Bibhuti Bhusan Chakra-Borty Vs State of West Bengal and Others

Court: Calcutta High Court

Date of Decision: Oct. 24, 1979

Acts Referred: Companies Act, 1956 â€" Section 235, 236, 237
Constitution of India, 1950 â€" Article 14, 20, 21, 226
Criminal Procedure Code, 1973 (CrPC) â€" Section 128, 132, 159, 197, 197(1)
Foreign Exchange Regulation Act, 1973 â€" Section 23, 23(1)
General Clauses Act, 1897 â€" Section 14
Industrial Disputes Act, 1947 â€" Section 10, 10(1), 14, 15, 16
Penal Code, 1860 (IPC) â€" Section 202, 302, 34, 84

Citation: 84 CWN 359

Hon'ble Judges: R.M. Datta, J; C.K. Banerjee, J

Bench: Division Bench

Advocate: R.C. Deb, Biswarup Gupta, Ranjan Deb and R.M. Kar, for the Appellant;Somnnath Chat-terjee, Advocate General and Ramen Deb for the Siate of West Bengal Arun Prakash Chatterjee, standing Counsel, Samar Datta and Samar Rudra for the respondent Benoy Chakraborty, for the Respondent

Final Decision: Allowed

Judgement

Ramendra Mohan Datta J.

1. This is an appeal from the Judgment and order dated December 18, 1978 of the learned Judge of the Court below in an application under

Article of the Constitution of India whereby an order dated August 4, 1977 granting sanction for prosecution under sec. 197 of the Code of

Criminal Procedure 1973 as also the proceedings pending in the Court of the Additional Chief Presidency Magistrate in Case No. C/783 was

challenged. The learned Judge did not interfere with the order or the proceedings and dismissed the application by discharging the Rule Nisi. The

facts briefly are that in 1969-70 the appellant Bibhuti Bhusan Chakraborty was posted as the Depuiy Commissioner of Police (North) in Calcutta

and in North Suburban District in the town of Calcutta. The appellant"s case is that on November 11, 1970 si about 8-30 p.m. the appellant as

such police officer went out on routine patrol and In course of his duties came to the crossing of Shyampukur Street and Telipara Lane at about 9-

55 p.m. The appellant was accompanied by a police party and met with an encounter with some anti - social elements. In that encounter Ranjit

Chakraborty and Samir Chakrabor;y, both sons of one Harshanath Chakraborty, received bullet injuries and were taken to the hospital. In the

police party also one Shew Mangal Singh, Officer-in-Charge of Jorabagan Police Station received bullet injuries. Another son of the name of

Benoy Chakraborty, was arrested. The said two persons Ranjit and Samir were removed to the hosptal where they died. A general diary in

Shyampukur Police Station was entered by the Police in Case No. 300 F.I.R. under the Code of Criminal Procedure, Indian Penal Code, the

Anns Act and the Explosive substance Act in respect of the said incident.

2. On December 22, 1970 the said Benoy Chakraborty filed a complaint on various allegations against the said Police Officers including the

appellant. The Additional Chief Presidency Magistrate (Judicial) took cognizance an ordered an enquiry. A judicial enquiry was held and a report

was made by Sri R. P. R. Chowdhury. According to the procedure, the same was done ex parte.

3. By his order dated February 27, 1971 Sr: H. S. Barari, the Addtio-nal Chief Presidency Magistrate, refused :o issue process, inter alia, holding

that the appellant being an officer of the West Bengal Government within the meaning of section 197(1) of the Code of Criminal Procedure, a

sanction was required against the appellant and one Sri P. Dey and, accordingly, no process could be issued aganist those two persons, but as

regards four other Police Officers to whom the said provision did not apply, the process was issued. On March 13, 1971 a report was made by

the then Commissioner of Police addressed to the then Home Secretary regarding the incident. On March 17, 1971 the Commissioner of Police

tor-warded a copy of the order and "the finding of Sri R.P. Roy Chowdhury, copies of the depositions and the order of the said H. S. Barari to

the Home Secretary. The said note, inter alia, reads as follows :

The learned A.C.P.M. has fixed 2.4.71 as the date for the appearance of Inspector Shew Mangal Singh. Sgt. Bimal Thakur, S.I. Ch"itta Ganguly

and S.I. Anil Maitra, I would request you to treat this matter as a priority case and make necessary arrangement for moving the Hon"ble High

Court on behalf of these officers for quashing the proceedings before 2.4.71. A brief consisting of the documents aforesaid is enclosed for the

perusal of L.R. and taking suitable actions.

Sd/-

R.K. Gupta

17.3.71 Commissioner of Poilce Calcutta

4. Besides the said orders and depositions, a copy of the petition filed by the said respondent Benoy Chakraborty in the Court of the Additional C.

P. M. was also sent to the Home Secretary for his perusal and record. On May 12, 1971 the Inspector of Explosive, East Circle, sen: his

confidential report to the Deputy Commissioner of Police, North and North Subarbun Division.

5. On or about August 12, 1971 Taliukdar J. dismissed the Revision Application of the respondent Benoy Chakraberty aganst the said order of

H.S. Barari. In such application the then Advocate General of the State was engaged by the State to appear on behalf of the appellant Bibhuti

Bhusan Chakraborty.

6. On or about September 2, 1971 and on December 22, 1971 Harshanath Chakraborty, the father of the deceased Ranjit and Samir, made two

successive petitions before the Governor praying for sanction to prosecute the appellant. The said petitions were placed before the State

Government which found that the prayers were not justified in the facts and circumstances of the case.

7. It is stated that the State Government took into consideration the relevant facts and circumstances appearing from records relating to the case

including the judicial enquiry and the report submitted by the Commissioner of Police and upon such consideration refused to grant the sanction. It

was mentioned in the petition dated December 22, 1971 that the Enquiring Magistrate, the said R. P. Roy Chowdhury, found in his enquiry report

that there was a prima facie case of murder against the said Bibhuti Bhusan Chakraborty and P. Dey. It was also pointed out that the said R. P.

Chowdhury found in his report that no sanction was required for prosecution. It was also pointed out that the Additional Chief Presidency

Magistrate had ordered that such sanction was necessary for prosecuting Bibhuti Bhusan Chakraborty and P. Dey and that the said order had

been upheld by the High Court.

8. On December 11, 1971 the Sta.e Government called for a report from the Commissioner of Police. On or about February 18, 1972 Benoy

made an application for a certificate of fitness to appeal to the Supreme Court from the said judgment and order of Talukdar, J. By an order dated

March 1, 1972 the Stare Government granted sanction to prosecute Benoy and Manick Lal Bose, inter alia, u/s 7 of the Explosive Act in respect

of the incident which happened on November 11, 1971. Thereafter on March 20, 1972 Benoy''s said application for certificate of fitness to appeal

to the Supreme Court was refused by Talukdar J.

9. It appears from the affidavit of Biswarup Mukherjee affirmed on September 8, 1977 and used as aiffidavit-in-op-position to the Writ petition

that on receipt of the said application dated September 2, 1971 for grant of sanction u/s 197(1) the State Government called for a report from the

Commissioner of Police, Calcutta on December 11, 1971, and thereafter the said Commissioner of Police obtained a report from the appellant

being the report dated June 23, 1972. The said report of the Police Commissioner dated June 23, 1572 has been made an annexure to the

aforesaid affidavit-in-opposition filed by Biswarup Mukherjee on-behalf of the State Government. It, inter alia, provides : -- * * *

It will be clear from the report of the D. C. (North) that on 11.11.70 along with his Asstt. Commissioner and other Officers faced a determined

and hostile mob armed with lethal weapons including fire arms and bombs, indiseriminately firing and hurling bombs on the officers. One of the

shorts went througn the palms of the Inspector Shew Man-gal Singh who was removed to hospital under orders of the D. C. (North) by the ''

Assistant Commissioner, Sri Chakraborty, however, could not leave the place as the mob was determined on violent acts endangering the fives of

che citizens and encircled and police party from three sides hurlng bombs and firing on them. He dispersed the unlawful assembly applying the

minimum force necessary under the circumstances. He acted, u/s 128 of the Cr. P.C. in good faith under colour of his office and used the minimum

force required to disperse the violently aggressive mob. He and his officers showed examplary courage and loyally and faithfully discharged their

onerous duties in the face of great danger to their lives and limbs and to ihose of other citizens. Sri Chakra-borty and his officers are, therefore,

fully entitled to protection u/s 132 Cr. P.C.

If a Police Officer is required to face a criminal trial, for acts done by him in good faith in the discharge of his official duties and /or under orders of

the superior officers and at the risk of grave personal danger including death, I feel the morale of the Police Force will be badly shaken. In my

view, no case for according sanction under cider u/s 197(1) Cr. P. C. or u/s 132 Cr. P. C. has been made out.

Sd/-

R. N. Chatterjee

Commissioner of Police, Calcutta 23.6.72

10. It will appear from the aforesaid that the report of the said R. N. Chatterjee, the then Commissioner of Police together with the report of the

Deputy Commissioner of Police (North) and the judgment of Talukdar J. were all placed in the file of the Government and the same must have

been considered when an application for sanction was made by Harshanath Chakraborty and the same was refused by the State Government. On

such refusal Benoy moved an application on or about March 16, 1973 under Article 226 of the Constitution and in such an application the then

State Government filed an affidavit through its Deputy Secretary (Home) being one Nalinaksha Nanda and affirmed by him on April 4, 1973

wherein the said Deputy Secretary categorically stated :

that the prayer of Sri Harshanath Chakraborty for sanctioning prosecution of respondents Nos. 2 and 3 was carefully considered by the State

Government and it was found that the prayer was not justified.

This averment was made in several paragraphs in the said affidavit. That application under Article 226 was ultimately not pressed and the Rule.

Nisi in that matter was discharged by an order dated November 26, 1973.

11. Thereafter Benoy made another application for grant of sanction on November 28, 1973. The said application was again considered by the

State Government and by an order dated December 24, 1973 the State Government refused to grant the sanction on the ground that the Officers

concerned acted in good faith in the discharged of their Official duties and/or under the orders of the superior Officers. Benoy again applied under

Article 226 of the Constitution in Matter No. 88 of 1974 challenging the refusal to grant the said sanction dated December 24, 1973. The then

State Government again filed another affidavit through the said Deputy Secretary (Home) Nalinaksha Nanda and affirmed by him on October 10,

1974 wherein it was stated :

I say that the State Government considered the application of the petitioner carefully and after careful consideration of all facts and circumstances,

the State Government did not find that the prayer of the petitioner for according sanction of prosecution of respondents Nos. 2 and 3, was justiled,

and accordingly, such prayer was refused.

12. The said writ application came up for hearing before A. N. Banerjee J. on September 30, 1975 when the learned Judge held that the petitioner

before him had no right on the basis of which he could ask for direction by the court on the Government to grant sanction to him for the

prosecution of the said respondent u/s 302/34 Indian Penal Code, and, accordingly the writ application was rejected and the Rule was discharged.

On behalf of Benoy Chakraborty an appeal was preferred from the judgment and order of A.N. Banerjee J. on or about May 7, 1976.

13. It appears that upto this stage the State Government instructed Mr. N. C. Mitra, the solicitor on behalf of the State, to appear also on behalf of

Bibhuti and P. R. D''ey in such various writ proceedings and in the said appeal preferred from the order of A. N. Banerjee J, and, accordingly, the

said Mr. N. C. Mitra the Government Solicitor was also acting on behalf of Bibhuti in the said appeal.

14. According to the appeallant''s counsel, the next chapter of the case began s''ince thereafter. In June, 1977 the new Ministry was formed in

West Bengal when the Left Front came into power and immediately thereafter on or about July 11, 1977 Benoy made another application for

grant of sanction to prosecute Bibhuti and P. R. De. So long Bibhuti and P.R. Dey were appearing in the High Court proceedings through the said

State Government lawyes and Benoy was being represented by Mr. Arun Prokash Chatter-jee, learned Advocate, who was appointed the

Standing Counsel by the newly formed Government. The appeal was mentioned and exparte orders were passed behind the back of Bibhuti and

P. R. Dey and without their knowledge in such a manner that they felt absolutely helpless in the matter and became very much concerned and

surprised.

15. According to the appellant, the grant of the impugned sanction was the result of a series of malafide acts on the part of the State Government

as would appear from the aforesaid and the following fact. Immediately after July 11, 1977 when Benoy made the new application it was thought

that the pendency of the said appeal from the order of A. N. Banerjee J. would stand in the way of the State Government granting sanction

effectively and, accordingly, in furtherance of the above, on or about July 21, 1977 an order was obtained exparte to the following effect and

under the following circumstances.

On July 20, 1977 the matter was mentioned before the Bench consisting of S.C. Ghose and R.N. Pyne JJ. in the absence of Bibhuti and P. R. Dey

and without any notice to them whereby it was represented to the said Bench on behalf of Benoy that the appeal might be ordered to appear in the

list marked to be mentioned inasmuch as the appellant Benoy wanted to withdraw the same. On July 21, 1977 the matter as appeared in the list

marked ""to be mentioned"" as item No. 2 and the following order was made in the absence of Bibhuti or his recorded advocate Mr. N. C. Mitra as

would appear from the Court minutes as set out below:

L/M TO BE MENTIONED NO. 2

Appeal No. 140/77

Benoy Chakraborty

v.

State of West Bengal & Ors.

Ghose and Pyne JJ.

21.7.77

THE COURT: Having heard the learned Satanding Counsel the application made by the appellant for sanction has to be considered in,

accordance with law. There will be no order on this appeal. The Rule is disposed of on the aforesaid terms.

The minutes show that the matter was mentioned.by Mr. Arun Prokash Chatterjee who by that time was appended the Standing Counsel of the

State Government. A draft order of the said minutes was issued and it appears therefrom that the Court minutes, set out hereinabove, have been

substantially sought to be altered to give a different picture in the manner as follows :

(i) Draft order dated 21st '' July, 1977.

The Hon''ble Mr. Justice S.C. Ghose

And

The Hon''ble Mr. Justice R.N. Pyne

President of the Union of India Benoy Chakraborty

v.

State of West Bengal & Ors.

This appeal appearing this day in the list marked as ""to be mentioned"" before the Hon''ble Mr. Justice S.C. Ghose and the Hon''ble Mr. Justice

R.N. Pyne and being called on in the presence of Mr. Samar Kumar Datta advocate for the said petitioner and the Standing Counsel for the

respondents abovenamed and upon hearing the said advocates.

This Court doth not think fit to make any order on this appeal save and except as here in after appearing and it is ordered that the application made

by the appellant for sanction u/s ''197 of the Code of Criminal Procedure to prosecute the respondents Bibhuti Chakraborty, Deputy

Commissioner of Police, North Division and P. De, Assistant Commissioner (North Suburb) u/s 202 read with section 84 of the Indian Penal

Code be considered in accordance with law by the respondent State of West Bengal above named and it is further ordered that the Rule Nisi

issued in the above matter and dated the 7th day of March 1974 do stand disposed of accordingly.

Witness etc. dt. 21.7.77

Samar Kumar Datta, Advocate

N.C. Mitra, Advocate for Respondent.

16. Mr. Deb appearing on behalf of Bibhuti contends that most surprising things happened at that time. From the order dated July 21,1977 it can

easily be grathered that the only person who appeared was Mr. A.P. Chatterjee. The minute of the Court does not show that any body else

excepting the standing Counsel appeared and mentioned the appeal. The minute definitely suggests that the previous application for sanction which

was the subject matter of the appeal would be considered by the Government in accordance with law. That is to say, Mr. Chatterjee was also

speaking on behalf of the State Government. Mr. Chatterjee was not only speaking on behalf of Benoy, the appellant in the appeal but obvioously

had been speaking on behalf of the Government as well inasmuch as the Government was to consider the application for sanction in accordance

with law. In other words, the previous order refusing to grant sanction was not in accordance with law and that was predetermined by the

Government and that was sought to be pronounced by the said order of the court. On the basis of such representation the said order was obtained

behind the back of Bibhuti and P.R. Dey. Mr. Deb comments that such an order was obtained from the court by giving the court an impression

that by such order nobody''s interest in the appeal was to suffer any prejudice. Mr. Deb with emphas''s contends that thereby the Court had been

overreached.

17. It is most surprising, according to Mr. Deb, that the draft order was sought to have been issued at the instance of the reeorded advocate of

Benoy, although the minute does not say so. Admittedly neither Mr. N.C. Mitra nor any assistant or anybody else on his behalf was present then.

It is also to be noticed that it was mentioned in the draft order that the matter was called on in the presence of the said Samar Kumar Datta,

advocate for Benoy although the minute was silent about that also. Mr. Deb comments that the said draft order shows also that the Standing

Counsel appeared for the respondents, i.e. for the State of West Bengal, Bibhuti and P.R. Dey. It would be clear therefrom that Mr. A.P.

Chatterjee mentioned the appeal not on behalf of the appellant Benoy alone but also on behalf of all the respondents'' to the appeal. In the next

place it is contended that the details have been provided in the draft order in such a manner as though the Court directed the State Government to

consider the application made by Benoy in accordance with the directions given in that order and as though for that purpose disposed of the Rule

Nisi and made no order on the appeal. It is further contended that all the steps were taken behind the back of Bibhuti who was intentionally kept

completely in the dark so that he might not take any steps to stop the grant of sanction by the State Government. The affidavit of Benoy affirmed in

September 1977 and used in opposition to this application is clear on the point. It reads as follows :--

I further say that the Appeal No. 184 of 1976, which was against the judgment of Mr. Justice A.N. Banerjee, was dismised for non-prosecution

by the appellant on the assurance of the Standing Counsel for the State that they would reconsider the application for sanction which the

complainant Benoy Chakraborty had made and which had been rejected arbitrarily by the Memo dated December 24,1073 issued under the

signature of Sri N. Nanda.

18. This is Benoy''s own version in his affidavit and it gives a ciear picture of how things were moving behind the scene. The further contention is

that the Appeal Court surely had not been told that a fresh application had been made by Benoy and that was why the appeal was not required to

be proceeded with. The appeal court was not told further that Bibhuti was still then being represented by the State Lawyer, Mr. N.C. Mitra under

instruction from the State of West Bengal. Even though admittedly Mr. N.C. Mitra did not appear on the day the matter was mentioned but his

name appeared in the draft order to give the impression that it was ordered in the presence of and in concurrence with Bibhuti''s recorded

advocate.

19. According to Mr. Deb, the appellant came to know of this order for the first time from the advance supply copy of the affidavit of Benoy and

immediately thereafter changed his lawyer and had the records searched through him and got those informations. Accordingly, Bibhuti had no other

alternative but to take up these points of malafide in the affidavit-in-re-ply affirmed by him on September 22, 1977 in answer to the said affidavit of

Benoy. After ascertaining such facts from the records Bibhuti immediately had the matter mentioned before the said Division Bench of Ghose and

Pyne JJ when Mr. R.C. Deb on behalf of Bibhuti, the Advocate General with the Standing Counsel Mr. A.P. Chatterjee and Mr. Amal Dutt,

Junior standing Counsel for the State of West Bengal and Mr. Samar Dutta for the appellant Benoy made submissions. The said order as

recorded, is also set out in full as follows:

Appeal No. 184 of 1976

Benoy Chakraborty

v.

The State of West Bengal & Ors.

Present :

The Hon''ble Mr. Justice Ghose

and

The Hon''ble Mr. Justice R. N. Pyne

September 8. 1977

Mr. Advocate General villi Mr. A. P. Chatterjee Standing Counsel and Mr. Amal Dutt Junior Standing Counsel for the State

Mr. R. C. Deb with Mr. Ajoy Mitter for the respondent Nos. 2 and 3

Mr. Samar Dutt For the Appellant

CHORE, J.

The previous order made by us dated the 21st.of July 1977, is recalled.

Having heard the parties we pass the following order: Samar Dutta, learned counsel appearing on behalf of the appellant states that in view of the

fact that the State through Mr. Advocate General has stated that they would consider the matter of granting sanetion to prosecute the respondents

Bibhu-ti Chakraborty and P.R. De he does not want to press the appeal. In view of that statement the appeal is dismissed. This order is made

without prejudice to the fights and contentions of the parties including the contention of Mr. Deb who is appearing on behaf of the two respondents

to the appeal, namely, Bibhuti Chakraborty and P.R. De that the Government has no longer any power to grant sanction for prosecution and also

without prejudice to the contention of the learned Advocate General that the Government has such power. The Advocate General states that the

State has already granted sanction but if any such sanction has been granted, the State will not be able to rely on the order passed by us on the

21st July, 1977, in support of such sanction, neither shall the said order validate such sanction.

Leave is given to all parties concerned to inspect the records.

R.N. Pyne, J.

I agree

20. Mr. Deb"s contention is that when the Appeal Court was apprised of the correct position and the manner in which the order was obtained

from it, the Appeal Court immediately recalled its previous order dated July 21, 1977. Thereafter a fresh order was made as recorded in the

aforesaid order of the Appeal Court. From submissions of the learned Advocate General it appears that the State Government had already granted

sanction and upon hearing that the said Bench specifically made it clear that if any such sanction had been granted then the State Government

would not be able to rely on the order of the Appeal Court passed on July 21, 1977 in support of such sanction and such an order passed by them

would not validate such sanction. That will clearly indicate how the mind of the Court reacted immediately after coming to know how the order

was obtained from it on July 21, 1977.

21. Thereafter followed some correspondence by and between Mr. N.C. Mitra, Solicitor to the State of West Bengal and the newly recorded

Advocate Mr. R.M. Kar acting on behalf of Bibhuti, showing how and in what man ner Mr. N.C. Mitra was acting to the detriment and prejudice

of his erstwhile client Bibhuti for whom he filed his warrant of attorney.

22. By his letter dated September 9, 1977 Mr. Kar asked for the cause papers and a copy of the paper book in Appeal No. 184 of 1976 (Benoy

Chakra-borty v. State of West Bengal & Ors.). There was no reply to the same and accordingly, on September 12, 1977 another letter was

written by Mr. Kar which reads as follows :

I have to invite your attention to my letter dated 9.9.77 and to ""request you for an early compliance thereof.

It appears from the records that the above appear was mentioned on 20th July, 1977 and was directed to be placed on the list marked to be

mentioned on 21st July 1977. -I shall thank you to furnish me with the following particulars : --

(i) If any notice of such mentioning on the 20th July 1977 was received by you, if so when ?

(ii) If the order passed by Their Lordships the Hon''ble Mr. Justice Ghose and the Hon''ble Mr. Justice Pyne on the July last was made in the

presence either of yourself or any other assistant of office. In the event none from your office was present at the time when the said order dated

21st July 1977 was passed, when and how the said order was communicated to you ?.

(iii) When and how the said order dated 21st July was communicated to the respondents Sri Bibhuti Bhusan Chakra-borty and Sri P.R. Dey ?

Yours faithfully,

Sri R. M. Kar

23. From the aforesaid letter it would appear that the new Advocate of Bibhuti had already searched the records and was asking for the said

particulars. Thereafter by his letter dated September 13, 1977 Mr. N. C. Mitra wrote back as follows :--

Your letter of 12.9.77. Since the order of 21st July 1977 has been recalled and orders passed on 8.9.77 in your presence at your-instance, I do

not consider that any reply is necessary of your letter of above date as the matter was fully gone into by your counsel and all facts were stated

before the Court.

Yours faithfully,

Sd. Illegible

Thereafter on September 15,1977 Mr. Kar replied, inter alia as follows :--

Particulars asked for in my letter dated 12.9.77 are absolutely necessary and there cannot be any objection to furnish me with such particulars. The

cause papers more particularly the paper book are also absolutely necessary. Please, therefore, furnish me with the said particulars as also the

Cause paper and the paper book in respect of the above in course of this week. My clients hope that they will not be compelled to take any

unpleasant steps for non-compliance of my above requests.

Please treat this as extremely urgent.

Yours faithfully,

Sd. R.M. Kar

24. The above correspondence makes it clear that the position of Bibhuti became such that his own erstwhile recorded advocate, N.C. Mitra had

also turned against him presumably acting under the advice of the new-Government and even the cause papers and the paper book in connection

with the said appeal were withheld from him and from his newly appointed lawyer. There could be no other explanation about such strange

behaviour of the Government Advocate with whom in the normal course the relation of Bibhuti, and P.R. Dey should have been the other way

round. Bibhuti was practically helpless in the matter and he had no other alternative but to suffer in the hands of the State Government who, a little

time earlier, had stretched its helping hand for him in the conduct of his litigation. It is not very difficult to appreciate the total helpless condition of a

litigant whose own lawyers turn against him at the instance of the other opposing side. Mr. N.C. Mitra could not have acted in that manner had he

not been instructed accordingly in that manner by the State Government. It may be that Mr. N.C. Mitra was bound to act in that matter on behalf

of the newly formed State Government, as the retained lawyer of the Government, but the manner in which he has withheld the cause papers and

the said particulars asked for by Bibhutis advocate Mr. Kar, shows the malafide motive of the State Governmant to somehow put all obstacles

before Bibhuti so that he might not come to know of the same or do anything that might be possible for him to take immediate action in the matter.

Everything seems to have been done in such a post haste manner that the malafide motive on the part of the State Government and/or its

Advocates became quite apparent, so much so that it did not call for any further proof in support of the same.

25. Mr. Deb contends that all these facts, if considered together, would conclusively prove that the Government had a pre-determined mind from

the very beginning to grant the sanction applied for. It must have been considered beforehand that what was standing on the way of such grant was

the pending appeal from the order of A.N. Banerji J. which kept the previous order of refusal to grant, pending. That was to be got rid of in order

that the impugned sanction could be granted, otherwise the sanction might not be a valid sanction. So long Mr. A.P. Chatterjee was appearing

against the Government and on behalf of Benoy but since the new Ministry was formed, he was appointed the Standing Counsel With the result

that his client''s interest became identical with that of the newly formed Government. The ex-parte mentioning before the Appeal court and the

appearances noted therein from time to time and the order obtained behind the back of Bibhuti go to suggest and conclusively prove that there was

an identity of inerest as between the State Government and Benoy.

26. Even after the impugned sanction was granted, the way the Government took action against Bibhuti would also go to show in what way the

State Government was bent upon taking part in this matter with all earnest. On August 17,1977 the suspension order was passed against Bibhuti.

On August 24,1977 Bibhuti demanded justice and thereafter on September 1,1977 obtained the Rule herein. Thereafter on September 5,1977

Bibhuti could came to know of the ex-parte order of the Appeal Court from the advance copy of the affidavit of Benoy under circumstances stated

hereinabove. The learned Judges of the Appeal Court appeared to have appreciated in what manner and how such an order was obtained from

the Bench and as such, immediately took all steps to stop the completion of the order. At that time, when the Bench was informed on September

8,1977 that the sanction had already been granted, the Bench immediately not only recalled its said previous order dated July 21,1977 but also

even though it was too late to rectify the mischief already done made all safeguards so that Bibhuti''s interest might be protected as far as possible.

It was made clear the Government would not be able to rely on the said order in the matter of granting its sanction. Leave was given to Bibhuti''s

lawyer also to inspect the records. It appears from the records that the said order dated July 21.1977 was drawn up and signed by that time at the

instance of the advocates of Benoy, but at the instance of the said Bench only the filing thereof could be and was stopped. The first and the second

draft minutes of the said order as corrected and altered and the order as drawn up were all placed before us to show in what manner the

appearance of lawyers had been altered therein.

On the aforesaid materials on records Mr. Deb contends that maneuverings in Court clearly showed that a way was being found out to facilitate

the consideration of Benoy''s application.

It is appropriate at this stage to deal with the order granting sanction on August 4,1977 which is set out below :--

Government of West Bengal

Home Department

Personnel and Administrative Reformers Branch

Order No. 926-P and AR (Vig)

Calcutta, the 4th August, 1977

WHEREAS it has been made to appear to the Governor that on the 11th November 1970, at about 10 p.m. Shri Bibhuti Bhusan Chakraborty,

I.P.S. Deputy Commissioner of Police, Detective Department Calcutta while functioning as the Deputy Commissioner of Police, North Division,

Calcutta being a public servant employed in connection with affairs of the State of West Bengal along with Shri Promode Ranjan De, the then

Assistant. Commissioner of Police, Calcutta, since retired and several other police officers, went in front of premises No. 71, Shyampukur Street

in the town of Calcutta in three vehicles including a jeep, got down and surrounded two brothers, Ranjit Chakraborty and Samir Chakraborty,

sons of Sri Harsha Chakraborty, that although Ranjit shouted that he was a constable of the Calcutta Police and in spite of the fact that Samir was

a N.V.F. trained boy, the said Shri Bibhuti Bhusan Chakraborty fired at Ranjit at point blank range.

That thereafter, the said Shri Bibhuti Bhusan Chakraborty along with the said Promode Ranjan De and other police officers further fired several

shots as the said two brothers Ranjit Chakraborty and Samir Chakraborty in succession. That this was done in furtherance of the common

intention of all to wit, to cause death of the said two brothers, Ranjit Chakraborty and Samir Chakraborty, or to cause such bodily injury or injuries

on the persons of the said two brothers as. were sufficient in the ordinary course of nature to cause death, or to cause such bodily injury or injuries

to the said two brothers, as the said Shri Bibhuti Chakraborty knew to be likely to cause the death of the two brothers or with the knowledge that

the said firing of shots at close range at the two brothers was so imminently dangerous that it must in all probability for incurring the risk of causing

death or such injury as aforesaid, and thereby the said Shri Bibhuti Chakrabarty committed, while acting and purporting to act in the discharge of

his official duty, an offence punishable u/s 302 read With section 34 of the Indian Penal Code, 1860.

AND WHEREAS the said Shri Bibhuti Bhusan Chakraborti is a public servant and is at the time of commission of the alleged offence was

employed in connection with the affiairs of the state of West Bengal and is not removeable from his office save by or with the sanction of the State

Government.

NOW, THEREFORE, in exercise of the power conferred by section 197 of the Code of Criminal Procedure, 1973 (2 of 1974) the Government

on a consideration of the facts and circumstances of the case, is pleased hereby to sanction the prosecution of the said Shri Bibhuti Bhusan

Chakraborti for the said offence punishable u/s 302 read with section 34 of the Indian Penal Code, 1960.

By order of the Governor.

Sd. B. Mukhopadhyay

Secretary to the Govt. of West Bengal.

4.8.77

27. It can be well seen that what was placed before the State Government for its consideration was nothing but Benoy"s application on the basis

whereof the purported sanction was granted. Nobody will appreciate from the body of this order that previous to this, two other applications had

been made one by the father and the other by Benoy and the Government refused to grant sanction thereon. There was "also no mention about the

reports of the Enquiring Officer Sri R.P. Roy Choudhury. There was no mention about the reports of the different Police Commissioners. The

question would arise whether it could be called a speaking order when no reason had been ascribed as to why the present Government was going

back on "its own previous order.

28. In the affidavit filed on behalf of the State Government it has been stated that the previous Government which refused to grant sanction did net

consider the report of Sri R.P. Roy Chowdhury and second, that the policy of the present Government was not to shield any person irrespective of

the position he might hold, against whom there was a prima facie case of offence under the law. Those are the two considerations on the basis

whereof the sanction had been granted. According to Mr. Deb, in respect of the first reason the learned Judge of the court below has held in

favour of his client by coming to the finding that on the said previous occasion the report of Sri R. P. Roy Chovvdhury was duly considered by the

then Government. Regarding the second reason the learned Judge held that since the said reason involved the policy consideration of the

Government the Court should not interfere into the same and should leave the matter to the Government and on that basis the court below

discharged the Rule.

29. It is to be noted that the State Government in its affidavit no where stated that the earlier Government was following a policy which was

different from the policy pursued by the present Government in the matter of shielding offenders amongst high Government officials. Further more it

has not been stated anywhere that the earlier Government was trying to shield any offender including the appellant. On the contrary, there is also

contradiction between professed policy of the present Government vis-a-vis the other offenders as found by the learned Judge of the Court below.

The affidavits filed on behalf of the former State Government would indicate that the said State Government did not pursue any policy of shielding

any offender. Such affidavits were filed by the said Nalinaksha Nanda, the Deputy Secretary (Home), Government of West Bengal.

30. No reason has been ascribed as to why the said Deputy Secretary (Home) Government of West Bengal was not asked to file an affidavit in

support of the statements made by the present secretary Biswarup Mukherjee. The learned Advocate General appearing on behalf of the State has

stated that the said Nalinaksha Nanda has since retired. Even if that be the position there is no explanation on behalf of the Government as to why

the said retired official could not be approached to file an affidavit to that effect. It is difficult to appreciate how different officers placed in such

posts as above could make such statements which are not consistent with the statements of the earlier officer concerned.

31. One Sri Biswarup Mukhopadhyay, Secretary to the Government of West Bengal, Home Department, has filed the affidavit-in-opposition in

the writ petition herein on behalf of the State Government and in paragraph 10 thereof he has stated that in respect of the application of Harshanath

Chakra-borty the then State Government took a decision not to accord sanction for prosecution of the appellant and, accordingly, the paryer for

sanction was rejected. That paragraph has been verified as based on information derived from the records of the Government of West Bengal in its

Home Department and the deponent believed the same to be true. The deponent further stated that it appeared to him that the report of the

Presidency Magistrate, 11th Court, Calcutta was not at all considered by the authorities concerned. He further stated in the said paragraph that on

receipt of the said application dated September 2,1971 the Government willed for a report from the Commissioner of Police on December

11,1971. The Commissioner of Police obtained a report from Bibhuti Chakraborty dated June 14,1972 and on the basis of the report of the

Official concerned the Commissioner of Police made his own report dated June 23,1972. The said officer on the basis of such information from

records has further stated as follows : --

It appears that the Government acted without considering the relevant materials, particularly the report of the Judicial enquiry by Sri R.P. Roy

Chowdhury and in fast based its decision on the recommendation of the Commissioner of Police which in fact was based on the report of the

petitioner himself.

32. It is difficult to follow how this Officer could make such a statement against the Government in the matter of a decision by such Government

and as to how. Che said Government formed its opinion in refusing to grant sanction, even though he said officer had no personal knowledge about

the same. It is difficult to rely on such sort of affidavit even though it is coming from no less a person than the Secretary (Home Department) of the

Government of West Bengal. The deponent has not even disclosed how he was posted when the said sanction was refused by the Government on

two previous occasions.

33. It is contended that the learned Judge of the Court below has come to a clear finding that there was no new material on the basis whereof the

State Government could grant the sanction. Having come to that finding the learned Judge ought to have held, according to Mr. Deb, that the State

Government could not have acted differently and granted the sanction on the basis of the self-same materials. The learned Judge has taken into

consideration that it was a policy consideration of the Government and the Court should not go into the same.

34. It is true, that the court cannot go into the question of propriety of the policy whether it is unwise or bad and so on. But the position here is

somewhat different. The policy has been disclosed. But it has not been stated anywhere that such a policy was in any way different from the policy

pursued by the previous Government, nor has it been stated anywhere that it was a new policy with the new Government. There is directly on

record materials to show that the State on the previous occasions was not shielding any person. Benoy in paragraph 19 of his affidavit directly

charged the then Government for shielding the offenders but on behalf of the State it was specially denied as absurd. The present Government also

says that it does not shield any person irrespective of the position that he might hold if he is an offender and is liable to be prosecuted. Since the

policy has been disclosed herein that is why it is open to the Court to examine it for the purpose of finding if it can be called a new Policy matter at

all in respect of the grant of sanction u/s 197(1) of the Cr. P.C.

35. This is a case of shootings by a police officer who was in the company of other police personnel and was supposed to be dealing with a violent

mob, and in course of performing his official duties as such police officer, under such circumstances he opened fire which ultimately caused the

death of two persons. If that is the version of the Police Officer, would not that be a relevant consideration for the State Government acting under

S. 197(1) of the Criminal Procedure Code at least to find out if the officer concerned had been acting in course of his duties and under what

circumstances he had to open the fire ? In a situation like thus can the Government only pursue its said policy of not shielding the offender,

however, high the post he might be holding because he has caused the death of two persons. If the Govern-ment on previous two occasions took

into consideration such facts, could it be said that the said Government was shielding the offender simply because the report of the Inquiry

Magistrate on the basis of the ex-parte evidence disclosed that there was a prima facie case of an offence of murder as a result of such shooting?

In any event, there are materials to show that the said report of the Enquiring Magistrate was also placed in the file of the Government and both

Harshanath and Benoy in their applications for grant of sanction specifically mentioned about the said enquiry held by Sri R.P. Roy Chowdhury

and his report as well as the nature and effect thereof, and accordingly, the Government in refusing the sanction must have considered the said

report was it not a relevant consideration for the Government to consider also the reports of the Commissioner of Police and to take his views in

the matter in respect of the incident which occured at that point of time ? Was it not a relevant consideration for the Government as to what was

the situation like at the relevant time when the incident occurred ? If the present Government was to consider the quetsion of granting sanction was

it not a material consideration for the present Government to take note of the fact that there was no new material an the basis whereof the sanction

could be granted ? Was it not to be considered that the State-Govern-ment had already refused to grant sanction I twice before ? Would the

Government consider this came in the same way where the Police officer concerned in his private capacity would commit a murder ?

36. The way the Government has moved in this matter clearly shows, according to Mr. Deb, that there was close affinity and close identity

between the interest of Benoy on one hand and the present Government on the other. The purported sanction was nothing but a whimsical and

arbitrary one. It is submitted that it was so granted without any acceptable reason and that it was motivated. Mr. Deb relied on the affidavit of

Benoy to show that such motivation was political. His affidavit would show at several places that be had strong political affiliations with the leftist

parties which had formed the new United Front Government. In paragraph 3 of his affidavit Benoy stated :

A great part of the situation was created by certain intriguing elements who had some associates in the police administration who wanted to

discredit the United Front Ministry as well as the leftists" by staging or causing to be staged murders and attacks on lives and properties of

common men, political personalities and also by encouraging rowdy and antisocial activities. Informations are increasingly coming to our

knowledge that a number of police personnel were kiled or caused to be killed by certain top people in the police administration itself who did not

like what they called infiltration of left elements in the police force. The incidents out of which the present proceedings have originated were also

one such incident when the petitioner headed a group of police officers in order kill out of hand a police constable namely, Ranjit Chakraborty

because he was suspected to have affiliation With the C. P. I (M).

In his application dated July 11, 1977 to the Governor for the grant of the said sanction he said :

In any event, in view of the change in the Government and the declared policy of the present Government, no offences though committed by

highest police officers would not be beyond the arm of the law, I venture to make this fresh application for sanction for prosecutions, of the said

Bibhuti Chakraborty alias B.B. Chakraborty and P. De.

37. It is contended that in deciding the question of grant or refusal to grant such sanction the authority concerned was to find out whether or not a

prima facie case has been made out and in so doing political considerations could not be brought in. The only relevant consideration before the

State Government, in the facts and circumstances of this case, was nothing but the incident which took place. It could not be any relevant

consideration as to whether by virtue of his being a high official of the Government the sanction should be withheld or not. But the consideration

was whether he was performing the duties as a Government servant entrusted to do some job wherein such hazards might be involved and what

situation he was tackling at the time the incident occurred. Was he there in course of his duties as such police officer or was he involved in a private

affairs unconnected with his official duties ? Did he open fire while acting as such police officer or did he do so while being unconnected in the

performance of his duties as such police officer? It necessarily follows that the Government was to consider not only Benoy"s point of view but

also the view point on which it acted previously i.e. those received from the high police officials, and if the same had been considered before it

would be the most relevant consideration for the present Government to take into account such records in order to grant the sanction.

38. It is contended that the Government was determined to grant the sanction and that was why it did not take Into consideration the other relevant

facts as discussed above. In the name of the above policy consideration all these relevant considerations could not have been brushed aside and, in

the facts and circumstances of this case, the question of grant of sanction could not have been considered on the basis of Benoy"s version alone,

particularly when the incident involved persons who professed some particularly political faith.

39. Regarding the affidavit of Biswaroop Mukherjee, to my mind, the allegations made therein regarding Nanda"s affidavit are vague and the way

the same has been verified, the Court can hardly place much importance thereon. There is no explanation as to why Nanda could not be

approached, even "if has since retired, to get this affidavit on this point. The criticisms of the act of the previous Government in the matter of non-

application of mind in refusing to grant the sanction, as sought to be made out in the affidavit of Biswaroop Mukherjee, is hardly reliable and all that

can be said about it is that it is rather unfortunate that the said officer should make such an affidavit. To my mind, the Government remains the same

although the Ministry might change from time to time. The Government officials could legitimately expect that the Government whom they served

would do equal justice to them even though the ministry might change from time to time.

In the petition Bibhuti has relied on an incident in which he was responsible in the matter of the arrest of a number of persons during a

demonstration and amongst them were some of the ministers who had since formed the present United Left Front Ministry. This was relied on by

Bibhuti for the purpose of making out a case for showing malafide and vindictive motive on the part of the Government in granting the sanction. I

do not think much reliance can be put on such allegations. There are no particulars and the allegations are just vague and do not disclose any

vindictive motive in the minds of the present Government in respect of such incidents. It was nothing but a political Incident and they voluntarily

courted arrest on political grounds and that could not be relied on by Bibhuti in support of the said point.

40. The Supreme Court in the case of Tara Chand Khatri Vs. Municipal Corporation of Delhi and Others, observed that the High Court would be

justified in refusing the investigation on the allegation of mala-fides if necessary particulars of the charge making out a prima facie case were not

given in the writ petition. It was observed that the burden of establishing malafides lay very heavily on the person who has alleged it.

41. The learned Advocate General urged that the allegation of malafides could not be made against the State Government even though allegations

have been made against the present Standing Counsel in respect of his appearance in Court. According to the learned Advocate General, it is true

that Mr. A. P. Chatterjee became the Standing Counsel just a few days prior to such orders being passed as aforesaid regarding the dismissal of

the pending appeal but the fact remains that he all through remained the lawyer of Benoy from the very beginning and he was not appearing on

behalf of the State although that has gone down in the minutes of the Count in that manner. It was poinied out by the learned Advocate General

that in the first part of the order dated September 8, 1977 only the submissions made by Mr. Samar Datta the Advocate appearing on behalf of

Benoy was recorded but in the later part of the order the statement made by him has been correctly recorded, viz., that the sanction had already

been granted by the State. The Advocate General argued that the Government did not act on the basis of the order of the Appeal Court. If that

had been so done then in the sanction itself the same would have been referred to. I have already discussed in what way everything was sought to

be done behind the back of Bibhuti.

42. Mr. A.P. Chatterjee appearing on behalf of the respondent Benoy contends with reference to the order dated July 21, 1977 that the matter

was mentioned on the previous day by the instructing Advocate Mr. Samar Datta and pursuant thereto the matter appeared in the list marked to be

mentioned. Mr. Chatterjee''s explanation is that so far as he remembered he became the Standing Counsel only a few days prior to that date and

he verbally informed the then assistant of Mr. N.C. Mitra that he was going to mention the matter. At that time Bibhuti''s case was being looked

after by the State Government Solicitor Mr. N.C. Mitra along with that of;he State Government. Minutes did not show, however, that anybody on

behalf of Mr. N.C. Mitra appeared but when the draft minute was issued for settlement it showed the name of Mr. N.C. Mitra. The admitted

position, however, is that nobody appeared on behalf of Mr. N. Mitra when the order of the Appeal Court was made in July 21, 1977. It was not

possible for Mr. Chatterjee to explain the position nor could Mr. Chatterjee explain how his appearances could be noted therein as appearing for

the respondents, i.e. both for the State Government and for Bibhuti. In any event, the same was sought to be altered under circumstances when

Bibhuti could not be consulted.

43. It is to be noted at this stage that Benoy in his affidavit took the stand that the sanction should be considered by the State Government afresh

on the basis of the fresh application made by Benoy and pursuant thereto the sanction was granted. In paragraph 16 of his affidavit affirmed in

September 1977, a supply copy whereof was sent on September 5, 1977 Benoy said so. His own version from the said paragraph of the affidavit

has already, been sent out hereinabove. At this stage Mr. S. K. Rudra was acting as his recorded advocate.

Benoy however wanted to change his stand taken in his affidavit and to amend it through his the then lawyers Mr. S.K. Rudra who addressed a

letter to Mr. R.M. Kar, Advocate acting for Bibhuti as follows :

Samar Kumar Rudra

Solicitor & Advocate

Temple Chambers

(Ground floor, Room No. 33)

6, Old Post Office St. Calcutta

19th September, 1977.

Sri R.M. Kar, Advocate

Dear Sir,

In the Matter of

Bibhuti Bhusan Chakraborty

v.

The State of West Bengal & Ors.

Yours of 17th September, 1977.

I have already intimated you through my court clerk Sisirendu Banerjee that the affidavit of my client Sri Benoy Chakraborty was affirmed on 9th

September, 1977 and I have also intimated you about the corrections made in page "8" paragraph 16 (4th line) which reads as follows:

Mr. Justice A. N. Banerjee was dismissed for non-prosecution by the appellant on the assurance by the Standing Counsel for the State that they

would.

Kindly read the said affidavit of my client corrected accordingly and oblige.

Kindly also supply me with a legible carbon copy of the affidavit in-reply on the usual terms as and when the same would be ready.

Yours faithfully,

Sd/- S.K. Rudra

On the basis of the said corrections, the said sentence read as follows:

I further say that the appeal No. 184 of 1976 which was against the judgment of Mr. Justice A. N. Banerjee was dismissed for non-prosecution

by the appellant on the assurance of the Standing Counsel for the State that they would reconsider the application for sanction which the

complainant Benoy Chakraborty had made and which had been rejected arbitrarily by the memo dated 24th December, 1973 issued under the

signature of Sri N. Nanda.

44. It would appear that previously Benoy was proceeding on the basis of the Court"s order in the matter of grant of sanction by the Court but

later on he changed it and relied on the was assurances of the standing counsel for the State that the State Government would reconsider the

application of Benoy and that was why the said appeal was got dismissed for non-prosecution by Benoy. Mr. A. P. Chatterjee could not have any

satisfactory explanation as to the different stands taken by his client my implicating him personally into the matter.

The question of malafides assumed importance by reason of those two versions of Benoy and we have considered the same carefully in finding out

how the State Government was acting in giving the sanction.

45. The substance of the argument of Mr. A. P. Chatterjee under the circumstances was that, even so, the Government did not in any manner

involve itself in the matter of obtaining such orders or for the purpose of granting the sanction. His contention was that it might be that the

complainant Benoy at that stage was advised to have the appeal disposed of so that if might not be said later on that the matter was sub-judice and

as such the Government could not grant the sanction on the basis of the fresh application of Benoy but that would not affect the decision of the

state Government in granting the sanction.

46. On behalf of Benoy it was sought to be argued that no particulars of malafides and no allegations thereof would be found in the petition itself.

The same have been alleged only in the affidavit-in-reply of Bibhuti. To that Mr. Deb contends that before the supply copy of the affidavit-in-

opposition of Benoy was received by Bibhuti the real position was not revealed and the same was purposely kept in the dark from Bibhuti and as

such Bibhuti could not have got any opportunity prior thereto to allege such malafide prior to his filing the affidavit in reply. To that Mr. A. P.

Chaterjee has contended that in that event me petition should have been amended and the point should have been alleged so that his client could

deal with the same in his affidavit.

47. To my mind the point has practically arisen by reason of the materials disclosed in the affidavit-in-opposition for the first time and accordingly,

if the State Government wanted to clarify the position or to meet the same, it ought to have asked for an opportunity to file further affidavit by way

of rejoinder and ought to have come out to disclose the position as to the circumstances under which the sanction was granted. No attempt was

made with regard thereto and, accordingly, it would be no excuse to say that the same could not have been dealt with by the State Government in

its affidavit filed herein.

48. The whole thing taken together makes out a clear case of malafide and, accordingly, it cannot be brushed aside on the technical plea of want of

pleading in the petition. This is a case where malafide is so apparent and writ so large on the face that no length of curtain is sufficient to cover it. In

''the absence of any explanation from the Government the court is bound to held that there is enough material before it to arrive at such conclusion.

49. This is a case where the plea of malafides was expressly taken in the affidavit-in-repiy and the parties were quite conscious about the position

and fully argued the same. Under such circumstances, in my opinion, the principles laid down in the case of Sri-La-Sri Subramania Desika

Gnanasambanda Pandarasannadhi Vs. State of Madras and Another, at page 1582 should be applied and followed in the facts and circumstances

of this case. The said Supreme Court decision would be more fully dealt with hereafter.

50. The arguments of Mr. Deb that the conduct of the State Government acting through its. Solicitor Mr. N.C. Mitra who had been representing

Bibhuti all throughout up to the dismissal of the said appeal and of the learned Standing Counsel who was acting for Benoy as also on behalf of the

State Government at a subsequent stage, have great force behind them that it would clearly show complicity between Benoy and the State

Government Benoy''s own affidavit, as set out hereinabove, would go to support the same. It could not but be described as a premeditated and

pre-planned action on the part of Benoy and the persons who were acting and instructing the State Government in that respect. The position seems

clear that unless there was complicity by and between Benoy and the State Government and/or the persons who were at the helm of affairs of the

State Government in connection with the said grant of sanction, the State Government would not have moved in such a hasty and determined

manner in the matter of granting such sanction. Furthermore, there is enough evidence, as disclosed from the facts and documents, that Benoy was

an ardent follower of the riding party and the persent Government was also too eager to change the decision of the previous Government which

refused the grant of sanction twice. It must have been that only on that basis Benoy could make the application over again and the State

Government could act in that manner without caring to consider the previous orders of the former Government or to know what was there in the

file on the basis whereof such sanction was twice refused.

51. The court is convinced that in between July 20,1977 when the matter was first mentioned by Mr. Samar Datta and September 5,1977 when

the supply copy of Benoy''s affidavit was sent to Bibhuti including the grant of such sanction on August 4,1977, as disclosed by the learned

Advocate General in court, everything was suppressed from Bibhuti both by Benoy as also by the Government Advocate acting under instruction

of the Govern-ment with a view to make the order granting sanction.

52. As stated hereinabove the order granting sanction was dated 4th August, 1977. The order itself did not show whether the previous orders

refusing to grant sanction were considered. It merely narrated the incident as state in the second application of Benoy for sanction. In the affidavit

filed by Biwarup Mukherjee, the Secretary to the Government of West Bengal, Home Department the deponent asserted in paragraph 10 thereof

it appears from the records that in taking the said decision the report submitted by the learned Judicial Magistrate 11th Court, Calcutta was not at

all considered by the authorities concerned."" According to the deponent the relevant materials were not considered by the Government which took

the previous decision. According to the deponent, in the instant case however, the Government had considered all the materials and further that the

present Government does not want to shield any person irrespective of the position he may hold against whom there is prima facie case that he

committed an offence under the provisions of law for the time being in force. There are two points involved in the said assertions. First, whether the

Government taking the previous decisions acted without taking into consideration the relevant materials which were considered in granting sanction,

secondly, whether it can be said to be a policy matter of the present Government not to shield any person Irrespective of the position he might hold

against whom there was prima facie case that he committed an offence under the provisions of law for the time being in force, and if so, if the said

policy was not followed by the previous Government which refused to grant the sanction on two previous occasions.

53. Regarding the first question the court below found in favour of the appellant herein-. I am an entire agreement with the said finding. On the said

two previous occasions on behalf of the Government the then Deputy Secretary (Home) Nanda definitely asserted by categorical statement that

the Government had considered all the relevant factors and had fully considered the matter. The learned Judge has come +o the finding that on

March 17,1971 the Commissioner of Police had sent to the Home Secretary in continuation of his report dated March 13,1971 the folio-wing

documents :

(i) Copy of the order and finding of R.P. Roy Chowdhury Presidency Magistrate,

(ii) Copies of deposition of 11 witnesses examined in the judicial enquiry

(iii) Copy of the petition filed by Benoy in the court of the Chief Presidency Magistrate and

(iv) Copy of the order sheet of the Additional Chief Presidency Magistrate dated February 27,1971 in which he had recommended the issue of

summons.

Those facts were known to the Government when on the previous occasions the Government had refused to grant sanction. The further finding of

the learned Judge is that on August 12,1971 Talukdar J, dismissed the criminal revis"on application by Benoy against the order of Additional Chief

Presidency Magistrate mentioning the finding of the said R. P. Roy Chowdhury that there was a prima facie case, Thereafter Harshanath, the father

of Benoy, made an application for sanction mentioning there in the finding of the said R.P. Roy Chowdhury of such prima facie case. On

December 22,1971 there was a second application by Harshanath in which the finding of R. P. Roy Chowdhury was referred to. The report dated

June 23,1972 made by R. N. Chatterjee, Commissioner of Police together with the judgment of Talukdar, J. were placed on the file. Then again,

in the petition in the matter No. 77 of 1973 the finding of R. P. Roy Chowdhury was also referred to. The affidavit of the State Government filed

through the Deputy Secretary also showed that the Government had considered the matter very carefully and after careful consideration of all the

facts and circumstances the government did not find the prayer of Harsha Nath Chakraborty to be justified. The sanction was refused on

December 24,1973 as in the opinion of the Government the officers concerned were acting in good faith in discharge of their official duties and

under the order of the superior officers. In matter No. 88 of 1974 also there was reference to the report of R. P. Roy Chowdhury and in the

affidavit filed on behalf of the State Government it was reiterated that all the aspects of the matter had been considered" carefully by the

Government who were not inclined to grant sanction in the matter. On behalf of Benoy, both the said matters being Matter No. 77 of 1973 and

matter No. 88 of 1974 where the grant of sanction was refused, were challenged in court and in the said proceedings the then Deputy Secretary

(Home) (General Administration) Nanda had made the categorical statement as stated hereinabove. There assertions were made by a responsible

officer of the Government who actually dealt with the matter. About the correctness of such assertions the present Secretary, Home Department

Biswarup Mukherjee could not have any personal knowledge. His knowledge was derived only from what he found from the records.

Accordingly, I would have expected Nanda Himself to file an affidavit seating that what he said previously was not correct. In the absence of such

an affidavit it is difficult to rely on the said affidavit of Biswarup Mukherjee which was not true to his knowledge. I am in entire agreement With the

learned Judge of the Court below in respect of the said finding that the Government took the previous decisions after considering all the relevant

materials including the report submitted by the Presidency Magistrate, 11th Court, Calcutta" which was on the file.

54. With regard to the second point as to whether or not lit was a policy consideration of the Government Mr. Deb contends first, that it could not

be a pollicy at all. Secondly, even assuming that it is a policy then it is contended that such a policy was of such a nature that every Government

would follow the same without any exception. Thirdly, there was no allegation that such a policy was in any way different from the"" policy followed

by the Government at the time the sanction was refused. In other words, such a policy was also followed by the Government which refused the

sanction. I have already discussed the matter in detail with referesce to the affidavits used herein to show that when challenged by Benoy Nanda

made positive assertion of facts to the effect that Government never shielded Bibhuti because he was a highly placed Government official so that no

criminal proceedings might be taken against him.

55. Section 197 confers no public right but only gives a nominal right. It is for the Government to consider in its discretion whether to give or not to

give such sanction. It follows therefore that when lit comes up for the consideration for the first time then the question of giving a hearing to the

accused or to ask him to explain or to show cause could not arise. The accused, under such circumstances, could not be said to have any right

which might be said to be likely to be infringed at that stage. We are not concerned with that stage. That stage came up before the Government

when it refused to give the sanction under the said section on two previous occasions. But when it came up for the third time and the Government

thought fit that it should grant the sanction then only the considerations take a different shape. The considerations under the circumstances become

different from "the original consideration. At that stage undoubtedly the question of following the principle of natural justice would come in. In that

respect the observation made in the case of AIR 1939 43 (Federal Court) and the passage at 57 could not be applied to the principles involved

herein.

56. In the case of B. B. Chari v. State of U.P. AIR 1962 SC 1973 at page 1581 the Supreme Court observed that the object of section 197(1)

clearly was to save the public servant from frivolous prosecution. The section, in my opinion, concerns the Government and the discretion to be

exercised thereunder for the grant of a sanction must be in accordance with the requirement provided therein. It is bound to vary from case to

case. Once the State Government has decided not to grant the sanction and has made the order to that effect it must have some fresh materials

before it to change its own decision and there comes the question of the State Government following the principles of natural justice. It cannot as-

Same the power to take a different view of the matter without considering all the materials which were placed before it on the former occasions

and without giving the accused an opportunity -to explain the position because his rights would be affected thereby. The Government, in other

words, in revising its decision for the purpose of granting the sanction must not only hear the complainant but also the version of the accused !in

order to find out in a case like this whether the official concerned noted in good faith and in discharge of his duties. At such a stage and under such

circumstances to say that the Government was acting under a policy consideration would; not be enough. It has to be satisfied that the previous

decision whereby the sanction was refused was based on a different policy which was not being pursued by the present Government. Under such

circumstances, if the officer concerned would get the opportunity to give his views and his versions, he might have satisfied the Government who

might have taken a different decision. This, however, would not be necessary in granting or refusing the sanction when the same would come up for

the Governments consideraton for the first time. The consideration would no doubt be a relevant consideration when the Government intended to

revise its decision on the same materials on a subsequent occasion. Such a consideration could not be left to the policy consideration of the

Government alone. If such a state of affiairs would be allowed to be utilised then it would not be any decision of a right minded person â€‹ but such a

decision would be nothing but an arbitrary or a whimsical decision based on caprice or ill will. Even though it is an executive order or an

administrative decision yet it must be a decision after proper application of mind. In the name of acting under a policy consideration the

Government could not exercise absolute power. If that would be permitted then there would be an end of the rule of law. In my opinion, the

learned Judge of the Court below after having held that there were no new material before the present Government to arrive at its decision could

not have held at the same time that there was a prima face case on the basis whereof the Government could have acted in granting the sanction.

Such an inconsistent stand could not be allowed to be taken by the Government vis-a-vis its own officer. Governments are changed from time to

time but the officers continue and they can legitimately look forward to every Government so that it might act impartially in respect of its officers. It

would be a very sad day for the country in its administrative sphere if its political consideration on party basis would become the guiding factor for

refusing progranting the sanction. If it be the policy of the new Government to set free all political offenders even though they have already been

convicted then there might not; be any difficulty to appreciate the same as a policy consideration but it would not be the same thing to say that it

was a policy matter of the new Government to bring to book any of its officers who might have supported the previous Government and in respect

of whom sanction has been refused even on two previous occassions. The observation of the Privy Council in the case of Gokulchand Divarkadas

Morarka v. The King reported in AIR 1948. PC 32 to the extent that the sanction could be refused on political grounds if the Governuient thought

it expedient, was not approved of by the Supreme Court in the case of Manhar Lal Bhogilal Shah Vs. State of Maharashtra, at page 1514. There

the Supreme Court observed that the authorities concerned would be expected to take into account the changed conditions obtaining after the

enforcement of our Constitution which guaranteed fundamental rights including Article 14.

57. We have to bear in mind that the main question for consideration before us to whether the officer concerned should be given an opportunity of

hearing, in whatever form it might be, when it came to the question of taking decision for the third time. Then again, it has to be borne in mind that

this is a case of an officer whose normal duties included maintenance of law and order situation of the country and that on special occasions he

might have to resort to firing in course of his duties when he could be placed in such a situation. For that purpose special provisions have been

made for him in the Criminal Procedure Code which has provided for his special protection under circumstances mentioned therein. In taking a

decision in respect of such a case when it came up for the third time I do not see any reason why the Government would not allow a hearing to

such an officer so that the Government might consider his version and then decide the question.

58. The learned Judge of the Court below while referring to the Privy Council decision (supra) observed that the effect of the aforesaid decision of

the Judicial Committee was that the sanction contemplated u/s 197 was essentially a discharge of the executive discretion by the Government and

could be exercised, if there is prima facie evidence on record, upon the policy consideration. In making such observation the learned Judge did not

take into consideration that the facts herein are different in the sense that the sanction came up for consideration before the Government for the

third time after two previous refusals.

59. In my opinion the learned Judge of the Court below was not right in following the principles decided in the case of In the Matter of Kalagava

Bapiah ILR 27 Mad (1904) 54 where the question of granting or refusing sanction u/s 197 came up for consideration of the first application and

not on "the third one as has been the case before us. The learned Judge was also not right in his appreciation of the Supreme Court decision in the

case of Manhar Lal Bhogilal Shah Vs. State of Maharashtra, where the Supreme Court criticised the said observation of the Judicial Committee of

the Privy Council. In that case the Supreme Court observed as follows;

We consider it unncessary to pronounce, with respect, on the correctness or otherwise of the above observations. We have no doubt that he

authorities concerned are expected to take into account the changed conditions obtaining after the enforement of our Constitution which guarantees

fundamental rights including Article 14. They are bound to examine the facts of a particular case and then decide whether prosecution should be

launched or not.

In this connection the learned Judge also did not consider the observation of Lord Justice Farwall in the case of Bex v. Board of Education, L.K.

(1910) 2 KBD 165 at page 181 where the Lord Justice observed as follows :

If this means-that the Board were hampered by pollitical considerations, I can only say that such considerations are pre-eminently extraneous, and

that no political consequences can justify the Board in allowing there judgment and discretion to be influenced there by.

According to the learned Judge the said observations were made in a different context and in respect of exercise of different type of power. In my

opinion, the learned Judge was not right in that respect and"" ought to have applied the principle enunciated therein to the facts of the case before

us.

60. On the question of malafide the learned Judge only dealt with the said allegation whereby it was alleged that the appellant had to arrest many

members of the C.P.I. (M) which formed an unlawful assembly when the left front Government was not in power. The allegation that when it came

to power the left front Government had grudge or grievances against the appellant and some of the Ministers were inimically disposed towards the

appellant and as such they had granted sanction for prosecution against him even though on two previous occasions the same was refused. In my

opinion, the learned judge was right in rejecting the questions of malafide on that ground but the learned Judge was not right in not going into the

other aspect of the case and in holding that the Governmnt was not guilty for any malafide act. What happened before the appeal Court was given

very little importance and the learned, Judge failed to appreciate the gravity of the situation in that respect.

61. For the reasons as aforesaid, I have no hesitation to hold that the arguments of Mr. Deb, as noted above, on the question of malafides on the

part of the Government are convincing and, accordingly, the same are acceptable to me. I have no doubt that malafide has been clearly established

in this case. On behalf of Benoy full opportunity was taken, in the manner as set out herinabove, through the instrumentality of the said persons

concerned who were at the helm of affiairs of the Government machinery, to get the sanction, immediately the United Front Ministry came into

power. The order itself would show that only Benoy"s version, as mentioned in his application, was taken into account in granting the sanction. No.

reasons" had been ascribed as to why the previous orders refusing to grant sanction was necessary to be changed. There is no indication in the

said order granting sanction that the previous orders of the Government were considered before the same was granted. In the facts and

creumstnees of this case it seems clear that the Government was bent upon granting sanction purely on political consideration but before doing it, it

was thought fit to get the necessary orders from the Court to put an end to the pending appeal and the same was so done behind the back of the

appellant and P.R. Dey so that there might be no impediment on its way until the said sanction was granted. From the Appeal Court orders it is

plain that the court would not have passed such an order in the absence of the appellant and the said P.R. Dey if the court was told about the

actual position that such an order might result in prejudicially affecting the interest of Bibhuti and P.R. Dey. In that event, surely the court would

have insisted on making the order upon notice to the said parties. The Appeal Court must have got the impression that it was making an innocuous

order. That would be evident from the fact that immediately the court was apprised of the real situation the Appeal Court took all possible steps tc

safeguard the interest of the appellant and even by recording that the Government would not be entitled to rely on the said order of withdrawal of

the appeal in the matter of granting such sanction although by that time the sanction had already been granted as intimated to court by the learned

Advocate General. The Appeal Court even issued directions preventing the filing of the order even though the same was settled and completed.

62. From the said orders of the Appeal Court and the submissions made before it on behalf of Benoy and the State Government as recorded

therein one thing is clear that the Appeal court was never apprised that Benoy had made a fresh application and the sanction was granted thereon.

The way things moved in court and the conduct of N.C. Mitra as disclosed in the correspondence of the recorded advocates appear to be clumsy

and irritating and particularly when it referred to a Government order. It became crystal clear that :he standing counsel could not have given such an

assurance had he not consulted the sanctioning authority before hand. The averments made by Benoy in his affidavit-in-opposition, as set out

hereinabove, and the correspondence made by Mr. N.C. Mitra in that connection leaves no doubt in the mind that the grant of sanction was

definitely predetermined. Under the Circumstances, it is legitimate to conclude that the withdrawal of the appeal was considered to be a major step

so far as Benoy was concerned and such a step would not have been taken unless the Government had predetermined the matter of granting such

sanction and unless it was so done with its concurrence. What became manifest was the close affinity and close identity of interest between Benoy

and the Government and that made the sanction motivated. There could be no doubt that such motivation was political as would appear from

Benoy"s affidavit as set out above.

63. In this case it was of little consequence that malafides were not alleged in the petition itself but it was alleged only in the affidavit-in-reply. As

observed hereinabove, a similar situation arose before the Supreme Court in the case of Sri-La-Sri Subramania Desika Gnanasambanda

Pandarasannadhi Vs. State of Madras and Another, where also the plea as to why the earlier notification which made the order invalid, should not

be extended was not specifically taken in the writ petition but was taken in the affidavit-in-re-joinder. Gajendragadkar C.J. speaking for the

Supreme Court observed at page 1582 as follows:

This reason is no doubt, technically right in the sense that this plea was not mentioned in the first affidavit filed by the appellant in support of his

petition, but in the affidavit-in-rejoinder filed by the Appellant this plea has been expressly taken. This is not disputed by Mr. Chetty, and so, when

the matter was argued before the High Court, the respondents had full notice of the fact that one of the grounds which the appellant challenged the

validity of the impugned order was that he had not been given a chance to show cause why the said notification should not be "issued. We are

therefore, satisfied that the High Court was in error in assuming that the ground in question had not been taken at any stage by the appellant before

the matter was argued before the High Court.

In my opinion, the parties were fully aware of the fact that such mala-fides have been alleged in the affidavit-in-reply and it was argued at length

and the respondents were fully aware of such allegations made in such affidavit, The facts herein are of peculiar nature. The acts constituting

malafide on the part of the Government could only be gathered and the same were revealed for the first time only in the affidavit filed by Benoy, in

opposition to the petition herein and, accordingly, the same could not have been alleged in the petition and necessarly the same was alleged in the

affidavlit-in-reply, Under the circumstances, if the Government wanted to explain the position further directions for affidavit by way of rejoinder

might have been prayed for but such a step was not taken.

64. In the case of State of Punjab Vs. Ramjilal and Others, it is observed by the Supreme Court that where malafide has been alleged against the

Government and the facts are entirely known to the Government, the Government has to discharge tire onus to prove that it is not so acting as

alleged. Shah J (as he then was) speaking for tire Supreme Court observed at page 1231.

Counsel for the State of Punjab contended that the plea that the action of State was not bona-fide cannot be said to be established, unless the

party alleging drat case names the officer or officers guilty of conduct which justifies an inference that the official act was done for a collateral

purpose, and since no such attempt was made and the High Court did not find that any named officer or officers was or were responsible for that

official act the plea that it was not bona fide must fall. We do not think that the law casts any such burden upon the party challenging the validity of

the action taken by the State Government. The State Government has undoubtdely to act through its officers. What matters were considered.

What matters were placed before the final authority, and he acted on behalf of the State Government in issuing the order in the name of the

Governor, are all within the knowledge of the State Government, and it would be placing an intolerable burden in proof of a just claims to require a

party alleging mala fides of State action o avert in his petition and to prove by positive evidence that a particular officer was responsible for

misusing the authority of the State by taking action for a collateral purpose.

65. In my opinion, the above principle as enunciated by the Supreme Court wholly applies to the facts of this case and the materials placed before

this court on behalf of the appellant are such that it was incumbent upon the Government to explain the position as to how the authority acted in

issuing the order reversing the previous ones.

66. I have carefully considered the question and the materials placed before me from the records of this case and I am satisfied therefrom that in

this case malafide on the part of the Government has been clearly established and proved and the order granting sanction in accordingly, liable to

be struck down as would be evident from the following facts :--

(a) a fresh application made by Benoy on July 11, 1977 during the pendency of the appeal being No. 184 of 1976 from the order of A. N.

Banerjee J. Immediately after the formation of the United Front Ministry in June 1977,

(b) the manoeuvering in court to obtain the order of the appeal court of July 21,1977, as observed in detail above, exparte and behind the back of

the appellant and P.R. Dey to get rid of the order of A. N. Banerji J;

(c) This was immediately followed by the impugned sanction dated August 4,1977,

(d) the complete identity between Benoy and the manner the State Government had sanctioned the cause of Benoy as stated hereinabove,

(e) absence of any affidavit by Nanda without any explanation in regard to matters of which he had expressly stated in his affidavit as to how the

Government considered the matter in refusing to grant sanction on two earlier occasions,

(f) the inconsistent stand on facts taken by the State Government with reference to the stand previously taken by it,

(g) the complete blacking out of Bibhuti"s version with reference to the incident of November 11, 1970 showing non-consideration and the

alternative version of the matter supported by police diary and the successive reports of the Commissioners of Police on two occasions, the two

previous refusals of sanction without any fresh materials before the Government.

67. Even after the impugned sanction was granted the way the Government took action against Bibhuti would also go to show in what way the

State Government was raking Part in this matter with right earnest. On August 17,1977 the suspension order was passed against Bibhuti. On

August 24,1977 Bibhuti demanded justice and thereafter on September 1,1977 obtained the Rule Nisi herein. Thereafter on September 5,1977

when the supply copy of the affidavit in opposition by Benoy was supplied to Bibhuti"s lawyer then only Bibhuti could come to know of the said

exparte order of the Appeal Court dated July 21,1977 which was so long completely kept suppressed from Bibhuti and P.R. Dey. I have already

observed how the Appeal court was surprised and in what way it tried to safeguard the interest of the appellant.

Under the circumstances as aforesaid, I held that mala fides have been clearly established in this case and on this basis alone the Rule Nisi is liable

to be made absolute. But in view of the fact that the point relating to the application of the principle of natural justice in this case has been fully

argued by both the parties we feel inclined to deal with the said point: as well.

68. Mr. Deb argued that in the facts and circumstances of his case Bibhuti had acquired an immunity from prosecution with regard to the same

incident on the same facts, when this immunity was sought to be taken away, it was only fair that the State Government should have given him ar

opportunity of hearing or to explain the position before the sanction was granted by following the principles of natural justice. It is also contended

that on the question of the alleged policy of the State Government also Bibhuti should have been given an opportunity to say that if such a policy

could be policy at all then the very same policy was also pursued by the Government on the previous two occassions to come to its finding in

refusing to grant sanction as appeared in the Government"s own affidavit. That being the position, it is contended that justice of the case demanded

that no sanction under the circumstances should have been given without following the principles of natural justice.

69. In the first place Mr. Deb contended that in the peculiar facts and circumstances of the case when the sanction was twice refused, on the

specific ground that it was not at all justified, the State Government should have given reasons in its order in granting sanction. Such reason should

have appeared in the order itself. Having regard to the two previous refusals it was required to be a speaking order. On two previous occasions,

the State Government found that there was no prima facie case for granting sanction. No reasons was given as to why it was necessary this time to

grant such sanction when on two previous occasions the Government thought that the same ""was not at all justified"". Accordingly, the order

granting sanction was not speaking as to the consideration of the Government with regard to the circumstances which led it to refuse the same and

why it was going back in changing the decision. It was not stated any where in the said order that on previous occasions the State Government did

not consider any of the facts which it considered this time in granting the said sanction or that the policy consideration of the present State

Government was in any way different from that of the previous State Government which refused to grant the sanction.

70. Mr. Deb contends that giving of reasons in the order in a part of the principles of natural justice and there is no difference here between judicial

function and quasi-judicial function as well as executive function. Even the affidavit did not show how the mind was applied and what were the

steps in the process of thinking. In support of his argument Mr. Deb relied on the Supreme Court decision in the case of Mohinder Singh Gill and

Another Vs. The Chief Election Commissioner, New Delhi and Others, where it was observed at page 858 that:

When a statutory functionary made an order based on certain grounds, its validity must be judged by the reasons so mentioned and should not be

supplemented by fresh reasons in the shape of affidavit or otherwise, otherwise an order bad in the beginning might, by the time it came to court on

account of a challenged, got validated by additional grounds later brought out.

In our case, similarly, according to Mr. Deb, the State Government acting u/s 197(1) of the Code of Criminal Procedure and deriving its powers

thereunder should have given its reasons partcularly when on two previous occasions it took an absolutely contrary view. Mr. Deb also relied on

the case of Hochtief Gammon v. State of Orissa AIR 1875 SC 2226 wherein at page 2234 the Supreme Court while dealing with a case u/s 10 of

the Industrial Disputes Act, 1947 observed.

The Courts have power to see that the Executive acts lawfully. It is no answer to the exercise of that power to say that the Executive acted

bonafide nor that they have bestowed pain staking consideration. They can not avoid scrutiny by Courts by failing to give reason. If they give

reasons and they are not good reasons the Court can direct them to reconsider the matter in the light of relevant matters, though the propriety,

adequacy or satisfactory character of those reasons may not be open to judicial scrutiny. Even if the Executive considers it inexpedient to exercise

their powers they should state their reasons and there must be material to show that they have considered all the relevant facts.

71. Mr. Deb next cited the case of The Siemens Engineering and Manufacturing Co. of India Ltd. Vs. The Union of India (UOI) and Another,

where the Supreme Court observed that it was a settled law that where an authority made an order in exercise of quasijudicial function it must

record its reasons in support of the order it made. That was a case under the Tariff Act, 1934 at page 1789 it was observed :

The Rule requiring reasons to be given in support of an order is like the principle of audi alterem partem, a basic principle of natural justice which

must inform every quSsi-judicial process and this Rule must be observed in its proper spirit and mere pretence of compliance with it would not

satisfy the requirement of law

72. Mr. Deb contends that the distinction beteen quasi-judicial orders and executive orders has since been obliterated since the decision of the

Supreme Court in A.K. Kraipak and Others Vs. Union of India (UOI) and Others, In the case of Mahabir Prasad Santosh Kumar v. State of

Uttar Pradesh, AIR 1970 SC 1304 the Supreme Court has explained why it was necessary to record the reasons in support of a decision by a

quasi-judicial authority in the following language at page 1304 :

Recording of reason in support of a decision on a disputed claim by a quasi-judicial authority ensures that the decision is reached according to law

and is not the result of caprice, whim or fancy or reached on grounds of policy or expediency.

In the case of Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, Bhagwali J. dealing with the said aspect of the principles of natural

justice held that the principle supplied to administrative enquiry and the authority concerned was required to act fairly and with impartiality.

In Maneka Gandhi"s case (supra) Bhagwati J at page 624 discussed the scope of Article 14 of our Constitution. The learned Judge observed :

It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subject to a narrow,

pendantic or Lexicographic approach. No attemp should be made to truncate its all-embracing scope and meaning for to be do so would be to

violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and

doctrinaire limits. We must reiterate here what was pointed out by the majority in E.P. Royappa Vs. State of Tamil Nadu and Another, , namely,

that from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies, one belongs to the

rule of law in republic, while the other to the whim and caprice of an absolute monarch. Where an ac! is arbitrary, it is implicit in it that it is unequal

both according to political logic and constitutional law and is therefore violative of Article 14. Article 14 strikes at arbitrariness in State action and

ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, ''is an essential element of

equality or non-arbitrariness pervades Article 14 like a broading omnipresence and the procedure contemplated by Article 21 must answer the test

of reasonableness in order to be in conformity with Article 14. It must be ""right and just and fair"" and not arbitrary, fanciful or oppressive otherwise

it would be no procedure at all and the requirement of Article 21 would not be satisfied.

Then again at page 626 the learned Judge observed :

The aim of both administrative enquiry as well as quasi-judicial inquiry is to arrive at a just '' decision and if a rule of natural justice is calculated to

secure justice, or to put it negatively, to prevent miscarriage of justice, it is difficult o see why it should be applicable to quasi-judicial inquiry and

not to administrative inquiry. It must logically apply to both. On what principle can distinction be made between one and the other ? Can it be said

that the requirement of ""fair play in action"" is any the less in an administrative inqury than in a quasi-judicial one ? Sometimes an unjust decision in

an administrative inquiry may have for more serious consequences than a decision in a quasi-judicial inquiry and hence the rules of natural justice

must apply equally in an administrative inquiry which entails civil consequences.

At page 628 the learned Judge after discussing the various decisions'' both English and Indian observed by quoting a passage from the decision of

the Supreme Court in Suresh Koshy George Vs. University of Kerala and Others, .

The rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great

extent on the facts and circumstances of that case, the frame; work of the law under which the enquiry is held and the constitution of the Tribunal or

body of persons appointed for the purpose. Whenever a complaint is made before a court that some principle of natural justice had been

contravened the; court has to decide whether the observance of that rule was necessary for a just decision on the facts of the case.

The learned Judge observed that the above view was reiterated and the reaffirmed in a subsequent decision of the Supreme Court in The D.F.O.,

South Kheri and Others Vs. Ram Sanehi Singh, and further observed :

The law must, therefore, now be taken to be well settled that even in an administrative proceeding, which involves civil consequences, the doctrine

of natural justice must be held to be applicable.

73. The question therefore arises as to whether the application of Benoy before the present Government and the decision thereon involvted any

civil consequences. Mr. Somnath Chatter-jee, learned counsel appearing as Junior to the learned Advocate General and arguing this point,

contends that this is a case where no civil consequence is involved. By the grant of sanction u/s 197 (1) of the Criminal Procedure Code all that

would happen is that the prosecution would be allowed to be commenced. The appellant would get enough opportunity to defend his case before

the Criminal Court. In that sense the principle of natural justice could not be said to be violated, if at the stage of granting the sanction lie would not

be given in opportunity of representing his case before the authority concerned. According to Mr. Deb, the order granting sanction would clearly

show that the Government did not consider the version of the appellant at all. He has not been given any opportunity whatsoever. Only Benoy''s

version has been considered and on the basis thereof the sanction has been granted. The appellant had many things to say about this matter but he

had been denied that opportunity.

The position possible might have been different had it been the case of the consideration of the first application u/s 197(1) of the Criminal

Procedure Code, but that is no the case here. It appears from the order granting sanction that the Government was possibly not at all aware of its

two previous refusals to grant such sanction on the self-same facts. Even in the affidavit in opposition filed by B. Mukherjee on behalf of the

present State Government no attempt has been made to show how the Government applied its mind although even of that would have been done

the same could not cure the defect of not stating the reasons in the order itself. The Government failed to appreciate that after the previous refusals

to grant sanction it sanction to prosecue was to be granted on the third occasion then the same would naturally involved civil consequences.

It has been observed in M.S. Gills case (supra) at page 876 that:

Civil consequences undoubtedly cover infraction of not merely pro-perty or personal rights but of civil consequences material deprivations and

non-pecuniary damages, in its comprehensive connotations, everything that effects a citizen in his civil life inflicts a civil consequence.

74. That is a case where a police officer was sought to be prosecuted and in order to fulfil the requirement of section 197 (1) of the Cr. P.C.

sanction was sought for from the Government. Rightly or wrongly the Government considered the matter from all its aspects and thought-it fit not

to grant the same and communicated its refusal in respect thereto. Another application was made on the same materials and it was again answered

by refusing to grant the sanction. Under such circumstances, the officer concerned would be legitimately claim to have acquir ed an immunity from

prosecution. On the basis of the said order refusing to grant sanction he could legitimately rest himself assured that on the basis of the same

materials he would not be prosecuted. Under such circumstances, when an application is made for the third time and he is sought to be prosecuted

by reason of the Government"s granting the sanction on the third occasion, on the same materials, that would surely entail civil consequences by

reason of such order. By reason of such order by granting sanction the name, fame mental agony and financial losses would inevtitably be involved.

He lost his gratuity and provident fund. He was suspended from his service. His pension had been withheld. These are surely civil consequences

whch resulted from the said order granting sanction. These are civil consequences which have already been inflicted on his civil life by reason of the

sanction being granted on the thrd time on the same materials.

75 Mr. Deb has referred to the case of Rohtas Industries Vs. S.D. Agarwal and Others, at page 713 and contends that the Supreme Court has

held that the reputation of the appellant should also be taken into account "in the matter of considering whether sanction for prosecution should be

granted or not. Mr. Deb contends that the said principle should be applied particularly when the consideration of the grant of refusal of sanction

has come up for the third time after the same was refused twice before. That was a case concerning the appointment of the inspectors to

investigate into the affairs of the company and to report thereon at the instance of the Central Government acting under the provisions of Sectionn

235, 236 and 237 of the Companies Act, 1956. There the Supreme Court at page 713 observed as follows:

The report submitted by the inspectors does not bind anybody. The Government is not required to act on the basis of that report, the company has

to be called upon to have its say in the matter but yet the risk it may be grave one is that the appointment of an Inspector is likely to receive such

press publicity as a result of which the reputation and prospects of the company may be adversly affected. It should not here fore be ordered

except on : satisfactory grounds.

In my opinion, that case was decided on the basis of the companies Act and on a different principle and that principle can not be invoked and

applied to the principle which is under consideration here.

76. Mr. Somnath Chatterjee then contends that there is no vested right in respect of a procedural matter. Section 197 (1) being a procedural

section and no person having any right in a procedure, no one can say that in a particular case the procedural matters should have been followed in

a particular way. It is contended that there is no condemnation involved herein. What is to be done is that only a per-'' mission has to be given.

Reliance is placed on the case of union of india (UOI) Vs. Sukumar Pyne, which dealt with a case under the Foreign Exchange Regulation Act,

1947 as substituted by Act 39 of 1957 wherein it was held that the person accused of the com-misson of an offence had no vested right to be tried

by a particular court or by a particular procedure except in so far as there would be any constitutional objection by way of discrimination or the

violation of any other fundamental right. It was held in that case that there was no principle underlying Article 20 of the Constitution which made a

right to any course of procedure a vested right. In my opinion, that case has no application to the facts of case before us because there the offence

has been committed u/s 23(1) of the Foreign Exchange Regulation Act, and u/s 23-D (1) for the purpose of adjudging under clause (a) of Sub-

section (1) of section 23 whether a person had made any contravention the Director of Enforcement was to hold an enquiry in a prescribed''

manner after giving that person a reosonable opportunity of being heard and if on such enquiry he would be satisfied that the person had made any

contravention, he might impose such penalty as he thought fit in accordance with the provisions of section 23. In this case, we are concerned with

the question of a reasonable opportunity of being heard on the third occasion when on the previous two occasions the Government decided in

favour of its officer.

77. Mr. Chattejee had also referred to the case of In Re: The Special Courts Bill, 1978, and the passage at page 517, where it has been observed,

following several previous Supreme Court decision including Union of India v. Sukumar Pyne (Supra), that every variation in procedure was not to

be assumed to be unjust. In my opinion, that is not the same thing as saying that the immunity acquired by a person from prosecution upon the

refusal to the grant of sanction on two previous occasions would not confer upon him a vested right of not being prosecuted on the same materials

wihout giving him an opportunity to make a representation specially when it is a case of a police officer acting in course of his duties.

78. Mr. Somnath Chatterjee has then referred to the House of Lords dcision in the case of Pearlberg v. Varty (Inspector of Taxes) reported in

(1972) 2 All E.R. 6 where the House of Lords dealt with the question of natural justice in respect of income tax assessment The question involved

was whether the tax payer had a right of audience before, or a right to make Written representation to, the single commissioner before he gave

leave u/s 6 (1) of the income tax Management Act, 1964 to raise back assess-mens on an application of the Inspector or other officer of the

Board of Inland Revenue made under tha; section. The tax-payer argued that he had special right on the basis of the principles of natural justice.

Lord Hailsham in speech observed that the section afforded no such right and a number of factors influenced the opinion of the learned Lord

Chancellor. The said factors were concerning the special language of section 6 of the Finance Act, 1960 which stood in contrast to the previous

enact-ments in connection therewith. The learned Lord Chancellor at page 10 of the Report observed :

The third fact of which affects my mind is the consideration that the decision, once made, does nor make any final determination of the rights of the

tax payer. It simply enables the inspector to raise an assessment by satisfying the commissioner that there are reasonable grounds for suspecting

loss of tax resulting from neglect, fraud, or wilful default, that is, that there is a prima facie probability that there has been neglect etc. and that the

Crown may have lost by it. When the assessment is made the taxpayer can appeal against it, and, on the appeal, may raise any question inter alia,

which would have been relevant on, the application for leave, except that leave given should be discharged.

The learned Lord Chancellor agreed with the observation of Lord Reid in the case, of Wiseman v. BorsB. man, reported in (1969) 3 All ER 275,

1971 AC 297 which read as follows:

It is, I think, not entirely irrelevant to have in mind that it is very unusual for there to be a judicial determination of the question whether there is a

prima facie case. Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima-

facie case but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before

him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party. Even where the decision is to be reached by

a body acting judicially there must be a balance between the need for expedition and the need to give full opportunity to the defendant to see the

material against him.

79. The above principle is so well established that nobody can think of disputing the same but in the facts and circumstances of the case before us

the position is not exactly the same as was before the Lord Chancellor or before Lord Reid. At the risk of repetition I venture to observe that here

in this case the Government had already decided twice before in favour of its officer and in so doing the Government took "into consideration,

rightly or wrongly, the police reports over and above the report of the exparte judicial enquiry of R.P. Roy Chowdhury. Then it came up for

consideration for the third time whether or not sanction should be granted. The Government appears to have taken only Benoy"s version of the

incident to find out the prima facie case and not the reports of the Commissioner of Police and other material documents which it had in its file in

granting the sanction for prosecution. The.position would clearly appear from sanction itself which did not mention anything excepting Benoy''s

version. The prima facie case can only be considered if the Government would consider the case of both sides involved in the case. If the

complanant''s version alone is to be looked into and considered then in every case there is bound to be sanction. But that is not the scope or intent

of S. 197 (1) of the Code of Criminal procedure. Under such circumstances, could it be said that the facts herein would suggest that the authority

concerned by giving hearing to its accused polce officer would be seeking his comments as to the guilt. We are not concerned with that position at

all. All that we are concerned with is to give the police officer a hearing so that he could remind the Government under what circumstancs and on

the basis of what materials on two previous occasions the Government took the decision otherwise.

80. Mr. Somnath Chatterjee has relied on several speeches of Viscount. Dilhorne and Lord Pearson to similar effect that) under such

circumstances the person affected would suffer no injustice in not being heard at that stage. Mr. Chatterjee has also relied on the passage at page

18 of the Report where the decision was of administrative or executive character which was taken into account. The learned Law Lord observed :

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The Commissioner''s decision to give leave for an assessment to be made is analogous to a decision by the Attorney-General or the Director of

Public-Prosecution to, give his consent to a prosecution in cases where such consent is required by statute. This function differs in character from

the decision of magistrate or a bench of magistrates thai there is a prima facie case for ''he prosecution justifying committal of the accused for trial.

When in accordance with statutory provisions there is formal silting in court and each side has an opportunity to present evidence and argument,

and plainly a judicial jurisdiction is being exercised.

I have already observed that the position herein is somewhat different because after :he immunity is acquired by the officer concerned the

Government seeks to decide it otherwise without considering the relevant materials before it.

Mr. Somnath Chatterjee has then referred to the case of Parry Jones v. The Law Society reported in (1968) I All. E.R. 177 where the Court of

Appeal applied the principle of Wiseman v. Borneman (supra). In the case Lord Denning, M. R. observed at page 179 :--

As we held a few days ago in the case of Wiseman v. Borneman (supra) a prima facie case stands on a very different footing from an actual

determination. When the only enquiry is whether there is prima facie evidence, natural justice does not require that the party should be given notice

of it.

81. Reliance was also placed on the Privy Council decision in the case of Furnell v. Whandanei High School Board reported in (1973) I AH E.R.

400. This was a case of a complaint against a teacher before the School Board which was under a statutory duty to appoint a sub-committee to

make a preliminary investigation of such complaint. The teacher knew nothing about the complaint and could not make any representations to the

sub-committee. On the basis of the report of the subcommittee the Board suspended the teacher. The charges were referred to the Disciplinary

Committee for final determination. Lord Morris, one of the Law Lords, who held the majority view at page 411 took note of the argument of the

appellant who contended that he had a right to be heard by the subcommittee and, in the alternative, if not by the sub-committee he should have

been heard by the Board if they contemplated suspending him on the principle of natural justice. The Judicial Committee in that case considered the

case of Wiseman v. Borneman (supra). Lord Reid at page 414 observed :--

There is a marked contrast in the regulations between a complaint and a charge. So also is there a contrast between investigating a complaint

before even there is a charge and a determination of the matter (see reg 5(1) which is the investigation of a charge. One of the principles of natural

justice is that a man should not be condemned unheard. But the sub-committee do not condemn. Nor do they criticise.

Viscount Dilhorne dissented and delivered a dissenting judgment which was concurred in by Lord Reid. At page 421 it was observed in the

dissenting judgment :--

As I have said, in my opinion, section 159, when it speeks of an investigation by a committee, means that it is the duty of the committee to go into

the matter thoroughly and to hear not just one side but both sides, if the teacher wants to be heard. The investigation by a Teachers" Disciplinary

Board involves hearing both sides and resembles a trial.

In my opinion, the above principle decided in the majority judgment in that case, strictly speaking, does not apply to the facts involved in this case

for the reasons stated above.

82. Mr. Somnath Chatterjee contends that there is no scope for the accused"s version to be taken into account in granting the sanction. If that

would be so, then the complainant also have to be given a hearing. As commented by Lord Reid in Wiseman v. Borneman (Supra) no one would

suppose that justice required that he should first seek comments of the accused. In order to decide whether to prosecute the accused it has to be

decided on the question whether there is a prima facie case.

In my opinion, those observations undoubtedly apply when the question of taking a decision for grant of sanction or not would arise for the first

time. But when on previous occasions on the consideration of the same materials before if the authority concerned refused to grant the sanction

then the further considerations must necessarily arise as to whether there were fresh materials for reviewing such dcision and if there would be none

then surely the accused''s version would be material for the purpose of enabling the accused to remind the authority why and how the authority

concerned decided differently on the- previous occasions. The purpose of giving him an opportunity of a hearing would be to enable him to place

relevant document on the basis where-of: the previous sanction was refused. It is not the question of Government considering the guilt of the

accused. The orders refusing to grant the sanction which did hot appear to have been considered by the Government in granting the sanction, could

have been placed by the accused as also other documents which were in the file and on the basis whereof the sanction was refused previously. The

accused could have come and said that what was being claimed as a policy of the present Government, if it was in fact a matter of policy at all,

was in no way different from the policy which was pursued by the Government which refused the sanction on previous two occasions. He could

have come and said that he acquired immunity by reason of the previous orders refusing sanction and by virtue thereof he was not to be

prosecuted on the self-same consideration. There was no fresh material before the authority concerned and as such he acquired a right of not being

prosecuted any more on the same materials. It was no longer a mere administrative or executive order by reasons of the said previous orders. He

acquired a right of not being prosecuted the effect whereof virtually and for all practical purposes was that he was com-pletely set free of any

charge. Accordingly, the principle underlying section 403 of the Criminal Procedure Code 1898 (Section 300 of the New Code) became

applicabe and he could not be asked to go through the prosecution. He could have come and drawn the attention of the authority concerned that

under the provision of section 197 there was no further scope for reviewing the order granting or refusing the sanction once it had been exercised

on the same materials. He could have come and drawn the attention of the authority concerned that it might have been an administrative or

executive power but it had civil consequences and as such he should be given an opportunity to make at least a written representation to the

authority concerned for explaining the postion. He could also have appeared and submitted before the authority concerned that since it was the

question of reviewing the previous orders refusing to grant the sanction the discretion to be exercised by the Government under such circumstances

could not be an absolute one but should be exercised imparially and on the basis of all the relevant materials before it even it was otherwise a case

of absolute discretion. He could have pointed out to the authority concerned that the enquiring Magistrate in making his report had taken into

account only the evidence adduced on behalf of the complainant, If it was to be the care of an absoute discretion in exercise of the power u/s

197(1) he could have explained that had ceased to be so when it purported to reverse the previous decisions in refusing to give sanction.

83. Mr. Chatterjee contends that the refusal to grant sanction would only mean that the sanct''oning authority in considering the matter then

decided'' that it was not expedient to grant sanction. It did not mean and could not mean that the Government had come to a conclusion that not

offence was committed. It was to be a subjective satisfaction. It followed, therefore, that if there was prima facie materials about the commission of

offence yet the Government at that stage could think thai it should not exercise its power of granting sanction. It is contended further that the effect

of refusal was that so long as there was no sanction the prosecution could not be validly initiated. In other words, the Court could not have taken

cognizance of the offence. It did not confer any right on anybody. It could not be said, therefore, that thereby one would get any immunity from the

consequences of an offence.

84. In my opinion, Mr. Chatterjee''s arguments are not sound and cannot be upheld. The authority exercising powers u/s 197 (1) of the Criminal

Procedure Code could not be allowed to exercise such powers in such a whimsical manner so as to intrude upon the liberty of a citizen acquired

by him after the authority concerned on previous occasions on the same materials have decided that the accused should not be prosecuted because

It was not justified at all. (See Nanda''s affidavit as quoted above). The Government under such circumstances would be expected to act what a

reasonable man under the circumstances would be expected to act and must exercise its discretion reasonably on the basis of the materials before

it and not arbitrarily. Under such circumstances the authority concenred should be conscious of the position that even though it was In exercise of a

purely administration power, it could not just be exercised arbitrarily In the name of the same being a policy matter or being based on expediency.

85. The power which was to be exercised u/s 197 (1) of the Criminal Procedure code could not be equated with the powers which were to be

exercised u/s 10 (1) of the Industrial Disputes Act where the language was completely different and contemplated that the Goverment had power

to refer the dispute at any time when the same might arise. Here the matter is considered not from that aspect. It would be clear that the principle

decided in the case of Western India Match Co. Ltd. Vs. The Western India Match Co. Workers Union and Others, and in the case of Avon

Services Production Agencies (P) Ltd. Vs. Industrial Tribunal, Haryana and Others, could not have any application to the facts of this case before

us. While acting under the said provisions of the Industrial Disputes Act there is enough scope for the Government reconsidering the decision from

time to time as and when the situation might arise and from that point of view the said principles have been decided. The provisions of the General

Clauses Act Viz., sections 14 to 21 thereof have no application. In this connection the language of Section 197(1) of the Cr. P. C. should be

considered and it would be found therefrom that the section does not say that such power to sanction could be exercised at any time whenever the

Government so desired even though the power provided thereunder had already been exercised previously. The power that has been conferred u/s

197(1) could not be exercised successively by relying on section 14 of the General Clauses Act (10 of 1897) so as to reverse it from time to time.

If that would be permitted then it would lead to absurdity because conflicting orders would be passed on the same materials from time to time

which could never be the intention of the legislature. The section is clear enough in its meaning. It could not be construed to mean that it conferred

such power on the Government which would enable it to keep the sword hanging on the head of the accused in such a manner so as to keep him in

constant mental torment and suspense throughout the rest of his life not knowing when such sanction would be granted even though it was refused

twice before. It is significant to note that the respondents have failed to cite even a single authority where the power had been used in such a

manner under the said provision.

86. The Standing counsel Mr. A. P. Chatterjee referred to the Privy Council decision in the case Nakkuda Alt v. M.F. Be Jayaratne, L.R. 1951

AC 66. That decision was disapproved by the House of Lord in the case of Ridge v. Baldwin LR 1963 (2) All E.R. 66. It is however contended

that the disapproval of the House of Lords did not touch the point relating to the applicability of natural justice. Be that as it may, it is convenient

under the circumstances to consider and follow the decision of the Supreme Court in this connection. In the case of Mahabir Jute Mills Ltd.,

Gorakhpore Vs. Shibban Lal Saxena and Others, at page 2060 the Supreme Court observed that it was desirable that the administrative orders

should contain reasons when they decide matters affecting rights of parties. For the reasons as staled above, in my opinion, the decision of the

learned Judge of the Court below cannot be upheld and the same must be and is hereby set aside. The appeal is allowed and the Rule Nisi must be

and is hereby made absolute. The sanction granted u/s 197 (1) of the Cr. P. C. is struck down on the grounds mentioned hereinabove. The

appellant would be entitled to the cost of the appeal. Certified to be a fit case for engaging two advocates.

Sd. C.K. Banerji, J.

I agree