IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No.454 of 2019

Arising Out of PS. Case No.-3165 Year-2015 Thana- PATNA COMPLAINT CASE District-Patna

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Rajesh Kumar Jaiswal Son of Sri Jai Narain Jaiswal Resident of Jagannathpuri, Barmasiya, Barmasiya, P.O. and P.S.- Katihar, District-Katihar

... ... Petitioner

Versus

1. The State of Bihar through Secretary Home, Main Secretariat, Patna - 800015
2. The Director General of Police, Government of Bihar, Old Secretariat Patna-800015
3. The Senior Superintendent of Police Patna District, Patna.
4. The Station House Officer P.S.- Sachivalaya, Patna.

... ... Respondents

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Appearance :
For the Petitioner/s : Mr.Rajesh Kumar Jaiswal, in person
For the Respondent/s : Mr.Lalit Kishore,A.G.
Mr. Prabhu Narayan Sharma, AC to A.G.

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

ORAL JUDGMENT

Date : 16-03-2021

This writ application has been preferred invoking the extraordinary jurisdiction of this Court under Article 226 and 227 of the Constitution of India with the following prayers:

> "i. For issuance of an appropriate writ/order/direction, including a writ in the nature of certiorari quashing and setting aside the order dated 29.10.2018 passed by the learned Chief Judicial Magistrate, Patna in Complaint Case No. 3165(C)/2015 by which he has by a common order rejected the applications dated 5.1.2018, 10.4.2018, 4.5.2018, 15.5.2018, 10.7.2018, 25.7.2018 & 8.8.2018 filed by the petitioner; and/or
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> ii. For issuance of an appropriate writ/order/direction, including a writ in the nature of

certiorari quashing and setting the application dated 14.12.2017 filed by the SHO, Sachivalaya P.S. (Respondent No.4) in the court of learned Chief Judicial Magistrate, Patna by which he has erroneously returned the Complaint Case No. 3165(C)/2015 under Section 157-1(b) of the Code of Criminal Procedure; and/or

iii. For issuance of an appropriate writ/order/direction, including a writ in the nature of mandamus directing the learned Chief Judicial Magistrate, Patna to decide the applications dated 29.10.2018 & 29.11.2018 filed by the petitioner in accordance with law; and/or

iv. For issuance of an appropriate writ/order/direction, including a writ in the nature of mandamus directing a fair investigation pursuant to the registration of First Information Report as directed by the Court of learned Chief Judicial Magistrate, Patna vide its order dated 31.10.2015 whereby the learned Magistrate owing to the facts, circumstances and nature of the offence alleged in the complaint Case No. 3163(C)/2015 transferred the said complaint for investigation to the concerned police station under Section 156(3) of Code of Criminal Procedure; and/or

v. For issuance of an appropriate writ/order/direction to the Officer-in-Charge/Station House Officer of the Sachivalaya Police Station, Patna for registration of first information report under Sections 166, 167, 420, 467, 468, 120B/34 of the Indian Penal Code in compliance of the order dated 31.10.2015 passed by the learned Chief Judicial Magistrate, Patna in Complaint Case No. 3165(C)/2015; and/or

vi. For issuance of an appropriate order/direction to the Respondent Nos. 2 & 3 to punish the erring

officers for deliberate violation of a judicial order; and/or

vii. Any other relief to which this Hon'ble Court deems the petitioner entitled to."

Brief facts of the case

2. The petitioner, who is the complainant before the learned Chief Judicial Magistrate, Patna has alleged that in the 47th Combined (P.T.) Examinations held in the year 2004 in which he had appeared along with thousands of other candidates, the result was published in utter violation of the provisions as contained in Section 4 of the Bihar Reservation of Vacancies in the Post and Services (For Scheduled Caste, Scheduled Tribes and other Backward Classes) Act, 1991 as Amended by an Act of 1994 (hereinafter referred to as the 'Act of 1991').

3. It is his grievance that the cut off marks of both the Category-5 i.e. other backward castes and the general candidates were identical i.e. 99, according to him, not even a single candidate of backward caste i.e. Category-5 was shortlisted from their own category. The complainant claims that by not shortlisting any candidate from Category – 5 the Penal provisions of the Act of 1991 were attracted. According to him, with regard to the issue of denial of reservation to the backward

castes a starred question was raised in the Legislative Assembly of the State to which a reply was given by the Hon'ble Chief Minister as Incharge Minister of Department of Personnel, Government of Bihar on the advice and report of the then Secretary, Department of Personnel.

4. The Complainant alleges that by giving a misleading reply to the Members of the Legislative Assembly as well as the citizens of the State asserting that there was no violation of the reservation policy of the State, they were misled. According to him, the said statement is prima-facie incorrect as is evident from the cut off marks supplied by the Commission to the complainant-petitioner which is, according to him, a denial of reservation to the complainant as well as other similarly situated persons.

5. It is further stated that being aggrieved by the denial of reservation, the petitioner intervened in a writ application being CWJC No. 5802/2007 filed in this Court with a prayer to direct publication of additional result as well as for award of punishment to those persons who were involved in denial of reservation and breach of the reservation policy.

6. The petitioner filed I.A. No. 6736/2013 in the said writ application. It is then stated that writ application was

disposed of saying that the issue had become stale and the process of selection and appointment have already been concluded, however, with regard to the prayer for punishment to the persons responsible for flouting the reservation policy, the learned Single Judge of this Court observed that since it was a penal provision as such only a court of competent jurisdiction can try and take a decision in the matter. Annexure 'P/3' is the copy of the judgment of this Court in CWJC No. 5802/2007.

7. It is submitted that in the light of the judgment of this court, the petitioner approached the Court of learned CJM, Katihar vide Complaint Case No. 2437/2015. The said learned Court observed that the offences as alleged in the complaint petition were committed within Patna Jurisdiction, therefore, the complaint was returned to the petitioner for presentation before the competent Court.

8. The petitioner, thereafter, moved before the learned Chief Judicial Magistrate, Patna by way of Complaint Case No. 3165(C)/2015 with a prayer that the matter be referred to the police station for registration of First Information Report and investigation of the case. He prayed for registration of F.I.R. under Section 166, 167, 420, 467, 468, 120B/34 of the Indian Penal Code as well as under Section 12 of the Act of 1991.

9. On 03.10.2015 the learned Chief Judicial Magistrate, Patna perused the records and directed the petitioner to comply with the provisions of Section 154(1) and 154(3) of the Code of Criminal Procedure (in short 'Cr.P.C.'). The petitioner claims that he complied with the said direction of the learned Chief Judicial Magistrate, thereafter, on being satisfied with the compliances the learned CJM, Patna vide his order dated 31.10.2015 sent the complaint petition to the Sachivalaya Police Station for registration of F.I.R. The petitioner was pursuing the matter with the Sachivalaya Police Station but no F.I.R. was registered. The petitioner thereafter moved this Court by filing a writ application being Cr.W.J.C. No. 916/2017 seeking a direction to the respondents to register the First Information Report and conduct a fair investigation in the matter. The said writ application was taken up for consideration. The respondents revealed that on receipt of the order of learned Chief Judicial Magistrate, Patna the S.H.O. had analysed the matter himself and on finding that prior sanction was necessary as the accused are public servants, the complaint was returned to the file of learned CJM, Patna under Section 157(B)(2) Cr.P.C.

10. After hearing the Criminal Writ Application, this Court disposed of the same vide order dated 25.01.2018. This

Court upheld the stand of the SHO and took a view that the extraordinary writ jurisdiction of the Constitutional Court is not required to be exercised in the facts of the present case. The judgment of this Court in Cr.W.J.C. No. 916/2017 was challenged before the Hon'ble Supreme Court vide SLP(Crl.) No. 1586/2018 which was also dismissed vide order dated 05.03.2018.

11. After the aforesaid round of litigation, the petitioner filed an application dated 10.07.2018 in the Court of learned CJM, Patna praying for an order in compliance of the earlier order dated 31.10.2015 on the ground that the contention of the respondents that prior sanction is required for an order under Section 156(3) of the Cr.P.C. is not correct. According to him, reliance placed by the respondents on the judgment of the Hon'ble Apex Court in the case of **Anil Kumar & Ors. Vs. M.K. Aiyappa** reported in **(2013) 10 SCC 705** is not tenable inasmuch as the present case is not one under Section 19 of the Prevention of Corruption Act, 1988.

12. The petitioner who appears in-person and is also a lawyer submits that he filed several applications before the learned CJM, Patna and in all those applications specifically pointed out that no prior sanction was required to maintain a

complaint petition. It is however his grievance that his all petitions were rejected vide order dated 29.10.2018 as contained in Annexure ‘P-33’ to the present writ application. He is aggrieved by the order contained in Annexure ‘P-33’.

13. Today in course of argument, petitioner submits that for purpose of proceeding with the complaint pending with the learned CJM, Patna, at this stage, no sanction is required. According to him, the learned CJM has erred in fact as well as in law in holding that the complaint petition is disclosing allegations against the four persons named in the complaint petition which are in the nature of an act done by them in discharge of their official duty. According to the petitioner, in the facts of the present case, the previous sanction in terms of Section 197 Cr.P.C. would not be required. He has relied upon the judgment of the Hon’ble Apex Court in the case of **Vinubhai Haribhai Malaviya & Ors. Vs. State of Gujarat & Anr.** reported in **(2019) 17 SCC 1** to submit that at the stage of section 156(3) Cr.P.C., the CJM is not required to call for the sanction order. He has though referred the judgment of the Hon’ble Apex Court in the case of **D. Devaraja Vs. Owais Sabeer Hussain** reported in **(2020) 7 SCC 695** but towards the end of the argument he has not placed much reliance on that

judgment.

14. Mr. Lalit Kishore, learned Advocate General assisted by Mr. Prabhu Narayan Sharma, learned A.C. to learned Advocate General submits that the impugned order is in accordance with law and no part of it requires any interference by this Court in exercise of it's power under Article 226 and 227 of the Constitution of India.

15. Learned Advocate General submits that on bare perusal of the complaint petition it would appear that the complainant – writ petitioner is raising an issue as to the results which were published by the Bihar Public Service Commission in the year 2007. The Chief Minister and other public servants of the State have been arrayed in the column of the accused. The allegations are that while answering the starred question with regard to the denial of reservation to the backward caste, in the Legislative Assembly of the State the Hon'ble Chief Minister as Incharge Minister of the Department of Personnel, Government of Bihar made some statements on the advice and under the report of the then Secretary, Department of Personnel, Government of Bihar and this reply was given to mislead not only the Hon'ble Legislative Assembly of the State and the Hon'ble Members but the general public of the State of Bihar.

16. It is his submission that the matters which were discussed at the Floor of the House has got certain privilege in terms of Article 194 of the Constitution of India, moreover on a bare reading of the complaint petition it would appear that the entire allegations are directly relatable to the official duty discharged by a public servants. It is, thus, his submission that in fact the complaint petition itself has been filed with sole intention to malign the image and reputation of the persons holding responsible position in the State of Bihar.

17. Relying upon the judgment of the Hon'ble Apex Court in the case of **Anil Kumar (supra)**, learned Advocate General submits that the Hon'ble Apex Court has cautioned that sometimes registration of F.I.R. itself is to malign the image of a person. According to him, in such circumstance and in a case where there is no previous sanction, the Magistrate cannot order investigation against a public servant while invoking powers under Section 156(3) Cr.P.C.

18. Learned Advocate General further submits that in an appropriate case where the allegations are directly relatable to the official duties of the public servant, the court may call for the sanction order even before proceeding with the complaint. It is his submission that in the present case if the learned CJM has

called for the sanction order after noticing the allegations made in the complaint petition, no fault may be found with the same. It is his submission that earlier order dated 03.10.2015 passed by learned C.J.M., Patna was passed in a routine and mechanical manner. Later on, when it was pointed out to the learned C.J.M., he could appreciate the correct legal position and passed the order impugned (Annexure 'P-33').

19. In course of argument, while going through the judgment rendered by the Hon'bhle Supreme Court in the case of **D. Devaraja (supra)** this Court noticed that the Hon'ble Apex Court has in the said case reiterated the views of the Hon'ble Constitution Bench of the Apex Court in the case of **Matajog Dobey Vs. H.C. Bhari** reported in **AIR 1956 SC 44**. Thus, the Court called for the said judgment and petitioner as well as learned Advocate General were requested to go through the judgment as well and address the Court, which has been accordingly done.

Consideration

20. Having heard the petitioner in-person and learned Advocate General for the State, this Court finds that the solitary question which has arisen for consideration before this Court is as to whether this is the appropriate stage for the learned C.J.M.

to call for the sanction order. Before proceeding with that aspect of the matter, this Court would extract hereunder the complete order dated 29.10.2018 which is impugned in the writ application:-

> "The Case record put up before me for order on the petition dated 14.12.2017 filed on behalf of S.H.O. Sachiwalya P.S., Patna and the rejoinder dated 05.01.2018, 10.04.2018, 04.05.2018, 15.05.2018, 10.07.2018, 25.07.2018 and 08.08.2018 which all are same and similar petition on filed on behalf of informant Rajesh Kumar Jaiswal. Heard Informant and A.P.O.
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> It has been submitted by the informant that by order dated 31.10.2015. O/C was directed to sent copy of complaint petition to Sachiwalya Police Station u/s 156(3) Cr.P.C. through S.S.P., Patna and the complainant was directed to file six copies of the complaint petition in compliance of Court's order. The complainant filed six copies of complaint petition. The Complainant moved before the Hon'ble Court vide Cr.W.J.C. No. 916/2017. During pendency of the writ petition, The S.H.O. Sachiwalaya P.S. submitted the report before this court u/s 157-1(b) as well as stating that before lodging an F.I.R. sanction under 197 of Cr.P.C. is pre-requirement. After taking consideration of the report of the S.H.O. Sachiwalaya P.S. The Hon'ble court vide its order dated 25.01.2018 refused to interfere in the matter. As the matter was subjudice before a competent court of law. When the matter sent u/s 156(3) of Cr.P.C. Then S.H.O. is duty bond to register an F.I.R. and commence investigation. Therefore, punish the S.H.O. for his wilful contempous act.
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> On the other hand prosecution officer on behalf of

S.H.O. Sachiwalya P.S., submitted that in this case all purposed accused are public servant and purpoting to act in the discharge of their official duties. So, it is necessary to get sanction report for prosecution before sending u/s 156(3) Cr.P.C. due to lack of pre sanction report this original petition return back to the court.

Rajesh Kumar Jaiswal filed a complaint petition vide complaint case No. 3165(C)/2015 against (1) Sri Nitish Kumar, The Chief Minister-cum-Minister in-charge, Department of Personnel, Government of Bihar, Patna.

(2) Sri Aamir Subhani, The then Secretary, Department of Personnel, Government of Bihar.

(3) Sri Govind Narain Akhouri, The then Secretary, Bihar Public Service Commission, Patna and

(4) Sri Sharad Chandra Jha, The controller of Examination cum Deputy Secretary, Bhihar Public Service Commission on dated 08.09.2015 upon the court send it u/s 156(3) Cr.P.C. on dated 14.12.2017. But S.H.O. of concerned P.S. return the said Complaint petition due to lack of sanction report of prosecution. After perusal of the record it also appears that before filing of this case, Informant has preferred C.W.J.C. vide No. 5802/2007 on similar ground which was dismissed by Hon'ble Court on dated 28.07.2015. During pendency of this case informant preferred Cr.W.J.C. vide no. 916/2017 on the similar ground which was also dismissed by the Hon'ble Court on dated 25.01.2018. After perusal of the complaint petition it appears that all four purpose accused are public servant and they are purposing to act in the discharge of their official duty. So, the previous sanction for prosecution is required u/s 197 of the Cr.P.C. In this case informant has not produced sanction report for the prosecution against abovesaid purposed accused person.

Hence, the petitions filed by the informant is hereby dismissed. Informant/Complainant is directed that if he want to proceed with this case then he must produce sanction report for prosecution against above named pruposed accused person within a month. Put up on 30.11.2018."

21. Section 197 of the Code of Criminal Procedure reads as under:-

> **"197. Prosecution of Judges and public servants.—** (1)When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction [g][save as otherwise provided in the Lokpal and Lokayuktas Act, 2013]—
> (a)in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government[b];
> (b)in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government.
> [d][Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted.]
> [f][Explanation.—For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under section 166A, section 166B, section 354, section 354A, section 354B, section 354C, section 354D, section 370, section 375, section 376, [h][section 376A, section 376C, section 376D or section 509 of the Indian Penal Code(45 of 1860).]
> (2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous

sanction of the Central Government.[c]

(3)The State Government may, by notification, direct that the provisions of sub-section (2)shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

[e][(3A) Notwithstanding anything contained in sub-section (3), no court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1)of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

3[(3B) Notwithstanding anything to the Contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991 (43 of 1991), receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the court to take cognizance thereon.]

(4)The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held."

(b) For delegation of powers and functions of Central Govt. under Ss. 197(1), 199(4), 321 Proviso and S. 432 to the Administrators or Chief Commissioners of the Union Territories, except Mizoram and Arunachal Pradesh-See S.O. 183(E), G.I. 1974, Pt. II, S. 3(ii), Ext.,p. 419; similarly all the powers of the State Govt. except those under Ss. 8 and 477 have been conferred on all the Administrators of the U. Ts. -ibid.

(c) Provisions of S. 197(2) applied to persons appointed or enrolled under Dist. Police Acts and Hyd. Police Act -See A. P. Gaz., 30-5-74, Pt, I, p. 701.

(d) Added by the Code of Criminal Procedure (Amendment) Act (43 of 1991), S. 2 (w.e.f 2-5-1991).

(e) inserted, ibid.

(f) inserted by the Criminal Law (Amendment) Act, (13 of 2013), S. 18, (3-2-2013).

(g) inserted by the Lokpal and Lokayuktas Act, (1 of 2014), S.58, Sch, Pt IV, (16-1-2014).

(h) Substituted by the Criminal Law (Amendments) Act (22 of 2018), S. 15, (21-4-2018).

22. In the case of **Matajog Dobey (supra)** a specific question which had come up for consideration before the Hon'ble Apex Court was as to whether the need for sanction is to be considered as soon as the complaint is lodged and on the allegations therein contained? In order to fully understand the views expressed by the Hon'ble Apex Court, this Court would reproduce paragraph 18, 19 and 20 of the said judgment as under:

> **"18.** There are two cases of this Court to which reference may be made here. In '*Shreekantiah Ramayya Munipalli* v. *The State of Bombay',* (S)AIR 1955 SC 278 at pp. 292-293 (E), Bose, J. observes as follows:
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> "Now it is obvious that if Section 197 of the Code of Criminal Procedure is construed too narrowly, it can never be applied, for of course, it is no part of an official's duty to commit an offence and never can be. But it is not the duty we have to examine so much as the act, because an official act can be performed in the discharge of official duty as well as in dereliction of it. The section has content and its language must be given meaning".
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> The question of previous sanction also arose in '*Amrik Singh* v. *State of Pepsu',* (S) *AIR* 1955 SC 309 at p. 312(F). A fairly lengthy discussion of the authorities is followed up with this summary:
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> "If the acts complained of are so integrally connected with the duties attaching to the office as to be inseparable from them, then sanction under Section 197(1) would be necessary; but if there was

no necessary connection between them and the performance of those duties, the official status furnishing only the occasion or opportunity for the acts, then no sanction would be required."

19. The result of the foregoing discussion is this: There must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty.

20. Is the need for sanction to be considered as soon as the complaint is lodged and on the allegations therein contained? At first sight, it seems as though there is some support for this view in - '*Hori Ram's case* (B)', and also in - '*Sarjoo Prasad* v. *Emperor',* AIR 1946 FC 25(G). Sulaiman, J. says that as the prohibition is against the institution itself, its applicability must be judged in the first instance at the earliest stage of institution. Varadachariar, J. also states that the question must be determined with reference to the nature of the allegations made against the public servant in the criminal proceedings.

But a careful perusal of the later parts of their judgments shows that they did not intend to lay down any such proposition. Sulaiman, J. refers (at P-52) to the prosecution case as disclosed by the complaint or the '*police report'* and he winds up the discussion in these words:

"Of course, if the case as put forward fails or the defence establishes that the act purported to be done is in execution of duty, the proceedings will have to be dropped and the complaint dismissed on that ground".

> The other learned Judge also states at p. 55, "At this stage we have only to see whether the case alleged against the appellant or '*sought to be proved'* against him relates to acts done or purporting to be done by him in the execution of his duty".
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> It must be so. The question may arise at any stage of the proceedings. The complaint may not disclose that the act constituting the offence was done or purported to be done in the discharge of official duty; but facts subsequently coming to light on a police or judicial inquiry or even in the course of the prosecution evidence at the trial, may establish the necessity for sanction.
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> Whether sanction is necessary or not may have to be determined from stage to stage. The necessity may reveal itself in the course of the progress of the case."

23. In the case of **Anil Kumar** (supra) the Hon'ble Apex Court was considering a similar issue which had arisen in a case under the Prevention of Corruption Act, 1988. The Hon'ble Apex Court has discussed at length the issue of prior sanction. In the opinion of this Court, the same reasoning and rationale would be applicable in the present case as well.

24. In the case of **D. Devaraja (supra)** the Hon'ble Apex Court was hearing a challenge to the judgment and order passed by Hon'ble Karnataka High Court. The Hon'ble Karnataka High Court disposed of an application under Section 482 Cr.P.C. which was filed for quashing of the order passed by the learned Additional Chief Metropolitan Magistrate-III,

Bangaluru City in PCR No. 17214/2013, taking cognizance of a private complaint inter-alia against the accused-appellant for the offences punishable under Sections 120B, 220, 323, 330, 348 and 506B read with Section 34 of the Indian Penal Code. The High Court did not quash the impugned order of the learned Additional Chief Metropolitan Magistrate, but remitted the complaint back to the learned Magistrate instead, with liberty to the appellant to apply for discharge. The appellant was a police officer in the rank of the Superintendent of Police. He raised an issue before the Hon'ble Apex Court with regard to the requirement of previous sanction. In that context the Hon'ble Apex Court considered the short question as to whether the learned Magistrate could, at all, have taken cognizance against the appellant, in the private complaint in the absence of sanction under Section 197 of the Code of Criminal Procedure read with Section 170 of the Karnataka Police Act, 1963, as amended by the Karnataka Police (Amendment) Act, 2013.

25. After elaborately discussing the scope and ambit of Section 197 of the Code read with Section 170 of the Karnataka Police Act, 1963, the Hon'ble Apex Court considered the various judicial pronouncements which were cited from both sides.

26. Paragraph 29 to 46 deal with the judicial pronouncements on the subject and the reproduction of those paragraphs hereunder would make the legal position clear. Therefore, those paragraphs from the judgment of the Hon'ble Apex Court are being reproduced hereunder:-

> **"29.** To effectively adjudicate the issues raised in this appeal, it is necessary to examine the scope and effect of Section 197 of the Criminal Procedure Code and/or Section 170 of the Karnataka Police Act, 1963. It is necessary to examine whether want of sanction would vitiate criminal proceedings against a police officer, in all cases? If not, what are the circumstances in which sanction is necessary.
> **30.** The object of sanction for prosecution, whether under Section 197 of the Code of Criminal Procedure, or under Section 170 of the Karnataka Police Act, is to protect a public servant/police officer discharging official duties and functions from harassment by initiation of frivolous retaliatory criminal proceedings. As held by a Constitution Bench of this Court in *Matajog Dobey* v. *H.C. Bhari*[15]: (AIR p. 48, para 15)
> "*15*. … Public servants have to be protected from harassment in the discharge of official duties while ordinary citizens not so engaged do not require this safeguard. …
> There is no question of any discrimination between one person and another in the matter of taking proceedings against a public servant for an act done or purporting to be done by the public servant in the discharge of his official duties. No one can take such proceedings without such sanction."
> **31.** In *Pukhraj* v. *State of Rajasthan*[16] this Court held: (SCC p. 703, para 2)
> "*2*. … While the law is well settled the difficulty really arises in applying the law to the facts of any particular case. The intention behind the section is to prevent public servants from being unnecessarily

15 AIR 1956 SC 44: 1956 Cri LJ 140
16 (1973) 2 SCC 701 : 1973 SCC (Cri) 944

harassed. The section is not restricted only to cases of anything purported to be done in good faith, for a person who ostensibly acts in execution of his duty still purports so to act, although he may have a dishonest intention. Nor is it confined to cases where the act, which constitutes the offence, is the official duty of the official concerned. Such an interpretation would involve a contradiction in terms, because an offence can never be an official duty. The offence should have been committed when an act is done in the execution of duty or when an act purports to be done in execution of duty. The test appears to be not that the offence is capable of being committed only by a public servant and not by anyone else, but that it is committed by a public servant in an act done or purporting to be done in the execution of duty. The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor need the act constituting the offence be so inseparably connected with the official duty as to form part and parcel of the same transaction. What is necessary is that the offence must be in respect of an act done or purported to be done in the discharge of an official duty. It does not apply to acts done purely in a private capacity by a public servant. Expressions such as the "capacity in which the act is performed", "cloak of office" and "professed exercise of the office" may not always be appropriate to describe or delimit the scope of section. An act merely because it was done negligently does not cease to be one done or purporting to be done in execution of a duty."

32. In *Amrik Singh* v. *State of PEPSU*[17] this Court referred to the judgments of the Federal Court in *Hori Ram Singh* v. *Crown*[18]; *H.H.B. Gill* v. *King Emperor*[19] and the judgment of the Privy Council in *Gill* v. *R.*[20] and held : (*Amrik Singh case*[17], AIR p. 312, para 8)

"*8*. The result of the authorities may thus be summed up : It is not every offence committed by a public servant that requires sanction for prosecution under

17 AIR 1955 SC 309 : 1955 Cri LJ 865
18 1939 SCC OnLine FC 2: AIR 1939 FC 43
19 1946 SCC OnLine FC 10: AIR 1947 FC 9
20 1948 SCC OnLine PC 10: (1947-48) 75 IA 41: AIR 1948 PC 128

Section 197(1) of the Code of Criminal Procedure; nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary; and that would be so, irrespective of whether it was, in fact, a proper discharge of his duties, because that would really be a matter of defence on the merits, which would have to be investigated at the trial, and could not arise at the stage of the grant of sanction, which must precede the institution of the prosecution."

33. Section 197 of the Code of Criminal Procedure, 1898, hereinafter referred to as the old Criminal Procedure Code, which fell for consideration in *Matajog Dobey*[15], *Pukhraj*[16] and *Amrik Singh*[17] is in pari materia with Section 197 of the Code of Criminal Procedure, 1973. The Code of Criminal Procedure, 1973 has repealed and replaced the old Code of Criminal Procedure.

34. In *Ganesh Chandra Jew*[7] this Court held : (SCC pp. 46-47, para 7)

"*7*. The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the

15 *Matajog Dobey* v. *H.C. Bhari,* AIR 1956 SC 44 : 1956 Cri LJ 140
16 *Pukhraj* v. *State of Rajasthan,* (1973) 2 SCC 701 : 1973 SCC (Cri) 944
17 AIR 1955 SC 309 : 1955 Cri LJ 865
7 *State of Orissa* v. *anesh Chandra Jew,* (2004) 8 SCC40 : 2004 SCC (Cri) 2104

excess will not be a sufficient ground to deprive the public servant of the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty." (emphasis supplied)

35. In *State of Orissa* v. *Ganesh Chandra Jew*[7] this Court interpreted the use of the expression "*official duty*" to imply that the act or omission must have been done by the public servant in course of his service and that it should have been in discharge of his duty. Section 197 of the Code of Criminal Procedure does not extend its protective cover to every act or omission done by a public servant while in service. The scope of operation of the section is restricted to only those acts or omissions which are done by a public servant in discharge of official duty.

36. In *Shreekantiah Ramayya Munipalli* v. *State of Bombay*[21] this Court explained the scope and object of Section 197 of the old Criminal Procedure Code, which as stated hereinabove, is in pari materia with Section 197 of the Code of Criminal Procedure. This Court held : (AIR pp. 292-93, paras 18-19)

"*18*. Now it is obvious that if Section 197 of the Code of Criminal Procedure is construed too narrowly it can never be applied, for of course it is no part of an official's duty to commit an offence and never can be. But it is not the duty we have to

7 (2004) 8 SCC 40 : 2004 SCC (Cri) 2104
21 AIR 1955 SC 287 : 1955 Cri LJ 857

examine so much as the act, because an official act can be performed in the discharge of official duty as well as in dereliction of it. The section has content and its language must be given meaning. What it says is—

'When any public servant … is accused of any "offence" alleged to have been committed by him while acting or purporting to act in the discharge of his official duty….'

We have therefore first to concentrate on the word "offence".

19. Now an offence seldom consists of a single act. It is usually composed of several elements and, as a rule, a whole series of acts must be proved before it can be established. In the present case, the elements alleged against Accused 2 are, first, that there was an "entrustment" and/or "dominion"; second, that the entrustment and/or dominion was "in his capacity as a public servant"; third, that there was a "disposal"; and fourth, that the disposal was "dishonest". Now it is evident that the entrustment and/or dominion here were in an official capacity, and it is equally evident that there could in this case be no disposal, lawful or otherwise, save by an act done or purporting to be done in an official capacity.

Therefore, the act complained of, namely, the disposal, could not have been done in any other way. If it was innocent, it was an official act; if dishonest, it was the dishonest doing of an official act, but in either event the act was official because Accused 2 could not dispose of the goods save by the doing of an official act, namely, officially permitting their disposal; and that he did. He actually permitted their release and purported to do it in an official capacity, and apart from the fact that he did not pretend to act privately, there was no other way in which he could have done it. Therefore, whatever the intention or motive behind the act may have been, the physical part of it remained unaltered, so if it was official in the one case it was equally official in the other, and the only difference would lie in the intention with which it was done : in the one event, it would be done in the discharge of an official duty and in the other, in the purported discharge of it."

37. The scope of Section 197 of the old Code of

Criminal Procedure, was also considered in *P. Arulswami* v. *State of Madras*[22] where this Court held : (AIR p. 778, para 6)

"*6*. … It is the quality of the act that is important and if it falls within the scope and range of his official duties the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted."

"If the act is totally unconnected with the official duty, there can be no protection. It is only when it is either within the scope of the official duty or in excess of it that the protection is claimable…."

38. In *B. Saha* v. *M.S. Kochar*[23] this Court held : (SCC p. 185, para 18)

"*18*. In sum, the sine qua non for the applicability of this section is that the offence charged, be it one of commission or omission, must be one which has been committed by the public servant either in his official capacity or under colour of the office held by him."

39. In *Virupaxappa Veerappa Kadampur* v. *State of Mysore*[4] cited by Mr Poovayya, a three-Judge Bench of this Court had, in the context of Section 161 of the Bombay Police Act, 1951, which is similar to Section 170 of the Karnataka Police Act, interpreted the phrase "*under colour of duty*" to mean "*acts done under the cloak of duty, even though not by virtue of the duty*".

40. In *Virupaxappa Veerappa Kadampur*[4] this Court referred (at AIR p. 851, para 9) to the meaning of the words "*colour of office*" in *Wharton's Law Lexicon*, 14th Edn., which is as follows:

"*Colour of office*, when an act is unjustly done by the countenance of an office, being grounded upon corruption, to which the office is as a shadow and colour."

41. This Court also referred (at AIR p. 852, para 9) to the meaning of "colour of office" in *Stroud's Judicial Dictionary*, 3rd Edn., set out hereinbelow:

"Colour: "Colour of office" is always taken in the worst part, and signifies an act evil done by the countenance of an office, and it bears a dissembling face of the right of the office, whereas the office, is

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22 AIR 1967 SC 776 : 1967 Cri LJ 665
23 (1979) 4 SCC 177 : 1979 SCC (Cri0 939
4 AIR 1963 SC 849 : (1963) 1 Cri LJ 814

but a veil to the falsehood, and the thing is grounded upon vice, and the office is as a shadow to it. But "by reason of the office" and "by virtue of the office" are taken always in the best part."

42. After referring to the Law Lexicons referred to above, this Court held : (*Virupaxappa Veerappa Kadampur case*[4] AIR p. 852, para 10)

"*10*. It appears to us that the words "under colour of duty" have been used in Section 161(1) to include acts done under the cloak of duty, even though not by virtue of the duty. When he (the police officer) prepares a false panchnama or a false report he is clearly using the existence of his legal duty as a cloak for his corrupt action or to use the words in *Stroud's Dictionary* "as a veil to his falsehood". The acts thus done in dereliction of his duty must be held to have been done "under colour of the duty"."

43. In *Om Prakash* v. *State of Jharkhand*[14] this Court, after referring to various decisions, pertaining to the police excess, explained the scope of protection under Section 197 of the Code of Criminal Procedure as follows : (SCC p. 89, para 32)

"*32*. The true test as to whether a public servant was acting or purporting to act in discharge of his duties would be whether the act complained of was directly connected with his official duties or it was done in the discharge of his official duties or it was so integrally connected with or attached to his office as to be inseparable from it (*K. Satwant Singh*[24]*)*. The protection given under Section 197 of the Code has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection (*Ganesh Chandra Jew*[7]*)*. If the above tests are applied to the facts of the present case, the police must get protection given

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4 Virupaxappa Veerappa Kadampur v. State of Mysore, AIR 1963 SC 849 : (1963) 1 Cri LJ 814
14 (2012) 12 SCC 72 : (2013) 3 SCC (Cri) 472
24 K. Satwant Singh v. State of Punjab, AIR 1960 SC 266 : 1960 Cri LJ 410
7 State of Orissa v. Ganesh Chandra Jew, (2004) 8 SCC 40 : 2004 SCC (Cri) 2104

under Section 197 of the Code because the acts complained of are so integrally connected with or attached to their office as to be inseparable from it. It is not possible for us to come to a conclusion that the protection granted under Section 197 of the Code is used by the police personnel in this case as a cloak for killing the deceased in cold blood."

(emphasis supplied)

44. In *Sankaran Moitra* v. *Sadhna Das*[5] the majority referred to *Gill* v. *R.*[20], *H.H.B. Gill* v. *King Emperor*[19]; *Shreekantiah Ramayya Munipalli* v. *State of Bombay*[21]; *Amrik Singh* v. *State of PEPSU*[17]; *Matajog Dobey* v. *H.C. Bhari*[15]; *Pukhraj* v. *State of Rajasthan*[16]; *B. Saha* v. *M.S. Kochar*[23]; *Bakhshish Singh Brar* v. *Gurmej Kaur*[13]; *Rizwan Ahmed Javed Shaikh* v. *Jammal Patel*[25] and held : (*Sankaran Moitra case*[5], SCC pp. 602-603, para 25)

"*25*. The High Court has stated that killing of a person by use of excessive force could never be performance of duty. It may be correct so far as it goes. But the question is whether that act was done in the performance of duty or in purported performance of duty. If it was done in performance of duty or purported performance of duty, Section 197(1) of the Code cannot be bypassed by reasoning that killing a man could never be done in an official capacity and consequently Section 197(1) of the Code could not be attracted. Such a reasoning would be against the ratio of the decisions of this Court referred to earlier. The other reason given by the High Court that if the High Court were to interfere on the ground of want of sanction, people will lose faith in the judicial process, cannot also be a ground to dispense with a statutory requirement or protection. Public trust in the institution can be maintained by entertaining causes coming within its jurisdiction, by performing the duties entrusted to it diligently, in accordance with law and the established procedure and without

5 (2006) 4 SCC 584 : (2006) 2 SCC (Cri0 358
20 1948 SCC Online PC 10 : (1947-48) 75 IA 41 : 1948 PC 128
19 1946 SCC Online FC 10 : AIR 1947 FC 9
21 AIR 1955 SC 287 : 1955 Cri LJ 857
17 AIR 1955 SC 309 : 1955 Cri LJ 865
15 AIR 1956 SC 44 : 1956 Cri LJ 140
16 (1976) 2 SCC 701 : 1973 SCC (Cri) 944
23 (1979) 4 SCC 177 : 1979 SCC (Cri) 939
13 (1987) 4 SCC 663 : 1988 SCC (Cri) 29
25 (2001) 5 SCC 7
26 Sankaran Moitra v Sadhana Das, 2003 Scc Online Cal 309 : (2003) 4 CHN 82

delay. Dispensing with of jurisdictional or statutory requirements which may ultimately affect the adjudication itself, will itself result in people losing faith in the system. So, the reason in that behalf given by the High Court cannot be sufficient to enable it to get over the jurisdictional requirement of a sanction under Section 197(1) of the Code of Criminal Procedure. We are therefore satisfied that the High Court was in error in holding that sanction under Section 197(1) was not needed in this case. We hold that such sanction was necessary and for want of sanction the prosecution must be quashed at this stage. It is not for us now to answer the submission of the learned counsel for the complainant that this is an eminently fit case for grant of such sanction."

45. The dissenting view of C.K. Thakker, J. in *Sankaran Moitra*[5] supports the contention of Mr. Luthra to some extent. However, we are bound by the majority view. Furthermore even the dissenting view of C.K. Thakker, J. was in the context of an extreme case of causing death by assaulting the complainant.

46. In *K.K. Patel* v. *State of Gujarat*[6] this Court referred to *Virupaxappa Veerappa Kadampur*[4] and held : (*K.K. Patel case*[6], SCC p. 203, para 17)

"*17*. The indispensable ingredient of the said offence is that the offender should have done the act "being a public servant". The next ingredient close to its heels is that such public servant has acted in disobedience of any legal direction concerning the way in which he should have conducted as such public servant. For the offences under Sections 167 and 219 IPC the pivotal ingredient is the same as for the offence under Section 166 IPC. The remaining offences alleged in the complaint, in the light of the averments made therein, are ancillary offences to the above and all the offences are parts of the same transaction. They could not have been committed without there being at least the colour of the office or authority which the appellants held."

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5 Sankaran Moitra v. Sadhna Das, (2006) 4 SCC 584 : (2006) 2 SCC (Cri) 358
6 (2000) 6 SCC 195 : 2001 SCC (Cri) 200
4. Virupaxappa Veerappa Kadampur v. State of Mysore, AIR 1963 SC 849 : (1963) 1 Cri LJ 814

27. Now coming to the present case, this Court finds that earlier the learned C.J.M. has passed an order under Section 156(3) Cr.P.C. but as it appears from the records, at the relevant time he had not applied his judicial mind and simply referred the complaint petition for registration of the First Information Report. The circumstances under which the F.I.R. was not lodged and it was returned to the learned C.J.M. are well discussed earlier, those were also subject to challenge before this Court in the first round of litigation in Cr.W.J.C. No. 916/2017. The judgment of this Court was under challenge before the Hon'ble Apex Court in SLP (Crl.) No. 1586/2018 which was dismissed. The fact remains that no F.I.R. has been lodged as no previous sanction was produced by the complainant. In such circumstance, if the complaint is pressed by the complainant – petitioner and the learned Magistrate decides to take up the private complaint, while doing so, he can definitely look into the statements made in the complaint petition and find out at the first instance as to the given nature of the allegations made against the public servants. The learned C.J.M. is well within his jurisdiction to see whether the case may proceed without a previous sanction. In the case of **Matajog Dobey** (supra) the Hon'ble Apex Court has held that

there must be a reasonable connection between the act and discharge of the official duty; and the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty.

28. In the present case, what to say of the accused, the complaint petition itself discloses that the statements made by the Hon'ble Chief Minister being In-charge Minister were on the Floor of the House and in this regard he was provided with the information by the other public servants who were discharging their own duty. Learned Chief Judicial Magistrate has rightly looked into this aspect of the matter.

29. As regards the need for sanction, at this stage, the Hon'ble Apex Court has held that the question may arise at any stage of the proceeding. Whether the sanction is necessary or not is to be determined in each case and the necessity may reveal itself in course of the progress of the case.

30. The learned C.J.M. has examined the averments made in the complaint petition, the learned Magistrate has taken a view that previous sanction is required in this case. In the opinion of this Court no fault may be found in the order (Annexure 'P-33') passed by learned C.J.M., Patna.

31. The judgment of Hon'ble Apex Court in the case of **Vinubhai Haribhai Malaviya** (supra) on which the petitioner has placed reliance is on an entirely different subject and has no application in the present case. In the said case the Hon'ble Apex Court was considering the power of the Magistrate to order further investigation until charges are framed, under Section 156(3) read with Section 173(8) Cr.P.C.

32. Keeping in mind the provision of Section 197 Cr.P.C. and the aforementioned judgments of the Hon'ble Apex Court, this Court is of the considered opinion that the impugned order as contained in Annexure 'P-33' does not suffer from any legal infirmity.

33. This Writ Application is devoid of merit. It is dismissed accordingly.

(Rajeev Ranjan Prasad, J)

Rajeev/.

AFR/NAFR	**AFR**
CAV DATE	
Uploading Date	17.03.2021
Transmission Date	17.03.2021

Note: The ordersheet duly signed has been attached with the record. However, in view of the present arrangements, during Pandemic period all concerned shall act on the basis of the copy of the order uploaded on the High Court website under the heading 'Judicial Orders Passed During The Pandemic Period'.