

(1999) 10 GAU CK 0021
In the Gauhati High Court
Case No : PIL No. 21 of 1998

Nabin Chandra Kalita

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 14-10-1999

Acts Referred:

Constitution of India, 1950 — Article 164, 167, 21, 226, 32
Criminal Procedure Code, 1973 (CrPC) — Section 197, 197(1), 202, 203, 239
Essential Commodities Act, 1955 — Section 15A
General Clauses Act, 1897 — Section 3(60), 3(60)
Penal Code, 1860 (IPC) — Section 120A, 120B, 420, 467, 471
Prevention of Corruption Act, 1988 — Section 13(1), 13(2), 19, 19(1)

Citation : (1999) 3 GLT 429

Hon'ble Judges : D. Biswas, J; A.K. Patnaik, J

Bench : Division Bench

Advocate : L. Nageswar Rao, Gautam Uzir, Mohan Rao, Azim H. Laskar, S.K. Medhi and M. Ahmed, for the Appellant; P.G. Barua, R.K. Jain, Ranjan Gogoi, M. Goel, D.K. Das, A.K. Sarma, Saumitra Saikia, B. Choudhury and Devashis Baruah, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Patnaik, J.—This is a public interest litigation questioning the legality and validity of the action of the Governor of Assam in withholding sanction to the prosecution of Sri Prafulk Kumar Mahanta, Chief Minister of Assam, Respondent No. 7.

2. The facts briefly are that on 14.8.93 case No. 12/93 was registered by the Superintendent of Police, Vigilance and Anti-Corruption, Assam in Police Station-- Anti-Corruption Bureau (ACB) against nine accused persons. The nine accused persons are Dr. Dayal Saikia, Dr. Inamul Haque, Dr. J.C. Deori, Dr. Tilleswar Baruah who were working as Officer-in-Charge of the Intensive Cattle Development Project, Demow (for short, "ICDP, Demow") at different times during the period 1986-92, Sri S.C. Bharali and Sri M.C. Gohain who were

working as Treasury Officers, Sibsagar, Sri N.N. Phukan who was working as Senior Accountant of ICDP, Demow, Sri D. Bora and Sri Gul Mohammad who were working as Accountants, ICDP, Demow during the period 1986-92. The allegation against the aforesaid nine accused persons was that they entered into a criminal conspiracy and caused drawal of Rs. 44,70,60,521/- from the public exchequer against issue of Letters of Credit of approximate amount of Rs. 1 crore during the period from 1986-92 by preparing fake and fictitious bills and also by forging Letters of Credit for purchase of medicines and construction work by abusing their position as public servants knowing fully well that there was no justification for drawal of such huge amount and thereby they defrauded the Government and acquired huge property disproportionate to their known sources of income. Initially, the investigation was entrusted to one Sri Rupen Bora, Inspector, by the Superintendent of Police, Anti-Corruption Bureau, Assam, Guwahati. Subsequently however the Government of Assam decided to entrust the case to the Central Bureau of Investigation for a thorough investigation and by notification dated 3.5.94 of the Government of Assam, the case was transferred to the Central Bureau of Investigation, and by notification dated 12.5.94, the Government of India authorised the Central Bureau of Investigation to register the case for investigation. Accordingly, the case was registered afresh as RC-3(A)/94/ACU-II on 17.5.94 in CBI, ACU-II Branch, Delhi and investigation was undertaken. After investigation, the Superintendent of Police, Central Bureau of Investigation, Special Police Establishment, ACU-II, New Delhi, submitted a report recommending prosecution of forty persons u/s 120-B read with Sections 420, 467, 471 and 477-A, Indian Penal Code and u/s 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988, (for short, PC Act, 1988). The aforesaid forty persons who were to be prosecuted as per the recommendation of the Superintendent of Police, CBI, included Sri Prafulla Kumar Mahanta, Chief Minister, Assam and Sri Nakul Das, Ex-Veterinary Minister, Assam. A copy of the report of the Superintendent of Police, CBI was sent to the Government of Assam by the Additional Director, Central Bureau of Investigation, Special Police Establishment, New Delhi by his letter dated 26.12.97 with the request to accord sanction for prosecution of the said Sri Prafulla Kumar Mahanta and Sri Nakul Das u/s 19(1)(c) of the PC Act, 1988 and u/s 197 of the Code of Criminal Procedure, (for short, Code of Criminal Procedure). By order dated 5.2.98, the Governor of Assam sanctioned prosecution of Sri Nakul Das, former Minister, Animal Husbandry & Vety. Department, Government of Assam. By Anr. order dated 5.2.98, the Governor of Assam withheld grant of sanction to prosecute Sri Prafulla Kumar Mahanta on the ground that the CBI investigation had not made out a prima-facie case against him. Thereafter a charge-sheet dated 15.7.98 was filed by the Central Bureau of Investigation in the Court of Special Judge, Assam, Guwahati against 38 accused persons. In the said charge-sheet it was mentioned that necessary sanction for prosecution of 22 persons who were public servants had been obtained from the competent authorities u/s 19(1)(c) of the PC Act, 1988 and Section 7, Code of Criminal Procedure, but sanction for prosecution of Sri Prafulla Kumar Mahanta had been withheld by the

competent authority. The Petitioner has prayed for a writ of certiorari quashing the order dated 5.2.98 withholding the sanction for prosecution of Sri Prafulla Kumar Mahanta, Respondent No. 7 and a writ of mandamus commanding the Respondents to re-examine the matter relating to sanction for prosecution against Respondent No. 7 in the light of materials collected by the Central Bureau of Investigation during investigation both before and after the filing of charge-sheet

3. Some preliminary questions relating to maintainability of the writ petition were raised by Mr. P.G. Barua, learned Advocate General, Assam and by Mr. R.K. Jain, learned Senior Counsel appearing for Respondent No. 7. Mr. Barua, learned Advocate General submitted that when the Governor grants or withholds sanction for prosecution u/s 197, Code of Criminal Procedure or u/s 19 of the PC Act, 1988, he exercises his own individual discretion and does not act on the aid and advice of the Council of Ministers. In support of this submission, he relied on the decision of the Supreme Court in *State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another*, wherein the Supreme Court held that in deciding to sanction or not to sanction the prosecution of a Chief Minister, the Governor acts in exercise of his discretion and not with the aid and advice of the Council of Ministers. Mr. Barua further argued that when the Governor acts not on the aid and advice of the Council of Ministers but in his own discretion, his action cannot be called in question in a Court of law in view of the protection given to the Governor under Article 361 of the Constitution. In support of this contention Mr. Barua relied on the observations of K. Ramaswamy, J. in paragraphs 145 and 146 of the judgment in *S.R. Bommai and others Vs. Union of India and others etc.* etc., to the effect that when the President acts not necessarily on the aid and advice of the Council of Ministers but otherwise under Article 356(1) of the Constitution, his satisfaction is a subjective one and such satisfaction is immune from challenge in a Court of law. Mr. Barua also cited the decision of the Madras High Court in *Dravida Munnetra Kazhagam v. Government of Tamil Nadu and Two Ors.* reported in 1994 I ILW 145 wherein a Division Bench of the Madras High Court after considering the decisions of different High Courts has come to the conclusion that the power contemplated u/s 19 of the PC Act, 1988 as well as Section 197, Code of Criminal Procedure is to be exercised only by the Governor as such and not in any other capacity and consequently he will be entitled to protection of immunity afforded by Article 361 of the Constitution. Mr. Barua cited several other decisions of different High Courts other than this Court in support of his contention that when the Governor exercises his discretion and does not act on the aid and advice of the Council of Ministers, his action is protected from challenge in a Court of law under Article 361 of the Constitution.

4. Mr. R.K. Jain, learned senior Counsel appearing for Respondent No. 7, however, submitted that the immunity to the Governor under Article 361 of the Constitution extends to acts done in the discharge of the duties of his office under the Constitution. He cited the decisions of the Full Bench of the Punjab & Haryana High Court in *Hardwari Lal Vs. G.D. Tapase and Others*, in which it was

held that when the Governor acted as a Chancellor of the University under the Maharshi Dayananda University Act, he had his own independent existence and exercised his power without any interference from any quarter and the office he held was a statutory office quite distinct from the office of the Governor and that the powers and duties exercised and performed by the Chancellor under the Act of statutes of the University had no relation to the exercise and performance of the powers and duties of the Governor and therefore the immunity under Article 361(1) of the Constitution could not be extended to the acts of the Chancellor. He also cited the decision of the Supreme Court in *Bhuri Nath and Others Vs. State of Jammu & Kashmir and Others*, , in which the aforesaid decision of the Full Bench of Punjab & Haryana High Court in *Hardwari Lal v. G.D. Tapase* to the effect that the office of Chancellor held by the Governor was a statutory office quite distinct from the office of the Governor was referred to with approval. Mr. Jain therefore argued that the order of the Governor granting sanction or withholding sanction u/s 197, Code of Criminal Procedure or Section 19 of the PC Act, 1988 has been passed in exercise of the statutory powers vested in the State Government by the aforesaid statutory provisions in Section 197, Code of Criminal Procedure and Section 19 of the PC Act, 1988 and independent of the powers and functions of the Governor under the Constitution. He contended that the protection under Article 361 of the Constitution which only extends to the performance of powers and duties of the office of the Governor will not be available to orders passed by the Governor in the capacity of State Government u/s 197, Code of Criminal Procedure or Section 19 of the PC Act, 1988 granting or withholding sanction for prosecution of a public servant. According to Mr. Jain therefore the Governor is answerable to a Court in case his order u/s 197, Code of Criminal Procedure or Section 19 of the PC Act, 1988 either granting sanction or withholding sanction is challenged before the Court. He however submitted that whenever an order of the Governor granting sanction or withholding sanction u/s 197, Code of Criminal Procedure or Section 19 of the PC Act, 1988 is challenged in a Court of law, the Governor would have to be impleaded as he is a necessary party. He cited the decision of the Supreme Court in *Udit Narain Singh Malpaharia Vs. Additional Member, Board of Revenue, Bihar*, for his submission that in a writ of certiorari the authority whose order is sought to be quashed is a necessary party. Mr. Jain vehemently argued that since the order dated 5.2.98 of the Governor of Assam withholding sanction for prosecution of Respondent No. 7 is sought to be quashed by a writ of certiorari in this writ petition, the Governor of Assam is a necessary party and since he has not been impleaded as a Respondent, the writ petition is liable to be dismissed on this ground alone.

5. Replying to the aforesaid contentions of Mr. P.G. Barua, learned Advocate General, Assam and Mr. RK Jain, learned Counsel appearing for Respondent No. 7, Mr. L. Nageswar Rao, learned Counsel for the Petitioner, assisted by Mr. Gautam Uzir, submitted that under Article 361 of the Constitution, the Governor is not answerable to any Court for exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the

exercise and performance of those powers and duties. The said protection, according to Mr. Rao, is a personal protection given to the Governor and therefore no proceeding can be initiated against a Governor personally and the Governor cannot be impleaded as a Respondent in a proceeding before a Court of law. But the second proviso to Article 361(1) of the Constitution makes it sufficiently clear that the protection given to the Governor under Article 361(1) does not restrict the right of any person to bring appropriate proceeding against a Governor of a State. Hence, orders passed by a Governor granting sanction or withholding sanction u/s 197, Code of Criminal Procedure or Section 19 of the PC Act, 1988 can always be challenged in a Court of law by impleading the concerned State Government as a Respondent But in such a proceeding the Governor cannot be impleaded as a Respondent in view of the personal protection to the Governor under Article 361(1) of the Constitution. He cited the decision of the Full Bench of the Bombay High Court in *State of Bombay v. K.M. Nanavati* 1960 Bombay Law Reporter, Vol. LXII-383, in which the Bombay High Court has held that Article 361 of the Constitution only gives a personal protection to the Governor, but the Governor must act according to law and he cannot exceed the power conferred upon him and, therefore, if in any case it is alleged that the Governor has exceeded his powers, the High Court will be competent to enquire into that question and decide whether action taken by him is within the law, even though it will not be possible to make any order against the Governor personally. Mr. Rao also cited the decision of the Supreme Court in *R. Balakrishna Pillai Vs. State of Kerala*, to explain that the order passed by Governor granting sanction or withholding sanction u/s 197, Code of Criminal Procedure for prosecution of a Chief Minister or a Minister is really an order passed by the State Government. He contended that since in the instant case the order dated 5.2.98 withholding sanction for prosecution of Respondent No. 7 is in effect an order of the State Government u/s 197, Code of Criminal Procedure and Section 19 of the PC Act, 1988, the said order of the State Government can be challenged in a Court of law as has been clearly stated in the second proviso to Article 361(1) of the Constitution.

6. Article 361(1) of the Constitution is quoted hereinbelow:

361. Protection of President and Governors and Rajpramukhs.--(1) The President, or the Governor or Rajpramukh of a State, shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties.

Provided that the conduct of the President may be brought under review by any Court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under Article 61:

Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State.

A plain reading of the aforesaid Clause (1) of Article 361 of the Constitution makes it clear that the Governor of a State is not answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties. But the second proviso to the said Article 361(1) states that nothing in the said Clause (1) of the Article 361 shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of a State. Thus, the second proviso itself makes it clear beyond doubt that the protection afforded to the Governor under Clause (1) of Article 361 of the Constitution does not bar initiation of appropriate proceedings before the Court against the Government of the concerned State. In Section 197, Code of Criminal Procedure the power to sanction the prosecution of a public servant is vested in the State Government in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed in connection with the affairs of a State and the Governor exercises the said power of the State Government, because u/s 3(60) of the General Clauses Act, 1897, the State Government means the Governor of the concerned State. Hence, an order of the Governor u/s 197, Code of Criminal Procedure is really an order of the State Government and such an order of the State Government can be challenged by a person in an appropriate proceeding against the State Government as has been clarified in the second proviso to Clause (1) of Article 361 of the Constitution quoted above. Moreover, the order that is passed by the Governor granting sanction or withholding sanction for prosecution of a Minister or Chief Minister u/s 197, Code of Criminal Procedure is passed in the exercise and performance of the powers and duties of the office of the Governor under the Constitution because under the Constitution it is the Governor who can remove a Minister or Chief Minister from his office. In *Namdeo Kashinath Aher Vs. H.G. Vartak and Another*, the High Court of Bombay held:

Whatever be the practical and actual position, the fact remains that it is the Governor who can accept the resignation of the Minister and it is the Governor again who can dismiss or remove the Minister from office. u/s 3(60) of the General Clauses Act, 1897, the word "State Government" has been defined. Clause (c) of Section 3(60) is applicable to the present case and therefore the State Government is to mean the Governor for the purpose of the present case. The result therefore is that Accused 1 is a public servant who can be said to be removable only by the State Government, meaning thereby the Governor, and I do not find any difficulty in coming to the conclusion that the second requirement of Section 197, Code of Criminal Procedure also is fully satisfied as far as Accused 1 is concerned.

The aforesaid passage from the decision of the High Court of Bombay in *Namdeo Kashinath Aher v. H.G. Vartak* was quoted by the Supreme Court in *R. Balakrishna Pillai v. State of Kerala* (supra) and it was held therein thus:

Taking note of the provisions of Article 167 (Article 164 for Ministers), it was

pointed out that the Chief Minister is paid from public exchequer for performing a public duty and is, therefore, a public servant within the meaning of Section 197 of the Code. So also a Minister of a State is paid from its public exchequer. He is paid for doing the duty entrusted to him as a Minister and, therefore, on the analogy of the observations relating to the Chief Minister, the Minister must also be held to be a public servant. Since he is appointed or dismissed by the Governor, he would fall within the expression "a public servant not removable from his office save by or with the sanction of the Government". In the instant case, as pointed out earlier, by virtue of the provisions in the General Clauses Act, 1897 the expression "Government" used in Section 197 would mean the Governor in the case of a Chief Minister or a Minister. That being so, we are of the opinion that a Minister would be entitled to the protection of Section 197(1) of the Code.

The aforesaid authorities would show that even when the Governor exercises the powers u/s 197, Code of Criminal Procedure to sanction or withhold sanction for prosecution of a Minister or Chief Minister, he exercises the powers and performs the duties of the office of the Governor under the Constitution. The Governor, therefore, is not answerable to any Court for any order passed by him u/s 197, Code of Criminal Procedure and thus cannot be impleaded as a Respondent in a proceeding before a Court challenging such order passed by him u/s 197, Code of Criminal Procedure.

7. The aforesaid logic also applies to an order passed by the Governor u/s 19 of the PC Act, 1988. Although, in the instant case a request had been made by the CBI to the Governor to accord sanction for prosecution of the Ex-Minister, Sri Nakul Das and the Chief Minister, Sri Prafulla Kumar Mahanta u/s 19(1)(c) of the PC Act, 1988, the draft sanction order which was sent to the Governor alongwith the said request and the report of the Superintendent of Police, CBI indicated that the Governor was to pass the order of sanction u/s 19(1)(b) and not u/s 19(1)(c). Section 19(1)(b) specifically covers the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government. Since a Minister or the Chief Minister of Assam is employed in connection with the affairs of the State and is not removable from his office save by or with the sanction of the State Government which by virtue of Section 3(60) of the General Clauses Act, 1897 would mean the Governor, the case of such Minister or Chief Minister would be covered by Section 19(1)(b) of the PC Act, 1988. Thus, the order of the Governor u/s 19(1)(b) of the PC Act is in effect an order of the State Government. Such an order can therefore be challenged before a Court as has been clarified in the second proviso to Article 361(1) of the Constitution. Again, since the order u/s 19(1)(b) of the PC Act, 1988 is passed by the Governor in the discharge of his official duties and the exercise of his powers of the office of the Governor under the Constitution, the Governor is not answerable to any Court for his order u/s 19(1)(b) of the PC Act, 1988 because of the protection under Article 361(1) of the Constitution.

8. In fact, the Governor is not a necessary party in a proceeding before a Court challenging his order u/s 197, Code of Criminal Procedure or Section 19 of the PC Act, 1988 granting sanction or withholding sanction for prosecution of a Chief Minister or a Minister so long as the challenge is not on the ground of malafide on the part of the Governor. This is because the order that is passed by the Governor u/s 197, Code of Criminal Procedure or Section 19 of the PC Act, 1988 is in effect an order, passed by the State Government as has been held above. Such an order passed by the Governor u/s 197, Code of Criminal Procedure or Section 19 of the PC Act, 1988 will have to be defended by the State Government before the Court and the Court can examine the order on objective considerations on the basis of materials placed by the Investigating Agency before the Governor for prosecution of the Minister or Chief Minister and if the Court finds that the order is not in accordance with law, the Court can issue appropriate directions to the State Government to place the matter before the Governor afresh for reconsideration in accordance with law. Thus, in the absence of the Governor, the Court can examine the legality of an order passed by him u/s 197, Code of Criminal Procedure or Section 19 of the PC Act, 1988 on grounds other than malafide on the part of the Governor and thereafter pass an effective order for compliance by the State Government.

9. For our conclusion that an order of the Governor can be challenged on grounds other than malafide on the part of the Governor, we find support from HM Seervai's Constitutional Law of India, Fourth Edition, Volume-2, para-18.79, relevant extract from which is quoted hereinbelow:

...The statement that a Governor's action is justiciable, in view of Article 361(1), second proviso, is only partly correct. If the Court can decide a matter without the Governor being called upon to justify his action, as for example, where the Governor's appointment of an Adv. Gen. is alleged to be in violation of the constitutional requirements for such appointment, the Court can decide that question on a quo warranto. For if the alleged disqualifications are established--and the requirement for appointment is that he is qualified to be a judge of the High Court--the Court can declare the appointment of the Respondent invalid, because the qualifications depend on the existence of objective facts which can be ascertained without the Governor having to answer for his action to the Court. The order of the Court would operate on the Respondent without bringing the Governor before the Court. But where a matter cannot be decided without requiring the Governor personally to account to the Court for his actions, as where he is alleged to have acted mala fide, he alone can deal with the allegation, for mala fides or bad faith is a state of mind, as rightly held by the Full Bench; and the Governor, and no one else, can depose to his state of mind. In such a situation the Government's action is not justiciable, for Article 361(1) bars the jurisdiction of the Court and the proviso to Article 361(1) cannot operate, for the government cannot be sued for the Governor discharging his official function in bad faith.

A full Bench of the Bombay High Court in *State of Bombay v. K.M. Nanavati*, (supra), has also not accepted the contention that the action of the Governor in the exercise and performance of the powers and duties of his office cannot be challenged in a Court with the following reasons:

...The Advocate General also contended that the Governor's action cannot be challenged in this proceeding, because the Governor is not represented before us and also because under Article 361 of the Constitution the Governor is not answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties. This article only gives personal protection to the Governor. No proceeding is however being held against the Governor. He is not being asked to answer for anything done by him. It is also not proposed to quash or set aside his order. The legality of his order has to be examined only in order to determine whether there is a valid return to the writ issued by this Court. If we had come to the conclusion that the Governor's order was invalid, we would have issued a writ to the officer now holding the accused in custody to hand him over. No writ or order would have been issued to the Governor. Consequently, it is not necessary that the Governor should be a party to the proceeding in order to enable us to decide whether there were good and sufficient reasons for not complying with the order of this Court.

10. With great respect, therefore, while we agree with the view taken by the Division Bench of the Madras High Court in *Dravida Munnetra Kazhagam v. Government of Tamil Nadu and Two Ors.* (supra) that the Governor is entitled to protection of immunity afforded by Article 361 of the Constitution in respect of an order passed by him u/s 197, Code of Criminal Procedure or Section 19 of the PC Act, 1988 and is not personally answerable to a Court of law, we are of the opinion that such an order passed by the Governor u/s 197, Code of Criminal Procedure or Section 19 of the PC Act, 1988 can still be challenged on grounds other than malafide on the part of the Governor before the Court and in such a proceeding, the State Government and not the Governor is the necessary party.

11. Thus, while the contention of Mr. Barua, learned Advocate General that the Governor while considering the question of granting or withholding sanction for prosecution of a Minister or Chief Minister u/s 197, Code of Criminal Procedure or Section 19 of the PC Act, 1988 does not act on the aid and advice of the Council of Ministers and exercises his own individual discretion is correct, the order that is passed by the Governor u/s 197, Code of Criminal Procedure of Section 19 of the PC Act, 1988 being really that of the State Government can still be challenged in a Court as he has been clarified in the second proviso to Clause (1) of Article 361 of the Constitution. The observations of K. Ramaswamy, J. in paras 145 and 146 of the Judgment in *S.R. Bommai v. Union of India* (supra), on which reliance was placed by Mr. Barua were in the context of the powers exercised by the Governor under Article 356(1) of the Constitution otherwise than on the aid and advice of the Council of Ministers and on his own subjective satisfaction and

has no relevance to an order passed by the Governor u/s 197, Code of Criminal Procedure or Section 19 of the PC Act, 1988 for prosecution of a Minister or Chief Minister on the materials placed before him by the Investigating Agency as such an order passed by the Governor u/s 197, Code of Criminal Procedure or Section 19 of the PC Act, 1988 can be examined on objective considerations on the basis of materials placed before the Governor in accordance with law. Similarly, the decision of the Full Bench of the Punjab & Haryana High Court in *Hardwari Lal v. G.D. Tapase* (supra) referred to in the decision of the Supreme Court in *Bhuri Nath v. State of Jammu & Kashmir* (supra), cited by Mr. R.K. Jain, learned Counsel for the Respondent No. 7, relating to the powers exercised by and duties performed by the Governor as Chancellor of University under the relevant University Act and the statutes of the University has no application to the facts of the present case because while exercising the powers and performing the duties of Chancellor the Governor does not exercise any powers or does not perform any duty of the office of the Governor, but while exercising the powers u/s 197, Code of Criminal Procedure or Section 19 of the PC Act, 1988 to sanction or withhold sanction to the prosecution of a Minister or Chief Minister, the Governor exercises his powers and performs his duties of the office of the Governor under the Constitution as indicated above and is not answerable to the Court for the exercise and performance of those powers and duties because of the protection under Article 361(1) of the Constitution. Further, there can be no doubt over the proposition that the authority whose order is under challenge before a Court is a necessary party, but in the instant case no malafide on the part of the Governor in passing the impugned order dated 5.2.98 u/s 197, Code of Criminal Procedure and Section 19 of the PC Act, 1988 has been alleged in the writ petition. Hence, the State Government of Assam is the necessary party and has been impleaded in this writ petition. The objections of Mr. Barua and Mr. Jain to the maintainability of the writ petition therefore have no merit.

12. Mr. Jain, learned Counsel for the Respondent No. 7 then submitted relying on the averments in para-11 of the affidavit-in-opposition filed by the Respondent No. 7 on 2.12.98 that the present public interest litigation has not been instituted bonafide to further the interest of justice or to advance any cause of the general public. He referred to the averments in the rejoinder filed on behalf of Respondent No. 7 on 25.1.99 to the effect that this public interest litigation has been engineered by his political rivals to achieve political mileage and gain. He brought to our notice various news items, copies of which have been annexed to the said rejoinder, to show that Sri Bhrigu Kumar Phukan and Sri Atul Bora, dissident AGP leaders, are behind this public interest litigation. Mr. Jain vehemently argued that the Petitioner and his brother Sri Satyam Kalita jointly own a total of 13 bighas 1 Kathas and 3 lechas of land as indicated in para-3 of the additional affidavit filed on behalf of the Respondent No. 7 on 13th May/99 and that the Petitioner has not filed any return of income either under the Income Tax Act or under the Agricultural Income Tax Act and does not have telephone connection and uses a bicycle for the purpose of his transportation. He

further stated that it has been stated in the said additional affidavit that the Petitioner took a loan of Rs. 9,024/- from the State Bank of India, Dadra Branch for starting a business under the Government Sponsored Scheme but has not been able to repay the said loan for which a recovery processing (Bakijai Case No. 8/96) is pending against him before the Certificate Officer. Mr. Jain contended that these facts stated in the said additional affidavit of the Respondent No 7 filed on 13th May/99 and not disputed by the Petitioner in his affidavit in reply would clearly go to show that the Petitioner does not have the required funds to institute and carry on with this public interest litigation and that some other persons have actually instituted this public interest litigation and are pursuing the same for collateral purposes. According to Mr. Jain, since the bonafides of the Petitioner in instituting and carrying on with this public interest litigation are in doubt, this writ petition should be rejected by the Court at the threshold without any further examination of the merit of the case. He cited the decision of the Supreme Court in *Bhartiya Homoeopathy College, Bharatpur Vs. Students Council of Homoeopathy Medical College, Jaipur and Others*, wherein the Supreme Court had expressed doubt as to whether the Students' Council who had instituted the litigation had the funds to indulge in the litigation and whether it had the backing of the majority of its members for the litigation. He also relied on the observation of Chief Justice Sabyasachi Mukharji in *Chhetriya Pardushan Mukti Sangharsh Samiti Vs. State of U.P. and others*, to the effect that it is the duty of the Court to ensure that the weapon under Article 32 of the Constitution should not be misused or permitted to be misused creating a bottleneck in the superior Court preventing other genuine violation of fundamental rights being considered by the Court. Mr. Jain placed great reliance on the observations of K.N. Singh, J. in AIR 1991 420 (SC) that a person invoking the jurisdiction of the Court under Article 32 must approach the Court for the vindication of the fundamental rights of affected persons and not for the purpose of vindication of his personal grudge or enmity and that it is the duty of the Court to discourage such petitions and to ensure that the course of justice is not obstructed or polluted by unscrupulous litigants by invoking the extraordinary jurisdiction of the Court for personal matters under the grab of the public interest litigation. Mr. Jain brought to our notice the observations of Sarkaria, J. in *Jasbhai Motibhai Desai Vs. Roshan Kumar, Haji Bashir Ahmed and Others*, to the effect that the High Court should do well to reject the applications of busybodies who indulged in the pastime of meddling with the judicial process either by force of habit or their improper motive. He also referred to the caution of P.N. Bhagwati, J. in *S.P. Gupta Vs. President of India and Others*, that the individual who moves the Court for judicial redress in public interest litigations must be acting bona fide with a view to vindicating the cause of justice and if he is acting for personal gain or private profit or out of political motivation or other oblique consideration, the Court should not allow itself to be activated at the instance of such person and must reject his application at the threshold. He submitted that in *Shri Sachidanand Pandey and Another Vs. The State of West Bengal and Others*, V. Khalid, J. observed that today public spirited litigants rush

to Courts to file cases in profusion under the attractive name "public interest litigation" but they must inspire confidence in Courts and among the public and they must be above suspicion. These observations, Mr. Jain pointed out, were reiterated by the Supreme Court in *Ramsharan Autyanuprasi v. Union of India* (1989) Suppl. (1) SCC 251 . He also referred to the observations of Pandian, J. to the effect that the busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either for themselves or as proxy of Ors. or for any other extraneous motivation or for glare of publicity break the queue muffling their faces by wearing mask of public interest litigation and get into the Courts by filing vexatious and frivolous petitions. According to Mr. Jain, if anybody was aggrieved by the order of the Governor withholding sanction for persecution of the Respondent No. 7, it was the CBI which had carried out the investigation and placed the materials, after such investigation before the Governor for sanction of prosecution of the Respondent No. 7. But the CBI had not come to the Court presumably because it was satisfied with the order passed by the Governor, and the Petitioner has approached this Court with an improper motive and therefore the Court should reject the petition at the threshold considering the fact that the Petitioner's reputation which is part of this personal liberty under Article 21 of the Constitution is at stake. He cited the decision of the Karantaka High Court in *C. Naganna v. State* AIR 1997 Karantaka 48, wherein a learned Single Judge held that if the students community or class had suffered and was injured, but did not wish to challenge the impugned provision, the petition at the instance of the Petitioner, who had no interest in the matter, in the sense that he was no way injured nor any of his rights was adversely affected by the rules, need not be permitted to challenge or claim any relief. He also relied on a Division Bench Judgment of the Imphal Bench of this Court in *Joint Action Committee, Protection on Agricultural Land Vs. Planning and Development Authority, Imphal and Others*, where a proposition was laid down that if the persons primarily injured as a result of the act of the authority did not wish to claim any relief and accepted such act or omissions willingly and without protest, the members of the public who complained of a secondary public injury could not maintain the action.

13. In reply to the aforesaid submissions of Mr. Jain, Mr. L. Nageswar Rao, learned Counsel for the Petitioner, urged that it is not the requirement of law that a Petitioner in a public interest litigation must disclose the details of his financial resources out of which the public interest litigation is instituted or carried on. He however referred to the averments in the affidavit-in-reply filed by the writ Petitioner on 28.6.99 wherein the Petitioner while denying that he was any way close to the dissident leaders of the AGP has stated that on the assurance of the friends and well-wishers who are willing to donate liberally to meet the expenditure of the public interest litigation, the Petitioner instituted the public interest litigation and that the Petitioner had been meeting the expenditure of the litigation by raising funds through donation. According to Mr. Nageswar Rao therefore the contention of Mr. Jain that the Petitioner had instituted and was

carrying on with the public interest litigation at the behest of the dissident leaders of AGP and out of the funds provided by them was factually not correct. Mr. Rao cited paragraphs from the Administrative Law by HWR Wade & CF Forsyth, Seventh Edition on "The New Law of Standing" in support of his submission that the question of locus standi need not necessarily be decided at the threshold and should be examined by the Court along with the merits of the case. He also relied on the decision of the House of Lords in the Inland Revenue Commissioner's Case (1982) ACC 617, wherein it has been held by the majority of the Judges that the question of standing may be decided together with the legal and factual context and not in isolation as a preliminary issue. Mr. Nageswar Rao placed great reliance on the decision of the Supreme Court in A.R. Antulay Vs. Ramdas Srinivas Nayak and Another, and in Sheonandan Paswan Vs. State of Bihar and Others, for his submission that a criminal proceeding is not a proceeding for vindication of a private grievance but it is a proceeding initiated for the purpose of punishment to the offender in the interest of the Society and that a right is given to any citizen to set the machinery of criminal law in motion for the purpose of bringing the offender to book. According to Mr. Nageswar Rao, therefore, every citizen has a right to approach this Court in a public interest litigation for the purpose of ensuring that the offender is booked and punished for the crime committed against the society. He therefore argued that since in the present case, the Petitioner was convinced that there were adequate materials collected in the course of investigation by the CBI to show that the Respondent No. 7 had committed the offences in question leading to siphoning of huge amount from the Government Treasury by fake and fictitious bills, the Petitioner had approached this Court in the present petition for ensuring that the Respondent No. 7 is not let off and is booked for the offences in question.

14. In A.R. Antulay v. Ramdas Srinivas Nayak (supra), a contention was raised that a private complaint would not lie and could not be entertained against Sri A.R. Antulay for offences alleged to be committed by him and the Supreme Court while rejecting the said contention held:

...Punishment of the offender in the interest of the society being one of the objects behind penal statutes enacted for larger good of the society, right to initiate proceedings cannot be whittled down, circumscribed or fettered by putting it into a straitjacket formula of locus standi unknown to criminal jurisprudence, save and except specific statutory exception....

Again in Sheonandan Paswan v. State of Bihar (supra), it was contended before the Supreme Court on behalf of Dr. Jagannath Misra that Sheonandan Paswan had no locus standi to oppose the withdrawal of his prosecution and Bhagawati, C.J., while rejecting the said contention held:

...Now if any citizen can lodge a first information report or file a complaint and set the machinery of the criminal law in motion and his locus standi to do so cannot be questioned, we do not see why a citizen who finds that a prosecution for an offence against the society is being wrongly withdrawn, cannot oppose

such withdrawal. If he can be a complainant or initiator of criminal prosecution, he should equally be entitled to oppose withdrawal of the criminal prosecution which has already been initiated at his instance. If the offence for which a prosecution is being launched is an offence against the society and not merely an individual wrong, any member of the society must have locus to initiate a prosecution as also to resist withdrawal of such prosecution, if initiated....

It is thus clear that every member of the society has locus standi in the matter of a prosecution of a person who is alleged to have committed an offence against the society. In the instant case, after investigation, the Superintendent of Police, CBI, SPE, ACU-II, New Delhi had submitted a report recommending prosecution of forty persons u/s 120-B read with Sections 420, 467, 471 and 477-A of the Indian Penal Code and u/s 13(2) read with Section 13(1)(d) of the PC Act, 1988 and the aforesaid forty persons included Sri Prafulla Kumar Mahanta, Chief Minister of Assam and Sri Nakul Das, Ex-Veterinary Minister, Assam. The Governor granted sanction for prosecution of Sri Nakul Das, Ex-Veterinary Minister, Assam, but withheld sanction for prosecution of the Chief Minister, Sri Prafulla Kumar Mahanta. The charge-sheet dated 15.7.98 filed by the CBI in the Court of Special Judge, Assam, Guwahati further shows that sanctions for prosecution of 22 public servants were obtained from the competent authorities u/s 19(1) of the PC Act, 1988 and Section 197, Code of Criminal Procedure but sanction for prosecution of Sri Prafulla Kumar Mahanta had been withheld by the Governor. As a result of the aforesaid offences alleged to have been committed by the accused persons a huge amount running to several crores had been withdrawn from the Government Treasury for payment of fake and fictitious bills. On these facts, we are of the considered opinion that every member of the society including the Petitioner has locus standi to approach this Court by way of a public interest litigation with a prayer to quash the order passed by the Governor withholding sanction for prosecution of the Chief Minister, Sri Prafulla Kumar Mahanta (Respondent No. 7) as he has as much interest as the CBI to ensure that the persons who have actually committed the said offences against the Society are punished after prosecution in the Court of law.

15. As to whether or not the Petitioner has bonafide instituted this public interest litigation to advance the cause of justice or at the behest of the political rivals of the Respondent No. 7, however, is a different matter. While the Respondent No. 7 has alleged in his affidavit-in-opposition, rejoinder and the affidavit referred to above that the writ Petitioner has no resources of his own to institute and carry on with this public interest litigation and that he has instituted and carried on with this public interest litigation at the behest of the political rivals of the Respondent No. 7, the Petitioner has denied the said allegations in his reply referred to above stating therein that he is not associated with the said political rivals of the Respondent No. 7 and that he has instituted and carried on with this public interest litigation with donations received from his friends and well-wishers and the members of public being convinced that the CBI had collected sufficient materials to show the involvement of the Respondent No. 7 in the offences. In

view of the said allegations and denials, the Court is not in a position to decide at the threshold the question of bonafide of the Petitioner in instituting and carrying on with this public interest litigation. Thus, even though the Supreme Court has observed in some of the decisions cited by Mr. Jain that the Court should reject a public interest litigation lacking in bonafide at the threshold, it may not be practicably possible for the Court to decide such a question of bonafide of the person who has instituted a public interest litigation at the threshold. In a simple case, the Court may be in a position to decide that a particular public interest litigation lacks bonafide and reject the same outright at the threshold. But in a more complicated case, the question of bonafide of the Petitioner in filing a public interest litigation can only be decided along with the merits of the case and not at the threshold. In this context, we would like to refer to the following observations of Lord Wilberforce with which Lord Diplock and Lord Scarman have agreed in *Inland Revenue Commissioner v. National Federation of Self-Employed and Small Businesses Ltd.* (supra):

I think that it is unfortunate that this course has been taken. There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application: then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the Courts being flooded and public bodies harassed by irresponsible applications. But in other cases this will not be so. In these it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed. In other words, the question of sufficient interest cannot, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context. The rule requires sufficient interest in the matter to which the application relates. This, in the present case, necessarily involves the whole question of the duties of the Inland Revenue and the breaches or failure of those duties of which the Respondents complain.

According to Lord Wilberforce therefore where it is necessary to consider the powers and the duties in law of those against whom the relief is asked and the breach or failure of their duties in respect of which complaint has been made, the question of sufficient interest cannot be considered in the abstract or as an isolated point but must be taken together with the legal and factual context. In the instant case, a large number of witnesses have been examined and voluminous documents have been collected by the CBI in course of investigation and a lengthy report was submitted by the Superintendent of Police, CBI before the Governor with a request to sanction the prosecution of Respondent No. 7 and 39 other accused persons including 22 public servants and yet the Governor has by the impugned order withheld sanction for prosecution of Respondent No. 7. Thus, in this case it is necessary for the Court to consider whether the powers or the duties in law of the sanction authority u/s 197, Code of Criminal Procedure

and u/s 19 of the PC Act, 1988 have been properly exercised or have been exercised in a manner contrary to law. By the test laid down by Lord Wilberforce in the aforesaid decision of the House of Lords, therefore, the question of locus standi including the bonafide of the Petitioner in this public interest litigation cannot be considered in the abstract or as an isolated point and it must be taken together with the legal and factual context. It is for this reason that we were not impressed with the contention of Mr. Jain, learned Counsel for the Respondent No. 7 that this writ petition should be rejected at the threshold on the ground of lack of bonafide on the part of the Petitioner and instead called upon the CBI by our order dated 2.7.99 to produce before the Court for our perusal the materials that were placed by the CBI before the Governor of Assam for the purpose of showing the involvement of Respondent No. 7 in the offences in question.

16. On the merits, Mr. L. Nageswar Rao, learned Counsel for the Petitioner submitted that the provisions for sanction in Section 197, Code of Criminal Procedure and Section 19 of the PC Act, 1988 have to be construed in the light of the object of the legislature in making the said provisions. According to Mr. Rao, the object of the legislature was not to protect the corrupt and dishonest public servants but to prevent the honest public servants from frivolous and vexatious prosecution. He relied on the observations of the Supreme Court in *S.A. Venkataraman Vs. The State*, to the effect that the sanctioning authority concerned may refuse to accord sanction on the ground that the prosecution is frivolous or vexatious or on the ground that in the public interest it would be inexpedient to do so and that without some safeguard of this kind a public servant may find it impossible to carry on his official duties efficiently. Mr. Nageswar Rao also referred to the decision of the Supreme Court in *M. Narayanan Nambiar Vs. State of Kerala*, wherein the Supreme Court while construing the provisions of the Prevention of Corruption Act, 1947 held that the desired object of the said Act was to prevent corruption among the public servants and to prevent harassment of the honest among them and that the Act should be liberally construed to bring about the said desired object. He also cited the decision of the Supreme Court in *R.S. Nayak Vs. A.R. Antulay*, in which it was reiterated that the Prevention of Corruption Act, 1947 was enacted to make effective provisions for the prevention of bribery and corruption and that the provisions of the Act must receive such construction at the hands of the Court as would advance the object and purpose underlying the Act and at any rate not defeat it. He relied on the decision of the Supreme Court in *State of Bihar and Another Vs. P.P. Sharma, IAS and Another*, in which the Supreme Court held that the object behind prior sanction is to prevent malicious, vexatious and unnecessary harassment to a public servant by laying false and frivolous accusation for prosecution and Section 197(1) is intended to immunise a public servant who discharges his duties honestly and diligently from the threat of prosecution.

17. Construing in the light of the aforesaid object of the law, Mr. L. Nageswar Rao contended that the sanctioning authority has to act consistent with the public

interest and interest of law and cannot withhold sanction and prevent allegations against a public servant being examined by the Court. He pointed out that in *Indu Bhusan Chatterjee Vs. The State of West Bengal*, the Supreme Court held that it was not for the sanctioning authority to judge the truth of the allegations made against the public servant. Similarly in *B. Saha and Others Vs. M.S. Kochar*, the Supreme Court further observed that whether the allegation or charge against the public servant was true or false was not to be gone into at the stage of sanction. He also placed great reliance on the observations of Jeevan Reddy, J. in *State Through Anti-Corruption Bureau, Government of Maharashtra, Bombay Vs. Krishanchand Khushalchand Jagtiani*, that the sanctioning authority is presumed to, and expected to, act consistent with public interest and the interest of law--both 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. In *Suresh H. Rajput etc. Vs. Bhartiben Pravinbhai Soni and others etc.*, he pointed out, the Supreme Court held that at the stage of sanction it was not for the sanctioning authority to weigh pros and cons and then to find whether the case could end in conviction or acquittal as all these matters were not matters for the sanctioning authority to weigh and to consider. He cited a Division Bench judgment of Gujarat High Court in *Nanjibhai Ratnabhai Chaudhari Vs. State of Gujarat*, for his submission that while granting sanction, it was not necessary for the sanctioning authority to judge the truth of the allegations made against the accused and if there were prima facie materials against the accused then the sanctioning authority should not weigh the defence and decide it before granting sanction.

18. Mr. Nageswar Rao vehemently argued that the sanctioning authority is only required to find out as to whether there exists a prima facie case against a public servant and nothing more. In support of this proposition he relied on the decision of the Supreme Court in *Rameshwar Bhartia Vs. The State of Assam*, He further explained that in *Martin Burn Ltd. Vs. R.N. Banerjee*, the Supreme Court held that prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. He referred to Halsbury on Evidence wherein "prima facie evidence" has been defined to mean evidence which, if not balanced or outweighed by other evidence, will suffice to establish a particular contention. He referred to Strouds Judicial Dictionary in which prima facie evidence has been taken synonymous with sufficient evidence. He also placed before the Court the meaning of the expression "prima facie case" in *Words & Phrases*, Permanent Edition, to show that a prima facie case does not mean a conclusive case. He also referred to the following definition of prima facie evidence given in *Black's Law Dictionary*:

Prima facie evidence. Evidence good and sufficient on its face. Such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defence, and which if not rebutted or contradicted, will remain sufficient. Evidence which, if unexplained or

uncontradicted, is sufficient to sustain a judgment in favour of the issue which it supports, but which may be contradicted by other evidence.

Mr. Nageswar Rao therefore argued that the sanctioning authority was only to consider whether the evidence or materials that were placed before him were sufficient to make out an offence on the part of the public servant. But he was not to further consider as to whether such evidence should be believed or not or whether the public servant had a defence in rebuttal of the evidence or materials placed before him.

19. Mr. Nageswar Rao then referred to the Press Release issued by the Raj Bhawan, Guwahati on 5.2.98 on Demow LOC Scam to show that the Governor has disbelieved the evidence in support of the allegations made against the Respondent No. 7 that he had received from the main accused Sri R.P. Bora Rs. 40 lakhs and an air ticket for Rs. 4350.00 from Guwahati to Delhi and back and that 2000 bundles of CI sheets were purchased by the said Sri R.P. Bora for distribution in the constituency of the Respondent No. 7. He further submitted that there were sufficient documentary and oral evidence which were placed before the Governor to show that bank drafts of several lakhs made out of funds provided by Sri R.P. Bora were distributed to different institutions in the constituency of the Respondent No. 7, but the Governor has taken a view that since the bank drafts were not misappropriated by the Respondent No. 7, mens rea an essential concomitant of crime had not been established. Thus, the said Press Release by Raj Bhawan on 5.2.98 would show that the Governor has discussed the merits of the case and taken into consideration various irrelevant factors and acted in a manner in which no reasonable person would have acted. The order of the Governor withholding sanction to the prosecution of Respondent No. 7, according to Mr. Nageswar Rao, was thus liable to be set aside on the ground of irrationality. He placed reliance on the judgment of the Court of Appeal in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (1948) 2 All ER 680, in which it has been held that if, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters and further if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters. He also placed great reliance on the decision of the House of Lords in *Padfield and Ors. v. Minister of Agriculture Fisheries and Food* and Ors. 1968 Appeal Cases 997 in support of the proposition that where discretion is conferred upon an authority, it should be used to promote the policy and object of the Act and the authority cannot use his discretion so as to thwart or run counter to the policy and objects of the Act. The aforesaid decision of the House of Lords in *Padfield*, Mr. Nageswar Rao pointed out, was quoted and followed by the Supreme Court in *Hochtief Gammon Vs. State of Orissa and Others*, and it was held therein that the Executive have to reach their decisions by taking into account relevant considerations and they should not take into

consideration irrelevant or extraneous consideration and they should not misdirect themselves on a point of law and only such a decision will be lawful and the Courts have power to see that the Executives acted lawfully. Mr. Nageswar Rao urged that the Press Release dated 5.2.98 of the Raj Bhawan clearly indicates that the Governor as the sanctioning authority has misdirected himself in law inasmuch he has lost sight of the very objects of Section 197, Code of Criminal Procedure and Section 19 of the PC Act, 1988, namely, to punish the corrupt and dishonest public servant and to protect the honest and efficient public servant from unnecessary harassment. He further argued that the Press Release would show that various irrelevant matters such as merits and credibility of the witnesses examined by the CBI have been taken into consideration although the Courts have clearly laid down in various decisions cited by him that the sanctioning authority is not to go into the pros and cons or weigh the evidence before him and has to only consider whether a prima facie evidence exists to show that the public servant had committed the offence in question.

20. Mr. Jain, learned Counsel for the Respondent No. 7, on the other hand, contended that the scope of judicial review in respect of an order passed by the sanctioning authority withholding prosecution of a public servant will be a very limited one because the right of the public servant to personal liberty under Article 21 of the Constitution would be at stake inasmuch as the reputation of public servant would be in jeopardy in case the Court quashes the order of the sanctioning authority withholding sanction and directs him to reconsider the matter afresh. In this context, he referred to the observation of Jeevan Reddy, J. in *Abdul Rehman Antulay Vs. R.S. Nayak* and another etc. etc., to the effect that the very fact of being accused of a crime affects the reputation and standing of the person among his colleagues and in society. He submitted relying on the decision of the Supreme Court in *State of Andhra Pradesh and Others Vs. Chitra Venkata Rao*, and *State of Uttar Pradesh and Others Vs. Maharaja Dharmander Prasad Singh and Others*, that the High Court in exercise of its powers of judicial review under Article 226 of the Constitution cannot act as a Court of appeal over the decision of the administrative authority. Mr. Jain relied on the decision of the Supreme Court in *Dwarkanath Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, for the proposition that it is not within the purview of a Court to substitute a decision taken by the constituted authority simply because the decision sought to be substituted would be a better one. He also cited the observations of M.N. Venkatachaliah, J. in *G.B. Mahajan and others Vs. The Jalgaon Municipal Council and others*, that "reasonableness in administrative law must distinguish between the proper use and improper abuse of power and the test is not the Court's own standard of reasonableness as it might conceive it in a given situation and that a thing is not unreasonable in the legal sense merely because the Court thinks it unwise. According to Mr. Jain, therefore, even if in instant case, the Court finds that the sanctioning authority had made some factual errors and ought to have taken a different view on the materials placed before him, the Court while exercising the power of judicial review cannot correct

those factual errors and substitute its own view for that of the sanctioning authority. He further pointed out that in the instant case, the impugned order withholding the sanction to the prosecution of Respondent No. 7 has been passed by the Governor who is a high ranking constitutional authority and therefore the Court must presume that such a high ranking authority must have discharged his function in a bonafide manner. He cited the decision of the Supreme Court in *Accountant General and Another Vs. S. Doraiswamy and Others*, in which R.S. Pathak, J., as he then was, observed that the Comptroller and Auditor General is a high ranking constitutional authority, and can be expected to act without arbitrariness. Mr. Jain submitted that Lord Denning has taken a view in *R. v. Metropolitan Police Commissioner ex-parte Blackburn* (1968) 1 All ER 763 and *R. v. Metropolitan Police Commissioner ex-parte Blackburn* (1973) 1 All ER 324, that in the carrying out of the duty of enforcing the law, the police have a discretion with which the Courts will not interfere, and did not interfere with the decision of the police in those cases not to prosecute the persons alleged to have committed the offences in question. According to Mr. Jain, therefore, the Court would not normally interfere with the discretion of the sanctioning authority withholding sanction to the prosecution of a public servant.

21. Relying on the decision of the Supreme Court in *Bhagwan Prasad Srivastava Vs. N.P. Mishra*, Mr. Jain contended that the object and purpose underlying Section 197, Code of Criminal Procedure is to afford protection to public servants against frivolous, vexatious or false prosecution for offences alleged to have been committed by them while acting or purporting to act in the discharge of their official duties. This was also the view taken by the Supreme Court in *State of Bihar v. P.P. Sharma* 1992 Suppl. (1) SCC 222, in which the Supreme Court held that the object behind prior sanction u/s 15-A of the Essential Commodities Act was to prevent malicious, vexatious and unnecessary harassment to a public servant by laying false or frivolous accusation or prosecution. Mr. Jain also cited the observations of Jayachandra Reddy, J. in *Director of Inspection and Audit and others Vs. C.L. Subramaniam*, to the effect that the object of Section 197, Code of Criminal Procedure is to provide guard against vexatious proceedings against judges, magistrates and public servants and to secure the opinion of superior authority whether it is desirable that there should be a prosecution. According to Mr. Jain, since Section 197, Code of Criminal Procedure and Section 19 of the PC Act, 1988 do not put any limitations on the power of the sanctioning authority to grant or withhold sanction, the ambit of the power of the sanctioning authority is very wide. He referred to the decision of the Federal Court in AIR 1945 16 (Federal Court) wherein it was held that Clause 16 of the Drugs Control Order (1943) was enacted for the purpose of protecting the citizen, and in order to give the Provincial Government in every case a proper opportunity of considering whether a prosecution should in the circumstances of each particular case be instituted at all and that the Provincial Government might have excellent reason for considering a prosecution undesirable or inexpedient. He also referred to the decision of the Privy Council in *Gokulchand Dwarkadas v. The King* AIR 1948 PC

32 , in which it was held that the Government has an absolute discretion to grant or withhold sanction under Clause 23 of the Cotton Cloth and Yarn (Control) Order, 1943. He also cited the decision of the Supreme Court in S.A. Venkataraman Vs. The State, in which it was observed that the authority concerned may refuse to accord sanction on the ground that the prosecution was frivolous or vexatious or on the ground that in the public interest it would be in expedient to do so. He placed great reliance on the observations of Sagir Ahmed, J. in Mansukhlal Vithaldas Chauhan Vs. State of Gujarat, that one of the guiding principles for the sanctioning authority while according or withholding sanction would be the public interest. According to Mr. Jain, therefore, besides the existence of a prima facie case, public interest would be a relevant factor for the sanctioning authority while deciding as to whether to grant or withhold sanction to the prosecution of a public servant and it is for this reason that the power to grant sanction under the both Sections 197, Code of Criminal Procedure and Section 19 of the PC Act, 1988 has been vested in the State Government and the Central Government and not in any subordinate authority.

22. Finally, Mr. Jain submitted that it is now settled by a long line of authorities that the sanctioning authority while granting or withholding sanction must consider not only the facts constituting the offence but also the materials and evidence in support of those facts placed before him for the purpose of sanction to the prosecution of a public servant for the offence in question. In support of this submission, he cited the decisions of the Supreme Court in Jaswant Singh Vs. The State of Punjab, , Major Som Nath Vs. Union of India (UOI) and Another, Mohd. Iqbal Ahmed Vs. State of Andhra Pradesh, State of Orissa Vs. K. Rajeshwar Rao, and Mansukhlal Vithaldas Chauhan Vs. State of Gujarat, Mr. Jain vehemently argued that since in the present case the Governor found no evidence whatsoever to show that the Respondent No. 7 had knowledge of the illegal withdrawals of huge amount of money by the main accused Sri R.P. Bora from the Government Treasury, he was perfectly justified in withholding the sanction to the prosecution of Respondent No. 7 for the offence of conspiracy by Respondent No. 7 with Sri R.P. Bora under Sections 120-A and 120-B of the IPC. He cited the decision of the Supreme Court in State of Maharashtra, Etc. Etc. Vs. Som Nath Thapa, Etc. Etc., for the proposition that to establish a charge of conspiracy, knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. Mr. Jain pointed out that since the Governor did not find any material or evidence placed before him showing that the Respondent No. 7 had knowledge about the indulgence in either an illegal act or a legal act by illegal means, he could not have possibly sanctioned prosecution of Respondent No. 7 for the offence of conspiracy u/s 120-B IPC read with Section 420, IPC. Similarly, he argued that the CBI had not been able to place materials before the Governor to show that the Respondent No. 7 had committed the offence of criminal misconduct as defined in Section 13(1)(d) of the PC Act, 1988, and therefore, the Governor was justified in withholding the sanction to the prosecution of Respondent No. 7 for the offence u/s 13(1)(d) of the PC Act,

1988. According to Mr. Jain, therefore, this is not a fit case in which the Court should interfere with the discretion of the Governor as the sanctioning authority u/s 197, Code of Criminal Procedure and Section 19 of the PC Act, 1988 to withhold sanction to the prosecution of Respondent No. 7 for the said offences.

23. Mr. D.K. Das, learned Special Public Prosecutor, CBI, stated that whatever materials had been collected by the CBI against the Respondent No. 7 were placed before the Governor who was the sanctioning authority and according to the CBI, the said materials disclosed prima facie that offences had been committed by the Respondent No. 7 u/s 120-B, IPC read with Section 420, IPC and u/s 13(2) read with Section 13(1)(d) of the PC Act, 1988. He, however, contended that while it is the function of the CBI as an investigating agency to collect materials, and where it finds that the materials disclose prima facie commission of offence by a public servant to place the materials before the sanctioning authority for sanction of prosecution of the public servant, the sanctioning authority is to decide as to whether or not the materials are sufficient to establish a prima facie case against the public servant and, accordingly, grant or withhold sanction. Mr. Das vehemently contended that the CBI as an investigating agency has done its job fairly and without any malafide against the Respondent No. 7. He, however, argued that the scope of the power of the sanctioning authority is not as wide as that of the Court under Sections 202, 203 and 239 of the Code of Criminal Procedure. Mr. Das in particular stated that regarding allegation of receipt of Rs. 40 lacs by Respondent No. 7, the CBI was unable to find any material to show as to where the said amount of Rs. 40 lacs was invested. He referred to the averments in the affidavit-in-opposition filed on behalf of the CBI in the present case in support of his submission.

24. In the instant case, the Governor withheld sanction to the prosecution of Respondent No. 7 on the ground that no prima facie case had been made out against the Respondent No. 7 in the materials collected by the CBI. The sanctioning authority has not taken a view that although a prima facie case was made out for prosecution of Respondent No. 7 for the offences in question, the sanction to his prosecution was withheld on other considerations of public interest. The sanctioning authority has not taken view that alongwith a prima facie case had been made out against the Respondent No. 7 on the basis of materials placed before him by the CBI, it was not expedient or desirable to sanction the prosecution of Respondent No. 7. Thus, it is not necessary for us to decide and consider in the present case the larger questions of law raised by Mr. Jain that the sanctioning authority can withhold the sanction to the prosecution of a public servant de hors the materials placed before him by the investigating authority on wider considerations of public interest and inexpediency. The only question that has to be decided in the present case is as to whether the Governor could have withheld the sanction to the prosecution of Respondent No. 7 on the ground that the materials collected by the CBI and placed before him did not disclose a prima facie case against the Respondent No. 7.

25. It is abundantly clear from the decisions cited by both Mr. Nageswar Rao and Mr. R.K Jain that the object of the legislature in making the provisions in Section 197, Code of Criminal Procedure and Section 19 of the PC Act, 1988 for prior sanction of the sanctioning authority for prosecution of a public servant is to ensure that the public servant is not subjected to unnecessary harassment or a vexatious prosecution. This being the object of the provisions for sanction in Section 197, Code of Criminal Procedure and Section 19 of the PC Act, 1988, the sanctioning authority has an obligation or duty under the law to find out (i) as to whether there exist facts constituting the offence for which sanction for prosecution is sought and (ii) as to whether there are materials or evidence in support of the said facts constituting the offence for which sanction for prosecution is sought. In other words, to be satisfied that a prima facie case exists for prosecution of a public servant, the sanctioning authority must be satisfied that there are facts showing the commission of offence in question by the public servant and that such facts are supported by the materials or evidence collected by the investigating agency and placed before him. This obligation or duty of the sanctioning authority was explained by the Privy Council in *Gokulchand Dwarakdas v. The King*, (supra) in the following words:

...Looked at as a matter of substance it is plain that the Government cannot adequately discharge the obligation of deciding whether to give or withhold a sanction without a knowledge of the facts of the case. Nor, in their Lordships' view, is a sanction given without reference to the facts constituting the offence in compliance with the actual terms of Clause 23. Under that clause sanction has to be given to the prosecution for contravention of any of the provisions of the Order. A person could not be charged merely with the breach of a particular provision of the Order, he must be charged with the commission of certain acts which constitute a breach, and it is to that prosecution--that is, for having done acts which constitute a breach of the Order--that the sanction is required.

Again, in *Jaswant Singh v. State of Punjab*, (supra), the Supreme Court held:

...It should be clear from the form of the sanction that the sanctioning authority considered the evidence before it and after a consideration of all the circumstances of the case sanctioned the prosecution and, therefore unless the matter can be proved by other evidence, in the sanction itself the facts should be referred to indicate that the sanctioning authority had applied its mind to the facts and circumstances of the case.

So also in *Som Nath v. Union of India*, (supra), the Supreme Court observed:

...For a sanction to be valid it must be established that the sanction was given in respect of the facts constituting the offence with which the accused is proposed to be charged.

Further, in *Mohd. Ahmed v. State of A.P.*, (supra), the Supreme Court reiterated:

...It is incumbent on the prosecution to prove that a valid sanction has been

granted by the Sanctioning Authority after it was satisfied that a case for sanction has been made out constituting the offence.

In *State of Bihar v. P.P. Sharma*, (supra), the Supreme Court summed up the obligation and duty of the sanctioning authority in the following language:

The sanction u/s 197, Code of Criminal Procedure is not an empty formality. It is essential that the provisions therein are to be observed with complete strictness. The object of obtaining sanction is that the authority concerned should be able to consider for itself the material before the Investigating Officer, before it comes to the conclusion that the prosecution in the circumstances be sanctioned or forbidden. To comply with the provisions of Section 197 it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is desirable that the facts should be referred to on the face of the sanction. Section 197 does not require the sanction to be in any particular form. If the facts constituting the offence charged are not shown on the face of the sanction, it is open to the prosecution, if challenged, to prove before the Court that those facts were placed before the sanctioning authority. It should be clear from the form of the sanction that the sanctioning authority considered the relevant material placed before it and after a consideration of all the circumstances of the case it sanctioned the prosecution.

26. Having held that it was the duty or obligation of the sanctioning authority while exercising the power u/s 197, Code of Criminal Procedure or Section 19 of the PC Act, 1988, to consider the facts constituting the offence for which sanction for prosecution of the public servant was being sought as well as the materials or evidence placed before the sanctioning authority in support of the said facts, we may now proceed to examine the facts constituting the offence for which sanction was sought for prosecution of Respondent No. 7. The facts constituting the offence for which sanction for the prosecution of Respondent No. 7 was sought from the sanctioning authority find place in the Draft Sanction Order sent by the Superintendent of Police, CBI to the Governor along with his request for sanction. The said Draft Sanction Order is quoted hereinbelow:

Whereas it is alleged that Sh. P.K. Mahanta while functioning as Chief Minister, Govt. of Assam during the year 1986-90 and while functioning as MLA during the year 1991-92 at Guwahati, Sibsagar and other places entered into a criminal conspiracy with Sh. R.P. Borah, private person and with S/S. Dr. Enamul Haque, Dr. Dayal Saikia, Dr. Jimal Chand Deori, Dr. Tishwar Barua, all O/CICDP, Demow, Dr. T.B. Dutta, Director Vety., Paresh Chandra Sharma, N.H. De, Thogi Ram Gogoi, all Sr. Audit Officers of Accountant General, Assam and Pramod Chander Das, Supervisor of AG, Assam, Mehtab Hussain, Jogeswar Dutta, both Accountants, ICDP, Demow, Jatinder Nath Dutta, Peon, ICDP, Demow, Makhan Chand Dutta, M.C. Gohain, Sarat Chandra Bharali, all Treasury Officers, Sibsagar Treasury, Duleswar Borah, Treasury Accountant Sibsagar, C.K. Bhuyan, Private Person, S.K. Srinivas, Manager, A. Janardhan Reddy, both Managers, Andhra Bank, A.T. Road, Guwahati, O. Radhakrishnan, Manager, Andhra Bank, H.M.T.

Road Brnach, Hyderabad, Ram Chandra Reddy, Manager, Andhra Bank, Padmarao Nagar Branch, Secunderabad, N.C. Acharya and Niranjana Kumar Nath, both Managers, UCO Bank, Maligaon Branch, Guwahati, Apporva Bhattacharji, Manager, Roing Branch, Arunachal Pradesh, Anil Sen Gupta, Manik Sen Gupta, both Branch Managers and Officers, Bank of Baroda, Guwahati and Pvt. Persons, Dilip Kumar Borah, Kartik Barthakur, Rojita Barpujari, Achyut Kumar Barpujari, Radhey Shyam Bhowmik, Atunu Guha, Rita Bose, Ashok Phukan, Tulsi Gogoi, Samsul Ansari, Chittaranjan Deori, Deb Brata Saikia & politicians Lt Hiteswar Saikia, Nakul Das, Barki Prasad Telinga and Sh. Dilip Kumar Saikia Sonowal to do or cause to be done an illegal act by illegal means to wit, to cheat the Govt. of Assam through Vety. Deptt. and in furtherance of the said criminal conspiracy they prepared and submitted false and bogus bills in the name of different firms/ persons which were prepared by them and the said private persons for having supplied different articles for construction work and earth work, prepared false sanction order and without receiving any articles mentioned in the bills, prepared false RCC bills and dishonestly passed the Treasury Vouchers without any LOC and withdrew a sum of Rs. 48,81,50,932.45 from SBI, Sibsagar through Sibsagar Treasury on the basis of said false and forged documents and they thereby misused their official positions as such public servants to obtain undue pecuniary advantage for themselves and for Ors. by putting the Govt. of Assam in such heavy wrongful pecuniary loss.

2. Whereas it is further alleged:

I. That Sh. P.K. Mahanta was functioning as Chief Minister, Govt. of Assam during the period 1986-90. He was MLA during 1991-92 in Assam Assembly. II. That Sh. P.K. Mahanta had full knowledge about involvement of Sh. R.P. Borah, a Contractor with Vety. Department, in fraudulent withdrawals being made from Government Exchequer by O/C ICDP Demow on the basis of false vouchers regarding construction of work, sheds, building, roads, earth works etc. and false supply of materials/medicine, films projectors and Hindi films.

III. That Sh. P.K. Mahanta received 2000 bundles of CI sheets from Sh. R.P. Borah amounting to Rs. 30 lacs approximately for the distribution of the same in Nagaon in his constituency in 1990 when Assembly Elections were to be held. The CI sheets were received by Dr. D. Barkataki Treasurer AGP Nagaon on behalf of Sh. P.K. Mahanta Chief Minister. The CI sheets were kept in the godown of Sh. Prahlad Rai Todi, a local businessman of Nagaon.

IV That in addition to above Sh. P.K. Mahanta by abusing his official position as a public servant obtained DDs amounting to Rs. 26 lacs from the said Sh. R.P. Borah in the name of various schools institutions, clubs, persons etc and distributed the same among them based in Nagaon during 1990-91 for getting himself elected from the said constituency.

V. That Sh. P.K. Mahanta received air ticket in the month of Sept. 91 for his journey from Guwahati to Delhi and Delhi to Guwahati for which the payment of

Rs. 4350 was made by Sh. R.P. Borah from his hotel Inderaj account.

3. That Sh. P.K. Mahanta was working as Chief Minister, Govt. of Assam during the period 1986-90 and was MLA during the period 1991-92. He misused his official position as public servant to obtain undue pecuniary advantage for himself and for Ors. .

4. And whereas the said facts constitute the commission of offence punishable u/s 120-B r/w 420, IPC and Section 13(2) r/w 13(1)(d) PC Act 1988 and substantive offence u/s 13(2) r/w 13(1)(d) PC Act 1988.

5. And whereas the State Govt. of Assam after fully and carefully examining the materials before it in regard to the said allegations and circumstances of the case considers that Sh. P.K. Mahanta should be prosecuted in the Court of Law for the aforesaid offences.

Now, therefore, the State Govt. of Assam both hereby accord sanction u/s 197 of the Code of Criminal Procedure 1973 and Section 19(1)(b) of the PC Act 1988 for prosecution of Sh. P.K. Mahanta for the said offences and any other offence punishable under other provisions of Law in respect of the acts aforesaid and for taking the cognizance of the said offences by a Court of Competent jurisdiction.

By order and in the name of Governor of Assam.

The opening paragraph of the aforesaid Draft Sanction Order would show that the sanction of the Governor was sought for prosecution of Respondent No. 7 for the offence of criminal conspiracy with Sri R.P. Borah and Ors. to do or to cause to be done an illegal act by illegal means, i.e. to cheat the Government of Assam through Veterinary Department by withdrawing a sum of Rs. 48,81,50,932.45 from the SBI, Sibsagar through Sibsagar Treasury on the basis of false and forged documents. Thus sanction of the Governor was sought for the offence u/s 120-B read with Section 420, IPC alleged to be committed by the Respondent No. 7.

27. The said offence of criminal conspiracy u/s 120-B read with Section 420, IPC was sought to be made out against the Respondent No. 7 by stating in para-2. II of the Draft Sanction Order that the Respondent No. 7 had the full knowledge about the involvement of Sri R.P. Borah, a contractor with Veterinary Department in fraudulent withdrawal being made from the Government exchequer by O/C ICIDP, Demow on the basis of false vouchers regarding construction work, sheds, building, roads, earth work, etc and false supply of materials/medicines, films projectors and Hindi films. But in support of the said allegation that the Respondent No. 7 had full knowledge about the involvement of Sri R.P. Borah in the fraudulent withdrawals being made from the Government exchequer by O/C ICIDP, Demow, no materials or evidence were placed by the CBI before the Governor. This would be clear from the entire evidence against the Respondent No. 7, Sri Prafulla Kumar Mahanta, summed up by the Superintendent of Police, CBI at pages 140 and 141 of his report sent to the Governor with the request for

sanction. The extracts from pages 140 and 141 of the report of the Superintendent of Police, CBI are reproduced hereinbelow:

37. P.K. Mahanta

There is no corroborative evidence for the allegation for the receipt of Rs. 40 lacs in cash for Assembly election in 1991 by Sh. P.K. Mahanta. Regarding CI sheets, there is sufficient evidence to prove that the bills were prepared in the name of Dr. D. Barkatoki from M/s. Kamrup Industries from where CI sheets were purchased. There is sufficient evidence to prove that payment to this industry was made by Sh. R.P. Borah. There is also evidence that the CI sheets were received by Dr. D. Barkatoki. There is the evidence of Sh. Horo Neog that Sh. P.K. Mahanta and Dr. D. Barkatoki took a back dated receipt of CI sheets from him to manipulate the record. Regarding distribution of DDs, there is also sufficient evidence that the beneficiaries of DDs had given applications to Sh. P.K. Mahanta for financial aid. There is also evidence that Sh. R.P. Borah got these DDs made from the embezzlement amount in favour of these beneficiaries and these DDs were given to Sh. P.K. Mahanta. The evidence of the beneficiary and their banks accounts show that the drafts were received by them. This has caused financial gains to Ors. . There is also evidence that five of the DDs were given to the AGP Anchalik Committees of Nagaon from where Sh. P.K. Mahanta successfully contested the election. He distributed all these DDs for his personal gain. There is also sufficient evidence to prove that Sh. R.P. Borah purchased the air ticket for Sh. P.K. Mahanta for his journey in Sept. 91 from Guwahati to Delhi and back when he was MLA and a public servant and he travelled on that air ticket.

28. On the aforesaid materials or evidence collected by the CBI and placed before the Governor, the sanction for prosecution of Respondent No. 7, Sri Prafulla Kumar Mahanta for the offence of conspiracy u/s 120-B read with Section 420, IPC, was withheld by the Governor for the following reasons indicated in the order dated 5.2.98 produced before the Court by the CBI:

Besides the above four allegations, the draft charge sheet sent to me by the CBI also includes the charge that Shri P.K. Mahanta entered into criminal conspiracy with Sri R.P. Borah and some Ors. to defraud the State of Rs. 48.1 crores. No evidence of such conspiracy has been provided. In reply to my question on this point the CBI has stated that "in a criminal conspiracy inference is drawn regarding meeting of minds from the omission, Commission and other circumstances. It may not be possible always to get direct evidence of criminal conspiracy but can be drawn from the circumstances. The conspiracy is always hatched in secrecy. There will not be direct evidence for conspiracy and only inference is drawn from the acts of accused persons and circumstances of the case. "Whereas this is a perfectly valid assertion, it is particularly necessary that when direct or indirect evidence is not available, the inference drawn should be reasonable. It has been stated. "There is collective responsibility of the Cabinet and the very fact that the other Cabinet colleagues were deeply involved in the

criminal conspiracy to defraud/embezzle the Government money Shri P.K. Mahanta also had personal knowledge about the illegal activities of his Cabinet colleagues". Insinuations and inferences have been made of Shri P.K. Mahanta having personal knowledge of this but no evidence is available in this regard. The theory of collective responsibility of Cabinet has moral or political applicability and does not apply in legal or criminal acts of Cabinet colleagues. The facts that Shri P.K. Mahanta approved of the appointment of Shri R.P. Borah as Chairman of the Assam Live Stock & Poultry Corporation or gave him a party ticket to contest Assembly elections, have been quoted by the CBI to support the charge of conspiracy. These facts by themselves may be part of the routine duties of a Chief Minister or the President of a political party. So long as there is no indication of criminal nexus of the appointing authority or the authority giving a party ticket, it is not reasonable to infer conspiracy. It has also been stated by the CBI that Shri P.K. Mahanta and his colleagues had intimate relations with Shri R.P. Borah, the main accused. This again is not supported by the evidence on record. In his statement to the CBI, Sri R.P. Borah has stated on 22nd December, 1996. "I was not very much known to Shri P.K. Mahanta". In view of all these facts, there is no prima facie evidence to support the theory of conspiracy.

It is clear from the aforesaid reasons given by the Governor in his order dated 5.2.98 that the Governor withheld the sanction to the prosecution of the Respondent No. 7 as no evidence of conspiracy on the part of the Respondent No. 7 had been provided. The portion of the order of the Governor quoted above would show that the CBI took a stand before the Governor that in a criminal conspiracy inference was drawn regarding meeting of minds from the omission, commission and other circumstances and that it might not be possible always to get direct evidence of criminal conspiracy but could be drawn from the circumstances as the conspiracy was always hatched in secrecy. The CBI also took a stand that there was collective responsibility of the Cabinet and the very fact that the other Cabinet colleagues were deeply involved in the criminal conspiracy to defraud/embezzle the Government money, the Respondent No. 7 also had personal knowledge about the illegal activities of his Cabinet colleagues. But the Governor did not accept the said stand of the CBI by holding that insinuations and inferences had been made of the Respondent No. 7 having personal knowledge of the illegal activities of his Cabinet colleagues, but no evidence was available in that regard and that the theory of collective responsibility of Cabinet colleagues had moral or political applicability and did not apply to legal or criminal acts of the Cabinet colleagues. The Governor therefore withheld the Section to the prosecution of Respondent No. 7 for criminal conspiracy on the ground that there was no evidence of personal knowledge of the Respondent No. 7 about the withdrawals of Rs. 48.1 crores by Sri R.P. Borah and some Ors. from the State Treasury.

29. As indicated above, sanction for prosecution of Respondent No. 7 was sought for the offence of conspiracy on the part of the Respondent No. 7 u/s 120-A read with Section 420, IPC. Section 120-A, IPC states that when two or more persons

agree to do, or cause to be done,--(1) an illegal act, or (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy. Thus, the material or evidence to show agreement between the Respondent No. 7 and Sri R.P. Bora and or Ors. for illegal withdrawals of the amounts from the State Treasury at Sibsagar was necessary to establish a prima facie case against the Respondent No. 7 for the offence of criminal conspiracy u/s 120-A read with Section 420, IPC. Such an agreement could also be inferred from the fact of receipt of pecuniary advantage and gains in support of which evidence or materials were collected by the CBI as indicated above provided there were materials or evidence to show that the Respondent No. 7 had personal knowledge of the illegal act of withdrawals of the amounts from the Government Treasury at Sibsagar by Sri R.P. Bora and Ors. . In State of Maharashtra, Etc. Etc. Vs. Som Nath Thapa, Etc. Etc., the Supreme Court while considering the ingredients of criminal conspiracy as defined in Section 120-A of the IPC, held:

The aforesaid decisions, weighty as they are, lead us to conclude that to establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary.

30. The aforesaid reasons given in the impugned order dated 5.2.98 of the Governor would show that the charge of conspiracy against the Respondent No. 7 was also sought to be supported by the CBI by pointing out that the Respondent No. 7 approved the appointment of Sri R.P. Borah as Chairman of Assam Live Stock and Poultry Corporation and gave him a party ticket to contest Assembly election. But the Governor took a view that these facts by themselves might be part of the duties of the Chief Minister or the President of the political party and so long as there was no indication of criminal nexus of the appointing authority or the authority giving party ticket, it was not reasonable to infer conspiracy. The aforesaid reasons in the impugned order dated 5.2.98 would further show that the CBI also contended that the Respondent No. 7 and his colleagues had intimate relation with Sri R.P. Bora, the main accused. But the Governor found that Sri R.P. Bora in his own statement made on 22.12.96 had stated that he was not very much known to Sri P.K. Mahanta and had finally concluded that there was no prima facie evidence to support the theory of conspiracy.

31. Mr. Nageswar Rao, learned Counsel for the Petitioner, vehemently contended that the aforesaid views of the Governor were so unreasonable that no reasonable authority could ever have taken the said views and, therefore, as per the decisions in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation (supra), the Courts could interfere with the impugned order dated 5.2.98 of the Governor.

32. For the purpose of finding out as to whether the aforesaid views of the Governor were really unreasonable on the materials or evidence placed before him, we perused the statement dated 22.12.96 of the main accused Sri R.P. Borah and we have found that this was what he had stated in his aforesaid statement on how he came to be appointed as Chairman of Assam Live Stock

and Poultry Corporation:

Sh. B.P. Talenga proposed my name for Chairman of Assam Live Stock and Poultry Corporation. I was earlier, Vice-President of Sibsagar AGP Unit and SH. B.P. Talenga was the Organising Secretary of the State for AGP. The proposal was submitted by him and I was made the Chairman on 6.4.90.

As to how he came to be known to the Respondent No. 7, Sri R.P. Borah stated in the aforesaid statement dated 22.12.96:

I was not very much known to Sh. P.K. Mahanta. In the month of June-July/90 I had gone to the residence of Sh. P.K. Mahanta along with Sh. B.P. Talenga. Whenever I met Sh. P.K. Mahanta, it was either Sh. Dilip Saikia or Sh. B.P. Talenga was with me. During that period Sh. Mahanta told me that some donations are to be given to schools, clubs and Naam Ghars, etc. So I should make arrangement for the same.

On the aforesaid materials or evidence placed by the CBI before the Governor, it is difficult for us to hold that the views taken by the Governor that there was no indication of criminal nexus and that there was no prima facie evidence in support of the theory of conspiracy were so unreasonable that no reasonable authority could ever have taken so as to call for an interference by the Court with the impugned order dated 5.2.98. Further, the view taken by the Governor that in the absence of evidence to show criminal nexus or personal knowledge of the Respondent No. 7 of the illegal withdrawals of amounts from the Government Treasury, no prima facie case of conspiracy was made out against the Respondent No. 7 cannot be held to be based on irrelevant considerations or as one vitiated by illegality.

33. A reading of the underlined portions of the Draft Sanctions Order extracted above would show that the CBI also sought sanction for prosecution of Respondent No. 7 for the offence u/s 13(2) read with Section 13(1)(d) of the PC Act, 1988 for misuse of his official position as a public servant to obtain undue pecuniary advantage for himself and for Ors. by putting the Government of Assam in heavy wrongful pecuniary loss. u/s 13(1)(d)(ii) of the PC Act, 1988, a public servant is said to commit the offence of criminal misconduct if he by abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage. Thus, abuse of his position as public servant for obtaining valuable thing or pecuniary advantage is a necessary ingredient of the offence u/s 13(1)(d)(ii) of the PC Act, 1988. In *Major S.K. KALE Vs. State of Maharashtra*, the Supreme Court has held that "abuse of position" must necessarily be "dishonest" so that it must be shown that the public servant has caused "deliberate" loss to the Government. If materials or evidence to show that the Respondent No. 7 had personal knowledge of the loss caused to the Government were available, inference can be drawn of any "dishonest" intent on the part of the Respondent No. 7 or that he caused "deliberate" loss to the Government. But, the Governor has in the order dated 5.2.98 taken a view that

there was no evidence of such personal knowledge of the Respondent No. 7. Hence, the view taken by the Government in the impugned order dated 5.2.98 that no prima facie case had been made out for sanction of prosecution against the Respondent No. 7 u/s 19 of the PC Act, 1988 cannot be said to be so unreasonable that no reasonable person could ever have taken it, requiring interference by the Court. We cannot also hold that the aforesaid view taken by the Governor was based on irrelevant considerations or that it was vitiated on account of irrationality or illegality.

34. Mr. Nageswar Rao, learned Counsel for the Petitioner, however, argued that the materials or evidence placed before the Governor by the CBI show that the Respondent No. 7 while holding office as a public servant, obtained for different persons valuable things or pecuniary advantages without any public interest such as, Rs. 40 lacs in cash for Assembly Election-1991, CI sheets, Demand Drafts for different institutions and organisations and air tickets for himself from Guwahati to Delhi and back. According to Mr. Nageswar Rao, therefore, if not the offence of criminal misconduct as defined in Section 13(1)(d)(ii), an offence of criminal misconduct as defined in Section 13(1)(d)(iii), has been made out against the Respondent No. 7 by the CBI. Yet the Governor has disbelieved the evidence with regard to receipt of Rs. 40 lacs in cash and receipt of CI sheets on one ground or the other and has further taken a view that the Demand Drafts were distributed to different institutions and not to individuals as such and that the Respondent No. 7 had not misappropriated the Demand Drafts for himself and that the travel expenses of party leaders such as air ticket of Respondent No. 7 for travel from Gauhati to Delhi and back were made from party funds or funds provided by the financier of the party. According to Mr. Nageswar Rao, this is a fit case in which sanction should have been granted by the Governor for prosecution of the Respondent No. 7 for having obtained for himself and for Ors. while holding public office valuable things and pecuniary advantages as mentioned in Section 13(1)(d)(iii) of the PC Act, 1988.

35. The powers and duties of the sanctioning authority, in our opinion, are different from those of the prosecuting authority. u/s 197, Code of Criminal Procedure and Section 19 of the PC Act, 1988, prior sanction is required for prosecution of a public servant for an offence and, therefore, there is a legal impediment to the prosecution if there is no such prior sanction. But it is not for the sanctioning authority to order prosecution for an offence for which no sanction is sought for prosecution. Construing a similar provision for prior sanction for prosecution in *Rameshwar Bhartia Vs. The State of Assam*, the Supreme Court held that a sanction for prosecution did not stand on the same footing as a direction for prosecution and that in both cases of sanction and direction application of mind was necessary, but there was that essential difference that in the one case there was a legal impediment to the prosecution if there be no sanction, and in the other case, there was a positive order that the prosecution should be launched. Thus, it was for the CBI to decide the offence or offences for which prosecution should be launched against a public servant and

to place the facts constituting the said offence or offences and the material in support of such facts before the sanctioning authority for sanction. In the present case, the Draft Sanction Order quoted above and in particular the underlined portions thereof would show that the facts constituting the offence of misuse and abuse of the official position of the Respondent No. 7 in obtaining pecuniary advantage and valuable thing for himself and Ors. were placed by the CBI before the Governor for sanction of prosecution. Therefore, sanction was sought from the Governor for the offence u/s 13(1)(d)(ii) read with Section 13(2) of the PC Act, 1988. The Draft Sanction Order does not show that the facts constituting the offence u/s 13(1)(d)(iii) were placed before the Governor for sanction of prosecution of the Respondent No. 7. In the first place, the receipt of Rs. 40 lacs by the Respondent No. 7 from Sri R.P. Bora, the main accused for the Assembly Election-1991 was not mentioned in the Draft Sanction Order. It was also not mentioned in the Draft Sanction Order that the Respondent No. 7 obtained the Demand Drafts distributed to different institutions and organisations "without any public interest". Similarly, it was not mentioned in the Draft Sanction Order that 2000 bundles of CI sheets were obtained by the Respondent No. 7 for any person "without any public interest". Regarding receipt of air ticket of Rs. 4350/- for travel by the Respondent No. 7 from Guwahati to Delhi and back while he was an MLA, the question of sanction by the Governor u/s 19 of the PC Act, 1988, does not arise. In the absence of the facts constituting the offence u/s 13(1)(d)(iii) read with Section 13(2) of the PC Act, 1988 in the Draft Sanction Order, the Governor as the sanctioning authority cannot possibly consider the question of grant of sanction to the prosecution of Respondent No. 7 under the said Section 13(1)(d)(iii) read with Section 13(2) of the PC Act, 1988. Therefore, no direction can be issued to the State Government to place the matter before the Governor afresh for the purpose of sanction for prosecution of the Respondent No. 7 for the offence of criminal misconduct as defined in Section 13(1)(d)(iii) read with Section 13(2) of the PC Act, 1988.

36. Having held that this is not a fit case in which the Court can in exercise of its power of judicial review interfere with the impugned order dated 5.2.98 of the Governor withholding sanction to the prosecution of Respondent No. 7 u/s 197, Code of Criminal Procedure and Section 19 of the PC Act, 1988 on the ground of irrationality or illegality, we now proceed to decide the question of bonafide on the part of the Petitioner in filing this public interest litigation. From the averments made in the writ petition, it appears that the Petitioner was under a belief that a lot of materials or evidence had been collected by the CBI showing the involvement of the Respondent No. 7 in the offences u/s 120-B read with Section 420, IPC and Section 13(1)(d) read with Section 13(2) of the PC Act, 1988 and such belief of the Petitioner was based not just on suspicion but on the informations derived from the Press Release dated 5.2.98 of the Raj Bhawan, a copy of which is annexed to the writ petition. The report of the Superintendent of Police, CBI sent to the Governor shows the materials or evidence which have been actually collected against the Respondent No. 7 and we have extracted in

this judgment the portion of the said report which deals with the materials or evidence collected against the Respondent No. 7. On the said materials or evidence, the Governor withheld sanction to the prosecution of the Respondent No. 7 after taking a view that no prima facie case was made out against the Respondent No. 7. On these fact, it was natural for the Petitioner to entertain a doubt as to whether the Governor had acted in accordance with law in withholding the sanction and to approach this Court for a direction to the State Government for re-examination of the matter by the Governor in accordance with law. It is however entirely a different matter that after examining the law and the evidence or materials and the impugned order dated 5.2.98 withholding sanction to the prosecution of the Respondent No. 7, we have come to the conclusion that the impugned order was not vitiated by irrationality or illegality calling for interference by the Court This is therefore not a case where we can held that the Petitioner lacked bonafide in instituting the present public interest litigation and where we should impose an cost on the Petitioner.

37. In the result, we dismiss this writ petition but order that the parties shall bear their respective costs.