IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 776 OF 2016

Mr. Ashok Shankarrao Chavan,]
Age : 58, Indian Inhabitant,]
residing at Bhagirathi Bhavan, Dadi]
Seth First Cross Lane,]
Babulnath, Mumbai – 400 007.] ..Petitioner.

Versus

1. His Excellency Shri. Ch. Vidyasagar]
Rao, the Hon'ble Governor of]
Maharashtra, Raj Bhavan,]
Walkeshwar Road, Malbar Hill,]
Mumbai – 400 035]
[Deleted]]
]

2. State of Maharashtra]
through Secretary, Home]
Department, Mantralaya, Mumbai –]
400032.]
]

3. Central Bureau of Investigation,]
being a Special Police Police Force,]
constituted under the Delhi Special]
Police Establishment Act, 1946,]
having its Mumbai Office at 11-A,]
Tanna House, Nathalal Parekh]
Street, Colaba, Mumbai – 400 039.] ..Respondents.

Mr. Amit Desai, Senior Advocate with Mr. Gopalkrishna Shenoy, C. Rashmikant, Rohan Dakshini, Ms. Pooja Kothari, Rahul Lakhani i/b M/s. Fedral & Rashmikant for the Petitioner.

Mr. Anil C. Singh, Additional Solicitor General with Mr. H. S. Venegaonkar, Ms. Indrayani Deshmukh, Ms. Geetika Gandhi and Ms. Priyamvad Singhania for Respondent No. 2 and 3.

Coram : **Ranjit More & Smt. S. S. Jadhav, JJ.**

Arguments heard on : **September 28, 2017**.
Judgment pronounced on : **December 22, 2017**.

JUDGMENT [Per Ranjit More, J.] :

1. The Petitioner by filing this petition under Article 226 of the Constitution of India is challenging the order dated 4th February 2016 passed by the Hon'ble Governor of Maharashtra, thereby granting sanction under section 197 of the Code of Criminal Procedure, 1973 [for short "the Code"] for launching prosecution against the Petitioner for the offence punishable under sections 120B and 420 of the Indian Penal Code, 1860. The grant of sanction is challenged mainly on the ground that in fact it is a review of the earlier order passed by the erstwhile Hon'ble Governor, dated 17th December 2013. The CBI had proposed sanction to prosecute the Petitioner as contemplated under section 197 of the Code of Criminal Procedure, 1973 and Section 19 of the Prevention of Corruption Act, 1988.

2. It is submitted that by an order dated 17th December 2013, the erstwhile Hon'ble Governor had refused to accord sanction after considering the material and by proper application of mind. It is submitted that there was no scope to review the earlier order since

the CBI was not only not aggrieved by the order but pursuant to the said order had proceeded to file application under section 169 of the Code of Criminal Procedure, 1973.

3. Mr. Desai, the learned Senior Counsel appearing for the Petitioner submitted that a review of an earlier order refusing to grant sanction could be undertaken with extreme caution and only if clinching new/fresh primary material, which is capable of converting into evidence, had been discovered by the investigating agency in the course of its investigation, subsequent to the sanction refusal order, indicating commission of the offence. He submitted that material already considered cannot be reconsidered and the review should be undertaken only in the rarest of rare cases. He submitted that while deciding whether or not to grant sanction, the sanctioning authority has to independently apply its own mind to the relevant facts and material constituting the specific offences charged that were before the investigating agency. Therefore, material such as another person's or authority's opinion *ex-facie* barred by law cannot be used to form a *prima facie* opinion and is not fresh material and is irrelevant. He then submitted that administrative orders that are arbitrary, illegal, irrational and/or passed without jurisdiction or based

on improper procedure or for extraneous considerations / political bias must be struck down by the superior Courts. Mr. Desai further submitted that a question regarding the validity of an order of sanction with no disputed facts must be decided at the earliest stage possible, to ensure that public servants are not harassed by vexatious and/or frivolous prosecution. Mr. Desai lastly submitted that in above circumstances, writ petition deserves to be allowed by setting aside the impugned order.

4. Mr. Singh, the learned ASG appearing on behalf of the Respondent-State as well as the Respondent-CBI contested the petition very vehemently. He submitted that by this petition, the Petitioner is challenging the order of the Hon'ble Governor to grant sanction for the prosecution against the Petitioner. This issue can be raised in the trial and at this stage, petition under Article 226 of the Constitution of India is not maintainable. Mr. Singh submitted that grant or refusal to grant sanction is an administrative process. The refusal of sanction to prosecute puts an end to the prosecution against the public servant, and therefore in the absence of provision for appeal provided under the statute, writ petition under Article 226 of the Constitution of India is the only remedy available to challenge the

same. However, he submitted that grant of sanction to prosecute the public servant stands on altogether different footing than a refusal to grant sanction. He submitted that such sanction can be challenged on the ground that (i) the same is granted without jurisdiction or by the incompetent authority; or (ii) the sanction order is passed without reasons in support thereof or on the grounds which are *ex-facie* illegal, or; (iii) sanction is granted without application of mind. He submitted that so far the first two categories are concerned, writ petition is maintainable, however, in respect of last category, the same can be challenged during the course of trial after affording an opportunity to the prosecution to lead evidence in trial.

. Mr. Singh submitted that the administrative order refusing to grant sanction can be reviewed in the event fresh material is brought before the sanctioning authority. In the present case, fresh material was brought before the Hon'ble Governor in the form of extract of Justice J. A. Patil Commission's Report and the order of the learned Single Judge of this Court in Criminal Revision Application No. 136 of 2014, which were not placed before the erstwhile Governor. He submitted that such “material” need not be limited to the evidence collected by the prosecution during the course of investigation. Mr. Singh fairly conceded that report is only recommendatory in nature

and not admissible in evidence, however, for the purpose of grant of sanction, the sanctioning authority can take the same into consideration. Mr. Singh submitted that similarly the above referred order of the learned Single Judge can also be the basis for reviewing the earlier order refusing to grant sanction. He lastly submitted that petition is without any merit and the same deserves to be dismissed.

5. Mr. Singh, the learned ASG at the inception of hearing of the petition objected the maintainability and the form of petition relying upon provisions of Article 361 of the Constitution of India and submitted that petition cannot lie against the Hon'ble Governor of the State. He, however, conceded that administrative actions of the Governor can be challenged and petition can be heard on merits. In the light of this statement, Mr. Desai, the learned Senior Counsel appearing for the Petitioner without prejudice to his rights and contention, sought oral leave to delete the name of Respondent No. 1. We granted oral leave to the Petitioner. Accordingly necessary amendment is carried out and name of Respondent No. 1 – Governor of Maharashtra is deleted.

. The submission of Mr. Singh and statement of Mr. Desai

are recorded in the order dated 18th September 2017. In the light of concession given by Mr. Singh, we proceeded to hear this writ petition on merits.

6. Before adverting to the merits of the submissions of the respective counsel, we must take note of certain dates and events, which are borne out by the record placed before us.

(1) On 19th April 2013, Justice J.A.Patil Inquiry Commission Report was submitted to the Government.

(2) On 19th August 2013, by its first application under section 197 of the Code of Criminal Procedure, the CBI forwarded report of the Office of the SP, CBI, ACB, Mumbai, giving the facts of the case, the allegations and result of investigation. Along with this report, copies of documents and statements of the witnesses were also sent.

(3) The erstwhile Governor by his order dated 17th December 2013 refused sanction to prosecute the Petitioner.

(4) On 20th December 2013, the report of Justice J.A.Patil Inquiry Commission was tabled in the legislative assembly.

(5) After erstwhile Governor refused sanction to prosecute the Petitioner, CBI made an application to the trial Court on 15th January 2014, under section 169 read with section 173 of the Code seeking to delete the name of the Petitioner from the list of accused due to the refusal of the erstwhile Governor to grant sanction under section 197 of the Code.

(6) On 18th January 2014, the trial Court rejected the application

made by the CBI under section 169 read with section 173 of the Code.

(7) On 25th May 2014, CBI filed Criminal Revision Application No.136 of 2014 before the learned Single Judge of this Court for quashing and setting aside the order of the trial Court dated 18th January 2014.

(8) On 27th March 2014, CBI filed supplementary charge-sheet before the trial Court interalia stating that the Petitioner was not involved in benami transaction in respect of the flats of Adarsh Co-operative Housing Society.

(9) On 19th June 2016, CBI filed second supplementary charge-sheet whereby it informed the trial Court that this was the final charge-sheet in the case as the investigation had been completed.

(10) The learned Single Judge of this Court by the order dated 19th November 2014 dismissed Criminal Revision Application No. 136 of 2014 filed by the CBI.

(11) Aggrieved by certain observations made by the learned Single Judge, the Petitioner filed Criminal Application No. 1274 of 2014 on 15th December 2014 for recall of the order dated 19th November 2014. The Criminal Application No. 1274 of 2014 was dismissed by the learned Single Judge by his order dated 4th March 2015.

(12) On 1st April 2015, the Petitioner filed Special Leave Petition No. 5636 of 2015 challenging the order dated 19th November 2014 and 4th March 2015.

(13) On 13th July 2015, the Supreme Court issued notice to the State and the CBI in SLP No. 5636 of 2015 and the said SLP is pending

before the Supreme Court for final disposal.

(14) Meanwhile, in the month of April and May 2014, BJP won the national election.

(15) On 30th August 2014, Shri. Ch. Vidyasagar Rao was appointed as Governor of Maharashtra.

(16) In October 2014, BJP in Association with Shiv Sena succeeded in the Assembly elections in the State of Maharashtra and formed the Government in the State.

(17) On 8th October 2015, CBI sent fresh proposal (second application) seeking sanction to prosecute the Petitioner.

(18) On 4th November 2016, the governor passed the impugned order according sanction to the CBI to prosecute the Petitioner.

7. In support of the sanction refusal order, the erstwhile Governor made following observations in his order dated 17th December 2013 :

> "3. Upon receipt of the above letter, I had carefully perused the entire record including the documents, statements and report of the CBI.
>
> 7. In light of the aforesaid, I have carefully considered the entire CBI report, documents and statements for considering the issue of grant of sanction for prosecution of Mr. Chavan.
>
> 18. I have carefully considered the entire aforesaid material placed before me by the CBI from the point of grant or refusal of sanction under section 197 Cr.P.C. In so far as they concern Mr. Chavan only.
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> 26. In respect of the allotment made to sister-in-law of Mr. Chavan, it appears from the documents produced that her application for membership was rejected and

she was called upon to file an Affidavit in 2008. Taking triggering point to the quid pro quo as the meeting of 02.06.2000, it is clear that the application made by his sister-in-law on 18.06.2004 was rejected and affidavit had to be then filed in 2008. Too much time has elapsed between the meeting of 2000 and the application of 2004 and the affidavit of 2008 and the grant of membership on 10.11.2008. I have not found any nexus in the documents produced before me to even *prima facie* appear that this grant of membership was a gratification or a quid pro quo for whatever actions were taken by Mr. Chavan. No document or oral evidence of any witness contains any evidence whatsoever to even prima facie show that there is a nexus or even so that the proposal of quid pro quo was the brain child of Mr. Chavan. It may also be noted that at the time of approval of membership Mr. Chavan was not the Revenue Minister nor was he the Chief Minister.

27. On the first count, I find that there is no material available with the CBI to prosecute Mr. Chavan as proposed.

28. The second aspect of the matter is about the non-deduction of 15% R.G.. In this regard I have perused in particular the application and correspondence between the Corporation, MMRDA and M/s Team One Architects. The CBI report in this regard is very revealing. It states that there is no evidence that the decision of non deduction of 15% RG from FSI computation was illegal. This position taken by the CBI itself coupled with the fact that there appears on record several correspondence in this regard, but none of them having any nexus or link with the Mr. Chavan. What is also crucial is that the application of the Architects above seeking relaxation of the 15% RG deduction from final computation passed through the MMRDA, the MCGM and the Urban Development Department. Based on the precedents which form a part of the note dated 02.06.2009 prepared by the Urban Development Department, Mr. Chavan accepted the proposal of the Architect and the same was communicated to the Commissioner of MMRDA accordingly. In my view the aforesaid material is inadequate to even prima facie reach any conclusion as to the guilt of Mr. Chavan as alleged by the CBI or even otherwise. I have not found any other material which

> would disclose the existence of even a prima facie case against Mr. Chavan even on this second count.
>
> 29. Having considered the above matter from all angles, the entire papers and documents, I do not find that even a *prima facie* case is made out and hence the request of the CBI for sanction to prosecute under section 197 of Cr.P.C is liable to be rejected and therefore I am hereby constrained to refuse the same."

. The above observations make it abundantly clear that erstwhile governor independently applied his mind to the CBI report and the primary material collected by the CBI during investigation and came to the conclusion that no *prima facie* case is made out to grant sanction under section 197 of the Code to prosecute the Petitioner. There was no challenge to this order at any stage by anybody.

8. As stated above, the sanction refusal order by the erstwhile Governor was reviewed by the Hon'ble Governor and granted sanction to prosecute the Petitioner under the impugned order. The Hon'ble Governor relied upon the purported additional material, namely, extract of the report of Justice J.A.Patil Commission and the order dated 19th November 2014 passed by the learned Single Judge of this Court in Criminal Revision Application No. 136 of 2014. The observations of the Hon'ble Governor that *prima facie* case exists against the Petitioner are contained in paragraph 21 and 22, which

read thus :

> 21. The relevant part of the finding of fact recorded by the Justice Patil Commission, as reflected in its report, reads thus :
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> "decision of reducing the proposed width of Capt. Prakash Pethe Marg was not legal and it was not in public interest. But the fact is that this decision taken by both Shri. Ashok Chavan as the Revenue Minister and Shri. Vilasraro Deshmukh as the Chief Minister obliged the Adarsh CHS. The society must have therefore felt grateful to both of them for their going out of the way to take a weird decision which fulfilled the long standing need and desire of both Shri Gidwani and Shri. Thakur who were trying hard to secure a plot of land in the Cuffe Parade area....."
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> "... However, the act of Shri. Ashok Chavan in approving non deduction of 15% RG while calculating FSI cannot be treated as an innocent act..... However, this decision when followed by the grant of membership and allotment of flats in Adarsh CHS to his close relatives, then it becomes indicative of quid pro quo...."
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> "..... It is difficult to accept this statement of Shri. Ashok Chavan as it does not appear probable that he would not come to know that his close relatives had applied for membership of Adarsh CHS and that the allotment of three adjoining flats on the same floor were granted to them. ... Therefore, it does not stand to reason that the applications made by these three members of Sharma family were without the knowledge of Shri. Ashok Chavan who was then the Chief Minister..... Taking all these facts into consideration we are of the opinion that there is certainly a nexus established between the acts of Shri. Ashok Chavan and the benefit derived by his close relatives in the form of membership of Adarsh CHS. That clearly indicates the grant of requisite permissions / clearances of the file of Adarsh CHS was by way of quid pro quo by Shri. Ashok Chavan"

> "....We reiterate that Shri. Ashok Chavan had given clearances / permissions in the matter of Adarsh CHS as 'quid pro quo'...."

> 22. The relevant finding of the Hon. Bombay High Court recorded in its judgment dated 19.11.2014 reads thus :

> 35. .... No evidence is placed before the trial Judge or this Court to indicate that the similar benefit is given to other societies in the past. Even if it is accepted for the time being, for the sake of arguments, that similar benefit was given to other societies also, it cannot be said that it was in the interest of public. It cannot be coincident that two of the close relatives of Respondent No. 2 got two flats worth crores of rupees according to the market value, by investing much lesser amount as compared to the market value"

9. In the backdrop of undisputed facts stated hereinabove, the issues required to be considered are whether the administrative decision to revisit sanction by the Competent Authority / sanctioning authority can be reviewed, and if the answer is in the affirmative, what are the parameters to do so. We are also called upon to consider whether sanction refusal order could have been reviewed by the impugned order granting sanction to prosecute the Petitioner on the basis of the extract of Justice J.A. Patil Commission Report and the order of learned Single Judge of this Court dated 19th November 2014 passed in Criminal Revision Application No. 136 of 2014.

10. The issue whether sanction order can be reviewed is no more *res-integra* in view of the decision of the Apex Court in the case of *State of Himachal Pradesh vs. Nishant Sareen*[1]. It is also referred by the Governor in paragraph 9 of the impugned order. The paragraph 12 and 13 of this decision are relevant for our purpose which read thus :

> "12. It is true that the Government in the matter of grant or refusal to grant sanction exercises statutory power and that would not mean that power once exercised cannot be exercised again or at a subsequent stage in the absence of express power of review in no circumstance whatsoever. The power of review, however, is not unbridled or unrestricted. It seems to us sound principle to follow that once the statutory power under Section 19 of the 1988 Act or Section 197 of the Code has been exercised by the Government or the competent authority, as the case may be, it is not permissible for the sanctioning authority to review or reconsider the matter on the same materials again. It is so because unrestricted power of review may not bring finality to such exercise and on change of the Government or change of the person authorised to exercise power of sanction, the matter concerning sanction may be reopened by such authority for the reasons best known to it and a different order may be passed. The opinion on the same materials, thus, may keep on changing and there may not be any end to such statutory exercise.
>
> 13. In our opinion, a change of opinion per se on the same materials cannot be a ground for reviewing or reconsidering the earlier order refusing to grant sanction. However, in a case where fresh materials have been collected by the investigating agency subsequent to the earlier order and placed before the sanctioning authority and on that basis, the matter is reconsidered by the sanctioning authority and in light of the fresh materials an opinion is formed that sanction to

1 (2010) 14 SCC 527

> prosecute the public servant may be granted, there may not be any impediment to adopt such course."

. The above observations make it abundantly clear that sanctioning authority cannot review the earlier decision on the same material again. However, if the fresh material is collected by the investigating agency subsequent to the earlier order, then, the earlier sanction order can be reviewed or re-considered.

11. The phrase "material" is not defined either under the Code of Criminal Procedure, 1973 or the Indian Penal Code, 1860. The phrase "Fresh material" has been used by the Apex Court in its various decisions including the decision in *Nishant Sareen's case (supra)* while considering the issue of sanction. Thus, it can be seen that the phrases "material" or "fresh material" have been evolved through judicial dictums and precedents and neither the Code of Criminal Procedure, 1973 nor the Indian Penal Code, 1860 make any reference of the said phrases.

12. Thus, in order to consider the controversy raised in the petition we have to decide what is meant by "material" and whether the extract from the Report of Justice J.A.Patil Commission and the observations of the learned Single Judge of this Court in the order

dated 19th November 2014 passed in Criminal Revision Application No. 136 of 2014 can be said to be "material". We are also required to consider whether the said report and the order can be said to be fresh material in the light of the Petitioner's contention that said report was available to the CBI when first application for sanction to prosecute the Petitioner was made and said order was passed and subsequent to the rejection by the trial Court of the application of CBI, under section 169 read with 173 of the Code in which it was contention of the CBI that Governor of Maharashtra has refused sanction against the Petitioner and review of the order is not possible as there is no scope for collecting more evidence, the CBI filed supplementary charge-sheet before the trial Court with information that this was the final charge-sheet in the case as investigation had been completed. The learned Senior Counsel rightly submits that filing an application under section 169 of the Code would indicate that there is no sufficient evidence or reasonable ground of suspicion to justify the prosecution of accused.

13. Mr. Desai, the learned Senior Counsel appearing for the Petitioner submitted that material to be considered by the sanctioning authority can only be the evidence collected by the investigating

agency during the course of investigation. In support of his contention, Mr. Desai relied upon the decision of the Apex Court in *Mansukhlal V. Chauhan v. State of Gujarat*[2], *State of Bihar v. P.P.Sharma*[3] and *State of T.N. v. M. M. Rajendran*[4]. He also relied upon the CBI Manual.

14. Per contra, Mr. Singh, the learned ASG submitted that issue of grant of sanction would arise only after perusal of the evidence collected by the investigating agency and/or other material provided to the sanctioning authority. Mr Singh, in support of his submission relied upon decisions of the Apex Court in *Dr. Subramanian Swamy v. Dr. Manmohan Singh*[5] and *CBI v. Ashok Kumar Aggarwal*[6].

15. In *Mansukhlal (supra)* the Appellant was prosecuted for the offence punishable under section 161 of IPC and section 5(2) of the Prevention of Corruption Act, 1947 and was ultimately convicted. The conviction was upheld by the High Court in an appeal. The conviction was challenged before the Apex Court on the ground inter

2 (1997) 7 SCC 622
3 1992 Supp(1) SCC 222
4 (1998) 9 SCC 268
5 AIR 2012 SC 1185
6 (2014) 14 SCC 295

alia that there was no valid sanction. The Apex Court found that the sanction to prosecute the Appellant was granted by the competent authority on directions of the High Court to the Secretary to that effect. The Apex Court held that the independent application of mind to the facts of the case as also the material and evidence collected during investigation by the authority comptent to grant sanction is essential. It was also held that sanction issued by the authority on the direction of the High Court was invalid because there was no independent application of mind by that authority inasmuch as the High Court direction had taken away the discretion of the authority not to grant sanction and it was left with no choice but to mechanically grant sanction in obedience to the mandamus issued by the High Court.

. The observations of the Apex Court relevant for our purpose are contained in paragraphs 18 and 19, which read thus :

> 18. The validity of the sanction would, therefore, depend upon the material placed before the sanctioning authority and the fact that all the relevant facts, material and evidence have been considered by the sanctioning authority. Consideration implies application of mind. The order of sanction must ex facie disclose that the sanctioning authority had considered the evidence and other material placed before it.....
>
> 19. Since the validity of "Sanction" depends on the applicability of mind by the sanctioning authority to the facts of the case as also the material and evidence

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

. The above observations reveal that while granting sanction, the Competent Authority or sanctioning authority is required to apply its independent mind to the evidence collected by the prosecution and other material placed before it. This authority does not support Mr. Desai, the learned Senior Counsel in his contention that sanctioning / competent authority is required to consider only the evidence collected by the investigating agency in the course of investigation.

16. In P. P. Sharma's case (supra), the Apex Court held that the order granting sanction is an administrative act and hence pre-decisional opportunity not required to be afforded to the public

servant; however there must be proper application of mind to the existence of the prima facie evidence of the commission of the offence. The relevant observations of the Apex Court are contained in paragraphs 27, 28 and 67, which read thus :

> "27. The sanction under section 197 Cr. P.C. is not an empty formality. It is essential that the provisions therein are to be observed with complete strictness. The object of obtaining sanction is that the authority concerned should be able to consider for itself the material before the investigating officer, before it comes to the conclusion that the prosecution in the circumstances be sanctioned or forbidden. To comply with the provisions of section 197 it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is desirable that the facts should be referred to on the face of the sanction. Section 197 does not require the sanction to be in any particular form. If the facts constituting the offence charged are not shown on the face of the sanction, it is open to the prosecution, if challenged, to prove before the court that those facts were placed before the sanctioning authority. It should be clear from the form of the sanction that the sanctioning authority considered the relevant material placed before it and after a consideration of all the circumstances of the case it sanctioned the prosecution.
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> 28. In the present case the investigation was complete on the date of sanction and police reports had been filed before the Magistrate. The sanctioning authority has specifically mentioned in the sanction order that the papers and the case diary were taken into consideration before granting the sanction. Case diary is a complete record of the police investigation. It contains total material in support or otherwise of the allegations. The sanctioning authority having taken the case diary into consideration before the grant of sanction it cannot be said that there was non application of mind on the part of the sanctioning authority. It is nobody's case that the averment in the sanction order to the effect that case diary was taken into consideration by the

> competent authority, is incorrect. We, therefore, do not agree with the finding of the High Court and set aside the same.
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> 67. It is equally well settled that before granting sanction the authority or the appropriate Government must have before it the necessary report and the material facts which prima facie establish the commission of offence charged for and that the appropriate Government would apply their mind to those facts."

. This decision also does not support contention of the Petitioner that consideration of the sanction is limited to the evidence collected by the investigating agency during the course of investigation.

17. In *M.M.Rajendran (supra)*, all the relevant material including the statements recorded by the Investigating Officer had not been placed for consideration by the Competent Authority and only report of the vigilance department was placed before him. The Apex Court held that sanction accorded on the basis of report of the vigilance department is invalid. This authority is also of no help to the aforesaid contention of the Petitioner.

18. In *Ashok Kumar Aggarwal's case (supra)*, the Apex Court has inter alia held that :

> "15. Consideration of the material implies

application of mind. Therefore, the order of sanction must *ex facie* disclose that the sanctioning authority had considered the evidence and other material placed before it. In every individual case, the prosecution has to establish and satisfy the court by leading evidence that those facts were placed before the sanctioning authority and the authority had applied its mind on the same. If the sanction order on its face indicates that all relevant material i.e. FIR, disclosure statements, recovery memos, draft charge sheet and other materials on record were placed before the sanctioning authority and if it is further discernible from the recital of the sanction order that the sanctioning authority perused all the material, an inference may be drawn that the sanction had been granted in accordance with law. This becomes necessary in case the court is to examine the validity of the order of sanction inter-alia on the ground that the order suffers from the vice of total non-application of mind.....

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

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

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

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

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

> 16.5 In every individual case, the prosecution has to establish and satisfy the court by leading evidence that the entire relevant facts had been placed before the sanctioning authority and the authority had applied its mind on the same and that the sanction had been granted in accordance with law.
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> 17. In view of the above, we do not find force in the submissions advanced by Shri Vishwanathan, learned ASG that the competent authority can delegate its power to some other officer or authority, or the Hon'ble Minister could grant sanction even on the basis of the report of the SP. The ratio of the judgment relied upon for this purpose, in *A. Sanjeevi Naidu etc. v. State of Madras & Anr., AIR 1970 SC 1102*, is not applicable as in the case of grant of sanction, the statutory authority has to apply its mind and take a decision whether to grant sanction or not."
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> [emphasis supplied]

. From this decision it is unequivocally clear that the sanctioning / competent authority while considering the issue of sanction under section 197 of the Code can take into consideration the evidence collected during the course of investigation as well as other material placed before it.

19. Mr. Desai in support of his contention then relied upon paragraph Nos. 22.15.2 and 22.16 of the CBI manual, which read thus :

> "22.15.2 Cases in which sanction for prosecution is to be issued by an authority other than the President of India – If an authority other than the President is competent to sanction the prosecution, the CBI will forward its investigation report, containing the oral and documentary evidence collected during the

> investigation, to such authority with a request to accord sanction to prosecute the public servant concerned of sanction for the prosecution is not received within three months from the date of such request, then the CBI should pursue the matter with concerned authority for expeditious disposal. If such authority declines to accord sanction, then its views, along with other records, should be sent to the CVC for advice through the Administrative Ministry/Department. Further action will be taken by the authority concerned on the basis of the advice of the CVC.
>
> 22.1.6 On completion of investigation in cases covered in items 22.15.1 and 22.15.2 above, the CBI shall send its report to the Administrative Authority along with the relevant statement of witnesses recorded during investigation and the documents. The Supreme Court judgment in the State of Tamil Nadu v. M. M. Rajendran reported in 1999 SCC (Criminal) 1000 and the Circular No.21/33/98-PD, dated 6-5.1999 issued by the policy division are also referred to in this regard."

. The CBI Manual appears to have been amended and paragraph 22.1.6 was inserted in view of the decision of the Apex Court in *M. M. Rajendran (supra)*. As observed earlier, in this case the sanctioning authority granted sanction only on the basis of report of the vigilance department and the statement recorded during investigation were not placed before the sanctioning authority. The above clause of the CBI Manual only shows that investigating agency is duty bound, while seeking sanction under section 197 of the Code, to place before the sanctioning authority the relevant statements of the witnesses recorded during investigation and the documents. The above clause of the CBI Manual does not support Mr. Desai's

contention that "material" which is required to be considered by the sanctioning authority is only evidence collected during the investigation process.

20. In *Subramanian Swamy (supra)*, the issue which fell for consideration before the Apex Court was whether a complaint can be filed by a citizen for prosecuting a public servant for an offence under the Prevention of Corruption Act, 1988 and whether the authority competent to sanction prosecution of a public servant for offences under the PC Act is required to take an appropriate decision within the time specified in clause I(15) of the directions contained in paragraph 58 of the judgment of the Apex Court in *Vineet Narain v. Union of India*[7] and the guidelines issued by the Central Government, Department of Personnel and Training and the Central Vigilance Commission.

. The Apex Court held that the Appellant citizen had the right to file a complaint for prosecuting Respondent No.2. The Apex Court, however, keeping in view the fact that the Court of Special Judge, CBI had already taken cognizance of the offences allegedly committed by Respondent No.2 under the 1988 Act, did not consider it necessary to give any other direction in the matter. The Court then

7 (1998) 1 SCC 226.

observed that at the same time, every Competent Authority shall take appropriate action on the representation made by a citizen for sanction of the prosecution of the public servant strictly in accordance with the direction contained in *Vineet Narain's case (supra)*.

. In paragraph 27, the Apex Court made following observations :

> "27. We may also observe that grant or refusal of sanction is not a quasi judicial function and the person for whose prosecution the sanction is sought is not required to be heard by the Competent Authority before it takes a decision in the matter. What is required to be seen by the Competent Authority is whether the facts placed before it which, in a given case, may include the material collected by the complainant or the investigating agency prima facie disclose commission of an offence by a public servant. If the Competent Authority is satisfied that the material placed before it is sufficient for prosecution of the public servant, then it is required to grant sanction. If the satisfaction of the Competent Authority is otherwise, then it can refuse sanction. In either case, the decision taken on the complaint made by a citizen is required to be communicated to him and if he feels aggrieved by such decision, then he can avail appropriate legal remedy."
>
> [emphasis supplied]

. The observations show that Competent Authority is obliged to consider material collected by the Complainant and/or investigating agency to grant or refuse to grant sanction to prosecute the public servant.

21. The above decisions of the Apex Court make it abundantly clear that the Competent Authority / sanctioning authority while granting sanction under section 197 of the Code must apply its mind to the material collected by the Investigating agency during the course of investigation under Chapter-XII of the Code. The sanctioning authority however also in addition to the evidence collected during the course of investigation, can consider "other material". The sanctioning authority cannot pass order only on the basis of "material" not collected during the investigation. In short, while granting sanction, the sanctioning authority can consider the evidence collected by the investigating agency under Chapter-XII of the Code during the course of investigation as well as "other material".

22. Chapter-XII of the Code of Criminal Procedure, 1973 deals with the information to the police and their powers to investigate. It mainly includes receiving information of the offence, powers of the police officer to investigate and procedure for investigation and then on completion of investigation filing of report under section 173 of the Code. Section 2(h) of the Code gives definition of the "investigation" which includes all proceedings for collection of evidence by the police officer. Section 197 of the Code, however, falls in Chapter-XIV of the

Code which deals with conditions requisite for initiation of the proceedings. This section is procedural in nature under which protective provision is made for public servant before launching any criminal prosecution against him. The decision of the sanctioning authority under section 197 of the Code is administrative decision and while taking this decision, the sanctioning / competent authority is required to arrive at particular conclusion by application of mind and while carrying this administrative process, the sanctioning authority may rely upon the material other than the material collected during the investigation by the Investigating Officer under Chapter-XII. Such material in our considered opinion can be *inter alai* in the nature of internal file notings, departmental communications, Government Resolutions, etc., etc.,

23. It is settled position in law that the sanctioning authority while dealing with the issue of sanction under section 197 of the Code must apply its own mind, consider the material placed before it and take appropriate decision. The prosecution is also duty bound to prove during the course of trial that decision of the sanctioning authority in this regard is taken after application of mind and considering the entire material placed before it. This duty of the

prosecution pre-supposes that the material which is placed before the competent / sanctioning authority is admissible and capable of being converted into evidence before the Court. In other words, the material which is inadmissible or which cannot be converted into evidence cannot be placed before the Competent Authority inasmuch as it is not possible for the prosecution to rely upon those materials in order to show that sanction was granted after application of mind by the sanctioning authority. Thus, in our considered opinion, the sanctioning / competent authority while dealing with the issue of sanction under section 197 of the Code though can consider material other than evidence collected by the investigating agency during the course of investigation, however, such material must be admissible or capable of being converted into evidence before the Court.

24. This takes us to consider the next point, namely, extract of the Justice J. A. Patil Commission Report or the judgment dated 14th November 2014 passed by the learned Single Judge of this Court in Criminal Revision Application No.136 of 2014 is “material”, which could have been taken into consideration by the Hon'ble Governor in reviewing the earlier sanction refusal order and passing the impugned order. Mr. Desai, in this regard submitted that commission report has

no evidentiary value and hence neither evidence nor material. Mr. Desai, the learned Senior Counsel for the Petitioner in support of his contention that said extract and the judgment are not material, relied upon the following decisions :

(1) *Kehar Singh v. State (Delhi Admn)*[8],

(2) *SBI v. National Housing Bank*[9],

(3) *State of Bihar v. Lal Krishna Advani*[10] *and*

(4) *Noorul Huda Maqbool Ahmed v. Ram Deo Tyagi*[11]

25. Mr. Singh, the learned ASG, on the contrary relied upon decision of the Apex Court in *T.T. Anthony v. State of Kerala*[12] to contend that extract of the said Inquiry Commission Report is material which can be relied upon while considering grant of sanction.

26. In order to appreciate above rival submissions, reference must be made to the provisions of sections 6 and 8B of the Commissions of Inquiry Act, 1952, which read thus :

> "**6. Statements made by persons to the Commission.-** No statement made by a person in the course of giving evidence before the Commission shall subject him to, or be used against him, in any civil or

8 (1988) 3 SCC 609.
9 (2013) 16 SCC 538.
10 (2003) 8 SCC 361.
11 (2011) 7 SCC 95.
12 2001(6) SCC 181.

criminal proceeding except a prosecution for giving false evidence by such statement :

Provided that the statement -

(a) is made in reply to a question which he is required by the Commission to answer, or

(b) is relevant to the subject-matter of the inquiry.

8B. Persons likely to be prejudicially affected to be heard.- If, at any stage of the inquiry, the Commission,-

(a) considers it necessary to inquire into the conduct of any person; or

(b) is of opinion that the reputation of any person is likely to be prejudicially affected by the inquiry,

the Commission shall give to that person a reasonable opportunity of being heard in the inquiry and to produce evidence in his defence:

Provided that nothing in this section shall apply where the credit of a witness is being impeached."

. The above provisions do show that the statement made by a person before the Commission appointed under the Commissions of Inquiry Act, 1952 cannot be used in any civil or criminal proceeding. The provisions also mandate prior notice to the concerned person and/or reasonable opportunity of being heard by the Commission before enquiring into the conduct of such person or in case in the opinion of Commission the reputation of any person is likely to be prejudicially affected by the inquiry.

27. The submission of Mr. Desai is supported by the decision of the Apex Court in *Kehar Singh (supra)*. The relevant observations of the Apex Court are contained in paragraph 41, which read as follows :

> "The report of the Commission was also prayed for although learned counsel not clearly suggest as to what use report of the Thakkar Commission could be to the accused in his defence. The report is a recommendation of the Commission for consideration of the Government. It is the opinion of the Commission based on the statements of witnesses and other material. It has no evidentiary value in the trial of the criminal case. The Courts below were also justified in not summoning the reports." [emphasis supplied.]

. In *Noorul Huda (supra)*, the Apex Court has interalia held that :

> "We have also carefully seen the Trial Court's order. The Trial Court has rightly relied on the decision of this Court in T.T. Antony v. State of Kerala [AIR 2001 SC 2637], wherein it is held that the observations and findings in the report of the Commission are only meant for the information of the Government. Acceptance of the report of the Commission by the Government would only suggest that being bound by the Rule of law and having duty to act fairly, it has endorsed to act upon it. It was further observed that the investigation agency may with advantage make use of the report of the Commission in its onerous task of investigation bearing in mind that it does not preclude the investigation agency from forming a different opinion under Section 169/170 of Cr.P.C. if the evidence obtained by it supports such a conclusion. However, the Courts were not bound by the report of the finding of the Commission of Inquiry and the Courts have to arrive at their own decision on the evidence placed before them in accordance with law. The Trial Court has also relied on Kehar Singh & Ors. v.State (Delhi Administration) AIR 1988 SC 1883 to hold that the report of the Commission referred the consideration of the government and it is the opinion of the Commission based on the statement of the witnesses and other material but has no evidentiary value in the criminal case."
>
> [emphasis supplied.]

. The Apex Court in SBI v. National Housing Bank (supra) has held as follows :

> "It is well settled by a long line of judicial authority that the findings of even a statutory Commission appointed under the Commissions of Inquiry Act, 1952 are not enforceable proprio vigore as held in Ram Krishna Dalmia v. Justice S.R. Tendolkar and Others [AIR 1958 SC 538] and the statements made before such Commission are expressly made inadmissible in any subsequent proceedings civil or criminal. The leading judicial pronouncements on that question were succinctly analysed by this Court in (2001) 6 SCC 181, Paras 29-34. Para 34 of the judgment inter alia reads:-
>
> > *"34..... In our view, the courts, civil or criminal, are not bound by the report or findings of the Commission of Inquiry as they have to arrive at their own decision on the evidence placed before them in accordance with law."*
> >
> > [emphasis supplied.]

28. The above decisions of the Apex Court make it abundantly clear that the Commission's Report under the Commissions of Inquiry Act, 1952 has no evidentiary value at the trial before the civil or criminal Courts. It is only recommendatory in nature. It is opinion of commission based on the statements of witnesses and other material. The above decisions also show that investigating agency may with advantage use the report of the commission, at the same time the report does not preclude the investigating agency from forming a different opinion under section 169/170 of the Code of Criminal

Procedure, 1973. In the light of this, we are of the considered view that report of the Commission cannot be said to be material which can be taken into consideration by the sanctioning authority for two reasons; firstly it is the opinion of the commission based on the statements of the witnesses and other material and; secondly it is not capable of being converted into evidence before the Courts.

29. Mr. Desai also contended that the report of the Commission is *non est* and cannot be taken into consideration as notice under section 8B of the Commissions of Inquiry Act, 1952 was not issued to the Petitioner. Mr. Singh, the learned ASG did not dispute that as a matter of fact notice under section 8B of the said Act was not issued to the Petitioner. As a matter of fact, counsel of the Inquiry Commission had made a statement that such notice would be issued to the Petitioner, which is recorded in the order of the Commission which is at page 70 of the petition.

. We find merit in the contention of Mr. Desai. The Apex Court in *State of Bihar v. Lal Krishna Advani (supra)* has interalia held that non furnishing of notice under section 8B of the Commissions of Inquiry Act renders the action non est. In paragraph 8, the Apex Court

made following observations :

> "It is thus incumbent upon the Commission to give an opportunity to a person, before any comment is made or opinion is expressed which is likely to prejudicially affect that person. Needless to emphasis that failure to comply with the principles of natural justice renders the action non est as well as the consequences thereof.

30. The Apex Court in *Sanjay Gupta v. State of U.P.*[13], in paragraphs 10 and 11 made following observations :

> "In State of Bihar v. Lal Krishna Advani and others while interpreting Section 8B of the Act which has been brought into the statute by the Amending Act 79 of 1971, the Court has opined thus: -
>
> > *"8. It may be noticed that the amendment was brought about, about 20 years after passing of the main Act itself. The experience during the past two decades must have made the legislature realize that it would but be necessary to notice a person whose conduct the Commission considers necessary to inquire into during the course of the inquiry or whose reputation is likely to be prejudicially affected by the inquiry. It is further provided that such a person would have a reasonable opportunity of being heard and to adduce evidence in his defence. Thus the principles of natural justice were got inducted in the shape of a statutory provision. It is thus incumbent upon the Commission to give an opportunity to a person, before any comment is made or opinion is expressed which is likely to prejudicially affect that person. Needless to emphasise that failure to comply with the principles of natural justice renders the action non est as well as the consequences thereof."*
>
> 11. In view of the aforesaid enunciation of law, it is difficult to sustain the report. "

13 (2015) 5 SCC 283.

31. In the light of observations of the Apex Court we find merit in the the Petitioner's contention that in the absence of notice to the Petitioner under section 8B of the Commissions of Inquiry Act, 1952, the finding of the inquiry commission is *non est* and the Governor could not have relied upon such *non est* finding that had no existence in the eyes of law to grant sanction to prosecute the Petitioner.

. At this stage, reference must also be made to the decision of the Apex Court in *T.T. Antony's case (supra)*. Before the Apex Court in T.T.Antony's case following four points arose for the determination :

> (i) whether registration of a fresh case, Crime No.268/97, Kuthuparamba Police Station on the basis of the letter of the DGP dated July 2, 1997 which is in the nature of the second FIR under Section 154 of Cr.P.C., is valid and can it form the basis of a fresh investigation?
>
> (ii) whether the Appellants, the Executive Magistrate in Cri. A. No. 689 of 2001 and the police constables in CA No. 4066 of 2001 and the Respondents in the State's appeal Cri. As Nos. 690-91 of 2001 have otherwise made out a case for quashing of proceedings Crime No.268/97 ?
>
> (iii) what is the effect of the report of Commission of Inquiry; and
>
> (iv) whether the facts and the circumstances of the case justify a fresh investigation by CBI.

. We are concerned with point No. (iii) above, namely, what was the effect of the report of the Commission of Inquiry, which is

answered by the Apex Court by making observations in paragraph 33 and 34, which read thus :

> "33. It is thus seen that the report and findings of the Commission of Inquiry are meant for information of the Government. Acceptance of the report of the Commission by the Government would only suggest that being bound by the Rule of law and having duty to act fairly, it has endorsed to act upon it. The duty of the police - investigating agency of the State - is to act in accordance with the law of the land. This is best described by the learned law Lord - Lord Denning - in R. v. Metropolitan Police Commissioner [1968 (1) All E.L.R. 763 at p.769] observed as follows :
>
> *"I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself."*
>
> 34. Acting thus the investigating agency may with advantage make use of the report of the Commission in its onerous task of investigation bearing in mind that it does not preclude the investigating agency from forming a different opinion under Section 169/170 of Cr.P.C. if the evidence obtained by it supports such a conclusion. In our view, the Courts civil or criminal are not bound by the report or findings of the Commission of Inquiry as they have to arrive at their own decision on the evidence placed before them in accordance with law."

. The decision merely shows that report of the inquiry commission is for the information of the Government and the Government may take appropriate action. This decision also shows

that investigating agency can use such report, but it is at liberty to arrive at a different opinion. In our considered view, this decision does not support the contention of Mr. Singh, the learned ASG

32. Let us now consider whether the judgment of the learned Single Judge of this Court in Criminal Revision Application No.136 of 2014, dated 14th November 2014 can be said to be "material" which can be taken into consideration by the Hon'ble Governor while reviewing refusal of sanction order and passing the impugned order. We have already observed that after the erstwhile Governor refused to grant sanction to prosecute the Petitioner by his order dated 17th December 2013, the CBI made an application to the trial Court on 15th January 2014 under section 169 read with 173 of the Code seeking to delete the name of the Petitioner from the list of accused. What is required to be noted is that contention of the CBI at that time, which is recorded by the trial Court in its order dated 18th January 2014 disposing of the said application, was that review of the refusal of sanction order is not possible as there is no scope for collecting more evidence and once sanction is refused by the Govenor it cannot be reviewed. The CBI did not agree with the order of the trial Court rejecting their application under section 169 read with 173 and

challenged the same before the learned Single Judge of this Court by filing Criminal Revision Application Nol. 136 of 2014. This application is dismissed by the learned Single Judge on 19th November 2014. By that time, the CBI had filed supplementary charge-sheet stating that the Petitioner was not involved in any benami transaction in respect of the flats in Adarsh Co-operative Housing Society and second supplementary charge-sheet whereunder it was informed to the trial Court that this was the final charge-sheet in the case as investigation is complete.

33. The issues which arose before the learned Single Judge in Criminal Revision Application No. 136 of 2014, are quoted in paragraph 23 of the said order, which are as follows :

> "(i) As to whether the learned Special Judge was under obligation to refrain himself from passing any order due to the pending petition before the High Court ;
>
> (ii) As to whether application under Section 169 of the Code of Criminal Procedure could have filed by the CBI after filing of the chargesheet under Section 170 of the Code of Criminal Procedure ;
>
> (iii) Third incidental and most important issue had also arisen and argued at length by both the sides was, as to whether it was not possible or permissible to prosecute the respondent No.2 for the offence punishable under Section 13(2) r/w. 13(1)(d) of the Prevention of Corruption Act in view of the refusal on the part of the Governor to grant sanction under Section 197 of the Code of Criminal Procedure for prosecution of respondent No.2 for the offences punishable under

Sections 120B and 420 of the Indian Penal Code. ”

34. Reading of the said order makes it clear that the learned Single Judge of this Court dismissed this revision application by concurring with the opinion of trial Judge that despite application by the CBI for closing the case or for deleting the name of the Petitioner, it was not possible to do so because the offence punishable under section 13(2) of the PC Act is independent of the offence for which sanction has been refused by the Governor. In paragraph 35, the learned Single Judge observed that “*even if it is accepted for the time being, for the sake of arguments, that similar benefit was given to other societies also, it cannot be said that it was in the interest of public. It cannot be co-incident that two of the close relatives of Respondent No.2 [the present petitioner] got two flats worth crores of rupees according to the market value, by investing much lesser amount as compared to market value.”* It is required to note that these very observations of the learned Single Judge are relied upon by the Hon'ble Governor in reviewing erstwhile Governor's order refusing sanction to prosecute the Petitioner and passed the impugned order. According to the Governor these observations are fresh material on the basis of which earlier sanction refusal order is reviewed and fresh

order granting sanction to prosecute the Petitioner was passed. What is important to note is that the Petitioner disputed the said observations of the learned Single Judge being contrary to the record and accordingly filed application for recall of this oder which was dismissed on the ground that remedy of the Petitioner is to approach the higher authorities. The Petitioner thereafter challenged this order by filing Special Leave Petition before the Apex Court, being SLP No.5636 of 2015, in which notice is issued to the State and CBI and the same is pending. The fact that the Petitioner's application for recall was made, the order was passed by the trial Court and subsequent challenge to the said order by the Petitioner before the Apex Court was not brought to the notice of the Governor by the CBI. The said observations of the learned Single Judge of this Court even for the time being are accepted are based on material collected by the CBI during the course of investigation. The very same material was placed before the erstwhile Governor while seeking sanction to prosecute the Petitioner by CBI. The erstwhile Governor while rejecting sanction to prosecute the Petitioner relied upon report of the CBI itself that there is no evidence that decision of non deduction of 15% RG from FSI computation was illegal and thereafter concluded that material relied upon by the CBI to seek sanction is inadequate even prima facie to

reach to the conclusion about the guilt of the Petitioner.

35. In short, the material on the basis of which the learned Single Judge made observations was already placed before the erstwhile Governor, the same was considered by the erstwhile Governor and sanction to prosecute the Petitioner was refused. The learned Single Judge merely expressed his tentative opinion which in our considered opinon cannot constitute fresh material which could have been taken support of while reviewing the earlier sanction order and to pass the impugned order. In this regard reference must be made to the decision of the Apex Court in *Mansukhlal (supra)* in which the Court held that sanction accorded on the direction of the High Court without independent application of mind by that authority is invalid.

36. Mr. Desai also relying upon section 43 of the Indian Evidence Act, 1872 contended that said judgment of the learned Single Judge of this Court in Criminal Revision Application No.136 of 2014 is irrelevant and therefore not admissible in evidence. We find substance in the contention of Mr. Desai. There is no dispute that said judgment of the learned Single Judge is not the judgment referred to in

sections 40, 41 and 42 of the Indian Evidence Act, 1872. Section 43 deals with relevancy of judgments other than those mentioned in sections 40, 41 and 42. Under this section, judgments orders or decrees other than those mentioned in sections 40, 41 and 42 are irrelevant unless the existence of such judgments, orders or decrees is a fact in issue or is relevant under some other provisions of the Indian Evidence Act, 1872. In the light of provisions of section 43, in our considered opinion, the judgment of the learned Single Judge of this Court in Criminal Revision Application No. 136 of 2014 cannot be considered as material which could have been taken support of while sanctioning the prosecution of the Petitioner.

37. Perusal of the impugned order reveals that the Governor reviewed the refusal of sanction order and granted sanction to prosecute the Petitioner only on the basis of alleged fresh material, namely, the extract of the report of Justice J. A. Patil Inquiry Commission and the above referred observations of the learned Single Judge of this Court in his order dated 14th November 2014 passed in Criminal Revision Application No. 136 of 2014. Since we have come to the conclusion that extract of the report of Justice J. A. Patil Commission as well as the order of the learned Single Judge of this

Court cannot be termed as "material", muchless as "fresh material", the impugned order is vitiated and cannot be sustained.

38. Mr. Desai, the learned Senior Counsel appearing for the Petitioner next contended that grant of valid sanction is precondition to the taking cognizance of an offence if section 197 of the Code is applicable in the facts and circumstances of the case. He submitted that question regarding validity of the sanction order can be raised and decided at any stage and that question should ideally be decided at an early stage. He also submitted that postponing the question regarding the validity of sanction order to a later stage in the prosecution would allow a public servant to be put through the ignominy of a trial that might later be vitiated on the grounds of the sanction order being held invalid. This course would effectively defeat the very purpose of the bar on cognizance under section 197 of the Code. In support of his contention, Mr. Desai, relied upon *Sankaran Moitra v. Sadhna Das*[14] *Abdul Wahab Ansari v. State of Bihar*[15] and *Nanjappa v. State of Karnataka*[16].

39. Mr. Singh, the learned ASG relied upon the decisions of

14 (2006) 4 SCC 584.
15 (2000) 8 SCC 500.
16 (2015) 14 SCC 186.

Dinesh Kumar v. Airport Authority of India[17] and *CBI v. Ashok Kumar Aggarwal* [18] to contend that proper stage to examine the validity of sanction is trial and this Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India should not interfere.

40. In *Sankaran Moitra (supra)*, the Apex Court in paragraph 11 and 22 held as follows :

> "11. We find that even if we were accept the submission of learned counsel for the complainant that the stage is not reached for considering whether sanction under Section 197(1) of the Code of Criminal Procedure is required in the present case or not, it would only be postponing the consideration of that question. ..... When we take note of this submission, postponing a decision on the applicability or otherwise of section 197(1) of the Code can only lead to the proceedings being dragged on in the trial Court and a decision by this Court, here and now, would be more appropriate in the circumstances of the case especially when the accused involved are police personnel and the nature of the complaint made is kept in mind.....
>
> **22. Learned counsel for the complainant argued that want of sanction under Section 197(1) of the Code did not affect the jurisdiction of the Court to proceed, but it was only one of the defences available to the accused and the accused can raise the defence at the appropriate time. We are not in a position to accept this submission. Section 197(1), its opening words and the object sought to be achieved by it, and the decisions of this Court earlier cited, clearly indicate that a prosecution hit by that provision cannot be launched without the sanction contemplated. It is a condition precedent, as it were , for a successful prosecution of a public servant when the provision is attracted, though the question may**

17 (2012) 1 SCC 532.
18 (2014) 14 SCC 295.

arise necessarily not at the inception, but even at a subsequent stage. We cannot therefore accede to the request to postpone a decision on this question."
[emphasis supplied]

. In *Abdul Wahab Ansari (supra)*, there was dispute between two sets of Mohammedan residents, one set complaining against the other about the encroachment of the property belonging to the mosque and the Appellant as Circle Inspector, on the basis of a complaint had inquired into the matter and arrived at a finding that the situation at the site was volatile for which order under section 144 of the Code had been promulgated. Thereafter, the Appellant made several requests to the encroachers for removal of the encroachment and ultimately the Sub-Divisional Magistrate appointed the Appellant as Duty Magistrate for use of police force to remove the encroachment in question. The Appellant visited the encroachment site and was able to remove the encroachment partially and reported the said fact to his senior officer, but next day when the Appellant along with armed force, reached the encroachment site, several miscreants armed with weapons started hurling stones and as the situation became out of control, after giving due warning, the Appellant was compelled to give order for opening fire and dispersed the mob. On account of such firing, one of the persons died and two others were injured and the Appellant then sent a report to his senior officer about the incident.

The son of the deceased filed complaint before the Chief Judicial Magistrate, alleging commission of offence by the Appellant under sections 302, 307, 380, 427, 504, 147, 148 and 149 of IPC as well as section 27 of the Arms Act. The CJM held that section 197 of the Code was not applicable to the facts of the case and that there was sufficient evidence available to establish that *prima facie* case for the offence punishable under sections 302, 307, 147, 148, 149 and 380 was made out against the accused. CJM, therefore, directed the issuance of non bailable warrant against the Appellant. The Appellant then moved the High Court under section 482 of the code praying *inter alia* that no cognizance could be taken without sanction of the appropriate government, as required under section 197 of the Code as the Appellant was discharging his official duty pursuant to an order of the Competent Authority. The High Court without going into merits of the matter and being of the opinion that all the questions may be raised at the time of framing of charge, disposed of the application filed by the Appellant. Thereafter Appellant approached the Apex Court. Before the Apex Court arguments were advanced on the basis of decision of the Apex Court in *Birendra K. Singh v. State of Bihar*[19] and it was contended that the question of applicability of section 197 of the Code can be raised at the time of framing of charge and therefore impugned

19 (2008) 8 SCC 498.

order of the High Court does not require interference at the hands of the Apex Court. The Apex Court in this case framed two questions for consideration, namely, (1) Assuming the provisions of section 197 of the Code applies, at what stage the accused can take such plea ? Is it immediately after the cognizance is taken and process is issued or is it only when the Court reaches the stage of framing of charge as held by the Supreme Court in Birendra K. Singh's case ? (2) Whether in the facts and circumstances of the present case, is it possible for the Court to come to a conclusion that the Appellant was discharging his official duty and in the course of such discharge of duty ordered for opening of fire to control the mob in consequence of which a person died and two persons were injured and in which event, section 197 of the Code can be attracted ? The Apex Court answered these questions in following terms :

> **"(1) Previous sanction of the Competent Authority being a precondition for the Court in taking cognizance of the offence if the offence alleged to have been committed by the accused can be said to be an act in discharge of his official duty, the question touches the jurisdiction of the Magistrate in the matter of taking cognizance and, therefore, there is no requirement that an accused should wait for taking such plea till the charges are framed.**
>
> (2) The Appellant had been directed by the Sub-Divisional Magistrate to be present with police force and remove the encroachment in question and in course of discharge of his duty to control the mob, when he had directed for opening of fire, it must be held that the order of opening of fire was in exercise of the power conferred upon him and the duty imposed upon him under the orders of the Magistrate and in that view of the

> matter section 197(1) applies to the facts of the present case. Admittedly, there being no sanction, the cognizance taken by the Magistrate is bad in law and unless the same is quashed qua the appellant it will be an abuse of the process of Court.
>
> [emphasis supplied]

. In *Nanjappa (supra)* the Apex Court while considering a question regarding sanction under section 19 of the PC Act, once again stated that question of a valid sanction could be raised and considered at any stage. The relevant observations of the Apex Court are contained in paragraphs 7, 10, 15, 20, 21 and 22, which read thus :

> "7. We have heard learned counsel for the parties at considerable length. This appeal must, in our opinion, succeed on the short ground that in the absence of a valid previous sanction required under Section 19 of the Prevention of Corruption Act, the trial Court was not competent to take cognizance of the offence alleged against the appellant.
>
> 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 section 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.
>
> 15. In Yusofalli Mulla's 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:

> *"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 14prohibits 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's case A.I.R. (32) 1945 F.C. 16 that a prosecution launched without a valid sanction is a nullity."*

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

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

> *15. Grant of proper sanction by a competent authority is a sine qua non for taking cognizance of the offence. It is desirable that the question as regard sanction may be determined at an early stage.*
>
> *16. But, even if a cognizance of the offence is taken erroneously and the same comes to the court's notice at a later stage a finding to that effect is permissible. Even such a plea can be taken for the first time before an appellate court."*

21. In B. Saha & Ors. vs. M.S. Kochar (1979) 4 SCC 177, this Court was dealing with the need for a sanction under Section 197 of the Cr.P.C. and the stage at which the question regarding its validity could be raised. This Court held that the question of validity of an order of sanction under Section 197 Cr.P.C. could be raised and considered at any stage of proceedings. Reference may also be made to the decision of this Court in K. Kalimuthu vs. State by DSP (2005) 4 SCC 512 where Pasayat, J., speaking for the Court, held that the question touching the need for a valid sanction under Section 197 of the Cr.P.C. need not be raised as soon as the complaint is lodged but can be agitated at any stage of the proceedings. The following observation in this connection is apposite:

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

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

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

41. Perusal of the above decisions makes it clear that question regarding the validity of sanction order may arise from stage to stage and can be considered at any stage. It is not necessary that the said question should be raised and decided only at the stage of trial. As a matter of fact, the Supreme Court has held that the absence of the valid sanction would oust the jurisdiction of the Magistrate to take cognizance of the offence where section 197 of the Code is applicable.

42. In *Dinesh Kumar (supra)*, sanction was granted to prosecute Appellant under section 13(2) read with section 13(1)(d) and 13(1)(a) of the Prevention of Corruption Act, 1988. The Appellant challenged the same in the High Court questioning the validity of sanction order. During pendency of writ petition, charge-sheet was filed and cognizance was taken by the trial Court. The High Court dismissed the appeal because it was open to the Appellant to question the validity of sanction order during trial on all possible grounds. It was the case of the Appellant that he had challenged the legality and

validity of the sanction order at the first available opportunity, even before charge-sheet is filed, then High Court was not justified in relegating Appellant to agitate the question of validity of sanction order in the course of trial. He further submitted that the High Court ought to have gone into merits of challenge to sanction order, which, according to him, on its face, suffered from non-application of mind. The Apex Court held that since cognizance was already taken against the Appellant by the trial Court, High Court did not err in leaving question of validity of sanction open for consideration by trial Court and giving liberty to Appellant to raise the issue concerning validity of sanction order in the course of trial and ultimately did not interfere with the impugned order of the High Court. The Apex Court in this case heavily relied upon the decision in the case of *Prakash Singh Badal v/s State of Punjab*[20] especially observations contained in paragraphs 47 and 48 thereof which read thus :

> "47. The sanctioning authority is not required to separately specify each of the offences against the accused public servant. This is required to be done at the stage of framing of charge. Law requires that before the sanctioning authority materials must be placed so that the sanctioning authority can apply his mind and take a decision. Whether there is an application of mind or not would depend on the facts and circumstances of each case and there cannot be any generalised guidelines in that regard.
>
> 48. The sanction in the instant case related to

20 (2007) 1 SCC 1.

> the offences relatable to the Act. There is distinction between the absence of sanction and the alleged invalidity on account of non-application of mind. The former question can be agitated at the threshold but the latter is a question which has to be raised during trial."

. The Apex Court thereafter held as follows in paragraphs 9 and 10 :

> "9. While drawing a distinction between the absence of sanction and invalidity of the sanction, this Court in *Prakash Singh Badal* expressed in no uncertain terms that the question of 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 *Prakash Singh Badal*, this Court referred to invalidity of sanction on account of non-application of mind.
>
> 10. In our view, invalidity of sanction where sanction order exists, can be raised on diverse grounds like non-availability of material before the sanctioning authority or bias of the sanctioning authority or the order of sanction having been passed by an authority not authorised or competent to grant such sanction. The above grounds are only illustrative and not exhaustive. All such grounds of invalidity or illegality of sanction would fall in the same category like the ground of invalidity of sanction on account of non-application of mind – a category carved out by this Court in *Prakash Singh Badal*, the challenge to which can always be raised in the course of trial."

. One of the issues that fell for consideration before the Apex Court in *CBI v. Ashok Kumar Aggarwal (supra)* was what is the proper stage to examine the issue of sanction. The Apex Court relying

upon its earlier decision in *Dinesh Kumar's case (supra)*, answered this issue by making following observations in paragraphs 58 and 59 :

> "58. The most relevant issue involved herein is as at what stage the validity of sanction order can be raised. The issue is no more *re integra*. In *Dinesh Kumar v. Airport Authority of India* this Court dealt with the issue and placing reliance upon the judgment in *Prakash Singh Badal v. State of Punjab*, came to the conclusion as under :
>
> > "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 *Prakash Singh Badal*."
>
> 59. Undoubtedly, the stage of examining the validity of sanction is during the trial and we do not propose to say that the validity should be examined during the stage of inquiry or at pre-trial stage."

43. The decisions in *Dinesh Kumar* and *Ashok Kumar Aggarwal* (supra) are rendered by two judges' bench of the Apex Court whereas the decision in *Abdul Wahab Ansari (supra)* is delivered by three judges' bench of the Apex Court. With respect, we have to follow the decision of the larger bench of the Apex Court in *Abdul Wahab Ansari's* case.

. That apart, the Apex Court in *Dinesh Kumar and Ashok*

Kumar Aggarwal (supra) made distinction between the absence of sanction and alleged invalidity of the sanction on the ground of non application of mind. The Apex Court in these decisions held that the question of absence of sanction can 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 question has to be raised in the course of trial. So far as the present case is concerned, we have already held that the report of the Justice J. A. Patil Commission and the the order of the learned Single Judge of this Court in Criminal Revision Application No. 136 of 2014 is not "material", muchless the "fresh material" and same could not have been the basis for review of the earlier order refusing sanction to prosecute the Petitioner. In terms of the decision of the Apex Court in *Nishant Sareen (supra)* in the absence of fresh material, the earlier order of the erstwhile Governor refusing the sanction to prosecute the Petitioner could not have been reviewed. Moreover, they were observations of the High Court while rejecting an application filed by CBI. It, therefore, could not have been considered as fresh material to propose review of the earlier sanction. The sanctioning authority is an independent which cannot allow itself to be influenced by any opinion. Thus, this is the case of absence of material and in the absence of material, the

earlier order of refusing sanction could not have been reviewed. It is not the case of non application of mind and, therefore, the same must be dealt with at the earliest possible in order to avoid ignominy to the public servant and this Court can entertain the writ petition under Article 226 of the Constitution of India. In view of the above observations, the contention of Mr. Singh, the learned ASG that sanction can be challenged and would be subject matter of trial cannot be accepted as it would amount to abuse of process of law.

44. In the backdrop of above discussion, we summarise our findings in following terms :

[A] It was permissible for the Hon'ble Governor – the sanctioning authority to review or reconsider the earlier decision of erstwhile Governor not to grant sanction to prosecute the Petitioner on fresh material which had surfaced after the earlier sanction was refused.

[B] The material which is required to be considered by the sanctioning authority is not limited / restricted to the evidence collected by the investigating agency during the course of investigation under Chapter-XII of the Code.

[C] However, such material must be admissible in evidence or

capable of being converted to evidence which can be substantiated at the trial.

[D] Neither the extract of Justice J. A. Patil Commission Report nor the order dated 19th November 2014 passed by the learned Single Judge of this Court in Criminal Revision Application No. 136 of 2014 are admissible in evidence or capable of being converted into evidence and therefore the same cannot be considered.

[E] In the absence of fresh material, the Governor has no jurisdiction to review the order of the erstwhile Governor.

[F] The petition challenging the impugned order by the Governor can be entertained at pre-trial stage since the same is passed without there being fresh material

45. In the light of above discussion, the impugned order passed by the Hon'ble Governor of Maharashtra State granting sanction to prosecute the Petitioner cannot be sustained and the same is accordingly quashed and set aside. Writ petition is allowed in above terms.

[Smt. S. S. JADHAV, J.] **[RANJIT MORE, J.]**