General Officer Commanding vs Cbi & Anr on 1 May, 2012

Equivalent citations: AIR 2012 SUPREME COURT 1890, 2012 (6) SCC 228, (2012) 2 RECCRIR 818, (2012) 2 BOMCR(CRI) 623, 2012 CALCRILR 2 435, (2012) 3 ALLCRILR 10, (2012) 2 CRIMES 178, (2012) 3 MAD LJ(CRI) 380, (2012) 52 OCR 309, (2012) 2 DLT(CRL) 334, (2012) 78 ALLCRIC 460, (2012) 2 CURCRIR 219, (2012) 3 ALLCRIR 3201, (2012) 5 SCALE 58, (2012) 114 ALLINDCAS 32 (SC), 2012 CALCRILR 3 775, (2012) 2 CHANDCRIC 270, 2012 (3) SCC (CRI) 88, 2012 (95) ALR SOC 26 (SC)

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Bench: Swatanter Kumar, B.S. Chauhan

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 257 of 2011

General Officer Commanding …Appellant

Versus

CBI & Anr. …Respondents

WITH

CRIMINAL APPEAL NO.55 of 2006

Additional Director General …Appellant

Versus

Central Bureau Investigation …Respondents

J U D G M E N T

Dr. B.S. CHAUHAN, J.

1. Criminal Appeal No. 257 of 2011 has been preferred against the impugned judgment and order dated 10.7.2007 passed by the High Court of Jammu and Kashmir in Petition Nos. 78 and 80 of 2006 under Section 561- A of the Code of Criminal Procedure, (J&K) (hereinafter called as `Code') by which the High Court upheld the order dated 30.11.2006 passed by the Additional Sessions Judge, Srinagar in File No. 16/Revision of 2006, and by the Chief Judicial Magistrate, Srinagar dated 24.8.2006, rejecting the appellant's application for not entertaining the chargesheet filed by the Central Bureau of Investigation (hereinafter called 'CBI').

2. Brief facts relevant to the disposal of this appeal are as under:

A. In Village Chittising Pora, District Anantnag, J&K, 36 Sikhs were killed by terrorists on 20.3.2000. Immediately thereafter, search for the terrorists started in the entire area and 5 persons, purported to be terrorists, were killed at village Pathribal Punchalthan, District Anantnag, J & K by 7 Rashtriya Rifles (hereinafter called as `RR') Personnel on 25.3.2000 in an encounter.

B. In respect of killing of 5 persons by 7 RR on 25.3.2000 at Pathribal claiming them to be responsible for Sikhs massacre at Chittising Pora, a complaint bearing No. 241/GS(Ops.) dated 25.3.2000 was sent to Police Station Achchabal, District Anantnag, J&K by Major Amit Saxena, the then Adjutant, 7 RR, for lodging FIR stating that during a special cordon and search operation in the forests of Panchalthan from 0515 hr. to 1500 hrs. on 25.3.2000, an encounter took place between terrorists and troops of that unit and in that operation, 5 unidentified terrorists were killed in the said operation. On the receipt of the complaint, FIR No. 15/2000 under Section 307 of Ranbir Penal Code (hereinafter called 'RPC') and

> Sections 7/25 Arms Act, 1959 was registered against unknown persons. A seizure memo was prepared by Major Amit Saxena (Adjutant) on 25.3.2000 showing seizure of arms and ammunition from all the 5 unidentified terrorists killed in the aforesaid operation which included AK-47 rifles (5), AK-47 Magazine rifles (12), radio sets (2), AK-48 ammunition (44 rounds), hand grenades (2) detonators (4) and detonator time devices (2). The said seizure memo was signed by the witnesses Farooq Ahmad Gujjar and Mohd.

Ayub Gujjar, residents of Wuzukhan, Panchalthan, J & K. C. The 7 RR deposited the said recovered weapons and ammunition with 2 Field Ordnance Depot. However, the local police insisted that the Army failed to hand over the arms and ammunition allegedly recovered from the terrorists killed in the encounter, which tantamounts to causing of disappearance of the evidence, constituting an offence under Section 201 RPC. In this regard, there had been correspondence and a Special Situation Report dated 25.3.2000 was sent by Major Amit Saxena, the then Adjutant, to Head Quarter–I, Sector RR stating that, based on police inputs, a joint operation with STF was launched in the forest of Pathribal valley on 25.3.2000, as a consequence, the said incident occurred. However, it was added that ammunition allegedly recovered from the killed militants had been taken away by the STF.

D. There had been long processions in the valley in protest of killing of these 5 persons on 25.3.2000 by 7 RR alleging that they were civilians and had been killed by the Army personnel in a fake encounter. The local population treated it to be a barbaric act of violence and there had been a demand of independent inquiry into the whole incident. Thus, in view thereof, on the request of Government of J & K, a Notification dated 19.12.2000 under Section 6 of Delhi Police Special Establishment Act, 1946 (hereinafter called as `Act 1946') was issued. In pursuance thereof, Ministry of Personnel, Government of India, also issued Notification dated 22.1.2003 under Section 5 of the Act 1946 asking the CBI to investigate four cases including the alleged encounter at Pathribal resulting in the death of 5 persons on 25.3.2000.

E. The CBI conducted the investigation in Pathribal incident and filed a chargesheet in the court of Chief Judicial Magistrate-cum- Special Magistrate, CBI, (hereinafter called the 'CJM') Srinagar, on 9.5.2006, alleging that it was a fake encounter, an outcome of criminal conspiracy hatched by Col. Ajay Saxena (A-1), Major Brajendra Pratap Singh (A-2), Major Sourabh Sharma (A-3), Subedar Idrees Khan (A-4) and some members of the troops of 7 RR were responsible for killing of innocent persons. Major Amit Saxena (A-5) (Adjutant) prepared a false seizure memo showing recovery of arms and ammunition in the said incident, and also gave a false complaint to the police station for registration of the case against the said five civilians showing some of them as foreign militants and false information to the senior officers to create an impression that the encounter was genuine and, therefore, caused disappearance of the evidence of commission of the aforesaid offence under Section 120-B read with Sections 342, 304, 302, 201 RPC and substantive offences thereof. Major Amit Saxena (A-5) (Adjutant) was further alleged to have committed offence punishable under Section 120-B read with Section 201 RPC and substantive offence under Section 201 RPC with regard to the aforesaid offences.

F. The learned CJM on consideration of the matter, found that veracity of the allegations made in the chargesheet and the analysis of the evidence cannot be gone into as it would tantamount to assuming jurisdiction not vested in him. It was so in view of the provisions of Armed Forces J & K (Special Powers) Act, 1990 (hereinafter called 'Act 1990'), which offer protection to persons acting under the said Act.

G. The CJM, Srinagar, granted opportunity to Army to exercise the option as to whether the competent military authority would prefer to try the case by way of court-martial by taking over the case under the provisions of Section 125 of the Army Act, 1950 (hereinafter called the `Army Act'). On 24.5.2006, the Army officers filed an application before the court pointing out that no prosecution could be instituted except with the previous sanction of the Central Government in view of the provisions of Section 7 of the Act 1990 and, therefore, the proceedings be closed by returning the chargesheet to the CBI.

H. The CJM vide order dated 24.8.2006 dismissed the application holding that the said court had no jurisdiction to go into the documents filed by the investigating agency and it was for the trial court to find out whether the action complained of falls within the ambit of the discharge of official duty or not. The CJM himself could not analyse the evidence and other material produced with the chargesheet for considering the fact, as to whether the officials had committed the act in good faith in discharge of their official duty; otherwise the act of such officials was illegal or unlawful in view of the nature of the offence.

I. Aggrieved by the order of CJM dated 24.8.2006, the appellant filed revision petition before the Sessions Court, Srinagar and the same stood dismissed vide order dated 30.11.2006. However, the revisional court directed the CJM to give one more opportunity to the Army officials for exercise of option under Section 125 of the Army Act.

J. The appellant approached the High Court under Section 561-A of the Code. The Court vide impugned order dated 10.7.2007 affirmed the orders of the courts below and held that the very objective of sanctions is to enable the Army officers to perform their duties fearlessly by protecting them from vexatious, malafide and false prosecution for the act done in performance of their duties. However, it has to be examined as to whether their action falls under the Act 1990. The CJM does not have the power to examine such an issue at the time of committal of proceedings. At this stage, the Committal Court has to examine only as to whether any case is made out and, if so, the offence is triable by whom.

Hence, this appeal.

3. Criminal Appeal No. 55 of 2006 has been preferred against the impugned judgment and order dated 28.3.2005 passed by the High Court of Guwahati in Criminal Revision No.117 of 2004 by which it has upheld the order of the Special Judicial Magistrate, Kamrup dated 10.11.2003 rejecting the application of the appellant seeking protection of the provisions of Section 6 of the Armed Forces (Special Powers) Act, 1958 (hereinafter called the `Act 1958') in respect of the armed forces personnel.

4. Facts and circumstances giving rise to this appeal are as under:

A. In order to curb the insurgency in the North-East, the Parliament enacted the Act 1958 authorising the Central Government as well as the Governor of the State to declare, by way of Notification in the official Gazette, the whole or part of the State as disturbed area. Section 4 of the Act 1958 conferred certain powers on the Army personnel acting under the Act which include power to arrest without warrant on reasonable suspicion, destroy any arms, ammunitions dumped and hide out, and also to open fire or otherwise use powers even to the extent of causing death against any person acting in contravention of law and order and further to carry out search and seizure. The entire State of Assam was declared disturbed area under the Act 1958 vide Notification dated 27.11.1990 and Army was requisitioned and deployed in various parts of the State to fight insurgency and to restore law and order.

B. On 22.2.1994, the 18th Battalion of Punjab Regiment was deployed in Tinsukhia District of Assam to carry out the counter insurgency operation in the area of Saikhowa Reserve Forest. The said Army personnel faced the insurgents who opened fire from an ambush. The armed battalion returned fire and in the process, some militants died. The Battalion continued search at the place of encounter and consequently, 5 bodies of the militants alongwith certain arms and ammunitions were recovered. In respect of the said incident, an FIR was lodged at P.S. Doom Dooma. Local Police also visited the place on 23.2.1994 and 1.3.1994 and investigated the case. The incident was investigated by the Army under the Army Court of enquiry as provided under the Army Act. Two Magisterial enquiries were held as per the directions issued by the State Government and as per the appellant, the version of the Army personnel was found to be true and a finding was recorded that 'the counter insurgency operation was done in exercise of the official duty'.

C. Two writ petitions were filed before the High Court by the non- parties alleging that the Army officials apprehended 9 individuals and killed 5 of them in a fake encounter. The High Court directed the CBI to investigate the matter.

D. The CBI completed the investigation and filed chargesheet against 7 Army personnel in the Court of Special Judicial Magistrate, Kamrup under Section 302/201 read with Section 109 of the Indian Penal Code, 1860 (hereinafter called `IPC'). The Special Judicial Magistrate issued notice dated 30.5.2002 to the appellant i.e. Army Headquarter to collect the said chargesheet. The appellant requested the said Court not to proceed with the matter as the action had been carried out by the Army personnel in performance of their official duty and thus, they were protected under the Act 1958 and in order to proceed further in the matter, sanction of the Central Government was necessary. The learned Special Judicial Magistrate rejected the case of the appellant vide order dated 10.11.2003. Being aggrieved, the appellant preferred the revision petition which has been rejected vide impugned order dated 28.3.2005 by the High Court.

Hence, this appeal.

5. As the facts and legal issues involved in both the appeals are similar, we decide both the appeals by a common judgment taking the Criminal Appeal No. 257 of 2011 as a leading case.

6. Shri Mohan Parasaran and Shri P.P. Malhotra, learned Addl. Solicitor Generals appearing on behalf of the Union of India and Army personnel, have contended that mandate of Section 7 of the Act 1990 is clear and it clearly provides that no prosecution shall be instituted and, therefore, cannot be instituted without prior sanction of the Central Government. It is contended that the prosecution would be deemed to have instituted/initiated at the moment the chargesheet is filed and received by the court. Such an acceptance/receipt is without jurisdiction. The previous sanction of the competent authority is a pre- condition for the court in taking the chargesheet on record if the offence alleged to have been committed in discharge of official duty and such issue touches the jurisdiction of the court.

7. On the other hand, Shri H.P. Raval, learned ASG, Shri Ashok Bhan, learned senior counsel appearing on behalf of the CBI, and Mr. M.S. Ganesh appearing for the interveners (though application for intervention not allowed) have vehemently opposed the appeals contending that the institution of a criminal case means taking cognizance of the case, mere presentation/filing of the chargesheet in the court does not amount to institution. The court of CJM has not taken cognizance of the offence, therefore, the appeals are premature. Even otherwise, killing innocent persons in a fake encounter in execution of a conspiracy cannot be a part of official duty and thus, in view of the facts of the case no sanction is required. The appeals are liable to be dismissed.

8. We have considered the rival submissions made by the learned counsel for the parties and perused the record.

9. The matter is required to be examined taking into consideration the statutory provisions of the Act 1990 and also considering the object of the said Act. It is to be examined as to whether the court, after the chargesheet is filed, can entertain the same and proceed to frame charges without previous sanction of the Central Government. The Act 1990 confers certain special powers upon members of the Armed Forces in the disturbed area in the State of J & K. The disturbed area is defined and there is no dispute that the place where the incident occurred stood notified under the Act 1990. Section 4 of the Act 1990 confers special powers on the officer of armed forces to take measures, where he considers it necessary to do so, for the maintenance of public order. However, he must give due warning according to the circumstances and even fire upon or use force that may also result in causing death against any person acting in contravention of law and order in the disturbed area and prohibit the assembly of five or more persons or carrying of weapons etc. Such an officer has further been empowered to destroy any arms dump, arrest any person without warrant who has committed a cognizable offence and enter and search without warrant any premises to make any arrest. Section 6 of the Act 1990 requires that such arrested person and seized property be handed over to the local police by such an officer.

10. Section 7 of the Act 1990 provides for umbrella protection to the Army personnel in respect of anything done or purported to be done in exercise of powers conferred by the Act. The whole issue is regarding the interpretation of Section 7 of the Act 1990, as to whether the term ‘institution’ used

therein means filing/presenting/submitting the chargesheet in the court or taking cognizance and whether the court can proceed with the trial without previous sanction of the Central Government.

11. The analogous provision to Section 7 of the Act 1990 exists in Sections 45(1) and 197(2) of the Code of Criminal Procedure, 1973 (hereinafter called 'Cr.P.C.'). The provisions of Section 7 of the Act 1990 are mandatory and if not complied with in letter and spirit before institution of any suit, prosecution or legal proceedings against any persons in respect of anything done or purported to be done in exercise of the powers conferred by the Act 1990, the same could be rendered invalid and illegal as the provisions require the previous sanction of the Central Government before institution of the prosecution.

According to the appellants, institution of prosecution is a stage prior to taking cognizance and, therefore, the word 'institution' is different from the words taking 'cognizance'.

The scheme of the Act requires that any legal proceeding instituted against any Army official working under the Act 1990 has to be subjected to stringent test before any such proceeding can be instituted. Special powers have been conferred upon Army officials to meet the dangerous conditions i.e. use of the armed forces in aid of civil force to prevent activities involving terrorist acts directed towards overawing the government or striking terror in people or alienating any section of the people or adversely affecting the harmony amongst different sections of the people. Therefore, Section 7 is required to be interpreted keeping the aforesaid objectives in mind.

12. The 'prosecution' means a criminal action before the court of law for the purpose of determining 'guilt' or 'innocence' of a person charged with a crime. Civil suit refers to a civil action instituted before a court of law for realisation of a right vested in a party by law. The phrase 'legal proceeding' connotes a term which means the proceedings in a court of justice to get a remedy which the law permits to the person aggrieved. It includes any formal steps or measures employed therein. It is not synonymous with the 'judicial proceedings'. Every judicial proceeding is a legal proceeding but not vice-versa, for the reason that there may be a 'legal proceeding' which may not be judicial at all, e.g. statutory remedies like assessment under Income Tax Act, Sales Tax Act, arbitration proceedings etc. So, the ambit of expression 'legal proceedings' is much wider than 'judicial proceedings'. The expression 'legal proceeding' is to be construed in its ordinary meaning but it is quite distinguishable from the departmental and administrative proceedings, e.g. proceedings for registration of trade marks etc. The terms used in Section 7 i.e. suit, prosecution and legal proceedings are not inter-changeable or convey the same meaning. The phrase `legal proceedings' is to be understood in the context of the statutory provision applicable in a particular case, and considering the preceding words used therein. In Assistant Collector of Central Excise, Guntur v. Ramdev Tobacco Company, AIR 1991 SC 506, this Court explained the meaning of the phrase "other legal proceedings" contained in Section 40(2) of the Central Excises and Salt Act, 1944, wherein these words have been used after suit and prosecution. The Court held that these words must be read as ejusdem generis with the preceding words i.e. suit and prosecution, as they constitute a genus. Therefore, issuance of a notice calling upon the dealer to show cause why duty should not be demanded under the Rules and why penalty should not be imposed for infraction of the statutory rules and enjoin of consequential adjudication proceedings by the appellate authority would not fall

within the expression "other legal proceedings" as in the context of the said statute. 'Legal proceedings' do not include the administrative proceedings.

In Maharashtra Tubes Ltd. v. State Industrial & Investment Corporation of Maharashtra Ltd. & Anr., (1993) 2 SCC 144, this Court dealt with the expressions 'proceedings' and 'legal proceedings' and placed reliance upon the dictionary meaning of expression 'legal proceedings' as found in Black Law Dictionary (Fourth Edition) which read as under:

> "Any proceedings in court of justice ... by which property of debtor is seized and diverted from his general creditors .... This term includes all proceedings authorised or sanctioned by law, and brought or instituted in a court of justice or legal tribunal, for the acquiring of a right or the enforcement of a remedy." The Court came to the conclusion that proceedings before statutory authorities under the provisions of the Act do not amount to legal proceedings.
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> 'Legal proceedings' means proceedings regulated or prescribed by law in which a judicial decision may be given; it means proceedings in a court of justice by which a party pursues a remedy which a law provides, but does not include administrative and departmental proceedings. (See also: S. V. Kondaskar, Official Liquidator v. V.M. Deshpande, I.T.O. & Anr., AIR 1972 SC 878; Babulal v. M/s. Hajari Lal Kishori Lal & Ors., AIR 1982 SC 818; and Binod Mills Co. Ltd., Ujjain v. Shri. Suresh Chandra Mahaveer Prasad Mantri, Bombay, AIR 1987 SC 1739).

The provision of Section 7 of the Act 1990 prohibits institution of legal proceedings against any Army personnel without prior sanction of the Central Government. Therefore, chargesheet cannot be instituted without prior sanction of the Central Government. The use of the words 'anything done' or 'purported to be done' in exercise of powers conferred by the Act 1990 is very wide in its scope and ambit and it consists of twin test. Firstly, the act or omission complained of must have been done in the course of exercising powers conferred under the Act, i.e., while carrying out the duty in the course of his service and secondly, once it is found to have been performed in discharge of his official duty, then the protection given under Section 7 must be construed liberally. Therefore, the provision contained under Section 7 of the Act 1990 touches the very issue of jurisdiction of launching the prosecution.

(i) INSTITUTION OF A CASE:

13. The meaning of the aforesaid term has to be ascertained taking into consideration the scheme of the Act/Statute applicable. The expression may mean filing/presentation or received or entertained by the court. The question does arise as to whether it simply means mere presentation/filing or something further where the application of the mind of the court is to be applied for passing an order.

14. In M/s. Lakshmiratan Engineering Works Ltd. v. Asst. Commissioner (Judicial) I, Sales Tax, Kanpur Range, Kanpur & Anr., AIR 1968 SC 488, this Court dealt with the provisions of U.P. Sales

Tax Act, 1948 and rules made under it and while interpreting the proviso to Section 9 thereof, which provided the mode of filing the appeal and further provided that appeal could be "entertained" on depositing a part of the assessed/admitted amount of tax. The question arose as what was the meaning of the word 'entertain' in the said context, as to whether it meant that no appeal would be received or filed or it meant that no appeal would be admitted or heard and disposed of unless satisfactory proof of deposit was available. This Court held that dictionary meaning of the word 'entertain' was either 'to deal with' or 'admit to consideration'. However, the court had to consider whether filing or receiving the memorandum of appeal was not permitted without depositing the required amount of tax or it could not be heard and decided on merits without depositing the same. The court took into consideration the words 'filed or received' in Section 6 of the Court Fees Act and held that in the context of the said Act it would mean 'admit for consideration'. Mere filing or presentation or receiving the memorandum of appeal was inconsequential. The provisions provided that the appeal filed would not be admitted for consideration unless the required tax was deposited.

15. In Lala Ram v. Hari Ram, AIR 1970 SC 1093, this Court considered the word 'entertain' contained in the provisions of Section 417(4) of the Code of Criminal Procedure, 1898 (analogous to Section 378 Cr.P.C.) providing for the period of limitation of 60 days for filing the application for leave to appeal against the order of acquittal. Thus, the question arose as to whether 60 days are required for filing/presenting the application for leave to appeal or the application should be heard by the court within that period. This Court held that in that context, the word 'entertain' meant 'filed or received by the court' and it had no reference to the actual hearing of the application for leave to appeal. So, in that context 'entertain' was explained to receive or file the application for leave to appeal.

16. In Hindustan Commercial Bank Ltd. v. Punnu Sahu (dead) through LRs., AIR 1970 SC 1384, this Court dealt with the expression 'entertain' contained in the proviso to Order XXI Rule 90 Code of Civil Procedure, 1908 as amended by the High Court of Allahabad and rejected the contention that it meant initiation of the proceeding and not to the stage when the court takes up the application for consideration, observing that 'entertain' means to "adjudicate upon" or "proceed to consider on merits".

17. In Martin and Harris Ltd. v. VIth Additional District Judge & Ors., AIR 1998 SC 492, while dealing with the provisions of Section 21(1) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, the word "entertain" was interpreted as considering the grounds for the purpose of adjudication on merits i.e. thereby taking cognizance of an application by the statutory authority. The Court rejected the contention that the term 'entertain' contained in the said statutory provision was synonymous with the word 'institute'.

18. In Jamuna Singh & Ors. v. Bhadai Shah, AIR 1964 SC 1541, this Court dealt with the expression 'institution of a case' and held that a case can be said to be instituted in a court only when the court takes cognizance of the offence alleged therein. Section 190(1) Cr.P.C. contains the provision for taking cognizance of offence (s) by Magistrate. Section 193 Cr.P.C. provides for cognizance of offence (s) being taken by courts of Sessions on commitment to it by a Magistrate duly empowered in that behalf.

This view has been reiterated, approved and followed by this Court in Satyavir Singh Rathi, ACP & Ors. v. State through CBI, (2011) 6 SCC 1.

19. A similar view has been reiterated by this Court in Kamalapati Trivedi v. The State of West Bengal, AIR 1979 SC 777, observing that when a Magistrate applies his mind under Chapter XVI, he must be held to have taken cognizance of the offences mentioned in the complaint. Such a situation would not arise while passing order under Section 156(3) Cr.P.C. or while issuing a search warrant for the purpose of investigation. In Devarapalli Lakshminarayana Reddy & Ors. v. V. Narayana Reddy & Ors., AIR 1976 SC 1672, this Court held that 'institution' means taking cognizance of the offence alleged in the chargesheet.

20. Mere presentation of a complaint cannot be held to mean that the Magistrate has taken the cognizance. (Vide: Narsingh Das Tapadia v. Goverdhan Das Partani & Anr., AIR 2000 SC 2946).

21. Thus, in view of the above, it is evident that the expression "Institution" has to be understood in the context of the scheme of the Act applicable in a particular case. So far as the criminal proceedings are concerned, "Institution" does not mean filing; presenting or initiating the proceedings, rather it means taking cognizance as per the provisions contained in the Cr.P.C.

(ii) SANCTION FOR PROSECUTION:

22. The protection given under Section 197 Cr.P.C. is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. Use of the expression "official duty" implies that the act or omission must have been done by the public servant in the course of his service and that it should have been done in discharge of his duty. The section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty. If on facts, therefore, it is prima facie found that the act or omission for which the accused was charged had reasonable connection with discharge of his duty, then it must be held to be official to which applicability of Section 197 Cr.P.C. cannot be disputed. (See: R. Balakrishna Pillai v. State of Kerala & Anr., AIR 1996 SC 901; S.K. Zutshi & Anr. v. Bimal Debnath & Anr., AIR 2004 SC 4174; Center for Public Interest Litigation & Anr. v. Union of India & Anr., AIR 2005 SC 4413; Rakesh Kumar Mishra v. State of Bihar & Ors., AIR 2006 SC 820; Anjani Kumar v. State of Bihar & Ors., AIR 2008 SC 1992; and State of Madhya Pradesh v. Sheetla Sahai & Ors., (2009) 8 SCC 617).

23. The question to examine as to whether the sanction is required or not under a statute has to be considered at the time of taking cognizance of the offence and not during enquiry or investigation.

There is a marked distinction in the stage of investigation and prosecution. The prosecution starts when the cognizance of offence is taken. It is also to be kept in mind that the cognizance is taken of the offence and not of the offender. The sanction of the appropriate authority is necessary to protect a public servant from unnecessary harassment or prosecution. Such a protection is necessary as an assurance to an honest and sincere officer to perform his public duty honestly and to the best of his ability. The threat of prosecution demoralises the honest officer. However, performance of public duty under colour of duty cannot be camouflaged to commit a crime. The public duty may provide such a public servant an opportunity to commit crime and such issue is required to be examined by the sanctioning authority or by the court. It is quite possible that the official capacity may enable the pubic servant to fabricate the record or mis- appropriate public funds etc. Such activities definitely cannot be integrally connected or inseparably inter-linked with the crime committed in the course of the same transaction. Thus, all acts done by a public servant in the purported discharge of his official duties cannot as a matter of course be brought under the protective umbrella of requirement of sanction. (Vide: Bhanuprasad Hariprasad Dave & Anr. v. The State of Gujarat, AIR 1968 SC 1323; Hareram Satpathy v. Tikaram Agarwala & Ors., AIR 1978 SC 1568; State of Maharashtra v. Dr. Budhikota Subbarao, (1993) 3 SCC 339; Anil Saran v. State of Bihar & Anr., AIR 1996 SC 204; Shambhoo Nath Misra v State of U.P. & Ors., AIR 1997 SC 2102; and Choudhury Parveen Sultana v. State of West Bengal & Anr., AIR 2009 SC 1404).

24. In fact, the issue of sanction becomes a question of paramount importance when a public servant is alleged to have acted beyond his authority or his acts complained of are in dereliction of the duty. In such an eventuality, if the offence is alleged to have been committed by him while acting or purporting to act in discharge of his official duty, grant of prior sanction becomes imperative. It is so, for the reason that the power of the State is performed by an executive authority authorised in this behalf in terms of the Rules of Executive Business framed under Article 166 of the Constitution of India insofar as such a power has to be exercised in terms of Article 162 thereof. (See : State of Punjab & Anr. v. Mohammed Iqbal Bhatti, (2009) 17 SCC

92).

25. In Satyavir Singh Rathi, (Supra), this Court considered the provisions of Section 140 of the Delhi Police Act 1978 which bars the suit and prosecution in any alleged offence by a police officer in respect of the act done under colour of duty or authority in exercise of any such duty or authority without the sanction and the same shall not be entertained if it is instituted more than 3 months after the date of the act complained of. A complaint may be entertained in this regard by the court if instituted with the previous sanction of the administrator within one year from the date of the offence. This Court after considering its earlier judgments including Jamuna Singh (supra); The State of Andhra Pradesh v. N. Venugopal & Ors., AIR 1964 SC 33; State of Maharashtra v. Narhar Rao, AIR 1966 SC 1783; State of Maharashtra v. Atma Ram & Ors., AIR 1966 SC 1786; and Prof. Sumer Chand v. Union of India & Ors., (1994) 1 SCC 64, came to the conclusion that the prosecution has been initiated on the basis of the FIR and it was the duty of the police officer to investigate the matter and to file a chargesheet, if necessary. If there is a discernible connection between the act complained of by the accused and his powers and duties as police officer, the act complained of may fall within the description of colour of duty. However, in a case where the act complained of does not

fall within the description of colour of duty, the provisions of Section 140 of the Delhi Police Act 1978 would not be attracted.

26. This Court in State of Orissa & Ors. v. Ganesh Chandra Jew, AIR 2004 SC 2179, while dealing with the issue held as under:

> "..... It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty. If the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant." (Emphasis added) (See also: P. Arulswami v. State of Madras, AIR 1967 SC 776).

27. This Court in Suresh Kumar Bhikamchand Jain v. Pandey Ajay Bhushan & Ors., AIR 1998 SC 1524, held as under:

> ".....The legislative mandate engrafted in sub-section (1) of Section 197 debarring a Court from taking cognizance of an offence except with a previous sanction of the concerned Government in a case where the acts complained of are alleged to have been committed by public servant in discharge of his official duty or purporting to be in the discharge of his official duty and such public servant is not removable from his office save by or with the sanction of the Government touches the jurisdiction of the Court itself. It is a prohibition imposed by the statute from taking cognizance, the accused after appearing before the Court on process being issued, by an application indicating that Section 197(1) is attracted merely assists the Court to rectify its error where jurisdiction has been exercised which it does not possess. In such a case there should not be any bar for the accused producing the relevant documents and materials which will be ipso facto admissible, for adjudication of the question as to whether in fact Section 197 has any application in the case in hand. It is no longer in dispute and has been indicated by this Court in several cases that the question of sanction can be considered at any stage of the proceedings." (Emphasis added)

28. In Matajog Dobey v. H.C. Bhari, AIR 1956 SC 44, the Constitution Bench of this Court held that requirement of sanction may arise at any stage of the proceedings as the complaint may not disclose all the facts to decide the question of immunity, but facts subsequently coming either to notice of the police or in judicial inquiry or even in the course of prosecution evidence may establish the necessity for sanction. The necessity for sanction may surface during the course of trial and it would be open to the accused to place the material on record for showing what his duty was and also the acts complained of were so inter-related or inseparably connected with his official duty so as to attract

the protection accorded by law. The court further observed that difference between "acting or purporting to act" in the discharge of his official duty is merely of a language and not of substance.

On the issue as to whether the court or the competent authority under the statute has to decide the requirement of sanction, the court held:

> "Whether sanction is to be accorded or not is a matter for the government to consider. The absolute power to accord or withhold sanction conferred on the government is irrelevant and foreign to the duty cast on the Court, which is the ascertainment of the true nature of the act.....There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What we must find out is whether the act and the official duty are so inter- related that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation." (Emphasis added)

29. In Sankaran Moitra v. Sadhna Das & Anr., AIR 2006 SC 1599, this Court held as under :

> "The High Court has stated that killing of a person by use of excessive force could never be performance of duty. It may be correct so far as it goes. But the question is whether that act was done in the performance of duty or in purported performance of duty. If it was done in performance of duty or purported performance of duty, Section 197(1) of the Code cannot be bypassed by reasoning that killing a man could never be done in an official capacity and consequently Section 197(1) of the Code could not be attracted." (See also: Rizwan Ahmed Javed Shaikh & Ors. v. Jammal Patel & Ors., AIR 2001 SC 2198).

30. In S.B. Saha & Ors. v. M.S. Kochar, AIR 1979 SC 1841, this Court dealt with the issue elaborately and explained the meaning of "official" as contained in the provisions of Section 197 Cr.P.C., observing:

> "In considering the question whether sanction for prosecution was or was not necessary, these criminal acts attributed to the accused are to be taken as alleged..... The words 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty' employed in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the section will be rendered altogether sterile, for, 'it is no part of an official duty to commit an offence, and never can be'. In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty,

> which is entitled to the protection of Section 197 (1), an act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution under the said provision."

31. In Parkash Singh Badal & Anr. v. State of Punjab & Ors., AIR 2007 SC 1274, this Court reiterated the same view while interpreting the phrase "official duty", as under:

> "...Official duty therefore implies that the act or omission must have been done by the public servant in course of his service and such act or omission must have been performed as part of duty which further must have been official in nature. The Section has, thus, to be construed strictly, while determining its applicability to any act or omission in course of service. Its operation has to be limited to those duties which are discharged in course of duty. But once any act or omission has been found to have been committed by a public servant in discharge of his duty then it must be given liberal and wide construction so far its official nature is concerned....."

32. In P.K. Choudhury v. Commander, 48 BRTF (GREF), (2008) 13 SCC 229, this Court dealt with the issue wherein an Army officer had allegedly indulged in the offence punishable under Section 166 IPC - public servant disobeying law, with intent to cause injury to any person and Section 167 IPC - public servant framing incorrect document with intention to cause injury, and as to whether in such an eventuality sanction under Section 197 Cr.P.C. was required. The Court held as under:

> "As the offences under Sections 166 and 167 of the Penal Code have a direct nexus with commission of a criminal misconduct on the part of a public servant, indisputably an order of sanction was prerequisite before the learned Judicial Magistrate could issue summons upon the appellant." The Court further rejected the contention that sanction was not required in view of the provisions of Sections 125 and 126 of the Army Act, which provided for a choice of the competent authorities to try an accused either by a criminal court or proceedings for court-martial. Section 126 provides for the power of the criminal court to require delivery of offender. The Court held that in case the competent authority takes a decision that the accused was to be tried by ordinary criminal court, the provisions of the Cr.P.C. would be applicable including the law of limitation and the criminal court cannot take cognizance of offence if it is barred by limitation. In case, the delay is not condoned, the court will have no jurisdiction to take the cognizance. Similarly, unless it is held that a sanction was not required to be obtained, the court's jurisdiction will be barred.

33. This Court in Nagraj v. State of Mysore, AIR 1964 SC 269, held that:

> " The last question to consider is that if the Court comes at any stage to the conclusion that the prosecution could not have been instituted without the sanction of the Government, what should be the procedure to be followed by it, i e., whether the Court should discharge the accused or acquit him of the charge if framed against him or just drop the proceedings and pass no formal order of discharge or acquittal

as contemplated in the case of a prosecution under the Code. The High Court has said that when the Sessions Judge be satisfied that the facts proved bring the case within the mischief of S. 132 of the Code then he is at liberty to reject the complaint holding that it is barred by that section. We consider this to be the right order to be passed in those circumstances. It is not essential that the Court must pass a formal order discharging or acquitting the accused. In fact no such order can be passed. If S. 132 applies, the complaint could not have been instituted without the sanction of the Government and the proceedings on a complaint so instituted would be void, the Court having no jurisdiction to take those proceedings. When the proceedings be void, the Court is not competent to pass any order except an order that the proceedings be dropped and the complaint is rejected." (Emphasis added)

34. In Naga People's Movement of Human Rights v. Union of India, AIR 1998 SC 431, the Constitution Bench of this Court while dealing with the issue involved herein under the provisions of Section 6 of the Armed Forces (Special Powers) Act, 1958, held as under:

"Under Section 6 protection has been given to the persons acting under the Central Act and it has been prescribed that no prosecution, suit or other legal proceeding shall be instituted against any person in respect of anything done or purported to be done in exercise of the powers conferred by the said Act except with the previous sanction of the Central Government. The conferment of such a protection has been assailed on the ground that it virtually provides immunity to persons exercising the powers conferred under Section 4 inasmuch as it extends the protection also to "anything purported to be done in exercise of the powers conferred by this Act". It has been submitted that adequate protection for members of armed forces from arrest and prosecution is contained in Sections 45 and 197 CrPC and that a separate provision giving further protection is not called for. It has also been submitted that even if sanction for prosecution is granted, the person in question would be able to plead a statutory defence in criminal proceedings under Sections 76 and 79 of the Indian Penal Code. The protection given under Section 6 cannot, in our opinion, be regarded as conferment of an immunity on the persons exercising the powers under the Central Act. Section 6 only gives protection in the form of previous sanction of the Central Government before a criminal prosecution or a suit or other civil proceeding is instituted against such person. Insofar as such protection against prosecution is concerned, the provision is similar to that contained in Section 197 CrPC which covers an offence alleged to have been committed by a public servant "while acting or purporting to act in the discharge of his official duty". Section 6 only extends this protection in the matter of institution of a suit or other legal proceeding.

xx xx xx In order that the people may feel assured that there is an effective check against misuse or abuse of powers by the members of the armed forces it is necessary that a complaint containing an allegation about misuse or abuse of the powers conferred under the Central Act should be thoroughly inquired into and, if it is found that there is substance in the allegation, the victim should be suitably compensated

> by the State and the requisite sanction under Section 6 of the Central Act should be granted for institution of prosecution and/or a civil suit or other proceedings against the person/persons responsible for such violation." (Emphasis added)

35. In Jamiruddin Ansari v. Central Bureau of Investigation & Anr., (2009) 6 SCC 316, this Court while dealing with the provision of Maharashtra Control of Organised Crime Act, 1999 (hereinafter called as 'MCOCA') held that:

> "As indicated hereinabove, the provisions of Section 23 are the safeguards provided against the invocation of the provisions of the Act which are extremely stringent and far removed from the provisions of the general criminal law. If, as submitted on behalf of some of the respondents, it is accepted that a private complaint under Section 9(1) is not subject to the rigours of Section 23, then the very purpose of introducing such safeguards lose their very raison d'être. At the same time, since the filing of a private complaint is also contemplated under Section 9(1) of MCOCA, for it to be entertained it has also to be subject to the rigours of Section
>
> 23. Accordingly, in view of the bar imposed under sub-section (2) of Section 23 of the Act, the learned Special Judge is precluded from taking cognizance on a private complaint upon a separate inquiry under Section 156(3) CrPC. The bar of Section 23(2) continues to remain in respect of complaints, either of a private nature or on a police report.

In order to give a harmonious construction to the provisions of Section 9(1) and Section 23 of MCOCA, upon receipt of such private complaint the learned Special Judge has to forward the same to the officer indicated in clause (a) of sub-section (1) of Section 23 to have an inquiry conducted into the complaint by a police officer indicated in clause (b) of sub-section (1) and only thereafter take cognizance of the offence complained of, if sanction is accorded to the Special Court to take cognizance of such offence under sub-section (2) of Section 23." (Emphasis added)

36. This Court in Harpal Singh v. State of Punjab, (2007) 13 SCC 387, while dealing with the provision of Section 20A(2) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter called 'TADA') held as under:

> "The important feature which is to be noted is that the prosecution did not obtain sanction of the Inspector General of Police or of the Commissioner of Police for prosecution of the appellant under TADA at any stage as is required by Section 20-A(2) of TADA. The trial of the appellant before the Designated Court proceeded without the sanction of the Inspector General of Police or the Commissioner of Police. In absence of previous sanction the Designated Court had no jurisdiction to take cognizance of the offence or to proceed with the trial of the appellant under TADA".
>
> (Emphasis added)

37. In Rambhai Nathabhai Gadhvi & Ors. v. State of Gujarat, AIR 1997 SC 3475, this Court while dealing with the same provisions of TADA, held that:

> "...Thus a valid sanction is sine qua non for enabling the prosecuting agency to approach the Court in order to enable the Court to take cognizance of the offence under TADA as disclosed in the report. The corollary is that, if there was no valid sanction the Designated Court gets no jurisdiction to try a case against any person mentioned in the report as the Court is forbidden from taking cognizance of the offence without such sanction. If the Designated Court has taken cognizance of the offence without a valid sanction, such action is without jurisdiction and any proceedings adopted thereunder will also be without jurisdiction."

38 In State of H.P. v. M.P. Gupta, (2004) 2 SCC 349, this Court while dealing with the issue held as under:

> "Use of the words "no" and "shall" makes it abundantly clear that the bar on the exercise of power of the court to take cognizance of any offence is absolute and complete. The very cognizance is barred. That is, the complaint cannot be taken notice of." (Emphasis added)

39. In broad and literal sense `cognizance' means taking notice of an offence as required under Section 190 Cr.P.C. `Cognizance' indicates the point when the court first takes judicial notice of an offence. The court not only applies its mind to the contents of the complaint/police report, but also proceeds in the manner as indicated in the subsequent provisions of Chapter XIV of the Cr.P.C. (Vide:

> R.R. Chari v. The State of Uttar Pradesh, AIR 1951 SC 207; and State of W.B. & Anr. v. Mohd. Khalid & Ors., (1995) 1 SCC 684).

40. In Dr. Subramanian Swamy v. Dr. Manmohan Singh & Anr., AIR 2012 SC 1185, this Court dealt with the issue elaborately and explained the meaning of the word 'cognizance' as under:

> "In legal parlance cognizance is 'taking judicial notice by the court of law', possessing jurisdiction, on a cause or matter presented before it so as to decide whether there is any basis for initiating proceedings and determination of the cause or matter judicially." (Emphasis added) (See also: Bhushan Kumar v. State (NCT of Delhi), (2012) 4 SCALE 191)

41. In State of Uttar Pradesh v. Paras Nath Singh, (2009) 6 SCC 372, this Court explained the meaning of the term 'the very cognizance is barred' as that the complaint cannot be taken notice of or jurisdiction or exercise of jurisdiction or power to try and determine causes. In common parlance, it means taking notice of. The court, therefore, is precluded from entertaining a complaint or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have been committed during discharge of his official duty.

42. The relevant provisions in the Cr.P.C. read as under:

> "45(1)- Notwithstanding anything contained in Sections 41 to 44 (both inclusive), no member of the Armed Forces of the Union shall be arrested for anything done or purported to be done by him in the discharge of his official duties except after obtaining the consent of the Central Government.
>
> 197(2)- No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government." Section 7 of the Act 1990, puts an embargo on the complainant/investigating agency/person aggrieved to file a suit, prosecution etc. in respect of anything done or purported to be done by a Army personnel, in good faith, in exercise of power conferred by the Act, except with the previous sanction of the Central Government.

43. Three expressions i.e. 'except', 'good faith' and 'purported' contained in the aforesaid provision require clarification/elaboration.

(i) Except :

> To leave or take out: exclude; omit; save Not including; unless. The word has also been construed to mean until.
>
> Exception – Act of excepting or excluding from a number designated or from a description; that which is excepted or separated from others in a general rule of description; a person, thing, or case specified as distinct or not included; an act of excepting, omitting from mention or leaving out of consideration.
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> (ii) Purport :
>
> Purport means to present, especially deliberately, the appearance of being; profess or claim, often falsely. It means to convey, imply, signify or profess outwardly, often falsely. In other words it means to claim (to be a certain thing, etc.) by manner or appearance; intent to show; to mean; to intend.
>
> Purport also means 'alleged'.
>
> 'Purporting' – When power is given to do something 'purporting' to have a certain effect, it will seem to prevent objections being urged against the validity of the act which might otherwise be raised. Thus when validity is given to anything 'purporting' to be done in pursuance of a power, a thing done under it may have validity though done at a time when the power would not be really exercisable. (Dicker v. Angerstein, 3 Ch D

> 600) 'Purporting to be done' – There must be something in the nature of the act that attaches it to his official character. Even if the act is not justified or authorised by law, he will still be purporting to act in the execution of his duty if he acts on a mistaken view of it." So it means that something is deficient or amiss: everything is not as it is intended to be.

In Azimunnissa and Ors. v. The Deputy Custodian, Evacuee Properties, District Deoria and Ors. AIR 1961 SC 365, Constitution Bench of this court held:

> "The word 'purport' has many shades of meaning. It means fictitious, what appears on the face of the instrument; the apparent and not the legal import and therefore any act which purports to be done in exercise of a power is to be deemed to be done within that power notwithstanding that the power is not exercisable.....Purporting is therefore indicative of what appears on the face of it or is apparent even though in law it may not be so." (Emphasis added) (See also: Haji Siddik Haji Umar & Ors. v. Union of India, AIR 1983 SC
>
> 259).
>
> (iii) GOOD FAITH:

44. A public servant is under a moral and legal obligation to perform his duty with truth, honesty, honour, loyality and faith etc. He is to perform his duty according to the expectation of the office and the nature of the post for the reason that he is to have a respectful obedience to the law and authority in order to accomplish the duty assigned to him. Good faith has been defined in Section 3(22) of the General Clauses Act, 1897, to mean a thing which is, in fact, done honestly, whether it is done negligently or not. Anything done with due care and attention, which is not malafide, is presumed to have been done in good faith. There should not be personal ill-will or malice, no intention to malign and scandalize. Good faith and public good are though the question of fact, it required to be proved by adducing evidence. (Vide: Madhavrao Narayanrao Patwardhan v. Ram Krishna Govind Bhanu & Ors., AIR 1958 SC 767; Madhav Rao Scindia Bahadur Etc. v. Union of India & Anr., AIR 1971 SC 530; Sewakram Sobhani v. R.K. Karanjiya, Chief Editor, Weekly Blitz & Ors., AIR 1981 SC 1514; Vijay Kumar Rampal & Ors. v. Diwan Devi & Ors., AIR 1985 SC 1669; Deena (Dead) through Lrs. v. Bharat Singh (Dead) through LRs. & Ors., (2002) 6 SCC 336; and Goondla Venkateshwarlu v. State of Andhra Pradesh & Anr., (2008) 9 SCC 613).

In Brijendra Singh v. State of U.P. & Ors., AIR 1981 SC 636, this Court while dealing with the issue held:

> ".....The expression has several shades of meanings. In the popular sense, the phrase 'in good faith' simply means "honestly, without fraud, collusion, or deceit; really, actually, without pretence and without intent to assist or act in furtherance of a fraudulent or otherwise unlawful scheme". (See Words and Phrases, Permanent Edition, Vol. 18A, page 91). Although the meaning of "good faith" may vary in the

> context of different statutes, subjects and situations, honest intent free from taint of fraud or fraudulent design, is a constant element of its connotation. Even so, the quality and quantity of the honesty requisite for constituting 'good faith' is conditioned by the context and object of the statute in which this term is employed. It is a cardinal canon of construction that an expression which has no uniform, precisely fixed meaning, takes its colour, light and content from the context."

45. For the aforesaid qualities attached to a duty one can attempt to decipher it from a private act which can be secret or mysterious. An authorised act or duty is official and is in connection with authority. Thus, it cannot afford to be something hidden or non-transparent unless such a duty is protected under some law like the Official Secrets Act.

46. Performance of duty acting in good faith either done or purported to be done in the exercise of the powers conferred under the relevant provisions can be protected under the immunity clause or not, is the issue raised. The first point that has to be kept in mind is that such a issue raised would be dependent on the facts of each case and cannot be a subject matter of any hypothesis, the reason being, such cases relate to initiation of criminal prosecution against a public official who has done or has purported to do something in exercise of the powers conferred under a statutory provision. The facts of each case are, therefore, necessary to constitute the ingredients of an official act. The act has to be official and not private as it has to be distinguished from the manner in which it has been administered or performed.

47. Then comes the issue of such a duty being performed in good faith. 'Good faith' means that which is founded on genuine belief and commands a loyal performance. The act which proceeds on reliable authority and accepted as truthful is said to be in good faith. It is the opposite of the intention to deceive. A duty performed in good faith is to fulfil a trust reposed in an official and which bears an allegiance to the superior authority. Such a duty should be honest in intention, and sincere in professional execution. It is on the basis of such an assessment that an act can be presumed to be in good faith for which while judging a case the entire material on record has to be assessed.

48. The allegations which are generally made are, that the act was not traceable to any lawful discharge of duty. That by itself would not be sufficient to conclude that the duty was performed in bad faith. It is for this reason that the immunity clause is contained in statutory provisions conferring powers on law enforcing authorities. This is to protect them on the presumption that acts performed in good faith are free from malice or illwill. ?The immunity is a kind of freedom conferred on the authority in the form of an exemption while performing or discharging official duties and responsibilities. The act or the duty so performed are such for which an official stands excused by reason of his office or post.

49. It is for this reason that the assessment of a complaint or the facts necessary to grant sanction against immunity that the chain of events has to be looked into to find out as to whether the act is dutiful and in good faith and not maliciously motivated. It is the intention to act which is important.

50. A sudden decision to do something under authority or the purported exercise of such authority may not necessarily be predetermined except for the purpose for which the official proceeds to accomplish. For example, while conducting a raid an official may not have the apprehension of being attacked but while performing his official duty he has to face such a situation at the hands of criminals and unscrupulous persons. The official may in his defence perform a duty which can be on account of some miscalculation or wrong information but such a duty cannot be labelled as an act in bad faith unless it is demonstrated by positive material in particular that the act was tainted by personal motives and was not connected with the discharge of any official duty. Thus, an act which may appear to be wrong or a decision which may appear to be incorrect is not necessarily a malicious act or decision. The presumption of good faith therefore can be dislodged only by cogent and clinching material and so long as such a conclusion is not drawn, a duty in good faith should be presumed to have been done or purported to have been done in exercise of the powers conferred under the statute.

?51. There has to be material to attribute or impute an unreasonable motive behind an act to take away the immunity clause. It is for this reason that when the authority empowered to grant sanction is proceeding to exercise its discretion, it has to take into account the material facts of the incident complained of before passing an order of granting sanction or else official duty would always be in peril even if performed bonafidely and genuinely.

52. It is in the aforesaid background that we wish to record that the protection and immunity granted to an official particularly in provisions of the Act 1990 or like Acts has to be widely construed in order to assess the act complained of. This would also include the assessment of cases like mistaken identities or an act performed on the basis of a genuine suspicion. We are therefore of the view that such immunity clauses have to be interpreted with wide discretionary powers to the sanctioning authority in order to uphold the official discharge of duties in good faith and a sanction therefore has to be issued only on the basis of a sound objective assessment and not otherwise.

53. Use of words like ‘No’ and ‘shall’ in Section 7 of the Act 1990 denotes the mandatory requirement of obtaining prior sanction of the Central Government before institution of the prosecution, suit or legal proceedings. From the conjoint reading of Section 197(2) Cr.P.C. and Section 7 of the Act 1990, it is clear that prior sanction is a condition precedent before institution of any of the aforesaid legal proceedings.

54. To understand the complicacy of the issue involved herein, it will be useful to compare the relevant provisions of different statutes requiring previous sanction.

CRIMINAL PROCEDURE CODE, 1973	PREVENTION OF CORRUPTION ACT, 1988	ARMED FORCES (SPECIAL POWERS) ACT, 1990
197. Prosecution of Judges and Public servants.- (1) When	19. Previous sanction necessary for prosecution.-	7. Protection to persons acting under Act.— No

|any person who is or|(1) No court shall |prosecution, suit | |was a Judge or |take cognizance of |or other legal | |Magistrate or a |an offence |proceeding shall be| |public servant not |punishable under |instituted, except | |removable from his |Sections 7,10,11,13 |with the previous | |office save by or |and 15 alleged to |sanction of the | |with the sanction of|have been committed |Central Government,| |the Government is |by a public servant,|against any person | |accused of any |except with the |in respect of | |offence alleged to |previous sanction. |anything done or | |have been committed |(a) in the case of a|purported to be | |by him while acting |person who is |done in exercise of| |or purporting to act|employed in |the powers | |in the discharge of |connection with the |conferred by this | |his official duty, |affairs of the Union|Act. | |no Court shall take |and is not removable|..... | |cognizance of such |from his office save|..... | |offence except with |by or with the | | |the previous |sanction of the | | |sanction. |Central Government, | | |..... |of that Government. | | |..... | | | |..... | | | |..... | | Thus, it is evident from the aforesaid comparative chart that under the provisions of Cr.P.C. and Prevention of Corruption Act, it is the court which is restrained to take cognizance without previous sanction of the competent authority. Under the Act 1990, the investigating agency/complainant/person aggrieved is restrained to institute the criminal proceedings; suit or other legal proceedings. Thus, there is a marked distinction in the statutory provisions under the Act 1990, which are of much wider magnitude and are required to be enforced strictly.

55. Thus, in view of the above, the law on the issue of sanction can be summarised to the effect that the question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duty. In order that the public servant may not be unnecessarily harassed on a complaint of an unscrupulous person, it is obligatory on the part of the executive authority to protect him. However, there must be a discernible connection between the act complained of and the powers and duties of the public servant. The act complained of may fall within the description of the action purported to have been done in performing the official duty. Therefore, if the alleged act or omission of the public servant can be shown to have reasonable connection inter-relationship or inseparably connected with discharge of his duty, he becomes entitled for protection of sanction. If the law requires sanction, and the court proceeds against a public servant without sanction, the public servant has a right to raise the issue of jurisdiction as the entire action may be rendered void ab-initio for want of sanction. Sanction can be obtained even during the course of trial depending upon the facts of an individual case and particularly at what stage of proceedings, requirement of sanction has surfaced. The question as to whether the act complained of, is done in performance of duty or in purported performance of duty, is to be determined by the competent authority and not by the court. The Legislature has conferred "absolute power" on the statutory authority to accord sanction or withhold the same and the court has no role in this subject. In such a situation the court would not proceed without sanction of the competent statutory authority.

56. The present case stands squarely covered by the ratio of the judgments of this Court in Matajog Dobey (Supra) and Sankaran Moitra (Supra). Thus, we have no hesitation to hold that sanction of the Central Government is required in the facts and circumstances of the case and the court concerned lacks jurisdiction to take cognizance unless sanction is granted by the Central Government.

57. The CJM Court gave option to the higher authorities of the Army to choose whether the trial be held by the court-martial or by the criminal court as required under Section 125 of the Army Act. Mr. P.P. Malhotra, learned ASG, has submitted the original file of the Army Authorities before the court, File notings reveal their decision that in case it is decided by this Court that sanction is required and the Central Government accords sanction, option would be availed at that stage.

58. Military Authority may ask the criminal court dealing with the case that the accused would be tried by the court-martial in view of the provisions of Section 125 of the Army Act. However, the option given by the Authority is not final in view of the provisions of Section 126 of the Army Act. Criminal court having jurisdiction to try the offender may require the competent military officer to deliver the offender to the Magistrate concerned to be proceeded according to law or to postpone the proceedings pending reference to the Central Government, if that criminal court is of the opinion that proceedings be instituted before itself in respect of that offence. Thus, in case the criminal court makes such a request, the Military Officer either has to comply with it or to make a reference to the Central Govt. whose orders would be final with respect to the venue of the trial. Therefore, the discretion exercised by the Military Officer is subject to the control of the Central Govt. Such matter is being governed by the provisions of Section 475 Cr.P.C. read with the provisions of the J & K Criminal Courts and court-martial (Adjustment of Jurisdiction) Rules, 1983.

Rule 6 of the said Rules, 1983, provides that in case the accused has been handed over to the Army authorities to be tried by a court-martial, the proceedings of the criminal court shall remain stayed. Rule 7 thereof, further provides that when an accused has been delivered by the criminal court to the Army authorities, the authority concerned shall inform the criminal court whether the accused has been tried by a court-martial or other effectual proceedings have been taken or ordered to be taken against him. If the Magistrate is informed that the accused has not been tried or other effectual proceedings have not been taken, the Magistrate shall report the circumstances to the State Government which may, in consultation with the Central Government, take appropriate steps to ensure that the accused person is dealt with in accordance with law.

59. Constitution Bench of this Court in Som Datt Datta v. Union of India & Ors., AIR 1969 SC 414, held that option as to whether the accused be tried by a criminal court or court-martial could be exercised after the police has completed the investigation and submitted the chargesheet. Therefore, for making such an option, the Army Authorities do not have to wait till the criminal court takes cognizance of the offence or frames the charges, which commences the trial.

60. In Delhi Special Police Establishment, New Delhi v. Lt. Col. S.K. Loraiya, AIR 1972 SC 2548, a similar view has been reiterated by this Court observing that relevant Rules require that an option be given as to whether the accused be tried by a court-martial or by ordinary criminal court. The Magistrate has to give notice to the Commanding Officer and is not to make any order of conviction or acquittal or frame charges or commit the accused until the expiry of 7 days from the service of notice.

61. In Balbir Singh & Anr. v. State of Punjab, (1995) 1 SCC 90, this Court dealt with the provisions of the Air Force Act, 1950; provisions of Cr.P.C. and criminal court and court-martial (Adjustment of

Jurisdiction) Rules, 1952 and reiterated the same view relying upon its earlier judgment in Ram Sarup v. Union of India & Anr., AIR 1965 SC 247, wherein it has been held that there could be variety of circumstances which may influence the justification as to whether the offender be tried by a court-martial or by criminal court, and therefore, it becomes inevitable that the discretion to make such a choice be left to the Military Officers. Military Officer is to be guided by considerations of the exigencies of the service, maintenance of discipline in the Army, speedier trial, the nature of the offence and the persons against whom the offence is committed.

62. Thus, the law on the issue is clear that under Section 125 of the Army Act, the stage of making option to try an accused by a court- martial and not by the criminal court is after filing of the chargesheet and before taking cognizance or framing of the charges.

63. A question has further been raised by learned counsel for the appellant that the Act 1990 is a special Act and Section 7 thereof, provides full protection to the persons who are subject to the Army Act from any kind of suit, prosecution and legal proceedings unless the sanction of the Central Government is obtained . Thus, in such a fact- situation, even if the Commanding Officer exercises his discretion and opts that the accused would be tried by the court-martial, the proceedings of court-martial cannot be taken unless the Central Government accords sanction.

64. Learned counsel for the CBI and interveners have opposed the submission contending that in case the accused are tried in the court- martial, sanction is not required at all. The provisions of the Act 1990 would apply in consonance with the provisions of the Army Act. Section 7 of the Act 1990 does not contain non-obstante clause. Therefore, once the option is made that accused is to be tried by a court-martial, further proceedings would be in accordance with the provisions of Section 70 of the Army Act and for that purpose, sanction of the Central Government is not required. The court-martial has been defined under Section 3(VII) of the Army Act which is definitely different from the suit and prosecution as explained hereinabove, and has not been referred to in the Act 1990.

65. Undoubtedly, the court-martial proceedings are akin to criminal prosecution and this fact has been dealt with elaborately by this Court in Union of India & Ors. v. Major A. Hussain, AIR 1998 SC 577. However, once the matter stands transferred to the Army for conducting a court-martial, the court-martial has to be as per the provisions of the Army Act. The Army Act does not provide for sanction of the Central Government. Thus, we do not find any force in the contention raised by the appellant and the same is rejected.

66. Sum up:

> i) The conjoint reading of the relevant statutory provisions and rules make it clear that the term “institution” contained in Section 7 of the Act 1990 means taking cognizance of the offence and not mere presentation of the chargesheet by the investigating agency.

ii) The competent Army Authority has to exercise his discretion to opt as to whether the trial would be by a court-martial or criminal court after filing of the chargesheet and not after the cognizance of the offence is taken by the court.

iii) Facts of this case require sanction of the Central Government to proceed with the criminal prosecution/trial.

iv) In case option is made to try the accused by a court-martial, sanction of the Central Government is not required.

67. In view of the above, the appeals stand disposed of with the following directions:

I. The competent authority in the Army shall take a decision within a period of eight weeks from today as to whether the trial would be by the criminal court or by a court-martial and communicate the same to the Chief Judicial Magistrate concerned immediately thereafter.

II. In case the option is made to try the case by a court-martial, the said proceedings would commence immediately and would be concluded strictly in accordance with law expeditiously. III. In case the option is made that the accused would be tried by the criminal court, the CBI shall make an application to the Central Government for grant of sanction within four weeks from the receipt of such option and in case such an application is filed, the Central Government shall take a final decision on the said application within a period of three months from the date of receipt of such an application.

IV. In case sanction is granted by the Central Government, the criminal court shall proceed with the trial and conclude the same expeditiously.

.....J. (Dr. B.S. CHAUHAN) .....J. (SWATANTER KUMAR) New Delhi, May 1, 2012
