

(1999) 01 MP CK 0018

In the Madhya Pradesh High Court

Case No : Writ Petition No's. 4924 and 4925 of 1998

Rajendra Kumar Singh and etc.

APPELLANT

Vs

State of Madhya Pradesh and Others

RESPONDENT

Date of Decision : 30-01-1999

Acts Referred:

Constitution of India, 1950 — Article 154(1), 163(2), 166, 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 197
Madhya Pradesh Special Police Establishment Act, 1947 — Section 4(1)
Madhya Pradesh Town Improvement Trust Act, 1960 — Section 71(1), 87
Penal Code, 1860 (IPC) — Section 120B, 21(2)
Prevention of Corruption Act, 1988 — Section 13(1), 13(2), 15

Citation : (1999) CriLJ 2807 : (1999) ILR (MP) 412 : (2000) 1 MPJR 29

Hon'ble Judges : C.K. Prasad, J

Bench : Single Bench

Advocate : P. Chidambaram and V.K. Tankha, for the Appellant; Dipankar Gupta, Advocate and S.L. Saxena, Advocate General, Soli J. Sorabji, Attorney General and V.S. Shrotri, for the Respondent

Final Decision : Allowed

Judgement

C.K. Prasad, J.

In both the writ petitions, relief sought for by the petitioners is one and the same and as the same is based on identical questions of law with little variation on facts, they are being disposed of by this common order.

In both the writ petitions filed under Articles 226 and 227 of the Constitution of India each of the petitioners pray for quashing of the order dated 23-9-1998 passed by his Excellency the Governor of Madhya Pradesh (hereinafter referred to as "Governor") granting sanction to prosecute them u/s 197 of the Code of Criminal Procedure for the offence punishable u/s 120B of the Indian Penal Code.

Shorn of unnecessary details, facts giving rise to the present writ petitions are that the Indore Improvement Trust, a body constituted under the M.P. Town

Improvement Trust Act 1960, proposed Scheme No. 54 for the town of Indore and by Notification dated 12-7-1963 invited objection in regard thereto. In Scheme No. 54 besides other lands, 22.56 acres of land of village Bhumori Dubey was also included, out of which two acres of land belonged to Ashok Kumar Jain and rest to his mother Sohan Kumari Shankhala. Said Sohan Kumari Shankhala filed an application before the Chairman of Indore Improvement Trust (hereinafter referred to as the "Trust") for release of 5 acres of land from the aforesaid Scheme for the purpose of construction of Hospital and Nursing Home for her son Dr. Vijay Kumar Jain. Chairman of the Trust sent its reply on 3-8-1966 conveying inclination to release 5 acres of land provided said Shankhala executes an agreement that the land so released shall be utilised for the purpose of construction of Hospital according to the Scheme of the Trust. Said Shankhala agreed to the aforesaid proposal and an agreement was executed on 20-8-1966 and one of the terms and conditions of the agreement was to complete construction within two years and on failure thereto, Trust would be entitled to take possession without payment of any compensation.

However, on 14-6-1972, said Shankhala expressed her inability to construct the Hospital and she requested for allotment of the same to the members of herfamily for commercial use. Trust, by its letter dated 17-7-1972, turned down the said request. Ultimately, a notification was published u/s 71(1) of the M.P. Improvement Trust Act, 1960 in the State Gazette on 19-11-1973 and the land in question was acquired and vested in the Trust. After the land vested in the Trust, the Trust took actual physical possession of the entire land comprised in Khasra Nos. 257 and 259 admeasuring 22.56 acres on 4-4-1975 and Panchnama was prepared.

The State Legislature passed M.P. Nagar Tatha Gram Nivesh Adhiniyam, 1973 repealing the M.P. Town Improvement Act, 1960. Former legislation extends to the area, where the aforesaid land is situated. Indore Development Authority was constituted under the Provisions of M.P. Nagar Tatha Gram Nivesh Adhiniyam, 1973 and u/s 87 of the Act, the entire land vested in the Indore Development Authority (hereinafter referred to as the "Authority").

Ashok Kumar Jain, one of the sons of Sohan Kumari Shankhala woke up in the year 1979 and filed Civil Suit No. 366-A/1979 before the Civil Judge, Class-I, Indore, for declaration and permanent injunction in respect of 2 acres of his land and similarly, Sohan Kumari Shankhala instituted Civil Suit No. 267-A/"1979 for the same relief in respect of 5 acres of land; impleading the Authority and others as defendants. In both the suits prayer for grant of temporary injunction was made, but was rejected by the trial Court. Appeal of Ashok Kumar Jain against the order refusing to grant temporary injunction by the trial Court was also rejected by the Appellate Court on 8-11-1985. Sohan Kumari Shankhala also assailed the order of the trial Court declining to grant injunction in appeal, but during the pendency of the appeal, Sohan Kumari Shankhala died and her heirs were not brought on record, hence appeal stood dismissed having abated on

24-7-1985, Civil Suit No. 267-A/1979 was ultimately dismissed, as prayed for, on 4-12-1988 at the request of counsel for Ashok Kumar Jain. "Civil Suit No. 266-A. of 1979 subsequently stood dismissed for want of prosecution.

After being unsuccessful before the Civil Court, Ashok Kumar Jain filed writ petition in the year 1988 before the Indore Bench of this Court which was registered as W.P. No. 1181/ 1988. During the pendency of the aforesaid writ petition, Ashok Kumar Jain filed an application dated 6-3-1995 before the Environment Minister Shri Bisahu Ram Yadav (petitioner in W.P. No. 4925/98) for release of 5 acres of land from the Scheme on the basis of agreement dated 20th of August, 1966 with his mother. In his application, Ashok Kumar Jain has clearly admitted that the land prayed to be released has already been allocated to the wholesale Kirana and Tea Merchants Association, but the Minister Shri Yadav, by letter dated 7-3-1995 addressed to the Chief Executive Officer of the Authority directed him to examine the application for release of land and to furnish point-wise comments. Chief Executive Officer of the Authority furnished his report by letter dated 1-4-1995 and opined that land be not released. Report of the Chief Executive Officer was also endorsed to the Private Secretary to the Minister Shri Yadav. In the report, it was also projected that land in Scheme No. 54 has already been developed and plots have been allocated and allottees have made construction thereon.

However, before the final decision on the application of Ashok Kumar Jain dated 6-3-1995 could be taken, he filed another application dated 22-4-1995 addressed to the Minister Shri Yadav for release of the land inter alia contending that the agreement dt. 20-6-1966 entered between his mother Sohan Kumari Shankhala and the Trust has not been rescinded. Minister Shri Yadav marked the application to the Deputy Secretary of the Department with direction to apprise him about the matter within 10 days. Additional Secretary R.D. Ahirwar in his note dated 18-7-1995 suggested that no decision be taken in the matter at the Government level as the matter is subjudice before a Court of law and he forwarded his Note for perusal of the Minister Shri Yadav. However, Minister Shri Yadav by his Minute dated 23-7-1995 directed for release of 7 acres of land and in pursuance of the Minute of the Minister, the Government issued instruction on 11-8-1995 to the Authority to release 7 acres of land which was later on changed to 7.50 acres by the Government by letter dated 31-9-1995.

After the issuance of the aforesaid instruction to the authority by the State Government writ petition filed by Ashok Kumar Jain came up for hearing before Indore Bench of this Court on 13-5-1996 and this Court by order dt. 13-5-1996 disposed of the writ petition finally with a direction to the authority and other respondents of the said writ petition "to take decision in pursuance of the letter dated 11-8-1995 in accordance with law within a period of two months from the date of receipt of the copy of the order". However, in the meanwhile, Bisahu Ram Yadav ceased to be the Minister and Shri Rajendra Kumar Singh (petitioner in W.P. No. 4924/98) became the Minister of Environment. He by his Order dated

13-9-1996 stayed the operation of the order dated 11-8-1995 by which land was directed to be released by the State Government. In the meanwhile, to put pressure an application for con-tempi (Contempt Petition No. 47/96) was filed and Addl. Secretary R.D. Ahirwar put up note on 16-10-1996, 17-11-1996 and 22-11-1996 suggesting to vacate the said order dated 13-9-1996, However, Minister Shri Singh rejected the same on 17-1-1997 and directed that the High Court may be apprised of the entire facts and circumstances of the case and request be made for extension of time granted earlier. However, on 20-2-1997, Minister Shri Singh heard the counsels for Ashok Kumar Jain, the Indore Development Authority and the Minute of hearing was recorded by the Addl. Secretary, which was approved by the Minister and in the light of approval granted by the Minister, instruction was issued by the Government on 24-2-1997 vacating the stay order dated 13-9-1996 and the Indore Development Authority was directed to comply with the order dated 11-8-1995.

However, before the land could be allocated to Ashok Kumar Jain and his family members, W.P. No. 511/97 was filed as a Public Interest Litigation inter alia making prayer for quashing the order of the State Government releasing or allotting the land as also for direction for investigation of the matter by Central Bureau of Investigation, before the Indore Bench of this Court. This Court, by order dated 31-3-1997 directed for maintenance of status quo which was later on vacated by order dt. 21-8-1997. Before the aforesaid writ petition could finally come up for disposal before this Court on 23-10-1997, State Government on 17-9-1997 decided to initiate disciplinary proceeding against Shri R.D. Ahirwar, the Addl. Secretary and on 26-9-1997 State Govt. issued another instruction directing the Indore Development Authority to take decision in accordance with the order dated 13-5-1996 passed by the High Court in W.P. No. 1181/ 88.

A complaint was made to the Lokayukta with regard to release of 7.50 acres of land and the Lokayukta on consideration of the materials brought before it by order dt. 13th March, 1998, in exercise of power conferred u/s 4(1) of the M.P. Special Police Establishment Act directed the Director General of Police of Special Police Establishment to register and investigate the offence against the Ministers Shri Yadav and Shri Singh and Shri R.D. Ahirwar, the Addl. Secretary. In pursuance of the aforesaid direction of the Lokayukta, S.P.E. Case No. 33/1998 was registered by the Special Police Establishment on 31-3-1998. Minister Rajendra Kumar Singh filed W.P. 2434/98 for quashing of the First Information Report and a learned single Judge of this Court on indepth analysis of the case of the parties, dismissed the writ petition by order dated 3-7-1998; holding as follows:--

Thus, from the aforesaid discussion it can be irrefragably held that the present case is not one, where this Court can come to the conclusion that the allegations in the FIR and the material collected so far, do not disclose any offence against the petitioner. Whether the allegations constitute an offence under Sections 13(1) (d), 13(2) and 15 of Prevention of Corruption Act and Section 120B of the Indian

Penal Code can be agitated by the petitioner at the appropriate stage. It would also depend upon in respect of what offences charge-sheet would be filed. Needless to emphasize, it would be open to the petitioner to call in question the propriety of the charge-sheet at the appropriate stage before the competent forum as per the established parameters of law. It is hereby made clear that the competent Court shall not be influenced by any of the observations made in this order.

After investigation, the Special Police Establishment found that a prima facie case has been made out against the two Ministers and sought sanction for prosecution of those Ministers. Consideration which should weigh with the State Government while granting sanction for prosecution in a case investigated by an agency headed by the Lokayukta came up for scrutiny before this Court in the case of *Gautam Bandopadhyay v. State of M. P.*, (1998) 1 Jab LJ 168. In the said case, it has been held as follows:--

Therefore, the State Government should have detailed its reasons in the order itself as to what led them to form the opinion that the recommendation given by the Lokayukta on the basis of investigation report, suffers from any infirmity and what was the reason which was not sufficient for granting sanction. If the order had been passed with reasons upon relevant considerations, that would have formed the basis for non-grant of sanction. It is not sufficient to assert that the circumstances exist and give no clue to what they are because the circumstances must be such as to lead to conclusion of certain definiteness. The formation of an opinion must, therefore, be as to whether there are circumstances suggesting the existence of one or more of the matters which dissuaded the Government from according sanction. This Court will not go into the question of aptness or sufficiency of the grounds upon which subjective satisfaction of the authorities is based but it should be shown that the opinion has been formed after considering relevant facts in an objective manner. This will be a very limited query by the Court.

Matter for grant of prosecution of the two Ministers was placed for consideration before the Chief Minister of the State who by his Minute dated 3-9-1998 turned down proposal for sanction of their prosecution u/s 120B of the Indian Penal Code, and assigned reasons for the same. Perhaps, he has assigned reasons for not granting the sanction for prosecution in view of the ratio laid down by this Court in the case of *Gautam Bandopadhyay* (supra), although the said case was in relation to another case investigated by the Special Police Establishment. Thereafter, the Chief Minister directed the matter to be placed before the Council of Ministers. Council of Ministers in its meeting held on 3-9-1998 approved the proposal of the Chief Minister. Reasons given by the Council of Ministers to decline sanction for prosecution are that "there is no evidence to show that Shri Rajendra Singh entered into agreement with any person to conspire to commit any illegal act or an act which is not illegal by illegal means." It further found that "the Special Police Establishment has not shown as to what specific act has

been committed either by Shri B.R. Yadav or Shri Rajendra Kumar Singh which could be construed as an act of conspiracy. The Special Police Establishment has made general comments about the commission of an offence of conspiracy by these two persons without specifically pointing out the illegal act alleged to have been committed by them. In the absence of any specific facts constituting the act of conspiracy, it is difficult to infer from the above facts that an offence of conspiracy has really been committed by them." Council of Ministers further found that "from the facts as found by S.P.E., there is nothing to infer that both Shri Yadav and Shri Singh or any other person were acting together in pursuit of the common end with other persons." Ultimately the Council of Ministers concluded that "on going through the total material collected through investigation there is not an iota of material available against both the Ministers from which it could be even faintly inferred that they entered into criminal conspiracy with any one. Totality of the material that has been collected and which has been referred to above do not indicate prima facie establishment of ingredients of Section 120B of Indian Penal Code.

Thereafter, the matter was forwarded to the Governor of the State who passed order dated 23-9-1998 according sanction for prosecution of the two Ministers u/s 120B of IPC. The order of Governor reads as follows:--

1. I have perused the investigation report and documents of Special Police Establishment in Criminal Case No. 33/98 and the letter No. 3/LA/ PS/98, dated 30-6-98 of Lokayukta, Madhya Pradesh, seeking sanction of prosecution of Shri B.R. Yadav and Shri Rajendra Kumar Singh, ex-Ministers. Sanction of prosecution is being sought u/s 197 of the Code of Criminal Procedure for an offence u/s 120B of the Indian Penal Code.

The case relates to decision taken by the two ex-Ministers to release land acquired and vested with the Indore Development Authority to its earlier owners, thereby granting undue pecuniary advantage to them in the process and causing substantial and avoidable financial loss to the public body. The case made out by the Special Police Establishment is that the two former ministers were involved in a criminal conspiracy with some others to give undue benefit to particular individuals against public interest and common good.

I have also seen the decision taken by the State Cabinet not to permit prosecution of the two ex-Ministers. I have perused the note of the Chief Minister in File No. F.7/38/98/1 (1) and the precis placed before the Cabinet. The note of the Chief Minister at pages N/16 to 23 as well as the precis placed before the Cabinet has discussed at length the evidence collected by the Investigating Agency. In my view, the sanctioning authority cannot substitute for itself the role of a trial Judge. In fact, I am also of the view that the sanctioning authority should not by assuming a role larger than is expected of it. preempt the thorough appreciation of evidence by a Court of law. Sanctioning authority has to only make a careful evaluation of the facts of the case and the evidence before it to arrive at a prima facie satisfaction that there is sufficient reason for launching

prosecution.

Thus having perused all the available documents and after careful scrutiny of the evidence put forth by the Special Police Establishment, I am satisfied that there is prima facie case for prosecution of Shri B.R. Yadav and Shri Rajendra Kumar Singh, ex-Ministers of the Government of Madhya Pradesh, for offence u/s 120B of the Indian Penal Code.

Sanction is, therefore, accorded u/s 197 of Cr. P.C. to the Special Police Establishment under the Lokayukta to prosecute Shri B.R. Yadav and Shri Rajendra Kumar Singh u/s 120B of the I.P.C.

Sd/- Dr. Bhai Mahavir, GOVERNOR. (Underlining mine)

It is the stand of the petitioners that the Council of Ministers having taken a decision not to sanction the prosecution, Governor of the State acted beyond his power, jurisdiction and authority in overruling the same. In answer thereto, respondent No. 4 has stated in the return that "in the instant case when the entire Ministry is hell bent to protect and defend their tainted colleagues by all means, the Governor was fully justified in according sanction for prosecution of the Ministers i.e., petitioners, applying the doctrine of necessity." It is relevant here to state that the two Ministers who are petitioner s in the writ petitions, ceased to be the Ministers before the date Council of Ministers met and took decision; not to sanction prosecution against them.

Section 197 of the Code of Criminal Procedure inter alia puts bar on Court in taking cognizance of offence committed by a Judge or a Magistrate or a Public Servant acting or purporting to act in the discharge of official duty without the sanction of the Government. Section 197(1) of Cr. P.C. which is relevant for the purpose is being quoted below:--

197. Prosecution of Judges and Public Servants -- (1) When any person who is or was a Judge or Magistrate or a Public Servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction--

(a) 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 the Union, of the Central Government;

(b) 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, of the State Government.

Shri P. Chidambaram appearing on behalf of the petitioners submits that power to grant sanction u/s 197 of the Cr. P.C. is a statutory power and the said provision has imposed bar for prosecution of Judges, Magistrates and Public

Servants without sanction of the Government, in case the offence has been committed while acting or purporting to act in the discharge of official duty. He submits that the bar for prosecution is lifted when sanction is granted by the Government. He submits that the provision contemplating sanction for prosecution u/s 197 of the Cr. P.C. is a statutory power and is not a constitutional power or a constitutional function. In support of his submission, he has placed reliance on a judgment of the Supreme Court in case of Mansukhlal Vithaldas Chauhan Vs. State of Gujarat, and he has drawn my attention to paragraph 17 of the judgment, which reads as follows:--

Sanction lifts the bar for prosecution. The grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to Government Servants against frivolous prosecutions (See Mohd. Iqbal Ahmed Vs. State of Andhra Pradesh, . Sanction is a weapon to ensure discouragement of frivolous and vexatious prosecution and is a safeguard for the innocent, but not a shield for the guilty.

Mr. Chidambaram's further contention is that u/s 197 of the Code of Criminal Procedure, the authority to grant sanction is the State Government. He submits that the Governor of the State in exercise of his powers conferred by Clauses (2) and (3) of Article 166 of the Constitution of India has framed the M.P. Government Business (Allocation) Rules and allocated the business of sanction under the same. He has drawn my attention to item Nos. 87 and 88 of Part-1, Clause (a) which reads as follows:--

87. All policy matters pertaining to Vigilance and discipline among public servants.

Special Police Establishment.

Mr. Chidambaram has further drawn my attention to item Nos. 3 and 4(1) of Chapter 21, Part-A of the M.P. Government Business (Allocation) Rules. Criminal Law including all matters included in the Indian Penal Code and all matters included in the Code of Criminal Procedure, 1973 except Probation of Offenders Act respectively have been allocated to Law and Legislative Affairs Department under the aforesaid items. It is his contention that under the M.P. Government Business (Allocation) Rules, the power to sanction, prosecution is allocated to one of the Departments of the State Government and hence the Council of Ministers were competent to consider the matter of grant or refusal to grant prosecution.

He submits that entries in the M.P. Government Business (Allocation) Rules have to be read liberally. In support of his subdivision, he has placed reliance on a judgment of Supreme Court in case of A. Sanjeevi Naidu, etc. Vs. State of Madras and Another, , and my attention has been drawn to the following para of the said judgment (Para 8):--

The first question that has to be decided is whether the function under the Motor

Vehicles Act had been assigned to Mr. Karunanidhi the Minister for Transport. It is true that when the various departments were reorganised in 1961, Motor Vehicles Act as well as Transport were included in the Home Department. But when the D.M. K. Ministry came to power after the 1967 general elections, the Home Department as such was not allocated to any Minister. The various subjects included in that department were distributed amongst several Ministers. Transport was allocated to the Transport Minister. Motor Vehicles Act as such was not allocated to any Minister. The allocation of business among the various Ministers appears to have been made under broad heads. While allocating subjects to the various departments there was a detailed and exhaustive enumeration of the subjects. But that method was not adopted in 1967 while distributing the business of the Government among the various Ministers. The functions under the Act undoubtedly relate to Transport Departments. It cannot be assumed that functions under the Act had not been assigned to any Minister. It is proved that those functions were being discharged by the Minister for Transport. Hence we agree with the High Court that those functions had been allocated to the Transport Minister and that the State Transport Undertaking was being run by the Transport Ministry.

Further contention of Mr. Chidambaram is that when Section 197 of the Cr. P. C., uses expression "State Government" by no stretch of imagination the expression "State Government" can be read to mean the "Governor". He submits that even in cases in which the statute used expression "Governor", by process of interpretation, the Apex Court read that expression as the "State Government" and in the present case when Section 197 of the Code of Criminal Procedure has used the words "the State Government" it cannot be read to mean Governor. In support of his submission Shri Chidambaram has placed reliance on a judgment of Supreme Court in case of State of Madhya Pradesh and others Vs. Dr. Yashwant Trimbak, , and he has drawn my attention to the following passage of the said judgment (Para 19):--

Mr. Jain's contention is solely based on the ground that in the Rule itself both the expressions "Governor" and "Government" have been used and, therefore, the expression "sanction of the Governor" in Rule 9(2)(b)(i) would mean the personal sanction of the Governor. We are unable to accept this contention. The power to sanction is nothing but an executive action of the Government provided under the Rules. This is not a matter with respect to which the Governor is required under the Constitution to Act in his discretion. In this view of the matter when the Governor has framed rules of business under Article 166(3) of the Constitution allocating his functions and it is the Council of Ministers which has taken the decision to sanction prosecution of the respondent, we see no legal infirmity in the same. The Tribunal erred in law in coming to the conclusion that the sanction required under the rule is. a sanction of the Governor.

Another decision on which Shri Chidambaram has placed reliance to contend that the expression "State Government" cannot be read as "Governor" is the decision

of Supreme Court in case of Bejoy Lakshmi Cotton Mills Ltd. Vs. State of West Bengal and Others, , in which the question was as to whether the " decision of the Governor would mean the satisfaction of the State Government. In the said case the Supreme Court held as follows (at P. 1151, Para 16 of AIR):--

We are also in agreement with the views expressed by the High Court that the Governor's personal satisfaction was not necessary in this case, as this is not an item of business, with respect to which, the Governor is, by or under the Constitution, required to act in his discretion. Although the executive Government of a State is vested in the Governor, actually it is carried on by Ministers; and, in this particular case, under Rules 4 and 5 of the Rules of Business, referred to above, the business of Government is to be transacted in the various departments specified in the First Schedule thereof. Item 5 therein is the Department of Land and Land Revenue and the Governor has allotted the business of that Department to a Minister. We are further in agreement with the views of the High Court that the said Minister-in-Charge, has got power to make Standing Orders regarding the disposal of cases, in his Department under the Rules of Business issued by the Governor on August 25, 1951, under Article 166(3) of the Constitution. In this case, there is no controversy that the Minister-in-Charge of the Department of Land and Land Revenue has made Standing Orders on Nov. 29 .1951 by virtue of powers given to him under Rule 19 and 20 of the Rules of Business.

Yet another decision on which Mr. Chidambaram has placed reliance is the judgment of Supreme Court in case of State of U.P. and others etc. Vs. Pradhan Sangh Kshettra Samiti and others etc., , to contend that although Article 243(g) of the Constitution uses the word "Governor", the same was read as the State Government. He draws my attention to the following paragraph of the said judgment (Para 9 of AIR):--

As regards the objection of the High Court that whereas Article 243(g) requires, the Governor to specify the village, the Act gives this power to the State Government to do so, the High Court has failed to notice the provisions of the Constitution which equate the Governor with the State Government in exercise of his functions except where he is by or under the Constitution required to exercise the function in his discretion. In this connection, we may refer to provisions of Article 163 of the Constitution which state that there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions except when they are to be exercised by him under the Constitution in his discretion. It is also not disputed that when a Minister takes action, according to the Rules of Business it is both in substance and in form the action of the Governor. Under the Constitution, therefore, while exercising the non-discretionary functions, the Governor cannot act without the aid and advice of the Council of Ministers. To do so will cut at the very root of the Cabinet system of Government we have adopted. In this connection, we may refer to the decision of this Court in Samsher Singh Vs. State of Punjab and

Another, , where the Constitution Bench of seven learned Judges had held that the executive power of the State is vested in the Governor under Article 154(1) of the Constitution. The expression "State" occurs in Article 154(1) to bring out the federal principle embodied in the Constitution. Any action taken in the exercise of the executive power of the State vested in the Governor under Article 154(1) is taken by the Government of the State in the name of the Governor as will appear in Article 166(1).

Shri Dipankar Gupta, appearing on behalf of Respondents 1 to 3 supports the contention that in the matter of grant of sanction for prosecution of ex-Ministers, power lies with the State Government and not the Governor. Accordingly, his submission is that the Governor acted beyond his jurisdiction in granting sanction for prosecution of the two ministers for offence punishable u/s 120B of the Indian Penal Code, u/s 197 of the Code of Criminal Procedure, overruling advice of the Council of Ministers.

Shri Soli J. Sorabji, the learned Attorney-General appearing on behalf of respondent No. 4, submits that: as a general rule, under the Constitutional scheme, the Governor acts on the aid and advice of his Council of Ministers, however, in exceptional cases or situation the Governor is obliged to act in his individual judgment or discretion. He submits that Article 163 of the Constitution expressly provides for the Governor to act in his individual judgment or discretion. He submits that discretion so conferred on the Governor is not exhaustive of the situation which may necessitate the Governor to act in his discretion independently of ministerial advice. His stand is that because of very nature or exigency of situation i.e., the question of grant or refusal of sanction for prosecution of Ministers who were members of the Council of Ministers is one of such exceptional cases where the Governor is required to act in his discretion. His submission is that advice of the Council of Ministers in its very nature shall be tainted with inherent or apparent bias as it had to deal with ex-Ministers and accordingly it would be inappropriate for the Council of Ministers to take decision. He submits that as a result thereof the doctrine of necessity comes into play and the Governor is required to take decision in his discretion. In support of his contention he has placed reliance on a judgment of the Supreme Court in case of State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another, and my attention has been drawn to the following passage from the said judgment (Para 9):--

We may add, there is nothing before us to think that any such mistake occurred, nor is there any ground taken in the petition for grant of special leave that the learned Judges proceeded on a mistaken view that the learned counsel had made a concession that there might arise circumstances, under which the Governor in granting sanction to prosecute a Minister must act in his own discretion and not on the advice of the Council of Ministers. The statement in the judgment that such a concession was made, is conclusive and, if we may say so, the concession was rightly made. In the facts and circumstances of the present case, we have no doubt in our mind that when there is to be a prosecution of the Chief Minister,

the Governor would, while determining whether sanction for such prosecution should be granted or not u/s 6 of the Prevention of Corruption Act, as a matter of propriety necessarily act in his own discretion and not on the advice of the Council of Ministers.

Having appreciated the rival submission, I am of the opinion that for prosecution of the petitioners for offence punishable u/s 120B of the Indian Penal Code, sanction u/s 197 of the Code of Criminal Procedure is necessary. This protection has been provided u/s 197 of the Code of Criminal Procedure to protect Judges, Magistrates and Public Servants from frivolous prosecution or in case when the prosecution of such persons is not in public interest. This, in my opinion, is a protection granted under the statute and grant of sanction lifts the bar of prosecution, but it cannot be elevated to the status of constitutional protection. In view of the Constitution Bench authority of the Supreme Court in case of *M. Karunanidhi Vs. Union of India and Another*, there is no difficulty in holding that the Chief Minister or Ministers being in the pay of the Government are Public Servants within the meaning of Section 21(2) of the Indian Penal Code. Once it is so; for prosecution of the petitioners u/s 120B of the Indian Penal Code, sanction u/s 197 of the Code of Criminal Procedure is necessary. Section 197 of the Cr. P. C, confers power on the State Government to sanction prosecution.

Article 163 of the Constitution provides that the Governor shall act with aid and advice of the Council of Ministers except insofar as he is by or under the Constitution required to exercise his function or any of them in his discretion. Governor in exercise of its power under Clauses 2 and 3 of Article 166 of the Constitution has framed M.P. Government Business (Allocation) Rules and allocated item of sanction for prosecution to one of the departments of the State Government. It is to be borne in mind that the Governor is to act with the aid and advice of his Council of Ministers, but he has certain discretionary powers. This point came up for consideration before 7-Judges Constitution Bench of the Supreme Court in case of *Samsher Singh Vs. State of Punjab and Another*, , wherein it has been held as follows (Para 138):--

Of course, there is some qualitative difference between the position of the President and the Governor. The former under Article 74 has no discretionary powers; the later too has none, save in the tiny strips covered by Articles 163(2) 371A(1)(b) and (d), 371A(2)(b) and (1% VI Schedule, Para 9(2) (and VI Schedule Para 18(3), until omitted recently with effect from 21-7-1972). These discretionary powers exist only where expressly spelt out and even these are not left to the sweet-will of the Governor but are remote-controlled by the Union Ministry which is answerable to Parliament for those actions. Again, a minimal area centering round reports to be despatched under Article 356 may not, in the nature of things, be amenable to ministerial advice. The practice of sending periodical reports to the Union Government is a pre-constitutional one and it is doubtful if a Governor could or should report behind the back of his Ministers. For a centrally appointed constitutional functionary to keep a dossier on his Ministers

or to report against them or to take up public stances critical of Government policy settled by the Cabinet or to interfere in the administration directly -- these are unconstitutional faux pas and run counter to parliamentary system. In all his constitutional "functions" it is the Ministers who act; only in the narrow area specifically marked out for discretionary exercise by the Constitution, he is untrammelled by the State Ministers' acts and advice. Of course, a limited free-wheeling is available, regarding choice of Chief Minister and dismissal of the Ministry as in the English practice adapted to Indian conditions.

Although, under Article 163(1) of the Constitution, Governor has been given discretion only in relation to his function which under the Constitution, he is required to exercise in his discretion. Grant of sanction u/s 197 of Cr. P. C. in my opinion, is statutory function of the State Govt. and cannot be said to be discretionary function of the Governor under the Constitution. I am of the considered opinion that this is not a matter with respect to which the Governor is ;required under the Constitution to act in his discretion. Business of sanction for prosecution u/s 197 of the Code of Criminal Procedure has been allocated by the Governor under the M.P. Government Business (Allocation) Rules and as such, as a general rule, Governor cannot act without the aid and advice of the Council of Ministers. I am fortified in my view from the judgment of the Supreme Court in case of Samsher Singh Vs. State of Punjab and Another, wherein it has been held as follows (Para 153):--

We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various Articles shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well-known exceptional situations. Without being dogmatic or exhaustive, these situations relate to (a) the choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the house; (b) the dismissal of a Government which has lost its majority in the house, but refuses to quit office; (c) the dissolution of the House where an appeal to the country is necessitous, although in this area the Head of State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step. We do not examine in detail the constitutional proprieties in these predicaments except to utter the caution that even here the action must be compelled by the peril to democracy and the appeal to the House or to the country must become blatantly obligatory. We have no doubt that De Smith's statement regarding royal assent holds good for the President and Governor in India:

Refusal of the royal assent on the ground that the monarch strongly disapproved of a bill or that it was intensely controversial would nevertheless be unconstitutional. The only circumstances in which the withholding of the royal assent might be justifiable would be if the Government itself were to advise such a course -- a highly improbable contingency -- or possibly if it was notorious that

a bill had been passed in disregard to mandatory procedural requirements; but since the Government in the latter situation would be of the opinion that the deviation would not affect the validity of the measure once it had been assented to, prudence would suggest the giving of assent.

In my opinion, as a general rule, grant of sanction for prosecution u/s 197, Cr. P.C. is the function of the State Government, it is a statutory in nature and not a constitutional function, further it is not the function of the nature on which the Governor has any discretion.

Having answered this, question which still needs consideration is as to whether in the facts of the present case doctrine of necessity arises and the question of sanction requires decision at the hand of the Governor and not the Council of Ministers. Further whether doctrine of necessity can be invoked in relation to function which is statutory and not constitutional. Mr. Sorabjee learned Attorney-General contends that public interest demands that in matter of grant of prosecution of ex-Ministers who were Ministers in the Council of Ministers headed by the same Chief Minister, be decided by the Governor in his discretion. He submits that in the facts of the present case, Council of Ministers were not expected to exercise their power in public interest alone and, therefore, Governor did not act beyond his jurisdiction in sanctioning prosecution of the petitioners. In this connection, he has drawn my attention to a judgment of Supreme Court in case of Vineet Narain and Others Vs. Union of India (UOI) and Another, in which it has been held as follows (Para 56 of Cri LJ):--

These principles of public life are of general application in every democracy and one is expected to bear them in mind while scrutinising the conduct of every holder of a public office. It is trite that the holders of public offices are entrusted with certain powers to be exercised in public interest alone and, therefore, the office is held by them in trust for people. Any deviation from the path of rectitude by any of them amounts to breach of trust and must be severely dealt with instead of being pushed under the carpet. If the conduct amounts to an offence, it must be promptly investigated and the offender against whom a prima facie case is made out should be prosecuted expeditiously so that the majesty of law is upheld and the rule of law vindicated. It is the duty of the judiciary to enforce the rule of law and, therefore, to guard against erosion of the rule of law.

Shri Sorabjee further submits that the matter stands concluded by the decision of the Supreme Court in case of State of Maharashtra v. Ramdas Shrinivas Nayak 1982 Cri LJ 1581 (supra).

Having given my most anxious consideration to the rival submission, neither on principle nor on precedent, I am inclined to accept the submission of the learned Attorney-General. Grant of sanction for prosecution u/s 197 of the Code of Criminal Procedure, although is not a constitutional function, over which the Governor can act in his discretion in normal circumstances, but in a given circumstance while performing statutory function, he may do so, applying the

principle of doctrine of necessity. In my opinion, discretionary function of the Governor cannot be confined to constitutional function only. Doctrine of necessity shall travel beyond the constitutional function of Governor and in my opinion in the facts of a given case, the Governor may be required to decide statutory function also in his discretion. Doctrine of necessity as the expression itself connotes has been evolved to override general principles and it cannot be confined to the constitutional functions.

Therefore, the question which requires consideration is as to whether the doctrine of necessity comes into play and the Governor can act in his discretion when the question of grant of sanction for prosecution of ex-ministers arises. In my opinion, no hard and fast rule can be laid for universal application in which the Governor can act in his discretion and the same will depend upon the facts and circumstances of each case. Here, in the present case, the petitioners did not continue to be the Members of the Council of Ministers when the decision was taken. Council of Ministers are sought to be disqualified to take decision in regard to sanction of prosecution of the petitioners on the ground that the petitioners, at one point of time being the members of the Council of Ministers, the present Council of Ministers shall be biased. True, it is that justice should not only be done, but seem to be done and the proceeding shall not be vitiated not only when there is actual bias in its maker in favour or against a party, but also when there is real likelihood of bias. In my opinion, the principle of bias cannot be applied against the entire Council of Ministers. As a general proposition of law, it cannot be said that in every case in which question of grant of sanction of ex-ministers arises, it has to be done by the Governor. If that be so, a person who was Minister, say two decades ago and has been in oblivion, by lapse of time, still the matter for grant of prosecution has to go before the Governor. Similarly in case of formation of next Government by a different political party matter relating to grant of sanction for prosecution of ministers who were members of the earlier Council of Ministers, not necessarily require sanction by the Governor. As stated earlier, no hard and fast rule for universal application can be laid for application of doctrine of necessity.

Here in the present case, the Ministers decisions were of their own and not of the Council of Ministers. There is no room to accept the broad proposition that Council of Ministers which has taken the decision not to sanction prosecution of the petitioners had built in tendency to support their colleagues.

In the return of respondent No. 4 it has been stated that "when the entire ministry is hell bent to protect and defend their tainted colleagues by all means, the Governor was fully justified in according sanction for prosecution of the Minister, i.e., the petitioner, applying the doctrine of necessity." In my opinion, this is too bald a statement to be given credence by a Court of law. Nothing has been stated on facts to arrive at this conclusion. Manu in his book "Manusmriti" wrote as follows:--

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ukn.M;ks uke jkKsfLr ;% Lo/kesa u fr"Bfr AA

The king should not leave an offender unpunished, whatever may be his relationship with him. Neither father, nor a teacher nor a friend, nor mother, nor wife, nor a son, nor a domestic priest should go unpunished for the offence committed.

Simply because, the Council of Ministers have decided not to grant sanction for prosecution of the petitioners, it cannot be inferred that the Council of Ministers were hell bent to protect the Ministers. After all, the Council of Ministers exercises sovereign functions, hence such allegation cannot be easily accepted. Wisdom, honesty, integrity and uprightness are after all nobody's monopoly. In the absence of any material, I am of the considered opinion that merely on the ground that the Council of Ministers have taken decision in favour of the petitioners, their decision cannot be said to be tainted and the doctrine of necessity cannot be invoked to enable the Governor to exercise the power in his discretion. True, it is that the Governor has given reasons for sanction for prosecution of the Ministers, so also the Council of Ministers while declining to grant prosecution. Here in the present case, I am not inclined to dilate on the reasons which weighed with the Governor or the Council of Ministers while taking decision contrary to each other, but the power of Governor to deal with matter of grant of sanction for prosecution of ex-ministers in disregard of the advice of the Council of Ministers, I am of the opinion that in the facts of the present case, it has not been demonstratively established that the doctrine of necessity impelled the Governor to take decision in his discretion. Hence, I am constrained to hold that he has acted without jurisdiction in granting sanction, overruling the advice of his Council of Ministers.

Now, I revert to the authority of the Supreme Court in case of State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another, . Learned Attorney General contends that the matter of grant of sanction for prosecution of a minister is to be decided by the Governor and the same stands concluded by the aforesaid judgment.

Shri Chidambaram, however, appearing on behalf of the petitioners submits that the judgment referred to above does not lay down as a ratio that in case of an ex-minister, matter of sanction is to be necessarily decided by the Governor independent of the advice of the Council of Ministers.

Having gone through the judgment closely. I am of the opinion that the question before the Supreme Court in the aforesaid case was as to whether concession made by a Counsel can be contradicted before the Superior Court and on consideration of the relevant materials held that the Superior Court cannot launch into an enquiry as to what transpired in the inferior Court. In the words of Supreme Court--"It is simply not done. Public Policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated

as mere counters in the game of litigation." We are bound to accept the statement of the Judges recorded in their judgment as to what transpired in Court. We cannot allow the statement of Judges to be contradicted by statements at the Bar or by affidavit and other evidence." Further, while considering as to whether such concession was made, the Supreme Court took into consideration that the Counsel may think that "there might arise situation under which the Governor in granting sanction to prosecute a minister must act in his own discretion and not on the advice of the Council of Ministers." Supreme Court further found that "the concession made was rightly made." Their Lordships further held that "in the facts of the present case, there was no doubt that when there is to be a prosecution of the Chief Minister, the Governor, as a matter of propriety necessarily acts in his own discretion and not on the advice of Council of Ministers.

In the aforesaid case, on account of certain circumstances, a concession was made that matter of grant of prosecution of the Chief Minister shall be decided by the Governor in his own discretion and not on the advice of Council of Ministers. In my opinion, the aforesaid judgment does not; as a ratio hold that in case of prosecution of Chief Minister, Governor necessarily has to act in his own discretion and not on the advice of Council of Ministers. Supreme Court is very explicit in saying so and has clearly stated that "in the facts of the present case", the Governor shall act in his own discretion and not on the advice of the Council of Ministers," Thus it is clear that on given facts, the Governor while deciding the question of grant, of sanction for prosecution may act on his own discretion and not on the aid and advice of Council of Ministers. But the aforesaid passage cannot be read to mean that in every case of sanction for prosecution of an ex-minister, Governor is required to act in his own discretion and not on the aid and advice of Council of the Ministers. Supreme Court itself has ruled that "in the facts and circumstance of the case", Governor has to act in his own discretion, I am not inclined to delete these words from the judgment nor I am competent to delete the same and hold that the Governor in case of grant of sanction for prosecution of ex-ministers has necessarily to act in his own discretion and not on the advice of the Council of Ministers, irrespective of the facts of the case.

Dr. H.M. Seervai in his Book "Constitutional Law of India", (Volume 2), Fourth Edition, has commented upon the case of State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another, and in paragraph 18.59, said as follows:--

An application had been made to the Governor of Maharashtra for sanction to prosecute Mr. Antulay under the Prevention of Corruption Act. The Governor held up the application till Mr. Antulay's appeal had been heard. Since two Courts had found him guilty of what can be described as corruption in the discharge of his official duties, the Governor gave his sanction. The thing to note is that the sanction was given after two Courts had found Mr. Antulay guilty of abuse of power and mala fide discharge of his duty. In collateral proceedings, experienced Senior Counsel, Mr. A.K. Sen conceded before the High Court that in such a

situation the Governor must act on his own discretion, because to hold otherwise would be to destroy the democratic foundation of our Constitution and the section which required the Governor's sanction would have to be struck down. It will be seen that the "precedent" of sanction given to prosecute Mr. Antulay does not support the proposition that without its being established in a Court of law that the Prime Minister was guilty of corruption, the President has power to give sanction to prosecute him under the Prevention of Corruption Act.

(Underlining mine)

I have found in preceding paragraph of my judgment that the "doctrine of necessity" cannot be invoked so as to enable the Governor to exercise his own discretion. Judgment in *State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another*, cannot be seen as precedent that in every case in matter of grant of sanction for prosecution of ex-minister, Governor has to exercise his power in his own discretion applying the doctrine of necessity. No law enjoins the Governor to act in his own discretion irrespective of facts of the case, while considering the grant of sanction for prosecution of exministers. Hence the authority relied on is clearly distinguishable and does not support the submission made by the learned Attorney-General.

To put the record straight, Shri Soli J. Sorabjee has contended that the matter of grant or refusal of sanction for prosecution is a matter within the individual judgment or discretion of the Governor, hence the Governor's decision cannot be challenged in any Court of law, in view of Articles 163(2) and 361 of the Constitution. It is difficult to accept this broad submission of the learned Attorney-General. Generally, it is so, but there can be exceptions in which same may be subject to the judicial review. In the case of *G. Krishta Goud and J. Bhoomaiah Vs. State of Andhra Pradesh and Others*, the Supreme Court laid down the law as follows:--

We must however sound a note of caution. Absolute, arbitrary, law-unto-oneself mala fide execution of public power, if gruesomely established, the Supreme Court may not be silent or impotent. Assuming as proved the case of a President gripped by communal frenzy and directing commutation of all the penalties where the convict belongs to a certain community and refusing outright where the convict belongs to a different community, there may be, as Shri Garg urged, a dilemma for the Court. Assuming the Governor in exercise of his power under Article 161 refusing to consider cases of commutation where the prisoner is above 40 years of age as a rule of thumb or arbitrarily out of personal vendetta rejecting the claim of clemency of a condemned prisoner is the Court helpless? This large interrogation is highly hypothetical and whether the remedy is in Court or by impeachment in Parliament or by rising resentment in public opinion, it is not for us to examine now. Enough unto the day is the evil thereof.

However, in the present case, I am not inclined to dilate on this issue any further as I have held that the function of grant or refusal of sanction for prosecution of

ex-ministers, was not within the individual judgment or discretion of Governor, hence the bar is not attracted.

In substance my conclusions are as follows:--

(a) Ministers are public servants within the meaning of Section 21 of the Indian Penal Code;

(b) To grant or not to grant sanction for prosecution is a statutory function and not constitutional function;

(c) Sanction lifts the bar of prosecution;

(d) Doctrine of necessity not necessarily applies in case of constitutional function in which Governor is to act on his own discretion but may also apply in case of statutory functions;

(e) As a rule of universal application it cannot be said that in every case relating to sanction of prosecution of ex-ministers doctrine of necessity applies and decision has to be taken by Governor in its discretion;

(f) In the facts of the present case doctrine of necessity cannot be applied to empower the Governor to act in his own discretion dehors the advice of the Council of Ministers.

I have found the impugned order of the Governor to be illegal and without jurisdiction, but this will not mean that I have upheld the reasoning and the grounds assigned by the Council of Ministers while declining to grant sanction. In my opinion, view which I have taken will not result into rendering the investigating agency remediless. In case, in the opinion of the investigating agency or the person interested, refusal to grant prosecution by the Council of Ministers is illegal on any one or more grounds, the same is subject to judicial review and can be corrected by the Court armed with power of judicial review. It has to be borne in mind that the sufficiency of material may not be a ground to refuse sanction for prosecution, but existence of material, of course can be seen and the same is within the domain of the authority which exercises power of sanction for prosecution. I have purposely not gone into the question of validity, legality or propriety of the order of Council of Ministers in the present proceeding, as the same is not the lis before me.

In the result, writ petitions are allowed. Orders of the Governor dated 23-9-1998 is quashed. In the facts and circumstances of the present case, there shall be no order as to cost.