

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION**

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

C.R.R. 810 of 2021

with

IA NO. CRAN 1 of 2021

(Via Video Conference)

Vinay Mishra

-vs.-

The Central Bureau of Investigation & Ors.

For the Petitioner : Dr. Abhishek Manu Singhvi, Sr. Adv.,
Mr. Siddhartha Luthra, Sr. Adv.,
Mr. Sandipan Ganguly, Sr. Adv.,
Mr. Sabyasachi Banerjee, Adv.,
Mr. Ayan Bhattacharjee, Adv.,
Mr. Ayan Poddar, Adv.,
Mr. Aman Sharma, Adv.,
Ms. Sunita Naskar, Adv.,
Ms. Moumi Yasmin, Adv.

For the CBI : Mr. Aman Lekhi, Ld. A.S.G.,
Mr. Ujjwal Sinha, Adv.,
Mr. Aniket Seth, Adv.,
Mr. Ritwiz Rishabh, Adv.,
Ms. Mehak Huria, Adv.,
Ms. Sikha Sandhu, Adv.,
Mr. Paranjay Chopra, Adv.

For the State : Mr. Kishore Datta, Ld. Adv. General,

Mr. S. G. Mukherji, Ld. P.P.,
Mr. Ranabir Roy Chowdhury, Adv.

Heard on : 07.06.2021, 09.06.2021, 10.06.2021,
15.06.2021, 19.06.2021, 21.06.2021,
22.06.2021, 23.06.2021, 30.06.2021,
02.07.2021, 06.07.2021, 09.07.2021 &
14.07.2021

Judgment on : 28.07.2021

Tirthankar Ghosh, J:-

The present revisional application has been preferred challenging the proceedings of RC Case No. 19/2020 under Sections 109/420/120B of the Indian Penal Code read with Sections 7/9/11/12 of the Prevention of Corruption Act, 1988 and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 pending before the learned Special Judge, C.B.I. (Special) Court, Paschim Bardhaman at Asansol as also the order dated 25.01.2021 passed in connection with the said proceedings.

Before dealing with the revisional application, this Court feels that the application for interim order should be dealt with.

The records of this case reflect that on 22.04.2021, a co-ordinate Bench of this Court was initially pleased to pass an order on the submissions advanced by Dr. Abhishek Manu Singhvi, learned senior advocate appearing for the petitioner, Mr. Y.J. Dastoor, learned Additional Solicitor General and Mr. Kishore Datta, learned Advocate General of the

State of West Bengal. The relevant part of the order dated 22.04.2021 is set out as follows :

“Mr. Dastoor, learned Senior Advocate frankly submits that a similar order, as already proposed by Mr. Singhvi, learned Senior Advocate, in line with Apex Court’s order, given on 25th March, 2021 in connection with a Special Leave to Appeal (Crl.) Nos.1620-1621/2021 relatable to the case of Anup Majee in coal scam, now pending before the Apex Court, may be recorded in this case, giving interim protection thereby providing the immunity from arrest till 3rd May, 2021 to the petitioner, provided the petitioner ensures his appearance before the C.B.I. on 3rd May, 2021.

It is known from Mr. Dastoor that investigation is still continuing.

In view of such candid submission of Mr. Dastoor, Ld. A.S.G. the petitioner is directed to be present on 3rd May, 2021, as proposed by Mr. Dastoor, before the C.B.I. and upon his conditional joining in the investigation, the immunity from arrest to petitioner be given till 3rd May, 2021.”

Subsequently an application for modification of the said order dated 22.04.2021 was taken out by the petitioner, *inter alia*, contending as follows:

(a) The petitioner had no idea of initiation and continuation of R.C Case No. 19 dated 21.09.2020 and R.C Case No. 22 dated 27.11.2020, as such, the petitioner had left India on or about September 2020. To that effect, copy of the Visa has been enclosed.

(b) The petitioner further stated that soon after leaving India, he renounced his Indian citizenship on 19.12.2020 much before he came to know about the criminal proceedings and as such, an application dated

19.12.2020 was submitted to Consulate Office of Government of India, United Arab Emirates (UAE). The said application was accepted by the Government of India on 22.12.2020 and therefore, he is no more an Indian citizen.

(c) The petitioner, therefore, apprehends that in case, he physically joins the investigation in terms of the order passed in connection with R.C Case No. 19 dated 21.09.2020, he may be harassed by way of arrest.

(d) The petitioner added, that from his reliable sources, he has come to know look out/red corner notice has been issued by C.B.I in connection with R.C. Case No. 19 dated 21.09.2020 which is contrary to the concept of coercive steps.

(e) The petitioner, therefore, by way of this modification application prays for joining investigation through video conferencing with a further prayer seeking protection against his arrest including cancellation of proclamation order and the look out circular in India and any other country.

The petitioner also filed a supplementary affidavit affirmed on 07.06.2021 stating that during the pendency of the present revisional application, he approached the Hon'ble Supreme Court with a prayer for no coercive action being taken in respect of R.C. Case No. 19 dated 21.09.2020 and R.C. Case No. 22 dated 27.11.2020 and for permission to exit from India after proper interrogation and for withdrawing the red corner/look out notice or any other notice against him.

It would have been better if the petitioner portrayed a transparent picture before this Court when the interim prayer was considered on 22.04.2021 as the revisional application which was initially filed before this Court avoids certain facts and is silent regarding the petitioner leaving India in September 2020.

To the best of the understanding of this Court, even the senior most counsel of the petitioner was not aware regarding the absence of the petitioner and his renunciation of citizenship, otherwise he would not have accepted the order which was passed on 22.04.2021 when the records before the Court depicted picture of the petitioner to be a victim of political vendetta. The modification application, in fact, was used as a negotiating tool after obtaining an initial interim order. The prayer for joining investigation by virtual mode was almost a dictate imposed upon the Court and setting new terms for showing to be a *bona fide* person ready to co-operate with the investigation.

In view of the aforesaid, the modification application being CRAN 1 of 2021 is dismissed.

So far as the subject matter is concerned, the same relates to FIR of R.C. Case No. 19 dated 21.09.2020 which is set out below:

“First information contents: CBI, ACB, Kolkata registered a Preliminary Enquiry (PE) vide no. PE0102018A0004 on 06.04.2018, against Shri Satish Kumar, the then Commandant of 36 Battalion of Border Security Force (BSF), Md. Enamul Haque, Shri Bhuvan Bhaskar s/o Shri Satish Kumar and others on the allegation of misconduct by public servant.

2. The PE has revealed that cattle from India to Bangladesh across the international border of these two countries are sent in large numbers not through ports of trade but illegally by paying illegal gratification to the border security force personnel responsible to prevent cross border movement of men and property, safeguarding interests of India. During 19.12.2015 to 22.04.2017, Shri Satish Kumar was posted as Commandant of BSF, 36 Battalion in Malda district which was having four companies deployed in Murshidabad and two companies at Malda, along India-Bangladesh Border.

3. It is alleged that during the period of posting of Shri Satish Kumar, the then Commandant, BSF of 36 Battalion, more than 20 thousand cows were seized by the Border Security Force before these cattle could be transported across the border to the Bangladesh but any vehicle carrying these animals or persons involved in illegal trade and smugglers of these animal were not seized or apprehended at the time of seizure. Further due to the close nexus between the BSF and Customs officials with traders like Md. Enamul Haque, Anarul Sk and Md. Gulam Mustafa; the seizure lists of such seized cattle were prepared arbitrarily categorizing the breed and size of seized animals with an intention to reduce the upset price of the cattle during auctions. These cattle were then auctioned immediately (within 24 hours of seizure) with the help of nearest Customs Station i.e. Jangipur, Murshidabad. Since the cattle were shown mostly small in size/common breed in the seizure memo of BSF, the auction value of such cattle were reduced which were then procured at a considerable lower price by the above named traders due to their unholy nexus also with officials of Customs department.

4. It is alleged that, in lieu of such favour, Md. Enamul Haque used to pay Rs.2000 per cattle to BSF officials and Rs.500 to concerned Customs officials. Besides, the officials of Indian Customs used to take bribe of 10% of the auction price from successful bidders like

Enamul Haque, Mr. Golam Mustafa, Anarul Sk. etc. It was also alleged that although BSF had not raised any grazing charges on the Customs Department for feeding the seized cattle but Rs.50/- per cattle was to be paid by the successful bidders to the officials of BSF.

5. It is alleged that, Shri Satish Kumar got his son Shri Bhuvan Bhaskar, employed in M/s Haque Industries Pvt Ltd, a company promoted by Md. Enamul Haque. Shri Bhuvan Bhaskar was paid salary of Rs. 30000/- to Rs. 40000/- per month between May 2017 to December 2017, which reflects upon his close relationship with partners of this unholy nexus.

6. It is further alleged that, only the said batch of traders were allowed to buy the cattle at very low prices at the auctions. After showing the auctioned cattle to have been disposed of at local market, the same were illegally smuggled across the international border.

7. The above information discloses commission of cognizable offences u/s 120B IPC and Sec 7, 11 & 12 of the Prevention of Corruption Act, 1988 by Shri Satish Kumar, the then Commandant, 36 Battalion, BSF; Md. Enamul Haque, Md. Golam Mustafa, Anarul Sk, other unknown officials of BSF and Indian Customs Department and other private persons.

8. Therefore, a regular case is registered against Shri Satish Kumar, the then Commandant, 36 Battalion, BSF; Md. Enamul Haque, Md. Golam Mustafa, Anarul Sk. other unknown officials of BSF and Indian Customs and unknown others and is entrusted to Moloy Das, PI for Investigation and report.”

Learned senior advocate appearing for the petitioner submitted that the petitioner was not named in the F.I.R. and not even in the first charge-

sheet submitted on 06.02.2021 and his name transpired for the first time in the second charge-sheet/supplementary charge-sheet which was submitted before the Special Court on 24.02.2021. The relevant part of the charge-sheet, which deals with the allegations against the present petitioner, is as follows :

“Shri Vinay Mishra, S/o Tej Bahadur Mishra.

Shri Vinay Mishra had received Rs.50 Lakh from accused Md. Enamul Haque (A-2) through Shri Manoj Sana, a staff of accused Md. Enamul Haque (A-2) during December 2016, as commission from accused Md. Enamul Haque (A-2) for managing the cattle smuggling business done by accused Md. Enamul Haque (A-2). Further, Shri Vinay Mishra disguised such commission received by him from accused Md. Enamul Haque (A-2) by way of arranging purported loans received by him from one shell company namely M/s Nu Ruchi Barter Pvt Ltd (NBFC Company) during May 2017.

Therefore, the evidence on record has established the involvement of Shri Vinay Mishra s/o Shri Tej Bahadur Mishra in the commission of the following offences, as under –

<i>Sl. No</i>	<i>Name of the accused</i>	<i>Sections of law</i>
<i>1</i>	<i>Shri Vinay Mishra (A-8)</i>	<i>109, 120B, 420 r/w Sec 7,9,11, 12 & 13(2) r/w 13(1)(d) PC Act, 1988.</i>

It is, therefore, prayed that the cognizance of the offences as alleged in the preliminary and supplementary chargesheets may kindly be taken and the supplementary chargesheet may be clubbed with the preliminary chargesheet bearing no. 01/2021 dated 06.02.2021 filed against Shri Satish Kumar (A-1), the then Commandant of 36 Battalion of BSF and six other accused persons u/s 109, 120B, 420 IPC and Sec 7, 11, 12 & 13(2) r/w 13(1) (d) PC Act,1988. In addition cognizance of

offences u/s 9 of PC Act, 1988 for the remaining accused (chargesheeted in the preliminary chargesheet) be also taken, as pursuant to conspiracy Shri Badal Krishna Sanyal (A-6) and Smt Tania Sanyal (A-5) due to their close connection with the accused public servant Shri Satish Kumar (A-1) and due to their influence had received the bribe amount in their account as narrated above. As such necessary order be passed and process be issued against the accused Shri Vinay Mishra (A-8) for his trial along with the other accused persons.”

The order-sheet of the learned Special Court reflects that on 30.12.2020, a prayer for search warrant in respect of the office and residential premises of the petitioner was allowed by the learned Special Court and on 25.01.2021, the prayer for issuance of warrant of arrest against the petitioner was also allowed by the learned Special Court. The order-sheet also reflects that the learned Special Court was pleased to take cognizance of the first charge-sheet on 06.02.2021 and by an order dated 24.02.2021, the learned Special Court was pleased to accept the supplementary charge-sheet.

Dr. Abhishek Manu Singhvi, learned senior advocate appearing for the petitioner at the threshold questioned the jurisdiction of the CBI to investigate within the State of West Bengal after the withdrawal of consent on 16.11.2018 in respect of the general consent which was accorded on 02.08.1989. The learned senior advocate has drawn the attention of this Court to both the Notifications which are reproduced below for proper appreciation :

“GOVERNMENT OF WEST BENGAL**Home Department****Police****NOTIFICATION****No. 6845-PL/PE/2A – 10/88**Dated Calcutta, the 2nd August, 1989

In pursuance of the provisions of section 6 of the Delhi Special Police Establishment Act, 1946 (Act No. 25 of 1946). The Governor of West Bengal hereby accords consent to the extension of powers and jurisdiction of all members of the Delhi Special Police Establishment to the State of West Bengal for investigation of offences as hereunder.

- (a) Offences under Prevention of Corruption Act, 1988 (Act No. 49 of 1988).
- (b) Attempts, abetments and conspiracies in relation to or in connection with one or more of the offences mentioned in the said Act and any other offence or offences committed in the course of the same transaction arising of the said facts.

The above consent shall not apply in respect of public servants defined under Section 2 (c) of the Prevention of Corruption Act, 1988, employed in connection with the affairs of the State or any Authority controlled or aided wholly or partly by the State Government, except at the specific request and with the prior concurrence of the State Government.

By order of the Governor,

N. KRISHNAMURTHY*Secy. To the Govt. of West Bengal”***“GOVERNMENT OF WEST BENGAL****Home & Hill Affairs Department****NABANNA****325, Sarat Chatterjee Road,****Howrah-711102**

No. 450/HS/PA/18

Dated : 16.11.2018

NOTIFICATION

In exercise of the powers conferred by Section 6 of Delhi Special Police Establishment Act, 1946 (Central Act No. 25 of 1946), Government hereby withdraw the consent accorded vide G.O. No. 6845-PL/PE/2A-10/88 dated 2.8.1989 of Home Department, Government of West Bengal to all the Members of Delhi Special Police Establishment to exercise the powers and jurisdiction under the said Act in the State of West Bengal.

By order of the Governor,

ATRI BHATTACHARYA
Principal Secretary to the Government of West Bengal
Home & Hill Affairs Department

Learned senior advocate thereafter referred to series of dates which are as follows :

- a) RC Case No. 19 was registered on 21.09.2020.
- b) RC Case No. 22 was registered on 27.11.2020
- c) The petitioner left the country on 16.09.2020.
- d) The petitioner filed an application for renunciation of his citizenship on 19.12.2020.
- e) The petitioner surrendered his passport on 22.12.2020.
- f) Searches were carried out by the CBI at the residence of the brother of the petitioner on 30.12.2020.
- g) The first charge-sheet in connection with the instant case was submitted on 06.02.2021. The petitioner was neither named in the charge-sheet nor his name was appearing in the FIR.
- h) Court took cognizance of the offences on 08.02.2021 and the second charge-sheet was submitted on 24.02.2021 wherein for the first time, the petitioner's name appeared as an accused.

Learned senior advocate submitted that so far as the allegation in the second charge-sheet against the present petitioner is concerned, the same is based on entries in a diary of one Manoj Sana and the amount referred to therein is Rs. 6.1 crores.

After referring to the aforesaid series of dates, learned senior advocate raised the issue of absolute lack of jurisdiction of CBI to investigate within the State of West Bengal without the prior consent being obtained from the State pursuant to the withdrawal Notification dated 16.11.2018.

It is further argued on behalf of the petitioner that the fundamentals of federalism do not allow the CBI to investigate the case within the State, under Section 6 of the Delhi Special Police Establishment Act, 1946 (hereinafter referred to as “DSPE Act”) as there is clear bar and it is only the Hon’ble Supreme Court and the High Court who are entitled to pass orders/directions upon the CBI to investigate without the applicability of Section 6 of the DSPE Act. Learned senior advocate referred to Entry 2 List II of VII Schedule and submitted that the State has exclusive jurisdiction as the terms public orders and police are referred to therein and as such the State has absolute authority and exclusive domain over the police. Additionally, it has been submitted that conjoint reading of Sections 3, 5 and 6 of the DSPE Act would make it clear that the jurisdiction of the officers under the said Act is restricted to Union Territory/Railway area and beyond the said limit, they are to take consent of the said State for exercising powers of investigation. In order to substantiate his arguments, learned senior advocate relied on the following judgments :

- i. ***Kazi Lhendup Dorji Vs. Central Bureau of Investigation and Ors.*** reported in ***1994 Supp (2) SCC 116*** (paragraphs 4, 9 and 17).

- ii. ***Ms. Mayawati Vs. Union of India and Others*** reported in **(2012) 8 SCC 106**. (paragraphs 9, 30, 41 and 44).
- iii. ***State of West Bengal and Ors. Vs. Committee for Protection of Democratic Rights, West Bengal and Ors.*** reported in **(2010) 3 SCC 571** (paragraphs 35 and 37).
- iv. ***M. Balakrishna Reddy Vs. Director, CBI, New Delhi*** reported in **(2008) 4 SCC 409** (paragraphs 18 and 19).
- v. ***Subramanian Swamy Vs. Director, CBI and Anr.*** reported in **(2014) 8 SCC 682** (paragraphs 67 and 68).
- vi. ***A.C. Sharma Vs. Delhi Administration*** reported in **(1973) 1 SCC 726** (paragraph 13).

Mr. Siddhartha Luthra, learned senior advocate also argued on behalf of the petitioner and submitted that a plain reading of the FIR shows that there is no existence of jurisdictional facts for the CBI to investigate and the same has been assumed by the agency. Learned senior advocate added that admittedly offence was alleged to have been committed in the districts of Malda and Murshidabad in West Bengal and there is no material with the CBI to show that prior consent has been obtained from the State Government under Section 6 of the DSPE Act to exercise their authority.

Learned senior advocate relied upon the following judgments to substantiate the aforesaid contentions :

- 1. ***Arun Kumar Vs. Union of India & Ors.*** reported in **(2007) 1 SCC 732** (paragraphs 41 to 47),
- 2. ***Corona Limited Vs. Parvathy Swaminathan & Sons*** reported in **(2007) 8 SCC 559** (paragraphs 27,29 and 36),

3. **Management of Express Newspaper (P) Ltd. Vs. Workers & Ors.** reported in **AIR 1963 SC 569** (paragraphs 10, 13 and 15).

It has also been submitted on behalf of the petitioner that delay in registration of the FIR has seriously prejudiced the petitioner as the allegation relates to the period from 19.12.2015 to 22.04.2017 and the preliminary enquiry was launched on 08.04.2018 and the FIR was registered more than two years after launching the preliminary enquiry and the alleged bribe money was claimed to have been transferred on 20.10.2016. According to the petitioner, such delay in the preliminary enquiry is without any explanation and vitiates the registration of the FIR which was on 21.09.2020. So far as the materials against the present petitioner is concerned, which according to the petitioner, relate to a hand written diary of one Manoj Sana, the entries of which have been questioned. In support of such contention, the following judgments have been relied upon :

1. **CBI Vs. V. C. Shukla & Ors.** reported in **(1998) 3 SCC 410** (paragraphs 34 and 39),
2. **Manohar Lal Sharma Vs. Union of India** reported in **(2017) 11 SCC 731** (paragraphs 282 and 283),
3. **Common Cause (A Registered Society) & Ors. Vs. Union of India and Others** reported in **2017 CrLJ 1625** (paragraphs 21 and 27).

Learned senior advocate for the petitioner by relying upon the authority and ratio of the judgment in **State of Haryana Vs. Bhajan Lal** reported in **1992 Supp (1) SCC 335** [paragraph 102 (clause 6)] emphasized that the petitioner being an office bearer of a particular political party has

been a victim of political vendetta and as such, weak evidences have been accumulated for framing the petitioner.

By referring to a decision of the Hon'ble Supreme Court in ***Yashwant Sinha & Ors. Vs. CBI*** reported in ***(2020) 2 SCC 338*** (paragraphs 118 and 119), it has been submitted that as CBI did not take any statutory approval as required under Section 17A of the Prevention of Corruption Act, 1988 from the Central Government before registering the FIR against the BSF official, the FIR cannot be registered legally.

Lastly, it has been submitted on behalf of the petitioner that Section 4 of the DSPE Act, 1946 read with Central Vigilance Commission Act, 2003 cannot take away the requirement of obtaining consent before initiation of investigation under Section 6 of the DSPE Act.

Mr. Kishore Datta, learned Advocate General, submitted that the fundamental facts are not in dispute and referred to the dates which were also part of the submission of the learned senior advocate appearing for the petitioner. According to him, although the preliminary enquiry was started much prior to 2018 and on 16.11.2018, the State of West Bengal having withdrawn the general consent, which was accorded on 02.08.1989 under Section 6 of the DSPE Act which was received by the CBI on 19.11.2018, the subsequent registration of the FIR on 21.09.2020 is in excess of its jurisdiction and authority. According to him, India is a federation of States as Article 1(1) of the Constitution of India provides that India is an Union of States i.e. federation of States and every federation requires division of powers between the Centre and the State. He submitted that distribution of

powers is legislative which is provided under Articles 245 to 255 and administrative which are provided under Articles 256 to 261. As per his submission, legislative powers of the Parliament and the State Legislatures are provided under Articles 245 and 246 of the Constitution. He added that investigation is included in the word “police” in Entry 2 List II of VII Schedule as well as in Entry 1 of List II. Hence, investigation is a State subject under the Constitution. DSPE Act being a pre-Constitutional statute was enacted under Entry 39 of the Federal Legislation List which corresponds to Entry 80 of List I of VII Schedule of the Constitution of India.

According to the learned Advocate General, Section 5 of the DSPE Act extends powers of CBI beyond Union Territories, however, the said power under Section 5 of the DSPE Act is subject to Section 6 of the DSPE Act which speaks about consent of State being mandatory for exercise of powers under Section 5 of the DSPE Act. The starting words of Section 6 of the DSPE Act clearly state that “Nothing contained in Section 5 shall be deemed to enable any member of DSP Establishment to exercise power and jurisdiction in any area in a State, without the consent of the Government of that State”. He submitted that a plain reading of the statute reflects that the consent of the Government of the State is mandatory and necessary for exercising of powers and jurisdictions of CBI in any area of the State.

Additionally, he submitted that consent under Section 6 of the DSPE Act flows from the federal structure of the Constitution which is held to be a basic structure of our Constitution. Federalism being one of the basic structures of the Constitution and there being demarcation of legislative

powers envisaged under Article 246 of the Constitution of India, consent of the State assumes importance. Thus, *de hors* consent of the State, the exercise of such power of CBI would be in absolute violation of Federal structure and against Article 246(3) of the Constitution, as police is State subject. In order to substantiate his argument, he relied upon judgment of the Hon'ble Supreme Court in ***State of West Bengal & Ors. Vs. Committee for Protection of Democratic Rights & Ors.*** reported in **(2010) 3 SCC 571** (paragraphs 23 to 35, 37, 38, 40).

The other argument which has been canvassed before this Court by the State of West Bengal is that Section 6 of the DSPE Act was never challenged by CBI and as such, consent of the State Government is mandatory before exercising any power within the jurisdiction of the State and no other meaning can be attributed to Section 6 of the DSPE Act. Any action of investigation in State *de hors* consent of the Government of that State by CBI is not permitted by law and as such, is illegal and *non est* in the eye of law. To that effect, learned Advocate General relied upon the judgments of the Hon'ble Supreme Court in ***Manohar Lal Sharma Vs. The Principle Secretary & Ors.*** reported in **(2014) 2 SCC 532** (paragraph 52) and ***M/S Fertico Marketing & Ors. Vs. Central Bureau of Investigation & Anr.*** reported in **(2021) 2 SCC 525** (paragraph 17).

Learned Advocate General emphasized that as the FIR/RC was registered without consent of the State of West Bengal much after the withdrawal of notification on 16.11.2018, CBI cannot be allowed to take recourse to the date on which the preliminary enquiry was registered and as

such, has no jurisdiction to investigate the offence so far as the present case is concerned. In support of his submission, learned Advocate General relied upon a judgment of the Hon'ble Supreme Court in **Bhavesh Jayanti Lakhani Vs. State of Maharashtra & Ors.** reported in **(2009) 9 SCC 551** (paragraphs 93 to 95, 98 to 100).

Learned Advocate General concluded his arguments by submitting that as the FIR/RC is nullity, all consequential steps, which followed, are *non est* in the eye of law.

Mr. Aman Lekhi, learned Additional Solicitor General, started his submission by controverting the submissions advanced on behalf of the petitioner as well as the State of West Bengal and emphasized that the preliminary enquiry which commenced on 06.04.2018 much prior to the withdrawal of consent will not affect the registration of RC, as the preliminary enquiry revealed cognizable offences and law mandates, when materials disclose cognizable offences, an FIR should be registered. Mere breach of a timeline cannot exempt an accused from being prosecuted and utmost would lead to a departmental proceeding against an offending official.

According to the learned Additional Solicitor General, the executive power of the State, under the constitutional scheme, is susceptible of being controlled by the executive power of the Union. In order to stress on the issue, reference has been made to **Union of India Vs. V. Sriharan** reported in **(2016) 7 SCC 1** (paragraph 40). The relevance of the said judgment, according to him, is in the context of the federal principle, though the

provisions of Sections 432 and 433 of the Code of Criminal Procedure have been dealt with. One of the issues which the Hon'ble Supreme Court was called upon to deal with is whether the State or the Central Government will have primacy under Section 432 (7) of the Code of Criminal Procedure and it was in the said context, the provisions of Criminal Procedure Code were examined along with the relevant provisions of the Constitution. Learned Additional Solicitor General has drawn the attention of this Court to paragraph 9 of the judgment in **V. Sriharan** (supra). By relying upon the said paragraph of the judgment, learned Additional Solicitor General explained that where the interest of the Centre will be affected, the appropriate Government would be the Central Government.

Learned Additional Solicitor General also relied upon a decision of this Hon'ble Court in **Ramesh Chandra Singh and Another Vs. Central Bureau of Investigation (2020 SCC Online Cal. 586)** and drew the attention of this Court to paragraphs 32, 33, 34 and 40 of the said judgment.

While referring to the facts of this case, it has been submitted that the officials involved in the instant case are of Border Security Force and Customs Department. The said officials are governed by Entry 2A of List I and is under the administrative control of the Ministry of Home and under Sections 5 and 10 of the Border Security Force Act, 1968, the general superintendence, direction and control of the force vests in the Central Government which is empowered to dismiss or remove from service any official subject to the provisions of BSF Act. It has been emphasized that the border of West Bengal with a foreign state is definitely a border of India.

Insofar as the customs officials are concerned, it has been submitted that they have been appointed by the Board of Revenue under Section 4 of the Customs Act, 1962 and the said Board itself being constituted by the Central Government under Section 3 of the Central Board of Revenue Act, 1963 having bearing upon the revenue of the Government, any breach in the responsibility of such officials would be under the domain of the Central Government.

The Centre having a legitimate concern over the issues from those affecting the State Government, the interpretation of the notification dated 02.08.1989 assumes importance. Attention has been drawn to the last part of the said notification which is as follows :

“....The above consent shall not apply in respect of public servants defined under Section 2 (c) of the Prevention of Corruption Act, 1988, employed in connection with the affairs of the State or any Authority controlled or aided wholly or partly by the State Government, except at the specific request and with the prior concurrence of the State Government.”

Thus, the restrictions under the said notification were in respect of officers of the State.

Learned Additional Solicitor General also drew the attention of this Court to Article 257 of the Constitution of India, relevant part of which is extracted below:

“257. *Control of the Union over States in certain cases. – (1) The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such*

directions to a State as may appear to the Government of India to be necessary for that purpose...”

Learned Additional Solicitor General submitted that having conceded to the entitlement of the Union to deal with matters with which it has concern, the State Government could not exercise its executive power to impede or prejudice exercise of the executive power of the Union. As no reason has been assigned by the State of West Bengal in the withdrawal notification dated 16.11.2018, the same is invalid and calls for no interference by this Court so far as the RC cases are concerned.

Learned Additional Solicitor General thereafter relied upon the judgment in ***State (NCT of Delhi) Vs. Union of India and Another*** reported in **(2018) 8 SCC 501** and referred to paragraphs 466, 467 and 475.17.

It has been submitted that the principle of federalism is not incorporated only in the three lists. The three lists of the VII Schedule are relatable to Articles 246, 249, 250, 254, 255, 256 and 257 of the Constitution on which reliance has been placed by the CBI. Further it is not in all matters that the executive power of the State would be overridden but only in matters of national interest or emergent situations the said principles are to be enforced.

Learned Additional Solicitor General submitted that the Centre having approached for consent, the State itself could not have withdrawn it without conforming with the Centre as this will be implicit in the applicability of Section 21 of General Clauses Act, 1977 which stipulates that rescinding of

an order is exercisable in the like manner and subject to the like sanction as the issuance of it. The issuance having recognized in the interest of the Centre, the withdrawal could not have been affected in defiance of it. As such, the action of registering an RC after the preliminary enquiry, which has disclosed cognizable offences, cannot conceivably be described in defiance of law.

Learned Additional Solicitor General by relying upon the judgment in ***Lalita Kumari Vs. Government of U.P.*** reported in **(2014) 2 SCC 1** submitted that no police officer can avoid the duty of registering offence if cognizable offence is disclosed and such erring officers who refuse to register the FIR where information discloses cognizable offences are liable to be proceeded against. Apart from the law laid down in ***Lalita Kumari*** (supra), it has been submitted that para 8.1 of the CBI (Crime) Manual, 2020 also requires in cases where preliminary enquiry reveals cognizable offences, investigation should be undertaken after registration of FIR. In support of his submission he relied upon a decision of the Hon'ble Supreme Court in ***Vineet Narain Vs. Union of India*** reported in **(1998) 1 SCC 226** which emphasized scrupulous adherence to the provisions of the Manual. The CBI Manual deals with the method of investigation and is a special procedure within the meaning of Section 4(2) of the Code of Criminal Procedure and merging the same with Chapter XII of the Code of Criminal Procedure is wholly unwarranted. Detailing on the issue of the CBI Manual, he submitted that preliminary enquiry having been commenced prior to withdrawal of consent and having

revealed the commission of cognizable offences, it was inevitable for the CBI to register FIR/RC.

Learned Additional Solicitor General also relied upon the decisions of the Hon'ble Supreme Court in ***Rajesh Bajaj Vs. State NCT of Delhi*** reported in ***(1999) 3 SCC 259*** and ***State of Haryana Vs. Bhajan Lal*** reported in ***1992 Supp (1) SCC 335*** and submitted that the allegations at its face value are to be accepted as correct. By referring to decisions in ***State of Karnataka Vs. Devendrappa*** reported in ***(2002) 3 SCC 89***, ***R. Kalyani Vs. Janak C. Mehta & Ors.*** reported in ***(2009) 1 SCC 516*** and ***Monica Kumar (Dr.) Vs. State of U.P.*** reported in ***(2008) 8 SCC 781***, the learned Additional Solicitor General emphasized on the scope of inherent power of the High Court and submitted that the power cannot be used to stifle a legitimate prosecution.

Learned Additional Solicitor General concluded his arguments by submitting that there is no illegality in the investigation and petition being misconceived is liable to be dismissed.

The instant revisional application was heard along with CRR 1270 of 2021 and CRR 1349 of 2021. At any point of time no question was raised as to whether the FIR made out any case, in the alternative, the only question of fact which has been raised is in this revisional application, wherein entries in a diary were questioned by the petitioner. It has been repeatedly contended by the CBI that investigation of the case is in progress despite, charge-sheet being filed before the jurisdictional Court. Entries in diary at the investigation stage are only for the purpose of ascertainment of the investigating agency to progress with the case, which may or may not be

used as the basic material against the petitioner when the final charge-sheet is submitted. As such the issue relating to 'entries of diary' so raised by the petitioner at this stage is premature and is liable to be rejected.

So far as these three revisional applications are concerned they were heard at a stretch and the contentions of State of West Bengal as well as CBI were more or less identical in all the three applications, although the State and Union opposed each other. On the other hand the petitioner in each application addressed this Court on facts and law separately.

On an overall evaluation of the submissions advanced by the parties in the three revisional applications the common question which is required to be answered is as follows:

Pursuant to the withdrawal notification dated 16.11.2018, whether the investigation by CBI in respect of FIR which was subsequently registered, is valid and legal?

The records of the case reflects that RC Case no. 19/2020 was registered for commission of offences punishable under Sections 109/420/120B of the Indian Penal Code read with Sections 7/9/11/12 of the Prevention of Corruption Act, 1988 and Section 13(2)/13(1)(d) of the Prevention of Corruption Act, 1988 against (i) Shri Satish Kumar, a Commandant of 36 Battalion of Border Security Force (BSF), (ii) other unknown officials of BSF and Indian Customs and (iii) individuals which included Md. Enamul Haque, Shri Bhuvan Bhaskar son of Shri Satish Kumar and others. The crux of the allegations relates to cross-border cattle

smuggling by evading customs duty and the Government Officials facilitating the same. The FIR and charge-sheet also reflect the involvement of the Government Officials along with certain individuals/beneficiaries who entered into conspiracy and manipulated the auction procedure in respect of the seized cattle thereby depriving the Government of India of its legitimate dues.

The Constitution Bench in the case of **Subramanian Swamy** (supra) while dealing with Section 6A of the DSPE Act was pleased to observe that there cannot be any rational basis which would entitle bureaucrats of Joint Secretary level and above, who are working with the Central Government should be protected under Section 6A of the DSPE Act while the same level of officers who are working in the State will not get such protection, though both classes of these officers are accused of an offence under the P.C. Act, 1988. Discrimination or differentiation must be based on pertinent and real differences, which are to be distinguished from irrelevant and artificial ones. In paragraph 70 of the said judgment it has been held that “*every public servant against whom there is a reasonable suspicion of commission of a crime or there are allegations of an offence under the PC Act has to be treated equally and similarly under Law.*”

A Co-ordinate Bench of this Court in **Ramesh Chandra Singh and Another Vs. Central Bureau of Investigation** reported in **2020 SCC Online Cal. 586** after taking into consideration the relevant Entries in List II of VII Schedule was pleased to hold that “*Article 246 only prescribes the powers of the Parliament and the State legislature to enact laws. The areas prescribed*

in List I are within the exclusive domain of the Parliament. List II is within the domain of the State legislature. List III enumerates areas which both the Parliament and the State can legislate. The Constitution inter alia aims to preserve the Federal Structure through the above provisions. It is not however a rigid demarcation. The framers of the Constitution were cautious to prescribe as above only in the context of the legislative powers of the Centre and the State. The area of operation of the Central Government and cannot be curtailed by any Central or State legislation.”

The Court proceeded to observe that the action of the Central Government in desiring investigation into the acts and omissions of its officer who functioned under a statute which Central Government has enacted must be outside the scope of Section 6 of the DSPE Act. The Central Government having a national responsibility in zealously regulating the conduct of the persons vested with the authority to enforce Central Legislations which includes Officials under the BSF Act and Customs Act. The national interest so sought to be secured and achieved must have a rational nexus with desire of the Central Government for conducting an investigation in alleged offences of the nature complained of through a central agency.

The Co-ordinate Bench of this Court thereafter proceeded to hold that *“This Court is, therefore, of the view that, the Central Government/CBI’s power to investigate and prosecute its own officials cannot be in any way impeded or interfered by the State even if the offenses were committed within the territory of the State. This Court is conscious of the limited jurisdiction of*

this court under Section 482 of the CrPC and does not wish to enter into the question of propriety of withdrawal of consent which existed for 30 years.”

This Court has also taken into account the observations of the Hon’ble Apex Court made in paragraph 23 of the judgment in ***Kanwal Tanuj Vs. State of Bihar & Ors.*** reported in **2020 SCC Online SC 395** wherein it has been held that *“The power bestowed on Special Police Force in terms of Section 2 and 3 of the 1946 Act cannot be undermined by an executive instruction in the form of proviso”*.

In paragraph 27 of ***M/S Fertico Marketing & Ors. Vs. Central Bureau of Investigation & Anr.*** reported in **(2021) 2 SCC 525**, the Hon’ble Supreme Court has been pleased to hold that *“.... there are no pleadings by the public servants with regard to the prejudice caused to them on account of non-obtaining of prior consent under Section 6 of the DSPE Act qua them specifically in addition to the general consent in force, nor with regard to miscarriage of justice.”*

On an overall assessment of the facts of the present case and the law referred to above, it can be safely stated that the offenders under the Prevention of Corruption Act are to be dealt with equally. As such, the public servants whose office location may be in different States, but are associated with the Central Government, corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by the Central Government cannot be distinguished and/or discriminated because of the location of their offices being at different States and are to be hauled up for corruption in like and

similar manner uniformly throughout the country. The view of the co-ordinate Bench of this Court in **Ramesh Chandra Singh** (supra) that the Central Government/CBI's power to investigate and prosecute its own officials cannot be impeded or interfered by the State assumes importance and is with the spirit of the Indian Constitution.

The gravity of the offences relating to corruption and the manner in which it is to be dealt with, was considered by the legislature as well as the Hon'ble Apex Court (in a number of judgments). Pursuant to **Vineet Narain's** case, Central Vigilance Commission Act, 2003 was enacted with the sole purpose of causing inquiries into offences alleged to have been committed under P.C. Act by certain categories of public servants of the Central Government, corporations by or under any Central Act, Government companies, societies and local authorities owned or controlled by the Central Government. Section 26 of the CVC Act, 2003 incorporates amendments to the DSPE Act, 1946. Consequently Section 4 of the DSPE Act was amended. Sub-section (1) of Section 4 of the DSPE Act vests the Commission with the powers to superintend investigations conducted by the officers of DSPE in respect of offences committed under the P.C. Act, 1988. The earlier sub-section (1) of Section 4 vested superintendence to the Central Government. Thus, the term 'superintendence' referred in the said provision is not merely administrative or logistic support but is a functional superintendence. Needless to state that it is only offences related to Prevention of corruption Act, 1988 which finds place in the DSPE Act and no other offences under special or general law has been referred to therein.

Moreover, the DSPE Act with its amendments have been restructured for facilitating/enabling the CBI to carry out investigations under the P.C. Act and the withdrawal notification dated 16.11.2018 is abrupt, devoid of any reasons and has the effect of shielding corrupt Central Government Officials, thereby, deterring the CBI officers to investigate offences in respect of officers falling within the category of Section 8(2) of the CVC Act, 2003. However, there may be cases where exclusively the officers belonging to the State Government are involved, in such cases the fact of the case may demand consent under Section 6 of the DSPE Act, but the nature of allegations complained in the present case, the officers/accused who are involved and the loss which has been sustained do not involve any interference with the powers vested in the State by the Constitution.

There has been no illegality committed in the ongoing investigation and as such there is no scope for interference in the continuation of investigation relating to RC case No. 19/2020 dated 21.09.2020.

Consequently, C.R.R. 810 of 2021 is dismissed.

Pending applications, if any, are also dismissed.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)

LATER

When the judgment was pronounced, Mr. Sabyasachi Banerjee, learned Advocate appearing on behalf of the petitioner prayed for stay of the order.

In view of the observations made in the judgment, prayer for stay is refused.

(Tirthankar Ghosh, J.)