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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 5th March, 2018

Decided on: 03rd April, 2018

+ CRL.REV.P. 462/2017

STATE

..... Petitioner

Through: Mr. R.S. Kundu, ASC with Ms. Suman Saharan and Mr. Premsagar Pal, Advocates. SI Bhoop Singh, P.S. A.C. Branch.

versus

MUKESH KUMAR SINGH & ANR

..... Respondents

Through: None.

+ W.P.(CRL) 942/2017 and CRL. M.A. Nos. 5237/2017,
8318/2017 and 8319/2017

+ W.P.(CRL) 3012/2017

K G TYAGI

..... Petitioner

Through: Mr. Hariharan, Sr. Advocate with Mr. Riyaz A. Bhatt, Mr. Jacob and Mr. Nayyar Kedar, Advocates.

versus

STATE

..... Respondent

Through: Mr. R.S. Kundu, ASC with Ms. Suman Saharan and Mr. Premsagar Pal, Advocates. SI Bhoop Singh, P.S. A.C. Branch.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

J U D G M E N T

The challenge

1. The criminal case (CC No.18/2010) from which these three

petitions arise was registered on the basis of report(s) submitted under Section 173 of the Code of Civil Procedure, 1973 (Cr.P.C.) – hereinafter referred to as “the case of ACB” – in relation to First Information Report (FIR) No.34/2008, which was registered on 16.10.2008 by Anti-Corruption Branch (ACB) Police Station of the Government of NCT of Delhi (GNCTD) for investigation into offences allegedly committed under Sections 7, 8 and 13(1)(a) and (d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (“POC Act”, for short) read with Sections 384, 120-B and 34 of Indian Penal Code, 1860 (“IPC” for short).

2. The Special Judge, in *seisin* of the case, directed by order dated 02.03.2017, one of the accused persons whose prosecution was sought by ACB to be put on trial while discharging the two others. The order of discharge is challenged by the State by the criminal revision petition while the accused against whom charges have been framed assails the same very order invoking the writ jurisdiction of this court. The said accused had questioned the legality and validity of the sanction for his prosecution under Section 19 of POC Act, his contentions having been rejected by the subsequent order dated 11.10.2017 of the Special Judge, which is the subject-matter of challenge in the second captioned writ petition.

3. During the course of investigation of the case of ACB, four persons came to be arrested, they including Inspector Krishan Gopal Tyagi (A1), Sub-Inspector Mukesh Kumar (A2), Assistant Sub-Inspector Rajbir Singh (A3) and Mr. Ravinder Chadha, Advocate. On

the petition of the last said arrestee, the Supreme Court by order dated 16.12.2013 in CrI. Misc. Petition Nos.18196-7 of 2013 in SLP (CrI.) Nos.7210-7211 of 2013 stayed the trial against him. As mentioned above, by order dated 02.03.2017, the Special Judge discharged A2 and A3 and directed charges to be framed against A1 for offences punishable under Sections 7/13(1)(d) of POC Act read with Sections 384,389,120-B IPC. The formal charges framed on 04.03.2017 reflect three heads, viz. under Sections 384/120-B IPC, Sections 389/120-B IPC and Sections 7/13(1)(d) of POC Act read with Section 120-B IPC.

4. After the charges had been framed, the prosecution led evidence on the issue of sanction and has examined Mr. Ashok Chand (PW-1), the then Additional Commissioner of Police (Additional CP) and Mr. Balwant Singh Dhingra (PW-2), the then Assistant Commissioner of Police (ACP), the former (PW-1) being the authority which had granted the sanction for prosecution of A1, A2 and A3 on 18.07.2014 under Sections 19 of POC Act, 1988 and the latter (PW-2) being the investigating officer of the case of ACB at the relevant point of time. The legality and validity of the sanction had been challenged before the trial court by A1, in the wake of such evidence having come on record, by a formal application. The said application was dismissed by the special Judge by order dated 11.10.2017.

Background Facts

5. Given the facts and circumstances of the case and the issues which have been raised by both sides, it is necessary to trace the germane background facts, in chronological order to the extent

possible, focus being on such facts and events as regards which there is now no dispute, culled out from the documents or material relied upon or submissions made by the State or such further material which has come to be proved during the recording of evidence of aforementioned witnesses at the instance of the accused or further at the hearing in this court.

6. On or about 29.09.2007, a person named Vijay Singh Yadav @ Vijji was shot dead in Gali Arya Samaj Bazar, Sita Ram Delhi, the said incident becoming subject matter of FIR No.356/2007, under Section 302 IPC of Police Station Hauz Qazi, Delhi – hereinafter referred to as “the case of murder” – in which one Abhay Yadav is stated to be the complainant. The said case of murder was initially investigated into by the local police. By order of the Commissioner of Police, Delhi, the investigation was transferred to the Crime Branch on 09.10.2007. During the relevant period, A1, A2 and A3 were posted in the Inter-State Cell (ISC) of Crime Branch, Dr. Joy N. Tirkey, ACP and Mr. Satyender Garg, Additional CP being their immediate superiors in hierarchy in ISC. The responsibility of the investigation into the case of murder was entrusted to A1. In the course of investigation that followed, A1 made several arrests including of Gopal Krishan Aggarwal effected on 07.12.2007. On the application moved by A1 on 08.12.2007, police custody remand of the said Gopal Krishan Aggarwal (and one another) was granted by the court of magistrate. On 22.02.2008, as the investigating officer of the case of murder, A1 filed report under Section 173 Cr.P.C. (“charge-sheet”) in the case of murder seeking prosecution of nine persons including

the said Gopal Krishan Aggarwal, this being followed later by supplementary charge-sheets. The said case was committed to the court of Sessions on 08.04.2008.

7. On 09.05.2008, A1 lodged daily diary (DD) entry No.11 at 09.57 p.m. in Anti Homicide (AH) Section of Crime Branch primarily to record that he was facing great problems ever since the filing of the charge-sheet in the case of murder, some of the accused persons arrested in the case being influential persons and he being under pressure from senior officers to save or help such of the accused, his superiors not being supportive and he apprehending some wrong might be done against him.

8. On 16.06.2008, Gopal Krishan Aggarwal moved the vacation judge of this court for release on bail on medical grounds, it being later converted into an application for regular bail which was granted by the vacation judge by order dated 20.06.2008. On the move initiated by A1 on 23.06.2008, special leave petition (SLP) later came to be filed in the Supreme Court against the said order of release on bail. It may be mentioned here itself that the Supreme Court by order dated 23.03.2009 in SLP (Crl.) No. 891 of 2009 cancelled the bail granted to Gopal Krishan Aggarwal in the case of murder, the trial in the said case having progressed, after formal charges were framed on 24.09.2010 including against Gopal Krishan Aggarwal, it being still pending trial.

9. On 14.07.2008, A1 lodged DD No.20 at 5.10 p.m. in AH Section of Crime Branch stating, *inter alia*, that Gopal Krishan

Aggarwal along with two other co-accused in the case of murder were hatching plan to get him involved in some false case and he suspected the complicity of some disgruntled police officials and advocates. This was followed by two other DD entries, one being DD No.27 dated 23.07.2008 lodged at 8.30 p.m. and the second DD No.14, dated 28.07.2008 lodged at 3.15 p.m. in Crime Branch (AH Section). As per DD No.27 Abhay Yadav, the complainant of the case of murder had telephonically informed him (A1) on the night of 22.07.2008 that Vinod @ Teda, a witness of the case of murder, had been lifted by officials of police post Turkman Gate, Police Station Chandni Mahal at the instance of Gopal Krishan Aggarwal (then out on bail) and upon he (A1) talking to the said witness, the latter having told him about he being pressurized and intimidated by Gopal Krishan Aggarwal to make him desist from deposing against him in the court, the allegations of Gopal Krishan Aggarwal, on the other hand, being that the witness was trying to extort money from him in the matter. By DD No.14, A1 recorded that Gopal Krishan Aggarwal (then out on bail) had made an attempt on that day to unnecessarily talk to him outside the court and he appearing to intend commit some mischievous act against him.

10. On 01.08.2008, FIR No.68/2008 was registered in Police Hauz Qazi, Delhi against Gopal Krishan Aggarwal and others for offence under Section 3 of Maharashtra Control of Organized Crime Act, 1999 (MCOCA).

11. On 16.10.2008, the ACB registered FIR No.34/2008 on the

complaint dated 15.10.2008 of Abhinav Krishan Aggarwal son of Gopal Krishan Aggarwal. The sum and substance of the allegations made in the said complaint are that A1, while carrying out the investigation into the case of murder, had adopted an unending systematic extortion routine making demands through Mr. Ravinder Chadha, Advocate and by creating pressure receiving money through his associates that included A2 and A3. It was stated in the complaint that A1 had called the said complainant Abhinav Krishan Aggarwal and his father Gopal Krishan Aggarwal several times to the office of crime branch, interrogating them and taking their signatures on blank papers and at times detaining them unnecessarily. He alleged that on 06.12.2007 his father was detained by A1 in the crime branch office and when he had met on 07.12.2007, A1 had demanded a bribe of Rs.8,00,000/- asking it to be brought to his residence on the next morning. He further alleged that when he had arranged and taken the said amount of money to the residence of A1, as instructed, the son of A1 had asked him to meet A1 at City Hospital, Pusa Road, where brother-in-law of A1 was admitted at the time. He stated that he had accordingly met A1 in the City Hospital, Pusa Road, where the said amount of money was handed over in the presence of one more person. He further stated that, as instructed by A1, he had met him again on the same date (08.12.2007) in the crime branch office when he was taken to the room of Mr. Joy Tirkey, ACP where he was told that the arrest of Gopal Krishan Aggarwal had to be effected under pressure and though he (the complainant) was also to be arrested in the case he was being spared and further that his father would be released

in 10-15 days. It was further alleged that A1 had asked him (the complainant) to engage Mr. Ravinder Chadha, Advocate assuring that the said counsel would do the needful and that the said advocate upon being met demanded Rs.2 lacs to be paid, which payment was to be made on the next date. He alleged that after this, the extortion became a routine, A1 exerting pressure and demanding money through the said advocate now and then. He stated that he had started secretly recording (in audio/video mode) the conversations and demands of the said advocate, and A1, since 31.12.2007, the video recordings collected indicative of acceptance of illegal gratification by one of the named public servants. According to his complaint, he was victim of extortion to the extent of Rs.26-27 lacs, out of which Rs.8 lacs had been taken directly by A1 on 08.12.2007, the rest having been realized through Mr. Ravinder Chadha Advocate, which according to his allegations, included Rs.4 lacs as the share of the Advocate and the balance of A1. He also stated that the video recordings collected by him confirmed the manipulation in the record of the investigation of the case of murder. The complainant also alleged that after his father had been released on bail on 20.06.2008 by the High Court, A1 had extended threats to have him implicated in some other case unless further amount of Rs.25 lacs was paid to him and further that upon refusal to accede to such demand, A1 had extended threats, subsequently MCOCA case having been got registered due to manipulation by A1. The complainant submitted with the complaint “un-edited DVD” of audio and video recordings of the conversations along with typed copy of transcript of the relevant portions prepared

by the complainant himself, seeing necessary action.

12. After its registration on 16.10.2008, the case of ACB was entrusted for investigation to Mr. H.P.S. Sodhi, ACP. The said investigating officer (IO) arrested A1,A2 and A3, besides Mr. Ravinder Chadha, Advocate on 17.10.2008.

13. On 09.02.2009, the Additional CP (Crime) granted sanction for prosecution (hereinafter referred to as “the first sanction order”) under Section 19 of POC Act. On 25.03.2009, charge-sheet was prepared and submitted in the court of Special Judge on 01.04.2009. On 22.04.2009, the Special Judge recorded an order taking cognizance of offences punishable under Sections 7/13(1)(d) of POC Act.

14. As per the record of ACB, the complainant Abhinav Krishan Aggarwal had handed over another copy of DVD (having been marked as “B”) containing audio/video recording of the conversation referred to in the complaint/FIR, the DVD submitted at the time of lodging of the FIR having been earlier signed by the Special Judge (and marked as “A”). Both the said DVDs in separate sealed parcels, (DVD mark “B” concededly having one additional track) were statedly examined by Andhra Pradesh Forensic Science Laboratory (APFSL) at Hyderabad, on the request dated 15.12.2008 of the IO for opinion as to whether the contents thereof were the same, the tracks of such recordings being continuous or whether there was any tampering noticed and further as to whether such material could be considered “*useful for investigation purposes*”. The report of APFSL dated 01.12.2009 was submitted with the first supplementary charge sheet in

the court of Special Judge on 16.02.2010. It is stated that two more supplementary charge-sheets were later submitted on 16.07.2010 and 16.09.2010 respectively.

15. On 06.03.2010, A1 made a request in the court of Special Judge for the DVDs in question to be opened to verify the number of files and their particulars. As per the proceedings conducted by the court on same date, the properties of the digital files contained in the two DVDs were checked and memoranda thereupon was prepared. Pertinent to note here that as per the said verification exercise the dates of creation of some of the files were found to be of January-February 1980, the latest in time being dated 12.08.2008, quite a few of year 2003, and one of 31.12.2007.

16. On 06.03.2010, A1 moved an application, A2 and A3 also filing similar applications, challenging the first sanction order for prosecution granted on 09.02.2009 under Section 19 of POC Act.

17. On 19.07.2010 the Special Judge, dealing with an application that had been moved, passed the order which reads thus :-

“...An application has been moved wherein it is stated that no cognizance had been taken against the accused Ravinder Chaddha as he is a private person and not being a public servant section 7 and 13 do not apply. Legally the said assertion is correct. However, it has been observed that the charge sheet filed manifests complicity between accused K.G. Tyagi and Ravinder Chaddha.

At this juncture, when charge has not been framed and the accused has not been discharged, the inadvertent omission is hereby rectified and accordingly, I take

cognizance of the offence u/s. 7, 8, 13 (1)(d) r/w 13 (2) POC Act and 384, 120B/34 against all the accused persons.

Application moved by Ravinder Chaddha becomes redundant in view of the fact that this court has taken cognizance of the offence against him. No notice is required to be served as the accused is already appearing.

Documents have been filed by the accused.

To come up on 07.08.2010 for remaining arguments as well as order on application u/s. 19 of POC Act.”

18. Meanwhile, A1 had made a representation to his superior authorities in the police department requesting for “fair” enquiry into the “fraud committed” by the investigating agency (i.e. ACB). An enquiry was instituted pursuant to the said representation and was conducted by Mr. P.S. Kushwah, Additional Deputy Commissioner of Police (Additional DCP) in Crime Branch (Headquarter). In the course of the said enquiry, A1 placed on record certain other material including copies of the documents that he had obtained under Right to Information Act, 2005 (RTI Act). The enquiry culminated in report dated 29.12.2011 (Ex.PW-1/D7). The enquiry officer Mr. P.S. Kushwah, Additional DCP, in his said report noted that he had gone through the police records and the records pertaining to prosecution sanction besides police file pertaining to the period after grant of such sanction, it including opinion of the Chief Public Prosecutor in December, 2008 raising issue as to “why the apparatus/instrument used in videography and audiography were not seized” and the supplementary statement under Section 161 Cr.P.C. dated 16.02.2009

of Abhinav Krishan Aggarwal – recorded after the grant of sanction on 09.02.2009 (received by ACB on 12.02.2009) – stating, *inter alia*, that “*three devices/instruments used in the recording are not available*” he having used one MP3 player (which had since been “*destroyed*”), pen camera and one mobile phone Nokia E90 (both of which he had “*returned*” to the source from where he had “*borrowed*” the same).

Enquiry Report

19. Taking note, *inter alia*, of DD No.11 dated 09.05.2008, DD No.20 dated 14.07.2008, DD No.27 dated 23.07.2008 and DD No.14 dated 28.08.2008 (contents whereof have been noted earlier), and the allegations of forgery vis-à-vis the contents of the DVDs and the alleged manipulation of records respecting their submission for forensic opinion of APFSL for consideration in the light of above background, the Additional DCP, in his report dated 29.12.2011 (Ex.PW-1/D7) concluded as under:-

“..... The material on record establishes that Insp. K.G. Tyagi had conducted the investigation of case FIR No.356/07 u/s 302/201/120B IPC Hauz Qazi and arrested 10 accused persons including Gopal Krishan, father of the complainant, Avinabh Aggarwal in case FIR No.38/08 PS ACB. It is also on record that Insp. K.G.Tyagi made efforts in filing an SLP against the order of Delhi High Court granting bail to Gopal Krishan in the month of Aug. 2008, much before the registration of case FIR No.34/08 against him.

THE DOCUMENTS ON WHICH THE SANCTION WAS ACCORDED

The perusal of prosecution sanction file reveals that the following documents were sent to sanctioning authority for perusal along with request to grant sanction dated 5/12/08:

- 1. Copy of FIR No.34/08 PS-ACB*
- 2. Copy of complaint*
- 3. Copy of transcription*
- 4. Copy of DVD*
- 5. Copy of seizure memo of DVD*
- 6. Copy of voice identification memo*
- 7. Copy of medical record of Sh. Jagdish Tyagi (brother-in-law of K.G. Tyagi)*
- 8. Statements recorded u/s 161 CPC.*
 - (i) Sh. Pawan Dabas dated 17/10/08*
 - (ii) Sh. Gopal Krishan Aggarwal dated 18/10/08*
 - (iii) Sanjeev Kumar dated 22/10/08*
 - (iv) ACP Joy Tirkey dated 22/10/08*
 - (v) Insp. Yashpal dated 26/12/08*

PROSECUTION SANCTION ACCORDED ON
INCOMPLETE INVESTIGATION

After receipt of above documents, a letter no.365/P.Cell/Vig. (P-IV) dated 16-01-09 was sent to DCP/ACB GNCT of Delhi asking therein to supply (a) memo of evidence (b) opinion of prosecution branch (c) case diaries (d) A report containing facts of the case, allegations and result of investigation along with necessary annexures for perusal of sanctioning authority (e) copies of statements of witnesses obtained during investigation but no follow up action was found on record. Further perusal revealed that the sanctioning authority had called the IO/ACB on 06/02/09 with the case

file and the same was perused by him but the IO/ACB chose to remain silent about this the case diary.

It is on record that the investigation of case FIR no.34/08 PS ACB was not complete when the sanction for prosecution against Insp. K.G. Tyagi and others was sought from the sanctioning authority by the IO/ACB on 5/12/08. The fact is that the main charge sheet was filed on 25/03/09 and subsequently the supplementary charge sheet was filed on 10.02.10. The sanction was granted on 09/02/09 by the sanctioning authority. It is clear that sanction was sought and accorded much before the investigation was concluded.

MISLEADING THE SANCTIONING AUTHORITY BY THE IO/ACB:

It is also on record that the instant case was based on a sting operation allegedly carried out by the complainant himself only, who was the son of an accused in a murder case investigated by Insp. K.G. Tyagi. The IO/ACB neither seized the original gadgets used in sting operation, nor made any enquiry/investigation in this regard. However on 13.12.08 Ld. Chief PP/ACB raised the objection that they be seized now which was well before the grant of sanction. In compliance of said objection, IO/ACB showed inability to seize the same for the purpose of secrecy. But in a very strange and calculated manner, after receiving the sanction on 13.02.09, he subsequently recorded a supplementary statement of complainant on 16.02.09 in which he not only described the make and mode of sting operation of the original recording equipments and other gadgets, but also brought on record the fact of non availability of this vital piece of evidence.

The Hon'ble High Court in State v. Karim Bux, AIR 1950 all 494: 1951 Cr.LJ 323 held as under:-

xxx xxx xxx

VITAL ILLEGALITIES COMMITTED DURING THE INVESTIGATION REQUIRES CONSIDERATION SINCE

THE FOLLOWING DOCUMENTARY EVIDENCE WAS PART OF INVESTIGATION BUT NOT BROUGHT BEFORE THE COMPETENT AUTHORITY:

i) DD No.5A dt. 17.10.08 PS ACB and search cum seizure memo dt. 17.10.08. He contended that as per memo ASI Rajbir was present at his house No.A-224, Vijay Nagar Colony, Bawana till 10.15 on 17.10.08 but as per DD No.5A dt. 17.10.08 PS ACB ASI Rajbir is shown present in the office of ACB at Old Secretariat, Civil Lines at 10.10 AM on the same day and the distance between the two places is about 30 kms.

ii) Arrest memo dt. 17.10.08 and house search cum inventory memo dt. 17.10.08. He contended that SI Mukesh Kumar is shown arrested at 12.30 PM on 17.10.08 at the office of ACB at Old Secretariat, Civil Lines and at the same time he is shown present at his house at E-307, Aastha Kunj, Sector 18, Rohini at 12.15 PM as per search cum inventory memo. He further contended that it is impossible that a distance about 22 kms could have been covered in 15 minutes.

iii) The objections raised by the Ld. Chief PP on 13.12.08 and the compliance made by the IO/ACB dated 15.12.08 implies that at the time of grant of sanction, the competent authority was either kept in dark or misled about the facts of non availability of original gadgets used in sting.

iv) A DVD could not have been made without the use of a computer because original data has to be transferred into hard disk but the complainant and investigation agency are silent about this aspect.

v) Copy of details of two DVDs opened and prepared before the Special Judge on 06.03.10 and copy of the same provided to the applicant mentioning the files name, date of creations and modifications, which reveals certain irregularities and abnormalities as most of the files were created between the years 1980, 2003 etc.

VITAL DOCUMENTS EITHER PREPARED OR BROUGHT
ON RECORD AFTER GRANT OF SANCTION DATED
09.02.09 THROUGH SUPPLEMENTARY CHARGE SHEET
DATED 10.02.10 HENCE THERE WAS NO OCCASION TO
SANCTIONING AUTHORITY TO EXAMINE THESE
DOCUMENTS:

It is also on record that ACB filed supplementary charge sheet on 10.02.10 along with following relied documents and there was no occasion for sanctioning authority to peruse these vital documents:

- (a) Copy of letter no.7499/KRM/ACP/ACB Dt.15.12.08 regarding expert opinion in RC no. 38/04 of PS ACB.*
- (b) Copy of forwarding letter vide Memo No. 7500/KRM/ACP/ACB Dt. 15.12.08 addressed to Director, C.F.S.L., Hyderabad along with request for expert opinion.*
- (c) Copy of R/C No.71/21/08. Dt.15.12.08 issued by MHC/M PS Civil Lines to Director C.F.S.L. Hyderabad.*
- (d) Copy of entry in register No.19 PS Civil Lines dt. 15.12.08 showing that the exhibits has been sent to C.F.S.L. Hyderabad.*
- (e) Copy of statement of HC Jitender MHC/M PS Civil Lines u/s 161 Cr.PC dated 5/12/09.*
- (f) Copy of statement of Insp. Yashpal of ACB u/s 161 Cr.PC dated 5/12/09.*
- (g) Copy of APFSL Report (File No.ENG/13/2008 Dt. 01.12.09.*
- (h) Copy of R/C No.95/08 dt.15.12.08 issued by ACB showing the receipt of parcel by expert on 18.12.09 on the rear side of R/C.*
- (i) Copy of computerized receipt issued by APFSL DT. 20.12.08. showing that two sealed cloth parcels were received on 20.12.08.*

The Hon'ble Apex Court in V. Venkata Subbarao v. State AIR 2007 SC 489 held that,

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TAMPERING, INTERPOLATION NOTICED ON THE
DOCUMENT FOUND IN THE SUPPLEMENTARY
CHARGE SHEET DATED 10.02.10.

- i. *Perusal of copy of priority letter no. 7499/KRM/ACP/ACB dt. 15.12.08 supplied along with supplementary charge sheet and the copy of letter bearing same diary number supplied under RTI Act reveal that these two letters are apparently different and in the letter supplied under RTI Act from APFSL Hyderabad some cutting and counter signature of unknown person have been noticed. It is found that two letters bearing same diary numbers were prepared. It is also noticed that no explanation of this has been given in any case diary by the IO/ACB.*
- ii. *Perusal of copy of forwarding letter no.7500/KRM/ACP/ACB dt. 15.12.08 supplied along with supplementary charge sheet and copy of letter bearing same diary number supplied under RTI Act from APFSL Hyderabad reveals that the former was addressed to Director, Central Forensic Science Laboratory, MHA, Govt. of India, Hyderabad whereas the latter was addressed to Director, AP Forensic Science Laboratory, Hyderabad. It is also found that the two forwarding letters on record bear the same Memo number i.e. 7500/KRM/ACP/ACB dated 15.12.08. It is also noticed that no explanation of this has been given in any case diary by the IO/ACB.*

It is also not out of place to mention here that the applicant sought information from ACB under RTI Act regarding the regular format of forwarding letter to FSL/CFSL and the perusal of this record indicates that the format of forwarding letter sent to CFSL/APFSL is apparently different from the regular format.

- iii. *Perusal of road certificate no. 71/21/08 dated 15.12.08 supplied along with supplementary charge sheet and copy of same road certificate received through RTI from North district reveals that letter "C" of CFSL was found to be*

changed into “comma(,)” thereby converting Director CFSL Hyderabad to Director, FSL Hyderabad. It is an apparent interpolation of the documentary evidence. How it came about is neither explained in any case diary nor in any statements of Insp. Yashpal, who had taken and deposited the exhibits in this case.

It is a well settled law that the sanction is a solemn and sacrosanct act which affords protection to govt. servant against frivolous prosecutions. The validity of sanction ultimately depends upon the entire material, relevant facts and evidence placed before the competent authority so that the competent authority has full knowledge of facts to take a decision either to grant the sanction or deny the same in relation to the public servant against whom the sanction is sought.

In the instant case, the information, received through RTI Act from various authorities and documents provided in supplementary charge sheet, reveals certain illegalities and irregularities that have been discussed in detail in the enquiry report and involves misrepresentation of facts before the competent authority in order to obtain sanction against the applicant by the IO/ACB. The Hon’ble Supreme Court in Maghmala & Ors. V.G. Narasimha Reddy & Ors. Manu/SC/0608/2010 held as:

xxx.

As discussed above, the instant enquiry reveals that in relation to the legal proposition on the subject, the fact of the case confirm that certain important documents and evidence were not brought before the competent authority i.e. sanctioning authority. Hence there was no occasion for the sanctioning authority to examine and peruse the full facts which one can say is against the principles of the natural justice.

(emphasis supplied)

20. The report dated 29.12.2011 of Additional DCP Crime Branch

based on the aforementioned enquiry was submitted before Mr. Ashok Chand (PW-1) who was then posted as DCP (Crime and Railways). He made endorsement on the said report (Ex.PW-1/D7) on 30.12.2010 as under:-

“I agree with the report and conclusion arrived at by Addl DCP/Crime/HQ Shir P.S. Kushwah. In the interest of natural justice all facts should have been brought before the competent authority according sanction.”

Judicial View on first Prosecution Sanction

21. The above mentioned applications moved on 06.03.2010 challenging the validity of sanction for prosecution were considered by the Special Judge, in which context the Additional Public Prosecutor representing the State placed on record “Written Submissions on behalf of the State” dated 18.05.2012, the contents of para 9 whereof being relevant may be extracted as under:-

“9. The discrepancies as pointed out by the accused in the following documents, relied upon by the prosecution may be vital and relevant to the issue of sanction.

a. A letter dated 15.12.2008 bearing no. 7500/KRM/ACP/ACB was issued by Sh. I.D. Shukla DCP/ACB. The said letter was forwarded to the Director CFSL, CFI’s Complex, Ramanthapur, Amabarpet Post, Hyderabad and needless to say that it authorized the said authority to examine the exhibits sent.

b. A letter dated 15.12.08 bearing no. 7499/KRM/ACB was issued by Dr. N. Dilip Kumar, Addl. CP/ACB. The said letter is addressed to Sh. O.N. Murthy, Director APFSL, Lakhri Ka Pul, opposite Nilofer Hospital, Hyderabad and sought expert opinion in RC- 38/04 while the present case is

FIR No.34/2008. How it is happened there is no explanation as per prosecution record.

c. Admittedly, FSL report in this case is received from APFSL Hyderabad while the record of charge sheet shows that the exhibits were sent to CFSL Hyderabad but there is no explanation on record about the same, it is not clear if these documents were put up before sanctioning authority or not.

d. The copy of Road Certificate number 71/21/08 dated 15.12.08 issued by MHC(M), PS: Civil Lines filed along with the supplementary charge-sheet shows that the same is addressed to Director 9 FSL, Hyderabad.

It is matter of record that the relied documents of the prosecution i.e. entry made in register number 19 of Malkhana as well as the statement of HC Jitender, MHC(M), PS: Civil Lines under section 161 Cr.P.C. shows that the exhibits of the present case were sent to CFSL, Hyderabad. Also the word 'C' is looking like number 9 or a Comma (,) on the receiving copy of RC No.71/21/08. From the case file there is no explanation how these vital discrepancies and irregularities arose in the relied documents of prosecution.

e. It is matter of record that on the back of receiving copies of RC no.71/21/08 and 95/08, both dated 15.12.08, the receiving date of exhibits is mentioned as 18.12.08. Whereas the date of receive in computerized generated receipt is shown as 20.12.2008. This is very vital discrepancy but it is also a matter of record that in total investigation there is no explanation how and why it is happened.

The aforesaid irregularities have not been explained by the IO in the charge sheet. Moreover it is not clear that these irregularities were brought in the knowledge of the sanctioning authority.

(emphasis supplied)

22. On 30.07.2012, the Special Judge passed a detailed order taking note of the law declared in *S. N. Bose vs. State of Bihar*, AIR 1968 SC 1292; *N.M. Rajendram vs. State*, 1995 Crl.L.J. 4195; *Mansukhlal Vithaldas Chauhan vs. State of Gujrat* (1997) 7 SCC 622; *KC. Singh vs. CBI*, Criminal Appeal No.976/2010, decided on 10.08.2011; *Ram Krishan Prajapati vs. State of U.P.* (2000) 10 SCC 43; and *K. Narsimhachari vs. State, Inspector of Police ACB Cuddapha District*, 2003 Crl.L.J. 3315. She also took note of the fact that the prosecution had conceded that vital and relevant documents had not been filed with the initial charge-sheet, observing and concluding thus:-

“7...The Ld. Prosecutor further conceded that following documents were obtained after the sanction was accorded being:

i) Supplementary statement of complainant Abhinav dated 16.02.2009 to the effect of non-availability or destruction of originals.

ii) FSL report collected from APFSL, Hyderabad.

iii) Statement of HC Jitender, MHC(M) PS-Civil Lines dated 05.12.2009.

iv) Statement of Inspector Yashpal of ACB dated 05.12.2009.

8. Perusal of the record reveals that the investigating agency recorded the supplementary statement of the complainant under Section 161 Cr.P.C. to the effect that the device/instrument used in recordings has either been destroyed or not available after sanction for prosecution was accorded on 16.02.2009. Prosecution did not seize the original equipment/instrument/device used for the sting operation by the complainant and the statement under Section 161 Cr.P.C. of the complainant which was a vital piece of evidence was recorded after according the sanction

making it clear that the sanctioning authority was never appraised of the destruction of recording equipment/device as stated by the complainant. It is also pertinent to note that FSL report was received by the investigating agency on 05.12.2009 from APFSL, Hyderabad but the sanction was accorded on 09.02.2009 and the FSL report was not placed before the sanctioning authority at the time of according sanction but was made a part of the supplementary chargesheet filed on 10.02.2010...

“9. ...amply clear that the investigation was incomplete on 09.02.2009 at the time of according sanction and number of material documents came into existence after according sanction till the filing of supplementary charge sheet on 10.02.2010 which were not placed before the sanctioning authority and vitiates the entire proceedings...”

“... I hold that the sanction order dated 09.02.2009 does not stand the scrutiny of law and the Ld. APP fairly conceded that the sanction order dated 09.02.2009 is invalid and the merits of the case need not be gone into as the sanction is non-est in law and strikes at the root of the prosecution case.

11. As a result of the above discussion, accused Krishan Gopal Tyagi, Mukesh Kumar Singh and Rajbir Singh are hereby discharged of the offences under the Prevention of Corruption Act....”

23. Though, by virtue of the order dated 30.07.2012, the three public servants, i.e. A1, A2 and A3 stood discharged for the offences under the POC Act, the discretion of the State to file fresh charge-sheet for such offences after obtaining valid sanction having been kept open, the proceedings in the criminal case continued before the Special Judge for consideration of the issue as to whether charge was made out for offences under Section 8 of POC Act and Section 384/34

read with Section 120-B IPC.

Developments after rejection of Prosecution Sanction

24. By order dated 18.05.2013, the Special Judge held a case for charge to be made out against A1, A2, A3 and Mr. Ravinder Chadha, Advocate for offences under Section 120B IPC, Section 384 read with Section 120-B IPC and Section 8 of POC Act read with Section 120-B IPC. Besides this, he also found a case made out for separate charge to be framed against A1 for offences punishable under Sections 388 and 389 IPC. As noted earlier, on the SLP (Crl.) 7210-7211 of 2013 moved by him, the Supreme Court by its order dated 16.12.2013 stayed the proceedings in the case against Mr. Ravinder Chadha, Advocate.

25. It appears that on 06.01.2014 the Special Judge decided to stay the entire trial (*i.e.* against A1, A2 and A3 as well) observing that it could not be “*segregated*”, the proceedings against one accused (Mr. Ravinder Chadha, Advocate) having been stayed. But taking note of supplementary charge-sheet that had also come to be filed, he decided, by his subsequent order dated 03.12.2014, to proceed ahead to hear arguments on charge in light to such supplementary charge-sheet. The reasons why the earlier approach was abandoned cannot be fathomed from the record.

26. Be that as it may, A1, A2 and A3 moved this Court to challenge the order dated 18.05.2013 directing charges to be framed. The issue of charge, however, stood remanded to the trial court by order dated 26.07.2016 passed by a learned single judge of this court in W.P.

(Crl.) 1236 and 1240-1/2013.

27. After the Special Judge had directed discharge of A1, A2 and A3 from the offences under POC Act by order dated 30.07.2012, the additional public prosecutor, in charge of the case had submitted a report (mark PW1/Z2) on 09.08.2012 before the Director of Prosecution (DoP). The DoP, in turn, submitted his final opinion (mark PW-1/Z3) on 30.10.2012 to ACB for Directorate of Vigilance, GNCTD, observing, *inter alia*, that “(I)n the absence of any fresh material to meet out or to remove the aforesaid defects in the investigation/case, it would be a futile exercise, in seeking fresh sanction in this matter on the basis of the available material at present.”

28. The Special Secretary (Vigilance), GNCTD addressed letter (mark PW-2/X1) dated 07.01.2013 to Special Commissioner of Police (Crime), Delhi Police conveying, *inter alia*, the opinion as aforesaid of DoP and also of Directorate of Vigilance to the effect that “*the defect of non-availability or destruction of original equipment /instrument/ device, used for sting operation cannot be cured in any manner.*”

Move for fresh Sanction

29. On 18.05.2013, however, the Special Judge, while framing charges as aforesaid sought “status report” from Additional Commissioner of Police of ACB as regards “*fresh sanction*” under Section 19 of POC Act to be submitted on the next date, i.e., 04.07.2013.

30. On 17.06.2013, the Additional Commissioner of Police/ACB addressed a letter (Ex.PW-2/D3 – also Ex.PW-2/D6) to Special Commissioner of Police (Crime) asking for “*the present position of the fresh prosecution sanction*” with reference to the order dated 18.05.2013 of the Special Judge.

31. It may be mentioned here that it has been fairly conceded at the hearing that on the date of above-said communication being sent (*i.e.*, 17.06.2013), and some of the subsequent correspondence in its wake, there was no request made or pending for fresh sanction to be accorded, such a request eventually being formally made on 31.07.2013 by letter (Ex.PW-2A) of the investigating officer (PW-2), this position expressly so communicated by letter dated 01.07.2013 (mark PW-2/X) of DCP, Vigilance to Additional CP (ACB).

32. The status report dated 04.07.2013 submitted in compliance with order dated 18.05.2013 of the Special Judge came up for consideration on 10.07.2013. The Special Judge recorded the following order on that date :-

“IO has appeared and filed an undated report in the court, which is totally unsatisfactory and not disclosing any details. Liberty was granted by this court as late on 30.07.2012, to seek sanction for prosecution, which was followed by directions dated 18.05.2013 to submit status report. There seems absolutely no progress in the matter. There is apparently some deliberate maneuvering at the end of IO. The status report was sought from Addl. Commissioner, PS-ACB, but the report submitted is neither signed nor forwarded by the Addl. Commissioner.

IO submit that the status report is filed after approval of the Addl. Commissioner.

The report filed in the court does not indicate if the same has approval of Addl. Commissioner. The report is as sketchy as it can be, furnishing absolutely no details. There is absolutely no explanation as regards the progress of file over a period of almost one year.

Let the Addl. Commissioner, PS-ACB be present in court on 15.07.2013 with the entire record and correspondence on this subject....”

33. The directions were communicated on the same date by the IO (PW-2) to the Directorate of Vigilance by a formal communication (Ex.PW-2/D2). On 15.07.2013, the Additional CP/ACB appeared before the Special Judge in compliance with the directions and produced for perusal the record containing correspondence on the subject of fresh sanction. The Special Judge recorded the following order:-

“Addl. Commissioner has appeared in court and produced before this court the file of correspondence between the office of ACB, Directorate of Vigilance and the office of Commissioner of Police to show that there has been series of communication with respect to sanction of prosecution against the accused persons for offence punishable under the PC Act. It is also submitted that the file seeking sanction lies with the Spl. Commissioner of Police since January-2013.

Sh. Dwivedi submits that a reminder shall be issued to the Spl. Commissioner, on this aspect, requesting him to take a decision for grant or refusal for sanction, within 15 days from today.

IO submits that the observations of this court dated 10.07.2013 indicating maneuvering at his end be expunged, as the relevant file has been shown to the court by the Addl. Commissioner.

I have seen the relevant file and am convinced that the delay is not on account of the IO. Remarks qua him, in the order sheet 10.07.2013, are expunged. ...”

34. On the same date, the Additional Secretary (Vigilance) in GNCTD sent a letter (Ex.PW-1/D10) to the Special Commissioner of Police (Crime) and communicated, *inter alia*, that “*Hon’ble Court has again directed to take a decision within 15 days from today vide their order dated 15/7/2013 in the aforesaid case.*” The Special Commissioner of Police (Crime), by his endorsement on this communication, confirmed that the “*Court (is) repeatedly asking Crime Branch to decide*” on the sanction against A1 and had given “*last 15 days*”. The Commissioner of Police recorded his minutes on this communication (Ex.PW1/D10) as under:-

“Please send it to Br. Prosecution Sanction must be granted.”

35. It is not clear as to what was the basis of the letter dated 15.07.2013 (Ex.PW1/D10) informing the Special CP, Crime, that decision on the issue of sanction was to be taken as per directive of the court “*within 15 days*” since formal order dated 15.07.2013 of the court, as noted above, does not show any such timeline having been set by the court.

36. Concededly, as noted earlier, while above noted correspondence was being exchanged, there was no formal request yet made by the

investigating agency (ACB) for sanction for prosecution. This was reiterated by another letter dated 19.07.2013 (mark PW-2/X5) sent by Joint CP (Crime) to Additional Secretary, Vigilance, GNCTD.

37. The formal request for sanction was finally submitted on 31.07.2013 (Ex.PW-2/A) by the IO (PW-2) to Additional CP (Crime), it being pointed out by the defence that this communication dated 31.07.2013 was conspicuously silent about the view taken by the Special Judge on the previous order of sanction holding it invalid and the reasons for such conclusion.

38. On 02.09.2013, the sanctioning authority made a request (Ex.PW-1/D5) for deficient documents including DVDs to be made available and certain queries to be answered for clarity on facts. Since there was no reply, the request was reiterated by another communication dated 18.09.2013. The reply (Ex.PW-1/D9) was sent on 31.10.2013 by the IO, *inter alia*, stating that copies of DVDs were “*not available*” with ACB. The sanctioning authority made another request on 18.11.2013 (Ex.PW-1/D6) for clarity on facts and for supply of copy of the DVDs. Though the IO sent a reply on 25.11.2013, the request of sanctioning authority for DVDs remained unaddressed. Therefore, there was yet another communication (Ex.PW-1/D2) on 26.02.2014 from the sanctioning authority on the subject. The DVDs were not made available and instead the investigating agency statedly addressed another communication on 20.06.2014 requesting for early grant of sanction.

39. Meanwhile, A-1 had moved another representation (Ex.PW-

1/D13) dated 03.09.2013 to Special CP (Crime) on the subject which was considered and as per file noting (Ex.PE-1/D12 – colly) it was recorded on 04.11.2013 that the same “*shall be looked into before taking final decision of prosecution sanction.*”

40. Mr. Ashok Chand (PW-1), Additional CP, who had earlier been DCP (Crime) and who had “*agreed*” with the report dated 29.12.2011 (Ex.PW-1/D7) of Mr. P.S. Kushwah, on 30.12.2011, in the meantime, had taken over as Additional CP (Crime) thereby becoming the sanctioning authority *qua* the public servants who are named herein as the accused persons. He sent yet another communication on 01.07.2014 (Ex.PW-1/D1) to Additional CP (ACB) for copy of the DVD to be provided.

41. On 14.07.2014, the Directorate of Vigilance of GNCTD addressed a letter (Annexure ‘Q’ to second captioned petition) to the sanctioning authority (PW1) on the subject of sanction for prosecution in the case of ACB, *inter alia*, stating as under:-

“... It has been reported by Addl. CP, Anti-Corruption Branch that the requisite prosecution sanction (s) is/are still awaited from your Department/Organization. The Chief Secretary, being CVO of Govt. of NCT of Delhi has expressed serious concern about the delay of grant of prosecution sanction.

In this connection, kindly refer to the decision of Hon’ble Supreme Court in the case of Vineet Narain, in which it was directed that the competent authority has to convey the decision regarding grant of prosecution sanction within a period of three months.

You are, therefore, requested to kindly take appropriate action in the matter of grant of prosecution sanction in respect of above mentioned official(s) immediately, and furnish the action taken report to this Directorate within 15 days; so that Chief Secretary could be apprised of the position. ...”

(emphasis supplied)

42. The letter was received by the office of sanctioning authority (PW1) on 18.07.2014 and, on the same date, sanction for prosecution (Ex.PW-1/A) was accorded under Section 19 of POC Act against A1, A2 and A3. The sanction order was submitted with the supplementary charge-sheet on 10.10.2014 in the court of Special Judge and cognizance thereupon was taken for offences under Sections 7, 8 and 13 of POC Act.

Court proceedings after fresh Sanction

43. The question of charge, thus, came up for consideration again before the Special Judge after the grant of fresh sanction for prosecution (Ex.PW-1/1) on 18.07.2014 and in the wake of remit of the issue by this court by order dated 26.07.2016. The defence raised the issue of invalidity of the fresh sanction as also the absence of any sanction under Section 197 Cr.P.C. The Special Judge, by order dated 02.03.2017, held that the fresh sanction under Section 19 of POC Act was “valid” and further that there was no requirement of sanction under Section 197 Cr.P.C. in this case. Crucially, the Special Judge rejected the electronic evidence (i.e., the contents of DVDs) as inadmissible and, therefore, held the same to be not available to the prosecution at the stage of framing of charge.

44. The Special Judge recorded her opinion in order dated 02.03.2017 that the “*exoneration of the accused persons in departmental proceedings*” was of no consequence and would not stand in the way of criminal trial. Though the order does not expressly so state, it was conceded by the learned additional standing counsel at the hearing before this court that these observations have been made by the Special Judge with reference to the enquiry report dated 29.12.2011 (Ex.PW-1/D7) of Additional DCP Mr. P.S. Kushwah.

45. The Special Judge, by her order dated 02.03.2017, found no case made out for putting A2 and A3 on trial and, thus, proceeded to discharge them. She found charges made out against A1 for offences punishable under Section 7 read with Section 13(1)(d) of POC Act and under Sections 384 read with Section 120 B of IPC besides under Section 389 read with Section 120 B IPC.

46. As mentioned earlier, in the wake of the evidence on the issue of sanction having been adduced by the prosecution, though the depositions of PW-1 (sanctioning authority) and PW-2 (IO), A1 had moved a fresh application challenging the validity of the fresh sanction for prosecution (Ex.PW-1/A) on 18.03.2016. The said application has been dismissed by the Special Judge, by order dated 11.10.2017, *inter alia*, observing that the argument of “*failure of justice*” can “*only be ascertained after the completion of trial*” , referring in the discussion to the rulings of the Supreme Court in *Central Bureau of Investigation vs. V.K.Sehgal*, (1999) 8 SCC 501; *R. Sundarajan vs. State by DSP, SPE, CBI, Chennai*, (2006) 12 SCC 749; *Prakash Singh Badal vs. State of Punjab & Ors.*, (2007) 1 SCC 1;

State of Karnataka vs. Ameerjan, (2007) 11 SCC 273; *R. Venkatkrishnan vs. CBI*, (2009) 11 SCC 737; *State of Madhya Pradesh vs. Virender Kumar Tripathi*, (2009) 15 SCC 533; *Ashok Tshering Bhutia vs. State of Sikkim*, (2011) 4 SCC 402; *State of Maharashtra through CBI vs. Mahesh G. Jain*, (2013) 8 SCC 119; *State of Bihar & Ors. vs. Raj Mangal Ram*, (2014) 11 SCC 388; *CBI vs. Ashok Kumar Aggarwal*, (2014) 14 SCC 295; *Vivek Batra vs. Union of India & Ors.*, AIR 2016 SC 4770; and *Girish Kumar Suneja vs. CBI*, (2017) 14 SCC 809.

47. The charge-sheet submitted in the case of ACB reveals the steps taken by ACB and the evidence gathered during investigation. The case of the prosecution as set out in the said charge-sheet rested primarily on the contents of the audio / video recordings which were submitted in the form of DVD, which had statedly been cross-checked with the written transcript, the voices having been identified and confirmed by Mr. Joy Tirkey, ACP and SI Sanjeev Kumar of Crime Branch, A1 having refused to give sample of his voice. The prosecution would also rely on the call details record (CDR) of mobile cell phone no.997127990 allegedly in use of A1 showing his presence in the area of City Hospital on 08.12.2007 when the first alleged payment was made, this being connected to CDR of mobile phone no.9811103338 statedly in use of the complainant. The charge-sheet, however, itself stated that the said mobile phone no.997127990 was registered in the name of Avinash Tyagi, a resident of Inder Puri, Delhi who, it is stated, never joined the investigation in spite of the notices being sent to him several times. The allegation that the said

mobile no.997127990 (admittedly of Avinash Tyagi) was in use of A1 is sought to be proved on the basis of supplementary statement dated 06.03.2009 of Mr. Joy Tirkey, ACP to the effect that the said mobile number was called by him frequently for talking to A1.

48. The request for sanction sent on 31.07.2013 (Ex. PW2/A) has been proved by the IO (PW-2) before the trial court. It summarizes the evidence on the basis of which prosecution is pressed as under :-

“During the course of investigation, the audio / video recordings of the conversation made between the complainants, his father and the alleged police officials were viewed, heard and examined. During the investigation the voice of the police officials got identified through Sh. Joy Tirkey, ACP and SI Sanjeev Kumar of Crime Branch, who were their supervisory officer / colleague at the relevant time, in the presence of Panch Witness.

During the course of investigation, letter was written to the City Hospital, Pusa Road, Karol Bagh, Delhi to get the medical record of Sh. Jagdish Tyagi (brother-in-law of K.G. Tyagi). The record had been supplied, as per which Jagdish Tyagi remained admitted in that Hospital from the period 07.12.2007 to 12.12.2007 for the treatment of the compound fractures. Complainant had alleged in his complaint that he paid the amount of Rs.8 lacs as first installment of bribe at that Hospital on 08.12.2007.

The DVD's seized during the course of investigation were sent to Andhra Pradesh Forensic Science Laboratories and the opinion thereof has been received vide file No.ENG/13/2008 dated 01.12.2009 which shows that there content are continuous without any tempering. The statements of Inspr. Yashpal of PS A.C. Branch and HC Jitender, MHC (M), PS Civil Lines were recorded u/s. 161 Cr. PC.

Sufficient evidence have come on record to initiate prosecution against Inspr. K.G. Tyagi, SI Mukesh Kumar and ASI Rajbir Singh of Anti Homicide Section, Crime Branch. The prosecution sanction of the competent authority as envisaged u/s. 19(1) of POC Act, 1988 may kindly be accorded to prosecute accused persons Inspr. K.G. Tyagi, SI Mukesh Kumar and ASI Rajbir Singh of Anti Homicide Section, Crime Branch, Delhi for the above mentioned offences...”

49. The IO (PW-2), during his cross-examination, conceded that he had not ascertained if APFSL, Hyderabad was authorized to give its opinion on the exhibits relating to the case of ACB in Delhi. He was confronted with the case diary and in that context he admitted that on the request of A1, the Special Judge at the time of remand proceedings on 22.12.2008 had signed 104 pages of the case diary, endorsement to this effect having been made on the last (third) leaf of case diary no.25 dated 15.12.2008. He conceded that the police file, as later presented, also contains a case diary bearing no.26 (one leaf) purporting to be of 17.12.2008 which, chronologically, would be a case diary that in ordinary course also would have been part of the police file made available to the Special Judge at the time of proceedings dated 22.12.2008. The said case diary bearing no.26, however, admittedly does not bear the signatures, or any endorsement, recorded by the Special Judge.

50. It may be added here that in case diary no.27 of 22.12.2008 which immediately follows the last above mentioned case diary, there is an explanation added that the case diary no.26 dated 17.12.2018 had been mixed up in some other file for which reason it could not signed

by the Special Judge.

51. The case diary no.26 dated 17.12.2008, about which questions are raised purports to note that A1 had been admitted to bail by default by the Special Judge for the reason the charge-sheet had not been submitted within the period of sixty days, it having been explained in the course of proceedings in the court of Special Judge at that stage that the default was for the reason prosecution sanction had not been obtained till then. It may also be added in this very context that PW-2 was confronted with copy of the reply dated 17.12.2008 (mark PW2/X-3), submitted in answer to the application for bail by default wherein it was indicated to the Special Judge that the challan had already been prepared on 13.12.2008, such proposed charge-sheet not having been shown the light of the day.

52. PW-2, under cross-examination, pleaded ignorance as to at whose instance the case under MCOCA was registered against the father of the complainant. He admitted that no formal request for sanction had been sent to the sanctioning authority during the period 30.07.2012 to 29.07.2013. He conceded that the sanctioning authority had asked for certain documents and clarifications though he would claim that he had sent a reply he was unable to show any such reply on record.

53. PW-2 admitted that two DVDs had been seized by the original investigating officer Mr. H.P.S. Sodhi (ACP), one having been kept in sealed condition while the second was kept in open condition “*for investigation purposes*”, also admitting that the sanctioning authority

was time and again asking for copy of the DVD to be made available and that he had not supplied the same. He did not come with any clear answer as to why the said DVD which was available could not be shared with the sanctioning authority.

54. PW-2 admitted that the original device whereby the complainant would have made the audio-video recordings was “*never available*” nor sent to FSL. He conceded that the position taken by the complainant that the original device was not available or that it had been destroyed was not communicated in the letter requesting for sanction (Ex. PW2/A).

55. PW-2 would not remember whether any CDRs of the mobile phone of A1 were collected. He avoided giving a clear answer as to whether Avinash Tyagi in whose name the above mentioned mobile phone is registered had made a representation in response to the notice under Section 160 Cr. PC to the effect that such phone was in his use. He admitted that A1 was the investigating officer of the case of murder in the course of which he had arrested the father of the complainant and further that this fact was not mentioned in the letter (Ex. PW2/A) requesting for sanction for prosecution.

56. The sanctioning authority (PW-1) has deposed before the Special Judge proving the sanction order (Ex. PW1/A). It may be mentioned here that the prime evidence on the basis of which such sanction was granted under Section 19 of POC Act is noted in the said sanction order as under :-

“...And whereas, during the course of investigation, the

audio / video recordings of the conversation made between the complainants, his father and the alleged police officials were viewed, heard and examined. During the investigation, the voice of the police officials were got identified through Shri Joy Tirkey, ACP and SI Sanjeev Kumar of Crime Branch, who were their supervisory officer/ colleague at the relevant time, in the presence of Punch witness.

And whereas, letter was written to the City Hospital, Pusa Road, Karol Bagh, Delhi to get the medical record of Sh. Jagdish Tyagi (brother-in-law of K.G. Tyagi). The record had been supplied, as per which Jagdish Tyagi remained admitted in that Hospital from the period 07.12.2007 to 12.12.2007 for the treatment of the compound fractures. Complainant had alleged in his complaint that he paid the amount of Rs.8 Lacs as first installment of bribe at that Hospital on 08.12.2007.

And whereas, the DVD's seized during the course of investigation were sent to Andhra Pradesh Forensic Science Laboratories and the opinion thereof has been received vide file No.ENG/13/2008 dated 01.12.2009 which shows that there contents are continuous without any tampering. The statements of Inspr. Yashpal of PS A.C. Branch and HC Jitender, MHC (M), PS Civil Lines were recorded u/s. 161 Cr. P.C.

And whereas, I Ashok Chand, Addl. CP/Crime, being the authority to remove Inspr. K.G. Tyagi, SI Mukesh Kumar and ASI Rajbir Singh of Crime Branch from service / office after fully and carefully examining the material i.e. FIR, Memos, Statement of witnesses, CFSL Report, transcription of audio cassettes and other documents collected during investigation and placed before me in respect to the said allegations and circumstances of the case, consider that the said Inspr. K.G. Tyagi, SI Mukesh Kumar ASI Rajbir Singh of Crime Branch should be prosecuted in the court of law for the aforesaid offences."

57. During his cross-examination, the sanctioning authority (PW-1)

conceded that the case of ACB is not a “*trap case*”. He conceded that the Crime Branch where A1, A2 and A3 were posted at the relevant point of time is a specialized unit tasked with the duty of investigating sensitive cases. He pleaded ignorance as to whether there was any material collected by the ACB to substantiate the allegation that A1 had called the complainant or his father several times to the Crime Branch office. He confirmed that no evidence had been placed before him by ACB regarding the source of Rs.8,00,000/- or its payment by the complainant to A1, other than the statement under Section 161 Cr. PC. He stated the police file pertaining to the case of murder was not made available to him.

58. PW-1 conceded that there is no evidence gathered to confirm the identity of the person from whom the complainant would have arranged the devices used in the recording. He also conceded that there was a claim that DVDs had been prepared “*by merging the data of three equipments*”, the description of equipment thus used having been given. He further admitted that neither any equipment used in recording had been sent to forensic lab nor any certificate under Section 65B of Evidence Act produced. Admitting the exchange of correspondence on the subject of prosecution which has been elaborated earlier, PW-1 conceded that DVDs were not made available.

59. The sanctioning authority (PW-1) admitted that the proposal for registration of a case under MCOCA is initiated by an officer of the rank of ACP only, the file of the case of such nature registered against

the father of the complainant not having been shown to him by ACB.

60. While not disputing that discrepancies existed in the road certificates respecting dispatch of the DVDs to APFSL, or CFSL, PW-1 declined to give any explanation stating this would be the burden of the investigating officer. He confirmed that he had asked for the copy of the DVDs but the same were not made available.

61. PW-1 conceded that the CDRs of the mobile phone registered in the name of Avinash Tyagi and alleged to be in use of A1 were not duly authenticated, in that particulars thereon had been hand-written and the same are not supported by any certificate under Section 65B of the Evidence Act nor any customer application form collected. According to him, no statement of Avinash Tyagi under Section 161 Cr. PC was shown to him.

62. PW-1 admitted his noting dated 30.12.2011 below the enquiry report dated 29.12.2011 (Ex. PW2/D-7) submitted by Mr. PS Kushwaha, Additional DCP. He admitted that he had agreed with the said enquiry report and further that the said report was not part of the file which was put up before him for according sanction. He admitted that earlier, on 04.11.2013, it had been recorded (Ex. PW1/D12) on the representation (Ex. PW1/D13) of A1 that the same would be considered at the time of taking a final decision on the prosecution sanction and further that such representation was neither put up before him nor perused by him while granting sanction.

63. The sanctioning authority (PW-1), under cross-examination, admitted that A1 had arrested the father of the complainant in the case

of murder “*while performing official duty*”. He conceded that as per the in-house instructions of Delhi Police, in a case of such nature, before granting sanction for prosecution against police officials for acts committed during the performance of official duty, parawise comments duly vetted by the Chief Public Prosecutor were to be called for. Concededly, no such comments were called by him.

64. PW-1 admitted that the letter dated 14.07.2014 of the Director of Vigilance of Government of NCT of Delhi, referred to earlier, expressing “*serious concern*” of the Chief Secretary over the delay in sanction for prosecution had been received in his office on 17.07.2014, he having dealt with it on 18.07.2014 granting sanction on the same day.

Pre-requisite of Sanction in law

65. The Indian Penal Code, enacted in 1860, contained provisions to deal with offences of corruption amongst public servants. The existing law in the Indian Penal Code having been found to be not adequate, special legislation with a view to eradicate the bribery of corruption came to be enacted, it eventually taking the shape of Prevention of Corruption Act, 1988 (POC Act).

66. In the present proceedings, inasofar as A1, A2 and A3 are concerned, the penal clauses contained in sections 7 and 13 of POC Act are relevant which, to the extent necessary, may be quoted as under:-

“7. Public servant taking gratification other than legal remuneration in respect of an official act — Whoever, being,

or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine

13. Criminal misconduct by a public servant —

(1) A public servant is said to commit the offence of criminal misconduct,—

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification other than legal remuneration as a motive or reward such as is mentioned in section 7; or

xxx

(d) if he,—

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or

xxx”

67. But, prosecution of a public servant for the afore-mentioned

offences is subject to “previous sanction” as required by Section 19 which reads thus:

“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”.

(emphasis supplied)

68. Since the case also involves offences under the general criminal law, particularly with reference to the penal clauses contained in Section 384 IPC (*extortion*) and Section 389 IPC (*putting person in fear of accusation of offences, in order to commit extortion*), the conditions requisite for initiation of such proceedings against such public servants as mandated by the general criminal procedure also needs to be borne in mind and, for this purpose, it is necessary to take note of the provision contained in Section 197 Cr.P.C. which, to the extent relevant, reads thus:-

“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:”

(emphasis supplied)

69. For purposes of discussion that must follow, the provision contained in Section 465 Cr.P.C. also needs to be noted:-

“465. Finding or sentence when reversible by reason of error, omission irregularity.

(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to

the fact whether the objection could and should have been raised at an earlier stage in the proceedings.”

(emphasis supplied)

The Arguments

70. The prime contention urged by A1 is that the fresh sanction for prosecution under Section 19 of POC Act (Ex.PW-1/A) is vitiated since it was granted under compulsion, crucial material having been withheld, material of import showing “frame-up” having been excluded, inadmissible evidence being the foundation and there being no proper application of mind. It is also his contention that the prosecution for offences under the general law (*i.e.*, IPC offences) in the present case is also impermissible, there being no sanction under Section 197 Cr.P.C. The State, on the other hand, argues that the Special Judge has taken an appropriate view in the absence of sanction under Section 197 Cr.P.C., the acts statedly committed constituting IPC offences being such as cannot be said to have been committed “*in discharge of official duty*”. It is also the argument of the State that the Special Judge by the impugned order has taken a correct approach on the issue of validity of sanction under Section 19 of POC Act, it being inadvisable for the court to interdict at this stage. In response, A1’s case is that he having raised the issue of invalidity of sanction under Section 19 of POC Act at the threshold, the evidence on this issue having been adduced by the prosecution, he is within his rights to seek intervention by the court to put an end to criminal proceedings which are wholly unauthorized and illegal for want of proper and valid sanction, it not being a case merely of “*error, omission or*

irregularity” but of invalidity and want of sanction which would occasion or result in “failure of justice”, if the prosecution is permitted to continue and, therefore, the question requires to be determined at this very stage.

Judicial view on validity of Sanction

71. In *Yusofalli Mulla Noorbhoy v. King*, 1949 SCC OnLine PC 20: AIR 1949 PC 264, the Privy Council ruled that prosecution launched without a valid sanction is a nullity observing that a court cannot be competent to hear and determine a prosecution the institution of which is prohibited by law. In *R.S. Nayak vs. A.R. Antulay*, (1984) 2 SCC 183, a Constitution Bench of five Hon’ble Judges of the Supreme Court held that “*trial without a sanction renders the proceedings ab initio void. But the terminus a quo for a valid sanction is the time when the court is called upon to take cognizance of the offence. ... “the existence of a valid sanction” being prerequisite to the taking of cognizance of the enumerated offences alleged to have been committed by a public servants*”, the court “*called upon to take cognizance of such offences,*” being bound to “*enquire whether there is a valid sanction to prosecute the public servant for the offence alleged to have been committed by him as public servant.*”. It has, however, also been consistent view of the courts that protection available under the statutory provisions rendering grant of sanction to prosecute a public servant – a condition precedent to the institution of the prosecution – is not absolute.

72. In *Mansukhlal Vithaldas Chauhan vs. State of Gujarat*, (1997) 7

SCC 622, the Supreme Court noted the observations of the Privy Council in *Gokulchand Dwarkadas Morarka v. King*, AIR 1948 PC 82, to the effect that the administrative authority conferred with the power to grant sanction could not “adequately discharge the obligation of deciding whether to give or withhold a sanction without a knowledge of the facts of the case.” The court noted that sanction lifts the bar for prosecution, it being “a weapon to ensure discouragement of frivolous and vexatious prosecution” and “is a safeguard for the innocent but not a shield for the guilty.” The conclusion was that “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”.

The court held:-

“18. The validity of the sanction would, therefore, depend upon the material placed before the sanctioning authority and the fact that all the relevant facts, material and evidence have been considered by the sanctioning authority. Consideration implies application of mind. The order of sanction must ex facie disclose that the sanctioning authority had considered the evidence and other material placed before it. This fact can also be established by extrinsic evidence by placing the relevant files before the Court to show that all relevant facts were considered by the sanctioning authority. (See also *Jaswant Singh v. State of Punjab* [AIR 1958 SC 124 : 1958 SCR 762] and *State of Bihar v. P.P. Sharma* [1992 Supp (1) SCC 222 : 1992 SCC (Cri) 192 : 1991 Cri LJ 1438] .)

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 a 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 it 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 bad 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)

73. It may be added here that in *Mansukhlal Vithaldas Chauhan* (supra) the prime issue raised was as to whether the High Court could have issued a mandamus on the question of sanction for prosecution and as to whether against such backdrop the order of sanction was valid. Holding the sanction for prosecution in that case to be bad in law on such account, the direction of the High Court on the subject having “*closed all other alternatives*” for the competent authority, the court observed thus:-

“23. In the performance of this duty, if the authority in whom the discretion is vested under the statute, does not act independently and passes an order under the instructions

and orders of another authority, the Court would intervene in the matter, quash the order and issue a mandamus to that authority to exercise its own discretion.”

74. The questions about validity of sanction in a prosecution for offences punishable under POC Act and IPC had also been raised in *Parkash Singh Badal vs. State of Punjab*, (2007) 1 SCC 1, and in that context the Supreme Court observed thus:-

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

(emphasis supplied)

75. In *V. Venkata Subbarao vs. State*, (2006) 13 SCC 305, on facts, it was found that vital documents respecting complicity had not been produced and in that view of the matter the sanction was found “*vitiated in law*” for the reason the sanctioning authority “*did not have any occasion to apply their mind to the entire materials on record*”.

76. In *State of Karnataka v. Ameerjan*, (2007) 11 SCC 273, it was observed that order of sanction is not to be “*construed in pedantic manner*” and that “*application of mind on the part of sanctioning authority is imperative for the sanction to be held to be valid*” and

further “ordinarily, before passing an order of sanction, the entire records containing the materials collected against the accused should be placed before the sanctioning authority”.

77. In *State of Maharashtra v. Mahesh G. Jain*, (2013) 8 SCC 119, the singular question addressed by the Supreme Court was as to whether the High Court was justified in refusing to grant leave to file an appeal against acquittal rendered principally on the foundation that the sanction for prosecution was defective and illegal on account of non application of mind, showing lack of satisfaction and the court examined the previous rulings and summarized the law relevant for the present discussion as under:-

“14. From the aforesaid authorities the following principles can be culled out:

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.

14.3. The prosecution may prove by adducing the evidence that the material was placed before the sanctioning authority and its satisfaction was arrived at upon perusal of the material placed before it.

14.4. Grant of sanction is only an administrative function and the sanctioning authority is required to prima facie reach the satisfaction that relevant facts would constitute the offence.

14.5. The adequacy of material placed before the sanctioning authority cannot be gone into by the court as it does not sit in appeal over the sanction order.

14.6. If the sanctioning authority has perused all the materials placed before it and some of them have not been proved that would not vitiate the order of sanction.

14.7. The order of sanction is a prerequisite as it is intended to provide a safeguard to a public servant against frivolous and vexatious litigants, but simultaneously an order of sanction should not be construed in a pedantic manner and there should not be a hypertechnical approach to test its validity.”

(emphasis supplied)

78. In *CBI v. Ashok Kumar Aggarwal*, (2014) 14 SCC 295, the Supreme Court examined the issue again and observed that “prosecution has to satisfy the court that at the time of sending the matter for grant of sanction by the competent authority, adequate material for such grant was made available to the said authority”, holding thus:-

“16. In view of the above, the legal propositions can be summarised 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.”

(emphasis supplied)

79. The Supreme Court by its decision in the case reported as *Vineet Narain Vs. Union of India*, (1998) 1 SCC 226, had laid down certain guidelines for the authorities conferred with the power to grant sanction for prosecution, particularly against the backdrop of complaint of inertia in matters where accusations are made against high dignitaries, the prime concern being as to whether judicial review could be an effective instrument for activating the investigative process which is under the control of the executive. The time limit of three months for grant of sanction for prosecution was part of the reforms that were introduced. The defence has placed reliance on circular no.08/05/15 issued by Central Vigilance Commission on 25.05.2015 on the subject of guidelines to be followed by

administrative authorities competent to accord sanction for prosecution under Section 19 of the POC Act taking note further, *inter alia*, of the directions of the Supreme Court in *CBI Vs. Ashok Kumar Aggarwal* (supra), as quoted above, in terms of which the sanctioning authority is under an obligation to discharge its duty to give or withhold sanction only after having full knowledge of the material facts of the case.

“Failure of justice”

80. Having regard, *inter alia*, to the provisions contained in Section 19 (3) (a) and (4) of the POC Act and Section 465 Cr.P.C. which have been quoted earlier, it is clear that mere fact that there is “*error, omission or irregularity*” in the order of sanction cannot result in the cognizance being held to be bad or prosecution to be interdicted unless it is demonstrated that such defects in the sanction for prosecution have occasioned “*failure of justice*”.

81. In *State vs. T. Venkatesh Murthy*, (2004) 7 SCC 763, the Supreme Court observed thus:-

“11. The expression “failure of justice” is too pliable or facile an expression, which could be fitted in any situation of a case. The expression “failure of justice” would appear, sometimes, as an etymological chameleon (the simile is borrowed from Lord Diplock in Town Investments Ltd. v. Deptt. of Environment, (1977) 1 All ER 813). The criminal court, particularly the superior court, should make a close examination to ascertain whether there was really a failure of justice or it is only a camouflage. (See. Shamnsaheb M. Multtani v. State of Karnataka, (2001) 2 SCC 577).”

82. In *CBI v. Ashok Kumar Aggarwal*, (2014) 14 SCC 295, the

Supreme Court while dwelling on the issue of “*failure of justice*”, *inter alia*, observed thus:-

“19 ...It has to be shown that the accused has suffered some disability or detriment in the protections available to him under the Indian criminal jurisprudence. “Prejudice” is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial and not matters falling beyond their scope. Once the accused is able to show that there has been serious prejudice caused to him with respect to either of these aspects, and that the same has defeated the rights available to him under legal jurisprudence, the accused can seek relief from the court. (Vide Nageshwar Shri Krishna Ghobe v. State of Maharashtra [(1973) 4 SCC 23 : 1973 SCC (Cri) 664 : AIR 1973 SC 165] , Shamnsaheb M. Multtani v. State of Karnataka [(2001) 2 SCC 577 : 2001 SCC (Cri) 358] , State v. T. Venkatesh Murthy [(2004) 7 SCC 763 : 2004 SCC (Cri) 2140] , Rafiq Ahmad v. State of U.P. [(2011) 8 SCC 300 : (2011) 3 SCC (Cri) 498] , Rattiram v. State of M.P. [(2012) 4 SCC 516 : (2012) 2 SCC (Cri) 481] , Bhimanna v. State of Karnataka [(2012) 9 SCC 650 : (2012) 3 SCC (Cri) 1210] , Darbara Singh v. State of Punjab [(2012) 10 SCC 476 : (2013) 1 SCC (Cri) 1037 : AIR 2013 SC 840] and Union of India v. Ajeet Singh [(2013) 4 SCC 186 : (2013) 2 SCC (Cri) 347 : (2013) 2 SCC (L&S) 321] .)”

(emphasis supplied)

The appropriate stage to raise objection on sanction

83. But as is clear from plain reading of provisions contained in Section 19 of POC Act, the plea of the public servant who is accused

of such offences as are involved herein about the “*error, omission or irregularity*” in the sanction for his prosecution occasioning or resulting in “*failure of justice*” cannot result in the court intervening unless such objection is raised at “*earlier stage in the proceedings*”. This also is the spirit of the law contained in Section 465 Cr.P.C. whereunder the court while determining the effect of such defect in the sanction order is required to “*have regard to the fact whether the objection could and should have been raised at an earlier stage of the proceedings.*” The discourse on this aspect in the authoritative pronouncements in the past would be of advantage and, therefore, must be noted hereinafter.

84. The State relies on rulings in *Central Bureau of Investigation v. V.K. Sehgal*, (1999) 8 SCC 501, where the respondent before the Supreme Court had been held guilty and convicted by the Special Judge in a case involving offences under POC Act. The High Court had set aside the order of conviction and sentence finding defect in the sanction for prosecution. In that context, the Supreme Court while allowing the appeal of the investigating agency observed that the appellate or revisional court were “*debarred*” from reversing such an order on such ground, the objection as to the validity not having been taken at the trial stage, holding that “*once the judicial filtering process is over on completion of the trial the purpose of providing for the initial sanction would bog down to a surplusage*”.

85. Similarly in *Ashok Tshering Bhutia v. State of Sikkim*, (2011) 4 SCC 402, on which reliance is placed by the State, the appellant had

been held guilty and convicted for offence under Section 13(2) read with Section 13(1)(e) of POC Act, the appeal against conviction having been dismissed by the High Court on the question of validity of sanction which was raised and the Supreme Court observed that “*where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless a miscarriage of justice has been caused thereby*”.

86. Though in the context of prerequisite of sanction under Section 197 Cr.P.C., in the judgment reported as *Abdul Wahab Ansari v. State of Bihar*, (2000) 8 SCC 500, the Supreme Court made certain observations which are crucial for just decision of the present case and which may be quoted as under:-

*“7. Previous sanction of the competent authority being a precondition for the court in taking cognizance of the offence if the offence alleged to have been committed by the accused can be said to be an act in discharge of his official duty, the question touches the jurisdiction of the Magistrate in the matter of taking cognizance and, therefore, there is no requirement that an accused should wait for taking such plea till the charges are framed. In *Suresh Kumar Bhikamchand Jain v. Pandey Ajay Bhushan* [(1998) 1 SCC 205 : 1998 SCC (Cri) 1] a similar contention had been advanced by Mr Sibal, the learned Senior Counsel appearing for the appellants in that case. In that case, the High Court had held on the application of the accused that the provisions of Section 197 get attracted. Rejecting the contention, this Court had observed: (SCC pp. 217-18, para 23)*

“The legislative mandate engrafted in sub-section (1) of Section 197 debarring a court from taking

cognizance of an offence except with a previous sanction of the Government concerned in a case where the acts complained of are alleged to have been committed by a public servant in discharge of his official duty or purporting to be in the discharge of his official duty and such public servant is not removable from his office save by or with the sanction of the Government touches the jurisdiction of the court itself. It is a prohibition imposed by the statute from taking cognizance, the accused after appearing before the court on process being issued, by an application indicating that Section 197(1) is attracted merely assists the court to rectify its error where jurisdiction has been exercised which it does not possess. In such a case there should not be any bar for the accused producing the relevant documents and materials which will be ipso facto admissible, for adjudication of the question as to whether in fact Section 197 has any application in the case in hand. It is no longer in dispute and has been indicated by this Court in several cases that the question of sanction can be considered at any stage of the proceedings.”

The Court had further observed: (SCC pp. 218-19, para 24)

“The question of applicability of Section 197 of the Code and the consequential ouster of jurisdiction of the court to take cognizance without a valid sanction is genetically different from the plea of the accused that the averments in the complaint do not make out an offence and as such the order of cognizance and/or the criminal proceedings be quashed. In the aforesaid premises we are of the considered opinion that an accused is not debarred from producing the

relevant documentary materials which can be legally looked into without any formal proof, in support of the stand that the acts complained of were committed in exercise of his jurisdiction or purported jurisdiction as a public servant in discharge of his official duty thereby requiring sanction of the appropriate authority.”

8. In the case of *Ashok Sahu v. GokulSaikia* [1990 Supp SCC 41 : 1990 SCC (Cri) 611] this court had said that want of sanction under Section 197 of the Code is a prohibition against institution of the proceedings, and the applicability of the section must be judged at the earliest stage of the proceedings and in that case, the Court directed the Magistrate to consider the question of sanction before framing a charge. In yet another case, in the case of *B. Sahav. M.S. Kochar* [(1979) 4 SCC 177 : 1979 SCC (Cri) 939] a three-Judge Bench of this Court had held that the question of sanction under Section 197 CrPC can be raised and considered at any stage of the proceedings and further in considering the question whether or not sanction for prosecution was required, it is not necessary for the court to confine itself to the allegations in the complaint, and it can take into account all the material on the record at the time when the question is raised and falls for consideration. This being the position, we are of the considered opinion that the decision of this Court in *Birendra K. Singh* case [(2000) 8 SCC 498 : JT (2000) 8 SC 248] does not lay down the correct law by directing that the objection on the question of sanction can be raised at the stage of framing of charge and not at any prior point of time.”

(emphasis supplied)

87. In *State of Karnataka v. C. Nagarajaswamy*, (2005) 8 SCC 370, it was held that:-

“14. 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 therefor 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.

15. 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 regards sanction may be determined at an early stage. (See Ashok Sahu v. GokulSaikia [1990 Supp SCC 41 : 1990 SCC (Cri) 611] and Birendra K. Singh v. State of Bihar [(2000) 8 SCC 498 : 2001 SCC (Cri) 17 : JT (2000) 8 SC 248] .)

16. 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. (See B. Saha v. M.S. Kochar [(1979) 4 SCC 177: 1979 SCC (Cri) 939] SCC para 13 and K. Kalimuthu v. State [(2005) 4 SCC 512 : 2005 SCC (Cri) 1291] .)”

(emphasis supplied)

88. In *Parkash Singh Badal v. State of Punjab*, (2007) 1 SCC 1, certain observations on the question of appropriate stage were made by the Supreme Court which may be noted as under:-

“47. The sanctioning authority is not required to separately specify each of the offences against the accused public servant. This is required to be done at the stage of framing

of charge. Law requires that before the sanctioning authority materials must be placed so that the sanctioning authority can apply his mind and take a decision. Whether there is an application of mind or not would depend on the facts and circumstances of each case and there cannot be any generalised guidelines in that regard.

48. The sanction in the instant case related to the offences relatable to the Act. There is a distinction between the absence of sanction and the alleged invalidity on account of non-application of mind. The former question can be agitated at the threshold but the latter is a question which has to be raised during trial.”

(emphasis supplied)

89. In *Ashok Kumar Aggarwal* (supra), the Supreme Court held that “the stage of examining the validity of sanction is during the trial and we do not propose to say that the validity should be examined during the stage of inquiry or at pre-trial stage”, and quoted the following passage from the previous ruling in *Dinesh Kumar v. Airport Authority of India*, (2012) 1 SCC 532:

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

(emphasis supplied)

90. In *State of Bihar v. Rajmangal Ram*, (2014) 11 SCC 388, the High Court of Patna had intervened in the criminal prosecution of public servant finding substance in the objection raised as to the validity of sanction for prosecution, the error pointed out pertaining to competency of the sanctioning authority. Against this backdrop, the Supreme Court examined “*the circumference of the Court's power to interdict a criminal proceeding mid-course on the basis of the legitimacy or otherwise of the order of sanction to prosecute*”. Taking note of the previous decisions on the subject including *T. Venkatesh Murthy* (*supra*) and *Prakash Singh Badal* (*supra*), the court held thus:-

“10. The High Court in both the cases had also come to the conclusion that the sanction orders in question were passed mechanically and without consideration of the relevant facts and records. This was treated as an additional ground for interference with the criminal proceedings registered against the respondents. Having perused the relevant part of the orders under challenge we do not think that the High Court was justified in coming to the said findings at the stage when the same were recorded. A more appropriate stage for reaching the said conclusion would have been only after evidence in the cases had been led on the issue in question.”

(emphasis supplied)

91. It has been pointed out by the learned senior counsel appearing for A1 that though the above passage from the judgment in *Rajmangal Ram* (*supra*) has been noted by the Special Judge in (Para 11 of) her order dated 11.10.2017, she has misquoted the last sentence so as to read it thus:-

“A more appropriate stage for reaching the said conclusion would have been only after evidence in the case had been led on the issue of question.”

(emphasis supplied)

92. The emphasis of the Supreme Court in above quoted passage from the decision in *Rajmangal Ram* (supra) is on conclusion to be reached “*after evidence....had been led on the issue in question*”. Since the Special Judge has mis-read the sentence by replacing the words “*issue in question*” by the words “*issue of question*”, it is clear, the true import and effect of the ruling was lost. Instances are galore of cases where this court has issued directions to the trial courts to examine and return findings on the objection as to the validity of sanction raised at initial stages and for this purpose requiring resort to be had to the provision of Section 311 Cr. PC to summon and examine the sanctioning authority as a witness even before considering the question of charge. [For illustration, see *Ashok Kumar Aggarwal Vs. Central Bureau of Investigation*, 2007 (4) JCC 2829]

93. In *Chandan Kumar Basu v. State of Bihar*, (2014) 13 SCC 70, *albeit* in the context of Section 197 Cr.P.C., it was reiterated that question of validity of sanction “*can be raised at any time after cognizance had been taken and may have to be determined at different stages of the proceeding/trial.*”

94. The ruling in *Nanjappa v. State of Karnataka*, (2015) 14 SCC 186, summarises the legal position thus:

“22. The legal position regarding the importance of sanction under Section 19 of the Prevention of Corruption Act 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 the 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.

xxx

23.2. A careful reading of sub-section (3) to Section 19 would show that the same interdicts reversal or alteration of any finding, sentence or order passed by a Special Judge, on the ground that the sanction order suffers from an error, omission or irregularity, unless of course the court before whom such finding, sentence or order is challenged in appeal or revision is of the opinion that a failure of justice has occurred by reason of such error, omission or irregularity. Sub-section (3), in other words, simply forbids interference with an order passed by the Special Judge in appeal, confirmation or revisional proceedings on the ground that the sanction is bad save and except, in cases where the appellate or revisional court finds that failure of justice has occurred by such invalidity. What is noteworthy is that sub-section (3) has no application to proceedings before the Special Judge, who is free to pass an order discharging the accused, if he is of the opinion that a valid order sanctioning prosecution of the accused had not been produced as required under Section 19(1).

23.3. Sub-section (3), in our opinion, postulates a prohibition against a higher court reversing an order passed

by the Special Judge on the ground of any defect, omission or irregularity in the order of sanction. It does not forbid a Special Judge from passing an order at whatever stage of the proceedings holding that the prosecution is not maintainable for want of a valid order sanctioning the same.

23.4. The language employed in sub-section (3) is, in our opinion, clear and unambiguous. This is, in our opinion, sufficiently evident even from the language employed in sub-section (4) according to which the appellate or the revisional court shall, while examining whether the error, omission or irregularity in the sanction had occasioned in any failure of justice, have regard to the fact whether the objection could and should have been raised at an early stage. Suffice it to say, that a conjoint reading of sub-sections 19(3) and (4) leaves no manner of doubt that the said provisions envisage a challenge to the validity of the order of sanction or the validity of the proceedings including finding, sentence or order passed by the Special Judge in appeal or revision before a higher court and not before the Special Judge trying the accused.

23.5. The rationale underlying the provision obviously is that if the trial has proceeded to conclusion and resulted in a finding or sentence, the same should not be lightly interfered with by the appellate or the revisional court simply because there was some omission, error or irregularity in the order sanctioning the prosecution under Section 19(1). Failure of justice is, what the appellate or revisional court would in such cases look for. And while examining whether any such failure had indeed taken place, the Court concerned would also keep in mind whether the objection touching the error, omission or irregularity in the sanction could or should have been raised at an earlier stage of the proceedings meaning thereby whether the same could and should have been raised at the trial stage instead of being urged in appeal or revision.”

(emphasis supplied)

95. In *Girish Kumar Suneja v. CBI*, (2017) 14 SCC 809, it has been observed as under:-

“66. Sub-section (4) of Section 19 of the PC Act is also important in this context inasmuch as the time lapse in challenging an error, omission or irregularity in the sanction resulting in a failure of justice is of considerable significance. Unless the challenge is made at the initial stages of a trial and within a reasonable period of time, the court would not be obliged to consider the absence of, or any error, omission or irregularity in the sanction for prosecution. Therefore, it is not as if the accused can, after an unreasonable delay, raise an issue about the sanction; but if that accused does so, the court may not decide that issue both at the appellate stage as well as for the purposes of stay of the proceedings”.

(emphasis supplied)

The principles

96. From the above, it can be summed up that:

- (a) A valid *sanction* for prosecution under Section 19 of the POC Act granted by the competent authority is a pre-requisite, it being a safeguard for the innocent public servants to ensure discouragement of frivolous or vexatious prosecutions, the absence of such valid sanction rendering the prosecution that is launched a nullity;
- (b) The grant of sanction is an administrative function and the court would not sit in appeal over it by embarking upon an exercise of examining the adequacy of material placed before the sanctioning authority;

(c) The judicial scrutiny is more of the decision making process it, however, being incumbent on the prosecution to prove that the appropriate authority had granted the sanction having regard to all the relevant facts and after perusing the materials placed before it in entirety, such material comprising all the vital documents including those which may “*tilt the balance in favour of the accused*”. The material on which the sanctioning authority proceeds to accord its approval for prosecution must be relevant to the case against the public servant and also be admissible in law;

(d) It is also *sine qua non* for the validity of the sanction that the competent authority on which the power to grant sanction is conferred does not treat it as an idle formality and applies its own independent mind undertaking the task in a manner that does not reflect mechanical approach, not the least being under pressure, compulsion or constraint from any external force or quarter;

(e) While mere error, omission or irregularity may not be of any consequence, withholding of vital documents or material from the sanctioning authority, particularly such material as may tilt the balance in favour of the accused public servants causes serious prejudice which may occasion failure of justice vitiating the sanction for prosecution;

(f) While absence of sanction for prosecution is a question to be agitated at the threshold, objection to the validity of sanction may be raised by the accused public servant “at any time” or “at any stage” in the course of or during trial, it being incumbent on the Special Judge presiding over the trial to find, and determine, if there is any invalidity attached to the sanction order and further as to whether failure of justice has occurred on such account and pass the necessary order thereupon – more appropriate stage for reaching such conclusion being after evidence has been adduced on the “issue in question” which means evidence having been adduced on the issue of validity of sanction;

(g) If such objection is raised belatedly, the time lapse being of considerable significance, the court is not obliged to consider the effect of any such error, omission or irregularity. In order to claim the protection of law against prosecution without valid sanction, the public servants, however, is expected to raise the issue at the earliest stage of the trial. The objection of such nature pressed when the trial is near termination would render the issue inconsequential. To put it simply, if the challenge to the validity of sanction is made at the initial stage of trial, and within reasonable period of time, the Special Judge is duty bound to examine the issue, being “free” to pass an appropriate order thereupon, the

inhibition of Section 19(3)(a) of the POC Act and Section 465 Cr. PC being inapplicable to the trial court, such provision forbidding the appellate or revisional court from entertaining such objection for the first time at later stages. It must, however, be added here that the determination of the issue by the Special Judge in the course of the trial is subject to judicial scrutiny by this court in the supervisory jurisdiction; and

(h). Further, it is necessary that the objection to the validity of sanction is considered and the issues raised are determined at the earliest for the reason continuation of criminal prosecution on invalid sanction is not desirable since such proceedings are void *ab initio*. Rather, if the objection is raised at an early stage, the court is duty bound to consider and decide upon it instead of relegating it to the concluding stage of final determination of the case, it being not just or fair to do so since that approach would render the statutory protection illusory.

Inadmissible Electronic Evidence

97. Before applying the above principles to the objection as to the validity of sanction for prosecution in the present case, it needs to be noted that the Special Judge has found the electronic evidence presented with the charge-sheet in the case of ACB to be inadmissible and, therefore, not available to the prosecution, observing thus:

“Admissibility of Electronic Evidence

25. *The second limb of arguments of learned counsels for accused persons pertained to the electronic evidence provided by the complainant Abhinav Krishan Aggarwal on 16.10.2008 to H.P.S. Sodhi, the then ACP/ACB Delhi in the shape of two DVDs containing audio-video recordings. It was very strenuously argued by learned counsels for accused persons that the only basis for supporting the allegations against the accused persons is the conversation that is said to have been recorded by the complainant Abhinav Krishan Aggarwal with the help of (i) MP3 player, (ii) Pen camera and (iii) Mobile phone Nokia E90. Since none of these devices were handed over to Anti Corruption Branch and consequently were not subjected to analysis, the secondary evidence in the shape of DVDs in the absence of certificate u/s 65B of Indian Evidence Act is inadmissible.*

26. *It is not in dispute that the complainant in his statement u/s 161 Cr.P.C. had categorically stated that the original instruments (MP3 player, Pen camera, Mobile phone Nokia AEA90) which were used to record the audio-video of the conversations were not handed over by him to Anti Corruption Branch as the same had been either destroyed or returned. He had also stated that the entire data relating to sting operation was transferred by him in the CDs which he has handed over to ACB. It is also the admitted case of the prosecution that no certificate u/s 65B of Indian Evidence Act was given by the complainant at the time of handing over the said CDs.*

27. *The law regarding the admissibility of electronic evidence has been laid down in the celebrated judgment of ANWAR P.V. VS P.K. BASHEER reported as (2014) 10 SCC 473 wherein it has been held by the Hon'ble Supreme Court that:*

“The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with

Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in Navjot Sandhu Case (supra), does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.”

28. The only inevitable conclusion qua the electronic evidence produced by the complainant which can thus be arrived at is that the same is inadmissible in law and cannot be looked into even at the stage of framing of charge.”

98. The learned additional standing counsel arguing for the State fairly conceded that the electronic evidence referred to in the charge-sheets is not admissible and, therefore, was not available even for purposes of the sanctioning authority, such electronic evidence inclusive of not only the DVDs presented by the complainant with or after the FIR but also the CDRs of the mobile phones mentioned in the case of ACB. No certificates under Section 65B of Indian Evidence Act, 1872 have been obtained or can possibly be secured now in

respect of the alleged audio / video recordings made by the complainant – this, for the simple reason the equipment statedly used by him has not been shared even with the investigating agency, the specious plea offered on 09.02.2009, more than three and a half months after lodging of the FIR, being unacceptable. There is neither any explanation given by, nor any anxiety shown by the investigating agency to ascertain from, him as to why he chose to destroy the MP3 player. Destruction of the equipment implies a conscious decision to render the equipment unavailable. An adverse inference is bound to be raised that if such equipment were to be brought before the forensic experts or the investigating agency or the court, its testing would not have affirmed its use for the purposes claimed. This would have a direct bearing on the authenticity or credibility of the material which is shown to be the product of the concerned device. The charge-sheet itself shows that the complainant has scrupulously avoided even identifying the source of other equipment which could have been utilized in putting together the audio / video tracks which were presented in the form of DVD. The source, if revealed, might have corroborated the word of the complainant. Further, it is only such source as would have been in a position to provide the necessary authentication in terms of Section 65 B. The non-disclosure of the source renders the possibility of such certification nugatory.

99. The chronology of events has been taken note of in earlier part of this judgment. It unmistakably shows that ACB was gullible enough to accept the audio / video recording presented to it by the complainant in the form of DVD without any endeavour to secure its

confirmation including by certification under Section 65B. The sanctioning authority at all stages, including just before the time of fresh sanction, was persisting with the demand for such material to be made available. Though one spare copy of DVD (mark 'B') was available all along, ACB scrupulously avoided giving any clear answer, not accounting for either the DVD or the equipment connected thereto. It was, as noted earlier, after a long gap of over three months that the statement of the complainant under Section 161 Cr. PC was recorded about the destruction of one device and return of the others to the source of procurement. Such statement, *ex facie*, is an after-thought.

100. In the above facts and circumstances, the inconsistencies in the audio / video files contained in the DVD assume significance. As noted earlier, the properties of the said files have already been scrutinized by the special court at the request of A1. Such scrutiny brought out a large number of such files pertaining to a period with which the case at hand can have not even a remotest connection. There is no explanation offered for such incongruity.

101. The above renders not only the audio / video files contained in the DVD but also the transcripts and the oral evidence as to identification of voices, as indeed the opinion of APFSL, irrelevant and inadmissible. This court, thus, upholds the view taken by the Special Judge on the subject of admissibility of electronic evidence of such nature. That part of the evidence relied upon by the prosecution consequently must be excluded from consideration.

Mobile phone connection

102. It was fairly conceded by the additional standing counsel at the hearing that there is no evidence of any mobile phone held in the name of any of the public servants accused in the case to be involved in any incriminating contact. The CDR on which reliance is placed pertains to the mobile phone of Avinash Tyagi, there concededly being no evidence whatsoever of any connection between such person and A1. The word of Mr. Joy Tirkey, ACP about some contact with A1 through such mobile phone is not based on any confirmed or authentic material. It has to be borne in mind that in the FIR, some role around the crucial time of arrest of Gopal Krishan Aggarwal was attributed to the said ACP as well. Be that as it may, even the CDR placed on record admittedly is not issued formally by the service provider nor is it supported by any certificate under Section 65B. As conceded in the evidence, no customer application form in its respect has been collected, the word of the registered owner of the phone in question being totally amiss. The allegations that such phone was in use around the City Hospital on 08.12.2007 are consequently unfounded. Even otherwise, in absence of any evidence showing relationship between A1 and Jagdish Tyagi, the person who statedly was then under treatment in that facility as an indoor patient, the CDRs do not have any relevance.

Effect of Enquiry Report

103. As noted earlier, the public servants (A1, A2 and A3) who face the criminal prosecution in the matter from which these petitions arise

also rely on the report (Ex. PW1/D7) dated 29.12.2011 of Mr. P.S. Kushwaha, Addl. DCP, reference to which has been found by the Special Judge in the impugned order to be of no consequence on the reasoning that exoneration in the departmental proceedings would not stand in the way of criminal trial. Arguing that such approach of the Special Judge was erroneous, it has been submitted that the report of inquiry by the Additional DCP has been wrongly equated with departmental disciplinary proceedings. Reliance is placed on the decision in *Nitya Dharmananda Vs. Gopal Sheelum Reddy*, (2018) 2 SCC 93, the reference being made particularly to the following observations :-

“8. ...Thus, it is clear that while ordinarily the Court has to proceed on the basis of material produced with the charge-sheet for dealing with the issue of charge but if the court is satisfied that there is material of sterling quality which has been withheld by the investigator/prosecutor, the court is not debarred from summoning or relying upon the same even if such document is not a part of the charge-sheet. It does not mean that the defence has a right to invoke Section 91 CrPC de hors the satisfaction of the court, at the stage of charge....”

(emphasis supplied)

104. *Per contra*, the learned additional standing counsel submitted that the reasons given in the impugned order cannot be faulted and, in this context, reliance was placed by him on *Noida Entrepreneurs Assn. vs. Noida*, (2007) 10 SCC 385 and *State v. M. Krishna Mohan*, (2007) 14 SCC 667. In *Noida Entrepreneurs Assn. (supra)*, the court had

quoted the following observations of a bench of three Hon'ble Judges of the Supreme Court in *Depot Manager, A.P. SRTC v. Mohd. Yousuf Miya* (1997) 2 SCC 699 as under :

“...The purpose of departmental enquiry and of prosecution are two different and distinct aspects. The criminal prosecution is launched for an offence for violation of a duty, the offender owes to the society or for breach of which law has provided that the offender shall make satisfaction to the public. So crime is an act of commission in violation of law or of omission of public duty. The departmental enquiry is to maintain discipline in the service and efficiency of public service...”

(emphasis supplied)

105. In *M. Krishna Mohan (supra)*, it was observed that exoneration of the public servants in the departmental proceedings (disciplinary inquiry) could not lead to the conclusion that he was not guilty of commission of the offences wherefor he was charged.

106. In the present case, the report (Ex. PW1/D7) dated 29.12.2011 of Mr. P.S. Kushwaha, Addl. DCP, cannot be equated with a report of departmental disciplinary proceedings. As noted earlier, the enquiry conducted by the Additional DCP was under the directions of superior authorities in the department of Delhi Police on the representation of A1 that he was being falsely framed. This was a high-powered enquiry conducted by an officer at the supervisory level, much senior in rank and hierarchy than the investigating officer of ACB. The enquiry of Mr. Kushwaha was conducted after the charge-sheet had been submitted in the court and at a time when the validity of the first

sanction for prosecution was yet to be considered by the Special Judge. As is clear from record, Mr. Kushwaha did a comprehensive job by taking into account the record of investigation in entirety. He found substance in the grievance of A1. He noted a number of discrepancies in the evidence gathered by ACB. He found incongruency in the evidence and unfairness of investigation. A report of such enquiry cannot be sidelined with reference to the rulings in *M. Krishna Mohan* and *Mohd. Yousuf Miya* (supra). The said report provides “*material of sterling quality*”, which cannot be brushed aside.

Testing validity of fresh sanction

107. The Court doesn’t find anything turning on the facts concerning unsigned CD. The draft charge-sheet that may have been prepared did not see formal action.

108. Though questions have been raised by the defence as to the propriety on the part of the Special Judge to *suo motu* bring up the issue of sanction through proceedings recorded on 18.05.2013 and persisting with the said subject over the proceedings that followed till the time the fresh sanction was accorded on 18.07.2014 – this, as per the submissions, being uncalled for – this court would not read much into the said record to find fault with the sanction which is under challenge here for the reason the trial court has couched its directions in neutral terms (“status report”). But, there is merit in the contention of the public servants that the manner in which the ACB went about the process for securing fresh sanction demonstrates that the order ultimately secured on 18.07.2014 from the sanctioning authority

(PW1) was the product more of extraneous influences and constraints rather than independent exercise of discretion.

109. The chronology of events tells it all. After the first sanction for prosecution had been found to be vitiated by the Special Judge by her order dated 30.07.2012, the matter had rested till ACB took the cue from the order dated 18.05.2013. Though in its communications to various quarters, it would try to show that the sanctioning authority was sitting over the issue of fresh sanction, the fact of the matter is that there was no formal request for fresh sanction till 31.07.2013. All along, prior to the said formal request and even thereafter till the last effective communication dated 01.07.2014 of the sanctioning authority, it was repeatedly calling for the requisite material (including DVD) with no clear answer from ACB. Though the proceedings of the special court do not indicate any timeline having been set, ACB built up pressure by indicating to the sanctioning authority that the court had mandated the sanction to be granted within 15 days. The need for expedition could have been communicated with reference to the relevant law on the subject but not in the manner done. This was, if not false, wholly misleading communication. The question of sanction had to be decided independently by PW1. Yet, the Commissioner of Police felt constrained to record – noticeably even before formal request had come, that the sanction “*must be granted*”. After this mandate, there was virtually no discretion left with the sanctioning authority to apply its own independent mind. No wonder, when the “*serious concern*” of the Chief Secretary was communicated, the sanctioning authority (PW1) readily obliged by granting the fresh

sanction on the same day (18.07.2014) as on which such communication had been received by him, forgetting that his requests to the ACB for entire material to be made available (on which account the matter had been held up at his end all along) were still not addressed. The constraints under which the sanctioning authority (PW1) obliged the investigating agency (ACB) in the wake of the pressure, built up by the latter, is writ large on the record.

110. The sanctioning authority (PW1) has conceded during the course of evidence that the “in-house” instructions required him to obtain the comments from the prosecution branch in the matter in a case where accusations of such nature had arisen against the backdrop of the public servants being engaged in discharge of their official duties. He admitted that A1 had arrested the father of the complainant while performing his official duty. There is no explanation even offered as to why such precaution of obtaining views of the prosecution branch was not taken in the case at hand. Noticeably, as already mentioned, after the first sanction had been found to be vitiated, the prosecution had already communicated its views that any further pursuit of the matter would be futile given the discrepancies in the evidence. Even such previous opinion of the prosecution was not considered when fresh sanction accorded.

111. The scrutiny of the charge-sheets would show that the evidence on which the fresh order of sanction has been obtained remains virtually the same on which the first sanction had been accorded, the additional material essentially being the report of APFSL and some

statements under Section 161 Cr. PC. There is nothing in the reports under Section 173 Cr. PC presented before the special court from which answer to the discrepancies or inconsistencies or allegations of unfair investigation, as noted in the report (Ex. PW1/D-7) of the Addl. DCP, could be found. The gist of the proceedings in the case so far conducted before the trial court shows that it is the conclusions reached in the said enquiry report (Ex. PW1/D-7) which formed the basis for the prosecution to concede the first order of sanction to be bad leading to the Special Judge returning findings to such effect by the order dated 30.07.2012. The defects in the prosecution case, particularly the incongruity of some crucial allegations made therein, have thus persisted, there being no endeavour made to overcome their effect. Yet, while sending the request for fresh sanction to be accorded, the ACB scrupulously avoided making any reference to the fate of the previous sanction or the reasons why it had failed the judicial scrutiny and the sanctioning authority (PW1) also did not feel it necessary to seek clarity or explanation on any of the relevant aspects connected thereto. This was not fair, not the least on the part of the ACB.

112. It is not that the ACB or the sanctioning authority (PW1) were not aware or conscious of the enquiry report (Ex. PW1/D-7) or its import. The sanctioning authority was heading the unit where these public servants were posted during the relevant period. The enquiry had been conducted in the head-quarters of Delhi Police within the knowledge of the entire hierarchy. The report of enquiry had been formally brought to the notice of the sanctioning authority (PW1) who

had even recorded that he was in full agreement with it. There were official notings mandating that such report would be considered at the stage of consideration for fresh sanction, this also in the context of another representation made by A1. But, concededly, the report was not part of the material on which fresh sanction for prosecution was granted. Since the enquiry report (Ex. PW1/D-7) was crucial material, an official report of a superior officer and consequently material of “sterling quality”, its exclusion from consideration vitiates the fresh sanction for prosecution – particularly because the said report highlighting not merely discrepancies or inconsistencies but also, and more importantly, illegalities committed by the investigating agency (ACB) including by tampering and interpolation of records rendering the “frame-up” (which A1 had been apprehending and bringing to the notice of his superiors at the crucial point of time) highly probable, is a material that “tilts the balance in favour of the accused”.

113. The fact that the core material on which fresh sanction has been accorded is inadmissible evidence renders it bad in law. The sanctioning authority (PW1) was well aware that A1 was not competent in law to initiate registration of a case under MCOCA. The ACB and the sanctioning authority (PW1) have been gullible to take the word of the complainant in this regard treating his allegation of threat by A1 of false implication in such case as acceptable on its face. So much so that even the file of the case under MCOCA was not perused to confirm if A1 had any role to play in such regard.

114. There is, thus, sufficient material available on record to

conclude that the fresh sanction under Section 19 of POC Act is vitiated, continuation of prosecution on its basis bound to lead to failure of justice. Since the issue of invalidity of fresh sanction was raised by the public servants at the threshold – the earliest possible stage, the Special Judge was duty bound to consider the objection in all its hues on the basis of evidence on the issue already adduced, rather than short shrifting it by misreading and misapplying the ruling of *Rajmangal Ram* (supra). Since the Special Judge has committed a grave error, this court is duty bound in its supervisory jurisdiction to interdict, lest the futile and *non-est* prosecution on the charge of offences under POC Act against these public servants continues as persecution.

On sanction under Section 197 Cr.PC

115. Since the questions raised in these petitions also concern the pre-requisite of sanction under Section 197 Cr. PC and the overlap of such statutory provision with the one under Section 19 of the POC Act, the rulings cited at the bar in that context may be considered at this stage.

116. In *Matajog Dobey v. H.C. Bhari*, AIR 1956 SC 44, a Constitution Bench ruled that the “*complaint may not disclose that the acts constituting the offence was done or purported to be done in the discharge of official duty; but facts subsequently coming to light on a police or judicial inquiry or even in the course of the prosecution evidence at the trial, may establish the necessity for sanction*”, the question as to whether sanction is necessary or not may have to be

determined from stage to stage, necessity revealing itself in the course of the progress of the case. The court ruled on the test for invocation of the protection under Section 197 Cr. PC thus :-

“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)

117. In *Centre for Public Interest Litigation Vs. Union of India*, (2005) 8 SCC 202, a bench of three Hon’ble Judges of the Supreme Court ruled in the context of protection under Section 197 Cr. PC as under :-

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

which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty. If the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant..

(emphasis supplied)

118. In *Kalicharan Mahapatra Vs. State of Orissa*, (1998) 6 SCC 411, the Supreme Court noted :-

“...The sanction contemplated in Section 197 of the Code concerns a public servant who ‘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’, whereas the offences contemplated in the PC Act are those which cannot be treated as acts either directly or even purportedly done in the discharge of his official duties. Parliament must have desired to maintain the distinction and hence the wording in the corresponding provision in the former PC Act was materially imported

in the new PC Act, 1988 without any change in spite of the change made in Section 197 of the Code...”

(emphasis supplied)

119. Quoting the above position of law from *Kalicharan Mahapatra (supra)*, the Supreme Court in the case reported as *Lalu Prasad Vs. State of Bihar*, (2007) 1 SCC 49, held thus :-

“10. ...It may be noted that Section 197 of the Code and Section 19 of the Act operate in conceptually different fields. In cases covered under the Act, in respect of public servants the sanction is of automatic nature and thus factual aspects are of little or no consequence. Conversely, in a case relatable to Section 197 of the Code, the substratum and basic features of the case have to be considered to find out whether the alleged act has any nexus with the discharge of duties. Position is not so in case of Section 19 of the Act...”

(emphasis supplied)

120. From the above, it can be concluded that there can be no thumb rule that in a prosecution before the court of Special Judge, the previous sanction under Section 19 of the POC Act would invariably be the only pre-requisite. If the offences on the charge of which the public servant is expected to be put on trial include offences other than those punishable under the POC Act, that is to say under the general law (i.e. penal code), the court is bound to examine, at the time of cognizance and also, if necessary, at subsequent stages (as the case progresses) as to whether there is a necessity of sanction under Section 197 Cr. PC. There is a material difference between the statutory

requirements of Section 19 of the POC Act, on one hand, and Section 197 Cr. PC, on the other. In prosecution for offences exclusively under the POC Act, the sanction is necessary qua the public servant. In cases under the general penal law against the public servant, the necessity (or otherwise) of sanction under Section 197 Cr. PC depends on the factual aspects. The test in the latter case is of the “nexus” between the act of commission or omission and the official duty of the public servant. To commit an offence punishable under law can never be part of the official duty of a public servant. It is too simplistic an approach to adopt and to reject the necessity of sanction under Section 197 Cr. PC on such reasoning. The “safe and sure test”, as laid down in the case of *Centre for Public Interest Litigation* (supra), is to find if the omission or neglect to commit the act complained of would have made the public servant answerable for charge of dereliction of his official duty. He may have acted “in excess of his duty”, but if there is a “reasonable connection” between the impugned act and the performance of the official duty, the protective umbrella of Section 197 Cr. PC cannot be denied, so long as the discharge of official duty is not used as a cloak for illicit acts.

121. In the present case, it has been fairly conceded by the sanctioning authority (PW1) in his deposition that the allegations pertain to the period when A1 was investigating the case of murder, it being part of his official duty. He had caused the arrest of Gopal Krishan Aggarwal, the father of the complainant, on 07.12.2007. Whether or not the allegations against Gopal Krishan Aggarwal in the case of murder are “proved” at the trial of the concerned sessions case

is beside the point. For the present, it is sufficient to note that cognizance was taken by the competent court on the charge-sheet presented in the case of murder, it resulting in Gopal Krishan Aggarwal being not only summoned (with others) as an accused but also put to trial on formal charges framed. The fact that the Supreme Court found it necessary to cancel the bail which had been granted to Gopal Krishan Aggarwal in the case of murder only reinforces the argument of the defence in the present case that the case of murder against Gopal Krishan Aggarwal is well founded. The fact remains that there can be no denial – rather it has been fairly conceded at the hearing before this court – that A1 was within the bounds of law, rather duty bound, in causing the arrest of Gopal Krishan Aggarwal in the case of murder, this being in the discharge of his official duty. It is inherent in this fact-situation that if A1 had refrained from causing the arrest of Gopal Krishan Aggarwal, such omission or neglect would have made him answerable for charge of dereliction of his official duty. Pertinent to note here that A1 had felt constrained to bring on official record his apprehension that he was likely to be framed in a false case on account of he not having succumbed to the pressure that was being exerted at the time of investigation of the case of murder. The case of ACB is not based on recovery of any incriminating material from these public servants. It is mere on the oral word of the complainant who, given the background facts, cannot be treated as independent or without motive. The report (Ex. PW1/D-7) of Mr. P.S. Kushwaha, Addl. DCP is a serious adverse comment on the fairness of the investigation of the case of ACB. The said report, particularly,

within the knowledge of the sanctioning authority (PW1) should have made it alive to the need to scrutinize the case even more closely and carefully so as to ensure that the protective umbrella of law was not unreasonably taken away. No thought towards this sacred duty seems to have crossed the mind of the authorities that be.

122. From the above perspective, there can be no denial that the prosecution in the case of ACB for offences under the general law (i.e. IPC) cannot also be permitted without a formal sanction under Section 197 Cr. PC.

On Charge

123. The Special Judge, by order dated 02.03.2017, discharged A2 and A3 on the following reasoning:-

“32. Now adverting to the complaint filed by Abhinav Krishan Aggarwal and the evidence collected during the investigation sans the electronic evidence and the transcriptions; the only allegation against accused SI Mukesh and ASI Rajbir Singh as per the complaint are that they used to contact the complainant telephonically and meet him frequently. Also, that they even tried to mediate the issue of bribe already given to Insp. K.G. Tyagi. The material placed on record reflects that except for this bald allegation against SI Mukesh and ASI Rajbir Singh, neither the complainant provided their mobile/telephone numbers nor any call detail record was collected by the IO to substantiate these allegations. The allegation; “They even tried to mediate the issue of bribe already given to Insp. K.G. Tyagi” is extremely vague and non-explanatory. No elaboration was given by the complainant so as to infer commission of any offence by them under Prevention of Corruption Act or the provisions of IPC.

35. Qua accused SI Mukesh and ASI Rajbir Singh, therefore, I am of the view that there is no material on the record from which they can be suspected of committing any offence, leave alone existence of strong suspicion. Hence, both accused persons are hereby discharged. ...”

124. The State challenges the discharge of A2 and A3 on the ground that the case against these public servants was based on same material which has led to A1 being put to trial.

125. Charges have been found made out by the Special Judge against A1 for the reasons recorded as under:-

“36. With respect to accused K.G. Tyagi, it was very specifically alleged by the complainant that accused K.G. Tyagi had extorted an amount of Rs.26-27 lakhs from him. Out of which Rs.8 lakhs were extorted directly from him on 08.12.2007 and the remaining amount was extorted through accused Advocate Ravinder Chadha (private person). According to the allegations of the complainant, accused K.G. Tyagi had asked him to deliver the said money at his residence at Shahdara, however, after arranging Rs.8 lakhs when the complainant went to the residence of accused K.G. Tyagi, he was informed that Insp. K.G. Tyagi was at city hospital, Pusa Road where his brother-in-law was admitted. Consequently, he delivered the amount of Rs.8 lakhs to accused K.G. Tyagi at City Hospital, Karol Bagh. The allegations of the complainant regarding the said extortion of Rs.8 lakhs on 08.12.2007 are prima facie supported by the call detail records of accused K.G. Tyagi and the complainant which reveal that at the relevant time accused K.G. Tyagi was in the area of Karol Bagh (city Hospital Cell ID). During investigation, documents pertaining to hospitalization of Jagdish Tyagi (brother-in-law of accused K.G. Tyagi) were also collected which also corroborated the aforesaid fact. It was also specifically alleged by the

complainant Abhinav Krishan Aggarwal that Insp. K.G. Tyagi threatened him and his father that if they do not pay a further sum of Rs.25 lakhs to Insp. K.G. Tyagi, he would get his father falsely implicated in some other case. When complainant and his father refused to pay the amount to Insp. K.G. Tyagi and his associate Adv. Ravinder Chadha, Insp. K.G. Tyagi threatened them to face the consequences and on 01.08.2008, a case under MCOCA was got registered against his father in PS Hauz Qazi.

37. In view of the said material on record, I am of the opinion that there is existence of strong suspicion which inculcates accused K.G. Tyagi for commission of offences punishable u/ss 7/13(1)(d) of PC Act read with Sections 384, 389, 120-B IPC.”

126. For the benefit of the discussion on the subject of charge that is bound to follow, it may be noted that the formal charges have been framed against A-1, under three heads, on 04.03.2017, thus:-

“That during the year 2007 at the office of Crime Branch or elsewhere at unknown time, you accused entered into criminal conspiracy to extort money from complainant Abhinav Krishan Aggarwal and his father Gopal Krishan Aggarwal by putting them in fear of detaining Gopal Krishan Aggarwal in custody and thereby dishonestly induced complainant to deliver you Rs.26-27 lacs and complainant handed over you Rs.8 lacs on 8.12.2007 at City Hospital, Pusa Road, Delhi and remaining amount was given by complainant through your co-accused Ravinder Chadha who was engaged as counsel for defending Gopal Krishan Aggarwal at your instruction as part of your criminal conspiracy. Thus you thereby committing offence punishable u/s. 384/120B IPC and within the cognizance of this court.

Secondly, during the period 2007 and 2008 at unknown place, unknown time you accused entered into criminal conspiracy with co-accused Ravinder Chadha to extort

money from complainant Abhinav Krishan Aggarwal by putting him under fear to implicate him and his father in case of MCOC Act and demanded Rs.25 lacs for above stated purpose. Thus you thereby committed offence punishable u/s. 389/120B IPC and within the cognizance of this court.

Thirdly, that you accused K.G. Tyagi while working as Inspector in Delhi Police, Crime Branch (public servant) entered into conspiracy with your co-accused Ravinder Chadha, an advocate by profession to commit illegal act namely demand and accept illegal gratification other than legal remuneration from complainant Abhinav Krishan Aggarwal during the period 2007-2008 and besides the above said agreement you did some act in pursuance of the said agreement i.e. demanded and accepted amount of Rs.26-27 lacs thereby committing criminal misconduct. Thus you thereby committed offence punishable u/s.7/13(1)(d) PC Act read with 120B IPC and within the cognizance of this court....”

127. The learned counsel appearing for the defence, however, argued that the order framing the charge as aforesaid against A1 is erroneous, it being based on mere allegations in the FIR, there being no corroboration by any independent material, the electronic evidence being inadmissible, the inquiry report of the Additional DCP showing the taint in the investigation and the inconsistencies in its conclusions having been totally ignored, the allegations of criminal conspiracy with co-accused Mr. Ravinder Chadha being wholly impermissible on account of stay against his prosecution. The learned counsel relied upon the law on the subject of consideration of charge as declared and summarized in *Union of India Vs. Prafulla Kumar Samal*, (1979) 3 SCC 4 thus :

“10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be, fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities

appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial...”

(emphasis supplied)

128. The Special Judge has given appropriate reasons in the order dated 02.03.2017 to direct discharge of A2 and A3. The other accused (A1), on the other hand, is right in submitting that the same reasons based on same material would also equally apply to him.

129. The proceedings against Mr. Ravinder Chadha, advocate having been stayed by the Supreme Court, it was wholly impermissible for he to be shown as a conspirator in the charge framed against A1. The other public servants (A2 and A3) having been discharged, the formal charge of criminal conspiracy (under Section 120-B IPC) cannot be framed with reference to any specific individual as being party to the design allegedly of A1, in absence of a case to such effect even of the prosecution. The complainant did allege that after the incident of 08.12.2007 he had been asked by A1 to contact the said advocate who, in turn, had collected certain amounts of money on various occasions, it totaling up to Rs.26-27 Lakhs which included Rs.4 Lakhs as the share of the said advocate and rest as of A1. It was fairly conceded that such allegations of the respective shares are not based on any evidence and, therefore, seem to be product of assumptions.

130. At the cost of repetition, it may be mentioned here that the case at hand is not of any recovery of incriminating material from A1, A2

or A3. The electronic evidence, as already noticed, is inadmissible and, therefore, not available to the prosecution. This should result in material in the nature of audio / video recordings, the transcripts, APFSL report, oral evidence as to voice identification, CDRs or circumstances relating to hospitalization of Jagdish Tyagi irrelevant and inconsequential. The allegation of the complainant having handed over Rs.8 Lakhs to A1 on 08.12.2007 to desist from arresting his father in the case of murder, without corroboration, is *per se* not credible for the simple reason A1 had already effected the arrest on 07.12.2007. The alleged exchanges after 08.12.2007 are vaguely mentioned with no specifics as to the amounts involved or the date, time or place indicated.

131. By referring to the threats attributed to A1 of false implication in the case of MCOCA, the Special Judge has committed the same error as done by the sanctioning authority (PW1). A case under MCOCA cannot be registered except at the instance of an officer of the rank of ACP. Unless there was material to show that his superiors were also involved, which is missing here, inferences against A1 cannot be drawn only because a case of MCOCA had been registered on 01.08.2008, *inter alia*, against the father of the complainant. For such circumstances to be used against A1 as corroborative of the case of ACB, something more than mere registration of FIR of MCOCA case had to be brought on record, particularly such material as would reflect pro-active and dishonest role played by him in setting up a false case under the said special law. Since the reports under Section 173 Cr. PC in the case of ACP are admitted to be silent in this regard, it

appears naïve to act on mere allegation in the complaint lodged (on 16.10.2008) admittedly ten months after the alleged illicit demands (December 2007) were made for the first time.

132. The report (Ex. PW1/D-7) of Mr. P.S. Kushwaha, Addl. DCP (HQ), as submitted on 29.12.2011, upon conclusion of enquiry, pursuant to directions of the superior authorities, based on comprehensive scrutiny of not only the record of investigation of the case of ACB but also of the other relevant official records renders the investigation report of ACB tainted. It bears repetition to note here in the context of charge that the enquiry found illegalities committed by the investigating agency on vital issues. Tampering and interpolation of crucial records has been vividly noticed and findings to that effect returned, there being no effort worth the name by ACB to explain the same to be attributable to some innocuous reasons. Such report containing such serious indictment castigating the ACB for unfair investigation is an official record which cannot be overlooked. After-all, the criminal court is not merely a post office or a mouth-piece of the prosecution. Since such material renders the plea of false implication highly probable, the case at hand can hardly be said to be one which is based on materials that give rise to grave suspicion against A1, A2 or A3.

Conclusions

133. For the foregoing reasons, this court finds the fresh sanction under Section 19 of POC Act to be vitiated rendering the proceedings in the criminal case based thereupon impermissible. In the given facts

and circumstances, this court also holds that the prosecution of A1, A2 or A3 for offences under the general criminal law (IPC offences) is also impermissible, there being no sanction under Section 197 Cr. PC. Further, this court concludes that no case of charge is made out on the available material to put A1, A2 or A3 on trial on the reports under Section 173 Cr. PC presented in the case of ACB.

134. In the result, the criminal revision petition (no.462/2017) of the State is dismissed. The criminal writ petitions (nos.942/2017 and 3012/2017) of A1 are allowed. The impugned orders of the Special Judge passed on 02.03.2017 and 11.10.2017, to the extent thereby charges were found made out against A1 and his plea against fresh sanction was rejected, are set aside. The writ petitioner (A1) is discharged. The proceedings arising out of the case of ACB in the court of the Special Judge against him are dropped.

135. This also disposes of the pending applications.

R.K.GAUBA, J.

APRIL 03, 2018

vk/yg