

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

Reserved on: November 06, 2020

Pronounced on: November 23, 2020

+ **W.P.(C) 7978/2020**

RAJIV AGARWAL

.... Petitioner

Through: Mr. Vijay Aggarwal, Mr.
Mudit Jain, Mr. Ashul
Aggarwal,
Mr. Shailesh Pandey, Ms.
Barkha Rastogi, Mr.
Deepanshu Choithani, Mr.
Shekhar Pathak, Mr. Yugant
Sharma, Mr. Hardik Sharma,
Advocates

Versus

UNION OF INDIA & ANR.

.... Respondents

Through: Mr. Kirtiman Singh, Central
Government Standing
Counsel with Mr. Waize Ali
Noor & Mr. Rohan Anand,
Advocates for respondent
No.1/UOI
Mr.Sanjay Jain, ASG, with
Ms. Sonia Mathur, Senior
Advocate, Mr.Ripudaman
Bhardwaj, Special Public
Prosecutor with Mr.Rishi Raj
Sharma and Mr.Padmash
Mishra, Advocates for
respondent No.2 with Mr.C.B.
Ojha, DSP
(HIQ)

+ **W.P.(C) 8021/2020 & CM No.26125/2020**

SIDDHARTH BEHURA

.... Petitioner

Through: Mr. Atmaram N S Nadkarni,
Senior Advocate with Mr.
Vedanta Varma, Mr. Sanat
Tokas, Ms. Ankita Tiwari &
Mr. Ayush Kaushik,
Advocates

Versus

UNION OF INDIA & ANR.

.... Respondents

Through: Mr. Kirtiman Singh, Central
Government Standing
Counsel with Mr. Waize Ali
Noor & Mr. Rohan Anand,
Advocates for respondent
No.1/UOI
Mr.Sanjay Jain, ASG, with
Ms. Sonia Mathur, Senior
Advocate, Mr.Ripudaman
Bhardwaj, Special Public
Prosecutor with Mr.Rishi Raj
Sharma and Mr.Padmesh
Mishra, Advocates for
respondent No.2 with Mr.C.B.
Ojha, DSP (HIQ)

+ **W.P.(C) 8617/2020 & CM No. 27790/2020**

R K CHANDOLIA

.... Petitioner

Through: Mr. Mudit Jain, Mr. Ashul
Aggarwal, Mr. Shailesh
Pandey, Ms. Barkha Rastogi,
Mr. Deepanshu Choithani,
Mr. Shekhar Pathak, Mr.
Yugant Sharma, Mr. Hardik
Sharma, Advocates.

Versus

UNION OF INDIA & ANR.

.... Respondents

Through: Mr.Ripudaman Bhardwaj,
Central Government Standing
Counsel for respondent No.1.
Mr.Sanjay Jain, ASG, with
Ms. Sonia Mathur, Senior
Advocate, Mr.Ripudaman
Bhardwaj, Special Public
Prosecutor with Mr.Rishi Raj
Sharma and Mr.Padmash
Mishra, Advocates for
respondents with Mr.C.B.
Ojha, DSP (HIQ)

+ **W.P.(C) 8620/2020**

SHARAD KUMAR

.... Petitioner

Through: Mr. Ramesh Gupta, Senior
Advocate along with Mr.
Balaji Subramanian & Ms.
Ishani Banerjee, Advocates.

Versus

UNION OF INDIA & ANR.

.... Respondents

Through: Mr.Ripudaman Bhardwaj,
Central Government Standing
Counsel for respondent No.1.
Mr.Sanjay Jain, ASG, with
Ms. Sonia Mathur, Senior
Advocate, Mr.Ripudaman
Bhardwaj, Special Public
Prosecutor with Mr.Rishi Raj
Sharma and Mr.Padmash
Mishra, Advocates for
respondents with Mr.C.B.
Ojha, DSP (HIQ)

CORAM:
HON'BLE MR. JUSTICE BRIJESH SETHI

JUDGMENT

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1. The relief sought in these petitions mainly relates to Crl.L.P.185/2018, titled as *Central Bureau of Investigation Vs. A.Raja & Ors.*, which is pending consideration before this Court. The Crl.L.P. 185/2018 arise out of FIR bearing No. RC DAI 2009 A 0045, registered on 21st October, 2009 by the Central Bureau of Investigation, wherein the applicants/ petitioners were charged for the offences under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 ("PC Act") and Indian Penal Code, 1860 IPC. Vide impugned judgment dated 21st December, 2017, the present applicants were acquitted of the charge to commit conspiracy for the offences under Sections 409/ 420/ 467 IPC and under Sections 13(2) r/w 13(1)(d) of the Prevention of Corruption Act, 1988. Against the impugned judgment of 21st December, 2017, the Crl.L.P.185/2018 has been preferred by the CBI seeking 'leave to appeal'.

2. The above captioned first petition W.P.(C) 7978/2020 has been filed by petitioner- *Rajiv Agarwal (respondent No.14 in*

Crl.L.P.185/2018); the second captioned petition W.P.(C) 8021/20200 has been filed by petitioner-Siddharth Behura (*respondent No.2 in Crl.L.P.185/2018*); the third captioned petition W.P.(C) 8617/2010 has been filed by petitioner-R.K.Chandolia (*respondent No. 3 in Crl.L.P.185/2018*) and the fourth captioned petition W.P.(C) 8620/2020 has been filed by petitioner-Sharad Kumar (*respondent No.16 in Crl.L.P.185/2018*).

3. The fulcrum of these petitions rests upon applications Crl.M.A. 13703/2020 (filed by respondent No.13); Crl.M.A. 13851/2020 (filed by respondent No.2) & Crl.M.A. 14091/2020 (filed by respondent No.13) in Crl.L.P.185/2018 vide which these applicants had sought a direction to CBI to place on record copy of mandatory approval with complete file maintained by the Government, containing all note sheets, reports, drafts, letters, correspondence etc. under Section 378(2) Cr.P.C. as well as approval/ notification under Section 24(8) Cr.P.C. in favour of Mr.Sanjeev Bhandari, Special Public Prosecutor authorizing him to file the criminal leave to appeal. During the course of arguments in these applications, CBI had placed before this Court Communication

dated 17th January, 2018 of the Government of India opining that it was a fit case to prefer an appeal against the judgment dated 21st December, 2017 passed by the learned Special Judge in CC No. 01 & 1A/2011 (RC.DAI.2009.A.0045) i.e. the 2G case and decision to engage Mr. Tushar Mehta, learned ASG to represent in the case. The communication of 17th January, 2018 reads as under:-

Most Immediate
By Special Messenger

Government of India
Ministry of Personnel, Public Grievances and Pensions
Department of Personnel & Training
AVD-II(B)

Subject- Filing of Criminal Appeal in Hon'ble Delhi High Court under Cr.PC against the impugned judgment dated 21.12.2017 of Ld. Special Judge in CC No. 01 & 1A/2011 (RC.DAI.2009.A.0045) – reg.

CBI may kindly refer to their letter No. 184/RC.DAI.2009.A 0045 dated 05.01.2018 on the above subject.

2. The proposal of CBI to file Criminal Appeal before Hon'ble Delhi High Court under Cr.PC against the impugned judgment dated 21.12.2017 of Ld. Special Judge in CC No. 01 & 1A/2011 (RC.DAI.2009.A.0045) has been examined in consultation with ALA, D/o Legal Affairs (DOLA), M/o Law & Justice. ALA, Department of Legal Affairs, Ministry of Law & Legal has opined inter alia that is a fit case to prefer an appeal. A copy of the advice conveyed by Department of Legal Affairs is enclosed herewith.

3. It has also been decided to engage Ld. ASG, Shri Tushar Mehta in the above case. Necessary further action may be taken in the matter accordingly.

(Khushboo Goel Chowdhary)
Deputy Secretary to the Govt. of India

Encls.- As above

Shri Vineet Vinayak, Head of Zone, CBI, Anti-Corruption
Branch, 1st Floor, CBI Headquarters, 5-B, CGO Complex, Lodhi
Road, New Delhi-110003.

DoP&T I.D.No. 137/03/2018-AVD-II(B) 17 January, 2018

4. Vide these petitions, the applicants/petitioners are seeking setting aside of Communication dated 17th January, 2018 issued by the Department of Personnel and Training (DoPT) for not being in conformity with the Delhi High Court Rules and CBI Manual. In addition, prayer is also made to hold that Crl. L.P.185/2018 was filed by an unauthorized person and is *non est* in the eyes of law. The common prayer made in these petitions is as under:-

**W.P.(C) 7978/2020 & W.P.(C) 8021/2020 &
W.P.(C) 8617/2020 & W.P.(C) 8620/2020**

“PRAYER

In the circumstances mentioned hereinabove, it is most respectfully prayed that this Hon’ble Court may graciously be pleased to issue appropriate writ, order or direction especially in the nature of Certiorari or Mandamus to:

A. Set aside the communication dated 17.01.2018 issued by Department of Personnel & Training for not being in terms of mandate of

law and for not being speaking and without any directions and without any application of mind;

B. Set aside the communication dated 17.01.2018 issued by Department of Personnel & Training for not being in conformity with Delhi High Court Rules and CBI Manual as concerned officers/authorities were not consulted with and as the appeal drafted was itself without their being any Special Public Prosecutor, at the time letter dated 17.01.2018 was issued;

C. Hold that the appeal i.e Crl LP 185/2018 titled as 'CBI vs A. Raja & Ors.' was filed by a person not authorized in law and is non est in the eyes of law;

D. Pass any other order(s) and direction(s) in view of the facts and circumstances of the case, in the interest of justice."

5. These four writ petitions have been filed by the parties when this Court was in the middle of hearing arguments in rebuttal in Crl.M.A. 13703/2020 & Crl.M.A. 13851/2020 & Crl.M.A. 14091/2020 in CRL.L.P. 185/2018, wherein almost similar relief has been sought. Learned counsels representing the writ petitioners agitated that these petitions be also heard and decision be rendered along with applications Crl.M.A. 13703/2020 & Crl.M.A. 13851/2020 & Crl.M.A. 14091/2020. This Court has heard extensive arguments addressed by not only learned counsels for applicants in Crl.M.A. 13703/2020 & Crl.M.A. 13851/2020 & Crl.M.A.

14091/2020 in CRL.L.P. 185/2018 but also of other respondents, who raised similar questions before this Court though no formal application was filed on their behalf.

6. The pleas raised in all the four writ petitions are almost similar and therefore, these petitions are being disposed of by this common order.

7. The writ petitioners have pleaded in these petitions that CBI has failed to produce the complete record and has not complied with CBI Manual as well as Report of Public Prosecutor and Director of Prosecution submitted to the Central Government seeking mandatory approval to file the appeal against acquittal and has also failed to place on record “any direction” in respect of either Mr. Tushar Mehta, learned ASG or Mr. Sanjiv Bhandari, learned Special Public Prosecutor to prefer the leave to appeal, as mandated by Section 378 (2) of Code of Criminal Procedure, 1973. It was submitted that in the absence of the above record, proceedings in Crl. L.P. No.185/2020 are without any authority of law, non-est and cannot survive. It was strenuously urged by all the learned counsels for the respondents before this Court that during the course of arguments in Crl.M.A.

13703/2020 & CrI.M.A. 13851/2020 & CrI.M.A. 14091/2020 in CRL.L.P. 185/2018, learned ASG had stated that the sanction of the Central Government to file an appeal by the CBI is an administrative order, which cannot be considered and decided in leave to appeal and has to be considered in writ jurisdiction, and this submission of learned ASG has necessitated filing of these writ petitions by the petitioners. It was submitted by all the learned counsels for petitioners that since the decision making process of filing the leave to appeal is questioned in these petitions, this Court shall look into the same being an administrative decision. In support of above submissions, reliance was placed upon decisions in ***Jugal Kishore vs. Lt. Governor, Delhi and Ors.* 2017 (2) JCC 1335; *Vishnu vs. Lt. Governor, Delhi and Ors.* 2016 (226) DLT 129; *Vinod Kumar vs State of Haryana* 2013 (16) SCC 293; *Tata Cellular Vs Union of India* AIR 1965 SC 11; *Ranjit Thakur Vs. Union of India and Ors.* AIR 1987 SC 2386 and order dated 10th October, 2018 in W.P.(CrI.) 225/201, titled as ***Manohar Lal Sharma versus Narendra Damodardas Modi & Ors.*****

8. The ground taken in the writ petitions is that under Section 378(2) Cr.P.C., only Central Government has the power to direct the Public Prosecutor to file an appeal against an order/judgment of acquittal but CBI has not placed any document before this Court issued by the Central Government vide which Mr.Sanjeev Bhandari was appointed as Special Public Prosecutor for CBI for 2G cases at Delhi High Court and was authorized or directed to file the criminal leave to appeal, since he was not even appointed as Special Public Prosecutor for CBI.

9. Another ground raised by the writ petitioners is with regard to CBI sharing the impugned communication dated 17th January, 2018 on screen and not filing it at the filing counter and it not being accompanied by any affidavit. Reliance was placed upon Delhi High Court Rules (Vol.III), Chapter-25 E “Appeal and Revision-Criminal”, to submit that the State Government is not supposed to issue direction to file an appeal where the case is trifling in itself and the acquittal involves no erroneous principles of law. It was further submitted that no appeal is to be filed however serious or otherwise important as the case may be, where the guilt of the accused is fairly

questionable or the evidence is disbelieved and the Court has considered and weighed it with impartiality, intelligence and care.

10. The writ petitioners also pleaded that an order under Section 378(2) Cr.P.C. is mandatory, which can be subjected to judicial scrutiny. Reliance was placed upon Hon'ble Apex Court's decision in *Khetrabasi Samual & Ors vs. State Of Orissa 1969 2SCC 571* and *Madan Mohan Singh vs. State Of Uttar Pradesh AIR 1954 SC 63* and decision of 31st May, 2002 of this Court in W.P.(C) 4235/1996, titled as *Jayadeva Prasad vs. Union Of India (UOI) & Anr. Manu/DE/0792/2002* (sec citation please) to submit that CBI Manual mandates that due process has to be followed for obtaining sanction under Section 378(2) Cr.P.C. to file an appeal and CBI is liable to bring on record the material facts constituting the offence placed before the Sanctioning Authority. Reliance was placed upon Clauses 23.20, 23.21, 23.22 and other Clauses of the CBI Manual in this regard. Reliance was also placed upon decision in *Shashikant Vs. CBI 2007 1 SCC 630* to submit that CBI Manual is a mandatory document and ought to be followed. Reliance was placed upon decision in *State Vs N. Ganeswaran 2013 (3) SCC 594* to submit

that non compliance with Cr.P.C. would not vitiate an act, if the same is in compliance with the CBI manual. Reliance was also placed upon decisions in ***State of Rajasthan & Ors. Vs. Union of India* 1978 SCR (1) 1** and ***Indian Railway Construction Co. Vs. Ajay Kumar* 2003 (4) SCC 579** in support of above submissions.

11. It was also urged that in the absence of necessary sanction under Section 378(2) Cr.P.C., the present appeal be rendered *non est*. In this regard, reliance was placed upon decision in ***State Vs. Mustaq Ahmed* (1988) 1 Crimes 322 (J & K)**.

12. Next ground urged in these writ petitions is that on the date of filing of the appeal, no special Public Prosecutor was engaged for 2G case. It was submitted that under Section 378(2) Cr.P.C., an appeal can be filed by a Public Prosecutor on the directions of the Central Government. It was stated that vide impugned communication of 6th March, 2014, Mr. Sanjeev Bhandari, learned Advocate had been appointed as Special Public Prosecutor for CBI in all the cases and it was a general appointment, whereas the present matter has been treated as a “special class” and under the directions and observations of the Hon’ble Apex Court, Special Public Prosecutors have been

appointed in this case from time to time. It is stated that Section 24 (8) Cr.P.C. uses the words “*for the purpose of any case or class of cases*” and a general appointment cannot overlap a specific appointment.

13. Mr. Atmaram N S Nadkarni, learned senior counsel and Mr. Vijay Aggarwal, learned counsel had also drawn attention of this Court to orders dated 16th March, 2020, 11th April, 2011 and 27th April, 2011 in Civil Appeal No. 10660/2010 and submitted that the Hon’ble Apex Court has been monitoring appointment of trial court Judge as well as Special Public Prosecutor in 2G case, and since by virtue of Gazette notification dated 8th February, 2018 (*modified on 16th February, 2018*) Mr. Tushar Mehta, learned ASG was appointed as Special Public Prosecutor for conducting appeals/ revisions in Delhi High Court arising out of 2G case and also since the said notification of 16th February, 2018 is not superceded by any other notification before filing the appeal, therefore, filing of appeal by Mr. Sanjeev Bhandari, learned Special Public Prosecutor without any sanction under Section 378(2) Cr.P.C. is bad in law. Reliance was placed upon decision of Hon’ble Rajasthan High Court in ***State Vs.***

***Devi Singh* RLW 1986 Raj 600 and *State of Rajasthan Vs. Manbhar* (1981) 2 SCC 525** and decision of Hon'ble Kerla High Court in ***State of Kerala Vs. Kolarveetil Krishnan* 1982 CrLJ 301.**

14. It was submitted that grant of sanction to file an appeal under Section 378(2) Cr.P.C. is akin to grant of sanction to prosecute under Section 197 Cr.P.C. or under Section 19 of the Prevention of Corruption Act, 1988 (PC Act) and in that regard reliance was placed upon Hon'ble Apex Court decisions ***State of Karnataka Vs. Ameerjan* 2007 11 SCC 273** and decision of this Court ***Ashok Kumar Aggarwal Vs. Central Bureau of Investigation* 2007 (10) AD (Delhi) 73** and ***Mohd. Iqbal Ahmed Vs. State of Andhra Pradesh* 1979 (4) SCC 172.**

15. It was also urged by Mr. Atmaram N S. Nadkarni, learned senior counsel & Mr. Vijay Aggarwal, learned counsel that the criminal leave petition has been filed under the affidavit of one Mr. V.M.Mittal, Deputy SP, who was actually not competent to swear on affidavit as during the trial it had come on record that his

investigation was confined to transactions pertaining to two companies only.

16. Further, to submit that no documents which are essential should be permitted to be concealed from the Court, reliance was placed upon decision of Hon'ble Apex Court in *Nitya Dharmananda alias K. Lenin & Anr. Vs. Gopal Sheelum Reddy* 2018 (2) SCC 93 and *State of Kerala Vs. Raghvan* 1974 Cri.L.J. 1373.

17. At the hearing, Mr. Vijay Aggarwal, learned counsel appearing for petitioner- *Rajiv Agarwal* pointed out various typographical errors and lacune in the criminal leave to appeal i.e. Cr.L.P.185/2018 to submit that the leave to appeal has been filed in a mechanical manner and without application of mind.

18. Mr. Vijay Aggarwal, learned Counsel drew attention of this Court to **para 23.20 of CBI Manual**, which reads as under:-

“If an important case, so categorized for close monitoring, on the basis of the amount involved, status of the accused, the sensitive nature of the investigation involving elected representatives etc., ends in acquittal, a reference should be made to the Attorney General or one of his nominees to determine whether the acquittal was as a result of flaws

in investigation or prosecution, fix responsibility for such flaws and to examine whether it is a fit case for appeal. Such references should be drafted by the Director of Prosecution in consultation with Director, CBI and should invariably contain their own respective views.”

19. Learned counsel submitted that the criminal leave to appeal has been filed by the CBI without scrutiny of judgment, evidence and documents placed on record before the trial court and also without application of mind, as CBI has filed the appeal in a mechanical manner against all the accused persons, without advertent the flaws and shortcomings pointed out in the impugned judgment of 21st December, 2017 and determining against which respondent appeal deserves to be filed and against which not.

20. Learned counsel, Mr. Vijay Aggarwal, has also placed reliance upon the decision in ***Jayrajibhai Jayantibhai Patel v. Anilbhai Nathubhai Patel***, (2006) 8 SCC 200 regarding judicial review of administrative decision. The relevant para of the said judgment reads as under:-

“18. Having regard to it all, it is manifest that the power of judicial review may not be exercised unless the administrative decision is illogical or suffers from procedural

impropriety or it shocks the conscience of the court in the sense that it is in defiance of logic or moral standards but no standardised formula, universally applicable to all cases, can be evolved. Each case has to be considered on its own facts, depending upon the authority that exercises the power, the source, the nature or scope of power and the indelible effects it generates in the operation of law or affects the individual or society. Though judicial restraint, albeit self-recognised, is the order of the day, yet an administrative decision or action which is based on wholly irrelevant considerations or material; or excludes from consideration the relevant material; or it is so absurd that no reasonable person could have arrived at it on the given material, may be struck down. In other words, when a court is satisfied that there is an abuse or misuse of power, and its jurisdiction is invoked, it is incumbent on the court to intervene. It is nevertheless, trite that the scope of judicial review is limited to the deficiency in the decision-making process and not the decision.”

(emphasis supplied)

21. Mr. Vijay Aggarwal, learned counsel drew attention of this Court to the impugned judgment of 21st December, 2017 to submit that prosecution had failed to prove its case. He specifically referred to deposition of star witnesses A.K.Srivastava (PW60); former AG Late Shri G.W.Vanhawati and Mr. D.S.Mathur, Ex Telecom

Secretary and various observations in the impugned judgment returning the finding that the present case is of no evidence.

22. Mr. Vijay Aggarwal, learned counsel also drew attention of this Court to Delhi High Court Rules, Vol II, Chapter 25, Appeal and Revision- Criminal, which reads as under:-

**“Part-E
APPEALS FROM ORDERS OF
ACQUITTAL**

1. **Appeals to be filed in certain** cases- Sessions Judges and District Magistrates should bear in mind the following order to the State Government regarding appeals against acquittals under Section 417 of the Criminal Procedure Code [See Section 378 of new Code].

The State Government will not direct an appeal-

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(2) Where, however serious or otherwise important the case, the legal guilt of the accused is fairly questionable or the evidence admits of any reasonable doubt, and the court has considered and weighed it with impartiality intelligence and care.”

He submitted that petitioner/CBI has failed to produce the relevant document to show that Government functionaries have applied their mind before presentation of the appeal. No document has been placed on record to substantiate the fact that Mr.Sanjeev

Bhandari, learned Special Public Prosecutor had filed the instant petition on the instructions of State Government or the CBI.

23. It was further argued by Mr. Vijay Aggarwal, learned counsel that reliance placed by CBI upon decision of Punjab and Haryana High Court in *Lal Singh v State of Punjab 1981 CriLJ 1069* is clearly misplaced as in para 22 of the said judgment, it has been observed that formation of an opinion for preferring an appeal against the judgment of acquittal is inherently administrative in nature, which can be interfered in writ jurisdiction.

24. Learned counsel for petitioners, especially Mr. N. Hariharan, learned Senior Counsel and Mr. Vijay Aggarwal, learned counsel submitted that the decision of the Central Government to direct filing of an appeal against acquittal, being an administrative decision must be in compliance with the *Wednesbury principle of reasonableness*. They also submitted that the *Wednesbury principle* demands that reasons for arriving at the decisions must be recorded in the executive order i.e. the direction is bad in law if it is not a reasoned order.

25. Besides the aforesaid grounds taken by Mr. Vijay Aggarwal, learned counsel some additional grounds have also been taken in W.P.(C) 8021/2020. It is stated that as per Chapter IV of Delhi High Court Rules, titled as “Presentation of Complaint and Other Documents” mandates that all documents are required to be filed at the filing counter. Another ground taken in the petition is that as per circular of 1st September, 2020, all filings have to be accompanied by an affidavit. It is submitted that CBI has produced the documents before this Court and not filed them in accordance with the procedure prescribed.

26. At the hearing, Mr. Atmaram N S Nadkarni, learned senior counsel pointed out that the Communication of the Government of India opining that it was a fit case to prefer an appeal against the judgment dated 21st December, 2017 passed by the learned Special Judge in CC No. 01 & 1A/2011 (RC.DAI.2009.A.0045) i.e. the 2G case and decision to engage Mr. Tushar Mehta, learned ASG to represent in the case, is dated 17th January, 2018, whereas on the date of filing of the appeal there was no Special Public Prosecutor engaged for 2G case and in the absence thereof, it is necessary to be

bring on record the relevant document as to who had given the approval to prefer an appeal against the impugned judgment dated 21st December, 2017.

27. Mr. Atmaram N S Nadkarni, learned senior counsel drew attention of this Court to Section 378(2) which reads as under:-

Section 378(2) in The Code Of Criminal Procedure, 1973

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of sub- section (3), to the High Court from the order of acquittal.

28. Mr. Nadkarni, learned senior counsel submitted that the letter dated 17th January, 2018 only talks about appointment of Mr. Tushar Mehta, learned ASG in this case and it nowhere issues any direction to file the appeal. He further stated that the sanction should have been issued by the Ministry of Home Affairs after report of opinion from Ministry of Law and Justice, whereas this letter has been issued by the Ministry of Personnel, Public Grievances and Pensions,

Department of Personnel & Training, (DoPT) Government of India. Learned counsel emphasized that according to Entries 35 and 36 of the Allocation of Business Rules, 1961, *Criminal Procedure* is a subject allocated to the Ministry of Home Affairs and that being the case, DoPT could not have directed filing of an appeal. He further submitted that the direction dated 17th January, 2018 has been signed by an Under Secretary to the Government of India and has not been issued in the name of the President and is, therefore, violative of Article 77(1) of the Constitution of India and needs to be set aside.

29. Mr. Atmaram N S Nadkarni and Mr. N. Hariharan, learned senior counsels and Mr. Vijay Aggarwal, Mr. Mudit Jain and Mr.D.P. Singh, learned counsels also drew attention of this Court to various provisions of Scheme of the Government of India (Allocation of Business) Rules, 1961 to submit that functions pertaining to “criminal law” and “criminal procedure” are entrusted to the Ministry of Home Affairs and not DoPT.

30. Mr. Ramesh Gupta, learned senior counsel submitted that the respondents were roped in a false and concocted case and vide impugned judgment of 21st December, 2017, they have been given a

clear acquittal. Learned senior counsel further submitted that the appellate court has to bear in mind the fact that in case of acquittal, there is double presumption in favour of the accused. First presumption of innocence is available to the accused under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless proved guilty by a competent court of law and thereafter, the accused having been acquitted, the presumption of his innocence stands further reinforced, reaffirmed and strengthened and appellate court should be very slow in interfering with the same.

31. Mr. Ramesh Gupta, learned senior counsel once again drew attention of this Court to the provisions of Section 378(2) Cr.P.C. and raised objections with regard to sanction and authority of learned Special Public Prosecutor for CBI to file the leave to appeal i.e. Cr.L.P.185/2018. He also drew attention of this Court to Delhi High Court Rules (Vol.III), Chapter-25 E “Appeal and Revision-Criminal” and various provisions of CBI Manual. He adopted arguments raised by Mr. Nadkarni, learned senior counsel with

regard to Allocation of Business Rules, 1961 and Article 77(3) of the Constitution of India.

32. It was contended by learned counsels for the petitioners that there is a difference between acquittal granted due to the fact that the case has not been proved beyond reasonable doubt and acquittal on the basis of no evidence appearing against the accused. It was stated that the instant case is of no evidence and therefore, the Central Government files as well as notings, must reflect application of mind as to why an appeal should be filed and since no such record has been produced, the approval/ sanction is bad in law. It is further prayed that the appeal has also not been filed by the Public Prosecutor especially empowered to do so, and therefore, this Court should hold that the same is *non est*, null and void and without any sanction and should not entertain the same.

33. On the other hand, Mr. Sanjay Jain, learned ASG raised serious objections to the filing of these writ petitions and stated that the criminal leave to appeal was filed two years ago and when this Court commenced hearing, respondents by filing applications after applications questioned applicability of Section 378 (2) Cr.P.C. and

Prevention of Corruption (Amendment) Act, 2018 and now, these writ petitions have been filed only to delay the proceedings.

34. Learned ASG submitted that Section 378 Cr.P.C only mandates that the appeal must be instituted on the direction of the Central Government to a Public Prosecutor. He submitted that Section 378 Cr.P.C. only provides the mechanism to file the appeal against the order of acquittal and does not contemplate any sanction/approval of the Central Government.

35. Learned ASG submitted that in the light of decision of the Hon'ble full-bench of Punjab and Haryana High Court in ***Lal Singh v. State of Punjab (Supra)***, it is a settled proposition of law that the issuance of a direction under Section 378 of the Code is an executive decision, which does not affect the rights of any person, as right to file an appeal is a substantive right of the Central Government and therefore, this Court need not look into the reasons for the issuance of such a direction.

36. Learned ASG next submitted that there is no need to test the direction on the anvil of the *Wednesbury Principle* because the direction is not amenable to judicial review, as the same is an

internal matter and does not cause any prejudice to the petitioners. It was further submitted by learned ASG that the provisions of The Allocation of Business Rules, 1961 states that the Ministry of Personnel and Training (DoPT) is the administrative authority for Delhi Special Police Establishment (CBI), including its legal division, and therefore, DoPT was the competent authority for issuing the direction to the CBI to institute an appeal against the order of acquittal.

37. Learned ASG further submitted that submissions with regard to appointment of Special Public Prosecutor and ASG in 2G case; procedure for filing appeal prescribed in Delhi High Court Rules; contents of CBI Manual etc. have already been addressed in CrI.M.A. 13703/2020; CrI.M.A. 13851/2020 & CrI.M.A. 14091/2020. He, therefore, submitted that the present writ petitions are unfounded and untenable and do not call for issuance of any notice and are required to be dismissed.

38. I have heard the rival contentions raised by learned counsels representing both the parties and given my thought to the matter. The preliminary issue for consideration before this Court is as to whether

Section 378(2) of the Cr.P.C enjoins the Government to pass a reasoned order while directing filing of an appeal to the Public Prosecutor and whether the Court can look into such reasons.

39. The provision of Section 378(2) of Cr.P.C. mandates that an appeal must be instituted by a Public Prosecutor on the direction of the Central Government. Section 378(2) Cr.P.C. does not contemplate that the Central Government has to show what material was considered by the parties before filing the appeal. In fact, Section 378(2) Cr.P.C. presupposes the decision-making process and contemplates only the communication of such a decision in the form of a direction to the Public Prosecutor. The Court, has thus, to satisfy itself that such a direction has been issued by the Central Government and the appeal has been instituted by a Public Prosecutor acting on such a direction.

40. The learned counsels for the petitioners want this Court to go into the files, notings, opinion and sanction/ approval, if any, given by the Government and also to analyze the same and direct the respondents to place them on record. In essence, they intend that whole of the process before filing of criminal leave to appeal should

be analyzed, scanned and examined in detail by this Court so as to satisfy itself whether there were deficiencies, irregularities and illegalities in the judgment of learned trial court which warranted filing of the present appeal. The learned counsels further intend this court to examine the fact whether Law Officers as well as Government officials of the concerned Ministries have applied their mind and arrived at a just and correct decision i.e. to file the present appeal.

41. The contentions of learned counsels though may apparently seem to be convincing, however, a deep analysis of the same reveals that it is against the settled principles of law as well as provision of Section 378(2) Cr.P.C. In fact, the learned counsels for the petitioners want this court to read the words ‘sanction or approval’ in Section 378(2) Cr.P.C. which Legislature in its wisdom has chosen not to provide the same in the provision. For ready reference, Section 378 Cr.P.C. is reproduced here.

“Section 378 in The Code Of Criminal Procedure, 1973

378. Appeal in case of acquittal.

***(1) Save as otherwise provided in sub- section
(2) and subject to the provisions of sub-
sections (3) and (5), the State Government***

may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court² or an order of acquittal passed by the Court of Session in revision.]

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, **the Central Government may also direct the Public Prosecutor to present an appeal**, subject to the provisions of sub-section (3), to the High Court from the order of acquittal.

(3) No appeal under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused,

no appeal from that order of acquittal shall lie under sub- section (1) or under sub- section (2).”

42. Though, more or less, similar submissions were raised in Crl.M.A. 13703/2020 & Crl.M.A. 13851/2020 & Crl.M.A. 14091/2020 and have been rejected vide a detailed order of even date, however, since these questions have been raised again by way of Civil Writs, this court will adjudicate the same trying its best to avoid repetition of what has been discussed and adjudicated in the earlier applications moved under Section 378(2) Cr.P.C.

43. As discussed earlier, Section 378 (2) Cr.P.C. no doubt contemplates a direction by the Government to the Public Prosecutor to file an appeal. But how and why the Government has formed an opinion to file the appeal is certainly beyond the scope of Section 378(2) Cr.P.C. As decided in applications moved under Section 378(2) Cr.P.C., it is only subjective satisfaction of the Government whether to file an appeal or not? How it has arrived at the decision and whether the files and notings reflect that detailed discussions which have taken place and reasons have been given after analyzing the judgment to file the appeal, is none of the

concern of the petitioners. The Government or its officials are free to decide and take an independent decision whether it is a fit case to file an appeal against the order of acquittal. No shackles or restraint can be put upon the Government as neither the Statute nor common sense permits the same. This Court is not at all supposed to sit over the decision taken by the Government and examine the notes and opinion to find out whether the decision of the Government to file the appeal is just, proper and fair and the impugned judgment has been properly analyzed. If this Court has to examine all the concerned papers, opinion, notings and files and to decide whether the decision to file the appeal is correct first, then the whole purpose of hearing the appeal will stand defeated as the decision will then be rendered by the Court on the basis of notings/ opinions in the Government files. This certainly was never the intention of the Legislature and neither it has been so provided in Section 378 (2) Cr.P.C. If the contention of learned counsels for the petitioners is accepted, it will lead to an absurd situation i.e. even before filing the appeal, the decision of the Government will be challenged by way of writ petition and the Court will have to first give its findings

whether the opinion framed by its Law Officers is correct and filing of appeal is justified. This Court is afraid that such an interpretation was neither contemplated nor can be given by this Court in view of the unambiguous language of Section 378 (2) Cr.P.C.

44. This Court is, therefore, of the opinion that prayer made by the petitioners cannot be accepted and there cannot be any judicial review of any notings/drafts/opinion given by the Government Officials or Law Officers which resulted into filing of an appeal. In fact, it is while hearing the appeal only that this Court will apply its judicial mind and pass a reasoned order whether the appeal filed by the appellant is maintainable or not. This Court is further of the opinion that if the contention of learned counsels for the petitioners is accepted, it will lead to chaos because whenever a criminal case or appeal is filed in Court, a writ will also be filed by the aggrieved person/accused/respondent calling for the police/ Government records and expecting the Court to go through the internal notings and to first satisfy itself whether there was sufficient application of mind by the police officers/ Government officials and, thus, no criminal case or appeal will be able to proceed further as Court will

first examine the internal documents of the Government and give its findings. This certainly cannot be said to be the intention of the Legislature and it will not only result in delay of the proceedings but will in fact bring to an halt, the criminal administration of justice.

45. Let this Court now address the contentions of the learned counsels for the petitioners, especially Mr. Vijay Aggarwal, learned counsel who has raised certain issues, which according to him go to the root of the matter and this Court must decide the same before proceeding further. It was argued that a sanction or approval by a competent authority to file an appeal is mandatory as per section 378(2) Cr.P.C. and since it has not been placed on the record, this Court cannot proceed further in the matter.

46. This Court has carefully considered the above submission and is of the opinion that the same cannot be accepted for the simple reason that no sanction akin to previous sanction required under Section 196 Cr.P.C. or 197 Cr.P.C. is provided in Section 378(2) Cr.P.C.

47. The relevant provision of Section 196 or 197 Cr.P.C. run as follows:-

196. Prosecution for offences against the State and for criminal conspiracy to commit such offence.

(1) No Court shall take cognizance of-

(a) any offence punishable under Chapter VI or under section 153A, of Indian Penal Code, or² Section 295 A or sub section (1) of section 505] of the Indian Penal Code (45 of 1860) or

(b) a criminal conspiracy to commit such offence, or

(c) any such abetment, as is described in section 108A of the Indian Penal Code (45 of 1860), except with the previous sanction of the Central Government or of the State Government.

(1A)² No Court shall take cognizance of-

(a) any offence punishable under section 153B or sub- section (2) or sub- section (3) of section 505 of the Indian Penal Code (45 of 1860), or

(b) a criminal conspiracy to commit such offence, except with the **previous sanction** of the Central Government or of the State Government or of the District Magistrate.]

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: ¹ Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression " State Government" occurring therein, the expression " Central Government" were substituted.

48. The above provisions of law categorically envisage that previous sanction is required in the cases specified above. The said mandate i.e. requirement of previous sanction is conspicuously absent in Section 378 Cr.P.C. Thus, it cannot by any stretch of imagination be held that previous sanction of Central Government is required to be placed on record and the same is pre-requisite for filing an appeal.

49. The learned counsels for respondents have next submitted that strict adherence to the Allocation of Business Rules, 1961 framed under Article 77 of the Constitution of India is required and in this regard, reliance is placed upon Hon'ble Apex Court's decision in

MRF Limited v Manohar Parrikar and Others, (2010) 11 SCC 374.

Article 77 of the Constitution of India which runs as follows:-

“Conduct of business of the Government of India. ...

(1) All executive action of the Government of India shall be expressed to be taken in the name of the President

(2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President

(3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business.”

50. Learned counsels for respondents have argued that the Gazette notification dated 17th January, 2018, vide which Mr. Tushar Mehta, learned ASG (now learned Solicitor General) was appointed as Special Public Prosecutor (CBI) for conducting prosecution, appeals/ revisions or other proceedings arising out of 2G Spectrum cases and Gazette Notification dated 6th May, 2019, vide which Mr. Sanjay Jain, learned ASG has been appointed as Special Public Prosecutor

to conduct prosecution, appeal/ revision or other proceedings arising out of the cases related to 2G spectrum cases before 2G trial Court and appellate/ revisional court and similarly, that of Mr. Sanjeev Bhandari, learned Special Public Prosecutor for CBI dated 6th March, 2014, have not been expressed in the name of the President and, therefore, the same is not in accordance with law and cannot be considered by this Court.

51. This Court has carefully considered the above submission. Learned counsels in this regard have also placed reliance upon decisions of the Hon'ble Apex Court in *State of Bihar v Rani Sonabati Kumari (1961) 1 SCR 728*; *J.P. Bansal Vs. State of Rajasthan (2003) 5 SCC 134* and *D.S. Sharma v Union of India ILR (1970) 1 Del.* and decision of Rajasthan High Court in *Dr. A.K. Datta v Union of India S.B Criminal Appeal No. 1 of 1971*.

52. This Court has also carefully gone through the above decisions. There is no quarrel with the proposition of law laid down in the abovesaid decisions. However, the same are distinguishable on the basis of facts and circumstances stated therein. It is a settled law that Article 77 of the Constitution of India is not mandatory but is

only directory in nature. Even if an order/ letter/ sanction / approval/ notification is not expressed in the name of the President or Governor, it does not make it *non est* or void and invalid. The Hon'ble Apex Court's in ***Air India Cabin Crew Assn. v. Yeshaswinee Merchant, (2003) 6 SCC 277*** has held as under:-

*“72. In our opinion, reference to Article 77 is wholly inappropriate. The exercise of statutory power under Section 34 by the Central Government, even though not expressed to have been taken in the name of President, does not render it invalid. Clause (2) of Article 77 insulates an executive action of the Government formally taken in the name of President from challenge on the ground that it is not an order or instrument made or executed by President. **Even if an executive action of the Central Government is not formally expressed to have been taken in the name of President, Article 77 does not provide that it would, therefore, be rendered void or invalid.** We need not, therefore, deal with the argument advanced on the basis of Article 77 of the Constitution because the respondent Association itself is relying on the directive dated 16-10-1989 of the Central Government which is not formally expressed in the name of President in terms of Article 77 of the Constitution.”*

(emphasis supplied)

53. Thus, as per the law laid down by the Hon'ble Apex Court, even if an executive action of the Central Government is not

formally expressed to have been taken in the name of the President of India, it would not be rendered void or invalid. Further, it is also a settled law that each and every executive decision need not be in the name of President or Governor. The said point has been discussed by the learned author *Durga Das Basu in his Commentary on the Constitution of India (8th Edition, 2008)*. The learned author has explained Article 77 of Constitution of India as under:-

'Executive Action'

1. Cl. (1) is confined to cases where the executive action is required to be expressed in the shape of a formal order or notification or any other instrument. The expression "executive action" in Art. 166(1) (Art. 77 is similarly worded) is comprehensive enough and 'apt' to include even orders which emerge after and embody the results of judicial or quasi-judicial disposal by Government. The scope of the expression includes initiation of legislation, maintenance of order, promotion of social welfare, direction of foreign policy and carrying on or supervision of general administration of the State. A notification is not an executive order, but a piece of subordinate legislation made by the Government. But if it is duly published in the Gazette of India over the signature of the Under Secretary who is authorised for this purpose, there is no violation of Art. 77. Usually executive decision is taken on the office files by way of notings or endorsements made by the appropriate minister or officer. If every executive decision has to be given a formal

expression the whole governmental machinery will be brought to a standstill. But when an executive decision affects an outsider or is required to be officially notified or communicated, it should be normally expressed in the form mentioned in Art 166(1).

(emphasis supplied)

54. There cannot be any dispute with the fact that it is very difficult for the Government to take each and every decision in the name of President or Governor. It is only those executive decisions or actions which relate to some Legislation, maintenance of order or promotion of social welfare, direction of foreign policy etc. which need to be in the name of the President or the Governor. All other decision taken by the Government can be published under the name and signature of Under Secretary, who is authorized for the said purpose. Thus, if every executive document is to be given a formal expression in the name of the President, the Government machinery will come to a halt. Article 77(1) of the Constitution of India mandates that issuance of an instrument in the name of the President applies only to the cases where the executive action is to be expressed in terms of a formal order, or alternatively in a case where the instrument reflects a quasi-judicial decision. Direction to the

Public Prosecutor to file an appeal or an authorization in his/her favour is an internal communication and it does not require an expression in formal terms i.e. in the name of President.

55. Learned counsels for the respondents have further argued that since the leave to appeal filed by the respondent/CBI is not as per the procedure prescribed under the law and is, therefore, violative of Article 21 of the Constitution of India. This Court has considered the contention of learned counsels. As discussed earlier, there is nothing on record to suggest that leave to appeal has not been filed in accordance with law under Section 378(2)Cr.P.C. The leave to appeal filed by the CBI, is in fact its substantive right which has been given to it by the Statute and therefore, there cannot be any question of violation of Article 21 of Constitution of India. The contention of learned counsels, therefore, cannot be accepted.

56. Learned counsels for the petitioners have also argued that when a power is given to do a certain thing, then the said thing must be done in that way or not at all. In the opinion of this Court, there is no quarrel with the above proposition of law. The documents sought by the respondents have been shown and supplied to the petitioners.

As discussed earlier, the other documents i.e. the internal notings in Government files cannot be placed on record for the reason that Section 378 Cr.P.C. is totally silent about it and the respondents have a substantive right to file an appeal and process for filing the same cannot be subjected to judicial review.

57. Learned counsels for the petitioners have relied upon a Punjab and Haryana High Court decision in *State of Punjab Vs. Mohinder Singh 1982 SCC Online P&H 97* to show that if Public Prosecutor is not authorized to file an appeal, the same cannot be considered by the Court. This Court has gone through the above judgment and is of the opinion that there is no quarrel with the preposition of law laid down therein. The said decision contemplates that a Public Prosecutor by virtue of his appointment vide Section 24 of the Code of Criminal Procedure, is not required to file a vakalatnama/ Power of Attorney to institute or for conducting a criminal appeal but an appeal against acquittal cannot be filed by him on his own unless, he is specifically directed by the Government concerned and when it is disputed, he should be able to dispel the doubt. Normally the Court will accept the statement of learned Public Prosecutor that he has

been authorized to file the appeal but if it is doubted for substantial reasons, he must dispel the doubt.

58. However, in the present appeal there is an authorization dated 17th January, 2018, vide which Mr. Tushar Mehta, learned ASG (now learned Solicitor General) was appointed as Special Public Prosecutor (CBI) for conducting prosecution, appeals/ revisions or other proceedings arising out of 2G Spectrum cases and the same which reads as under:-

Most Immediate
By Special Messenger

Government of India
Ministry of Personnel, Public Grievances and Pensions
Department of Personnel & Training
AVD-II(B)

Subject- Filing of Criminal Appeal in Hon'ble Delhi High Court under Cr.PC against the impugned judgment dated 21.12.2017 of Ld. Special Judge in CC No. 01 & 1A/2011 (RC.DAI.2009.A.0045) – reg.

CBI may kindly refer to their letter No. 184/RC.DAI.2009.A 0045 dated 05.01.2018 on the above subject.

2. The proposal of CBI to file Criminal Appeal before Hon'ble Delhi High Court under Cr.PC against the impugned judgment dated 21.12.2017 of Ld. Special Judge in CC No. 01 & 1A/2011 (RC.DAI.2009.A.0045) has been examined in consultation with ALA, D/o Legal Affairs (DOLA), M/o Law & Justice. ALA, Department of Legal Affairs, Ministry of Law & Legal has opined inter alia that is a fit case to prefer an appeal. A copy of the advice conveyed by Department of Legal Affairs is enclosed herewith.

3. It has also been decided to engage Ld. ASG, Shri Tushar

Mehta in the above case. Necessary further action may be taken in the matter accordingly.

(Khushboo Goel Chowdhary)
Deputy Secretary to the Govt. of India

Encls.- As above

Shri Vineet Vinayak, Head of Zone, CBI, Anti-Corruption Branch, 1st Floor, CBI Headquarters, 5-B, CGO Complex, Lodhi Road, New Delhi-110003.

DoP&T I.D.No.137/03/2018 -VD-II(B) 17 January, 2018

59. In addition, there is also a notification dated 6th May, 2019 vide which Mr. Sanjay Jain, learned ASG was also appointed as Special Public Prosecutor to conduct prosecution, appeal/ revision or other proceedings arising out of the cases related to 2G spectrum cases before 2G Trial Court and Appellate/ Revisional Court and it runs as under:-

**[TO BE PUBLISHED IN THE GAZETTE OF INDIA IN
PART- 2 SECTION3(2)]**

DY No. 726/DOP Sec.

GOVERNMENT OF INDIA

Dated 06.05.2019

**MINISTRY OF PERSONNEL,PUBLIC GRIEVANCES
AND PENSIONS**

**(DEPARTMENT OF PERSONNEL AND TRAINING)
NEW DELHI**

DATED: 06.05.2019

NOTIFICATION

The Central Government hereby appoints SHRI. Sanjay Jain, Additional Solicitor General as Special Public Prosecutor for conducting Appeals or revisions etc. before the High Court and Supreme Court in 2G spectrum case along with Shri Tushar Mehta, Solicitor General of India. Further, Shri Sanjay Jain will appear on the said appeal or revision on 2G

Spectrum cases under the direct supervision of Ld. Solicitor General of India and whenever it is desirable, the Ld. Solicitor General of India would appear and argue the matter at his discretion.

[F.No. 225/59/2014-AVD-2]

PK JAISWAL

UNDER SECRETARY TO THE GOVERNMENT OF
INDIA

The Manager
Government of India Press
Mayapuri, Ring Road
NEW DELHI, 110064

No. 225/59/2014-AVD-2

New Delhi Dated 06/05/2019

Copy Forwarded for information to

1. The Registrar, Supreme Court of India, New Delhi
2. The Registrar, Delhi High Court, New Delhi
3. The Accountant General, Central Revenues, New Delhi
4. The Pay and Accounts Officer, CBI, CGO Complex, New Delhi
5. Direction of Prosecution, CBI, CGO Complex, New Delhi
6. Department of legal affairs, New Delhi
7. Guard File

PK JAISWAL

UNDER SECRETARY TO
THE GOVERNMENT OF INDIA

60. Vide Notification dated 6th March, 2014 issued by Government of India, Mr. Sanjeev Bhandari has been appointed as the Special Public Prosecutor for the CBI and authorized for conducting the prosecution appeals, revisions and other matters arising out of the cases investigated by the Delhi Special Police

Establishment (CBI) and the said Notification is quoted hereunder
for ready reference:-

[To be published in the Gazette of India in part-II Section-3, Sub-section (ii)] Government of India Ministry of Personnel, Public Grievances and Pensions Department of Personnel & Training **** NOTIFICATION New Delhi dated 6-03-2014 S.O. In exercise of the powers conferred by sub-section (8) of Section 24 of the Code of Criminal Procedure, 1973 (Act No. 2 of 1974). The Central Government hereby appoints S/Shri Sanjeev Bhandari and K. Raghavacharyulu, Advocates as Special Public Prosecutors of the Delhi Special Police Establishment (Central Bureau of Investigation) in Delhi High Court at New Delhi for conducting the prosecution appeals, revisions or other matters arising out of the cases investigated by the Delhi Special Police Establishment (CBI). [F. No. 225/14/2014- AVD-II] (Rajiv Jain) Under Secretary to Government of India To The Manager, Government of India Press Mayapuri, Ring Road, <u>New Delhi- 110064</u> No.225/14/2014-AVD-II New Delhi dated 6 March, 2014 Copy to: 1. The Chief Secretary, Government of Delhi, New Delhi. 2. The Registrar, Delhi High Court, New Delhi. 3. The Director, Central Bureau of Investigation, New Delhi. 4. Director of Prosecution, Central Bureau of Investigation, New Delhi. 5. Department of Legal Affairs, Shastri Bhavan, New Delhi. 6. Guard File. (Rajiv Jain)

61. A perusal of the afore referred notifications/ authorization clearly reveals that Mr. Tushar Mehta, learned ASG, Mr. Sanjay Jain, learned ASG and Mr. Sanjeev Bhandari, learned Special Public Prosecutor for CBI have been authorized to conduct the appeal. The contention of learned counsels for the respondents is, therefore, devoid of any substance and is rejected.

62. Learned Senior counsel Mr. Atmaram N S Nadkarni argued that Ministry of Home Affairs is the appropriate Ministry to take decision as regards filing of appeal. In this regard, he has referred to Allocation of Business Rules and submitted that Criminal Procedure Code falls under Ministry of Home Affairs and, therefore, DOPT cannot consider or pass any directions for filing the appeal.

63. Learned ASG on the other hand has argued that CBI falls under the Ministry of Personnel, Public Grievance and Pensions and it is clear from Clause 20A of Government of India (Allocation of Business) Rules, 1961. This Court has carefully gone through the same and the relevant portion thereof. In this regard, let this Court first examine the subjects which are being dealt by Ministry of

Personnel, Public Grievance and Pensions under the DoPT. The subjects are as follows:-

***“MINISTRY OF PERSONNEL, PUBLIC
GRIEVANCES AND PENSIONS (KARMIK,
LIK SHIKAYAT TATHA PENSION
MANTRALAYA)***

***A. DEPARTMENT OF PERSONEL
AND TRAINING
(KARMIK AUR PRASHIKSHAN VIBHAG)***

***I. RECRUITMENT, PROMTION AND
MORALE OF SERVICES***

XXXXXXX

II. TRAINING

XXXXXXX

***III. VIGILANCE AND
DISCIPLINE***

20. (a) Central Vigilance Commission;

***(b) All policy matters pertaining to
vigilance and discipline among public
servants.***

***(c) Relationship between Members of
Parliament and the Administration.***

***20A. The Prevention of Corruption Act
1947 (2 of 1947); the Central Bureau of
Investigation (the Delhi Special Police
Establishment including the Legal Division,
the Technical Division, the Policy Division,
and the Administration Division); the Food
Offences Wing and Economic Offences
Wing.”***

64. Let this Court now also refer to the subjects falling under Ministry of Home Affairs. The relevant subjects under Law and Order are as follows:-

“II LAW AND ORDER

18. XXXX

XXXX

34. XXXX

35. *Criminal Law.*

36. *Criminal Procedure.”*

65. A perusal of the subjects falling under Ministry of Personnel, Public Grievance and Pensions reveals that DoPT is the Nodal Ministry controlling CBI and is clear from **Clause 20A** which runs as follows:-

“III VIGILANCE AND DISCIPLINE

19. XXXX

20A. *The Prevention of Corruption Act, 1947 (2 of 1947); the Central Bureau of Investigation (the Delhi Special Police Establishment including the Legal Division, the Technical Division, the Policy Division, and the Administration Division); the Food Offences Wing; and Economic Offences Wing.”*

66. This is not in dispute that Cr.P.C. is subject matter of Ministry of Home Affairs. However, as per *Allocation of Business Rules, 1961*, CBI has been placed under the DoPT. This Court is of the opinion that no doubt Criminal Law and Criminal Procedure are the subject matters of Ministry of Home Affairs but it is difficult to

ignore Clause 20A which clearly contemplates that CBI falls under DoPT. The whole of the *Allocation of Business Rules, 1961* have to be read harmoniously and cannot be read in such a manner that Clause 20A is totally ignored because of the reason that subject ‘Criminal Law’ and ‘Criminal Procedure’ appearing in entries 35 & 36 fall under Ministry of Home Affairs. In the opinion of the court, merely because Criminal Law and Criminal Procedure falls within the domain of Ministry of Home Affairs, it does not in any way suggest that DoPT ceases to be a controlling ministry of CBI. In view of the fact that CBI falls under the DoPT, it was for DoPT to appoint and engage the services of learned ASG and not the Ministry of Home Affairs. However, it is repeatedly argued by learned counsels for the petitioners that when ‘Criminal Law and Criminal Procedure’ have been placed under Ministry of Home Affairs, then why appeal which comes under the provisions of Cr.P.C has not been directed to be filed by Ministry of Home Affairs but by DoPT. The answer to the above contention is very simple and clear. The subject ‘Criminal Procedure’ for the purpose of enactment/ amendment etc. will, no doubt, fall under Ministry of Home Affairs.

But in case an appeal is to be filed by CBI, which falls under DoPT, as per Clause 20A of Allocation of Business Rules, 1961, the said Ministry will have to take a call whether to file an appeal or not. This, in the opinion of this Court is the only interpretation which can be given to the Allocation of Business Rules, 1961 without creating any conflict or confrontation between different clauses and without rendering any entry redundant.

67. Article 77(3) of the Constitution of India provides for the creation of rules of allocation of business to facilitate the better transaction of business between different wings of the Government. The Allocation of Business Rules, therefore, must be construed from the lens of such facilitation of business and consequently, the entries must be construed harmoniously. If the entry/subject of administration of CBI vests in the DoPT, there appears to be no reason to exclude it from the aegis of the DoPT. If this Court were to accede to the construction put forward by the petitioners, it would lead to an incongruous situation where the CBI would be under the administrative control of the DoPT but would need approval from

the Ministry of Home Affairs every time a decision has to be taken by the Central Government under the Cr.P.C.

68. Now coming to the number of judgments cited by learned counsels for the petitioners in support of their contentions. This Court has carefully gone through the same and is of the opinion that there is no quarrel with the proposition of law laid down therein. However, these cases are distinguishable on the basis of facts and circumstances stated therein. It is well settled that judicial precedent cannot be followed as a Statute and has to be applied with reference to the facts of the case involved in it. The ratio of any decision has to be understood in the background of the facts of that case. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. It has to be remembered that a decision is only an authority for what it actually decides. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. The ratio of one case cannot be mechanically applied to another case without regard to the factual situation and circumstances of the two cases.

69. In ***Padma Sundara Rao v. State of Tamil Nadu*** (2002) 3 SCC 533 the Hon'ble Apex Court has held that the ratio of a judgment has to be read in the context of the facts of the case and even a single fact can make a difference. In para 9 of the said judgment, the Apex Court has held as under:-

“9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in British Railways Board v. Herrington. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.”

70. In ***Bharat Petroleum Corporation Ltd v. N.R. Vairamani***, (2004) 8 SCC 579, the Apex Court has held that a decision cannot be relied on without considering the factual situation. The Apex Court observed as under:-

“9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems nor as provisions of a

Statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as Statutes. To interpret words, phrases and provisions of a Statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret Statutes, they do not interpret judgments. They interpret words of Statutes; their words are not to be interpreted as Statutes. In London Graving Dock Co. Ltd. v. Horton [1951 AC 737: (1951) 2 All ER 1 (HL)] (AC at p. 761) Lord Mac Dermott observed: (All ER p. 14 C-D)

“The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge...”

10. *In Home Office v. Dorset Yacht Co. [(1970) 2 All ER 294 : 1970 AC 1004 : (1970) 2 WLR 1140 (HL)] (All ER p. 297g-h) Lord Reid said,*

“Lord Atkin's speech ... is not to be treated as if it were a statutory definition. It will require qualification in new circumstances”.

Megarry, J. in Shepherd Homes Ltd. v. Sandham (No. 2) [(1971) 1 WLR 1062 : (1971) 2 All ER 1267] observed:

“One must not, of course, construe even a reserved judgment of Russell, L.J. as if it were an Act of Parliament.”

And, in Herrington v. British Railways Board [(1972) 2 WLR 537 : (1972) 1 All ER 749 (HL)] Lord Morris said: (All ER p. 761c)

“There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case.”

11. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

12. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

“Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

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Precedent should be followed only so far as it marks the path of justice, but you must cut the

dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.”

71. Thus, the judgments cited by learned counsel for the petitioners which are based upon their own peculiar facts and circumstances are distinguishable and do not help the learned counsels for the petitioners.

72. In view of the above discussion, this Court is of the opinion that it is true that under Article 226 of the Constitution, an unreasonable order can be challenged and set aside. However, it is also true that the said order can only be challenged if the Statute enjoins upon the State such an obligation or that such decision making process requires the adherence to the principles of natural justice or the internal decision unjustifiably violates the right of an aggrieved person. The State has a substantive right to file an appeal against acquittal and this is subjective satisfaction of the Government. The decision of the Full Bench of the Punjab and Haryana High Court in ***Lal Singh (supra)***, which has also arisen out of Article 226 petition itself, specifically observes that the decision

making process under Section 378 Cr.P.C. is in the realm of *subjective satisfaction of the Government*, which need not be scrutinized by this Court and the only enquiry that the Court must limit itself is to find out whether the Public Prosecutor has acted on the direction of the appropriate Government. In these circumstances, this Court is of the opinion that no case has been made out by the writ petitioners as to how an internal decision of the Government to utilize the right vested in it by the Cr.P.C, adversely affects the right of the petitioners and, therefore, all the drafts/notings or file need to be examined by the Court.

73. Learned counsel for the petitioner, Mr. Vijay Aggarwal during the course of argument has referred to certain paragraphs/ portion of the judgment of learned trial court to demonstrate that there was no substance in the allegations levelled against petitioner and the investigation was faulty and prosecution was also not able to satisfy the Court about grievances of the allegations.

74. This Court had asked learned counsel not to touch the merits of the case even when the arguments were being addressed in CrI.M.A. 13703/2020 & CrI.M.A. 13851/2020 & CrI.M.A.

14091/2020. However, despite the said pointing out by the Court, learned counsel has referred to the merits of the case. This Court is, however, of the opinion that the issues on merit will be discussed, analysed and examined during the course of hearing of the criminal leave petition and therefore, this Court refrains itself from making any comment at present, as this may prejudice either the case of the petitioners or the respondents.

75. As discussed hereinabove, the civil writ petitions filed by the respondents are not maintainable, as the issues raised therein go beyond the scope of Section 378 (2) Cr.P.C and the Court is not supposed to go for judicial review of internal notings, correspondence or files i.e. internal decisions of Central Government, who has a substantive right to file an appeal. The petition seeking leave to appeal has been filed by the Special Public Prosecutor, who is duly authorized to do the same and is being conducted by learned ASG who is also fully authorized by the Central Government to do so. The civil writ petitions and pending applications are, therefore, dismissed.

76. The Judgment be uploaded on the website of this court forthwith.

BRIJESH SETHI, J

NOVEMBER 23, 2020

r/ak/ap

