

31.5.2024

Present: Sh. Lalit Mohan, Ld. PP for CBI.
Sh. Riyaz Ahmed Bhat, Sh. Sikander A. Siddiqi and
Sh. Saifuddin, Ld. Counsels for accused with the
accused, P. Sasi in person

This is an application filed on behalf of accused seeking summoning, in defence, of the record of the proceedings conducted by Justice K. Venkatswami Commission of Inquiry and later by Justice S.N. Phukan Commission of Inquiry in relation to the Tehelka.com tapes.

1. Ld. Counsel for the accused/applicant submitted that the prosecution's case rests on the allegation that the officials of Tehelka.com had conducted a sting operation during the year 2000 to expose alleged corruption in procurement of defence equipment and had recorded 12 different meetings with accused/applicant P. Sasi in 12 different video tapes. That as per the depositions of officials of Tehelka.com 105 tapes had been recorded during the alleged sting operation and subsequently a four and half hours documentary called 'Operation Westend' was edited from these tapes, which was telecast on 13.03.2001. That subsequent to the telecast, Justice K. Venkatswami Commission of Inquiry was constituted to look into the Tehelka tapes expose' and the proceedings in accordance with the provisions of the Commissions of Inquiry Act, 1952 were undertaken by the Commission.

(i) That during the pendency of these proceedings, Justice K. Venkatswami resigned as Chairman of the Commission in

November, 2002 and he was substituted by Justice S.N. Phukan in January, 2003. The proceedings continued under the Chairmanship of Justice S.N. Phukan till October 2004, when the Union Government decided to wind up the Commission. That the material especially the tapes and documents which the prosecution is relying upon to incriminate the applicant in this case was produced before the aforesaid Commission by the officials of Tehelka.com upon receipt of notices issued by the commission in accordance with the provisions of the Commissions of Inquiry Act, 1952. A number of persons including the officials of Tehelka.com filed sworn affidavits before the commission and were examined during the proceedings conducted by the Commission.

(ii) That it was after Justice S.N. Phukan Commission of Inquiry was wound up that the instant case was registered by CBI on 06.12.2004. That, it is not the prosecution's case that CBI had directly seized the aforesaid material from the officials of Tehelka.com. That the applicant had sought permission of this Court to put the deposition of Sh. Mathew Samuel before the Commission during his cross-examination while he was examined before this Court as PW-18 in accordance with Section 145 of the Indian Evidence Act. The said request was declined vide order dated 28.07.2022. That since the record of the proceedings before the Commission of Inquiry is not extraneous or irrelevant to the present proceedings as the subject matter of these two proceedings happens to be the same, the applicant is entitled to adduce the said record in his defence.

(iii) That the applicant's request for permission to confront PW-18 with his deposition before the Commission was declined by

this Court in view of Section 6 of the Commissions of Inquiry Act, 1952 and in view of the Judgment of the Supreme Court in Kehar Singh's case. That the said judgment does not lay down that the record of the proceedings before the Commission cannot be used by an accused in a trial in defence. Nor does any law prohibit the user of the same in defence. That the various provisions of the Constitution of India especially Articles 14 & 21 mandate a fair trial and the fairness of a trial includes the right of an accused to adduce evidence in defence.

(iv) Ld. Counsel when called upon to explain the relevancy of the record sought to be summoned submitted that the proceedings before the Commission are relevant, as the subject matter was the same, the Commission was instituted to inquire into the tehelka tapes and these same are the subject matter of the present trial also, that an examination of the record of proceedings conducted by the Commission of Inquiry would establish the falsity of the prosecution's witnesses examined in this case and a denial thereof would gravely prejudice the rights of the applicant. That it is the defence of the accused that the tapes relied in evidence are not the same tapes which were produced before the Commission of Inquiry and are manipulated and tampered and that the record of the Commission is necessary to substantiate the said defence of the accused. That the details of the record required to be summoned to enable the accused/applicant to effectively adduce evidence in defence, are mentioned in para 10 of the application.

2. Ld. PP for CBI submitted that the daily orders recorded, sworn affidavits and depositions of various persons especially Tarun Tejpal, Anirudha Bahal, Mathew Samuel and Kartic S.

Godavarthy before Justice Venkatswami Commission of Inquiry or Justice S.N. Phukan Commission of Inquiry is not relied upon documents in this case. That the prosecution has not relied upon any deposition made before the said Inquiry Commission by any witness. As such, the said deposition cannot be used for the confrontation/defence as the same was not made in the course of investigation before the IO u/Sec. 161 Cr.PC or otherwise.

(i) That this Ld. Court vide order dated 28.07 2022 has already declined the request of the accused/applicant to confront the witness PW-18 Mathew Samuel in cross-examination with portions of his deposition recorded before the Commission of Inquiry. That the accused had impugned the said order dated 28.07.2022 before Hon'ble High Court of Delhi by filing Crl. M.C. 4407/2023. The said petition was dismissed by Hon'ble (Mr) Justice Dinesh Kumar Sharma vide order dated 29.08.2023. That this application therefore is not maintainable as this issue of admissibility in evidence of any part of the record of the Commission has already been decided for the present proceedings by H'ble the High Court of Delhi and the present application is in contravention of the judgement of H'ble the High Court in the present case.

(ii) That prosecution evidence in the present case was completed on 30.05.2023 and the statement u/Sec. 313 Cr.PC was recorded on 03.11.2023. That the accused has had ample opportunity to lead evidence in his defence and the instant application of the accused has been filed merely to delay the trial proceedings, as the accused has no defence to lead. That the affidavits which are sought to be produced for the purpose of confrontation by the accused were not relied upon by the

prosecution in the examination in chief and were only brought during the cross-examination of PW-18. That it has been consistently held by the Constitutional Courts that the evidence produced before a Commission constituted under the Commissions of Inquiry Act is inadmissible in a future proceeding except for the purposes as laid down in Section 6 of the Act. That as previous such application of accused was dismissed on merits, present application is not maintainable for the same relief.

3. I have heard the Ld. Counsel for the accused/applicant as well as the Ld. PP for CBI and perused the record and considered the judicial pronouncements relied upon.

4. Accused P. Sasi is on trial for the alleged commission of offences 7, 9 and 13 (2) r/w Sec. 13 (1) (d) of Prevention of Corruption Act, 1988 on the accusation that during the year 2000 while posted as Assistant in the office of Ordnance Services-16 B, Directorate General of Ordnance Services, Master General Ordnance Branch, Ministry of Defence, Government of India, New Delhi, he demanded and accepted illegal gratification/pecuniary advantage from Mr. Mathew Samuel and Sh. Anil Malviya who were posing as representatives of a fictitious defence production company by the name of Westend Intl., for passing on information and documents and for inducing by exercise of personal influence other public servants to render service to the said fictitious company in obtaining a supply order from the Government of India in favour of the said fictitious company for supply of its fake product of HHTI to the Indian Army.

5. Prosecution has concluded its evidence after examining

some twenty witnesses in evidence, the accused has elected to lead evidence in defence and after availing of the opportunity to produce witness/es in defence if any has applied for the summoning of the record of the Justice K. Venkataswami Commission of Inquiry succeeded by the Justice S.N.Phukan Commission of Inquiry, in his defence evidence. The details of the record sought as described in para 10 of the application is as follows:

- (i) Daily orders recorded at the culmination of the proceedings for a day.
- (ii) Sworn affidavits filed by various persons especially Tarun Tejpal, Anirudha Bahal, Mathew Samuel and Kartic S. Godavarthy.
- (iii) Depositions of various persons especially Tarun Tejpal, Anirudha Bahal, Mathew Samuel and Kartic S. Godavarthy.

6. Ld. Defence Counsel fervently argued that as the tehelka tapes were the subject of the inquiry before the Justice K. Venkataswami Commission of Inquiry as well as the Justice S.N. Phukan Commission of Inquiry and constitute the subject matter of the present prosecution also therefore the proceedings before and record of, the said Commission of Inquiry would per se be relevant, and would support and substantiate the defence of the accused that the tapes relied in evidence were tampered with besides effectively exposing the falsity of the statements made on oath by the prosecution witnesses, in the present trial, against the accused.

7. A brief backdrop is warranted to appreciate this contention of the Ld. Defence Counsel. The case of the prosecution is that

during the year 2000, Tehelka.com a news and views website, owned by M/s Buffalo Networks Pvt. Ltd., conducted a series of sting operations to expose alleged corruption in procurement of defence equipment, which was given the name 'Operation Westend'. Shri Tarun Tejpal was the Chief Executive Officer and Editor-in-chief of Tehelka.com, Sh. Anirudhha Bahal and Mathew Samuel were Editor (Investigations) and the correspondent respectively of Tehelka.com. For the purposes of this investigative story, 'Operation Westend', Anirudhha Bahal, Mathew Samuel journalists working for Tehelka.com and one Anil Malviya who had also assisted them in this operation assumed fake identities, Anirudha Behal became Alvin D'Souza, the President of Westend Intl., Mathew Samuel portrayed himself as the Chief Liaison Officer of the firm, Anil Malviya under the assumed name of Rajiv Sharma was projected as the Chief Representative of M/s West End International, London.

8. The said fictitious firm M/s West End International, London, was shown to be a supplier/ manufacturer of defence related products/equipment, including HHTI, and was desirous of procuring an order for supply of its fake product of HHTI to the Indian Army. During 'Operation Westend' these journalists held a number of meetings with various individuals viz. Army officials, officials of Ministry of Defence, politicians, middlemen etc, for obtaining a purchase order from the ministry of defence for supply of its fake product of HHTI to the Indian army. These several meetings with various persons/public servants in connection with the defence deal for supply of HHTI's of Westend Intl. to the Indian army were secretly recorded by these journalists in 105 video tapes, Hi-8 and MiniDV's, famed as the

‘Tehelka Tapes’. Tehelka.com published the story as ‘Operation Westend’, imputing corruption at various levels in defence procurements which lead the Government of the day to institute a Commission of Inquiry to look into the Tehelka tapes expose.

9. The Justice K. Venkataswami Commission of Inquiry was set up on 31.3.2001 to look into the tehelka tapes expose`, Justice K. Venkataswami resigned as Chairman of the said Commission in November 2002, and was reconstituted as the Justice S.N. Phukan Commission of Inquiry in January 2003. The Government later issued notification winding up the Justice S.N. Phukan Commission of Inquiry in October 2004, and CBI was entrusted with the investigation into the Tehelka Tapes. The Tehelka tapes had been delivered by the functionaries of Tehelka.com to the Commission of Inquiry so instituted, and were later handed over to CBI for the purposes of investigation into the same. CBI registered several criminal cases against different persons on the basis thereof, and RC.No.ACI/2004A0006/CBI/ACU-I against accused P.Sasi is one such case registered in this manner. Within this frame of reference then these proceedings against accused P.Sasi may very well be construed as a fallout of the Tehelka Tapes expose`, ‘Operation Westend’ as were the above referred Commissions of Inquiry so instituted.

10. Even then, it is incapable of being inferred much less concluded that the subject matter of these criminal proceedings against P.Sasi is the same as that of the Commission of Inquiry appointed u/Sec. 3 of the Commissions of Inquiry Act, 1952, to inquire into the Tehelka Tapes expose` on corruption in defence procurements. The mandate of the Commission of Inquiry though

instituted in the wake of the Tehelka Tapes revelations and the investigative story published/telecast as ‘Operation Westend’ by Tehelka.com, never was and could not have been to prosecute accused P.Sasi for commission of offences punishable under the Prevention of Corruption Act, 1988. A Commission of Inquiry is instituted u/Sec. 3 of the Commissions of Inquiry Act, 1952 (hereinafter referred to as the Act) with specific terms of reference, either to inquire into any matter of definite public importance or to perform some specified functions.

11. It is so promulgated u/Sec. 3 of the Commissions of Inquiry Act, 1952, as follows:

“3. Appointment of Commission

(1) [Save as otherwise provided in the Lokpal and Lokayuktas Act, 2013, the appropriate Government may], if it is of opinion that it is necessary so to do, and shall, if a resolution in this behalf is passed by [each House of Parliament or, as the case may be, the Legislature of the State], by notification in the Official Gazette, appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public importance and performing such functions and within such time as may be specified in the notification, and the Commission so appointed shall make the inquiry and perform the functions accordingly:

PROVIDED that where any such Commission has been appointed to inquire into any matter-

(a) by the Central Government, no State Government shall, except with the approval of the Central Government, appoint another Commission to inquire into the same matter for so long as the Commission appointed by the Central Government is functioning;

(b) by a State Government, the Central Government shall not appoint another Commission to inquire into the same matter for so long as the Commission appointed by the State Government is functioning, unless the Central Government is of opinion that the scope of the inquiry should be extended to two or more States.

(2) The Commission may consist of one or more members appointed by the appropriate Government, and where the Commission consists of more than one member, one of them may be appointed as the Chairman thereof.

[(3) The appropriate Government may, at any stage of an inquiry by the Commission fill any vacancy which may have arisen in the office of a member of the Commission (whether consisting of one or more than one member).

[(4) The appropriate Government shall cause to be laid before [each House of Parliament or, as the case may be, the Legislature of the State], the report, if any, of the Commission on the inquiry made by the Commission under sub-Section (1) together with a memorandum of the action taken thereon, within a period of six months of the submission of the report by the Commission to the appropriate Government.]

12. The Commission of Inquiry so appointed u/Sec. 3 of the Act upon conclusion of the inquiry/mandate submits its report to the Govt. of the day which report alongwith action taken thereon is ordained by the statute to be tabled in Parliament. It would be more than apt here to advert to the terms of reference of the Commissions of Inquiry instituted to look into the Tehelka tapes expose`. The Justice K. Venkataswami Commission of Inquiry was appointed with the following terms of reference:

“a) To inquire whether the transaction relating to Defence and other procurements referred to in the videotapes and transcripts have been carried out in terms of prescribed procedure and imperatives of national security;

b) To inquire whether in any of the aforesaid procurement transactions, illicit gains have been made by persons in public office, individuals, and any other organization as alleged, and if so, to what extent;

c) To suggest action that may be taken in respect of persons who may be found responsible by the Commission for their acts of commission and/or omission in respect of transactions referred to in sub-clause (a) and above;

d) To inquire into all aspects relating to the making and publication of these allegations and any other matter arises from or is connected with or incidental to any act, omission or transaction referred to in sub-clause (a) and (b) above;”

13. The Justice K. Venkataswami Commission of Inquiry was appointed to inquire into the defence related transactions imputed in the videotapes and report if the same were as per the established procedure in strict adherence to the imperatives of national security or in aberration thereof, and if any persons in public office, individuals or any organization/s had incurred illicit gains therefrom as also to suggest action that may be taken against such persons/entities. No adjudicatory functions were assigned to be performed by the Commission, the mandate was to inquire into the imputations of corruption and to submit its conclusions with recommendations in the form of its report for the decision making by the executive on the purported revelations. Pertinently, no report was submitted by the H'ble Commission against the accused or otherwise. The Justice S.N. Phukan Commission of Inquiry ceased to exist w.e.f. 4th October, 2004 by virtue of the notification issued by Department of Personnel & Training to this effect, as CBI was called in to investigate and prosecute if required as per law.

14. The Commission of Inquiry appointed u/Sec. 3 of the Act may come to be vested with some of the powers and trappings of a Court of Law to facilitate and enable an effective execution of the inquiry into the matter assigned and the performance of the functions designated, as per its terms of reference. Towards such end, the government appointing the Commission may by notification to this effect endow the Commission with the power to call upon the presence of any person and production of any information by any such person, before the Commission, as would be required and would be relevant, in the opinion of the Commission, to the subject-matter of the inquiry and such person

shall be deemed to be legally bound to appear and/or furnish such information, and failure on his part may invite proceedings as envisaged under Section 176 and Section 177 IPC, 1860. Towards such end, to accomplish the assigned, in the discharge of the inquiry/ function commissioned, the Commission or any gazetted officer authorised in this behalf by the Commission, may also enter any building or place if there is reason to believe that any document/ material relevant to the subject matter of the inquiry may be found therein, and may also seize any books of account or documents, subject of course to the provisions of Section 102 and Section 103 of the Code of Criminal Procedure, 1898 (5 of 1898).

15. The Commission is deemed to be a Civil Court in the sense to the extent and for the purposes of offences as described in Section 175, Section 178, Section 179, Section 180 or Section 228 of the Indian Penal Code, 1860, and its proceedings as judicial proceedings for the purposes of offences defined under Sections 193 and 228, Indian Penal Code, 1860, for no other purposes and in no other sense. The Commission of Inquiry so instituted otherwise is not a Court of law or Tribunal constituted either under the Code of Civil Procedure, 1908, or the Code of Criminal Procedure, 1973, or Special enactments, vested with the jurisdiction to decide civil disputes or conduct criminal prosecutions and inflict penalties.

16. There are as such no adversaries competing and opposing one another for determination of their conflicting rights/ liabilities. Though a person likely to be prejudicially affected by the inquiry has a right of being heard in the inquiry and is also entitled to produce evidence in his defence, and can even cross-

examine witnesses examined before the Commission in connection with the inquiry as well as to legal representation, for though the Commission by virtue of Sec.8 of the Act is at liberty to evolve its own procedure to fulfill the mandate, however under no circumstances can any lawful proceedings be held in violation of the principles of natural justice in particular its fundamental principle that no man should be condemned unheard, *Audi alteram partem*, however there is no enforceable determination of the rights and liabilities of any person contemplated thereby. The conduct of a person may be the subject of an inquiry though, towards which are the necessary safeguards in place under Section 8A and 8B, of the Act.

17. The conclusions that it arrives at, the findings that it reports are for the exclusive consumption of the Government of the day, recommendatory in nature, government may or may not act on such recommendations. H'ble the Apex Court in the celebrated and often quoted judgement in ***Ram Krishna Dalmia v. S.R.Tendolkar***, 1958 SCC OnLine SC 6 upon a careful Section by Section analysis of the statute concluded that a Commission of Inquiry has no judicial powers and its recommendations not effective 'proprio vigore'. I have taken the liberty of quoting generously from this landmark judgement as the law laid down has direct bearing given the terms of reference of the Commissions of Inquiry on the Tehelka tapes expose`. It has been deliberated upon and held as follows:

"2. The Commissions of Inquiry Act, 1952, (hereinafter referred to as "the Act") received the assent of the President on 14-8-1952, and was thereafter brought into force by a notification issued by the Central Government under Section 1(3) of the Act. As its long title states, the Act is one "to provide for the appointment of Commissions of Inquiry

and for vesting such Commissions with certain powers”. Sub-Section (1) of Section 3, omitting the proviso not material for our present purpose, provides:

“The appropriate Government may, if it is of opinion that it is necessary so to do, and shall, if a resolution in this behalf is passed by the House of People or, as the case may be, the Legislative Assembly of the State, by notification in the Official Gazette, appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public importance and performing such functions and within such time as may be specified in the notification, and the Commission so appointed shall make the inquiry and perform the functions accordingly.”

Under sub-Section (2) of that Section the Commission may consist of one or more members and where the Commission consists of more than one member one of them may be appointed as the Chairman thereof. Section 4 vests in the Commission the powers of a civil court while trying a suit under the Code of Civil Procedure in respect of the several matters specified therein, namely, summoning and enforcing attendance of any person and examining him on oath, requiring discovery and production of any document, receiving evidence on affidavits, requisitioning any public record or copy thereof from any court or officer, issuing commissions for examination of witnesses or documents and any other matter which may be prescribed. Section 5 empowers the appropriate Government, by a notification in the Official Gazette, to confer on the Commission additional powers as provided in all or any of the sub-Sections (2), (3), (4) and (5) of that Section. Section 6 provides that no statement made by a person in the course of giving evidence before the commission shall subject him to, or be used against him in, any civil or criminal proceeding except a prosecution for giving false evidence by such statement provided that the statement is made in reply to a question which he is required by the Commission to answer or is relevant to the subject-matter of the inquiry. The appropriate Government may under Section 7 issue a notification declaring that the Commission shall cease to exist from such date as may be specified therein. By Section 8 the Commission is empowered, subject to any rules that may be made, to regulate its own procedure including the time and place of its sittings and may act notwithstanding the temporary absence of any member or the existence of any vacancy among its members. Section 9 provides for indemnity to the appropriate Government, the members of the Commission or other persons acting under their directions in respect of anything which is done or intended to be done in good faith in pursuance of the Act. The rest of the Sections are not material for the purpose of these

appeals.

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8. While we find ourselves in partial agreement with the actual conclusion of the High Court on this point, we are, with great respect, unable to accept the line of reasoning advanced by learned counsel for the petitioners, which has been accepted by the High Court for more reasons than one. In the first place neither Parliament nor the Government has itself undertaken any inquiry at all. Parliament has made a law with respect to inquiry and has left it to the appropriate Government to set up a Commission of Inquiry under certain circumstances referred to in Section 3 of the Act. The Central Government, in its turn, has, in exercise of the powers conferred on it by the Act, set up this Commission. It is, therefore, not correct to say that Parliament or the Government itself has undertaken to hold any inquiry. In the second place the conclusion that the last portion of clause (10) is bad because it signifies that Parliament or the Government had usurped the functions of the judiciary appears to us, with respect, to be inconsistent with the conclusion arrived at in a later part of the judgment that as the Commission can only make recommendations which are not enforceable *proprio vigore* there can be no question of usurpation of judicial functions. As has been stated by the High Court itself in the latter part of its judgment, the only power that the Commission has is to inquire and make a report and embody therein its recommendations. The Commission has no power of adjudication in the sense of passing an order which can be enforced *proprio vigore*.

(emphasis supplied)

A clear distinction must, on the authorities, be drawn, between a decision which, by itself, has no force and no penal effect and a decision which becomes enforceable immediately or which may become enforceable by some action being taken. Therefore, as the Commission we are concerned with is merely to investigate and record its findings and recommendations without having any power to enforce them, the inquiry or report cannot be looked upon as a judicial inquiry in the sense of its being an exercise of judicial function properly so called and consequently the question of usurpation by Parliament or the Government of the powers of the judicial organs of the Union of India cannot arise on the facts of this case and the elaborate discussion of the American authorities founded on the categorical separation of powers expressly provided by and under the American Constitution appears to us, with respect, wholly inappropriate and unnecessary and we do not feel called upon, on the present occasion, to express any opinion on the question whether even in the absence of a specific provision for separation of powers in our Constitution, such

as there is under the American Constitution, some such division of powers — legislative, executive and judicial — is, nevertheless implicit in our Constitution. In the view we have taken it is also not necessary for us to consider whether, had the Act conferred on the appropriate Government power to set up a Commission of Inquiry with judicial powers, such law could not, subject, of course, to the other provisions of the Constitution, be supported as a law made under some entry in List I or List III authorising the setting up of courts read with these two entries, for a legislation may well be founded on several entries.

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13. *It will be apparent from its long title that the purpose of the Act is to provide for the appointment of Commissions of Inquiry and for vesting such Commissions with certain powers. Section 3 empowers the appropriate Government, in certain circumstances therein mentioned, to appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public importance and performing such functions within such time as may be specified in the notification. It seems clear — and it has not been controverted — that on a proper construction of this Section, the functions the performance of which is contemplated must be such as are ancillary to and in aid of the inquiry itself and cannot be read as a function independent of or unconnected with such inquiry. That being the position, as we conceive it to be, the question arises as to the scope and ambit of the power which is conferred by it on the appropriate Government. The answer is furnished by the statute itself, for Section 3 indicates that the appropriate Government can appoint a Commission of Inquiry only for the purpose of making an inquiry into any definite matter of public importance and into no other matter. In other words the subject-matter of the inquiry can only be a definite matter of public importance. The appropriate Government, it follows, is not authorised by this Section to appoint a Commission for the purpose of holding an inquiry into any other matter. Learned Solicitor-General, in the premises, submits that the Section itself on the face of it, makes a classification so that this statute falls within the first category mentioned above and contends that this classification of things is based on an intelligible differentia which has a reasonable relation to the object sought to be achieved by it, for a definite matter of public importance may well call for an inquiry by a Commission. In the alternative the learned Solicitor-General urges that in any case the Section itself quite clearly indicates that the policy of Parliament is to provide for the appointment of Commissions of Inquiry to inquire into any definite matter of public importance and that as there is no knowing when,*

where or how any such matter may crop up Parliament considers it necessary or expedient to leave it to the appropriate Government to take action as and when the appropriate moment will arrive. In the tempo of the prevailing conditions in modern society events occur which were never foreseen and it is impossible for Parliament or any legislature to anticipate all events or to provide for all eventualities and, therefore, it must leave the duty of taking the necessary action to the appropriate Government. This delegation of authority, however, is not unguided or uncontrolled, for the discretion given to the appropriate Government to set up a Commission of Inquiry must be guided by the policy laid down, namely, that the executive action of setting up a Commission of Inquiry must conform to the condition of the Section, that is to say, that there must exist a definite matter of public importance into which an inquiry is, in the opinion of the appropriate Government, necessary or is required by a resolution in that behalf passed by the House of the People or the Legislative Assembly of the State. If the preambles or the provisions of the statutes classed under the first category mentioned above could be read as making a reasonable classification satisfying the requirements of Article 14 and if the preamble to the statute considered in the case of Kathi Raning Rawat [(1952) 1 SCC 215 : (1952) SCR 435] could be construed as laying down sufficiently clearly a policy or principle for the guidance of the executive, what objection can there be to construing Section 3 of the Act now under our consideration as also making a reasonable classification or at any rate as declaring with sufficient clarity the policy of Parliament and laying down a principle for the guidance of the exercise of the powers conferred on the appropriate Government so as to bring this statute at least in the fourth category, if not also in the first category? On the authorities, as they stand, it cannot be said that an arbitrary and uncontrolled power has been delegated to the appropriate Government and that, therefore, the law itself is bad.”

18. The purpose of appointing a Commission of Inquiry by the government is succinctly yet distinctly culled in ***M.V. Rajwade I.A.S. v. Dr. S.M. Hassan***, AIR 1954 Nag 71, as follows:

17. An enquiry under the Commissions of Inquiry Act, 1952, on the other hand, is of wholly different character. There is no accuser, no accused and no specific charges for trial; nor is the Government, under the law, required to pronounce, one way or the other, on the findings of the Commission. ‘In re Maharaja Madhava Singh’, 32 Cal 1 (PC) (D), was a case of the Commissioners appointed by the

Viceroy and Governor-General in Council for the purpose of enquiring into the truth of a certain imputation against the Maharajah, in which their Lordships of the Privy Council observed:

“It is sufficient to say that the Commission in question was one appointed by the Viceroy himself for the information of his own mind, in order that he should not act in his political and sovereign character otherwise than in accordance with the dictates of justice and equity, and was not in any sense a Court, or, if a Court, was not a Court from which an appeal lies to His Majesty in Council.”

19. These observations apply ‘mutatis mutandis’ to the instant case. The Commission in question was obviously appointed by the State Government “for the information of its own mind”, in order that it should not act, in exercise of its executive power, “otherwise than in accordance with the dictates of justice and equity” in ordering a departmental enquiry against its officers. It was, therefore, a fact finding body meant only to instruct the mind of the Government without producing any document of a judicial nature. The two cases are parallel, and the decision must be, as in — ‘In re Maharaja Madhava Singh (D)’, that the Commission was not a Court.

19. The investigation into the Tehelka Tapes expose` was handed over to CBI by the government not in pursuance to the recommendations made by the Justice S. N. Phukan Commission of Inquiry as the said Commission of Inquiry was wound up before it could conclude the inquiry and file its report. Even if such a report had been filed, it would have no evidentiary value in or binding effect on, the judicial proceedings, even if on the same subject matter, before a Court of Law. It has been so elucidated by Hon'ble the Apex Court in ***T.T. Antony v. State of Kerala***, (2001) 6 SCC 181:-

“29. Regarding Point (iii), the principles as to the position of the Commission of Inquiry appointed under the Commissions of Inquiry Act, the report and finding recorded by the Commission are too well settled to admit of any elaborate discussion except to reiterate them here. As long back as in 1904, the Privy Council in Maharaja Madhava Singh v. Secy. of State for India in Council [(1903-04) 31 IA 239 (PC)] laid down : (IA p. 241]

“[I]t is sufficient to say that the Commission in question

was one appointed by the Viceroy himself for the information of his own mind, in order that he should not act in his political and sovereign character otherwise than in accordance with the dictates of justice and equity, and was not in any sense a court....”

30. A Division Bench of the Nagpur High Court in M.V. Rajwade v. Dr S.M. Hassan [AIR 1954 Nag 71 : 55 Cri LJ 366] following the said judgment of the Privy Council, held that the Commission was a fact-finding body meant only to instruct the mind of the Government without producing any document of a judicial nature and that findings of the Commission of Inquiry were not definitive like a judgment. It was also pointed out that there was no accuser, no accused and no specific charges for trial; nor was the Government, under the law, required to pronounce, one way or the other, on the findings of the Commission. That judgment was approved by various judgments of this Court.

31. In Ram Krishna Dalmia v. Justice S.R. Tendolkar [AIR 1958 SC 538 : 1959 SCR 279] a Constitution Bench of this Court while considering the constitutional validity of the Commissions of Inquiry Act, indicated that the Commission is merely to investigate, record its findings and make its recommendations which are not enforceable proprio vigore and that the inquiry or report cannot be looked upon as judicial inquiry in the sense of its being an exercise of judicial function properly so called. The recommendations of the Commission of Inquiry are of great importance to the Government in order to enable it to make up its mind as to what legislative or administrative measures should be adopted to eradicate the evil found or to implement the beneficial objects it has in view. It would be appropriate to notice the following observations of the Constitution Bench : (AIR p. 547, para 9)

“But seeing that the Commission of Inquiry has no judicial powers and its report will purely be recommendatory and not effective proprio vigore and the statement made by any person before the Commission of Inquiry is, under Section 6 of the Act, wholly inadmissible in evidence in any future proceedings, civil or criminal, there can be no point in the Commission of Inquiry making recommendations for taking any action ‘as and by way of securing redress or punishment’ which, in agreement with the High Court, we think, refers, in the context, to wrongs already done or committed, for redress or punishment for such wrongs, if any, has to be imposed by a court of law properly constituted exercising its own discretion on the facts and circumstances of the case and without being in any way influenced by the view of any person or body, howsoever august or high powered it may be.”

32. In State of Karnataka v. Union of India [(1977) 4 SCC

608] the observations referred to above were approved by a seven-Judge Bench of this Court. In *Sham Kant v. State of Maharashtra* [1992 Supp (2) SCC 521 : 1992 SCC (Cri) 765] it was held that the findings of the Inquiry Commission would not be binding on the Supreme Court. There, the question was whether an undertrial died due to injuries sustained by him in police custody. The report of the Commission of Inquiry mentioned that the injuries possibly might have been sustained by him even prior to his arrest. In the appeal arising out of conviction and sentence of the police officer concerned, this Court, on material before it, found that the victim died on account of ill-treatment meted out by the police and held that the findings of the Commission would not bind this Court.

33. It is thus seen that the report and findings of the Commission of Inquiry are meant for information of the Government. Acceptance of the report of the Commission by the Government would only suggest that being bound by the rule of law and having duty to act fairly, it has endorsed to act upon it. The duty of the police — investigating agency of the State — is to act in accordance with the law of the land. This is best described by the learned Law Lord — Lord Denning — in *R. v. Metropolitan Police Commr.* [(1968) 1 All ER 763 : (1968) 2 QB 118 : (1968) 2 WLR 893 (CA)] (All ER, at p. 769) where he observed as follows: “I hold it to be the duty of the Commissioner of Police, as it is of every Chief Constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself.”

34. Acting thus the investigating agency may with advantage make use of the report of the Commission in its onerous task of investigation bearing in mind that it does not preclude the investigating agency from forming a different opinion under Sections 169/170 CrPC if the evidence obtained by it supports such a conclusion. In our view, the courts, civil or criminal, are not bound by the report or findings of the Commission of Inquiry as they have to arrive at their own decision on the evidence placed before them in accordance with law.” (emphasis supplied)

20. Nonetheless, the fact in issue in the present case, as to whether accused P. Sasi has committed the offences defined and made punishable u/Sec. 7, 13(1)(d) r/w 13(2) and 9, of the Prevention of Corruption Act, 1988, and if so what penalty should

be imposed on him could not have been and was not, directly and squarely, the subject matter of the inquiry instituted in the wake of the Tehelka Tapes expose', no effective determination could have been arrived at by the H'ble Commission of Inquiry in this regard, nor any punishment if warranted could have been recommended or enforced in pursuance thereto, though the conduct of the applicant/accused was to be inquired into for which notices had been sent to him too by the Commission, amongst many others, including Mathew Samuel and Anirudha Behal.

21. It has come on record during the cross-examination of Mathew Samuel as PW18, that he had appeared before the Commission of Inquiry and had filed certain affidavits and was cross-examined by the Counsels of various noticees before the Inquiry Commission and that accused P.Sasi was one such noticee before the Commission. He had also identified the affidavits which he had submitted before the Commission as EX.PW18/D 1 &2. Mathew Samuel was sought to be confronted with certain portions of his these affidavits during his cross-examination which permission was declined while sustaining the objection of the prosecution in this regard. Anirudha Behal as PW11, deposed about his affidavit submitted before the Commission which was tendered as EX.PW11/A, this is the first and infact the only document tendered in evidence through him and he was extensively cross-examined by the defence on the same.

22. It is also fallen in his deposition during cross-examination that he had filed more than one affidavit before the Commission, and was cross-examined at length on more than one occasion

before the commission, prosecution however has not relied on any other affidavit/s affirmed to have been submitted by Anirudha Behal before the Commission of Inquiry, or any part of such record, neither the same were sought by the defence to be requisitioned for the cross- examination of PW11. Tarun Tejpal as PW16 has not stated anything about having participated in the proceedings before the Commission of Inquiry and nothing in this regard has been drawn out of him during cross-examination. Besides, by way of the present application the defence seeks the summoning of the affidavit/s filed by one Kartic S. Godavarthy before the Commission of Inquiry, not fielded as a witness by the prosecution, again a document not relied upon by the prosecution.

23. The affidavits furnished and depositions made before the Commission of Inquiry by the abovesaid prosecution witnesses/persons are required to be relied in defence, one to impeach the credit of the witnesses, to expose their lies and two to substantiate that the Tehelka tapes relied in evidence in the present case have been tampered with and are not the same tapes as were to be inquired into by the Commission. When Mathew Samuel was being cross-examined in Court, the defence was not allowed to confront him, during his cross-examination, with portions of his affidavits submitted to the Commission, which had been introduced in the course of his cross-examination only, to discredit his testimony in the present proceedings in the light of the bar envisaged under Section 6 of the Act, on the use of such statements adduced/made before the Commission instituted u/Sec. 3 of the Act, while sustaining the objection of the prosecution in this regard vide order dated 28.7.2022.

24. The accused/applicant had challenged the said order sustaining the objections of the prosecution in CrI.M.C. No.4407/2023, titled as ***P. Sasi Vs. CBI***, which petition came to be dismissed by H'ble the High Court of Delhi on 29.8.2023 with the following observations:

“Thus, the analysis of the above said judgments would make it clear that the present case is distinguishable from the law laid down in the Sajjan Kumar case. The present petition is liable to be dismissed; firstly, the CBI has not relied upon any material placed before the Commissions of Inquiry Act. Secondly, the affidavits which are sought to be produced for the purpose of confrontation by the accused were not relied upon by the prosecution in the examination in chief and were only brought during the cross-examination of PW-18. Thirdly, it has consistently held by the Constitutional Courts that the evidence produced before a Commission constituted under the Commissions of Inquiry Act is inadmissible in a future proceeding except for the purposes as laid down in Section 6 of the Act.

25. Before proceeding further it would be warranted to advert to the statute that embodies the embargo. Section 6 of the Act prescribes as follows:

“ 6. Statements made by persons to the Commission. No statement made by a person in the course of giving evidence before the Commission shall subject him to, or be used against him in any civil or criminal proceeding except a prosecution for giving false evidence by such statement:

Provided that the statement----

- (a) is made in reply to a question which he is required by the commission to answer, or*
- (b) is relevant to the subject matter of the inquiry.”*

26. When it has been held in CrI.M.C. No.4407/2023, titled as ***P. Sasi Vs. CBI***, that the statements made to the Commission are inadmissible in evidence in a future proceedings, the stipulation would apply with the same vigor, carry same weight, import and purport, across all the stages of the future proceedings, not exclusively to the stage when the prosecution evidence is being

recorded but even when any such statements are sought to be lead in evidence by the accused at the stage of defence evidence. It is not that in defence the accused can be said to be entitled to lead material made inadmissible in evidence by virtue of any law/statute. The statements would be inadmissible irrespective of whether these are sought to be relied in evidence by the prosecution or the defence. So far as the admissibility of evidence is concerned the same parameters and law would apply to the entire evidence from all sides, be it the prosecution or the defence, the rules of evidence so far as appreciation thereof is concerned, the standard of assessment of the evidence may differ though, for if the prosecution must succeed beyond reasonable belief, the defence on the preponderance of probabilities may sufficiently secure the benefit of doubt.

27. What Section 6 of the Act, prohibits is the use of such statements in any future proceedings except to the extent and for the purposes as explicitly provided therein. The limited use that any statement made before a Commission of Inquiry appointed u/Sec. 3 of the Act may be put is towards proceedings for perjury and no other, neither civil nor criminal. If such statements cannot be used to impeach the credit of the witness during his cross-examination, then in defence also the same moratorium shall apply, for the statements are sought to be requisitioned and relied in defence to discredit the witnesses of the prosecution. The exposition rendered on the aspect in *Kehar Singh & Ors vs State (Delhi Admn.)* 1988 AIR SC1883, is equally pertinent even at the stage of defence evidence, relevant portions are reproduced below:

“7. On analysis of the provision of s. 6 of the

Commissions of Inquiry Act, 1952, it will be found that there are two restrictions on the use of a statement made by a witness before the Commission. A statement given in a Commission cannot be used to subject the witness to any civil or criminal proceedings nor it can be used against him in any civil or criminal proceedings and it is in the context of these restrictions the Provisions of s.145 read with s. 155 (3) and s.157 of the Evidence Act which permit the use of a previous statement of witness and for what purpose will have to be examine. These Sections clearly indicate that there are two purposes for which a previous statement can be used. One is for cross-examination and contradiction and the other is for corroboration. The first purpose is to discredit the witness by putting him the earlier statement and contradicting him on that basis. So far as corroboration is concerned it could not be disputed that it is none of the purposes of the defence to corroborate the evidence on the basis of the previous statement. Section 145, therefore, is the main Section under which relief was sought by the accused. The use for which the previous statement was asked for was to contradict him if necessary and if it was a contradiction then the earlier statement was necessary so that contradicting be put to the witness and that part of the statement can be proved. [89E-G; 91D-E]]

8. Contradiction could be used either to impeach the credit of a witness or discredit him on to pull down or bring down the reliability of the witness. These purposes for which the previous statements are required could not be said to be purposes which were not against the witness. The two aspects of the restrictions which s. 6 contemplates are the only two aspects which could be the result of the use of these state. There is no other use of such previous statements in criminal proceedings. It is therefore, clear that s. 6 prohibits the use of the previous statements at the trial either for the purpose of cross-examination to contradict the witness or to impeach his credit. (emphasis supplied) Therefore, the Courts below were right in not granting the relief to the accused. [91F-92A]

9. The report of a Commission is a recommendation of the Commission for the consideration of the Government. It is the opinion of the Commission based on the statements of witnesses and other material. It has no evidentiary value in the trial of a criminal case.”

28. Ld. Counsel for the accused/applicant has again relied upon the justification accorded in the facts of the case by H’ble the High Court of Delhi in ***Sajjan Kumar Vs. CBI (Crl. Rev.***

No.328/12) decided on 03.08.2012 while distinguishing the judgment of Hon'ble of the Apex Court in *Kehar Singh's*. The relevant portion of the said judgment is being reproduced here as under:

“ 25. The objection of prosecution that accused cannot use the previous statement for purpose of contradiction is based on the observation made by Apex Court in Kehar Singh's case has been sustained by learned Trial Court vide impugned order without appreciating the context in which it was so held.

26. At this stage, it would be appropriate to take note of the fact that in Kehar Singh's case, the prosecution did not rely upon any affidavit filed or statement made before the Commissions. It was the accused who requested for the copies of the statement of witnesses made before the Commission to contradict the witness with reference to such statements as part of defence. Therefore, the facts of the case before this Court are altogether different.

27. The contention of learned Senior Advocate for CBI that the affidavits filed and statement made before the Commissions are admissible in examination-in-chief of PW-1 Smt. Jagdish Kaur but accused is precluded from contradicting the witness on Ex.PW1/A to C during cross-examination in view of bar of Section 6 of Commissions of inquiry Act, is devoided of any merit as no examination-in-chief which is not allowed to be subjected to cross-examination can be read in evidence, since a person against whom a deposition is made/examination in chief is directed, has a legal right to cross-examine the witness who has deposed against him.

28. Neither the part of examination in chief which referred to affidavits Ex.PW1/A & B and statement Ex.PW1/C, nor these documents can be read in evidence against the accused unless he is given an opportunity to cross-examine PW-1 Smt. Jagdish Kaur with respect to affidavits filed and statement made before the Commissions.”

29. Indisputably, no statement of a witness tendered by the prosecution can be read in evidence unless the accused has availed of the opportunity to cross-examine him or her. Without the witness having been subjected to cross-examination, his examination remains incomplete and whatever statement he

made in his chief-examination is inconsequential being inadmissible. For such reasons therefore, if the prosecution has been permitted to rely in evidence on any statement of a witness made to a Commission of Inquiry for the purposes of corroboration or as substantive piece of evidence in the facts of the case, then the accused would have every right to cross-examine on such statements, alongwith all material aspects concerning the subject matter.

30. It has then so been, as reflected on the face of the record, that when the prosecution had tendered in evidence one such affidavit of Anirudha Behal submitted before the Commission, EX.PW11/A, the defence had seized of the opportunity to cross-examine him on the said affidavit, as well as the contents thereof. However, now in defence any such purported affidavit that Anirudha Behal may have submitted as no such affidavit has been relied in evidence by the prosecution to corroborate and in support of the allegations against the accused, any such affidavit cannot be now relied in defence evidence by the accused to impeach his credit. Similar hurdle lies in the summoning of the statements/ depositions of other persons/witnesses as detailed in par 10 (ii) (iii) of the application.

31. Ld. Counsel submitted that the record of the proceedings of the Commission would demonstrate that the tehelka tapes relied in evidence in the present prosecution are not the same on the basis whereof the Commission of Inquiry came to be instituted and would also show that the tapes have been tampered with. As adverted earlier, the case of the prosecution is that the meetings of the undercover journalists of Tehelka.com posing as representatives of the fictitious company Westend International,

in connection with the sale of its dummy product, be it with public functionaries, bureaucrats, army officers, private persons/ political middlemen, were secretly recorded with hidden camera devices, for the investigative story on corruption underlying defence procurements, 'Operation Westend'.

32. As per the prosecution, a total of 105 tapes were recorded during 'Operation Westend', 99 of these were shot by Mathew Samuel, and the remaining by Anirudha Behal and Anil Malviya aka Rajiv Sharma, using two types of audio/video tapes i.e. Hi8 tape and mini DV tapes. Tehelka.com had, at the conclusion of the sting operation, published/ telecast an edited 4/12 version of the sting operation as a documentary titled 'Operation Westend'. The tehelka tapes were submitted before the Commission of Inquiry instituted in the wake of this expose made in this 4/12 documentary. Though the recordings in the main were the handiwork of Mathew Samuel, the tapes were retained in his custody by Anirudha Behal. Anirudha Behal and Mathew Samuel both have been questioned in cross-examination on the safe custody thereof, and the manner in which the edited version was prepared.

33. Mathew Samuel is alleged to have met P.Sasi in the very beginning of 'Operation Westend'. It is the case against the accused/applicant that Anil Malviya @ Rajiv Sharma and Sh. Mathew Samuel held 12 different meetings with P. Sasi, which were recorded in 12 different Tehelka tapes. In the first five meetings, P. Sasi provided to the functionaries of Tehelka.com information as well as documents viz. the catalogues and supply orders/contracts relating to defence procurements including Hand Held Thermal Imagers, on the basis of which the functionaries of

Tehelka.com prepared their own catalogue as well as the proposal purportedly of M/s West End International, London, and in the subsequent four meetings dated 06.09.2000, 17.09.2000, 21.09.2000 and 25.09.2000, as recorded in Tehelka tapes Nos. 3, 5, 10 and 11, respectively, P. Sasi provided to Sh. Anil Malviya and Sh. Mathew Samuel the important documents/information and as a quid pro quo, he demanded and/or accepted the illegal gratification.

34. Based on the information and documents provided by accused P. Sasi during the meetings on 06.09.2000, 21.09.2000 & 25.09.2000, it is alleged, the Tehelka journalists had prepared a proposal and catalogue for supply of Hand Held Thermal Imagers/Binoculars/ purportedly issued by Sh. George Varghosa of M/s West End International, UK and submitted the same to the Ministry of Defence in the last week of October, 2000, vide a letter addressed to Maj. General P.S.K. Chaudhary, ADG (Weapons & Equipment), Army HQ, South Block, New Delhi, who on 27.10.2000 marked it to the Director, WE-4 and was subsequently processed in the Ministry of Defence. In the later 6 meetings from 27.10.2000 to 08.12.2000, recorded in six different Tehelka tapes bearing nos. 22, 23, 35, 37, 40 and 53, P. Sasi is attributed to have provided further information to Sh. Mathew Samuel about various officers of the Indian Army and Ministry of Defence, who were involved or might be helpful in evaluation of the said proposal of M/s West End International, UK and eventually placement of supply order to the said fictitious firm. Accused P. Sasi, in these meetings, had assured Sh. Mathew Samuel to arrange the later's meeting with the said officers and in this connection, allegedly, accused P. Sasi

arranged a meeting of Sh. Mathew Samuel with Sh. H.C. Pant, the then Staff Officer to Raksha Utpadan Rajya Mantri on 22.11.2000, and had thereby exercised his personal influence with Sh. H.C.Pant to show favour to M/s West End International, London.

35. The tehelka tapes relied in evidence in the present case were played before Mathew Samuel who had narrated the contents thereof, and has been cross-examined at length based on its contents on the authenticity thereof. It is the veracity of its contents besides the forensic examination of this piece of electronic evidence that can vouch for the genuineness of the tapes which has been capably tested by the defence during the cross-examination of the very witness who had made the recordings and before whom the facts to be proved thereby were transacted. The defence has questioned the credibility/reliability of the forensic examination, and cross-examined the forensic expert at length. Ld. Defence Counsel when called upon to elaborate as to how and in what manner the record of the day to day proceedings of the Commission of Inquiry would be relevant for an assessment of the genuineness/authenticity of the tapes, the electronic evidence relied upon by the prosecution, Ld. Counsel was willing to forego this part of the relief claimed under the present application.

36. As a consequence of the discussion above and for such reasons in the light of the specific bar enshrined in Section 6 of the Act against use of statements made to the Commission instituted u/Sec. 3 of the Act, in any future proceedings except for a proceeding for perjury premised thereon, this application for seeking summoning, in defence, of the record of the proceedings

conducted by Justice K. Venkatswami Commission of Inquiry and later by Justice S.N. Phukan Commission of Inquiry in relation to the Tehelka.com tapes accordingly stands dismissed. Application stands disposed of.

NEELOFER ABIDA PERVEEN
Special Judge (PC Act) CBI-22
Rouse Avenue Courts,
New Delhi/31.05.2024