

(2012) 04 BOM CK 0055

In the Bombay High Court

Case No : Criminal Writ Petition No. 1017 of 2005

Asiya Sayed Khwaja Ayub

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 10-04-2012

Acts Referred:

Constitution of India, 1950 — Article 21, 22(1), 226
Criminal Procedure Code, 1973 (CrPC) — Section 161, 197
Explosive Substances Act, 1908 — Section 3
Explosives Act, 1884 — Section 5, 9(b)
Penal Code, 1860 (IPC) — Section 109, 120, 120B, 193, 201
Prevention of Terrorism Act, 2002 — Section 18, 20, 21, 22, 3

Citation : (2012) 04 BOM CK 0055

Hon'ble Judges : Kode P.D., J;Khanwilkar, A.M.

Bench : Division Bench

Advocate : Mihir Desai, for the Appellant; Ravi Kadam, Gen., with P.A. Pol, Public Prosecutor, for State. Girish Kulkarni for Respondent No. 3 and Subhash Jha with Ms. Sharon Patole instructed by . ms. Law Globle, for Respodent Nos. 11 to 14, for the Respondent

Judgement

KHANWILKAR A.M., J.—The petitioner, claiming to be mother of one Sayed Khwaja Yunus Sayed Ayub, has approached this Court by way of writ petition under Article 226 of the Constitution of India complaining about the inexplicable circumstances in which her son has disappeared while in police custody on 6th January, 2003. Therefore, in the present petition, it has been prayed that the respondents must disclose the whereabouts of Sayed Khwaja Yunus Sayed Ayub (hereinafter referred to as "Khwaja Yunus", for the sake of brevity) and to produce him before the Court forthwith. In the event he is already dead, his remains should be produced before the Court within specified time. It is further prayed that the Authorities should direct the prosecution and suspension of respondent Nos. 3, 9 and 10. It is further prayed that the respondents be directed to pay at least Rs. 20,00,000/- as compensation for violation of the fundamental rights of Khwaja Yunus as well as of the petitioner guaranteed

under the Constitution of India. It is further prayed that direction be issued to respondent No. 1, State of Maharashtra, to extend adequate protection to Dr. Mateen. He was, at the relevant time, in Thane Jail along with her son, Khwaja Yunus. Dr. Mateen unraveled the acts of commission and omission of the police officials about the torture caused to Khwaja Yunus as well as other co-accused while in police custody and the possibility of Khwaja Yunus succumbing to the injuries caused to him during interrogation in police custody. During the pendency of this petition, the petitioner has amended this petition and has asked for further relief of direction against respondent No. 15, Director General of Police and respondent Nos. 1 and 2, State of Maharashtra, to accord sanction to prosecute respondent Nos. 3 and 9 to 14 for the offence u/s 302 and other offences in relation to Khwaja Yunus, his treatment in police custody and his death.

2. Briefly stated, the background in which this petition has been filed for the aforesaid reliefs, as stated by the petitioner, is as follows:-

(a) A bomb blast took place on 2nd December, 2002. Four persons were arrested from different places namely Dr. Mateen, Muzammil, Zaheer and Khwaja Yunus and charged under POTA. Subsequently all the accused who were tried have been acquitted by the Sessions Court. Khwaja Yunus is dead. He was arrested on 25th December, 2002 from near Chikaldhara. He was kept with the other accused at Ghatkopar Police Station. Investigation took place both at Ghatkopar Police Station and Powai Police Station. It is the petitioner's case that at both places, they were tortured.

(b) On 6th January, 2003, the three accused, namely, Dr. Mateen, Khwaja Yunus and Zaheer were interrogated at Ghatkopar police lock-up from 12.00 Noon to about 1.30 P.M. Khwaja Yunus was badly tortured by respondent Nos. 10 to 14. He vomited blood and it is feared that he died due to police torture at Ghatkopar Police Station. Dr. Mateen, the co-accused, who is a witness to this, has testified to this effect. Dr. Mateen is a doctor who has conducted number of postmortem. Zaheer has also testified.

(c) Khwaja Yunus died in the afternoon of 6th January, 2003 at Ghatkopar Police Station. Thus, all those who claim to have seen Khwaja Yunus alive after 2.00 P.M. on 6th January, 2003 said so with a view to cover up the crime and are required to be prosecuted. The police officials at Ghatkopar and Powai decided to dispose the body of Khwaja Yunus. The cover-up was that Mr. Vaze (respondent No. 5) and three others would claim that they were taking Khwaja Yunus to Aurangabad to follow a lead. They would stop on way at Lonavala Police Station for dinner (to prove that Khwaja Yunus was with them till then) and after that would claim that the jeep met with an accident and Khwaja Yunus ran away. An F.I.R. disclosing Khwaja Yunus having run away is accordingly filed in the Court at Parner.

(d) In the POTA Case registered against Khwaja Yunus and others in connection

with bomb blast incident, the petitioner's husband filed application before the POTA Court for production of his son Khwaja Yunus and other reliefs. The said Court ordered enquiry into the disappearance of Khwaja Yunus. Co-accused Dr. Mateen and Zaheer testified at this enquiry. It was during this deposition that Dr. Mateen and Zaheer testified that they were taken to Ghatkopar Police Station and Khwaja Yunus was beaten up there. He vomited blood and he possibly died. Both of them were cross-examined. Even the Police Officers of Powai Police Station deposed in the said enquiry. At that time, all the Police Officers who testified (including respondent Nos. 3 and 5 to 9) stated that Khwaja Yunus has absconded. The POTA Court, on 28th February, 2003, held that it was difficult to record positive finding, one way or the other, and gave liberty to the petitioner's husband to approach the High Court for ordering a C.B.I. Enquiry. The Special Judge, however, also ordered that the State should, in the interregnum, pay Rs. 5,000/- per month to the parents of Khwaja Yunus.

(e) The petitioner's husband then filed a petition in the High Court for compensation and C.B.I. enquiry. The State also filed a petition in the High Court against the order directing them to pay Rs. 5,000/- per month, mainly on jurisdictional issues. In the State's petition, stay was granted. That petition was ordered to be tagged along with the present petition. However, that petition has not been argued by the State with liberty to proceed with the same separately before the Appropriate Bench. In spite of the stay to the order of the POTA Court referred to above, the State subsequently paid Rs. 3,00,000/- to the parents of Khwaja Yunus, without prejudice to the rights of the parties.

(f) On 7th May, 2003 the investigation of the present case was transferred to C.I.D. The first petition filed by petitioner's husband was allowed to be withdrawn, with liberty to approach the State for transferring the investigation to CBI. Since the State Government did not respond, a second petition was filed. On 25th February, 2004 the prosecution stated that some clue was found about how Khwaja Yunus disappeared and the Court granted a week's time to CID to file the report. During the pendency of the second petition, on 3rd March, 2004, the State C.I.D. claimed that they had arrested PSI Vaze (respondent No. 5) in relation to offence u/s 302 of I.P.C. and were going to arrest three constables for having killed Khwaja Yunus. These were the four persons who claimed that they were taking Khwaja Yunus to Aurangabad. The State admitted that Khwaja Yunus was killed and had not absconded.

(g) Even after that, the investigation proceeded very slowly, as is recorded by this Court in its order dated 26th March, 2004. On 7th April, 2004, the Court went through the investigation record and concluded that the investigation had been totally shoddy and improper. It was further directed that the statement of Dr. Mateen made before the POTA Court be treated, as the F.I.R.

(h) On 30th April, 2004 the Recall Application filed by the State was heard and rejected. Writ Petition No. 1343 of 2003 was disposed of, keeping the claim for compensation open. The Recall Application was dismissed.

(i) The State appealed against this order in the Supreme Court. The same was dismissed on 9th August, 2004. As a result, finally, the State filed an F.I.R. On the basis of Dr. Mateen's statement on 16th September, 2004 at Ghatkopar Police Station.

(j) Since even thereafter, no significant steps were perceived to be taken by the State, the present Writ Petition came to be filed in April, 2005.

3. The petitioner also relies on the events which have unfolded after institution of this petition as follows:-

(a) During the above period, the C.I.D. carried on investigation, including recording statements of Dr. Mateen, Zaheer, Police Officers attached to Powai Police Station, respondent Nos. 4 to 10 as also Police Officers attached to Ghatkopar and Lonavala Police Stations. Besides, they did spot panchnamas and also examined in detail the telephone records of various Police Officers. The Investigating Officer concluded that Khwaja Yunus was tortured at Ghatkopar Police Lock-up including by respondent Nos. 11 to 14 and died as a result of this torture. The Investigating Officer further concluded that respondent Nos. 3 and 10 were part of the cover-up, apart from various other violations of I.P.C. This was stated in the affidavit of Kiran Gosavi dated 16th October, 2006.

(b) In the order dated 20th October, 2006 it is recorded that Gosavi has filed this affidavit along with the chart. In the said affidavit, it is also recorded that draft charge-sheet had been submitted to the DGP. Thus, as recorded in the above said order by October, 2006, the investigation in the matter was over.

(c) In the order dated 5th July, 2007, it is recorded that the Director General had already sent the papers to the State Government for sanction. In the order dated 3rd September, 2007, it is recorded that the State Authorities were moving very slow in the matter of "B" Summary.

(d) In the meantime, "B" Summary was filed and granted on 26th September, 2007 by the Magistrate Court at Parner. Mr. Sachin Vaze (respondent No. 5) challenged the said decision in the Sessions Court but his application was rejected on 25th January, 2008. Even the petition filed in the High Court, Aurangabad Bench, by respondent No. 5 against the said decision came to be disposed of. Thus, the F.I.R. filed against Khwaja Yunus having absconded came to an end.

(e) Finally, the State on 5th December, 2007 granted sanction to prosecute respondent Nos. 5 to 8. On 16th January, 2008, the High Court directed the State to file an affidavit justifying the dropping of names of other officials from sanction order.

4. The pleadings and in particular the case made out by the petitioner essentially rest on the documents and material collected in three separate proceedings which, according to the petitioner, inescapably indicates complicity of respondent Nos. 3 and 5 to 14 causing torture to her son, Khwaja Yunus, while in police

custody, which presumably resulted in his death, and, after his death, causing to destroy the material evidence, and, instead, create evidence to justify the stand that Khwaja Yunus had gone missing after the accident of the police Gypsy jeep in which he was allegedly travelling along with respondent Nos. 5 to 8. However, for considering the question whether the decision of the Sanctioning Authority to grant sanction to prosecute only respondent Nos. 5 to 8 and not respondent Nos. 3 and 9 to 14 is justified or otherwise, will have to be tested on the basis of the material and documents gathered by the State C.I.D. during the investigation of the case registered on the basis of the statement of Dr. Mateen and the sanction proposal, as also the documents accompanying therewith considered by the Sanctioning Authority.

5. Be that as it may, the first proceedings emanated from the F.I.R. registered by respondent No. 5 that, while the police party was taking Khwaja Yunus to Aurangabad in connection with the investigation of Ghatkopar Bomb Blast Case, the police vehicle met with an accident; and, taking advantage of that accident, Khwaja Yunus managed to escape from police custody and has gone absconding. In connection with the said F.I.R., after investigation by the State C.I.D., police report was filed that the complaint lodged by respondent No. 5 about absconding of Khwaja Yunus was maliciously false. The State C.I.D., who investigated the said offence, requested the Judicial Magistrate First Class to file the case as "B" Summary. That report was accepted by the Magistrate by a speaking order dated 26th September, 2007. Against the said decision, respondent No. 5 carried the matter in Revision before the Sessions Judge at Ahmednagar. That Revision Application came to be dismissed and the view taken by the Magistrate came to be upheld. Respondent No. 5 then carried the matter before this Court, Bench at Aurangabad, by way of Criminal Writ Petition No. 265 of 2008. Even the said writ petition came to be disposed of with observation. The material collected in connection with these proceedings ("B" Summary proceedings), according to the petitioner, clearly indicate that the complaint registered by respondent No. 5 against Khwaja Yunus having absconded after the jeep accident is maliciously false. At the same time, it establishes that Khwaja Yunus was in police custody at the relevant time and the police have failed to produce any material to show that Khwaja Yunus was alive.

6. The petitioner then relies on the material collected during the second set of proceedings commenced at the instance of the petitioner's husband, who had filed application before the Special Judge (POTA Court), praying for direction against the police firstly to appoint independent investigating agency such as C.B.I. and further to take action against the concerned police officials along with their superior offices for negligence on their part and to report the whereabouts of Khwaja Yunus. In the context of this relief, the Special Judge (POTA Court), before whom the trial in relation to the Ghatkopar Bomb Blast occurred on 2nd December, 2012 was pending, in which Khwaja Yunus was named as one of he accused, ordered preliminary enquiry. In that enquiry, statements came to be recorded. The enquiry, however, ended with the opinion of the Special Judge that

two versions were emerging from the material collected during the preliminary enquiry and it was not possible to take a firm view as to whether the petitioner's son, Khwaja Yunus, succeeded in absconding soon after the accident or whether he died because of the torture and assault on him by the police whilst he was in police custody and his dead body has been disposed of to destroy the evidence of torture and murder. The petitioner is relying even on material collected during preliminary enquiry in support of the reliefs claimed in the present writ petition.

7. The petitioner is then relying on the material collected in the third set of proceedings. The third set of proceedings have emanated because of the direction issued by this Court to register F.I.R. on the basis of the statement given by Dr. Mateen.

8. Broadly, two reliefs have been claimed by the petitioner. The first is to question the decision of the Sanctioning Authority in not according sanction to prosecute respondent Nos. 3 and 9 to 14, respectively, in spite of overwhelming material to indicate their complicity regarding causing torture and assault on Khwaja Yunus whilst he was in police custody, which presumably resulted in his death and then of having destroyed the evidence in that behalf. The second relief is to grant compensation to the petitioner, who is mother of Khwaja Yunus.

9. The respondents have filed affidavits from time to time to deal with the issues raised by the petitioner and to place on record relevant facts as was required in terms of order passed by this Court in the present proceedings.

10. After having perused the pleadings and considered the rival submissions, we deem it appropriate to deal with the second relief first. For, consideration of this relief will not detain us. Inasmuch as the State C.I.D. filed B" Summary Report before the Parner Court in the criminal case initiated on the basis of complaint made by respondent No, 5 regarding disappearance of Khwaja Yunus soon after the accident. That report has been accepted by the Magistrate and that view has been confirmed right up to the High Court. It necessarily follows that the case made out in the complaint filed by respondent No. 5 was not only false but maliciously false. The concomitant of that finding is that Khwaja Yunus did not run away from the spot as claimed by respondent No. 5 but was murdered and his body was disposed of, whilst in police custody. For considering the point in issue, it may not be necessary to examine whether the death of Khwaja Yunus occurred in Police Lock-up or while he was being taken to Aurangabad because of the torture and assault on him by the concerned Police Officers during the journey or that the police officials destroyed the evidence of that offence. Even without going into those matters, the petitioner ought to succeed in getting compensation, as it is common ground that Khwaja Yunus is untraceable and presumed to be dead, whilst in police custody.

11. In addition to the said judicial finding in "B" Summary proceedings, we also have material collected in the second proceedings, being preliminary inquiry done by POTA Court about the disappearance of Khwaja Yunus in pending trial

before it relating to Bomb Blast case. The opinion recorded in the said proceedings would also lead to the same conclusion that Khwaja Yunus went missing, whilst in police custody, and he must have died presumably because of injuries caused to him and that the concerned police officials must have destroyed the evidence in that behalf.

12. At any rate, the registration of F.I.R. on the basis of statement of Dr. Mateen and the investigation thereof culminated with filing of police report in the concerned Court to prosecute the accused named therein, who are police officials, coupled with the fact that the concerned criminal Court has taken cognizance of the said offence and has also framed charges against respondent Nos. 5 to 8, all these are, prima fade, indicative of torture, assault and murder of Khwaja Yunus whilst in police custody. The petitioner, being mother of Khwaja Yunus, is, therefore, entitled to the relief of compensation not only for the said acts of commission and omission, resulting in violation of fundamental rights of Khwaja Yunus, but also because she has lost her sole bread winner - who has gone missing in mysterious circumstances, whilst in police custody - affecting her fundamental right guaranteed under the Constitution.

13. Notably, it is not the case of any of the respondents that Khwaja Yunus has been sighted or his whereabouts have become available and known to any one since 6th January, 2003. In law, the respondents having failed to substantiate or even remotely assert that they have heard of Khwaja Yunus or he being alive for almost last 9 years, it will have to be presumed that he is dead. Indeed, that legal presumption was not available when this petition was filed in 2005. But, on the date when this petition proceeded for hearing, that legal presumption was certainly available. In any case, the burden of proving that Khwaja Yunus is still alive will be on the respondents only when they would be extricated from the liability of paying compensation to the petitioner.

14. As aforesaid, there is overwhelming material on record to indicate that Khwaja Yunus, while in police custody on 6th January, 2003, must have succumbed to the injuries caused to him by the concerned officials and that there is good possibility of the said officials having destroyed the evidence in that behalf. For considering the relief of compensation, in our opinion, it would be unnecessary to analyse any other aspect of the matter. Thus, there can hardly be any doubt that the petitioner ought to succeed with regard to relief of compensation as prayed.

15. The next question is: Whether the petitioner is entitled to compensation at least up to Rs. 20,00,000/- for violation of fundamental rights guaranteed to Khwaja Yunus as well as to herself under the Constitution of India? The petitioner, in her petition as well as in affidavit dated 15th February, 2008, has asserted that her family was fully dependent on Khwaja Yunus, who was providing financial support. He used to send approximately Rs. 20,000/- per month for the family. He had promised to send even more amount every month after he resumed work. It is then stated that the petitioner has lost her son, who

was hardly 27 years" old and had still larger part of his life to live. She has suffered tremendous mental torture and agony due to the events and circumstances in which her son has disappeared. Thus, even the petitioner's fundamental right guaranteed by the Constitution has been abridged. Accordingly, the petitioner is entitled to, and the respondents are liable to pay, immediate compensation of at least Rs. 20,00,000/-. In the affidavit, the petitioner asserts that her son was a Sales Engineer with a Dubai-based company called WIKA Middle East F2E since 2nd January, 2001. He had starting salary of 3000 Dirhams per month (approximately thirty nine thousand Indian Rupees). That was revised to 3300 Dirhams after completion of six months" probationary period. He was likely to get promotion very soon, and his salary would have been between Rs. 70,000/- to Rs. 80,000/- per month. It was pointed out by the petitioner that her husband has died during the pendency of this petition.

16. It is not disputed that Khwaja Yunus possessed the Degree of Engineering, and he was employed in a company at Dubai as Sales Engineer. It is common ground that Khwaja Yunus was picked up by the police while he was returning from Chikaldhara and brought to Mumbai. He was in police custody since then, and never returned home alive or has contacted any relatives or friends thus far. Considering the qualification of Khwaja Yunus and his young age at the time of his death while in police custody, coupled with the fact that the petitioner and her family were entirely dependent on his income and support, and also because he was gainfully employed at Dubai, earning respectable salary, we have no hesitation in accepting the petitioner's claim of compensation up to Rs. 20,00,000/-. Indeed, the petitioner has asserted that she would be entitled for much higher compensation in a suit for damages and has, thus, been advised to restrict her claim to Rs. 20,00,000/- in lieu of violation of fundamental rights, with liberty to file suit.

17. As aforesaid, it is a case of violation of fundamental rights of Khwaja Yunus, who mysteriously disappeared and presumably died, whilst in police custody. This position is virtually accepted in the criminal action initiated by the State (presently against respondent Nos. 5 to 8). The quantum of compensation will have to be decided on the basis of the context of the crime, the reply of the State, the extent and nature of mental trauma and the loss caused due to the violation of fundamental right. In the present case, taking all these factors into account, we have no hesitation in accepting the petitioner's prayer for grant of compensation amount of Rs. 20,00,000/- in lieu of violation of fundamental right of Khwaja Yunus as well as her fundamental right guaranteed under the Constitution of India. The petitioner and other family members must have undergone tremendous mental trauma since 6th January, 2003 not only of losing her only son, who was the sole bread winner of the family, but also because of forced anxiety on her family due to consequent litigation before the Parner Court then, before the POTA Court at Mumbai and the successive writ petitions in this Court. Notably, the other accused, with whom the petitioner's son had allegedly

conspired in commission of crime of Ghatkopar Bomb Blast, have already been acquitted by the trial Court. There was excellent chance that even the petitioner's son would have been similarly acquitted. The concerned police officials were responsible for the sudden disappearance of her son whilst in police custody; and to destroy the evidence of their acts of commission and omission, filed false complaint to spread canard that Khwaja Yunus has absconded after the accident caused to police vehicle while travelling to Aurangabad. That tall claim of the concerned police officials has since been exposed. According to the petitioner, if her son was alive and was working at Dubai, his present monthly salary would have been approximately Rs. 1.5 lakhs. He would have earned much more amount in the course of time, being a well-qualified and proficient Engineer. As estimated by the petitioner, her son would have earned around "10 crores spread over a period of 34 years of economically fruitful life still left, taking his retirement age as 60 years. This argument is not completely wrong. However, we may, for the time being, accept the petitioner's claim of compensation only up to Rs. 20,00,000/-, with liberty to the petitioner to pursue other proceedings for more compensation, if so advised. All questions in those proceedings will have to be decided on their own merits. Further, we may have to keep in mind that the petitioner has already received sum of Rs. 3,00,000/- from the State, which has been paid by the State, and received by the petitioner without prejudice to the rights and contentions of the parties in the pending proceedings. This position has been recorded in the order dated 31st March, 2008. The amount so paid will have to be adjusted from the compensation amount payable to the petitioner. The petitioner would be, therefore, entitled to receive balance amount of only Rs. 17,00,000/- by way of compensation in the fact situation of the present case.

18. We do not think it necessary to elaborate on the reported decisions pressed into service to justify the claim of compensation. The petitioner has rightly relied on the exposition of the Apex Court in the cases of Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others, ; Death of Sawinder Singh Grover In re;; Inder Singh Vs. State of Punjab and others, ; Shri Bodhisattwa Gautam Vs. Miss Subhra Chakraborty, ; Murti Devi Vs. State of Delhi and Others, ; D.K. Basu Vs. State of West Bengal, ; wherein it is reiterated that compensation is a remedy under public law and that it is not a punitive measure. The objective of granting compensation is to apply balm to the wounds and not to punish the transgressor. The Apex Court also noted that the quantum of compensation would depend on the facts of each case. See also Smt. Kangujam Ongbi Thoibi Devi Vs. State of Manipur and Others, .

19. The petitioner has also relied on the decision of the Apex Court in the case of The Chairman, Railway Board and Others Vs. Mrs. Chandrima Das and Others, , wherein the Supreme Court has analysed the international human rights instruments; and held that the same should be read into domestic jurisprudence and may be made basis for grant of compensation, including to non-citizens. It is further held that the Government should be vicariously held responsible for its

employees" action.

20. In the case of (Ajab Singh Vs. State of U.P.)⁹, (2003)3 S.C.C. 521; (Shakila Abdul Gaffar Khan Vs. Vasant Raghunath Dhoble)¹⁰, 2004(1) Bom.C.R.(Cri.) (S.C.)¹³ : (2003)7 S.C.C- 749, the Court re-stated the legal position that payment of compensation for violation of fundamental right by the officers of the State ought to be made even if the concerned officers were to be acquitted in respect of offence committed by them of having beaten the person in public view, who succumbed to injuries.

21. Reliance is placed on the decision of the Division Bench of this Court in the case of (Shobha Anil Lodse Vs. State of Maharashtra)¹¹, 2004(1) Bom.C.R.(Cri.) (N.B.) 455, decided on 30th April, 2003, and another decision in the case of (Sheela Yerpude Vs. State of Maharashtra)¹², 2005(Supp.) Bom.C.R.(Cri.)(N.B.) 188, decided on 27th January, 2005. In the latter case, the allegation was of custodial death. The State had started investigation against its Police Officers, and later on, charge-sheet came to be filed. The Court awarded compensation to the petitioner by invoking multiplier system applicable in motor accident claims.

22. Reliance is lastly placed by the petitioner on the case of Mrs. Hassan Ammal of the Madras High Court decided on 1st July, 2011 in support of relief of compensation.

23. As aforesaid, we have no hesitation in accepting the relief of compensation claimed by the petitioner, and for the reasons recorded, after providing due adjustment of the amount already received by the petitioner from the State, the petitioner would be entitled to receive further sum of Rs. 17,00,000/- from the State forthwith.

24. The question is: Whether the amount should be paid by the State or it would be open to the State to recover the same from the erring police officials? It is well established position that the State is vicariously liable for the acts of its police officials. The State would, therefore, be initially responsible to pay the amount quantified in this order towards compensation forthwith, and would be free to recover that amount and the loss caused to the State exchequer due to the acts of commission and omission of the erring police officials, including in pursuing and defending the legal proceedings, from the said officials, by resorting to Departmental action. In other words, the State may recover the amount paid by it to the petitioner from the erring police officials, being aggregate Rs. 20,00,000/-, along with expenses incurred in pursuing false complaint filed by the concerned police official(s), its investigation and legal expenses to defend it and for investigating and also pursuing all other legal actions against them. The amount so spent by the State must be recovered together with interest accrued thereon at appropriate rate from the date of payment made by the State to the petitioner or expenses so incurred, as the case may be, until the amount is fully recovered from the erring police officials.

25. That takes us to the first relief in the context of non-grant of sanction to

prosecute respondent Nos. 3 and 9 to 14. This issue will have to be addressed in two parts. One is about the non-grant of sanction qua respondent Nos. 11 to 14, who, at the relevant time, were attached to Ghatkopar C.I.U., D.C.B., C.I.D. (hereinafter, for short, "Ghatkopar Unit") having office at L.B.S. Road, near Sarvodaya Hospital, Ghatkopar (West), and had caused the arrest of the accused in the main Ghatkopar Bomb Blast case. The second part is regarding non-grant of sanction to prosecute respondent Nos. 3, 9 and 10. As regards respondent No. 9, he was working as Police Inspector attached to Powai Unit- D.C.B., C.I.D., Unit - 8 (hereinafter, "Powai Unit", for short), having office at Hiranandani Gardens, Powai, Mumbai. He has since expired. He and respondent Nos. 3 and 10 were attached to the said Powai Unit. Thus, the question to be examined while dealing with the second part is only qua respondent Nos. 3 and 10.

26. Before dealing with these two aspects specifically, we may notice that the grievance of the petitioner was more in the nature of decision of the Sanctioning Authority, being hit by the Wednesbury Principle, and not breach of any due" process as such.

27. The learned Advocate General has defended the decision of the Sanctioning Authority of having accorded sanction to prosecute only against respondent Nos. 5 to 8, who were attached to Powai Unit, dated 5th December, 2007. He submits that the Proposing Authority, although asked for according sanction against, in all, fourteen Police Officers (1 ACP, 4 PIs, 1 API, 2 PSIs, 1 ASI, and 5 policemen), the file was processed at different levels, and the Director General of Police, respondent No. 15, who is the Administrative Head, after considering the totality of the material placed before him and on the basis of discussions with Investigating Officers, along with their supervisory officials, recommended to give sanction to prosecute only respondent Nos. 5 to 8. That considered recommendation of respondent No. 15 ought to be given higher weightage and not the nothings made by his Subordinate Officers. Moreover, the recommendation of respondent No. 15 was duly considered at the highest level by the Home Department, who, in turn, also sought opinion from the Law and Judiciary Department and thereafter reconsidered the entire proposal before issuing the sanction order dated 5th December, 2007. Thus, there was complete adherence to due process. Further, the Director General of Police, in his recommendation, has made detailed analysis, as is noticed from the original file. The Home Department has agreed with those recommendations and proceeded to pass the sanction order limited to respondent Nos. 5 to 8 and not other ten police officials. He submits that there is no allegation of bias against any of the Authorities involved in the decision-making process. At the same time, there is intrinsic material to show that the final decision has been taken by the Sanctioning Authority after due application of mind on the basis of opinion, observations and recommendations of subordinates, including of the Law and Judiciary Department. The Sanctioning Authority has considered totality of evidence, and not only one piece of evidence such as statement of Dr. Mateen and Zaheer, which is pressed into service by the petitioner. He has placed

reliance on the decision of the Apex Court in the case of Mansukhlal Vithaldas Chauhan Vs. State of Gujarat, , in particular paragraphs 25 and 26, to buttress the above argument.

28. We have perused the original sanction file produced by the learned Advocate General. From the remarks/objections and endorsements of the officers at different levels till the decision is taken by the Sanctioning Authority as noticed from the original file, there is hardly any scope to argue that the sanction order dated 5th December, 2007 as issued does not conform to due process or due application of mind. We will revert to this aspect a little later. We would like to make it clear, at the outset, that we may not be understood to have recorded any opinion, one way or the other, pertaining to the sanction accorded against respondent Nos. 5 to 8. Whether the said sanction is valid or otherwise is not in issue in the present petition. The validity thereof will have to be put in issue in the criminal trial instituted against the said respondents, which is pending before the Sessions Court for Greater Mumbai, being Sessions Case No. 728 of 2009. In the present judgment, we are dealing only with one issue as to whether the decision of the Sanctioning Authority in not granting sanction to prosecute respondent Nos. 3 and 9 to 14 can be said to be legal and proper.

29. As aforesaid, the principal grievance of the petitioners is that the Sanctioning Authority has not followed the parameters while considering the issue regarding grant or non-grant of sanction against respondent Nos. 3 and 9 to 14. That issue will have to be considered keeping in mind the Wednesbury Principle, which the Court is required to adhere to on the touchstone of whether all the relevant material was placed before the authority; whether the authority has taken into consideration all the relevant material, i.e., whether he has ignored any relevant material; whether the authority has taken into account any irrelevant or extraneous material; whether the decision suffers from "Wednesbury Unreasonableness", i.e., when decision is such as no reasonable person on proper application of mind could take or procedural impropriety. The test in deciding this argument is whether wrong is of such a nature as to require intervention of the Court. From the original file perused by us, it is noticed that all the relevant material for taking a decision on the issue was placed before the authority; and it can be safely assumed that the authority has taken into consideration all the relevant material and has not ignored any relevant material from consideration.

30. The above position is reinforced from the fact that the file travelled at different levels before it reached the Sanctioning Authority. The analysis of the relevant material was available on the file, which was duly considered by the Sanctioning Authority. At one stage, to clear some doubt, opinion from the Law and Judiciary Department was invited. On receipt of response from the Law and Judiciary Department, the Sanctioning Authority finally proceeded to take the decision. The fact that the Sanctioning Authority took decision, inter alia, on the basis of the opinion given by the other officials does not mean that it has not

considered the relevant material itself. There can be no such presumption. The recommendations made at different levels would culminate in the final decision of the Sanctioning Authority. From the material found from the original file, it is not possible to take the view that the Sanctioning Authority took any irrelevant or extraneous material into account.

31. Thus, the only issue that needs to be elaborated, is the argument of the petitioner that the material referred to by the petitioner would lead to an inescapable conclusion indicating involvement and complicity of respondent Nos. 3 and 9 to 14 in the acts of commission and omission with regard to custodial torture and assault on Khwaja Yunus, whilst in police custody, and which must have caused his death; and of causing disappearance of that evidence. In other words, no reasonable person could have come to the conclusion reached by the Sanctioning Authority of not granting sanction to prosecute respondent Nos. 3 and 9 to 14.

32. In the context of the above, we have mentioned, at the outset, that we may have to consider this aspect in two parts to untangle the complexity and confusion caused by the material collected during three separate proceedings referred to above. We have to keep in mind that the proposal to accord sanction to prosecute submitted by the Investigating Officer to the Sanctioning Authority is in respect of the criminal case, which is now registered as Sessions Case No. 728 of 2009 before the Sessions Court for Greater Mumbai. At the end of investigation of that case, which was commenced with registration of F.I.R. registered on the basis of statement of Dr. Mateen, the Investigating Officer, along with the material collected by him during the investigation, submitted proposal for sanction to prosecute each of the fourteen accused (Police Officers). The said proposal was duly considered at different levels before it was placed before the Sanctioning Authority. From the material before the Sanctioning Authority, it was obvious that several investigating agencies/units were associated with the investigation of the main offence of Ghatkopar Bomb Blast, followed by blasts at several other places in succession, thereby lolling hundreds of persons and severely injuring and several of them being rendered handicapped for the remainder of their life. The Crime Branch of Mumbai Police was entrusted with the responsibility of tracing the accused involved in the said offence. The investigation of Ghatkopar Bomb Blast vide C.R. No. 166 of 2002 was carried out by Powai Unit, as that blast had taken place within their territorial jurisdiction. Respondent Nos. 11 to 14, at the relevant time, were attached to Ghatkopar Unit. The task of Ghatkopar Unit was to collect intelligence/information from various sources and make the same available to their superiors, who, in turn, would entrust the actual investigation to any unit/team, which would include arrest, interrogation, seeking remand, etc., of an accused/suspect. The material also discloses that Dr. Mateen and Shaikh Zaheer Bashir (referred to as "Zaheer" for the sake of brevity) were picked up from Aurangabad on 23rd December, 2002 in a joint operation with Intelligence Bureau (I.B.) officers by a team of police officials attached to Ghatkopar Unit,

including respondent Nos. 11 to 14 herein, and they were brought to Ghatkopar Unit at about 10.00 hours on 24th December, 2002. They were soon handed over to Powai Unit for investigation on 24th December, 2002 at about 14.30 hours, as per the directions of superiors, as the Powai Unit was entrusted with the investigation of Ghatkopar Bomb Blast Case. It is also matter of record that, on 24th December, 2002, D.C.B., C.I.D., Unit I, picked up Shaikh Mohammed Muzammil Jamil Algand (referred to as "Muzammil", for the sake of brevity) from Mumbai, and was handed over to Powai Unit for investigation on the same day. Similarly, Airport Unit, D.C.B., C.I.D., picked up Khwaja Yunus from Karanja, Parbhani District, on 25th December, 2002, and handed him over to Powai Unit for investigation on 26th December, 2002. All the four accused were in custody of Powai Unit. Respondent No. 9 Police Inspector was in-charge of this unit. The said unit was functioning under respondent No. 3, A.C.P. Initially, respondent No. 9 was the Chief Investigating Officer and after application of provisions of POTA to the case on 3rd January, 2003, respondent No. 3-A.C.P. was entrusted with investigation and Airport Unit Team was assisting him. Notably, the Deputy Commissioner of Police (Detention), Crime Branch, C.I.D., Mumbai, vide order dated January 4, 2003, formed a team of 8 police personnel under respondent No. 3 as Chief I.O., including respondent Nos. 9, 10 and 5, to carry out further investigation of the Ghatkopar Blast Case. The said office order reads thus:-

No. DCP

(Det)ACP(N/W) 1

2003 Of Vithaldas

office of the Dy.

Commissioner of

Police (Detention)

Crime Branch,

C.I.D., Mumbai

Date: January 4, 2003.

OFFICE ORDER

The further investigation of DCB, CID, C.E. No. 156/2002 (Ghatkopar Police Station C.R. No. 355/2002 u/s 120 IPC, sections 3, 4, 18, 20, 21, 22 r/w section 53 of Prevention of Terrorism Act 2002 r/w sections 302, 307, 326, 427, 24 IPC section 5, 9(b) Explosives Act 1884 r/w section 3 Explosive Substance Act 1908 r/w section 3, Damage to Public Property Act) has been entrusted to Asst. Commr. Of Police, D-1 (North/West), A.E. Pote (Chief 10).

Following officers and men of DCB, CID will be the Asst. I.Os in the said case and they will assist the Chief IO in the investigation of the case.

?

1.

P.L. DCB, CID Unit-VIII

ArunBorude,

2.

P.L. DCB, CID Unit-VIII

Rajendra Joshi

3.

A.P.I. DCB, CID Unit-VIII

D.N. Mohite

4.

P.S.I. DCB, CID Unit-VIII

G.S. Gore

5.

P.S.I. DCB, CID Andheri CIU

SachinVaze

6.

H.C. 19848/ DCB, CID, Unit VIII

Kesarkar

7.

H.C. 15045/ DCB, CID, Unit-VIII

Mahajan

Sd/-

(Pradip Sawant)

Dy Commissioner of Police (Detention)

Crime Branch, CID, Mumbai

Copy to:-

1.

A.C.P.,

D-1 (North/West), DCB, CID, Mumbai

2.

Sr.P.I.,

Unit-VIII, DCB, CID, Mumbai

3.

Sr.P.I.,

Andheri CIU, DCB CID, Mumbai

4.

Sr.P.I.

(Admn.), DCB, CID, Mumbai"

(emphasis supplied)

33. It is thus obvious that respondent Nos. 11 to 14 were not part of the investigating team constituted under the aforesaid office order. In other words, respondents Nos. 11 to 14 were associated with the Ghatkopar Bomb Blast Case only to the extent of causing arrest of Dr. Mateen and Zaheer from Aurangabad in a joint operation with Intelligence Bureau officers and bringing them to Ghatkopar Unit, to which they were attached and handing over them on the same day to Powai Unit for investigation as per the direction of superiors, as the Powai Unit was investigating that case. Except this limited role, respondent Nos. 11 to 14 were in no way associated either with the investigation or with the filing of any reports, remand applications or producing the accused before the Court in that case.

34. As aforesaid, the investigation was entrusted to specially constituted investigating team as per office order dated January 4, 2003. The record also establishes that the two accused picked up by respondent Nos. 11 to 14 from Aurangabad were produced before the Court for remand by the Powai Unit on regular basis on 27th December, 2002, 3rd January, 2003, 22nd January, 2003, 31st January, 2003. At no point of time, they had complained to the Court about any torture or assault at the hands of respondent Nos. 11 to 14. It is also noticed that each of these accused were regularly produced before the medical officers of Government Hospitals from time to time initially on 27th December, 2002 and on 3rd January, 2003, etc. No injuries were noticed on their person, nor did they complain about assault by any police official to the doctors. There is no contemporaneous record during the relevant period to indicate that respondent Nos. 11 to 14 had interrogated any of the four accused in connection with the Ghatkopar Bomb Blast Case at any time, except that Dr. Mateen and Zaheer were picked up by them from Aurangabad and brought to Mumbai and handed them over to Powai Unit for investigation as per the direction of superiors.

35. Significantly, Dr. Mateen and Zaheer expressed their desire to depose about the disappearance of Khwaja Yunus before the POTA Court by sending

communication from jail only on 13th February, 2003, after the judicial enquiry regarding disappearance of Khwaja Yunus was commenced by the said Court pursuant to application filed by the petitioner's husband dated 17th January, 2003 and more particularly after the meeting of Advocate Parvez Memon, junior of Advocate Majeed Memon, in Thane Jail on 8th February, 2003. Further, they gave statements before the POTA Court on 17th and 18th February, 2003. In these statements, there is no reference to the involvement of respondent Nos. 11 to 14 attached to Ghatkopar Unit during interrogation of Khwaja Yunus on 6th January, 2003. Their statements reveal that no description of police officials, who allegedly assaulted Khwaja Yunus on 6th January, 2003 in their presence, has been mentioned. As a consequence, respondent Nos. 11 to 14 were not summoned during the preliminary enquiry by the POTA Court, unlike the other police officials of Powai Unit. The statements of police officials of Powai Unit have been recorded during the said preliminary enquiry.

36. What is significant to mention is that Dr. Mateen and Zaheer, by that time, were familiar with the names and description of respondent Nos. 11 to 14, who had picked them from Aurangabad on 23rd December, 2002 and travelled along with them till Mumbai by road, before being handed over to Powai Unit for investigation. They were in the company of respondent Nos. 11 to 14 for more than 20 hours during this period. They were also kept in Ghatkopar C.I.U. Office for more than four hours. It is also noticed that there is no lockup room in Ghatkopar C.I.U. Unit, to which respondent Nos. 11 to 14 were attached at the relevant time. There is, however, separate police lock-up room in Ghatkopar, which is 1.5 Kms. away from Ghatkopar C.I.U. Unit.

37. Notably, on 20th December, 2004, for the first time, Dr. Mateen filed application before the Special Court through jail to add respondent Nos. 3 and 10 attached to Powai Unit and also permit them to identify the unknown officers in Test Identification Parade. Obviously, in this application, Dr. Mateen and Zaheer were not referring to respondent Nos. 11 to 14, whose names as well as description were very much known to them.

38. Be that as it may, all these aspects have been considered by the Sanctioning Authority. From the nothings in the original file, it is seen that the Sanctioning Authority was also made conscious of the fact that there are only three witnesses who have spoken about the assault on Khwaja Yunus at Ghatkopar C.I.U. Dr. Mateen has spoken about that for the first time before the POTA Court on 17th February, 2003 without naming the concerned Police Officers, much less respondent Nos. 11 to 14. It is noticed that Dr. Mateen only in his subsequent statement recorded by C.I.D. Crime on 28th February, 2004 and on 16th January, 2005 has progressively improved upon his story of assault by naming Police Officers of Ghatkopar C.I.U. and Powai Unit. The sequence of events and circumstances, in which Dr. Mateen has spoken about the involvement of respondent Nos. 11 to 14 for the first time on 16th January, 2005 speaks volumes. The Sanctioning Authority was also conscious of the fact that no

identification parade of the police personnel or spot panchnama of the concerned Police Stations has been done during the investigation of this case. The witnesses claim that they were taken to Ghatkopar Unit in veiled condition. They claim that they heard sounds of screaming and someone being beaten by belt. Indeed, Dr. Mateen claims that he was taken to the room where Khwaja Yunus was kept and about the presence of Police Officers in that room. But he has not named the Police Officers. This version of the witnesses is belied by the statement of H.C. Gaikwad attached to Lonavala Police Station that Khwaja Yunus was brought to his Police Station on the night of 6th January, 2003, in good condition, where he was kept in the lock-up for a short duration before being taken by respondent Nos. 5 to 8 to Aurangabad by police jeep. The Sanctioning Authority has also considered the fact that later on, on 13th July, 2004, H.C. Gaikwad did not identify the photograph of Khwaja Yunus "after eighteen months", as he had only glimpse of the accused. As regards the version of Zaheer, in his statement recorded on 18th February, 2004, 28th February, 2004 and 4th January, 2005, it is noticed that he has not witnessed the incident of assault on Khwaja Yunus, but claims to have only "overheard" (hearsay) the conversation of a constable in that behalf. But no identification of that constable has been done. More importantly, this disclosure was never made by him to the POTA Court or any doctor at any time soon thereafter. The Sanctioning Authority has taken totality of circumstances into account before taking final decision and after going through the charge-sheet, case diary, all relevant documents and material on record with regard to the crime in question, and was convinced that the material collected during investigation would not stand to judicial scrutiny indicative of likelihood of involvement of respondent Nos. 11 to 14 and of being convicted in connection with the offence of assault on or murder of Khwaja Yunus, whilst he was in police custody during remand to Powai Unit. It is not a case where no reasonable person could have come to such a conclusion.

39. We are conscious of the fact that the petitioner has relied upon other material to buttress her stand that respondent Nos. 11 to 14 attached to Ghatkopar Unit are also involved in the commission of the said offence along with police officials of Powai Unit. We shall deal with the same a little later while considering the case of respondent Nos. 3, 9 and 10. In our opinion, the material considered by the Sponsoring Authority is indicative of the fact that respondent Nos. 11 to 14 were in no way associated with the investigation of the main Ghatkopar Bomb Blast Case and, for the first time, allegation about their involvement appears in the statement of Dr. Mateen dated 16th January, 2005.

40. Considering the above finding, no fault can be found with the opinion of the Sanctioning Authority of not granting sanction to prosecute respondent Nos. 11 to 14, lest it would result in their persecution, who were in no way concerned with the investigation of the main case, and particularly when none of them was member of the specially constituted investigating team by the Deputy Commissioner of Police.

41. The respondents would urge that Dr. Mateen and Zaheer, who were picked up by respondent Nos. 11 to 14 from Aurangabad, seem to have made subsequent statement to implicate the said respondents out of grudge against them. It is their submission that they had picked up/arrested altogether 12 terrorists accused in different bomb blast cases and recovered RDX explosives, detonators, AK 47 assault rifles, etc., from different places. Thus, the possibility of these accused conspiring to implicate respondent Nos. 11 to 14 cannot be completely ruled out. The said accused had opportunity to interact with each other in jail as well as all when produced in Court. They belonged to dreaded terrorist outfit and many of them owed allegiance to Al-Qaida and Lashkar E Toiba (LeT) groups. They are all educated men but in the name of Jihad, they have indulged in offence of creating terror and to destabilise the financial capital of the country, i.e., Mumbai. It is the case of respondent Nos. 11 to 14 that the attempt of Dr. Mateen and Zaheer to falsely implicate them is in furtherance of a well-thought plan to demoralise and destabilise the elite police force of the City of Mumbai. The names of respondent Nos. 11 to 14 of having committed custodial torture appeared on record only after lapse of two years which itself is indicative of deep rooted conspiracy to implicate as many police personnel and more particularly senior police officials. The police and I.B. have reason to believe that the terrorist outfits such as Al-Qaida seem to have instructed its members to falsely involve as many police personnel as possible with the allegation of custodial torture with a view to destabilise and demoralise the entire police force. This is noticed from the Al Qaida Manual seized during the course of investigation. According to Respondent Nos. 11 to 14, this aspect has been noticed by the Metropolitan Magistrate of 34th Court, Vikhroli, Mumbai, while considering bail application of respondent Nos. 11 to 14 vide order dated 17th March, 2005. We do not wish to examine this argument.

42. Suffice it to observe that it is not a case of non-placement of relevant material before the Sanctioning Authority or non-consideration of any material placed before it. The Sanctioning Authority is competent to wade through the entire material placed before it to form an opinion that no evidence, either direct or circumstantial, that could stand judicial scrutiny, is available on record. The Sanctioning authority was bound to abide by the observation made by this Court in its order dated 20th October, 2006, which had attained finality. It predicated that the Director General must take decision whether sanction u/s 197 of the Criminal Procedure Code is required or not, in case the concerned Police Officers were to be prosecuted. Further, that decision was to be taken after going through the charge-sheet, case diary and all relevant documents and materials collected during the course of investigation, after being satisfied that the investigation has been properly conducted, and would stand to judicial scrutiny and that there is all likelihood of the officers, who are charged of offence, being convicted. This is the test applied by the Sanctioning Authority, which is unexceptionable.

43. The argument of the petitioner is that it is not the job of the Sanctioning Authority to scrutinise the record to find out whether the trial would end in

conviction of the public servant. The Sanctioning Authority has to see whether there is any title of material which ""warrants trial" of the public servant by the Court taking cognisance of the offence. It is submitted that the statements of Dr. Mateen and Zaheer left nothing to imagination about the involvement of respondent Nos. 11 to 14 and the charge-sheet presented by the investigating officer names them as accused in the commission of the alleged offence. There can be no debate that the Court can take cognizance of offence against the public servants which is in connection with the discharge of their official duty only upon grant of sanction by the Sanctioning Authority. The purpose of having such provision is to protect the honest and sincere Government servants who have acted in good faith in discharge of their official duty. Indeed, it cannot be used as a shield to protect dishonest Government servants. If the overwhelming material collected during investigation of the offence in question itself indicates that, respondent Nos. 11 to 14 were unconnected with the investigation of the main offence of bomb blast and had no role to play whatsoever after handing over custody of Khwaja Yunus to the investigating team, i.e., Powai Unit, merely because there is reference to their involvement by the so-called eye-witnesses, who were incidentally arraigned as accused in the commission of the main offence of bomb blast, it may be legitimate for the Sanctioning Authority to protect the public servant, in this case police officials of some other unit, from being persecuted. If the Sanctioning Authority, on the strength of evidence collected during investigation is convinced that the public servant is likely to be persecuted, no fault can be found with the approach of the Sanctioning Authority in refusing to grant sanction to prosecute, so long as it is to protect the innocent, honest and sincere public servant. We are of the opinion that the decision of the Sanctioning Authority not to accord sanction to prosecute respondent Nos. 11 to 14 is unexceptionable.

44. We may now turn to the challenge regarding non-grant of sanction to prosecute respondent Nos. 3, 9 and 10, respectively. Notably, respondent No. 9 has expired during the pendency of this petition. As a result, the contest in this petition is about non-grant of sanction to prosecute respondent Nos. 3 and 10, respectively. There is no doubt that respondent Nos. 3, 9 and 10, at the relevant time, were attached to Powai Unit. The investigation of the main case was entrusted to Powai Unit. The Sanctioning Authority has gone by the evidence collected during the investigation of the crime in question about the disappearance of Khwaja Yunus. It is noticed from the said official record that Khwaja Yunus was interrogated by a team of officers of the Powai Unit headed by respondent No. 5. After the interrogation on 6th January, 2003, on the same night, Khwaja Yunus was required to be taken to Aurangabad in connection with the investigation regarding the revelations made by him. For that purpose, steps were taken by the concerned police official to obtain permission of the superior officer on 6th January, 2003 vide communication sent by respondent No. 3 to Additional Police Commissioner (Crime). Only after that permission was granted, Khwaja Yunus was removed from Powai Police Station for being taken to

Aurangabad by road by the team of police officials of respondent Nos. 5 to 8. The contemporaneous official record maintained in the regular course of business of the police such as case diaries, station diaries, lock-up register entries, the aforesaid letter and the communication sent by the Deputy Commissioner of Police (DET) to Commissioner of Police, Aurangabad, of the same date, i.e., 6th January, 2003, and the response received from the Commissioner of Police, Aurangabad, thereto as well as the daily registers maintained in the Police Station, Powai Unit VIII, are indicative of the fact that the team of police officials consisting of respondent Nos. 5 to 8 took custody of Khwaja Yunus from Powai Unit at around 10.30 pm on 6th January, 2003 and proceeded for Aurangabad by road. The factual position mentioned in the contemporaneous record is supported by the statements of official witnesses. Further, the D.C.P. (Detection) C.B., C.I.D., is a superior officer to respondent No. 3. There is no material to suggest that even the D.C.P. was responsible or involved in the commission of the alleged offence. On the basis of such material, the Sanctioning Authority proceeded to examine the proposal to accord sanction to prosecute the concerned accused, including respondent Nos. 3, 9 and 10.

45. The Counsel for the respondents had invited our attention to the chart at page 442 of the writ petition paper book, which shows the names of the Police Officers and staff concerned with Bomb Blast Case. The same reads thus:-

LIST OF POLICE OFFICERS AND STAFF CONCERNED WITH BOMB BLAST CASE

Powai unit (D.C.B. CID unit 8)

Andheri C.I.U. DCB, CID

Ghatkopar C.I.U., DCB, CID

Airport Unit DCB, DCB, C.I.D

Unit No. 1, DCB, CID

1

ACP

Ambadas Pate

PI

PradipShanna

PI

PrafullBhosle

**

Sr.PI

VashishtaAndhale

Sr. PI Mohan MukundKulkarni

2

PI

AranBorude

**

PI

AslamMomin

API

RajaramVhanamane

**

API

Sunil Ghosalkar

API

Kalkundre

3

PI

Rajendra Joshi

API

PrakashBhandari

PSI

Hemant Desai

**

API

Padvi

And other officers and staff

4

Dattatrey John,

HC ***

API

AshokBorkar

PSI

Ashok Knot

**

And other officers and staff

5

NarhariBirmule,

HC ***

PSI

DayaNayak

API YadavraoJadhav

6

MangeshMahajan, ASI

PSI

SanjivGawade

API

Prakash Paul

7

API

Mohite

PSI

SachinWaze*

And other officers and staff

8

PSI

Gore

PC

RajendraTiwari*

9

PSI

Thorat

PC

Sunil Desai

10

And staff Investigation of Ghatkopar Blast was carried out by this Unit vide C.R. No. 156/ 2002. Sr. Nos. 1, 2, 3, 6, 7 and 8 were in the specially formed investigation team. All accused were in custody of this unit On 6/1/03 KhwajaKhwajaYunus was interrogated by this unit alongwithSachinVaze

PC

Driver RajaramNikam * And about 12 to 15 constablt PSI

SachinWaze was in the investigation team of Ghatkopar blast case and was deputed to Powai Unit. He and other officers of Powai Unit interrogated KhwajaYunus on 6/1/03. He and constables Tiwari, Sunil Desai, and Nikam took KhwajaKhwajaYunus from Powai Unit on 6/1/03 at 10.30 p.m. and proceeded for Aurangabad in Gypsy jeep of Andheri Unit

Sr. No. 1, 2, 3, 4 picked up Matin and Zaheer from Aurangabad on 23/12-02 and handed over to Powai Unit for Investigation on 24/12/ 02

Sr.No. 2, 3 and staff picked up KhwajaKhwajaYunus from KaranjaParbhani on 25/12/ 02 and handed him to Powai Unit on 2002 26/12/02

Picked up Muzzand handed over to Powai Unit on 24/12/ 2002

* Officers - Sanction granted, charge-sheet filed

** Officers arrested - Sanction not granted, not charge-sheeted

*** Officers not arrested - Sanction not granted, not charge-sheeted.

46. From the record, having noticed that Khwaja Yunus left the Police Station at 10.30 pm on 6th January, 2003 and while in the custody of respondent Nos. 5 to 8 enroute Aurangabad, he is stated to have disappeared or is killed. Notably, the stand of the Investigating Officer in the proceedings before the Parner Court was that the group of police officials, of which Sachin Vaze, respondent No. 5, was the head, was responsible for the disappearance or death of Khwaja Yunus, while taking him from Powai to Aurangabad for investigation purpose. The stand of the State in those proceedings was that the co-accused had given statement that Khwaja Yunus was beaten and murdered by respondent No. 5, Sachin Vaze, who was accused before the Parner Court. In the present petition, however, the case of the petitioner is that custodial death of Khwaja Yunus was caused due to merciless beating during the interrogation at Ghatkopar Unit. As regards respondent No. 3, the argument is that he came on the scene only on 3rd

January, 2003, after POTA was applied to the Bomb Blast Case. The interrogation of accused in that case was done on 6th January, 2003 by the team of police officials headed by Sachin Vaze, respondent No. 5. The statement about assault on the accused, in particular Khwaja Yunus, during interrogation given by Dr. Mateen has come for the first time on 28th February, 2004. There was no case of assault in any of the previous statements by the co-accused till 2004. Significantly, no complaint has been made even to the Advocate, who had interviewed the co-accused until then, nor to any Court, where the accused were produced for remand from time to time or to doctors of Government Hospital when taken for periodical medical check-ups. The Advocate had met the co-accused while they were in police custody. All these aspects have been considered by the Sanctioning Authority and, therefore, the Sanctioning Authority has exercised discretion to grant sanction only against four police officials, respondent Nos. 5 to 8. A priori, no reasonable person would arrive at a conclusion different than the one reached by the Sanctioning Authority that respondent Nos. 3, 9 and 10 were in no way concerned with the incident in question in respect of which sanction proposal was under consideration.

47. The argument of the petitioner is founded on the statements of Dr. Mateen and Zaheer as well as the mobile records indicating that the officers were in Ghatkopar area and not at Powai as claimed by them and moreover, no register was maintained as to which officer was interrogating whom and failure to conduct 48 hourly medical checkup of arrested accused in the main Bomb Blast Case. Reliance is also placed on the affidavit of Gosavi, which states that the phone records of the concerned mobile numbers was corroborated. These circumstances or evidence would, at best, probabalise the presence of respondent Nos. 3, 9 and 10 to 14 in Ghatkopar area. So far as respondent Nos. 11 to 14 are concerned, as has been noticed earlier, they are attached to Ghatkopar Unit. The fact that these respondents were using mobile number issued in the name of some other person and not their own cannot, by itself, lead to the involvement of any of these officers in the commission of offence in the case of disappearance of Khwaja Yunus on 6th January, 2003. The statements of Dr. Mateen and Zaheer by themselves cannot be the basis to proceed in the matter, to form an opinion that there is all likelihood of the stated officers being convicted. Similarly, the factum of failure to produce the accused before the doctor for medical check up as per the norms cannot be the basis to presume custodial torture, much less resulting in death. None of the accused complained about this in their previous statements before the Court or medical officer. Be that as it may, the test applied by the Sanctioning Authority is keeping in mind the observations of this Court in order dated 20th October, 2006. It is not necessary for us to dwell upon the factual matrix as to whether the vehicle in which the police party along with Khwaja Yunus travelled, in fact, met with the accident or that he was killed by the said party after custodial torture, and, to destroy that evidence, the said police team (respondent Nos. 5 to 8) disposed of his body.

48. It was argued by the Counsel for the petitioner that the POTA Court did not

discard the statement of Dr. Mateen, The Sanctioning Authority, therefore, could not have overlooked the said statement, which clearly points out the involvement of all the said respondents in the commission of crime of custodial assault and custodial death of Khwaja Yunus. This argument clearly overlooks that the POTA Court has finally concluded that no final opinion can be reached in the enquiry conducted by it. That itself pre-supposes that the statement of Dr. Mateen was not decisive. The Sanctioning Authority has adverted to that statement and yet chose to limit the sanction only against respondent Nos. 5 to 8, which means the Sanctioning Authority was satisfied that other 10 police officials need not be prosecuted only because of the version given by the co-accused.

49. The real question is: Whether there was all likelihood of respondent Nos. 3, 9 and 10 being convicted in connection with the alleged offence? Except the statement of Dr. Mateen and Zaheer, the other contemporaneous documentary evidence as well as statements of other witnesses indicate that Khwaja Yunus was seen alive in good condition when he was taken away from the Powai police lock-up at 10.30 pm on 6th January, 2003. In the wake of such overwhelming evidence, no reasonable person would form opinion different than the one taken by the Sanctioning Authority. In any case, the Sanctioning Authority, being satisfied that respondent Nos. 3, 9 and 10 were not responsible and had no role to play, was justified in declining to grant sanction to prosecute the said respondents.

50. The respondents have raised several points to contend that the version of Dr. Mateen and Zaheer as regards timing, place, number of assailants, etc., is nothing short of major discrepancies and improvements from time to time amounting to contradictions. According to the respondents, Dr. Mateen, in his deposition in POTA Court on 17/ 18th February, 2003, had stated that he was taken to Ghatkopar CIU unit at 11.30 p.m. whereas, Zaheer, in his deposition before the POTA Court on 18th February, 2003, has given the timing of Khwaja Yunus being taken to Ghatkopar Unit early in the morning at 3.30 a.m. Further, Zaheer, in his statement dated 28th February, 2004, claims that they (the accused in main Bomb Blast Case) were taken to CIU, Ghatkopar Unit, at 11.30 a.m. But, in his further statement made on 4th January, 2005, he claims the timing as 10 to 10.30 a.m. The respondents have also invited our attention to the discrepancy in the statement of Dr. Mateen and Zaheer with regard to the places of alleged assault on Khwaja Yunus on 6th January, 2003 at Ghatkopar. Dr. Mateen, in his statement of 17/18th February, 2003 given before the POTA Court, has stated that Khwaja Yunus was interrogated and assaulted in backside room, whereas, in his statement dated 27th May, 2005 recorded u/s 161 of the Criminal Procedure Code by the State CID, he has stated that Khwaja Yunus and he himself were taken to a lock-up room at Ghatkopar CIU. Khwaja Yunus was interrogated and assaulted at that place. As is noted earlier, there is no lock-up room in the office of the CIU, Ghatkopar. There are two DCB CID offices at Ghatkopar, namely, CIU Ghatkopar Unit and Unit 7, Ghatkopar. There is a general police lock-up in the compound of Ghatkopar Police Station where the accused,

including Khwaja Yunus, Dr. Mateen and Zaheer were lodged. Besides, Zaheer in his deposition dated 18th February, 2003 before the POTA Court has stated that, on 6th January, 2003, Khwaja Yunus was taken to a right hand side room, but, in his statement dated 28th February, 2004, he stated that he was made to sit in a verandah (passage) near grilled lock-up and Khwaja Yunus was taken to the right side through western side room to his room. Thus, there was material contradiction in the two versions given by Dr. Mateen and Zaheer regarding the place where Zaheer was made to sit during the course of interrogation and assault. It is the case of the said respondents that Dr. Mateen was interested in completely derailing the process of investigation and gave different versions after due deliberations. Notably, in his statement dated 17/ 18th February 2003 before POTA Court he claims that three officers and two constables had interrogated and assaulted Khwaja Yunus on 6th January, 2003, whereas, in his statement recorded u/s 161 of the Criminal Procedure Code on 28th February, 2004, before the State CID, it is mentioned that two officers and 3 to 4 constables interrogated and assaulted Khwaja Yunus on 6th January, 2003. In the FIR recorded by the Ghatkopar Police Station at the instance of the State CID on 16th September, 2004, he has mentioned the names of officers Sachin Vaze (respondent No. 5) and four officers and two constables. Thereafter, on 16th January, 2005, in his further statements recorded by State CID, he has alleged that Khwaja Yunus was interrogated and assaulted by four Police Officers, namely, Praful Bhosale (respondent No. 11), API Rajaram Vahamane (respondent No. 13), PSI Hemant Desai (respondent No. 12) and PSI Ashok Khot (respondent No. 14) and two unknown constables. In his further statement dated 27th May, 2005, he has alleged that 7 to 8 police staff interrogated and assaulted Khwaja Yunus. It is also noticed from the statement of Dr. Mateen dated 16th January, 2005 that he was taken to the police lock-up in veil. The same was removed when he was in CIU Ghatkopar Office on 6th January, 2003. But Zaheer, in his deposition before the POTA Court dated 18th February, 2003, stated that, on 6th January, 2003, he was constantly kept in veil at Ghatkopar CIU Unit. In the statement dated 4th January, 2005, Zaheer claimed that, on 6th January, 2003, Khwaja Yunus, Dr. Mateen and himself were all kept in veil in Ghatkopar CIU. There are other discrepancies or infirmities bordering on false and vexatious plea taken by the said witnesses, which have been pointed out by the said respondents.

51. It is not necessary to analyse all those aspects in the present decision. Suffice it to observe that the Sanctioning Authority, having examined the totality of facts emerging from the record, has arrived at the subjective satisfaction that there was no likelihood of the said respondents (respondent Nos. 3, 9 to 14) of being convicted in connection with the offence in question. It is not open to this Court to sit over the said opinion as a Court of appeal. It cannot be gainsaid that the Sanctioning Authority has to take into account the totality of the circumstances. That opinion cannot be faulted by pointing out that there was at least some material to indicate the complicity of the concerned police officials

and, in spite of that material, the Sanctioning Authority refused to accord sanction to prosecute the officers.

52. In the case of *Mansukhlal Vithaldas Chauhan Vs. State of Gujarat*, (supra), the Apex Court has expounded that the validity of the sanction depends upon the material placed before the Sanctioning Authority; and the fact that all the relevant facts, material evidence have been considered by the Sanctioning Authority. The order of sanction must expressly disclose that the Sanctioning Authority had considered the evidence and other material placed before it. That fact can be established by extrinsic evidence by placing the relevant record before the Court to show that all relevant facts were considered by the Sanctioning Authority. It proceeded to hold that the validity of sanction depends on independent application of mind by the Sanctioning Authority to the facts of the case and the evidence and other material collected during investigation. The discretion to grant or not to grant sanction vests absolutely in Sanctioning Authority. Judicial review of that subjective satisfaction of the Sanctioning Authority is possible only when it is shown that the discretion exercised was affected by extraneous consideration or decision taken under pressure and is not independent for any reason whatsoever. The Sanctioning Authority is not supposed to act mechanically. Indeed, the observations are in the context of challenge to grant of sanction to prosecute the petitioners by the Sanctioning Authority. As aforesaid, we are not called upon to examine whether the sanction to prosecute granted against respondent Nos. 5 to 8 is valid and we are not expressing any opinion in that behalf.

53. Our attention was invited to the decision of the Apex Court in *Commissioner of Income Tax, Bombay v. Mahindra and Mahindra Limited*, (1983) 4 SCC 392 , in particular paragraph 11 thereof, which has considered the parameters of the Courts before a judicial administrative or executive action or decision and the ground on which the Court can interfere with the same. Amongst other authorities, reference is made to passage appearing at pages 285-286 in Prof. De Smith's treatise *Judicial Administrative Action* (4th Edn.), wherein, it is noted that the authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. The discretion must be exercised only by the authority. It is observed that the principle can be grouped into two main categories; failure to exercise a discretion, and excess or abuse of discretionary power. These two classes are not mutually exclusive. The same extracted portion has been considered by the Apex Court in a subsequent judgment in the case of *Siemens Public Communication Networks Pvt. Ltd. and Another Vs. Union of India (UOI) and Others*, . Also, see *State of U.P. and Others Vs. Renusagar Power Co. and Others*, .

54. The Counsel for the petitioner has relied on Rule 238 in the Bombay Police Manual. We may note that the validity of this provision has not been challenged. The said provision predicates the procedure to be followed in prosecuting a public servant, which is preceded by collating all information to facilitate the

Sanctioning Authority to take an informed decision on the proposal of grant or non-grant of sanction. Even in the present case, we have noticed from the original file that inputs from all sections were placed before the Sanctioning Authority. As aforesaid, it is not possible to countenance the argument of the petitioner that the Sanctioning Authority has failed to consider any relevant facts or material or, for that matter, has considered any extraneous matter. In that case, the question of sending back the matter to the Sanctioning Authority for re-consideration of the proposal to grant sanction against respondent Nos. 3 and 9 to 14, as is suggested, does not arise.

55. The Counsel for the petitioner submits that, in the case of custodial death, the Court must take a different approach. To buttress this submission, reliance is placed on the dictum of the Apex Court in the case of *Haricharan and Another Vs. State of Madhya Pradesh and Others*, . The same reads thus:-

35. We are, however, unable to agree that any of the appellants could take advantage of any of the legal submissions made by the learned Counsel in the facts and circumstances of this case. It has become necessary to remind ourselves of the principles laid down by this Court in *D.K. Basu Vs. State of West Bengal*, . In the aforesaid landmark judgment, this Court declared that custodial violence, including rape, torture and death in the lockup, strikes a blow to the rule of law. It was emphasised that custodial death is perhaps one of the worst crimes in a civilised society governed by the rule of law. It is aggravated by the fact that crimes in custody are committed by persons, who are charged with the solemn responsibility to protect the fundamental rights of all the citizens. These crimes are committed under the shield of uniform and authority within the four walls of the Police Station or lock-up, the victim being totally helpless.

36. The judgment in *D.K. Basu* further declared that the fundamental rights under Articles 21 and 22(1) of the Constitution required to be jealously and scrupulously protected. It interpreted the principle that the expression: (SCC p. 417)

Life or personal liberty in Article 21 includes right to live with human dignity. Therefore, it also includes within itself guarantee against the torture and assault by the States or his functionaries.

37. The Supreme Court, as the custodian and protector of the fundamental and the basic human right of the citizens, would view with deep concern any allegation made against the police officials about custodial crimes. In the present case, we are dealing with the torture of a detenu, resulting in death. Using, any form of torture for extracting any kind of information from a suspect was declared to be "neither right, nor just, nor fair". It was specifically laid down that though a crime suspect must be interrogated-- indeed subjected to sustained and scientific interrogation-determined in accordance with the provisions of law, he cannot, however, be tortured or subjected to third degree methods or eliminated with a view to elicit information or extract a confession. The aforesaid

observations of this Court, in our opinion, have been totally disregarded in the present case.

38. Mr. Narendra Rai had submitted that there is no direct evidence of the involvement of Anil Kumar Singh Kushwaha in the legal custody and alleged torture of Mathura. He also submitted that no specific role had been attributed to him. In our opinion, both the submissions are without any merit. This submission of Mr. Nagendra Rai is completely answered by the observations made by this Court in *State of M.P. Vs. Shyamsunder Trivedi and Others*, .

39. We may notice here the observations made in SCC paras 16 and 17 of the aforesaid judgment in *Shyamsunder Trivedi*. (SCC pp. 272-73)

"16....The High Court erroneously overlooked the ground reality that rarely in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel would be available, when it observed that "direct" evidence about the complicity of these respondents was not available. Generally speaking, it would be the police officials alone who can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues, and the present case is an apt illustration, as to how one after the other police witnesses feigned ignorance about the whole matter.

17. From our independent analysis of the materials on the record, we are satisfied that respondents 1 and 3 to 5 were definitely present at the Police Station and were directly or indirectly involved in the torture of Nathu Banjara and his subsequent death while in the police custody as also in making attempts to screen the offence to enable the guilty to escape punishment. The trial Court and the High Court, if we may say so with respect, exhibited a total lack of sensitivity and a "could not care less" attitude in appreciating the evidence on the record and thereby condoning the barbarous third degree methods which are still being used at some Police Stations, despite being illegal. The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact-situations and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the courts because it reinforces the belief in the mind of the police that no harm would come to them, if an odd prisoner dies in the lockup, because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crimes in a civilised society, governed by the rule of law and poses a serious threat to an orderly civilised society. Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront

to human dignity. Police excesses and the maltreatment of detainees/undertrial prisoners or suspects tarnishes the image of any civilised national and encourages the men in "khaki to consider themselves to be above the law and sometimes even to become law unto themselves. Unless stern measures are taken to check the malady, the foundations of the criminal justice delivery system would be shaken and the civilisation itself would risk the consequence of heading towards perishing. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may lose faith in the judiciary itself, which will be a sad day.

56. The question under consideration is: Whether the opinion of the Sanctioning Authority of not granting sanction to prosecute respondent Nos. 3 and 9 to 14 can be said to be just and proper? We have already analysed the prosecution case. From the sanction papers produced before us, it is noticed that the Sanctioning Authority has considered the entire material placed before it, including the adverse noting made by the Investigating Officer, but was satisfied that there was no likelihood of respondent Nos. 3 and 9 to 14 being convicted and it would be a case of persecution of those officers. The sanction is, therefore, limited to those police officials, who, in the opinion of the Sanctioning Authority, were responsible for the situation of causing death or disappearance of Khwaja Yunus while he was being taken to Aurangabad enroute. The Sanctioning Authority, while exercising discretion, is certainly entitled to sift the material to ascertain whether it is a case to grant sanction against all the named police officials or only some of them whom he finds that there is all likelihood of the concerned official(s) being convicted of the charge against them.

57. Much emphasis was placed by the petitioner on the statement of Dr. Mateen and Zaheer, who were allegedly eye-witnesses, to contend that Khwaja Yunus died in the police lock-up. It is submitted that whether that statement is truthful or otherwise, is a matter for trial, and the Sanctioning Authority could not have ignored the same at all. We have already dealt with this submission. The overwhelming evidence, except the statement of the above named persons, who were co-accused in the main Bomb Blast Case, along with Khwaja Yunus, would indicate that Khwaja Yunus was handed over to the team of police officials for being taken to Aurangabad in connection with investigation of some disclosure made by Khwaja Yunus during interrogation. The said police team, i.e., respondent Nos. 5 to 8, took Khwaja Yunus from the Police Station lock-up at 10.30 P.M. in good condition, and he is stated to have disappeared thereafter. That evidence has been considered by the Sanctioning Authority before recording its satisfaction that the sanction to prosecute be granted only against respondent Nos. 5 to 8.

58. The Counsel for respondent Nos. 11 to 14 has relied on the decision of the Apex Court in Union of India (UOI) and Another Vs. S.B. Vohra and Others, , to contend that the statutory duties should be allowed to be performed by the statutory authorities at the first instance; and that the High Court may interfere

against such decision only in exceptional cases, after observing due care and circumspection. In this judgment, reference is made to the decisions wherein it is opined that the Courts are not experts in policy and public administration, and should not step beyond their institutional capacity. It is noted that the distinction must be kept in mind where the subject-matter lies within the expertise of the Courts (for instance, criminal justice, including sentencing and detention of individuals) and those which were more appropriate for decision by democratically elected and accountable bodies. Further, it would be inappropriate for the Court to substitute itself for the statutory bodies to decide the matter.

59. In the case of (C.S. Krishnamurthy Vs. State of Karnataka)²⁰, (2005)4 S.C.C. 81, the Apex Court re-stated the exposition in Balaram Swain Vs. State of Orissa, , wherein, the High Court reversed the finding of the trial Court that the Sanctioning Authority has not applied its mind on the material placed before him. That was on the basis of the stand taken by the Sanctioning Authority that he had perused the consolidated report of the vigilance and fully applied his mind before granting sanction. Even in that case, the Sanctioning Authority had gone through the report of the Superintendent of Police; and, after discussing the matter with the Legal Department, accorded sanction. In such a situation, there is intrinsic evidence of due application of mind, and consideration of all the relevant material, including the statements recorded by the Investigating Officer, which were placed before the Sanctioning Authority.

60. The respondents have then relied on the decision of our High Court in the case of (Union of India through M.B. Suresh & ors., Vs. State of Maharashtra & Anr.)²², 2003 Bom.C.R.(Cri.) 1429 : 2003 All.M.R.(Cri.) 1016, wherein, it was seriously contended that Government has every right to file petition and protect officers. While agreeing with that contention, the Court observed thus:-

18.... They (aggrieved persons) are claiming that prosecution against them is not maintainable in the absence of sanction in view of the section 197 of the Cri.P.C. According to them and even according to the Union of India, the Central Government/the Union of India is sanctioning authority and how can the sanctioning authority be said to be aggrieved for prosecution of some individual officer. It was his further contention that the conduct of Union of India in filing the petition shows that respondents even if they had approached the authority for sanction, would never have been able to secure sanction. How can they expect justice from the Government which is interested in protecting accused against whom they have filed complaints?... Mr. Mehta filed the same (Vakalatnama) on behalf of all the petitioners. It was seriously contended that the Government has every right to file petition and protect the officers. The Government which is the sanctioning authority is aggrieved by the fact that there is an attempt to bypass it and file prosecution and therefore the Government has every right to challenge such order/action. Even if as a sanctioning authority, if the case is placed before the Government then in that capacity the Government can consider the issue of granting or not granting sanction. The question really is

why should the Government be held to be not competent to file such petition. A situation can be envisaged in which every individual officer who has been harassed by some smuggler or some other anti social element would request the Government to protect him or otherwise why the Government should not act against such act of smugglers or bootleggers, if it is of the view that its officers are being harassed and threatened to be obliterated by such elements from taking action against them. It is in fact the duty of the Government to protect honest and sincere officers who dare take serious action against such forces, why action of the Government be viewed with suspicion if it is trying to protect honest sincere and dare devil officers entrusted with the hard duty of controlling crimes like smuggling. (emphasis supplied)

61. Mr. Jha then relied on the decision of the Apex Court in *State Through Anti-Corruption Bureau, Government of Maharashtra, Bombay Vs. Krishanchand Khushalchand Jagtiani*, . In paragraph 8, it is observed thus:-

8.... The law presumes - and the court must also presume until the contrary is established - that such authority will act fairly and objectively and will accord sanction only where he is satisfied that the charge(s) against the public servant requires to be enquired into by a court. The authority is presumed to, and expected to act consistent with public interest and the interest of law - but of which demand that while a public servant be not subjected to harassment, genuine charges and allegations should be allowed to be examined by the courts. Both the considerations aforesaid should be present in the mind of the authority while deciding the question of grant of previous sanction required by section 6(1) (c) of the Act (Bombay Municipal Corporation Act) or, for that matter, section 197 of the Criminal Procedure Code. See *R.S. Nayak Vs. A.R. Antulay*, ...

62. Reliance was also placed on the decision in the case of *U.P. Financial Corporation Vs. Gem Cap (India) Pvt. Ltd. and Others*, , wherein, it is observed that doctrine of fairness, evolved in Administrative Law, was not supposed to convert the Writ Courts into Police Authorities over Administrative Authority. The constraints -self-imposed entirely - of Writ Jurisdiction will remain. Ignoring them would lead to confusion and uncertainty. The jurisdiction may become rudderless. The Apex Court re-stated the legal principle that the extent of judicial scrutiny/ judicial review in the case of administrative action cannot be larger than in the case of quasi judicial action. 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.

62A. Also, see *Chanmuniya Vs. Chanmuniya Virendra Kumar Singh Kushwaha and Another*, . In this decision, the Apex Court re-stated the legal principle that the object of the provision for sanction is that the authority should be able to consider for itself the evidence before it comes to a conclusion that the prosecution in the circumstances be sanctioned or forbidden. Further, this absolute decision to grant or withhold sanction upon consideration of the evidence before it and all necessary facts.

63. In the case of State of Punjab and Another Vs. Mohammed Iqbal Bhatti, , the Apex Court has observed that validity of an order of sanction would depend on application of mind on the part of the authority concerned and the material placed before it. All material facts and material evidence must be considered by the Sanctioning Authority. It must apply its mind on such material facts and evidence collected during the investigation.

64. The Counsel for the petitioner, indeed, argued that the evidence collected during investigation would suggest that the accused persons were taken to Ghatkopar Police Station and were beaten up mercilessly. However, the Sanctioning Authority has proceeded on the basis that the accused were beaten mercilessly at Powai and, for that reason, has confined sanction only against respondent Nos. 5 to 8. This argument is devoid of merits. The matter has been fully and properly analysed by the Sanctioning Authority on the basis of the inputs from different sources and the evidence and material collected during the investigation, which were placed before it for consideration. From that, it is noticed, that on the fateful day, the accused persons, including Khwaja Yunus, were taken back to Powai Police Station, from where, Khwaja Yunus was handed over to the team of police officials consisting of respondent Nos. 5 to 8 of Powai Police Lockup, for being taken to Aurangabad. The evidence, except the statement of the co-accused, indicates that the accused, including Khwaja Yunus, were taken away to Powai Police Station in good condition. The prosecution case is with regard to the charge of custodial death due to merciless beating of suspect Khwaja Yunus, while he was in police custody at Powai Police Station. The charge framed against respondent Nos. 5 to 8 by the Sessions Court dated 19th March, 2011 reinforces that position, which reads thus:-

I, Y.G. Khobrgade, the Addl. Sessions Judge, Mumbai do hereby charge you :

1. Sachin Hindurao Vaze,
2. Rajendra Rajmani Tiwari,
3. Sunil Vasant Desai,
4. Rajaram Kisna Nikam

as under: -

FIRSTLY, that, you accused 1 to 4, during period of 4-1-2003 to 6-1-2003, in furtherance of your common intention and knowledge abetted each other and mercilessly beaten with belt, kicks, fist and blow and buttocks and committed murder of suspect Khwaja Yunus during course of police custody remand at Powai police Station and thereby committed an offence punishable u/s 302 r/w section 109, 34 of IPC, and within my cognizance.

SECONDLY, that during the same time and place you accused Nos. 1 to 4 agreed to do or cause to be done all illegal act and mercilessly beaten to suspect Khwaja Yunus during course of Police custody remand and beside above said agreement

that you accused 1 to 4 did some act, in pursuance of the said agreement to commit homicidal death of Khwaja Yunus during course of Police custody remand which offence is punishable with death or imprisonment of life or a criminal conspiracy to commit an offence and thereby committed an offence punishable u/s 120B r/w section 34 of IPC and within my cognizance.

THIRDLY that, on 6.3.2003 during course of trial before Special Court constituted under Prevention of Terrorist Activities Act, Mumbai in furtherance of common intention you accused No. 2, Rajendra Rajmani Tiwari, 3, Rajaram Kisan Nikam and you accused No. 4, Sunil Vasant Desai deposed false on oath that, you lodged F.I.R. No. 3/03 at Parner Police Station that, the suspects Khwaja Yunus escaped by taking advantage of accident of police van and thereby committed an offence punishable u/s 193 r/w section 34 of IPC, and within my cognizance.

FOURTHLY, that, on 6-1-03 at about 22.30 hours at Parner Police Station you accused No. 1 lodged false FIR which is registered as Crime No. 3/03 knowingly gave false information that the accident of police gypsy took place at Jategaon Ghat and by taking advantage of dark and accident the suspect Khwaja Yunus escaped from police custody under handcuff and created screen to believe and destroyed evidence of offence with an intention to screen the offender from legal punishment and thereby committed an offence punishable u/s 201 of IPC, and within my cognizance.

FIFTHLY, that you accused 1 to 4 during period of 4-1-2003 to 6-1-2003, in furtherance of your common intention and knowledge abetted each other and mercilessly beaten with belt, kicks, fist and blow and buttocks and committed murder of suspect Khwaja Yunus during the course of police custody remand at Powai Police Station and gave information at Parner Police Station that the suspect named above escaped from police custody with handcuff at Jategaon-ghat after accident of police Gypsy which all of you know that incident of accident is false and thereby committed an offence punishable u/s 203 r/w 34 of IPC and within my cognizance.

SIXTHLY, that during period of 4-1-2003 to 6-1-2003 at Powai Police Station, Mumbai, in furtherance of common intention you accused 1 to 4 being Public Servants charged with preparation of a record or writing, namely police diary and report framed that record or writing in a manner which all of you knew to be incorrect that suspect Khwaja Yunus murdered by you but screen that he escaped from police custody, which was made by you with other accused persons with the intention that thereby it would save the person above referred to from legal punishment and, thereby committed an offence punishable u/s 218 of IPC, and within my cognizance.

SEVENTHLY, that during the period of 4-1-2003 to 6-1-2003 at Powai Police Station, Mumbai, in furtherance of common intention you accused 1 to 4 being Public Servants voluntarily caused grievous hurt to suspect Khwaja Yunus, Dr. Abdul Matin Abdul Basit, Zahir Ahmad Basir Ahmad Shaikh and Shaikh Mohd.

Mujammil Jamil Ahmad, for the purpose of extorting from him a confession or information which may lead to the detection of an offence of explosion of bomb in Bus near to Ghatkopar Railway Station on 2-12-2002 and that you have thereby committed an offence punishable u/s 331 of IPC, and within my cognizance.

EIGHTHLY, that during the period of 4-1-2003 to 6-1-2003 at Powai Police Station, Mumbai, in furtherance of common intention you accused 1 to 4 being Public Servants committed criminal intimidation by threatening and caused grievous hurt to suspects Khwaja Yunus, Dr. Abdul Matin Abdul Basit, Zahir Ahmad Basir Ahmad Shaikh and Shaikh Mohd. Mujammil Jamil Ahmad, and you have thereby committed an offence punishable u/s 326 r/w section 34 of IPC, and within my cognizance. And I hereby, direct that you be tried by this Court on the charge aforesaid.

65. In the context of the said prosecution case, the matter has been considered by the Sanctioning Authority for considering the proposal for according sanction to the Police Officers named in the charge-sheet/ police report. No fault can be found with the said approach.

66. For the reasons mentioned hitherto, this petition partly succeeds.

(a) The relief of direction to produce Sayed Khwaja Yunus Sayed Ayub cannot be taken forward, as, in law, he is presumed to be dead.

(b) Prayer Clause (b) for direction to place respondent Nos. 3, 9 and 10 under suspension and to prosecute them, is rejected.

(c) As regards prayer Clause (c) to direct the respondents to pay at least Rs. 20,00,000/- as compensation for violation of the fundamental rights guaranteed to Khwaja Yunus, as well as his mother, the petitioner before us, is allowed. The respondents are ordered to pay Rs. 20,00,000/- as compensation to the petitioner after providing adjustment of Rs. 3,00,000/- already paid to the petitioner, pursuant to the order of this Court dated 28th February, 2003, which was without prejudice to the rights and contentions of the parties. Further, the petitioner will be free to pursue remedy of suit, if so advised, for additional compensation amount, which will have to be decided on its own merit, in accordance with law.

(d) It is further ordered that the amount of compensation on the above basis shall be paid initially by the State of Maharashtra to the petitioner within eight weeks from the date of this order. It will be open to the State of Maharashtra to recover the said amount proportionately from the erring police officials (responsible for the disappearance of Khwaja Yunus) along with expenses incurred towards investigation of the cases, i.e., Parner Court, POTA Court enquiry and the present case and to defend the proceedings including successive writ petitions, and interest thereon at appropriate rate until the loss caused to the public exchequer is fully realised from them, by resorting to departmental

action.

(e) As regards prayer Clause (d), the same is worked out, as Dr. Mateen is no more in Thane Jail, and has been acquitted in connection with the main offence of Bomb Blast.

(f) As regards prayer Clause (dd) to direct respondent No. 15 to seek sanction for prosecution in respect of death of Khwaja Yunus against respondent Nos. 3 and 9 to 14 and direct respondent Nos. 1 and 2 to grant sanction to prosecute respondent Nos. 3 and 9 to 14 for the offence u/s 302 and for offences in relation to Khwaja Yunus, his treatment in police custody and his death, the same is rejected.

(g) Since the remaining prayer clauses in the petition are interim reliefs claimed by the petitioner, nothing survives for consideration in that behalf.

67. While parting, we, once again, make it clear that this judgment is not an expression of opinion in any manner in relation to the matters to be considered in the trial pending against respondent Nos. 5 to 8. The same will have to be decided on its own merits in accordance with law uninfluenced by the observations in this decision - which are for the limited purpose of answering the two broad issues raised in this petition. The petition is disposed of on the above terms.