respondent no.2. The entire conduct of the Petitioners is deplorable and speaks volumes of malafide on their part. The petitioner no. 1 was determined to implicate the respondent no. 2 at all cost and in his pursuit, he roped another notorious hawala dealer and arms dealer namely Abhishek Verma in the case and later he was made approver against Respondent No.2 after recording his statements as per choice and now the status of the said approver has been set aside by this Court and the said judgment was upheld by the Supreme Court by dismissing the Appeal (Criminal) No.1837 of 2013 on 22.11.2013. While passing the said judgment following observations were made by the apex court:

“While passing the impugned judgment and considering the fact that the material required to be considered had not even been placed before the Court while disposing of the application for grant of pardon and the manner in which the application had been dealt

with as Respondent No. 2 and the present appellant had been playing hide and seek with the Court and in spite of the fact that the Court had asked the appellant to disclose the criminal cases against Respondent No. 2, no information was furnished to the Court, we are of the considered opinion that in the facts and circumstances of the case, substantial justice should not be defeated on mere technicalities.”

25. After the above judgment, CBI collected criminal records of Abhishek Verma and informed the trial court on 01.07.2014 that in view of large number of criminal cases of serious nature against Abhishek Verma, his application for becoming approver be dismissed. Thereafter, the said Abhishek Verma filed an application in the trial court on 31.07.2014 categorically admitting that he was forced, pressurized, coerced and threatened of being eliminated by the investigating officer to make a fabricated and concocted statement against respondent no. 2 which was dictated word by word by the CBI officers and in fact, he was used as a convenient tool by CBI officers to settle their personal score against him.

26. Mr. Khanna further submitted that the respondent no. 2 had earlier filed Civil Contempt Petition No.336 of 2001 on the ground that the guidelines issued by the Supreme Court in its judgment in D.K. Basu (supra) were not complied with by the petitioners while arresting him on 19.10.2000. However, the said petition was dismissed by this Court and later on by the Supreme Court. Petitioners have taken a ground in the present petition that as the above contempt petition filed by the respondent No.2 was on the same facts and since the same has been dismissed, the private complaint is not maintainable and as such the petitioners sought interference of this Hon'ble Court u/s 482 Cr.P.C.

27. Mr. Khanna submitted that the relief sought in Civil Contempt Petition was entirely different from the relief sought in the private complaint. The question was raised in the civil contempt petition was that the guidelines of **D.K. Basu** (*supra*) were not complied with by the petitioners while arresting Respondent No.2 whereas the relief sought in the private complaint is that the respondent No. 2 was tortured, manhandled, physically injured and his property was damaged by the petitioners. In his private complaint, the respondent no. 2 had also categorically stated the fact of filing of Civil Contempt petition mentioned above.

28. Mr.Khanna, learned senior counsel submitted that this Court while dismissing the Civil Contempt Petition specifically observed in para No.6 of the judgment that such complex and contested facts would be properly considered in a trial. The arrest of respondent No.2 was not warranted at all under the afore noted DA case since he was fully cooperating with the investigating agencies right from the day one and he in fact was arrested by the petitioner only with malicious intention in order to ensure that respondent No.2 is not reinstated in the service pursuant to the order dated 28.09.2000 passed by the Central Administrative Tribunal. Moreover, respondent No.2 remained in the custody of CBI and judicial custody in RC No.S19 which is in question from 19.10.2000 to 27.11.2000. Respondent No.2 did not appear only on 18.10.2000. Therefore, there was no occasion before the petitioners to raid the house of respondent No.2 and arrest him. The said move of the petitioner was just to frustrate the order dated 28.09.2000 passed by the Tribunal.

29. Mr.Khanna also submitted that the doctor recorded in the medical

examination dated 19.10.2000 as under:-

“Brought for medical examination c/o fever. No h/o cough, chill or burning....

O/E Pt is conscious, oriented

Pulse 80/m BP-130/84 MMHG

Pupils NSNR, No smell of Alcohol fesuit

L/E Abrasion over distal end of Rt.Forearm

No order external injury or sign of #

Imp. Simple blunt.

Adv.

T.PCMx1day

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Review if fever persist”

30. It is apparent from the report that respondent No.2 was suffering from fever and received injuries. Thus, there was no necessity to tell to the Doctor or the Magistrate to that effect.

31. On the issue of sanction, he has relied upon the decision in ***Urmila Devi v Yudhvir Singh:(2013) 15 SCC 624*** wherein it has been held as under:-

“39. The allegations complained of against the Respondent at the instance of the Appellant in the present proceedings if found to be true, the resultant position would be, that the Respondent cannot be said to have legally acted in his official capacity as Executive Magistrate while ordering for the search and inquiry by the Tehsildar, the DSP and the other police officers along with the two video cameramen. It is again relevant to keep in mind that the only basis for the Respondent to act was the so called complaint of Smt. Maya Rani alleging that the Appellant was having illicit relationship with R.C. Chopra. Assuming such an allegation of Smt. Maya Rani was true on its face value, we wonder, how a person in the rank of an SDM took a decision to barge into the house of a lady, that too at the odd hours of 10 pm accompanied by a pose of police officers under the guise of ascertaining the truthfulness or otherwise of such a complaint and for that purpose engage the

services of two cameramen also with video cameras. In our considered opinion such a behaviour of the Respondent as narrated in the complaint of the Appellant, if ultimately found to be true, can only be held to be a high handed one bordering on indecency of the highest order, wholly abusing his status as SDM and can never be held to have acted within the statutory framework of law.

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41. In our considered opinion, having regard to our above conclusions, it will have to be held that the Respondent though might have been holding the post of an Executive Magistrate, none of the acts alleged against him can by any stretch of imagination be held to have been carried out in his capacity as an Executive Magistrate. When the said conclusion of ours based on the allegations set out in the complaint and noted by the Courts below are inescapable, it will have to be held that invocation of Section 197 of Code of Criminal Procedure was wholly uncalled for and consequently the impugned orders of the learned Additional Sessions Judge as well as the High Court cannot be sustained. Resultantly, the summons issued by the learned trial Court dated 30.07.2001 and the order dated 17.04.2007 by which the Magistrate declined to recall the issuance of summons on 30.07.2001 should stand restored. The appeal stands allowed with costs payable by the Respondent in a sum of Rs. 25,000/- (Rupees Twenty Five Thousand Only) to the Appellant.

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45. Incidents of abuse of authority by public servants, despite several pronouncements of this Court in which such abuse has been deprecated, and the effect which such abuse has on the confidence of the people in the Rule of Law to which we are committed and the credibility of the institutions that are meant to preserve and nurture that confidence is what, in my opinion, calls for some elaboration. There is no gainsaying that excesses by those vested with power and abuse of official position by those who hold public offices cannot easily be eliminated, especially when respect for law is on the decline and enforcement machinery either insensitive or inadequate. Even when complete eradication of such excesses and abuse may be a far cry, the mechanism for redressal against such

abuse ought to be efficient. Absence or failure of any such mechanism can lead to disturbing and in extreme cases disastrous consequences as was aptly prophesied by Lord Denning in his first Hamlyn Lecture of 1949 under the title "Freedom under the Law" when he said:

'No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do: and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient, our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up-to date machinery, by declarations, injunctions and actions for negligence... This is not the task of parliament... The courts must do this. of all the great tasks that lie ahead this is the greatest. Properly exercised the new powers of the executive lead to the welfare state; but abused they lead to a totalitarian state. None such must ever be allowed in this country.'

46. The above was said about civilized, highly developed countries with credible institutional backup. It is more so in the case of nascent democracies around the world. Experience in this country has shown that excesses are often committed by those in power. This Court has in several pronouncements expressed grave concern over the insensitivity of state authorities in protecting the basic rights of citizens and even gone to the extent of laying down principles that would bind such authorities to act humanely in situations that keep recurring. of these decisions, cases dealing with custodial violence stand out in bold relief where this Court has deprecated incidents of torture and other inhuman, cruel or degrading treatment declaring such acts to be clear violations of citizens' fundamental right to life guaranteed under Article 21 of the Constitution of India.

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51. We have referred to the pronouncements of this Court only to show that excesses by those in authority affect not only the immediate victims who suffer them, but should such excesses go unnoticed and unpunished, they have a more pernicious effect in that they tend to erode the Rule of Law, violate fundamental rights and shake the faith and the confidence of the people in the efficacy and the credibility of the institutions that are meant to protect the citizens against them and eventually lead to catastrophic results like anarchy and the return of dark days of barbarism.

52. It is in the above backdrop that we need to examine the question that falls for determination in the present case which is in essence yet another case accusing the functionaries of the State machinery of highhanded, insensitive and unwarranted acts of misbehavior, that the same constitute offences punishable under the Indian Penal Code. The question precisely is whether sanction Under Section 197 of the Code of Criminal Procedure was necessary for prosecuting the Respondent public servant who is alleged to have acted without the authority of law and without any lawful justification, harassed the complainant, violated her right to privacy, and subjected her to an unwarranted public humiliation in –

52.1 Having entered the house of the complainant-Urmila Devi after sunset equipped, as it were, with video cameras;

52.2 Having asked Mr. R.C. Chopra who was present in the house of the complainant to undress;

52.3 Having taken the complainant and Mr. Chopra to the Police Station without any reasonable cause and without disclosing to them the offence for which they were being forced to do so;

52.4 Having subjected them to medical examination without their consent and without there being any cause whatsoever for such an examination;

52.5 Having threatened them with dire consequences if the complainant did not withdraw the complaint filed by her against one Maya Rani.

53. The High Court has taken the view that the prosecution launched by the Appellant against the Respondent was legally impermissible without the sanction of the State Government.

That view has been assailed before us primarily on the ground that the Respondent was neither acting nor could be said to be acting in the purported discharge of his official duty so as to entitle him to the protection of Section 197, Code of Criminal Procedure which to the extent the same is relevant for our purposes reads as under:

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.

(2) -(4).

54. A careful reading of the above would show that protection against prosecution will be available only if the following ingredients are satisfied:

(i) The person concerned is or was a judge or magistrate or public servant.

(ii) Such person is not removable from his office save by the sanction of the Government.

(iii) Such person is accused of commission of an offence.

(iv) Such offence is committed while the person concerned was acting or purporting to act in the discharge of his official duties.

55. There is in the instant case no dispute that the first three of the four requirements set out above are satisfied inasmuch as the Respondent public servant was not removable from the office held by him save by or with the sanction of the Government and that he is accused of the commission of offences punishable under the Indian Penal Code. What

constituted the essence of the forensic debate at the bar was whether the offences allegedly committed by the Respondents were committed while he was 'acting or purporting to act in the discharge of his official duty'. The words "acting or purporting to act in the discharge of his official duty" appearing in Section 197 (supra) are critical not only in the case at hand but in every other case where the accused invokes the protection of that provision. What is the true and correct interpretation of that provision is no longer *res integra*. The provision has fallen for consideration on several occasions before this Court. Reference to all those decisions may be unnecessary for the law has been succinctly summed up in the few decisions to which we shall presently refer. But before we do so we may point out that the expression "official duty" appearing in Section 197 has not been defined. The dictionary meaning of the expression would, therefore, be useful for understanding the expression both literally and contextually.

59. The expression "official duty" would in the absence of any statutory definition, therefore, denote a duty that arises by reason of an office or position of trust or authority held by a person. It follows that in every case where the question whether the accused was acting in discharge of his official duty or purporting to act in the discharge of such a duty arises for consideration, the Court will first examine whether the accused was holding an office and, if so, what was the nature of duties cast upon him as holder of any such office. It is only when there is a direct and reasonable nexus between the nature of the duties cast upon the public servant and the act constituting an offence that protection Under Section 197 Code of Criminal Procedure may be available and not otherwise. Just because the accused is a public servant is not enough. A reasonable connection between his duties as a public servant and the acts complained of is what will determine whether he was acting in discharge of his official duties or purporting to do so, even if the acts were in excess of what was enjoined upon him as a public servant within the meaning of that expression Under Section 197 of the Code.

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63. The test of direct and reasonable connection between the official duty of the accused and the acts allegedly committed by

them is, therefore, the true test to be applied while deciding whether the protection of Section 197 of the Code of Criminal Procedure is available to a public servant accused of the commission of an offence. The High Court has not adverted to this test nor has it held that there existed a direct and reasonable connection between the official duty being discharged by the accused public servant and the acts committed by him. The High Court has on the contrary misdirected itself when it said that the accused had only committed an act of omission towards his official duties which entitled him to the protection of Section 197 of the Code.

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67. With the above observations, I agree that the appeal be allowed with the directions contained in the order proposed by my esteemed Colleague Kalifulla, J.”

32. Also relied upon the decision in **Satyavir Singh Rathi, Assistant Commission of Police & Ors v. State Through Central Bureau of Investigation : (2011) 6 SCC 1** wherein it has observed as under:-

“82. Sub-section (1) of Section 140 is reproduced below:

140: Bar to suits and prosecutions.- ‘(1) In any case of alleged offence by a police officer or other person, or of a wrong alleged to have been done by such police officer or other person, by any act done under colour of duty or authority or in excess of any such duty or authority, or wherein it shall appear to the court that the offence or wrong if committed or done was of the character aforesaid, the prosecution or suit shall not be entertained and if entertained shall be dismissed if it is instituted, more than three months after the date of the act complained of.’

Provided that any such prosecution against a police officer or other person may be entertained by the court, if instituted with the previous sanction of the Administrator, within one year from the date of the offence.

(2)

(3)

This Section postulates that in order to take the shelter of the period of three months referred to therein the act done, or the

wrong alleged to have been done by the police officer should be done under the colour of duty or authority or in excess of such duty or authority or was of the character aforesaid, and in no other case. It must, therefore, be seen as to whether the act of the Appellants could be said to be under the colour of duty and therefore, covered by Section 140 *ibidem*.

83. At the very outset, it must be made clear from the judgment of this Court in *Jamuna Singh's case* that the date of cognizance taken by a Magistrate would be the date for the institution of the criminal proceedings in a matter. The facts given above show that the cognizance had been taken by the Magistrate beyond three months from the date of incident. The larger question, however, still arises as to whether the shelter of Section 140 of the Delhi Police Act could be claimed, in the facts of this case.

84. We must, at the outset, reject the learned ASG's argument that Section 140 would be available to police officials only with respect to offences under the Delhi Police Act and not to other penal provisions, in the light of the judgment in *Professor Sumer Chand's case* (*supra*) which has been rendered after comparing the provisions of the Police Act, 1861 and Section 140 of the Delhi Police Act, 1978 and it has been held that the benefit of the latter provision would be available *qua* all penal statutes. The expression 'colour of duty' must now be examined in the facts of this case.

85. In *Venugopal's case*, this Court held as under:

'14. It is easy to see that if the act complained of is wholly justified by law, it would not amount to an offence at all in view of the provisions of Section 79 of the Indian Penal Code. Many cases may however arise wherein acting under the provisions of the Police Act or other law conferring powers on the police the police officer or some other person may go beyond what is strictly justified in law. Though Section 79 of the Indian Penal Code will have no application to such cases, Section 53 of the Police Act will apply. But Section 53 applies to only a limited class of persons. So, it becomes the task of the Court, whenever any question whether this section applies or not arises to bestow particular care on its decision. In doing this it has to ascertain first what act is

complained of and then to examine if there is any provision of the Police Act or other law conferring powers on the police under which it may be said to have been done or intended to be done. The Court has to remember in this connection that an act is not "under" a provision of law merely because the point of time at which it is done coincides with the point of time when some act is done in the exercise of the powers granted by the provision or in performance of the duty imposed by it. To be able to say that an act is done "under" a provision of law, one must discover the existence of a reasonable relationship between the provisions and the act. In the absence of such a relation the act cannot be said to be done "under" the particular provision of law."

(emphasis supplied)

86. This judgment was followed in **Narhar Rao's case**. This Court, while dealing with the question as to whether the acceptance of a bribe by a police official with the object of weakening the prosecution case could be said under to be under 'colour of duty' or in excess of his duty, observed as under:

*'5. But unless there is a reasonable connection between the act complained of and the powers and duties of the office, it cannot be said that the act was done by the accused officer under the colour of his office. Applying this test to the present case, we are of the opinion that the alleged acceptance of bribe by the Respondent was not an act which could be said to have been done under the colour of his office or done in excess of his duty or authority within the meaning of Section 161(1) of the Bombay Police Act. It follows, therefore, that the High Court was in error in holding that the prosecution of the Respondent was barred because of the period of limitation prescribed under Section 161(1) of the Bombay Police Act. The view that we have expressed is borne out by the decision of this Court in **State of Andhra Pradesh v. N. Venugopal: AIR 1964 SC 33**, in which the Court had construed the language of a similar provision of Section 53 of the Madras District Police Act (Act 24 of 1859). It was pointed out in that case that the effect of*

Section 53 of that Act was that all prosecutions whether against a police officer or a person other than a police officer (i.e. a member of the Madras Fire Service, above the rank of a fireman acting under Section 42 of the Act) must be commenced within three months after the act complained of, if the act is one which has been done or intended to be done under any of the provisions of the Police Act. In that case, the accused police officers were charged under Ss.348 and 331 of the Indian Penal Code for wrongly confining a suspect Arige Ramanua in the course of investigation and causing him injuries. The accused were convicted by the Sessions Judge under Ss.348 and 331 of the Indian Penal Code but in appeal the Andhra Pradesh High Court held that the bar under Section 53 of the Police Act applied and the accused were entitled to an acquittal. It was, however, held by this Court that the prosecution was not barred under Section 53 of the Police Act, for it cannot be said that the acts of beating a person suspected of a crime or confining him or sending him away in an injured condition by the police at a time when they were engaged in investigation are acts done or intended to be done under the provisions of the Madras District Police Act or Code of Criminal Procedure or any other law conferring powers on the police. The appeal was accordingly allowed by this Court and the acquittal of the Respondent set aside.”

87. Both these judgments were followed in Atma Ram's case (*supra*) where the question was as to whether the action of a Police Officer in beating and confining a person suspected of having stolen goods in his possession could be said to be under colour of duty. It was held as under:

‘The provisions of Sections 161 and 163 of the Code of Criminal Procedure emphasize the fact that a police officer is prohibited from beating or confining persons with a view to induce them to make statements. In view of the statutory prohibition it cannot, possibly, be said that the acts, complained of, in this case, are acts done by the Respondents under the colour of their duty or authority. In our opinion, there is no connection, in this case

between the acts complained of and the office of the Respondents and the duties and obligations imposed on them by law. On the other hand, the alleged acts fall completely outside the scope of the duties of the Respondents and they are not entitled, therefore, to the mantle of protection conferred by Section 161 (1) of the Bombay Police Act.'

88. *Similar views have been expressed in Bhanuprasad Hariprasad Dave's : AIR 1968 SC 1323 wherein the allegations against the police officer was of taking advantage of his position and attempting to coerce a person to give him a bribe. The plea of colour of duty was negated by this Court and it was observed as under:*

'9. All that can be said in the present case is that the first Appellant a police officer, taking advantage of his position as a police officer and availing himself of the opportunity afforded by the letter Madhukanta handed over to him, coerced Ramanlal to pay illegal gratification to him. This cannot be said to have been done under colour of duty. The charge against the second Appellant is that he aided the first Appellant in his illegal activity.'

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90. *In the light of the facts that have been found by us above, it cannot, by any stretch of imagination, be claimed by anybody that a case of murder would fall within the expression 'colour of duty'. We find absolutely no connection between the act of the Appellants and the allegations against them. Section 140 of the Delhi Police Act would, therefore, have absolutely no relevance in this case and Mr. Sharan's argument based thereon must, therefore, be repelled."*

33. Mr.Khanna, learned senior counsel further submitted that a false counter affidavit has been filed by respondent No.1/CBI which is at page No.253 wherein it was claimed that it was a party in the aforementioned Contempt Petition at page No.5 of counter affidavit (para No.3 at page No.258). In fact, CBI was never a party in the said petition and both the petitioners were only parties therein. After making false averments CBI in

para No.3 of its counter affidavit reproduced the verbatim averments which had been made by petitioner No.2 in para Nos.12 to 16 of his counter affidavit filed in contempt petition. Thus, CBI has falsely claimed these averments had been made by it in its counter affidavit filed in Civil Contempt Petition. Since, CBI was not a party in said petition, it had not filed any counter affidavit, thus by committing contemptuous act, respondent No.2 filed an application on 30.08.2012 seeking initiation of perjury proceedings under Section 340 of the Cr P C and for taking *suo motto* cognizance of illegal contemptuous act against Shi Subash Rastogi, SP, CBI, who had filed false affidavit. Moreover, the fact of relying upon verbatim averments of petitioner No.2 by CBI in its counter affidavit filed in the present case petition clearly exposes the conspiracy between the said petitioner and the CBI respondent No.1.

34. Mr.Khanna, further submitted that the State was made a party in the present proceedings as per the instructions of the Court itself and thereafter, State had filed a short affidavit after a lapse of two years under the instructions / on behalf of Mr.Neeraj Kumar, Commissioner of Police, who also happened to be the Joint Director of CBI at the relevant point of time when the respondent No.2 was arrested.

35. Ms.Sonia Mathur, Standing Counsel appearing on behalf of respondent No.1/CBI as well as Mr.Rajesh Mahajan, Additional Standing Counsel appearing on behalf of respondent No.3/State have supported the case of the petitioners and submitted that the petitioners had not committed the offence alleged and whatever in fact was done that was while discharging the official duty and which is permissible under law relied upon by the petitioners. The situation was created by respondent No.2

itself, therefore, the petitioners had to use force, therefore, there is connection between the official duty and alleged offence, thus, the present petition deserves to be allowed.

36. I have heard learned counsels for parties.

37. On 17.09.1999 a preliminary enquiry in respect of disproportionate assets alleged to have been accumulated by respondent No.2 was registered. Thereafter, on 07.12.1999, case FIR No.RC-S-19-99-E0006 was registered against respondent No.2 for amassing disproportionate assets to his known sources of income to the tune of Rs.40.00 Lac. On 19.10.2000, the respondent No.2 was arrested as he did not respond to the notice under Section 160 of the Cr P C issued by the petitioners. On 30.07.2001, respondent No.2 filed a Civil Contempt Petition No. 336/2001 before this Court inter alia, averring that the guidelines laid down by the Supreme Court in ***D.K.Basu (supra)*** had not been complied with at the time of his arrest. However, the said petition was dismissed by this Court vide order dated 28.08.2003 and the SLP was also dismissed by the Supreme Court on 16.04.2004. During the pendency of the afore noted Contempt Petition, respondent No.2 filed a Criminal Complaint Case bearing No.329/2001 in the Court of Chief Metropolitan Magistrate wherein vide order dated 11.01.2005, learned Metropolitan Magistrate issued summons against petitioners for the offences punishable under Sections 323/427/448 of the IPC. In the said complaint, respondent No.2 stated that he was working as Deputy Director of Enforcement, Enforcement Wing (Delhi Zone) and was handling the cases pertaining to FERA violations. There was a pressure upon him to scuffle down the investigations of those cases and he even threatened with dire

consequences in case he did not make up pre-mature repatriation to his parent cadre. Due to the enmity, a case was filed on the by petitioner No.1. Preliminary enquiry was started for the alleged misappropriate assets and later has culminated into criminal cases. The respondent No.2 joined the investigations on 20 occasions between 03.02.2000 to 08.05.2000, however, on 19.10.2000 at about 05.00AM, the petitioner Nos.1 & 2 made forcible entry into his house after beating the gate keeper and the house was broke open and his family members were locked in one room. In support of his case, respondent No.2 examined himself as CW1 and corroborated the facts of the case. Shri Vijay Kumar Aggarwal, brother of respondent No.2 has been examined as CW2 and Shri Krishan Kumar, security guard has been examined as CW3. After perusal of the complaint, testimony of witnesses and documents filed on record, learned Trial Court decided to proceed against petitioners for the offences punishable under Sections 323/427/448 of the IPC and accordingly issued summons against them.

38. It cannot be disputed that as per Section 46 (2) Cr P C, if any person, who is to be arrested, forcibly resists the endeavour to arrest him or attempts to evade the arrest, the arresting officer may use all means necessary to effect the arrest. But, it is also settled law that the arrest and force used therein should not be intentional and malafide. If the said part is missing, then certainly, the petitioners are entitled for the benefit of the Sections 197 of the Cr P C and Section 140 of the Delhi Police Act. It is also settled position of law that police may use excess force during arrest and if during investigation and arrest, if something happened, then for taking action against said officers, the sanction as mentioned above, is

required. In such situation, the Magistrate has no power to take cognizance without sanction from the competent authority on record.

39. The case of the petitioners is that they had broke open the door of the house of respondent No.2 and used force while arresting respondent No.2 and that was during course of their official duty. As there was a case registered against respondent No.2 for disproportionate of assets and accordingly on 19.10.2000 he was arrested. It is also admitted fact that force was used on the ground that respondent No.2 and his brother Vijay Kumar Aggarwal were seeing moving inside the house with some files and they were not opening the door. The petitioners waited for ½ hour for their response, failing which, the petitioners had to take action for arresting the respondent No.2.

40. The purpose of sanction is that no one rope officers in a false case, if they have done anything while performing their duty. But, that protection is up to the extent only if there was no intentional or malafide in arrest or any action taken by them.

41. It is pertinent to mention here that respondent No.2 was posted as Deputy Director of Enforcement and based on concrete information, a search was conducted by the officials of Enforcement Directorate at the residential and business premises of a hawala dealer, namely, Subhash Barjatya on 01.01.1998 which resulted in seizure of incriminating documents including a debit advice received by him on his fax machine installed in his office. According to the such advice US\$ 1.5 Lac had been transferred through hawala channel from the account of one Royale Foundation, Swiss Bank Corporation, Zurich, Switzerland to the account

of one S.K. Kapoor, HSBC Hongkong. Subhash Barjatya made a complaint that the said debit advice had been planted by ED officers during the course of search. Based upon the said complaint a case FIR No.S-18/E0001/99 dated 29.01.1999 was registered by CBI.

42. It is not in dispute that respondent No.2 was called many a times by petitioner No.1 in CBI office and complete details of income and expenses and expenditure along with documents were furnished to him. However, to implicate respondent No.2, petitioner No.1 on 17.09.1999 recommended to petitioner No.2 for registration of a preliminary enquiry for disproportionate assets of Rs.8.38 Lac against respondent No.2 during the check period between 01.04.1989 to 04.03.1999. While, computing said disproportionate assets petitioner No.1 included all the expenses prior to check period, i.e., 01.04.1989, but did not include his income prior to 01.04.1989. Moreover, while computing the expenses, the petitioner No.1 even added cost of property which respondent No.2 had procured even before joining the service i.e. on 17.12.1985. The said preliminary enquiry was converted into FIR No.S-19/E0006/1999 on 07.12.1999. After taking sanction against respondent No.2, the charge sheet was filed on 05.12.2002 by clubbing assets belonging to the family members of respondent No.2 in his hands despite the fact that such assets had already been assessed by the Income Tax Department in respect of their respective hands for years together. While, dealing with the validity of the sanction order dated 26.11.2002 in the said disproportionate assets, the Supreme Court while dismissing the Criminal Appeal No.1838/2013 filed by the CBI has recorded as under:-

“33. It appears from the facts and figures given in the report, particularly from the Income Tax returns /

assessment orders of the respondent and his family members, that there has not been a fair assessment regarding the income of the respondent and other family members as shown by them in their income-tax returns and it is far from satisfaction, as is evident from the preliminary enquiry report dated 17.9.1999. Same remained the position regarding the assessment of the value of the apartments purchased by the respondent at Barakhamba Road, New Delhi, if compared with the property purchased by the Indian Oil Corporation in the same locality.”

43. Apart from conducting unfair investigation, the petitioner no.2 had also fabricated and forged documents during the course of the investigation in order to falsely implicate respondent no.2 and also wrongly confined his younger brother Mr.Vijay Aggarwal in CBI office where he was humiliated, harassed and tortured. Therefore, vide order dated 26.06.2006 this Court ordered for registration of two FIRs against petitioner no.2 and his superior officer Neeraj Kumar, the then Joint Director and held that padded investigation had been done by them.

44. The Supreme Court in its judgment dated 22.11.2013 endorsed the finding of both the above orders and held in para 34 & 35 of the judgment as under:-

“34. The judgment delivered by the Delhi High Court in the case of Vijay Aggarwal, brother of the respondent, in Writ Petition (Crl.) No. 675 of 2001 against the officers of the CBI impleading them by name, make it evident that very serious allegations had been made against the said officers of having acted with oblique motive to force him to ensure that his brother Ashok Kumar Aggarwal withdraws the

complaint filed by him against them under Section 340 Cr.P.C. The court ultimately held that investigation had not been conducted in a fair manner. The order passed therein reads:

“33. In the result, the petition is partly allowed. The Special Cell of Delhi Police is directed to register an FIR on the basis of the allegations contained in the present petition and the complaint of the petitioner dated 23.2.2004 addressed to the Commissioner of Police, Delhi and take up the investigation of the case. The investigation shall be conducted by an officer not below the rank of Assistant Commissioner of Police in the said Cell independently and uninfluenced by the findings and observations contained in the report of enquiry dated 26.4.2005 conducted by the Joint Director, CBI and shall endeavour to conclude the investigation expeditiously within a period of two months from the date of this order and shall file a status report in the court on 5th September, 2006.”

35. Another Writ Petition (Crl.) No. 738 of 2001 was filed by Shish Ram Saini, Chartered Accountant against the CBI and its officers making allegations against them that he had been harassed by the CBI's officers as he was employed as an Accountant in the firms and companies of respondent herein. The court held that the authorities had proceeded with high-handedness and found substance in the allegations made by the petitioner therein. The order runs as under:

“31. In view of the above discussion and in the result, the present petition is partly allowed and the Special Cell of Delhi Police is directed to register a case on the basis of allegations contained in the complaint dated 5.7.2001 lodged by the petitioner with police station Lodhi Colony and those contained in the present petition. The investigation shall be conducted by an officer not below the rank of Assistant Commissioner of Police in the said Cell independently and uninfluenced by the findings and observations contained in the report of enquiry dated 26.4.2005 conducted by the Joint Director, CBI.”

45. It is also not in dispute that during the investigation of FIR in question i.e. S-19/E0006/1999 the respondent No.2 was examined by petitioner No.2 on around 20 occasions between 03.02.2000 to 08.05.2000. The respondent No.2 was under deemed suspension and transferred to Kolkata. The said order of deemed suspension as well as transfer were challenged by him before the CAT, Principal Bench by filing OA No.783/2000. The Tribunal after hearing the parties passed order dated 28.09.2000 directing the Ministry of Finance, Controlling Authority of respondent No.2 to review the suspension of respondent No.2 within a period of four weeks. Pursuant to said order dated 28.09.2000, Additional Director, Income Tax (Vigilance-I) wrote a letter dated 12.10.2000 to the Superintendent of Police, SIU-VIII, CBI, New Delhi requesting for latest position of the investigation in the case and the reasons, if any, for not revoking the suspension of the respondent No.2. The said letter was received by the Superintendent of Police, CBI and respondent No.2 on 12.10.2000 itself, wherein specifically mentioned that time bound action

was required to be taken and as such required input be provided to the department by 18.10.2000 positively. On receipt of aforesaid letter, petitioner No.2 immediately issued notice under Section 160 of the Cr P C on 13.10.2000 to respondent No.2 and sought his presence in CBI office on 14.10.2000. The move of the said petitioner was to frustrate the order passed by the Tribunal on 28.09.2000. However, in compliance of the notice dated 13.10.2000, respondent No.2 attended the office of petitioner No.2 on 14.10.2000. No investigation was carried out on that date and after some time the respondent No.2 was allowed to go. However, another notice dated 14.10.2000 issued under Section 160 Cr.P.C against respondent No.2 for his appearance on 18.10.2000. The respondent No.2 could not attend the office of petitioner No.2 since he was suffering from fever. Accordingly, he sent a written letter on 18.10.2000 informing that in view of high fever, respondent No.2 was unable to attend CBI office and requested for a date next week. The petitioners instead of sending any reply or comments to the Ministry of Finance and to ensure that respondent No.2 is not reinstated in the service on 19.10.2000 raided the house of respondent No.2 in the morning and entered the house forcibly. The search was conducted between 05.00 to 08.00AM morning as per the *Panchnama* dated 19.10.2000 and the respondent No.2 was arrested at 05.30AM, thereafter, he was produced before the doctor for medical examination at 08.45AM. The medical report prepared by doctor concerned at DDU Hospital, Delhi clearly shows that at that time, respondent No.2 was suffering from fever and having abrasion over distal end of right forearm. Moreover, there is no signature of respondent No.2 on *Panchnama* which establishes that search was in absence of respondent No.2. At what time search was concluded, the petitioners left that portion blank.

46. The petitioner No.1 was complainant of said disproportionate assets case and he himself was leading the team of CBI officers to arrest the respondent No.2. Thus, said petitioner was determined to implicate the respondent No.1 at all costs and in his pursuit, he roped another notorious hawala dealer and arms dealer namely Abhishek Verma in the case and later he was made approver against respondent No.2.

47. It is pertinent to mention that status of such approver had been set aside by this Court and the said judgment was upheld by the Supreme Court while dismissing the Appeal (Criminal) No.1837/2013 on 22.11.2003. Thereafter, CBI collected the criminal records of Abhishek Verma and informed the learned Trial Court on 01.07.2014 that in view of large number of criminal cases of serious nature against Abhishek Verma, his application to become approver be dismissed. Thereafter, said Verma filed application before learned Trial Court on 31.07.2014 while categorically admitting that he was forced, pressurised, coerced and threatened of being eliminating by the Investigating Officer to make fabricated and concocted statement against respondent No.2, which was dictated word to word by CBI officers.

48. The reason made out by petitioners to break open the house and arrest the respondent No.2 as stated in para No.12 of the counter affidavit filed by the petitioner No.2 in Civil Contempt Petition was that through one of the windows on the ground floor of the house, it was seen that respondent No.2 was moving with his younger brother with certain files and papers in their hands and despite hearing the door bell, they did not open the door and went into the kitchen to lit the stove, thus, they were in the act of destroying the papers. The said excuse taken by the petitioners

to justify their illegal and unlawful act of breaking open the house and to arrest the respondent No.2 and his younger brother was nothing, but an afterthought. There is no corroborative material on record to support this contention of the petitioners. Moreover, after arresting the respondent No.2, petitioner carried out the search of the house and thereafter, prepared a search list at page Nos.72-74 and also list of seized documents/articles at page Nos.75-76. The list of seized documents/articles so prepared by the petitioners nowhere shows seizure of any file or any paper or burnt files or of any unburnt paper or ashes of any burnt documents. Thus, it falsified the claims of the petitioners. Moreover, learned Trial Court which is seized with the matter has considered all these facts while summoning the accused persons and these facts can only be decided during trial.

49. It is pertinent to mention here that respondent No.2 vide W.P. (Crl) 1401/2002 and Crl. Rev. Petition No.338/2014 in this Court challenged 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 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. Both petitions were allowed by the Coordinate Bench of this Court vide a common judgment delivered on 13.01.2016.

50. The Coordinate Bench in para Nos.3 & 4 of above decision recorded

as under:

“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.”

51. While drawing the conclusion in above decision, this Court recorded as under:-

“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).

xxxxx

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, suppressio 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.”

52. On the issue of estoppel, the Supreme Court in case of ***Sangeetaben Mahendrabhai Patel v State of Gujarat & Anr : (2012) 7 SCC 621*** held as under:

“23. This Court has time and again explained the principle of issue estoppel in a criminal trial observing that where an issue of fact has been tried by a competent court on an earlier occasion and a finding has been recorded in favour of the accused, such a finding would constitute an estoppel or res judicata against the prosecution, not as a bar to the trial and conviction of the accused for a different or distinct offence, but as precluding the acceptance/reception of evidence to disturb the finding of fact when the accused is tried subsequently for a different offence. This rule is distinct from the doctrine of double jeopardy as it does not prevent the trial of any offence but only precludes the evidence being led to prove a fact in

issue as regards which evidence has already been led and a specific finding has been recorded at an earlier criminal trial. Thus, the rule relates only to the admissibility of evidence which is designed to upset a finding of fact recorded by a competent court in a previous trial on a factual issue.”

53. Accordingly, the charge sheet against the petitioner in RC No.S-18-E0001-1999 has been quashed and order of the Special Judge dated 24.05.2014 and RC No.S-19-E0006-1999 were quashed. Thus, the cases against the respondent No.2 mentioned above were dropped.

54. It is pertinent to mention that CCP No.336/2001 was on the ground that petitioners violated the directions issued by the Supreme Court in ***D.K.Basu*** (*supra*) which are as under:-

“36.

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation center or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or

relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory. Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and state headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board."

55. The injuries and damages to property was not the subject matter of the said petition. Though, respondent No.2 had mentioned that the petitioners had caused injuries while raiding and arresting him. But, there

is no opinion of the Court on this issue. Therefore, plea of estoppel is not applicable in this case.

56. From the above discussion and the orders passed by the Courts, as noted above, against the petitioners it is established that the petitioners with malafide intentions opened preliminary inquiry and not recorded correct facts which culminated into RC No.S-19/1999-E0006 against respondent No.2. The said respondent appeared about 20 times before CBI and joined investigation. If respondent No.2 could not appear on 18.10.2000 due to high fever, that was not the ground to arrest him on 19.10.2000. I have no hesitation to say that the arrest in question was to frustrate the order dated 28.09.2000 passed by the Tribunal whereby the Tribunal directed the Controlling Authority of respondent No.2 to review the suspension. The petitioners instead of giving comments on the case to said authority malafidely conducted search and arrested respondent No.2 on 19.10.2000 at 05.30AM early morning from his residence. Therefore, abovementioned acts of the petitioners were malafide.

57. It is important to note that the case FIR No.RC-S-19/1999-E0006 wherein respondent No.2 was arrested has been quashed while passing the adverse remarks against petitioners as noted above. The medical report dated 19.10.2000 established injuries upon respondent No.2. If in such a situation, the petitioners had been summoned by the learned Trial Court vide impugned order dated 11.01.2005 in the absence of sanction under Section 197 Cr P C, learned Trial Court committed no wrong. The petitioners are not entitled to protection under Section 140 of the Delhi Police Act in such circumstances. Therefore, I affirm the impugned order dated 11.01.2005.

58. Finding no merit in the petition, the same is dismissed accordingly with no order as to costs.

59. I hereby make it clear that the observations made by this Court shall not prejudice the rights and contentions of the parties during trial.

Crl.M.A.Nos.15838/2012 & 16693/2015

Dismissed as infructuous.

MARCH 29, 2016

Jg/RS/M

**SURESH KAIT
(JUDGE)**

