

## Sh. B.S. Thind and etc. Vs State of H.P. and Another

**Court:** High Court of Himachal Pradesh

**Date of Decision:** April 6, 1992

**Acts Referred:** Criminal Procedure Code, 1973 (CrPC) â€” Section 15A, 165, 165(1), 165(3), 165(5)

Himachal Pradesh Prevention of Specific Corrupt Practices Act, 1983 â€” Section 8, 9

Penal Code, 1860 (IPC) â€” Section 120B, 166, 167, 323, 34

Prevention of Corruption Act, 1988 â€” Section 13, 13(2)

**Citation:** (1992) CriLJ 2935

**Hon'ble Judges:** Kamlesh Sharma, J

**Bench:** Single Bench

**Advocate:** H.S. Mattewal, H.S. Rair and S.D. Vasudeva, for the Appellant; Inder Singh, T.R. Chandel and R.L. Sood, (for No. 2), for the Respondent

**Final Decision:** Allowed

### Judgement

@JUDGMENTTAG-ORDER

Kamlesh Sharma, J.

Both these Criminal Revisions are being disposed of by a common judgment as these arise out of the same order

dated 31st October, 1991 passed by the Chief Judicial Magistrate, Shimla, in application No. 66/2 of 1991 but the documents on the file of

Criminal Revision No. 109 of 1991 will be referred to.

2. A case F. I. R. No. 21 dated 16th January, 1991 u/s 120B IPC, Section 13(d)(1)(ii) & (iii) of the Prevention of Corruption Act and Sections

8(c) and 9(c) of the H.P. Prevention of Specific Corrupt Practices Act, 1983, Police Station, Enforcement, South Zone, Shimla, was registered

against M/s. Shimla Engineers and Builders, 9, 1st Floor Lower Mall, Shimla, and Ors., Petitioner, Sh. B. S. Thind, presently working as Deputy

Inspector General of Police, Enforcement, South Zone, Shimla, took up the investigation of the case and on 17th January, 1991 caused search to

be made through his the then Superintendent of Police, Sh. Gurbaksh Singh of the premises of 9/1, Lower Mall, Shimla; 25, the Mall, system

Sales, Shimla and 19, Eastern Upper Plats, the Mall, Shimla. In fact, search was made in the premises of 25, the Mall, Shimla, only and certain

documents were taken into possession vide Seizure Memo, Annexure "C to the petition. These documents pertain to M/s. Shimla Engineers and -

Builders and were produced by respondent Sh. Sharat Chander Rai, one of its partners voluntarily as mentioned in the Seizure Memo itself.

Similarly, searches of residential premises of other co-accused, Sh. J. S. Parihar, Executive Engineer, Nathpa Jhakri Project, Sh. M. C. Tiwari,

Member (Project) H.P.S.E.B. (retired) were also got conducted by other Police Officers. The search of the house of Sh. O.P. Mahajan, Chief

Engineer, Nathpa Jhakri Project, was conducted by the petitioner, Sh. B. S. Thind, himself.

3. On 24th January, 1992, while granting anticipatory bail to respondent and other co-accused, learned brother D. P. Sood, J. ordered that

Zinmeys of the case be signed by the Registrar of this Court and it was done. Thereafter, the respondent filed a Criminal complaint under Sections

166/167/466/120-B read with Section 34 IPC against the petitioners in both the revision petitions in the Court of the Chief Judicial Magistrate,

Shimla. Copy of the complaint is on record as Annexure "D" to the petition. The complaint contained two sets of allegations. One set of allegations

pertains to alleged criminal tres-pass by the petitioners in the premises 25, the Mall, Shimla, where the proprietor of System Sales, Sh. Rakesh

Bhatnagar, has his individual office. The other set of allegations are for forging documents pertaining to searches conducted of the residences of

S/Sh. J. S. Parihar and M. C. Tiwari. It is alleged that since these documents are of earlier dates to 24th January, 1991 and not signed by the

Registrar (vig.) of this Court in pursuance to the order dated 24th January, 1991, these are false and forged ones. Copies of these documents are

filed as Annexures "B" and "C" to the complaint Annexure "D" to the petition (Paged 54 to 62).

4. The Chief Judicial Magistrate, Shimla, took cognizance of the complaint and directed issue of process to the petitioners vide his order dated 5th

July, 1991. The petitioners appeared in the case and moved an application dated 29th July, 1991 u/s 197 Cr. P. C. praying for dropping the

proceedings on the ground that the mandatory requirement of sanction has not been complied with. After hearing the parties, the Chief Judicial

Magistrate rejected the prayer of the petitioners vide his order dated 31-10-1991 and summoned the prosecution evidence for the next date. The

conclusions of the Chief Judicial Magistrate as stated in Para 21 of this judgment are as under :--

A perusal of above circumstances would prima facie reveal that at this stage there is no reasonable nexus between the raid conducted and the

investigation of F.I.R. No. 21. If at all, the premises of Shri Rakesh Bhatnagar were required to be searched, it could be done after preparing

record of satisfaction to conduct such search. Therefore, the accused-applicants cannot pretend or fancifully claim that such search was a part of

their duty without establishing so on file which can be done only after they get the opportunity to lead evidence or to put their case across when the

complainant leads his evidence. Similar is true about the allegation of fabrication of records which is, of course, required to be proved by the

complainant and rebutted by the applicants. This is not the stage when the innocence or otherwise of the accused-applicants or their having acted

in discharge or purported discharge of their official duty can be adjudicated. [See : State of Bihar and Another Vs. P.P. Sharma, IAS and Another,

5. For coming to the findings that there was no reasonable nexus between the search of the premises of Sh. Rakesh Bhatnagar and official duties of

Sh. B. S. Thind as Investigating Officer, the Chief Judicial Magistrate has presumed that no record was prepared under Sub-sections (1) and (3)

of Section 165 Cr.P.C. Mr. Mattewal, learned counsel for the petitioner, has urged that the Chief Judicial Magistrate was not justified in making

such a presumption when the record prepared by Sh. B. S. Thind was before him. By record, Mr. Mattewal means Zimneys of that date when

search was made and search order which was given to Sh. Gurbaksh Singh Superintendent Police and not any other separate record. The relevant

portion of the Zimneys is as under:

...and the premises of the concerned officials/firms wherever the accused persons/firms have resided or are residing or the business premises of the

firms are located or from where the firms are actually doing business are searched as there is every likelihood that documentary evidence in the

shape of letters, correspondence which may have passed between the various co-conspirators for the achievement of the main object of

conspiracy are being concealed in the above mentioned places and that the aforesaid documentary evidence is necessary for the purposes of

investigation in the present case and that such things referred to above cannot in my opinion be otherwise obtained without undue delay and

without searching the aforesaid premises and there is no time to approach the Court for search warrants, I am of the belief that search of the above

mentioned premises is necessary for purposes of investigation of this case. Further keeping in view the nature and magnitude of the offences in

question, I am of the belief that the entire evidence concerning this case especially with respect to conspiracy may not be available in the office

record and there is every possibility that the accused may be concealing the documents or other things concerning the case at the places where

they have been residing in the past or are residing at present and as such there are reasonable grounds for believing that anything necessary for the

purposes of investigation into the case may be found at the places where the accused persons are residing or have been residing or where the

premises of the concerned firm are located or from the premises where the partners of the accused firm conduct their business. Therefore, search

of the aforesaid places are necessary for the purposes of investigation to unearth the entire racket of conspiracy and to collect all relevant evidence

of the case....I have already prepared the search orders stating the ground of search and reasons for not obtaining the orders of the Court, in

respect of house search of Shri M. C. Tiwari Member Projects (Retd) MPSEB Shanti Niwas Kelston, J. S. Parihar Executive Engineer Nathpa

Jhakri Project F--7 Housing Board Colony Kelston. I will be conducting the house search of Shri O. P. Mahajan....

At this time the following officers alongwith their vehicles and staff have reported at my residence as directed.

1. Sh. A. N. Sharma SP (South Zone)
2. Sh. Gurbux Singh SP (Adm. & Operations)
3. Sh. Rama Nand DSP
4. Sh. Adi Ram DSP
5. Sh. Tarlochan Singh DSP.

The facts of the case have been brought to their notice and search orders have been handed over to Shri A. N. Sharma, Sh. Harbhajan Singh &

Sh Gurbux Singh for searching the houses of Shri M. C. Tiwari and J. S. Parihar and business premises of the firm M/s. Shimla Engineers and

Builders respectively and the record made also being sent to the Magistrate as required u/s 165 (5) of the Cr.P.C.

6. The search order dated 17th January, 1991 given to Sh. Gurbaksh Singh, Superintendent Police is:--

Case FIR No. 21/91 dated 16-1-91 u/s 120 B IPC Section 13(d)(i)(ii)(iii) read with Section 13(2) Prevention of Corruption Act 1988 and

Sections 8(c) and 9 (a) of the Himachal Pradesh Prevention of Specific Corrupt Practices Act 1983 Police Station Enforcement South Zone

Shimla has been registered against the partners of the firm M/s. Shimla Engineers and Builders 9 (1st floor) Lower Mall Shimla, Shri O. P.

Mahajan Chief Engineer Nathpa Jhakri Project and Shri J. S. Parihar XEN Nathpa Jhakri Project and Sh. M. C. Tiwari (Retd.) Member Projects

Himachal Pradesh State Electricity Board.

From the contents of the FIR it appears that serious offences have been committed by the partners of the firm M/s. Shimla Engineers and Builders

in criminal conspiracy with the above mentioned accused and in order to collect relevant evidence immediately it would be in the interest of justice

and investigation if the business premises of the firm M/s. Shimla Engineers and Builders located at 9/1st Floor) Lower Mall Shimla are searched.

It is reliably learnt that most of the business of the firm is transacted from the premises of System Sales 25 the Mall Shimla as one of the partners is

common and sometimes from the premises of another partner Sharat Chander Rai located at 19 Eastern Upper flat the Mall Shimla. Hence the

search of both these premises along with the one at the Lower Mall is necessary for the purposes of investigation as there is every likelihood that

documentary evidence in the shape of letters, correspondence which may have passed between the various co-conspirators for the achievement of

the main object of the conspiracy are being concealed in the above mentioned places and that the above mentioned documentary evidence is

necessary for the purposes of investigation in the present case and that such things referred to above cannot in my opinion be otherwise obtained

without undue delay and without searching the aforesaid premises and there is no time to approach the court for search warrants, I am of the belief

that search of the abovementioned premises is necessary for the purposes of investigation of this case. Further keeping in view the nature and

magnitude of the offences in question I am of the belief that the entire evidence concerning the case especially with respect to conspiracy may not

be available in the office record and there is every possibility that the accused may be concealed the documents or other things concerning the case

at either of the following premises (1) 9 (1st Floor) Lower Mall Shimla (2) 25 the Mall System Sales Shimla (3) 19 Eastern Upper Flat, the Mall

Shimla and as such there are reasonable grounds for believing that anything necessary for the purposes of investigation of the case may be found at

the above mentioned three addresses. Therefore search of these three premises are necessary for the purposes of investigation and to unearth the

entire racket of conspiracy and to collect all relevant evidence of the case.

As I am proceeding to search the residential premises of Shri O. P. Mahajan then Chief Engineer Nathpa Jhakri Project, I hereby direct Shri

Gurbux Singh, SP (Administration) Enforcement to search the premises of 9 (1st Floor) Lower Mall, Shimla, 25 the Mall System Sales Shimla,

and 19 Eastern upper Flat the Mall Shimla for the things already mentioned above. Shri Gurbux Singh, SP (Administration) Enforcement is also

directed to search for the books of account and register of machinery and list of employees of M/s. Shimla Engineers and Builders in the above

three premises as this record is also necessary for the purposes of investigation.

7. These Zimneys and the search order were signed by the Registrar (Vig.) of this Court and there is no dispute that this record was prepared

before search was conducted in the premises of Sh. Rakesh Bhatnagar.

8. On the other hand, the learned counsel for respondent No. 2, Sh. Inder Singh has stressed that record as envisaged under Sub-section. (1) of

Section 165, Cr.P.C. is required to be prepared separately and cannot form part of Zimneys. Copies of record prepared under Sub-section (1)

and (3) of Section 165, Cr.P.C. are not only sent to nearest Magistrate empowered to take cognizance of the offence but copies thereof are also

supplied to owner or occupier of the place searched, on his making application as provided by Sub-section (5) of Section 165, Cr.P.C. If such

record forms part of Zimneys, it cannot be made available to the owner/ occupier of the place searched who is an accused as Zimneys are

privileged documents under Sub-section (3) of Section 172, Cr.P.C. \ With the result the provision of Sub-section (5) of Section 165, Cr.P.C. is

rendered nugatory and a valuable right given to the owner/occupier of the place searched who is an accused is lost. For making this submission,

the learned counsel has relied upon a decision in Sanchaita Investments and Others Vs. State of West Bengal and Others, In this case, the learned

Judges refused to take into consideration the Zimneys for holding that the records were prepared under Sub-section (1) of Section 165, Cr.P.C.

and opined that such record should be prepared independently of Zimneys.

9. There is merit in this submission made on behalf of respondent No. 2. In the present case, record was made under both the Sub-section (1) and

(3) of Section 165, Cr.P.C. So far Sub-section. (3) is concerned, independent record in the form of search order is there. But for causing search

of the premises 25, the Mall, Shimla, where Sh. Rakesh Bhatnagar was running his individual business under the name and style of System Sales,

the satisfaction that documents pertaining to M/s. Shimla Engineers and Builders might be found there and could not be otherwise obtained without

any delay was recorded in the Zimneys of 17th January, 1991. This is certainly not in consonance with the provisions of Sub-section (i) of Section

165, Cr.P.C. and also takes away the right of Sh. Rakesh Bhatnagar, occupier of the place searched to get copy of that record as provided under

Sub-section (5) of Section 165, Cr.P.C. because being an accused he is not entitled to have access to Zimneys as laid down under Sub-section

(3) of Section 172, Cr.P.C. For this reason, copies of Zimneys containing record under Sub-section (1) of Section 165, Cr.P.C. have not been

supplied to Sh. Rakesh Bhatnagar. Only copies of search order and seizure memo have been supplied and also submitted in the court of the trial

Judge though late and only after a grievance was made in this regard.

10. From the above stated facts and circumstances on record, it appears that provisions of Sub-section (1) and (5) of Section 165, Cr.P.C. have

not been complied with strictly. Whether there is substantial compliance thereof and what is the effect of their non-compliance to the extent it has

been found hereinabove on recovery, seizure memo, investigation or trial is not in issue before this Court. In the present revision petitions, the point

for consideration and decision of this Court is whether such non-compliance of Sub-sections (1) and (5) of Section 165, Cr.P.C. renders the entry

of Sh. B. S. Thind in the searched premises as illegal and unauthorised and amounts to trespass as alleged by respondent No. 2 in his complaint or

Sh. B. S. Thind was acting or purporting to act in discharge of his official duty. The words ""acting or purporting to act in discharge of his official

duty"" have been interpreted by the Supreme Court of India in a catena of cases but for the purpose of this case, suffice it to refer to a few of them.

11. In paras 18 and 19 of the judgment in B. Saha and Others Vs. M.S. Kochar, Sarkaria, J., speaking for the Bench held :--

18. The words ""any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty"" employed

in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the section will

be rendered altogether sterile, for, ""it is not part of an official duty to commit an offence, and never can be."" In the wider sense, these words will

take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed

or purports to be performed. The right approach to the import of these words lies between these two extremes. While on the one hand, it is not

every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section

197(1), an act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution under the said

provision. As pointed out by Ramaswamy, J., in Baijnath Gupta and Others Vs. The State of Madhya Pradesh, at p. 181 ""it is the quality of the act

that is important, and if it falls within the scope and range of his official duties, the protection contemplated by Section 197 of the Criminal

Procedure Code will be attracted.

19. In sum, the sine qua non for the applicability of this section is that the offence charged, be it one of commission or omission, must be one which

has been committed by the public servant either in his official capacity or under colour of the office held by him.

12. Further in paras 20 and 21, the learned Judge referred to the observations made in the earlier judgments and said :--

20. While the question whether an offence was committed in the course of official duty or under colour of office, cannot be answered

hypothetically, and depends on the facts of each case, one broad test for this purpose, first deduced by Varadachariar, J., of the Federal Court in

Hori Ram v. Emperor, 1939 FCR 159 : 1939 Cri LJ 468 is generally applied with advantage. After referring with approval to those observations

of Varadachariar, J., Lord Simonds in AIR 1948 128 (Privy Council) tersely reiterated that the "test may well be whether the public servant, if

challenged, can reasonably claim, that what he does, he does in virtue of his office.

21. Speaking for the Constitution Bench of this Court, Chandrasekhar Aiyar, J., restated the same principle, thus :--

... in the matter of grant of sanction u/s 197, the offence alleged to have been committed by the accused must have something to do, or must be

related in some manner, with the discharge of official duty... there must be a reasonable connection between the act and the discharge of official

duty the act must bear such relation to the duty that the accused could lay a reasonable claim, but not a pretended or fanciful claim, that he did it in

the course of the performance of his duty.

13. In a recent case State of Bihar and Another Vs. P.P. Sharma, IAS and Another, K. Ramaswamy, J., in his concurring judgment observed in

para 35 as under:--

Investigation of a crime is not of a routine duty, in particular in intractable terrains of high places committed with dexterity and sophistication. The

unfounded threat of mala fides or bias often deter a sincere and dedicated investigator to make indepth investigation causing catastrophic incursion

on the effectivity to connect the offender with crime which would serve the detractor's purpose....

14. Further, while dealing with the point that what is the test to be applied in a case to find out whether sanction is required or not, the learned

Judge in paras 63, 64 and 65 of the judgment said:--

... The object behind prior sanction is to prevent malacious, vexatious and unnecessary harassment to a public servant by laying false or frivolous

accusation or prosecution. In other words Sections 197(1), 15-A and related sections intended to immune a public servant who discharges his

duties honestly and diligently from the threat of prosecution. Honest discharges of public duty would impinge adversely of the interests, acts or

omissions of private persons who would be prone to harass in criminal proceedings and prosecution to demoralise a public servant.

64. The next between the discharge of the public duty and the offending act or emission must be inseparable. The obvious reason is to balance the

public good and efficiently of the performance of the public duty by a public servant and the legitimate and bona fide grievance of an aggrieved

person. Sometimes while discharging or purported to discharge the public duty, the officer may honestly exceed his limit or pass an order or take a

decision which may later be found to be illegal etc. Therefore, the prior sanction by the appropriate Government is an assurance to a public servant



to discharge his official functions diligently, efficiently and honestly without fear or favour, without having haunt of later harassment and victimization,

so that he would serve his best in the interest of the public.

65. The offending act must be integrally connected with the discharge of duty and should not be fanciful or pretended. If the act complained of is

directly, and inextricably connected with the official duty, though it was done negligently, or in dereliction of duty or in excess thereof, Section 197

and similar provisions operate as a canopy against malicious, vexatious or frivolous accusation or prosecution at the hands of the aggrieved

persons. It is well settled law that public servant can only be said to act or purported to act in the discharge of his official duty if his act or omission

is such as to lie within the scope of his official duty. It is not every offence committed by a public servant that requires sanction for prosecution, nor

even every act done by him while he actually engaged or purported to have engaged under colour of his official duty that receives protection from

prosecution. If questioned he must claim that he had done by virtue of office and it is inextricably connected with the duty. Sanction then would be

necessary, irrespective of whether it was in fact a proper discharge of his duty or not is a matter of defence on merits, which would be considered

at the trial and could not arise at the time of grant of sanction which must precede taking cognizance of the prosecution. Therefore, there must be

reasonable connection between the acts complained and discharge or purported discharge of the official duty the act or omission must bear such a

relation to the duty that the accused could lay reasonable nexus but not a pretended or fanciful claim that he did it in the course of the performance

of his duty ....

15. The broad test laid down in these two judgments is to be applied to the facts of this case as alleged by respondent No. 2 in his complaint and

stated by him and his witnesses before the petitioners were summoned by the Chief Judicial Magistrate. The petitioners are in fact challenging the

initiation of criminal proceedings against them for want of sanction. Therefore, the necessity of sanction is to be determined on the basis of the

allegations made without investigation as to whether these allegations are correct or not. In this regard the observations of Sarkaria, J., in B. Saha

and Others Vs. M.S. Kochar, are relevant:--

... Whether this allegation or charge is true or false, is not to be gone into at this stage. In considering the question whether sanction for prosecution

was or was not necessary, these criminal acts attributed to the accused are to be taken as alleged.

16. The allegations against the petitioners as stated in the complaint are :-

6. That the accused No. 1 fully knew that the registered office of the firm aforesaid is situated at 9/1 Lower Bazar, Simla yet he on 17-1-1991, at

about 2 p.m. barged into the office of the complainant's partner Shri Rakesh Bhatnagar, at 25 the Mall, Shimla, in the absence of Shri Rakesh

Bhatnagar, in the presence of the complainant and after having a look around, he left. On the same day, the accused No. 1 accompanied by the

accused No. 2 again barged in the office of Shri Rakesh Bhatnagar, at about 5.30 p.m. and left the premises after some time. At 7.30 p.m. again

the aforesaid two barged into the premises aforesaid. On the last occasion, the accused No. 1 enquired from Shri Gurbax Singh, SP Enforcement,

as to whether any document has been recovered from the premises. Shri Gurbax Singh, who was the delegate of the accused No. 1 answered in

the negative. Thereafter the accused No. 1 asked Shri Gurbax Singh to take into possession list of machinery and list of employees of M/s. Simla

Engineers and Builders. The accused No. 2 asked accused No. 1 to instruct Shri Gurbax Singh, Superintendent of Police, to take into possession

photo copies of tender dated 28-8-88 and photo copies of ledger containing the details of payments and receipts. The complainant was asked by

the Superintendent of Police to supply the same. The complainant supplied the aforesaid ""documents after getting these documents from the

registered office of the firm.

7. That the entry of the accused in the aforesaid premises was pursuant to the conspiracy between the two to defame the complainant, the firm and

its partners including Shri Rakesh Bhatnagar and with an intention to insult, annoy and intimidate the occupants of the premises as well.

17. In para 8 of the complaint, it is stated that the provisions of Section 165, Cr.P.C. were not complied with before conducting the search.

Further, it is stated that the search conducted under the order of petitioner Sh. B. S. Thind in connivance with petitioner Sh. V. P. Gupta lacked

propriety because the premises of M/s. Simla Engineers and Builders, 9/1, Lower Bazar, Shimla, and premises of other partners Shri Sharat

Chander Rai and Lt. Col. Duggal (Retd.) were not searched. It is also stated in the complaint and in his statement by respondent No. 2, that both

the petitioners had animus against him, Sh. Rakesh Bhatnagar and another partner of Simla Engineers and Builders which motivated them to search

the premises of Sh. Rakesh Bhatnagar where he is running his individual business in order to insult, annoy and intimidate him and the other partners.

Except the alleged conduct of Sh. B. S. Thind in not complying with the requirement of Sub-sections (1) and (5) of Section 165, Cr.P.C. and also

his conduct during the search and thereafter, no background has been given under which the petitioners could nurse any grudge or enmity with Sh.

Rakesh Bhatnagar and other partners of M/s. Simla Engineers and Builders.

18. There cannot be any doubt that Sh. B. S. Thind being the Investigating Officer in the case had power of search like any other police officer

entrusted to investigate a cognizable offence but when he was making the search, in a particular set of circumstances, he was to make it in the

manner provided u/s 165, Cr.P.C. In this regard, the observations of the Supreme Court in *The State of Rajasthan Vs. Rehman*, are pertinent. In

para 7 of the judgment *K. Subba Rao, J.*, has examined the scheme of the Code of Criminal Procedure and found that there are four groups of

sections regulating the searches authorised in it. For the purpose of the present case, the observations for the fourth group of sections which

provide for searches by Police Officers during the investigation of a cognizable offence are quoted here :--

... The fourth group of sections appears in Chapter XIV which provides for searches by a Police Officer during the investigation of a cognizable

offence. The power of search given under this chapter is incidental to the conduct of investigation the police officer is authorised by law to make.

u/s 165 four conditions are imposed : (i) the police officer must have reasonable ground for believing that anything necessary for the purposes of an

investigation of an offence cannot, in his opinion, be obtained otherwise than by making a search without undue delay; (ii) he should record in

writing the grounds of his belief and specify in such writing as far as possible the things for which the search is to be made; (iii) he must conduct the

search, if practicable, in person; and (iv) if it is not practicable to make the search himself, he must record in writing the reasons for not himself

making the search and shall authorise a subordinate officer to make the search after specifying in writing the place to be searched, and, so far as

possible, the thing for which search is to be made. As search is a process exceedingly arbitrary in character, stringent statutory conditions are

imposed on the exercise of the power.

19. It has been examined above that the conditions laid down in Sub-sections (1) and (5) of Section 165, Cr.P.C. have not been strictly complied

with but the defect pointed out is not such as to turn the entry of petitioner Sh. B. S. Thind in the searched premises from an action in the discharge

of his official duty into a criminal trespass. In fact, he did record his satisfaction that documents pertaining to M/s. Simla Engineers and Builders

might be found in the premises 25, the Mall, Shimla, as these premises were in the occupation of one of the partners of the said firm and these

documents could not be otherwise obtained without undue delay but not separately and only in the Zimneys of 17th January, 1991. He further gave

the requisite search order to Sh. Gurbax Singh, Superintendent of Police. Both the Zimneys of 17th January, 1991 and Search Order have been

reproduced herein-above, the contents whereof speak for themselves. After making record under Sub-section (1) of Section 165, Cr.P.C., though

not separately, and issuing search order, Sh. B. S. Thind was within his rights to cause search being made in the individual premises of Sh. Rakesh

Bhatnagar at 25, the Mall, Shimla. Therefore, in the facts and circumstances of this case, this Court has no hesitation to hold that Sh. B. S. Thind

had caused the search of the premises of Sh. Rakesh Bhatnagar to be made through Sh. Gurbaksh Singh, Superintendent of Police, in discharge of

his official duty and it cannot be said that his official status had furnished him an occasion or opportunity for conducting search in the individual

premises of Shri Rakesh Bhatnagar in order to intimidate, insult and annoy him and other partners. The case set up by respondent No. 2 in his

complaint is not of exceeding his limits by Shri B. S. Thind in conducting the search. Even if he has committed some irregularities in recording an

order under Sub-section (1) of Section 165, Cr.P.C. or submitting that record and record under Sub-section. (3) of Section 165, Cr.P.C. to the

trial Judge, that may be an irregularity but he had conducted the search through Sh. Gurbaksh Singh, Superintendent of Police, and had visited the

premises for inspecting the operation of search in exercise of his official duty. It is not his pretended or fanciful claim that he caused the search of

the premises of Sh. Rakesh Bhatnagar to be made in the course of the performance of his duty because Shri Rakesh Bhatnagar was a partner of

M/ s. Shimla Engineers and Builders against whom F.J.R. No. 21 of 1991 was being investigated by Shri B. S. Thind and documents of the firm

could be found in the individual premises of the partners. In fact, it was from these premises that documents mentioned in the Seizure Memo,

Annexure "C", to the petition were produced by respondent No. 2. Therefore, the conclusion is that no cognizance of the offences under Sections

166, 167 and 448, I.P.C. could be taken by the Chief Judicial Magistrate against Shri B. S. Thind without the sanction of the appropriate

Government.

20. So far petitioner Brig. V.P. Gupta is concerned, it is not disputed before me that he is a public servant and if sanction is required for the trial of

Shri B. S. Thind, it is required for his trial as well as the allegations against him are only of conspiracy and common intention. It is not denied that he

is employed as a Member (Not Voting) by the H. P. State Electricity Board and entrusted the task of maintaining vigilance and enquiring into the

irregularities committed by various officials/ officers of the Board. It was in this capacity that he had accompanied Shri B. S. Thind to the searched

premises and assisted him in the search.

21. So far the allegations of forging the documents, Annexure "B" and "C" to the complaint, Annexure "D" to the petition are concerned, the case

of respondent No. 2-complainant is that since these documents were not produced before the Registrar (Vig.) on 24th January, 1991 along with

other documents of the case for his signatures, these were prepared at a later date. There cannot be any dispute that acts of omission and

commission which amount to forgery cannot be termed action in discharge of official duty. In the present case, Annexures "B" and "C" are search

orders for searching the residential premises of Shri J. S. Parihar, the then XEN, Nathpa Jhakri Project and Shri M. C. Tiwari (Retd.) Member

(Project) H. P. S. E. B. which the petitioner Shri B. S. Thind had issued to his officers S/Sh. Harbhajan Singh, Dy. Superintendent of Police, and

A. N. Sharma, Superintendent of Police, authorising them to conduct searches. In fact, searches were conducted in the residential premises of both

these officers and house Search Memos were prepared by them on 17th January, 1991 though nothing was found. Before issuing these search

orders, petitioner Shri B. S. Thind had also made an order under Sub-section (1) of Section 165, Cr.P.C. though not separately yet in the Zimneys

of 17th January, 1991, which has been reproduced in this judgment, earlier. In view of the Zimneys of 17th January, 1991, a prima facie case of

forging Annexure "B" and "C" as alleged by respondent No. 2 is not made out. So far explanations for not producing these documents before the

Registrar (Vigilance) for his signatures, as given by petitioner Shri B. S. Thind are concerned, this Court, in these proceedings, need not examine

them and give its findings because these will be his defence if trial is held at a later stage. Anyhow, even if these documents were prepared at later

dates, as alleged by respondent No. 2, it was done in purported exercise of his official duty and sanction is required to prosecute the petitioners.

22. There is another aspect of the case on which the Chief Judicial Magistrate has opined that it will be only after evidence is adduced by both the

parties whereby the complainant respondent proves his case and the petitioners establish their defence and also that they have acted in discharge of

their official duty that question of sanction can be determined. For taking this view, he has referred to a Supreme Court judgment in State of Bihar

and Another Vs. P.P. Sharma, IAS and Another, In para 68 of this judgment, K. Ramaswamy, J., has observed :--

... The emphasis of Section 197(1) or other similar provisions that "no court shall take cognizance of such offence except with the previous

sanction" posits that before taking cognizance of the offence alleged, there must be before the court the prior sanction given by the competent

authority. Therefore, at any time before taking cognizance of the offence it is open to the competent authority to grant sanction and the prosecution

is entitled to produce the order of sanction. Filing of charge sheet before the court without sanction per se is not illegal, nor a condition

precedent....

23. The question of necessity of sanction is required to be considered at an earlier stage of proceedings was emphasised by the learned Judges of

the Supreme Court in 1990 SCC 611 (Ashok Sahu v. Gokul Saikia) in the following words:--

We agree that the want of sanction u/s 197 of Code is a prohibition against institution of the proceedings, and the applicability of the section must

be judged at the earliest stage of the proceedings. See: Hori Ram v. Crown (1939 Cri LJ 468) (FC) and, Sarjoo Prasad v. King Emperor (1946

Cri LJ 838) (FC). Regard being had to these principles, we are of the opinion that it would be proper that the Magistrate considers the question of

necessity of sanction after recording some evidence with opportunity to the parties. The Court then will be in a better position to come to a

conclusion whether on the facts so established prima facie, sanction u/s 197 is necessary or not.

24. If in a given case, facts are not enough for coming to a conclusion that the acts complained of were done in the discharge of official duty, the

Court may go ahead with the trial and consider this question at any later stage when sufficient evidence in this regard is brought on record. The

observations made in this regard in an earlier decision of the Supreme Court in Bakhshish Singh Brar Vs. Gurmej Kaur and Another, are of

guidance (para 4):

There are rival versions involved in this case. The question was whether without the sanction u/s 197 of the Cr.P.C. the proceedings could go on.

It is quite apparent that as a result of the alleged search and raid, which was conducted by the petitioner in discharge of his official duties certain

injuries, which are described as grievous injuries had been inflicted on the complainant and one of the alleged offenders had died. In this case,

admittedly, the petitioner is a Government servant. Admittedly, there was no sanction u/s 197 of the Cr.P.C. had been taken. The trial in this case

is one of the offences mentioned u/s 196, Cr.P.C. The contention of the petitioner was that u/s 196, Cr.P.C. the cognizance of the offence could

not be taken nor the trial proceeded without the sanction of the appropriate authorities. The learned Additional Sessions Judge, Kapurthala after

consideration of the facts and circumstances of the case in view of the observations of this Court in Pukhraj Vs. State of Rajasthan and Another,

that unless cognizance is taken and the facts and in the circumstances and the nature of the allegations involved in this case are gone into the

question whether the raiding party exceeded its limits or power while acting in the official duties cannot be determined. The learned Judge observed

after gathering the materials and some evidence, it would be possible to determine whether the petitioner while acting in the discharge of his duties

as a police officer had exceeded the limit of his official capacity in inflicting grievous injuries on the accused and causing death to the other accused.

It was further observed in para 5 :

This court in the aforesaid decision had occasion to consider this aspect. The case is instructive and illustrative how a balance has to be struck

between the need for speedier trial of criminal offenders and at the same time protecting public servants or police officials in the discharge of their

duties without obstructions. There the appellant had filed a complaint against his superior officer, in the Postal Department under Sections 323 and

502 of I.P.C. alleging that when the appellant went with a certain complaint to the second respondent, the said respondent kicked him in his

abdomen and abused him by saying "'sale, gunde, badmash ....'" The said respondent filed an application u/s 197, Cr.P.C. praying that the court

should not take cognizance of the offence without the sanction of the Government, as required by Section 197, Cr.P.C. It was further contended

that the alleged acts, if at all done by the accused were done while discharging his duties as a public servant. The trial Magistrate dismissed the

application. The High Court allowed the revision application of the said respondent. This Court on appeal held that at that stage, the Court was

concerned only with one point, viz., whether on facts alleged in the complaint, it could be said that the acts were done in purported exercise of his

duties. Applying the test laid down in the decisions of the Federal Court and this Court to acts complained of, viz., kicking the complainant and

abusing, could not be said to have been done in the course of the performance of the duty by the said respondent. The facts subsequently coming

to light during the course of the judicial enquiry or during the course of the prosecution evidence at the trial might establish the necessity for

sanction, it was observed. This Court noted that it might be possible for the said respondent to place materials on record during the course of the

trial for showing what his duties were and also that the acts complained of were so interrelated with his official duty, so as to attract the protection

afforded by Section 197, Cr.P.C. This Court reiterated that the question whether sanction was necessary or not might have to depend upon from

stage to stage having regard to the facts and circumstances of the case. This Court allowed the appeal and allowed the trial to proceed without the

sanction.

25. In the light of the above observations, this Court is of the opinion that there is sufficient material on the file of this case for coming to the

conclusion that the petitioners had acted or purported to act in the exercise of their official duty in conducting search in the premises of Shri Rakesh

Bhatnagar at 25, the Mall, Shimla and also in preparing the documents, Annexures "B" and "C" to the complaint which is Annexure "D" to the

petition.

26. The net conclusion of the above discussion is that unless sanction is obtained, as envisaged u/s 197(1), Cr.P.C. against the petitioners, the

proceedings pending against them in the criminal complaint under Sections 166/167/448/466/120-B read with Section 34, I.P.C. cannot proceed

further. Instead of ordering stay of proceedings, it will be in the fitness of things to quash them for want of requisite sanction. Therefore, the revision

petitions are allowed and proceedings pending against the petitioners in both the revision petitions, under Sections 166/167/448/466/120-B read

with Section 34, I.P.C. in the Court of the Chief Judicial Magistrate, Shimla, are quashed.