P. Nallammal And Ors. vs State on 25 January, 1999

Equivalent citations: 1999CRILJ1591

ORDER

R. Balasubramanian, J.

1. There are three special Calendar Cases namely C.C. Nos. 11 of 1997, on the file of the 13th Additional Special Judge, Chennai; C.C. No. 17 of 1997, on the file of the 12th Additional Special Judge, Chennai and C.C. No. 1 of 1998 on the file of the 11th Additional Special Judge, Chennai. In C.C. No. 11 of 1997, there are two accused, first one being a former Minister in the State of Tamil Nadu and the second one being his wife. The second accused in that case is the sole petitioner in Crl. R.C. No. 190 of 1998. In C.C. No. 17 of 1997, there are seven accused and the first accused is a former Member of the Tamil Nadu Legislative Assembly and former Minister and the other accused are his family members. The first and second accused in this case are the petitioners in Crl. R.C. No. 446 of 1998; the fifth accused in this case is the petitioner in Crl. R.C. No: 447 of 1998; the third and fourth accused are the petitioners in Crl. R.C. No. 448 of 1998; the seventh accused is the petitioner in Crl. R.C. No. 449 of 1998 and the sixth accused is the petitioner in Crl. R.C. No. 490 of 1998. In C.C. No. 1 of 1998, there are five accused, out of which the first accused was a Member of the Tamil Nadu Legislative Assembly as well as the Speaker in the said Assembly and the other accused are his family members. The first accused therein is the petitioner in Crl. R.C. No. 443 of 1998; the second accused is the petitioner in Crl. R.C. No. 443 of 1998; the third accused is the petitioner in Crl. R.C. No. 444 of 1998; the fourth accused is the petitioner in Crl. R.C. No. 445 of 1998 and the fifth accused is the petitioner in Crl. R.C. No. 491 of 199.8. The first accused in C.C. No. 1 of 1998 is also the petitioner in Crl. R.C. No. 314 of 1998 and the accused 2 to 5 in that Calendar Case are the petitioners in Crl. R.C. No. 315 of 1998.

2. The second accused in C.C. No. 11 of 1997 filed Crl. M.P. No. 303 of 1997 seeking discharge under Section 239 of the Code of Criminal Procedure and that was dismissed on merits. That order is challenged in Crl. R.C. No. 190 of 1998 by that accused. The petitions of the first and second accused; fifth accused; third and fourth accused; seventh accused and sixth accused in C.C. No. 17 of 1997 namely Crl. M.P. Nos. 230, 114, 115, 88 and 87 of 1998 under Section 239 of the Code of Criminal Procedure seeking discharge, were dismissed on merits. Those orders are respectively challenged in Crl. R.C. Nos. 446 to 449 of 1998 and Crl. R.C. No. 490 of 1998. The applications of the first accused; second accused; third accused; fourth accused and the fifth accused in C.C. No. 1 of 1998, i.e. Crl. M.P. Nos. 288, 289, 290, 291 and 292 of 1998 under Section 239 of the Code of Criminal Procedure, seeking discharge were also dismissed on merits. They are challenged respectively in Crl. R.C. Nos. 442 to 445 and 491 of 1998. The first accused in C.C. No. 1 of 1998 filed a petition Crl. M.P. No. 240 of 1991 under Section 91 of the Code seeking production of certain records. That was dismissed on merits against which Crl. R.C. No. 314 of 1998 is before this Court. Accused 2 to 5 in that case filed Crl. M.P. Nos. 219 and 241 to 243 of 1998, all under Section 91 of the

Code seeking production of certain records. All those petitions were dismissed on merits. Hence Crl. R.C. No. 315 of 1998 is before this Court. Against the first accused in C.C. No. 11 of 1997, a charge under Section 13(2) read with Section 13(1)(e) of the Prevention of Corruption Act, 1988 has been framed. Against the second accused, a charge under the above referred to Section read with Section 109 of the Indian Penal Code is framed. In C.C. No. 17 of 1997, against the first accused a charge under Section 13(2) read with Section 13(1)(e) of the Prevention of Corruption Act, 1988 has been framed. Against the rest of the accused, a charge under the above referred to Sections read with Section 109 of the Indian Penal Code has been framed. In C.C. No. 1 of 1998, a charge under Section 13(2) read with Section 13(1)(e) of the Prevention of Corruption Act has been framed against the first accused. Against the accused 2 to 5, a charge under the above referred to section read with Section 109 of the Indian Penal Code has been framed.

3. I heard Mr. T. Sudhanthiram, learned counsel appearing for the petitioners in Crl. R.C. No. 190 of 1998; Mr. G. Krishnan, learned senior counsel appearing for the petitioners in all the other Revisions and Mr. R. Shanmugasundaram, learned State Public Prosecutor, assisted by Mr. N. R. Elango, learned Government Advocate (Criminal Side), for the respondents in all these Revisions.

4. According to Mr. G. Krishnan, learned senior counsel, the first accused in C.C. No. 1 of 1998, who was the Speaker of the State Assembly during the check period, is not a public servant at all and therefore he cannot be proceeded with under the Prevention of Corruption Act, 1988, here in after referred to as the 1988 Act. Alternatively the learned senior counsel also contended that the first accused had satisfactorily explained the possession of the assets in his hand and once the explanation is found to be satisfactory, which the learned trial Judge refused to hold so, it cannot be said that the offence for which he is charged is made out. Assuming for a moment that the first accused in C.C. No. 1 of 1998 is a public servant and the first accused in C.C. Nos. 11 and 17 of 1997 are public servants in their capacity as Minister, yet the rest of the accused in C.C. Nos. 1 of 1998, 11 of 1997 and 17 of 1997 are not public servants and they are only private individuals, though they might be close relatives of the respective public servants. According to the learned senior counsel the 1988 Act covers only the offences committed by public servants. The 1988 Act contains provisions to try even private individuals for the offence of abetting the public servant committing certain specified offences under the Act. The act of criminal misconduct as brought out in Section 13(1)(e) of the Act is not one such offence as enumerated in the Act itself for the commission of which an abettor could be made responsible. In other words, when the 1988 Act contains specific provision for prosecuting private individuals also under the Act in respect of only certain offences and when there is no such provision in respect of an offence enumerated under Section 13(1)(e) of the Act, the respective accused, other than the first accused in the Calendar Cases, cannot at all be prosecuted under the Act for having abetted the said offence falling under Section 13(1)(e) of the 1988 Act. Therefore the submission of the learned senior counsel for the petitioners is that the prosecution of the rest of the accused in the Calendar Cases other than the respective first accused therein is misconceived and without authority of law. In this context, the learned senior counsel stated that the 1988 Act being penal in nature, it's provisions have to be necessarily strictly construed. In the absence, of any provision to prosecute private individuals as in this case for an offence of abetting an offence under Section 13(1)(e) read with Section 13(2) of the Act, the Court should act very cautiously in receiving the final report and framing a charge against the private individuals. The

learned senior counsel contended that even on facts, there is absolutely no ground for presuming that the respective accused have committed any offence at all and therefore the framing of the charge is without any materials. According to the learned senior counsel, the facts alleged against the respective accused are groundless. The learned senior counsel added that from the very fact that some of the properties are standing in the name of the other accused other than the first accused in the respective Calendar Cases by themselves will enable the Court to infer that those accused are not guilty of abetting the offence. In other words, according to the learned senior counsel, the framing of the charge for an offence under Section 109 of the Indian Penal Code against the accused other than the public servant in the cases is totally unwarranted and not supported by any materials.

5. The learned senior counsel also contended that under Section 13(1)(e) of the Act, possession of assets by itself is not an Offence and it is the failure of the public servant to satisfactorily explain such possession alone is an offence. Under Section 13(1)(e) of the Act, it is the public servant, who has to satisfactorily account for his possession and when that failure is made as an offence, there is no scope at all for anybody else abetting for such a failure and on this ground also, the charge for abetment against the respective private individuals has to be necessarily set aside. The learned senior counsel further contended that in CC. No. 1 of 1998 all the accused filed separate applications under Section 91 of the Code to send for certain documents which would throw ample light on their innocence or the absence of materials to frame a charge against them. However the learned trial Judge had erroneously, both on a point of law and on facts, dismissed those petitions. If those documents are sent for, then they would have certainly had a definite impact on the mind of the learned trial Judge and he would not have framed charges at all. The learned senior counsel also contended that the dismissal orders on the discharge applications filed in CC No. , 1 of 1998 do not contain reasons at all, and in the absence of the same, this Court will be handicapped to appreciate and understand the mind of the learned trial Judge behind the dismissal orders. According to the learned senior counsel, the law requires reasons to be given by the Court while the discharge applications are disposed of against the accused.

6. Mr. T. Sudhanthiram, learned counsel appearing for the petitioner in Crl. R.C. No. 190 of 1998, argued that act of criminal misconduct falling under Section 13(1)(e) of the Act, namely possession of assets disproportionate to the known sources of income, is preceded by an act of corruption by the public servant himself. In other words, the assets in the hands of the public servant or anybody on his behalf, is the result of corrupt practice by the public servant and therefore it is only that corrupt activities of the public servant alone, which led him to own assets, is the offence. If that is so, if at all a private individual can be roped in to be tried along with a public servant under the Act, then such charge should necessarily relate to the corrupt practice of the public servant preceding his coming into possession of assets. The act of corrupt practice of the public servant comes to an end as soon as he completes that act and therefore the offence is completed on that day itself. The result that flows as a consequence of such corrupt practice is of no significance at all. Therefore if at all a private individual can be charged, it should relate only to the corrupt practice which precedes the public servant coming to possession of the assets.

7. Mr. R. Shanmugasundaram, learned State Public Prosecutor, contended that the first accused in CC. No. 1 of 1998 is a 'public servant'. Before the final report was filed in this case and when the

crime was at the investigation stage, the first accused referred to above moved for anticipatory bail before this Court and one of the contentions raised on his behalf was that he is not a public servant at all and therefore the registering of a crime under the Prevention of Corruption Act, 1988 itself is without jurisdiction. A learned single Judge of this Court (M. S. Janarthanam, J.) went into that question in detail while considering the anticipatory bail petition arid gave a finding that the first accused in CC. No. 1 of 1998 is a public servant. That order remains in force even as on date and therefore it does not lie in the mouth of the first accused to contend contra at this stage. The learned State Public Prosecutor next argued that the explanations offered by the respective public servants in the Calendar Cases are found to be not satisfactory and the Court at the time of framing charge is only concerned with prima facie materials and even a suspicion, however slender it may be, would be a ground to frame a charge. The learned State Public Prosecutor contended that possession by itself though initially may not be an offence under Section 13(1)(e) of the Act, yet when the public servant does not satisfactorily account for it, the possession becomes objectionable and possession at that point of time becomes an offence. It is the contention of the learned State Public Prosecutor that failure to explain possession of assets is not an offence. Therefore possession becomes an offence at that particular stage namely when the public servant fails to satisfactorily explain and whether the public servant had committed that offence all by himself or was he aided or abetted by any other person including a private individual can be the subject matter of investigation and filing of final report for an offence under the Act if adverse materials are collected against the private individual also. A reading of the Prevention of Corruption Act as a whole does not exclude prosecuting private individuals for having abetted a public servant to commit an offence falling under Section 13(1)(e) of the Act and therefore filing of the final report and framing of the charge is well within the four corners of law. As far as the orders of the respective Special Judge declining to send for the documents sought for by the accused in C.C. No. 1 of 1998, the learned State Public Prosecutor contended that at the time of framing of charge, the Court is concerned only about prima facie material and to find out that, the Court is expected to consider only the documents sent along with the final report and not look at the documents that may be produced by the accused at that stage. In other words, the learned State Public Prosecutor contended that the documents on which the prosecution is not relying upon, cannot be made the subject matter of scrutiny by the Court at the time of framing of the charge. Assuming for a moment without admitting that the documents produced by the accused can be considered while framing charge, that would not mean that every document which the accused wants to be produced or produced, should be taken into account. In other words, according to the learned State Public Prosecutor, if the reliability of the documents is not disputed, then probably the Court may consider the documents produced by the accused. The documents sought to be sent for by the accused in C.C. No. 1 of 1998 are not admitted documents by the prosecution and in any event, those documents are subject to proof and witnesses have to be examined and cross-examined on the genuineness or otherwise of the same. Those documents are totally extraneous at this stage. On the whole, according to the learned State Public Prosecutor, the materials available on record and placed before the Court prima facie disclose the offence alleged against all the accused and therefore the framing of the charge is in order and not liable to be interfered by this Court at this stage of the proceedings.

8. In the light of the submissions made by the respective counsel on both sides, to my mind the following points arise for consideration in this batch of Revisions :

(A) Whether the first accused in C.C. No. 1 of 1998 is a public servant or not?

(B) Whether there is any breach of the requirement of law relating to investigation of the offence under the 1988 Act (Section 17) and if so, what follows?

(C) Whether the prosecution of the private individuals in all the three cases, other than the first accused in each case, for an offence under Section 109 of the Indian Penal Code and Section 13(2) read with Section 13(1)(e) of the Act is without authority of law?

(D) Whether the learned Special Judge has committed any error, either in law or on facts, in dismissing the respective applications under Section 91 of the Code filed by the accused in that case to send for certain documents?

(E) Whether the Judge while framing charge is constrained to look only into the documents filed by the prosecution along with the final report or is it open to the Court to scrutinise the documents that are sent for or produced by the accused at that stage? and (F) Whether the orders refusing discharge are bad in law for want of reasons reflected in the orders?

9. The decision in the first question cannot detain this Court even for a minute more than what is really necessary. It is not disputed that the first accused in C.C. No. 1 of 1998 moved for anticipatory bail before this Court in this crime. A point was urged on his behalf in that proceedings that he is not a public servant and therefore registering of a crime against him under the 1988 Act is without jurisdiction. A learned single Judge of this Court had gone into that issue at length and held that the first accused is a public servant. That judgment is reported in Sedapatti Muthiah v. State of Tamil Nadu 1998 (2) Mad Law Weekly (Crl.) 592. The, first accused is before this Court in the same crime at a subsequent stage. That judgment referred to above still holds good as far as he is concerned and in any event, no contra judgment of any Court of higher jurisdiction has been brought to the notice of this Court to take a different view. Under these circumstances, this Court holds that the first accused in CC. No. 1 of 1998 is a public servant.

10. The next question that falls for consideration is whether the investigation done by a non-designated officer is in violation of the requirement of law as enumerated in Section 17 of the 1988 Act. A reading of Section 17 of the Act specifies three types of officers, who can investigate any offence punishable under this Act without the order of a competent Court. However Section 17 contains two provisos. Under the first proviso, if there is a general or special order by the State Government concerned authorising a police officer not below the rank of an Inspector of Police, then he may also investigate any such offence as provided for in that proviso. The second proviso sounds a further note of caution that offences falling under Section 13(1)(e) of the Act shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police. In other words, though an Inspector of Police, if there is a special or general order in this behalf issued by the State Government, may investigate any offence under the Act, yet he also shall not investigate an offence falling under Section 13(1)(e) of the Act without the order of a police officer not below the

rank of a Superintendent of Police. In this case the investigation is in respect of an offence falling under Section 13(2) read with Section 13(1)(e) of the Act. The investigation is done by an Inspector of Police. It is not contended before this Court that there is no special or general order issued in this behalf by the State Government authorising police officers not below the rank of an Inspector of Police to investigate. But the point urged is that the second proviso has not been strictly complied with in this case. In other words though there is an order by the Superintendent of Police enabling an Inspector of Police to investigate the offence falling under Section 13(1)(e) of the Act, yet that order of the Superintendent of Police is not an order as contemplated in the second proviso to Section 17 of the Act. The learned senior counsel argued that the Superintendent of Police had not given any reasons at all in his order enabling the Inspector of Police to investigate the offence falling under Section 13(1)(e) of the Act and in the absence of reasons, the said authorisation is illegal. According to the learned senior counsel, the mandatory requirement of law is that the said order should contain reasons ex facie. If the order of the Superintendent of Police is bad in law for the reasons stated above, then any investigation done by the Inspector of Police on such illegal order vitiates the entire proceedings done by him. There is a long line of decisions rendered by the Honourable Supreme Court of India, the last of which being the one report in State of Haryana v. Bhajan Lal holding that the requirement of Section 5-A of the 1947 Act is not directory but mandatory and that the order referred to in that Section (Section 5-A of the 1947 Act corresponding to Section 17 of the 1988 Act) should disclose reasons on the face of: it. In that case the facts are as follows complaint was presented by an individual to the office of the Chief Minister. The Officer on Special Duty in that office made an endorsement on 12-11-1987 stating, "CM. has seen. For appropriate action" and marked the same to the Director General of Police. The Director General of Police made his endorsement, "Please look into this; take necessary action and report" and marked it to the Superintendent of Police, Hissar. The Superintendent of Police made an endorsement reading, "please register a case and invest-gate" and forwarded the same to the Station House Officer. On the above facts, the Honourable Supreme Court of India held as follows :

> 123. It means that a police officer not below the rank of an Inspector of Police authorised by the State Government in terms of the first proviso can take up the investigation of an offence referred to in clause (e) of Section 5(1) only on a separate and independent order of a police officer not below the rank of a Superintendent of Police. To say in other words, a strict compliance of the second proviso is an additional legal requirement to that of the first proviso for conferring a valid authority on a public officer not below the rank of an Inspector of Police to investigate an offence falling under clause (e) of Section 5(1) of the Act. This is clearly spelt out from the expression "further provided" occurring in the second proviso.
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> 124. A conjoint reading of the main provision Section 5 A(1) and the two provisos thereto, shows that the investigation by the designated police officers is the rule and the investigation by an officer of a lower rank is an exception.
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> 135. In the present case, there is absolutely no reason, given by the S. P. in directing the SHO to investigate and as such the order of the S.P. is directly in violation of the dictum laid down by this Court in several decisions which we have referred to above.

> Resultantly, we hold that the third appellant, SHO is not clothed with the requisite legal authority within the meaning of the second proviso to Section 5-A(1) of the Act to investigate the offence under clause (c) of Section 5(1) of the Act.

Therefore there cannot be any doubt that the order passed by the Superintendent of Police should ex facie disclose reasons in the order. But the order produced in this case does not disclose any reasons at all. Therefore there cannot be any difficulty in holding that the order of the Superintendent of Police in exercise of his power under the second proviso to Section 17 of the 1988 Act is definitely bad in law.

11. Does such an illegality, on the facts of the case on hand, put an end to the entire investigation done by the police officer or docs the proceeding survives to be proceeded further? The view of the Honourable Judges of the Supreme Court of India appears to be that any illegality committed during investigation will not ex facie wipe out the entire proceedings unless prejudice or miscarriage of justice is shown to have visited the accused on account of such illegality during investigation. The decisions which take the view are H.N. Rishbud v. State of Delhi ; Munnalal v. State of U.P. ; Sailendranath v. State of Bihar AIR 1968 SC 1292 : 1968 Cri LJ 1484; Khandu Sonu v. State of Maharashtra ; A.C. Sharma v. Delhi Administration and State of Haryana v. Bhajan Lal . In State of Haryana v. Bhajan Lal 1992 Cri LJ 527 (referred supra), for the first time it was argued before the Honourable Supreme Court of India about the illegality committed during investigation in that the order of the Superintendent of Police suffers for lack of reasons disclosed on the face of it. On facts, the Apex Court found that the investigation had not commenced in that case at all and in that background proceeded to hold that the authorisation given by the Superintendent of Police was bad in law and that the salutary legal requirement of disclosing the reasons for according to the permission is not complied. In that view of the matter, while reversing the judgment of High Court in quashing the proceedings on other grounds, the Honourable Supreme Court of India quashed the entire investigation with liberty to take up fresh investigation in accordance with law. In H.N. Rishbud v. State of Delhi , which was also a case under the 1947 Act, it was clearly held that a defect or illegality in an investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial and if cognizance is in fact taken on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial, which follows it, cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice, The law laid down by the Supreme Court of India in the above referred to judgment had been followed by the subsequent judgment reported in Munnalal v. State of U.P. . In the case on hand, the authorisation by the Superintendent of Police under the second proviso to Section 17 of the Act was in the year 1996. Materials have been collected during investigation and final report had been filed. The Court had taken cognizance of the offence. The learned senior counsel has not argued before me that on account of the illegality committed during investigation, any prejudice or miscarriage of justice has been caused to any of the accused, under these circumstances and in view of the long line of judgments referred to above, while holding that the authorisation given by the Superintendent of Police under the second proviso to Section 17 of the 1988 Act is bad in law for. lack of reasons shown on the face of it, yet in view of the fact that neither prejudice nor miscarriage of justice is shown to have visited any of the accused on account of such illegality, I have to hold that the proceedings still survives for continuation and disposal of the

same in accordance with law from the time of framing a charge. Accordingly Point B fails. '

12. The third ground raised on behalf of the learned senior counsel is that in respect of an offence falling under Section 13(1)(e) of the Act, there cannot be any prosecution for abetting the said offence as the same is not provided for under law. It is not in dispute that properties standing in the name of the relatives of each of the public servants are the subject matter of scrutiny and the final report before the Court in each case. While the prosecution wants to establish that those properties were in fact purchased by the public servants in each cases with their funds, the case of the defence is that the properties standing in the names of private individuals really belong to them in their own way and absolutely and the public servants in each case had no role to play in such transactions. The purchases in their respective names, were from their own funds as well as from borrowed funds. The respective public servants also would contend that they have nothing to do with the purchases of those properties.

13. In this backdrop of the facts, it is necessary to trace the law relating to corruption. For the first time the law relating to corruption was codified in the year 1947 and it came to be called as the Prevention of Corruption Act, 1947. When the Act was enacted in the year 1947, possession of assets by a public servant was not by itself an offence but was made as a rule of evidence against the public servant facing charges under Section 5(1)(a) to (d). The rule of evidence, as referred to above, was contained in Sub-section (3) of Section 5 of the original Act. In the year 1964, the Act underwent an amendment and the rule of evidence as provided for under Sub-section (3) of Section 5 of the original Act, was deleted and a new clause namely clause (e) was added to Section 5(1) of the original Act. Clause (e) thus introduced made possession of assets by public servant disproportionate to his known source of income, unless satisfactorily explained by him, an offence. When the original Act of 1947 was repealed and a new Act namely the Prevention of Corruption Act, 1988, was brought in, the law on this subject underwent many substantial changes and old Section 5(1)(e) now stands as Section 13(1)(e) of the present Act. The registration of the crime and the framing of the charge against all the accused in this case is under the Prevention of Corruption Act, 1988.

14. It could be seen from the introduction of the 1988 Act that the 1947 Act had some inadequacies which has necessitated the bringing about of the 1988 Act. From the statement of Objects and Reasons to this Act, the circumstances which lead to the bringing of the new Act appear to be that the Legislature intended to make the existing anti-corruption laws more effective by widening their coverage and by strengthening the provisions. The provisions in Chapter IX of the Indian Penal Code dealing with public servants and those who abet them and the provisions in the Criminal Law Amendment Ordinance 1944 to enable attachment of ill-gotten wealth obtained through corrupt means, including from transferees of such wealth, were intended to be codified with modifications so as to , make the provisions more effective in combating corruption among the public servants. The Statement of Objects and Reasons also envisages widening the scope of the definition of the expression, "public servant"; incorporation of offences under Sections 161 to 165-A of the Indian Penal Code, enhancement of penalties provided for these offences.

15. In the light of the arguments advanced by the learned senior counsel Mr. G. Krishnan, Mr. T. Sudhanthiram, learned counsel for the petitioner in one of the Revisions and Mr. R.

Shanmugasundaram, learned State Public Prosecutor for the respondent in all these cases, I applied my mind very carefully to the arguments advanced as to whether a private individual can be charged under Section 109 of the Indian Penal Code of having abetted an offence under Section 13(2) read with Section 13(1)(e) of the Act. It is no doubt true that when the Prevention of Corruption Act, 1988 was brought into force, the Legislature thought about bringing about a complete and exhaustive Code so far as the offences of bribery and corruption committed by public servants and abetment of the same by private individuals as well as offences committed by private individual and abetment of the same by the public servants. Sections 161 and 165 of the Indian Penal Code, as they stood then, deal with the offences committed by public servants, taking gratification other than legal remuneration in respect of art official act and obtaining valuable thing without consideration from person concerned in proceeding or business transaction by such public servant; Sections 162 and 163 speak about offences committed by any person (not necessarily a public servant) by taking gratification, in order, by corrupt or illegal means, to influence public servant or for the same purpose for exercise of personal influence with public servant. Section 164 of the Indian Penal Code, as it stood then, creates an offence of abetment by a public servant in relation to the offence under Sections 162 and 163 of the Indian Penal Code and punishment. Likewise an individual can be brought before Court for having abetted an offence committed by a public servant under Sections 161 and 165 of the Indian Penal Code. The offences spelt out in Sections 161 and 165 of the Indian Penal Code, now stand redrafted as Sections 7 and 11 of the 1988 Act. The offences provided for under Sections 162 and 163 of the Indian Penal Code how stand redrafted as Sections 8 and 9 of the present Act. Sections 164 and 165-A of the Indian Penal Code now stand redrafted as Sections 10 and 12 of the 1988 Act. The aggravated form of the offence under Section 7 of the 1988 Act is brought in under Section 13(1)(a) and the aggravated form of the offence under Section 11 of the Act is now brought in as Section 13(1)(b) of the present Act. While the new Act was brought into force, while deleting Sections 161 to 165-A of the Indian Penal Code and bringing the same into the Corruption Act, they underwent some changes in achieving a deterrent punishment for the offenders. Criminal misconduct is made punishable under Sub-section (2) to Section 5 of the 1947 Act and it is also under Sub-section (2) to Section 13 of the present Act. Five types of criminal misconduct were described in clauses (a) to (e) of Section 5(1) of the old Act, which are also found as clauses (a) to (e) in Sub-section (1) to Section 13 of the present Act. Clause (d) of Sub-section (1) to Section 5 of the old Act is split into three Special divisions and brought as such in clause (d) in Sub-section (1) to Section 13 of the present Act. Sub-division (3) as found in clause (d) to Sub-section (1) to Section 13 of the present Act is a new provision.

16. Criminal misconduct under the 1947 Act as well as under the 1988 Act consisted of five distinct types with a slight modification in the criminal misconduct falling under clause (d) of Sub-section (1) of Section 13 of the 1988 Act. Criminal misconduct falling under clauses (a) and (b) of the old Act as well as the new Act can be equated to Sections 161 and 165 of the Indian Penal Code as they then stood, since deleted. I have already noted that on Sections 161 to 165-A of the Indian Penal Code being deleted from the Indian Penal Code, they are found entered under different Sections in the 1988 Act. All types of criminal misconduct as defined in the 1947 and 1988 Acts were not definitely covered under Sections 161 to 165-A of the Indian Penal Code as they then stood. In other words, criminal misconduct falling under clauses (c) to (e) of the Act were outside the area of operation of Sections 161 to 165-A of the Indian Penal Code. Sections 161 and 165 of the Indian Penal Code relate

to offences committed by the public servants themselves. Sections 162 and 163 relate to offences committed to induce a public servant by corrupt or illegal means or by exercise of personal influence. Section 164 of the Indian Penal Code provides for an offence of abetment and punishment in respect of offences under Sections 162 and 163 of the Indian Penal Code whereas Section 165-A provides for the offence of abetment and punishment thereto in respect of offences falling under Sections 161 and 165 of the Indian Penal Code. When that is the situation; namely the offence of criminal misconduct falling under clauses (c) to (e) were not covered in the above referred to Sections of the Indian Penal Code, could it be said that on Sections 161 to 165-A of the Indian Penal Code being deleted and brought into the 1988 Act as separate Sections, the offence of abetting an offence of criminal misconduct falling under clauses (c) to (e) read with Section 109 of the Indian Penal Code is completely wiped out The argument advanced before me and decided by me is that in respect of an offence falling under clause (e) to Sub-section (1) of Section 13 of the 1988 Act, there cannot be a charge of abetment under Section 109 of the Indian Penal Code against a private individual. A reading of the 1988 Act as it stands today containing Sections 161 to 165-A of the Indian Penal Code, since deleted in it, does not give any indication that the Legislature while framing the 1988 Act intended to do away with the abetment of the offence of criminal misconduct falling under clause (e) to Sub-section (1) of Section 13 of the Act read with Section 109 of the Indian Penal Code. To my mind, the Legislature has clearly preserved the right of the prosecution to fall back upon Section 109 of the Indian Penal Code in respect of the offence of criminal misconduct falling under clause (e) referred to above. Section 28 of the 1988 Act declares that the provisions of 1988 Act shall be in addition to, and not in derogation of, any other law for the time being in force. By virtue of Section 31 of the 1988 Act, Sections 161 to 165-A of the Indian Penal Code stood omitted. A reading of Sections 28 and 31 of the 1988 Act does not lead to the conclusion that by the coming into force of the 1988 Act, Section 109 of the Indian Penal Code also stood deleted and that it is not available any more for the prosecution to bring a person for an offence of criminal misconduct coming under clause (e) of Sub-section (1) of Section 13 of the 1988 Act read with Section 109 of the Indian Penal Code. Therefore, I have no hesitation to hold that there is no Legislative omission, either express or implied, in the 1988 Act with reference to the power of the prosecuting agency to proceed against a private individual against his alleged act of abetment in relation to the criminal misconduct of a public servant falling under clause (e) of Sub-section (1) of Section 13 of the 1988 Act. In A.C. Sharma v. Delhi Admn. , dealing with Interpretation of Statute and Rule of Construction, the Honourable Supreme Court of India laid down that the Legislature cannot be presumed to have intended to make any substantial alteration in the existing law beyond what it expressly declares. At the risk of repetition, I would like to add that what the 1988 Act declares in letter and spirit is that the offences enumerated in Sections 161 to 165-A of the Indian Penal Code came to be deleted from that statute book and brought in as offences under the 1988 Act itself. Beyond that, it is not possible to read the 1988 Act to conclude that the abetment of other offences not covered under Sections 161 to 165-A of the Indian Penal Code were also terminated from the statute book. In other words, criminal misconduct not falling under clauses (a) and (b) of Sub-section (1) of Section 13 of the 1988 Act can still be abetted if materials do indicate the same.

17. The act of criminal misconduct by the public servant is defined in clauses (a) to (e) of Sub-section (1) to Section 5 of the old Act and Section 13 of the present Act. Each type of criminal misconduct is by itself an offence punishable under Section 13(2) of the Act. Section 107 of the Indian Penal Code

defines 'abetment'. Section 109 of the Indian Penal Code speaks about abetting any offence and the punishment therefor. The word 'offence' is defined in Section 40 of the Indian Penal Code. The definition indicates that the term 'offence' denotes a thing made punishable by this Code (Indian Penal Code) and in the context of Section 109 as a thing punishable under this Code or under any Special or Local Law as hereinafter defined. Section 41 defines 'special law' as a law applicable to a particular subject. Section 2(n) of the Code of Criminal Procedure defines an 'offence' meaning as any act or omission made punishable by any law for the time being in force etc. etc. The Prevention of Corruption Act, 1988, is definitely a special law and an act of criminal misconduct by a public servant is made punishable under that law. Therefore, this satisfies the definition of Section 2(n) of the Code of Criminal Procedure. Even if tested in the light of the definition of the word 'offence' in the Indian Penal Code, it is clear that the word 'offence' used in Section 109 of the Indian Penal Code relates to an offence punishable not only under the Indian Penal Code but also under any special law or local law.

18. The argument of Mr. G. Krishnan, learned senior counsel that the 1988 Act is a self-contained Code and it takes in all situations connected with corruption and bribery leaving no room at all for anyone to fall back on any other law, does not appear to be correct. It is no doubt true, with reference to the offences as found originally in Sections 161 to 165-A of the Indian Penal Code, the 1988 Act is made as a complete Code. I have already noted in this judgment that criminal misconduct as brought in under clauses (a) and (b) of Sub-section (1) of Section 5 of the old Act, corresponding to Section 13(1)(a) and (b) of the new Act, alone is covered by Sections 161 to 165-A of the Indian Penal Code. There are three other types of criminal misconduct and they are found enumerated in clauses (c) to (e) of Sub-section (1) of Section 13 of the 1988 Act. When each of clauses (a) to (e) of Sub-section (1) of Section 13 of the 1988 Act are offences of criminal misconduct by themselves and distinct, it is not possible to say that once Sections 161 to 165-A of the Indian Penal Code have been deleted and brought into the 1988 Act, all offences of abetting criminal misconduct as set out under Section 13 of the 1988 Act have been provided for in the 1988 Act itself. In respect of criminal misconduct falling under clauses (c) to (e) of Sub-section (1) of Section 13 of the 1988 Act, when Sections 161 to 165-A of the Indian Penal Code did not cover those situations, the prosecution had the option to fall back upon the other provisions contained in the Indian Penal Code to bring a person before Court for trial. In Lennart Schussler v. The Director of Enforcement, New Delhi 1969 Law Weekly (Crl) 274, a question arose as to whether a person can be prosecuted for criminal conspiracy in respect of offence under the Indian Penal Code and offences under the Special or Local Law and in such circumstances can he be tried under Section 120-B of the Indian Penal Code read with the offences either under the Indian Penal Code or Special Law as the case may be. The Special Law involved in that case was the Foreign Exchange Regulation Act. More or less a similar argument as in this case namely the Foreign Exchange Regulation Act is a complete Code by itself and it is exhaustive in nature in respect of offences falling under that Act and, therefore, the prosecution cannot be launched for an offence under that Law read with Section 120B of the Indian Penal Code, was advanced. The learned Judge held that there is no provision in the Foreign Exchange Regulation Act, which precludes a person from being prosecuted under Section 120-B of the Indian Penal Code as well,

19. In In Re: Mrs. B Gervase AIR (37) 1950 Madras 599 : 51 Cri LJ 1518, a question arose as to whether the Madras Buildings (Lease and Rent Control) Act excludes the application of the Penal Code to any offences committed by a person against any officers engaged in the administration of that Act when the requirements under the Indian Penal Code are satisfied. A learned Judge of this Court held, (2) The learned counsel for the petitioner has raised four main contentions before me. The first was that the Madras Buildings (Lease and Rent Control) Act, 1946, was a complete and self-contained Act and that the Penal Code could not be applied to any offence alleged to have been committed by a person against any officers engaged in the administration of that Act, and similar self-contained Acts. The argument is wholly unsustainable. The Income-tax Act and the Estates Land Act are even more complete Acts, and yet it is obvious that they will not exclude the operation of the Indian Penal Code wherever such operation is not expressly excluded, or excluded by necessary implication as by a provision for a separate punishment for such offences. If these were not so, even murders can be committed of persons carrying out the provisions of Madras Buildings (Lease and Rent Control) Act, 1946, and similar Acts, and nothing can be done as the Penal Code will be excluded. The simple rule of interpretation in such cases, like this, is that the Indian Penal Code will apply wherever its application is not expressly or by necessary implication, excluded, and where the requirements prescribed under the Indian Penal Code for the offence charged are satisfied." An identical question, as in this case namely, whether a private individual can be prosecuted along with a public servant for an offence under Section 5(1)(e) of the 1947 Act read with Section 109, of the Indian Penal Code, came up before a learned single Judge of this Court. The learned single, Judge by Judgment dated 17-6-1988 in an unreported judgment in Crl. M. P. No. 10950 of 1987, held that the offence of acquiring and being in possession of disproportionate assets can be abetted by another including one, who is not a public servant. An argument was advanced before the learned single Judge in that case that the gist of the offences under Section 5(1)(e) of the 1947 Act is the inability of the public servant to satisfactorily account for his assets found to be disproportionate to his known sources of income and this inability to account cannot be abetted by anyone, much less by one, who is not a public servant. It also appears that it was argued before the learned single Judge, who decided that case, that the failure to account for alone is the offence and not possession. The position in law on this aspect is that possession of assets disproportionate to the known sources of income, by itself, would not be an offence initially but once the public servant fails to satisfactorily account for the same, then from that time, the possession becomes objectionable (See State of Haryana v. Bhajan Lal 1992 Supp (1) SCC 335 : 1992 Cri LJ 527 and M. Krishna Reddy v. State Deputy Supdt. of Police, Hyderabad . Therefore, it is possession, which is not satisfactorily explained, found to be disproportionate to the known sources of income, that is the offence. This is what the learned single Judge has also said in that case relying on State of Maharashtra v. K.K.S. Ramaswamy . This judgment of the learned single Judge was taken to the Honourable Supreme Court of India by a Special Leave Petition in S. L. P. No. 2841 of 1998 and it was dismissed at the admission stage itself by judgment dated 14-12-1988. The argument of Mr. G. Krishnan, learned senior counsel that the learned single Judge who rendered judgment in Crl. M. P. No. 10950 of 1987 has hot correctly understood the judgment of the Honourable Supreme Court of India in State of Maharashtra v. K.K.S. Ramaswamy 1977 Cri LJ 1740 (referred supra) does not appear to be correct and in any event, it does not alter the verdict rendered by the learned single Judge in the abovementioned case.

20. It is no doubt true that in respect of the offence of criminal misconduct falling under Section 13(1)(e) of the Act, it is drily the public servant who has to explain and his failure results in the possession of the assets in an offence. The opportunity to explain is only with the public servant and not with the private individual. But that does not, as contended by the learned senior counsel for the petitioner, lead to the conclusion that except the public servant, nobody else can be tried for having abetted the said offence. As already noticed, possession of assets becomes an offence only when the public servant fails to satisfactorily account for the same. Failure to explain is not made an offence but the actual possession after the failure is made an offence. Section 13(1)(e) deals with possession by the public servant by himself or by any person on his behalf. Therefore, acquiring possession of assets in the ways referred to above is capable of being abetted. There is neither an express or implied exclusion in the 1988 Act to deal with such a situation falling back on Section 109 of the Indian Penal Code, of a private individual having abetted the said offence. In the 1988 Act besides Sections 10 and 12 dealing with abetment of the respective offences mentioned therein, Section 14 deals with punishing persons, who are habitually committing offences falling under Sections 8, 9 and 12. An offence falling under clauses (c) or (d) of Sub-section (1) of Section 13 is also made punishable under Section 15 of the said Act. The argument of the learned senior counsel that while interpreting a penal statute, the Legislative provisions contained in that Act must be strictly construed, has to be accepted and there can be no quarrel about that. In this context, the learned senior counsel relied upon Section 6 of the Scheduled Castes and Scheduled Tribes (POA) Act, 1989, wherein certain provisions of the Indian Penal Code were made applicable for offences under that Act. From this the learned senior counsel contended, if really the Legislature wanted to preserve some of the provisions of the Indian Penal Code for offences under the 1988 Act also, then they could have made similar provisions as referred to above found in the S.C. and S.T. (POA) Act, 1989. In A.C. Sharma v. Delhi Admn. 1973 Cri LJ 902 (referred supra) the Honourable Supreme Court of India on the Interpretation of Statutes held that the Legislature cannot be presumed to have intended to make any substantial alteration in the existing law beyond what, it expressly declares. Applying the test laid down therein, if the provisions of the S.C. and S.T. Act and the Corruption Act 1988 are read, it is clear that in the 1989 Act, the Legislature had expressly declared what it really meant. In other words, the Legislature while framing 1989 Act referred to above, made no room for any doubt about the applicability of certain provisions of the Indian Penal Code for offences under that Act. The absence of such a provision as found in the 1989 Act in the Corruption Act will only lead to the conclusion that the Legislature did not want to wipe out all the provisions of the Indian Penal Code except Sections 161 to 165-A of the Indian Penal Code which are found re-drafted in the 1988 Act.

21. The learned senior counsel relied upon the judgment of the Honourable Supreme Court of India in Kalicharan Mahapatra v. State of Orissa to contend that prosecution of a private individual for having abetted the offence under Section 13(1)(e) of the Act would stand excluded. A reading of that judgment does not support the argument advanced by the learned senior counsel. The question that arose in that case and decided by the Honourable Supreme Court of India was about the need for a sanction and the issue whether a private individual can be prosecuted for having abetted the offence falling under Section 13(1)(e) of the Act, was not at all raised and decided. The learned senior counsel relied upon the judgment of this Court in M. Inbarajan v. Baladhandapani 1998 (2) Law Weekly (Cri) 631 : 1999 Cn LJ 75 where it has been held that there is no scope for invoking the

principle of abetment found in Section 109 of the Indian Penal Code in respect of the offence under Section 138 of the Negotiable Instruments Act. On facts, this case also does not apply to the case on hand. The learned senior counsel relied upon the judgment of the Honourable Supreme Court of India in Niranjan Singh K.S. Punjabi v. Jitendra Bhimraj Bijaya to contend that when a Special Statute provides for harsher punishment than the punishment provided in ordinary law in respect of similar offences, a higher responsibility vests in Court in such situation to ensure that those not covered by the express language of the Special Statute are not subjected to the Special Provisions by stretching the language and also for the purpose that penal statutes must be strictly construed. The prosecution in that case was under the TADA. On facts, it was found in that case that the offence complained of would not satisfy the ingredients of the said Special Law and the ordinary law of the land can take care of the situation and thus the case was remitted to the ordinary Court dealing with ordinary law of the land. That ¦ order was affirmed by the Honourable Supreme Court of India in that judgment. The facts as found in that case are not similar to the case on hand. Therefore, this judgment of the Honourable Supreme Court of India does not come to the help of the petitioners/accused. The learned senior counsel relied upon the judgment of this Court in Masilamani v. The Inspector of Police 1998 (1) Law Weekly (Cri) 189 to contend that while interpreting a penal statute the Rule of Interpretation always exhibits a preference to liberty of subject and in case of ambiguity enables Court to resolve doubt in favour of the subject and against Legislature on its failure to express itself clearly. The issue involved in that case was whether the presumption created under Section 41-B of the Tamil Nadu Prohibition Act would apply to a trial for an offence under Section 4-A of the Act and it was answered in the negative. This case also does not help the petitioners/accused. A perusal of the 1988 Corruption Act shows that there are two Sections dealing with abetment namely Sections 10 and 12. Section 10 deals with abetment of offences falling under Sections 8 and 9 whereas Section 12 deals with abetment of offences falling under Sections 7 and 11. Section 13(1)(a) of the Act speaks about a person habitually committing an offence under Section 7. In other words, it is a aggravated form of the offence under Section 7. Likewise Section 13(1)(b) speaks about a person habitually committing an offence falling under Section 11 of the Act. As far as persons, who abet the act of criminal misconduct falling under any of the clauses of Section 13(1) of the Act, there is no provision relating to abetment of the said act of criminal misconduct. Therefore, the argument of the learned State Public Prosecutor that in respect of the act of criminal misconduct coming within Section 13(1) of the 1988 Act, the said Act does not contain any provision to bring before Court the person who abets such act of criminal misconduct, appears to be correct. Viewed in that manner also, it has to be necessarily held that there being no provision of abetment of the offences falling under Section 13(1) of the Act in the 1988 Act itself, the prosecution can definitely fall back upon Section 109 of the Indian Penal Code.

22. Under the circumstances and for the reasons stated above, I have no hesitation to reject the argument of the learned senior counsel that private individuals cannot be prosecuted along with the public servant under Section 13(1)(e) of the 1988 Act read with Section 109 of the Indian Penal Code, as a misconceived one. In other words, the prosecution of the Private individual along with the public servant for the offences referred to above is well maintainable. Under Section 3 of the 1988 Act, the Special Judge has power to try not only any offences punishable under this Act but also any conspiracy to commit or any attempt to commit or any abetment of any of the offences under the Act. Criminal misconduct coming under Section 13(1)(e) of the 1988 Act is a distinct

offence by itself and, therefore, the Special Judge has jurisdiction to try not only that offence against that offender who committed the same but also try persons who had either conspired to commit the same or attempted to commit the same or abetted the same. The private individuals in this case are before the Court on the ground that they have abetted the act of criminal misconduct falling under Section 13(1)(e) of the 1988 Act committed by the public servant. Therefore, I hold that the prosecution in the present form is maintainable.

23. Question Nos. D, E and F can be conveniently disposed of together. Discharge of an accused is governed by Sections 227, 239 and 245 of the Code of Criminal Procedure. The scope and ambit of these three provisions have been explained to a nicety by the Honourable Supreme Court of India in the judgment in R.S. Nayak v. A.R. Antulay . It is better I extract what exactly the Honourable Supreme Court of India said in regard thereto in that judgment.

The Cr.P.C. contemplates discharge of the accused by the Court of Session under Section 227 in a case triable by it; cases instituted upon a police report are covered by Section 239 and cases instituted otherwise than on police report are dealt with in Section 245. The three sections contain somewhat different provisions in regard to discharge of the accused. Under Section 227, the trial Judge is required to discharge the accused if he 'considers that there is not sufficient ground for proceeding against the accused.' Obligation to discharge the accused under Section 239 arises when "the Magistrate considers the charge against the accused to be groundless". The power to discharge is exercisable under Section 245(1) when "the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction...." It is a fact that Sections 227 and 239 provide for discharge being ordered before the recording of evidence and the consideration as to whether charge has to be framed or not is required to be made on the basis of the record of the case, including documents and oral hearing of the accused and the prosecution or the police report, the documents sent along with it and examination of the accused and after affording an opportunity to the two parties to be heard. The stage for discharge under Section 245, on the other hand, is reached only after the evidence referred to in Section 244 has been taken. Notwithstanding this difference in the position there is no scope for doubt that the stage at which the Magistrate is required to consider the question of framing of charge under Section 245(1) is a preliminary one and the test of "prima facie" case has to be applied. In spite of the difference in the language of the three sections the legal position is that if the trial Court is satisfied that a prima facie case is made out, charge has to be framed.(Para 44).

How the Court should appreciate the case when a question of discharge arises, has been laid down in a very early judgment of the Honourable Supreme Court of India in State of Bihar v. Ramesh Singh , wherein it is held as follows :

> Reading Sections 227 and 228 together in juxtaposition, as they have got to be, it would be clear that at beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weight in a sensitive balance whether the facts, if proved, would be

incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. (Para 4) On the power of the Court to analyse the materials at the time of discharge, there is yet another judgment of the Honourable Supreme Court of India, consisting of three Honourable Judges, in Supdt. & Remembrancer, Legal Affairs v. Anil Kumar and the judgment is as follows :

At the stage of framing charges, the prosecution evidence does not commence. The Magistrate has, therefore, to consider the question as to framing of charge on a general consideration of the materials placed before him by the investigating Police Officer. The standard test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise is not exactly to be applied at the stage of Section 227 or 228. At this stage, even a very strong suspicion founded upon materials before the Magistrate, which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged, may justify the framing of charges against the accused in respect of the commission of that offence. Foll. (Para 18) In Radhe Shyam v. Kunj Behari , the Honourable Supreme Court of India held that meticulous consideration of evidence and materials by Court was not required at the stage of discharge. This judgment also is by a Bench of three Honourable Judges. In Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijja , the power of the Court and the area of discussion at the time of discharge is again well stated and it is as follows :

It seems well settled that at the Sections 227-228 stage i.e. stage of framing the charge, the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may for this limited purpose sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. (Para 7) The last of the judgment in this line would be the judgment of the Honourable Supreme Court of India in State of Maharashtra v. Som Nath Thapa 1996 SCC (Crl) 820 : 1996 Cri LJ 2448, rendered by a Bench of three Honourable Judges, where it has been stated as follows :

If there is ground for presuming that the accused has committed the offence, a Court can justifiably say that a prima facie case against him exists, and so, frame a charge against him for committing that offence. (Para 30) Regarding the meaning of the word 'presume', in Black's Law Dictionary it has been defined to mean "to believe or accept upon probable evidence". In Shorter Oxford English Dictionary it has been mentioned that in law 'presume' means "to take as proved until evidence to the

contrary is forthcoming", Stroud's Legal Dictionary has quoted in this context a certain judgment according to which "A presumption is a probable consequence drawn from facts (either certain, or proved by direct testimony) as to the truth of a fact alleged.(Para 31) So if on the basis of materials on record, a Court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the Court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage. (Para 32) In view of the clear and categorical pronouncement of the Law on the scope of discharge, as laid down by the Honourable Supreme Court of India, there cannot be any doubt at all in anybody's mind as to what the Court at this stage is expected to do. In the light of the law laid down as stated above, I perused the various orders of the Special Judge in and by which the applications filed by the accused under Section 239 of the Code of Criminal Procedure, were rejected and I do not find that the judgments, in all those applications are in strict conformity with the requirement of law as referred to above. The learned Judges in each case had confined themselves only to prima facie material available at this stage and the reading of the respective orders does show that it cannot be said that the charge against the accused is groundless. In the course of the order in each discharge petition, the learned Judges have found, with reference to the check period, the income and sources of income of the concerned public servants as well as that of the private individuals prior to the check period; and during the check period. The materials collected during investigation do show valuable assets in the possession of the public servants or with private individuals, the value of which is shown to be disproportionate to the known sources of income prior to the check period and during check period. The public servant concerned had been examined and his explanation was found to be unsatisfactory. The evidence collected during the investigation and placed before the Court at this stage, prima facie disclose grounds for presuming that the accused is guilty of the offences concerned. The Honourable Supreme Court of India in the judgment in Som Nath Thapa's case : 1996 Cri LJ 2448 (referred supra) held that if there is ground for presuming that the accused has committed the offence, a Court can justifiably say that a prima facie case against him exists and so frame a charge against him for committing the offence. It is also said in that judgment that if on the basis of materials on record, a Court could come to the conclusion that commission of the offence is the probable consequence, a case for framing of charge exists. Further it is said in that judgment that to put it differently, if the Court were to think that the accused might have committed the offence, it can frame the charge, though for conviction, the conclusion is required to be that he has committed the offence. At the risk of repetition, this Court states that the evidence collected by the police during investigation and placed before the Court shows possession of assets either with the public servant or by his relatives, which is far disproportionate to the known sources of income before the check period as well as

> during the check period. Under these circumstances, I am in full agreement with the learned Special, Judges concerned in each case that there are grounds to proceed further against the accused and as such no interference is called for with such findings.

24. What are the materials that must be looked into by the Court while applying its mind to discharge or not to discharge has been argued at length by the learned senior counsel for the petitioner. The argument of the learned senior counsel for the petitioner in this regard is intertwined with his attack on the order of the lower Court in each application refusing to send for certain documents. The facts of the judgment in Angusami v. Kaleeswaran Ambalam 1989 Law Weekly (Crl) 108 are as follows :

> It was also a case instituted on a police report. The learned trial Magistrate discharged the accused. It was challenged in Revision before the Court of Sessions. The learned Sessions Judge set aside the order of discharge holding that there was no scope for a Magistrate to consider the documents filed by the accused at the stage of examination of the accused under Section 239 of the Code. That order was challenged before this Court.
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> A learned single Judge of this Court in that case held as follows :
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> 23. The views expressed in the above decisions can be summarised thus : The stage of Section 239 of the Code prior to the framing of the charge under Section 240 of the Code, is not expected to be a dress rehearsal of a trial. The Magistrate at that stage is required to consider the police report and the documents sent along with it under Section 173 which are furnished to the accused in compliance with Section 207 of the Code and the explanation given by the accused during his examination and the submission, if any, made by the prosecution and the accused for finding out whether the charge, which means the accusation, levelled against the accused is groundless. At that stage, as rightly pointed out by the learned single Judge of the Delhi High Court in Surinder Kumar Yadav's case 1986 (3) Crimes 645, it is not open to the Magistrate to consider any other document, which is not covered by the provisions of Section 207 of the Code, and the examination of the accused, if any under that provision must necessarily be with regard to the material placed by the prosecution against him and the documents referred to under Section 207, Cr.P.C. but the documents produced by the accused are not to be taken into consideration by the Magistrate while applying his mind whether the accusation levelled against the accused is groundless or not. I am fortified in my view by the Judgment of the Supreme Court reported in J.P. Sharma v. Vinod Kumar Jain ....

This view has been followed by learned Mr. Justice Arunachalam in two of his Lordship's judgments in M.S. Kuppuswamy v. State 1990 Law Weekly (Crl) 384 and Muthuraman v. State 1991 Law Weekly (Crl) 223. In the first case, it has been laid down as follows :

At the stage of Section 239, Cr.P.C. there is no question of adding or subtracting anything or considering any extraneous matter other than the documents forwarded to the Court as contemplated under Section 173, Cr.P.C. and furnished to the accused under Section 207, Cr.P.C. besides examining the accused and affording an opportunity, both to the prosecution and the accused of being heard. Therefore, either in the exercise of inherent powers or the revisional powers at this stage, the documents sought to be brought on record by the defence cannot be looked into....

In the second case, it has been laid down as follows :

At the stage of Section 239, Cr. P.C. prior to the framing of the charge Under Section 240, Cr. P.C. there is no scope for a dress rehearsal of a trial. The Magistrate is not required to consider at this stage any other document, which is not covered by Section 207, Cr. P.C. and the examination of the accused. At this stage, prior to the framing of the charge, it is not open to the Magistrate to consider any other document, which does not form part of the record forwarded Under Section 173, Cr. P.C. (Para 2) As against the judgments referred to above, the learned senior counsel for the petitioner relied upon two judgments in Thirthraj Upendra Joshi v. State of Karnataka 1983 Cri LJ 318 (Karnataka) and Satish Mehra v. Delhi Admn. 1996 (3) Crimes 85 (SC). In the first case, the learned Judge of the Karnataka High Court held that the documents produced before the Court at the stage of Section 239 of the Code, should be adverted to. The Honourable Judges of the Supreme Court of India, in the second case above-referred to were of the considered opinion that the Sessions Judge would be within his powers to consider even materials which the accused may produce at the stage contemplated under Section 227 of the Code. This judgment of the Honourable Supreme court of India is by a Bench of two Honourable Judges. There are two other judgments rendered by the Honourable Supreme Court of India in V.C. Shukla v. CBI 1980 Supp SCC 92 : 1980 SCC (Crl) 695 : 1980 Cri LJ 690 and State of Bihar v. P.P. Sharma 1992 Supp (1) SCC 222, which definitely throw some light on the relevancy or otherwise of the documents that may be produced by the defence at the stage of considering discharge. The first case was decided by a Bench of four Honourable Judges of the Honourable Supreme Court of India and the second case was decided by three Honourable Judges of the Supreme Court of India. It is no doubt true that in the case of Satish Mehra (1996 (3) Crimes 85) (referred supra), the permissibility of the Court to look into the defence document at the discharge stage was recognised. I carefully read the judgment with care, caution and respect. In that judgment, in paragraph 11, the Honourable Judges have stated as follows :

If the accused succeeds in producing any reliable material at that stage which might fatally. affect even the very sustainability of the case, it is unjust to suggest that no such material shall be looked into by the Court at that stage.

The dispute in that case was between husband and wife. The spouses were living in America. They have a tender female child aged about 18 months. The relationship

between the husband and wife was estranged. The husband filed proceedings in U. S. to get custody of the child and it was ordered. While in America; the wife gave a complaint to the police there that her husband had sexually abused Nikita, who was then aged four- The U. S. Police looked into the matter in detail and found that the accusation was ill-founded and it was untrue. The wife came down to India with the child where the husband moved the Court for the issue of a Writ of Habeas Corpus to get the custody of the child. The wife filed a complaint before the Crime Against Women Cell, New Delhi. The complaint was that while in U. S. the husband committed sexual abuses with Nikita and that he committed certain misdemeanour on his wife. After investigation, for want of jurisdiction, the case was closed. The wife thereafter filed a complaint before another Police Station in New Delhi for offences under Sections 354 and 498-A of the Indian Penal Code. The Investigating Officer moved for including an offence under Section 376 of the Indian Penal Code. The case was charge-sheeted. Even when the case was pending investigation, the husband moved the Honourable Supreme Court to quash the First Information Report.

25. In the backdrop of these facts, besides stating in paragraph 11 of the said judgment, which is already extracted above, it is further stated that if the materials produced by the accused even at that early stage, would clinch the issue, why should the Court shut it out saying that such documents need be produced only after wasting a lot more time in the name of trial proceedings. Then the Honourable Supreme Court of India went on to notice that the learned Sessions Judge has missed certain germane aspects. The husband produced the medical report obtained by the U. S. police while the complaint given by the wife against husband for sexual abuse on the child was investigated. That report showed that there was absolutely no indication of any sexual abuse when the child was physically examined. That report was produced before the Court to counter the medical report obtained in New Delhi which shows that the examination of the genitals of the child showed "a wide vaginal opening". It was contended before the Honourable Supreme Court that the finding of the Doctor based in Delhi on the condition of the child runs contrary to the medical report of the U. S. Doctors on the earlier complaint and, therefore, the child should have been exposed to such injury only by the wife so as to implicate the husband in the crime. The learned Judges also took note of the fact that in the complaint filed by the wife before Crime Against Women Cell, New Delhi, no allegation was made that the child was sexually abused while the husband was in India and there is no averment whatsoever that the husband did anything against his daughter anywhere in India. On these broad facts only the Honourable Judges proceeded to hold that in a given case, the defence documents could be looked into and ultimately quashed the charge itself. Therefore, it is very clear to my mind that on the peculiar facts of that case where there was no dispute at all regarding the document relied upon by the accused, the Honourable Judges acted upon it in the interest of justice.

26. As against the judgment in Satish Mehra' s case, in the judgment of V.C. Shukla's case : 1980 Cri LJ 690 referred to above, it is stated that at the time of discharge only Section 173 records should be perused. I feel it better to extract the exact words from the judgment on this issue.

39...Realising this difficulty, the learned counsel for the appellant, put forward an alternative argument, viz., that Section 238 of the Code itself consists of two separate stages - one starting from Section 238 and ending up to Section 240 and the other starting from Section 242 and ending up to Section 248. We are, however, unable to agree with this argument because it appears that the enactment of Section 251-A (sic) by virtue of the amendment of 1955 the words 'commencement of trial' were introduced for the first time which clearly denote that the trial starts in a warrant case right from the stage when the accused appears or is brought before the Court. This appears to us to be the main intent and purpose of introducing the words commencement of trial by the amendment Act of 1955 which did not appear in the Code of 1898 or in the various amendments made before the Act of 1955 to the Code. Thus, if the trial begins at that stage, it cannot be said that the proceedings starting with Section 251-A onwards amount to an inquiry within the meaning of Section 2(j) of the Code. Furthermore, it would appear that the amendment of 1955 in fact simplified the entire procedure for trial of warrant cases by a Magistrate by not requiring the Magistrate to record any evidence before framing of the charge or discharging the accused. All that the Magistrate had to do was to satisfy himself that the documents referred to in Section 173 had been furnished to the accused and if that had not been done, to direct that the documents should be furnished. Thereafter, the Magistrate on consideration of the documents referred to in Section 173 only and without recording any evidence, was to examine the accused if he considered, necessary and after hearing the parties proceed either to frame the charge or to discharge the accused. In other words, the simplified procedure introduced by the amendment of 1955, which is now retained by the Code in Sections 238 to 240, amounts to a trial from beginning to end. The fact that no evidence is to be recorded before framing of the charge and the Magistrate has to proceed only on the documents referred to under Section 173 i.e. the statement recorded in the case diary, and Other papers or materials collected by the police, clearly shows that these proceedings are not an inquiry at all because the scheme, of the Code generally appears to be that whenever an inquiry is held, evidence or affidavits have to be recorded by the Court before passing an order....

This judgment is rendered by a Bench of four Honourable Judges. This judgment clearly lays down that at the stage of discharge, the Court has to look only to the Section 173 records. In the case of Som Nath Thapa, referred to above, the Court held that:

> It is apparent that at the stage of framing of the charges, probative value of the materials on record cannot be gone into and the materials brought on record by the prosecution has to be accepted as true at that stage.
>
> In view of the judgments in V.C. Shukla's case and Som Nath Thapa's case, I am of the respectful opinion that the law laid down by the Honourable Supreme Court of India in Satish Mehra's case was rendered only on the peculiar facts available in that case. It is needless to state that facts will not always be similar in all cases and it will vary from case to case. Even in Satish Mehra's case, the emphasis was on the reliability of the documents and the same clinching the issue. In P.P. Sharma's case referred to earlier, the Supreme Court held that the High Court committed a serious error in putting an end to the prosecution at its inception by going into merits in a trial on consideration of the affidavits and documents which, unless proved to be true

and reliable in regular trial, cannot form the basis of any decision regarding commission of offence.

27. The documents which the accused in C. C. No. 1 of 1998 wanted to summon are in the nature of statements recorded by police during investigation from some persons; some documents evidencing loan transaction and statements stated to have been recorded from some of the accused under the Income-tax Act which form part of the record before the Appellate Authority under that Act. It is not the case of any of the accused that the Income-tax Department accepted the case of the accused on the assets owned by them. It is needless to state that statements recorded by the police during investigation are not substantive evidence and it can be used only to contradict the said witness when he deposes in Court. As already laid down by the Honourable Supreme Court of India, the Court at the stage of framing of charge could only apply its mind to find out whether the materials do show a prima facie case or not and since the Courts below in this case have found that the evidence collected by the police and placed before the Court do disclose prima facie material against the accused. I am of the opinion that the failure to send for the documents at this stage by the accused in C. C. No. 1 of 1998 cannot be said to be illegal or opposed to any known principles of law. In V.C. Shukla's case, it has been said that Section 173 records alone Should be seen at the stage of discharge. In Som Nath Thapa's case, it is stated that Section 173 records must be accepted as true at that stage. Therefore, on this ground also, the non sending of the records sought for by the accused in C. C. No. 1 of 1998 will not in any way affect the case of the prosecution. The learned counsel's contention that the order dismissing the application for discharge is bad in law since it does not contain reasons, does not appear to be sound in law. Section 239 of the Code is applicable to the case on hand. It speaks about discharge. It mandates that if the Court sees reason to discharge the accused, then it shall record its reasons for so doing. There is no provision in the Code of Criminal Procedure compelling the Court to give reasons while deciding to frame a charge. The reliance placed by the learned senior counsel on the judgment in State of Karnataka v. L. Muniswamy and State of U.P. v. Dr. Sanjay Singh 1994 Supp (2) SCC 707, to sustain his argument that while passing the order against the accused under Section 239 of the Code of Criminal Procedure the order must contain full reasons does not appear to be correct. The Court of Session in the first case, discharged the accused 11, 12 and 16 under Section 227 of the Code and that order was not the subject-matter of the judgment of the Honourable Supreme Court of India in that case. After discharging the accused 11, 12 and 16, the learned Sessions Judge went on to hold that there are materials against the other accused and adjourned the case for framing charges. Then the accused, against whom charges were directed to be framed, moved the High Court in Revision and the High Court found the issue in their favour and allowed the Revision. Those orders in the Revisions were challenged by the State. After extracting Section 227 of the Code, which is more or less similar to Section 239 of the Code, the Honourable Supreme Court of India said that the object of the provision, which requires the Sessions Judge to record his reasons, is to enable the superior Court to examine the

correctness of the reasons for which the Sessions Judge has held that there is or is not sufficient ground for proceeding against the accused. The High Court is, therefore, entitled to go into the reason given by the Session Judge in support of his order and determine itself whether the order is justified. In Sanjay Singh's case, referred to earlier, again it is seen that the Court of Session discharged both the accused by giving reasons. The State filed a Revision before the High Court and the High Court affirmed the order of the Sessions Judge and thus the matter went up before the Honourable Supreme Court of India. The judgment in the case of State of Karnataka v. L. Munisamy, referred to earlier, has been quoted with approval in that case. In none of the two cases referred to above, the question whether while rejecting the application, the Court should give reasons or not had come up for consideration. In fact the statute is very clear that the Court is under a legal obligation to give reason only when it decides to discharge the accused. The learned State Public Prosecutor brought to my notice two judgments, one reported in Jayaprakash v. State 1981 Cri LJ 460 (Kerala) and the other reported in Mahantaswamy v. State of Karnataka 1987 Cri LJ 497 (Karnataka). In the first case, the scope and impact of Section 228 of the Code was gone into and it was said that while framing, charge, passing of a formal order with reasons not obligatory. In the second case, the scope and impact of Sections 239 and 240 of the Code was gone into and it was held that while framing a charge against the accused, giving reasons for the same or writing a detailed order is not within the contemplation of Section 240 of the Code. It was also held that the question of giving reasons would arise only when the accused persons are discharged under Section 239 of the Code. In this case, the order challenged in some of the Revisions is in the nature of rejecting the applications filed by the accused for discharge. Mr. G. Krishnan, learned senior counsel, relied upon the judgment of this Court in Villi Thevar v. State , to contend that even while refusing to discharge the accused, there must be discussion of the materials made available as otherwise Section 227 of the Code would become meaningless and ineffective. In view of the judgments referred to above, both for and against, on the requirement or otherwise of giving reasons, I do not want to express any opinion on this point. But the fact that remains in this case is that except in C. C. No. 1 of 1998, in the other two Calendar Cases, there have been elaborate discussion and reasons have been assigned by the Judges concerned while the applications for discharge were dismissed. Even in C. C. No. 1 of 1998, the learned Special Judge had referred to all the judgments brought to his notice on the power of discharge and held in paragraph 26 as follows :

Some of the witnesses, particularly witness Nos. 2 and 3, say about the ancestral properties possessed by first accused and his family and income before the check period. The documents filed on the side of the prosecution also show the extent of properties and its value purchased during the period. Annexures also at this stage throw some suspicion about the accused persons.

Therefore, there is clear application of mind to the materials available on record. The learned Judge proceeded to state further that:

Suffice to find out at this stage whether there are materials to frame charge or not ? If I go deep into the matter and discuss the materials in depth, it may cause any embarrassment either to the prosecution or the defence at the stage of trial. Needless to say that at this stage, the Court is mostly concerned about the materials or the prima facie case. From the statements and also Annexure, it is clear that there are materials to frame charge against the accused.

Therefore, even here I find that the order cannot be said to be bad for want of discussion and reasons. In view of my discussion and finding on the need to send for documents at the instance of the accused at the stage of discharge, the judgment of this Court in Cri. R. C. Nos. 714 and 715 of 1997, dated 2-12-1997 and A. Ramachandran v. State 1998 (3) Crimes 131 (Madras) do not really apply, on facts, to the case on hand. However, I am informed that the judgment of this Court in Crl R.C. Nos. 714 and 715 of 1997 is set aside by the Honourable Supreme Court of India leaving the question namely to send for the documents under Section 91 of the Code, open.

28. In the result, all the revisions fail and they are dismissed.