IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.831 OF 2023

Padmakar Narhar Deshpande ....Applicant

: Versus :

Central Bureau of Investigation,
Anticorruption Branch, Pune and Anr. ....Respondents

WITH
CRIMINAL APPLICATION NO.559 OF 2023

Padmakar Narhar Deshpande ....Applicant

: Versus :

The State of Maharashtra and Anr. ....Respondents

Mr. Adwait Bhonde with Mr. Ameya Dange and Mr. Vishal Pande, *for the Applicant.*

Mr. Kuldeep S. Patil with Mr. Ashish Kumar Srivastava, *for Respondent-CBI*

CORAM : SANDEEP V. MARNE, J.

DATED : 3 July 2024.

JUDGMENT :-

1) These two Criminal Applications are filed by the Applicant challenging the Order dated 27 January 2023 passed on application at Exhibit-84 and Order dated 12 December 2022 passed on application at Exhibit-118 seeking discharge in Special Case No.387 of 2020 and Special Case No.15 of 2019 respectively.

2) The issue involved in the present Applications is about entitlement of an accused to seek discharge on the ground of incompetency of the officer granting sanction for prosecution. According to Applicant, the crime alleged against him is referrable to his capacity as General Manager, (TEGS VII) for whom the Competent Authority for sanction of prosecution is Chairman and Managing Director and in his absence, the Executive Director. That his demoted designation of Assistant General Manager (SMGS V) has erroneously been taken into consideration for issuance of sanction by General Manager (HRM) HO, who is not the competent sanctioning authority.

3) Briefly stated, facts of the case are that Applicant joined Bank of Maharashtra on the post of Clerk and got promoted to various positions. He was working on the post of General Manager, which is Scale Grade VII level lost, during the relevant period of 2012 to 2014. In departmental proceedings, he was found guilty of misconduct relating to sanctioning of credit proposals during the years 2012 to 2014 and by order dated 1 December 2018, he came to be reverted from Top Executive Grade Scale VII (**TEGS-VII**), which is equivalent to the post of General Manager to the post of Senior Manager Grade Scale V (**SMGS-V**), which is equivalent to the post of Assistant

General Manager, by fixing him at initial basic pay. Applicant has retired from service on attaining the age of superannuation on 31 January 2019.

4) Applicant has been arraigned as accused No.4 in Special Case No.387 of 2020 registered in CBI Court, Pune for offences punishable under Sections 120-B, r/w 409 and 420 of the IPC and Sections 13(2) and 13(1)(b) of the Prevention of Corruption Act, 1988 (**Act of 1988**). He is also arraigned as accused No.8 in Special Case No. (ACB) No.15 of 2019 registered with CBI Court, Pune for offences punishable under Sections 120-B r/w 420, 465, 468 and 471 of the IPC and Sections 13(2) r/w 13(1)(d) of Act of 1988.

5) General Manager (HRM), Head Office has issued sanction orders dated 6 March 2019 and 17 March 2020 under Section 19(1)(c) of the Act of 1988 for Applicant's prosecution in connection with both the cases. The Central Bureau of Investigations (**CBI**) has filed charge-sheets dated 30 March 2019 under Section 173 of the Code of Criminal Procedure, 1973 (the **Code**) in Special Case (ACB) No.15 of 2019 and on 25 June 2020 in Special Case No.387 of 2020.

6) In the above background, Applicant filed application at Exhibit-118 in Special Case (ACB) No.15 of 2019 seeking his discharge under the provisions of Section 227 of the Code. Similarly, the application was filed seeking discharge in Special Case No.387 of 2020. The Applicant sought discharge from both the cases essentially on the ground that the sanction for prosecution has not been given by the competent authority.

7) The discharge application filed in Special Case (ACB) No.15 of 2019 at Exhibit-118 has been rejected by the learned Special Judge, CBI by order dated 12 December 2022. Similarly, the discharge application filed at Exhibit-84 in Special Case No.387 of 2020 has been rejected by the learned Special Judge, CBI by order dated 27 January 2023. Both the orders are subject matter of challenge in the present Criminal Applications filed under the provisions of Section 482 of the Code.

8) Mr. Adwait Bhonde, the learned counsel appearing for Applicant would submit that the learned Special Judge has erred in rejecting the applications filed by the Applicant for discharge under Section 227 of the Code. That prosecution for offences punishable under the provisions of Act of 1988 requires a valid order of sanction for prosecution under provisions of Section 19 thereof. That under Section 19(1)(c), only the authority competent to remove a public servant from office can issue prosecution sanction. That the office occupied by the public servant at the time of commission of crime is relevant for the purpose determining competency of authority to issue prosecution sanction. That Petitioner occupied office of General Manager (TEGS-VII) during the years 2012 to 2014, when the crime is alleged to have been committed. That as per the amended Schedule of Competent Authorities issued by the Bank vide letter dated 15 April 2015, Chairman and Managing Director or in his absence, the Executive Director is the Competent Authority for sanction of prosecution for Executives in Scale VII. That Applicant's demotion to the post of the Scale V by subsequent order dated 1 December 2018 is irrelevant for the purpose of determining competency of authority for issuance of prosecution sanction. He would

submit that under the provisions of Section 19(1)(c), the emphasis is on the word *'office'* and that the office occupied by the public servant at the time of commission of alleged crime is relevant for the purpose of determining competency of authority for issuance of prosecution sanction. Relying on judgment of the Apex Court in ***R.S Nayak and Ors. V/s. A.R. Antulay and Ors.***[1], Mr. Bhonde would submit that the Apex Court has emphasised on the word *'office'* occupied by the public servant, which is relevant for issuance of prosecution sanction. Mr. Bhonde would further submit that when there is defect in the prosecution sanction, the Court is empowered to pass an order of discharge before the prosecution can be taken to trial. That sanction order if found to be invalid, the entire prosecution becomes illegal and without jurisdiction and must be interdicted in exercise of jurisdiction under Section 227 of the Code. That invalid sanction for prosecution results in a fundamental error invalidating cognizance and rendering it without jurisdiction. He would rely on judgment of the Apex Court in ***State of Goa V/s. Babu Thomas***[2] Relying on judgment of the Apex Court in ***Nanjappa V/s. State of Karnataka***[3], Mr. Bhonde would submit that the issue about proper sanction must be dealt with at the stage of taking cognizance. He would also rely upon judgment of the Apex Court in ***State Inspector of Police, Vishakhapatnam V/s. Surya Sankaram Karri***[4] in support of his contention that the question relating to validity of sanction must be determined at early stage. Mr. Bhonde would also rely upon judgment of this Court in ***Sunil Achyutrao Thete V/s. The State of Maharashtra***[5] to

[1] AIR 1984 SC 684
[2] (2005) 8 SCC 130
[3] (2015) 14 SCC 186
[4] (2006) 7 SCC 172
[5] Criminal Revision Application No.5 of 2020 decided on 20 October 2023.

demonstrate that validity of sanction can be gone into while considering discharge application.

9) Mr. Bhonde would submit that since a demonstrable case of incompetency of authority to grant sanction is made out, the said issue can no longer be considered as triable issue and therefore ought to be decided at the stage of discharge. He would submit that even otherwise, the Applicant had retired from service from the date of issuance of prosecution sanction and the General Manager (HRM) HO otherwise did not have any authority over the Applicant to remove him from the office as on the date of grant of sanction. He would submit that since the sanction for prosecution is null and void, the criminal proceedings are liable to be quashed by directing discharge in both the cases.

10) *Per contra,* Mr. Kuldeep Patil, the learned counsel appearing for Respondent-CBI would oppose the applications submitting that the issue of competency of hierarchical officer to issue prosecution sanction is a triable issue and cannot be decided before the case is taken to trial. Relying on the judgment of this Court in ***Sushil Kumar V/s. Central Bureau of Investigation & Ors.***[6], Mr. Patil would contend that in similar circumstances, this Court has held that the issue of incompetency of authority cannot be decided before commencement of trial. He would rely upon judgment of the Apex Court in ***Dinesh Kumar V/s. Chairman, Airport Authority of India***[7] in support of his contention that the challenge to the competency of the authority can always be raised in the course of trial. He also relied upon

[6] Criminal Writ Petition No. 4050 of 2021 decided on 9 June 2023.

[7] (2012) 1 SCC 532

judgment of the Apex Court in ***State of Bihar and Ors. V/s. Rajmangal Ram***[8].

11) Without prejudice to his contention that competency of authority to issue prosecution sanction is a triable issue, Mr. Patil would further submit that the sanction has been granted in both the applications by the authority competent to remove the Applicant from office. That Respondent has retired from service on the post of Assistant General Manager, which is Scale-V post for whom the competent authority to sanction prosecution is the General Manager (HRM) HO. That the position occupied by the Applicant during the relevant time of commission of crime becomes irrelevant for the purpose of issuance of sanction under Section 19(1)(c) as the authority competent to remove him from office on the date of issuance of prosecution sanction was General Manager (HRM) HO. That therefore, the prosecution sanction issued in the present case is perfectly valid. Mr. Patil would pray for dismissal of both the applications.

12) Rival contentions of parties now fall for my consideration.

13) Orders passed by the Special Court rejecting the applications filed by the Applicant seeking discharge in respect of two Special Cases lodged against him are challenged in the present applications essentially on the ground that since the sanction for prosecution issued against the Applicant under the provisions of Section 19(1)(c) of the Act of 1988 is invalid, his discharge under Section 227 of the Code ought to have been granted. Therefore, the two issues that arise for determination are :

[8] AIR 2014 SC 1674

(I) Whether issue of competency of the authority to issue prosecution sanction and validity of such sanction needs to be decided at pre-trial stage in the facts and circumstances of the present case?

(II) Whether the General Manager (HRM), HO is the Competent Authority for issuing prosecution sanction for Applicant?

14) To answer the first issue, it would be necessary to consider provisions of Section 19 of the Act of 1988, which requires sanction for prosecution of a public servant. Section 19 provides thus:

> **19. Previous sanction necessary for prosecution.—**
> (1) No court shall take cognizance of an offence punishable under [sections 7, 11, 13 and 15] alleged to have been committed by a public servant, except with the previous sanction [save as otherwise provided in the Lokpal and Lokayuktas Act, 2013 (1 of 2014)]—
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> (a) in the case of a person [who is employed, or as the case may be, was at the time of commission of the alleged offence employed] in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;
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> (b) in the case of a person [who is employed, or as the case may be, was at the time of commission of the alleged offence employed] in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;
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> (c) in the case of any other person, of the authority competent to remove him from his office:
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> [Provided that no request can be made, by a person other than a police officer or an officer of an investigation agency or other law enforcement authority, to the appropriate Government or competent authority, as the case may be, for the previous sanction of such Government or authority for taking cognizance by the court of any of the offences specified in this sub-section, unless—
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> (i) such person has filed a complaint in a competent court about the alleged offences for which the public servant is sought to be prosecuted; and

(ii) the court has not dismissed the complaint under section 203 of the Code of Criminal Procedure, 1973 (2 of 1974) and directed the complainant to obtain the sanction for prosecution against the public servant for further proceeding:

Provided further that in the case of request from the person other than a police officer or an officer of an investigation agency or other law enforcement authority, the appropriate Government or competent authority shall not accord sanction to prosecute a public servant without providing an opportunity of being heard to the concerned public servant:

Provided also that the appropriate Government or any competent authority shall, after the receipt of the proposal requiring sanction for prosecution of a public servant under this sub-section, endeavour to convey the decision on such proposal within a period of three months from the date of its receipt:

Provided also that in case where, for the purpose of grant of sanction for prosecution, legal consultation is required, such period may, for the reasons to be recorded in writing, be extended by a further period of one month:

Provided also that the Central Government may, for the purpose of sanction for prosecution of a public servant, prescribe such guidelines as it considers necessary.

Explanation.—For the purposes of sub-section (1), the expression "public servant" includes such person—

(a) who has ceased to hold the office during which the offence is alleged to have been committed; or

(b) who has ceased to hold the office during which the offence is alleged to have been committed and is holding an office other than the office during which the offence is alleged to have been committed.]

(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) 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, the sanction required under sub-section

(1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

(4) 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.—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.

15) In the present case, clause (c) of sub-section (1) of Section 19 would be relevant since Applicant is not employed with Central or State Government. Therefore, the authority competent to remove him from office would be authority competent to grant prosecution sanction. Relying on sub-section (2) of Section 19, it is sought to be contended that the office occupied by Applicant at the time of commission of crime would be relevant and the authority competent to remove him from that office would be the one who can grant prosecution sanction. There is no dispute about the position that during the years 2012-14, when the crime is alleged to have been committed, Applicant worked as a Grade Scale -VII officer (General Manager) for whom the competent authority as per the amended Schedule of Competent Authorities issued by the Bank vide letter dated 15 April 2015 is the Chairman

and Managing Director or in his absence, the Executive Director. However Applicant is later reverted to the position of Grade Scale-V officer (Assistant General Manager) by order dated 1 December 2018, for which post the competent authority for issuance of prosecution sanction is General Manager (HRM) HO. The prosecution sanction in both the cases has been issued by the General Manager (HRM) HO, who according to Applicant, is incompetent to issue the same.

16) Provisions of sub-section (3) of Section 19 also need to be borne in mind under which, mere error, omission or irregularity in the grant of sanction does not affect any finding, sentence or order passed by a competent court unless in the opinion of the court, a failure of justice has been occasioned.

17) In the present case, prosecution sanction has been issued on 6 March 2019 and 17 March 2020 and CBI has filed charge-sheets dated 30 March 2019 under in Special Case (ACB) No.15 of 2019 and on 25 June 2020 in Special Case No.387 of 2020. Immediately after filing of the chargesheets, Applicant filed applications seeking his discharge on the ground of incompetency of authority to issue prosecution sanction. Therefore it would be necessary to consider the law on the subject with regard to permissibility to decide the issue of validity of prosecution sanction with reference to objection of competency of authority before commencement of the trial.

18) Mr. Bhonde has relied upon judgment of the Apex Court in ***State of Goa V/s. Babu Thomas*** (supra) in which it has held in paras-11 and 12 as under:

> 11. Referring to the aforesaid provisions, it is contended by learned counsel for the appellant that the Court should not, in appeal, reverse or alter any finding, sentence or order passed by a special Judge on the ground of the absence of any error, omission or irregularity in, the sanction required under sub-section (1), unless the Court finds a failure of justice has in fact been occasioned thereby. In this connection, a reference was made to the decision of this Court rendered in the case of *State v. T. Venkatesh Murthy.* Reference was also made to the decision of this Court in the case of *Durga Dass v. State of H.P.* where this Court has taken the view that the Court should not interfere in the finding or sentence or order passed by a special Judge and reverse or alter the same on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless the Court finds that a failure of justice has in fact been occasioned thereby. According to the counsel for the appellant no failure of justice has occasioned merely because there was an error, omission or irregularity in the sanction required because evidence is yet to start and in that view the High Court has not considered this aspect of the matter and it is a fit case to intervene by this Court. We are unable to accept this contention of the counsel. **The present is not the case where there has been mere irregularity, error or omission in the order of sanction as required under sub- section (1) of Section 19 of the Act. It goes to the root of the prosecution case. Sub-section (1) of Section 19 clearly prohibits that the Court shall not take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction as stated in clauses (a), (b) and (c)**.
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> 12. **As already noticed, the sanction order is not a mere irregularity, error or omission.** The first sanction order dated 2.1.95 was issued by an authority that was not a competent authority to have issued such order under the Rules. The second sanction order dated 7.9.97 was also issued by an authority, which was not competent to issue the same under the relevant rules, apart from the fact that the same was issued retrospectively w.e.f. 14.9.94, which is bad. The cognizance was taken by the Special Judge on 29.5.95. Therefore, when the Special Judge took cognizance on 29.5.95, there was no sanction order under the law authorising him to take cognizance**. This is a fundamental error which invalidates the cognizance as without jurisdiction.**
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> *(emphasis supplied)*

19) Mr. Bhonde reads the judgment in ***Babu Thomas*** to mean that if the prosecution sanction itself is invalid, the cognizance of offence becomes without jurisdiction and therefore such objection must be determined at the earliest so as to save wastage of time in conducting the trial unnecessarily. According to Mr. Bhonde, decision of such objection before commencement of the trial helps the prosecution as well as the prosecution can correct the error and get the sanction for prosecution issued by the Competent Authority in the event the ruling on competency is received before commencement of trial.

20) Mr. Bhonde has relied upon judgment of the Apex Court in ***Nanjappa V/s. State of Karnataka*** (supra) which arose out of challenge to the judgment and order of the High Court reversing the order of acquittal and convicting the Appellant therein. The Apex Court has held that grant of valid sanction is essential for taking cognizance by the Court. The Apex Court has held in paras-10 to 20 as under:

> **10. A plain reading of Section 19(1) (supra) 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 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 but for the presence of sub-section (3) to Section 19 to which we shall presently turn. But before we do so, we wish to emphasise that the language employed in sub-section (1) of Section 19 admits of no equivocation and operates as a complete and absolute bar to any court taking cognizance of any offence punishable under Sections 7, 10, 11, 13 and 15 of the Act against a public servant except with the previous sanction of the competent authority.

14. Relying upon *Yusofalli Mulla Noorbhoy v. R., Basdeo Agarwalla v. Emperor* and *Budha Mal v. State of Delhi*, it was held that the accused had neither been tried by a Court of competent jurisdiction nor was there any accusation or conviction in force within the meaning of Section 403 of Cr.P.C. to stand as a bar against their prosecution for the same offences. The following passage from the decision succinctly sums up the legal foundation for accepting the contention urged on behalf of the State of Bhopal: (*Baji Nath case,* AIR p.496, para 6)

> "6. … **If no Court can take cognizance of the offences in question without a legal sanction, it is obvious that 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**, and the sections of the Code on which learned counsel for the petitioners relied have really no bearing on the matter. Section 530 of the Code is really against the contention of learned counsel, for it states, inter alia, that if any Magistrate not being empowered by law to try an offender, tries him, then the proceedings shall be void. Section 529(e) is merely an exception in the matter of taking cognizance of an offence under Section 190, sub-section (1), clauses (a) and (b); it has no bearing in a case where sanction is necessary and no sanction in accordance with law has been obtained."

15. In *Yusofalli Mulla Noorbhoy* case (supra), the Privy Council was examining whether failure to obtain sanction affected the competence of the Court to try the accused. **The contention urged was that there was a distinction between a valid institution of a prosecution on the one hand and the competence of the Court to hear and determine the prosecution, on the other. Rejecting the contention that any such distinction existed, this Court observed**: (SCC OnLine PC)

> "The next contention was that the failure to obtain a sanction at the most prevented the valid institution of a prosecution, but did not affect the competency of the Court to hear and determine a prosecution which in fact was brought before it. This suggested distinction between the validity of the prosecution and the competence of the Court was pressed strenuously by Mr. Page, but seems to rest on no foundation. **A Court cannot be competent to hear and determine a prosecution the institution of which is prohibited by law and Section 14 prohibits the institution of a prosecution in the absence of a proper sanction.** The learned Magistrate was no doubt competent to decide whether he had jurisdiction to entertain the prosecution and for that purpose to determine whether a valid sanction had been given, but as soon as he

decided that no valid sanction had been given the Court became incompetent to proceed with the matter. Their Lordships agree with the view expressed by the Federal Court in *Agarwalla case* that a prosecution launched without a valid sanction is a nullity."

16. The Federal Court had in *Basdeo Agarwalla* case (supra), summed up the legal position regarding the effect of absence of a sanction in the following words: (SCC OnLine FC)

"**In our view the absence of sanction prior to the institution of the prosecution cannot be regarded as a mere technical defect.** The clause in question was obviously enacted for the purpose of protecting the citizen, and in order to give the Provincial Government in every case a proper opportunity of considering whether a prosecution should in the circumstances of each particular case be instituted at all. Such a clause, even when it may appear that a technical offence has been committed, enables the Provincial Government, if in a particular case it so thinks fit, to forbid any prosecution. The sanction is not intended to be and should not be an automatic formality and should not so be regarded either by police or officials. There may well be technical offences committed against the provisions of such an Order as that in question, in which the Provincial Government might have excellent reason for considering a prosecution undesirable or inexpedient. But this decision must be made before a prosecution is started. A sanction after a prosecution has been started is a very different thing. The fact that a citizen is brought into Court and charged with an offence may very seriously affect his reputation and a subsequent refusal of sanction to a prosecution cannot possibly undo the harm which may have been done by the initiation of the first stages of a prosecution. Moreover in our judgment the official by whom or on whose advice a sanction is given or refused may well take a different view if he considers the matter prior to any step being taken to that which he may take if he is asked to sanction a prosecution which has in fact already been started."

17. So also the decision of this Court in *Budha Mal v. State of Delhi*, this Court had clearly ruled that absence of a valid sanction affected the competence of the Court to try and punish the accused. This Court observed:

"We are satisfied that the learned Sessions Judge was right in the view he took. Section 403 CrPC applies to cases where the acquittal order has been made by a court of competent jurisdiction but it does not bar a retrial of the accused in cases where such an order has been made by a court which had no jurisdiction to take cognizance of the case. **It is quite apparent on this**

record that in the absence of a valid sanction the trial of the appellant in the first instance was by a Magistrate who had no jurisdiction to try him."

18. The above line of reasoning was followed by this Court in ***State of Goa v. Babu Thomas*** , where this Court while dealing with a case under Section 19 of the Prevention of Corruption Act, 1988 held that absence of a valid sanction under Section 19(1) went to the very root of the prosecution case having regard to the fact that the said provision prohibits any Court from taking cognizance of any offence punishable under Sections 7, 10, 13 and 15 against the public servant, except with the previous sanction granted by the competent authority in terms of clauses (a), (b) and (c) to Section 19(1). This Court was in that case dealing with a sanction order issued by an authority who was not competent to do so as is also the position in the case at hand. The second sanction order issued for prosecution of the accused in that case was also held to be incompetent apart from the fact that the same purported to be retrospective in its operation. This Court noted that on 29th March, 1995 when cognizance was taken by the Special Judge, there was no order sanctioning prosecution with the result that the Court was incompetent to take cognizance and that the error was so fundamental that it invalidated the proceedings conducted by the Court. The Court accordingly upheld the order passed by the High Court but reserved liberty to the competent authority to issue fresh orders having regard to the serious allegation made against the accused.

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, <u>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</u>. This Court observed: (*C. Nagarajaswamy* case, SCC p.375, paras 14-16)

> "14. **<u>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</u>**. 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, **<u>at the stage of final arguments after trial</u>**, 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 <u>may be determined at an early stage</u>**.

> 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."
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> *(emphasis and underling supplied)*

21) According to Mr. Bhonde, the judgment of the Apex Court in ***Nanjappa*** highlights the issue of issuance of proper sanction to be *sine qua non* for taking cognizance of the offence, in absence of which the Court has no jurisdiction to take cognizance. He would submit that the question as regards the sanction must therefore be determined at the earliest possible stage. Thus, according to Mr. Bhonde, the judgment of the Apex Court in ***Nanjappa*** must be read to mean that issuance of valid sanction for prosecution, being a jurisdictional fact thereby striking at the root of Court's power to take cognizance of offences under the Act of 1988, the issue of competence of authority to issue prosecution sanction must be determined at the earliest possible stage and discharge of the accused is eminent the moment it is demonstrated that the prosecution sanction has been issued by an incompetent authority.

22) Reliance is also placed by Mr. Bhonde on the judgment of the Apex Court in ***State Inspector of Police, Vishakapatnam V/s. Surya Sankaram Karri*** (supra) in which it has held in para-25 as under:

> 25. In *State of Karnataka v. C. Nagarajaswamy*, it was held : (SCC p.375, para 15)
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> "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."

23) On the other end of the spectrum are the two decisions of the Apex Court relied upon by Mr. Patil in support of his contention that the objection about validity of prosecution sanction must be determined during the course of the trial. He has relied upon judgment of the Apex Court in ***Dinesh Kumar*** (supra) in which the Division Bench of the Delhi High Court had held that it was open to the Appellant to question the validity of his sanction order during the trial on all possible counts. The Appellant, on the other hand, insisted that the objection with regard to validity of sanction must be decided at the first available opportunity and the Division Bench was not justified in relegating the Appellant to adopt the question of sanction order in the course of trial. The Apex Court, however did not agree with the contentions raised on behalf of the Appellant and held in paras-7, 9 and 10 as under:

> 7. This Court has in Mansukhlal Vithaldas Chauhan1 considered the significance and importance of sanction under the P.C. Act. It has been observed therein that the sanction is not intended to be, nor is an empty formality but a solemn and sacrosanct act which affords protection to government servants against frivolous prosecutions and it is a weapon to ensure discouragement of frivolous and vexatious prosecution and is a safeguard for the innocent but not a shield for the guilty. This Court highlighted that validity of a sanction order would depend upon the material placed before the sanctioning authority and the consideration of the material implies application of mind.
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> 9. **While drawing a distinction between the absence of sanction and invalidity of the sanction, this Court in Parkash Singh Badal expressed in no uncertain terms that the absence of sanction could be raised at the inception and threshold by an aggrieved person. However, where sanction order exists, but its legality and validity is put in question, such issue has to be raised in the course of trial.** Of course, in Parkash Singh Badal, this Court referred to invalidity of sanction on account of nonapplication of mind.
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> 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 <u>the order</u>**

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.

11. In a later decision, in Ameerjan, this Court had an occasion to consider the earlier decisions of this Court including the decision in Parkash Singh Badal. Ameerjan was a case where the trial Judge, on consideration of the entire evidence including the evidence of the sanctioning authority, held that the accused Ameerjan was guilty of commission of offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the PC Act. However, the High Court overturned the judgment of the trial court and held that the order of sanction was illegal and the judgment of conviction could not be sustained.

12. Dealing with the situation of the case wherein the High Court reversed the judgment of the conviction of the accused on the ground of invalidity of sanction order, with reference to Parkash Singh Badal, this Court stated in Ameerjan (2007) 11 SCC 273 in para 17 of the Report as follows: (SCC p. 280)

> "17. ***Parkash Singh Badal*** **therefore, is not an authority for the proposition that even when an order of sanction is held to be wholly invalid inter alia on the premise that the order is a nullity having been suffering from the vice of total non-application of mind**. We, therefore, are of the opinion that the said decision cannot be said to have any application in the instant case."

13. **In our view, having regard to the facts of the present case, now since cognizance has already been taken against the appellant by the trial Judge, the High Court cannot be said to have erred in leaving the question of validity of sanction open for consideration by the trial court and giving liberty to the appellant to raise the issue concerning validity of sanction order in the course of trial. Such course is in accord with the decision of this Court in Parkash Singh Badal and not unjustified.**

(emphasis supplied)

24) Thus, in ***Dinesh Kumar,*** the Apex Court has referred to its decision in ***Parkash Singh Badal Vs. State of Punjab***[9] in which distinction is drawn between cases involving absence of sanction and legality of sanction issues. The Court held that while the former objection has to be decided at the threshold, the latter on has to be raised and decided at the trial.

25) Mr. Patil has also placed reliance on the judgment in ***State of Bihar V/s. Rajmangal Ram*** in which the criminal proceedings were interdicted on the ground that the sanction of the prosecution was granted by the Law Department of the State and not by the parent department, to which the Respondents belonged. Allowing the Appeal and setting aside the order passed by the High Court, the Apex Court has held in paras-3, 4, 5, 7, 9 and 10 as under:

> 3. ….. Notwithstanding the above differences in approach discernible in the proceedings instituted before the High Court, the scrutiny in the present appeals will have to be from the same standpoint, namely, **the circumference of the court's power to interdict a criminal proceeding midcourse on the basis of the legitimacy or otherwise of the order of sanction to prosecute.**
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> 4. Though learned counsels for both sides have elaborately taken us through the materials on record including the criminal complaints lodged against the respondents; the pleadings made in support of the challenge before the High Court, the respective sanction orders as well as the relevant provisions of the Rules of Executive Business, we do not consider it necessary to traverse the said facts in view of the short question of law arising which may be summed up as follows:
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> **"Whether a criminal prosecution ought to be interfered with by the High Courts at the instance of an accused who seeks mid-course relief from the criminal charges levelled against him on grounds of defects/omissions or errors in the order granting sanction to prosecute including errors of jurisdiction to grant such sanction?"**
>
> 5. The object behind the requirement of grant of sanction to prosecute a

[9] (2007) 1 SCC 1

public servant need not detain the court save and except to reiterate that the provisions in this regard either under the Code of Criminal Procedure or the Prevention of Corruption Act, 1988 are 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 the wide range of duties cast on him by virtue of his office. The test, therefore, always is—whether the act complained of has a reasonable connection with the discharge of official duties by the government or the public servant. If such connection exists and the discharge or exercise of the governmental function is, prima facie, founded on the bonafide judgment of the public servant, the requirement of sanction will be insisted upon so as to act as a filter to keep at bay any motivated, ill-founded and frivolous prosecution against the public servant. However, realising that the dividing line between an act in the discharge of official duty and an act that is not, may, at times, get blurred thereby enabling certain unjustified claims to be raised also on behalf of the public servant so as to derive undue advantage of the requirement of sanction, specific provisions have been incorporated in Section 19(3) of the Prevention of Corruption Act as well as in Section 465 of the Code of Criminal Procedure which, inter alia, make it clear that any error, omission or irregularity in the grant of sanction will not affect any finding, sentence or order passed by a competent court unless in the opinion of the court a failure of justice has been occasioned. This is how the balance is sought to be struck.

7. In a situation where under both the enactments any error, omission or irregularity in the sanction, which would also include the competence of the authority to grant sanction, does not vitiate the eventual conclusion in the trial including the conviction and sentence, unless of course a failure of justice has occurred, it is difficult to see how at the intermediary stage a criminal prosecution can be nullified or interdicted on account of any such error, omission or irregularity in the sanction order without arriving at the satisfaction that a failure of justice has also been occasioned. This is what was decided by this Court in ***State by Police Inspector v. T. Venkatesh Murthy*** wherein it has been inter alia observed that,

> "14. ……**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**."

8. The above view also found reiteration in ***Parkash Singh Badal v. State of Punjab*** wherein it was, inter alia, held that mere omission, error or irregularity in sanction is not to be considered fatal unless it has resulted in

failure of justice. In Parkash Singh Badal it was further held that Section 19(1) of the PC Act is a matter of procedure and does not go to the root of jurisdiction. On the same line is the decision of this Court in ***R. Venkatkrishnanv. CBI*** (2009) 11 SCC 737. In fact, a three-Judge Bench in ***State of M.P. v. Virender Kumar Tripathi*** (2009) 15 SCC 533 while considering an identical issue, namely, the validity of the grant of sanction by the Additional Secretary of the Department of Law and Legislative Affairs of the Government of Madhya Pradesh instead of the authority in the parent department, **this Court held that in view of Section 19(3) of the PC Act, interdicting a criminal proceeding mid-course on ground of invalidity of the sanction order will not be appropriate unless the court can also reach the conclusion that failure of justice had been occasioned by any such error, omission or irregularity in the sanction. It was further held that failure of justice can be established not at the stage of framing of charge but only after the trial has commenced and the evidence is led** (para 10 of the report).

9. There is a contrary view of this Court in ***State of Goa v. Babu Thomas*** holding that an error in grant of sanction goes to the root of the prosecution. **But the decision in Babu Thomas (supra) has to be necessarily understood in the facts thereof, namely, that the authority itself had admitted the invalidity of the initial sanction by issuing a second sanction with retrospective effect to validate the cognizance already taken on the basis of the initial sanction order. Even otherwise, the position has been clarified by the larger Bench in *State of Madhya Pradesh v. Virender Kumar Tripathi* (supra)**.

10. In the instant cases the High Court had interdicted the criminal proceedings on the ground that the Law Department was not the competent authority to accord sanction for the prosecution of the respondents. **Even assuming that the Law Department was not competent, it was still necessary for the High Court to reach the conclusion that a failure of justice has been occasioned**. Such a finding is conspicuously absent rendering it difficult to sustain the impugned orders of the High Court.

(emphasis supplied)

26) In ***State of Bihar V/s. Rajmangal Ram*****,** the Apex Court has considered its judgment in ***Babu Thomas*** and has observed that the said judgment has to be necessarily understood in the facts thereof where the authority itself had admitted the invalidity of earlier sanction by issuing the

second sanction with retrospective effect to validate the cognizance already taken on the basis of initial sanction order. The Apex Court has relied on three judge Bench judgment in ***State of Madhya Pradesh V/s. Virender Kumar Tripathi***[10] where the validity of grant of sanction by the Additional Secretary of Department of Law and Legislative Affairs of the Government of Madhya Pradesh instead of the authority in the parent department was questioned, it was held that interdicting criminal proceedings mid-course on the ground of invalidity of the sanction order will not be appropriate unless the Court can reach the conclusion that failure of justice had been occasioned by such error, omission or irregularity in the sanction. What is more pertinent is observations in Para 10 of the judgment in ***Virendra Kumar Tripathi*** that the stage at which inquiry into failure of justice on account of invalid sanction is to be conducted at the trial. The three Judge Bench has held as under:

> 10. In the instant case there was not even a whisper or pleading about any failure of justice. **The stage when this failure is to be established is yet to be reached since the case is at the stage of framing of charge whether or not failure has in fact been occasioned was to be determined once the trial commenced and evidence was led.** In this connection the decisions of this Court in State v. T. Venkatesh Murthy and in Parkash Singh Badal v. State of Punjab need to be noted. That being so the High Court's view quashing the proceedings cannot be sustained and the State's appeal deserves to be allowed which we direct.
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> *(emphasis supplied)*

27) Thus, in ***Rajmangal Ram*** the Apex Court has taken note of conflicting views taken in Three Judge Bench decision in ***Virendra Kumar Tripathi*** and two Judge Bench decision in ***Babu Thomas*** and has followed the law expounded in the former one. Therefore, the law expounded by the Apex

[10] (2009)15 SCC 533

Court in ***Rajmangal Ram,*** after considering the decisions in ***Virendra Kumar Tripathi*** and ***Babu Thomas,*** that mere incompetency of authority issuing prosecution sanction would not *ipso facto* invalidate the prosecution in absence of cause of failure of justice, would bind this Court.

28) A Single Judge of this Court (*Smt. Bharati Dangre, J.*) had an occasion to decide the issue of competency of prosecution sanctioning authority and entitlement of the accused for discharge before commencement of the trial in ***Sushil Kumar*** (supra). The Petitioner therein worked as Inspector of Income Tax and faced prosecution for offences punishable under Section 7 of the Act of 1988. The sanction for his prosecution was granted by the Commissioner of Income Tax. The Petitioner contended that the sanction ought to have been granted by the Chief Commissioner of Income Tax since the Petitioner was promoted to the post of Inspector of Income Tax by order dated 1 May 2012, which order was issued by the Chief Commissioner of Income Tax. This Court has discussed various judgments on the issue, including the judgments in ***Babu Thomas*** and ***Nanjappa*** which are relied upon by Mr. Bhonde. This Court, however, took into consideration the law expounded by the Apex Court in ***Dinesh Kumar*** (supra) and held that the question as to validity of sanction for prosecution on the ground of competency of sanctioning authority is a matter to be determined during the course of the trial. This Court held in paras-11, 12 and 13 as under :

> 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."
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> 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 chargesheet, 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 nonavailability 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 nonapplication 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 nonapplication 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.

(emphasis supplied)

29) In ***Sushil Kumar***, this Court has also taken note of the judgment of the Apex Court in ***Central Bureau of Investigation V/s. Pramila Virendra***

Agarwal[11] in which the law laid down in ***Dinesh Kumar*** (supra) has been reiterated.

30) In my view therefore the law appears to be well settled that the issue as to competency of authority granting sanction for prosecution cannot be decided before commencement of the trial.

31) In ***Rajmangal Ram***, the Apex Court, after reiterating the law expounded in three Judge Bench decision in ***Virendra Kumar Tripathi,*** has gone a step ahead by holding that mere competency of authority granting prosecution sanction is not *ipso-facto* a ground for interdicting the criminal proceedings unless a conclusion is reached that failure of justice has been occasioned. It further held that failure of justice can be established not at the stage of framing of charge but only after trial has commenced and the evidence is led. In my view therefore the issue of competency of General Manager (HRM), HO to grant prosecution sanction and also the issue of failure of justice needs to be decided after conclusion of the trial.

32) Having held that the issue of validity of prosecution sanction on the ground of competency of the sanctioning authority needs to be decided during the course of the trial, I need not answer the second question formulated above about the competency of General Manager (HRM) HO to issue prosecution sanction in the present case. The said issue will be decided by the Trial Court during the course of the trial. Therefore, it is not necessary to discuss the ratio of the judgment of Constitution Bench in ***R.S. Nayak V/s. A.R. Antulay*** (supra) which is sought to be relied upon by Mr. Bhonde

[11] (2020) 17 SCC 664

in support of his contention that '*office*' occupied by the accused at the time of commission of alleged offence would be the relevant factor. The Applicant would be at liberty to raise all those contentions, as well as to lead necessary evidence during the course of trial.

33) Consequently, I do not find any reason to interfere in the impugned orders passed by the learned Special Court. Both Criminal Applications are devoid of merits and are **dismissed** without any order as to costs.

SANDEEP V. MARNE, J.