AFR
Reserved on 27.2.2023
Delivered on 11.4.2023

Court No. - 28
Case :- APPLICATION U/S 482 No. - 283 of 2023
Applicant :- Shivraj Singh And 2 Others
Opposite Party :- State Of U.P. Thru. Secy. Home Lko. And 2 Others
Counsel for Applicant :- Kapil Misra
Counsel for Opposite Party :- G.A.

Hon'ble Shree Prakash Singh,J.

1. Heard Sri Jyotindra Mishra, learned Senior Advocate, assisted by Sri Kapil Mishra, learned counsel for the applicants, Sri Shiv Nath Tilhari, learned A.G.A.-I for the State and perused the material placed on record.

2. By means of instant application, the applicants have assailed the sanction orders dated 3.8.2010 & 3.3.2022 and entire proceedings in Sessions Trial Nos.1245 of 2010 and 13 of 2013 arising out of Case Crime No.30 of 2010 under Sections 120B, 121, 121A, 420, 467, 468 I.P.C. & 13, 18, 20, 21, 23 (2), 38, 39, 40 UAPA (State Vs. Shivraj Singh and another) & (State Vs. Rajendra Kumar @ Arvind) relating to Police Station Kidwai Nagar, District Kanpur Nagar pending in the court of ASJ-3/Special NIA/ATS Court, Lucknow.

3. Factual matrix of the case is that on 8.2.2010, three persons, namely, Shivraj Singh, Rajendra Kumar @ Arvind Kumar and Kripa Shankar were arrested by Uttar Pradesh State Task Force team, headed by Sub Inspector Rajeev Dwivedi at 4.50 pm. The First Information Report was lodged at Police Station Kidwai Nagar on the complaint of Sub Inspector Rajeev Dwivedi. Thereafter, a letter was sent by Investigating Officer to DIG (ATS) on 7.7.2010 for grant of sanction of prosecution and the DIG (ATS) sent a letter on 12.7.2010 to the Secretary, Department of Home, Government of UP making a request for grant of sanction for prosecution.

4. After considering the aforesaid request, sanction for prosecution was granted by the State Government, vide letter dated 3.8.2010. The charge sheet was filed by the Investigating Officer and on 4.8.2011, charges were framed against accused Shivraj Singh and Kripa Shankar in Sessions Trial No.1245 of 2010 and against the co-accused Rajendra Kumar @ Arvind on 8.3.2023 in Sessions Trial No.13 of 2013. The prosecution witnesses, i.e., P.W. 1 to P.W. 13 were examined and while cross-examination of witnesses, they admitted that neither there was any literature in hand writing of the accused persons nor there was any evidence of extorting money thereof at Kanpur Nagar and further addmitted that techinically somebody has printed or published these materials other than the accused persons.

5. On 8.6.2016 the applicants moved an application before the trial court for disposal of the case. On 10.2.2021, they also filed an application for framing of question under Section 313 of Cr.P.C. and statement of the accused was recorded on 15.2.2021. On 8.1.2022 all files of Sessions Trial No.1245 of 2010, 13 of 2013, 1265 of 2010, 1265A of 2010 were transferred to the learned ASJ-3/Special NIA/ ATS Court, Lucknow. On 4.8.2022, the accused persons came to know that vide application dated 22.3.2022, supplementary case diary and amended order of sanction for prosecution dated 3.3.2022 has been submitted before the court and, thereafter, on 29.9.2022, an objection was filed by the co-accused with a request that trial court may cancel the supplementary case diary and the sanction order. Reply to the objection dated 29.9.2022 was also filed by the Investigating Agency on 24.11.2022 and, thereafter, on 24.11.2022 itself, the trial court granted permission to the prosecution upon the application under Section 311 Cr.P.C. and, thus, the applicant being aggrieved by the sanction orders dated 3.8.2010 and 3.3.2022 including the entire proceedings initiated in Sessions Trial Nos.1245 of 2010 and 13 of 2013, has instituted the instant application.

6. Learned Senior Counsel appearing for the applicants contends that at the very initial stage, intent of the prosecution is dubious, as on the basis of unconfirmed information, the applicants were arrested without cogent piece of evidence; as the First Information Report was lodged against the applicants and the charge sheet has also been filed. Thereafter, without prior intimation to the applicants, the case was transferred from Kanpur to Lucknow and, while taking the perplexing action supplementary case diary and the amended order of sanction dated 3.3.2022 was filed before the trial court. Although as soon as this fact came into knowledge of the applicants, they filed objections on 29.9.2022 but the trial court, without applying its judicial mind, has accepted the supplementary case diary and issued order of sanction for prosecution on 3.3.2022 which was about 12 years after the first sanction was granted.

7. Adding his arguments, he submits that from several dates fixed before the trial court and the order impugned passed thereafter, it is evident that the trial court has acted in a very cavaliar and supine manner. He submtis that first of all, when the matter was transferred from Kanpur to Lucknow, it was not intimated to the applicants and, thereafter, when the objection was filed by the applicants on 29.9.2022 for cancellation of supplemetary case diary and order of sanction on the ground of being unlawful sanction, the trial court granted time to the Investigating Agency to file objection, which was filed on 24.11.2022, and, thereafter, on 2.12.2022, an application on behalf of the accused was filed for *haziri mafi* on the ground of illness but on the same day, the trial court recorded statement of witness Prashant, who was Special Secretary, Home Government of U.P. and denied the opportunity of cross-examination. He submits that it is on 15.12.2022, when it came in the knowledge that on 24.12.2022, the prosecution is granted permission by the trial court upon its application under Section 313 of Cr.P.C. and that too without intimating the accused and without disposal of objection dated 29.9.2022.

8. Continuing with his arguments, he submits that provision of Section 45 (2) of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as 'the Act 1967') clearly provides that 'sanction of prosecution shall be given only after considering the report of such authority appointed by the Central Government or, as the case may be, the State Government, which shall make an independent review of evidence'. He submits that from the aforesaid provision, it is very clear that sanction of prosecution can be given only after considering the report of authority. Meaning thereby that the sanctioning authority must have gone through the report of the authority appointed by the Central Government or the State Government as the case may be but in the instant matter the first sanction was granted in the year 2010 and there was no any review authority at the very point of time and, suddenly, on 3.3.2022 in the garb of provisions of Section 173 (8) of Cr.P.C., the sanction for prosecution was granted and supplementary case diary was submitted before the trial court along with the order of sanction for prosecution, which is totally unlawful and against the mandate of Sub Section (2) of Section 45 of the Act 1967. He added that first sanction dated 3.8.2010 is invalid as the authority was not appointed by the Government for independent review of evidences gathered in the course of inviestigation and further there was no material before the sanctioning authority for considering the same as per the mandate of Sub Section (2) of Section 45 of the Act 1967.

9. Further argued that Investigating Officer filed the charge sheet against the applicants in a mechanical manner and that is without collecting any evidence and further no offence under Sections under Sections 120B, 121, 121A, 420, 467, 468 I.P.C. & 13, 18, 20, 21, 23 (2), 38, 39, 40 UAPA are made out against the applicants and the instant matter is an example of sheer abuse of process of law and, therefore, the entire criminal proceedings initiated against the applicants are liable to be quashed.

10. In support of his contention, he has placed reliance on a Judgment reported in **2021 LawSuit(All) 1115, Sheikh Javed Iqbal @ Ashfaq Ansari @ Javed Ansari Vs. State of UP & Another** and has referred paras 35, 36 and 37 of the aforesaid Judgment. Paras 35, 36 and 37 of the aforesaid Judgment are quoted as under:-

> *"35. The main object of imposing condition of independent review by an authority appointed by the Central Government or the State Government as the case may be, was to prevent the misuse of the stringent provisions of UAPA by the law enforcing agencies. Further, when legislature in its wisdom has prescribed a specific mandatory procedure to accord sanction, it was the duty of sanctioning authority to follow that statutory procedure. But unfortunately, there is no material on record to show even prima-facie that the recommendation of any authority who have independently reviewed the evidence collected by the investigating authority was ever placed before the competent authority at the time of obtaining sanction under sub-section (1) of Section 45 of the UAPA. In other words, the competent authority while granting sanction, in the present case was deprived of the relevant material i.e. recommendation of independent authority that was mandatory to consider as to whether sanction should or should not be granted.*
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> *36. Now coming to the question as to whether this inherent violation of the mandatory procedure is to be taken care of by the trial Court in trial, as in this case trial has moved forward and many prosecution witnesses have been examined by the prosecution, or the defect in the sanction granted in this case is of such a nature, which should not wait till the conclusion of the trial. In order to appreciate this point it is desirable to have a look at the law with regard to the sanction.*
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> *37. Hon'ble Supreme Court in C.B.I. vs. Ashok Kumar Aggarwal , MANU/SC/1220/2013,relied on by Ld Additional Government Advocate, while deliberating the validity of sanction held as under:-*
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> > *"7. The prosecution has to satisfy the court that at the time of sending the matter for grant of sanction by the competent authority, adequate material for such grant was made available to the said authority. This may also be evident from the sanction order, in case it is extremely comprehensive, as all the facts and circumstances of the case may be spelt out in the sanction order. However, in every individual case, the court has to find out whether there has been an application of mind on the part of the*

sanctioning authority concerned on the material placed before it. It is so necessary for the reason that there is an obligation on the sanctioning authority to discharge its duty to give or withhold sanction only after having full knowledge of the material facts of the case. Grant of sanction is not a mere formality. Therefore, the provisions in regard to the sanction must be observed with complete strictness keeping in mind the public interest and the protection available to the accused against whom the sanction is sought.

It is to be kept in mind that sanction lifts the bar for prosecution. Therefore, it is not an acrimonious exercise but a solemn and sacrosanct act which affords protection to the government servant against frivolous prosecution. Further, it is a weapon to discourage vexatious prosecution and is a safeguard for the innocent, though not a shield for the guilty.

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.

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

(a) 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.

(b) 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.

(c) 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.

(d) 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.

(e) 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."

11. Placing reliance on the aforesaid Judgment, learned counsel for the applicant submits that object of the provision regarding independent review by an autority appointed by the Central Government or State Government, is to prevent misuse of the stringent provisions of the Act 1967. Thus, the pvoisions of Sub Sections (1) and (2) of Section 45 of the 1967 are more relevant and important.

12. Further placing reliance upon a Judgment of the Apex Court rendered in case of **Mansukhlal Vithaldas Chauhan Vs. State of Gujarat (1997) 7 SCC 622,** he has referred paras 38 and 39 of the aforesaid Judgment. Paras 38 and 39 of the aforesaid Judgment are quoted as under:-

"38. From the notings of the Secretariat file, contained in Exhibit 70, as also the conflicting statement 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, admitted, 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 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 a part of right to life, philosophizes early and of criminal proceedings through a speedy trial."

13. Referring the aforesaid, he added that it is trite law that once it is found that sanction is not as per the law, the matter must be sent back to the authority for reconsideration of the matter and to pass fresh order but in the instant matter, contrary to the aforesaid proposition of law, even after passing of about 11 to 12 years, the order dated 3.8.2010 has been validated by way of further investigation, thereby filing supplementary charge sheet and a review order.

14. While concluding his argument, he contended that sanction for prosecution as envisaged in Sub Section (2) of Section 25 of the Act 1967 is materially different than the provision of sanction for prosecution provided under Section 19 of the Prevention of Corruption Act, 1947 (hereinafter referred to as 'the Act 1947'). He further added that looking into the stringent law, it appears that the intent of the legislature was very clear to specifically put the provisions that 'only after considering the

report of such authority', the authorities would take decision with respect to sanction for prosecution and this provision is not given in 'the Act, 1947'. Thus, both the provisions are not similar and any ratio of Judgment, which was held, considering the provisions of Act 1947 would not be applicable in the present matter. Therefore, the order dated 3.8.2010 and 3.3.2022 including the entire proceeding of sessions trials aforementioned vitiate in the eyes of law and thus, the same are liable to be quashed.

15. Per contra, Sri Shiv Nath Tilahari, learned counsel appearing for the State has opposed the conention aforesaid with fullest vehemence and added that learned counsel for the applicants has tried to twist the actual fact and law and has interpreted the same in his own manner. He submits that provision of Section 45 of Act 1967 is very clear in its meaning and that mandates that the sanction for prosecution under Sub Section (1) of Section 45 shall be given within such time as may be prescribed considering the report of the authorities appointed by the Central or State Government who will have independently reviewed the evidences gathered during the course of investigation and then the recommendation is to be made to the Central Government or State Government as the case may be.

16. He further submits that the Investigating Agency has power to gather the evidence by further investigation and even prior permission by the trial court is not required. The Investigating Agency filed supplementary case diary including the letter dated 3.3.2022 and that was considered by the trial court as the same is permissible under the law. He further contended that vilidity of the sanction for prosecution can be considered during the trial and also submitted that there is material difference in between the 'invalid sanction' and 'absence of sanction'. He submits that it is settled law that absence of sanction can be looked into at the threshhold but as far as the validity of sanction is concerned that is the subject matter of the trial and so far as the present matter is

concerned, admittedly, it is not a case of absence of sanction as evidently the prosecution sanction has been done and, therefore, it is not the stage where allegedly invalid sanction can be challenged.

17. In support of his submissions, he has placed reliance on a Judgment of the Apex Court reported in (**2020) 17 SCC 664, Central Bureau of Investigation and another Vs. Dhirendra Kumar Agrawal and another** and has referred on paragraph 11 of the above said Judgment. Para 11 of the aforesaid Judgment is quoted as under:-

> *"11. Further the issue relating to validity of the sanction for prosecution could have been considered only during trial since essentially the conclusion reached by the High Court is with regard to the defective sanction since according to the High Court, the procedure of providing opportunity for explanation was not followed which will result in the sanction being defective. In that regard, the decision in the case of Dinesh Kumar Vs. Chairman, Airport Authority of India, (2012) 1 SCC 532 relied upon by the learned Additional Solicitor General would be relevant since it is held therein that there is a distinction between the absence of sanction and the alleged invalidity on account of nonapplication of mind. The absence of sanction no doubt can be agitated at the threshold but the invalidity of the sanction is to be raised during the trial. In the instant facts, admittedly there is a sanction though the accused seek to pick holes in the manner the sanction has been granted and to claim that the same is defective which is a matter to be considered in the trial."*

18. Placing reliance on the aforesaid Judgment, he added that ratio of the Judgment aforesaid is very clear that validity of the sanction for prosecution could be considered during the course of trial and distinction has also been drawn in between 'absence of sanction' and 'invalidity of sanction' including non-application of mind. He further added that this is a case where the applicants have been charged for waging war against the Government of India and, thus, is of serious concern and, therefore, no liberal interpretation can be given so far as the procedure prescribed under the Act, 1967 is concerned.

19. He finally submits that law is very clear on this point and this case is not of 'absence of sanction' and if there is any invalidity or defect in

'the sanction for prosecution', the applicants have opportunity to raise it before the trial court at the time of trial, therefore, submission is that instant application is liable to be dismissed.

20. Having heard learned counsel for the parties and after perusal of the material placed on record, the conundrum is that whether the first sanction granted on 3.8.2010 and, later on, supplemented vide review order dated 3.3.2022, is a valid sanction of prosecution or not. At the very inception, when the sanction for prosecution was sought, the State Government, vide order dated 3.8.2010 granted sanction for prosecution with respect to the applicants. The matter proceeded and, thereafter, the Investigating Officer started further investigation and a supplementary case diary was submitted before the trial court appending therewith the copy of the order dated 3.3.2022 of the review authority and, thus, further question is that by way of deriving powers under Section 173 (8) of Cr.P.C., whether the further investigation can be done to fill up the gaps/lacunaes of the investigation.

21. It is borne out from the arguments advanced by the learned counsel for the applicants that on 3.8.2010, first sanction of prosecution was granted by the State. So far as the present matter is concerned, the provisions with respect to the sanction of the prosecution contains in Section 45 (1) and (2) of the Act 1967 wherein the mandate of the provision is that at the time of grant of sanction of proseution, the authority granting such sanction, shall proceed 'only after considering the report' of an authority appointed by the Central Government or the State Government. The contention of the learned counsel for the applicants is that on 3.8.2010, there was no report of the authority appointed by the Central Government or the State Government before the sanctioning authority, as the review autyhority was appointed after the first sanction granted by the State Government on 3.8.2010 and further submission is that the provision of Section 45 (2) of the Act 1967 is not similar to the provisions of Section 19 of the Act 1947.

22. The crux of the contention of the State is that the sanction for prosecution has been granted and that too is in consonance with the provision of the Act 1967. Further since the matter was proceeded after framing of charges and, admittedly, there is an order of sanction for prosecution, thus, this cannot be said that there is absence of sanction and if there is any invalidity, which is being raised at this stage, the same can be looked into by the trial court.

23. When this Court examined this case on facts and law, it is decipherable that the Investigating Agency undoubtedly has power to proceed with further investigation and the prior approval for proceeding with such investigation is not required under the law. Of course, time and again, it has also been the view of the Hon'ble Apex Court, therefore, the supplementary case diary appending the order 3.3.2022, has rightly been submitted by the Investigating Officer before the trial court.

24. So far as the order dated 3.3.2022 passed by the review authority is concerned, the matter pertains to year 2010 and about 12 years have been passed. Further, it is settled that the grant of sanction is merely an administrative function and sanctioning authority is required to reach over satisfaction, at the first hand that acts and facts would constitute the offence and, now, after lapse of 12 years, it would not be just and fair to initiate proceeding of grant of sanction to put the applicants and other side for another innings of litigations and keep the trial pending indefinite long period.

25. It has been enuntiated that there is distinction between 'absence of sanction' and 'invalidity of sanction'. Absence of sanction can be raised and agitated at the very inception but the invalidity or illegality of the sanction is to be raised during the trial.

26. Admittedly, the sanction was granted on 3.8.2010 and, thus, prima facie it is not a case of absence of sanction but the applicants-accused persons have raised certain illegality and invalidity in grant of sanction

for prosecution and those are three folds. Firstly, the Review authority was not in existence at the time of grant of sanction; secondly, there was no material before the sanctioning authority; and thirdly Section 173 (8) is not meant for filling the lacunaes. All the pleas are with respect to invalidity said to be creeping in the impugned order of sanction. As has been discussed in preceding paragraphs, the instant matter is not a case of absence of sanction and if there is any alleged invalidity prevailing in the order of sanction, the same can be raised/assailed before the trial court.

27. In view of the aforesaid submissions and discussions, this Court does not find any merit in this application.

28. Consequently, the application is hereby **dismissed.**

29. However, the applicants-accused persons are at liberty to raise their grievance with respect to the invalidity of the sanction, if any, before the trial court concerned.

Order Date :- 11.4.2023
Ram Murti