IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.4050 OF 2021

Sushil Kumar	..	Petitioner
Versus		
Central Bureau of Investigation & Ors.	..	Respondents

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Mr.Satyavrat Joshi with Mr.Sumant Deshpande for the Petitioner.

Mr.Kuldeep S. Patil with Mr.Nikhil G. Hire for the Respondent No.1/CBI.

Mr.Y.M.Nakhawa, A.P.P. for the State.

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CORAM: BHARATI DANGRE, J.

RESERVED ON : 26th APRIL, 2023
PRONOUNCED ON : 09th JUNE, 2023

JUDGMENT :-

1. The petitioner, an Inspector of Income Tax facing prosecution for the offence punishable under Section 7 of the Prevention of Corruption Act, 1988 (for short, "P.C.Act"), sought his discharge from Special Case ACB No.13 of 2013, pending before the learned Special Judge at Kalyan, District Thane, which relief was refused to him by the impugned order below Exh.17, passed by the learned Special Judge on 18/08/2021.

The petitioner is an accused in connection with C.R.No.RC/BA1/2013/A0018, registered with Central Bureau of Investigation ("CBI"), the prosecution being initiated on the basis of a complaint lodged by one Ms.Smita Pethe, who alleged that the petitioner, an Income Tax Officer, demanded a sum of Rs.5,00,000/- from her to stop the recovery proceedings against the notice issued by the Tax Recovery Officer, Range-1, Kalyan for recovery of tax of Rs.46,69,937/- from her in the capacity as Director of M/s.Verjinia Foods Ltd., Bhiwandi, Thane. The demand was verified and during the verification proceedings, it is alleged that the petitioner demanded a bribe of Rs.25,000/- as part payment to stall the recovery proceedings and for not initiating the attachment proceedings. During the trap proceedings, the bribe money could not be delivered. Thus, an offence came to be registered under Section of the P.C.Act.

2. On completion of investigation, the charge-sheet came to be filed and the sanction for prosecution was granted by the Commissioner of Income Tax, Thane on 14/10/2023. The concerned Judge issued process and the petitioner is aggrieved by it's issuance and seek discharge on the ground that apart from the flaw in the merits of the prosecution case, there is a defect in the sanction accorded, as the sanction ought to have been granted by the Chief Commissioner of Income Tax, since the petitioner came to be promoted in the cadre of Inspector vide order dated 01/05/2012, which was signed by the Additional Commissioner of Income Tax (HQ) (Admin) on behalf of the Chief Commissioner of Income Tax,

Pune. Therefore, the sanction is accorded by the Commissioner of Income Tax, who is an officer lower in ranking than the Chief Commissioner of Income Tax, who was his appointing authority in the cadre of Inspector, and since he is not the authority competent to remove the petitioner from service, the sanction is defective.

3. Heard the learned counsel Mr.Satyavrat Joshi for the petitioner, who would assertively submit that the Sanction Order dated 14/10/2023 is in terms of Section 19(1)(c) of the P.C.Act, which permitted his prosecution. According to Mr.Joshi, the Sanction Order is signed by the Commissioner of Income Tax, who is subordinate in ranking to the Chief Commissioner of Income Tax. The submission advanced is, since the Commissioner of Income Tax is not competent to remove the petitioner from service, and hence he is not the competent authority to accord sanction.

Reliance is place upon Article 311 of the Constitution of India, which clearly stipulate that no person who is a member of a civil service of the Union or all India Service or in civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which, he was appointed. It is thus argued that since the appointment of the petitioner in the cadre of Inspector was at the hands of Chief Commissioner of Income Tax, no officer subordinate to him, can dismiss or remove him from service and, therefore, he cannot even accord sanction under Section 19(1)(c) of the P.C. Act.

According to Mr.Joshi, this glaring lacuna and defect in the sanction making it invalid, deserve him a discharge, but the learned Special Judge has failed to consider the glaring lacuna in the case of the prosecution and, according to him, once it is found that the authority granting sanction was not competent to accord sanction, the end result of the trial could be acquittal and undergoing the rigmarole of the trial is an empty formality.

4. Mr.Joshi has placed reliance upon the decision of this Court in the case of ***Somdatta Govindrao Khandare Vs. State of Maharashtra***[1] as well as another decision in the case of ***Ashok Sadashiv Phalle Vs. The State of Maharashtra & Ors.***[2]***.*** He would also rely upon the decision of the Apex Court in the case of ***State of Karnataka Vs. C. Nagarajaswamy***[3] as well as the decision in the case of ***Nanjappa Vs. State of Karnataka***[4]. Reliance is also placed upon the decision in the case of ***State of Mizoram Vs. C. Sangnghina***[5], where it is ruled that the sanction for prosecution must be a valid sanction and if it is found that the sanction was not properly accorded, it is permissible to file a fresh/supplementary charge-sheet after obtaining valid sanction. Mr. Joshi would also make reference to the decision of the Division Bench of this Court in the case of ***Sanjay Janardan Dukre Vs. The State of Maharashtra***[6]***.***

5. Rebutting the submissions of Mr.Joshi, the learned

1 2016 SCC OnLine Bom 10668
2 2016 SCC OnLine Bom 10667
3 (2005) 8 SCC 370
4 2015 ALL MR(Cri) 3318 (S.C.)
5 (2019) 13 SCC 335
6 2022 ALL MR (Cri) 3111

counsel Mr.Kuldeep Patil appearing for the CBI would press into service the significance and importance of sanction, as highlighted by the Apex Court in the case of ***Mansukhlal Vithaldas Chauhan Vs. Stgate of Gujarat***[7]. He would submit that grant of sanction for prosecution is not an formality, but it is a significant act and which in the words of the Apex Court has been described as "sacrosanct act", which affords protection to the Government servants against frivolous prosecution and it intend to discourage frivolous and vexatious prosecution. He would submit that before the sanction is accorded, it is necessary for the sanctioning authority to have the entire material placed before him, so that he can apply his mind to the same and arrive at a decision.

Mr.Patil would submit that a thin distinction of line exist between the two, i.e. in absence of sanction and invalidity of sanction, which may be on distinct grounds, including non application of mind by the sanctioning authority. According to Mr.Patil, absence of sanction is a point, which is permitted to be agitated at a threshold, since if the sanction, which is sine qua non for prosecution of the public servant is not obtained, he cannot be subjected to trial or the trial cannot proceed, but as regards the objection raised that the sanction is not valid for distinct reasons, the said question has to be raised necessarily during trial. He would place reliance upon the decision of the Apex Court in the case of ***Parkash Singh Badal Vs. State of Punjab***[8] and, in particular, paragraphs 47 and 48 of the said judgment. Mr.Patil place reliance upon the following decisions :-

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7 (1997) 7 SCC 622
8 (2007) 1 SCC 1

Dinesh Kumar Vs. Chairman Airport Authority of India & Anr. (2012) 1 SCC 532;

Central Bureau of Investigation & Ors. Vs. Pramila Virendra Kumar Agarwal & Anr. (2020) 17 SCC 664;

State of Bihar & Ors. Vs. Rajmangal Ram AIR 2014 SC 1674

According to Mr. Patil, the stage has not ripen in the case of the petitioner to determine, whether the sanction accorded was proper or not, as according to the petitioner, it is not granted by the competent authority.

6. Mr.Patil filed a pursis during the pendency of the petition and has placed on record a communication addressed by the Deputy Commissioner of Income Tax to the Director of Income Tax (Vig.), Western Region, Mumbai on 05/11/2014 and he has also placed on record the copy of Notification No.531 dated 07/10/1988, published in The Gazette of India, Extraordinary, Part II.

Relying upon the aforesaid communication, the submission advanced by Mr.Patil is, the Commissioner of Income Tax is the appointing authority of the petitioner, the Inspector of Income Tax and, being an appointing authority, it is also an authority to impose penalty and thus, accord sanction under the P.C.Act.

7. On hearing the learned counsel appearing for the respective parties, I have perused the impugned order as well as the precedents before me.

Article 311(1) of the Constitution of India prescribe that no person, who is a member of a civil service of the Union or an all India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to the one by whom he is appointed.

Taking lead from the aforesaid provision, when the legislature intended to determine the authority competent to grant sanction for prosecuting a public servant, in Section 9 of the Prevention of Corruption Act, 1988, it specified the authorities who can accord sanction.

Section 19 of the Act prescribe that in case a person is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, then the sanction would be granted by that Government and where the appointment of a person is in connection with the affairs of the State, then the sanction shall be accorded by the State Government. Sub-clause (c) of sub-section (1) of Section 19 stipulate contingency in case of any other person and in this case, it is the authority competent to remove him from his office, who is empowered to accord sanction. A conjoint reading of Article 311 of the Constitution of India read with Section 19 of the Prevention of Corruption Act would thus make it amply clear that in case of a person covered in clause (c), his appointing authority, who is competent to remove from office is the one who is competent to grant sanction for his prosecution. Admittedly, a person cannot be removed by an authority, who is lower in rank than his appointing authority and such a removal, if effected, shall be violative of Article 311(1) of the Constitution of India.

In the present case, it is the submission of Mr.Joshi that the order of promotion of the petitioner to the post of Inspector, is signed by the Additional Commissioner of Income Tax (HQ) for Chief Commissioner of Income Tax, Pune and based on this, the argument advanced is, any authority subordinate to the Chief Commissioner of Income Tax cannot remove him from service and, necessarily, cannot accord sanction for his prosecution.

Mr.Patil has placed on record a communication addressed by the Deputy Commissioner of Income Tax on behalf of the Chief Commissioner, who has intimated that the Commissioner of Income Tax-II, Thane was the competent authority to remove Shri Sushil Kumar, Inspector of Income Tax. It was intimated as under :-

> "2. In this matter, I am directed to inform that the Commissioner of Income tax-II, Thane was the Competent Authority to remove Shri. Sushil Kumar, Inspector of Income Tax, on 14.10.2013. The fact of CIT being Competent Authority in the instant case is also evident from the para (5) of Sanction Order dt. 14.10.2013, issued for according sanction for prosecution of Shri. Sushil kumar, Insp., under Sec.19(1)(c) of Prevention of Corruption Act, 1988.
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> 3. Further, I am directed to enclosed a copy of Notification No.531, dated 07.10.1988, published in The Gazette of India, Extraordinary, Part-II, for ready reference, wherein it is mentioned that Commissioner of Income Tax is the Appointing Authority & Authority to impose penalty for Inspector of Income tax."

8. Mr.Patil has also placed on record the Notification issued by the Central Board of Direct Taxes (CBDT) on 05/10/1988 issued in exercise of the powers conferred by sub-rule(2) of rule (9), clause (b) of sub-rule(2) of rule 12 and rule 24 of the

Civil Services (Central, Classification and Appeals) Rules, 1965 and as per the said Notification, the Commissioner of Income Tax is the appointing authority competent to impose penalty on the Inspector of Income Tax. From the reading of the communication dated 05/11/2014 alongwith the Notification dated 05/10/1988, it is apparent that the Commissioner of Income Tax is the appointing authority and, therefore, authority competent to remove the petitioner, the Inspector of Income Tax and, necessarily, he is the authority competent to grant sanction for prosecution.

9. The question that arises for consideration before me is, whether the submission of Mr.Joshi is to be accepted at this stage or whether the assertion on behalf of the respondent that the Commissioner of Income Tax is the appointing/removing authority and, therefore, a sanction accorded by him is a valid sanction. Admittedly, this being a bone of contentions between the parties, the burden would be required to be discharged by each of them to prove the aforesaid fact.

In order to establish the counter claim, the accused as well as the Department of Income Tax would be required to adduce necessary evidence about the officer, who is competent to accord sanction, being an appointing authority and, therefore, competent authority to remove the petitioner. At the stage when the trial is yet to commence, whether this plea can be entertained is a moot question.

10. Accord of proper sanction by the competent authority, undisputedly is a sine qua non for taking cognizance of the offence. There can be two distinct scenarios; one when there is no sanction accorded at all and second, when the sanction is accorded, but it is not valid and this can be on various grounds, namely, the authority did not apply the mind and, hence, grant of sanction is vitiated, the sanction is granted by an authority, who is not competent to grant the same etc. In ***C. Nagarajaswamy*** (supra), the Apex Court recorded as under :-

> "14. Ordinarily, the question is to whether a proper sanction has been accorded for prosecution of the accused persons or not is a matter which should be dealt with at the stage of taking cognizance. But in a case of this nature where a question is raised as to whether the authority granting the sanction was competent therefor or not, at the stage of final arguments after trial, the same may have to be considered having regard to the terms and conditions of service of the accused for the purpose of determination as to who could remove him from service."

Their Lordship further clarified in the very same decision that it is desirable that the question as regards sanction may be determined at an early stage, which means at the time of taking cognizance, but a further clarification was offered by declaring that 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

In this context, it was recorded that it was not possible to accord with the decision of the High Court that the trial court was bound to record either a judgment of conviction or acquittal, even after holding that the sanction was not valid and even if a judgment of conviction or acquittal was recorded, the same would not make any distinction for invoking provision of Section 300 of the Code as even then, it would be held to have been rendered illegally and without jurisdiction.

11. In ***Nanjappa*** (supra), it was held that the question regarding validity of sanction can be raised at any stage of proceedings, as invalid sanction renders the trial non-est in the eyes of law, though a second trial is not forbidden upon obtaining a valid sanction. Reference was made to sub-section (3) of Section 19, which postulate prohibition on higher Court against the reversal of an order on ground of any defect. Referring to it's earlier decision in the case of ***State of Goa Vs. Babu Thomas[(2005) 8 SCC 130]***, where the Court had held that absence of a valid sanction went to the root of the prosecution, having regard to the fact that under Section 19(1), the Court is prohibited from taking cognizance of any offence punishable under the Act, except with the previous sanction granted by the competent authority.

It was a case, where the sanction order was issued by an incompetent person and, therefore, it was recorded that there was no order sanctioning prosecution and as a result of which, the Court was not competent to take cognizance and the error was so fundamental that it invalidated the proceedings conducted by the Court. The order passed by the High Court was upheld reserving the liberty to the competent authority to issue fresh orders having regard to the serious allegations made against the accused.

Reference was also made to the decision in ***C. Nagarajaswamy*** (supra) and the position of law was crystallised in the following words :-

> "15. 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."

While interpreting sub-section (3) of Section 19 it was recorded as under :-

> "16. .... A careful reading of sub-section (3) to Section 19 would show that the same interdicts reversal or alteration of any finding, sentence or order passed by a Special Judge, on the ground that the sanction order suffers from an error, omission or irregularity, unless of course the court before whom such finding, sentence or order is challenged in appeal or revision is of the opinion that a failure of justice has occurred by reason of such error, omission or irregularity. Sub-section (3), in other words, simply forbids interference with an order passed by Special Judge in appeal, confirmation or revisional proceedings on the ground that the sanction is bad save and except, in cases where the appellate or revisional court finds that failure of justice has occurred by such invalidity. What is noteworthy is that sub-section(3) has no application to proceedings before the Special Judge, who is free to pass an order discharging the accused, if he is of the opinion that a valid order sanctioning prosecution of the accused had not been produced as required under Section 19(1). 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. 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......Failure of justice is, what the appellate or revisional Court would in such cases look for. And while examining whether any such failure had indeed taken place, the Court concerned would also keep in mind whether the objection touching the error, omission or irregularity in the sanction could or should have been raised at an earlier stage of the proceedings meaning thereby whether the same could and should have been raised at the trial stage instead of being urged in appeal or revision."

12. Mr.Joshi has relied upon the decision in the case of ***C. Sangnghina*** (supra), but on reading of the said law report, I do not think that this decision takes his case any further, as it has laid down the proposition of law that when an accused is discharged before commencement of trial due to invalidate or improper sanction for prosecution i.e. sanction by incompetent authority, subsequent filing of fresh/supplementary charge-sheet, after obtaining a valid/proper sanction is permissible and not barred by principles of "double jeopardy".

This decision, however, do not propagate the principle that before commencement of the trial, an accused deserved to be discharged, if the sanction is not granted by the competent authority. Ultimately, the authoritative pronouncement in the case of ***Dinesh Kumar*** (supra) still hold good and the assertive verdict reads thus :-

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

13. In the case of ***Pramila Virendra Kumar Agarwal*** (supra), the position of law as laid down in ***Dinesh Kumar*** (supra) is reiterated in the following words :-

> "11. Further the issue relating to validity of the sanction for prosecution could have been considered only during trial since essentially the conclusion reached by the High Court is with regard to the defective sanction since according to the High Court, the procedure of providing opportunity for explanation was not followed which will result in the sanction being defective. In that regard, the decision in *Dinesh Kumar v. Airport Authority of India* relied upon by the learned Additional Solicitor General would be relevant since it is held therein that there is a distinction between the absence of sanction and the alleged invalidity on account of non-application of mind. The absence of sanction no doubt can be agitated at the threshold but the invalidity of the sanction is to be raised during the trial. In the instant facts, admittedly there is a sanction though the accused seek to pick holes in the manner the sanction has been granted and to claim that the same is defective which is a matter to be considered in the trial."

In the wake of the aforesaid authoritative pronouncements of law on the subject, the question as to whether the sanction for prosecuting the petitioner was valid or not as it is sought to be projected, that it is not by the competent authority, is a matter to be determined during the course of trial, when the evidence shall be permitted to be adduced, to establish that the Commissioner of Income Tax was the competent authority and even it is permissible for the accused to submit evidence to the contrary. This point, therefore, deserves to be examined during trial and the relief claimed by the petitioner, seeking discharge at this stage, cannot be granted.

Necessarily, by upholding the impugned order, the writ petition is dismissed.

(SMT. BHARATI DANGRE, J.)