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

Judgment reserved on: 20.05.2015

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Judgment delivered on: 25.05.2015

+ **BAIL APPLN. 878/2015**

ANIL KUMAR

..... Applicant

Through: Mr. N. Hariharan, Senior Advocate
along with Mr. Rajiv Mohan,
Mr. Siddharth S. Yadav & Mr. Sahil
Paul, Advocates.

versus

GNCT OF DELHI

..... Respondent

Through: Mr. Dayan Krishnan, Senior
Advocate along with Mr. Rajat
Katyal, APP and Inspector Arun
Chouhan, PS – A.C. Branch, for the
State.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

J U D G M E N T

VIPIN SANGHI, J.

1. The present bail application has been preferred under Section 439 Cr.P.C. to seek regular bail in case First Information Report (FIR) No.15/2015 registered at Police Station (PS) – Anti Corruption Branch (ACB), Civil Lines under Sections 7/ 13 of the Prevention of Corruption Act (PC Act) read with Sections 34/120-B/201 I.P.C.

2. The aforesaid FIR has been preferred on the complaint of one Javed S/o Khalil, who stated that he is running business of sale & purchase of used cars from Darya Ganj. ASI Amar Singh, HC Anil Kumar – the applicant, and the Constable Sarvan, were posted at PS – Sonia Vihar. They were creating troubles for him by claiming that he was running an illegal business. Javed stated that he was being threatened with arrest in some cases. On 30.04.2015, at 08:30 p.m. Constable Sarvan came to the office of Javed and demanded Rs.20,000/- from him for not arresting him in a case. Javed claims to have replied that he was having only Rs.10,000/- and he told Sarvan that the remaining amount would be given in the presence of Amar Singh and HC Anil Kumar – the applicant. On this, according to Javed, Sarvan left the workshop after receiving Rs.10,000/- by saying that on 01.05.2015 the complainant should reach near Balaji Properties, Near Traffic Light, Bhajanpura at 04:00 p.m. with the remaining amount. The complainant stated that he was against corruption. He stated that he did not have any personal enmity with ASI Amar Singh, HC Anil Kumar – the applicant, and the Constable Sarvan and he had no monetary transaction with them. He stated that he was giving the money under compulsion. The complainant claimed that he had recorded the voice of Constable Sarvan in his mobile phone and in the conversation, Constable Sarvan had asked the complainant to bring the remaining amount of Rs.10,000/- on the following day because HC Anil Kumar and ASI Amar Singh had demanded their share from the amount. He produced Rs.10,000/- comprising of 10 notes of Rs.1,000/- each and he demanded legal action be taken against the three persons.

3. As per the FIR, the panch witness Sh. Raj Prakash working as Assistant Secretary II, Delhi Agricultural Marketing Board, Government of

National Capital Territory of Delhi (GNCTD), Institutional Area, Pankha Road, Janakpuri, New Delhi signed the said complaint. Thereafter, the pre-raid proceedings were drawn up; the Phenolphthalein powder was applied on the GC notes and its test was explained to the complainant and the panch witness by giving a demonstration, and the complainant was instructed to remain close to the panch witness, so that he is able to see and hear the transaction of giving and acceptance of bribe amount. The complainant was instructed to give the money only upon the demand, and not otherwise. The panch witness was also instructed that upon satisfaction that the bribe amount has been accepted by the accused on demand, he should raise his right hand over his head to give a signal to the raiding party. The Raid Officer along with his team left the ACB at 04:00 p.m. At about 04:45 p.m., the Raid Officer with his staff reached near Balaji Properties at a distance of 100 metres from the Traffic Light. The complainant and the panch witness were sent ahead with suitable instructions, while the Raid Officer and the other members of the raiding party followed them from some distance. At about 04:45 p.m. the complainant and the panch witness entered the plot of Balaji Properties and at about 05:00 p.m. the panch witness came out and gave the pre-planned signal. On receipt of the signal, the Raid Officer and the other members of the raiding party immediately rushed to, and reached the spot where the complainant and the panch witness were present. The complainant pointed out towards a person whose name was later revealed as Anil Kumar – the applicant. The complainant stated that the applicant is an associate of Sarvan and Amar Singh.

4. The applicant Anil Kumar tried to slip away from the spot, but was apprehended by the Raid Officer with the help of the raiding party. Upon disclosure of the identity of the Raid Officer, the applicant became

perplexed. The applicant was told that his search was required to be taken and if he so wish as, he could take the search of the Raid Officer or of the members of the raiding party. On hearing the name of ACB, the applicant got frightened and refused to search. On the instructions of the Raid Officer, the panch witness took search of HC Anil Kumar – the applicant. However, the bribe amount was not recovered from him.

5. The panch witness was examined and he informed that he had accompanied Javed – the complainant, and reached the room on the back side of the said property. One person was present in the room, who identified the complainant and enquired from the complainant about the identity of the panch witness. Javed told him that the panch witness was his relative from Muzaffar Nagar. Thereafter, that person demanded Rs.10,000/-. Javed called that person as Sarvan. Javed told Sarvan that the amount of Rs.10,000/- was for all the three, i.e. ASI Amar Singh, HC Anil Kumar – the applicant and Sarvan. The complainant asked Sarvan to call ASI Amar Singh and HC Anil Kumar. On this Sarvan stated that both of them were present at the spot. Javed was asked to give the money to Sarvan, who stated that he would distribute the same amongst themselves. Javed took out the bribe amount from his pocket. Sarvan received the bribe amount through his right hand and put the same in the right pocket of his pant. The panch witness also stated that the complainant Javed was repeatedly asking Sarvan to call HC Anil Kumar & ASI Amar Singh, which made Sarvan suspicious and he asked as to why he was repeatedly insisting for calling both of them. Sarvan stated that he would call both of them and then he left the room at a fast pace and escaped from the plot. The panch witness also disclosed that while coming out of the room, Sarvan made gestures towards a person who was seated outside on a chair. That person

also followed Sarvan at a fast pace. The complainant identified the person following Sarvan as ASI Amar Singh. Both these persons managed to escape from the plot. The panch witness also informed that when he came out from the room, these persons were not present there. The panch witness also informed that the complainant Javed pointed out towards a person who was going out of the plot, and informed that he is HC Anil Kumar – the applicant. On this, the panch witness immediately gave the pre-planned signal. The raiding party rushed towards the spot. Javed pointed out HC Anil Kumar – the applicant to the raiding party. The raiding party overpowered the applicant – HC Anil Kumar. The panch witness also stated that on the instructions of the Raid Officer, he took search of HC Anil Kumar – the applicant, but the bribe amount was not recovered from his possession because Constable Sarvan along with ASI Amar Singh had managed to escape with the bribe amount.

6. The FIR narrates the further action taken on the complaint. The Raid Officer, his party, the complainant, the panch witness and HC Anil Kumar – the applicant made efforts to trace Constable Sarvan and ASI Amar Singh but they could not be traced. No person could be contacted to give a lead about them. Consequently, the Raid Officer came back to the ACB. The Rukka was prepared for offences under Sections 7 & 13 of the PC Act read with Section 120-B/ 34/ 201 I.P.C., on which the FIR was registered. The applicant was, consequently, taken into custody.

7. The submission of Mr. Hariharan, learned senior counsel for the applicant is, firstly, that the above narration would show that no case is made out against the applicant. Neither the applicant is claimed to have made a demand of illegal gratification from the complainant, nor did he

accept any illegal gratification from the complainant during the trap proceedings, nor the GC notes were recovered from the applicant. The applicant has been implicated only on the basis of the statement of the complainant – who is himself a discredited person, having several cases against him, and on the basis of the allegation that Sarvan claimed that his demand for bribe was made not just for himself, but also on behalf of the applicant and ASI Amar Singh.

8. Mr. Hariharan submits that mere presence of the applicant in the area of Balaji Properties is not sufficient to implicate the applicant, since he was engaged in apprehending proclaimed offenders and was duty bound to keep a tap in the area within his jurisdiction.

9. Mr. Hariharan submits that for invoking Section 120-B of the I.P.C. and alleging existence of a criminal conspiracy, there has to be a prior meeting of mind between the accused, which is completely missing even on a perusal of the FIR in question.

10. Mr. Hariharan submits that qua the applicant, the investigation is complete and there is no useful purpose to be served in keeping him in custody any longer.

11. Mr. Hariharan further submits that the ACB of the GNCTD is, even otherwise, incompetent to act on the complaint of the complainant Javed; to lay the trap; to register the FIR; to investigate the offence; to arrest the applicant, or; to prosecute the petitioner, since he is not an employee or functionary of the GNCTD. The submission is founded upon the constitutional and legal framework existing qua the Union Territory of Delhi.

12. Mr. Hariharan submits that the Union Territory of Delhi is called the National Capital Territory of Delhi (NCTD) and the Administrator thereof is called the Lt. Governor of Delhi by virtue of Article 239 AA (1) of the Constitution of India. Sub-Article 2(a) states that there shall be a Legislative Assembly for the National Capital Territory (NCT), and the seats in such Assembly shall be filled by members chosen by direct election from territorial constituencies in NCT. Sub-Article (3)(a) of Article 239 AA states: *“Subject to the provisions of this Constitution, the Legislative Assembly shall have power to make laws for the whole or any part of the National Capital Territory with respect to any of the matters enumerated in the State List or in the Concurrent List in so far as any such matter is applicable to Union Territories except matters with respect to Entries-1, 2 and 18 of the State List and Entry 64, 65 and 66 of that List in so far as they relate to said Entries 1, 2 and 18”.*

13. Mr. Hariharan submits that, therefore, the Legislative Assembly of National Capital Territory of Delhi is incompetent to make laws in relation to the Entries 1 and 2 of the State List which are:

“1. Public order (but not including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power).

2. Police (including railway and village police) subject to the provisions of entry 2A of List I.”

14. Mr. Hariharan submits that “Police” stands specifically excluded from the legislative competence of the Legislative Assembly of the NCT. The executive power of the GNCTD extends to the legislative power of the Legislative Assembly. Thus, the ACB of GNCTD is not competent to take

action in respect of Delhi Police officers, which is not a Police force of the NCTD. Mr. Hariharan submits that the administrative, disciplinary and financial control over the Delhi Police vests in the Union Government and not in the GNCTD. He has also referred to Section 41 of the Government of National Capital Territory of Delhi Act, 1991 (GNCTD Act) which, *inter alia*, states that the Lieutenant Governor shall act in his discretion in matters which fall outside the purview of the powers conferred on the Legislative Assembly, but in respect of which powers and functions are entrusted or delegated to him by the President. Mr. Hariharan submits that it is the Union Government, acting through its delegate – namely the Lieutenant Governor, who is empowered to exercise his discretion in the matter.

15. On 08.11.1993 the Lieutenant Governor of NCT of Delhi issued a notification. Insofar as it is relevant, it reads as follows:

“ NOTIFICATION

No.F.1(21) /92-Home(P) Estt. In supersession of this Govt.'s Notification No. F.12(7) /86-HP-II dated 1.8.86 and in exercise of the powers conferred by Section 2(s) of the Code of Criminal Procedure Code, 1973 (No.II of 1974) read with the Govt. of India, Ministry of Home Affairs Notification No.U-11011/2/74-UTL (i) dated 20.3.74, the Lt. Governor of the National Capital Territory of Delhi hereby declares that Anti-Corruption Branch, Govt. of N.C.T. of Delhi at Old Secretariat, Delhi to be a Police Station for:—

- i) Offences under the Prevention of Corruption Act (No.49), 1988 and*
 - ii) Attempts, abetment and conspiracies in relation to or in connection with the aforesaid offences and any other offence committed in the course of same transaction arising out of the same set of facts,*
- and it shall have jurisdiction all over the National Capital Territory of Delhi.*

By order and in the

*Name of Lt. Governor of
Govt. of N.C.T. of Delhi.”*

16. Mr. Hariharan submits that the aforesaid notification dated 08.11.1993 has been amended vide notification dated 23.07.2014 issued by the Ministry of Home Affairs, being SO No.1896(E), in pursuance of Section 21 of the General Clauses Act read with Government of India, Ministry of Home Affairs notification No.183/A dated 20.03.1974. The notification dated 23.07.2014, *inter alia*, states:

“having regard to the guidelines issued by the Central Vigilance Commission over the jurisdiction of the Central Bureau of Investigation and the Anti-Corruption Branch, Government of National Capital Territory of Delhi, the Central Government hereby declares that the notification number F.1/21/92- Home (P) Estt.1750, dated the 8th November, 1993 issued by the Lieutenant Governor of the National Capital Territory of Delhi shall be applicable to the officers and employees of that Government only and for that purpose amends the said notification, namely:—

In the said notification, after the existing paragraph, the following paragraph shall be inserted, namely:—

“2 This notification shall apply to the officers and employees of the Government of National Capital Territory of Delhi.””

17. The submission is that the ACB of the GNCTD was declared to be a Police Station under Section 2(s) of the Cr.P.C., with powers to deal with offences under the PC Act by virtue of the notification dated 08.11.1993. The same stands amended on 23.07.2014 issued by the Ministry of Home Affairs, Government of India. After amendment by the 23.07.2014 notification, the ACB is now empowered to exercise jurisdiction only in respect of the officers and employees of the GNCTD, and not in relation to officers of the Delhi Police, since the officers and employees of Delhi Police

are not employees of the GNCTD. Mr. Hariharan submits that the notification dated 23.07.2014 has been issued in exercise of the executive power of the Union Government. Mr. Hariharan, lastly, submits that, in any event, after the ACB of the GNCTD had laid the trap, the investigation should have been entrusted to the appropriate authority viz. the Vigilance Department of Delhi Police, which deals with complaints under the Prevention of Corruption Act, or to the CBI.

18. On the other hand, the State represented through Mr. Dayan Krishnan, Senior Advocate has opposed the present bail application. On the merits, he has referred to the status report filed by the State. The status report discloses that during the course of investigation, mobile phone of the complainant and the compact disks of the recordings of the conversation between the complainant and Sarvan have been seized in accordance with law, and a certificate under Section 65-B of the Evidence issued. The complainant had recorded the telephonic conversation that he had with Sarvan before and after the raid. In the said telephonic recorded conversation, the name of the petitioner is categorically surfacing as one of the persons who had demanded the bribe from the complainant. The transcript of the conversation which is stated to have been taken place between Sarvan and the complainant, points towards the conspiracy hatched by the applicant, ASI Amar Singh and Sarvan to demand and accept bribe from the complainant. Mr. Krishnan submits that, pertinently, the applicant was apprehended from the spot, which is the office of a property dealer – Balaji Properties. The place of apprehension, namely Balaji Properties falls outside the jurisdiction of PS – Sonia Vihar, where the applicant and the other two accused persons are posted. It is argued that there was no occasion for the applicant to be present on the property of Balaji Properties in his duty hours at the time of

the raid. The involvement of the applicant in the conspiracy is, therefore, evident. It is further submitted that the Call Detail Records (CDR) and the records of the Cell ID Towers suggests the presence of the applicant in the area of Balaji Properties at the relevant time. It is pointed out that the applicant had claimed that he was in the area of Nanaksar Gurudwara at the relevant time, which is not substantiated by the Cell ID Towers.

19. Mr. Krishnan submits that the applicant being a Police Officer has immense clout and releasing him on bail at this stage would hamper the investigation and there is apprehension that the prosecution witnesses may also turn hostile. It is submitted that the other two accused are on the run.

20. To meet the argument of Mr. Hariharan with regard to the competence, or lack of it, of the ACB of GNCTD to act in the matter, Mr. Krishnan has also referred to Article 239 AA(3)(a). He submits that the legislative power of the Legislative Assembly and, consequently, the executive power of the GNCTD in relation to investigation of a crime stems from Entries 1 and 2 of the Concurrent List of the Seventh Schedule. These Entries read as follows:

“1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power. (emphasis supplied)

2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.”

21. Mr. Krishnan submits that earlier the offences – which are now covered by the PC Act, formed part of the I.P.C. itself, namely Sections 161

to 165A. Upon enactment of the PC Act, Sections 161 to 165A of the I.P.C. were repealed. It is submitted that the competence of the Legislative Assembly of the NCT to legislate, and, consequently, the executive power of the GNCTD extends to deal with criminal law, including all matters included in the I.P.C. at the commencement of the Constitution. The matters viz. the offences under the Prevention of Corruption Act are not offences against any laws with respect to any of the matters specified in List I or List II. The said matter does not concern use of naval, military or air force or any other armed forces of the Union in aid of the civil power. Thus, the power of the GNCTD extends to cases falling under the PC Act. The executive power of GNCTD extends to criminal procedure, including all matters including in the Code of Criminal Procedure at the commencement of the Constitution.

22. Mr. Krishnan also refers to Section 17 of the PC Act, which specifies the rank of Police officers who are empowered to investigate any offence punishable under the said Act. He submits that a perusal of Section 17 would show that it is not only the specified officers of the Central Bureau of Investigation (CBI) – which is established under the Delhi Special Police Establishment Act, 1946 (DSPE Act), who are empowered to act under the PC Act, the Police Officers of the specified ranks are also authorized to act in the matter. It is pointed out that the officers of the ACB of GNCTD are also police officers, drawn from the Delhi Police holding the specified ranks.

23. Mr. Krishnan submits that the notification dated 23.07.2014 itself refers to the guidelines issued by the Central Vigilance Commission (CVC) on the aspect of jurisdiction of the CBI, and ACB, GNCTD. The said guidelines, insofar as they are relevant, read as follows:

“1.5.2 The Special Police Establishment enjoys with the respective State Police Force concurrent powers of investigation and prosecution under the Criminal Procedure Code. However, to avoid duplication of effort, an administrative arrangement has been arrived at with the State Governments according to which:

(a) Cases, which substantially and essentially concern Central Government employees or the affairs of the Central Government, even though involving State Government employees, are to be investigated by the SPE. The State Police is, however, kept informed of such cases and will render necessary assistance to the SPE during investigation;

(b) Cases, which substantially and essentially involve State Government employees or relate to the affairs of a State Government, even though involving certain Central Government employees, are investigated by the State Police. The SPE is informed of such cases and it extends assistance to the State Police during investigation, if necessary. When the investigation made by the State Police authorities in such cases involves a Central Government employee, the requests for sanction for prosecution of the competent authority of the Central Government will be routed through the SPE”.

[Emphasis supplied]

24. Thus, Mr. Krishnan submits that the CVC guidelines recognize the fact that the power of investigation and prosecution under the Cr PC of the CBI and the police force are concurrent. It is only an administrative arrangement which has been arrived at with State Governments, to demarcate the nature of cases that one or the other agency may investigate and prosecute. However, the said administrative arrangement does not impinge on the jurisdiction of either the CBI, or the State Police Force, to investigate and prosecute in such like cases. He submits that by virtue of the notification dated 08.11.1993, the ACB of GNCTD has been declared to be a police station under Section 2(s) of the Cr.P.C. for offences under the Prevention of Corruption Act and, as above said, it is manned by police

officers of the specified ranks. Thus, the jurisdiction of the CBI and the ACB of GNCTD are concurrent. In fact, the primary responsibility to register, investigate and prosecute a case under the PC Act-in relation to Delhi Police personnel lies with the GNCTD, as they are engaged and deployed in related to the affairs of the GNCTD.

25. Mr. Krishnan has also referred to para 1.11 of the CBI Manual, which reads as follows:

“1.11 It has also been agreed that the State Police or Anti-Corruption/Vigilance set-up may take immediate action in respect of the Central Government employees in the following circumstances:—

(a) Where there is complaint of demand of bribe by a Central Government employee and a ‘trap’ has to be laid to catch such employee red-handed, and there is no time to contact the Superintendent of Police concerned of the CBI, the trap may be laid by the State Police/Anti-Corruption or Vigilance set-up and, thereafter, the CBI should be informed immediately and it should be decided in consultation with CBI whether further investigation should be carried out and completed by the State Police or by the CBI.

(b) Where there is likelihood of destruction or suppression of evidence if immediate action is not taken, the State Police/Anti-Corruption or Vigilance set-up may take necessary steps to register the case, secure the evidence and, thereafter, hand over the case to the CBI for further investigation.

(c) Information about cases involving Central Government employees, who are being investigated by the State Police/Anti-Corruption or Vigilance set-up, should be sent by them to the local CBI Branch, Head of the Department and/or the office concerned as early as possible but, in any event, before a charge sheet or a final report is submitted.

(d) All cases against Central Government employees which are investigated by the State Police/Anti-Corruption or Vigilance set-up and in which it is necessary to obtain sanction for prosecution from a Competent Authority of a Central Government Department shall be referred to the Competent Authority directly under intimation to the CVC”.

[Emphasis supplied]

26. The submission of Mr. Krishnan is that para 1.11 extracted above is a clear pointer to the recognition of the fact that the Anti-Corruption or Vigilance set up has the jurisdiction to take action in respect of a Central Government employee, when there is a complaint for demand of bribe by such Central Government employee and a trap is laid to catch such employee red-handed, and there is no time to contact the Superintendent of Police of the concerned CBI. It is also argued that the issue of jurisdiction is a purely legal issue, which has to be examined in the light of the constitutional and legal framework, and the CVC manual or the CBI manual cannot be of any use to examine the said issue, except to show how the Union Government and State Governments have interpreted and understood the constitutional and legal framework, and, implemented the same.

27. Mr. Krishnan has also placed heavy reliance on the judgment of the Supreme Court in ***A.C. Sharma v. Delhi Administration***, (1973) 1 SCC 726. In this case, the accused was a dealing clerk in the Labour Office, Delhi. Upon conviction by the Special Judge, Delhi and subsequent dismissal of his appeal by the High Court, the accused A.C. Sharma preferred an appeal before the Supreme Court. One of the grounds taken by him in his appeal pertained to the legality of the investigation into the offence alleged against him, by the Deputy Superintendant of the Anti Crime Department of the Delhi Administration. The contention was that Delhi Special Police

Establishment (DSPE) had the exclusive jurisdiction for investigation of offences of bribery and corruption in the departments of the Central Government. As the appellant was an employee of the CPWD, the offence against him could be investigated only by the DSPE. Since, in his case, the investigation was not done by the DSPE, his trial was vitiated. The submission before the Supreme Court was that the investigation by the ACB, Delhi was without jurisdiction. The issue considered by the Supreme Court was posed in para 6, which reads as follows:

“6. The short but important question with far-reaching effect, if the appellant's contention were to prevail, requiring our decision is, whether with the setting up of the Delhi Special Police Establishment, the Anti-Corruption Branch of the Delhi Police had been completely deprived of its power to investigate into the offences like the present or whether both the SPE and the Anti-Corruption Branch had power to investigate, it being a matter of internal administrative arrangement for the appropriate authorities to regulate the assignment of investigation of cases according to the exigencies of the situation”.

28. After examining the provisions of the DSPE Act, the Supreme Court, insofar as it is relevant, observed:

“13. The scheme of this Act does not either expressly or by necessary implication divest the regular police authorities of their jurisdiction, powers and competence to investigate into offences under any other competent law. As a general rule, it would require clear and express language to effectively exclude as a matter of law the power of investigation of all the offences mentioned in this notification from the jurisdiction and competence of the regular police authorities conferred on them by CrPC and other laws and to vest this power exclusively in the DSPE. The DSPE Act seems to be only permissive or empowering, intended merely to enable the DSPE also to investigate into the offences specified as

contemplated by Section 3 without imparting any other law empowering the regular police authorities to investigate offences.

[Emphasis supplied]

29. After examining the provisions of Prevention of Corruption Act (2 of 1947), and in particular Section 5 thereof, the Supreme Court, *inter alia*, observed:

“14. This sub-section, therefore, does not confer sole power on DSPE to investigate into the offences mentioned therein to the complete exclusion of the regular police force. It is merely concerned with the object of making provision for safeguarding against arbitrary use of power of investigation by officers below certain ranks, so that public servants concerned are saved from frivolous harassment at the hands of disgruntled persons. In this connection it is also noteworthy that apart from the restriction contained in Section 5-A(1) the applicability of the provisions of CrPC to the proceedings in relation to the aforesaid offences is, subject to certain modifications contained in Section 7-A, expressly recognised. The schemes of the two enactments, namely, the DSPE Act, 1946 and the Prevention of Corruption Act, 1947, suggest that they are intended to serve as supplementary provisions of law designed to function harmoniously in aid of each other and of the existing regular police investigating agencies for effectively achieving the object of successful investigation into the serious offences mentioned in Section 5-A without unreasonably exposing the public servant concerned to frivolous and vexatious proceedings”

30. The Supreme Court also referred to D.O. No. 21/8/63-GD dated October 5, 1963, addressed by the Central Bureau of Investigation, Ministry of Home Affairs, Government of India to the Inspectors General of Police inviting their attention to the Government of India Resolution No. 4/31/61-T dated April 1, 1963 establishing the Central Bureau of Investigation consisting of six Divisions to assist the State Police Forces. This letter talked

of a similar administrative arrangement between the CBI and the State Police force, as referred to hereinabove. In relation to the said letter, the Supreme Court observed:

“No doubt, this letter contains only administrative instructions but it clearly shows the construction placed during all these years by the administrative officers concerned with administering this law on the provisions of the SPE and the Prevention of Corruption Act. If the view stated in this letter is not clearly against the language and scheme of these Acts then it is entitled to due consideration and has some persuasive value. The contention raised by Mr. Anthony that Delhi not being a State but only a Union territory, the directions contained in DO No. 21/8/63-GD, are inapplicable and that in Delhi it is only the DSPE which has exclusive authority to investigate into the offences mentioned in Section 5-A is not easy to accept. Reference to the State Police force in that DO in our view includes the police force of the Union territory of Delhi”.

31. The submission of Mr. Krishnan is that the decision in **A.C. Sharma** (supra) put a quietus on the issue sought to be raised by the petitioner with regard to the jurisdiction of the ACB of the GNCTD to investigate and prosecute the case against him under the PC Act.

32. Mr. Krishnan further submits that the Supreme Court in the same decision went on further to hold that even if there was some illegality committed in the course of investigation, the same does not affect the competence and jurisdiction of the Court to try the offence and the invalidity of the preceding investigation does not result in vitiation of the trial, unless miscarriage of justice is caused thereby. The Supreme Court in para 15 held as follows:

“As the foregoing discussion shows the investigation in the present case by the Deputy Superintendent of Police cannot be considered to be in any way unauthorised or contrary to law. In this connection it may not be out of place also to point out that the function of investigation is merely to collect evidence and any irregularity or even illegality in the course of collection of evidence can scarcely be considered by itself to affect the legality of the trial by an otherwise competent court of the offence so investigated. In H.N. Rishabud and Inder Singh v. State of Delhi 1955CriLJ374 it was held that an illegality committed in the course of investigation does not affect the competence and jurisdiction of the court for trial and where cognizance of the case has in fact been taken and the case has proceeded to termination of the invalidity of the preceding investigation does not vitiate the result unless miscarriage of justice has been caused thereby. When any breach of the mandatory provisions relating to investigation is brought to the notice of the court at an early stage of the trial the Court will have to consider the nature and extent of the violation and pass appropriate orders for such reinvestigation as may be called for, wholly or partly, and by such officer as it considers appropriate with reference to the requirements of Section 5-A of the Prevention of Corruption Act, 1952. This decision was followed in Munna Lal v. The State of U.P. AIR 1964 SC 28 where the decision in State of Madhya Pradesh v. Mubarak Ali, 1959CriLJ920 was distinguished. The same view was taken in the State of Andhra Pradesh v. M. Venugopal : [1964]3SCR742 and more recently in Khandu Sonu Dhobi v. State of Maharashtra (1972) 3 SCC 118. The decisions of the Calcutta, Punjab and Saurashtra High Courts relied upon by Mr Anthony deal with different points : in any event to the extent they contain any observations against the view expressed by this Court in the decision just cited those observations cannot be considered good law”.

33. Therefore, Mr. Krishnan submits that even if, for the sake of argument, it were to be assumed that the case against the appellant could be registered, investigated and prosecuted only by the CBI or Delhi Police, the alleged irregularity in the ACB of GNCTD initiating action on the

complaint, in any event, would not vitiate the investigation or the eventual trial. The ACB of the GNCTD also consists of the police officers drawn from the Delhi Police, and it is not the case of the applicant that the investigation into the offences under Section 7/13 of PC Act, of which the appellant is accused, are being investigated by police officers below the rank competent to so investigate under Section 17 of the PC Act.

34. I proceed to deal with the aforesaid legal issue with regard to the competence of the ACB of GNCTD to act on the complaint of the complainant under the PC Act qua a Delhi Police personnel first. This is an important constitutional issue which has a bearing on the executive authority of the Union, and the said issue cannot be finally determined without hearing the Union and examining its stand. However, the Union is not a party to these proceedings and the present proceeding being a bail application – involving the personal liberty of the applicant, I do not consider it appropriate to allow these proceedings to get mired in a full-fledged hearing on this issue, after calling upon the Union of India to place their stand before this Court. Adopting that course of action would derail these proceedings and prejudice the personal liberty of the applicant, as the final resolution of the issue would consume more time in hearing and in arriving at a decision. I am, therefore, proceeding to consider the merits of the submissions on this aspect on the basis of limited representation, only for the purpose of this case. I am also informed that this issue is pending consideration before this Court in other proceedings.

35. Article 239AA (3)(a) of the Constitution of India vests powers in the Legislative Assembly of the NCT to make laws in respect of any matter enumerated in the State List or in the Concurrent List, except in respect of

Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of the said list, insofar as they relate to Entry 1, 2 and 18. Thus, it would be seen that there is no fetter on the legislative power of the Legislative Assembly of the NCT in relation to matters enumerated in List III-the concurrent list of the Seventh Schedule to the constitution.

36. It is a well settled principle of constitutional interpretation that an entry in a legislative list must be read in its widest amplitude and the legislature must be held to have power not only to legislate with respect to the subject matter of the entry but also to make ancillary or incidental provision in aid of the main topic of legislation (*see Kasturi Lal Harlal v. State of U.P. & Ors.*, (1986) 4 SCC 704).

37. Since matters contained in Entries 1 and 2 of the State List are excluded from the legislative domain of the Legislative Assembly of the NCT, and Mr. Krishnan has placed reliance only on Entries 1 and 2 in List-III Concurrent List, it needs examination whether the executive action in the present case, of the ACB of the GNCTD, is relatable to the executive power of the GNCTD springing from Entries 1 and 2 in List-III of Concurrent List. It also needs examination, as to what is the scope of the executive power of the Union in relation to the investigation of cases under the PC Act, in relation to Union/Central Government officers and employees, who are serving in the NCT.

38. I may first deal with entries 1 & 2 of List II of the Seventh Schedule, relied upon by the applicant. Entry 1 of List II, primarily deals with “Public Order”. On the meaning of “Public Order”, Durga Das Basu in his Shorter Constitution of India, 14th Edition 2009 (Vol. II page 2369) comments that:

“1. ‘Public Order’ is a most comprehensive term (*Ramesh Thappar v. State of Madras*, (1960) SCJ 418) and subject to the exception mentioned, viz., use of the armed forces in aid of the civil power, the State Legislature is given plenary authority to legislate on all matters which relate to or are necessary for the maintenance of public order (*Lakhinarayan Das v. Province of Bihar*, AIR 1950 FC 59), including the prevention of insult to national honour (*Natarajan N.V., in re*, AIR 1965 Mad. 11).

2. Public order implies absence of violence and an orderly state of affairs, in which citizens can peacefully pursue their normal avocation of life (*Basudeva v. Rex.*, AIR 1949 All. 513). Anything which disturbs public tranquility disturbs ‘public order’ (*Ramesh Thappar (supra)*). This entry also includes ‘public safety’ in its relation to the maintenance of public order (*Nek Mohammad v. Prov. of Bihar*, AIR 1949 Pat. 1(FB)). In short, ‘public order’ is synonymous with public peace, safety and tranquility (*Superintendent Central Prison, Fatehgarh v. Ram Manohar*, AIR 1960 SC 633) and would, therefore, cover legislation to regulate the use of sound amplifiers (*State of Rajasthan v. Chawla G.*, AIR 1959 SC 544), or to prevent forcible and fraudulent conversion (*Stainislaus Rev. v. State of MP*, AIR 1977 SC 908) or to prevent anti-social activities (*Ashok Kumar Dixit v. State of UP*, AIR 1987 All. 235).”

39. An offence under the PC Act *per se* would have no bearing on “Public Order”. “Public Order” implies violence and an orderly state of affairs in which citizens can peacefully pursue their normal avocations of life. The Constitution draws a clear distinction between maintenance of public order on the one hand, and the enforcement of the criminal law on the other hand, since they have been provided as two separate entries in two different lists of the Seventh Schedule. Though, to maintain and enforce public order, enforcement of the criminal law, including matter included in the I.P.C. may be necessary, the enforcement of the criminal law including all matters in the I.P.C. may not have a bearing on “Public Order” as defined and interpreted. Thus, in my view, Entry 1 of List II – State List would not

cover the subject of investigation and prosecution of an offence under the PC Act.

40. The subject of Entry 2 of List II – State List is “Police” (including railway and village police) subject to the provisions of Entry 2A of List I. The word ‘Police’ has been interpreted to be wide enough to empower the State Legislature to create an armed constabulary – (*Pooran Mistry v. State of UP*, AIR 1955 All 370). The subject matter of the entry “Police” relates to, *inter alia*, the creation of the armed constabulary/police force; the creation of hierarchy of the police force; its deployment; its objectives, powers and jurisdiction; the laying down of rules, regulations and conditions of service and powers of the police officers/personnel. It would include the aspect of disciplinary control and supervision over the police personnel. The same, however, does not touch upon the power to enforce the criminal law by invoking the criminal procedure, *inter alia*, under the Cr.P.C.

41. The subject matter of Entry 1 of List-III is criminal law. It is an inclusive entry, since it reads “*criminal law, including all matters included in the IPC at the commencement of the constitution ...*” (Emphasis supplied). It would, thus, mean that the executive power of the GNCTD extends to implementation of the criminal law generally, and includes all matters included in the I.P.C. at the commencement of the constitution. Pertinently, the offences now dealt with by the PC Act were earlier dealt with by the I.P.C. in Section 161 to 165A, and it is only in 1988 – upon enactment of the PC Act, that the said provisions were repealed. The executive power of the GNCTD also extends to the enforcement of the Code of Criminal Procedure. Thus, reliance placed by the applicant on Entries 1 & 2 of List II of the Seventh Schedule appears to be misplaced. Mr.

Krishnan appears to be right in his submission that the relevant legislative entry qua enforcement of PC Act cases are entries 1 & 2 of List III.

42. The principle laid down by the Supreme Court in *A.C. Sharma* (supra) would squarely apply in the facts of the present case. In this regard, reference may also be made to the Division Bench judgment of the Madhya Pradesh High Court in *Ashok Kumar Kirtiwar v. State of Madhya Pradesh*, 2001 CrL LJ 2785. The Division Bench of the Madhya Pradesh High Court observed in this case that Section 17 of the PC Act refers to police officers of certain ranks, who alone can investigate the offence under the said Act without making any reference to the offender as to whether he is connected with the affairs of the Union or of the State. In para 13, the Division Bench, in this case, *inter alia*, held as follows:

“13. The contention that the Delhi Special Police Establishment Act, 1946 confers exclusive jurisdiction on the Special Police Force created under that Act to investigate the offences of bribery and corruption committed by the Central Government Employees, is also wholly misplaced. While this Central Act of 1946 does provide for an agency for investigation of such offences committed by the Central Government Employees, there is however, no provision in the Act to exclude jurisdiction of Police Officers of various States to investigate the said offences when committed by such employees in their States. The scope of the Central Act of 1946 is rather limited inasmuch as it provides for the investigation of such offences when committed by the Central Government Employees only. The Special Police Force under this Central Act cannot investigate the offences committed by the State Government Employees. The legal position in the matter is made luculent by the Supreme Court in AC Sharma Vs. Delhi Administration, AIR 1973 SC 913”

43. The Division Bench also took notice of the judgment of the Supreme Court in *State of Madhya Pradesh & Ors. V. Shri Ram Singh*, (2000) 5 SCC 88, wherein the Supreme Court has observed in respect of the P.C. Act:

"10. The Act was intended to make effective provisions for the prevention of bribery and corruption rampant amongst the public servants. It is a social legislation intended to curb illegal activities of the public servants and is designed to be liberally construed so as to advance its object. Dealing with the object underlying the Act this Court in R.S. Nayak v. A.R. Antulay, 1984 (2) SCC 183 held:

"18. The 1947 Act was enacted, as its long title shows, to make more effective provision for the prevention of bribery and corruption. Indisputably, therefore, the provisions of the Act must receive such construction at the hands of the court as would advance the object and purpose underlying the Act and at any rate not defeat it. If the words of the statute are clear and unambiguous, it is the plainest duty of the court to give effect to the natural meaning of the words used in the provision. The question of construction arises only in the event of an ambiguity or the plain meaning of the words used in the statute would be self-defeating. The court is entitled to ascertain the intention of the legislature to remove the ambiguity by construing the provision of the statute as a whole keeping in view what was the mischief when the statute was enacted and to remove which the legislature enacted the statute. This rule of construction is so universally accepted that it need not be supported by precedents. Adopting this rule of construction, whenever a question of construction arises upon ambiguity or where two views are possible of a provision, it would be the duty of the court to adopt that construction which would advance the object underlying the Act, namely, to make effective provision for the

prevention of bribery and corruption and at any rate not defeat it.”

11. Procedural delays and technicalities of law should not be permitted to defeat the object sought to be achieved by the Act. The overall public interest and the social object is required to be kept in mind while interpreting various provisions of the Act and deciding cases under it.”

44. Thus, in my view, the GNCTD acting through the ACB has the executive power/authority to enforce criminal law, which includes the PC Act, within the NCT.

45. The notification dated 08.11.1993 was issued by the GNCTD in the name of the Lt. Governor of GNCTD in exercise of powers conferred under Section 2(s) of Cr PC. Section 2(s) of Cr PC defines “police station” to mean any post or place declared generally or specially by the State Government, to be a police station, and includes any local area specified by the State Government in this behalf. The issuance of the notification dated 08.11.1993 by the GNCTD itself relates to exercise of executive power conferred on the GNCTD by Entry 2 of List III – Concurrent List. By this notification, the Lt. Governor of GNCTD declared the ACB, GNCTD at Old Secretariat to be a police station, *inter alia*, for offences under the PC Act, and it was stipulated that it shall have jurisdiction all over the NCT of Delhi.

46. Before I proceed to consider the impact of the notification dated 23.07.2014 issued by the Ministry of Home Affairs in the name of the Lieutenant Governor, which is relied upon by the applicant, at this stage, I consider it necessary to examine the issue as to what is the extent of the executive power of the Union vis-à-vis NCTD.

47. Article 73(1) of the Constitution, insofar as it is relevant, provides that: subject to the provisions of this Constitution, the executive power of the Union shall extend –

“(a) To the matters with respect to which Parliament has power to make laws; provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the legislature of the State has also power to make laws.”

48. Thus, in relation to matters enumerated in the concurrent list, though the legislative competence of the Parliament overshadows the legislative competence of the State Legislature, the executive powers of the Union in respect of such matters do not, *“save as expressly provided in this Constitution or in any law made by Parliament”*, extend in any State. In a matter falling in the concurrent list, not covered by the Constitution or law made by Parliament – which vests authority in the Union to exercise its executive power in the State, the executive power of the Union does not extend to the State.

49. Article 162 deals with the extent of executive power of the States. It reads:

“162. Extent of executive power of State Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof Council of Ministers.”

50. Thus, in respect of matters enumerated in List II, the States have the exclusive executive powers. Even in respect of the matters enumerated in the concurrent list, the executive power vests in the State, subject to the condition that it is “*subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof*”.

51. In ***Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab***, AIR 1955 SC 549, the Constitution Bench of the Supreme Court had the occasion to consider the extent of executive of powers of the Union and the States. The Supreme Court, *inter alia*, observed as follows:

“7. Article 73 of the Constitution relates to the executive powers of the Union, while the corresponding provision in regard to the executive powers of a State is contained in Article 162. The provisions of these articles are analogous to those of section 8 and 49(2) respectively of the Government of India Act, 1935 and lay down the rule of distribution of executive powers between the Union and the States, following the same analogy as it provided in regard to the distribution of legislative powers between them. Article 162, with which we are directly concerned in this case, lays down:

"Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws :

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

Thus under this article the executive authority of the State is exclusive in respect to matters enumerated in List II of Seventh Schedule. The authority also extends to the Concurrent List except as provided in the Constitution itself or in any law passed by the Parliament. Similarly, Article 73 provides that the executive powers of the Union shall extend to matters with respect to which the Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or any agreement. The proviso engrafted on clause (1) further lays down that although with regard to the matters in the Concurrent List the executive authority shall be ordinarily left to the State it would be open to the Parliament to provide that in exceptional cases the executive power of the Union shall extend to these matters also.

Neither of these articles contain any definition as to what the executive function is and what activities would legitimately come within its scope. They are concerned primarily with the distribution of the executive power between the Union on the one hand and the States on the other. They do not mean, as Mr. Pathak seems to suggest, that it is only when the Parliament or the State Legislature has legislated on certain items appertaining to their respective lists, that the Union or the State executive, as the case may be, can proceed to function in respect to them.

On the other hand, the language of Article 162 clearly indicates that the powers of the State executive do extend to matters upon which the State Legislature is competent to legislate and are not confined to matters over which legislation has been passed already. The same principle underlies Article 73 of the Constitution. These provisions of the Constitution therefore do not lend any support to Mr. Pathak's contention."

52. The proviso to Article 73 is in respect of a "State", and not a "Union Territory" which the NCTD is. Having noticed the constitutional scheme qua the distribution of executive powers between the Union and the States, I

now proceed to examine as to what is the position in respect of the Union Territory of Delhi, i.e. NCTD.

53. Delhi is enlisted at serial no.1 in the list of Union Territories in Schedule I to the Constitution of India. The Union Territories are dealt with in Part VIII of the Constitution of India which begins with Article 239. Article 239 (1) states: “***Save as otherwise provided by Parliament by law, every Union Territory shall be administered by the President acting, to such extent as he thinks fit, through an Administrator to be appointed by him with such delegation as he may specify***” (Emphasis supplied).

54. Therefore, if a law made by Parliament puts fetters on the executive powers of the President in respect of a Union Territory, to the extent of such fetter the executive power of the President shall stand curtailed in respect of the Union Territory.

55. The Parliament has enacted the Government of National Capital Territory of Delhi Act, 1991 (GNCTD Act). By virtue to Section 41 of the GNCTD Act, the Lieutenant Governor is mandated to act in his discretion in matters:

“(i) *which falls outside the purview of the powers conferred on the Legislative Assembly but in respect of which powers or functions are entrusted or delegated to him by the President; or*

(ii) in which he is required by or under any law to act in his discretion or to exercise any judicial or quasi-judicial functions.”

56. Thus, in respect of matters which do not fall outside the purview of the powers conferred on the Legislative Assembly – in other words, which fall within the legislative competence of the Legislative Assembly, or in which he is not required by or under any law to act in his discretion or

exercise his judicial or quasi-judicial functions, the Lieutenant Governor must act on the aid and advice of the Council of Ministers. The NCT of Delhi shall not be administered by the President through the Lieutenant Governor, in respect of matters over which the Legislative Assembly of the NCT has authority to make laws. This position emerges from the constitutional scheme contained in Articles 239 and 239AA, read with Sections 41 to 44 of the GNCTD Act, 1991, as would be evident from the following discussion.

57. Sub-Article (4) of Article 239AA is relevant in this regard, and it reads:

*“(4) **There shall be a Council of Ministers** consisting of not more than ten per cent. of the total number of members in the Legislative Assembly, **with the Chief Minister at the head to aid and advise the Lieutenant Governor in the exercise of his functions in relation to matters with respect to which the Legislative Assembly has power to make laws, except in so far as he is, by or under any law, required to act in his discretion:***

Provided that in the case of difference of opinion between the Lieutenant Governor and his Ministers on any matter, the Lieutenant Governor shall refer it to the President for decision and act according to the decision given thereon by the President and pending such decision it shall be competent for the Lieutenant Governor in any case where the matter, in his opinion, is so urgent that it is necessary for him to take immediate action, to take such action or to give such direction in the matter as he deems necessary.”

(Emphasis supplied)

58. Section 44 of the GNCTD Act is also relevant, and, insofar as it is relevant, the same reads as follows:

“44. Conduct of business:

(1) *The President shall make rules :*

(a) *for the allocation of business to the Ministers in so far as it is **business with respect to which the Lieutenant Governor is required to act on the aid and advice of his Council of Ministers**; and*

(b) *for the more convenient transaction of business with the ministers, including the procedure to be adopted in the case of a difference of opinion between the Lieutenant Governor and the Council of Ministers or a Minister.*

(2) *Save as otherwise provided in this Act, all executive action of Lieutenant Governor whether taken on the advice of his Ministers or otherwise shall be expressed to be taken in the name of the Lieutenant Governor.*

(3) *... .. ”*

(Emphasis supplied)

59. On a reading of Sub-Articles (2)(a), (4), (5), and (6) of Article 239AA it emerges that the seats in the Legislative Assembly for the NCT are filled by members chosen by direct election from territorial constituencies in the NCT. The Chief Minister, who heads the Council of Ministers, is appointed by the President, and the Council of Ministers are appointed by the President on the advice of the Chief Minister. The Council of Ministers are collectively responsible to the Legislative Assembly.

60. The Supreme Court in *S.R. Chaudhuri Vs. State of Punjab & Ors.*, (2001) 7 SCC 126, has observed as follows:

*“34. The very concept of responsible Government and representative democracy signifies Government by the people. In constitutional terms, it denotes that **the sovereign power which resides in the people is exercised on their behalf by their chosen representatives and for exercise of those powers, the representatives are necessarily accountable to the people for***

what they do. The Members of the Legislature, thus, must owe their power directly or indirectly to the people. The Members of the State Assemblies like Lok Sabha trace their power directly as elected by the people while the Members of the Council of State like Rajya Sabha owe it to the people indirectly since they are chosen by the representative of the people. The Council of Minister of which a Chief Minister is head in the State and on whose aid and advice the Governor has to act, must, therefore owe their power to the people directly or indirectly.”

(Emphasis supplied)

61. The position would be no different in relation to the NCT of Delhi, since the Members of the Legislative Assembly are directly elected by the citizens from territorial constituencies in the NCT of Delhi, and the Council of Ministers is collectively responsible to the Legislative Assembly. The mandate of the people, with whom the sovereign power resides, must be respected by the Lieutenant Governor in respect of matters which fall within the domain of the legislative assembly, provided there is no other constitutional or legal fetter.

62. A Division Bench of this Court in *Om Parkash Pahwa & Ors. Vs. State of Delhi & Others*, 75 (1998) DLT 3 (DB), had occasion to examine the scope and impact of Article 239AA of the Constitution on the executive power of the Union, which acts in the NCTD through the Lieutenant Governor. The Division Bench observed as follows:

“65. To examine the scope and impact of Article 239AA, we would borrow the several principles of law laid down in Shamsher Singh Vs. State of Punjab, (1974) II LLJ 465 SC, a decision of a Constitution Bench of the Supreme Court which contains an illuminating exposition of the Constitutional scheme and impact on the working of the Government under the pari materia provisions such as Articles 53, 77, 154 and 166 of

the Constitution. Shamser Singh's case was decided when Art 239AA was not to be found in the Constitution.

66. Under the Parliamentary or Cabinet System of Government as embodied in our Constitution, the President is the constitutional or formal Head of the Union and he exercises his powers and functions conferred on him by or under the Constitution at the aid and advice of his Council of Ministers. The Governor is the constitutional or formal Head of the State and he exercises all his powers and functions conferred on him by or under the Constitution on the aid and advice of his council of ministers save in the spheres where the Governor is required by or under the constitution to exercise his functions in his discretion. A comparative reading of Articles 74 and 163 of the Constitution shows that in the matter of exercise of such functions which are 'in his discretion by or under the Constitution' the Governor is not made to depend on the aid and advice of the Council of Ministers under Article 163. The Constitution has not chosen to provide for similar discretionary functions to be discharged by the President under Article 74. The words "in his discretion" are used in relation to some powers of the Governor and not in the case of the President.

*67. The phraseology employed by Clause (4) of Article 239AA deserves to be compared with that employed in Article 163. **The Lt. Governor of NCT of Delhi would be aided and advised by the Council of Ministers in the exercise of his functions in relation to the matters with reference to which the legislative assembly has power to make laws. However, the Governor while exercising such powers and discharging such functions which 'any law' requires to be done 'in his discretion' are not associated with the aid and advice of the Council of Ministers. There the Lt. Governor acts in his discretion.***

68. To put it briefly what the Governor of a State may do at his discretion must be so provided for by the Constitution. What the Lt. Governor of NCT of Delhi may do at his discretion may be provided by or under 'any law' and not the Constitution merely."

(Emphasis supplied)

63. Thus, the constitutional scheme in relation to the extent of executive power of the Union over the NCTD is on similar lines as it is in relation to a State, except that, whereas the Governor of a State may act in his discretion in matters so provided for in the Constitution, the Lieutenant Governor of NCTD may so act in his discretion as provided by any law made by Parliament.

64. The Legislative Assembly of the NCT constituted by Article 239AA 2(a) is, by Article 239AA(3)(a) empowered to make laws in respect of matters enumerated in, *inter alia*, the concurrent list of the Seventh Schedule to the Constitution. Therefore, in respect of matters dealt with by Entries 1 and 2 of the Concurrent List, the Lieutenant Governor cannot act in his discretion, and he is bound to act upon the aid and advice of the Council of Ministers. No law has been cited by the applicant, by which the Lieutenant Governor was empowered to act in his discretion in the matters covered by Entries 1 & 2 of the List III- Concurrent List.

65. Thus, it appears to me, that the Union Government could not have issued the notification dated 23.07.2014 thereby seeking to restrict the executive authority of the GNCTD acting through its ACB to act on complaints under the PC Act only in respect of officers and employees of the GNCTD. By an executive fiat, the Union Government could not have exercised the executive power in respect of a matter falling within the legislative competence of the Legislative Assembly of the NCT, since the law made by Parliament, namely the GNCTD Act read with Article 239 AA put fetters on the executive authority of the President.

66. After the judgment was reserved in the present application, the Ministry of Home Affairs has issued a notification bearing No. SO 1368(E) on 21.05.2015 thereby further amending the notification dated 08.11.1993 and, *inter alia*, providing that “ACB police station shall not take any cognizance of the offences against officers, employees and functionaries of the Central Government”. In my view, since the Union lacks the executive authority to act in respect of matters dealt with in Entries 1 & 2 of List III of the Seventh Schedule, the further executive fiat issued by the Union Government on 21.05.2015 is also suspect.

67. In the light of the aforesaid discussion, the submission of the applicant that the ACB of the GNCTD does not have the competence or jurisdiction to act on the complaint of the complainant is rejected. Since the applicant is a Delhi Police personnel serving the citizens in the NCTD and the functions of the Delhi Police personnel substantially and essentially relate to the affairs of the GNCTD, in my view, the ACB of the GNCTD has the jurisdiction to entertain and act on a complaint under the PC Act in respect of a Delhi Police officer or official, and to investigate and prosecute the crime. This would also be in consonance with the guidelines issued by the CVC as contained in para 1.5.2(b) set out herein above.

68. I also find merit in the submission of Mr. Krishnan that the continued investigation into the crime in question by the ACB of GNCTD would not vitiate the eventual trial in the light of the judgment of the Supreme Court in *A.C. Sharma* (supra). In this regard, reference may also be made to *Dr. G.S.R. Somaiyaji v. State through CBI*, (2002) CrI LJ 795.

69. Lastly, turning to the merits of the case, it is well settled that while considering the bail application, the Court should not examine the merits in

detail or make any observations which may prejudice the trial one way or another. The transcript of the allegedly recorded telephonic conversation between the complainant and Sarvan has been read out in Court, and the name of the applicant, as one of the persons demanding the bribe, and as one of the persons for whom the bribe was sought to be collected by Sarvan appears to be mentioned. Coupled with this is the fact that the applicant was found at the spot, i.e. Balaji Properties, where Sarvan allegedly fixed the meeting with the complainant for payment of the bribe amount. It is for the applicant to explain as to what he was doing during his official duty hours at Balaji Properties, which does not even fall within the territorial jurisdiction of his police station at the time of the raid.

70. The applicant is a Head Constable at P.S – Sonia Vihar and, therefore, the possibility of his misusing his official position to threaten or influence the complainant and other prosecution witnesses, or tamper with the evidence cannot be ruled out at this stage.

71. In view of the aforesaid aspects, I do not find any merit in the present bail application and, consequently, dismiss the same. However, it is made clear that the observations made in this judgment shall not prejudice the case of either party, and shall not influence the proceedings or the judgment which the Trial Court may render qua the applicant.

(VIPIN SANGHI)
JUDGE

MAY 25, 2015
B.S. Rohella/sr