Manju Surana vs Sunil Arora on 27 March, 2018

Equivalent citations: AIRONLINE 2018 SC 1002

Author: Sanjay Kishan Kaul

Bench: Sanjay Kishan Kaul, J. Chelameswar

REPORT

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 457 OF 2018
(Arising out of SLP (Crl.) No.5838 of 2014)

MANJU SURANA ….Appella

Versus

SUNIL ARORA & ORS. ….…Respond

WITH

CRIMINAL APPEAL NO. 458 OF 2018
(Arising out of SLP (Crl.) No.1092 of 2015)

JUDGMENT

SANJAY KISHAN KAUL, J.

CRIMINAL APPEAL NO. 457 OF 2018 (Arising out of SLP (Crl.) No.5838 of 2014)

1. Leave granted.

2. The question of law sought to be raised in the appeals is as to whether prior sanction for prosecution qua allegation 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 of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.').

3. In Criminal Appeal No.....of 2018 (arising out of SLP (Crl.) No.5838 of 2014), the appellant submitted a complaint before the Special Judge (Prevention of Corruption Act, Jaipur Metropolitan City, Jaipur) under Sections 7 & 13 of the Prevention of Corruption Act, 1988 (hereinafter referred to as the 'PC Act') and Sections 420, 467, 468 & 471 read with Section 120B of the Indian Penal Code, 1860 (hereinafter referred to as 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 as "Principal Secretary to the Government P.H.E.D. Chief Minister" is the first respondent before us, the other persons arrayed as accused before the Special Judge, being the

Superintending Engineer, Chief Engineer, ex Chief Minister (as she then was), ex Minister of P.H.E.D., Finance Secretary, Deputy Accountant General and P.S.L. Company through its Managing Director are also before us, as the Respondents. It is 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 was stated to be given the advantage for personal interest. It is not necessary for the purpose of the present controversy to get into the detailed facts but suffice to say that 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, is 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.

4. It is extremely relevant to note that from the facts, which have now come to light, respondent No.1 herein was neither holding the post of the Principal Secretary of the P.H.E.D nor the Chief Secretary at the relevant stage of time and the description of his office is consequently not correct. The first respondent was actually holding the post of Principal Secretary to the Chief Minister.

5. The Special Judge closed the complaint in terms of order dated 4.2.2014 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 has been granted by the competent authority under Section 19 of the PC Act read with Section 197 of the Cr.P.C. To support this conclusion, reliance was placed on the judgment of this Court in Anil Kumar v. M.K. Aiyappa1 opining that no complaint could be forwarded for investigation under Section 156(3) of the Cr.P.C. nor could any proceedings be initiated under Sections 202 & 202 of the Cr.P.C. in the absence of such sanction. It was, thus, observed that further proceedings in the case would be conducted on the filing of sanction.

6. The appellant preferred a revision petition against this order, which has been dismissed by the detailed impugned order dated 30.4.2014. The order really refers to various judicial pronouncements and then concludes that in view of the judgment in Anil Kumar v. M.K. Aiyappa2 and P. Nallammal v. State3 both for the reasons of absence of any sanction, as also the revision petition being directed against an interlocutory order, the petition was not maintainable. 1 (2013) 10 SCC 705 2 supra 3 (1999) 6 SCC 559 Thereafter the present Special Leave Petition has been filed.

7. We have heard learned counsel for the parties.

8. Mr. Prashant Bhushan, learned counsel appearing for the appellant sought to question the view taken in Anil Kumar4 and in L. Narayana Swamy v. State of Karnataka5 following the earlier judgment. The sub-stratum of the argument is that the requirement of prior sanction for prosecution against the public servant would arise only when cognizance is taken, while no such sanction was required at the stage of setting into motion an investigation under Section 156(3) of the Cr.P.C.. It was, thus, contended that the observations in these two judgments are per incuriam or in conflict with the long line of earlier judgments on the question as to when the cognizance can be stated to have be taken. Mr. Bhushan drew our attention to Section 19(1) of the PC Act, which reads

as under:

> "19. Previous sanction necessary for prosecution -
>
> (1) No court shall take cognizance of an offence punishable under section 7, 10, 11, 13 and15 alleged to have been committed by a public servant, except with the previous sanction,-

4 supra 5 (2016) 9 SCC 598

(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."

9. He sought to emphasise that the bar is to the court taking "cognizance of an offence except with the previous sanction".

10. We may next refer to Chapter XIV of the Cr.P.C., which is under the heading "Conditions Requisite for Initiation of Proceedings". Section 190 states as to when cognizance would be taken and is reproduced for convenience as under:

> "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-
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> (a) upon receiving a complaint of facts which constitute such offence;
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> (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."

11. Section 197 of the Cr.P.C. under the same chapter prescribes a pre-condition of obtaining sanction before the court takes cognizance against a public servant. The relevant portion 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-
>
> (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) in the case of a person who is employed or, as the case may be, was at the lime of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:
>
> 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."

12. Once cognizance is taken the procedure is triggered off under Chapter XV with the heading "Complaints to Magistrates". It would be suffice to reproduce Section 200 as under:

> "200. Examination of complainant.- A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:
>
> Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses—
>
> (a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or
>
> (b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:
>
> Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them."

13. The Magistrate, if he thinks fit, may postpone the issue of process against the accused to inquire the case himself or direct an investigation post taking cognizance, as per Section 202, which is reproduced herein under:

> "202. Postponement of issue of process.- (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192 , may, if he thinks fit [and shall in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction], postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:
>
> Provided that no such direction for investigation shall be made-
>
> (a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions;

or

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

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:

> Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all hi s witnesses and examine them on oath.
>
> (3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant."

14. Keeping in mind the aforesaid provisions, we now turn to Chapter XII with the heading "Information to the Police and their powers to investigate". Section 156 forms a part of this Chapter and reads as under:

> "156. Police officer's power to investigate cognizable cases.-
>
> (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."

15. The relevant provision is Section 156(3) of the Cr.P.C. where a Magistrate is empowered to make an order of investigation in terms of sub-sections (1) & (2).

16. It is, thus, the submission of Mr. Prashant Bhushan that there is a distinction between the investigation carried out at pre-cognizance stage, which would not face the requirement of a prior sanction qua a public servant, as against a post-cognizance proceeding which needs prior sanction. We may also notice that in terms of sub-section (4) of Section 5 of the PC Act, for the proceedings before a Special Judge under the PC Act, the Special Judge shall be deemed to be a Magistrate.

17. In the aforesaid context, he referred to a catena of judgments. We have analyzed those and some other cases dealing with the issue. Judgments on the nature of proceedings being an inquiry under Section 156(3) of the Cr.P.C.:

18. In R.R. Chari v. State of U.P.6, a three Judges Bench of this Court, in the inception years of this Court, referred to Gopal Marwari v. Emperor7qua the observations that the word 'cognizance' indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. This was different from initiation of proceedings. The word 'cognizance' was somewhat of an indefinite import and perhaps not used exactly in the same sense. Thereafter it proceeded to notice the observations of Das Gupta, J. in Superintendent and Remembrancer of Legal Affairs, West Bengal v. Abani Kumar Banerjee 8 where observations were made to the effect that what is taking cognizance has 6 1951 SCR 312 7 AIR 1943 Pat 245 8 AIR 1950 Cal 437 not been defined in the Cr.P.C., but it could be said that any Magistrate who has taken cognizance of any offence under Section 190(1)(a) of the Cr.P.C. must not only have applied his mind to the contents of the petition but must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter – proceedings under Section 200 and thereafter under Section

202.However, when the Magistrate applies his mind, not for the purpose of proceeding under the subsequent sections of this Chapter, but for some other kind, e.g. ordering investigation under Section 156(3) or issuing a search warrant for the purposes of the investigation, he could not be said to have taken cognizance of offence. The Supreme Court gives its imprimatur to these observations.

19. Gopal Das Sindhi v. State of Assam 9 (three Judges Bench), the decision in R.R. Chari10 was followed.

20. Jamuna Singh v. Bhadai Shah11 (three Judges Bench),the decision in R.R. Chari12 was followed.

9 AIR 1961 SC 986 10 supra 11 (1964) 5 SCR 37 12 supra

21. In Nirmaljit Singh Hoon v. State of W.B.13 (three Judges Bench), it was sought to be canvassed that the investigation by the police being one ordered by the Chief Presidency Magistrate under Section 156(3) of the Cr.P.C., that investigation was part of the proceedings of the Court. This plea was rejected inter alia on the ground that the police authorities have, under Sections 154 & 156 of the Cr.P.C., a statutory right to investigate into a cognizable offence without requiring any sanction from a judicial authority. Secondly, for taking cognizance under Section190(1)(a) of the Cr.P.C., a Magistrate must not only have applied his mind but must have done so for purposes of proceeding under Section 200 and the provisions following that Section. The application of mind only for ordering investigation under Section 156(3) or issuing a warrant for purposes of investigation could not be said to have taken cognizance of the offence.

22. Devarapally Lakshminarayana Reddy v. V. Narayana Reddy 14 (three Judges Bench) – Mr. Prashant Bhushan referred to the aforesaid judgment for analysis of Section 156(3) of the Cr.P.C. In para 13, it 13 (1973) 3 SCC 753 14 (1976) 3 SCC 252 has been observed that when a Magistrate receives a complaint he is not bound to take cognizance if the facts alleged in the complaint, disclose the commission of an offence. Only if he forms an opinion that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under Section 156(3) will be conducive to justice and save the valuable time of the Magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence, himself. Thereafter in paras 14 & 17, it has been observed as under:

> "14. This raises the incidental question: What is meant by "taking cognizance of an offence" by a Magistrate within the contemplation of Section 190? This expression has not been defined in the Code. But from the scheme of the Code, the content and marginal heading of Section 190 and the caption of Chapter XIV under which Sections 190 to 199 occur, it is clear that a case can be said to be instituted in a court only when the court takes cognizance of the offence alleged therein. The ways in which such cognizance can be taken are set out in clauses (a),
>
> (b) and (c) of Section 190(1). Whether the Magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted, and the nature of the preliminary action, if any, taken by the Magistrate. Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding sections in Chapter XV to the Code of 1973, he is said to have taken cognizance of the offence within the meaning to Section 190(1) (a). If, instead of proceeding under Chapter XV, he has, in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence." ....

"17. Section 156(3) occurs in Chapter XII, under the caption :

"Information to the Police and their powers to investigate"; while Section 202 is in Chapter XV which bears the heading:

"Of complaints to Magistrates". The power to order police investigation under Section 156(3) is different from the power to direct investigation conferred by Section 202(1). The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, the second at the post- cognizance stage when the Magistrate is in seisin of the case. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156(3). It may be noted further that an order made under sub-section (3) of Section 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or charge-sheet under Section 173. On the other hand, Section 202 comes in at a stage when some evidence has been collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered under Section 202 to direct, within the limits circumscribed by that section an investigation "for the purpose of deciding whether or not there is sufficient ground for proceeding". Thus the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him."

23. In Tula Ram v. Kishore Singh15 (two Judges Bench) – cited before us, it was observed that Sections 190 and 156(3) of the Cr.P.C.

are mutually exclusive and work in totally different spheres. Thus, even if a Magistrate receives a complaint under Section 190, he can act under Section 156(3) provided that he does not take cognizance. Chapter 14 deals with post cognizance stage while Chapter 12, so far as the Magistrate is concerned, deals with pre-cognizance stage, that is to say that even when a Magistrate starts acting under Section 190 and the provisions following, he cannot resort to Section 156(3). Thus, Section 202 would apply only in cases where the Magistrate has taken cognizance and chooses to inquire into the complaint either himself or through any other agency. Before proceeding to do so, there may be a situation where the Magistrate, before taking cognizance himself, chooses to order a pure and simple investigation under Section 156(3) of the Cr.P.C.

15 (1977) 4 SCC 459

24. Srinivas Gundluri v. SEPCO Electric Power Construction Corpn.16 (two Judges Bench) – The Magistrate in the case had merely allowed the application filed by the complainant under Section

156(3) of the Cr.P.C. and sent the same along with its annexure for investigation by the police officer and that was held not to have amounted to having taken cognizance.

25. Subramanian Swamy v. CBI17 (five Judges Bench) – It was observed that Section 156 of the Cr.P.C. enables an officer in charge of a police station to investigate a cognizable offence. Insofar as non- cognizable offences are concerned, it was found that the police officer by virtue of Section 155 Cr.P.C. can investigate it after obtaining appropriate orders from the Magistrate having power to try such case or commit the case for trial regardless of the status of the officer concerned. In view thereof, the scheme of Sections 155 and 156 of the Cr.P.C. was held to indicate that the local police may investigate a senior government officer without previous approval of the Central Government.

16(2010) 8 SCC 206 17(2014) 8 SCC 682 The Constitution Bench while dealing with the inquiry and investigation under the P.C. Act held that there was no basis to classify the two sets of public servants differently on the ground that one set of officers is decision-making officers and not the other set of officers.

26. Despite the aforesaid catena of judgments, a different path has been traversed in two judgments of this Court where the offences alleged are under the P.C. Act read with the I.P.C.

27. In Anil Kumar v. M.K. Aiyappa18 (two Judges Bench), the Court proceeded to examine whether the Magistrate, while exercising his powers under Section 156(3) of the Cr.P.C., could act in a mechanical or casual manner and go on with the complaint after getting the report. In that context, a reference was made to an earlier judgment in Maksud Saiyed v. State of Gujarat 19 case, where it was observed that there was a requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) of the Cr.P.C. Thereafter the Bench proceeded to draw a conclusion that a Special Judge/Magistrate cannot refer the matter under Section 156(3) 18 supra 19(2008) 5 SCC 668 of the Cr.P.C. against a public servant without a valid sanction order.

28. The Bench further proceeded to examine whether the order directing investigation under Section 156(3) of the Cr.P.C. would amount to taking cognizance of the offence since a contention was raised that the expression “cognizance” appearing in Section 19(1) of the P.C. Act would have to be construed as post-cognizance stage and not pre-cognizance stage and therefore, the requirement of sanction does not arise prior to taking cognizance of the offences of the P.C. Act. Insofar as the expression ‘cognizance’, which appears in Section 197 of the Cr.P.C. was concerned, a reference was made to the judgment in State of U.P. v. Paras Nath Singh20. In that case it was observed that the jurisdiction of a Magistrate to take cognizance of any offence is provided by Section 190 of the Cr.P.C. and so far as the public servant was concerned this was clearly barred by Section 197 of the Cr.P.C. unless the sanction was obtained from the appropriate authority. After referring to certain other judgments on the issue of purport and meaning of the word ‘cognizance’, it was concluded that ‘cognizance’ has a wider connotation and is not merely confined to the 20(2009) 6 SCC 372 stage of taking cognizance of the offence.

29. The Bench proceeded to discuss Section 19(1) of the P.C. Act as also Section 19(3) of the P.C. Act, which reads as under:

> "19. Previous sanction necessary for prosecution.— ....
>
> (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."

30. It was sought to be contended that the requirement of sanction was only procedural in nature and hence directory or else Section 19(3) of the P.C. Act would be rendered otiose. This contention was not found acceptable as sub-section (3) of Section 19 of the P.C. Act had an object to achieve, which applied only in circumstances where a Special Judge had already rendered a finding, sentence or order. This would not mean that the requirement to obtain sanction was not a mandatory requirement. In the absence of prior sanction, it was observed, that the Magistrate cannot order investigation against a public servant even while invoking power under Section 156(3) of the Cr.P.C.

31. L. Narayana Swamy v. State of Karnataka 21 (two Judges Bench) – The judgment in Anil Kumar v. M.K. Aiyappa22 was followed. After discussing various other pronouncements, it was concluded that even while directing an inquiry under Section 156(3) of the Cr.P.C., the Magistrate applies his judicial mind to the complaint and therefore, it would amount to taking cognizance of the matter.

32. Mr. Tushar Mehta, learned Additional Solicitor General sought to canvas the view taken in the last two judgments referred to aforesaid to submit that application of mind was necessary to exercise power under Section 156(3) of the Cr.P.C. and that credibility of information was to be weighed before ordering investigation (Ramdev Food 21 (2016) 9 SCC 598 22 supra Products (P) Ltd. v. State of Gujarat 23). It was, thus, submitted that allegation against a public servant under the P.C. Act offences are technical in nature and would require a higher evaluation standard and thus the Magistrates ought to apply their mind before ordering investigation against public servant. The consequences of starting investigation under Section 156(3) of the Cr.P.C., it was submitted, would result in the police registering an FIR (Suresh Chand Jain v. State of Madhya Pradesh24 and Mohd. Yousuf v. Afaq Jahan25). Thus, a situation may arise where a Magistrate may exercise his power under Section 156(3) of the Cr.P.C. in a routine manner resulting in an FIR being registered against a public servant, who may have no role in the allegation made.

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 23(2015) 6 SCC 439 24(2001) 2 SCC 628 25(2006) 1 SCC 627 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 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. Crl. M.P. 161/2015 in SLP (Crl.) No.5838/2014 26 supra 27 supra

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 has to 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.

49. The application is accordingly allowed, leaving the parties to bear their own costs.

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50. Leave granted.

51. The matter is referred to a larger Bench along with SLP (CRL.) No.5838/2014 in terms of the judgment passed today.

.....J. (J. Chelameswar) .....J. (Sanjay Kishan Kaul) New Delhi.

March 27, 2018.