Mansukhlal Vithaladas Chauhan

Vs

State of Gujarat

(M.K.Mukherjee, S.Saghir Ahmed JJ)

03.09.1997

JUDGMENT

S.SAGHIR AHMAD.J.

1. The appellant, who as Divisional Accountant, held a Class III Post, in the Medium Irrigation Project Division at Ankleshwar, Gujarat, was prosecuted for offences under Section 161 IPC and Section 5(2) of the Prevention of Corruption Act, 1947, and was ultimately convicted and sentenced to two years' rigorous imprisionment and a fine of Rs.15,000/-for the offence under Section 5(2) of the Act and another two years' rigorous imprisionment for the offence under Section 161 IPC, by the trial court, namely, Special Judge, Bharuch.This was upheld by the High Court in appeal.

2. Mr.U.R.Lalit, senior counsel appearing on behalf of the appellant has strenuously contended that the entire proceedings, namely, the proceedings before the trial court as also the High Court are liable to be set aside as there was no valid sanction within the meaning of Section 6 of the Prevention of Corruption Act, 1947 (hereinafter referred to as "the Act") with the consequence that the trial court had no jurisdiction to take orgnizance of these offences, much less try them. This contention is challenged by the counsel appearing on behalf of the State of Gujarat, who has contented that there was proper and valid sanction granted within the meaning of the Act and it was thereafter that the trial court took cognizance of the offences and initiated the case which ultimately ended in the conviction of the appellant. The trial court as also the High Court before whom the question of want of "sanction" was raised have held concurrently that there was proper sanction by the competent authority and therefore, the appellant was rightly convicted particularly as the charges were proved against him.

3. In order to appreciate the controversy as regards "sanction", we may set out the following few facts.

4. M/s R.L.Kalathia & Company, a partnership firm of eleven partners, one of whom was Mr.Harshadrai Laljibhai Kalathia, were awarded, in 1979, the contract for constructing Pigut Dam in Valia Taluka of District Bharuch at an estimated cost of Rupees eighty six lacs.The work was completed on 31 December, 1982.Excluding the payments made against running bills, there still remained a sum of Rupees eighty lacs to be paid to the contractor from whom the appellant allegedly demanded Rs.20,000/-but Harshadrai Laljibhai Kalathia reported the matter to the Deputy Director (Anti Corruption), Shri Vaghela, who, in his turn, briefed the Police Inspector, Shri Agravat and the latter, namely, Shri Agravat arranged and laid a trap on 4.4.83.The currency notes, treated with anthracene powder, were offered to the appellant who was allegedly, caught red-handed by the raiding party. Police Inspector Agravat examined the hands of the appellant in the light of the

ultra violet lamp which indicated marks of anthracene powder on the tips, palm and fingers of the left hand as also on his right hand. Some marks of blue anthrance powder were also found on the currency notes. Inspector Agravat gave a receipt of Rs.20,000/- to the appellant and took the currency notes in his possession. The usual Panchnama was prepared and further investigation was carried out by Shri Agravat.

5. In the meantime, the appellant submitted an application (Ex.45) to the Home Minister on 9.3.1984 for investigation being handed over to an independent officer. The Home Minister by his order dated 13.3.1984 directed fresh investigation of the case, in pursuance of which the investigation was taken up by the Assistant Director, Shri Vaghela, who submitted a fresh report in December, 1984 against the appellant. On the receipt of this report, the Secretary, Gujarat Vigilance Commission, by his letter dated 3.1.1985, wrote to the Government to grant sanction for prosecuting the appellant as a prima facie case was made out against him after fresh investigation. The Government, however, did not immediately grant the sanction and consequently the complainant, Shri Harshadrai Laljibhai Kalathia, filed in the name of the firm, M/s R.L.Kalathia & Company, a Special Civil Application No.5126 of 1984 in the Gujarat High Court under Article 226 of the Constitution for a direction to the respondents, namely the State of Gujarat and others, to sanction prosecution of the appellant for offences punishable under Section 161 IPC and 5(2) of the Act. The Gujarat High Court, by its order dated 2.1.1985.partly allowed the petition and passed the following operative order :

> "In the result, this petition is partly allowed. Respondent No.7 (newly added) is directed to accord sanction under the relevant provisions of the Prevention of Corruption Act to prosecute M.V.Chauhan who was working as Divisional Accountant of Medium Irrigation Project at Ankleshwar as stated above. It need not be stated that prosecution will be for offences punishable under the relevant provisions of law. Respondent No.7 is directed to accord sanction within one month from the receipt of the writ of this Court. Rule made absolute to the extent stated above with no order as to costs".

6. From the above it will be seen that the Secretary of the Department who was not originally a party in the writ petition, was impleaded as respondent No.7 and a direction was given by the High Court to the Secretary to grant sanction for prosecuting the appellant.

7. In view of the judgement of the Gujarat High Court, sanction was given and the appellant was prosecuted.

8. Section 197 of the Criminal Procedure Code which deals with the prosecution of Judges and Public Servants for offences alleged to have been committed by them while acting or purporting to act in the discharge of their official duty, lays down that no court shall take cognisance of such offences except with the previous sanction either of the Central Government or the State Government, as the case may be Section 6 of the Act, however, contains a special provision for sanction for prosecution for a few specific offences, including the offence punishable under Section 161 IPC it provides as under:

6. Previous sanction necessary for prosecution : -(1) No court shall take cognizance of an offence punishable under Section 161 [or Section 164] or Section 165 of the Indian Penal Code (45 of 1860), or under sub-section (2) [for sub-section (3A)] of Section 5 of this Act, alleged to have been committed by a public servant, except with the previous sanction.(a) in the case of a person who is

employed in connection with the affairs of the [Union] and is not removable from his office save by or with the sanction of the Central Government, [of the] Central Government) in the case of a person who is 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 the] State Government;(c) in the case of any other person, of the authority competent to remove him from his office.(2) Where for any reason whatsoever any doubt arises whether the previous sanction as required under sub-section (1) should be given by the Central or 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 offense was alleged to have been committed".

9. This Sanction places a bar on the Court from taking cognizance of the offences specified in Sub-section (1) against Public Servants unless the prosecution for those offences has been sanctioned either by the Central Government, if the person who has allegedly committed the offence, is employed in connection with the affairs of the Union Government and is not removable from his office except with the sanction of the Central Government, or by the State Government if that person is employed in connection with the affairs of the State Government. But if the "public servant" is not an employee of either the Central Government or the State Government, sanction, is to be given by the authority competent to remove him from the office held by him.

10. "Public servant" is defined in Section 21 of the IPC as a person falling under any of the categories specified therein. Twelfth Clause of Section 21 embraces within the fold of "public servant", every person who is

> (a).In the service of Government or remunerated by fees or commission for the performance of any public duty by the Government.
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> (b) In the service or pay of a local authority, a Corporation establish by or under a Central, Provincial or other State Act or a Government company as defined in Section 617 of the Companies Act, 1956.

11. Clause Twelfth was added by the Criminal Law (Amendment) Act (2 of 1958) and was substituted, in its present form, by Anti Corruption Laws (Amendment) Act, 1964 (11 of 1964).The definition of "public servant", as set out in Section 21 of the IPC, has been adopted by the Act so that there is no difference between the "public servant" as defined in the Code and the public servant define in the Act.12. Once the person against whom prosecution is to be launched is found to be covered by the definition of "public servant" and the requirement to that extent is satisfied, the next question whether he is to be prosecuted or not is considered either by the Central Government or by the State Government and if the person is neither the employee of the Central Government nor of the State Government, the question of sanction is considered by the person who is competent to remove him from the office held by him.13. Sub-section (2) of Section 6 is classificatory in nature in as much as it provides that if any doubt arises whether the sanction is to be given by the Central Government or the State Government or any other authority, it shall be given by the appropriate Government or the authority, which was competent to remove that person from the office on the date on which the offence was committed. This rule is a departure from the normal rule under which the relevant date is the date of taking cognizance, as laid down by this Court in R.S.Nayak Vs. A.R.Antulay, AIR 1984 SC 684 = 1984 Cr.L.J. 613.14. From the perusal of Section 6, it would appear that the Central or the State Government or any other authority Depending upon the category of the public servant) has the right to consider the facts of each case and to decide whether that "public servant" is to be prosecuted or not. Since the Section clearly

prohibits the Courts from taking cognizance of the offenes specified therein, it envisages that Central or the State Government or the "other authority" has not only the right to consider the question of grant of sanction, it has also the discretion to grant or not to grant sanction.15. In Gokulchand Dwarkadas Morarka Vs. The King AIR 1948 PC 82, it was pointed out that "The sanction to prosecute is an important matter, it constitutes a condition precedent to the institution of the prosecution and the Government have an absolute discretion to grant or withhold their sanction. The are not, as the High Court seem to have thought, concerned merely to see that the evidence discloses a prima facie case against the person sought to be prosecuted. They can refuse sanction on any ground which commends itself to them, for example that on political or economic grounds they regard a prosecution as in-expedient.Looked at as a matter of substance it is plain that the Government cannot adequately discharge the obligation of deciding whether to give or withhold a sanction without a knowledge of the facts of the case.

16. In Basedo Agarwalla Vs. Empereor, AIR 1945 FC 16, it was pointed out that sanction under the Act is not intended to be, nor is an automatic formality and it is essential that the provisions in regard to sanction should be observed with complete strictness.This Court in State through Anti-Corruption Bureau, Government of Maharashtra, Bombay Vs. Krishanchand Khushalchand Jagtiani, (1996) 4 SCC 472, while considering the provisions of Section 6 of the Act held that one of the guiding principles for sanctioning authority would the public interest and, therefore, the protection available under Section 6 cannot be said to be absolute.17. Sanction lifts the bar for prosecution. The grant of sanction is not an idle formality or an acrinomious exercise but a solemnl_ and sacrosanct act which affords protection to Government Servants against frivolous prosecutions (See : Mohd. Iqbal Ahmed Vs.State of Andhra Pradesh AIR 1979 SC 677).Sanction is a weapon to ensure discouragement of frivolous and vexations prosecutions and is a safeguard for the innocent but not a shield for the guilty.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. This fact can also be established by extrinsic evidence by placing the relevant files before the Court to show that all relevant facts were considered by the sanctioning authority.(See also Jaswant Singh Vs.The State of Punjab, 1958 SCR 762-AIR 1958 SC 12 State of Bihar & Anr. Vs.P.P. Sharma, 1991 Cr.L.J.1438 (SC)].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 a decision one way or the other. Since the discretion to grant or not to grant sanction vests absolutely in the sanctioning authority, its discretion should be shown to have not been affected by any extraneous consideration. If it is shown that the sanctioning authority was unable to apply its independent mind for any reason whatsoever or was under an obligation or compulsion or constraint to grant the sanction, the order will be bad for the reason that the discretion of the authority "not to sanction" was taken away and it was compelled to act, mechanically to sanction the prosecution.20. The narration of facts, set out in the beginning of the Judgement, would show that while the matter of grant of sanction was under the consideration of the State Government, Harshadrai had filed a petition on behalf of his firm in the Gujarat High Court under Article 226 of the Constitution for a writ in the nature of mandamus direction the State Government to grant sanction. In this petition, the Secretary of the Department who, originally was not impleaded, was,

subsequently, arrayed as respondent No.7 and a direction was issued to him to grant sanction and the Secretary, acting in pursuance of the order of the High Court, granted the sanction.21. The question is whether the High Court could issue a mandamus of this nature and whether the order of Sanction, in these circumstances, is valid.22. Mandamus which is a discretionary remedy under Article 226 of the Constitution is requested to be issued, inter alia, to compel performance of public duties which may be administrative, ministerial or statutory in nature, Statutory duty may be either directory or mandatory. Statutory duties, if they are intended to be mandatory in character, are indicated by the use of the words "shall" or "must". But this is not conclusive as "shall" and "must" have, sometimes, been interpreted as "may". What is determinative of the nature of duty, whether it is obligatory, mandatory or directory, is the scheme of the Statute in which the "duty" has been set out. Even if the "Duty" is not set out clearly and specifically in the Statute, it may be implied as correlative to a "Right".

23. In the performance of this duty, if the authority in whom the discretion is vested under the Statute, does not act independently and passes an order under the instructions and orders of another authority, the Court would intervene in the matter, quash the order and issue a mandamus to that authority to exercise its own discretion.

24. In The Vice-Chancellor, Utkal University and others vs.S.K.Ghosh and others (1954) SCR 883 = AIR 1954 SC 217, this Court pointed out that in a proceeding for mandamus, the Court cannot sit as a Court of Appeal or substitute its own discretion for that of the authority in which the Statute had vested the discretion. It was pointed out :

> "(18).We also think the High Court was wrong on the second point. The learned Judges rightly hold that in a "mandamus petition the High Court cannot constitute itself into a Court of appeal from the authority against which the appeal is sought, but having said that they went on to do just what they said they could not. The learned Judges appeared to consider that it is not enough to have facts established from which a leakage can legitimately be inferred by reasonable minds but that there must in addition be proof of its quantum and amplitude though they do not indicate what the yard-stick of measurement should be. That is a proposition to which we are not able to assent.(19) We are not prepared to perpetrate the error into which the learned High Court Judges permitted themselves to be led and examine the facts for ourselves as a Court of appeal but in view of the strictures the High Court has made on the Vice-Chancellor and he Syndicate we are compelled to observe that we do not feel they are justified. The question was one of urgency and the Vice-Chancellor and the members of the Syndicate were well within their rights in exercising their discretion in the way they did. It may be that the matter could have been handled in some other way, as, for example, in the manner the learned Judges indicate, but it is not the function of Courts of law to substitute their wisdom and discretion for that of the persons to whose judgment the matter in question is entrusted by the law".25. This principle was reiterated in Tata Cellular vs.Union of India, AIR 1996 SC 11 = (1994) 6 SCC 651, in which it was, inter alia, laid down that the Court does not sit as a Court of Appeal but merely reviews the manner in which the decision was made particularly as the Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituting its own decision which itself may be fallible. The Court pointed out that the duty of the Court is to continue itself to the question of legality, its concern should be1.Whether a decision-making authority exceeded its powers ?2. committed

an error of law;3. committed a breach of the rules of natural justice;4.reached a decision which no reasonable Tribunal would have reached or5. abused its powers.26. In this case, Lord Denning was quoted as saying :"Parliament often entrusts the decision of a matter to a specified person or body, without providing for any appeal it may be a judicial decision, or a quasi-judicial decision, or an administrative decision. Sometimes Parliament says its decision is to be final.At other times it says nothing about it. In all these cases the Courts will not themselves take the place of the body of whom Parliament has entrusted the decision. The Courts will not themselves embark on a reheating of the matter See Healey Vs.Minister of Health (1955) 1 QB 221".27.Lord Dennings further observed as under "If the decision-making body is influenced by considerations which ought not influence it or fails to take into account matters which it ought to take into account, the Court will interfere, see, Padfield Vs. Minister of Agriculture, Fisheries and Food 1968 AC 997".28. In Sterling Computers Ltd. Vs. M/s. M & N Publications Ltd. and others, AIR 1996 SC 51 = (1993) 1 SCR 81 = (1993) 1 SCC 445,.it was pointed out that while exercising the power of judicial review, the Court is concerned primarily as to whether there has been any infirmity in the decision-making process? In this case, the following passage from Professor Wade's Administrative Law was relied upon "The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the Court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The Court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which legislature is presumed to have intended".

29. It may be pointed out that this principle was also applied by Professor Wade to quasi-judicial bodies and their decisions. Relying upon the decision in The Queen Vs.Justice of London (1895) QB 214, Professor Wade laid down the principle that where a public authority was given power to determine a matter, mandamus would not lie to compel to reach some particular decision.

30. A Division Bench of this Court comprising of Kuldip Singh and B.P.Jeevan Reddy, JJ, in U.P.Financial Corporation Vs.M/s.Gem Cap (India) Pvt.Ltd. and others, AIR 1993 SC 1435 = (1993) 2 SCR 149 = (1993) 2 SCC 299, observed as under :"The obligation to act fairly on the part of the administrative authorities was evolved to ensure the Rule of Law and to prevent failure of justice. This doctrine is complementary to the principles of natural justice which the Quasi-Judicial Authorities are bound to observe. It is true that the distinction between a quasi-judicial and the administrative action has become thin, as pointed out by this court as far back as 1970 in A.K. Kraipak Vs.Union of India, AIR 1970 SC 150. Even so the extent of judicial scrutiny/judicial review in the case of administrative action cannot be larger than in the case of quasi judicial action. If the High Court cannot sit as an appellate authority over the decisions and orders of quasi-judicial authorities it follows equally that it cannot do so in the case of administrative authorities. In the matter of administrative action, it is wellknown, more than one choice is available to the administrative authorities they have a certain amount of discretion available to them. They have "a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred" (Lord Diplock in Secretary of State for Education v Tameside Metropolitan Borough Council- 1977 AC 1014 at 1064).The Court cannot substitute its judgment for the judgment of administrative authorities in

such cases. Only when the action of the administrative authority is so unfair or unreasonable that no reasonable person would have taken that action, can the Court intervene".

31. In the background of the above principles, let us now scrutinise the judgment of the Gujarat High Court which, let us say here and now, could only direct the Govt. for expeditious disposal of the matter of sanction.

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

33. The High Court put the Secretary in a piquant situation. While
the Act gave him the discretion to sanction or not to sanction the prosecution of the appellant, the judgment gave him no choice except to sanction the prosecution as any other decision would have exposed him to an action in contempt for not obeying the mandamus issued by the High Court. The High Court assumed the role of the sanctioning authority, considered the whole matter formed an opinion that it was a fit case in which sanction should be granted and because it itself could not grant sanction under Section 6 of the Act, it directed the Secretary to sanction the prosecution that the sanction order may be treated to be an order passed by the Secretary and not that of the High Court. This is a classic case where a Brand name is changed to give a new colour to the package without changing the contents hereof. In these circumstances, the sanction order cannot but be held to be wholly erroneous having been passed mechanically at the instance of the High Court.

34. Learned counsel for the State of Gujarat contended that the judgement passed by the High Court cannot be questioned in these proceedings as it had become final. This contention is wholly devoid of substance. The appellant has questioned the legality of "sanction" on many grounds one of which is that the sanctioning authority did not apply its own mind and acted at the behest of the High Court which had issued a mandamus to sanction the prosecution. On a consideration of the whole matter, we are of the positive opinion that the sanctioning authority, in the instant case, was left with no choice except to sanction the prosecution and in passing the order of sanction, it acted mechanically in obedience to the mandamus issued by the High Court by putting the signature on a proforma drawn up by the office. Since the correctness and validity of the 'sanction order was assailed before us, we had necessarily to consider the High Court judgment and its impact on the "Sanction". The so-called finality cannot shut out the scrutiny of the judgment in terms of actus curieae neminem gravabit as the order of the Gujarat High Court in directing the sanction to be granted, besides being erroneous, was harmful to the interest of the appellant, who had a right, a valuable right, of fair trial at every stage, from the initiation till the conclusion of the proceedings.

35. There is another aspect of the matter.

36. The High Court by its order dated 21.1.1985 had directed the Secretary, Road & Building Department, to grant sanction within on month from the receipt of the order. The sanction order (Exhibit 9) is dated 23rd January, 1985 and is signed by Shri J.P. Lade, Deputy Secretary to the

Government of Gujarat, Road & Building Department. Shri Lade has been examined as PW-8.He stated that on the relevant date, he was serving as under Secretary and was also holding the additional charge of the Deputy Secretary, Road & Building Department and in that capacity, he gave the sanction as he felt that there was sufficient evidence against the appellant warranting his prosecution.

37. PW-14, Shri Pravinchandra Jaisukhlal, who was the Secretry Road & Building Department, where Shri Lade was the Under Secretary, stated that he had given the sanction for prosecution of the appellant. He further stated that before according to sanction he had seen all papers. He also stated that the signature on Exhibit 9 was that of Shri Lade as the correspondence is usually done by the Under Secretary after the orders are passed on the file.

38. From the nothings of the Secretariat file, contained in Exhibit 70, as also the conflicting statements made by the Secretary and the Under Secretary, it is not possible to hold as to who actually granted the sanction. The Gujarat High Court has held that the sanction was granted by the Deputy Secretary, Shri Lade (PW-8)ignoring the fact that the file was also placed before the Secretary and he had also put his signature thereon. The file had, admittedly, been sent to the office of the Chief Minister from where it was received back on 30th January, 1985 and as such it is not understandable as to how sanction could be granted on 23rd January, 1985.This confusion also appears to be the result of the order passed by the High Court that the Sanction must be granted within one month. Secretary being the head of the Department stated on oath that he had granted the sanction, particularly as the mandamus was directed to him and he had to comply with that direction. Deputy Secretary, who actually issued the order of sanction, had signed it and, therefore, he owned the sanction and stated that he had sanctioned the prosecution. Both tried to exhibit that they had faithfully obeyed the mandamus issued by the High Court and attempted to save their skin, destroying, in the process, the legality and validity of the sanction which constituted the basis of appellant's prosecution with the consequence that whole proceedings stood void ab initio.

39. Normally when the sanction order is held to be bad, the case is remitted back to the authority for re-consideration of the matter and to pass a fresh order of sanction in accordance with law. But in the instant case, the incident is of 1983 and, therefore, after a lapse of fourteen years, it will not, in our opinion, be fair and just to direct that the proceedings may again be initiated from the stage of sanction so as to expose the appellant to another innings of litigation and keep him on trial for an indefinitely long period contrary to the mandate of Article 21 of the Constitution which, as part of right to life, philosphizes early end of criminal proceedings through a speedy trial.

40. The appeal is consequently allowed. The judgments passed by the trial court as also by the High Court are set aside and the appellant is acquitted. He is on bail. He need not surrender. His bail bonds are cancelled