

**THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO. 1439 OF 2018

Balu Dasu Rathod	]	
Age 42 Years, Occ : Service (Police Sub Inspector)	]	
presently residing at New Jarimari Police Line,	]	
Ravi Building, Room No. 301,	]	
Near Office of the Commissioner of Police,	]	
Thane (West).	]	...Applicant

Versus

- | | | | |
|----|---|---|----------------|
| 1. | The State of Maharashtra |] | |
| | through the Director General of Police, |] | |
| | Maharashtra State, having office at |] | |
| | Maharashtra Police Headquarters, |] | |
| | Shahid Bhagat Singh Marg, Mumbai |] | |
| 2. | The Additional Commissioner of Police |] | |
| | (West Region), Thane. |] | |
| 3. | The Superintendent of Police, |] | |
| | Anti Corruption Bureau, Thane. |] | |
| 4. | The Senior Inspector of Police, |] | |
| | Naupada Police Station, |] | |
| | District Thane. |] | ...Respondents |

Mr. Satyavrat Joshi for the Applicant.
Mr. A.R. Patil, APP for Respondent – State.

CORAM : S.S. SHINDE, J.
DATE : 04th SEPTEMBER 2019

(ORAL JUDGMENT)

1. Rule. Rule made returnable forthwith, with the consent of parties matter is heard finally.

2. This application is filed with following substantive prayers:

a) that this Hon'ble Court may be pleased to exercise its power under Section 482 of the Code of Criminal Procedure, 1973 and may be pleased to quash and set aside the order below Exhibit 25 passed by the learned Special Judge, Thane, dated 29.11.2018 in Special Case No. 16 of 2015;

3. The brief facts leading for filing the present application, briefly stated in the memo of application, are as under:

It is the case of the applicant that he is working as Police Sub Inspector and facing prosecution for the offences punishable under Sections 7, 8, 13(i)(d) read with 13(2) of the Prevention of Corruption Act, 1988 (for short the Act). That the applicant is an accused in connection with C.R. No. II-66 of 2014 registered with Naupada Police Station, Thane. That the prosecution was initiated against the applicant on the basis of the complaint, which was registered by one Dyanchand Shyamsunder Yadav. That investigations in connection with the aforesaid case were carried out and thereafter, a charge-sheet was filed in the Court of the learned Special Judge, Thane.

4. Applicant being aggrieved by the order of issuance of process passed by the learned Special Judge, Thane inasmuch as the learned Special

Judge has completely ignored the provisions of Section 19 of the said Act, which requires that the sanction, which is forming part of the charge-sheet qua the present applicant, is not accorded by the competent Authority, who is empowered to remove the applicant from service. Applicant had also preferred a application for discharge on the merits of the case which was rejected by the learned Special Judge, Thane vide order dated 17.02.2018.

5. Applicant being aggrieved by the rejection of application for discharge on merits preferred Application, vide Criminal Application No. 275 of 2018 before the High Court. The said application was disposed off by the High Court by an order dated 4th September 2018 with liberty to the applicant to file an application before the learned Trial Court questioning the validity and / or correctness of the sanction order dated 29th April 2015.

6. Pursuant to the aforesaid order passed by this Court (CORAM : A.S. GADKARI, J) dated 04th September 2018 the applicant had approached the learned Trial Court, Thane by filing an application for discharge on the ground of invalid / defective sanction. That the Anti-Corruption Bureau, Thane has opposed the said application by filing its say. The said application was rejected by the learned Special Court by an order dated 29.11.2018.

7. Being aggrieved and dissatisfied by the rejection of the application seeking discharge, by the learned Special Judge, Thane the

applicant filed the present Criminal Application.

8. Learned counsel appearing for the applicant made following submissions:

The allegations made against the applicant are fallacious and are absolutely baseless and there is no material whatsoever to connect the applicant to the commission of the aforesaid offences. In fact the grant of a proper sanction is the essential requirement prior to taking cognizance and in absence of the same the prosecution is rendered infructuous. That, it is imperative to note that the Applicant, in these circumstances, has been appointed by an order which is signed in the name of the Director General of Police, Maharashtra State.

9. It is submitted that, vide sanction order dated 29th April 2015 the sanction in terms of Section 19(1)(c) was accorded against the applicant, thereby permitting a prosecution to be initiated against him. It is pertinent to note that the said sanction order dated 29th April 2015 has been accorded by the Additional Commissioner of Police, Thane. Who is an officer to the rank of a Deputy Inspector General of Police. Admittedly, the Deputy Inspector General of Police is an Authority subordinate in rank not only to Respondent No. 1 but also to the Special Inspector General of Police, Maharashtra State. That, it is in these circumstance that the sanction itself,

in the present case, has been accorded by a functionary, who is not competent to remove the applicant from service and hence, the order of issuance of process passed by the learned Special Judge, based on such defective sanction, is erroneous and the same deserves to be quashed and set aside. It is submitted that, a bare perusal of the charge-sheet, which is filed against the present applicant, would reveal that the prosecution itself has relied upon the statement of one Jaywant Zagade, whereupon he has examined relevant papers, more particularly the appointment order of the present applicant and has thereby stated that the applicant has been appointed vide an order passed by the office of Respondent No. 1 and in fact, it is the case of the prosecution itself that the applicant has been appointed vide order passed by the highest functionary of the State viz. Director General of Police, Maharashtra State.

10. That in the present case, it is not in dispute that the power to impose a major punishment of dismissal, removal or compulsory retirement upon the applicant is derived from the Bombay Police (Punishment and Appeals) Rules, 1956 and a useful reference can be made to the First Schedule of the said Rules, wherein it has been stated as to the kinds of punishment, which can be imposed upon the members of the police force as defined under the Bombay Police Act and the authority, which is competent to impose such a punishment.

11. That it has been also provided in the Schedule that a punishment of dismissal, compulsory retirement or removal from service cannot be inflicted upon the applicant by any authority lower in rank than that by which the applicant was appointed. That it is an undisputed position that the Additional Commissioner of Police, Thane, is not competent to remove the applicant from service and it is in these circumstances that a sanction accorded by the said Additional Commissioner of Police is null and *void ab initio* and, in these circumstances, the applicant states that the order of issuance of process may be quashed and set aside.

12. That a plain reading of Article 311 of the Constitution of India itself has created a safeguard, by which it has been laid down that no person, who is a member of Civil Service or of the Union or an All Indian Service or Civil Service of a State or holds a civil post in the Union of the State, shall be dismissed or removed by an Authority sub-ordinate to it, by which he was appointed. It is submitted that, this Hon'ble Court has decided a similar issue in four Criminal Applications and thereby the order of issuance of process passed by the learned Special Judges in four different proceedings were similarly quashed and set aside. That the learned Special Judge, Thane has erroneously relied on the Government Resolution dated 12.02.2013 and rejected the application for discharge. The said G.R. cannot be made applicable in the present case since the appointing authority of the

applicant is Director General of Police, State of Maharashtra.

13. In support of aforesaid submissions the learned counsel appearing for the applicant placed reliance on the exposition of the Supreme Court in the case of Nanjappa Vs. State of Karnataka¹ and in the case of State of Karnataka Through CBI Vs. C. Nagarajaswamy².

14. On the other hand learned APP appearing for the Respondent – State submits that, the application filed by the applicant for discharge was after 3 years from the date of framing the charge. It is submitted that already trial has been commenced, and one witness is also examined. It is submitted that, the sanction is given by the Additional Commissioner of Police, Thane which is authorized by the appointing authority of the applicant. Without admitting but assuming that, there is no valid sanction, at the most it would amount to an irregularity and at the later stages of the trial the said contention can be gone into and error / irregularity can be rectified. Learned APP in support of said contention invites attention of this Court to paragraph no. 23.5 of the judgment in the case of Nanjappa (Supra) and reasons assigned by the Special Court in the impugned order, submits that application may be rejected.

15. Heard counsel appearing for the Applicant and learned APP

1 (2015) 14 SCC 186

2 (2005) 8 SCC 370

appearing for the Respondent – State at length. With their able assistance perused the averments and grounds taken in the application and annexures thereto. The Trial Court rejected the application filed by the Applicant holding that, the sanction accorded for prosecution of the application by the Additional Commissioner of Police is valid. The present applicant earlier filed application at Exhibit – 11 for discharge under Section 227 of the Cr.P.C. before the Trial Court. However, said application was contested on merits and same was rejected. Thereafter, the present applicant filed Criminal Application No. 275 of 2018 before this Court. However, said application was withdrawn by the applicant with liberty to file the fresh application before the Trial Court only on the ground to challenge the correctness of sanction order dated 29th April 2015. This court allowed the applicant to withdraw the Petition with liberty to file an application before the Trial Court, questioning the validity and / or correctness of the sanction order dated 29th April 2015. the Trial Court was further directed that in case applicant files application within 3 months from the date of passing the said order the Additional Sessions Judge, Thane seized of the Special Case bearing ACB No. 16 of 2015, was directed to decide the said application, in view of the observations made by the Supreme Court in the case of Nanjappa Vs. State of Karnataka and State of Karnatak through CBI Vs. C. Nagrajaswamy (Supra).

16. Pursuant to the liberty granted by this Court (CORAM : A.S. GADKARI, J) by order dated 04.09.2018 the applicant filed the fresh application below Exhibit – 25 in aforesaid special case. The said application was rejected by the said Court. It needs to be mentioned at this juncture that the correctness of the order passed by the Trial Court thereby rejecting the application for discharge filed by the applicant on merits, has attained finality and liberty was granted to the petitioner / applicant to file fresh application only to agitate the validity and / or correctness of the sanction order dated 29th April 2015. Therefore, the prayer of the applicant to discharge him on merits has been rejected by the Trial Court in first round of litigation, and since the application filed by the applicant was withdrawn with liberty to file the application only to question the validity and / or correctness of the aforesaid sanction order. Therefore, the finding recorded by the Trial / Special Court on merits thereby rejecting the prayer of the applicant for discharge has attained finality. Therefore, the scope of the present proceedings is confined to the extent of questioning the validity and / or correctness of the aforesaid sanction order.

17. It is an admitted position that, the applicant was appointed by the order dated 16th July 2013 signed by the Special Inspector General of Police (estb) Maharashtra State on behalf of the Director General of Police, Maharashtra State, whereas the sanction to prosecute the applicant was

accorded by the Additional Commissioner of Police, Authorized Territorial Jurisdiction, Thane City. The Applicant has placed reliance upon the Article 311 of the Constitution of India so also the Section 19 of the said Act. The Hon'ble Supreme Court in the Case of Nanjappa Versus State of Karnataka (Supra) while explaining scope, ambit and mandate of Section 19 of the said act in paragraph 10 observed thus :

A plain reading of Section 19(1) (supra) leaves no manner of doubt that the same is couched in mandatory terms and forbids courts from taking cognizance of any offence punishable under Sections 7, 10, 11, 13, and 15 against public servants except with the previous sanction of the competent authority enumerated in clauses (a), (b) and (c) to sub-section (1) of Section 19. The provision contained in sub-section (1) would operate in absolute terms but for the presence of sub-section (3) to Section 19 to which we shall presently turn. But before we do so, we wish to emphasise that the language employed in sub-section (1) of Section 19 admits of no equivocation and operates as a complete and absolute bar to any court taking cognizance of any offence punishable under sections 7, 10, 11, 13 and 15 of the Act against a public servant except with the previous sanction of the competent authority.

18. The Supreme Court in paragraph no. 22 of the said judgment further observed that, *“if the Trial Court proceeds, despite the invalidity*

attached to the sanction order, the same shall be deemed to non est in the eyes of law and shall not forbid a second trial of the same offences, upon grant of a validity sanction for such prosecution”.

19. The ultimate conclusion reached by the Hon’ble Supreme Court is in paragraph no. 23 of the said judgment. Paragraph no. 23 read’s as under:

23. Having said that there are two aspects which we must immediately advert to. The first relates to the effect of sub-section (3) to Section 19, which starts with a non obstante clause. Also relevant to the same aspect would be Section 465 CrPC which we have extracted earlier.

23.1. It was argued on behalf of the State with considerable tenacity worthy of a better cause, that in terms of Section 19(3), any error, omission or irregularity in the order sanctioning prosecution of an accused was of no consequence so long as there was no failure of justice resulting from such error, omission or irregularity. It was contended that in terms of Explanation to Section 4, “error includes competence of the authority to grant sanction”. The argument is on the face of it attractive but does not, in our opinion, stand closer scrutiny.

23.2. A careful reading of sub-section (3) to Section 19 would show that the same interdicts reversal or alteration of any findings, 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 provisions obviously is that if the trial has proceeded to conclusion and resulted in a findings 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.

20. In another judgment in the case of State Of Karnataka Through

CBI Versus C. Nagarajswamy (Supra). The Hon'ble Supreme Court in paragraph no. 15 held that, grant of proper sanction by competent authority is *sine qua non* for taking cognizance of the offence under the said act. The paragraph nos. 13 to 16 of the said judgment is reproduced herein below :

13. The appellant proceeded against the respondents under the Act. Section 5 of the Act provides the procedure and powers of the Special Judge. Section 19 of the Act mandates that no court shall take cognizance of offence punishable under the provisions specified therein except with the previous sanction by the authorities specified therein.

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. Gokul Saikia and Birendra K. Singh v. State of Bihar.)

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 of that effect is permissible. Even such a plea can be taken for the first time before an appellate court. (See B. Sahu v. M.S. Kochar SCC para 13 and K. Kalimuthu v. State).

21. Therefore, it is crystal clear that unless there is previous sanction by the Competent authority, the Special / Trial Court cannot take cognizance of the offence. In the present case sanction is accorded by the Additional Commissioner of Police, Thane who is neither appointing authority nor he can remove the present applicant from the government service. As already observed, appointing authority of the applicant is Director General of Police, Maharashtra State and the sanction is given by the Additional Commissioner of Police, Thane. Therefore, keeping in view the exposition of law by the Supreme Court in the aforesaid two authoritative pronouncements in the case of Nanjappa Vs. State of Karnataka and State of Karnatak through CBI Vs. C. Nagrajaswamy (Supra), an inevitable conclusion is that the cognizance taken by the learned Sessions Court, Thane for the aforesaid offences against the applicant, cannot legally sustain and therefore, the cognizance taken by the said Court will have to be treated without previous sanction of the competent authority. The sanction

given by the Additional Commissioner of Police, Thane cannot be treated as valid sanction as contemplated under Section 19 of the said Act.

Thus, in the present case, the applicant by filing the present application has brought to the notice of this Court that, the cognizance in the present case was erroneously taken by the Court of competent jurisdiction.

22. In that view of the matter, order taking cognizance by the learned Special Judge, Thane dated 29.11.2018 in Special Case No. 16 of 2015 is hereby quashed and set aside in term of prayer clause 'a', and consequently applicant stands discharge.

23. The Respondent nos. 1 to 4 would be at liberty to submit additional charge-sheet along with fresh sanction from the competent authority as contemplated under Section 173(8) of the Code of Criminal Procedure before the Trial Court, and seek fresh order of issuance of process against the applicant.

24. By reserving the liberty to the Respondents, as aforestated, the application is allowed in terms of prayer clause 'a'. Rule made absolute in the above terms.

(S.S. SHINDE, J.)