IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL MISC.APPLICATION NO. 21714 of 2016

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RAMANBHAI AMBELAL PATEL (JANI) & 10 other(s)

Versus

STATE OF GUJARAT & 2 other(s)

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Appearance:
MR B.S. PATEL WITH MR. CHIRAG B PATEL(3679) for the Applicant(s) No. 1,10,11,2,3,4,5,6,7,8,9
MR AJ YAGNIK(1372) WITH MR. A.B. PANDYA for the Respondent(s) No. 3
MR. MITESH AMIN, PUBLIC PROSECUTOR WITH MS. M.D. MEHTA, APP for the Respondent(s) No. 1 & 2

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CORAM: **HONOURABLE MS JUSTICE SONIA GOKANI**

Date : 29/11/2019

ORAL ORDER

1. The petitioners are the elected members of the Agricultural Produce Market Committee (APMC), Surat, which is constituted under the provisions of the Gujarat Agriculture Produce Markets Act, 1963. This Committee has established a market and had also entered retail of various vegetables as well as agricultural items for citizens of Surat. The resultant effect of which is that the farmers are getting 40% of more price and citizens are getting items at 40% less value. According to the petitioners, the respondent no.3, though, has no connection with the activity of the market committee, but with a view to take revenge and harass the petitioners, a complaint has been filed by the respondent no.3 by suppressing material facts. The petitioner no.1

is the Vice-Chairman of the Market Committee. The complaint has been registered by the respondent no.3 before the Court of learned Special Judge, ACB and 6th Additional Sessions Judge, District Court, Surat in a Criminal Inquiry No. 3 of 2015 for the offences punishable under Sections 406, 408, 409, 420, 463, 464, 465, 467, 468, 471, 477 (A), 205 and 120(B) of the Indian Penal Code, 1860 and under Sections 7, 9, 11, 12, 13, 15 and 20 of the Prevention of Corruption Act. The order came to be passed by the learned Special Judge on 07.07.2016. This has aggrieved the petitioners, who are before this Court with the following prayers:

> *"(A) Your Lordship will be pleased to quash and set aside the complaint bearing Inquiry Case No. 3 of 2015 and order dated 07.07.2016 passed by the learned Special Judge, ACB and 6th Additional Sessions Judge, District Court, Surat at Annexure-A to the application and also the FIR being M. Case No. 3 of 2016 registered with ACB Police Station, Surat at Annexure-B to the petition;*
> *(B) Pending admission, final hearing and disposal of this Criminal Misc. Application, stay further proceeding in pursuance to the order passed by the learned Special Judge, ACB and 6th Additional Sessions Judge, District Court, Surat at Annexure-A to the application and also the FIR being M. Case No. 3 of 2016 registered with ACB Police Station, Surat at Annexure-B to the petition."*

2. It is the say of the petitioners that, in the last more than 10 years, the Market

Committee has established its market yard in Surat. The rival group of the petitioners since could not succeed in the last election, with a view to settle the score, 217142016the complaint came to be filed by the respondent no.3 with a mala-fide intention. There are many suppressions of vital aspects.

3. The respondent no.3 according to the petitioners had filed Special Criminal Application No. 3304 of 2015 before this Court, which was disposed of by an order dated 11.06.2015. The respondent no.3 had approached this Court with a petition under Articles 226 and 227 of the Constitution of India seeking direction to lodge the complaint against the Chairman, Vice-Chairman and members of the APMC, Surat. This Court (Coram: Smt. Justice Abhilashakumari) along the line of the dictum issued in the case of ***Lalitakumari v. State,*** directed the Police Officer to inquire into the matter and to register an offence, if such inquiry discloses commission of cognizable offence. It appears that, the Police Inspector, Mahidharpura Police Station, Surat was directed to look into the complaint dated 07.04.2015 made by the respondent no.3. The Police Inspector, Mahidharpura Police Station, Surat vide his report addressed to his Superior Officer dated

01.07.2015 found no cognizable offence from the complaint and the material presented by the respondent no.3.

4. The respondent no.3 once again approached before this Court by preferring Special Criminal Application No. 6251 of 2015, which was disposed of by this Court on 02.11.2015, where, this Court (Coram: Mr. Justice J.B. Pardiwala, J.) directed the Commissioner of Police, Surat City to look into the matter expeditiously and pass appropriate order directing the concerned Police Station to initiate appropriate inquiry in accordance with law, pursuant to the complaint lodged by the respondent no.3 in writing.

5. The Deputy Police Commissioner, Zone-1, Surat City submitted his report on 12.01.2016, pursuant to the directions issued by the Court and have been addressed to the Commissioner of Police, Surat City. Another communication dated 07.01.2016 from the Additional Police Commissioner, 'A' Division was addressed to the Deputy Police Commissioner, Zone-1. Since, the Commissioner of Police, Surat City had divided the complaint to two Police Stations, i.e. Mahidharpura Police Station and Varachha Police Station, they both inquired and reported. This

was done and the reports have been forwarded to the Commissioner of Police, Surat City. It appears that, a detailed inquiry had been made and they have filed the applications, since they found no substance in the complaint made by the respondent no.3 herein.

6. A private complaint was filed before the Court of learned Sessions Judge being Inquiry No. 3 of 2015 on dated 06.07.2015. It appears that while respondent no.3 approached this Court and sought direction to get the F.I.R. registered against the petitioners, he also had simultaneously filed a complaint on 06.07.2015 where the learned Sessions Judge has directed the same to be put-up before the Special Court of ACB. The Court on 07.07.2016 directed investigation under Section 156(3) of the Code of Criminal Procedure and to send the matter to the Police Inspector, A.C.B. Police Station, Surat to inquire into the allegations and report be filed within 90 days' time.

7. The Court has chosen not to inquire the matter under Section 202 of the Code of Criminal Procedure and passed the order directing investigation under Section 156 (3) of the Code of Criminal Procedure.

8. This has aggrieved the petitioners, who

are before this Court urging, inter-alia, that as per the decision of the Apex Court rendered in the case of ***Anil Kumar & Ors. v. M.R. Aiyappa and another*** reported in ***(2013) 10 SCC 705***, without previous sanction, no order under Section 156(3) of the Code can be passed. All the petitioners are the office bearers of the Market Committee and they are public servants. There is no disclosure on the part of the respondent no.3 of the previous proceedings before the police, the entire complaint is based on administrative irregularity, there is nothing to indicate a single allegation which can be made punishable under the law. The complaint also does not reveal that any amount has been misappropriated and the vague allegation of scam has resulted into sending the matter for investigation. It is also stated that as to how the offences under the Indian Penal Code have also not been made out. The petitioners are before this Court seeking to quash and set aside the complaint with the above-mentioned prayers.

9. This Court at the time of issuance of notice, had protected the petitioners by directing not to arrest them, citing the decision of the ***Joginder Kumar v. State of Uttar Pradeh*** reported in ***(1994) 4 SCC 260***. That protection has continued till today. This Court also on

07.11.2017 passed the following order:

"1. The Investigating Officer, Mr. N.P. Gohil, Anti Corruption Bureau, Surat has recently taken over investigation under Criminal Inquiry No. 3 of 2015 and M. Case No. 3 of 2016 on 23.10.2017. He is not much aware of the action undertaken by his predecessor pursuant to the order passed by this Court which had directed the Investigating Officer to continue the investigation.

2. *Considering the earlier report submitted by the police and also bear in mind the order passed by this Court on 28.12.2016 in Criminal Misc. Application No. 27814 of 2016, which is as follow:*

> *"1. Over and above the issue raised of decision of the Apex Court in the case of Anil Kumar and others v. M.K. Aiyappa and another, reported in (2013) 10 SCC 705, the petitioner has also raised the issue of mechanically passing of the order under Section 156(3) of the Code of Criminal Procedure, in a matter of the year 2010. More particularly, after three detailed reports submitted by three police officers of different ranks.*
> *2. Notice, returnable on 9th November, 2016. Learned Additional Public Prosecutor waives service of notice for the respondent no.1 — State.*
> ***3.*** *Subject to the petitioner cooperating with the investigation, interim relief in terms of Paragraph-15(B)(iii). This, however, shall in no manner preclude the authority concerned from continuing the investigation. Direct service is permitted."*

3. It emerges that till date no substantial investigation has been done on the part of the investigating agency. Let the Investigating

Officer attempt to complete the investigation within a period of eight weeks. While so doing he may bear in mind the interim relief granted earlier by this Court.

Hearing of these matters shall be continued on November 09, 2017."

10. This Court has heard learned advocate Mr. B.S. Patel with learned advocate Mr. Chirag B. Patel for the petitioners, learned advocate Mr. Anand Yagnik with learned advocate Mr. A.B. Pandya for the respondent no.3 (both argued for respondent no.3), learned Public Prosecutor Mr. Mitesh Amin with learned Additional Public Prosecutor Ms. Maithili D. Mehta for the respondent- State.

11. According to the learned advocate Mr. B.S. Patel, it is a case alleging corruption against the public servants, as the petitioners are the members, Chairman and Vice-Chairman of the APMC, Surat who under Section 57 of the Gujarat APMC Act are the public servants. According to him, the decision of the Apex Court in case of Anil Kumar (supra) will not permit any investigation without prior sanction from the competent authority. He has urged that the decision cannot be said to be per-incuriam. This Court is bound by the decision of the Apex Court and Article 141 of the Constitution of India will not permit this Court to take an independent

view. According to him, the complainant himself is a whistle blower. He has a duty to inform that the police has already inquired into the matter and has refused to register the complaint. He has also taken this Court through the provision of Section 156 and urged that, when the order came to be passed under Section 156 of Code of Criminal Procedure, he urged that there is no ingredients of any offence made out in the complaint and hence, the said complaint deserves to be quashed and set aside. He further urged that, even if this Court finds that decision of the Apex Court is per-incuriam, one Bench of this Court since has already held contrary to that, this Court needs to refer the Division Bench. He further has urged that, twice the respondent no.3 approached this Court and the police has exhaustively inquired into the matter and found no substance. This Court on 02.11.2015 in Special Criminal Application No. 6251 of 2015 had directed the Commissioner of Police, Surat City to look into the matter, who had also directed two different Police Stations i.e. Mahidharpura Police Station and Varachha Police Station and the reports from the Senior officers received clearly reflects that there are no cognizable offences made out.

11.1. According to learned advocate, the

complaint was kept for verification and yet, neither the complainant nor the advocate had intimated the Court of the earlier developments and the order passed by the Court is not a speaking order. It is the abuse of process of law by the complainant. He emphasized that when the Apex Court considers any matter and decides the issue, it is not within the competence of this Court or any Court to call in question the judgment or term the same as per-incuriam. He also added that the nation is passing through a critical period where any third party can initiate criminal proceedings against anyone, particularly, against those who are discharging public duties. Therefore, without the sanction, no prosecution could be permitted, more particularly, against the public servants. He also heavily relied upon the decision of this Court rendered in Special Criminal Application No. 9307 of 2016 dated 28.12.2016 in the case of Vinodbhai Ramjibhai Patel v. State of Gujarat & Ors. Learned advocate for substantiating his oral version, has pressed into service various decisions.

11.2 Learned advocate Mr. Patel has also relied on the amendment of the Prevention of Corruption Act, 2018 urging fervently that the amendment is already brought in the Prevention of

Corruption Act with the addition of Section 17 A which precludes lodgment of F.I.R. without the prior approval of the concerned Government. The proviso, provides that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person. It further provides that, the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month. He, therefore, has emphasized that without the prior sanction it is not feasible for the Court to direct any inquiry or investigation. He also heavily relied upon the decision rendered in the case of ***Yashwant Singh & Ors. v. Central Bureau of Investigation through its Director & Anr.*** reported in ***2019 Law Suit (SC) 1845*** to urge that even the Apex Court has recognized in a serious matter of Rafael deal that seeking the permission of the Government under Section 17A of the Prevention of Corruption Act for investigating the offence would be necessary and Section 17A of the Act constitute a bar to any inquiry or any investigation, unless there is a previous approval. It is his further argument that in the

case of ***Manju Surana v. Sunil Arora & Ors.*** reported in ***(2018) 5 SCC 557***, the question of law raised before the Apex Court was whether prior sanction for prosecution qua allegation of corruption in respect of public servant is required before setting in motion even the investigative process under Section 156(3) of the Code of Criminal Procedure. The Court clarified the settled law with regard to Chapters-12 and 14 of CrPC but express doubt regarding applicability of the said provision with regard to the offences under PC Act and referred the matter to the Larger Bench. He further urged that Sections 190 and 156(3) of CrPC since are mutually exclusive and the Court can act under Section 156(3) of CrPC when it receives a complaint under Section 190, the Court does not take cognizance as it is the Chapter-14, while deals with post cognizance stage. The Magistrate deals with pre-cognizance stage. According to him, even before taking cognizance, it can choose to direct the simple investigation under Section 156(3) of CrPC, but in a case of allegations of corruption, the prior sanction is a must. The Apex Court has not held the earlier decision as per-incuriam and has restrained itself by merely stating that different path has been traversed in two judgments of the Apex Court, where the offences are under the P.C. Act r/w. I.P.C. He therefore,

has urged that this Court may not in a position to hold that the decision of the Anilkumar (supura) is per-incuriam.

12. For and on behalf of the respondent no.3, learned advocate Mr. Anand Yagnik has urged this Court that the decision rendered by the Apex Court in the case of Anil Kumar (supra) is per-incuriam, as there are various other decisions which were not considered by the Apex Court. He has urged that, neither the Criminal Procedure Code nor the Prevention of Corruption Act would require the sanction from the competent authority before the police undertakes the journey of investigation. Such issue of sanction would arise only on completion of investigation and where the investigating agency prepares finally the report in the form of charge-sheet. It is also his say that the word 'cognizance' as defined in Section 19 of the Prevention of Corruption Act, would have no connection with the powers of police to investigate the complaint under Section 156(3) of the Code. The Court at the time of directing the investigation under Section 156(3) of the Code, does not take cognizance of the offence, upon a complaint, which is a pre-cognizance stage, at which, the Court directs the registration of the F.I.R., on the basis of the complaint. The grievance is made that on account of decision of

Anil Kumar (supra), the genuine complaints of Corruption and further allegations against the public servant would not be entertained. The nation is with the corrupt public servants and at this stage to, put an embargo when the statute does not warrant any such sanction at the pre-cognizance level would amount to stultifying the very object of the Act, because such private complaint is not entertained, without a valid sanction, it would create not only the harassment but would also embolden the corrupt and public servants /officers.

13. Mr. A.B. Pandya, learned advocate appearing for the respondent no.3 has also tendered various authorities and urged that this matter is for quashing of the complaint which cannot be tried as full-fledged trial, nor can the powers of the Investigating Officer be curtailed. He further urged that the Court need not look into the details which are to be looked into by the Investigating Officer. The original record shall be called for, if the Court requires further details, however, reports of the police where it chose not to register the F.I.R. are the scrap and are not required to be regarded at all.

14. For and on behalf of respondent- State, learned Public Prosecutor Mr. Mitesh Amin has

urged that attempt was made to file the complaint directly on 06.07.2015 and after about one year on 07.07.2016, the order impugned came to be passed. According to him, the earlier complaint had been given to the Mahidharpura Police Station, where no substance was found. Twice attempts have been made to approach this Court and at the instance of the Court's direction, it had been inquired into and no cognizable offence was noticed. He has urged that the verification of the complainant is a must as per the decision rendered in the case of ***Priyanka Srivastava and another v. State of Uttar Pradesh and others*** reported in ***2015 (6) SCC 287***. According to the learned Public Prosecutor, assuming that other details were furnished, his complaint needs to be remanded back for reconsideration at the hands of the very Presiding Officer.

15. On having thus heard both the sides, the following questions that arise before this Court, as to whether,

(A) the learned Magistrate can entertain the private complaint made for the offences under the provisions of Prevention of Corruption Act, without the order of sanction invoking the powers under Section 156 of the Code of Criminal Procedure?

(B) the decision rendered in the case of Anil Kumar (supra) is per-incuriam and the Reference made in the case of Manju Surana (supra) will govern the fate of the complaints filed against the public servants?

16. Pursuant to the order passed by this Court on 26.11.2019, petitioner No.8 had remained present before the I.O. concerned along with another person. However, Petitioner No.9, on account of his cancerous condition, could not remain present before the I.O.

16.1. The I.O. required further time to prepare a report and to find out, as to whether, a cognizable offence is made out or not.

17. Case diary also has been brought on record, which indicates the transfer of investigation from one officer to another, as mentioned in the order of this Court dated 26.11.2019. The fact remains that, till date, the investigation has not been completed by the police, and therefore, it is not in a position to state, as to whether, a cognizable offence is made out or not, from the material on record.

18. In the instant case, the facts in relation to the complaints made to the police authority are on a much better footings. Police

authority has twice not found any substance and without waiting for the verification of complainant, order under Section 156(3) of the Cr.P.C. is passed by the Court.

19. In this eventuality, it would be apt to reproduce the order of this Court passed in Criminal Misc. Application No. 27814 of 2016.

> *"7. Having, thus, heard the learned Counsels on both the sides, at the outset, it is needed to be mentioned that this very issue had come up for consideration before this Court (Coram: Mr. J.B. Pardiwala, J.) in case of '**VINODBHAI RAMJIBHAI PATEL VS. STATE OF GUJARAT AND OTHERS**', in Special Criminal Application (Quashing) No. 9307 of 2016, where, this Court was considering the case, where, the applicant filed a private complaint in the Court of the learned Special Judge, Surat, for the offence punishable under Sections 7, 9, 11, 13 and 15 of the Prevention of Corruption Ac, 1988 and Sections 120B, 177, 182, 193, 196, 197, 199, 203, 204, 406, 409, 420, 423, 466, 467, 468, 471, 477 read with 34 and 114 of the Indian Penal Code. The complaint was lodged against, in all, nineteen persons. Upon such complaint being filed in the Court concerned, the same was registered as the Criminal Inquiry Case No.6 of 2016. However, subsequently, the learned Special Judge dropped the inquiry as he noticed that along with the complaint, there was no order of sanction passed by a competent authority, as required under Section 19 of the PC Act. While so holding, the learned Special Judge placed reliance on the decision of the Supreme Court in the case of '**ANIL KUMAR AND OTHERS** (Supra).*
>
> *7.1 In the above background, this Court, after extensive discussion of various decisions and the rival submissions, vide its judgment and order dated 28.12.2016, held that as soon as the complaint is filed, learned Magistrate has to decide either to refer the matter to the police authority for investigation under Section 156(3) of the Code or to inquire into the matter, himself. In either case, the Court needs to consider the contents of the application and annexures to convince itself that the complainant has made out a case for further action. This Court also, further, held that whatever may be the legal implications of the*

*decision of the Apex Court in '**ANIL KUMAR AND OTHERS** (Supra), the position of law, as it stands today, requires that the previous sanction under Section 17A of the PC Act is a must before the Court proceeds to order police investigation under Section 156(3) of the Code. This Court, further, held and observed as under:*

"67. I am conscious of the fact that this principle laid down by the Supreme Court, by giving plain and literal meaning to the term "cognizance", has led to some confusion. The confusion is that if an order of police investigation under Section 156(3) of the Code amounts to taking of cognizance, then the concept of pre-cognizance stage and post-cognizance stage would pale into insignificance. To put it in other words, the law, as on date, is that once the Magistrate decides to proceed in accordance with the provisions of Section 200 / Section 204 of the Code, he is deemed to have been taken cognizance, and in the course of the inquiry, he cannot switch over to a pre-cognizance and order police investigation under Section 156(3) of the Code.

68. What would be the position, if an order under Section 156(3) of the Code, amounts to taking of the cognizance upon a complaint? I am not going into this issue as it is not relevant or necessary for the purpose of deciding this matter. In an appropriate case and at an appropriate stage, the Apex Court may clarify this issue.

69. Before I conclude, I would like to make a reference once again to the decision of the Supreme Court in the case of Priyanka Srivastava (supra). In Priyankya Srivastava (supra), the Supreme Court has observed that a stage has come in this country where Section 156(3) of the Cr.P.C. applications should be supported by an affidavit duly sworn of the applicant who seeks to invocation of the jurisdiction of the Magistrate. According to the Supreme Court, the object is to verify the truth and also to verify the veracity of the allegations. Such affidavit can make the applicant more responsible. This is somewhat in tune with the object of recording of the verification of the complainant on oath, as provided under Section 200 of the Cr.P.C.

70. My final conclusions are as under: [A] The decision of the Supreme Court in the case of Aiyappa (supra) cannot be termed as per incuriam.

[B] The power to take cognizance of an offence under the Prevention of Corruption Act, 1988 has been

conferred on the Special Judge by virtue of Section 5 of that Act. Hence, the application, under Section 156(3) of the Cr.P.C. disclosing the commission of an offence under the Prevention of Corruption Act, can be entertained by the Special Judge only if the complaint is accompanied by a valid sanction accorded by a competent authority under Section 19 of the Act, 1988.

[C] Although there is no specific provision in the Prevention of Corruption Act conferring power on the Special Judge to act under Section 156(3) of the Cr.P.C., but since the Special Judge, by virtue of Section 5 of the Prevention of Corruption Act, is empowered to take cognizance of the offences under that Act, yet the order of the registration of the F.I.R. and its investigation on the application under Section 156(3) of the Cr.P.C. can only be made by the Special Judge. When the Court concerned applies his mind for the purpose of ordering an investigation under Section 156(3) of the Code, he can be said to have taken cognizance of the complaint. At the stage of referring the complaint to the police under Section 156(3) of the Cr.P.C. for investigation, the Court concerned is under an obligation to apply his mind to the allegations made in the complaint.

[D] In the absence of a valid sanction issued by a competent authority under Section 19 of the Prevention of Corruption Act, 1988, the complaint or an application under section 156(3) of the Code, cannot be looked into and will be liable to be dismissed."

7.2 Before, this Court proceeds further to consider the subsequent developments and the various decisions of the Apex Court as well as of this Court, it would be relevant to refer to the provisions of Section 156(3) of the Code, which read thus:

*"**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."*

7.3 It would also be apt to refer to Section 19 of the PC Act, which runs 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 removable 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.
(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.
(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 the 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) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;
(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.
(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings. Explanation.—For the purposes of this section,—
(a) error includes competency of the authority to grant sanction;
(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall

be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature."

*7.4 In '**ANIL KUMAR AND OTHERS** (Supra), the Apex Court was considering case of the appellants, who filed a private complaint under Section 200 of the Code, before the Additional City Civil and Special Judge for Prevention of Corruption on 9.10.2012. The complaint of the Appellants was that the first respondent with a mala fide intention passed an order dated 30.6.2012, in connivance with other officers and restored valuable land in favour of a private person. On a complaint being raised, the first respondent vide order dated 06.10.2012, recalled the earlier order. Alleging that the offence which led to issuance of the order dated 30.06.2012 constituted ingredients contained under Section 406, 409, 420, 426, 463, 465, 468, 471, 474 read with Section 120-B IPC and Section 149 IPC and Section 8, 13(1)(c), 13(1)(d), 13(1)(e), 13(2) read with Section 12 of the PC Act, a private complaint was preferred under Section 200 of the Code. On receipt of the complaint, the Special Judge passed an order on 20.10.2012 , referring t he complaint to Deputy Superintendent of Police — 3 Karnataka Lokayukta, Bangalore Urban, under Section 156(3) of the Code for investigation and to report.*

7.5 Aggrieved by the said order, the first respondent herein approached the High Court of Karnataka by filing Writ Petition Nos.13779-13780 of 2013, where, it was contended that since the appellant is a pubic servant, a complaint brought against him without being accompanied by a valid sanction order could not have been entertained by the Special Court on the allegations of offences, punishable under the PC Act. It was urged before the Apex Court that, even though, the power to order investigation under Section 156(3) can be exercised by a Magistrate or the Special Judge at pre-cognizance stage, yet, the government's sanction cannot be dispensed with. It was also contended that the requirement of a sanction is the pre-requisite condition, even to present a private complaint in respect of a public servant, concerning the alleged offence, said to have been committed in discharge of his official duty.

7.6 The High Court, after hearing the parties, took the view that the Special Judge could not have taken notice of the private complaint, unless the same was accompanied by a sanction order, irrespective of whether, the Court was acting at a pre-cognizance stage or the post- cognizance stage, if, the complaint pertains to a public servant, who is alleged to have

committed the offences, in discharge of his official duties. The High Court, therefore, quashed the order passed by the Special Judge, as well as the complaint filed against the appellant. Aggrieved by the same, therefore, the complainants approached the Apex Court by way of appeals.

7.7 In appeal, both the sides argued fervently before the Apex Court and it was insisted, for and on behalf of the proposed accused, that the question of sanction is of paramount importance for protecting the public servants, who are acting in good faith, while performing their official duties. It was also urged that the requirement of sanction is pre-requisite, when a person files a private complaint under Section 200 of the Code.

*7.8 The Apex Court, after availing opportunity to both the sides, examined the scope of Section 156(3) of the Code and referred to the decision in '**MAKSUD SAIYED VS. STATE OF GUJARAT**', (2008) 5 SCC 668, where, Respondent No. 2 was a former Chairman-cum-Managing Director of Dena Bank and later on, the Chairman and Managing Director of Bank of Baroda, Mumbai, whereas, Respondent Nos. 3 to 11 were Directors of Dena Bank. Appellant was a Director of Nagami Nicotine Pvt. Ltd., who had transactions with the said Company. He had taken a loan from Dena Bank. As loans were not paid, admittedly, an original application was filed against him before the Debts Recovery Tribunal, Ahmedabad, for recovery of a sum of Rs.120.13/- lakhs from the Company. The Bank, then, floated a public issue of 8 crores equity shares of Rs. 10/- each for cash at a premium of Rs. 17/-, i.e. at a price of Rs. 27/- each. Prospectus was published for the purpose of public issue and therein, some false and misleading information had been given with regard to sanction limits, the dues and export bills of the Company. It was, therefore, alleged that the Company had committed an offence punishable under Sections 120B, 425, 191, 192, 177, 181 as also 500 the IPC and a criminal complaint was filed before the Chief Judicial Magistrate, Vadodara, by the appellant on or about 28.02.2005, leveling various allegations. An order under Sub-section (3) of Section 156 of the Code was passed by the learned Chief Judicial Magistrate, relying on or on the basis of allegations made in the said complaint. The learned Chief Judicial Magistrate by an order dated 28.02.2005, directed the police authorities to investigate the complaint. Respondent, therefore, approached this Court by way of an application under Section 482 of the Code for quashing*

the impugned complaint and the investigation on 10.05.2005 and this Court allowed the same vide judgment and order dated 9.01.2006. Hence, the challenge was made before the Apex Court, where, after hearing both the sides and considering the various decisions, pressed into service before it, the Apex Court dismissed the same.

*7.9 Thus, by relying on the decision in '**MAKSUD SAIYED**' (Supra), this Court held that, while referring the matter for investigation under Section 156(3) of the Code, it should be reflected by the learned Magistrate as to what had weighed with it for making such a reference, although, a detailed expression of his views is not warranted. This Court also examined the expression 'Cognizance' appearing in Section 19(1) of the PC Act and inquired into the matter, as to whether, Section 156(3) of the Code would amount to taking cognizance of the offence or not. The relevant observations read as under:*

"13 In such circumstances referred to above, the learned A.P.P. Prays that there being no merit in this application, the same be rejected.

- *ANALYSIS:*

14 Having heard the learned counsel appearing for the parties and having considered the materials on record, the only question that falls for my consideration is whether the learned Special Judge committed any error in passing the impugned order.

15 The question of law that falls for my consideration is, whether a private complaint for the offence under the Prevention of Corruption Act, 1988 without the sanction order being accompanied can be entertained by the Court while invoking the power under Section 156(3) of the Cr.P.C.?

16 Section 156 of the Cr.P.C. reads as under: "156. Police officer's power to investigate cognizable case

(1) …...
(2) …...
(3) Any Magistrate empowered under section 190 may order such an investigation as above mentioned."

17 Section 19 of the Act, 1988 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 removable 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.

(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under subsection (1) should be given by the Central Government or the State Government or any other authority; such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, (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 the absence of, or any error, omission or irregularity in, the sanction required under subsection (1), unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby;

(b) no Court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) no Court shall stay the proceedings under this Act on any other ground and no Court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

(4) In determining under subsection

(3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the Court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.

Explanation.

For the purposes of this section,

(a) error includes competency of the authority to grant sanction; (b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature."

7.10 However, this Court did not accept the contention of the learned Counsel that the requirement of sanction is only procedural in nature and hence, directory or else Section 19(3) would be rendered otiose, by holding that sub-Section (3) of Section 19 has an object to achieve, which applies in circumstances, where, a Special Judge has already rendered a finding, sentence or order. In such an event, it shall not be reversed or altered by a court in appeal, confirmation or revision, on the ground of absence of sanction. However, that does not mean that the requirement to obtain sanction is not a mandatory requirement. Once, it is noticed that there was no previous sanction, as already indicated in various judgments by Hon'ble the Apex Court, the Magistrate cannot order investigation against a public servant, by invoking powers under Section 156(3), Cr.P.C..

7.11 This Court also noticed that the term 'Cognizance' has a wider connotation and it is 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) the Code, obviously, he does not take 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 of the Code, the next step to be taken is to follow up under Section 202 of the Code. Consequently, a Special Judge referring the case for investigation under Section 156(3) is at pre-cognizance stage.

*7.12 The Apex Court in case of '**PRIYANKA SRIVASTAVA AND ANOTHER**' (Supra), expressed its anguish over the abuse of process of law by the unscrupulous litigants by stating that the appeals, like the present one, projects and frescoes a scenario, which is not only disturbing but also has the potentiality to create a stir, compelling one, to ponder in a perturbed state, as to how some unscrupulous, unprincipled and deviant litigants can ingeniously and innovatively design, in a nonchalant manner to knock at the doors of the Court, as if, it is a laboratory, where, multifarious experiments can take place and such skillful persons can adroitly abuse the process of the Court, at their own will and desire, by painting a canvas of agony by assiduous assertions made in the application, though, their real intention is to harass the statutory authorities, without any remote remorse, with the inventive design, primarily to create a mental pressure on the said officials as individuals, for they would not like to be dragged to a court of law to face criminal cases and further pressurize them, in such a fashion so that financial institution, which they represent, would ultimately be constrained to accept the request for "One Time Settlement" with the fond hope that the obstinate defaulters, who had borrowed money from it would withdraw the cases instituted against them.*

7.13 In the matter before the Apex Court, respondent No.3, namely, Prakash Kumar Bajaj, son of Pradeep Kumar Bajaj, had availed a housing loan from the financial institution, namely, Punjab National Bank Housing Finance Limited (PNBHFL) on 21.01. 2001 vide Housing Loan Account No. IHL-583. The loan was taken in the name of the respondent No.3 and his wife, namely, Jyotsana Bajaj. As there was default in consecutive payment of the installments, the loan account was treated as a Non Performing Asset (NPA), in accordance with the guidelines framed by the Reserve Bank of India. The authorities of the financial institution issued notice to the borrowers under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, and in pursuance of the proceedings undertaken in the said Act, the PNBHFL, on 05.06.2007, submitted an application before the District Magistrate, Varanasi, U.P. for taking appropriate action under Section 13(4) of the SARFAESI Act.

7.14 At that juncture, respondent No.3 preferred W.P. No.44482 of 2007, which was dismissed by the High Court on 14.09.2007, with the observation that

it was open to the petitioner,therein, to file requisite objection and thereafter, to take appropriate action as envisaged under Section 17 of the SARFAESI Act. After the dismissal of the writ petition with the aforesaid observation, respondent No.3 filed Criminal Complaint Case No.1058 of 2008, under Section 200 of the Code, against the then Vice-President, Assistant President and the Managing Director respectively, for the offences punishable under Sections 163, 193 and 506 of the IPC. It was alleged in the said complaint that the aforesaid accused persons had intentionally taken steps to cause injury to him. The learned Magistrate vide order dated 04.10.2008, dismissed the criminal complaint and declined to take cognizance after recording the statement of the complainant and examining the witnesses under Section 202 of the Code.

7.15 Being grieved by the aforesaid order, respondent No.3 preferred a Revision Petition No.460 of 2008, which was eventually heard by the learned Additional Sessions Judge, Varanasi, U.P and after adumbrating the facts and taking note of the submissions of the revisionist, set aside the order dated 04.10.2008 and remanded the matter to the trial Court with the direction that he shall hear the complaint again and pass a cognizance order according to law, on the basis of merits, according to the directions given in the said order. The learned Additional Sessions Judge, again, heard the counsel for respondent No.3 and the learned counsel for the State, but, no notice was issued to the accused persons, therein. The order passed against the said accused persons, at that time, was an adverse order inasmuch as the matter was remitted. It was, therefore, incumbent to hear the respondents though they had not become accused persons.

7.16 After the remand, the learned Magistrate vide order dated 13.07.2009, took cognizance and issued summons to the proposed accused persons. Therefore, they knocked at the doors of the High Court, under Section 482 of the Code, by way of Crl. Misc. No.13628 of 2010 and the High Court allowed the same, by setting aside the impugned order.

7.17 It appears that the borrowers filed an objection under Section 13(3A) of the SARFAESI Act. However, as the objection was not dealt with, respondent No.3 preferred W.P. No.22254 of 2009, which was disposed of on 05.05.2009 by the High Court, directing disposal of the same. Eventually, the objection was rejected by the competent authority vide

order dated 01.06.2009. Being grieved by the aforesaid order of rejection, respondent No.3 filed Securitisation Appeal No.5 of 2010, before the Debt Recovery Tribunal (DRT), Allahabad, U.P., which was also rejected vide order dated 23.11. 2012. Being, un-successful before the DRT, the borrowers preferred another appeal before the Debts Recovery Appellate Tribunal (DRAT), Allahabad, U.P.

7.18 After the High Court quashed the earlier proceedings, respondent No.3, in October, 2011, filed another application under Section 156(3) of the Code, against V.N. Sahay, Sandesh Tripathi and V.K. Khanna, alleging criminal conspiracy and forging of documents referring to three post-dated cheques and eventually it was numbered as Complaint Case No. 344/2011, which gave rise to FIR No. 262 of 2011 under Sections 465, 467, 468, 471, 386, 506, 34 and 120B IPC. Being not satisfied with the same, on 30.10.2011, he filed another application under Section 156(3) against the present appellants alleging that there has been under-valuation of the property. It was also numbered as Complaint Case No. 396/2011, wherein, the learned Magistrate directed the SHO to register FIR against the proposed accused-appellants. Pursuant to the said order, another complaint being FIR No. 298/2011 was registered.

7.19 In the above background, respondent No.3 made the officials agree to enter into one time settlement. The said agreement was arrived at with the stipulation that he shall withdraw various cases filed by him on acceptance of the one time settlement. On 28.11.2011, the one time settlement was acted upon and respondent No.3 deposited Rs.15 lakhs towards the same. It may, however, be noted that at that juncture, respondent No.3 did not disclose about the initiation of the complaint cases Nos. 344/2011 and 396/2011 against them. Therefore, the proposed accused had to approach the High Court of Allahabad, which disposed of the same, and thereafter, the challenge was taken before the Apex Court. In these factual matrix, the Apex Court observed and held as under:

"27. Regard being had to the aforesaid enunciation of law, it needs to be reiterated that the learned Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations and not to issue directions without proper application of mind. He has also to bear in mind that sending the matter would be conducive to justice and then he may pass the requisite order. The present is a case where the accused persons are serving in high positions in the bank. We are absolutely conscious that the position

does not matter, for nobody is above law. But, the learned Magistrate should take note of the allegations in entirety, the date of incident and whether any cognizable case is remotely made out. It is also to be noted that when a borrower of the financial institution covered under the SARFAESI Act, invokes the jurisdiction under Section 156(3) Cr.P.C. and also there is a separate procedure under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, an attitude of more care, caution and circumspection has to be adhered to.

28. Issuing a direction stating "as per the application" to lodge an FIR creates a very unhealthy situation in the society and also reflects the erroneous approach of the learned Magistrate. It also encourages the unscrupulous and unprincipled litigants, like the respondent no.3, namely, Prakash Kumar Bajaj, to take adventurous steps with courts to bring the financial institutions on their knees. As the factual exposition would reveal, he had prosecuted the earlier authorities and after the matter is dealt with by the High Court in a writ petition recording a settlement, he does not withdraw the criminal case and waits for some kind of situation where he can take vengeance as if he is the emperor of all he surveys. It is interesting to note that during the tenure of the appellant No.1, who is presently occupying the position of Vice-President, neither the loan was taken, nor the default was made, nor any action under the SARFAESI Act was taken. However, the action under the SARFAESI Act was taken on the second time at the instance of the present appellant No.1. We are only stating about the devilish design of the respondent No.3 to harass the appellants with the sole intent to avoid the payment of loan. When a citizen avails a loan from a financial institution, it is his obligation to pay back and not play truant or for that matter play possum. As we have noticed, he has been able to do such adventurous acts as he has the embedded conviction that he will not be taken to task because an application under Section 156(3) Cr.P.C. is a simple application to the court for issue of a direction to the investigating agency. We have been apprised that a carbon copy of a document is filed to show the compliance of Section 154(3), indicating it has been sent to the Superintendent of police concerned.

29. At this stage it is seemly to state that power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of

the code. A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellows citizens, efforts are to be made to scuttle and curb the same.

30. In our considered opinion, a stage has come in this country where Section 156(3) Cr.P.C. 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 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."

7.20 It is, thus, clear from the above decision that the emphasis on the part of the Apex Court is that the learned Magistrate has to apply his mind before passing the order under Section 156(3) of the Code.

*7.21 At this stage, the decision rendered by the Apex Court in case of '**R.R. CHARI VS. STATE OF U.P.**', AIR 1951 SC 207, deserves reference, where, the Apex Court was considering the challenge in appeal by special leave, against an order of the Allahabad High Court, dismissing the revision petition of the appellant against the order of the Special Magistrate, refusing to quash the proceedings on the ground that the prosecution of the appellant inter alia under sections 161 and 165 and 314 of IPC was illegal and without jurisdiction in the absence of the sanction of the Government under section 107 of the Code and section 6 of the PC Act.*

7.22 In the matter before the Apex Court, the appellant held the office of Regional Deputy Iron and Steel Controller, Kanpur Circle, U.P. in 1947, and thus, was a public servant. The police having suspected the appellant to be guilty of the offences mentioned above applied to the Deputy Magistrate, Kanpur, for a

warrant of his arrest on the 22.10.1947 and the warrant was issued on the next day. The appellant was arrested on the 27.10.1947, but, was granted bail. On the 26.11.1947, the District Magistrate cancelled his bail as the Magistrate considered that the sureties were not proper. On the 01.12.1947, the Government appointed a Special Magistrate to try offences under the Act and on the very day, the appellant was produced before the Special Magistrate and was granted bail. The police continued the investigation. On the 06.12.1948, sanction was granted by the Provincial Government to prosecute the appellant, inter alia, under sections 161 and 165 of the IPC. On the 31.01.1949, sanction in the same terms was granted by the Central Government. In the meantime, as a result of an appeal made by the appellant to the High Court of Allahabad, the amount of his bail was reduced and on the 25.03.1949, the appellant was ordered to be put up before the Magistrate to answer the charge-sheet submitted by the prosecution, where, it was urged on behalf of the appellant that when the warrant for his arrest was issued by the Magistrate on the 22.10.1947, the Magistrate took cognizance of the offence and, as no sanction of the Government had been obtained before that day, the initiation of the proceedings against him, which began on that day without the sanction of the Government, was illegal. It was also urged that the same proceedings, since, had continued against him, and therefore the notice to appear before the Magistrate, issued on 25.03.1949, is also illegal. The learned Magistrate took cognizance of the offences on 22.03.1947, by relying, principally, on certain observations in Emperor v. Sourindra Mohan Chuckerbutty.

7.23 Therefore, the issue before the Apex Court was to determine, as to when the learned Magistrate took the cognizance. While so doing, the Apex Court referred to the decision of the Kolkata High Court in Superintendent and Remembrancer of Legal Affairs, West Bengal v. Abani Kumar Banerjee, where, the Kolkata High Court has observed that what is taking cognizance has not been defined in the Code, however, it observed that before a magistrate takes cognizance of any offence under section 190 (1) (a) of the Code, he must not only have applied his mind to the contents of the petition but he also must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter, under the provisions of Section 200 of the Code and thereafter, to send it for an inquiry and report a under Section 202 of the Code. When a magistrate applies his mind, not for the purpose of proceeding under the subsequent sections of this Chapter, but, for taking action of

some other kind, e.g., ordering investigation under Section 156(3) or for issuing a search warrant for the purpose of investigation, he cannot be said to have taken cognizance of the offence.

*7.24 Reference is also needed to be made of another decision of the Apex Court in '**DEVARAPALLI LAXMINARAYANA REDDY VS. V. NARAYANA REDDY**', 1976 (3) SCC 252, where, the Apex Court was considering the case, where, on receiving a complaint against the appellants, for allegedly Committing offences under ss. 147, 148, 307, 395, 448, 378 and 342 of the IPC, the Judicial Magistrate, F.C., Dharmavaram., forwarded it to the police under Section 156(3) of the Code for investigation . The appellants, therefore, filed an application in the High Court under Section 482 of the Code, against the said order of the Magistrate, praying that the order passed by the Magistrate be quashed inasmuch as "it was illegal, unjust and gravely prejudicial to the petitioners". The learned Single Judge of the High Court. however, dismissed it by an order dated 20.10.1975.*

7.25 Before the Apex Court, it was urged that the complaint included offences, triable exclusively by the Sessions Court, and under Section 202(1), Proviso 1(a), of the Code, the learned Magistrate was prohibited from directing the police to investigate and that he was bound to proceed with the same, himself , before issuing process to the accused. For and on behalf of the prosecution, it was urged that the powers conferred on the Magistrate under Section 156(3) of the Code are independent of his power to send the case for investigation under Section 202(1) of the Code and that such powers can be invoked before the Magistrate takes cognizance of the case, but, Section 202 of the Code, comes into operation only after he starts dealing with the complaint in accordance with the provisions of Chapter XV, where, the Apex Court held that the powers to order police investigation, under 156(3) of the Code are different from the powers to direct investigation under Section 202(1) of the Code. Both of them, operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, whereas the second, at the post-cognizance stage, when the Magistrate is in seisin of the case. It, further, held that an investigation under Section 202 of the Code for the purpose or deciding, whether or not, there is sufficient ground for proceeding and it is not to initiate a fresh case on police report, but, to assist the Magistrate in completing the proceedings, already instituted upon a complaint before him.

7.26 The Apex Court also examined the term 'Cognizance' and further held that, when, on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 200 of the Code and the succeeding sections in chapter XV of the Code, he is said to have taken cognizance of the offence, within the meaning of Section 190(l)(a) of the Code . However, if, instead of' proceeding under Chapter XV, he has, in the exercise of his discretion, taken action of some other kind, he cannot be said to have taken cognizance of any offence.

7.27 It is, thus, quite clear from the above decision that on a reading of the complaint, if, the learned Magistrate finds that allegations made therein discloses a cognizable offence and if, he is of the opinion that the forwarding the same to the police for investigation under Section 156(3) of the Code, would be conducive to justice and to save the valuable time of the Court from being wasted, by ordering inquiry into the matter, which is, essentially, the preliminary duty of the police, the Court shall be justified in adopting that course, with an alternative not to take cognizance of the offence, itself. It is, therefore, held, in clear terms, that ordering inquiry or investigation under Section 156(3) of the Code, itself, cannot be said to have taken cognizance of the offence.

*7.28 In the case of '**MOHD. YOUSUF V. SMT. AFAQ JAHAN**', AIR 2006 SC 705, the Apex Court was considering, in appeal, the order passed by a learned Single Judge of the Allahabad High Court, Lucknow Bench. The respondents No.1 had filed a petition under Section 432 of the Code to quash the direction given to register F.I.R., where, the charge-sheet was filed after investigation as well as the cognizance was taken by the learned Chief Judicial Magistrate,Raebareli. By order dated 13.07.1998, learned CJM had directed the police to register the complaint and investigate the case. On 19.07.1998, on the basis of the order passed by learned CJM, police registered FIR No. 830 of 1998 for alleged commission of offences punishable under Sections 420, 467, 468 and 471 of the Indian Penal Code, 1860*

7.29 It was a case, where, the Appellant received a notice dated 18.01.1996, from the Union Bank of India, Raebareli ,asking him to pay back the loan amount with interest amounting to Rs. 1,25,421/-. Appellant was shown to be a guarantor for the loan taken by respondent No. 1 on 30.12.1994. Appellant was surprised to receive the notice as he had never stood

as guarantor for any loan. He made enquiry from the Bank and came to know that the respondent No.1 had forged some documents in conspiracy with her husband Zahirul Islam, where, an affidavit purported to have been signed by the appellant was filed with the bank to make him the second guarantor. Appellant had never signed the document and his signature was forged. A writ petition, therefore, was filed before the Allahabad High Court to quash the notice issued by the Bank. However, the same was dismissed, while reserving liberty in favour of the appellant, to seek appropriate remedy. On 13.07.1998, an application was filed before the learned CJM, alleging commission of offences by the persons, named as accused, therein. Learned CJM directed the police to register and investigate the case. Thus, on the basis of order of learned CJM, the FIR was registered.

7.30 It was the grievance on the part of the appellant that the accused persons with the help of the bank manager forged his signature in the agreement form and also prepared an affidavit, to show him as a guarantor. After investigation charge sheet was filed by the police on 13.09.1999. On 24.05.2000 respondent No.1 filed the application under Section 482 of the Code for quashing the FIR, the charge sheet and the order of the learned magistrate by which he had taken cognizance so also the order, directing the polices to register the case under Section 156(3) of the Code. By the impugned order the High Court quashed the charge sheet on the ground that the magistrate had no power to order registration of the case. Hence, the challenge was taken before the Apex Court.

7.31 After hearing the parties, the apex Court held and observed that Section 156, falling within Chapter-XII, deals with the powers of Police Officers to investigate cognizable offences. Investigation envisaged under Section 202. contained in Chapter-XV, of the Code is different from the investigation contemplated under Section 156 of the Code . The investigation contemplated in Chapter- XII can be commenced by the police even without the order of a Magistrate. But, that does not mean that when a Magistrate, orders an investigation under Section 156(3) of the Code, it would be a different kind of investigation. Such investigation must also end up only with the report contemplated under Section 173 of the Code. But, the significant point to be noticed is, when a Magistrate orders investigation under Chapter-XII, he does so before he takes cognizance of the offence. But, a Magistrate need not order any such Investigation, if, he proposes to take cognizance of the offence. Once he takes cognizance of the offence, he has to follow the

procedure envisaged in Chapter-XV of the Code. The Apex Court, further, observed that a reading of Section 202(1) of the Code, makes the position clear, that the investigation referred to, therein, is of a limited nature. Such investigation is only for helping the Magistrate to decide, whether or not, there is sufficient ground for him to proceed further. The Apex Court, further, held as under:

"7. Chapter XII of the Code contains provisions relating to "information to the police and their powers to investigate", whereas Chapter XV, which contains Section 202, deals with provisions relating to the steps which a Magistrate has to adopt while and after taking cognizance of any offence on a complaint. Provisions of the above two chapters deal with two different facets altogether, though there could be a common factor i.e. complaint filed by a person. Section 156, falling within Chapter XII deals with powers of the police officers to investigate cognizable offences. True, Section 202, which falls under Chapter XV, also refers to the power of a Magistrate to "direct an investigation by a police officer". But the investigation envisaged in Section 202 is different from the investigation contemplated in Section 156 of the Code.

8. The various steps to be adopted for investigation under Section 156 of the Code have been elaborated in Chapter XII of the Code. Such investigation would start with making the entry in a book to be kept by the officer in charge of a police station, of the substance of the information relating to the commission of a cognizable offence. The investigation started thereafter can end up only with the report filed by the police as indicated in Section 173 of the Code. The investigation contemplated in that chapter can be commenced by the police even without the order of a Magistrate. But that does not mean that when a Magistrate orders an investigation under Section 156(3) it would be a different kind of investigation. Such investigation must also end up only with the report contemplated in Section 173 of the Code. But the significant point to be noticed is, when a Magistrate orders investigation under Chapter XII he does so before he takes cognizance of the offence.

9. But a Magistrate need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance of the offence he has to follow the procedure envisaged in Chapter XV of the Code. A reading of Section 202(1) of the Code makes the position clear that the investigation referred to therein is of a limited nature. The Magistrate can

direct such an investigation to be made either by a police officer or by any other person. Such investigation is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further. This can be discerned from the culminating words in Section 202(1) i.e. 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."

10. This is because he has already taken cognizance of the offence disclosed in the complaint, and the domain of the case would thereafter vest with him.

11. The clear position therefore is that any judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complaint because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."

*7.32 The Apex Court, in case of '**L. NARAYANA SWAMY VS. STATE OF KARNATAKA & OTHERS**', (2016) 9 SCC 598, raised two questions, as to whether, the order directing further investigation under Section 156(3) of the Code could be passed in relation to a public servant, in absence of a valid sanction, contrary to the decision of the Apex Court in '**ANIL KUMAR AND OTHERS** (Supra) and '**MANHARBHAI MULJIBHAI KAKADIA V. SHAILESHBHAI MOHANBHAI PATEL**', (2012) 10 SCC 517, and whether, a public servant, who is not on the same post loses the protection under Section 19(1) of the Code PC Act, though, he continues to be a public servant, where, after a detailed discussion as what amounts to 'Cognizance' and the discussion of the various other decisions, it concluded on the first question that the order directing further investigation under Section*

156(3) of the Code cannot be passed in absence of a valid sanction. The Apex Court, then, held as below:

"11. Since requirement of obtaining sanction is contained in Section 19(1) of the P.C. Act, it would be proper to reproduce the same. For our purposes, reproduction of subsection (1) of Section 19 of the P.C. Act shall suffice which we reproduce herein below:

"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 [save as otherwise provided in the Lokpal and Lokayuktas Act, 2013]—

(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 removable 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."

12. As is clear from the plain language of the said Section, the Court is precluded from taking "cognizance" of an offence under certain sections mentioned in this provision if the prosecution is against the public servant, unless previous sanction of the Government (Central or State, as the case may be) has been obtained. What is relevant for our purposes is that this Section bars taking of cognizance of an offence. The question is whether it will cover within its sweep order directing investigation under Section 156(3) of the Cr.P.C? High Court has taken the view, in the impugned judgment, that bar is from taking cognizance which would not apply at the stage of investigation by investigating officer. It is observed that sanction is required only after investigation and that too when, after investigation, it is found that there is substantial truth in the investigation report as to what amounts to cognizance of offence.

13. The High Court has referred to Section 190 of the Cr.P.C. which stipulates that cognizance of an offence is to be taken under three contingencies viz. (a) upon receiving a complaint of facts which

constitute such offence, or (b) on the basis of police report stating such facts which constitute an offence or upon information received from any person other than police officer, or (c) suo moto when Magistrate acquires that such an offence has been committed. This position is clearly discernible from the reading of Section 190 of the Cr.P.C. and we extract the same herein below:

"190. Cognizance of offences by Magistrates.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under Sub-Section (2), may take cognizance of any offence(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

14. When a complaint is received, the Court records preliminary evidence of the complainant on the basis of which it satisfies itself as to whether sufficient evidence is placed on record which may prima facie constitute such offence. Likewise, Police report is filed under Section 173(2) of the Cr.P.C. on the completion of investigation and on perusal thereof, the Magistrate satisfies himself about the facts which constitute such offence. Similar is the position in the third contingency. On this basis, the High Court has opined that since prior sanction is required only at the time of taking cognizance which stage comes much after the investigation is ordered under Section 156(3) of Cr.P.C. at the stage of giving direction to investigate into the complaint, such a sanction is not required.

15. The above view taken by the High Court is contrary to the judgments of this Court in Manharibhai Muljibhai Kakadia and Anil Kumar. In Manharibhai Muljibhai Kakadia, the facts were that the respondent filed before the CJM a criminal complaint alleging that

the appellant had, by doing the acts stated, committed the offences punishable under Sections 420, 467, 468, 471 and 120B IPC. The CJM, in exercise of his power under Section 202 CrPC by his order dated 18.06.2004 directed an enquiry to be made by a police inspector. The investigating officer investigated into the matter and submitted a compliant summary report opining that no offence was made out. The CJM on 16.04.2005 accepted that report and dismissed the complaint. The respondent complainant filed a criminal revision petition there against under Section 397 read with Section 401 CrPC before the High Court. The appellants then made an application seeking their impleadment as respondents in the revision proceedings so that they could be heard in the matter. On 05.08.2005, the High Court dismissed that application. Against that order, appeal was heard by special leave. This Court set aside the order of the High Court permitting the appellants to be impleaded in the revision proceedings. The Court took note of the provisions of Cr.P.C. I.e. Section 202, which does not permit an accused person to intervene in the course of inquiry by the Magistrate. However, it was held that even while directing inquiry, the Magistrate applies his judicial mind on the complaint and, therefore, it would amount to taking cognizance of the matter. In this context, the Court explained the word "cognizance" in the following manner: "34. The word "cognizance" occurring in various sections in the Code is a word of wide import. It embraces within itself all powers and authority in exercise of jurisdiction and taking of authoritative notice of the allegations made in the complaint or a police report or any information received that an offence has been committed. In the context of Sections 200, 202 and 203, the expression "taking cognizance" has been used in the sense of taking notice of the complaint or the first information report or the information that an offence has been committed on application of judicial mind. It does not necessarily mean issuance of process." 16 Second judgment in the case of Anil Kumar v. M.K. Aiyappa referred to above is directly on the point. In that case, identical question had fallen for consideration viz. whether sanction under Section 19 of the P.C. Act is a precondition for ordering investigation against a public servant under Section 156(3) of Cr.P.C. even at pre-cognizance stage?

Answering the question in the affirmative, the Court discussed the legal position in the following manner:

"13. The expression "cognizance" which appears in Section 197 CrPC came up for consideration before a

threeJudge Bench of this Court in State of U.P. v. Paras Nath Singh [(2009) 6 SCC 372 : (2009) 2 SCC (L&S) 200], and this Court expressed the following view: (SCC pp. 375, para 6)

"6. … 10. … 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 Black's 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.' [Ed.: As observed in State of H.P. v. M.P. Gupta, (2004) 2 SCC 349, 358, para 10 : 2004 SCC (Cri) 539.] "

14. In State of W.B. v. Mohd. Khalid [(1995) 1 SCC 684 : 1995 SCC (Cri) 266] , this Court has observed as follows:

"13. 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." [Ed.: As considered in State of Karnatak v. Pastor P. Raju, (2006) 6 SCC 728, 734, para 13 : (200) 3 SCC (Cri) 179.]

The meaning of the said expression was also considered by this Court in Subramanian Swamy case [(2012) 3 SCC 64 : (2012) 1 SCC (Cri) 1041 : (2012) 2 SCC (L&S) 666] ."

15. The judgments referred to herein above clearly indicate that the word "cognizance" has a wider connotation and is 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) CrPC, 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 CrPC and the next step to be taken is to follow up under Section 202 CrPC. Consequently, a Special Judge referring the case for investigation under Section 156(3) is at pre-cognizance stage.

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21. The learned Senior Counsel appearing for the appellants raised the contention that the requirement of sanction is only procedural in nature and hence, directory or else Section 19(3) would be rendered otiose. We find it difficult to accept that contention. Sub-section (3) of Section 19 has an object to achieve, which applies in circumstances where a Special Judge has already rendered a finding, sentence or order. In such an event, it shall not be reversed or altered by a court in appeal, confirmation or revision on the ground of absence of sanction. That does not mean that the requirement to obtain sanction is not a mandatory requirement. Once it is noticed that there was no previous sanction, as already indicated in various judgments referred to hereinabove, the Magistrate cannot order investigation against a public servant while invoking powers under Section 156(3) CrPC. The above legal position, as already indicated, has been clearly spelt out in Paras Nath Singh [(2009) 6 SCC 372 : (2009) 2 SCC (L&S) 200] and Subramanian Swamy [(2012) 3 SCC 64 : (2012) 1 SCC (Cri) 1041 : (2012) 2 SCC (L&S) 666] cases." Having regard to the ratio of the aforesaid judgment, we have no hesitation

in answering the question of law, as formulated in para 7 above, in the negative. In other words, we hold that an order directing further investigation under Section 156(3) of the Cr.P.C. cannot be passed in the absence of valid sanction. "

*7.33 This Court also deems it appropriate to refer at this stage to the decision of the Apex Court in '**MANJU SURANA**' (Supra), where, it was considering the question of law sought to be raised in the appeals, as to whether, prior sanction for prosecution, qua allegations of corruption in respect of a public servants, is required before setting in motion even the investigative process under Section 156(3) of the Code .*

7.34 In the matter before the Supreme Court, the appellant submitted a complaint before the Special Judge (Prevention of Corruption Act), Jaipur Metropolitan City, Jaipur, under Sections 7 & 13 of the PC Act and Sections 420, 467, 468 & 471, read with Section 120B, of the IPC. The appellant sought investigation of offences and registration of an FIR against the accused persons. The first respondent, arrayed as an accused before the Special Judge, was the Principal Secretary to the Government, P.H.E.D., Chief Minister and the other persons, arrayed as accused before the Special Judge,were the Superintending Engineer, Chief Engineer, Ex.-Chief Minister (as she then was), Ex-Minister of P.H.E.D., Finance Secretary, Deputy Accountant General so also P.S.L. Company. It was alleged in the complaint that in the drinking water project Nos.1 to 8, a conspiracy was hatched for fulfilling the personal vested interest by way of a tender procedure, which caused loss to the Government fund. The last and the 8th accused were stated to be given the advantage for personal interest. In short, as per the allegations of the appellant, there was a shortage of budget for running the projects and the report of respondent No.1, then, the Principal Secretary, Dated: 20.4.2008 was liable to be perused. In order to make payments for the outstanding and running projects, the Chief Secretary, accused No.1, was stated to have written a proposal to the Finance Department, but, the Finance Secretary expressed his inability for making available such huge amounts. The fund was stated to have been digressed. However, the Apex Court noticed that respondent No.1, therein, was neither holding the post of the Principal Secretary of the P.H.E.D nor the Chief Secretary at the relevant point of time and the description of his office was consequently, found to be not correct. In fact, the first respondent was holding the post of Principal Secretary to the Chief Minister.

*7.35 Therefore, the Special Judge closed the complaint in terms of order dated 04.02.2014, on account of the fact that the accused persons arrayed as respondents are either public servants or have remained as public servants and no prior sanction had been obtained by the complainant nor the same was granted by the competent authority, as required under Section 19 of the PC Act read with Section 197 of the Code. While so doing, the learned Special Judge placed reliance on the judgment of the Apex Court in '**ANIL KUMAR AND OTHERS**' (Supra), opining that no complaint could be forwarded for investigation under Section 156(3) nor could any proceedings be initiated under Sections 202 & 202 of the Code, in absence of such a sanction. It was, thus, observed that further proceedings in the case would be conducted on the grant / filing of sanction.*

*7.36 The appellant, therefore, preferred a revision petition against the said order, which came to be dismissed by the detailed order dated 30.4.2014 by the Court concerned, by relying on various judicial pronouncements and holding, in view of the decision in '**ANIL KUMAR AND OTHERS**' (Supra), that both for the reason of absence of any sanction so also the revision petition being directed against an interlocutory order, the same was not maintainable.*

7.37 The question raised before the Apex Court was as to whether, the prior sanction for prosecution, for allegations of corruption against a public servant, is required before directing investigation under Section 156(3) of the Code, where, it was held that what amounts to taking cognizance is not defined under the Code, but, it can be said that before a magistrate takes cognizance of any offence under section 190 (1) (a) of the Code, he must not only have applied his mind to the contents of the petition but he also must have done so for the purpose of proceeding in a particular way, as indicated in the subsequent provisions of the concerned Chapter, under the provisions of Section 200 of the Code and thereafter, to send it for an inquiry and a report under Section 202 of the Code. When a magistrate applies his mind, not for the purpose of proceeding under the subsequent sections of this Chapter, but, for taking action of some other kind, e.g., ordering investigation under Section 156(3) or for issuing a search warrant for the purpose of investigation, he cannot be said to have taken cognizance of the offence.

7.38 The relevant findings and observations of the Apex Court reads as follows:

"33. We have examined the rival contentions and do find a divergence of opinion, which ought to be settled by a larger Bench. There is no doubt that even at the stage of 156(3), while directing an investigation, there has to be an application of mind by the Magistrate. Thus, it may not be an acceptable proposition to contend that there would be some consequences to follow were the Magistrate to act in a mechanical and mindless manner. That cannot be the test.

34. The catena of judgments on the issue as to the scope and power of direction by a Magistrate under Chapters 12 & 14 is well established. Thus, the question would be whether in cases of the P.C. Act, a different import has to be read qua the power to be exercised under Section 156(3) of the Cr.P.C., i.e., can it be said that on account of Section 19(1) of the P.C. Act, the scope of inquiry under Section 156(3) of the Cr.P.C. can be said to be one of taking 'cognizance' thereby requiring the prior sanction in case of a public servant? It is trite to say that prior sanction to prosecute a public servant for offences under the P.C. Act is a provision contained under Chapter 14 of the Cr.P.C. . Thus, whether such a purport can be imported into Chapter 12 of the Cr.P.C. while directing an investigation under Section 156(3) of the Cr.P.C., merely because a public servant would be involved, would beg an answer.

35. The apprehension expressed by the learned ASG possibly arises from the observations in Suresh Chand Jain v. State of Madhya Page 23 of 30 Pradesh26 followed in Mohd. Yousuf v. Afaq Jahan27. Thus, the observations are to the effect that even at a pre-cognizance stage under Section 156(3) of the Cr.P.C., it is open to the Magistrate to direct the police to register an FIR and that even if the Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter.

36. The complete controversy referred to aforesaid

and the conundrum arising in respect of the interplay of the P.C. Act offences read with the Cr.P.C. is, thus, required to be settled by a larger Bench.

37. The papers may be placed before Hon'ble the Chief Justice of India for being placed before a Bench of appropriate strength.

38. We have passed a detailed order making a reference to a larger Bench insofar as the main matter is concerned. It may be noticed that in the present Special Leave Petition, notice was issued to the Respondents, except Respondent No. 4. Since the proceedings before the Magistrate at the threshold were directed to be kept in abeyance without notice to the Respondent, and thereafter the revision petition was dismissed in limine by the High Court, the occasion for Respondent No.1 to have knowledge of the proceedings did not arise. Respondent No.1 seeks deletion from the array of parties in these proceedings as he has been wrongly arrayed as a party.

39. The aforesaid plea is predicated on the averments in the complaint itself, which seeks to make a grievance over the actions of the Principal Secretary, Public Health and Engineering Department (PHED) in which capacity respondent No.1 is stated to have been arrayed. It is averred in the application that respondent No.1 was serving as a Secretary and Principal Secretary to the Chief Minister and not as Principal Secretary, PHED. In fact, the officer working as the Principal Secretary, PHED has not been arrayed as a respondent. There is no allegation made against the Secretary/Principal Secretary to the Chief Minister. The allegation is of collusion of the respondents.

40. In terms of the averments in the application, respondent No.1 sought to point out that there are only two references to him as accused No.1 - Para 4(iv) and Para 8. These are in the context of inviting tenders, shortage of budget for running the current projects and the report of stated accused No.1 as the Principal Secretary. The second reference is to the stated accused No.1 as the Chief Secretary, who wrote a proposal to the Finance Department whereupon the Finance Secretary expressed his inability for making available such a huge amount. Once again, respondent No.1 was not holding the post of the Chief Secretary nor is the Chief Secretary then arrayed as a party.

41. Our attention was also drawn to the notings file, which are of the Chief Engineer (SP) and approved by the Secretary, PHED and the Hon'ble Minister, PHED. It is, thus, alleged that respondent No.1 was neither involved with the decision making process nor he held any of the two posts.

42. The application is sought to be opposed and a counter affidavit was filed by the appellant. It is stated that respondent No.1 is trying to take undue advantage of the inadvertent mistake of the appellant in mentioning his correct designation while filing the criminal complaint. It is alleged that respondent No.1 was very much involved with the decision making process. In any case the merit of the complaint of the appellant is yet to be examined.

43. On 20.2.2018, we had issued directions for the appellant to place on record the material placed before the Magistrate in support of the complaint indicating the alleged involvement of respondent No.1. In response thereto, a supplementary affidavit was filed by the appellant. On this behalf a file noting of 9.5.2008 is referred to. The discussion was with regard to the funding of the same project and the presence of respondent No.1 is noted though undisputedly the minutes are not signed by him while they are signed by other officers. It has been averred that since the Principal Secretary to the Chief Minister had no role to play in the discussion, why was he/respondent No.1 present?

44. We may also note the submission of learned counsel for respondent No.1 that in case a situation arises where the Magistrate hasto proceed on the complaint under Section 156(3) of the Cr.P.C. and during investigation some material is found, the counsel cannot really object to the inclusion of the name of respondent No.1 at that stage. However, inclusion at this stage is stated to be without any material facts and is an embarrassment, considering the constitutional position held by respondent No.1.

45. We have given a thought to the respective pleas of the parties.

46. No doubt the process under Section 156(3) of the Cr.P.C. is only one of investigation. The larger

question, of whether any such direction can be issued without prior sanction has been referred to a larger bench. Were the appellant to succeed and were the matter to go back to the Magistrate and the Magistrate after application of mind forms an opinion to direct investigation by the police, it would be always open to the Magistrate to include the name of respondent No.1 if such material is found against him.

47. Merely because the appellant has roped in respondent No.1 in the complaint is not sufficient ground to allow his name to be included as such. The complaint is categorical – the role of Secretary, PHED and the Principal Secretary has been questioned. That is the mindset with which the complainant knocked the doors of the criminal courts. There was no allegation in respect of any role played by the Secretary/Principal Secretary to the Chief Minister. It cannot be said to be a mere mis-description of name, which can be corrected. It cannot be the stand of the appellant that willy-nilly somehow, respondent No.1 must remain arrayed as an accused in those proceedings, even though the proceedings before the Magistrate are at the stage of only whether there should be a direction for investigation or not. It is not that every officer in the Government has to be arrayed in respect of any role performed or not. The mere presence in one meeting of respondent No.1 and that too when he was not a signatory and really had no role to play in that capacity, as apparent from the minutes, cannot be now used to justify his name being included as an accused. This is clearly an afterthought. It is not for the appellant to question as to which officer should or should not be present.

48. We are, thus, of the view that respondent No.1 needs to be struck off from the array of parties both in the present proceedings and consequently in the complaint. We, however, make it clear that if a situation arises where investigation is directed under Section 156(3) of the Cr.P.C. and some material comes to light to array respondent No.1 as an accused, our order would not come in the way."

7.39 Thus, from the decisions referred herein above, it is very clear that the scope and power of direction, which can be issued under Chapter-XII and Chapter-XIV of the Code, are different. Therefore, the question that was raised before the Apex Court was, whether, in case of PC Act, a different import is to be read qua the exercise of powers by the learned Magistrate under Section 156(3) of the Code, on account

of Section 191 of the PC Act can be said to be one of taking cognizance, and thereby, would require prior sanction in case of a public servant. The Apex Court held, in clear terms, that the prior sanction to prosecute a public servant for an offence under the PC Act is contained in Chapter-XIV of the Code. However, whether, such a propriety can be imported into Chapter-XII of the Code, while directing the investigation under Section 156(3) of the Code, because a public servant is involved, is a vague answer.

*7.40 The decision of this Court in '**SURESH KUMAR GUPTA VS. STATE OF GUJARAT & ANOTHER**', 1997 (2) GLH 356, also would require reference at this stage, where, the observations are to the effect that in cases, where, the parties file private complaints, the same will be proceeded with under Chapter-XV of the Code, title of which is 'Complaints to Magistrates'. So far as complaints to Magistrate are concerned, the same may be pertaining to the offences both cognizable and non-cognizable. If, an information is furnished to an officer in-harge of a Police Station, of the commission of an offence of a non-cognizable nature, he is required to enter or cause to be entered the substance of that information in the book to be kept by such officer in such form as the State Government may prescribe in this behalf and refer the informant to the Magistrate under Sub-section (1) of Section 55 of the Code. Under Section 156 of the Code, Officer in-charge of the Police Station, is invested with the powers to investigate the offence of a cognizable nature, of which information is given to him, but a party aggrieved has a right to approach the Magistrate also for taking necessary action under the penal laws for offences, be it cognizable or non-cognizable.*

7.41 Therefore, the question before this Court was that when, the party approaches the learned Magistrate for taking action under penal law, learned Magistrate has to decide from the facts disclosed before him, which according to the complainant constitutes an offence, whether, it constitutes a cognizable offence or a non-cognizable offence. Learned Magistrate shall also have to bear in mind that, if, the information given to him pertains to a cognizable offence, why the complainant has not approached the Officer in-charge of the concerned Police Station. If, the offence disclosed before him pertains to non-cognizable offence, then also, he has to consider and bear in mind as to whether, the party concerned has approached the officer in-charge of the concerned Police Station under Sub-section (1) of Section 155 of the Code and has been referred to him or the party aggrieved has straightaway approached the Magistrate.

In such a situation, the learned Magistrate has two courses open, namely; (i) to proceed in the matter in accordance with Chapter-XV of the Code or (ii) to direct investigation under Section 156(3) of the Code. The second course to direct investigation under Section 156(3) of the Code is open to the Magistrate before he takes cognizance of the matter under sections 190, 200 and 204 of the Code. Once the Magistrate takes cognizance under sections 190, 200 and 204 of the Code, he is not entitled in law to order any investigation under Section 156 (3) of the Code. It was, further, held and observed that under Section 202 of the Code, the Magistrate has powers to direct the Police to inquire in the matter, but, it would not amount to investigation, as contemplated under Section 156 (3) of the Code.

*7.42 It is to be noted, at this stage, that the decisions of the Apex Court in '**ANIL KUMAR AND OTHERS**' (Supra) and in '**DEVARAPALLI LAXMINARAYANA REDDY**' (Supra) have been referred to the Larger Bench, by opining that there are divergent opinions, despite of catena of decisions. Thus, noting the two different paths in the above referred both the decisions, where, the offence were alleged under the PC Act read with IPC, the position, which emerges is that the Apex Court has chosen not to term the same per incurium.*

*7.43 This court notices that the Coordinate Bench of this Court and some of the other High Courts, which had an occasion to deal with these decisions, in clear terms, have held that these decisions are not per incurium, whereas, the High Court of Karnataka and some other High Courts have held these decisions to be per incurium. Noticing the restraint observed by the Apex Court in '**MANJU SURANA**' (Supra), in consonance with the judicial propriety and more particularly, the binding decision of the Apex Court in '**SURESH CHAND JAIN V. STATE OF M.P. AND ANOTHER**', 2001(2) SCC 628, in '**MANJU SURANA**' (Supra) and in '**MOHD. YOUSUF**' (Supra), the reference has been made to the larger Bench. This decision, in no unclear terms, has clarified the Scheme of the Code and the catena of decisions on this issue and the scope and power of directions by the learned Magistrate, making it extremely clear that the exercise of powers under Section 156 (3) of the Code is at pre-cognizance, stage and the different import is not to be read qua the powers to be exercised under Section 156 (3) of the Code, merely because the case is the one under the PC Act.*

***7.44** Being fully conscious of the fact that Article 141 of the Constitution of India, which makes it obligatory on the part of the High Courts to follow the Apex*

*Court, which are binding by all means to this Court and even the obiter of the Apex Court also would have been binding on this Court and all other Courts of this Country. Even, while noticing the reference to the Larger Bench in case of '**MANJU SURANA**' (Supra) and missing reference of the ratio laid down in the case of '**R.R. CHARI** ' (Supra) and other decisions of the Apex Court in case of '**ANIL KUMAR AND OTHERS**' (Supra) and subsequent two decisions, although, this Court is of the opinion that in case of '**MANJU SURANA**' (Supra), the Apex Court stopped short of saying that the decision lays down the law, contrary to what has been held earlier and yet, it has referred the matter for consideration of larger Bench and therefore, it would not be apt to term it is a per incurium. The prior sanction for prosecution against a public servant shall arise only when the cognizance is taken and since, there is no question of taking cognizance at that stage, which is Section 156(3), Chapter-XII, of the Code, and this insistence will give an upper hand to the executive to a large extent, especially in corruption charges, which is a burning issue and yet, it may not be possible to hold it otherwise, in the present scenario.*

7.45 Moreover, at this stage, the provisions of Section 17A and Section 19 of the PC Act would require reproduction, which read as follows:

""17A. (1) No police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, without the previous approval—

(a) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of the Union, of that Government;

(b) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of a State, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed:

Provided that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue

advantage for himself or for any other person:

Provided further that the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month.

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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 removable 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.

(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority; such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973,

(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 the absence of, or any error, omission or irregularity in, the sanction required under subsection (1), unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby;

(b) no Court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c)no Court shall stay the proceedings under this Act on any other ground and no Court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

(4)In determining under subsection (3), whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the Court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings."

7.46 This makes it abundantly clear that no police officer shall conduct any enquiry or inquiry or investigation into any offence, alleged to have been committed by a public servant under this Act, where, the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, without the previous approval in the case of a person, who is or was employed, at the time, when the offence was alleged to have been committed, in connection with the affairs of the Union or the State Government or in the case of a person, who is or was employed, at the time, when the offence was alleged to have been committed, in connection with the affairs of a State or the Union Government or in the case of any other person, of the authority competent to remove him from his office, at the time, when the offence was alleged to have been committed. However, no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person. It, further, provides that the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month.

*7.47 Thus, these provisions make clear the provisions, which have been brought into Statute Book, by way of notification in the official gazette dated 26.07.2018. This has, thus, become a part of the Statute Book on 26.07.2018. The reference of this provision also has been made in the case of '**YASHWANT SINHA**' (Supra).*

*7.48 While referring to the decision of the Apex Court in '**LALITA KUMARI V. STATE OF UTTAR PRADESH AND OTHERS**', (2014) 2 SCC 1, this Court sees no reason to grant such a relief, holding that there is also another obstacle in the form of amendment in the PC Act, which has come into being force in the year 2018, whereby, Section 17A has been inserted after Section 17 of the PC Act. The Court, therefore, holds that this provision would create an absolute bar against conducting any inquiry or investigation, unless there is a previous approval. This Court also finds that there is no challenge to the provisions of Section 17A of the PC Act, as it stood on the date of the filing of the petition and even, as on the date, Section 17A of the PC Act continues to be on the Statute Book, which will create a bar against conducting of an inquiry or investigation. Therefore, the complainant ought to have sought prior approval in terms of Section 17A of the PC Act.*

7.49 It was also argued by the learned Sr. Advocate, Mr. Desai, for the petitioner that this being a procedural law, will come into effect retrospectively and considering the fact that, though, the complaint is of the year 2016 and the law being the procedural, which has come into effect from the retrospective date, will require the previous permission to be taken, while proceeding under the PC Act.

7.50 Learned Sr. Advocate, Mr. Saiyed, also argued before this Court there is likelihood of the challenge to Section 17A

of the PC Act in the near future.

7.51 However, the fact remains that, today, it is on the Statute Book, and therefore, the Court, at the time of referring, any further course of action from the material and on verification of the complainant, shall bear in mind the provisions of Section 17A of the PC Act and the subsequent developments of the law. The presence of Section 17A of the PC Act has put a fetter upon the powers of the learned Magistrate, which shall also be kept in mind.

*8. Resultantly, this petition is **ALLOWED** and the order of the learned Special Judge, ACT & 6th Addl. Sessions Judge, District Court, Surat, passed below Exhibit-1 in Criminal Inquiry Case No. 3 of 2015, Dated: 07.07.2016, so also the order, directing registration of the FIR being C.R. No. I-M. Case No. 3 of 2016, Dated: 10.08.2016, by the Surat City, ACB Police Station, District: Surat, are **QUASHED** and set aside. The Court below is **DIRECTED** to follow the Code and the subsequent decisions on the subject, at the time of invoking the powers, both under Chapter-XII and Chapter-XIV of the Code.*

*8.1 None of the observations and the findings shall come in the way of the parties in proceeding before the Court below, which shall take its own **INDEPENDENT** decision, on the factual matrix, which shall be presented before it in the form of oral as well as documentary evidences as well as the contents of the complaint. This should not be **CONSTRUED** as curtailment of the powers of the Court below, except, as observed herein above.*

*8.2 This Court has granted protection to the petitioner-proposed accused person in the complaint filed by respondent No.3-original complainant, which has continued, till date, therefore, the same shall **CONTINUE** till the Court below choses to take cognizance or to proceed, in accordance with law.*

*8.3 In wake of the fact that, twice, pursuant to the directions issued by this Court, detailed and extensive inquiries had been made by the police authorities, as mentioned herein above, to the effect that no cognizable offence has been made out so also the subsequent developments in law, this Court has **DEEMED** it fit to continue the protection of the petition for the limited period, as above."*

20. Resultantly, this petition is **ALLOWED** and the order dated 07.07.2016 *passed by the learned Special Judge, ACB and 6th Additional Sessions Judge, District Court, Surat in Inquiry Case No. 3 of 2015 and also the FIR being M. Case No. 3 of 2016 registered with ACB Police Station, Surat* are **QUASHED** and set aside. The Court below is **DIRECTED** to follow the Code and the subsequent decisions on the subject, at the time of invoking the powers, both under Chapter-XII and Chapter-XIV of the Code.

20.1 None of the observations and the findings shall come in the way of the parties in proceeding before the Court below, which shall take its own **INDEPENDENT** decision, on the factual matrix, which shall be presented before it in the form of oral as well as documentary evidences as well as the contents of the complaint. This should not be **CONSTRUED** as curtailment of the powers of the Court below, except, as observed herein above.

20.2 This Court has granted protection to the petitioner-proposed accused person in the complaint filed by respondent No.3-original complainant, which has continued, till date, therefore, the same shall **CONTINUE** till the Court below choses to take cognizance or to proceed, in accordance with law.

20.3. In wake of the fact that, twice, pursuant to the directions issued by this Court, detailed and extensive inquiries had been made by the police authorities, as mentioned herein above, to the effect that no cognizable offence has been made out so also the subsequent developments in law, this Court has **DEEMED** it fit to continue the protection of the petition for the limited period, as above.

Rule is made absolutely, accordingly. Direct service is permitted.

(MS SONIA GOKANI, J)

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