

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 674 of 2017

Ganesh S. Borade

.. Applicant

Versus

The State of Maharashtra

.. Respondent

...

Mr. Manoj S. Mohite with Mr. Rushikesh Kale i/b V.V. Purwant
for the applicant.

Mr. Ajay Patil, APP for the State.

CORAM: BHARATI DANGRE, J.

DATED : 22nd OCTOBER, 2019

ORAL JUDGMENT:-

1 Present Criminal Application filed under Section 482 of the Code of Criminal Procedure assails two orders passed by the Addl. Sessions Judge, Kalyan. The first order dated 6th November 2015 rejects the application moved by the applicant for dropping the proceedings against him whereas the second order impugned dated 26th October 2016 rejects the application moved by him to examine the sanctioning authority at a pre-trial stage.

2 Shorn of unnecessary details, the bare necessary facts reveal that the applicant was working as a Ward Officer of "C" ward of Kalyan Dombivli Municipal Corporation and a complaint was preferred by one Vimal S. Saklecha that the applicant

Tilak

demanded a bribe of Rs.20,000/- in January 2013 for approving the alleged illegal changes in Shop no.7 located at Shivprasad Tulsiram chawl, Kalyan owned by the complainant. The complainant also alleged that in the month of March 2013, the applicant had called him to his office and threatened to demolish the construction and further demanded an amount of Rs.30,000/- to avoid any adverse action. On 29th January 2014, it is alleged that the complainant was again called to the office by the applicant and when he approached him he was informed that there were several complaints against the internal construction carried out in the shop and there was a demand of Rs.Five lakhs from the applicant on the pretext that the construction undertaken by the complainant was illegal.

Based on the said complaint, a trap was laid on 1st February 2015 and it is alleged that at the instance of the applicant, one Kaiyam Shaikh accepted the bribe of Rs.Three lakhs. Pursuant to the pre-trap and post-trap panchnama, the applicant as well as Kaiyam Shaikh were arrested. On 16th July 2014, the sanction was granted by the Municipal Commissioner to prosecute the applicant and charge-sheet came to be filed for the offences punishable under Sections 7, 8, 13(1)(d) r/w Section 13(2) of the Prevention of Corruption Act, 1988.

3 The applicant on a belief that the sanction granted by the Commissioner of the Kalyan Dombivli Municipal

Corporation is illegal and not in accordance with law, moved an application below Exhibit-25 before the Sessions Judge, requesting him not to take cognizance on the basis of the report filed by the ACB under Section 173 of the Code of Criminal Procedure and to drop the proceedings against him. The said application came to be rejected on 6th July 2015 by the Addl. Sessions Judge. The Sessions Judge while dealing with the contention of the applicant that the sanction accorded by the sanctioning authority is without application of mind and was granted without perusal of any documents and investigation papers, though accepted the legal position of a valid sanction being a pre-requisite for taking cognizance of the offences by a public servants, did not find substance in the application preferred for dropping the proceedings. The trial Court by making reference to the documents relied upon by the applicant in form of correspondence between the ACB and the sanctioning authority, which the applicant had sought under the Right to Information Act, recorded that the sanctioning authority would have to be confronted with the said documents and his explanation would be required to be sought before deriving a conclusion whether the sanction was properly granted. It was held that this task can be undertaken only during trial when the sanctioning authority enters the witness box and consideration of the documents at this stage without affording an opportunity to the sanctioning authority would amount to condemning the

Authority without hearing. As a consequence of the aforesaid decision, the application at Exhibit-25 came to be rejected.

4 Another application vide Exhibit-30 came to be moved by the applicant before the Special Judge wherein it was averred that while rejecting the application for dropping of proceedings, the learned Court has held that the sanctioning authority ought to have been afforded an opportunity and therefore, a request was made through the application preferred on 19th December 2015 to initiate inquiry pertaining to validity of sanction accorded by the sanctioning authority and to direct that the sanctioning authority be examined on oath and to produce on record all original documents in respect of accord of sanction. This application came to be rejected on 26th October 2016 by recording that the case is at the stage of inquiry and charge is yet to be framed. Relying upon the judgment of the Apex Court in case of *Prakash Singh Vs. State of Punjab, AIR 2007 SC 1274*, the learned Judge held that a distinction is to be drawn between absence of sanction and the alleged invalidity on account of non application of mind and the former question can be agitated at the threshold but the latter is the question which has to be determined during trial. The application filed by the applicant for examining the sanctioning authority at the stage of inquiry was therefore declined.

5 The issue raised in the criminal application is whether in exercise of the inherent jurisdiction of this Court, the impugned orders are liable to be quashed and set aside. Shri Mohite, learned counsel for the applicant has made his submission to the effect that the question of sanction may arise at any stage of prosecution and it can be raised at the time of framing of charge and will have to be decided *prima facie* on the basis of the accusation. He would submit that whether sanction is necessary or not may have to be determined from stage to stage and the material brought on record depending upon facts of each case and he would rely upon the judgment of the Apex Court in case of ***Devinder Singh Vs. State of Punjab***,¹ in support of his submission that question of sanction can be considered at any stage of the proceedings. He would also place reliance on the judgment of the Apex court in case of ***Abdul Wahab Ansari Vs State of Bihar***,² which according to him, reiterates the settled position of law that previous sanction of the competent authority being a pre-condition for the Court taking cognizance of the offence if the offence alleged to have been committed by the accused in discharge of his official duty and 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 a plea till the charges are framed.

1 (2016) 12 SCC 87

2 (2000) 8 SCC 500

According to him, the Apex Court has reiterated the legislative mandate engrafted in sub-section (1) of Section 197 in form of a prohibition imposed by the statute from taking cognizance and that the question of sanction can be considered at any stage of the proceedings.

6 On hearing the learned counsel for the applicant, I have also heard the learned Public Prosecutor Shri Ajay Patil appearing for the State who vehemently opposed the present application and would urge that the issue of sanction ought to be determined at the stage of trial and he would invite the attention of the Court to the requirement of sanction contemplated in Section 19 of the Prevention of Corruption Act, 1988 and would submit that the Court would not exercise its inherent power in conflict with the mandate of the statute.

7 Section 19 of the Prevention of Corruption Act prohibits the Court from taking cognizance of an offence punishable under Section 7, 11, 13 and 15 alleged to have been committed by a public servant except with the previous sanction from the authority competent to grant a sanction. Bare reading of the provision reveal that there is an embargo on the Court to take cognizance of an offence punishable under the Act in absence of a valid sanction. At the same time, by virtue of sub-section (3) of Section 19, which begins with a non-obstante clause, no finding

sentence or order passed by a Special Judge is liable to 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, unless in the opinion of the Court it has resulted into failure of justice. An embargo is also created in form of sub-clause (b) of sub-section (3) and it is not permissible for any Court to stay the proceedings under the Act on the ground of any error, omission or irregularity in the sanction granted by the authority unless it has resulted into failure of justice.

Sub-section (4) provides that 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.

8 It is no longer a disputed position in law that grant or refusal of sanction must be preceded by application of mind on the part of the competent authority. If the accused can demonstrate that the order granting sanction suffer from non-application of mind, it may be called in question before a competent authority of law. The grant of sanction is a device provided by law to safeguard the public servants from vexatious and frivolous prosecution. It enables the public servants to perform his duty without fear or favour and without being

succumbed to the pressure of unscrupulous elements. The object in securing a sanction from the competent authority is to protect the innocent public servants from the uncalled for prosecution but not to spare the person who is guilty and the competent authority, prima facie on examining the material placed before it accords sanction to prosecute such a public servant. The sanctioning authority is expected to apply its mind to the several facets involved, including whether the act was committed by a public servant while acting or purporting to act in discharge of his official duty. The grant of sanction being considered as a pre-requisite for a valid prosecution of a public servant, the question of sanction has always been considered in the backdrop of the stage and the material brought on record upto that stage. When the law requires a sanction, the public servant has a right to raise the issue of jurisdiction if he is being prosecuted without a sanction and the entire action may be rendered void ab-initio for want of sanction. Sanction can be obtained during the course of the trial depending upon the facts of an individual case and particularly at what stage of proceedings requirement of sanction has surfaced. Validity of a sanction order would depend upon the material placed before the sanctioning authority and the consideration of the material which implies application of mind. There is a distinction between absence of sanction and invalidity of the sanction. The question of absence of sanction could be raised at the inception and threshold by an accused, whereas,

where its legality and validity is brought in question, such issue has to be raised in the course of a trial.

9 The Apex Court in case of *Dinesh Kumar Vs. Airport Authority of India*,³ has culled out the succinct distinction in the following paragraphs :-

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

"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."

9 *While drawing a distinction between the absence of sanction and invalidity of the sanction, this Court in Parkash Singh Badal expressed in no*

3 (2012) 1 SCC 532

uncertain terms that the absence of sanction could be raised at the inception and threshold by an aggrieved person. However, where sanction order exists, but its legality and validity is put in question, such issue has to be raised in the course of trial. Of course, in Parkash Singh Badal, this Court referred to invalidity of sanction on account of non- application of mind.

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

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

10 The decision relied upon by Shri Mohite in case of ***Devinder Singh*** (supra) recapitulates the position of grant of sanction in form of the principles emerging from the catena of

decisions and the same have been culled out in paragraph nos.38 and 39 of the said report and the particular portion needs a reproduction in the following portion of the report:-

39.6 Ordinarily, question of sanction should be dealt with at the stage of taking cognizance, but if the cognizance is taken erroneously and the same comes to the notice of Court at a later stage, finding to that effect is permissible and such a plea can be taken first time before appellate Court. It may arise at inception itself. There is no requirement that accused must wait till charges are framed.

39.7 Question of sanction can be raised at the time of framing of charge and it can be decided prima facie on the basis of accusation. It is open to decide it afresh in light of evidence adduced after conclusion of trial or at other appropriate stage.

39.8 Question of sanction may arise at any stage of proceedings. On a police or judicial inquiry or in course of evidence during trial. Whether sanction is necessary or not may have to be determined from stage to stage and material brought on record depending upon facts of each case. Question of sanction can be considered at any stage of the proceedings. Necessity for sanction may reveal itself in the course of the progress of the case and it would be open to accused to place material during the course of trial for showing what his duty was. Accused has the right to lead evidence in support of his case on merits.

11 The sanction contemplated is not an empty formality. The order granting sanction must *ex-facie* disclose that the sanctioning authority has considered the evidence and other

material placed before it and the prosecution has to establish and satisfy the Court by leading evidence that those facts were placed before the sanctioning authority and the authority has applied its mind on the same. If the sanction order on its face indicates reflects the relevant material i.e. the FIR, disclosure statement, recovery memos, panchnama and other material on record which were placed before the sanctioning authority and it is further discernible from the recital of the sanction order that the sanctioning authority has perused all the material placed before it, an inference may be drawn that the sanction is granted in accordance with the law. In absentia, it is open for the accused to allege that the sanction order suffers from non-application of mind and cannot be termed to be a valid sanction. The burden thus lies on the prosecution to lead evidence to the effect that the sanctioning authority had before it the relevant material and it had applied its mind before granting the sanction. In absence of a valid sanction, no cognizance of the offence can be taken and the grant of proper sanction by a competent authority is *sine qua non* for taking cognizance of the offence.

The question as to whether the proper sanction is accorded for prosecution of the accused person, can be dealt at the stage of taking cognizance. However, whether there is a valid sanction and whether the relevant material was placed before the sanctioning authority and the material has been construed by the sanctioning authority would be a matter of trial. Reliance placed

by Shri Mohite in case of ***Devinder Singh*** cannot be made applicable to the present case in hand qua the proposition of law laid down therein i.e. that the issue of sanction can be raised at any stage of the trial. Perusal of the applications preferred by the applicant i.e. Exhibit 25 and 30 do disclose that the applicant allege that there were two sanctions. It is also alleged that the ACB had submitted draft sanction to the sanctioning authority and the sanctioning authority without application of mind has merely put his signature on the said draft. The said allegations can only be verified when the sanctioning authority steps into the witness box and throws light on the process adopted by him while according sanction. On an application being preferred by the applicant to drop the proceedings, the Sessions Court rejected the same on the ground that the sanctioning authority would be required to be confronted with the material placed before him, the applicant took out another application seeking examination of the sanctioning authority at the stage where charge was yet to be framed but the charge-sheet was filed. The learned Sessions Judge has rightly rejected the said application by relying upon the judgment of the Apex Court in case of ***CBI Vs. Ashok Kumar Aggarwal***,⁴ wherein the Apex Court observed as under :-

58 *The most relevant issue involved herein is as at what stage the validity of sanction order can be raised. The issue is no more res-integra. In Dinesh Kumar v. Chairman Airport Authority of India & Anr., AIR 2012*

4 2014(14) SCC 295

SC 858, this Court dealt with an issue and placing reliance upon the judgment in [Parkash Singh Badal & Anr. v. State of Punjab & Ors.](#), AIR 2007 SC 1274, came to the conclusion as under:

“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...](#)”

59 Undoubtedly, 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 pretrial stage.

12 In light of the aforesaid settled position of law, since the applicant preferred an application seeking examination of the sanctioning authority, prior to the commencement of the trial, allowing the same would be nothing short of a mini-trial for determination of the question of sanction, which is clearly impermissible.

13 I am unable to persuade myself by the submission of Shri Mohite and the reliance placed by him in the judgment in case of Devender Singh (supra) do not assist him in the proposition which is sought to be propounded by him.

14 Resultantly, the present application being without any merit and substance deserves to be dismissed and is accordingly dismissed.

SMT. BHARATI DANGRE, J