Reported in **ILR [2011] M.P. 2629**

SPECIAL LEAVE PETITION PREFERRED AGAINST THE ORDER AND REGISTERED AS SLP(CRI.) NO.8958/11 HAS BEEN DISMISSED BY THE APEX COURT ON 18.11.2011.

HIGH COURT OF MADHYA PRADESH : JABALPUR

Present : **Hon. Shri Justice R.C. Mishra**
Hon. Smt. Justice Vimla Jain

MISCELLANEOUS CRIMINAL CASE NO.3187/2008

(1) Ashok Kumar Jain, aged about 48 years, son of Sheel Chand Jain

(2) Smt. Sunita Jain, wife of Ashok Kumar Jain, Both Resident of M-4 BDA Complex, Near Mata Mandir, Bhopal

(3) Rajeev Jain, son of Sheel Chand Jain, Resident of Sonal House Club Road, Distt. Vidisha ...**Petitioners**

vs.

(1) Central Bureau of Investigation, through its Supdt. of Police, Anweshan Bhawan, Char Imli, Bhopal.

(2) Umed Singh Raghuwanshi, son of Gangaram Raghuwanshi, Resident of Behlot Road, Kalabag, Ganjbasoda, Vidisha.

(3) Raj Kumar Sen, son of Ramesh Prasad Sen, Resident of 29/12 Old Subhash Nagar, Bhopal

(4) Ramesh Chandra Parashar, Resident of E-5/135, Arera Colony, Bhopal

(5) Pradeep Chaturvedi, son of S.S. Chaturvedi, Resident of Umrao Singh Bagicha, Near Railway Station, Ganjbasoda, Vidisha.

(6) Syed Sajid Aslam, son of S.S.M. Aslam, Resident of H. No.3, Ahata Rustoom Khan, Shyamla Hills, Bhopal.

(7) Nanulal Ahirwar, son of Sonitram, Resident of behind Usha Company, Near Sagar Puliya, Sagar Road, Distt. Vidisha ...**Respondents**

Shri Ajay Mishra, Sr. Adv. with Shri Mukesh Sahu, Adv. for petitioners.

Shri Vikram Singh, Standing Counsel for respondent no.1-CBI.

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CRIMINAL REVISION NO.554/2007

(1) Ashok Kumar Jain, aged about 48 years,
son of Sheel Chand Jain

(1) Smt. Sunita Jain, wife of Ashok Kumar Jain,
Both Resident of M-4 BDA Complex,
Near Mata Mandir, Bhopal

(2) Rajeev Jain, son of Sheel Chand Jain,
Resident of Sonal House Club Road,
Distt. Vidisha ...**Petitioners**

vs.

(1) Central Bureau of Investigation,
through its Supdt. Of Police, Anweshan Bhawan,
Char Imli, Bhopal.

(2) Umed Singh Raghuwanshi,
son of Gangaram Raghuwanshi,
Resident of Behlot Road, Kalabag,
Ganjbasoda, Vidisha.

(3) Raj Kumar Sen, son of Ramesh Prasad Sen,
Resident of 29/12 Old Subhash Nagar, Bhopal

(4) Ramesh Chandra Parashar,
Resident of E-5/135, Arera Colony, Bhopal

(1) Pradeep Chaturvedi,
son of S.S. Chaturvedi,
Resident of Umrao Singh Bagicha,
Near Railway Station, Ganjbasoda, Vidisha.

(2) Syed Sajid Aslam,
son of S.S.M. Aslam,
Resident of H. No.3, Ahata Rustoom Khan,
Shyamla Hills, Bhopal

(1) Ashok Kumar Jain, son of Babulal Jain,
Resident of Malviya Park, Vidisha

(2) Nanulal Ahirwar, son of Sonitram,
Resident of behind Usha Company,
Near Sagar Puliya, Sagar Road,
Distt. Vidisha ...**Respondents**

Shri Ajay Mishra, Senior Counsel with Shri Mukesh Sahu, Advocate, for the petitioner.

Shri Vikram Singh, Standing Counsel for the respondent-CBI.

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CRIMINAL REVISION NO.836/2008

Ashok Kumar Jain, son of late Babulal Jain,
aged about 57 years, Income Tax Advocate,
Resident of opp. Malviya Garden, Vidisha ... **Petitioner**

vs.

CBI/ACB Bhopal ... **Respondent**

Shri Vijay Nayak, Adv. for the petitioner.

Shri Vikram Singh, Standing Counsel for the respondent-CBI.

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CRIMINAL REVISION NO.1098/2008

(1) Umed Singh Raghuwanshi, son of Gangaram Raghuwanshi, Resident of Behlot Road, Kalabag, Ganjbasoda, Vidisha.
(2) Raj Kumar Sen, son of Ramesh Prasad Sen, Resident of 29/12 Old Subhash Nagar, Bhopal
(3) Ramesh Chandra Parashar, Resident of E-5/135, Arera Colony, Bhopal
(3) Pradeep Chaturvedi, son of S.S. Chaturvedi, Resident of Umrao Singh Bagicha, Near Railway Station, Ganjbasoda, Vidisha.
(1) Syed Sajid Aslam, son of S.S.M. Aslam, Resident of H. No.3, Ahata Rustoom Khan, Shyamla Hills, Bhopal ...**Petitioners**

vs.

(1) Central Bureau of Investigation, through its Supdt. Of Police, Char Imli, Bhopal.
(2) Ashok Kumar Jain, aged about 48 years, son of Sheel Chand Jain
(3) Smt. Sunita Jain, wife of Ashok Kumar Jain, Both Resident of M-4 BDA Complex, Near Mata Mandir, Bhopal
(4) Rajeev Jain, son of Sheel Chand Jain, Resident of Sonal House Club Road, Distt. Vidisha
(5) Nanulal Ahirwar, son of Sonitram, Resident of behind Usha Company, Near Sagar Puliya, Sagar Road, Distt. Vidisha ... **Respondents**

Shri Ajay Mishra, Senior Counsel with Shri Mukesh Sahu, Advocate Adv. for the petitioner.

Shri Vikram Singh, Standing Counsel for the respondent-CBI.

Date of Hearing : 3/2/2011 (M.Cr.C. No.3187/08)
Date of Hearing : 4/2/2011 (Cri. Revision Nos.554/07, 836/08 & 1098/09)
Date of Order : 11.05.2011

O R D E R

As per : R.C. Mishra, J.

These petitions are interrelated, as arisen from the same proceedings pending as Special Case No.8/06 before Special Judge [under the Prevention of Corruption Act, 1988 (hereinafter referred to as the '1988 Act'), for CBI cases], Bhopal.

2. MCrC No.3187/2008 is a petition, under Section 482 of the Code of Criminal Procedure (for short 'the Code'), for having the order-dated 22.09.2007, rejecting the objection as to competence of M.V. Surti, the Deputy Superintendent of Police (CBI), Bhopal to investigate into the matter as well as the petitioners' prayer for taking into consideration the documents furnished by them at the stage of framing of charge nullified and also for quashing the charge-sheet as against the petitioner namely Ashok Kumar, son of Sheel Chand Jain [for brevity 'Ashok(S)'], his wife Sunita Jain and brother Rajeev Jain.

3. The revision registered as Criminal Revision No.554/2007 is directed against a common order-dated 17.02.2007 passed by the Special Judge, rejecting the applications, under Section 91 of the Code, moved by the revisionists as well as by co-accused Nanulal Ahirwar and R.C. Parashar.

4. The revision numbered as Criminal Revision No.836/2008 has been preferred against the order-dated 18.03.2008 whereby charges of the offences punishable under Section 13(1)(e) read with S.13(2)

read with 201 of the IPC and 120B read with 201, 465 and 471 of the IPC were framed against the revisionist namely Ashok Kumar Jain, son of Babulal Jain [hereinafter referred to as 'Ashok(B)'], an Income-Tax Practitioner.

5. The subject-matter of Criminal Revision No.1098/2008 is the order-dated 15.02.2008 whereby not only the application filed by Ashok(S), Sunita, Rajeev and R.C. Parashar for recalling the order-dated 22.09.2007 was rejected but it was also concluded that a *prima facie* case was made out against Ashok(S) to justify framing of charges of the offences punishable under Sections 120-B read with 465 and 471 of the IPC and Section 13(1)(e) read with 13(2) of the Act whereas the other accused were liable to be charged with the offences punishable under Sections 120-B read with 465, 471 and 201 of the IPC and Section 109 read with 13(1)(e) read with 13(2) of the Act.

6. Background facts may be summed up thus -

(1) During the check period from 01.04.1999 to 20.05.2004, Ashok(S) had remained posted as Branch Manager of Vidisha Branch and the Bhopal City Branch Office IV of the United India Insurance Company Limited.

(2) On 20.05.2004, upon complaint made by one Mohd. Sajid, a trap was arranged by M.V. Surti, the Deputy Superintendent of Police (CBI) to apprehend Ashok(S) red-handed while accepting bribe of Rs.20,000/-. The trap proceedings were organized. He also conducted search in Ashok(S)'s residence i.e. MIG-4 located in New BDA Complex, Bhopal and recorded the details of the properties seized in a list (Annexure 'P-1').

(3) On 02.05.2005, M.V. Surti registered yet another case against Ashok(S) in respect of offence punishable under Section 13(1)(e) read with 13(2) of the Act on the ground that

during the check period, he had acquired properties and pecuniary resources in his name and also in the name of his family members disproportionate to his known sources of income to the extent of Rs.11,43,071/-. Investigation further revealed that explanations furnished by Ashok(S) with regard to various sources of income were found to be false or unacceptable. To illustrate, -

(a) The plea that an amount of Rs.2,86,000/- was received by Sunita Jain as an advance towards consideration under a sale agreement from Umed Singh Raghuwanshi, the proposed purchaser of a plot located in Behlot Road, Ganjbasoda, was unacceptable due to the following reasons –

(i) He had not given prior intimation to the insurance company, as required under the Conduct Rules, either regarding sale of the plot or as to receipt of an amount of Rs.2,86,000/- as advance.

(ii) Non-judicial stamp of Rs.50/-, whereon the sale agreement purported to have been executed on 07.04.2004, was not sold by the stamp vendor Rajkumar Sen on that day.

(iii) Rajkumar Sen, in order to prove sale of the stamp on the aforesaid date to Umed Singh Raghuwanshi, had made false entries in the corresponding register suggesting that on that day, he had sold two stamps (a) one in the denomination of Rs.10/- to Obaidulla Khan, Manager of M/s Bhopal Carrier Service and Zaheer Uddin, the proprietor of the firm and (b) another in the denomination of Rs.50/- to Umed Singh Raghuwanshi whereas on verification, it

was found that only one stamp in the denomination of Rs.50/- was sold by him to Obaidulla Khan and Zaheer Uddin.

(iv) Umed Singh Raghuwanshi claimed to be an agriculturist by profession but it was found that he was not filing income-tax returns despite being engaged in the business of sale of tractors also. As such, the amount of Rs.2,86,000/- was not declared by him to the income-tax department. Further, being a financially sound person, he could have easily arranged Rs.1,25,000/- for payment to Smt. Sunita as the balance amount of consideration. Moreover, he had not lodged any FIR or filed a Civil Suit for recovery of the amount of Rs.2,86,000/- said to have been paid by him to Sunita as advance.

(v) The ante-dated sale-agreement purported to have been executed on 07.04.2004 was attested by Pradeep Chaturvedi and S.S. Aslam and was notarized by R.C. Parashar.

(4) Claim of Rs.2,03,000/- as salary drawn by Sunita Jain while being in the employment of Rajeev Jain, an agent of the Insurance Company, was also found to be false and the income tax returns submitted by Rajeev Jain were found to be fictitious for the following reasons -

(i) By virtue of rider placed by Rule 14(1) of the General Insurance (Conduct, Discipline & Appeal) Rules, 1975, Rajeev Jain could not act as an insurance agent.

(ii) In the initial records, Ashok(S) had declared that his wife Smt. Sunita Jain was unemployed.

(iii) In the Bank accounts opened during the period from 1999-2004, Smt. Sunita Jain had declared herself

to be a house wife and left the column pertaining to occupation blank.

(iv) There was no evidence to substantiate that Smt. Sunita Jain was employed by Rajeev Jain.

(v) During the check period, only an amount of Rs.88,000/- was deposited by Rajeev Jain and there was no record as to payment of an amount of Rs.2,03,000/- as salary amount to Sunita Jain.

(vi) As Sunita did not file any income tax return, the amount of Rs.2,03,000/- remained undeclared.

(vii) Rajeev Jain was residing at Vidisha whereas Sunita was living with her husband at Bhopal since April, 2000. Thus, the assertion that Rajeev had employed Sunita was inherently improbable.

(5) Income tax returns submitted by Rajeev Jain were found to be false whereas the enclosures were found to be annexed subsequently. Further, rough drafts of the false documents which were allegedly substituted for the originals enclosure with the help of Nanulal Ahirwar posted as Daftari and the record keeper in the Income-Tax Office at Vidisha, were found to have been authored by Ashok(B).

7. In the light of these facts, Sunita, Rajeev, Ashok(B) and Nanulal (who had not challenged the order framing charges against him) were arraigned as accused and further investigation revealed involvement of other persons namely Umed Singh Raghuwanshi, Raj Kumar Sen, Ramesh Chandra Parashar, Pradeep Chaturvedi, Sayed Sajid Aslam, the revisionist in Criminal Revision No.1098/2008 in the offences. Ultimate outcome of the investigation indicated that Ashok(S) was not able to satisfactorily account for the disproportionate assets to the extent of Rs.6,73,602/-. Accordingly, charge-sheet was filed against him, his wife Sunita, brother Rajeev and seven other accused named above before the Special Court.

MCrC No.3187/2008

8. According to the petitioners namely Ashok(S), Sunita and Rajeev, - in view of the restriction imposed by second proviso to Section 17 of the Act, M.V. Surti, being the Deputy Superintendent of Police (for short 'DSP'), was not authorized even to register the case under Section 13(1)(e). However, he not only recorded the FIR but also conducted investigation without the order of the police officer not below the rank of Superintendent of Police, as contemplated in the proviso. In such a situation, an application was moved on 26.03.2007 for their discharge on the ground of incompetence of the Investigating Officer. No reply was filed on behalf of the CBI despite availing of several opportunities. Ultimately, learned trial Judge rejected their application vide order-dated 22.9.2007. Since the order was passed even without affording them an opportunity of being heard, they submitted an application on 08.07.2008 for recalling the order but this application was also dismissed for the reasons assigned in the order-dated 15.02.2008.

9. Learned Senior Counsel appearing on behalf of the petitioners except Ashok(B) has strenuously contended that continuance of the prosecution founded on unauthorized and illegal investigation, is an abuse of the process of the Court in view of the following facts -

(i) M.V. Surti, the DSP, who recorded the FIR, had authorised himself to conduct the investigation despite the express bar contained in the second proviso.

(ii) The trial Court had taken cognizance of the offences ignoring the fact that the charge sheet was not based on a legal and valid investigation.

This apart, legality and propriety of the order-dated 22.09.2007, have been challenged on the ground that it contained a wrong fact as to hearing of the arguments despite the fact that a number of adjournments were sought and granted on the ground of non-availability of Shri Meena, Public Prosecutor In-charge of the case, whose son was reportedly indisposed.

In response, learned Standing Counsel for the CBI has submitted that on 02.02.2005, M.V. Surti had validly registered the case as In-charge Superintendent of Police, CBI Bhopal. Attention has also been invited to the contents of fax message suggesting that on that day, Superintendent of Police, CBI Bhubaneshwar was looking after overall supervision of the working of the officials of CBI posted at Bhopal.

10. Learned Senior Counsel still contended that no document authorizing M.V. Surti to investigate the case was placed on record either along with the charge sheet or with the replies to the applications dated 05.05.2007 and 23.06.2007. Reference has also been made to the guidelines contained in Rule 7.11 of the CBI Crime Manual-2005, which defines powers of Deputy Superintendent of Police in the following terms -

> *The Superintendent of Police will investigate/enquire into the cases which are allotted to him. In Branches where there is no Additional SP, one of the Deputy Superintendents of Police will assist the Superintendent of Police in supervision of the work relating to administration, establishment/accounts. In this respect he will perform such functions and duties as are allotted to him by the Superintendent of Police. He may be designated Dy. SP (Hqrs) and will hold charge of the Branch in the absence of the SP from the Headquarters.*

11. With reference to the argument that M.V. Surti was authorized by way of an oral order, learned Senior Counsel referred to the decision of the Apex Court in **State Inspector of Police v. Surya**

Sankaram Karri (2006) 7 SCC 172 wherein it was held that issuance of oral direction for investigation is not contemplated under the Act.

12. In the light of the rival contentions, the following questions arise for consideration in the petition (MCrC No.3187/2008) under Section 482 of the Code -

> "Whether in the official capacity of DSP, M.V. Surti was not competent either to register the offence under Section 13(1)(e) read with 13(2) of the Act or to investigate the same in absence of an authorization by the competent authority ?
>
> If so, what would be the effect on the consequent proceedings" ?

13. Before proceeding further, it would be necessary to advert to the provisions of Section 17 of the 1988 Act, which is couched in the following terms : -

> ***17. Persons authorised to investigate*** **-** *Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no police officer below the rank -*
> *(a) in the case of the Delhi Special Police Establishment, of an Inspector of Police.*
> *(b) in the metropolitan areas of Bombay, Calcutta, Madras and Ahmedabad and in any other metropolitan area notified as such under sub-section (1) of section 8 of the Code of Criminal Procedure, 1973 (2 of 1974), of an Assistant Commissioner of Police;*
> *(c) elsewhere, of a Deputy Superintendent of Police or a police officer of equivalent rank,*
> *shall investigate any offence punishable under this Act without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant:*
> *Provided that if a police officer not below the rank of an Inspector of Police is authorised by the State Government in this behalf by general or special order, he may also investigate any such offence without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make arrest therefor without a warrant:*

> *Provided further that an offence referred to in clause (e) of sub-section (1) of section 13 shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police.*
>
> *(Emphasis supplied)*

14. A bare perusal of the FIR recorded on 2.2.2005 would reveal that the scriber M.V. Surti, while writing his designation as S.P. (presumably in-charge) had entrusted the investigation to himself in the capacity of DSP.

15. Learned Senior Counsel has strenuously contended that the entire proceedings before the Special Judge were illegal and void *ab initio*, inasmuch as the investigation forming basis thereof had been conducted without obtaining the necessary order of the Superintendent of Police, under the second proviso to S.17 of the 1988 Act. According to him, since the illegality in the course of investigation was brought to the notice of the trial Court at the stage of the charge only, it ought to have directed fresh investigation by an officer authorized by the Superintendent of Police. To buttress the contention, he has placed reliance on the following observations made by the Apex Court in **H.N. Rishbud v. State of Delhi AIR 1955 SC 196,** with reference to Section 5(4) and proviso to Section 3 of the Prevention of Corruption Act, 1947 (which correspond to the first proviso to Section 17 (supra) and Section 5-A, which corresponds to the main part of Section 17 -

> *"We are, therefore, clearly, also, of the opinion that where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby. .. It does not follow, however, that the invalidity of the investigation is to be completely ignored by the Court during trial. When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such reinvestigation as the circumstances of*

> *an individual case may call for… When the attention of the Court is called to such an illegality at a very early stage it would not be fair to the accused not to obviate the prejudice that may have been caused thereby, by appropriate orders, at that stage but to leave him to the ultimate remedy of waiting till the conclusion of the trial and of discharging the somewhat difficult burden under section 537, Cr. P. C. of making out that such an error has in fact occasioned a failure of justice.*

Reference has also been made to the decision of Supreme Court in **State of M.P. v. Mubarak Ali AIR 1959 SC 707**, upholding this Court's order directing re-investigation to rectify the defects and cure the illegality of the investigation in view of the fact that the objection was taken before commencement of the trial. Learned Senior Counsel has cited the following decisions of other High Courts to the same effect -

(i) **State of Karnataka v. B. Narayan Reddy 2002 Cr.L.J. 845**

(ii) **Mukteshwar Prasad Singh v. State of Jharkhand 2007 Cr.L.J (NOC) 425**

He has also relied upon a single Bench decision of this Court in **State of M.P. v. Dr. Devendra Singh 2002 CriLJ 4368**, wherein the order of the trial Judge quashing the part of investigation conducted by the unauthorized police officers with liberty to re-investigate in accordance with law was set aside and the trial Court was directed to proceed with the trial excluding the statements of three witnesses recorded by such officers.

16. To fortify the argument that, in absence of authorization by the S.P., M.V. Surti was not entitled to register or investigate into the offence under Section 13(1)(e) of the Act, our attention is invited to the following precedents -

(i) **Umesh Kumar Choubey v. State of M.P. 2000 Cr.L.J. 1760**

(ii) **H. S. Gotla v. State of Karnataka 2001 Cr.L.J. 2695**

(iii) **Girija Shankar Shukla v. SDO Harda 1973 MPLJ 411**

17. In the last mentioned case, a Full Bench of this Court had to resolve the conflict of opinions expressed by two Division Benches regarding the meaning of the expression "holding current charge of the duties". After referring to the various decisions of the English and Indian Courts, it proceeded to approve the view taken by a Division Bench in **Ramratan v. State of M.P. AIR 1964 M.P. 114** to the following effect -

> *"A person appointed permanently or to officiate on a post holds that rank whereas a person who is placed only "in current charge of duties of a post" does not hold that rank. Accordingly, those functions or powers of the post, which depend on the rank, cannot be discharged by a person who is placed only in current charge of the duties of that post".*

18. In the case of **H.S. Gotla**, the DSP had registered the case as In-charge Superintendent of Police at the relevant point of time and exercising his power as in-charge Superintendent of Police permitted himself by an order of sanction for investigation into the matter. While holding that rank of the Deputy Superintendent of Police had remained unchanged, learned single Judge proceeded to quash registration of the case as well as continuation of investigation for want of order of an Officer not below the rank of Superintendent of Police to conduct the investigation, as contemplated in the second proviso to Section 17 of the 1988 Act. However, liberty was granted to the State to initiate fresh proceedings by following the due procedure of law.

19. In **Umesh Kumar**'s case, objection as to incompetence of a DSP to investigate the offence under S.13(1)(e) without any order of

the S.P was taken at an early stage of the trial. A single Bench of this Court, placing primal reliance on certain observations made by the Supreme Court in **State of Haryana v. Bhajanlal, AIR 1992 SC 604**, rejected the argument that the defect stood cured by application of S.P. before the JMFC for issuing warrant of search to be conducted by the DSP, as it was of the opinion that there could not be a deemed order under second proviso to S.17. However, following the guideline laid down in **H.N. Rishbud**'s case (above), the learned Judge, while declining to quash the FIRs, discharged the petitioners with the observation that the investigating authority would be at liberty to proceed afresh in accordance with law, if they so desire.

20. For a proper appreciation of the rival contentions, it is necessary to refer briefly to the legislative history leading to creation of the offence punishable under Section 13(1)(e) of the 1988 Act and the enactment of Section 17 thereof. As pointed out already, Section 17 corresponds to Section 5-A(1) of 1947 Act with necessary modifications in view of the fact that the entire Chapter IX of the Indian Penal Code that comprised the offences by or relating to public servants was omitted by the 1988 Act.

21. Section 3 of the 1947 Act ran as follows -

> **3. Offence under Section 165-A of the Penal Code to be cognizable offence**.—An offence punishable under Section 161 or Section 165 or Section 165-A of the Indian Penal Code shall be deemed to be a cognizable offence for the purposes of the Code of Criminal Procedure, 1898, notwithstanding anything to the contrary contained therein:
>
> *[Provided that a police officer below the rank of Deputy Superintendent of Police shall not investigate any such offence without the order of the Magistrate of the first class or make any arrest therefor without a warrant.]* *(Emphasis supplied)*

Section 5(4) of the 1947 Act read as under -

"Notwithstanding anything contained in the Code of Criminal Procedure, 1898, a Police Officer below the rank of Deputy Superintendent of Police shall not investigate any offence punishable under sub-Section (2) without the order of a Magistrate of the First Class or make any arrest therefor without a warrant".

22. By virtue of the provisions of the Prevention of Corruption (Second Amendment) Act, 1952, -

(a) the proviso to Section 3 was omitted and it was further amended by adding the words "or Section 165-A" after the portion "Section 165".

(b) sub-section (4) of Section 5 of the 1947 Act was replaced.

(c) Section 5-A, which was worded in the following form was introduced –

***5-A. Investigation into cases under this Act**.— Notwithstanding anything contained in the Code of Criminal Procedure, 1898, no police-officer below the rank,—*

(a) in the presidency-towns of Madras and Calcutta, of an Assistant Commissioner of Police,

(b) in the presidency-town of Bombay, of a Superintendent of Police, and

(c) elsewhere, of a Deputy Superintendent of Police,

shall investigate any offence punishable under Section 161, Section 165 or Section 165-A of the Indian Penal Code or under sub-section (2) of Section 5 of this Act, without the order of a Presidency Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant:

Provided that a police-officer of the Delhi Special Police Establishment, not below the rank of an Inspector of Police, who is specially authorised by the Inspector-General of Police of that Establishment may, if he has reasons to believe that, on account of the delay involved in obtaining the order of a Magistrate of the first class, any valuable evidence relating to such offence is likely to be destroyed or concealed, investigate the offence without such order; but in every case where he makes such investigation, the police-officer shall, as soon as may be, send a report of the same to a Magistrate of the first class together with the circumstances in which the investigation was made.

23. Against this backdrop, the Apex Court in **H. N. Rishbud**'s case (supra) explained the nature, scope and object of a provision

like Section 5(4) as well as the underlying policy in the following terms -

> *"It is in the light of this scheme of the Code that the scope of a provision like Section 5(4) of the Act has to be judged. When such a statutory provision enjoins that the investigation shall be made by a police officer of not less than a certain rank, unless specifically empowered by a Magistrate in that behalf, notwithstanding anything to the contrary in the Code of Criminal Procedure, it is clearly implicit therein that the investigation (in the absence of such permission) should be conducted by the officer of the appropriate rank. …*
> *When the Legislature has enacted in emphatic terms such a provision it is clear that it had a definite policy behind it. …*
> *The underlying policy, in making these offences by public servants non-cognizable appears to be that public servants who have to discharge their functions - often enough in difficult circumstances - should not be exposed to the harassment of investigation against them on information levelled, possibly by persons affected by their official acts, unless a Magistrate is satisfied that an investigation is called for, and on such satisfaction authorises the same. This is meant to ensure the diligent discharge of their official functions by public servants, without fear or favour. When, therefore the Legislature thought fit to remove the protection from the public servants, in so far as it relates to the investigation of the offences of corruption comprised in the Act, by making them cognizable, it may be presumed that it was considered necessary to provide a substituted safeguard from undue harassment by requiring that the investigation is to be conducted normally by a police officer of a designated high rank. Having regard therefore to the peremptory language of sub-section (4) of Section 5 of the Act as well as to the policy apparently underlying it, it is reasonably clear that the said provision must be taken to be mandatory..*
> *We are, therefore, clear in our opinion that Section 5(4) and proviso to Section 3 of the Act and the corresponding Section 5-A of Act 59 of 1952 are mandatory and not directory and that the investigation conducted in violation thereof bears the stamp of illegality."*

By Anti-Corruption Laws (Amendment) Act, 1964, clause (e) in Section 5 of the 1947 Act was added and Section 5-A was substituted by a new Section, comprising two sub-sections. Section 17 of the 1988 Act (as reproduced above) corresponds to the first sub-Section with necessary modifications.

24. The legislative intent in incorporating Section 17 in the 1988 Act was to ensure that the investigation of any offence under the Act should be done ordinarily by officers of the rank of Deputy Superintendent of Police or above. However, under the first proviso, an officer below the rank of Deputy Superintendent but not that of an Inspector of Police, if authorized by the State Government in this behalf, would also be legally competent to investigate the offences subject to condition as contained in the second proviso which says that an offence referred to in clause (e) of sub-section (1) of section 13 shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police.

25. It is a settled rule of constriction that the language of the proviso, even if general, is normally to be construed in relation to the subject matter covered by the section to which the proviso is appended. In other words, normally a proviso does not travel beyond the provision to which it is a proviso. In this view of the matter, the second proviso is applicable to power of an officer authorized by the State Government, under the first proviso, and not to the general power conferred on designated officers including a Deputy Superintendent of Police to investigate any offence under the Act.

26. In **Bhajanlal**'s case (supra), the Supreme Court had the occasion to interpret analogously worded provisions of Section 5A(1) of 1947 Act. It was observed (in paragraph 124 of the Judgment) that a conjoint reading of the main provision, 5A(1) and the two provisos thereto, shows that the investigation by the designated police officers is the rule and the investigation by an officer of a lower rank is an exception. However, to understand the true meaning of the observation, it is necessary to look into the factual

context and read the foregoing paragraphs of the judgment, as extracted below -

> *" 121. Section 5A of the Act as it originally stood, was inserted by the (Second Amendment) Act 58 of 1952 based on the recommendations of the Committee of Members of Parliament under the chairmanship of Dr. Bakshi Tek Chand. The said section as it stands now was substituted by Act 40 of 1964, the main object of which is to protect the public servant against harassment and victimisation. (See The State of M. P. v. Mubarak Ali (AIR 1959 SC 707) (albeit). In A. C. Sharma v. Delhi Administration (1973) 3 SCR 477: (AIR 1973 SC 913), Dua, J. said that the scheme of this provision is for effectively achieving the object of successful investigation into the serious offences mentioned in Section 5 of the Act without unreasonably exposing the public servant concerned to frivolous and vexatious proceedings. A Constitutional Bench of this Court in A. R. Antulay v. R. S. Nayak (1984) 2 SCR 914 at page 941 : (AIR 1984 SC 718 at p. 732) has observed that "Section 5A is a safeguard against investigation of offences by public servants, by petty or lower rank police officer. "*
>
> *122. According to Section 5A, notwithstanding anything contained in the Code, no police officer below the rank specified in clauses (a) to (d) of Section 5A (1), shall investigate any offence punishable under Sections 161, 165 or 165A of the IPC or under Section 5 of the Act without the order of a Presidency Magistrate or a Magistrate of the first class as the case may be or make arrest therefor without a warrant. There are two provisos to that section. As per the first proviso, if a police officer not below the rank of an Inspector of Police is authorised by the State Government, either by general or special order, he may investigate any such offence without the order of a Magistrate or make arrest therefor without a warrant. According to the second proviso, an offence referred to in clause (e) of sub-section (1) of Section 5 shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police.*
>
> *123.It means that a police officer not below the rank of an Inspector of Police authorised by the State Government in terms of the first provisos can take up the investigation of an offence referred to in clause (e) of Section 5 (1) only on a separate and independent order of a police officer not below the rank of a Superintendent of 'Police. To say in other words, a strict compliance of the second proviso is an additional legal requirement to that of the first proviso for conferring a valid authority on a police officer not below the rank of an Inspector of Police to investigate an offence falling under clause (c) of Section 5(1) of the Act. This is clearly spelt out from the expression "further provided" occurring in the second proviso."*
>
> *(Emphasis supplied).*

27. A bare reading of the order passed by learned Single Judge in **Umesh Kumar**'s case would reveal that the view that, in absence

of authorization by the Superintendent of Police, investigation conducted by DSP into an offence under Section 13(1)(e) would be without jurisdiction, was based only on the observations made by the Supreme Court in paragraph 123 of the judgment rendered in **Bhajanlal**'s case (quoted already) with regard to the Police officers inferior in rank to that of a DSP. However, it was nowhere observed in the judgment that the second proviso governs the entire section and not the first proviso alone. On the contrary, it was clearly indicated in paragraph 134 of the judgment that the second proviso prescribes an additional safeguard in case the investigation is entrusted to an officer other than that of a designated rank. Relevant observations may be reproduced as under -

> *"It is, therefore, clear in the light of the above principle of law that the Superintendent of Police or any police officer of above rank while granting permission to a non-designated police officer in exercise of his power under the second proviso to Section 5A(1), should satisfy himself that there are good and sufficient reasons to entrust the investigation with such police officer of a lower rank and record his reasons for doing so; because the very object of the legislature in enacting Section 5A is to see that the investigation of offences punishable under Section 161, 165 or 165A of Indian Penal Code as well as those under Section 5 of the Act should be done ordinarily by the officers designated in clauses (a) to (d) of Sec. 5A(1). The exception should be for adequate reasons which should be disclosed on the face of the order."*

28. Taking into consideration the legislative history, object and basic scheme of the provisions of Section 17 of the 1988 Act and above all, the aforesaid observations in **Bhajanlal**'s case, we are of the considered opinion that each one of the officers designated in clauses (a) to (c) thereof is competent to investigate the offence under Section 13(1)(e) even without order of authorisation by Superintendent of Police as contemplated in the second proviso. The question posed in Para 12 (above) is, therefore, answered in the negative. As an obvious corollary, an order under the second

proviso would be necessary only in a case where investigation into the offence is sought to be conducted by an officer of a lower rank, though authorized by the State Government under the first proviso.

29. In view of the opinion formed by us, the view taken by learned Single Judge in **Umesh Kumar**'s case (**2000 CRI.L.J. 1760**) on interpretation of the second proviso to Section 17 of the 1988 Act is legally erroneous and is hereby overruled.

30. Reverting to the facts of the present case, it may easily be concluded that, in any case, M.V. Surti, being the DSP, had the authority to register the offence under Section 13(1)(e) as the second proviso to Section 17 is only applicable to investigation that commences with lodgment of information relating to the commission of a cognizable offence.

31. The objection that the prosecution based on outcome of the investigation conducted by M.V. Surti, the officer who had recorded the FIR as the complainant was not sustainable in law, is also misconceived. The Apex Court in **State v. V. Jayapaul AIR 2004 SC 2684** has clearly laid down that where the investigation was done by the same police officer who lodged FIR, the same cannot be held barred by law and such investigation could be assailed only on the ground of bias or real likelihood of bias on the part of the Investigating Officer. In that case, Inspector of Police, Vigilance and Anti-Corruption had received information about commission of the offence in question and had scribed the FIR. The Supreme Court, while reiterating the view taken in **State of U.P. v. Bhagwant Kishore Joshi AIR 1964 SC 221**, proceeded to observe as under-

> *"There is nothing in the provisions of the Criminal Procedure Code which precluded the appellant from taking up the investigation. The fact that the said police officer prepared the FIR on the basis of the information received by him and*

registered the suspected crime does not disqualify him from taking up the investigation of the cognisable offence. A suo motu move on the part of the police officer to investigate a cognisable offence impelled by the information received from some sources is not outside the purview of the provisions contained in Sections 154 to 157 of the Code or any other provisions of the Code."

This apart, the Apex Court in **State of M.P. v. Ram Singh, (2000) 5 SCC 88**, had the occasion to consider effect of investigation by an unauthorized police officer upon the consequent criminal proceedings by making reference to the decisions in the cases of **H.N. Rishbud** and **Bhajanlal**. In that case, upon the information that Ram Singh, an Excise Sub-Inspector had acquired properties disproportionate to his known sources of income, a raid was conducted by the Deputy Superintendent of Police (SPE) Lokayukt Office, Gwalior and the initial investigation was also conducted by another Deputy Superintendent of Police but thereafter, one Inspector of the SPE was authorised by the Superintendent of Police to conduct further investigation. However, a single Bench of this Court, while exercising inherent powers under Section 482 of the Code, quashed the investigation and the consequent proceedings on the ground that the order of the Superintendent of Police clothing the Inspector with the requisite legal authority to investigate within the meaning of the second proviso did not reflect application of mind. Observing that the facts of the case were somewhat different and distinguishable from those of **Bhajanlal**'s case, the Supreme Court proceeded to allow the State appeal and in the judgment, also quoted the following observations made by the three Judge Bench of the Supreme Court in **H.N. Rishbud**'s case (supra) with approval -

"A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190 Cr.P.C. as the material on which cognizance is taken. But it cannot be maintained that a

> *valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Section 190 Cr.P.C. is one out of a group of sections under the heading "Conditions requisite for initiation of proceedings." The language of this section is in marked contrast with that of the other sections of the group under the same heading, i.e., Sections 193 and 195 to 199.*
>
> *These latter sections regulate the competence of the Court and bar its jurisdiction in certain cases excepting in compliance therewith. But Section 190 does not. While no doubt, in one sense, clauses (a), (b) and (c) of Section 190(1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity. Such an invalid report may still fall either under Clause (a) or (b) of Section 190(1) (whether it is the one or the other we need not pause to consider) and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial."*
>
> *That an illegality committed in the course of investigation does not affect competence and jurisdiction of the Court for trial is well settled as appears from the cases of* ***Prabhu vs. Emperor AIR 1944 PC 73*** *and* ***Lumbhardar Zutshi vs. The King AIR 1950 PC 26.***

32. It is relevant to note that the petitioners had not challenged the order-taking cognizance at the earliest possible opportunity. In this view of the matter, even if it is assumed that the investigation was, in any manner, defective, the order taking cognizance and the consequent proceedings cannot be quashed as no failure of justice had occasioned thereby. For this, reference may be made to the decision of the Apex Court in **Munna Lal v. State of U.P. AIR 1964 SC 28** wherein the view taken in **Mubarak Ali**'s case (above) was distinguished.

33. For these reasons, none of the contentions raised on behalf of the petitioners in MCrC No.3187/2008 against validity of order taking cognizance or the consequent proceedings deserves acceptance. Further, the inherent powers, under Section 482 of the Code, are to be exercised *ex debito justitiae* to prevent abuse of the process of Court but not to stifle a legitimate prosecution, when the issue involved, whether factual or legal, can not be decided without

sufficient material. Accordingly, no interference is called for with the order-dated 22.09.2007 or the subsequent proceedings.

CRIMINAL REVISION NO.836/2008

34. As pointed out already, in this revision, the order framing charges is the subject matter of the challenge. According to the revisionist namely Ashok(B), he was only engaged by Rajeev Jain as a tax consultant to file income tax returns but he has been unnecessarily roped in the case upon the allegations that he had given the rough drafts of the enclosures submitted by Rajeev Jain along with income tax returns.

35. Shri Vijay Nayak, learned counsel appearing on behalf of Ashok(B), has urged that no offence was made out against him for the following reasons :-

(i) No evidence is available on record to establish that the rough notes in question were prepared by the petitioner.

(ii) There is no iota of evidence to suggest that he had acted as a co-conspirator.

(iii) Nothing on record suggests that he had used the forged documents as genuine.

36. However, a bare reading of the relevant extracts of the charge-sheet would reveal that Ashok(B) was arraigned as an accused because -

(i) It was found that the enclosures to the income tax returns submitted by Rajeev Jain were

prepared at his instance by Narendra Kumar Jain, the Accountant.

(ii) The enclosures were, in fact, substituted subsequent to the search of residence of Ashok(S) with a view to explaining the disproportionate income as the income earned by his brother Rajeev Jain.

(iii) It was further noticed that Ashok(B) had made alterations in the enclosures at the time when the income tax returns were in the custody of Nannulal Ahirwar, the Daftari of Income Tax Office at Vidisha, who had taken out the original returns from the Record Room and had made them available to Rajeev Jain for substitution of the enclosures.

37. As indicated already, Ashok(S) is charged with the offence of criminal conspiracy which is always hatched in secrecy and it is impossible to adduce direct evidence of the same. The offence can be only proved largely from the inferences drawn from acts or illegal omission committed by the conspirators in pursuance of a common design (See. **Shivanarayan Laxminarayan Joshi v. State of Maharashtra AIR 1980 SC 439**. Moreover, it is not necessary that each member of a conspiracy must know all the details of the conspiracy (**R. K. Dalmia v. Delhi Administration AIR 1962 SC 1821** relied on). Besides this, framing of charge and to establish the charge of conspiracy cannot possibly be placed at par (**Hardeo Singh v. State of Bihar AIR 2000 SC 2245** referred to).

38. The trial Judge is required to record reasons only if he decides to discharge the accused (See. **Kanti Bhadra Shah v. State of W.B. (2000) 1 SCC 722**). It is also well established that even a strong suspicion leading to presumption as to possibility as against certainty about commission of crime makes out a case for framing of charge. Moreover, at this stage, the Court need not undertake an elaborate enquiry in sifting and weighing the material and should not enter upon a process of evaluating the evidence by deciding its worth or credibility. Nor is it necessary to delve deep into various aspects. All that the Court has to consider is whether the evidentiary material on record if generally accepted, would reasonably connect the accused with the crime. Accordingly, the order framing charges against Ashok(B) deserves to be affirmed as well merited.

CRIMINAL REVISION NO.1098/2008

39. In view of the above discussion pertaining to the petition under Section 482 of the Code, the order-dated 15.02.2008 rejecting prayer for recalling the order-dated 22.09.2007 does not call for any interference under the revisional jurisdiction. Moreover, learned trial Judge also did not commit any error of jurisdiction in reaching the conclusion that the revisionists deserved to be charged with the offences punishable under Sections 120-B read with 465, 471 and 201 of the IPC and Section 109 read with 13(1)(e) read with 13(2) of the Act.

CRIMINAL REVISION NO.554/2007

40. At the outset, it may be observed that the order impugned in this revision is based on the decision of the Apex Court in **State of Orissa v. Debendra Nath Padhi (2005) 1 SCC 568.** As explained therein, the entitlement of the petitioners to seek order,

under Section 91 of the Code, would ordinarily not come till the stage of defence. Accordingly, the rejection of application seeking production of documents mentioned therein does not suffer from any error of jurisdiction.

41. In the result -

(i) The MCrC preferred by Ashok Kumar Jain, Smt. Sunita Jain and Rajeev Jain stands dismissed.

(ii) Cri. Revision No.554/2007 is also dismissed. However, it would be open to the revisionists to apply at the stage of defence for production of any relevant document existence of which is admitted by any witness of the respondent in his cross-examination or otherwise to enable him to prove any specific plea taken by them.

(iii) The Cri. Revision Nos.836/2008 and 1098/2008 stand dismissed.

42. Copy of this order be retained in the connected revisions.

(R.C. MISHRA)
JUDGE
11.05.2011

(SMT. VIMLA JAIN)
JUDGE
11.05.2011