

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPLICATION (MAIN) NO. 71 OF 2017

Pradeep Ramchandra Velip,
major of age, Police Inspector,
currently attached to the
Notice Branch, Traffic Police,
Goa Police, Altinho, Panaji, Goa.

..... Petitioner.

Versus

(1) The State of Goa,
through Police Inspector,
Maina Curtorim Police Station,
Maina Curtorim, Salcete, Goa.

(2) The Police Inspector,
Maina Curtorim Police Station,
Maina Curtorim, Salcete, Goa.

(3) Peter Luis, major of age,
H.No.852, Mugali Moll,
Sao Jose de Areal, Salcete Goa.

..... Respondents.

Mr. Ryan Menezes, Advocate for the Petitioner.

Mr. S.R. Rivonkar, Public Prosecutor for Respondents No.1 & 2.

None for Respondent No.3, though served.

***Coram : Shantanu S. Kemkar &
Nutan D. Sardesai, JJ.***

Date : 5 January 2018.

ORAL JUDGMENT : (Per Shantanu S. Kemkar, J.)

This Criminal Misc. Application (Main) has been filed under Section 482 of the Criminal Procedure Code 1973 (for short “Cr.P.C.”) for quashing and setting aside the Order dated 9th July 2013, passed by the Judicial Magistrate, First Class, at Margao in Criminal Misc. Application No.990/2012/D, as also the Judgment & Order dated 23rd September, 2016, passed by the Additional Sessions Judge, South Goa, at Margao in Criminal Revision Application No.80/2013/I, allowing the application filed under Sections 155 and 156 of the Cr.P.C., by the third respondent Peter Luis, by directing the Police to register the complaint dated 4.12.2012 filed by him against the Petitioner for commission of the alleged offences under Sections 341, 506, 337, 182 and 211, read with Section 34 of the Indian Penal Code and investigate same.

2. The Petitioner, at the relevant time, was working as a Police Sub-Inspector at Maina-Curtorim Police Station. According to him, on 26th November 2012 at about 3.50 hours he was on night round patrolling duty/vehicle checking. On reaching Ramnagar Junction, Mugalli, Salcete, from Nessai side, he noticed two persons standing near a motorcycle (Bajaj XCD, GA-08-J-4335). On suspicion, he questioned them about their presence at the spot at

such odd hours. On being questioned, the said persons attempted to flee from the spot, but their attempt to flee was thwarted by him and the Police Constable who was accompanying him. The Constable and the Petitioner apprehended them and on further questioning about their identity, both of them started giving evasive and irrelevant replies. They avoided to show the driving licence and other papers of the motorcycle and became aggressive and started arguing and abusing the Petitioner. In the meantime, another person arrived at the spot on a motorcycle stating that the rider of the earlier motor cycle was his brother Peter Luis (respondent No.3) and the pillion was his friend Francis. All the three persons then charged towards the Petitioner and started pushing him, using criminal force. At that point of time, other police staff arrived in a TATA Sumo Jeep. On seeing the additional police arriving at the spot, the third respondent caught hold of the left side shoulder flap of the Petitioner and threw him on the road, and all of them fled in different directions.

3. An FIR was lodged qua the incident against the said three persons and the case was investigated by PSI Shri R.D. Dessai. On 27th November 2012, the third respondent Peter Luis, Ronson Luis and Francisco Rebello sought pre-arrest bail from the Sessions Court, South Goa, Margao. Their applications were granted on 30th November 2012. After investigation, the Police filed the

investigation report and Criminal Case No.406/S/2012/III was registered against the three accused persons.

4. According to the Petitioner, on 4th December, 2012, the third respondent submitted a complaint, making frivolous allegations against him, to the Superintendent of Police, demanding action against the Petitioner and others. He also made a complaint to the State Human Rights Commission against the Petitioner. Thereafter, the third respondent filed a complaint dated 20th December 2012 before the Judicial Magistrate, First Class, Margao, seeking direction for registration of an FIR and investigation under Section 156 of the Criminal Procedure Code. By the impugned Order, the learned Magistrate has directed the Police Inspector, Maina Curtorim Police Station to register the Complaint dated 4th December 2012 filed by the respondent No.3 and investigate the same as per law, either by himself or by any other responsible Officer deputed by him on his behalf. The said Order was challenged by the Petitioner in Criminal Revision Application No.80/2013 before the learned Additional Sessions Judge-1, South Goa. The learned Additional Sessions Judge-1, South Goa, Margao vide, Margao vide Judgment dated 23rd September, 2016 dismissed the Petitioner's Criminal Revision Application. Aggrieved by the said Order and the Judgment, the Petitioner has filed this Petition invoking jurisdiction

of this court under Section 482 of the Cr.P.C..

5. Mr. R. Menezes, learned Counsel for the Petitioner argued that both the Courts below have committed an error in holding that for issuing directions under Sections 156(3) of the Cr.P.C. by the Magistrate for registration of an offence against a public servant, sanction as contemplated under Section 197 of the Cr.P.C. is not required and the bar under Section 197 of the Cr.P.C. regarding taking of cognizance would not be applicable. The learned Counsel for the Petitioner has pointed out that the question involved in this petition is squarely covered by the Judgment passed by the Supreme Court in the case of *Anil Kumar & Ors. vs. M.K. Aiyappa & Anr.*, reported in 2013(4) Bom.C.R.(Cri) 296. It has also been argued by the learned Counsel for the Petitioner that the Courts below have committed an error in distinguishing the Judgment passed by the Supreme Court in the case of *Anil Kumar & Ors. (supra)* merely by saying that the same is under the provisions of the Prevention of Corruption Act. He also argued that the Courts below have failed to follow the ratio of the case of *Anil Kumar & Ors. (supra)* and have also failed to see that the provisions for sanction under Section 19(1) of the Prevention of Corruption Act and Section 197(1) of the Cr.P.C. are *pari materia*. He also submits that while passing the impugned order, the Courts below have also not

taken into consideration the fact that the complaint filed by the third respondent was not supported by an affidavit and on this ground alone the same was liable to be dismissed. In support of this submission, he placed reliance on the Judgment of the Supreme Court in the case of *Priyanka Srivastava and anr. vs. State of Uttar Pradesh and ors.*, (2015) 6 SCC 287.

6. Mr. S.R. Rivonkar, learned Public Prosecutor appearing for respondents No.1 and 2 has also supported the submissions made by the learned Counsel for the Petitioner and has submitted that in the absence of sanction for prosecution against the Petitioner Public Servant, invocation of powers under Section 156(3) of Cr.P.C. by the learned Magistrate was not permissible.

7. None for the third respondent despite service of notice.

8. We have considered the submissions made by the learned Counsel for the Petitioner and the learned Public Prosecutor and perused the impugned Order and Judgment.

9. The Supreme Court in the case of *Anil Kumar & Ors. (supra)*, while dealing with the question as to whether the Special Judge/Magistrate is justified in referring a private complaint made under Section 200 Cr.P.C. for investigation by the Deputy

Superintendent of Police-Karnataka Lokayukta in exercise of powers conferred under Section 156(3) Cr.P.C. without the production of a valid sanction order under Section 19 of the Prevention of Corruption Act, has considered the scope of Section 156(3) and the word “cognizance” and in paragraphs 8 to 12 has held as under :

“8. We may first examine whether the Magistrate, while exercising his powers under Section 156(3) Cr.P.C., could act in a mechanical or casual manner and go on with the complaint after getting the report. The scope of the above mentioned provision came up for consideration before this Court in several cases. This Court in Maksud Saiyed case (supra) examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where a jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 Cr.P.C., the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) Cr.P.C., should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation.

9. We will now examine whether the order directing investigation under Section 156(3) Cr.P.C. would amount to taking cognizance of the offence, since a contention was raised that the expression "cognizance" appearing in Section 19(1) of the PC Act will have to be construed as post-cognizance stage, not pre-cognizance stage and, therefore, the requirement of sanction does not arise prior to taking cognizance of the offences punishable under the provisions of the PC Act. The expression "cognizance" which appears in Section 197 Cr.P.C. came up for consideration before a three-Judge Bench of this Court in *State of Uttar Pradesh v. Paras Nath Singh* (2009) 6 SCC 372, and this Court expressed the following view:

"6.And the jurisdiction of a Magistrate to take cognizance of any offence is provided by Section 190 of the Code, either on receipt of a complaint, or upon a police report or upon information received from any person other than a police officer, or upon his knowledge that such offence has been committed. So far as public servants are concerned, the cognizance of any offence, by any court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression, no court shall take cognizance of such offence except with the previous sanction. Use

of the words no and shall makes it abundantly clear that the bar on the exercise of power of the court to take cognizance of any offence is absolute and complete. The very cognizance is barred. That is, the complaint cannot be taken notice of. According to Blacks Law Dictionary the word cognizance means jurisdiction or the exercise of jurisdiction or power to try and determine causes. In common parlance, it means taking notice of. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have been committed during discharge of his official duty.

xxx xxx xxx

xxx xxx xxx"

In State of West Bengal and Another v. Mohd. Khalid and Others (1995) 1 SCC 684, this Court has observed as follows:

"It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to proceed against the offenders against whom a prima facie case is made out."

10. The meaning of the said expression was also considered by this Court in Subramaniam Swamy case (supra). The judgments referred to herein above clearly indicate that the word "cognizance" has a wider connotation and not merely confined to the stage of taking cognizance of the offence. When a Special Judge refers a complaint for investigation under Section 156(3) Cr.P.C., obviously, he has not taken cognizance of the offence and, therefore, it is a pre-cognizance stage and cannot be equated with post-cognizance stage. When a Special Judge takes cognizance of the offence on a complaint presented under Section 200 Cr.P.C. and the next step to be taken is to follow up under Section 202 Cr.P.C. Consequently, a Special Judge referring the case for investigation under Section 156(3) is at pre-cognizance stage.

11. A Special Judge is deemed to be a Magistrate under Section 5(4) of the PC Act and, therefore, clothed with all the magisterial powers provided under the Code of Criminal Procedure. When a private complaint is filed before the Magistrate, he has two options. He may take cognizance of the offence under Section 190 Cr.P.C. or proceed further in enquiry or trial. A Magistrate, who is otherwise competent to take cognizance, without taking cognizance under Section 190, may direct an investigation under Section 156(3) Cr.P.C. The Magistrate, who is empowered under Section 190 to take cognizance, alone has the power to refer a private complaint for police investigation under Section 156(3) Cr.P.C..

12. We may now examine whether, in the above mentioned legal situation, the requirement of sanction is a pre-condition for ordering investigation under Section

156(3) Cr.P.C., even at a pre-cognizance stage. Section 2(c) of the PC Act deals with the definition of the expression "public servant" and provides under Clauses (viii) and (xii) as under:

"(viii) any person who holds an office by virtue of which he is authorised or required to perform any public duty.

(xii) any person who is an office-bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the Central Government or any State Government, or local or other public authority."

The relevant provision for sanction is given in Section 19(1) of the PC Act, which reads as under:

"19. Previous sanction necessary for prosecution. -

(1) No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction –

(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person who is employed in connection with the affairs of a State and is not removeable from his office save by or with the sanction of the State Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office."

Section 19(3) of the PC Act also has some relevance; the operative portion of the same is extracted hereunder:

"Section 19(3) - Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) --

(a) no finding, sentence or order passed by a special judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of absence of, or any error, omission or irregularity in the sanction required under sub-section (1), unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby;

(b) xxx xxx xxx

(c) xxx xxx xxx"

10. In paragraph 14, the Supreme Court also considered the order passed by it in Criminal Appeal No.257 of 2011 in the case of *General Officer, Commanding vs. CBI* in which the issue of sanction was considered, and summarized by following term :

“Thus, in view of the above, the law on the issue of sanction can be summarized to the effect that the question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duty. In order that the public servant may not be unnecessarily harassed on a complaint of an unscrupulous person, it is obligatory on the part of the executive authority to protect him .. If the law requires sanction, and the court proceeds against a public

servant without sanction, the public servant has a right to raise the issue of jurisdiction as the entire action may be rendered void ab-initio."

11. The aforesaid Judgment of the Supreme Court came into consideration before a Division Bench of this Court consisting of the Chief Justice Mohit Shah, J. in Criminal Writ Petition No. 126 of 2014, in the case of *Advocate Aires Rodrigues vs. Officer in Charge, Anti Corruption Branch, and ors.*, decided on 22nd December 2014. In paragraphs 4, 5 and 6, the Division Bench has observed thus and held that the decision of the Supreme Court in the case of *Anil Kumar & Ors. (supra)* is binding and cannot be allowed to be watered down.

"4. The petitioner appearing as party in person is not in a position to dispute that the present case is squarely covered by the ratio laid down by the Supreme Court in the case of **Anil Kumar** (supra). The petitioner, however, sought to contend that the decision in **Anil Kumar's** case was rendered without considering the ratio laid down by the Supreme Court in some other decisions, including the decisions of the Constitution Bench in *Matajog Dobey vs. H.C. Bhari*, AIR 1956 SC 44 and decision of the three Judge Bench in *R.R. Chari vs. State of Uttar Pradesh*, AIR 1951 SC 207, and *Devarapalli Lakshminarayana Reddy and others vs. V. Narayana Reddy and others*. (1976) 3 SCC 252 and some other decisions. The petitioner also sought to rely upon the decision of two Judge Bench of the Supreme Court dated 7th July, 2014 in Criminal Appeal No. 1359 of 2014 and

contended that the Supreme Court has taken a different view in the matter than the view taken in Anil Kumar's case.

5. We have carefully considered the aforesaid decisions sought to be relied upon by the petitioner. In **Anil Kumar'** case, the Supreme Court has considered various decisions relied upon by the petitioner, including the decisions in **Tula Ram and others vs. Kishore Singh**, (1977) 4 SCC 459; **R.S. Nayak vs. A. R. Antulay**, (1984) 2 SCC (Cri) 172; **State of West Bengal vs. Mohd. Khalid**, (1995) 1 SCC 684, **Srinivas Gundluri vs. SEPCO Electric Power Construction Corporation**, (2010) 8 SCC 206 and **Subramanian Swamy vs. Manmohan Singh**, (2012) 3 SCC 64.

6. It is relevant to note that in **Tula Ram and others vs. Kishore Singh** (supra), the Supreme Court had already considered the decisions in **R.R. Chari vs. State of Uttar Pradesh** (supra) **Devarapalli Lakshminarayana Reddy and others vs. V. Narayana Reddy and others** (supra) and other decisions. Thus the binding decision of the Supreme Court in the case of **Anil Kumar** (supra), decided on October 1, 2013 cannot be allowed to be watered down on the ground that there are other decisions on the point rendered by Larger Benches of the Supreme Court.”

12. Thus, in view of the clear pronouncements of the Supreme Court, in our considered view the learned Magistrate did not have jurisdiction to order registration of the FIR and direct investigation into the offences under the Indian Penal Code against the Petitioner in the absence of there being any sanction for

prosecution under Section 197 of the Cr.P.C.

13. The Supreme Court in the case of *Priyanka Srivastava and anr. (supra)*, in paragraphs 22 and 30 has held thus :

“22. In *Anil Kumar v. M.K. Aiyappa (supra)*, the two-Judge Bench had to say this: (SCC p. 711, para 11)

“11. The scope of Section 156(3) CrPC came up for consideration before this Court in several cases. This Court in *Maksud Saiyed (2008) 5 SCC 668*, examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 CrPC, the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) CrPC, should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation.

30. In our considered opinion, a stage has come

in this country where Section 156(3) CrPC applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of the said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.”

14. In the present case, we find that the third respondent did not file any affidavit in support of the complaint. Though the complaint was filed prior to the passing of the judgment by the Supreme Court in the case of *Priyanka Srivastava and anr. (supra)*, but the Revision was decided after the Judgment of the Supreme Court and, as such, the Revisional Court ought to have taken note of the Judgment of the Supreme Court in the case of *Priyanka Srivastava and anr. (supra)*. In the result, there is violation of the law laid down by the Supreme Court in *Priyanka Srivastava and anr.*

(*supra*), and for this reason also the impugned orders are liable to be quashed.

15. So far as the reason assigned by both the Courts below that since the law laid down by the Supreme Court in the case of *Anil Kumar & Ors. (supra)* is in the matter of the Prevention of Corruption Act and therefore is not applicable, cannot be accepted. As the provisions contained under Section 19(1) of the Prevention of Corruption Act, as also in Section 197(1) of the Cr.P.C., so far as they relate to the sanction being identical, the ratio of the said Judgment applies with full force to the present matter and, as such, the law laid down by the Supreme Court in the case of *Anil Kumar & Ors. (supra)* was required to have been followed.

16. In the result the Petition is allowed. The impugned Order dated 9th July 2013, passed by the Judicial Magistrate, First Class, at Margao in Criminal Misc. Application No.990/2012/D, as also the Judgment & Order dated 23rd September, 2016, passed by the Additional Sessions Judge-1, South Goa, at Margao in Criminal Revision Application No.80/2013/I, are quashed and set aside.

17. Rule is made absolute in the above terms.

Nutan D. Sardesai, J.

Shantanu S. Kemkar, J.