

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Criminal Application [ABA] No.445 of 2016

(Khanhaiya Ramchand Thawrani

vs.

State of Maharashtra, through Dy. Commissioner of Police, Economic Offence Wing, Nagpur)

with

Criminal Application [ABA] No.446 of 2016

(Khanhaiya Ramchand Thawrani

vs.

State of Maharashtra, through Dy. Commissioner of Police, Economic Offence Wing, Nagpur)

with

Criminal Application [ABA] No.447 of 2016

(Khanhaiya Ramchand Thawrani

vs.

State of Maharashtra, through Dy. Commissioner of Police, Economic Offence Wing, Nagpur)

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Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

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Court's or Judge's Orders

*Shri Avinash Gupta, Senior Advocate with Shri Aakash Gupta, Advocate for the Applicant
Mrs. Bharti Dangre, Public Prosecutor with Shri S.S. Doifode, A.P.P. for the Non-Applicant/State.*

CORAM : S.B. SHUKRE, J.
DATE : 24th OCTOBER, 2016.

These three bail applications are being disposed of by this common order, as the offences registered against the applicant in three crimes at two police stations are similar, arise out of same allegations and that the common grounds are raised in these applications.

02] The allegations against the applicant are that the applicant is not a registered member of a recognised stock

exchange nor has any licence issued by the Central Government to deal in securities and yet, he dealt in securities and thus carried out illegal business of trading in shares. It is also alleged that the applicant kept a place, which was not a recognised stock exchange and used it for the purpose of entering into or performing various contracts in securities in contravention of the provisions of the Securities Contracts (Regulation) Act, 1956 (hereinafter called 'the Securities Act' for short). It is further alleged that by indulging in illegal share trading, the applicant caused huge loss of revenue to the Government by cheating the Government, various authorities and persons having stakes or interest in securities dealings. These activities were carried on, according to the police, by the applicant at three different places falling within the jurisdiction of Police Station Tahsil and Police Station Lakadganj and accordingly three distinct crimes were registered against the applicant. The crime pertaining to Police Station Tahsil is Crime No.102/2016 registered for the offence punishable under Sections 406, 465, 468, 471, 420 and 120-B of the Indian Penal Code (for short 'the I.P.C.') and also the offence punishable under Section 23(1) of the Securities Act and the crimes pertaining to Police Station Lakadganj are Crime Nos.153/2016 and 155/2016 registered

for the offences punishable under Sections 419, 420, 406, 467, 471, 477-A and 120-B read with Section 34 of the I.P.C. and also the offence punishable under Section 23(1) of the Securities Act. Bail applications Nos.445, 446 and 447 of 2016 relate to these three distinct crimes respectively.

03] I have heard Shri Avinash Gupta, learned Senior Counsel for the applicant and Mrs. Bharti Dangre, learned Public Prosecutor, who argued on law points involved and Shri S.S. Doifode, learned A.P.P. assisting the learned Public Prosecutor on factual aspects of the case. I have gone through the case-diary including the F.I.R. and the material placed on record.

04] Shri Gupta, learned Senior Counsel has taken an objection which hits at the very basis of the crimes registered against the applicant. The core of this argument is that there being no complaint filed by a competent authority or person, no investigation could be made by the police and even if the investigation is made, it cannot culminate into a police report or a final report as contemplated under Section 173(2) of the Code of Criminal Procedure (for short 'the Cr.P.C.'). His other part of the argument is that there is no *prima facie* case made

out for the I.P.C. offences. I feel it necessary to give a summary of his argument by reproducing them in the forgoing paragraphs.

05] As regards the I.P.C. offences, the learned Senior Counsel submits that the offences alleged against the applicant, which are punishable under various sections of the I.P.C. are not at all made out, as there is absolutely nothing on record which would show that anybody was deceived by inducing him to deliver any property or to give any consent for retention of property nor is there any allegation that any false documents were created and used as genuine. He further submits that there is also no allegation that particular accounts have been falsified by the applicant.

06] About the offence of illegal trading in shares punishable under various clauses of Section 23(1) of the Securities Act, the learned Senior Counsel submits that investigation by a police officer under the provisions of the Securities Act is not permissible unless and until there is a complaint filed and cognizance thereof has been taken by the Special Court under Section 26 read with Section 26B of the Securities Act. He submits that the complaint under Section 26(1) of the Securities Act can be filed only by the authorities

mentioned therein or by a person, who falls in the same category of those authorities constituting together the affected party. He further submits that these authorities are Central Government or the State Government or the Securities and Exchange Board of India (hereinafter called as 'the SEBI' for short) or a recognised stock exchange. He further submits that Section 26(1) also permits filing of a complaint by any person and as the expression "by any person" is preceded by various authorities like the Government or the SEBI falling in the same category, the expression "by any person" would have to be understood by the meaning conveyed by the words preceding it by applying the doctrine of *ejusdem generis*. He further submits that such person could be a registered or recognised Broker, member of clearing house, listed Companies, Depository, a body which is entrusted with the function of de-materialization of the shares, listed Mutual Funds Managers, individual shareholders suffering loss due to illegal trading in shares and so on and so forth. He further submits that a Police Officer or a Police Head Constable can never fall within the meaning of the expression "any person" and the F.I.R in the present case has been filed by either a Police Head Constable or Naik Police Constable not having any authority in law.

07] The learned Senior Counsel further submits that under Section 25 of the Securities Act, any offence punishable under Section 23 has been made cognizable within the meaning of Cr.P.C. by a deeming provision and it would confer only a limited power upon a Police Officer to make arrest without warrant as defined under Section 2(c) of Cr.P.C. and that too when most basic condition of Section 26(1) is fulfilled i.e. a complaint as contemplated under this section is filed. He further submits that provision of Section 25 cannot be read independently of the provision of Section 26. He further submits that if it is to be held that only because offence punishable under Section 23 has been deemed to be a cognizable offence, a Police Officer can not only arrest but also make investigation, it would result in an anomalous situation, where there would be a police investigation under Section 156 of the Cr.P.C. on the one hand and no police report filed under Section 173(2) of the Cr.P.C., because under Section 26(1), Court can take cognizance of offence only when a complaint is made by the competent person named therein and under Section 2(d) of the Cr.P.C., complaint does not include a police report filed under Section 173(2) of Cr.P.C. Therefore, the learned Senior Counsel further submits that harmonious interpretation of both these

sections would have to be made and by doing so it could be seen that a Police Officer can make arrest without warrant and make investigation only when a complaint under Section 26(1) of the Securities Act is filed by the competent person. In support of his argument, he has relied upon the case of Jeewan Kumar Raut and another vs. Central Bureau of Investigation – (2009) 7 SCC 526.

08] Mrs. Bharti Dangre, learned Public Prosecutor submits that even though Section 26(1) makes it mandatory that a complaint must be filed by a competent person if the Court has to take cognizance of any offence punishable under the Securities Act, the question of taking of cognizance would arise much later when the investigation is over and the time has arrived for filing a police report. She further submits that Sections 25 and 26 of the Securities Act operate in different fields and, therefore, would have to be read and understood independently. She further submits that while Section 25 makes the offences punishable under the provisions of the Securities Act as cognizable and, hence, gives an authority to the police to make arrest without warrant implying that the police can register the offence and make an investigation into it, Section 26 only speaks of taking cognizance of the offence

by the Court upon a complaint filed by the competent person thereby indicating that when it comes to filing the report upon culmination of police investigation, the police, instead of filing a police report under Section 173(2) of the Cr.P.C., would have to file a complaint along with the material collected during the course of investigation through any of the authorities or person named in Section 26(1) of the Securities Act. She submits that after all, as per the settled legal position, taking cognizance of any offence under Section 190 of the Cr.P.C. only means application of mind by the Judge or the Magistrate to the contents of the complaint for the purpose of taking action against the offender under the provisions of law and this stage would arrive only when the investigation is over and complaint in accordance with law under Section 26(1) of the Securities Act is filed. Till that time, she further submits, by virtue of the power conferred upon the police by Section 25 of the Securities Act, police can not only make arrest but also go ahead with the investigation of the offence. She relies upon the case of S.R. Sukumar vs. S. Sunaad Raghuram – (2015) 9 SCC 609, in support of her argument. She also refers to the Guidance Manual issued by the SEBI, a copy of which has been placed on record, wherein the SEBI has expressed an opinion that because Section 25 of

the Securities Act makes all the offences punishable under Section 23 as cognizable, the offences can be investigated by the State Law Enforcement Authority also. The learned Public Prosecutor also relies upon the case of *Jeewan Kumar Raut (supra)* and submits that if the investigating agency has been expressly and statutorily prohibited from filing a police report, it can always file a complaint petition with the help of the competent authority, or any person as contemplated under Section 26(1) of the Securities Act so that the requirements of Section 26 are completely fulfilled.

09] Shri S.S. Doifode, learned A.P.P., who has assisted the learned Public Prosecutor on factual aspects of this case, submits that there is ample material collected by the investigating agency during the course of investigation showing that this applicant was actively involved in illegal trading of shares by using “SOU DA SOFTWARE”, which trading is called in common parlance as “DABBA” trading. He further submits that the offence *prima facie* committed by the applicant by contravening the provisions of the Securities Act is punishable under Section 23(1) of that Act and the investigation so far made has revealed that huge amounts of taxes, service charges, brokerage etc. have been evaded by the illegal trading in shares indulged in by the applicant, which

has caused huge economic loss to the Government. He further submits that a detailed investigation into various aspects of the matter, such as, what kind of shares were illegally traded, what were the figures of the final settlement, how many more persons were involved, whether the offence *prima facie* committed by the applicant has larger ramifications and so on and so forth is required to be investigated into and this would not be possible unless the custodial interrogation of the applicant is allowed. On these grounds, he has urged that the applicant be denied anticipatory bail in all the three crimes.

10] The law points raised in this matter go to the root of the whole case and so would require priority in our attention and their resolution. Let us proceed to deal with them.

11] Upon reading the Securities Act, as a whole, one can see that it is a special statute tailor made to control certain transactions in shares or securities and penalise any of the contraventions of its provisions. Its object is to prevent undesirable transactions in securities by regulating the business of securities and providing for matters connected with it. This way it aims at preventing loss of revenue to the

public exchequer as well as loss of any damage to various authorities, brokers, listed companies, individual shareholders etc. This special enactment creates an elaborate mechanism for prohibiting and discouraging unauthorised or illegal dealings in shares or securities. Section 23 of the Securities Act provides for penalties for contravening its provisions by prescribing a term imprisonment which may extend to ten years or fine which may extend to Rs.25.00 crores or both. It also provides for certain procedure to be followed for registering the offences punishable under Section 23 and taking their cognizance. While this Act mandates that cognizance of the offences punishable under Section 23 can be taken only upon a complaint filed by specially named authorities and persons and that too by Special Courts established under the Act, it is silent on power of police to make investigation when there is no complaint filed by the authority or person contemplated under Section 26 of the Act. There is no provision made under this Act which expressly confers power upon police to register an F.I.R. and make investigation just like Sections 154 and 156 of the Cr.P.C. These features of the Securities Act are unique and pose some difficulties in operation of the Act in the field giving rise to questions which need to be answered. These questions are :

- i. Who can file a complaint alleging commission of any offence punishable under Section 23 of the Securities Act ?
- ii. Whether filing of a complaint as contemplated under Section 26 of the Securities Act is a must for setting the law in motion ?
- iii. In what circumstances police can make arrest without warrant ?
- iv. Whether police can make investigation and if so, when ?
- v. What is the proper procedure to be followed for dealing with the offences punishable under Section 23 of the Securities Act ?

12] An attempt to answer these questions can best be made by delving into the relevant provisions of the Securities Act and the Cr.P.C. The relevant provisions of the Securities Act could be Sections 25, 26, 26A, 26B and 26D, while the relevant provisions of the Cr.P.C. would be Sections 2(c), 2(d), 2(r), 4, 156, 200 and 202. It would be convenient to reproduce here these provisions of law. They read as follows:

The Securities Contracts (Regulation) Act, 1956

25. Certain offences to be cognizable -

Notwithstanding anything contained in the Code of Criminal Procedure, 1898, any offence punishable under section 23, shall be deemed to be a cognizable offence within the meaning of that Code.

26. Cognizance of offences by courts -

(1) No court shall take cognizance of any offence punishable under this Act or any rules or regulations or bye-laws made thereunder, save on a complaint made by the Central Government or State Government or the Securities and Exchange Board of India or a recognised stock exchange or by any person.

(2) *No court inferior to that of a Court of Session shall try any offence punishable under this Act.*

26A. Establishment of Special Courts -

(1) The Central Government may, for the purpose of providing speedy trial of offences under this Act, by notification, establish or designate as many Special Courts as may be necessary.

(2) A Special Court shall consist of a single judge who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.

(3) A person shall not be qualified for appointment as a judge of a Special Court unless he is, immediately before such appointment, holding the office of a Sessions Judge or an Additional Sessions Judge, as the case may be.

26B. Offences triable by Special Courts -

Notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences under this Act committed prior to the date of commencement of the Securities Laws (Amendment) Second Ordinance, 2013 or on or after the date of such commencement, shall be taken cognizance of and triable by the Special Court established for the area in which the offence is committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the High Court concerned.

26D. Application of Code to proceedings before Special Court -

(1) Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting prosecution before a Special Court shall be deemed to be a Public Prosecutor within the meaning of clause (u) of section 2 of the Code of Criminal Procedure, 1973.

(2) The person conducting prosecution referred to in sub-section (1) should have been in practice as an Advocate for not less than seven years or should have held a post, for a period of not less than seven years, under the Union or a State, requiring special knowledge of law.

Code of Criminal Procedure, 1973

2. Definitions – In this Code, unless the context otherwise requires :

(c) “cognizable offence” means an offence for which, and “cognizable case” means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;

(d) “complaint” means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation – A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint, and the police officer by whom such report is made shall be deemed to be the complainant.

(r) “police report” means a report forwarded by a police officer to a Magistrate under sub-section (2) of section 173.

4. Trial of offences under the Indian Penal

Code and other laws –

(1) All offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

156. Police officer's power to investigate

cognizable case –

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned.

200. Examination of complainant – A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate.

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses -

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under Section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

202. Postponement of issue of process –

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction, postpone the issue of process against the accused, and either inquire into the case

himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding :

Provided that no such direction for investigation shall be made, -

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

13] On reading these provisions, one would realize that they present before us a clear canvas of the procedure to be followed in taking cognizance of offences punishable under Section 23 of the Securities Act, making inquiry or investigation into them and trying the offenders for the purpose of booking them under the law. By Sections 26, 26B and 26D of the Securities Act, a certain procedure has been laid down for dealing with the offences under the Act. This procedure, I must say, is special as it mandates, by making a departure from the provisions of the Cr.P.C., as to how cognizance of offences is to be taken and how they be tried. Section 26 of the Securities Act prescribes a special way of taking cognizance of the offences punishable under the

Securities Act and closes the door on other ways of taking cognizance of offences, quite unlike Section 190 of the Cr.P.C. Under Section 190 of the Cr.P.C., a Magistrate of the First Class, may take cognizance of any offence either upon a complaint or a police report or upon information received from any person other than a police officer or upon his own knowledge. But Section 26 of the Securities Act restricts cognizance taking business to only one mode i.e. upon a complaint by competent authority or person. This is clear from the language employed in Section 26. This section begins with a negative prescription, “No court shall take cognizance....” and ends with an exception created to the bar imposed by saying, “save on complaint made by the Central Government.....”. This would show that cognizance of offences punishable under the Securities Act has to be taken only in the manner prescribed under Section 26 and in no other way. This would also mean that Section 190 of the Cr.P.C. would have no application to the offences under this Act. Section 25 of the Securities Act, however, is not on the procedure but on the nature of offences, with which we shall deal later on. But Sections 26A and 26D are about procedure only. They lay down that offences under the Securities Act shall be triable only by Special Courts and restrict applicability

of provisions of the Cr.P.C. only to the extent that they are not inconsistent with the provisions of the Securities Act.

14] So, this procedure being special in nature would prevail upon the procedure prescribed under the provisions of the Cr.P.C. Section 26D of the Securities Act clearly lays down that except as otherwise provided in the Act, the provisions of the Cr.P.C. shall apply to the proceedings before the Special Court. Section 4(2) of the Cr.P.C. also lays down that generally all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with, according to the provisions of the Cr.P.C., but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing such offences. These two provisions are enough for one to understand that offences punishable under Section 23 of the Securities Act are to be taken cognizance of and tried only in accordance with the provisions of the Securities Act, and in no other way, and that the provisions of the Cr.P.C. shall have application only to the extent that they are not in conflict with the provisions of the Securities Act. Then, there is another principle of law which accords primacy to the provisions of the Securities Act. The principle is that when

law requires a thing to be done in a certain manner, it must be done in that manner only or not at all. A useful reference in this regard may be had to the observations of the Hon'ble Apex Court in the case of *Dhanajaya Reddy vs. State of Karnataka – (2001) 4 SCC 9.* So there is no escape from following the special procedure laid down under the Securities Act for dealing with the offences under it.

15] Now, I shall deal with the questions which have vexed one and all in these matters and which have been formulated earlier. First two questions are on the conditions requisite to set the law in motion, next two questions seek clarification on powers of police to make arrest and to investigate, and the fifth, the last one if I may say so at least for the purpose of the present controversy, yearns to know the procedure to be followed in dealing with the offences under the Securities Act.

16] Offences punishable under the provisions of the Securities Act are deemed to be cognizable under Section 25 of that Act. Ordinarily, under Section 154 of the Cr.P.C., information relating to the commission of a cognizable offence can be given by any person, who has the information about

commission of such an offence. The law thus can be set in motion on the basis of information given by any person either orally or in writing to an officer-in-charge of a police station and upon receipt of such information, a police officer in exercise of his power under Section 156(1) of the Cr.P.C. can, without the order of a Magistrate, make investigation into such an offence. The law can also be set in motion under the scheme of the provisions of the Cr.P.C. by making a complaint in terms of Section 2(d) before a concerned Magistrate. Under Section 190 of the Cr.P.C., cognizance of an offence can be taken by a Magistrate upon either a police report or a complaint filed in terms of Section 2(d) of the Cr.P.C. or information received from any person other than a police officer or own knowledge of the Magistrate that an offence has been committed. This scheme of the Cr.P.C., however, has been substantially altered under the provisions of the Securities Act. It prescribes that cognizance of any offence punishable under this Act can be taken only upon a complaint made by any authority or person contemplated under the Act and in no other way. Had the legislature intended that cognizance of offence be taken upon police report, it would have expressly provided so. Such an express provision, in fact, has been seen to be made in other special enactments.

Example of Section 33(1) of the Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act) can be cited to emphasize the point. Section 33(1) of the POSCO Act reads as under :

33. Procedure and powers of Special Court –

(1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

This would be an additional reason to support the conclusion I have already drawn that cognizance of any offence punishable under Section 23 of the Securities Act must be taken only upon a complaint filed in accordance with the provisions of Section 26 of this Act and in no other way.

17] The term 'complaint' used in Section 26 of the Securities Act has definite meaning in law. It has not been defined in the Securities Act. In view of Section 26(d) of the Securities Act as well as Section 4(2) of the Cr.P.C., this term, therefore, would have to be understood by its definition given in Section 2(d) of the Cr.P.C. This definition makes it clear that in order that any information relating to commission of an offence under the Securities Act qualifies itself to be a

complaint, it must be given either orally or in writing to a Magistrate and not to a police officer as contemplated under Section 154 of the Cr.P.C. and it must be given with a view to the Magistrate taking action against the offender and that it does not include a police report. In other words 'complaint' as contemplated under the law is distinct and different from information given under Section 154 of the Cr.P.C. to an officer-in-charge of a police station regarding commission of a cognizable offence. It is an information disclosing commission of offence given to a Magistrate for the purpose of bringing the offender to book. It also excludes a police report. "Police report" as defined under Section 2(r) of the Cr.P.C. is nothing but a report forwarded by a police officer to a Magistrate under Section 173(2) of the Cr.P.C., which is after completion of the investigation. If a complaint does not include a police report and is also not an information given to a police officer under Section 154 of the Cr.P.C., commonly called the First Information Report, the only way to set the law in motion or to start an inquiry or investigation, as the case may be, for the offence punishable under Section 23 of the Securities Act would be by filing a complaint in terms of Section 26 of that Act.

18] It has been argued by the learned Public Prosecutor that the stage of taking cognizance of an offence arrives only when the investigation is over and the matter is before a Magistrate or a Special Judge and, therefore, investigation can always be made by a police officer into the offences punishable under the Securities Act and after completion of the investigation, the lacuna arising from absence of complaint filed under Section 26 of this Act could be filled up by obtaining such a complaint and filing the same instead of a police report before the Special Court. The learned Senior Counsel for the applicant, however, disagrees contending that there cannot be any investigation unless there is a complaint made by a competent person that an offence punishable under the provisions of the Securities Act has been committed.

19] I must make it clear here that since the provisions of the Cr.P.C. are applicable to the proceedings before a Special Court established under the Securities Act, except as otherwise provided in this Act, a Special Judge appointed in terms of Section 26A of the Securities Act, taking cognizance of an offence punishable under this Act would also have the same power as are conferred upon a Magistrate under the

provisions of the Cr.P.C. The point made by the learned Senior Counsel for the applicant appeals to reason. There cannot be any investigation first, without there being any complaint filed under Section 26 of the Securities Act for, there is no provision in the Cr.P.C. or the Securities Act, which permits a police officer to make investigation first and then obtain a complaint to justify the investigation made. If the argument that an investigation first and complaint later is to be accepted, it would create an anomalous situation. It would be like *putting a cart before the horse*. Such a situation would have serious implications. If the law enforcing agency decides, in the absence of a proper complaint, to make investigation and also arrest the accused and upon culmination of the investigation further decides to take the matter before the competent court, its success in doing so would be contingent upon the competent authority agreeing to file a complaint. If the competent authority refuses to oblige the police officer, all the investigation made will go waste. The arrest of the accused made during the course of the investigation will be rendered illegal and there will be question mark over the propriety and purpose of the whole exercise itself.

20] There is no doubt that a police officer can make investigation into a cognizable offence. But, he can do so either in exercise of his power under Section 156(1) of the Cr.P.C. (i.e. without order of Magistrate) or upon direction received from a Magistrate under Section 156(3) or Section 202 of the Cr.P.C. Here, we are concerned with power of police officer to investigate without order of Magistrate under Section 156(1) of the Cr.P.C. But this power of police officer under Section 156(1) of the Cr.P.C. comes alive only when an information or F.I.R. relating to commission of cognizable offence is received by him under Section 154 of the Cr.P.C. and not otherwise. In the absence of F.I.R. received and registered under Section 154, there would be no case called “cognizable case” to be investigated into by a police officer. Under Section 156(1) of the Cr.P.C., it is worthy to note, what can be investigated is “cognizable case” and this provision avoids use of expression “cognizable offence”. We have, however, seen earlier that the complaint contemplated under Section 26 of the Securities Act is different from the F.I.R. filed under Section 154 of the Cr.P.C. and it does not include within its fold such an F.I.R. Therefore, question of a police officer exercising his power to investigate a cognizable case under Section 156(1) of the Cr.P.C. in case of any offence

under the Securities Act would not arise. It would then follow that filing of a complaint by a competent authority or a person in terms of Section 26 of the Securities Act first is a *sine quo non* for setting the law in motion and making inquiry or investigation into the offences alleged to be committed under the provisions of this Act.

21] The learned Public Prosecutor has relied upon the case of *S.R. Sukumar vs. S. Sunaad Raghuram* in order to bolster her argument that since taking of cognizance is something which occurs at the time when the matter is placed before a Magistrate, Section 26 would have no bearing upon powers of the police to at least register an offence and make investigation into it by invoking the provision of Section 25 of the Securities Act, which makes the offences under this Act as deemed to be cognizable. With due respect, I may say that this case law does not assist the learned Public Prosecutor in convincing me to accept her said argument. The Hon'ble Apex Court in this case has dwelt upon the concept of "cognizance" and has explained as to what amounts to taking of cognizance by a Magistrate. This is clear from its observations made in paragraph 12 that "cognizance of offence' means taking notice of the accusations and applying the judicial mind to the

contents of the complaint and the material filed therewith". The Hon'ble Apex Court has not held that there can be investigation by police without there being a proper complaint received and registered and that the police can obtain such a complaint later on in order to justify the investigation made by it.

22] The next contention of the learned Public Prosecutor is that even otherwise in the instant case, a complaint has been filed by a proper person as the expression "any person" appearing in Section 26 of the Securities Act takes within its fold any police officer including a Police Head Constable or a Naik Police Constable as in the present case. According to the learned Senior Counsel for the applicant, the argument of the learned Public prosecutor is misconceived as the expression "any person" has to be understood by the meaning assigned to the specific words preceding it by application of the principle of *ejusdem generis* and that in any case a police officer cannot be considered to be the Central Government or the State Government under Article 166 of the Constitution of India.

23] Upon a careful consideration of the terms and

expressions employed in Section 26 of the Securities Act, I am persuaded to accept the said argument of the learned Senior Counsel for the applicant. We have seen that a complaint can be filed only by the authorities mentioned therein or by any person. The authorities named in this Section are either the Central Government or the State Government or SEBI or a recognized stock exchange. The words “Central Government or the State Government or the Securities Exchange Board of India or a recognized Stock Exchange” appear first and are followed by the words “or by any person”. Naming of these authorities so specifically in this section only indicates that by such devise the legislature intends to achieve the object of the Securities Act effectively on the one hand and prevent its misuse on the other. In other words, enumeration by the legislature of specific authorities who can file the complaint is consistent with the objects of the Securities Act. Such enumeration of the specific authorities also bundles them up into a distinct class of persons affected by the contravention of the provisions of the Securities Act. This class, though distinct and separate, is not, however, exhaustive. It is only a species of the larger class of affected persons called the genus. There could be several other authorities or persons, who might also be affected similarly by the violation of the provisions of this

Act. These authorities or persons, to illustrate the point and not to exhaust it, could be stated as follows :

- i. registered or recognised broker;
- ii. a Clearing Corporation entrusted with the duties and functions of a Clearing House in terms of Section 8A of the Securities Act;
- iii. all companies of which shares or units of mutual funds are listed on the recognized platform;
- iv. the Depositories contemplated under Regulation 10 of the Securities Contracts (Regulation)(Manner of Increasing and Maintaining Public Shareholding in Recognised Stock Exchanges) Regulations, 2006;
- v. individual shareholders seeking protection against illegal share trading.

24] This would only show that naming of the authorities specifically in this section is not exhaustive. There could be many more such similarly affected authorities or persons. This would lead me to conclude that the conditions necessary for applying the doctrine of *ejusdem generis* to understand the meaning of the general words “any person” are fulfilled in this case.

25] In the case of Kavalappara Kottarathil Kochuni @ Moopil Nayar and others vs. The States of Madras and Kerala and others – AIR 1960 SC 1080, a Constitution Bench of the Hon'ble Apex Court observed in paragraph 50 thus :

“..... The rule is that when general words follow particular and specific words of the same nature, the general words must be confined to the things of the same kind as those specified. But it is clearly laid down by decided cases that the specific words must form a distinct genus or category. It is not an inviolable rule of law, but is only permissible inference in the absence of an indication to the contrary.....”

26] In another Constitution Bench decision in the case of Amar Chandra Chakroborty vs. The Collector of Excise, Government of Tripura and others – AIR 1972 SC 1863, the Hon'ble Apex Court reiterated the same principle and laid down that five conditions must be fulfilled in order that the interpretation of the general words is made by following the doctrine of *ejusdem generis*, when it observed in paragraph 9 thus :

“.....The ejusdem generis rule strives to reconcile the incompatibility between specific and general words. This doctrine applies when (i) the statute

contains an enumeration of specific words; (ii) the subject of the enumeration constitutes a class or category; (iii) that class or category is not exhausted by the enumeration; (iv) the general term follows the enumeration and (v) there is no indication of a different legislative intent.....”

27] It is clear now that the expression “any person” would have to be assigned the same meaning as is conveyed by the specific words preceding it in Section 26 of the Securities Act. In other words, the expression “any person” could not be understood as connoting anything other than that conveyed by the class of persons affected by contravention of the provisions of the Securities Act. The genus of affected persons would include not only its aforesaid species, but also the other species indicated earlier by way of an illustration. It would then follow that a police officer would not be a person falling within the reach of the expression “any person” employed in Section 26 of the Securities Act.

28] I must say it here that if the legislature had intended that “any person” would also include a police officer, it would have expressed so specifically and the fact that the legislature refrained from doing so would be sufficient to infer

that the legislature intended to exclude a police officer from the meaning conveyed by the expression “any person”. There are other special enactments in which the legislature has expressly provided for authority of the police to make investigation and while conferring such a power, the legislature has not only conferred such power on the police, but also clarified that it shall be exercised only by the police officer of a particular rank and not any police officer. By way of illustration, a few of such enactments could be referred to, such as Section 17 of the Prevention of Corruption Act, 1988 or Section 43 of the Unlawful Activities (Prevention) Act, 1967. Such provision is conspicuously absent in the Securities Act and, therefore, it would serve as an additional reason for saying that in the expression “any person”, a police officer is neither included nor contemplated.

29] An attempt has been made on behalf of the prosecution to faintly suggest that a police officer can also fulfill the requisites of the expression “the State Government” used in Section 26 of the Securities Act. I am afraid, it can never be so in view of the provisions of Article 166 read with Article 12 of the Constitution of India as pointed out to me by the learned Senior Counsel for the applicant. Under Article 12 “the State” includes *inter alia* the State Government and under

Article 166, every executive action of the State Government has to be taken in the name of the Governor in accordance with the rules made for transaction of its business. A police officer intending to file a complaint alleging contravention of the provisions of the Securities Act does not and cannot do so in the name of the Governor, unless the rules made for the convenient transaction of government business permit him to do so. Hypothetically speaking, even when a provision granting such permission is made in the rules, no such rule has been shown, it would ordinarily specify the rank of the police officer, which would generally be much higher than that of a Police Head Constable. This is for the reason that the requirements of taking action against the culprits under this Act, given the white collar nature of the crime involving deep understanding of the operation of the share market, are of much higher standard. The argument is, therefore, rejected.

30] The learned Public Prosecutor has further argued that Section 25 of the Securities Act makes the offences punishable under the Securities Act cognizable and, therefore, permits police to make the investigation. It is also her argument that Section 25 of this Act operates independently of Section 26 of the Act. I have already found that there

cannot be any investigation first and complaint later or to be precise at the end of the investigation. Such an interpretation is like *having a dessert first and the main course later*. It is also fraught with great risk emanating from the chance a police officer would be taking. If it happens that, after a person is put behind the bars, investigation is made and completed, the authority or the person contemplated under Section 26 of the Securities Act refuses to oblige the police by lodging a complaint, the entire exercise undertaken by the police including arrest and detention would stand vitiated and then one does not know as to how the solace to the affected person would be provided, who will do it and in what manner. Surely, this is not the intention of the legislature. Therefore, harmonious interpretation in this case would have to be made by reading together the provisions of Sections 25 and 26 of the Securities Act and also the relevant provisions of the Cr.P.C. Once such an interpretation is made, one would find that it facilitates the intention of the legislature, by suppressing undesirable transactions in securities, preventing loss being caused to the state exchequer or any other stakeholders and also preventing abuse of the procedure prescribed under the Securities Act. Such an interpretation would also show that Section 25 does not operate

independently and is indeed supplemental to Section 26 of the Securities Act.

31] What Section 25 provides is cognizability of any offence punishable under Section 23 of the Securities Act by a deeming fiction. Under Section 2(c) of the Cr.P.C., a cognizable offence is the one for which police can make arrest without warrant. When offence is made cognizable by a deeming fiction, it necessarily follows that a police officer can make arrest without warrant only when the other conditions prescribed in the enactment are fulfilled. This will not be so, when an offence is made cognizable in its own right and in that case a police officer would get authority to make arrest without warrant the moment the offence is registered. This would mean that a police officer would get the authority to make arrest without warrant only when there is a complaint filed before the Special Court under Section 26 of the Securities Act and other conditions implicit in the provisions of Chapter XV and XVI of the Cr.P.C. are fulfilled. The procedure indicated by various provisions of Chapter XV and XVI of the Cr.P.C. would also have to be followed by the Court before whom the complaint is filed. Under Section 200 of the Cr.P.C., a Magistrate can take cognizance of the offence, and

in his discretion, exercised in accordance with law, may decide to either dismiss the complaint under Section 203 of the Cr.P.C. or issue the process in terms of Section 204 of the Cr.P.C. Under Section 202(1), a Magistrate or the Special Judge in case of the offences punishable under Section 23 of the Securities Act, can also postpone the issue of process against the accused and either inquiry into the case himself or direct an investigation to be made by a police officer or some other fit person, for the purpose of deciding whether or not there is sufficient ground for proceeding. It is here under Section 202(1) of the Cr.P.C. when a decision is taken to postpone the issue of process that a Special Court in its discretion may direct an investigation to be made in the case by a police officer. It is only when such a direction is issued that a police officer can make investigation and not otherwise. If the direction of the Special Judge does not contain any further order regarding making of the arrest, a police officer making investigation need not once again approach him to seek clarification regarding arrest and can, without there being any warrant or specific order issued by the Special Judge, effect arrest of the accused during the course of the investigation. Section 25 of the Securities Act is thus dependent upon filing of the complaint under Section 26 of

the Securities Act as well as issuance of direction by a Special Judge or Court for investigation to be made by the police officer. Once a complaint is filed under Section 26 and a direction for police investigation under Section 202(1) of the Cr.P.C. is issued, a police officer would get all the power to make the arrest by virtue of the deeming provision of the cognizability of the offence. In a way, Section 25 also acts as a clarification for the police officer that on receipt of the direction for investigation by him, he need not ask for further orders or directions for effecting the arrest of the accused. Thus, Section 25 does not operate independently of Section 26 of the Securities Act rather it supports and supplements Section 26 so that there is effective investigation and proper collection of evidence against the offender. Such an inference arises by interpreting harmoniously all the relevant provisions. It also promotes the object of the Securities Act, and prevents any anomalous situation arising from independent reading of Sections 25 and 26 of the Act.

32] In any case, Section 25 of the Securities Act cannot be understood as conferring power upon the police to also make investigation in the offence punishable under Section 23 *de hors* a complaint filed under Section 26 just because these

offences are deemed to be cognizable for which a police officer can make arrest without warrant. There is a marked distinction between authority to make arrest without warrant in a cognizable offence and power to make investigation without order of a Magistrate in a cognizable case. What Section 25 does is that it lends cognizability to any offence punishable under Section 23 of the Securities Act and nothing more. It does not make the case relating to any of these offences as cognizable. Power of a police officer to make investigation under Section 156 of the Cr.P.C. without order of a Magistrate is in respect of a cognizable case and it emanates from receiving an information relating to commission of a cognizable offence under Section 154 of the Cr.P.C. This power sees its culmination when either a report under Section 169 or a police report under Section 173(2) is filed before a Magistrate. We have already seen that law can be set in motion under the provisions of the Securities Act only upon a complaint filed by a competent authority or a person named in Section 26 of the Securities Act and that such complaint excludes the police report. Therefore, there would be no question of receiving of any information in respect of commission of cognizable offence by a police officer as contemplated under Section 154 of the Cr.P.C. and if there

is not such an information, there would be no further question of a police officer getting an authority under Section 156 of the Cr.P.C. to make investigation in such an offence. Even according to explanation to Section 2(d) of the Cr.P.C., defining “complaint”, a report made by a police officer is deemed to be the complaint only when it discloses, after investigation, the commission of a non-cognizable offence. Section 25 of the Securities Act, however, makes any offence under Section 23 of this Act cognizable. Therefore, by no stretch of imagination, it could be said that there could be an investigation by a police officer and after investigation what could be filed by the police officer could be deemed to be a complaint as laid down in the explanation of Section 2(d) of the Cr.P.C. So, the investigation by a police officer without fulfilling the conditions discussed earlier would be a clear no no under the scheme of the provisions of the Securities Act. However, if those conditions are fulfilled, certainly there could be an investigation, there could be an arrest, and there could be also a report indicating final result of the investigation to be placed before the Special Court in order to enable it to deal with the same in accordance with law either under Sections 203 or 204 of the Cr.P.C.

Guidance Manual issued by the SEBI, wherein one of the instructions is on the lines that as the offences punishable under Section 23 of the Securities Act are cognizable as per Section 25, police can make investigation. I must say, such an instruction would only be the perception of law carried by the SEBI, which could be a complainant under Section 26. A complainant's perception of law does not take the place of law. The reliance of the learned Public Prosecutor on the Guidance Manual, in my humble opinion, is incorrect.

34] The learned Senior Counsel for the applicant as well as the learned Public Prosecutor both have placed reliance upon the case of *Jeewan Kumar Raut (supra)* in order to support their differing lines of arguments. Reliance of the learned Senior Counsel is on the principle that the Securities Act being a special statute, it shall prevail over the provisions of the Cr.P.C. as soon as a conflict between the two arises and reliance of the learned Public Prosecutor is primarily on the observations of the Hon'ble Apex Court appearing in Paragraph 25 holding that, as Section 22 of the Transplantation of Human Organs Act, 1994 (for short 'the TOHO Act) prohibits taking of cognizance except on a complaint made by an appropriate authority and even though

the C.B.I. has all the power of an investigating agency, it would have to file a complaint petition only as an appropriate authority and not a police report in consonance with the requirements of Section 22 of the TOHO Act.

35] I do not think that there could be any quarrel about the principle of prevalence of special statute over the provisions of the Cr.P.C. to the extent that they modify or replace the provisions of the Cr.P.C. But, the principle sought to be culled out from the observations of the Hon'ble Apex Court in paragraph 25 by the learned Public Prosecutor cannot be seen to be really emerging from it as those observations have been made in the light of specific provisions contained in that Act, especially the Section 13 of the TOHO Act, which provision is conspicuously absent in the Securities Act. Section 13 of the TOHO Act expressly confers authority upon the C.B.I. to make investigation. Therefore, the Hon'ble Apex Court reconciling the provision of Section 22, which lays down that the Court shall take cognizance of an offence under that Act only upon a complaint made by the appropriate authority with the provision of Section 13 of that Act, held that while C.B.I. can make investigation, what it can file before the Court upon completion of investigation is only a

complaint petition and not a police report. As stated earlier, the provision akin to that of Section 13 of the TOHO Act is absent in the Securities Act and, therefore, said observations of the Hon'ble Apex Court in the case of *Jeewan Kumar Raut* would render no assistance to the line of argument adopted by the learned Public Prosecutor.

36] Rival parties have also referred to me the two cases (i) *Dr. Sandhya Arun Kulkarni vs. The State of Maharashtra and another – 2016 ALL MR (Cri) 963* and (ii) unreported case of *Pankaj Pathak vs. State of Madhya Pradesh and another.*

37] In the case of *Dr. Sandhya Kulkarni*, this Court took a view that combined reading of Sections 17 and 28 of Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 would make it clear that the complaint for contravention of the provisions of that Act must be filed by an appropriate authority or the officer authorised by the appropriate authority and if the complaint has not been filed by such an authority or the officer, the Court would be precluded from taking cognizance of the complaint. The unreported case of *Pankaj Pathak* appears to

be decided in view of the compromise arrived at between the petitioner and respondent therein and that there is a passing reference made to the effect that police have no authority to register an F.I.R. for an offence punishable under the Securities Act.

38] The case of *Dr. Sandhya Kulkarni* is in the context of a different enactment and, therefore, would have no direct application to the facts of the present case. In the case of *Pankaj Pathak*, only a passing remark has been made that an F.I.R. cannot be registered in respect of an offence punishable under the provisions of the Securities Act. I do not think that such a passing reference made in the order of the learned Single Judge of Madhya Pradesh High Court could render any meaningful assistance in deciding the controversy involved in this case.

39] The result of the above discussion would lead to the following conclusions, which answer the questions formulated in this order thus :

- (a) Complaint alleging commission of any offence punishable under Section 23 of the Securities Act can be filed only by the Central Government or the

State Government, or the SEBI or recognized stock exchange or by any person, who falls in the same category as the category of the authorities mentioned in Section 26 or who is a person affected by contravention of the provisions of the Securities Act.

(b) Filing of a complaint by an authority or a person contemplated by Section 26 of the Securities Act, is *sine qua non* for setting the law in motion.

(c) No authority has been given under the Securities Act to a Police Officer of any rank to file a complaint under Section 26 of the Securities Act.

(d) A Police Officer can neither make investigation into the offences punishable under the Securities Act nor effect arrest for them till the time the requisite conditions discussed at length in the order are fulfilled.

(e) The procedure for dealing with the offences punishable under Section 23 of the Securities Act would be governed by Sections 26, 26B and Section 26D of that Act together with applicable and relevant provisions of the Cr.P.C., in particular,

those contained in Chapters XV and XVI of the Cr.P.C.

40] Once it is found that there can be no investigation initiated by a Police Officer without there being a complaint filed in terms of Section 26 of the Securities Act and also without there being any express authorisation by the competent Court given to him for making an investigation into the offences alleged to be committed under various clauses of Section 23(1) of the Securities Act, no arrest can be sought to be made by a Police Officer. In this case, there is no complaint filed so far in terms of Section 26 of the Securities Act. Therefore, insofar as this offence is concerned, the applicant would be entitled to be released on confirmed anticipatory bail.

41] As regards the offences registered under various sections of the I.P.C., I must say, as of now, there is no material available on record from which *prima facie* involvement of the applicant in all or any of the offences could be seen. There is not even an allegation that anybody has been induced with dishonest intention to part with money or property. There is also nothing available on record showing that some documents have been *prima facie* falsified by the

applicant. In fact, there is also not much dispute raised about deficiency of the prosecution case on these counts. Therefore, even for these offences, the applicant would be entitled to be granted a relief of confirmed anticipatory bail.

42] I think, it would be appropriate to make it clear that the observations made in this order are confined to decide the controversy raised in these applications, and therefore, they will not be construed as precluding the competent authority or person as contemplated under Section 26 of the Securities Act from filing an appropriate complaint or initiate appropriate proceedings, as permissible under the law.

43] In the result, I am inclined to grant these applications. Hence, the order.

The applications are allowed and the interim anticipatory bail granted to the applicant on 13th July, 2016 by this Court in these applications is hereby confirmed on the same conditions subject to observations made herein above.

All the applications are disposed of accordingly.

C E R T I F I C A T E

I certify that this order uploaded is a true and correct copy of the original signed order.

Uploaded by: S.D. Waghmare
P.A. to the Hon'ble Judge.

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