

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.638 OF 2012

Sagar Ramchandra Vatkar,]
 R/o. "Sangamnagar", Taluka and District]
 Satara.] ... Appellant

Versus

The State of Maharashtra]
 [At the instance of A.C.B., Satara, C.R.]
 No.82 of 2009.]]
 [Notice to be served on the A.P.P., High]
 Court, Mumbai.]] ... Respondents

...

Mr. Girish Kulkarni i/b Mr. Dilip Bodake for the Appellant.

Ms. Veera Shinde, A.P.P. for the State.

...

CORAM : MRS. BHARATI DANGRE, J.

RESERVED ON : 23RD MARCH, 2021.

PRONOUNCED ON : 09TH APRIL, 2021.

JUDGMENT:-

1. This Appeal arises out of judgment and order dated 19/05/2011 passed by the Special Judge, Satara in Special Case

No.3 of 2011, where the accused/Appellant was tried for offences under Sections 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (for short, **“the PC Act”**) and on conclusion of trial, was convicted for the aforesaid offences. On conviction under Section 7 of the PC Act, the Appellant is sentenced to suffer Rigorous Imprisonment for two years and to pay fine of Rs.10,000/-, in default, to undergo Simple Imprisonment for six months. On conviction under Sections 13(1) (d) read with Section 13(2) of the PC Act, the Appellant is further sentenced to suffer Rigorous Imprisonment for two years and to pay fine of Rs.10,000/-, in default, to undergo Simple Imprisonment for six months. Both the sentences are directed to run concurrently.

2. The brief facts, giving rise to the appeal may be summarized as under:

The Appellant was working as Principal and holding a Class-I post of the District Education and Training Institute, Phaltan, District Satara, for the period from 03/01/2008 to 16/12/2009. Undisputedly, he fall in the category of ‘Public servant’. It is alleged that while holding the abovementioned post, on 14/12/2009, he demanded an amount of Rs.1 lakh from the complainant – Vishwambhar Sopan Babar, the president of Krishi Vikas Pratisthan, Devapur, who runs Mhaswad Adhyapak (D.Ed College) Vidyalaya, as a motive or reward other than legal

remuneration for sending a proposal for obtaining permission for admitting 10 extra students from Dy. Director, Education Department, Kolhapur. Out of the total amount demanded, Rs.50,000/- was sought as initial amount to be delivered, near Smile Hotel situated on the Pune-Bangalore Highway, within the jurisdiction of Satara Police Station. It is the case of the prosecution, that the said amount was accepted as illegal gratification other than the legal remuneration as a motive or reward for discharging the official duty and by this act, the Appellant has committed an offence under Section 7 of the PC Act. Further, it is the case of the prosecution that on 16/12/2009, the Appellant in his capacity as a public servant accepted the demanded an amount of Rs.50,000/- as an illegal gratification for sending the proposal of the complainant for obtaining permission for admitting 10 extra students from Dy. Director, which he was bound to do as a public servant. He was, therefore, charged with demanding and accepting the said amount as bribe by corrupt and illegal means to obtain pecuniary advantage, by abusing his position as a public servant and thus charged for committing for offence under Section 13(1)(d) read with Section 13(2) of the PC Act.

3. On being charged on 11/08/2011 and when he pleaded not guilty, the Appellant was tried in Special Case No.3 of 2011. The prosecution led its evidence through four witnesses being the complainant (PW-1), the panch witness (PW-2), the investigating

officer (PW-3) and the Sanctioning Authority (PW-4). The defence also examined one witness, the Workshop Assistant of the Appellant.

4. The Special Court on appreciation of the evidence, held that the prosecution had proved the guilt of the Appellant, beyond reasonable doubt, and convicted him under Sections 7 and 13(1)(d) read with Section 13(2) of the PC Act and sentenced him as noted above.

5. I have heard Mr. Girish Kulkarni, learned counsel appearing for the appellant and Ms. Shinde, learned A.P.P. for the State.

6. Adv. Kulkarni has assailed the said judgment on multiple grounds viz. there is no verification of initial demand and he urges that PW-2 has stated that the Appellant demanded the money by making a gesture whereas according to him, in the transcription, there is no mention about the money being demanded by the Appellant, orally. The submission of learned counsel is that there is no evidence about the conversation between the Appellant and the complainant. He categorically submits that in the absence of the demand being proved, the recovery of money from the Appellant is of no consequence. He also highlights an important aspect, which, according to him, goes to the root of the matter being a defect in the sanction order and, for raising the said ground, he has put his

finger on the evidence of PW-4 and the sanction order dated 10/03/2011. The submission of learned counsel for the Appellant is to the effect that it is settled position of law that sanction implies application of mind of the Sanctioning Authority and when such Authority acts at the dictates of his superiors, it is indicative of non-application of his mind before the sanction is granted. According to him, the grant of sanction is an administrative function and the Sanctioning Authority is required to *prima facie* reach a satisfaction of himself that the relevant facts would constitute an offence and this satisfaction of the Sanctioning Authority is a *sine qua non* to validate an order granting sanction. Existence of a valid sanction is a prerequisite for taking cognizance of an offence alleged to have been committed by a public servant, is the submission of Mr. Kulkarni, and, in the absence of such a valid sanction, according to him, the trial is without jurisdiction.

7. The learned counsel has placed reliance on two judgments of the Apex Court being **Central Bureau of Investigation v. Ashok Kumar Aggarwal¹** and on the judgment of the Apex Court in the case of **Nanjappa v. State of Karnataka²**. According to him, these judgments would also answer the objections raised by learned A.P.P. about the validity of sanction order or the objection raised about defect in the sanction order, being raised at the belated stage.

1 (2014) 14 SCC 295

2 (2013) 14 SCC 186

8. Per contra, Ms. Shinde, learned A.P.P. would rely upon the judgment in the case of *Dinesh Kumar v. Chairman, Airport Authority of India & Anr*³, and she would submit that absence of sanction and validity of sanction are two distinct aspects and the submission is that while drawing a distinction between the absence of sanction and validity of sanction, the Apex Court in the case of *Prakash Singh Badal v. State of Punjab*⁴ has categorically held that the question of absence of sanction could be raised at the inception and threshold by the aggrieved person, however, if the sanction order exists but its legality and validity is in question, such objection has to be tested during the course of trial. In the light of the said position, learned A.P.P. would submit that the said objection not being raised at the trial, it would not be open for the Appellant to raise it at the stage of appeal. However, learned A.P.P. would also urge that Section 19 of the PC Act, which contemplate existence of a valid sanction necessary for prosecution and which prohibits courts from taking cognizance of an offence punishable under Sections 7 and 13 of the PC Act alleged to have been committed by a public servant, itself create an embargo in the form of sub-section (3) thereto, that no finding, sentence or order passed by a Special Judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in sanction, unless in the opinion of that court, a failure of justice has in fact been occasioned thereby.

3 (2012) 1 SCC 532

4 (2007) 1 SCC 1

Ms. Shinde urge that in the absence of 'failure of justice' being depicted by the Appellant, mere defect or irregularity in sanction, would not vitiate his conviction. Further, according to her, sub-section (4) of Section 19 of the PC Act itself contemplate that in determining whether there has been a failure of justice, the court will have to give regard to the fact whether the objection could and should have been raised at any earlier stage, in the proceedings. It is only when the two obstacles are crossed by the Appellant, he would be entitled to argue about the sanction not being a valid one.

9. The valid sanction granted, being the bone of contention between the parties, as the counsel for the Appellant argue that the sanction is not a valid sanction, and, as per the public prosecutor who contest the submission, the points need to be determined at the outset as a premier issue, I have heard the respective counsel on the said point extensively and also perused the authoritative pronouncements on the said point.

10. The Appellant is a public servant and is charge-sheeted for offence committed by him under the PC Act while working as Principal of the District Institute of Education and Training, Phaltan, District Satara, a Class-I post. Admittedly, the Principal Secretary of the School Education and Sports Department, Mantralaya, Mumbai, is his appointing and removing authority. PW-4 is the Principal Secretary of the School Education and Sports

Department, who admits in his deposition that he is the appointing and removing authority of the Principal and he possessed the authority to grant sanction. He issued the sanction order, which is dated 10/03/2011, which is Ex-49. The sanction order incorporates the following:

“AND WHEREAS, having fully examined the material placed before me and considering all the facts and circumstances disclosed therein, I am satisfied that, there is a prima facie case made out against the Accused Person and that it is necessary in the interest of justice that, the said Accused Person should be prosecuted in the court of competent jurisdiction for the “said offence or offences.

AND WHEREAS, in accordance with the provisions of clause (b) of sub-section (1) of section 19 of the Prevention of Corruption Act, 1988 before the court takes cognizance of the said offences, it is necessary for me the undersigned to accord sanction for the prosecution of the said accused person.

AND WHEREAS, in accordance with the provisions of clause (b) of sub-section (1) of section 19 of the Prevention of Corruption Act, 1988 before a court takes cognizance of the said offence, it is necessary for me in the capacity as Principal Secretary, School Education and Sports Department, Mantralaya, Mumbai being the authority or superior authority to the authority competent to remove Accused Person from service,

to accord sanction for prosecution of the said Accused Person.

NOW THEREFORE, in exercise of the powers conferred by clause (b) of Sub-section (1) of Section 19 of the Prevention of Corruption Act, 1988, I Sanjay Kumar Principal Secretary, School Education and Sports Department Mantralaya Mumbai hereby accord sanction for prosecution of the said accused person Shri Sagar Ramchandra Vhatkar, Principal District Institute of Education and Training, Phaltan, Dist. Satara, Class-1 for the offences committed by the said accused person, for taking cognizance of the said offence by the Court of the Competent jurisdiction.”

The schedule incorporated in the sanction order include the particulars of the accused, the details of the crime number and the criminal acts alleged to have been committed by the Appellant justifying invocation of Sections 7 and 13(1)(d) read with Section 13(2) of the PC Act. The sanction order is issued in the name of the Governor of Maharashtra.

11. The Sanctioning Authority, PW-4 stepped into the witness box and deposed about the sanction order being issued by him against the Appellant on receipt of the investigation papers accompanying the letter issued by the S.P., Anti Corruption Bureau, Pune, through the Home Department, in Crime No.82 of 2009 registered with Satara Police Station in respect of the Appellant on the allegations levelled against him under the PC Act.

He further deposed that on a perusal of all the papers, which were received by him along with the confidential letter on 31/05/2010 and, on appreciating the same, including the papers of investigation, he arrived at a conclusion that it is a fit case to grant sanction to prosecute the Appellant. PW-4 further deposed that he forwarded all the papers to the Law and Judiciary Department and, on 04/09/2010 received the opinion of the said Department, which was concurring with his conclusion. Further, in his deposition, PW-4 has stated that he forwarded all the papers along with his opinion to the Chief Minister through the Minister of his Department since the basic salary of the Appellant was above Rs.10,650/-. His deposition to that effect, needs a reproduction at verbatim, which reads as under:

“3. After perusing and appreciating entire documents including investigation papers and others, I came to the conclusion that it is a fit case to grant sanction to prosecute the accused. Thereafter, I sent all the papers to Law & Judiciary Department. On 4.9.2010 I received their opinion. It was concurrent to my conclusion. As the basic salary of the accused was above Rs.10,650/-, I sent all the papers along with my opinion to the Chief Minister through the Minister of my Department. Accordingly the Chief Minister accorded sanction on 31.1.2011. Thereafter I received all the papers back from the office of Chief Minister. Thereafter on 10.3.2011 I gave the sanction order to prosecute the accused under above Sections. It is now shown to me. It bears my signature and seal of my office. I

identify it. It is typed as per my dictation. Its contents are true and correct. It is at Ex.49.

4. Thereafter my office sent back all the papers along with Sanction Order to D.G.P., A.C.B. Office, Mumbai confidentially.”

12. In the light of the said testimony of the Sanctioning Authority, the submission advanced is that there is complete non-application of mind at the instance of the Sanctioning Authority and, therefore, the sanction lacks in its validity and being a invalid sanction, the cognizance of the offence taken cannot be sustained.

13. Grant of sanction is a sacrosanct act and it is intended to provide safeguard to a public servant against the frivolous and vexatious litigation. It is only an administrative function and the Sanctioning Authority is required to, *prima facie*, reach the satisfaction that relevant facts would constitute the offence. The satisfaction of the Sanctioning Authority is essential to validate an order granting sanction. It is incumbent upon the prosecution to prove the existence of a valid sanction, which connote that the sanction must be granted by the Sanctioning Authority after being satisfied, that a case is made out for sanction. The sanction order must expressly show that the Sanctioning Authority has perused the material and, on consideration of the circumstances, granted the sanction for prosecution. It is open for the prosecution to prove by adducing evidence that the material was placed before the

Sanctioning Authority and its satisfaction was arrived at upon perusal of the said material and if some of those material is not placed, that would not necessarily vitiate the order of sanction.

Grant of sanction is a serious exercise of power by the competent authority, which is expected to take conscious decision on the basis of the relevant material. The decision making, on the basis of relevant material, should be reflected in the sanction order and, if not, it should be capable of proving it before the court. The existence of a valid sanction is a prerequisite for taking cognizance of offence alleged to have been committed by a public servant, however, the bar for taking of cognizance by the court is raised, as contemplated under Section 19 of the PC Act. Therefore, when the court is called upon to take cognizance, it must enquire whether there is a valid sanction to prosecute a Public Servant. A trial without valid sanction is a trial without jurisdiction by the court.

14. In *Ashok Kumar Aggarwal (supra)*, in paragraphs 13 and 14, the Apex Court held as under:

13. The prosecution has to satisfy the court that at the time of sending the matter for grant of sanction by the competent authority, adequate material for such grant was made available to the said authority. This may also be evident from the sanction order, in case it is extremely comprehensive, as all the facts and circumstances of the case may be spelt out in the sanction order. However, in every individual

case, the court has to find out whether there has been an application of mind on the part of the sanctioning authority concerned on the material placed before it. It is so necessary for the reason that there is an obligation on the sanctioning authority to discharge its duty to give or withhold sanction only after having full knowledge of the material facts of the case. Grant of sanction is not a mere formality. Therefore, the provisions in regard to the sanction must be observed with complete strictness keeping in mind the public interest and the protection available to the accused against whom the sanction is sought.

14. It is to be kept in mind that sanction lifts the bar for prosecution. Therefore, it is not an acrimonious exercise but a solemn and sacrosanct act which affords protection to the government servant against frivolous prosecution. Further, it is a weapon to discourage vexatious prosecution and is a safeguard for the innocent, though not a shield for the guilty.

15. The application of mind of the Sanctioning Authority, can be discerned from the order of sanction, which must, *ex-facie*, disclose consideration of the material in the form of evidence and other material placed before it. It is imperative for the prosecution to establish and satisfy the court by leading evidence that those facts were placed before the Sanctioning Authority and the Sanctioning Authority has applied its mind on the same. It is only on completion of the aforesaid formalities and, the evidence to that effect being placed on record by the prosecution and further from

the recital of the sanction order, an inference may be drawn that the sanction, which is granted is in accordance with law.

16. It becomes necessary, in every case, to examine the validity of the sanction order, *inter alia*, on the ground that the order suffers from vice of non-application of mind. The principles having summarized by the Apex Court in paragraph 16 of the said judgment, in the following words:

“16. In view of the above, the legal propositions can be summarised as under:

16.1 The prosecution must send the entire relevant record to the sanctioning authority including the FIR, disclosure statements, statements of witnesses, recovery memos, draft charge sheet and all other relevant material. The record so sent should also contain the material/document, if any, which may tilt the balance in favour of the accused and on the basis of which, the competent authority may refuse sanction.

16.2 The authority itself has to do complete and conscious scrutiny of the whole record so produced by the prosecution independently applying its mind and taking into consideration all the relevant facts before grant of sanction while discharging its duty to give or withhold the sanction.

16.3 The power to grant sanction is to be exercised strictly keeping in mind the public interest and the protection available to the accused against whom the sanction is sought.

16.4 The order of sanction should make it evident that the authority had been aware of all relevant facts/materials and had applied its mind to all the relevant material.

16.5 In every individual case, the prosecution has to establish and satisfy the court by leading evidence that the entire relevant facts had been placed before the sanctioning authority and the authority had applied its mind on the same and that the sanction had been granted in accordance with law.”

17. What flows from the aforesaid authoritative pronouncement is the authority which has been conferred with the power to grant sanction for prosecution of a public servant has to do complete and conscious scrutiny of the record produced by the prosecution and what is implied is that this exercise is undertaken by the authority itself by applying its mind independently and, by taking into consideration, all the relevant facts placed before it when it is discharging its duties either to grant or to withhold the sanction.

18. In the case of P.L. Tatwal v. State of Madhya Pradesh⁵, the Apex Court held that the grant of sanction is a serious exercise of power by the competent authority and it also held that the trial court should conduct a through enquiry as to whether all the relevant material is placed before the competent authority and the competent authority has referred to the same, so as to form an

⁵ (2014) 11 SCC 431

opinion whether the same constitutes an offence requiring sanction for prosecution. Dealing with the case of an appellant, who appealed before the court on the ground that in view of his appointment by the Administrator, the sanction must also be given by the Administrator and in absentia by the State Government, which appoints the Administrator and to claim that there is no proper and valid sanction by the competent authority, after referring its earlier decisions in the case of *State of Maharashtra v. Mahesh G. Jain*⁶, the court held as under:

13. In a recent decision in State of Maharashtra through Central Bureau of Investigation v. Mahesh G. Gain, the court has referred to the various decisions on this aspect from paragraph 8 onwards. It has been held at paragraph 8 as follows:

“8. In Mohd. Iqbal Ahmed v. State of A.P., this Court lucidly registered the view that (SCC p. 174, para 3) it is incumbent on the prosecution to prove that a valid sanction has been granted by the sanctioning authority after being satisfied that a case for sanction has been made out constituting an offence and the same should be done in two ways; either (i) by producing the original sanction which itself contains the facts constituting the offence and the grounds of satisfaction, and (ii) by adducing evidence aliunde to show the facts placed before the sanctioning

6 (2013) 8 SCC 119

authority and the satisfaction arrived at by it. It is well settled that any case instituted without a proper sanction must fail because this being a manifest defect in the prosecution, the entire proceedings are rendered void ab initio.”

In the peculiar facts, it was held as under:

16. In such circumstances, we are of the view that the trial court should conduct a proper inquiry as to whether all the relevant materials were placed before the competent authority and whether the competent authority has referred to the same so as to form an opinion as to whether the same constituted an offence requiring sanction for prosecution. In that view of the matter, we set aside the impugned order passed by the High Court and also order dated 27.12.2004 passed in Special Case No. 12 of 2004 by the trial court and remit the matter to the Special Judge (P.C. Act, 1988), Ujjain, Madhya Pradesh.

19. The aforesaid authoritative pronouncements undisputedly contemplate “application of mind” by the Sanctioning Authority “upon consideration of the material placed before it”. Consideration implies application of independent mind. The order of sanction must, *ex facie*, disclose that the Sanctioning Authority, on consideration of the evidence and other material placed before it, has applied its mind and arrived at a decision either way. In case of

Mansukhlal Vithaldas Chauhan v. State of Gujarat⁷, the Apex Court has observed as under:

“19. Since the validity of "Sanction" depends on the applicability of mind by the sanctioning authority to the facts of the case as also the material and evidence collected during investigation, it necessarily follows, that the sanctioning authority has to apply its own independent mind for the generation of genuine satisfaction whether prosecution has to be sanctioned or not. The mind of the sanctioning authority should not be under pressure from any quarter nor should any external force be acting upon it to take decision one way or the other. Since the discretion to grant or not to grant sanction vests absolutely in the sanctioning authority, its discretion should be shown to have not been affected by any extraneous consideration. If it is shown that the sanctioning authority was unable to apply its independent mind for any reason whatsoever or was under an obligation or compulsion or constraint to grant the sanction, the order will be bad for the reason that the discretion of the authority "not to sanction" was taken away and it was compelled to act mechanically to sanction the prosecution”.

20. The aforesaid observation came to be made in the conspectus of the fact where the High Court in a writ petition issued a writ in the nature of mandamus directing to accord sanction under the relevant provisions of the PC Act to prosecute the appellant therein, who was working as Divisional Accountant in the Medium

⁷ Decided on 03/09/1997 in _____

Irrigation Project. The Sanctioning Authority was directed to accord sanction within one month from the date of receipt of the order of the court and it is in the backdrop of this fact that the aforesaid observations were made and Their Lordships have held as under:

“32. By issuing a direction to the Secretary to grant sanction, the High Court closed all other alternatives to the Secretary and compelled him to proceed only in one direction and to act only in one way, namely, to sanction the prosecution of the appellant. The Secretary was not allowed to consider whether it would be feasible to prosecute the appellant; whether the complaint of Harshadraj of illegal gratification which was sought to be supported by "trip" was false and whether the prosecution would be vexatious particularly as it was in the knowledge of the Govt. that the firm had been black-listed once and there was demand for some amount to be paid to Govt, by the firm in connection with this contract. The discretion not to sanction the prosecution was thus taken away by the High Court.

33. The High Court put the Secretary in a piquant situation. While that Act gave him the discretion to sanction or not to sanction the prosecution of the appellant, the judgment gave him no choice except to sanction the prosecution as any other decision would have exposed him to action in contempt for not obeying the mandamus issued by the High Court. The High Court assumed that role of the sanctioning authority, considered the whole matter, formed an opinion that it was a fit case in which sanction should be granted and because it itself

could not grant sanction under Section 6 of the Act, it directed the Secretary to sanction the prosecution so that the sanction order may be created to be an order passed by the Secretary and not that of the High Court. This is a classic case where a Brand name is changed to give a new colour to the package without changing the contents thereof. In these circumstances the sanctions order cannot but be held to be wholly erroneous having been passed mechanically at the instance of the High Court.”

21. In the wake of the aforesaid guiding principles, I have considered the submissions of Mr. Kulkarni, learned counsel appearing for the Appellant. By the sanction order issued by the Principal Secretary, School Education Department, being the appointing and removing authority of the Appellant i.e. the Principal of the District Institute of Education and Training, a Class-1 officer, he was competent to accord the sanction being the authority or superior authority to the authority competent, to remove him from service. Accordingly, sanction came to be accorded by him to prosecute the Appellant. It is not the argument of Mr. Kulkarni that the said sanction order suffers from inherent lacuna as the Sanctioning Authority projected that it had considered the relevant material placed before it and scrutinized all the necessary facts and circumstances disclosed therein and was satisfied that a *prima facie* case is made out against the Appellant and, in the interest of justice, he needs to be prosecuted for the said offence. However, when the Sanctioning Authority entered in the

witness box, its inadequacy of being a valid sanction became apparent. PW-4 forwarded the papers to the Law & Judiciary Department and received the opinion of the said Department, which concurred with his opinion. So far, so good. However, the necessary papers along with the opinion, were forwarded to the Chief Minister through the Ministry of School Education Department and the Chief Minister accorded sanction on 31/01/2011. The Sanctioning Authority deposed he received the papers back from the Chief Minister's office and, thereafter, to be precise on 10/03/2011, he accorded sanction to prosecute the accused under the said sections.

22. This chronology do not find mention in the order granting sanction.

There cannot be two sanction orders and if the sanction was accorded by the Chief Minister on 31/01/2011, then the sanction granted by PW-4 in the capacity as Principal Secretary of the School Education Department clearly miss out the tenet of granting sanction by independently applying his mind before granting the sanction. PW-4 has categorically stated that it was only after the Chief Minister accorded sanction, he gave the sanction order on 10/03/2011 without even a whisper of the file being routed through the Chief Minister. The reason cited in his deposition is since the basic salary of the Appellant was above Rs.10,650/-, the file was forwarded to the Chief Minister through the Minister of the

Department. The act of granting sanction, though an administrative act, is not expected to be processed in the department as a normal departmental file, jumping over table to table and from one authority to other authority, completing formalities. Grant of sanction, which has been identified as a serious business involving satisfaction of the authority granting it and not merely a procedural aspect as the normal file is processed.

23. In the light of the deposition of the Sanctioning Authority, that after the Chief Minister granted the sanction, he issued the sanction order is reflective of acting under the dictation of his superior authority and this surely deprived the decision maker, who is entrusted with the discretionary power or a duty expressly or impliedly discharged by him for a public purpose. The decision maker has failed to exercise the power vested in him or failed to perform his duty since he was guided by the decision of his superior authority.

The well known principle in Administrative Law, “Acting under Dictation” is described by Professor Wade and Forsyth, 7th Edition of Administrative Law as under:

**“Surrender, Abdication, Dictation’
Power in Wrong Hands**

“Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one

authority is in substance exercised by another. The proper authority may share its power with someone else or may allow someone else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void."

The authority invested with the power, proper to act on its own but in substance the power is exercised by another. In the very early decision, being in case of **Commissioner of Police v. Gordhandas Bhanji**⁸, the principle has been succinctly spelt out as a discretion conferred on a statutory authority must be exercised by that authority himself in the following paragraphs:

"It was objected as to this that there is no specific law which compels him to exercise the discretion. Rule 250 merely vests a discretion in him but does not require him to exercise it. That is easily met by the observations of Earl Cairns L.C. in the House of Lords in Julius v. Lord Bishop of Oxford (1980) 5 A.C. 214, observations which have our full and respectful concurrence :-

"There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for

8 AIR 1952 SC 16

whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so."

The discretion vested in the Commissioner of Police under Rule 250 has been conferred upon him for public reasons involving the convenience, safety, morality and welfare. of the public at large. An enabling power of this kind conferred for public reasons and for the public benefit is, in our opinion, coupled with a duty to exercise it when the circumstances so demand. It is a duty which cannot be shirked or shelved nor can it be evaded; performance of it can be compelled under section 45."

In another decision, in *State of U.P. & Ors. v. Maharaja Dharmander Prasad Singh & Ors*⁹, which ruled to the effect that if discretion is surrendered to an extraneous body or power, it would be vitiated by non application of mind and in paragraph No.55, relevant principles have been culled out in the following words:

"It is true that in exercise of powers of revoking or cancelling the permission is akin to and partakes of a quasi-judicial complexion and that in exercising of the former power the authority must bring to bear an unbiased mind, consider impartially the objections raised by the aggrieved party and decide the matter consistent with the principles of natural justice. The authority cannot permit its decision to

9 (1989) 2 SCC 505

be influenced by the dictation of others as this would amount to abdication and surrender of its discretion. It would then not be the Authority's discretion that is exercised, but someone else's. If an authority "hands over its discretion to another body it acts ultra vires". Such an interference by a person or body extraneous to the power would plainly be contrary to the nature of the power conferred upon the authority. De Smith sums up the position thus:

"The relevant principles formulated by the courts may be broadly summarised as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. Nor where a judgment must be made that certain facts exist can a discretion be validly exercised on the basis of an erroneous assumption about those facts. These several principles can conveniently

be grouped in two main categories: failure to exercise a discretion, and excess or abuse of discretionary power. The two classes are not, however, mutually exclusive."

The settled principles of administrative law being breached and the decision of the Sanctioning Authority suffers from the said vice of non-application of mind/acting under dictation of his superior and this ground itself is sufficient to clamp the said sanction as an invalid one.

24. PW-2, the Sanctioning Authority, did not apply its mind and issued the sanction order on its own judgment even though the power to grant or refuse the sanction vests in him as an appointing or terminating authority. In law, this amounts to non-exercise of power by the authority and would vitiate the order passed.

25. Coming to the objections of learned A.P.P. on two aspects viz. whether the defect in the sanction results in failure of justice and whether such an objection could be raised, for the first time in appeal when it was not raised before the trial, the decision of the Apex Court in Nanjappa (supra), has answered the said objections. As far as factual aspect is concerned, it can be very well noted that the sanction order signed by the Principal Secretary of the School Education Department, dated 10/03/2011 form the basis of taking cognizance of the case against the Appellant under the provisions of

the PC Act. However, it is only when the Sanctioning Authority entered the witness box on 08/05/2012, he disclosed the process, which was followed by him in according the sanction as contained in the order dated 10/03/2011. It is only then the Appellant, for the first time, became aware and conscious of the aspect of non-application of mind on the part of the Sanctioning Authority and that he has acted in the dictation of the superior authority in the Government being the Chief Minister of the State. The first opportunity to note that the sanction was not in exercise of free and independent mind of the Sanctioning Authority became available only on the deposition of PW-4 during the course of trial.

As far as the legal position is concerned, the decision in Nanjappa (supra) has answered the said issue as to what is the stage at which the objection *qua* sanction can be raised. Paragraphs 20 and 21 of the said judgment are relevant, which read as follows:

“20. What is important is that, not only was the grant of a valid sanction held to be essential for taking cognizance by the Court, but the question about the validity of any such order, according to this Court, could be raised at the stage of final arguments after the trial or even at the appellate stage. This Court observed:

“14. Ordinarily, the question as to whether a proper sanction has been accorded for prosecution of the accused persons or not is a matter which should be dealt with at the stage of taking

cognizance. But in a case of this nature where a question is raised as to whether the authority granting the sanction was competent therefore or not, at the stage of final arguments after trial, the same may have to be considered having regard to the terms and conditions of service of the accused for the purpose of determination as to who could remove him from service.

15. Grant of proper sanction by a competent authority is a sine qua non for taking cognizance of the offence. It is desirable that the question as regard sanction may be determined at an early stage.

16. But, even if a cognizance of the offence is taken erroneously and the same comes to the court's notice at a later stage a finding to that effect is permissible. Even such a plea can be taken for the first time before an appellate court."

21. In B. Saha & Ors. v. M.S. Kochar (1979) 4 SCC 177, this Court was dealing with the need for a sanction under Section 197 of the Cr.P.C. and the stage at which the question regarding its validity could be raised. This Court held that the question of validity of an order of sanction under Section 197 Cr.P.C. could be raised and considered at any stage of proceedings. Reference may also be made to the decision of this Court in K. Kalimuthu vs. State by DSP (2005) 4 SCC 512 where Pasayat, J., speaking for the Court, held that the question touching the

need for a valid sanction under Section 197 of the Cr.P.C. need not be raised as soon as the complaint is lodged but can be agitated at any stage of the proceedings. The following observation in this connection is apposite: “

“15. The question relating to the need of sanction under Section 197 of the Code is not necessarily be considered as soon as the complaint is lodged and on the allegations contained therein. This question may arise at any stage of the proceeding. The question whether sanction is necessary or not may have to be determined from stage to stage. Further, in cases where offences under the Act are concerned the effect of Section 19, dealing with question of prejudice has also to be noted.”

26. The question is precisely answered in paragraph No. 22 in the following words:

“22. The legal position regarding the importance of sanction under Section 19 of the Prevention of Corruption is thus much too clear to admit equivocation. The statute forbids taking of cognizance by the Court against a public servant except with the previous sanction of an authority competent to grant such sanction in terms of clauses (a), (b) and (c) to Section 19(1). The question regarding validity of such sanction can be raised at any stage of the proceedings. The competence of the court trying the accused so much depends upon

the existence of a valid sanction. In case the sanction is found to be invalid the court can discharge the accused relegating the parties to a stage where the competent authority may grant a fresh sanction for prosecution in accordance with law. If the trial Court proceeds, despite the invalidity attached to the sanction order, the same shall be deemed to be non-est in the eyes of law and shall not forbid a second trial for the same offences, upon grant of a valid sanction for such prosecution.”

27. Drawing a comparison with Section 465 of the Code of Criminal Procedure and comparing it with sub-section (3) of Section 19 of the PC Act, Their Lordships have held as under:

23.3 Sub-section (3), in our opinion, postulates a prohibition against a higher court reversing an order passed by the Special Judge on the ground of any defect, omission or irregularity in the order of sanction. It does not forbid a Special Judge from passing an order at whatever stage of the proceedings holding that the prosecution is not maintainable for want of a valid order sanctioning the same.

23.4 The language employed in sub-section (3) is, in our opinion, clear and unambiguous. This is, in our opinion, sufficiently evident even from the language employed in sub-section (4) according to which the appellate or the revisional Court shall, while examining whether the error, omission or irregularity in the sanction had occasioned in any failure of justice, have regard to the fact whether the objection could and should have been raised at an early stage. Suffice it to say, that a conjoint reading

of sub-sections 19(3) and (4) leaves no manner of doubt that the said provisions envisage a challenge to the validity of the order of sanction or the validity of the proceedings including finding, sentence or order passed by the Special Judge in appeal or revision before a higher Court and not before the Special Judge trying the accused.

The aforesaid issues being answered in the above judgment, it is always open for the Appellant to raise the issue about the lack of proper sanction even in an appeal.

28. The objection of learned A.P.P. ultimately is then reduced as to whether the error or irregularity in the order sanctioning the prosecution has resulted in ‘failure of justice’.

29. In the judgment in *Ashok Kumar Aggarwal (supra)*, Their Lordships have expounded the term “failure of justice” and when can an error or irregularity in a sanction result into ‘failure of justice’.

“19. The court must examine whether the issue raised regarding failure of justice is actually a failure of justice in the true sense or whether it is only a camouflage argument. The expression ‘failure of justice’ is an extremely pliable or facile an expression which can be made to fit into any case. The court must endeavour to find out the truth. There would be ‘failure of justice’ not only by unjust conviction but also by acquittal of the guilty

as a result of unjust or negligent failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and safeguarded but they should not be over emphasised to the extent of forgetting that the victims also have certain rights. It has to be shown that the accused has suffered some disability or detriment in the protections available to him under Indian Criminal Jurisprudence. 'Prejudice' is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial and not matters falling beyond their scope. Once the accused is able to show that there has been serious prejudice caused to him with respect to either of these aspects, and that the same has defeated the rights available to him under legal jurisprudence, the accused can seek relief from the Court."

30. In Section 19(3) of the PC Act, the stress is on "failure of justice". It is true that the failure of justice is relevant to an error, omission or irregularity in sanction and, therefore, a mere error, omission or irregularity in sanction is not considered fatal unless it has resulted in "failure of justice" or "failure of justice" has occasioned thereby. In determining whether "failure of justice" has occurred, sub-section (2) enjoins upon the court a duty to consider whether the plea was raised on that score at the trial stage.

31. In the present case, the Appellant did not get an opportunity to become aware of the non-application of mind by the Sanctioning Authority till the Sanctioning Authority deposed during the course

of trial that he had followed the procedure which is depictive of non-application of mind on his part. Since the procedure followed by the Sanctioning Authority is reflective of non-application of mind on failure to apply his mind independently before grant of sanction to prosecute the Appellant whereas the Appellant, who has already suffered an ignominious situation and had to face a trial resulting into a conviction but for the valid sanction as per law, is sufficient to hold that it has resulted in failure of justice. The scope of judicial review permits an administrative action of the authority to be reviewed when it fetter the discretion and when an authority acts *ultra vires* and fails to exercise the discretion, it is not truly exercising its power and the action of the sanctioning authority is clearly a category of illegality and acting under dictation, being a branch of unlawful exercise of discretion, goes to the root of the matter and by non-adhering to the principles of exercise of discretion conferred, it has resulted in failure of justice.

32. The issue of sanction being decided as above and since it goes to the root of the matter, I have not required to go into the other points raised in the appeal challenging the impugned judgment. The sanction accorded by the Sanctioning Authority is an invalid sanction and at this stage, it is also not possible to relegate the prosecution to obtain a fresh sanction since more than a decade has elapsed when the Appellant was arraigned as an accused and it is too late in the day to prosecute him with the fresh sanction, at this

stage. The lacuna on part of the prosecution, therefore, leaves no room other than to discharge the Appellant of the charges levelled against him and the appeal, therefore, succeeds.

33. The appeal is allowed and the impugned judgment and order dated 19/05/2011 is quashed and set aside.

(BHARATI DANGRE, J.)