

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

WEDNESDAY, THE 15TH DAY OF JULY 2015/24TH ASHADHA, 1937

WP(C).No. 11822 of 2013 (C)

PETITIONER:

**KARTHIKEYA VARMA @ KARTIK VARMA, AGED 48 YEARS,
S/O.N.U.RAMA VARMA THAMPURAN, D4, KAILAS APARTMENTS,
N.F.GATE, TRIPUNITHURA, ERNAKULAM DISTRICT.**

**BY SRI.DUSHYANT A.DAVE (SENIOR ADVOCATE)
AVS.SRI.SUNIL NAIR PALAKKAT
SRI.K.N.ABHILASH
SMT.R.LEELA**

RESPONDENT(S):

- 1. THE UNION OF INDIA, REPRESENTED BY
THE SECRETARY TO THE MINISTRY OF LAW
& JUSTICE OF THE UNION OF INDIA,
NEW DELHI, PIN - 110011.**
- 2. THE STATE OF KERALA, REPRESENTED BY
THE SECRETARY TO THE HOME DEPARTMENT,
SECRETARIAT, TRIVANDRUM, PIN - 695001.**
- 3. THE DEPUTY SUPERINTENDENT OF POLICE,
VIGILANCE AND ANTI CORRUPTION BUREAU,
ERNAKULAM UNIT, KATHRIKADAVU, ERNAKULAM-682017.**
- 4. JOY KAITHARATH, AGED 60 YEARS, S/O.ANTONY,
GENERAL SECRETARY,
STATE HUMAN RIGHTS PROTECTION CENTRE, THRISSUR,
REG.NO.389/03, VELLIKULANGARA, THRISSUR-680699.**

**R1 BY ADV. SRI.N.NAGARESH, A S G OF INDIA
R2 & R3 BY SENIOR GOVERNMENT PLEADER SRI.C.S.MANILAL
R4 BY ADV. SRI.JOHN K.GEORGE**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 09-06-2015 ALONG WITH WPC. 20071/2013 & CONNECTED CASES,
THE COURT 15-07-2015 DELIVERED THE FOLLOWING:**

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APPENDIX

PETITIONER(S)' EXHIBITS:

- EXHIBIT-P1: THE TRUE COPY OF THE MEMORANDUM OF BYE LAWS OF THE KCA DATED NIL.
- EXHIBIT-P2: THE TRUE COPY OF THE COMPLAINT DATED 13/6/2011 FILED BEFORE THE COURT OF INQUIRY & SPECIAL JUDGE, THRISSUR FILED BY THE 4TH RESPONDENT.
- EXHIBIT-P3: THE TRUE COPY OF THE ORDER DATED 7/7/09 IN CMP-792/11 OF THE COURT OF THE INQUIRY COMMISSIONER AND SPECIAL JUDGE, THRISSUR.
- EXHIBIT-P4: THE TRUE COPY OF THE FIR DATED 18/3/13 NO-VC-4/13 VIGILANCE AND ANTI CORRUPTION BUREAU UNIT ERNAKULAM.
- EXHIBIT-P5: THE TRUE COPY OF THE JUDGEMENT IN CRL.M.C.2726/10 DATED 26/10/10 OF THIS HON'BLE COURT.
- EXHIBIT-P6: THE TRUE COPY OF THE ORDER DATED 31/1/2011 OF SUPREME COURT IN SLP (CRL.) 10107/2011.

RESPONDENTS' EXHIBITS: NIL.

//TRUE COPY//

P.S. TO JUDGE

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“C.R.”

A.MUHAMED MUSTAQUE, J.

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**W.P.(C).Nos.11822/2013, 20071/2013,  
1383/2014 & 15389/2014**  
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Dated this the 15th Day of July, 2015

J U D G M E N T

These batch of writ petitions are filed by the office bearers of the Kerala Cricket Association (hereinafter referred to as the “KCA”) challenging registration of First Information Reports and investigation under the Prevention of Corruption Act, 1988. In one of the writ petitions, the petitioner has challenged the constitutional validity of Sections 2(v) and 2(c)(viii) of the Prevention of Corruption Act (for short, the “PC Act”). Since common issues are to be decided in all these writ petitions, these cases are disposed of by a common judgment.

2. The facts involved in each case, for the purpose of understanding the issues, are narrated separately.

3. **W.P.(C).No.11822/2013** is filed by one Karthikeya Varma, an office bearer of KCA. KCA has decided to construct a stadium of International standard and purchased a land in Edakochi at Ernakulam. A complaint was filed before the Court of the Enquiry Commissioner & Special Judge, Thrissur by one Joy Kaitharath, alleging corruption in the

purchase of the land, against the petitioner and a few others. The court vide order dated 7/7/2011 forwarded the complaint to the Director of Vigilance and Anti Corruption Bureau, Thiruvananthapuram for enquiry and report. Thereafter, an FIR was registered on 18/3/2013. The FIR is produced as Ext.P4 in W.P.(C).No.11822/2013.

4. **W.P.(C).No.20071/2013** is filed by one T.N.Anantha Narayanan, an office bearer of KCA, challenging the same proceedings which are under challenge in W.P.(C).No.11822/2013.

5. **W.P.(C).No.1383/2014** is filed by one T.C.Mathew, who was the Honorary Secretary of KCA. He is also the present President of KCA. The party respondent one Harish.V. filed a private complaint before the Vigilance Court, Kottayam alleging corrupt practice in purchasing land in Manakkad Village, Thodupuzha Taluk for constructing a stadium. The Court of Enquiry Commissioner and Special Judge, Kottayam ordered vigilance enquiry against the petitioner-T.C.Mathew. The complaints against other accused, namely, the Chief Minister and the Minister for Water resources have been dismissed.

6. **W.P.(C).No.15389/2014** is filed by one Jayesh George, Joint Secretary of KCA, challenging the same proceedings which are under challenge in W.P.(C).No.11822/2013.

7. The common question in all these writ petitions is whether the office bearers of KCA discharge any public duty and whether they can be treated as a public servant for the purpose of PC Act?

8. Heard the learned counsel appearing for the petitioners Shri Dushyant A.Dave (Sr.), Shri M.K.Damodaran (Sr.), Shri M.Revikrishnan and Shri K.N.Abhilash, the learned counsel Shri S.Sreekumar (Sr.) for the party respondent-Harish.V, learned counsel Shri John K.George for the party respondent-Joy Kaitharath and the learned Senior Government Pleader Shri C.S. Manilal for the State.

9. The learned Senior Counsel Shri Dushyant A.Dave drew my attention to the definition of 'public duty' and 'public servant' under Section 2 of the PC Act. The learned Senior Counsel submits that KCA is a registered Society formed under the Travancore-Cochin Literary, Scientific and Charitable Societies Registration Act, 1955. KCA has affiliation with the Board of Control for Cricket in India (for short, "BCCI"). It is further submitted that the entire financial requirement of KCA is met by BCCI and no assistance is received from the State Government or the Central Government for the activities of KCA. Learned Senior Counsel relied on the judgment of the Hon'ble Supreme Court in **Zee Telefilms Ltd. and another v. Union of India and others [(2005) 4 SCC 649]** and submitted

that majority view was that BCCI is not an instrumentality of the State for the purpose of Article 12 of the Constitution of India and in view of the above, no Governmental function is being discharged by KCA and therefore, the duty discharged by the officers of KCA cannot be considered as a public duty and no official of KCA can be treated as a public servant. The learned Counsel also relied on the judgment of the Hon'ble Supreme Court in **PV Narasimha Rao v. State (CBI/SPE) [(1998) 4 SCC 626]** and submitted that a public office is attached with certain responsibilities of more or less of a public character and argued that none of the officials of KCA are holding the office having responsibilities of public character.

10. Shri M.K.Damodaran, learned Senior Counsel appearing for T.N.Anantha Narayanan relied on the judgment of the Hon'ble Supreme Court in **Government of Andhra Pradesh v. P.Venku Reddy [(2002) 7 SCC 631]** and the judgment of the Division Bench of this Court in **Rafeek v. State of Kerala [2005 (2) KLT 29]** and argued that the Court is required to adopt a purposive approach based on the Legislation while construing the definition of public servant under the PC Act. It is further argued that the Legislature never intended to give a broader meaning to a public servant to include discharge of duties by an office bearer of a private body.

11. The learned counsel Shri K.N.Abhilash relied on the earlier order of this Court in CrI.M.C.No.2726/2009 filed by one K.Balaji Iyengar, an office bearer of KCA, challenging criminal prosecution by the Vigilance Court. In the above Criminal M.C., it was held that KCA is discharging State function. Learned counsel argued that the above order is *per incuriam*, as it was passed relying on the minority view of the judgment in **Zee Telefilms'** case [(2005) 4 SCC 649]. He further submitted that in view of the judgment of the Hon'ble Supreme Court in **Board of Control for Cricket in India v. Cricket Association of Bihar and others** [(2015) 3 SCC 251], the BCCI or KCA cannot be treated as an instrumentality under the State and at the best, it may be amenable based on functional activity for the purpose of judicial review by treating it as an Authority in relation to the function in terms of Article 12 of the Constitution.

12. The learned counsel Shri M.Revikrishnan appearing for the petitioner-Jayesh George would argue that definition of public servant is an exhaustive definition under PC Act. The public servant referred under Section 19 of PC Act has to be understood in the background of the definition under Section 2 of the PC Act. The learned counsel submitted that the stipulation of previous sanction, under Section 19 of of the PC Act clearly indicates that the office of the public servant has an element of

Governmental control. He further argued that 'public duty' and 'public servant' defined under the PC Act has to be read conjointly while determining the character of the office. It is further submitted that none of the meaning assigned to a public servant would bring an office bearer of a private body, within the fold of definition of 'public servant' under the PC Act.

13. The learned Senior Counsel Shri S.Sreekumar placed much reliance on the order of this Court in Crl.M.C.No.2726/2009. The learned Senior Counsel submitted that this Court has taken the view that the office bearers of KCA are public servants and are discharging public duties. It is further submitted that T.C.Mathew one of the writ petitioners in this matter, approached the Hon'ble Supreme Court challenging the order in Crl.M.C. No.2726/2009. He further argued that the Apex Court dismissed the Special Leave Petition filed by the T.C.Mathew. In that view of the matter, it is argued that the issue is concluded as to the character of the office bearers of KCA. The learned counsel also referred to the judgment of the Hon'ble Supreme Court in **A.C. Muthiah v. Board of Control for Cricket in India [(2011) 6 SCC 617]** and submitted that the Apex Court in the above judgment referred to the order of this Court in Crl.M.C.No.2726/2009

and referred it as having a persuasive impact on the larger issue on function of BCCI, to determine BCCI as a State.

14. The learned Special Government Pleader Shri C.S.Manilal would argue that the writ petitions are not maintainable at this stage to interfere with the investigation ordered by the Vigilance Court. It is further submitted that it is a matter of investigation to find whether the petitioners are discharging public duties or holding the office of public servants. The learned Special Government Pleader also drew attention of this Court to the definition of 'public duty' under Section 2(b) read with definition of 'public servant' in Section 2(c)(viii) of the PC Act. The learned Special Government Pleader further submitted that by virtue of combined reading of the above provision, there is *prima facie* case to proceed against the petitioners.

15. The registration of FIR or inquiry at initial stage is a preliminary step for an investigation relating to commission of an offence. It is a settled principle of law that the power of quashing an FIR or an enquiry or any investigation at initial stages should be exercised by the Court, invoking the power under Article 226 of the Constitution or invoking the inherent power under Section 482 of Cr.P.C. with circumspection and sparingly. {see judgment in **S.M.Datta v. State of Gujarath [AIR 2001 SC 3253]** and **State**

of West Bengal and others v. Swapan Kumar Guha and others [AIR 1982 SC 949]}.

16. In the **State of Haryana and others, v. Ch. Bhajan Lal [AIR 1992 SC 604]** the Hon'ble Supreme Court delineated categories of cases in which the High Court may exercise power under Art.226 of the Constitution or under Section 482 of Cr.P.C. In **Swapan Kumar Guha's** case (*supra*) and **Ch.Bhajan Lal's** case (*supra*), it is held that the High Court can exercise power where the allegations made in the FIR do not constitute an offence or FIR or other materials do not disclose justification of investigation.

17. Apart from the settled proposition of law as above, there are many occasions where an FIR or an investigation has to be quashed unrelated to facts, disclosed in the complaint based on an adjudication of pure question of law, or based on a decision relating to mixed questions of fact and law which may have a fundamental bearing on the criminal complaint or the FIR registered. There is no impediment for the Court entertaining a writ petition, independent of the complaint to decide upon an unsettled question of law or mixed questions of fact and law, to decide on validity of the prosecution or registration of FIR or maintainability of the complaint.

18. These writ petitions, in fact, have to be decided on pure question of law as well as mixed questions of fact and law based on the interpretation of the provisions of the PC Act and decide upon the question whether purchase of land for construction of Cricket Stadium would bring an action within the ambit of discharge of public duty for the purpose of PC Act.

19. In the complaint relating to W.P.(C).No.11822/2013 and connected cases, there are allegations against the Government officials. It appears that based on the preliminary enquiry, those allegations are found untenable against officials. These allegations are related to concession given in stamp duty. Therefore, the Government officials are not arrayed as accused while registering FIR. Therefore, the question in these writ petitions is being examined in the light of the facts relating to purchase of land by the KCA for the purpose of construction of Cricket stadium.

20. There is no dispute in this case that KCA is a body constituted under the Travancore Cochin Literary, Scientific and Charitable Society Act, 1955. The Memorandum and the Rules of the Association would go to show that they have monopoly in promoting cricket in the State and the only affiliated body from the State with BCCI. KCA regulates and controls all District Associations affiliated with it. It also regulates as to how the

District Associations will be eligible for affiliation with them. The activities of KCA in the State is akin to the activities of the BCCI at National level.

21. In Judicial Review of Administrative Action (5th edition) by *de Smith, Woolf and Jowell in Chapter 3, para.024* it is stated on public function as follows:

“A body is performing a ‘public function’ when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides ‘public goods’ or other collective services, such as health care, education and personal social services, from funds raised by taxation. A body may perform public functions in the form of adjudicatory services (such as those of the criminal and civil courts and tribunal system). They also do so if they regulate commercial and professional activities to ensure compliance with proper standards. For all these purposes, a range of legal and administrative techniques may be deployed, including rule making, adjudication (and other forms of dispute resolution); inspection; and licensing.

Public functions need not be the exclusive domain of the State. Charities, self-regulatory organisations and other

nominally private institutions (such as universities, the Stock Exchange, Lloyd's of London, churches) may in reality also perform some types of public function. As Sir John Donaldson, M.R. urged, it is important for the courts to 'recognise the realities of executive power' and not allow 'their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted'. Non-governmental bodies such as these are just as capable of abusing their powers as is Government."

22. On account of the change in geopolitical scenario under International relationship, often many organisations and transnationals are considered as non State actors as they have the capability to influence socio-economic scenario of the State even though, they do not belong to established institutions of the State. The conduct of non-State actors also give rise to human right violation, which make them accountable under enforceable legal obligations to comply with human right standards under the Constitution or National Legislations. Therefore, it is necessary fundamentally to understand "discharge" of State function, public function or public duty by a private body.

23. Primarily, there are two approaches to determine 'public function' or 'State function' or 'public duty' carried out by a Corporation or a private body. They are structural approach and functional approach. The

structural approach is one relating to examining the structure of the body to consider whether the body can be treated as a State instrumentality or an agency of the Government.

24. In **Pradeep Kumar Biswas v. Indian Institute of Chemical Biology [(2002) 5 SCC 111]** a Seven-Judge Bench of the Hon'ble Supreme Court laid down the following tests to examine a body to treat it as State:-

- i. Formation of the body*
- ii Objects and functions*
- iii Management and Control*
- iv Financial aid, etc.”*

25. The Hon'ble Supreme Court in various judgments has laid down parameter guidelines for identifying a body as coming within the definition of other bodies. In **GM, Kisan Sahkari Chini Mills Ltd. v. Satrugan Nishad, [(2003) 8 SCC 639]** it was held by the Hon'ble Supreme Court that the real test to consider the status of the body is to see how far it is controlled by the Government and not the forms in which the body is constituted. Even a Company would be a State, if terms and conditions of such employment are governed by the Statute or the State {see the judgment in **HEC Voluntary Retd. Employees Welfare Society v. Heavy Engineering Corpn. Ltd., [(2006) 3 SCC 708]}**.

26. In **Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi**, [(1975) 1 SCC 421] it was observed by the Hon'ble Supreme Court as follows:

"The growing power of the industrial giants, of the labour unions and of certain other organised groups, compels a reassessment of the relation between group power and the modern State on the one hand and the freedom of the individual on the other. *The corporate organisations of business and labour have long ceased to be private phenomena.*"

27. In **Zee Telefilms Ltd. case** [(2005) 4 SCC 649], dissenting minority judgment, the following tests have been applied to determine the structure of body as State, based on the following functions:

- "(i) When the body acts as a public authority and has a public duty to perform.
- (ii) When it is bound to protect human rights.
- (iii) When it regulates a profession or vocation of a citizen which is otherwise a fundamental right under a statute or its own rule.
- (iv) When it regulates the right of a citizen contained in Article 19(1)(a) of the Constitution available to the general public and viewers of the game of cricket in particular.
- (v) When it exercises a de facto or a de jure monopoly.

(vi) When the State outsources its legislative power in its favour.

(vii) When it has a positive obligation of public nature.”

28. It was further observed in the dissenting minority judgment in **Zee Telefilms'** case **[(2005) 4 SCC 649]** as follows, after adverting to the functions of BCCI:

“Applying the tests laid down hereinbefore to the facts of the present case, the Board, in our considered opinion, fits the said description. It discharges a public function. It has its duties towards the public. The public at large will look forward to the Board for selection of the best team to represent the country. It must manage its housekeeping in such a manner so as to fulfil the hopes and aspirations of millions. It has, thus, a duty to act fairly. It cannot act arbitrarily, whimsically or capriciously. Public interest is, thus, involved in the activities of the Board. It is, thus, a State actor.”

29. In **M.P. State Coop. Dairy Federation Ltd. v. Rajnesh Kumar Jamindar**, **[(2009) 15 SCC 221]** the Hon'ble Supreme Court after examining various judgments held that co-operative dairy federation is a State within the meaning of Article 12 and observed as follows:

“We have noticed the history of the Federation. It was a part of the department of the Government. It not only carries on commercial activities, it works for achieving

the better economic development of a section of the people. It seeks to achieve the principles laid down in Article 47 of the Constitution of India viz. nutritional value and health. It undertakes training and research work. Guidelines issued by it are binding on the societies. It monitors the functioning of the societies under it. It is an apex body. We, therefore, are of the opinion that the appellant herein would come within the purview of the definition of "State" as contained in Article 12 of the Constitution of India."

30. The functional approach is essentially to examine the scope of function of the body, when such body otherwise cannot be considered as a State or other authorities under Article 12 of the Constitution. There are many private bodies which discharge statutory functions. These statutory functions discharged by the private bodies are certainly amenable to the jurisdiction of the High Court under Article 226 of the Constitution. For example, Private Banking Company, initiating SARFAESI proceedings. The Private Banking Company cannot be considered as a State or other authorities under Article 12 of the Constitution except to the limited purpose in relation to the discharge of statutory functions. Functional approach may be decisive for determination, either in the context of State function or while discharging statutory function as authorised under law. On account of the

nature of activity, sometimes, activities, even though not referable under any statutory law or governmental direction, still qualify as State function.

31. In **Board of Control for Cricket in India v. Cricket Association of Bihar and others [(2015) 3 SCC 251]** the Hon'ble Supreme Court after adverting to the majority view in **Zee Telefilms'** case **[(2005) 4 SCC 649]** held as follows:

“33. The majority view thus favours the view that BCCI is amenable to the writ jurisdiction of the High Court under Article 226 even when it is not “State” within the meaning of Article 12. The rationale underlying that view if we may say with utmost respect lies in the “nature of duties and functions” which BCCI performs. It is common ground that the respondent Board has a complete sway over the game of cricket in this country. It regulates and controls the game to the exclusion of all others. It formulates rules, regulations, norms and standards covering all aspects of the game. It enjoys the power of choosing the members of the national team and the umpires. It exercises the power of disqualifying players which may at times put an end to the sporting career of a person. It spends crores of rupees on building and maintaining infrastructure like stadia, running of cricket academies and supporting State associations. It frames pension schemes and incurs expenditure on coaches, trainers, etc. It sells broadcast and telecast rights and collects admission fee to venues where the matches are played. All

these activities are undertaken with the tacit concurrence of the State Government and the Government of India who are not only fully aware but supportive of the activities of the Board. The State has not chosen to bring any law or taken any other step that would either deprive or dilute the Board's monopoly in the field of cricket. On the contrary, the Government of India has allowed the Board to select the national team which is then recognised by all concerned and applauded by the entire nation including at times by the highest of the dignitaries when they win tournaments and bring laurels home. Those distinguishing themselves in the international arena are conferred highest civilian awards like the Bharat Ratna, Padma Vibhushan, Padma Bhushan and Padma Shri apart from sporting awards instituted by the Government. Such is the passion for this game in this country that cricketers are seen as icons by youngsters, middle aged and the old alike. Any organisation or entity that has such pervasive control over the game and its affairs and such powers as can make dreams end up in smoke or come true cannot be said to be undertaking any private activity.

34. The functions of the Board are clearly public functions, which till such time the State intervenes to takeover the same, remain in the nature of public functions, no matter discharged by a society registered under the Registration of Societies Act. Suffice it to say that if the Government not only allows an autonomous/ private body to discharge functions which it could in law take over or regulate but even lends its

assistance to such a non-government body to undertake such functions which by their very nature are public functions, it cannot be said that the functions are not public functions or that the entity discharging the same is not answerable on the standards generally applicable to judicial review of State action.

35. Our answer to Question (i) therefore, is in the negative, qua, the first part and affirmative qua the second. BCCI may not be "State" under Article 12 of the Constitution but is certainly amenable to writ jurisdiction under Article 226 of the Constitution of India."

32. In **Marsh v. Alabama (3) 326 US 501; 19 L.ed.265**, it was held by the Hon'ble Supreme Court of the United States that where a private Corporation is privately performing a public function, it is bound by the Constitutional standards applicable to all State actions. The above judgment was relied on by the Hon'ble Supreme Court in **BCCI's case [(2015) 3 SCC 251]** while emphasising on functional test.

33. In **Binny Ltd. v. V.Sadasivan [(2005) 6 SCC 657]**, the Hon'ble Supreme Court held in para.11 as follows:

".....A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise

public functions when they intervene or participate in social or economic affairs in the public interest...”

34. In **Zee Telefilms Ltd. case [(2005) 4 SCC 649]**, majority has held as follows:

“31. Be that as it may, it cannot be denied that the Board does discharge some duties like the selection of an Indian cricket team, controlling the activities of the players and others involved in the game of cricket. These activities can be said to be akin to public duties or State functions and if there is any violation of any constitutional or statutory obligation or rights of other citizens, the aggrieved party may not have a relief by way of a petition under Article 32. But that does not mean that the violator of such right would go scot-free merely because it or he is not a State. Under the Indian jurisprudence there is always a just remedy for the violation of a right of a citizen. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution, which is much wider than Article 32.”

35. The majority view in **Zee Telefilms Ltd. case [supra]** is that BCCI cannot be considered as a State or a public body considering their function and observed that since socio-economic policy of the Government has changed and the State is distancing itself from commercial activities and concentrating on governance rather than on business and the need to extend the scope of other authorities is no longer necessary. It was further

held that there is a dividing line between a State enterprise and a non-State enterprise, which is distinct and the judiciary should not be an instrument to erase the said dividing line unless, circumstances of the day require to do so. It was also held by the majority that in the absence of any authorisation by the State, if a private body chooses to discharge a public function, which is not prohibited by law, it would be incorrect to hold that passion of the body would make it an instrument of the State.

36. The majority judgment in ***Zee Telefilms Ltd. case*** [*supra*] was followed in **BCCI's case [(2015) 3 SCC 251]**. In that view of the matter, BCCI or KCA which discharges same function at State level cannot be treated as State or other authorities. However, as held in the above cases, if they discharge State functions or public duties, certainly, those functions or duties can be subjected to judicial review on Constitutional standards.

37. It is in the background of the law relating to the structure of KCA, the issue has to be examined in relation to the provisions under the PC Act. It is well settled principle of law that every statutory provisions have to be interpreted in the context of purport and object of Legislation. Therefore, 'public duty' and 'public servant' referred under the PC Act have to be adjudged with reference to the purpose of Legislation under the PC Act.

38. Section 2(b) of the PC Act defines public duty as follows:

“2(b) public duty” means a duty in the discharge of which the State, the public or the community at large has an interest.”

39. It also defines Public Servant with reference to the Office held by such persons under the State or Government or as required to perform a public duty. The meaning of public servant as defined under the PC Act clearly indicates that the office held by him must be authorised under law. This list of public servants is an exhaustive list and not narrated here as it has no relevance in the present context of the dispute. For the purpose of this case, much emphasis has been given to the definition of 'public servant' with reference to clause viii under Section 2(c) of the PC Act which reads as follows:

“S.2(c)(viii) any person who holds an office by virtue of which he is authorised or required to perform any public duty.”

40. The arguments on the side of the learned counsel for the complainant and the learned Special Government Pleader are that conjoined reading of public duty as defined under Section 2(b) of the PC Act and 'public servant' under 2(c)(viii) of the PC Act clearly indicates that the officers of KCA discharge a public function considering the purpose for which the stadium is being constructed. According to the learned Counsel, the stadium is being constructed in discharge of a State function and

therefore, by virtue of the office held by the KCA, they perform a public duty.

41. In the backdrop as above, it is necessary to advert to the concept of sovereign function, State function, public function and public duty.

42. Law making is a sovereign power and a State function. It denotes "power" vested with the State to regulate men under juridical laws. Wesley N. Hohfeld a renowned author of "Fundamental Legal Conceptions as Applied in Judicial Reasoning" classifies that jural correlative of 'power' is 'liability'. Thus, someone who holds the power can control, reduce and expand the entitlement of the men upon whom the power is imposed. The men bears 'liability' and exposed to exercise of such power. In a Constitutionally governed State, ordinarily, this power to make law, derives from the Constitution. However, due to expansion of State activities, as seen from the judgments afore-noted, certain activities of the private body or Corporation are also capable to control reduce or expand the entitlements. These exercises of power could be classified as a sovereign or State function.

43. On the other hand, 'public duty' refers to a correlative 'public right' based on the jural correlatives as legal position, expounded by

Wesley N. Hohfeld. In the context of governance or discharge of Governmental function, the 'public right' is synonymous with 'legal obligation'. The public duty thus, is a public function or a legal obligation discharged by a public servant under the command of public right. These public rights necessarily, presuppose existence of positive law of the State or valid Governmental directions. The "public right" or "legal obligation" cannot exist in vacuum, the "right" or "legal obligation" must be relatable to law or an authorised function by the Government. Thus, public duty discharged by a public servant is based on the positive law of the State or valid executive directions.

44. In every discharge of public duty, there is an element of sovereign function, State function or public function. However, in discharge of sovereign or State function, none could assign that there is a public duty being discharged in that function. This denotes exercise of "power". Legislature, collectively discharges sovereign or State function. A Member of Parliament or a Member of a Legislative Assembly individually discharges a public duty individually, as his activity is accountable under the ordinary law. Legislative exercise cannot be considered as a public duty. On the other hand, it can be treated only as an exercise of power.

45. It is on an analysis of the above legal concepts that the provisions under the PC Act have to be adverted. Thus, public duty under the PC Act refers to discharge of duty in relation to State, public or community at larger interest. Thus, a public servant must be under the positive command under the law to discharge such a duty. If a body or Corporation exercises a State function, without obligation under the existing laws, it is only an exercise of State function and cannot be treated as a discharge of public duty.

46. In the construction of the stadium to hold cricket matches to be viewed by public, no doubt the community at large has interest. By the construction of the stadium, the KCA controls and regulates, entitlement of men to the extent of rules and regulations laid down by them for admission in the stadium. The stadium is being constructed for the public; the activities are controlled by KCA; no doubt, the construction has to be styled as a State function or a public function. If the stadium is constructed based on any positive laws or under the direction of the Government, certainly that function would come within the ambit of public duty. However, if the stadium is not constructed under an existing legal obligation or by Governmental direction, that State function cannot be treated as a public duty.

47. Much argument has been raised by the learned counsel for the complainant based on the order of this Court in CrI.M.C.No.2726/2009 wherein this Court held that the office bearers of KCA are public servants as defined under S.2(c)(viii) of the PC Act. It is to be noted that the learned Single Judge relied upon the minority view in **Zee Telefilms Ltd. Case** (*supra*) to hold that the officers of the KCA are performing a public duty. The learned Single Judge observed so, after adverting to the nature and function of the office of the KCA as follows:

“Even if the Cricket Association is not an other authority, and thereby not an instrumentality of the State, for the purpose of Article 12 of the Constitution, if the Secretary and President of the Association, who hold those offices are authorised or require to perform any public duty by virtue of holding their offices, they would be public servant as defined under sub clause viii of Section 2(c) of the PC Act.”

The Special Leave Petition against the order in the above Criminal M.C. was dismissed by a non-speaking order. If the dismissal of the Special Leave Petition is without support of reasons, the doctrine of merger would not be attracted. {See **Kunhayammed v. State of Kerala [2000 (3) KLT 354 (SC)]**}. Therefore, dismissal of the Special Leave Petition filed by T.C.Mathew cannot be relied on by the complainant to argue that it is binding on this Court.

48. This Court is of the view that the above judgment has no precedential value for the reason that the majority judgment in **Zee Telefilms Ltd.** and the judgment in **BCCI's** case (supra) have categorically held that BCCI's body cannot be treated as a public office and is only amenable under Art.226 of the Constitution based on the functions they discharge. Therefore, this Court is of the view that the order in the above Crl.M.C.No.2726/2009 holding the office bearers of KCA as public servant will not hold good as the major premise for taking such a view was based on the nature and structure of the office of KCA.

49. Coming back to the facts of the case, whether the construction of the cricket stadium would come within the ambit of discharge of a public duty has to be considered in the light of law as above, with reference to the facts in the complaint. The complainant has no case that the stadium is being constructed by the KCA in discharge of legal obligations under any positive law enacted by the State or by the executive direction of the Government. In that view of the matter, construction of the stadium can only be considered as a State function and not in discharge of any public duty.

50. It is to be noted that the KCA has only purchased a land for the purpose of construction. It has not completed the construction of the cricket

stadium. The mere purchase of the land for the purpose of construction of a stadium cannot be said to be having a public element. The construction of the stadium would depend upon many factors. It is possible for the KCA to abandon the project on account of any intervening factors. Suppose, in a situation where KCA decides not to use the land for stadium and convert it for private use of members, does their intention to construct stadium attract discharge of a public duty and a public function for the purpose of the PC Act? It is to be noted that penal law operates on *ex ante* mode of function of the law. The citizen must know beforehand the offence which would entail him to criminal punishment. The maxim *nulla poena sine lege* has four different notions which states that the categories of criminal law should be determined by general rules; that a person should not be punished unless his act is a breach of Rules; that penal statutes should be strictly construed; that penal statutes should not have retrospective operation. (See page 387 G.W.Paton's "*A Textbook of Jurisprudence*" Oxford University Press). Article 20(1) of the Constitution and Article 11(2) of the Universal Declaration of Human Rights envisage protection to a citizen from proceeding against an act which do not constitute an offence at the time when it was committed. The Penal Law, therefore, could not

operate unless breach of Rule has come into existence at the time it is alleged.

51. The public duty in the context of criminal complaint would arise only when the construction of stadium is accomplished. The event complained, is only one step in the construction of stadium. Purchase of land cannot be considered as discharge of a public function. The functional approach in determining public duty; is to determine the action on account of the impact of public element and if it has control over the public at large. It is only when a stadium is completed, there will be a public element and not before. As has been already noted, office of the KCA is not a public office. The KCA is not under a legal obligation under any statutory law or governmental decision to construct stadium. Thus, no complaint would be maintainable against the KCA for the purchase of the land for construction of the stadium.

52. The upshot of the above discussions, inevitably has to conclude that the complaint is not maintainable and the entire proceedings resulting from the impugned orders have to be quashed. Accordingly, the same are quashed and the writ petitions are allowed. In view of the fact that the complaint is not maintainable, the challenge in the writ petitions regarding validity of Sections 2(v) and 2(c)(viii) under the PC Act does not

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require consideration. However, if the act of the petitioners constitute an offence under any other provisions of law, this judgment will not stand in the way of the State in proceeding against the petitioners in accordance with law. No costs.

A.MUHAMED MUSTAQUE, JUDGE

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