REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL/CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO.120 OF 2012

Manohar Lal Sharma .....Petitioner

Versus

The Principal Secretary and Ors. .....Respondents

WITH

WRIT PETITION (CIVIL) NO.463 OF 2012

WITH

WRIT PETITION (CIVIL) NO.429 OF 2012

WITH

WRIT PETITION (CIVIL) NO.498 OF 2012

WITH

WRIT PETITION (CIVIL) NO.515 OF 2012

AND

WRIT PETITION (CIVIL) NO.283 OF 2013

ORDER

R.M. LODHA, J.

The question for the purposes of this order really resolves itself into this: whether the approval of the Central Government is

necessary under Section 6A of the Delhi Special Police Establishment Act, 1946 ("DSPE Act" for short) in a matter where the inquiry/investigation into the crime under the Prevention of Corruption Act, 1988 ("PC Act" for short) is being monitored by the Court. It is not necessary to set out the facts in detail, suffice, however, to say that the Central Bureau of Investigation (CBI) has registered preliminary enquiries (PEs) against unknown public servants, *inter alia,* of the offences under the PC Act relating to allocation of coal blocks for the period from 1993 to 2005 and 2006 to 2009. Few regular cases have also been registered. In pursuance of the orders passed by this Court, the inquiries and investigations into the allocation of coal blocks are being monitored by this Court and the CBI has been submitting reports about the status of the progress made in that regard.

2. On 08.05.2013, the Court noted that in the matter of investigation, CBI needed insulation from extraneous influences of the controlling executive. On that day, the Court wanted to know from the learned Attorney General, whether the Central Government was intending to put in place the appropriate law for the independence of the CBI and its functional autonomy and insulate it from extraneous influences so that CBI is viewed as a non-partisan investigating agency. The learned Attorney General sought time to seek instructions and report to the Court by way of

an affidavit on behalf of the Central Government. The matter was, accordingly, fixed for July 10, 2013.

3. In pursuance of the order dated 08.05.2013, an affidavit was filed by the Central Government. In that affidavit various actions which were taken in compliance of the directions of this Court in *Vineet Narain*[1] were indicated. In the affidavit, it was also stated that a Group of Ministers (GoM) has been constituted to consider the aspects noted in the order of 08.05.2013. The GoM had proposed certain amendments in the law; the proposals of GOM have also been approved by the Cabinet.

4. On 10.07.2013, the Court observed that the amendments as proposed in the DSPE Act were likely to take some time and, accordingly, put to the learned Attorney General two queries, first, as to why clarification should not be made that the approval from the Central Government under Section 6-A of the DSPE Act for investigation of the offences alleged to have been committed under the PC Act is not necessary as it is the stand of the Government that the power of supervision for investigation has already been shifted from the Government to the Central Vigilance Commission (CVC) and, second, why the approval of the Government was necessary in respect of "Court-monitored" or "Court-directed" investigations.

5. In *Vineet Narain*[1], this Court was approached under Article 32 of the Constitution allegedly as there was inertia by the CBI in the investigations into Jain Diaries case where the accusations made were against high dignitaries. The background that necessitated the monitoring of the investigation by this Court is indicated in the first paragraph[2] of the judgment. The Single Directive 4.7(3)[3] which contained certain instructions

[1] Vineet Narain and Others v. Union of India and Anr; (1998) 1 SCC 226

[2] These writ petitions under Article 32 of the Constitution of India brought in public interest, to begin with, did not appear to have the potential of escalating to the dimensions they reached or to give rise to several issues of considerable significance to the implementation of rule of law, which they have, during their progress. They began as yet another complaint of inertia by the Central Bureau of Investigation (CBI) in matters where the accusation made was against high dignitaries. It was not the only matter of its kind during the recent past. The primary question was: Whether it is within the domain of judicial review and it could be an effective instrument for activating the investigative process which is under the control of the executive? The focus was on the question, whether any judicial remedy is available in such a situation? However, as the case progressed, it required innovation of a procedure within the constitutional scheme of judicial review to permit intervention by the court to find a solution to the problem. This case has helped to develop a procedure within the discipline of law for the conduct of such a proceeding in similar situations. It has also generated awareness of the need of probity in public life and provided a mode of enforcement of accountability in public life. Even though the matter was brought to the court by certain individuals claiming to represent public interest, yet as the case progressed, in keeping with the requirement of public interest, the procedure devised was to appoint the petitioners' counsel as the amicus curiae and to make such orders from time to time as were consistent with public interest. Intervention in the proceedings by everyone else was shut out but permission was granted to all, who so desired, to render such assistance as they could, and to provide the relevant material available with them to the amicus curiae for being placed before the court for its consideration. In short, the proceedings in this matter have had great educative value and it does appear that it has helped in future decision-making and functioning of the public authorities.

[3] 4.7(3)(i) In regard to any person who is or has been a decision-making level officer (Joint Secretary or equivalent or above in the Central Government or such officers as are or have been on deputation to a Public Sector Undertaking; officers of the Reserve Bank of India of the level equivalent to Joint Secretary or above in the Central Government, Executive Directors and above of the SEBI and Chairman & Managing Director and Executive Directors and such of the bank officers who are one level below the Board of Nationalised Banks), there should be prior sanction of the Secretary of the Ministry/Department concerned before SPE takes up any enquiry (PE or RC), including ordering search in respect of them. Without such sanction, no enquiry shall be initiated by the SPE.

(ii) All cases referred to the Administrative Ministries/Departments by CBI for obtaining necessary prior sanction as aforesaid, except those pertaining to any officer of the rank of Secretary or Principal Secretary, should be disposed of by them preferably within a period of two months of the receipt of such a reference. In respect of the officers of the rank of Secretary or Principal Secretary to Government, such references should be made by the Director, CBI to the Cabinet Secretary for consideration of a Committee consisting of the Cabinet Secretary as its Chairman and the Law Secretary and the Secretary (Personnel) as its members. The Committee should dispose of all such references

to the CBI regarding modalities of initiating an inquiry or registering a case against certain categories of civil servants fell for consideration.

6. On behalf of the Union while defending the Single Directive 4.7(3), it was contended before this Court in *Vineet Narain*[1] that protection to officers at the decision-making level was essential to protect them and to relieve them of the anxiety from the likelihood of harassment for taking honest decisions. It was argued on behalf of the Union that the absence of any such protection to them could adversely affect the efficiency and efficacy of these institutions because of the tendency of such officers to avoid taking any decisions which could later lead to harassment by any malicious and vexatious inquiries/investigations.

7. The Court noted the report of Independent Review Committee (IRC) and few decisions of this Court, particularly, *K. Veeraswami*[4] *and J.A.C Saldanha*[5] and struck down the Single Directive 4.7(3). Pertinently, the Court noted that the view it had taken was not in conflict with *J.A.C. Saldanha*[5]. *K. Veeraswami*[4] was held distinguishable.

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preferably within two months from the date of receipt of such a reference by the Cabinet Secretary.

(iii) When there is any difference of opinion between the Director, CBI and the Secretary of the Administrative Ministry/Department in respect of an officer up to the rank of Additional Secretary or equivalent, the matter shall be referred by CBI to Secretary (Personnel) for placement before the Committee referred to in clause (ii) above. Such a matter should be considered and disposed of by the Committee preferably within two months from the date of receipt of such a reference by Secretary (Personnel).

(iv) In regard to any person who is or has been Cabinet Secretary, before SPE takes any step of the kind mentioned in (i) above the case should be submitted to the Prime Minister for orders.

[4] K. Veeraswami v. Union of India; (1991) 3 SCC 655

[5] State of Bihar v. J.A.C Saldanha; (1980) 1 SCC 554

8. The DSPE Act was brought into force in 1946. Under this Act, the superintendence of the Special Police Establishment (SPE) was transferred to the Home Department and its functions were enlarged to cover all departments of the Central Government. The jurisdiction of the SPE extended to all the Union Territories. Its jurisdiction could also be extended to the States with their consent. The CBI was established on 01.04.1963 *vide* Government Resolution issued by the Ministry of Home Affairs, Government of India.

9. Section 3 of that Act empowers the Central Government to specify by notification in the official gazette the offences or classes of offences which are to be investigated by the Delhi Special Police Establishment (DSPE).

10. Section 4 relates to superintendence and administration of SPE.

11. Section 5 deals with extension of powers and jurisdiction of SPE to other areas. The Central Government has been empowered to extend to any area (including railway areas), in a State not being a Union Territory the powers and jurisdiction of members of the DSPE for the investigation of any offences or classes of offences specified in a notification under Section 3.

12. Section 6 provides that Section 5 shall not be deemed to enable any member of the DSPE to exercise powers and jurisdiction in any area in a State, not being a Union Territory or railway area, without the consent of the Government of that State.

13. In pursuance of the judgment of this Court in *Vineet Narain*[1], DSPE Act came to be amended with effect from 11.09.2003. Section 4 was amended. Sub-section (1) of Section 4 now provides that the superintendence of the Delhi Special Police Establishment insofar as it relates to investigation of offences alleged to have been committed under the PC Act shall vest in the Central Vigilance Commission. Section 4A to 4C and Section 6A have been inserted.

14. Section 6A reads as under:

> "Section 6 A - Approval of Central Government to conduct inquiry or investigation.—(1) The Delhi Special Police Establishment shall not conduct any inquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act,1988 except with the previous approval of the Central Government where such allegation relates to -
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> (a) the employees of the Central Government of the level of Joint Secretary and above; and
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> (b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by that Government.
>
> (2) Notwithstanding anything contained in sub-section (1), no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any gratification other than legal remuneration

referred to in clause (c) of the *Explanation* to section 7 of the Prevention of Corruption Act, 1988."

15. Section 6A, thus, provides for obtaining approval of the Central Government to conduct inquiry or investigation where the allegations for commission of an offence under the PC Act relate to the employees of the Central Government of the level of the Joint Secretary and above.

16. The amendments in the DSPE Act were made effective from 11.09.2003. On the same date the Central Vigilance Commission Act, 2003 (for short, 'CVC Act') was enacted. The CVC Act provides for the constitution of a Central Vigilance Commission (CVC) to inquire into offences alleged to have been committed under the PC Act by certain categories of public servants as is reflected from the Preamble.[6]

17. Section 8 of the CVC Act deals with the functions and powers of the CVC. To the extent, it is relevant, Section 8 reads as under:

"8. Functions and powers of Central Vigilance Commission.—
(1) The functions and powers of the Commission shall be to--

(a) exercise superintendence over the functioning of the Delhi Special Police Establishment in so far as it relates to the investigation of offences alleged to have been committed under the Prevention of Corruption Act, 1988 or an offence with which a public servant specified in sub-section (2) may,

[6] An Act to provide for the constitution of a Central Vigilance Commission to inquire or cause inquiries to be conducted into offences alleged to have been committed under the Prevention of Corruption Act, 1988 by certain categories of public servants of the Central Government, corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by the Central Government and for matters connected therewith or incidental thereto.

under the Code of Criminal Procedure, 1973, be charged at the same trial;

(b) give directions to the Delhi Special Police Establishment for the purpose of discharging the responsibility entrusted to it under sub-section (1) of section 4 of the Delhi Special Police Establishment Act, 1946:

Provided that while exercising the powers of superintendence under clause (a) or giving directions under this clause, the Commission shall not exercise powers in such a manner so as to require the Delhi Special Police Establishment to investigate or dispose of any case in a particular manner;

(c) to (h) ……..

(2) ……"

18. The constitutional validity of Section 6A is pending before the Constitution Bench of this Court. In *Subramanian Swamy (Dr.)*[7], a three-Judge Bench of this Court referred the matter to the larger bench to authoritatively adjudicate the validity of Section 6A. The challenge is based on the touchstone of Article 14 of the Constitution as it is the case of the petitioner therein that Section 6A is wholly arbitrary and unreasonable. The contention of the Union on the other hand is that arbitrariness and unreasonableness are not available as grounds to invalidate the legislation. Since the question of validity of Section 6A is pending before the Constitution Bench of this Court, we make it clear that this order does not touch upon this aspect at all.

19. We have heard Mr. Goolam E. Vahanvati, learned Attorney General, Mr. Amarendra Sharan, learned senior counsel for the CBI,

[7] Subramanian Swamy (Dr.) v. Director, CBI and Others; [(2005) 2 SCC 317]

Mr. Manohar Lal Sharma, petitioner-in-person, Mr. Prashant Bhushan, learned counsel in the writ petition filed by Common Cause and Mr. Gopal Sankaranarayanan, learned counsel for the intervenor.

20. Mr. Goolam E. Vahanvati, learned Attorney General says 'Yes' to the question which we have indicated in the beginning of the order because he says that the whole idea behind Section 6A is to provide a screening mechanism to filter out frivolous or motivated investigation that could be initiated against senior officers and to protect them from harassment and to enable them to take decisions without fear. He heavily relies on the decision of this Court in *K. Veeraswami*[4] and submits that the Court has recognised the need for protecting high-ranking officials from vexatious litigation. Learned Attorney General fairly submits that the observations made by this Court in paragraph 28 in *K. Veeraswami*[4] have been distinguished in *Vineet Narain*[1] but he submits that the observations in *Vineet Narain*[1] have been doubted in the referral order in *Subramanian Swamy (Dr.)*[7] .

21. Learned Attorney General argues that it will not be appropriate to issue clarification in the terms proposed in the order dated 10.07.2013 in respect of first query for the reasons: (i) requirement of prior sanction does not flow from the power of superintendence; (ii) there is a presumption of constitutionality in favour of a statutory provision, which cannot be

nullified/amended/modified by an interim order; (iii) a statutory provision cannot be struck down without a specific challenge being levelled thereto; and (iv) the Court has the power of judicial review to set right improper exercise of power conferred under Section 6-A. Elaborating the above, learned Attorney General submits that while the power of superintendence operates during the stage of investigation, the power to grant sanction comes into play at the pre-investigation stage. Therefore, the two powers operate in different spheres and one cannot be said to flow from the other. Section 8(1) of the CVC Act, which vests the power of superintendence of investigation of cases under PC Act is not in conflict with Section 6A of the DSPE Act, which requires prior approval of the Government to initiate any investigation or inquiry for the officers of level of Joint Secretary and above under the PC Act. These provisions operate in two different stages.

22. The learned Attorney General states that the Central Government accepts the position that CBI's investigation must be conducted in a non-partisan manner without any extraneous influences but a statutory provision cannot be nullified on a presumption that the power under Section 6A may be exercised improperly. If there is any instance where the power under Section 6A is abused or is utilized to shield an accused who should be prosecuted, this Court always has the power of judicial review to correct the same.

23. In response to the second query, learned Attorney General submits that Section 6A is in the nature of procedure established by law for the purposes of Article 21 and where consequences follow in criminal law for an accused, the Court is not at liberty to negate the same even in exercise of powers under Article 32 or Article 142. According to him, requirement of sanction under Section 6A is to be interpreted strictly and cannot be waived under any circumstances. That the Court monitors or directs an investigation does not affect the basis of protection available under law and the CBI cannot be asked to proceed with inquiry or investigation *de hors* the statutory mandate of Section 6A.

24. Learned Attorney General, thus, submits that Section 6A which has a definite objective must be allowed to operate even in the cases where the investigation into the crimes under PC Act is being monitored by the Court.

25. Mr. Amarendra Sharan, learned senior counsel who assisted the Court on behalf of CBI with equal emphasis at his command says 'No' to that question. He states that the objective behind enactment of Section 6A to give protection to officers at the decision-making level from the threat and ignominy of malicious and vexatious inquiry/investigation and likelihood of harassment for taking honest decisions is fully achieved when a case is monitored by the constitutional court. The constitutional courts

are repository of the faith of the people as well as protector of the rights of the individual and, therefore, no prior approval of the Central Government under Section 6A in the cases in which investigation is monitored by the constitutional court is necessary.

26. Learned senior counsel for the CBI submits that this Court has consistently held with reference to Section 6 of the DSPE Act and Section 19 of the PC Act that requirement of sanction for prosecution was not mandatory when the same is done pursuant to the direction of the Court or where cases are monitored by the Court. On the same analogy, he submits that it can be safely concluded that the approval under Section 6A of the DSPE Act is not necessary in the cases where investigation is monitored by the constitutional court. He argues that requirement of approval under Section 6A, if held to be necessary even in Court-monitored cases, it would amount to restricting power of monitoring by a constitutional court up to officers below the ranks of Joint Secretary only which would mean that the constitutional court has no power to monitor investigation of an offence involving officers of the Joint Secretary and above without prior permission of the Central Government. Such an interpretation will be directly contrary to the power (as well as constitutional duty) of the constitutional court to monitor an investigation in larger public interest.

27. Mr. Amarendra Sharan, learned senior counsel has argued that Section 6A must be read down to mean that prior approval is not necessary in cases where investigation is monitored by the constitutional court.

28. The arguments of Mr. Prashant Bhushan, learned counsel for the Common Cause, Mr. Manohar Lal Sharma, one of the petitioners, who appears in person and Mr. Gopal Sankaranarayanan, learned counsel for the intervenor are in line with the arguments of Mr. Amarendra Sharan. They submit that Section 6A cannot be a bar to investigation in Court monitored cases. According to them, if Section 6 is not a restriction on the Court but only on the Central Government as has been held by this Court in *Committee for Protection of Democratic Rights*[8], that principle equally applies to Section 6A. They referred to the orders passed by this Court in 2G case and, particularly, reference was made to the order dated 03.09.2013 in *Shahid Balwa*[9].

29. In the criminal justice system the investigation of an offence is the domain of the police. The power to investigate into the cognizable offences by the police officer is ordinarily not impinged by any fetters. However, such power has to be exercised consistent with the statutory provisions and for legitimate purpose. The Courts ordinarily do not interfere

[8] State of West Bengal and Others v. Committee for Protection of Democratic Rights, West Bengal and Others; [(2010) 3 SCC 571]

[9] Writ Petition (Civil) No. 548 of 2012; Shahid Balwa v. Union of India and Ors.

in the matters of investigation by police, particularly, when the facts and circumstances do not indicate that the investigating officer is not functioning bona fide. In very exceptional cases, however, where the Court finds that the police officer has exercised his investigatory powers in breach of the statutory provision putting the personal liberty and/or the property of the citizen in jeopardy by illegal and improper use of the power or there is abuse of the investigatory power and process by the police officer or the investigation by the police is found to be not bona fide or the investigation is tainted with animosity, the Court may intervene to protect the personal and/or property rights of the citizens.

30. Lord Denning[10] has described the role of the police thus:

> "In safeguarding our freedoms, the police play vital role. Society for its defence needs a well-led, well-trained and well-disciplined force or police whom it can trust, and enough of them to be able to prevent crime before it happens, or if it does happen, to detect it and bring the accused to justice.
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> The police, of course, must act properly. They must obey the rules of right conduct. They must not extort confessions by threats or promises. They must not search a man's house without authority. They must not use more force than the occasion warrants……."

31. One of the responsibilities of the police is protection of life, liberty and property of citizens. The investigation of offences is one of the

[10] The Due Process of law; First Indian Reprint 1993, pg. 102

important duties the police has to perform. The aim of investigation is ultimately to search for truth and bring the offender to the book.

32. Section 2(h) of the Code of Criminal Procedure (for short, "Code") defines investigation to include all the proceedings under the Code for collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by Magistrate in this behalf.

33. In *H.N. Rishbud*[11], this Court explained that the investigation generally consists of the following steps:

> 1. Proceeding to the spot;
> 2. Ascertainment of the facts and circumstances of the case;
> 3. Discovery and arrest of the suspected offender;
> 4. Collection of evidence relating to the commission of the offence which may consist of the examination of:
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> (a) various persons (including accused) and the reduction of statement into writing, if the officer thinks fit;
>
> (b) the search of places and seizure of things, considered necessary for the investigation and to be produced at the trial;
>
> 5. Formation of the opinion as to whether on the materials collected, there is a case to place the accused before a Magistrate for trial, if so, take the necessary steps for the same for filing necessary charge-sheet under Section 373, Cr.P.C.

34. Once jurisdiction is conferred on the CBI to investigate the offence by virtue of notification under Section 3 of the DSPE Act or the CBI takes up investigation in relation to the crime which is otherwise within the jurisdiction of the State police on the direction of the constitutional court, the exercise of the power of investigation by the CBI is regulated by the

[11] H.N. Rishbud v. State of Delhi; AIR 1955 SC 196

Code and the guidelines are provided in the CBI (Crime) Manual. Paragraph 9.1 of the Manual says that when, a complaint is received or information is available which may, after verification, as enjoined in the Manual, indicate serious misconduct on the part of a public servant but is not adequate to justify registration of a regular case under the provisions of Section 154 of the Code, a preliminary enquiry (PE) may be registered after obtaining approval of the competent authority. It also says that where High Courts and Supreme Court entrust matters to CBI for inquiry and submission of report, a PE may be registered after obtaining orders from the head office. When the complaint and source information reveal commission of a *prime facie* cognizable offence, a regular case is to be registered as enjoined by law. PE may be converted into RC as soon as sufficient material becomes available to show that *prima facie* there has been commission of a cognizable offence. When information available is adequate to indicate commission of cognizable offence or its discreet verification leads to similar conclusion, a regular case must be registered instead of a PE.

35. Paragraph 9.10 of the Manual states that PE relating to allegations of bribery and corruption should be limited to the scrutiny of records and interrogation of bare minimum persons which may be necessary to judge whether there is any substance in the allegations which

are being enquired into and whether the case is worth pursuing further or not.

36. Paragraph 10.1 of the Manual deals with registration and first information report. To the extent it is relevant, it reads as under:

> "10.1 On receipt of a complaint or after verification of an information or on completion of a Preliminary Enquiry taken up by CBI if it is revealed that *prima facie* a cognizable offence has been committed and the matter is fit for investigation to be undertaken by Central Bureau of Investigation, a First Information Report should be recorded under Section 154 Criminal Procedure Code and investigation taken up. While considering registration of an FIR, it should be ensured that at least the main offence/s have been notified under Section 3 of the Delhi Special Police Establishment Act. The registration of First Information Report may also be done on the direction of Constitutional Courts, in which case it is not necessary for the offence to have been notified for investigation by DSPE. The FIRs under investigation with local Police or any other law enforcement authority may also be taken over for further investigation either on the request of the State Government concerned or the Central Government or on the direction of a Constitutional Court. ……."

37. Paragraph 10.6 of the Manual, *inter alia*, provides that if a case is required to be registered under the PC Act against an officer of the rank of Joint Secretary and above, prior permission of the Government should be taken before inquiry/investigation as required under Section 6A of the DSPE Act except in a case under Section 7 of the PC Act where registration is followed by immediate arrest of the accused.

38. A proper investigation into crime is one of the essentials of the criminal justice system and an integral facet of rule of law. The investigation by the police under the Code has to be fair, impartial and

uninfluenced by external influences. Where investigation into crime is handled by the CBI under the DSPE Act, the same principles apply and CBI as an investigating agency is supposed to discharge its responsibility with competence, promptness, fairness and uninfluenced and unhindered by external influences.

39. The abuse of public office for private gain has grown in scope and scale and hit the nation badly. Corruption reduces revenue; it slows down economic activity and holds back economic growth. The biggest loss that may occur to the nation due to corruption is loss of confidence in the democracy and weakening of rule of law.

40. In recent times, there has been concern over the need to ensure that the corridors of power remain untainted by corruption or nepotism and that there is optimum utilization of resources and funds for their intended purposes.[12]

41. In 350 B.C.E., Aristotle suggested in the "*Politics*" that to protect the treasury from being defrauded, let all money be issued openly in front of the whole city, and let copies of the accounts be deposited in various wards. What Aristotle said centuries back may not be practicable today but for successful working of the democracy it is essential that public revenues are not defrauded and public servants do not indulge in bribery

[12] Hon'ble Shri Pranab Mukherjee, President, Republic of India, in his speech at the inauguration of All India Lokayktas Conference, 2012

and corruption and if they do, the allegations of corruption are inquired into fairly, properly and promptly and those who are guilty are brought to book.

42. In this group of matters, it is alleged that coal blocks for the subject period have been allocated for extraneous considerations by unknown public servants in connivance with businessmen, industrialists and middlemen. The allocation of coal blocks is alleged to suffer from favouritism, nepotism and pick and choose. The Comptroller and Auditor General (CAG) in its Performance Audit on allocation of coal blocks and augmentation of coal production has estimated loss to the public exchequer to the tune of about Rs.1.86 lac crore as on 31.03.2011 for Open-cast mines/Open-cast reserves of Mixed mines while pointing out inadequacies and shortcoming in the allocation. Our reference to the CAG report, we clarify, does not mean that we have expressed any opinion about its correctness or otherwise. Be that as it may, having regard to the serious allegations of lack of objectivity and transparency and the PEs having already registered by the CBI to inquire/investigate into allegations of corruption against unknown public servants in the allocation of coal blocks, this Court in larger public interest decided to monitor the inquiries/investigations being conducted by CBI.

43. The monitoring of investigations/inquiries by the Court is intended to ensure that proper progress takes place without directing or

channeling the mode or manner of investigation. The whole idea is to retain public confidence in the impartial inquiry/investigation into the alleged crime; that inquiry/investigation into every accusation is made on a reasonable basis irrespective of the position and status of that person and the inquiry/investigation is taken to the logical conclusion in accordance with law.

44. The monitoring by the Court aims to lend credence to the inquiry/investigation being conducted by the CBI as premier investigating agency and to eliminate any impression of bias, lack of fairness and objectivity therein.

45. However, the investigation/inquiry monitored by the court does not mean that the court supervises such investigation/inquiry. To supervise would mean to observe and direct the execution of a task whereas to monitor would only mean to maintain surveillance. The concern and interest of the court in such 'court directed' or 'court monitored' cases is that there is no undue delay in the investigation, and the investigation is conducted in a free and fair manner with no external interference. In such a process, the people acquainted with facts and circumstances of the case would also have a sense of security and they would cooperate with the investigation given that the superior courts are seized of the matter. We find that in some cases, the expression 'court monitored' has been

interchangeably used with 'court supervised investigation'. Once the court supervises an investigation, there is hardly anything left in the trial. Under the Code, the investigating officer is only to form an opinion and it is for the court to ultimately try the case based on the opinion formed by the investigating officer and see whether any offence has been made out. If a superior court supervises the investigation and thus facilitates the formulation of such opinion in the form of a report under Section 173(2) of the Code, it will be difficult if not impossible for the trial court to not be influenced or bound by such opinion. Then trial becomes a farce. Therefore, supervision of investigation by any court is a contradiction in terms. The Code does not envisage such a procedure, and it cannot either. In the rare and compelling circumstances referred to above, the superior courts may monitor an investigation to ensure that the investigating agency conducts the investigation in a free, fair and time-bound manner without any external interference.

46. The Court is of the view that a fair, proper and full investigation by the CBI into every accusation by the CBI in respect of allocation of coal blocks shall help in retaining public confidence in the conduct of inquiry/investigation. Moreover, the Court-monitoring in a matter of huge magnitude such as this shall help in moving the machinery of

inquiry/investigation at appropriate pace and its conclusion with utmost expedition without fear or favour.

47. As regards the first query put to the learned Attorney General on 10.07.2013, we are of the view that the said query takes within its fold one of the facets of the constitutionality of Section 6A and since that is under consideration by the Constitution Bench of this Court, we do not think it is necessary to deal with that query. Accordingly, this order is confined to the second query, namely, whether the approval of the Central Government is necessary in respect of Court-monitored or Court-directed investigations.

48. There is no doubt that the objective behind the enactment of Section 6A is to give protection to certain officers (Joint Secretary and above) in the Central Government at the decision making level from the threat and ignominy of malicious and vexatious inquiries/investigations and the provision aims to ensure that those, who are in decision making positions, are not subjected to frivolous complaints and make available some screening mechanism for frivolous complaints but the question is: is the restrictive provision contained in Section 6A rendered nugatory or its objective is otherwise not achieved where the investigations into the crime under PC Act are monitored by the constitutional court? We do not think so. The constitutional courts are the sentinels of justice and have been

vested with extraordinary powers of judicial review to ensure that the rights of citizens are duly protected[13].

49. The power under Article 142(1) of the Constitution which provides that Supreme Court in exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any "cause" or "matter" has been explained in large number of cases. It has been consistently held that such power is plenary in nature. The legal position articulated in *Prem Chand Garg*[14] and *A.R. Antulay*[15], with regard to the powers conferred on this Court under Article 142(1) has been explained in *Delhi Judicial Service Association*[16]. It is exposited by the three Judge Bench in *Delhi Judicial Service Association*[16] that power under Article 142(1) to do "complete justice" is entirely of different level and of a different quality. Any prohibition or restriction contained in ordinary laws cannot act as a limitation on the constitutional power of this Court. Once this Court is in seisin of a cause or matter before it, it has power to issue any order or direction to do "complete justice" in the matter. This legal position finds support from other decisions of this Court in *Poosu*[17], *Ganga Bishan*[18] and *Navnit R. Kamani*[19].

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[13] Babubhai Jamnadas Patel v. State of Gujarat; [(2009) 9 SCC 610]
[14] Prem Chand Garg v. Excise Commissioner, U.P. and Others; [1963 Supp (1) SCR 885]
[15] A.R. Antulay v. R.S. Nayak and Another; [(1988) 2 SCC 602]
[16] Delhi Judicial Service Association, Tis Hazari Court, Delhi v. State of Gujarat and others; [(1991) 4 SCC 406]
[17] State of U.P. v. Poosu and Another; [(1976) 3 SCC 1]
[18] Ganga Bishan v. Jai Narain; [(1986) 1 SCC 75]
[19] Navnit R. Kamani v. R.R. Kamani; [(1988) 4 SCC 387]

50. The majority view of the Constitution Bench in *Union Carbide*[20], with regard to power of this Court under Article 142 of the Constitution holds the same view as expressed by this Court in *Delhi Judicial Service Association*[16]. The majority view in *Union Carbide*[20] in paragraph 83[21] of the Report has reiterated that the prohibitions or limitations or provisions contained in ordinary laws, cannot *ipso facto,* act as prohibitions or limitations on the constitutional powers under Article 142. Such prohibitions or limitations in the statutes might embody and reflect

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[20] Union Carbide Corporation and Others vs. Union of India and Others; [(1991) 4 SCC 584]

[21] **83.**It is necessary to set at rest certain misconceptions in the arguments touching the scope of the powers of this Court under Article 142(1) of the Constitution. These issues are matters of serious public importance. The proposition that a provision in any ordinary law irrespective of the importance of the public policy on which it is founded, operates to limit the powers of the apex Court under Article 142(1) is unsound and erroneous. In both *Garg* as well as *Antulay cases* the point was one of violation of constitutional provisions and constitutional rights. The observations as to the effect of inconsistency with statutory provisions were really unnecessary in those cases as the decisions in the ultimate analysis turned on the breach of constitutional rights. We agree with Shri Nariman that the power of the Court under Article 142 insofar as quashing of criminal proceedings are concerned is not exhausted by Section 320 or 321 or 482 CrPC or all of them put together. The power under Article 142 is at an entirely different level and of a different quality. Prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under Article 142. Such prohibitions or limitations in the statutes might embody and reflect the scheme of a particular law, taking into account the nature and status of the authority or the court on which conferment of powers — limited in some appropriate way — is contemplated. The limitations may not necessarily reflect or be based on any fundamental considerations of public policy. Sri Sorabjee, learned Attorney General, referring to *Garg case,* said that limitation on the powers under Article 142 arising from "inconsistency with express statutory provisions of substantive law" must really mean and be understood as some express prohibition contained in any substantive statutory law. He suggested that if the expression 'prohibition' is read in place of 'provision' that would perhaps convey the appropriate idea. But we think that such prohibition should also be shown to be based on some underlying fundamental and general issues of public policy and not merely incidental to a particular statutory scheme or pattern. It will again be wholly incorrect to say that powers under Article 142 are subject to such express statutory prohibitions. That would convey the idea that statutory provisions override a constitutional provision. Perhaps, the proper way of expressing the idea is that in exercising powers under Article 142 and in assessing the needs of "complete justice" of a cause or matter, the apex Court will take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly. The proposition does not relate to the powers of the Court under Article 142, but only to what is or is not 'complete justice' of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power. No question of lack of jurisdiction or of nullity can arise.

the scheme of a particular law, taking into account the nature and status of the authority or the Court on which conferment of powers – limited in some appropriate way – is contemplated. The powers under Article 142 are not subject to any express statutory prohibitions.

51. In *Supreme Court Bar Association*[22], this Court stated, "It, however, needs to be remembered that the powers conferred on the Court by Article 142 being curative in nature cannot be construed as powers which authorise the Court to ignore the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to "supplant" substantive law applicable to the case or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly……". The Court, however, went on to say that the constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject.

52. The proper way for the Court, as stated in *Union Carbide*[20] , in exercise of the powers under Article 142 is to take note of the express

[22] Supreme Court Bar Association v. Union of India and Another; [(1998) 4 SCC 409]

prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly. Where the Court finds that statutory limitations are so fundamental that any departure therefrom may result in a consequence directly contrary to the purpose for which the plenary power under Article 142(1) is meant, obviously, the Court will exercise its power appropriately having regard to the statutory limitations.

53. The Supreme Court has been conferred very wide powers for proper and effective administration of justice. The Court has inherent power and jurisdiction for dealing with any exceptional situation in larger public interest which builds confidence in the rule of law and strengthens democracy. The Supreme Court as the *sentinel on the qui vive*, has been invested with the powers which are elastic and flexible and in certain areas the rigidity in exercise of such powers is considered inappropriate.

54. In the event of any senior officer (Joint Secretary or above) or the Central Government in an ongoing inquiry/investigation by the CBI being monitored by the Court has reason to believe that such officer may be unnecessarily harassed by the CBI, then the Central Government or the senior officer (Joint Secretary or above) can always apply to the Court which is monitoring the inquiry/investigation for protection of his rights.

Such legal course being available to the category of officers covered by Section 6A, we hardly find any merit in the submission of the learned Attorney General that requirement of approval under Section 6A cannot be waived even in Court-monitored investigations and inquiries.

55. The argument of the learned Attorney General that Section 6A is in the nature of procedure established by law for the purposes of Article 21 and where consequences follow in criminal law for an accused, the Court is not at liberty to negate the same even in exercise of powers under Article 32 or Article 142 overlooks the vital aspect that Court monitoring of the inquiry/investigation conducted by the CBI is itself a very strong check on the CBI from misusing or abusing its power of inquiry/investigation. The filtration mechanism which Section 6A provides to ensure that the senior officers at the decision making level are not subjected to frivolous inquiry is achieved as the constitutional court that monitors the inquiry/investigation by CBI acts as guardian and protector of the rights of the individual and, if necessary, can always prevent any improper act by the CBI against senior officers in the Central Government when brought before it.

56. When Court monitors the investigation, there is already departure inasmuch as the investigating agency informs the Court about the progress of the investigation. Once the constitutional court monitors the inquiry/investigation which is only done in extraordinary circumstances

and in exceptional situation having regard to the larger public interest, the inquiry/investigation into the crime under the PC Act against public servants by the CBI must be allowed to have its course unhindered and uninfluenced and the procedure contemplated by Section 6A cannot be put at the level which impedes exercise of constitutional power by the Supreme Court under Articles 32, 136 and 142 of the Constitution. Any other view in this regard will be directly inconsistent with the power conferred on the highest constitutional court.

57. In the case of *Committee for Protection of Democratic Rights*[8], the Constitution Bench of this Court has held that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to CBI to investigate a cognizable offence alleged to have been committed within the territory of the State without the consent of the State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. In this regard, it is relevant to refer to the conclusions recorded by the Constitution Bench in clauses vi and vii, paragraph 68 of the Report which read as under:

> "68. (i) to (v) ……
> (*vi*) If in terms of Entry 2 of List II of the Seventh Schedule on the one hand and Entry 2-A and Entry 80 of List I on the other, an investigation by another agency is permissible subject to grant of consent by the State concerned, there is no reason as to why, in an exceptional situation, the Court would be precluded from exercising the same power which the Union could exercise in terms of the provisions of the statute. In our

opinion, exercise of such power by the constitutional courts would not violate the doctrine of separation of powers. In fact, if in such a situation the Court fails to grant relief, it would be failing in its constitutional duty.

(*vii*) When the Special Police Act itself provides that subject to the consent by the State, CBI can take up investigation in relation to the crime which was otherwise within the jurisdiction of the State police, the Court can also exercise its constitutional power of judicial review and direct CBI to take up the investigation within the jurisdiction of the State. The power of the High Court under Article 226 of the Constitution cannot be taken away, curtailed or diluted by Section 6 of the Special Police Act. Irrespective of there being any statutory provision acting as a restriction on the powers of the Courts, the restriction imposed by Section 6 of the Special Police Act on the powers of the Union, cannot be read as restriction on the powers of the constitutional courts. Therefore, exercise of power of judicial review by the High Court, in our opinion, would not amount to infringement of either the doctrine of separation of power or the federal structure."

58. Learned Attorney General with reference to the above judgment submitted that the principle of law laid down in the case of *Committee for Protection of Democratic Rights*[8] cannot be extended to requirement of prior approval under Section 6A. He submitted that *Committee for Protection of Democratic Rights*[8] was concerned with Section 6 of the DSPE Act while the present case is concerned with Section 6A which is totally different provision. Learned Attorney General has argued that the need for consent of the State Government before investigation is carried out by the CBI in terms of Section 6 of the DSPE Act is a requirement that flows from the federal structure of the

Constitution, because police and law and order are State subjects. On the other hand, he argues that the need for prior approval under Section 6A is in the nature of protection conferred on a particular cadre of persons, which is necessitated by the need of administration. Therefore, no parallel can be drawn between two provisions and the law laid down in respect of one provision cannot be extended to the other.

59. Learned Attorney General is right that the two provisions, namely, Section 6 and Section 6A are different provisions and they operate in different fields, but the principle of law laid down in respect of Section 6, in our view, can be extended while considering applicability of Section 6A to the Court-monitored investigations. If Section 6 necessitates the prior sanction of the State Government before investigation is carried out by the CBI in terms of that provision and the principle of law laid down by the Constitution Bench of this Court is that the constitutional courts are empowered to direct the investigation of a case by CBI and in such cases no prior sanction of the State Government is necessary under Section 6 of the DSPE Act, there is no reason why such principle is not extended in holding that the approval of the Central Government is not necessary under Section 6A of the DSPE Act in a matter where the inquiry/investigation into the crime under the PC Act is being monitored by the Court. It is the duty of this Court that anti-corruption laws are

interpreted and worked out in such a fashion that helps in minimizing abuse of public office for private gain.

60. Learned Attorney General heavily relied upon the observations made in paragraph 28 by the Constitution Bench of this Court in *K. Veeraswami*[4]. He, particularly, referred to the following observations with emphasis on the highlighted portion:

> "28. . . . . Section 6 is primarily concerned to see that prosecution for the specified offences shall not commence without the sanction of a competent authority. That does not mean that the Act was intended to condone the offence of bribery and corruption by public servant. Nor it was meant to afford protection to public servant from criminal prosecution for such offences. It is only to protect the honest public servants from frivolous and vexatious prosecution. The competent authority has to examine independently and impartially the material on record to form his own opinion whether the offence alleged is frivolous or vexatious. The competent authority may refuse sanction for prosecution if the offence alleged has no material to support or it is frivolous or intended to harass the honest officer. But he cannot refuse to grant sanction if the material collected has made out the commission of the offence alleged against the public servant. Indeed he is duty bound to grant sanction if the material collected lend credence to the offence complained of. There seems to be another reason for taking away the discretion of the investigating agency to prosecute or not to prosecute a public servant. When a public servant is prosecuted for an offence which challenges his honesty and integrity, the issue in such a case is not only between the prosecutor and the offender, but the State is also vitally concerned with it as it affects the morale of public servants and also the administrative interest of the State. The discretion to prosecute public servant is taken away from the prosecuting agency and is vested in the authority which is competent to remove the public servant. <u>The authority competent to remove the public servant would be in a better position than the prosecuting agency to assess the material</u>

collected in a dispassionate and reasonable manner and determine whether sanction for prosecution of a public servant deserves to be granted or not."

61. In *Vineet Narain*[1], this Court distinguished the above observations in paragraphs 34 and 35 of the report which read as under:

"34. The other decision of this Court is in *K. Veeraswami*. That was a decision in which the majority held that the Prevention of Corruption Act applies even to the Judges of the High Court and the Supreme Court. After taking that view, it was said by the majority (per Shetty, J.) that in order to protect the independence of judiciary, it was essential that no criminal case shall be registered under Section 154 CrPC against a Judge of the High Court or of the Supreme Court unless the Chief Justice of India is consulted and he assents to such an action being taken. The learned Attorney General contended that this decision is an authority for the proposition that in case of high officials, the requirement of prior permission/sanction from a higher officer or Head of the Department is permissible and necessary to save the officer concerned from harassment caused by a malicious or vexatious prosecution. We are unable to accept this submission.

35. The position of Judges of High Courts and the Supreme Court, who are constitutional functionaries, is distinct, and the independence of judiciary, keeping it free from any extraneous influence, including that from executive, is the rationale of the decision in *K. Veeraswami*. In strict terms the Prevention of Corruption Act, 1946 could not be applied to the superior Judges and, therefore, while bringing those Judges within the purview of the Act yet maintaining the independence of judiciary, this guideline was issued as a direction by the Court. The feature of independence of judiciary has no application to the officers covered by the Single Directive. The need for independence of judiciary from the executive influence does not arise in the case of officers belonging to the executive. We have no doubt that the decision in *K. Veeraswami* has no application to the wide proposition advanced by the learned Attorney General to support the Single Directive. For the same

reason, reliance on that decision by the IRC to uphold the Single Directive is misplaced."

62. In *Vineet Narain*[1], this Court clarified that the decision in *K. Veeraswami*[4] has no application to the officers covered by the single directive. In other words, the observations made by this Court in *K. Veeraswami*[4] were held to be confined to the Judges of the High Courts and the Supreme Court who are constitutional functionaries and their position being distinct and different from the government officers.

63. The referral order in *Subramanian Swamy (Dr.)*[7] , records the argument advanced on behalf of the Central Government that the view in *Vineet Narain*[1] with regard to the observations in *K. Veeraswami*[4] case was not correct but, in our view, recording the contention of the Central Government in the referral order and the pendency of constitutionality of Section 6A before the Constitution Bench do not mean that what has been said in *Vineet Narain*[1] about the observations in paragraph 28 of *K. Veeraswami*[4] stand obliterated.

64. The fact that the investigation is monitored by the constitutional court is itself an assurance that investigation/inquiry by the CBI is not actuated with ulterior motive to harass any public servant and the investigating agency performs its duties and discharges its responsibility of fair and impartial investigation uninfluenced by extraneous considerations.

65. In light of the above discussion, our answer to the question is in the negative and we hold that the approval of the Central Government is not necessary under Section 6A of the DSPE Act in a matter where inquiry/investigation into the crime under the PC Act is being monitored by this Court. This position holds good in cases which are directed by the Court to be registered and the inquiry/investigation thereon is actually being monitored by this Court.

……J.
(R.M. Lodha)

……J.
(Kurian Joseph)

New Delhi;
December 17, 2013.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL/CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO. 120 OF 2012

Manohar Lal Sharma ….Petitioner

Versus

The Principal Secretary & Ors. ...Respondents

WITH

WRIT PETITION (CIVIL) NO.463 OF 2012

WITH

WRIT PETITION (CIVIL) NO.429 OF 2012

WITH

WRIT PETITION (CIVIL) NO.498 OF 2012

WITH

WRIT PETITION (CIVIL) NO.515 OF 2012

WITH

WRIT PETITION (CIVIL) NO.283 OF 2013

O R D E R

Madan B. Lokur, J.

1. The question for consideration relates to the applicability of Section 6A of the Delhi Special Police Establishment Act, 1946 (hereinafter referred to as the Act) to an inquiry or investigation monitored by a constitutional court. In my opinion, this section has no application to a constitutional court monitored inquiry or investigation. While I agree with the same conclusion arrived at by Brother Justice Lodha, my reasons are quite different.

2. Section 6A of the Act reads as under:

> "**Approval of Central Government to conduct inquiry or investigation**.—(1) The Delhi Special Police Establishment shall not conduct any inquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act, 1988 (49 of 1988) except with the previous approval of the Central Government where such allegation relates to –
>
> 1. the employees of the Central Government of the level of Joint Secretary and above; and
>
> 2. such officers as are appointed by the Central Government in corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by that Government.
>
> (2) Notwithstanding anything contained in sub-section (1), no such approval shall be necessary for case involving arrest of a person on the spot on the charge of accepting or attempting to accept any gratification other than legal remuneration referred to in clause (c) of the *Explanation* to Section 7 of the Prevention of Corruption Act, 1988 (49 of 1988)."

3. At the outset, one must appreciate that a constitutional court monitors an investigation by the State police or the Central Bureau of Investigation (for short the CBI) only and only in public interest. That is the leitmotif of a constitutional court monitored investigation. No constitutional court 'desires' to monitor an inquiry or an investigation (compendiously referred to hereafter as an investigation) nor does it encourage the monitoring of any investigation by a police authority, be it the State police or the CBI. Public

interest is the sole consideration and a constitutional court monitors an investigation only when circumstances compel it to do so, such as (illustratively) a lack of enthusiasm by the investigating officer or agency (due to 'pressures' on it) in conducting a proper investigation, or a lack of enthusiasm by the concerned Government in assisting the investigating authority to arrive at the truth, or a lack of interest by the investigating authority or the concerned Government to take the investigation to its logical conclusion for whatever reason, or in extreme cases, to hinder the investigation.

4. Having made this position clear, the present concern is only with respect to an investigation conducted by the CBI into the allocation of coal blocks, the monitoring of that investigation by this Court and the impact of Section 6A of the Act on the investigation.

Background - The Single Directive

5. Section 6A of the Act was brought on the statute book with effect from 11th September 2003. Prior thereto, the sum and substance of Section 6A of the Act was in the form of a 'Single Directive' issued by the executive Government. The Single Directive protected, *inter alia*, a class of officers from being investigated by the CBI or in the registering of a case against that class of officers. This was through a provision requiring prior sanction of

the Secretary of the concerned Ministry or Department before the CBI undertakes an investigation against an officer of the rank of a Joint Secretary or above. The Single Directive made it clear that "Without such sanction, no inquiry shall be initiated by the SPE (Special Police Establishment)." The relevant extract of the Single Directive has been quoted by Brother Justice Lodha and it is not necessary to repeat it.

6. The Single Directive was the subject of challenge in ***Vineet Narain v. Union of India, (1998) 1 SCC 226***. This Court struck it down, *inter alia*, on three grounds that are best expressed in the words of this Court:

> (i) "The learned Attorney General contended that this decision[23] is an authority for the proposition that in case of high officials, the requirement of prior permission/sanction from a higher officer or Head of the Department is permissible and necessary to save the officer concerned from harassment caused by a malicious or vexatious prosecution. We are unable to accept this submission.
>
> "…….The feature of independence of judiciary has no application to the officers covered by the Single Directive. The need for independence of judiciary from the executive influence does not arise in the case of officers belonging to the executive. We have no doubt that the decision in *K. Veeraswami* has no application to the wide proposition advanced by the learned Attorney General to support the Single Directive." [paragraph 34 and 35 of the Report].
>
> (ii) "In the absence of any statutory requirement of prior permission or sanction for investigation, it cannot be imposed as a condition precedent for initiation of the investigation once jurisdiction is conferred on the CBI to investigate the offence by virtue of the notification under Section 3 of the Act." [paragraph 43 of the Report].

[23] K. Veeraswami v. Union of India, (1991) 3 SCC 655

(iii) "The law does not classify offenders differently for treatment thereunder, including investigation of offences and prosecution for offences, according to their status in life. Every person accused of committing the same offence is to be dealt with in the same manner in accordance with law, which is equal in its application to everyone." [paragraph 44 of the Report].

7. Among other things, this Court also considered a Report given by an Independent Review Committee (IRC) constituted by the Government of India by an order dated 8th September 1997 and noted one of its observations in the preface to its Report, namely,

> "In the past several years, there has been progressive increase in allegations of corruption involving public servants. Understandably, cases of this nature have attracted heightened media and public attention. A general impression appears to have gained ground that the Central investigating agencies concerned are subject to extraneous pressures and have been indulging in dilatory tactics in not bringing the guilty to book. The decisions of higher courts to directly monitor investigations in certain cases have added to the aforesaid belief."

8. Unfortunately, rather than make a serious attempt to consider the Report or the views of this Court, the Single Directive was given a fresh lease of life, and a statutory one at that, by enacting Section 6A in the Delhi Special Police Establishment Act, 1946.

9. The justification for the enactment was the recommendations contained in the Report of the Joint Committee of both Houses of Parliament set up to examine the provisions of the Central Vigilance Commission Bill,

1999. In its Report presented to Parliament on 22nd November 2000 the Joint Committee had this to say:

> "41. The Committee note that many witnesses who appeared before the Committee had expressed the need to protect the bona fide actions at the decision making level. At present there is no provision in the Bill for seeking prior approval of the Commission or the head of the Department etc. for registering a case against a person of the decision making level. As such, no protection is available to the persons at the decision making level. In this regard, the Committee note that earlier, the prior approval of the Government was required in the form of a 'Single Directive' which was set aside by the Supreme Court. The Committee feel that such a protection should be restored in the same format which was there earlier and desire that the power of giving prior approval for taking action against a senior officer of the decision making level should be vested with the Central Government by making appropriate provision in the Act. The Committee, therefore, recommend that Clause 27 of the Bill be accordingly amended so as to insert a new section 6A to the DSPE Act, 1946, to this effect."

10. Furthermore, in the debate in Parliament relating to the Bill, the Union Law Minister stated that the rationale behind the Single Directive was "that those who are in senior decision-making positions, those who have to exercise discretion, those who have to take vital decisions, could be the targets of frivolous complaints." Justifying Section 6A of the Act, the Hon'ble Minister went on to say:

> "Do we allow those complaints against them to go on and those people to be subjected to all these? Or, do we have some screening mechanism whereby serious complaints would be investigated and frivolous complaints would be thrown out? And this is how the single-point directive was born, and in 1988, they replaced the senior

civil servants in the senior decision-making positions by saying "Joint Secretaries and above'. And, if you were to say that there is no protection to be given to you, when you take all the decisions, when you make all the discretions, and anybody can file a complaint, and an inspector or the CBI or the police can raid your house any moment, if this elementary protection is not to be given to the senior decision-makers, you may well have a governance where instead of tendering honest advice to political executives, a very safe, non-committal advice is going to be given."

11. It is under these circumstances that Section 6A of the Act replaced the Single Directive.

12. In his written submissions, learned Attorney-General summed up the discussion by saying that Section 6A is intended "to provide a screening mechanism to filter out frivolous or motivated investigation that could be initiated against senior officers to protect them from harassment and to enable them to take decisions without fear."

Cause for the present discussion

13. Why has the applicability of Section 6A of the Act come up for discussion? Prior to the present case, there was a general outcry that allocations of coal blocks for mining and exploitation were arbitrarily made in various parts of the country to private players which in effect amounted to distribution of largesse by the Central Government to these private players. The financial implications of the allocations came under the scrutiny of the Comptroller and Auditor General of India (C&AG) and, based on the Report

submitted by the C&AG and tabled in Parliament on 16th August 2012, some believed that the allocations were not made with *bona fide* motives and that the whole gamut of allocations ought to be impartially investigated by the CBI. Although the CBI had begun investigations on the basis of directions issued by the Central Vigilance Commission, it was perceived that the CBI was 'going slow' or not actively investigating the allegations perhaps with a view to protect some powerful vested interest. It is under these circumstances that public interest litigation was initiated in this Court. Given the importance of the case and the issues involved, this Court decided, in the larger public interest, to monitor the investigations being conducted by the CBI.

14. While the matter of allocations is being considered on merits, one of the issues that has arisen is with regard to the interpretation of Section 6A of the Act since it was apprehended by the petitioners that despite this Court monitoring the investigations, the Central Government could stall them by declining to give previous approval to the CBI to carry out an inquiry or conduct an investigation into the allegations since officers of the level of Joint Secretary and above would be involved.

15. The issue got precipitated when it was brought to our notice through an application filed by the CBI that previous approval sought by it (to

examine a particular officer) was granted by the Central Government only after some clarifications were given and that too after a lapse of three months.[24] This is what was said by the CBI in paragraph 8 of its application:

> "8. It is relevant to mention that prior to the passing of order dated 08.05.2013, a request had been made vide letter dated 06.03.2013 for approval under Section 6A in three of the RC's. The said approval was initially declined on 22.05.2013. However, after sending a detailed report, sanction was granted by the Government and received by the Respondent no.3 on 12.06.2013."

16. This request for previous approval was in sharp contrast to the submission earlier made by the CBI in ***Centre for Public Interest Litigation v. Union of India***[25] when it had submitted (with reference to Section 6A of the Act) that "as the investigation was directed by this Court, grant of approval/permission is not necessary and the CBI shall investigate into the allegations as per law." The change in stance over the years was highlighted before us by the petitioners who perceived this to be an instance of 'pressure' put on the CBI.

Submissions

17. Learned Attorney-General submitted that though the requirement of previous approval under Section 6A of the Act may seem onerous to an investigating agency or a public interest litigant, its rigour has undergone

[24] I.A. No.14091 of 2013 in Writ Petition (Crl) No.120 of 2012 filed on 8th July 2013
[25] WP (C) No.11550 of 2009 – order dated 4.4.2011 passed by the Delhi High Court

substantial slackening and that this ought to meet the requisites of a non-partisan investigation by the CBI. Reference was made to the recommendations given in March 2011 by a Group of Ministers which dealt, *inter alia*, with the "relevance/need for Section 6A of the Delhi Special Police Establishment Act, 1946". The recommendations were accepted by the Central Government and Office Memorandum No. 372/19/2011-AVD-II (Part-I) dated 26th September, 2011 was issued. The relevant extract of the Office Memorandum reads as follows:-

> "The undersigned is directed to state that the provision of section 6A of the DSPE Act, 1946 provides for safeguarding senior public officials against undue and vexatious harassment by the investigating agency. It had been observed that the requests being made by the investigating agency under said provision were not being accorded due priority and the examination of such proposals at times lacked objectivity. The matter was under consideration of the Group of Ministers constituted to consider measures that can be taken by the Government to tackle Corruption.
>
> The Government has accepted the following recommendation of the Group of Ministers, as reflected in para 25 of the First Report of the Group of Ministers:-
>
> 1. The competent authority shall decide the matter within three months of receipt of request accompanied with relevant documents.
>
> 2. The competent authority will give a Speaking Order, giving reasons for its decision.

(c) In the event a decision is taken to refuse permission, the reasons thereof shall be put up to the next higher authority for information within one week of taking the decision.

(d) Since section 6A specifically covers officers of the Central Government, above the rank of Joint Secretary, the competent authority in these cases will be the Minister in charge in the Government of India. In such cases, intimation of refusal to grant permission along with reasons thereof, will have to be put up to the Prime Minister.

The above decision of the Government is brought to the notice of all Ministries/Departments for due adherence and strict compliance."

18. Learned Attorney-General also submitted that apart from the safeguards introduced by the Office Memorandum, the constitutional courts always have the power of judicial review if previous approval for investigation is withheld for collateral reasons. He submitted that, if necessary, some additional safeguards may also be incorporated by this Court, including that in the event a decision for granting previous approval is not taken within a specified period, a default clause of a deemed previous approval would automatically apply.

19. He justified giving protection to senior officers, who are decision makers, on the ground that the CBI will have only one side of the story before it embarks on an investigation. The senior Government functionary sought to be investigated would not even have a hearing before

investigations commence. Reliance was placed on ***P. Sirajuddin v. The State of Madras, (1970) 1 SCC 595*** to submit that if baseless allegations are made against senior Government officials, it would cause incalculable harm not only to the officer in particular but to the department that he belonged to, in general. The following passage was relied upon:

> "Before a public servant, whatever be his status, is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The lodging of such a report against a person, specially one who like the appellant occupied the top position in a department, even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general."

20. It was also submitted that the fact that an investigation is being monitored by a constitutional court will ensure that the Central Government does not withhold granting previous approval for collateral reasons. It was submitted that there is a presumption that official acts are performed lawfully and it is only to protect a decision maker from undue harassment that Section 6A has been introduced in the Act. Protection of honest public servants from frivolous and vexatious complaints was emphasized by the learned Attorney-General.

21. The learned Attorney-General made a concession to the effect that in the event of the CBI conducting an enquiry, as opposed to an investigation

into the conduct of a senior government officer, no previous approval of the Central Government is required since an enquiry does not have the same adverse connotation that an investigation has.

Discussion

22. Some of the safeguards suggested by the learned Attorney-General find a mention in ***Vineet Narain***. However, these were not specifically accepted or rejected while considering the validity of the Single Directive only because this Court held that the Single Directive had been issued without any legislative sanction and it amounted to interdicting the investigations.

23. No doubt the rigour of Section 6A of the Act has already been diluted by the issuance of the Office Memorandum dated 26th September 2011. But the question is this: Is there a need for a further dilution of Section 6A of the Act in respect of a constitutional court monitored investigation? Is it necessary for the CBI to take the previous approval of the Central Government for investigating a senior official even in a constitutional court monitored investigation?

24. What is an investigation has already been discussed by Brother Justice Lodha and I endorse his views on this. However, what is crucial for an investigation is that it should conclude expeditiously from the point of view

of all concerned: from the point of view of the accused, a quick conclusion to the investigation will clear his name and image in society if he is innocent. This is certainly of considerable importance to a person who has been wrongly accused or framed for an offence; from the point of view of society, a quick closure to investigation is necessary so that those against whom there is evidence of the commission of a crime are tried at the earliest and punished if they are guilty. This, so far as society is concerned, is essential for maintaining the rule of law; and from the point of view of the investigator, an expeditious conclusion of investigations is necessary because greater the delay, greater the chances of evidence being destroyed, witnesses being compromised or the accused being able to manipulate circumstances to his or her advantage.

25. In this light, the interplay between Section 6A of the Act and a constitutional court monitored investigation should be such as to protect senior government officials from frivolous and vexatious complaints and at the same time prevent them from exercising influence or prolonging the grant of previous approval by the Central Government thereby effectively scuttling the investigation.

26. On the protective side, it was submitted by the learned Attorney-General that when the CBI requests for the grant of previous approval, it

presents only one side of the story and it is necessary to give the senior government official an opportunity of explaining his side of the story before approval is granted by the Central Government to conduct investigations by the CBI. Assuming a senior government officer is being unfairly investigated by the CBI in a constitutional court monitored investigation without the previous approval of the Central Government, is it difficult for him or her to approach the constitutional court and present his side of the story and contend that he or she should not be investigated for an alleged offence? It is only the substitution of a forum, from a Minister to a constitutional court, which will consider the officer's request and a fair hearing given by a constitutional court certainly cannot be said to be detrimental to his or her interest. On the contrary, the protection given by a constitutional court will be more real.

27. On the preventive side, one must not forget that senior government officials wield at least some influence. This Court has also cautioned in ***Samaj Parivartan Samudaya v. State of Karnataka, (2012) 7 SCC 407*** that our criminal jurisprudence contemplates that "an investigation should be fair, in accordance with law and should not be tainted. But, at the same time, the court has to take precaution that interested or influential persons are not able to misdirect or hijack the investigation so as to throttle a fair

investigation resulting in the offenders escaping the punitive course of law." Effectively, therefore, Section 6A of the Act calls for an equal treatment before law for all, and that is precisely what a constitutional court monitored investigation seeks to achieve – preventing misuse of the law.

28. The Office Memorandum relied on by the learned Attorney-General can hardly be termed as efficacious in any manner. Firstly, it cannot be used to interpret a provision of law such as Section 6A of the Act. I am not inclined to give any importance to the Office Memorandum for understanding or appreciating Section 6A of the Act. Secondly, the Office Memorandum can always be withdrawn, modified or amended on the whim of the executive Government, on the same rationale as given for enacting Section 6A of the Act, namely, for 'protecting' a senior government official. Therefore, it does not effectively prevent possible misuse of the law.

29. The entire issue may be looked at from another angle. Section 156 of the Criminal Procedure Code enables the local police to investigate a cognizable offence while Section 155 of the Criminal Procedure Code enables a police officer to investigate a non-cognizable offence after obtaining an appropriate order from the magistrate having power to try such case or commit the case for trial regardless of the status of the concerned officer. Therefore, the local police may investigate a senior Government

officer without previous approval of the Central Government, but the CBI cannot do so. This is rather anomalous.

30. This anomaly has, in fact, occurred. In ***Centre for PIL v. Union of India, (2011) 4 SCC 1*** investigations were conducted by the local police in respect of a senior government official, without any previous approval, and a challan filed in the court of the Special Judge dealing with offences under the Prevention of Corruption Act, 1988. It is difficult to understand the logic behind such a dichotomy unless it is assumed that frivolous and vexatious complaints are made only when the CBI is the investigating agency and that it is only the CBI that is capable of harassing or victimizing a senior Government official while the local police of the State Government does not entertain frivolous and vexatious complaints and is not capable of harassing or victimizing a senior government official. No such assumption can be made.

31. With regard to the time factor for taking a decision, as proposed by the learned Attorney-General it is worth referring to ***Dr. Subramanian Swamy v. Dr. Manmohan Singh, (2012) 3 SCC 64*** wherein this Court noted in paragraph 17 of the Report as follows:-

> "During the course of hearing, the learned Attorney General filed written submissions. After the hearing concluded, the learned Attorney General filed supplementary written submissions along with

a compilation of 126 cases in which the sanction for prosecution is awaited for periods ranging for more than one year to a few months."

32. Referring to this situation, this Court observed in paragraph 70 of the Report as follows:-

> "Therefore, in more than one-third cases of request for prosecution in corruption cases against public servants, sanctions have not been accorded. The aforesaid scenario raises very important constitutional issues as well as some questions relating to interpretation of such sanctioning provision and also the role that an independent judiciary has to play in maintaining the Rule of Law and common man's faith in the justice-delivering system. Both the Rule of Law and equality before law are cardinal questions in our constitutional laws as also in international law and in this context the role of the judiciary is very vital."

33. It is true that in ***Swamy*** this Court was referring to delays in sanctions for prosecution but it is not unlikely that a similar scenario may play itself out in respect of the grant of previous approval for investigation notwithstanding time lines being laid down as mentioned in the Office Memorandum. This is because if the time lines are not adhered to, it is unlikely that the CBI, in the absence of any realistic functional autonomy, will be able to press the Central Government beyond a point for expeditious approval for investigating an offence against a senior government official. Investigations can be paralyzed by unwarranted delays, both intentional and unintentional.

34. Equality before law has been emphasized by this Court in ***Sirajuddin*** in the passage cited by the learned Attorney-General. This has also been emphasized in ***Swamy*** in the passage quoted above. In ***Vineet Narain***, the issue of equality before law was adverted to in paragraph 44 of the Report. Keeping this salutary equality principle in mind, it is necessary that Section 6A be so interpreted that the requirement of a previous approval is not necessary when an investigation by the CBI is being monitored by a constitutional court. The protection afforded to a senior government officer can be adequately taken care of by a fair and impartial hearing in a constitutional court; the preventive mechanism for a fair investigation can be impartially taken care of by a constitutional court; expeditious and non-partisan conclusion of an investigation can be and will undoubtedly be monitored by a constitutional court. More importantly, public interest will be taken care of if Section 6A of the Act is interpreted as not putting a fetter on the power of a constitutional court in a case of a continuing mandamus.

35. The learned Attorney-General is right in saying that official acts are presumed to have been done in accordance with law. While this certainly applies to senior government officers, it equally applies to the CBI which, it is presumed, will 'officially' act against a senior government officer in a constitutional court monitored investigation only if it is confident that there

is enough material before it to conduct an investigation. It is not possible to assume that in a constitutional court monitored investigation the CBI will, in a trigger-happy manner, ride roughshod and target senior government officers only because they are empowered to do so. The submission of the learned Attorney-General must equally apply to the CBI and an official act of the CBI must also be presumed to have been done in accordance with law.

36. Interestingly, as noted in ***Subramaniam Swamy v. Director (CBI), (2005) 2 SCC 317*** no previous approval for investigation was required by the CBI from the date of decision in ***Vineet Narain*** (18th December 1997) till the insertion of Section 6-A of the Act with effect from 12th September 2003 except for a brief period of two months from 25th August 1998 to 27th October 1998. Absolutely no material was placed before us to suggest that during the period when the Single Directive was not in operation, nor was Section 6A of the Act on the statute book, the CBI investigated frivolous and vexatious complaints against senior government officers or harassed any of them in any way. The fear that decision makers in the Government will be wary of taking a *bona fide* decision that may inadvertently stir up an avoidable controversy does not appear to be based on any material.

37. Finally, a constitutional court monitored investigation is nothing but the adoption of a procedure of a 'continuing mandamus' which traces its

origin, like public interest litigation, to Article 32 of the Constitution and is our contribution to jurisprudence. This has been sufficiently discussed in ***Vineet Narain*** and there is no present necessity of any further discussions on this. In ***M.C. Mehta v. Union of India, (2008) 1 SCC 407*** this Court referred, in the context of ongoing investigations, to a 'continuous mandamus' and observed that:

> "The jurisdiction of the Court to issue a writ of continuous mandamus is only to see that proper investigation is carried out. Once the Court satisfies itself that a proper investigation has been carried out, it would not venture to take over the functions of the Magistrate or pass any order which would interfere with his judicial functions."

38. The question therefore is, can a statutory fetter such as Section 6A of the Act bind the exercise of plenary power by this Court of issuing orders in the nature of a continuing mandamus under Article 32 of the Constitution? The answer is quite obviously in the negative. Any statutory emasculation, intended or unintended, of the powers exercisable under Article 32 of the Constitution is impermissible.

39. In the Constitution Bench decision in ***State of West Bengal v. Committee for Protection of Democratic Rights, (2010) 3 SCC 571*** the question that arose was whether the High Court could direct the CBI to investigate a cognizable offence, which is alleged to have taken place within

the territorial jurisdiction of a State, without the consent of the State Government. Apart from the constitutional issue relating to the separation of powers, the other issue related to the statutory bar on investigations, without the consent of the State Government, imposed by Section 6 of the Act. This Section reads as follows:

> **6. Consent of State Government to exercise of powers and jurisdiction**.—Nothing contained in Section 5 shall be deemed to enable any member of the Delhi Special Police Establishment to exercise powers and jurisdiction in any area in a State, not being a Union Territory or railway area, without the consent of the Government of that State."

40. The Constitution Bench discussed the issue of separation of powers and later dealt with the statutory bar in the context of judicial review. The Constitution Bench referred (in paragraph 51 of the Report) to the speech of Dr. Ambedkar in the Constituent Assembly, with reference to Article 32 of the Constitution, wherein he said.

> "If I was asked to name any particular article in this Constitution as the most important - an article without which this Constitution would be a nullity - I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance."

Thereafter, explaining the importance of clause (2) of Article 32 and the expression "in the nature of" used therein, the Constitution Bench held, in

paragraph 53 of the Report that the power conferred is "in the widest terms and is not confined to issuing the high prerogative writs specified in the said clause but includes within its ambit the power to issue any directions or orders or writs which may be appropriate for enforcement of the fundamental rights. Therefore, even when the conditions for issue of any of these writs are not fulfilled, this Court would not be constrained to fold its hands in despair and plead its inability to help the citizen who has come before it for judicial redress (per P.N. Bhagwati, J. in *Bandhua Mukti Morcha* v. *Union of India*[26])."

41. Concluding the discussion, the Constitution Bench held (in paragraph 68(vii) of the Report) that the power of judicial review exercisable by a constitutional court cannot be restricted by a statutory provision. It was held as follows:

> (*vii*) When the Special Police Act itself provides that subject to the consent by the State, CBI can take up investigation in relation to the crime which was otherwise within the jurisdiction of the State police, the Court can also exercise its constitutional power of judicial review and direct CBI to take up the investigation within the jurisdiction of the State. The power of the High Court under Article 226 of the Constitution cannot be taken away, curtailed or diluted by Section 6 of the Special Police Act. Irrespective of there being any statutory provision acting as a restriction on the powers of the Courts, the restriction imposed by Section 6 of the Special Police Act on the powers of the Union, cannot be read as restriction on the powers of the constitutional courts. Therefore, exercise of power of judicial

[26] (1984) 3 SCC 161

review by the High Court, in our opinion, would not amount to infringement of either the doctrine of separation of power or the federal structure."

42. The law laid down by the Constitution Bench vis-à-vis a High Court exercising judicial review under Article 226 of the Constitution and a statutory restriction under Section 6 of the Act, would apply (perhaps with greater vigour) *mutatis mutandis* to the exercise of judicial review by this Court under Article 32 of the Constitution with reference to a statutory restriction imposed by Section 6A of the Act. That being so, Section 6A of the Act must be meaningfully and realistically read, only as an injunction to the executive and not as an injunction to a constitutional court monitoring an investigation under Article 32 of the Constitution in an exercise of judicial review and of issuing a continuing mandamus.

43. The need for a separate opinion has arisen since I have some reservations on the interpretation of the decisions of this Court referred to by Brother Justice Lodha with regard to the plenitude of powers exercisable by this Court under Article 142 of the Constitution. Those reservations are not at all material for the present since the conclusion arrived at is the same – the route being different. While Brother Justice Lodha has relied on Article 142 of the Constitution to arrive at a conclusion that Section 6A of the Act has

no application to a constitutional court monitored investigation, I have reached the same conclusion by relying, *inter alia*, on Article 32 of the Constitution and the discussion on judicial review found in ***Committee for Protection of Democratic Rights***.

.....J.
(Madan B. Lokur)

New Delhi;
December 17, 2013