



Judgment

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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL APPEAL NO.101 OF 2006

Central Bureau of Investigation,
Nagpur.

..... **Appellant.**

:: V E R S U S ::

V.Prabhakar Rao,
Stenographer,
c/o Regional Labour
Commissioner, Seminary
Hills, Nagpur.

..... **Respondent.**

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Mrs.Mugdha Chandurkar, Counsel for the Appellant.
Shri R.M.Patwardhan, Counsel for the Respondent.

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CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 13/08/2024

PRONOUNCED ON : 04/09/2024

JUDGMENT

1. By this appeal, the appellant - Central Bureau of Investigation, Nagpur (the CBI) has challenged judgment and order dated 30.9.2005 passed by learned Judge, Special Court for CBI, Nagpur (learned Judge of the Special Court) in Special Case No.17 of 2003 (Old case No.21/1994).

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2. By the said judgment impugned, the respondent (accused) is acquitted of offences under Sections 7 and 13(1)(d) read with 13(2) of the Prevention of Corruption Act, 1988 (the P.C.Act) on ground of absence of valid sanction.

3. Facts of the prosecution case can be summarized as under:

In April 1994, the accused was working as Stenographer in the office of the Assistant Labour Commissioner (Central) at Nagpur (the ALC). On 7.4.1994, Pradipkumar Choudhary (the complainant) submitted an application for amendment of his licence under the Contract Labour Regulation Act. By the said application, he requested for a licence to engage 70 labourers as the original licence was granted to him to 65 labourers only. On receipt of the application, he was called after 3-4 days. Accordingly, he met the accused for 2-3 times. At the time of such meetings, it was alleged that the accused demanded Rs.700/- on a

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pretext that out of the said amount, he has to pay some amount to the Assistant Labour Commissioner Shri Zade. The accused called him in his office on 29.4.1994. On that day also, the demand was made by the accused. As he was not desirous to pay the amount demanded by the accused, on the same day, he approached to the office of the CBI and filed a complaint alleging that gratification amount is demanded by the accused. On receipt of the complaint, an offence was registered and the officer of the CBI called two witnesses to act as panchas. After arrival of panchas, allegations in the complaint were explained to panchas as well as the complaint was given to panchas who verified contents of the complaint. The complainant produced seven currency notes of Rs.100/-. The officer of the CBI shown demonstration as to use of phenolphthalein powder and sodium carbonate. The said solution was applied on the tainted notes and the same was kept in a shirt pocket of the complainant. The complainant and panchas were instructed. As per instructions, the complainant was asked not to hand over

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the amount unless it is demanded. Pancha No.1 was instructed to remain along with the complainant and observe events took place between the complainant and the accused. Whereas, accused No.2 was asked to remain with other raiding party members. Accordingly, pre-trap panchanama was drawn.

4. After the pre-trap panchanama, the complainant, panchas, and other raiding party members proceeded towards the office of the accused. The complainant and pancha No.1 met the accused and after some time, they along with the accused went to a Tea Stall and, thereafter, the complainant gave a predetermined signal to raiding party members on which the accused was caught. The hand wash of the complainant and the accused was collected. After completion of investigation and obtaining a sanction, chargesheet was filed against the accused.

5. To substantiate contentions, the prosecution examined in all four witnesses namely Nandkumar

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Shivnarayan Shahu vide Exhibit-20 (PW1), the Sanctioning Authority; Anil Madhav Deshpande vide Exhibit-25 (PW2), the Shadow Pancha; Pradipkumar Choudhary vide Exhibit-33 (PW3), the Complainant; and Satish Joshi vide Exhibit-34 (PW4), the Trap Officer.

6. Besides the oral evidence, the prosecution further relied upon Sanction Order Exhibit-21, office order Exhibit-22, pre-trap panchanama Exhibit-26, seizure memo Exhibit-27, post-trap panchanama Exhibit-29, First Information Report Exhibit-35, seizure memo Exhibit-27, and map Exhibit-28,

7. After considering the evidence adduced during the trial, learned Judge of the Special Court held that the sanction accorded to prosecute the accused is not valid sanction as Sanctioning Authority PW1 Nandkumar Shahu is not competent person to accord the sanction and acquitted the accused though offences under Sections 7 and 13(1)(d) read with 13(2) of the PC Act are proved against the accused.

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8. Being aggrieved and dissatisfied with the same, the present appeal is preferred.

9. Heard learned counsel Mrs.Mugdha Chandurkar for the CBI and learned counsel Shri R.M.Patwardhan for the accused.

10. Learned counsel for the CBI submitted that observation of learned Judge of the Special Court, that the sanction accorded to prosecute the accused is not by competent person, is itself erroneous. She submitted that learned Judge of the Special Court observed that Sanctioning Authority PW1 Nandkumar Shahu has not considered that the accused was appointed as Stenographer and the Regional Labour Commissioner (RLC) is the post of Administrator and Controlling Authority at the station. The accused was appointed and transferred to the post of Stenographer. Thus, PW1 Nandkumar Shahu is not the Sanctioning Authority and there is no evidence that powers are delegated to him to accord the sanction. She submitted that it is observed

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by learned Judge of the Special Court that the accused was appointed as Stenographer as per the office order issued by under Secretary and was working in the office of the RLC. Thus, PW1 Nandkumar Shahu was not the Competent Authority to grant the sanction to prosecute the accused. As the sanction is not accorded by the Competent Authority, the accused was acquitted. To substantiate her contentions, she placed reliance on Exhibit-22 the office order and submitted that if the said office order is perused, it would show that upon qualifying test held by the office of the RLC at Nagpur, the accused who was working in the office of the RLC at Vijaywada, Hyderabad Region, was appointed and transferred as Stenographer in regular basis in the Pay Scale of Rs.1200-30-1560-EB-40-2040 w.e.f. the date of his joining duties in the office of the RLC at Nagpur. She submitted that as the said office order was issued by the under Secretary, learned Judge of the Special Court held that the under Secretary is the appointing and removing authority. In support of her contentions, she placed

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reliance on provisions of the Departmental Manual (the DM) of the Chief Labour Commissioner and submitted that in view of Rule 19(2) of the said DM for Group-C and D, the RLC is the Appointing Authority. She submitted that though this fact was brought to the notice of learned Judge of the Special Court, the said learned Judge has not considered the same.

11. Learned counsel for the CBI further invited my attention towards heading of filling of vacancies and submitted that as per the Schedule, appointing authorities for various cadres are determined and as per the Department Manual, all other posts other than Office Superintendent in the office of the RLC, the RLC is the appointing authority. She also invited my attention towards Chapter-6 of the said manual which deals with Conduct and Discipline and submitted that in view of point No.6.4.(iii), under Rule 10(1) of the Central Civil Services Rules (CCS Rules), following are authorities competent to place a government servant under suspension and it states that RLC is the competent

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authority to take departmental action of suspension against the Group-C employee. Thus, she submitted that in view of the Central Civil Services Rules, department manual, Sanctioning Authority PW1 Nandkumar Shahu, who was serving as the RLC at the relevant time, was the Competent Authority who accorded the sanction. She further submitted that even accepting contention that Sanctioning Authority PW1 Nandkumar Shahu is not competent person to accord the sanction, the accused cannot be acquitted on the sole ground of absence of valid sanction in view of bar under Section 19(3)(a) of the PC Act which states that no order of sanction and sentence can be reversed or altered even on the ground of absence of sanction unless a "failure of justice" has been occasioned thereby. She submitted that a reading of the said Section makes it clear that error, omission or irregularity in proceedings held before or during the trial or in any enquiry were reckoned by legislature as possible occurrences in criminal courts and, therefore, prohibition is imposed that such error, omission or

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irregularity has occasioned "a failure of justice" the superior court shall not quash the proceedings merely on the ground of such error, omission or irregularity. She submitted that learned Judge of the Special Court has given finding that as far as offences under Sections 7 and 13(1)(d) of the PC Act are concerned, the same are held to be proved. Thus, merely on the ground of sanction, learned Judge of the Special Court acquitted the accused which is erroneous.

12. *Per contra*, learned counsel for the accused submitted that learned Judge of the Special Court considered that Sanctioning Authority PW1 Nandkumar Shahu was not Competent Authority to accord the sanction. Not only the competency but also learned Judge of the Special Court held that the sanction granted is without application of mind. He submitted that the accused was appointed by the order of the under Secretary and learned Judge of the Special Court considered Exhibit-22 and, therefore, the judgment impugned in the appeal is legal and correct one.

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13. During hearing of the appeal, learned counsel for the accused filed on record an application under Section 391 of the Code of Criminal Procedure for adducing additional evidence on the ground that during the course of hearing of the appeal, learned counsel who was appearing for the accused earlier sought time to prove the Civil Services Rules to show that RLC at Nagpur is the Competent Authority for appointing candidates. The category specified in the Rules covers post of Stenographers. However, it is pertinent to note that the accused was working as Lower Division Clerk in the office of the RLC at Hyderabad Region at the relevant time and after passing of the examination for the post of Stenographer, he was appointed and posted at Nagpur by virtue of Exhibit-22 which is the order issued by the under Secretary. He further submitted that during the trial, one communication issued by the RLC (Central) to the RLC at Hyderabad Region is relevant, which shows that the RLC at Nagpur is not Competent Authority to accord the sanction. Being the said communication was

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issued, the accused be permitted to adduce additional evidence by producing relevant documents on record. He further submitted that learned Judge of the Special Court rightly considered that Sanctioning Authority PW1 Nandkumar Shahu admitted that offices like RLC and ALC fall under the Ministry of Labours. The appointment order is issued by the under Secretary and from the evidence of the Sanctioning Authority and Trap Officer PW4 Satish Joshi, nothing came on record that the accused was appointed by the Head of the Department. No evidence is adduced as to who is the Head of the Department. There is no evidence as to delegation of powers of Appointing Authority for the post of Stenographers in Group-C and held that there was no valid sanction and acquitted the accused.

14. In support of his contentions, learned counsel for the accused placed reliance on following decisions:

1. The State of Maharashtra vs. Ajay Ratansingh Parmar¹ and

¹ 2022 ALL MR (Cri) 2140

2. The State of Maharashtra vs. Vithal Sajan Ahire².

On the point of additional evidence, he placed reliance on the decision in the case of:

Mrs.Maria Felicidade Amaltina Mascarenhas and ors vs. Shri Joao Francisco Serrao and anr³.

15. After considering submissions made by learned counsel for the CBI and learned counsel for the accused, issue raised is that the accused is acquitted only on the ground that the sanction obtained by the prosecution was not valid.

16. Thus, validity of the sanction has been raised in the present appeal.

17. Learned counsel for the CBI submitted that acquittal of the accused on the ground of invalid sanction itself is erroneous. Learned Judge of the Special Court could not have acquitted the accused only on the ground

² 2024 ALL MR (Cri) 1782

³ 2022(1) ALL MR 652

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of the alleged invalid sanction. She invited my attention to evidence of Sanctioning Authority PW1 Nandkumar Shahu and submitted that the Sanctioning Authority accorded the sanction after application of mind.

18. Perusal of the evidence of Sanctioning Authority PW1 Nandkumar Shahu shows that he was serving as the Welfare Commissioner and at the time of the alleged incident, he was working as the RLC at Nagpur and holding jurisdiction all over Vidarbha and Marathwada Regions. Three ALCs and four Labour Enforcement Officers were his subordinates. Two posts of the ALCs were at Nagpur and one post of the ALC Assistant Labour Commissioner was at Chandrapur. During his tenure, in second week of April 1994, Shri A.P.Zade was holding the charge of the post of Shri M.T.Rughani as the ALC in addition to his own charge. Post of stenographer in the office of the RLC at Nagpur was non-gazetted post of Group-C. The RLC was the Competent Authority for appointment and termination of the post of Stenographer. The accused was working as

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Stenographer in his office. He accorded the sanction for prosecution of the accused. Before according the sanction, he perused the entire documents and came to conclusion that sufficient material is available to accord the sanction and he accorded the sanction.

19. During the cross examination of Sanctioning Authority PW1 Nandkumar Shahu, it was brought on record that the RLC is the post of Administration and Controlling Authority. Two Stenographers were working in the office. It was admitted that appointment of officers i.e. the RLC and the ALC are being made by the Ministry of Labour. He denied that the appointment of the Stenographers are to be made by the Ministry of Labour under the signature of the under Secretary. He specifically stated that he had no occasion to see documents making appointment and posting of the accused as Stenographer at Nagpur.

Thus, an attempt was made to show that PW1 Nandkumar Shahu is not appointing or removing

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authority of the accused and, therefore, the sanction accorded by him is not a valid sanction.

20. Perusal of the Sanction Order shows that Sanctioning Authority PW1 Nandkumar Shahu specifically mentioned that he being the Competent Authority, after fully and carefully examining material placed before him, accorded the sanction.

21. Whether sanction is valid or not and when it can be called as valid, the same is settled by various decisions of the Honourable Apex Court as well as this court.

22. The Honourable Apex in the case of **Mohd.Iqbal Ahmad vs. State of Andhra Pradesh**⁴ has held that what the Court has to see is whether or not the sanctioning authority at the time of giving the sanction was aware of the facts constituting the offence and applied its mind for the same and any subsequent fact coming into existence after the resolution had been

4 1979 AIR 677

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passed is wholly irrelevant. The grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to government servants against frivolous prosecutions and must therefore be strictly complied with before any prosecution can be launched against the public servant concerned.

23. The Honourable Apex Court, in another decision, in the case of **CBI vs. Ashok Kumar Agrawal**⁵, has held that sanction lifts the bar for prosecution and, therefore, it is not an acrimonious exercise but a solemn and sacrosanct act which affords protection to the government servant against frivolous prosecution. 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. The prosecution must send the entire relevant record to the sanctioning authority including the FIR, disclosure statements, statements of witnesses, recovery memos,

5 2014 Cri.L.J.930

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draft charge sheet and all other relevant material. It has been further held by the Honourable Apex Court that 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. 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. 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. 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. In every individual case, the prosecution has to establish and satisfy the court by leading evidence that the entire relevant facts had been

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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.

24. The Honourable Apex Court, in the case of **State of Karnataka vs. Ameerjan**⁶, held that it is true that an order of sanction should not be construed in a pedantic manner. But, it is also well settled that the purpose for which an order of sanction is required to be passed should always be borne in mind. Ordinarily, the sanctioning authority is the best person to judge as to whether the public servant concerned should receive the protection under the Act by refusing to accord sanction for his prosecution or not. For the aforementioned purpose, indisputably, application of mind on the part of the sanctioning authority is imperative. The order granting sanction must be demonstrative of the fact that there had been proper application of mind on the part of the sanctioning authority.

6 (2007)11 SCC 273

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25. Perusal of the evidence and findings recorded by learned Judge of the Special Court shows that learned Judge of the Special Court held that Sanctioning Authority PW1 Nandkumar Shahu is not competent person and, therefore, the sanction accorded by him is not a valid sanction. Though reliance was placed on CCS and CCA Rules, the same were not considered by learned Judge of the Special Court and held that no evidence is adduced about delegation of powers of Appointing Authority for the post of Stenographer.

26. The entire issue revolves around the office order issued by the under Secretary. The said order shows that the RLC at Vijaywada, Hyderabad Region, was requested to relieve the accused of his duties and asked to report duty to RLC at Nagpur. As far as initial appointment of the accused is concerned, no evidence is adduced. The entire reliance is placed on provisions of Manual. In view of Rule 19(2) and Schedule thereunder, it shows that for Group-C and Group-D, the Appointing Authority is the Head of the Department. Exhibit-22, the Office Order,

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would show that upon qualifying test held by the office of the RLC at Nagpur, the accused working in the office of the RLC at Vijaywada, Hyderabad Region, was appointed and transferred as Stenographer. Learned Judge of the Special Court held that the under Secretary is the Appointing and Removing Authority. As per Schedule, Appointing Authority for Group-C and Group-D is the RLC. Chapter-6 of the DM, deals with Conduct and Discipline and submitted that in view of clause 6.4(iii), it deals with Rule 10(1) of the CCS Rules which states that the RLC is the Competent Authority to take departmental action of suspension against Group-C employees.

27. Thus, in view of CCS Rules and the DM, Sanctioning Authority PW1 Nandkumar Shahu serving as the RLC at the relevant time was the Competent Authority who accorded the sanction.

28. Besides CCS Rules, under Section 19(3)(a) of the P.C. Act, there is a bar which states that no finding, sentence or order passed by a special Judge shall be

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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, the sanction required under sub-section (1), unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby. Unless failure of justice has been occasioned by such error, omission or irregularity in sanction, order of conviction cannot be interfered with. The object behind the requirement of grant of sanction to prosecute a public servant need not detain the court save and except to reiterate that the provisions in this regard either under the Code or the P.C. Act designed as a check on frivolous, mischievous and unscrupulous attempts to prosecute a honest public servant for acts arising out of due discharge of duty and also to enable him to efficiently perform his duties cast on him by virtue of his office.

29. A combined reading of sub-sections (3) and (4) of Section 19 of the said P.C. Act makes position clear that notwithstanding anything contained in the Code no finding, sentence and order passed by a Special Judge

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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 the sanction required under sub-section (1), unless in the opinion of that court a failure of justice has in fact been occasioned thereby.

Sub section (4) states that in determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings. Explanation thereto further provides that for the purpose of Section 19, error includes “competency of the authority to grant sanction”.

30. Thus, it is clear from language employed in sub-section (3) of Section 19 that the said sub-section has application to the proceedings before the Court in appeal, confirmation or revision, and not to the

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proceedings before the Special Judge. The said sub-section (3) clearly forbids the court in appeal, confirmation or revision, the interference with the order passed by the Special Judge on the ground that the sanction was bad.

31. Section 19(4) of the P.C.Act:

Explanation. - For the purposes of this section,-

(a) error includes competency of the authority to grant sanction;

(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature.

32. Considering the legal position informed in sub-section (3) of Section 19 and the Explanation, the term “Error” includes competency of the authority to grant sanction. Hence, such competency to grant sanction would not be open to be questioned. That apart, it was

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for the accused to demonstrate what prejudice he has suffered by such inappropriate action.

33. The Honourable Apex Court in the case of **Nanjappa vs. State of Karnataka**⁷ dealt with intricacies of Section 19(1) as also Section 19(3) and 19(4) of the P.C. Act as to at what stage the question of validity of sanction accorded under Section 19(1) of the P.C. Act could be raised, and what are the powers of the court in appeal, confirmation or revision under subsection (3) of Section 19 of the P.C. Act. It is observed that the legal position regarding the importance of sanction under Section 19 of the Prevention of Corruption Act 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

7 ((2015) 14 SCC 186

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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 the 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.

34. Thus, learned Judge of the Special Court has to consider whether any failure of justice has been occasioned on account of such error, omission or irregularity.

35. The Honourable Apex Court in the case of **Shamnsaheb M.Multtani vs. State of Karnataka**⁸ observed that we often heard about 'failure of justice' and quite often the submission in a criminal court is accentuated with the said expression. Perhaps it is too

⁸ (2001)2 SCC 577

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pliable or facile an expression which could be fitted in any situation of a case. The expression 'failure of justice' would appear, sometimes, as an etymological chameleon (the simile is borrowed from Lord Diplock in *Town Investments Ltd. v. Deptt. of the Environment* [(1977) 1 All ER 813 : 1978 AC 359 : (1977) 2 WLR 450 (HL)]). The criminal court, particularly the superior court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage.

36. Here, in the present case, learned Judge of the Special Court acquitted the accused only on the ground of the alleged invalid sanction when the entire evidence sufficiently proved that the accused demanded and accepted the amount towards illegal gratification.

37. A plain reading of Section 19(1) leaves no manner of doubt that the same is couched in mandatory terms and forbids courts from taking cognizance of any offence punishable under Sections 7, 10, 11, 13, and 15

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against public servants except with the previous sanction of the competent authority enumerated in clauses (a), (b) and (c) to sub-section (1) of Section 19. The provision contained in sub-section (1) would operate in absolute terms which says that no Court can take cognizance of the offences in question without a legal sanction. Thus, no Court can be said to be a Court of competent jurisdiction to try those offences and that any trial in the absence of such sanction must be null and void. There is always distinction between a valid institution of a prosecution and the competence of the court to hear and determine the prosecution.

38. What is important is that, not only grant of valid sanction held to be essential for taking cognizance by the Court, but also the question about the validity of such sanction could be raised at the stage of final arguments after the trial or even at the appellate stage. Grant of proper sanction by a Competent Authority is a *sine qua non* for taking cognizance of the offence. It is desirable that the question as regards sanction may be

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determined at an early stage. When question regarding validity of sanction is raised, merely because there is any omission, error or irregularity in the matter of according sanction that does not affect the validity of the proceeding unless the court records the satisfaction that such error, omission or irregularity has resulted in failure of justice.

39. The order of the sanction is prerequisite as it is intended to provide a safeguard to a public servant against vexatious litigation, but it should not be construed in a pedantic manner with a hyper-technical approach to test its validity.

40. Insofar as the present case is concerned, it was never raised that due to the erroneous sanction, any prejudice is caused to the accused. The question as to whether the sanction for prosecuting the accused was valid or not and prejudice caused to the accused by the said invalid sanction, was never raised before the trial court.

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41. Learned counsel for the CBI rightly placed reliance on the decision of the Honourable Apex Court in the case of **P.I.Babu vs. CBI**⁹ wherein it is held that the Special Court has committed an error acquitting accused only on the ground of alleged invalid sanction.

In the case of **Central Bureau Investigation vs. V.K.Sehgal and anr**¹⁰ also the Honourable Apex Court had considered aspect as to validity of sanction and observed that in a case where accused failed to raise question of valid sanction, the trial would normally proceed to its logical end by making judicial scrutiny of the entire case law. If that case ends in conviction there is no question of failure of justice on the mere premise that no valid sanction was accorded for prosecuting the public servant, because the very purpose of providing such a filtering check is to safeguard public servants from frivolous or mala fide or vindictive prosecution on the allegation that they have committed offence in the discharge of their official duties.

9 Criminal Appeal No.1864/2013 decided on 18.1.2024.

10 (1999)8 SCC 501

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In the case of **State of Madhya Pradesh vs. Virender Kumar Tripathi**¹¹ also the Honourable Apex Court held that as far as defect in sanction aspect is concerned, there was not even a whisper or pleading about any failure of justice and when no prejudice is caused to the accused, the High Court's view quashing the proceedings cannot be sustained.

In the case of **State of Bihar and ors vs. Rajmangal Ram**¹² also the Honourable Apex Court held that error, omission or irregularity in sanction order including error of jurisdiction of grant of sanction, court's power to interdict a criminal proceeding is not available. It is held that unless court reaches to conclusion that a failure of justice has been occasioned by such error, omission or irregularity in sanction, order passed interdicting criminal proceedings against the respondent public servants on ground that Law Department was not Competent Authority to accord sanction held not sustainable.

¹¹ (2009)15 SCC 553

¹² (2014)11 SCC 388

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42. Thus, when any error, omission or irregularity in the sanction including competency of the authority to grant sanction does not vitiate the eventual conclusion unless a failure of justice has occurred, merely because there is any omission, error or irregularity in the matter of according sanction, that does not affect the validity of the proceeding unless the court records the satisfaction that such error, omission or irregularity has resulted in failure of justice.

43. In the instant case, admittedly, from the judgment impugned in the appeal, it reveals that the accused has not raised a ground that due to error, omission or irregularity and the sanction accorded by the incompetent person, any prejudice is caused to the accused.

44. Thus, unless and until any prejudice is caused to the accused, due to the error, omission or irregularity, the validity of sanction cannot be affected.

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45. Learned counsel for the accused filed the application for adducing additional evidence on ground that essential communication dated 8.12.1989 was not produced before learned Judge of the Special Court to show that RLC at Nagpur was not the Competent Authority. The document Exhibit-22 is the similar document issued under the signature of the under Secretary. By this letter, the under Secretary requested RLC at Hyderabad Region to relieve the accused. The similar request is made by the RLC at Nagpur to RLC at Hyderabad Region stating that the accused is qualified in the Departmental Examination of Stenographer and his appointment from 1.11.1989 is at Nagpur. His appointment will be with effect from the date of his joining at RLC at Nagpur. The document is produced by filing the application under Section 391 of the Code. The said Section deals with Appellate Court's power to receive additional evidence. Section 391 forms an exception to the general rule that an appeal must be decided on the evidence which was before the trial court

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and the powers being an exception shall always have to be exercised with caution and circumspection so as to meet the ends of justice. Be it noted further that the doctrine of finality of judicial proceedings does not stand annulled or affected in any way by reason of exercise of power under Section 391. It is not to fill up the lacuna but to subserve the ends of justice. Section 391 is thus akin to Order 41 Rule 27 of the Civil Procedure Code. The power to record additional evidence under the said Section should only be exercised when the party making such request was prevented from presenting the evidence in the trial despite due diligence being exercised or that the facts giving rise to such prayer came to light at a later stage during pendency of the appeal and that non- recording of such evidence may lead to failure of justice. The proposition of taking additional evidence in a criminal appeal cannot be adopted as a matter of course by the Appellate Court and in fact, the occasion for the Appellate Court to take a considered decision on the prayer for adducing

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additional evidence in appeal could arrive only after the appeal itself has been heard on merits and not before. The key words in Section 391(1) are "if it thinks additional evidence to be necessary". The word "necessary" used in Section 391(1) is to mean necessary for deciding the appeal. The powers of Appellate Court are contained in Section 386 of the Code. Power to take additional evidence under Section 391 is, thus, with an object to appropriately decide the appeal by the Appellate Court to secure ends of justice.

46. The Appellate Court's powers to receive additional evidence under Section 391 of the Code are powers being in the nature of an exception shall always have to be exercised with caution and circumspection so as to meet the ends of justice. Though under provisions of the said Section a wide discretion has been conferred, the powers could not be exercised for filling up any lacunae and the Appellate Court while directing taking of additional evidence was required to record reasons for the same. The powers were held to be in the nature of

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exception to the general rule and it was stated that the same must be exercised with great care. It is, therefore, seen that the powers under Section 391 to take additional evidence by the appellate court are of a discretionary nature and are to be exercised sparingly and only in suitable cases. In view thereof, additional evidence cannot be tendered at the appellate stage as a matter of right and the power to be exercised by the appellate court is to be based on discretion, sound judicial principles and in the interest of justice. The discretion is to be exercised in suitable cases.

47. In the case in hand, learned counsel for the accused filed on record the document to show that the RLC is not Competent Authority. The similar nature of communication is already at Exhibit-22. Moreover, he has not placed any circumstances to show that parties seeking to produce additional evidence, after due exercise of diligence, the document was not within his knowledge and could not be produced the same. It was also not established that in absence of the said

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document, the court cannot come to conclusion or decide the matter.

48. Thus, no material is produced on record to show that in absence of this document, the Appellate Court is not in a position to dispose of the appeal and, therefore, the application for producing the additional evidence deserves to be rejected.

49. Learned counsel for the CBI submitted that merely on the basis of any error, omission or incompetency in the Sanction Order, learned Judge of the Special Court cannot acquit the accused, hence case be remanded for deciding issue as to validity of sanction. Section 386 of the Code deals with powers of the Appellate Court.

50. The Honourable Apex Court in the case **Issac alias Kishore vs. Ronald Cheriyan and ors**¹³ has dealt with when powers can be exercised and observed that under Section 386(a) and (b)(i), the power to direct retrial has been conferred upon the Appellate Court when

¹³ (2018)2 SCC 278

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it deals either with an appeal against judgment of conviction or an appeal against acquittal (High Court). There is a difference between the powers of an Appellate Court under Clauses (a) and (b). Under Clause (b), the Court is required to touch the finding and sentence, but under Clause (a), the Court may reverse the order of acquittal and direct that further enquiry be made or the accused may be retried or may find him guilty and pass sentence on him according to law. Normally, retrial should not be ordered when there is some infirmity rendering the trial defective. A retrial may be ordered when the original trial has not been conducted satisfactorily for particular reasons like, appropriate charge not framed, evidence wrongly rejected which could have been admitted or evidence admitted which could have been rejected etc. Retrial cannot be ordered when there is a mere irregularity or where it does not cause any prejudice, the Appellate Court may not direct retrial. The power to order retrial should be exercised only in exceptional cases.

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51. In the light of the above well settled legal position, it is required to see whether retrial can be directed in the present case.

52. In view of the settled principles of law, it is crystal clear that the Sanctioning Authority has to apply his/her own independent mind for generation of his/her satisfaction for sanction and purpose for which an order of sanction is required to be passed should always be borne in mind. It is also well settled that merely because there is some omission, error or irregularity in the sanction order, criminal proceedings cannot be thrown out unless some prejudice is caused to accused or failure of justice had been occasioned by such error. As already observed, no such issue is raised before the Special Court that due to the error, omission or irregularity, as sanction is accorded by the incompetent person, any such prejudice is caused to the accused. Learned Judge of the Special court has not considered the evidence and wrongly rejected the evidence of the Sanctioning Authority. Learned Judge of the Special Court ought to

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have considered the evidence as regards, whether the Sanctioning Authority has applied his mind. Merely on the basis of incompetency of the authority, the sanction accorded held to be invalid which is an erroneous observation and, therefore, the power under Section 386(b) of the Code is to be exercised and the matter is to be remitted back to learned Judge of the Special Court to reconsider the issue, whether the sanction accorded is valid or not by considering an aspect whether any prejudice is caused to the accused as the sanction was accorded by the incompetent person. Learned Judge of the Special Court to consider whether the Sanctioning Authority was incompetent to accord the sanction.

53. Under these circumstances, the judgment impugned passed by learned Judge of the Special Court is hereby quashed and set aside and the matter is remanded back to learned Judge of the Special Court with a direction to decide the issue of sanction afresh on merits and record its findings on the issue of the sanction. The case shall be decided by learned Judge of

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the Special Court expeditiously and preferably within a period of six months from the date of receipt of copy of this judgment. Learned Judge of the Special Court shall give an opportunity to both parties to adduce an evidence on the issue of the sanction, if required. The parties shall cooperate with the Special Court to dispose of the matter, at the earliest.

Appeal stands **disposed of**.

Criminal Application No.741/2024 also stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!

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