

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: October 12, 2020
Pronounced on: November 23, 2020

+ **CrI.M.A. 13703/2020, CrI.M.A. 13851/2020 & CrI.M.A. 14091/2020 in CRL.L.P. 185/2018**

CENTRAL BUREAU OF INVESTIGATION Petitioner

Through: Mr.Sanjay Jain ASG with
Ms. Sonia Mathur, Senior
Advocate & Special Public
Prosecutor with Mr. Ripu
Daman Bhardwaj, Special
Public Prosecutor & Mr. Rishi
Raj Sharma & Ms. Noor
Rampal, Advocates

Versus

A.RAJA & ORS.

.... Respondents

Through: Mr. Manu Sharma, Ms.
Ridhima Mandhar, Mr. Kartik
Khanna & Mr.Vijay Singh,
Advocates for respondent
No.1.

Mr. Siddharth Luthra, Senior
Advocate with Mr. Vedanta
Varma, Mr. Sanat Tokas, Ms.
Ankita Tiwari & Mr.Ayush
Kaushik, Advocates for
respondent No.2.

Mr.Vijay Aggarwal, Mr.Mudit
Jain, Mr.Ashul Aggarwal, Mr.
Shailesh Pandey & Ms.
Barkha Rastogi, Advocates
for respondents No. 3,4, 13 &
14.

Mr. Atmaram N S Nadkarni,
Senior Advocate with Mr.
Salvador Santosh Rebello,
Ms. Arzu Paul, Mr. Mahesh
Agarwal, Mr. Rishi Agrawala,
Ms. Niyati Kohli & Mr.
Pratham Vir Agarwal,
Advocates for respondent
No.5.

Mr. Varun Sharma, Advocate
for respondent No. 6.

Ms. Tarannum Cheema & Mr.
Akshay Nagarajan, Advocates
for respondent No.7.

Mr. D. P. Singh, Ms. Sonam
Gupta & Ms. Ishita Jain,
Advocates for respondent
No.8-M/s Unitech Wireless.

Mr. Mohit Kumar Auluck &
Mr. Pramod Sharma,
Advocates for respondents
No. 9 and 11.

Mr. N. Hariharan, Senior
Advocate with Mr. Siddharth
Yadav, Advocate for
respondent No.10/Surender
Pipara

Ms. Manali Singhal, Mr.
Santosh Sachin, Mr. Deepak S
Rawat & Ms. Aanchal
Kapoor, Advocates for
respondent No.12-M/s
Reliance Telecom Ltd.

Mr. Sandeep Kapur, Mr. Vir
Inder Pal Singh Sandhu,
Mr. Abhimanshu Dhyani, Mr.
Sahil Modi, Advocates for
respondent No.15.

Mr. Balaji Subramanian &
Ms. Ishani Banerjee,
Advocates for respondent
No.16.

Dr. Joseph Aristotle S. & Ms.
Sneha, Advocates for
respondent No.17.

CORAM:
HON'BLE MR. JUSTICE BRIJESH SETHI

ORDER

**CrI.M.A. 13703/2020 (by R-13); CrI.M.A. 13851/2020 (by R-2) &
CrI.M.A. 14091/2020 (supplementary application by R-13)**

1. Vide this common order, this Court will dispose of the above captioned three applications. Vide first application [CrI.M.A. 13703/2020], applicant/respondent No.13- *Asif Yusuf Balwa* is seeking necessary direction to the petitioner to furnish copy of mandatory approval under Section 378(2) Cr.P.C. obtained by the petitioner i.e. CBI along with concerned note sheets, reports, drafts, letters and correspondence to file the present appeal. Vide second application [CrI.M.A. 13851/2020], applicant/ respondent No.2- *Siddharth Behura* is also seeking copy of mandatory approval with complete file maintained by the Government containing all note sheets, reports, drafts, letters, correspondence etc. under Section 378(2) Cr.P.C. Applicant/respondent No.2 is seeking copy of

approval/ notification under Section 24(8) Cr.P.C. in favour of Mr.Sanjeev Bhandari, Special Public Prosecutor authorizing him to file the instant petition. The prayer made by the respondents runs as follows:-

CrI.M.A. 13703/2020 & CrI.M.A14091/2020

PRAYER

“It is, therefore, prayed that this Hon’ble Court be pleased to:

(a) Pass necessary orders and directions to Appellant to place on record all the documents through official mode with affidavit, which have been shared by the Appellant with the respondents over email.

(b) Pass necessary orders and directions to Appellant to place on record all the Truncated documents along with its enclosures therein, so that proper sense can be out of the documents.

(c) Pass any other order(s) and direction(s) in view of the facts and circumstances of the case, in the interest of justice.

CrI.M.A. 13851/2020

PRAYER

It is, therefore, prayed that this Hon’ble Court be pleased to:

(a) Pass necessary orders and directions, to the Appellant for supply of copy of mandatory approval alongwith the complete file maintained by the concerned government department containing all the note sheets,

reports, drafts, letters and correspondences etc., if any, obtained by the Appellant under Section 378 (2) of Code of Criminal procedure, 1973 to file the captioned Appeal.

(b) Pass necessary orders and directions, to the Appellant for supply of copy of the approval/notification under Section 24 (8) Cr.P.C of Sh. Sanjeev Bhandari, Spl Public Prosecutor who has filed captioned Appeal alongwith the Criminal leave application;

(c) Pass any other order(s) and direction(s) in view of the facts and circumstances of the case, in the interest of justice.”

2. Learned counsel for the applicant/respondent No.13 submitted that the allegations levelled against the present applicant with other accused was of intentionally aiding and facilitating the payment of alleged quid pro-quo of Rs.200 crores as a reward for alleged undue favours shown to company M/s Swan Telecom Private Limited. Learned Special Court vide order dated 21st December, 2017 had acquitted all the accused persons including the present applicant. Thereafter, the petitioner/CBI has filed the instant leave to appeal against the said order of acquittal passed by the learned Special Court on 21st December, 2017. Learned counsel for applicant/respondent No.13 has, however, submitted that this Court cannot hear and decide the petition seeking ‘leave to appeal’ unless

petitioner/CBI places the mandatory approval u/S 378(2) Cr.P.C. on record.

3. Learned counsel for the applicant/respondent No.13 had drawn attention of this Court to Section 378 of Cr.P.C. Mr. Vijay Aggarwal, learned counsel submitted that in terms of sub section 2(b) of Section 378 Cr.P.C. and Chapter 23 of CBI Manual, it is mandatory to obtain sanction/approval before filing the appeal/petition. He further submitted that appeal against acquittal cannot be filed without the directions/ sanction of the Government and petitioner's failure to place it on record goes to the root of the matter, as it would make the instant leave to appeal "*non est*". He also submitted that there is no document on record to show that there is sanction/authorization in favour of Mr.Sanjeev Bhandari, learned Special Public Prosecutor to file the instant petition or that Mr. Sanjay Jain, learned ASG Jain has been authorized to conduct the present appeal.

4. Learned ASG at the very outset submitted that though grant of approval/authorization to the Public Prosecutor to file leave to appeal/revision is an administrative order or internal communication

and petitioner is under no obligation to show it to the respondents, however, he submitted that he would place the same on record for perusal and satisfaction of the Court. Since the hearing was being conducted through video conference, he had showed the relevant documents i.e. approval/ authorization in favour of learned Special Public Prosecutors on screen and also supplied the copy of the same to the court as well as to all the learned counsels for the respondents.

5. Learned ASG submitted that filing of instant applications which are frivolous in nature at this stage is, in fact, nothing else but an abuse of the process of law and wastage of judicial time. At this juncture, what is required to be seen is whether the judgment of acquittal passed by the learned trial court is perverse or not and consequently whether leave to appeal has to be granted or not, and by raising vague averments, respondents are only wasting the precious judicial time of this Court.

6. Mr. Vijay Aggarwal, learned counsel for applicant/respondent No.13, however, argued that it cannot be presumed that if appeal has been filed, then necessary sanction might have been obtained or granted. He submitted that mandatory requirements provided by the

law have to be followed. In this regard, he has placed reliance upon decision of State of *Uttar Pradesh v. Singhara Singh*, AIR 1964 SC 358 wherein the Hon'ble Apex Court while referring to decision in *Nazir Ahmed Vs. The King Emperor* AIR 1936 PC 253(2) has observed that where a power is given to do a certain thing in a certain way, then the said thing must be done in that way or not at all. It was submitted that prosecution cannot withhold documents while presenting a case before the Court. He further submitted that it has been held in catena of judgments that the respondent has an inherent right to obtain a copy of every such document which has a bearing on the case of the prosecution. Reliance was also placed upon decision in *Additional District Magistrate Vs. State of Jabalpur* (1976) 2 SCC 521, which reads as under:-

“415. The view of the Bombay High Court that Section 16-A(9) may be read down so as to enable the court to examine the forbidden material is impossible to sustain. What use can a court make of material which it cannot disclose to the detenu and how can it form a judicial opinion on matters not disclosed to a party before it? The High Court, at the highest, could satisfy its curiosity by tasting the forbidden fruit but its secret scrutiny of the grounds and the file containing the relevant information and material cannot enter into its

judicial verdict.”

7. Mr. Siddharth Luthra, learned senior counsel submitted that the relief sought in CrI.M.A. 13851/2020 by respondent No.2 is more or less similar but he would also like to address arguments on the issue in question. Mr. N. Hariharan, learned senior counsel appearing for respondent No.10 submitted that though no formal application has been filed on behalf of respondent No.10, but before this Court proceeds to hear the criminal leave petition on merits, petitioner be directed to place on record the sanction/direction issued by the Government to prosecute/conduct this appeal in terms of Section 378(2) Cr.P.C. and also to furnish copy of all concerned note sheets, reports, drafts, letters and correspondence relating to filing of the present appeal. Similar was the stand taken by Mr. Atmaram NS Nadkarni, learned senior counsel appearing for respondent No.5 and Mr.D.P.Singh, learned counsel appearing for respondent No.8.

8. During the course of arguments, it was brought to the notice of this Court that by virtue of Gazette notification dated 17th January, 2018, Mr. Tushar Mehta, learned ASG (now learned Solicitor General) was appointed as Special Public Prosecutor for conducting

prosecution, appeals/ revisions or other proceedings arising out of 2G Spectrum cases investigated by the Delhi Special Police Establishment (CBI) in the court of Special Judge, CBI as well as appellate/ revisional courts. It was, however, argued by learned counsels for the respondents that it is first required to be seen whether Mr. Sanjay Jain, learned ASG has been authorized to appear in this appeal and whether Mr. Sanjeev Bhandari, Special Public Prosecutor for the CBI, was authorized to file the same.

9. The hearing on this application continued for about a week. As discussed in para no. 4 hereinabove, during the course of hearing, learned ASG produced before this court Notification dated 6th March, 2014 issued by Government of India, vide which Mr. Sanjeev Bhandari has been appointed as the Special Public Prosecutor for the CBI and authorized for conducting prosecution appeals, revisions and other matters arising out of the cases investigated by the Delhi Special Police Establishment (CBI). Learned ASG submitted that by virtue of this authorization, the instant appeal has been filed by Mr. Sanjeev Bhandari, learned Special Public Prosecutor.

10. Learned ASG also placed before this Court communication of 17th January, 2018 of the Government of India opining that it was a fit case to prefer an appeal against the judgment dated 21st December, 2017 passed by the learned Special Judge in CC No. 01 & 1A/2011 (RC.DAI.2009.A.0045) i.e. the 2G case and its decision to engage Mr. Tushar Mehta, learned ASG to represent this case. The communication of 17th January, 2018 reads as under:-

<u>Most Immediate</u>
<u>By Special Messenger</u>
Government of India Ministry of Personnel, Public Grievances and Pensions Department of Personnel & Training AVD-II(B)
Subject- Filing of Criminal Appeal in Hon'ble Delhi High Court under Cr.PC against the impugned judgment dated 21.12.2017 of Ld. Special Judge in CC No. 01 & 1A/2011 (RC.DAI.2009.A.0045) – reg.
CBI may kindly refer to their letter No. 184/RC.DAI.2009.A 0045 dated 05.01.2018 on the above subject.
2. The proposal of CBI to file Criminal Appeal before Hon'ble Delhi High Court under Cr.PC against the impugned judgment dated 21.12.2017 of Ld. Special Judge in CC No. 01 & 1A/2011 (RC.DAI.2009.A.0045) has been examined in consultation with ALA, D/o Legal Affairs (DOLA), M/o Law & Justice. ALA, Department of Legal Affairs, Ministry of Law & Legal has opined inter alia that is a fit case to prefer an appeal. A copy of the advice conveyed by Department of Legal Affairs is enclosed herewith.
3. It has also been decided to engage Ld. ASG, Shri Tushar Mehta in the above case. Necessary further action may be taken in the matter accordingly.
(Khushboo Goel Chowdhary) Deputy Secretary to the Government of India
<u>Encls.- As above</u>
Shri Vineet Vinayak, Head of Zone, CBI, Anti-Corruption Branch, 1 st Floor, CBI Headquarters, 5-B, CGO Complex, Lodhi Road, New Delhi-110003.
DoP&T I.D.No.137/03/2018 -VD-II(B) 17 January, 2018

11. Learned ASG further submitted that Hon'ble Apex Court in Civil Appeal No. 10660/2010, vide order dated 12th March, 2018, had dismissed the plea vide which the appointment of Mr. Tushar Mehta in place of Mr. Anand Grover, learned ASG to appear in appeals arising out of 2G cases was challenged. The Hon'ble Court while observing that the Government has issued a notification appointing Shri Tushar Mehta, learned senior counsel, in exercise of the power conferred by sub-section (8) of Section 24 of the Code of Criminal Procedure, 1973 (2 of 1974) and the Central Government has appointed him as per modified notification for the purpose of appeals/revisions arising out of the cases related to 2G Spectrum investigated by the Delhi Special Police Establishment (CBI) in 2G spectrum cases. The Hon'ble Apex Court held that earlier Mr. Grover, learned ASG was appointed as Special Prosecutor and services rendered by him are appreciated. However, his appointment was only confined to the trial court and Government had issued a fresh notification for appeals, revisional proceedings etc. and it was open to the Government to issue fresh notification and for this reason, the Hon'ble Court allowed the application filed by Mr.

Anand Grover, learned ASG for his discharge from the case.

12. Learned ASG submitted that by virtue of aforesaid order, the Hon'ble Apex Court has categorically held that the Government has the prerogative to appoint any Public Prosecutor who is duly qualified to take up the appeals/revisions arising out of the 2G case.

13. Mr. Sanjay Jain, learned ASG also produced notification dated 6th May, 2019 vide which he was appointed Special Prosecutor for conducting appeals or revisions before this Court and Hon'ble Apex Court arising out of 2G Spectrum case.

14. Learned ASG has also brought the attention of this Court to another communication dated 24th May, 2019 issued by the Central Bureau of Investigation (CBI), wherein reference was made to notification dated 6th May, 2019 vide which he was appointed as Special Public Prosecutor to conduct appeals/revisions arising out of the 2G Spectrum cases.

15. Mr. Vijay Aggarwal, Advocate for applicant/respondent No.13, however, submitted that even though the above mentioned documents have been produced before this Court by learned ASG in

support of his submissions, however, the prayer made in his application is yet to be answered. He submitted that the twin prayers have been made in his application, first one is for directing the petitioner to furnish copy of mandatory approval under Section 378(2) Cr.P.C. granted by the Government of India for filing the instant leave petition and second, to provide the copies of concerned note sheets, reports, drafts, letters and correspondence with regard to procedure followed in filing the instant petition.

16. Mr. Vijay Aggarwal, learned counsel submitted that the documents produced by the learned ASG and copies of which have been supplied to them by e-mail, do not form part of the record and whatever has been submitted is truncated and not complete record. Learned counsel further submitted that earlier learned Senior Advocate Mr. U.U.Lalit (as his Lordship then was) was appearing as Special Public Prosecutor before the trial court and thereafter vide Notification dated 6th March, 2014, Mr. Sanjeev Bhandari was appointed as Special Public Prosecutor to represent CBI in Delhi High Court in all the appeals, revisions and other proceedings arising out of investigation carried out by the Delhi Special Police

Establishment, however, there is no specific order appointing him for 2G case i.e. in CC No. 01 & 1A/2011 (RC.DAI.2009.A.0045). Learned counsel further submitted that similarly, the communication dated 24th May, 2019 of CBI, is in the form of an advisory to appoint Mr.Sanjay Jain, ASG in cases arising out of 2G Spectrum cases before the trial court and appellate/revisonal court and it also mentions certain annexures, which have not been placed before this Court.

17. Learned ASG, on the other hand, referred to the provisions of Section 378(2) Cr.P.C. which contemplates that the Central Government may direct the Public Prosecutor to present an appeal, subject to the provisions of sub- section (3), to the High Court from the order of acquittal. He also submitted that Section 378(2) Cr.P.C. does not refer to appointment of Special Public Prosecutor and it is the prerogative of the Central Government to appoint as many Prosecutors as it requires in a specified case. Learned ASG also drew attention of this Court to Section 24(8) which reads as under:-

“ The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has

been in practice as an advocate for not less than ten years as a Special Public Prosecutor.”

18. Learned ASG further submitted that appointment of Mr. Tushar Mehta, learned ASG did not mean that he would be the only one to file the leave to appeal or represent the petitioner in 2G appeals and no other Public Prosecutor can do so. Learned ASG drew attention of this Court to the provisions of Section 16 of The Advocates Act, 1961 and Bar Council of India Rules, 1975, Chapter-I, Part VI, Restriction on Senior Advocates (Rules under Section 16(3) and 49(1) (g) of Act) and submitted that since Mr. Tushar Mehta, learned senior advocate was appointed as Special Public Prosecutor, he could not have filed the petition being a Senior Advocate. Learned ASG submitted that the instant appeal has, therefore, been filed by Mr. Sanjeev Bhandari, learned Special Public Prosecutor while assisting Mr. Tushar Mehta, learned ASG and, thus, no further inquiry is required to be made in this matter.

19. Learned ASG further relied upon decision of Full Bench of Punjab and Haryana High Court in *Lal Singh Vs. State of Punjab etc.* (1981) 2 ILR 496 and submitted that essence of Section 378(1)

Cr.P.C. or Section 378(2) Cr.P.C. is the presentation of the appeal to the High Court and not the preceding steps leading to the same, namely, the process of the formation of the opinion, the subjective satisfaction or the decision of the State Government or the consequential direction to present such an appeal.

20. Learned ASG further submitted that in the instant case, after the opinion was formed by the Government, the present appeal was filed and since decision to file an appeal is an administrative decision, which lies within the executive powers of the Government, process thereof is not required to be shown under any Statute. Learned ASG submitted that with regard to filing of the appeal, this Court has only to look into the provision of Section 378(2) Cr.P.C., documents placed before this Court and decision in *Lal Singh (Supra)* and not the procedure adopted by the Government in forming the opinion.

21. Learned ASG submitted that what is required to be seen is as to whether the Public Prosecutor was authorized to file the leave petition or not. According to learned ASG, as per notification dated 6th March, 2014 issued by Government of India, Mr.Sanjeev

Bhandari, Advocate was appointed as Special Public Prosecutor for the Central Bureau of Investigation to conduct trials of all the appeals, revisions and other matters before this Court, which arise out of investigation by the Delhi Special Police Establishment (CBI). Learned ASG submitted that it is not the case of respondents that Mr. Sanjeev Bhandari, Advocate did not have the eligibility to be appointed as Special Public Prosecutor. Thus, according to him there is no illegality in filing the appeal by Shri Sanjeev Bhandari, learned Special Public Prosecutor.

22. Learned ASG further submitted that in case a Special Public Prosecutor appointed in an appeal happens to be a Senior Advocate, he is not supposed to sign or file the same. In such circumstances, he can ask his Junior Associate Counsel to sign and file the same and there is no illegality in the same. It was submitted that in this appeal, Mr. Tushar Mehta, learned ASG was engaged by virtue of Notification dated 17th January, 2018 for the purpose of filing appeal against the judgment dated 21st December, 2017 and he was assisted by Mr. Sanjeev Bhandari, Special Public Prosecutor, who has filed the instant leave to appeal. Learned ASG, thus, submitted that the

arguments and objections raised by the respondents are baseless and the instant leave petition should be heard on merits.

23. Mr. Sidharth Luthra, learned senior counsel for respondent No.2 argued the matter in detail and submitted that since 2G matters were class of cases, the Hon'ble Apex Court had appointed Special Public Prosecutors during the trial. He argued that Mr. Sanjeev Bhandari was appointed as Special Public Prosecutor to represent all the cases pertaining to CBI in Delhi High Court and later on Mr. Tushar Mehta, learned ASG was appointed to pursue the 2G appeals and because of his appointment, the notification of Mr. Sanjeev Bhandari stood superseded. He was, therefore, not at all authorized to file the present leave to appeal. Mr. Sidharth Luthra, learned senior counsel for respondent No.2 further submitted that neither Mr. Sanjeev Bhandari nor learned ASG can represent the petitioner in this case. He, therefore, argued that before the leave petitions are heard, the jurisdictional aspect has to be considered and seen. In support of his submissions, he relied upon the following case law:-

1). *Management of the Express Newspaper (P) Ltd. vs. Workers and Others, (1963) 3 SCR 540,*

2). *Popular Muthiah Vs. State* (2006) 7 SCC 296,

3). *Carona Ltd. Vs. Parvathy Swaminathan & Sons* (2007) 8 SCC 559,

4). *Arun Kumar & Ors. Vs. Union of India & Ors.* (2007) 1 SCC 732.

24. Mr. Sidharth Luthra, learned senior counsel further submitted that the background of the matter is that the Hon'ble Apex Court in Civil Appeal No. 10660 of 2010 while monitoring the proceedings in the matter, had directed the appointment of Special Public Prosecutors and creating a Special Court to try 2G cases.

25. The learned Senior Counsel next argued that Section 24(8) Cr.P.C. uses the word(s)/phrase "*cases or class of cases*" which is not defined in the provision. The term "class of cases" has a legal import and has been considered in the context of Article 14 of Constitution of India in the following decisions:

- i. *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75,
- ii. *Lachmandas Kewalram Ahuja v. State of Bombay*, AIR 1952 SC 235,
- iii. *Kathi Raning Rawat v. State of Saurashtra*, AIR 1952 SC 123,
- iv. *In Re Special Courts Bill, 1978*, (1979) 1 SCC 380.

26. It was further submitted by Mr. Siddharth Luthra, learned Senior Counsel that ordinarily all prosecutions take place by the Government appointed Public Prosecutor or Additional Public Prosecutor. The appointment of a Special Public Prosecutor under Section 24(8) Cr.P.C. for a 'cases or class of cases' cannot be done as a matter of routine. Further, any such appointment/notification must specify which case or class of cases, the appointment relates to. He stated that power under Section 24(8) Cr.P.C. cannot be assumed to have been exercised without a notification which is for a specific purpose, for a specific case or class of cases. While a Public Prosecutor or an Additional Public Prosecutor, who is incharge of the case, may appear and plead before the Hon'ble Court without any written authority under Section 301(1) Cr.P.C., this provision does not apply to a Special Public Prosecutor who has to be appointed by a notification and for specific reasons. The notification dated 6th March, 2014 appointing Sh. Sanjeev Bhandari, Advocate as Special Public Prosecutor only mentions in a generic manner that his appointment is for CBI cases in the Delhi High Court but is silent in regard to 2G cases.

27. It was further submitted by Mr. Siddharth Luthra, learned Senior Counsel that appointment of Special Public Prosecutor is to be done only in exceptional cases and for the reasons to be recorded.

In this regard, he has relied upon the following cases:-

- i. *The Deputy Superintendent and Remembrancer of Legal Affairs v. Gaya Prosad* AIR 1914 Cal 560,
- ii. *MukulDalal v Union of India* 1988 (3) SCC 144,
- iii. *Sunil Kumar v. State of MP*, 1992 MPLJ 772,
- iv. *Rajendra Nigam v. State of MP* 1998 Cri LJ 998,
- v. *Poonamchand Jain v. State of M.P.* 2001(2) MPLJ 61,
- vi. *AbulKhaderMusliar v. State* 1992 Cri LJ 1249.

28. It was next submitted by learned senior counsel that Advocate General cannot be treated as Public Prosecutor unless appointed under Section 24(8) Cr.P.C. In this regard, he has placed reliance on the following cases:-

- i. *Rajendran v Ayappan* 1985 SCC Online Ker 40'
- ii. *Rajendra Nigam (Supra)* (Follows *State of Kerala v. Krishna* 1982 Cri LJ 301,
- iii. *BalachandraPrabhakarKodlekare v. State of Karnataka* MANU/KA/1803/2013.

29. It was next submitted that in the present case, the notification for Mr. Bhandhari's appointment can be understood as follows:

- a) It was issued in the year 2014 and was not for the 2G matter.
- b) The 2G trial was pending at the time of his appointment;
- c) His appointment was pursuant to a larger exercise for appointment of CBI Public Prosecutor/s for the High Court;
- d) The mere use of the term 'Special' in the notification does not comply with S.24(8) Cr.P.C requirements generally and specifically not for 2G cases.
- e) It was also not approved or cleared by the Hon'ble Apex Court at the time though the said Trial was still pending.

30. It was next submitted that Mr. Bhandari was not empowered to file the present Leave to appeal and this is a jurisdictional fact which has to be considered first, as laid down by Hon'ble Apex Court in the following decisions:

- a. *Express Newspapers (P)Ltd. v. Workers & Ors.* AIR 1963 SC 569,
- b. *Carona Ltd. v. Parvathy Swaminathan & Sons* (2007) 8 SCC 559,
- c. *Arun Kumar v. Union of India* (2007) 1 SCC 732,

31. So far as Mr. Bhandari's right to present an appeal is concerned, it was submitted that the right to file an appeal is governed by Section 378(4) Cr.P.C and a specific direction is required to do so. In this regard reference was made to the following case laws:-

- i. *Subhash Chand v. State (Delhi Administration)*(2013) 2 SCC 17,
- ii. *Hitendra Vishnu Thakur v. State of Maharashtra* (1994) 4 SCC 602,
- iii. *ThilayilAbdurahiman v State of Kerala* 1997 SCC Online 376,
- iv. *Lal Singh v State of Punjab* 1981 CrI. LJ 1069,
- v. *State of Kerala v Krishnan* 1981 SCC Online Ker 199,
- vi. *Assistant Commissioner of Central Excise v Sabnife Power Systems Ltd* 2002 (9) SCC 389,

32. It was further argued that it is well-settled law as held in *Nazir Ahmed v King Emperor, AIR 1936 PC 253* that if something is to be done in a particular manner, it must be done in that manner or not at all. It is further submitted that the Apex Court in *Dharani Sugars & Chemicals Limited v Union of India, (2019) 5 SCC 480* has also held that if a Statute confers power to do a particular act and has laid down the method in which that power is to be exercised, it necessarily prohibits the doing of the act in any manner other than that which has been prescribed.

33. It was lastly submitted by learned Senior Counsel that the genesis of the action is legally infirm in this case because of absence of authority to file the Leave to Appeal by Sh. Sanjeev Bhandari and

this is fatal for the prosecution. Reliance in this regard was placed upon *State of Punjab v Davinder Pal Singh Bhullar 2011 (14) SCC 770*.

34. Mr. N. Hariharan, learned senior counsel appearing for respondent No.10 submitted that Section 2(u) Cr.P.C. defines appointment of Public Prosecutor and Section 24(1) Cr.P.C. provides that Central or State Government, with the consent of High Court, shall appoint a Public Prosecutor in the High Court for conducting any prosecution or appeal. He submitted that Section 24(8) Cr.P.C. provides that for a class of case or cases, the Central or State Government may appoint a Special Public Prosecutor, who shall be an Advocate with service of not less than ten years. While drawing the attention of this Court to the aforesaid provisions, learned senior counsel submitted that since 2G is a special class of case and, therefore, Special Public Prosecutors were appointed for trial of the same. He, however, submitted that the documents referred to by the learned ASG do not meet the requirements with regard to appointment of Special Public Prosecutor in the instant petition. Learned senior counsel pointed out that the notification by virtue of

which Mr.Sanjeev Bhandari, Advocate has been appointed as Special Public Prosecutor to represent CBI in Delhi High Court in all the appeals, revisions and other proceedings arising out of investigation carried out by the Delhi Special Police Establishment, is dated 6th March, 2014. He was, therefore, appointed as a Special Public Prosecutor in Delhi High Court for CBI cases or appeals much before the pronouncement of the impugned judgment. Whereas in the instant appeal which is of a special class category, a Special Public Prosecutor was required to be appointed under Section 24(8) of Cr.P.C. for filing appeal after passing of the judgment. Learned counsel further submitted that even the requirement of Section 24(1) Cr.P.C. of seeking permission of the High Court in appointing the Special Public Prosecutor, has not been complied with.

35. Mr. N.Hariharan, learned senior counsel further argued that in view of the above submissions, Mr. Sanjeev Bhandari, Special Public Prosecutor for CBI, had no authority to file the instant leave petition as he did not satisfy the criteria under Section 24(1) Cr.P.C., as his appointment was not with the permission of the High Court

and also because of the fact that the notification dated 6th March, 2014 is prior to the date of impugned judgment dated 21st December, 2017 and did not specify the category/ class of cases he was appointed for.

36. Learned senior counsel next submitted that notification dated 17th January, 2018 issued by the Central Government appointing Mr. Tushar Mehta, learned ASG in this case, is under Section 24(8) Cr.P.C. but it does not show that it also fulfills the requirement of Section 24(1) Cr.P.C. Learned senior counsel further pointed out that after the appointment of Mr. Tushar Mehta, learned ASG by notification dated 17th January, 2018 vide which he was authorized to appear in this case, any previous notification, became redundant. Learned senior counsel pointed out that since on the date of filing of the appeal, Mr. Tushar Mehta, ASG was the Special Public Prosecutor for 2G cases, therefore, Mr. Sanjeev Bhandari, Special Public Prosecutor had no authority to file the appeal. He further submitted that the notification dated 17th January, 2018 nowhere mentioned that he would be assisted by any counsel. In support of his submissions, learned counsel placed reliance upon the decision of

Hon'ble Apex Court in '*K. Anbazhagan Vs. State of Karnataka & Ors. (2015) 6 SCC 158*'. Learned senior counsel submitted that in *K. Anbazhagan (supra)*, the Hon'ble Apex Court has held that a Special Public Prosecutor has to be appointed in consultation with the Chief Justice of the High Court in terms of Section 24(1) Cr.P.C. Learned senior counsel, thus, submitted that appointment of Mr. Tushar Mehta, learned ASG, Mr. Sanjeev Bhandari, Special Public Prosecutor and Mr. Sanjay Jain, ASG/learned Special Public Prosecutor in this case does not satisfy the criteria under Section 24(1) Cr.P.C. and Section 24(8) Cr.P.C. Learned senior counsel submitted that since the documents placed on record by learned ASG are truncated and, therefore, in order to bring out the clear picture, all the office notings, documents etc. are required to be brought on record.

37. Mr. N.Hariharan, learned senior counsel has also drawn the attention of this Court to 197th Law Commission Report on Public Prosecutor's Appointment, dated 31st July, 2006 to submit that Legislature has emphasized that any appointment in violation of Section 24(1) Cr.P.C. will be violative of Article 14 of Constitution

of India and, therefore, appointment of Public Prosecutor in this case has to be within the ambit of Section 24(1) Cr.P.C. The relevant quoted portion of the aforesaid Report reads as under:-

“Before parting, we are also of the view that appointment of Public Prosecutors and Addl. Public Prosecutors in the High Court under sec. 24(1) by dispensing with consultation with the High Court is clearly violative of Art. 14 as it not only permits arbitrary appointments but excludes the consultation with the High Court in the matter of appointment of these officers which is crucial.

Just as the provision for consultation of the Chief Justice of a High Court in the matter of appointment of Judges of the High Court is mandatory, on the same analogy, sec. 24(1) is of highest importance, though it is not a constitutional provision. Absence of consultation process with the High Court will, in our opinion, clearly violate Art. 14 of the Constitution.”

38. Mr. N.Hariharan, learned senior counsel also submitted that appointment under Section 24(8) Cr.P.C. cannot be made arbitrarily. Learned senior counsel emphasized that extra ordinary cases require extra ordinary consultation. According to learned senior counsel, any person filing an appeal has to be appointed in consultation with the High Court. Reliance in this regard was placed upon the decision in

State of Kerala Vs. Krishnan 1981 SCC OnLine Kerala 199.

39. Mr. D.P.Singh, learned counsel appearing for respondent No. 8 also raised objection with regard to appointment of learned ASG and Special Public Prosecutor in this case. Learned counsel submitted that trial pertaining to 2G case was conducted by the Special Court under the directions of the Hon'ble Apex Court and Special Public Prosecutor was also appointed by the Hon'ble Apex Court in this case during the trial. He further submitted that thereafter, the Government had also appointed Public Prosecutor and Additional Public Prosecutor in this case for trial. He next submitted that recently vide notification No. F./8/95/2020/HP-II/2626-2639, dated 30th July, 2020 Special Public Prosecutors have been appointed under Section 24(8) Cr.P.C. for conducting proceedings in bail, trial, appeals, applications and writ petitions etc. in connections with FIRs related to Citizenship Amendment Act protests and North East District Delhi riots and in the same manner, a notification requiring appointment of a Special Public Prosecutor in 2G appeals was required to be issued. However, no such notification has been placed on record by learned ASG appearing for the petitioner. Learned

counsel further pointed out that appointment of Mr.Sanjeev Bhandari, Special Public Prosecutor for CBI in Delhi High Court is of the year 2014 and he has never been specifically appointed for this case and, therefore, he had no authority to file the instant petition. Learned counsel submitted that before hearing the petition, this Court has to first satisfy itself whether the appeal has been filed by the CBI on the directions of Central Government.

40. Mr. Atmaram NS Nadkarni, learned senior counsel appearing for respondent No.5 submitted that he adopts the arguments raised by learned counsel for the respondents. He has also raised objection with regard to admissibility of documents placed before this court.

41. Mr. Sanjay Jain, learned ASG submitted that the authority of Mr. Sanjeev Bhandari, Special Public Prosecutor to appear in this case is being questioned by the respondents. He submitted that by virtue of notification dated 6th March, 2014, Mr. Sanjeev Bhandari was appointed as Special Public Prosecutor to represent CBI in Delhi High Court and therefore, he is vested with authority to appear in any case or appeal pertaining to the CBI. Learned ASG submitted that the powers of Mr. Sanjeev Bhandari, learned Special Public

Prosecutor in filing the documents /petitions and appeals on behalf of the CBI, are unfettered. Learned ASG submitted that after the order of the Hon'ble Apex Court dated 12th March, 2018 in *Civil Appeal No. 10660/2010 (supra)* was passed, it is now for the Government to appoint a Public Prosecutor/Special Public Prosecutor. It was further submitted that Mr. Tushar Mehta, learned ASG was not obligated to file the appeal but the appeal was surely filed under his guidance by Mr.Sanjeev Bhandari, learned Special Public Prosecutor and these are matters of procedure to be followed and not required to be gone into by this court. Learned ASG once again submitted that the issue in hand is whether leave to appeal is to be granted or not and respondents are raising completely non productive arguments, which are beyond the jurisdiction of this Court.

42. During the course of hearing of the application, respondent No.13 filed CrI.M.A. 14091/2020 seeking a direction to petitioner/CBI to place on record all the documents through official mode with affidavit, which have been placed before this Court during the course of hearing.

43. Mr. Vijay Aggarwal, learned counsel for applicant/respondent No.13 submitted that in terms of office order No.452/RG/DHC/2020, dated 28th August, 2020, all filing has to be accompanied by requisite court fees as well as affidavit attested by the Oath Commissioner and in e-filing mode, scanned copy of the receipt of the court fee, attested affidavit along with petition/suit/appeals/applications, has to be uploaded, failing which it shall be returned with objections. Learned counsel submitted that the documents/notifications placed before this Court are required to be placed on record with appropriate court fee and affidavit, which has not been done by the petitioner/CBI. Learned counsel further argued that the Central Government had first to satisfy itself whether it was a fit case for appeal. In this regard, he has drawn the attention of this Court to Delhi High Court Rules, Vol. II, Chapter 25, Appeal and Revision- Criminal, which reads as under:-

“Part-E

**APPEALS FROM ORDERS OF
ACQUITTAL**

1. **Appeals to be filed in certain** cases- Sessions Judges and District Magistrates should bear in mind the following order to the State Government regarding appeals against

acquittals under Section 417 of the Criminal Procedure Code [See Section 378 of new Code].

The State Government will not direct an appeal-

XXXXXX

(2) Where, however serious or otherwise important the case, the legal guilt of the accused is fairly questionable or the evidence admits of any reasonable doubt, and the court has considered and weighed it with impartiality intelligence and care.”

44. Learned counsel further submitted that petitioner/CBI has also failed to produce the relevant document to show that Mr. Sanjeev Bhandari, learned Special Public Prosecutor had filed the instant petition on the instructions of State Government or the CBI.

45. Mr. Vijay Aggarwal, learned counsel thereafter relied upon the decision of *11th April, 2010 of the Hon'ble Apex Court in Civil Appeal No. 10660 of 2010*, with regard to appointment of Special Public Prosecutor to conduct prosecution on behalf of CBI and ED in 2G Spectrum case, wherein it was observed that in normal course, the Central Government or State Government may make appointment of a Special Public Prosecutor, but since the Apex Court was monitoring the 2G case, Mr. K.K. Venugopal, learned

senior counsel for CBI and ED, was requested to suggest names of advocates for appointment as Special Public Prosecutor and thereafter, Mr.U.U.Lalit, learned Senior Advocate (as his Lordship then was) was appointed as Special Public Prosecutor and learned Senior Advocate was further informed that he may choose two advocates already on the panel of CBI, to assist him. He also placed reliance upon decision in *K. Anbazhagan (Supra)* to submit that in somewhat similar case, it was directed that State of Karnataka in consultation with the Chief Justice of Karnataka shall appoint a senior lawyer having experience in criminal trials, as Public Prosecutor to conduct the cases, whereas no consultation with Hon'ble Chief Justice of High Court of Delhi has taken place in the present matter.

46. Mr. Vijay Aggarwal, learned counsel submitted that though Gazette notification dated 16th February, 2018, vide which Mr. Tushar Mehta, learned ASG was appointed in this case is on record, however, no order has been placed on record showing the names of his assisting counsels. He submitted that petitioner/CBI has failed to place on record any document showing that Mr. Sanjeev Bhandari,

who was appointed as Special Public Prosecutor for the CBI, was given the authority to assist Mr. Tushar Mehta, learned ASG in this case. Learned counsel next submitted that appointment of Mr. Tushar Mehta, learned ASG is of the year 2018, that is, after passing of the impugned judgment on 21st December, 2017, whereas Mr. Sanjeev Bhandari was appointed as Special Public Prosecutor for CBI in Delhi High Court in the year 2014 and, therefore, he could not have filed the appeal.

47. In continuation of his arguments, Mr. Vijay Aggarwal, learned counsel submitted that Section 378(2) Cr.P.C. is akin to Section 196 Cr.P.C. or Sec.197 Cr.P.C. He submitted that this Court is vested with the powers to ensure as to whether sanction with regard to filing of the instant petition was granted or not. He also placed reliance upon decision of the Hon'ble Apex Court in *State of Karnataka Vs. Ameerjaan (2007) 11 SCC 273* to submit that the sanction order must demonstrate that there was proper application of mind on the part of sanctioning authority. Reliance was also placed upon decisions of Hon'ble Apex Court in *Mohd. Iqbal Ahmed Vs. State of Andhra Pradesh (1979) 4 SCC 172* and *State represented by*

Inspector of Police, Chennai Vs. N.S.Gnaneswaran (2013) 3 SCC 594 in support of above submissions. Learned counsel also relied upon decision of this Court in *Ashok Kumar Aggarwal Vs. Central Bureau of Investigation 2007(10) AD (Delhi) 73*.

48. Learned counsel further brought attention of this Court to a decision of 31st May, 2002 of a Division Bench of this Court in *C.W.P.4235/1996, Jayadeva Prasad Vs. Union of India (UOI) & Ors. Manu/DE/0792/2002*, vide which it was decided as under:-

“5. It is further decided that the Director of Prosecution will be vested with the power of direction and control over the prosecution offices. However the Director, CBI will continue to exercise general superintendence over the prosecution wing.

6. It is decided that the duties of the Director of Prosecution will include:-

(a) Supervising and monitoring the conduct of prosecution in courts;

(b) Preferring as well as appearing in appeals, revisions, etc. on behalf of the CBI in Appellate and Revisional Courts;

(c) Giving advice to Police Officers on all matters relating to criminal offences during investigation and trial;

(d) Advising on the feasibility of filing appeals, revisions, etc.;

(e) Preparing a panel of Special Counsels to conduct prosecutions, appeals or revisions on behalf of CJI with the approval of the Government and operating the same; and

(f) Selecting retainer counsel for High Courts.”

49. Learned counsel submitted that in terms of para 6(e) of the aforesaid decision, the instant petition seeking leave to appeal ought to have been filed by a special counsel with the approval of the Government.

50. Learned counsel further submitted that documents shown to this Court should have been filed on affidavit as per Section 297(2) Cr.P.C. which mandates that the affidavit of a deponent shall state such facts which the deponent is able to prove from his own knowledge and belief and deponent shall also clearly state grounds of such belief. Learned counsel drew attention of this Court to a decision of 14th March, 2017 of Bombay High Court in *M/S Jaimin Jewellery Exports Pvt. Ltd. Vs. The State of Maharashtra*, in this regard.

51. Mr. Vijay Aggarwal, learned counsel submitted that the stand of learned ASG with regard to sanction to file the leave to appeal or procedure followed is a question to be raised in writ jurisdiction is incorrect, as this Court under Section 482 Cr.P.C or under Section

151 CPC or under Article 226 of the Constitution of India, has ample power to answer the same.

52. *Per contra*, Learned ASG submitted that for appointment of a Special Public Prosecutor, the Central Government is not required to consult any one. Section 24(8) Cr.P.C. provides for appointment of an Advocate as Special Public Prosecutor and Section 24 of Cr.P.C. does not suggest that Section 24(8) Cr.P.C. is governed by Section 24(1) Cr.P.C. According to learned ASG, the Legislature could have added any other condition in Section 24(8) Cr.P.C., if it had so desired. Learned ASG further submitted that the Hon'ble Apex Court while exercising its extra ordinary inherent power under Article 142 of Constitution of India had appointed a Special Public Prosecutor in 2G case, whereas the controversy with regard to appointment of Mr.Tushar Mehta, learned ASG as a Special Public Prosecutor in place of Mr. Anand Grover, learned ASG, has been put to rest by the order dated *12th March, 2018 in Civil Appeal No.10660/2010 (supra)*.

53. Learned ASG next submitted that Apex Court's decision in *K. Anbazhagan (Supra)* does not state that the Special Public

Prosecutor has to be appointed in terms of Section 24(1) Cr.P.C. He submitted that Section 24 Cr.P.C. is divided into various sub-sections, wherein Section 24(1) Cr.P.C. requires consultation with High Court but Section 24(8) Cr.P.C. does not require any consultation with High Court for appointment of a Special Public Prosecutor. Learned ASG relied upon a decision of 15th June, 2017 of High Court of Bombay in ***Suo Moto Writ Petition No.1 of 2016, Registrar (Judicial) Vs. The State of Maharashtra & Anr.*** to submit that it is exclusively in the domain of the Central Government to appoint a Special Public Prosecutor and Section 24(8) Cr.P.C. cannot be governed by Section 24(1) Cr.P.C.

54. Learned ASG further submitted that by virtue of decision of Full Bench of Punjab and Haryana High Court in ***Lal Singh (Supra)***, procedure adopted is not required to be shown to the respondents. Learned ASG submitted that for the purpose of trial, the appointment of Special Public Prosecutor was made by the Hon'ble Apex Court and post trial, field has been left open for the Central Government to appoint Special Public Prosecutor. Learned ASG further submitted that notification of appointment of any Special Public Prosecutor

does not wash away the earlier notifications, unless specified and the services of already empanelled Special Public Prosecutors can be utilized in any case.

55. This court has heard the rival contentions raised by learned counsel for the parties, gone through the entire material placed on record and given its thought to the matters.

56. Lengthy arguments have been addressed by learned counsel for the respondents and much stress has been laid upon Section 378 (2) Cr.P.C. For ready reference, Section 378 Cr.P.C. is reproduced hereunder:-

“Section 378 in The Code Of Criminal Procedure, 1973

378. Appeal in case of acquittal.

(1) Save as otherwise provided in sub- section (2) and subject to the provisions of sub-sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court² or an order of acquittal passed by the Court of Session in revision.]

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any

Central Act other than this Code, **the Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of sub- section (3), to the High Court from the order of acquittal.**

(3) No appeal under sub- section (1) or sub- section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under sub- section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If in any case, the application under sub- section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub- section (1) or under sub- section (2).

57. Learned counsels for the respondents have laid much stress upon the words ‘**Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of sub- section (3), to the High Court from the order of acquittal**’ appearing in the provision. It is argued that in terms of Section 378 (2) Cr.P.C., it was mandatory for the appellant to first obtain a

sanction/ approval of the Government before filing the appeal and the appellant was also duty bound to place the same on record along with note-sheets, correspondence and file containing sanction/approval. It was further argued that the petitioner has even failed to place on record any authorization in favour of Mr.Sanjeev Bhandari, Special Public Prosecutor to file the present leave to appeal as well as in favour of Mr. Sanjay Jain, learned ASG to conduct the same.

58. Learned ASG further argued that even approval of the Government to file the appeal or the notings in the file or decision taken by the Government is not required to be shown to the respondents as these are internal matters of the Government. However, later on during the course of arguments, to satisfy the curiosity of respondents regarding appointments, learned ASG shared the documents regarding authorization/ approval in favour of Special Public Prosecutors on screen and copies were supplied to the court and also given to learned counsels for the parties.

59. This Court has gone through the notifications placed on record. The first notification pertains to appointment of Shri Sanjeev

Bhandari by Central Government as Special Public Prosecutor for
Delhi High Court for conducting the prosecutions, appeals, revisions
or other matters investigated by CBI. It runs as under:-

<p>[To be published in the Gazette of India in part-II Section-3, Sub-section (ii)] Government of India Ministry of Personnel, Public Grievances and Pensions Department of Personnel & Training **** NOTIFICATION New Delhi dated 6-03-2014 S.O. In exercise of the powers conferred by sub-section (8) of Section 24 of the Code of Criminal Procedure, 1973 (Act No. 2 of 1974), The Central Government hereby appoints S/Shri Sanjeev Bhandari and K. Raghavacharyulu, Advocates as Special Public Prosecutors of the Delhi Special Police Establishment (Central Bureau of Investigation) in Delhi High Court at New Delhi for conducting the prosecution appeals, revisions or other matters arising out of the cases investigated by the Delhi Special Police Establishment (CBI). [F. No. 225/14/2014- AVD-II] (Rajiv Jain) Under Secretary to Government of India To The Manager, Government of India Press Mayapuri, Ring Road, <u>New Delhi- 110064</u> No.225/14/2014-AVD-II New Delhi dated 6 March, 2014 Copy to: 1. The Chief Secretary, Government of Delhi, New Delhi. 2. The Registrar, Delhi High Court, New Delhi. 3. The Director, Central Bureau of Investigation, New Delhi. 4. Director of Prosecution, Central Bureau of Investigation, New Delhi. 5. Department of Legal Affairs, Shastri Bhavan, New Delhi. 6. Guard File. (Rajiv Jain) Under Secretary to Government of India</p>
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60. Perusal of above notification clearly shows appointment of Mr. Sanjeev Bhandari as Special Public Prosecutor for CBI, for the purpose of conducting appeals, revisions etc. The learned ASG has also placed on record the communication of 17th January, 2018 of Government of India opining that it was a fit case to file an appeal and also the decision to engage Mr. Tushar Mehta learned ASG (now learned AG) to represent the case.

Most Immediate
By Special Messenger

Government of India
Ministry of Personnel, Public Grievances and Pensions
Department of Personnel & Training
AVD-II(B)

Subject- Filing of Criminal Appeal in Hon'ble Delhi High Court under Cr.PC against the impugned judgment dated 21.12.2017 of Ld. Special Judge in CC No. 01 & 1A/2011 (RC.DAI.2009.A.0045) – reg.

CBI may kindly refer to their letter No. 184/RC.DAI.2009.A.0045 dated 05.01.2018 on the above subject.

2. The proposal of CBI to file Criminal Appeal before Hon'ble Delhi High Court under Cr.PC against the impugned judgment dated 21.12.2017 of Ld. Special Judge in CC No. 01 & 1A/2011 (RC.DAI.2009.A.0045) has been examined in consultation with ALA, D/o Legal Affairs (DOLA), M/o Law & Justice. ALA, Department of Legal Affairs, Ministry of Law & Legal has opined inter alia that is a fit case to prefer an appeal. A copy of the advice conveyed by Department of Legal Affairs is enclosed herewith.

3. It has also been decided to engage Ld. ASG, Shri Tushar Mehta in the above case. Necessary further action may be taken in the matter accordingly.

(Khushboo Goel Chowdhary)
Deputy Secretary to the Government of India

Encls.- As above

Shri Vineet Vinayak, Head of Zone, CBI, Anti-Corruption Branch, 1st Floor, CBI Headquarters, 5-B, CGO Complex, Lodhi Road, New

Delhi-110003.

DoP&T I.D.No. 137/03/2018- AVD-II(B)

17 January, 2018

61. Learned ASG Shri Sanjay Jain has also placed on record notification dated 6th May, 2019 vide which he was appointed as Special Public Prosecutor to conduct prosecution, appeal/ revision or other proceedings arising out of the cases related to 2G spectrum cases before 2G Trial Court and Appellate/ Revisional Court and it runs as under:-

[TO BE PUBLISHED IN THE GAZETTE OF INDIA IN PART- 2
SECTION 3(2)]

DY No. 726/DOP Sec.

GOVERNMENT OF INDIA Dated 06.05.2019
MINISTRY OF PERSONNEL, PUBLIC GRIEVANCES AND
PENSIONS
(DEPARTMENT OF PERSONNEL AND TRAINING)
NEW DELHI

DATED: 06.05.2019

NOTIFICATION

The Central Government hereby appoints SHRI. Sanjay Jain, Additional Solicitor General as Special Public Prosecutor for conducting Appeals or revisions etc. before the High Court and Apex Court in 2G spectrum case along with Shri Tushar Mehta, Solicitor General of India. Further, Shri Sanjay Jain will appear on the said appeal or revision on 2G Spectrum cases under the direct supervision of Ld. Solicitor General of India and whenever it is desirable, the Ld. Solicitor General of India would appear and argue the matter at his discretion.

[F.No. 225/59/2014-AVD-2]

PK JAISWAL

UNDER SECRETARY TO THE GOVERNMENT OF INDIA

The Manager
Government of India Press
Mayapuri, Ring Road
NEW DELHI, 110064

No. 225/59/2014-AVD-2

New Delhi Dated 06/05/2019

Copy Forwarded for information to

1. The Registrar, Apex Court of India, New Delhi
2. The Registrar, Delhi High Court, New Delhi
3. The Accountant General, Central Revenues, New Delhi
4. The Pay and Accounts Officer, CBI,CGO Complex, New Delhi
5. Direction of Prosecution, CBI, CGO Complex, New Delhi
6. Department of legal affairs, New Delhi
7. Guard File

PK JAISWAL

UNDER SECRETARY TO THE GOVERNMENT OF INDIA

62. Thereafter, learned ASG also placed on record communication dated 24th May, 2019 issued by CBI which referred to his appointment as Special Public Prosecutor in the present matter vide notification no. 225/59/2014-AVD-II dated 6th May, 2019. The same runs as under:-

CENTRAL BUREAU OF INVESTIGATION
DIRECTORATE OF PROSECUTION
PLOT NO. 5B, 9th FLOOR, CBI HQ BUILDING
CGO COMPLEX, LODHI ROAD
NEW DELHI

Subject: Proposal for engagement of Shri. Sanjay Jain Additional Solicitor General as Special Public Prosecutor to conduct prosecution, appeals/ revisions or other proceedings arising out of the cases related to 2G Spectrum cases before 2G trial court and Appellate/ Revisional courts- regarding

Please find enclosed herewith DoPT Approval & Notification No. 225/59/2014-AVD-II dated 6.05.2019 engagement of Shri. Sanjay Jain Additional Solicitor General as Special Public Prosecutor to conduct prosecution, appeals/revisions or other proceedings arising out of the cases related to 2G Spectrum cases before 2G trial court and Appellate/ Revisional courts.

This is for information and taking necessary action in the matter.

(MUNISH KUMAR SHARMA)
Office Supdt. CBI, HO, DOP

Encl: As above.

HoB, CBI, ACB, New Delhi.

CBI, I.D. No. 394/11/3/2018- DOP

New Delhi

Dated: 24/5/2019

63. Learned counsels for the respondents were, however, not satisfied with the above notifications and submitted that all the documents shown by the learned ASG, copies of which were also supplied to them should have been filed on affidavit. In this regard reference was made to the decision of *M/S Jaimin Jewellery Exports Pvt. Ltd. Vs. The State of Maharashtra (supra)*.

64. This Court has thoroughly gone through the above judgment which clarifies as to how an affidavit has to be drafted for filing the same in the court. The above pronouncement of Hon'ble Apex Court related to a case under Section 138 of Negotiable Instruments Act and it was discussed in the said case as to what should be the contents of the affidavit and it must state and specify as to what portion pertains to deponent's knowledge and what is written on his information or belief.

65. In the opinion of the Court, the above judgment is not relevant in the present context. The documents in the present petition were shown to the Court by the learned ASG to dispel the doubt lingering

in the mind of respondents that perhaps Mr. Sanjeev Bhandari, learned Special Public Prosecutor has filed the leave to appeal without any authority and Mr. Sanjay Jain, learned ASG is unauthorizedly representing CBI on his own without any approval from the Government of India. In fact, this Court had never asked the learned ASG to file the documents and thus, there was no occasion or reason for learned ASG to file the said documents on affidavit. Moreover, the notification of Mr. Sanjeev Bhandari, Special Public Prosecutor and Mr. Sanjay Jain, learned ASG has already been published in the official Gazette and there was no need to file the same alongwith affidavit. The learned counsels have questioned the appearance of learned ASG in the leave to appeal as if he was appearing without any approval or sanction inviting unwarranted trouble for himself and endangering his reputation and standing at bar and exposing himself not only to disciplinary proceedings by Bar Council but also inviting wrath of the CBI as to why he is so enthusiastic to appear without any authority. The contention raised by learned counsels for the respondents is, therefore, devoid of any substance and is hereby rejected.

66. Let this Court now decide another important issue raised by learned counsels for the respondents which according to them goes to the root of the matter and it pertains to placing on record all the note-sheets, drafts, correspondences and file containing sanction or approval vide which decision was taken to file the appeal.

67. Mr. Vijay Aggarwal, learned counsel and Mr. Siddarth Luthra and Mr. N. Hariharan, learned senior counsels have vehemently argued that prosecution cannot withhold any document while presenting a case. The prosecution be, therefore, directed to place on record all the relevant documents, note-sheets, drafts and concerned file granting sanction as well as order of sanction. Learned counsel, Mr. Vijay Aggarwal in this regard has also placed reliance on the decision of Hon'ble Apex Court in "*Uttar Pradesh v. Singhara Singh*, AIR 1964 SC 358, wherein it was held that where a power is given to do a certain thing in a certain manner, then the thing must be done in that way or not at all. The learned counsel also relied upon decision in "*Additional District Magistrate Vs. State of Jabalpur* (1976) 2 SCC 521, and further submitted that respondent has an inherent right to obtain a copy of every such document which has

bearing on the case.

68. This Court is in total agreement with the law laid down in the authorities cited by the learned counsels. However, the documents sought by them can only be placed on record, provided it is the mandate of law to do so and such mandate is also reflected by Section 378 Cr.P.C. Perusal of Section 378 Cr.P.C. however, reveals that it is totally silent about the fact that all proceedings which have culminated into a decision to file an appeal by the Government should be supplied to the learned counsels for the respondents. Moreover, the procedural part which has resulted in formation of opinion by the Government are internal proceedings of Government. The learned Public Prosecutor's duty is only to file an appeal if so directed by the Government. Whether the decision taken by the Government to file an appeal was correct or not will be decided by this Court while deciding the leave petition after hearing the learned counsels for the parties and going through the evidence and not on the basis of notes, drafts or opinion appearing in Government files. In this regard, reference can be made to full Bench judgment of Punjab and Haryana High Court in "*Lal Singh Vs. State*

of Punjab etc. 1981 Crl LJ 1069” wherein it was held that the Government has to form an opinion that the judgment of acquittal deserves to be appealed against or not and Section 378 (1) Cr.P.C. does not even remotely makes mention of the process for the formation of such an opinion or decision to do so. It only contemplates presentation of appeal on the direction of the Government through the medium of Public Prosecutor. It was further held that ultimate decision i.e. the whole process starting from the consideration of the judgment through the channels of various officials is not contemplated by any statutory provision. In essence, it was held that presentation of appeal to the High Court and not the preceding steps i.e. decision of the State Government etc. is contemplated under Section 378 of the Cr.P.C. The relevant paras of the judgment run as follows:-

*“22. Now it is axiomatic that before the power or the right to present an appeal against an order of acquittal under Section 378(1) is exercised, the State Government must arrive at a clear opinion that the judgment of acquittal deserves to be appealed against. The formation of such an opinion must inevitably precede the presentation of an appeal. **What deserves highlighting here is the basic fact that Section 378(1) does not even remotely make mention of the process***

for the formation of such an opinion nor of the decision to do so. It only envisages the presentation of appeal on the direction of the State Government through the medium of the Public Prosecutor. This being patently so the learned Additional Advocate General seems to be on a firm footing in his submission that both the process of the formation of an opinion for preferring an appeal against the judgment of acquittal as also a positive decision to this effect is inherently administrative in nature. The subjective satisfaction of the State Government whether a particular judgment of acquittal calls for being challenged by way of appeal and the process by which this satisfaction or decision is to be arrived at is neither governed nor prescribed by any statutory provision, far less any specific section of the Code itself. Therefore it would appear that the mode of the formation of the opinion and the ultimate decision in this regard by the State Government is within the ambit of and entirely governed by the general executive power of the State Government under Article 162 of the Constitution of India and is thus purely administrative.

23. Viewed from another angle it would seem that there is no statutory provision in the Code (nor has any such provision in any other enactment been brought to our notice) which mandates or obliges the State Government to examine every or any judgment of acquittal. It would follow, therefore, that the State Government may in its discretion consider or even refuse to consider or examine a judgment for the purpose of arriving at an opinion whether it should be appealed against or not. The ordinary practice and process for preferring appeals against acquittal, namely, that the Public Prosecutor conducting the case would opine and the District Magistrate may recommend the filing of the appeal thereunder to the Government and the State would then

proceed to form its opinion to prefer an appeal is plainly not prescribed in terms by any statutory provision as such. It is a practice or procedure under the inherent executive functions of the State under Article 162 of the Constitution of India. Similarly the ultimate decision or the subjective satisfaction of the Government as also the whole process beginning from the consideration of the judgment through the channel of recommendatory officials is not one which has been laid out either in the Code itself or by any other statutory rule on the point but is wholly circumscribed by the purely executive power of the State. Section 378(1) does not either in express or implied terms adverts to the process of the formation of the State's opinion or its culmination one way or the other. Reference in this connection may instructively be made to the observations of their Lordships of the Apex Court in Barium Chemicals Ltd. v. Co. Law Board. What, therefore, deserves highlighting is the fact that any words about the formation of an opinion are conspicuous by their very absence in Section 378(1) of the Code. Again it does not even make a mention of any decision of the State Government consequent thereto. Therefore, the very absence of the word 'opinion' or 'decision' in the statute has to be given its necessary import.

24. To conclude on this aspect we would hold that the process of the formation of the opinion as also the decision by the State Government to prefers an appeal against an order of acquittal is purely administrative and derives its source from the general executive power of the State under Article 162 of the Constitution of India. **Consequently the date and time of such a purely administrative decision is of little relevance in determining the crucial issue as to when the power under Section 378 of the Code would stand exhausted.**

25. *Coming now to the mode of presenting of an appeal against the order of acquittal it calls for notice that the statute visualises a direction to the Public Prosecutor to present an appeal to the High Court, Plainly the presentation of the appeal is the dominant objective and the direction to the Public Prosecutor is only a mode of achieving the same. The direction to the Public Prosecutor cannot be divorced from the presentation of an appeal and it would be hyper technical to dissect it from the same and treat it as an independent entity. To put it in other words the essence of Section 378(1) is the presentation of the appeal to the High Court and not the preceding steps leading to the same, namely, the process of the formation of the opinion, the subjective satisfaction or the decision of the State Government or the consequential direction to present such an appeal. Therefore it follows that the date and the time of the direction alone to the Public Prosecutor for presenting the appeal is a matter of little or no significance for determining as to when the power under Section 378 would exhaust itself.”*

(emphasis supplied)

69. Perusal of the above judgment clearly reveals that Section 378 (1) and (2) of Cr.P.C. does not make reference to or contemplate as to how the Court has arrived at a decision to file an appeal. The process of formation of opinion for preparing an appeal against the judgment of acquittal i.e. analysis of the judgment, notes, drafts and files pertaining to sanction or even grant of sanction i.e. the process of arriving at a decision to file or not to file an appeal and subjective

satisfaction of the Government is not governed by any statutory provision. It is rightly observed in the above judgment that Section 378 Cr.P.C. nowhere mentions the word ‘opinion’ or ‘decision’ which may give a right to the respondents to challenge the same being perverse or *mala fide*. Thus, what the provision contemplates is the presentation of an appeal and not the preceding steps leading to the same. In view of the above law, the contentions of learned counsels for respondents seeking to place on record communication, drafts, notes in the file relating to grant of sanction or approval, is rejected being beyond the scope of Section 378 (2) Cr.P.C.

70. Next contention of learned counsels for the respondents was that Mr. Sanjeev Bhandari, learned Special Public Prosecutor and Mr. Sanjay Jain, learned ASG, have not been properly appointed for the reason that 2G spectrum cases were monitored by the Hon’ble Apex Court and Special Public Prosecutors were appointed to conduct the trial. The appointment of other counsels/ Public Prosecutors i.e. Mr. Sanjeev Bhandari or Mr. Sanjay Jain, is against the spirit and order of the Hon’ble Apex Court and, therefore, their appointments come under a cloud and they could not have filed or

conducted the leave to appeal.

71. This Court has carefully considered the above contention of learned counsels for the respondents. Learned ASG, in this regard, has drawn the attention of this court to the order of the Hon'ble Apex Court in *Civil Appeal No. 10660/2010 (Supra)* dated *12th March, 2018* and submitted that vide said order, it was left open for the Government to appoint a Public Prosecutor/ Special Public Prosecutor after conclusion of 2G trial. This Court has carefully gone through the order of the Hon'ble Apex Court in which the appointment of Mr. Tushar Mehta, learned Standing Counsel, to appear in appeals arriving out of 2G cases in place of Mr. Anand Grover, learned ASG, was challenged. The Hon'ble Apex Court had dismissed the said appeal and observed that Mr. Anand Grover was appointed as Special Prosecutor for the purpose of trial in 2G cases and the court appreciates the services rendered by him. It was next observed by the Hon'ble Apex Court that appointment of Mr. Anand Grover was confined to the trial court only and **it was open to the Government to issue fresh notification for other courts, appeals, revisional proceedings etc.** The Hon'ble Apex Court had also

accepted the application of Mr. Anand Grover seeking his discharge from the case. The Court had further specifically observed that no contempt was made out because of appointment of Mr. Tushar Mehta, learned ASG in place of Mr. Anand Grover as the cases before trial court were over and Mr. Anand Grover was appointed for conducting trial before learned trial court only. The Hon'ble Apex Court's order runs as under:-

“...Considering the importance of this matter, earlier, this Court had appointed Shri U.U. Lalit as Special Prosecutor. Since Shri Lalit has been elevated as Judge of this Court, this Court vide order dated 02.09.2014 nominated Shri Anand Grover as counsel for the C.B.I. and the Enforcement Directorate in the proceedings before the “Trial Court”. Thereafter, the Government of India had issued notification on 26.11.2014 and 27.11.2014 appointing Shri Anand Grover as Special Public Prosecutor for conducting prosecution, appeals/revisions or other proceedings rising out of the cases related to 2G Spectrum investigated by the Delhi Special Police Establishment (CBI) in the Court of Special Judge (2G Spectrum cases), Central Bureau of Investigation, New Delhi and appellate/revisional courts and vide notification dated 27.11.2014 Shri Anand Grover was appointed as Special Public Prosecutor for conducting prosecution, appeals/revisions or other proceedings out of the cases under the Prevention of Money

Laundrying Act, 2002 etc. arising out of 2G Spectrum cases on behalf of the Directorate of Enforcement before the Special Court of PMLA and appellate/revisonal and higher Courts.

Thereafter, Shri Anand Grover had conducted the matters. However, it is stated by Shri Grover that the cases which were pending before the trial court at the time when he was appointed are over.

Now, the Government has issued a notification appointing Shri Tushar Mehta, Sr.Adv, in exercise of the power conferred by sub-section (8) of section 24 of the Code of Criminal Procedure, 1973 (2 of 1974). The Central Government has appointed him as per modified notification for the purpose of "Appeals/revisions or other proceedings arising out of the cases related to 2G Spectrum investigated by the Delhi Special Police Establishment (CBI) is the Court of Special Judge (2G spectrum cases, Central Bureau of Investigations, New Delhi appellate/revisonal Courts", arising out of the cases related to 2G Spectrum investigated by the Delhi Special Police Establishment (CBI) in the Court of Special Judge "2G spectrum cases, Central Bureau of Investigation, New Delhi".

Contempt application has been filed on behalf of the petitioner CPIL i.e. in Contempt Petition (C) No.793 of 2018 questioning appointment of Mr. Tushar Mehta. An application No.28660 of 2018 has been filed by Shri Anand Grover to discharge him from the cases.

After hearing the learned counsel for the parties, are of the opinion that Shri Grover

was appointed as Special Prosecutor by this Court. We appreciate the services rendered by him. At the same time, since his appointment was confined to the trial court and Government had issued a notification for other courts, appeals, revisional proceedings etc. it was open to the Government to issue fresh notification and in the facts, we allow the application filed by Shri Anand Grover for his discharge from the case.

In the aforesaid circumstances, we find that no contempt is made out since the cases are over before the trial court for which purpose, this Court had appointed Shri Anand Grover as special Public Prosecutor. It cannot be said to be a case of contempt committed by the Government while appointing Shri Tushar Mehta as Public Prosecutor vide aforesaid modified notifications. No case is made out to proceed with the contempt petition and the same is hereby dismissed.

(Emphasis supplied)

72. In view of the above order of the Hon'ble Apex Court, it is clear that Government was free to appoint anyone as Special Public Prosecutor or authorize any Prosecutor or counsel to file the appeal and, therefore, to submit that the filing of criminal leave to appeal by Mr. Sanjeev Bhandari and appointment of Shri Sanjay Jain, learned ASG is against the mandate of Hon'ble Apex Court, will not be correct.

73. Let this Court now proceed to the next argument of learned counsels for the respondents that appointment of Mr. Sanjay Jain, learned ASG to conduct the present appeal is bad in law and *non est* as he was not properly appointed under Section 24 (8) of Cr.P.C. As mentioned in earlier part of the judgment, it was argued that appointment of Mr. Sanjay Jain does not carry the approval or consent of the Hon'ble the Chief Justice as per Section 24 (1) of Criminal Procedure Code. Section 24 of the Cr.P.C. deals with appointment of Public Prosecutors. It runs as under:-

24. Public Prosecutors.

(1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.

(2) The Central Government may appoint one or more Public Prosecutors for the purpose of conducting any case or class of cases in any district or local area.

(3) For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district: Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.

(4) The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons, who are, in his opinion fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.

(5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4).

(6) Notwithstanding anything contained in sub-section (5), where in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre: Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under sub-section (4).

(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (6), only if he has been in practice as an advocate for not less than seven years.

(8) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor.

74. Section 24 (1) Cr.P.C. no doubt contemplates that the Central Government or State Government after consultation with the High Court will appoint a Public Prosecutor or one or more Additional

Public Prosecutor for conducting any prosecution, appeal or other proceedings on behalf of the Government. Thus, consultation with High Court is required for appointment of a Prosecutor or Additional Public Prosecutors under Section 24(1) of Cr.P.C. However, no such condition is attached to Section 24 (8) Cr.P.C. to appoint special Public Prosecutor. There is nothing on record which suggests that Section 24 (8) Cr.P.C. is governed by Section 24 (1) Cr.P.C. To bring the contents of Section 24 (1) Cr.P.C. into Section 24 (8) Cr.P.C. will be to frustrate the intent of Legislature. A plain reading of Section 24 (8) Cr.P.C suggests that Government is free to appoint a Special Public Prosecutor for the purpose of any case or class of cases. The only condition attached to this is that the learned Advocate so appointed must be in practice as an Advocate for not less than ten years and this is not in dispute that both Mr. Sanjeev Bhandari, learned Special Public Prosecutor and Mr. Sanjay Jain, learned ASG fulfill the above criteria.

75. Learned counsels for the respondents have, however, referred to the judgment of Hon'ble Apex Court in ***K. Anbazhagan Vs. State of Karnataka & Ors. (2015) 6 SCC 158*** in support of their

contention. Perusal of the said judgment reveals that it does not further the case of the respondents. The brief facts of the said case are that case pertaining to prosecution of Ms. J.Jayalithaa, who was the Chief Minister of Tamil Nadu under Section 120B of the Indian Penal code read with Section 13(1) & 13(2) of the Prevention of Corruption Act, 1988 was transferred from the State of Tamil Nadu to State of Karnataka on the direction of the Hon'ble Apex Court. The observation regarding appointment of Special Public Prosecutor in consultation with Chief Justice, Karnataka High Court was made by the Hon'ble Apex Court in the peculiar facts of the case as it related to the transfer of a case from State of Tamil Nadu to State of Karnataka and this is not the case here nor any such direction has been passed by the Hon'ble Apex Court.

76. On the other hand, in the case in hand, vide notification dated 6th March, 2014, issued by Government of India, Mr. Sanjeev Bhandari has been appointed as Special Public Prosecutor for Central Bureau of Investigation by virtue of Section 24(8) of Cr.P.C. in Delhi High Court for conducting the prosecution, appeals, revisions or other matters arising out of the case investigated by

Delhi Special Police Establishment. **This notification has not been specifically superceded by any subsequent notification.** The appointment of Mr. Tushar Mehta, learned ASG as Special Public Prosecutor to conduct 2G trials did not mean that appeal should have been filed by him only. In fact, being a Senior Advocate, he could not have drafted or filed the appeal and that is why, Mr. Sanjeev Bhandari, Special Public Prosecutor has done it and he has been so authorized to do by virtue of notification which is quoted again for ready reference:-

[To be published in the Gazette of India in part-II
Section-3, Sub-section (ii)]
Government of India
Ministry of Personnel, Public Grievances and Pensions
Department of Personnel & Training)

NOTIFICATION

New Delhi dated 6-03-2014

S.O. In exercise of the powers conferred by sub-section (8) of Section 24 of the Code of Criminal Procedure, 1973 (Act No. 2 of 1974). The Central Government hereby appoints S/Shri Sanjeev Bhandari and K. Raghavacharyulu, Advocates as Special Public Prosecutors of the Delhi Special Police Establishment (Central Bureau of Investigation) in Delhi High Court at New Delhi for conducting the prosecution appeals, revisions or other matters arising out of the cases investigated by the Delhi Special Police Establishment (CBI).

[F. No. 225/14/2014- AVD-II]

(Rajiv Jain)

Under Secretary to Government of India

To
The Manager,
Government of India Press
Mayapuri, Ring Road,

New Delhi- 110064

No.225/14/2014-AVD-II
2014

New Delhi dated 6 March,

Copy to:

1. The Chief Secretary, Government of Delhi, New Delhi.
2. The Registrar, Delhi High Court, New Delhi.
3. The Director, Central Bureau of Investigation, New Delhi.
4. Director of Prosecution, Central Bureau of Investigation, New Delhi.
5. Department of Legal Affairs, Shastri Bhavan, New Delhi.
6. Guard File.

(Rajiv Jain)

Under Secretary to Government of India

77. Thus, the appeal, of course, was to be conducted by learned ASG as Special Public Prosecutor but there was no bar for Mr. Sanjeev Bhandari to file the same. Mr. N.Hariharan, learned senior counsel and other learned counsels have, however, submitted that the impugned judgment is dated 21st December, 2017 whereas Mr. Sanjeev Bhandari was appointed as Special Public Prosecutor on 6th March, 2014 i.e. much before filing of the appeal. He was, therefore, not authorized to file the same. This Court has given its thought to the matter. As discussed earlier, since Mr. Tushar Mehta, learned ASG could not have filed the leave to appeal being a senior counsel, Mr. Sanjeev Bhandari who has been appointed and authorized vide notification dated 6th March, 2014, has done so and as stated earlier his appointment has not been specifically superceded

by another notification. In these circumstances, there seems to be no illegality in filing the appeal by him.

78. Mr. Vijay Aggarwal, learned counsel has next argued that every sanction order must reveal that there was proper application of mind by Sanctioning Authority. In this regard, he has placed reliance upon Hon'ble Apex Court's decision in *State of Karnataka Vs. Ameerjaan* (2007) 11 SCC 273; *Mohd. Iqubai Ahmed Vs. State of Andhra Pradesh* (1979) 4 SCC 172 and *State represented by Inspector of Police, Chennai Vs. N.S.Gnaneswaran* (2013) 3 SCC 594. He has also relied upon decision of this Court in *Ashok Kumar Aggarwal Vs. Central Bureau of Investigation* 2007(10) AD (Delhi) 73.

79. This Court has perused the above authorities and is of the opinion that the same do not help the respondents. As held earlier, there is no need for any sanction as Section 378 (2) Cr.P.C. nowhere contemplates obtaining of any previous sanction as contemplated in Section 196 or 197 of Cr.P.C. Therefore, there was no need or requirement to produce any sanction, note-sheet, file or approval to file the present leave to appeal.

80. A number of judgments were filed before this Court by learned counsels for the respondents. This Court has carefully gone through all the judgments and is of the opinion that there is no quarrel with the proposition of law laid down therein. However, these cases are distinguishable on the basis of facts and circumstances stated therein. It is well settled that judicial precedent cannot be followed as a Statute and has to be applied with reference to the facts of the case involved in it. The ratio of any decision has to be understood in the background of the facts of that case. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. It has to be remembered that a decision is only an authority for what it actually decides. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. The ratio of one case cannot be mechanically applied to another case without regard to the factual situation and circumstances of the two cases. Thus, the judgments which are based upon their own peculiar facts and circumstances are distinguishable and do not help the learned

counsels for the respondents.

81. In view of the above discussion, this Court is of the opinion that petitioner/CBI is not bound to disclose or furnish on record the copy of any approval/ sanction or notes for filing appeal under Section 378(2) Cr.P.C. for the reason that the essence of Section 378(2) Cr.P.C. is the presentation of the appeal to the High Court and not the preceding steps leading to the same, namely, the process of the formation of the opinion, the subjective satisfaction or the decision of the Government to present an appeal. Thus, it is difficult to interpret Section 378(2) of Cr.P.C. in the manner in which the learned counsels for the respondents intend this Court to interpret. They intend that this Court should read the words 'previous sanction' in Section 378(2) of Cr.P.C., whereas the Legislature has not provided the same. The words 'formation of opinion' or 'how it is arrived at' is conspicuously absent in Section 378 (2) of Cr.P.C. In these circumstances, this Court is of the opinion that respondents are not entitled to the relief claimed for and petitioner cannot be directed to place on record copies of drafts, letters, reports or approval to file the present leave to appeal.

82. As discussed earlier, the appointment of Mr. Sanjeev Bhandari, learned Special Public Prosecutor to file the leave to appeal and Mr. Sanjay Jain, learned ASG to conduct the same, is in consonance with law. The order of the Hon'ble Apex Court dated 12th March, 2018 in *Civil Appeal No. 10660 of 2010 (Supra)* has dispelled all the doubts and has categorically stated that Special Public Prosecutor in 2G case was appointed for the purpose of conducting trials only before learned Special Judge and Central Government was free to appoint anyone post trial.

83. In view of the above discussion, it is hereby held that Government is not under any obligation by virtue of any provision of law to place on record the documents i.e. note sheets, letters, correspondence or approval to file an appeal and it is also not mandated by Section 378 (2) Cr.P.C.

84. With aforesaid observations, these applications are dismissed.

85. The order be uploaded on the website of this Court forthwith.

BRIJESH SETHI, J

NOVEMBER 23, 2020

r/ak/ap